

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

**Before  
J.K. CARBERRY, L.T. BOOKER, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MARSHALL L. MAGINCALDA, JR.  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900686  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 3 August 2007.  
**Military Judge:** LtCol Eugene Robinson, USMC.  
**Convening Authority:** Commander, U.S. Marine Corps Forces  
Central Command, Camp Pendleton, CA.  
**Staff Judge Advocate's Recommendation:** LtCol I.D. Brasure,  
USMC.  
**For Appellant:** Capt Michael Berry, USMC.  
**For Appellee:** Maj Jonathan Nelson, USMC.

**26 August 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 general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of conspiracy to commit larceny, housebreaking, kidnapping, false official statements, and murder; wrongful appropriation; and housebreaking, in violation of Articles 81, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 921, and 930. The members sentenced the appellant to 448 days of confinement, the period of pretrial confinement, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged and ordered it executed.

The appellant alleges one assignment of error: a due process violation of his right to speedy post-trial review. The appellant was sentenced on 3 August 2007, and the CA acted on the appellant's court-martial on 7 December 2009, 857 days later. Record at 2610; CA's Action of 7 Dec 2009.

### **Principles of Law**

The appellant's claim that he was denied his due process right to speedy post-trial review is reviewed *de novo*. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). When a convening authority has not taken action on a court-martial within 120 days of the completion of the trial, this court must "apply a presumption of unreasonable delay" and then analyze whether the delay violated the due-process rights of the appellant. *Id.* at 142. If this court finds a due process violation, relief will be granted unless the Government shows that the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009). Whether the delay was harmless beyond a reasonable doubt is also reviewed *de novo*, considering the totality of the circumstances. *Id.* That determination necessarily involves analyzing the case for prejudice. *Id.* Without convincing evidence of prejudice in the record, we "will not presume prejudice from the length of the delay alone." *Id.*

### **Discussion**

A due process analysis of post-trial delay is triggered by a determination that the delay in question is facially unreasonable. *Moreno*, 63 M.J. at 135-36. In this instance, the Government concedes that the 857 days it took for the CA to act is facially unreasonable. Government's Answer of 26 Apr 2010 at 6. Assuming without deciding that the appellant was denied his right to speedy post-trial review and appeal, we proceed directly to the question of whether that error was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). In this case the appellant claims he was prejudiced because: (1) his individual military counsel, the lawyer he claims was most familiar with his case, retired from active duty before having the opportunity to review the authenticated record of trial for error and submit clemency matters; and, (2) because the appellant's obligated service ended before the CA acted, thus foreclosing the CA from granting clemency in the form of setting aside the conviction and instead, imposing nonjudicial punishment upon the appellant. We are not persuaded by either argument.

In the first instance, the appellant was represented by an experienced civilian counsel who had appeared as counsel in over 40 courts-martial and who received the record of trial more than 5 months before the CA acted. See Appellate Exhibit IV and Receipt for Copy of Record dated 23 Jun 2009.

Additionally, the appellant was represented by detailed military counsel who submitted a 3-page clemency petition to the CA on the appellant's behalf. We are convinced the appellant's counsel had ample time to review the record for error and submit clemency matters on the appellant's behalf. As such, we are convinced that the appellant was not prejudiced by the retirement of his individual military counsel.

In the second instance, the fact that the CA could not impose nonjudicial punishment because the appellant was past his obligated service is of no moment. This issue was specifically highlighted to the CA in the appellant's clemency petition and was considered by the CA prior to his action. It is clear that the CA knew he was authorized to grant clemency, but chose not to. Accordingly, we are convinced that the appellant suffered no prejudice as it relates to the CA's exercise of clemency.

Although we are mindful of the adverse impact that delays such as this may have upon the "public perception of fairness in the military justice system," we will not "presume prejudice from the length of the delay alone." *Ashby*, 68 M.J. at 123-24; see *United States v. Toohey*, 63 M.J. 353, 363 (C.A.A.F. 2006). Under the totality of circumstances in this record, we conclude that the Government has demonstrated that the post-trial delay in this case 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 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 *Toohey 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 meaningful relief available 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 or sentence that should be approved. Art. 66(c), UCMJ.

**Conclusion**

Accordingly, we affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL  
Clerk of Court