

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
L.T. BOOKER, E.C. PRICE, M. FLYNN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JAMES W. HARPER  
SEAMAN (E-3), U.S. NAVY**

**NMCCA 200800091  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 11 April 2003.

**Military Judge:** CAPT Carole Gaasch, JAGC, USN.

**Convening Authority:** Commanding Officer, USS CURTIS WILBUR  
(DDG 54).

**For Appellant:** LT Brian Korn, JAGC, USN.

**For Appellee:** LT Brian Burgtorf, JAGC, USN.

**27 May 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of a six-month period of unauthorized absence and wrongful use of ecstasy, a controlled substance, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. On 11 April 2003, the military judge awarded a sentence of confinement for 90 days, forfeiture of \$750.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. Over the course of the next six years, this court remanded the case several times to correct various post-trial

processing errors. On 3 December 2009, the convening authority (CA) disapproved the sentence in its entirety as corrective action in light of the lengthy post-trial processing time and defects in the post-trial documentation.

Before us now the appellant alleges that his due process rights have been violated by the excessive post-trial processing and appellate review of his court-martial and that relief under Article 66, UCMJ, specifically disapproval of the findings, is warranted due to excessive and unexplained post-trial delay. In support, the appellant points to the nearly seven years between trial and docketing with this court. Appellant's Brief of 4 Feb 2010 at 3, 8-9. He alleges that "the delay between his original court-martial and the filing of his clemency request made it impossible for his substitute trial defense counsel to contact [him and that therefore his] opportunity for clemency was thereby prejudiced, as he was unable to put any potential compelling clemency matters before the CA." *Id.* at 6. However, he concedes that he has made no specific showing of harm. *Id.* at 9.

The Government concedes that the delay is facially unreasonable. Government's Answer of 8 Mar 2010 at 6; see also *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). Notwithstanding that this case was tried prior to *Moreno*, we nonetheless find, consistent with that case, that the unexplained delay in this case, including the more than four years that passed between the trial date and the apparent initial docketing with this court and the additional nearly two years between the initial docketing and the controlling CA's action, is unreasonable.

Assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we proceed directly to the question of whether any error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Here, the appellant concedes there is no evidence of any specific harm resulting from the delay. There is no issue that would afford the appellant relief: no oppressive incarceration resulting from the delay, no particularized anxiety caused by the delay, and no rehearing which might be affected by excessive post-trial delay. See *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 139. The appellant has not raised any issues regarding the conduct of his trial and the CA disapproved the sentence in its entirety (or, in an alternative formulation, approved a sentence of no punishment).

Under the totality of circumstances in this record, we conclude that the Government has met its burden to show that the post-trial delay in this case, while unacceptable, was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008). "To find otherwise would essentially adopt a presumption of prejudice in cases where [we find] a due process violation as a result of unreasonable post-trial delay" a standard the United States Court of Appeals for the Armed Forces has repeatedly declined to adopt. *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009).

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *Toohy v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004), and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Having done so, we conclude that any further relief, which given the CA's action in disapproving the entire sentence would be limited to action on findings, would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Therefore, we find that the delay in this case does not affect the findings that should be approved. Art. 66(c), UCMJ.

Accordingly, the findings and the approved sentence of no punishment are affirmed.

For the Court,

R.H. TROIDL  
Clerk of Court