IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **J.D. HARTY** **K.K. THOMPSON**

UNITED STATES

v.

James A. KOFFORD
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200301251 Decided 12 December 2006

Sentence adjudged 11 April 2002. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Division (Rein), Okinawa, Japan.

LCDR E. MCDONALD, JAGC, USN, Appellate Defense Counsel
LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LCDR PAUL BUNGE, JAGC, USN, Appellate Government Counsel
LT C.A. POULSON, JAGC, USN, Appellate Government Counsel

HARTY, Senior Judge:

A general court-martial, composed of officer members, convicted the appellant, contrary to his pleas, of conspiracy to introduce a controlled substance, methylenedioxymethamphetamine (ecstasy), onto an installation controlled by the armed forces, two specifications of introduction of ecstasy onto an installation controlled by the armed forces with the intent to distribute, distribution of ecstasy, and use of ecstasy, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The appellant was sentenced to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

We have considered the record of trial, the appellant's original assignment of error and five supplemental assignments of

error,[1] the Government's Answers, and the parties' excellent oral arguments.[2] We find that the findings and sentence are not correct in law and fact and that error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ. We will set aside the findings and sentence in our decretal paragraph.

Background

On 20 March 2001, the Naval Criminal Investigative Service (NCIS), located in Okinawa, Japan, intercepted a package containing 100 tablets of ecstasy, transported through the U.S. and military postal systems and addressed to the appellant at his on-base address. NCIS scheduled an on-base controlled delivery of the package to the appellant and invited Japanese narcotics officers assigned to the Narcotics Control Office (JNCO) to participate. On 22 March 2001, the appellant was notified by telephone that he had a package at the Division Schools office. The appellant reported to the office and took possession of the package. The appellant was apprehended by NCIS at 1141 on 22

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[1] I. THE CHARGES AND SPECIFICATIONS SHOULD BE DISMISSED AS A RESULT OF THE GOVERNMENT'S VIOLATION OF APPELLANT'S RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ.

II. THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO SUPPRESS TEN INCRIMINATING STATEMENTS GIVEN TO JAPANESE AUTHORITIES BY APPELLANT AFTER HE WAS DIRECTED TO COOPERATE WITH THE JAPANESE AUTHORITIES BY MILITARY AUTHORITIES AND HAD INVOKED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

III. WHETHER THE FOREIGN CRIMINAL JURISDICTION OFFICER EXTENDED TESTIMONIAL OR TRANSACTIONAL IMMUNITY TO THE APPELLANT, ON THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY'S BEHALF, WHEN THAT OFFICER TOLD THE APPELLANT TO COOPERATE FULLY WITH THE JAPANESE AUTHORITIES AND THAT IF THE APPELLANT WAS CONVICTED AND SENTENCED BY THE JAPANESE, THE MARINE CORPS WOULD ONLY ADMINISTRATIVELY SEPARATE HIM FROM ACTIVE DUTY? (Specified issue).

IV. IF IMMUNITY WAS NOT EXTENDED TO THE APPELLANT, WAS THE STATEMENT CONCERNING COOPERATION WITH THE JAPANESE AUTHORITIES, COMBINED WITH THE STATEMENT CONCERNING USING ONLY ADMINISTRATIVE SEPARATION PROCEDURES AGAINST THE APPELLANT, AN INEFFECTIVE PROMISE SERVING AS AN UNLAWFUL INDUCEMENT FOR PURPOSES OF ARTICLE 31(D), UCMJ?. (Specified issue).

V. WHETHER THE MILITARY JUDGE ERRED WHEN HE RULED THAT STATEMENTS TAKEN BY JAPANESE LAW ENFORCEMENT OFFICERS WERE ADMISSIBLE AT APPELLANT'S COURT-MARTIAL WHEN THOSE STATEMENTS WERE TAKEN IN VIOLATION OF DUE PROCESS OF LAW?

VI. APPELLANT HAS BEEN DENIED DUE PROCESS WHERE MORE THAN FOUR YEARS HAVE ELAPSED SINCE HIS COURT-MARTIAL AND HIS CASE HAS YET TO BE DECIDED BY THIS COURT.

[2] Oral arguments were heard at the U.S. Naval Academy as part of the U.S. Navy-Marine Corps Court of Criminal Appeals' outreach program.

March 2001, when he left the building in possession of the package.

The appellant was taken to the NCIS office where he was informed of his rights. At 1220 on 22 March 2001, the appellant requested to speak with an attorney, and refused consent to search his barracks room. The appellant was then processed and moved to a location where he could see who was being brought into the NCIS building for questioning. NCIS brought one of the appellant's associates, Private (Pvt) T, into the office and turned Pvt T toward the appellant so they could see each other. NCIS agents periodically walked out of the room where Pvt T was being questioned and commented, within the appellant's hearing, that Pvt T was "talking" or giving NCIS "what they wanted." At 1745 the same day, an NCIS agent approached the appellant and gave him his business card in case the appellant changed his mind and wanted to speak with NCIS. The appellant immediately stated that he wanted to waive his right to speak with an attorney, and at 1807 signed his rights waiver and gave an incriminating oral statement to NCIS. The appellant admitted to knowingly receiving the 100 tablets of ecstasy, and the use of various controlled substances.[3]

The appellant was placed into pretrial confinement on 22 March 2001 after he waived his right to counsel and gave his statement to NCIS. The pretrial confinement order stated the basis for the confinement was "ART 112a- Wrongful possession of controlled substance with intent to distribute." Appellate Exhibit XI at 15. The special court-martial convening authority, Colonel M, however, testified that he placed the appellant in pretrial confinement solely for the Japanese under the Status of Forces Agreement (SOFA) between the United States and Japan. Record at 65. The Japanese authorities, however, never requested the U.S. Marine Corps to confine the appellant on their behalf. *Id*. at 84. The appellant was provided a military attorney to assist him at the confinement review hearing held on 27 March 2001, however, no attorney-client relationship was formed. Appellate Exhibit XXXIV.

While in pretrial confinement, the appellant was informed by the foreign criminal jurisdiction officer, Major (Maj) M, that he should be polite and cooperate fully with the Japanese interrogators. When the appellant expressed concern over what would happen to him if the Japanese prosecuted him, Maj M told the appellant that the Marine Corps would only administratively separate him from active duty and not take him to trial if he was convicted and sentenced in the Japanese courts. Record at 89.[4]

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[3] The military judge suppressed the appellant's statement to NCIS due to a violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), but rejected the appellant's assertion that the statement was involuntary. Record at 223.

[4] This testimony was elicited by asking the witness whether that is what he stated during his Article 32, UCMJ, hearing testimony. At the Article 32, UCMJ, hearing, the following actual dialogue occurred:

A noncommissioned officer gave the appellant a SOFA brief in the brig on 19 April 2001, telling him, in part, that it would be in his best interest to be polite and cooperative with the Japanese authorities. *Id*. at 214-15.

After being advised by Maj M and receiving a SOFA brief, and after being confined for 29 days in the Okinawa brig, the appellant was transported by the military to the JNCO office for his first Japanese interrogation. Over the next 72 days, the appellant was transported back and forth between the brig and the JNCO office where he was interrogated more than 20 times by the Japanese authorities. These interrogations resulted in 10 written confessions.

The appellant was convicted in the Japanese courts of conspiracy to import 100 units of ecstasy and the importation of the same ecstasy. He was sentenced to confinement for three years, which was suspended for four years. *Id*. at 451. Military charges were subsequently preferred and referred against the appellant for use of mushrooms and ecstasy, introduction of 30 units of ecstasy with the intent to distribute, distribution of ecstasy, conspiracy to introduce 100 units of ecstasy, and introduction of 100 units of ecstasy with the intent to distribute. Most of these offenses were alleged based upon admissions contained in the numerous custodial confessions the appellant made to Japanese investigators. The appellant was sentenced on 11 April 2002. The CA took his action on 22 November 2002 and the record was docketed with this court on 20 June 2003.

> Q: Did you ever have any discussion with [the appellant] about what would happen to him after his Japanese matter had been handled?
> A: Yeah, I remember that he was very concerned with that topic. To the best of my recollection, it's always a concern, and I do my best to provide them all the possible options. However, you know, I make sure they know that I'm not the SJA or I'm not the Convening Authority, and so, nothing I say is really definitive.
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> Q: Did he express a concern to you about whether or not he might be charged with these same offenses in a U.S. or military tribunal?
> A: Yes, he did.
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> Q: Do you recall what you told him about that, how you answered that question?
> A: Yeah. At the time, because there were some other issues, the concern – the way I understood and the way I advised him was that dependent on the outcome of his Japanese trial and if he was convicted and sentenced in the Japanese trial and had some punishment, likely, they would just adsep him while he was in Japanese confinement.

Article 32, Investigating Officer's Report of 17 Dec 2001 at 51-52.

Speedy Trial

For his first assignment of error, the appellant claims he was denied his Article 10, UCMJ, speedy trial rights, and requests this court to dismiss all charges and specifications. The appellant argues that because the Japanese authorities did not assert jurisdiction over his case on 22 March 2001 and did not request that he be confined, the initial pretrial confinement was for military purposes and not for the Japanese. The appellant's Article 10, UCMJ, argument rests on whether the initial confinement was or was not for the Japanese authorities. This is an issue of fact.

We review *de novo* a military judge's decision whether an accused has received a speedy trial, however, we give substantial deference to the military judge's findings of fact unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)). The appellant was placed in pretrial confinement on 22 March 2001. The confinement order stated the confinement was the result of a violation of Article 112a, UCMJ, and the appellant was given a review hearing pursuant to R.C.M. 305(i)(2). Appellate Exhibit XI at 15, 16. The appellant's commanding officer, however, testified that when he ordered the appellant into confinement, he believed that the Japanese had jurisdiction over any criminal offense involving the 100 units of ecstasy mailed to the appellant. It was always his intent to hold the appellant for the Japanese, even though the Japanese did not request that the appellant be confined. Record at 65.

From this evidence, the military judge found that the appellant was placed in pretrial confinement to make him available for the Japanese authorities. *Id*. at 179. The record of trial supports that finding of fact, and, therefore, it is not clearly erroneous. *Id*. at 178-85. The military judge's finding on that issue is entitled to substantial deference during our *de novo* review.

Article 10, UCMJ, reads in pertinent part as follows: "Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require . . . [and] immediate steps shall be taken . . . to try him or to dismiss the charges and release him." A plain-language reading of Article 10, UCMJ, indicates that the Article's scope is limited to situations involving the confinement of service members for military charges. When the military confines a service member in order to make him available to a foreign government, Article 10, UCMJ, protections are not invoked, and the time spent in military confinement does not count toward the Government's speedy trial accountability under that Article. *See United States v. Frostell*, 13 M.J. 680, 685 (N.M.C.M.R. 1982)(holding that "the crucial consideration is the purpose underlying the confinement").

Giving substantial deference to the military judge's findings, we conclude that: (1) the appellant was confined in anticipation of eventually turning him over to the Japanese authorities; (2) there were no military charges pending against the appellant on 22 March 2001; and, (3) the officer ordering confinement did not intend to prefer charges against the appellant at the time he ordered the confinement. We conclude, therefore, that the provisions of Article 10, UCMJ, did not apply to the appellant until he was confined for the purpose of military charges on 18 October 2001. Appellate Exhibit XI at 31. This assignment of error is without merit.

Japanese Statements

For his first three supplemental assignments of error, the appellant challenges the admission of his 10 separate statements made to the Japanese authorities, because (1) they were derivative of his statement to NCIS taken in violation of *Edwards*; (2) he was granted actual or *de facto* immunity; or in the alternative, (3) the statements were involuntary due to an unlawful inducement in violation of Article 31(d), UCMJ; and, (4) the statements were taken in violation of the appellant's due process rights. We agree with the appellant's contention that his statements to the Japanese were the product of an unlawful influence or inducement. We will address each of the appellant's assertions separately after a discussion of waiver or forfeiture.

1. Waiver or Forfeiture

A motion to suppress statements, to dismiss a charge or specification because prosecution is barred by a grant of immunity, or an allegation of improper use of immunized testimony in the prosecutorial decision are waived if not brought before the military judge at the appropriate time, absent plain error. *See United States v. Allen*, 59 M.J. 478, 483 (C.A.A.F. 2004); R.C.M. 905(e) and 907(b)(2). A plain error analysis requires the determination of (1) whether there was an error; (2) if so, whether the error was plain or obvious; and (3) if the error was plain or obvious error, whether it was prejudicial. *See United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

2. *De Facto* Immunity

The appellant was placed in confinement immediately after giving his original incriminating statement to NCIS. While in confinement, the Foreign Criminal Jurisdiction Officer, Maj M, told the appellant that if he fully cooperated with the Japanese investigators, he would receive a better result in the Japanese courts. When the appellant asked if he would be charged with the same offenses at court-martial, Maj M told him if he was convicted and sentenced by the Japanese, the Marine Corps would only administratively separate him from active duty. The military judge did not make findings of fact and conclusions of

law on whether this amounted to *de facto* immunity, because this issue was not raised at trial.[5]

There are two types of immunity that may be granted to a military accused: transactional and testimonial. Transactional immunity protects an accused "from trial by court-martial for one or more offenses under the code." R.C.M. 704(a)(1). Testimonial immunity protects an accused against "the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial." R.C.M. 704(a)(2). Only an officer authorized to serve as a general court-martial convening authority (GCMCA) may grant either form of immunity. R.C.M. 704(c). A GCMCA cannot delegate the authority to approve a grant of immunity to a third party, R.C.M. 704(c)(3), however, he may convey an approved specific grant of immunity through a third party. Any purported grant of immunity by someone not empowered to make such a grant is invalid. *See United States v. McKeel*, 63 M.J. 81, 83 (C.A.A.F. 2006).

When someone displaying apparent authority to grant immunity, but who does not have actual authority to grant immunity, promises such, an appellant may sometimes enforce the apparent grant under a *de facto* immunity theory. The appellant, however, must establish that "(1) a promise of immunity was made; (2) [he] reasonably believed that a person with apparent authority to do so made the promise; and (3) [he] relied upon the promise to his . . . detriment." *Id*. (citing *Shepardson v. Roberts*, 14 M.J. 354, 358 (C.M.A. 1983); *United States v. Caliendo*, 32 C.M.R. 405, 409 (C.M.A. 1962); *United States v. Thompson*, 29 C.M.R. 68, 71 (C.M.A. 1960); R.C.M. 704(c) Discussion; MCM, App. 21, at A21-38). We conclude there was no *de facto* grant of immunity because the first prong was not met -- there was never an actual promise of immunity made to the appellant.

Our review of military *de facto* immunity cases convinces us that the person with apparent authority must make an unequivocal offer involving a *quid pro quo* before there can be a "promise" of immunity. That is, the Government actor must offer to take an action or forbear from taking an action in return for an accused taking an action he is not otherwise obligated to take, or surrendering a right he is not otherwise obligated to surrender. *See, e.g., McKeel*, 63 M.J. at 83 (promise not to prefer charges in return for accepting nonjudicial punishment and waiving administrative separation board)*; United States v. Jones*, 52 M.J. 60, 65 (C.A.A.F. 1999)(promise to dispose of charges at nonjudicial punishment if service members agreed to pay restitution and testify against co-accused); *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992)(promises charges will not be brought if service member testifies before a board investigating

[5] Although the appellant moved to suppress his 10 statements to the Japanese, it was based on a derivative evidence theory flowing from his attack on his NCIS statement. Appellate Exhibit XIII.

a training death); *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991)(promise not to prosecute if accused participated in a child-sexual-abuse-treatment program); *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986)(promise not to prosecute if accused told where drugs were located onboard ship).

Here, the Foreign Criminal Jurisdiction Officer, Maj M, told the appellant to cooperate with the Japanese and, in response to the appellant's inquiry, told him "that dependent on the outcome of his Japanese trial and if he was convicted and sentenced in the Japanese trial and had some punishment, likely, they would just adsep him while he was in Japanese confinement." Article 32 Investigating Officer's Report of 17 Dec 2001 at 51-52. We do not discern an actual offer on the Government's part to act or forebear from taking action in return for a *quid pro quo* from the appellant.

The practical effects of Maj M's statements to the appellant were that (1) it provided the appellant with some but not all relevant information the appellant needed to make an informed tactical decision concerning his rights;[6] (2) the appellant's conviction in the Japanese courts was more probable if he cooperated and gave full confessions to the Japanese; (3) the Japanese conviction was the condition precedent for a Japanese sentence; (4) the Japanese sentence was the condition precedent for the military to "likely . . . just adsep" the appellant. We are unwilling to extend the doctrine of *de facto* immunity to cases that do not involve an actual offer requiring a direct *quid pro quo* from the appellant. Because there was no *de facto* immunity, failure of the trial defense counsel to raise the issue or the military judge to *sua sponte* raise and rule on the issue was not error, plain or otherwise. The appellant failed to raise any issue concerning *de facto* immunity, and therefore forfeited the right to review on appeal.[7]

[6] The appellant was aware that being cooperative with the Japanese could result in a lighter sentence, and was able to weigh that against the information concerning whether he would be prosecuted by the military. There is nothing in the record suggesting the appellant was also aware that if prosecuted by the military, his Japanese confessions could be used against him. Tactical decisions made without essential information are uninformed decisions.

[7] We reject the appellant's oral argument that *McKeel* established a new rule that can be applied retroactively to cases still pending on direct appeal at the time the decision was rendered, thereby preventing waiver. We do not find that our superior court created a new rule in *McKeel*. *See Griffin v California*, 380 U.S. 609 (1965).

3. Unlawful Influence

Concluding that the appellant forfeited the issues surrounding *de facto* immunity does not end our inquiry. Although not creating *de facto* immunity, the facts surrounding that issue also raise the question of whether there was an unlawful influence or inducement under Article 31(d), UCMJ, which produced the appellant's numerous incriminating statements to the Japanese.

The appellant exercised his right to consult with an attorney before speaking with NCIS. That right was violated by NCIS, thereby making the appellant's oral confession inadmissible. Subsequently, while confined and before he was questioned by the Japanese, the appellant was informed more than once by representatives of Maj M's office to be honest and open with the Japanese investigators, and on one occasion was advised by Maj M that only administrative separation would follow if he was convicted and sentenced by the Japanese. This "advice" must be considered in the context of the appellant's physical and legal surroundings as part of the totality of circumstances.

Under the SOFA, the U.S. Government must notify the Japanese Government when a crime has been committed by a service member and the U.S. Government does not have jurisdiction over that crime under the SOFA. This applies to all controlled substance cases where the substance is also prohibited by Japanese law. Once notice is given under the SOFA, Japan has 20 days to bring an indictment. According to the Japanese Penal Code, Japan can only confine someone for 23 days before an indictment must be issued. Record at 77.

In order to accommodate these time restrictions, the military sometimes places service members in pretrial confinement, allegedly for the Japanese, but does not start the 20-day Japanese indictment clock under the SOFA through a formal notice,[8] nor does it start the 23-day confinement clock under the Japanese Penal Code by transferring custody of the service member to the Japanese.[9] This practice allows the military to confine service members without starting the speedy trial clock, it does not initiate any requirement to provide military counsel or Japanese civilian counsel, and it allows the Japanese to take as much time as they desire to investigate and indict the service member without violating the SOFA or its own Penal Code.

[8] Because it is very difficult for the Japanese prosecutors to investigate a crime and obtain an indictment all within 20 days of the offense, the U.S. Government orally notifies the Japanese of the offense but does not issue a formal notice to the Japanese Government. Record at 73.

[9] Nor does the military start the speedy trial clock under military law. A service member shall be brought to trial within 120 days of preferral of charges or imposition of restraint. R.C.M. 707(a).

The appellant could not appeal his detention in the brig to the Japanese courts prior to Japan asserting its jurisdiction over the case on 22 June 2001. Record at 85, 87, 95; Appellate Exhibit XI at 21. The appellant was not entitled to a Government-provided Japanese attorney for the Japanese charges until he was actually indicted on 13 July 2001.[10] The appellant was physically transferred to Japanese control the same day he was indicted, and was returned to military control on 18 October 2001 following his conviction and sentencing. Appellate Exhibit XI at 26, 29-31.

The appellant was also not entitled to a military attorney to advise him. He was confined for the Japanese, and military authorities had not done anything that would afford the appellant a right to detailed military counsel until 31 October 2001 when military charges were preferred.[11] The military generally does not prefer charges while the Japanese are investigating a service member because it would interfere with the Japanese investigators' ability to obtain statements involving offenses closely related to the charges preferred by the military.[12] *Id*. at 117. We need not decide here whether the appellant could have sought extraordinary relief from this court or our superior court while being held in the Okinawa brig for Japanese authorities, we will assume for sake of argument that he could.[13] Assuming that he had that right, the record makes clear that he would not have access to local detailed counsel to inform him of that option or to assist him in preparing and filing his petition.

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[10] The U.S. Government does not employ Japanese attorneys to represent detainees on Japanese charges until a detainee is indicted by the Japanese, and military defense counsel are not appointed to service members detained for the Japanese. Record at 112.

[11] The staff judge advocate (SJA) for 3d Marine Division, Lieutenant Colonel M, testified that based on his tours of duty in Okinawa, it is his experience that the military does not detail military counsel to a service member held in the brig for the Japanese, and will detail military counsel once military charges are preferred. Record at 112, 117.

[12] The SJA's testimony on this point suggests to this court that an intentional decision is made not to prefer charges because an accused would then be entitled to detailed military counsel who would properly advise their client that any statement made to the Japanese authorities could be used against him at a later court-martial for the same or similar offenses.

[13] "[T]he Supreme Court, citing the All Writs Act, reiterated that courts should issue writs only when: (1) 'the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires,' (2) 'the Petitioner [has met] the burden of showing that [his] right to issuance of the writ is clear and indisputable, and (3) 'in the exercise of its discretion, [the court is] satisfied that the writ is appropriate under the circumstances.' This Court has issued writs when there is a showing of illegal confinement, lack of jurisdiction over a person, a double-jeopardy bar to prosecution, and for reasons of judicial economy." *Parker v. United States*, 60 M.J. 446, 448 (C.A.A.F. 2005)(Crawford, J., concurring in part and dissenting in part)(internal citations omitted).

The appellant was held in pretrial confinement by the military for almost four months without military or civilian counsel and without effective access to a court while he went through more than 20 interrogations. The appellant was confined for approximately 29 days before he was first questioned by the Japanese. It was during those 29 days that Maj M and representatives of his office "advised" the appellant. In his first of 10 written confessions to the Japanese, the appellant stated "[t]oday, I felt like providing a statement because I have thought about various things while I was being held for 30 days in the U.S. Military brig under the instructions of the Camp Commander." Appellate Exhibit IX at 41.

Whether the advice from Maj M and his office is "characterized as unwarranted assurances . . . or outright pressure, the result was the same: it influenced" the appellant's decision to waive his rights and to provide confessions to the Japanese authorities.[14] *Cunningham*, 36 M.J. at 101. We conclude that, under the unique facts of this case, being held in confinement without effective access to courts or legal counsel, through the course of more than 20 interrogations, preceded by the advice and assurances given by Maj M and representatives of his office, combined to serve as an "unlawful influence" or "unlawful inducement" within the meaning of Article 31(d), UCMJ.[15] *See Id*. at 101 (holding that assurances not amounting to *de facto* transactional immunity may be an "unlawful influence" under Article 31(d), UCMJ); *see also Churnovic*, 22 M.J. at 408 (holding that an unauthorized promise of use immunity, not amounting to *de facto* testimonial immunity, may constitute an unlawful inducement for purposes of Article 31(d), UCMJ).

As the result of an unlawful influence or unlawful inducement, in violation of Article 31(d), UCMJ, the content of the appellant's statements to the Japanese investigators should not have been admitted at his subsequent trial by court-

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[14] The appellant held a long-standing belief that he should not waive his right to speak to counsel. He had been informed by his father, a law-enforcement officer, to always invoke the right to consult an attorney before making a statement. Record at 212. He followed this advice with NCIS and also denied a request for consent to search his barracks room. However, he chose not to assert his rights after receiving advice and assurances from the Government and sitting in the brig thinking about it for a month without legal counsel or effective access to a court.

[15] The procedure of detaining a service member without counsel and with limited access to courts, combined with advice to cooperate with Japanese authorities and an assurance that only administrative action will follow, is a long-standing practice. *See United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984); *United States v. Frostell,* 13 M.J. 680 (N.M.C.M.R. 1982). In each of these cases, the accused gave statements to the Japanese authorities, which were then used against the accused on military charges closely-related to the Japanese charges.

martial.[16] The appellant's failure to raise this precise issue did not constitute waiver, because it was plain error to admit the Japanese confessions when they were clearly the product of an unlawful influence or inducement by a person or persons subject to the UCMJ.

4. Derivative Use

The impact of an unlawful influence or inducement, however, goes beyond the admissibility of the appellant's statements to the Japanese. Prosecutions may not result from a statement obtained in violation of Article 31(d), UCMJ. *See Cunningham*, 36 M.J. at 102 (citing *United States v. Kimble*, 33 M.J. 284, 291 (C.M.A. 1991)). Nor may evidence discovered as a result of those statements be later used against the appellant. MILITARY RULE OF EVIDENCE 305(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

Here, Specifications 3 and 4 under the Charge appear to be based solely on the unlawfully influenced statements to the Japanese, and the testimony of Pvt M and Lance Corporal (LCpl) Q appears to be derivative of those statements. The Government was never required to demonstrate, by a preponderance of the evidence, that the decision to prosecute, and the evidence presented against the appellant, was untainted by his statements to the Japanese investigators. We will address both the suspect charges and the evidence.

a. Charges

Specification 3 under the Charge, alleging introduction of 30 tablets of ecstasy onto an installation under the control of the armed forces, appears to be based solely on the appellant's Japanese confessions. NCIS Special Agent (SA) Rodriguez testified that NCIS first learned about the appellant's introduction of 30 tablets of ecstasy in April or May 2001, through a wire intercept of a discussion between an NCIS informant and Pvt T, in which Pvt T described his source of ecstasy as a staff noncommissioned officer who ran the corporals' course. Record at 46. Although SA Rodriguez testified that NCIS was aware of this information before JNCO informed NCIS of the imported 30 tablets of ecstasy, NCIS reports rebut that testimony. The wire intercept referred to occurred on 16 March 2001, during which Pvt T stated that the package "was already enroute." Appellate Exhibit XI at 43. The only package that was "enroute" on that date contained the 100 tablets of ecstasy, not the prior package containing 30 tablets of ecstasy. Additionally, Specification 4 under the Charge,

[16] The actual translated statements were not admitted into evidence. The Japanese investigator who took the statements testified as to what the appellant told him. Record at 380-93.

alleging distribution of ecstasy on divers occasions, appears to be based solely upon the appellant's Japanese confessions, and the confessions obtained from Pvt M and LCpl Q, who were implicated in the appellant's confessions. Appellate Exhibit IX at 75-84.

b. Evidence

In his fourth confession to the Japanese, given on 23 April 2001, the appellant provided identifying information about two Marines who received ecstasy from him. Appellate Exhibit IX at 46-50. JNCO requested investigative assistance from NCIS in identifying these two Marines. Record at 469. The Marines, LCpl Q and Pvt M, were unknown to NCIS prior to that time. *Id*. Both Marines testified for the Government and provided corroboration necessary for admission of the appellant's confessions, plus substantive evidence concerning the appellant's own mushroom use, ecstasy use, and ecstasy distribution to the witnesses. *Id*. at 291-306. These witnesses and their testimony appear to be derivative of the appellant's Japanese confessions. We will address the impact of these errors in our decretal paragraph.

Post-Trial Delay

In his final supplemental assignment of error, the appellant claims that the post-trial delay in his case has violated his right to due process. We agree.

Our superior court has identified four factors in determining whether post-trial delay violates due process rights: (1) total length of delay; (2) reasons for that delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant. *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). More recently, our superior court has explained: "Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation." *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). We will address each factor.

1. Length of the Delay

From the appellant's date of sentencing on 11 April 2002 until the final brief was filed on 2 October 2006, a total of 1,635 days of delay occurred. Of this delay, 435 days elapsed before the case was docketed with this court on 20 June 2003, and the balance of the delay, 1,200 days, occurred between docketing and final briefing. We conclude this delay is facially unreasonable, and we will perform a full due process analysis. *Moreno*, 63 M.J. at 136.[17]

2. Reasons for the Delay

Reasons for the delay include the Government's responsibility for delay, as well as "any factors attributable to an appellant." *United States v. Haney*, 64 M.J. 101, 107 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 136)(internal quotation marks omitted). Here, appellate defense counsel requested a total of 14 enlargements of time prior to filing his first brief and assignment of error on 7 January 2005. A different appellate defense counsel filed a brief and supplemental assignment of error on 16 September 2005, and in response to this court's order specifying issues, he filed a response to court order and supplemental assignments of error on 31 July 2006. Appellate Government counsel requested one enlargement of time to file its answer to specified and supplemental assignments of error, which was subsequently filed on 2 October 2006. Oral arguments were held on 19 October 2006. Pursuant to *Moreno*, we do not weigh delays in briefing and filing appellate documents against the appellant. *Moreno*, 63 M.J. at 137.

3. Assertion of the Right to a Timely Review

The appellant did not assert his right to a speedy appellate review until his second appellate defense counsel filed his response to this court's specified issues on 31 July 2006. Within that brief, the appellant included a supplemental assignment or error, not in response to any issue specified by this court, concerning post-trial delay. The Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972), noted that where the defendant has asserted his speedy trial right, that assertion is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Failure to assert that same right, however, does not waive the right to speedy review. *Id*. at 528. As our superior court concluded in *Moreno*, the appellant's failure to assert his right to speedy review earlier than he did does not weigh "heavily against [the appellant] under the circumstances of this case." *Moreno*, 63 M.J. at 138.

[17] *Moreno* involved 1,688 total days of delay from the completion of his court-martial to the date this court issued its opinion. The longest period of delay -- 925 days – occurred between the date of docketing and final briefing. *Moreno*, 63 M.J. at 135, 137.

4. Prejudice from the Delay

In *Moreno*, our superior court enumerated three prejudice sub-factors to consider when analyzing claims of prejudice from post-trial review delay: (1) oppressive incarceration pending appeal; (2) constitutionally cognizable anxiety; and, (3) impairment of the ability to present a defense at a rehearing. *Id*. at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 308 (5th Cir. 1980)).

a. Oppressive Incarceration Pending Appeal

"This sub-factor is directly related to the success or failure of an appellant's substantive appeal . . . if an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive." *Id*. at 139 (internal citations omitted). Like the accused in *Moreno*, the appellant served his full term of confinement before his appeal was resolved by this court, and he has prevailed on a substantive appellate issue resulting in his conviction being set aside. Thus, the appellant served his confinement under a conviction that has now been set aside. "We therefore find that he has suffered some degree of prejudice as the result of oppressive incarceration." *Id*.

b. Constitutionally Cognizable Anxiety

An appellant must show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by appellants serving their confinement while waiting for an appellate decision. The particularized anxiety or concern must be related to the timeliness of the appellant's appeal, and requires the appellant to demonstrate a nexus between his anxiety or concern and the processing of his case on post-trial review. This nexus assists the reviewing court in fashioning compensatory relief for the appellant's particular harm. An appellant may suffer constitutionally cognizable anxiety regardless of the outcome of his appeal. *Id*. Here, the appellant does not allege, nor do we find, any constitutionally cognizable anxiety.

c. Impairment of the Ability to Present a Defense at a Rehearing

As a result of our decision to set aside the appellant's conviction and authorize a rehearing, the appellate delay encountered by the appellant may have a negative impact on his ability to prepare and present his defense at the rehearing. We, however, will not speculate on whether an appellant will be prejudiced at rehearing. The appellant must specifically identify how he would be prejudiced at rehearing due to the delay. The appellant does not assert any specific harm he will suffer on rehearing as a result of the delay in his case, and, therefore, has failed to establish prejudice under this sub-factor.

5. Post-Trial Delay Conclusion

Because of the unreasonably lengthy delay, the lack of any justifiable reasons for the delay, and the prejudice suffered by the appellant as a result of oppressive incarceration, our balancing of the four *Barker* factors leads us to conclude that the appellant was denied his due process right to speedy review and appeal. We are not convinced beyond a reasonable doubt that this constitutional error was harmless. *See United States v. Toohey*, 63 M.J. 353, 356 (C.A.A.F. 2006)(citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Because we have found legal error resulting in substantial prejudice to a material right, as well as a deprivation of due process, we must consider appropriate relief.

6. Relief

A rehearing is the appropriate remedy for the military judge's erroneous admission of the appellant's confessions made to the Japanese authorities. In considering the range of options to address the denial of the appellant's due process right to speedy review, we are mindful that we are unable to provide direct sentence relief, because we must set aside the sentence in order to permit a rehearing. Therefore, should there be a rehearing resulting in a conviction and new sentencing, we believe that limiting the sentence that may be approved by the convening authority will adequately afford the appellant relief for the deprivation of his speedy appellate review due process rights.

Conclusion

The findings and sentence are set aside. The record is returned to the Judge Advocate General for remand to an appropriate convening authority who may order a rehearing subject to the following conditions:

1. The convening authority may not use the information contained in the petitioner's statements to the Japanese authorities or to NCIS, or any evidence derived from those statements, to determine whether charges are warranted.

2. If charges are preferred, the Government will have the burden of showing, by a preponderance of the evidence, that each decision to prefer a charge was untainted by the appellant's statements to the Japanese authorities and to NCIS.

3. If a rehearing is held, the Government will have the burden of showing, by a preponderance of the evidence, that the evidence to be presented against the appellant is untainted by the appellant's statements to the Japanese authorities and to NCIS.

4. In the event that a rehearing is held resulting in a conviction and sentence, the convening authority may approve no portion of the sentence other than a punitive discharge, if one is awarded.

Chief Judge ROLPH and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court