

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

**Before  
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**KEVIN P.D. DUONG  
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200700126  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 28 September 2006.

**Military Judge:** CDR Randall G. Johnson, JAGC, USN.

**Convening Authority:** Commanding Officer, Marine Aviation  
Training Support Group-21, Naval Air Station, Pensacola,  
FL.

**Staff Judge Advocate's Recommendation:** LtCol J.R.

Woodworth, USMC (9 Jan 2007); **SJAR Addendum:** LtCol J.L.

Gruter, USMC (18 Sep 2008); **Supplemental SJAR:** LtCol J.L.

Gruter, USMC (5 Jun 2009).

**For Appellant:** LT Michael Maffei, JAGC.

**For Appellee:** Maj Elizabeth Harvey, USMC; LCDR Christopher  
Burris, JAGC.

**22 October 2009**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a special court-martial of knowingly receiving and possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.

The appellant was sentenced to confinement for six months, forfeiture of \$849.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

On 18 July 2007, this court found the CA's action to be a legal nullity and directed the record of trial be returned to the Judge Advocate General of the Navy for remand to an appropriate CA for new post-trial processing. A second CA's action was issued on 7 October 2008 and the case was redocketed with this court on 11 March 2009. On 22 April 2009, pursuant to a Government Motion to Remand, this court set aside the CA'S action of 7 October 2008, and directed the record of trial be returned to the Judge Advocate General of the Navy for remand to an appropriate CA for a new post-trial processing. The third and final CA's action was taken on 27 July 2009. On 5 August 2009, the case was again redocketed for completion of appellate review.

The appellant raises three assignments of error.<sup>1</sup> First, the appellant asserts post-trial delay that denied him due process. Second, he argues relief is warranted under Article 66, UCMJ, due to the post-trial delay. Third, he contends it was improper for the CA to purportedly execute the appellant's bad-conduct discharge when taking his 27 July 2009 action.

After carefully examining the pleadings of the parties and the record of trial, 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 remains. Arts. 59(a) and 66(c), UCMJ.

The appellant first alleges that he was denied speedy post-trial review. A due process analysis of post-trial delay begins with a determination whether the delay in question is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). We find a delay of 1,042 days from the date of sentencing to the date his appeal was docketed with this court for completion of appellate review facially unreasonable.

Given the delay in this case, we will assume, without deciding, that the appellant was denied his due process right to a speedy post-trial review, and consider if the error in that

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<sup>1</sup> We note that on 10 April 2009 the appellant specified two assignments of error alleging defects in post-trial processing. Due to our 22 April 2009 remand of this case a third time for new post-trial processing, both assignments of error were mooted. We now consider only the appellant's three remaining assignments of error.

regard was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

We consider whether constitutional error is harmless beyond a reasonable doubt *de novo* based on the totality of the circumstances. *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009)(citing *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)). The appellant does not articulate any particular prejudice resulting from post-trial processing of this case and after carefully reviewing the record, we do not find that the appellant was prejudiced by this delay. While the delay in this case is unacceptable, we will not presume prejudice from the length of the delay alone. *Id.* at 26. Considering the totality of the circumstances, we conclude that the Government met its burden to show that the due process error was harmless beyond a reasonable doubt. Additionally, even if such error was not harmless, any relief we could fashion in this case would be disproportionate to the possible harm generated from the delay in light of the serious nature of appellant's offenses. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

We next consider the appellant's argument that Article 66, UCMJ, warrants relief as a result of the post-trial delay. We are aware of our authority to grant relief under Article 66, UCMJ, and in this case we choose not to exercise this authority. See *United States v. Simon*, 64 M.J. 2005 (C.A.A.F. 2006); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Lastly, the appellant argues that the CA's action purports to order the appellant's bad-conduct discharge executed. Although the CA's action uses language that is different from that contained in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 16, it is nevertheless correct. We note that Appendix 16 only provides guidance and is not mandatory. Moreover, the 27 July 2009 CA's action indicates clearly that the CA was executing only that portion of the approved sentence that he had the legal authority to order executed. As such, we hold that the CA's action did not purport to order the bad-conduct discharge executed.

### **Conclusion**

Accordingly, the findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court