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

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

**UNITED STATES OF AMERICA**

**v.**

**SPENCER A. DUNCAN**
**SEAMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 200800323**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 1 April 2009.
**Rehearing Military Judge:** CAPT David M. McQuiston, JAGC, USN.
**Convening Authority:** Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
**Staff Judge Advocate's Recommendation:** CDR F.J. Yuzon, JAGC, USN.
**For Appellant:** LT Dillon Ambrose, JAGC, USN.
**For Appellee:** LT Sergio Sarkany, JAGC, USN.

**10 September 2009**

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**OPINION OF THE COURT**

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

GEISER, Chief Judge:

On 15 February 2008, a military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of possession and receipt of child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence was confinement for 3 years, forfeiture of all pay and allowances, reduction to pay grade E-1 and a bad-conduct discharge.

On 25 November 2008, this court affirmed the military judge's findings, but set aside the appellant's sentence because the military judge considered improper evidence in aggravation.[1] *United States v. Duncan*, No. 200800323, unpublished op. (N.M.Ct.Crim.App. 25 Nov 2008). We authorized a rehearing on the sentence. *Id.*

The Navy-Marine Corps Appellate Review Activity (NAMARA) forwarded their first notification of the court's decision to the convening authority and the appellant on 17 February 2009. Letter of Navy-Marine Corps Appellate Review Activity of 17 Feb 2009. The next day, 18 February 2009, the convening authority referred the appellant's case for rehearing on the sentence. Convening Authority Order of 18 Feb 2009.

Two days after the CA's receipt of the NAMARA notification, the appellant was transferred from the Charleston Naval Brig to the Jacksonville Naval Brig. Affidavit of Appellant of 15 Jul 2009 at 1. Also on this date, the appellant's confinement status changed from that of a sentenced prisoner to a pretrial detainee. *Id.* According to the appellant, he was unaware that his sentence had been set aside until he was informed in early February 2009. *Id.*

The following day, the Commanding Officer of Transient Personnel Unit Jacksonville signed a letter officially ordering the appellant into pretrial confinement. Commanding Officer letter of 20 Feb 2009. Three days later, the appellant waived his right to a hearing before an Initial Reviewing Officer (IRO). Pretrial Confinement Acknowledgment of Rights of 23 Feb 2009.

On 1 April 2009, a military judge conducted a new sentencing hearing and awarded the appellant 30 months confinement and a dishonorable discharge.[2] Although the military judge and counsel computed 411 days of *Allen* credit, at no point during the rehearing process did the appellant's newly detailed trial defense counsel ask for any additional sentence credit under RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) or Article 13, UCMJ, for some or all of the 87

[1] At trial, the military judge reviewed and considered victim impact statements from children whose images the appellant did not possess.

[2] The convening authority approved the confinement and a bad-conduct discharge, in line with the appellant's previous sentence.

days the appellant spent in post-trial confinement after this court set aside his sentence. In addition, the military judge never inquired of the appellant whether he had been subject to any illegal pretrial confinement.

From the date of his initial trial on 25 November 2008 until the date of his sentence rehearing on 1 April 2009, the appellant remained in a no-pay status, was housed with sentenced prisoners, and wore the rank of E-1, not E-2. Enclosures 3 and 4, Defense Counsel Clemency Letter of 11 May 2009. The appellant now asserts that his trial defense counsel was ineffective for not requesting additional confinement credit for delay and administrative errors relative to his change of status from sentenced prisoner to pretrial confinee.

**Ineffective Assistance of Counsel**

The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id*.; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

While the appellant raises several technical errors arising from his change in status following our decision,[3] they primarily appear tied to the 87 day delay between the date of this court's decision setting aside the appellant's sentence and the date the convening authority (CA) received the Judge Advocate General's (JAG) mandate to comply with our opinion. Administratively, JAG mandates are issued through NAMARA (Code 40).

The parties agree that the Government is entitled to 30 days following a decision by this court to decide whether to move this court for reconsideration or to certify the case to the Court of Appeals for the Armed Forces (CAAF). During this 30-day decision period, the appellant remains in a confined prisoner status because this court's decision is inchoate. *United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997). Once

[3] The appellant asserts multiple R.C.M. 305 violations as well as Article 13 credit for illegal pretrial punishment premised on the Government's failure to more proactively change his confinement status.

a decision is made not to pursue either of the two appeal options available to the Judge Advocate General or, in the absence of a stay issued by a competent court, no later than the end of the 30-day decision period; NAMARA is obligated to expeditiously issue a mandate to the CA to effect this court's decision. In the instant case, NAMARA delayed an additional 57 days before issuing the required mandate.

We decline to adopt the Government's argument that the fact that this court's order remains inchoate until such time as NAMARA actually communicates the JAG's mandate to the CA serves to deny an appellant a judicial avenue of redress for illegal confinement. To adopt this position would, in effect, create a virtually unlimited period during which an appellant could be wrongfully kept without rank or pay in a sentenced prisoner status with no lawful opportunity for judicial redress.[4]

Having carefully considered the pleadings and the facts and circumstances in the record, we find that the Government materially prejudiced a substantial right of the appellant when it allowed 57 additional days to elapse beyond their statutory 30-day reconsideration/appeal decision period. The multiple issues raised by the appellant essentially all arose from this delay.

We decline to adopt the appellant's requested piecemeal approach, which would result in some 228 days of additional confinement credit. We find such a result excessive in view of the actual prejudice suffered. We do, however, order 57 days of additional day-for-day confinement credit for the prejudice arising from the NAMARA delay. This credit is to be counted in addition to the 411 days of *Allen* credit already computed by the trial court.[5] In view of this, we need not determine if the trial defense counsel's deficient performance at trial was of sufficient magnitude to constitute IAC. Our decision to award the appellant 57 days of additional confinement credit effectively resolves the material prejudice suffered by the appellant.

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[4] We note with approval, that once in receipt of the JAG's mandate, the CA acted within days to change the appellant's status from prisoner to pretrial detainee, to decide whether to order the appellant into pretrial confinement, and to afford the appellant a timely opportunity for an Initial Review Officer hearing, which, in this case, the appellant waived.

[5] *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

Our prior decision affirmed the findings in this case. The approved sentence of confinement for 30 months and a bad-conduct discharge is affirmed. We direct that the appellant be credited with a total of 468 days of confinement credit.

Senior Judge BOOKER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court