

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JACOB M. LAVOY  
MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201000586  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 16 March 2006.

**Military Judge:** CAPT Keith Allred, JAGC, USN.

**Convening Authority:** Commanding Officer, Naval Submarine Support Center Bangor, Silverdale, WA.

**Staff Judge Advocate's Recommendation:** LT G. Mosca, JAGC, USN.

**For Appellant:** CAPT Salvador Dominguez, JAGC, USN.

**For Appellee:** Capt Paul Ervasti, USMC.

**31 March 2011**

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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 two specifications of illegally transporting aliens into the United States for private gain in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) as assimilated under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for twelve months, reduction to pay grade E-1, forfeiture of \$849.00 pay per month for eight months, and a fine of \$3,000.00. The convening authority approved the sentence as adjudged and ordered it executed. In accordance with the pretrial agreement, the convening authority suspended all

confinement in excess of six months for a period of 12 months, and suspended all adjudged forfeitures and waived automatic forfeitures for six months.

In his sole assignment of error, the appellant avers that his due process rights have been violated by the excessive post-trial delays in processing and appellate review of his court-martial, or, alternatively, that relief under Article 66, UCMJ, is warranted due to excessive post-trial delay. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Post-Trial Delay**

In support of his argument that his post-trial due process rights have been violated, the appellant points to the nearly four years (1,601 days) it took to docket the case with this court after the convening authority took action.<sup>1</sup> The appellant however, does not allege any specific prejudice as a result of that delay. Appellant's Brief of 21 Jan 2011 at 6-7. Notwithstanding the mistaken belief that this case did not require Article 66, UCMJ, review, we nonetheless find that the delay in this case is unreasonable. Although the Government argues that there is no due process violation, it concedes that the delay in the case was unreasonable. Government's Brief of 22 Feb 2011 at 7. See also *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006).

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, there is no evidence of any specific harm resulting from the delay and the appellant has not alleged any such harm. There is no evidence of oppressive incarceration resulting from the delay, particularized anxiety caused by the delay, or any 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. Additionally, we note that the appellant never requested speedy post-trial review.

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<sup>1</sup> The appellant was sentenced on 16 March 2006 and after considering the staff judge advocate's recommendation and the appellant's request for clemency, on 13 June 2006 the convening authority approved the sentence and ordered it executed subject to the limitations of the pretrial agreement. Since the convening authority approved the adjudged 12 months of confinement, and since 12 months equals one year, the case required review under Article 66, UCMJ. The convening authority erroneously forwarded the record to Submarine Group 9 for review under Article 64(a), UCMJ. In an undated document, the staff judge advocate for Submarine Group 9 found that no corrective action was warranted, and determined that the proceedings, findings and sentence as approved by the convening authority were "final and conclusive."

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 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 sentence as approved by the convening authority.

For the Court

R.H. TROIDL  
Clerk of Court