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

BEFORE

D.A. WAGNER D.O. VOLLENWEIDER R.E. VINCENT

UNITED STATES

v.

Russell B. MULLINS
Master-at-Arms First Class (E-6), U. S. Navy

NMCCA 200200988 Decided 7 December 2006

Sentence adjudged 06 April 2001. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Warfare Center Weapons Division, Point Mugu, CA.

LCDR JASON GROVER, JAGC, USN Appellate Defense Counsel
Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
LT STEVEN M. CRASS, JAGC, USN, Appellate Defense Counsel
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

WAGNER, Senior Judge:

The appellant has filed 21 assignments of error and 2 supplemental assignments of error. The asserted errors emanate from the appellant's general court-martial conviction[1] for rape of a child under 16 years of age, sodomy of a child under 16 years of age, two specifications of indecent acts upon a child under 16 years of age, possession of child pornography that had been transported in interstate commerce, and possession of child pornography on Federal property.[2] The appellant was sentenced to confinement for 10 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.[3]

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[1] The appellant entered pleas of not guilty to all charges and specifications before a panel composed of officer and enlisted members.

[2] The appellant's crimes violated Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934.

[3] There was no pretrial agreement and the convening authority approved the sentence as adjudged.

Background

The appellant's daughters, D and S, seven and nine years old, spontaneously reported to their mother, then divorced from the appellant, that the appellant had done "rude" things to them. When pressed for details, they admitted that the rude things were sexual in nature. The victims' mother reported the allegations and the children were interviewed by investigators, child sexual assault specialists, and mental health professionals. The charges of possession of child pornography arise from images found on a computer that was seized from the appellant's residence. At trial, the victims testified via remote camera. They related details of the sexual abuse incurred at the hand of their father, the appellant.

Unconstitutional Definition of Child Pornography

The appellant's first assignment of error raises legal and factual sufficiency of the evidence and alleges that the military judge erred when he instructed the members using a definition of child pornography made unconstitutional based on the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The Court of Appeals for the Armed Forces has applied the *Ashcroft* holding to military courts-martial. *United States v. O'Connor,* 58 M.J. 450 (C.A.A.F. 2003). The Government concedes that the military judge's instruction included the language later struck down in *Ashcroft*, but argues that the erroneous instruction had no impact on the members, as the evidence clearly proved that the images in question were of real children. We disagree with both parties' positions.

We review the adequacy of the military judge's instructions to the members de novo. *United States v. Dearing,* 63 M.J. 478, 483 (C.A.A.F. 2006). Use of the definition struck down in *Ashcroft* in instructions to members on findings has been found to be error as a matter of law. *United States v. Thompson*, 57 M.J. 319 (C.A.A.F. 2002)(summary disposition). Our superior court has most recently stated that, after finding that the military judge erroneously relied on the same definitional language regarding child pornography, the proper standard to employ on appeal was the harmless error analysis set forth by the Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967). *United States v. Cendejas*, 62 M.J. 334, 337 (C.A.A.F. 2006). In order to find the error harmless, we must believe, beyond a reasonable doubt, that the instructional error did not contribute to the defendant's conviction or sentence. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)(quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005))

In the case before us, the record contains ample evidence that the images in question were of real children. Five of the sixteen images admitted into evidence were positively identified as actual children from a database of child pornography victims. Record at 462. Additionally, nine images were positively

identified as minors under the age of eighteen by an expert in Tanner scale analysis in determining the age of adolescents. *Id*. None of this evidence was challenged at trial. Under the circumstances of this case, where there is no doubt that the members considered the images to be of actual children, we find no possibility that the erroneous portions of the definition in the judge's instructions played any role in the resulting findings of guilt. There is no possibility of prejudice resulting from the error and we find the instructional error harmless beyond a reasonable doubt.[4]

Sufficiency of the Evidence[5]

The balance of the appellant's first assignment of error alleges that the evidence adduced at trial was legally and factually insufficient to support the findings of guilty. The test we apply for these issues are well-known. For legal sufficiency, we consider whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

A. The child-victim witnesses were unreliable and inconclusive as to the incidents of rape, sodomy, and indecent acts.

The appellant asserts that the testimony of the minor victims, his eight and ten-year-old biological daughters, was contradictory and coached and, therefore, not credible. He also asserts, in particular, that the testimony relating to penetration in support of the rape charge was insufficient. We

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[4] In an attempt to meet its burden, the Government cites *United States v. Tynes*, 58 M.J. 704 (Army Ct.Crim.App. 2003), *rev'd*, 60 M.J. 329 (C.A.A.F. 2004) as authority, without noting that it was reversed by our common superior court. In *Tynes*, the Army court applied the harmless error analysis to an instruction to members that encompassed the same definitional language regarding child pornography deemed unconstitutional by the Supreme Court in *Ashcroft*. In that case, the Army court found that, because they were convinced that the evidence adduced at trial demonstrated that the images were of real children, the members were not impacted by the erroneous instruction and the conviction could stand. While we agree with the reasoning of our Army brethren, we note that our superior court reversed that decision. We distinguish the case before us, however, factually from the decision in *Tynes*. It is unclear from the *Tynes* decision whether evidence that the depictions were real children was introduced at trial.

[5] I. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN THE CONVICTION TO ALL CHARGES AND SPECIFICATIONS.

disagree. In support of his contention, the appellant claims that his ex-wife had a vindictive motive to frame him and had previously attempted to do so by raising unsubstantiated allegations that he physically abused the children and by coaching her two daughters to falsely testify that the appellant sexually abused them. The appellant also claims that the twice-weekly therapy sessions between the minor victims and their treating mental health therapist, during which the minor victims discussed their upcoming court appearances and their original statements to authorities, is further evidence of coaching. This claim is without substance.

We find no evidence that the victim-witnesses were "coached" in any way. Specifically, we find it proper and appropriate for the treating mental health professional to prepare the girls to handle the stress of testifying at a court-martial where, as here, there is no evidence that such discussions involved fabricating a story or rote memorization of a prior statement. As one of the children stated during cross-examination, she had looked at her prior statement just twice in the month prior to trial.

Regarding the appellant's contention that the testimony of the minor victims was inconsistent, we would expect to see some level of inconsistency when dealing with minor witnesses, especially those who have been traumatized by sexual abuse. As our superior court and other federal courts have noted:

> Inconsistencies such as these are not uncommon when child abuse victims testify:
>
> > The evidence . . . is underscored by the fact that the persuasive testimony is from a child, from whom gathering more exact details as to when the sexual conduct precisely began is an unreasonable expectation and a formidable hurdle. Any person who suffers from some type of traumatic experience, adult or child, may have difficulty relating that experience in a chronological, coherent and organized manner. See Kermit V. Lipez, The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy, 42 Me. L. Rev. 283, 345 (1990).

United States v. Cano, 61 M.J. 74, 77 (C.A.A.F. 2005)(quoting *Paramore v. Filion*, 293 F. Supp. 2d 285, 292 (S.D.N.Y. 2003))

We find, as apparently the members did, the childrens' testimony to be credible and worthy of belief. The testimony is corroborated in many respects by other witnesses. For example, Karen Timbers, a sexual assault advocate present in the home on one occasion when the appellant came to the house in an effort to see D and S, testified that the girls appeared terrified when the

appellant knocked on the door and ran to their bedroom. She stated that D and S were crying, visibly shaken, and afraid to come out of their room.

As to the allegation that the evidence of penetration was insufficient, we note that S testified that she called the body part between a male's legs his "private" and also called the body part between a female's legs her "private." Record at 719, 725. She also distinguished "private" from other body parts, such as the "bottom." *Id.* at 719. She then went on to state that the appellant put his private in her private, that it hurt, and that it felt like knuckles stretching her private. The appellant points to the examination results of the victim that showed her hymen to be intact, but fails to recognize the corroborating testimony of the examining nurse, who indicated that penetration of the labia could be achieved without tearing the hymen. The examining nurse also testified that there could have been irritation and pain that resulted in no injury, or that injuries sustained could have healed and left no scars. She also testified that the stretching of the labia and hymen could be described as feeling like knuckles by a child. This testimony was further corroborated by a medical expert in the field of child sexual assault and abuse.

B. The evidence failed to prove possession of the computer in which the child pornography was discovered and also failed to prove that the images had been transported in interstate commerce.

A forensic computer examiner testified that a computer seized from the appellant's home was found to contain over 700 images of adult pornography and 16 images of child pornography in the inactive portion of the hard drive, indicating that the images had been deleted from the active memory. The examination also disclosed two internet chat segments involving the topic of sexual activity between father and daughter. The forensic computer examiner testified that the computer was internet-capable, but could not establish that any particular image had been received via the internet. The appellant's daughters testified that the appellant had shown them pornography on the computer.

We agree with the appellant that the evidence was insufficient to prove that the images had traveled in interstate commerce. We will take corrective action in our decretal paragraph. We have no problem concluding, however, that the evidence was sufficient to prove possession of child pornography on Federal property.

With the exception of the offense of possession of pornography that had traveled in interstate commerce, based on our review of the entire record, we conclude that a rational trier of fact could have found, and in this case did find, all of the elements of each of the offenses to be present beyond any reasonable doubt. After weighing all the evidence in the record

of trial and recognizing that we did not see or hear the witnesses, this court is also convinced of the appellant's guilt beyond a reasonable doubt as to those offenses.

Ineffective Assistance of Trial Defense Counsel

In his second assignment of error, the appellant alleges that his trial defense counsel were ineffective in representing him during and after his court-martial. We apply the well-known test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), referencing a strong presumption of competence in trial defense counsel and establishing a high hurdle for the appellant to overcome in demonstrating ineffectiveness. We specifically note that the appellant relies on his own affidavit in large part to demonstrate what evidence, including witnesses, should have been pursued and presented in his defense. We also note that the Government accurately points out the obvious tactical problems associated with calling one of the appellant's proposed witnesses, a registered sex offender, who committed adultery with the appellant while awaiting the release of her boyfriend from prison.

We also disagree with the appellant's claim that his trial defense counsel conceded guilt against his wishes during the sentencing phase of the trial. It is apparent from the record that the appellant participated in an interview with the clinical psychologist that enabled the doctor to testify on sentencing that the appellant's offenses, if proved, would place him in the category of mild pedophilia, with good rehabilitation potential. The trial defense counsel, with the apparent cooperation of the appellant, then tried to include this valuable sentencing evidence into the trial without conceding guilt on his behalf. Apparently, the tactic was effective, as the members sentenced the appellant to 10 years of confinement, far short of the maximum of life in prison or the term requested by the prosecutor, which was 25 to 30 years.

The appellant's allegations regarding the post-trial representation by his trial defense counsel skew the facts and are without substance. On the whole, the appellant fails to establish facts that would overcome the presumption of competence in his trial defense counsel. On the contrary, the appellant was well and fairly represented at his trial.

Human Lie Detector Testimony

The appellant asserts in his sixth assignment of error that the military judge erred in permitting the expert testimony of a child sexual abuse expert. The expert witness testified at trial, stating that she interviewed both D and S separately. She also testified as to characteristics she looks for in determining whether a child has been coached regarding the story they are telling or whether a child has, in fact, been sexually abused. The witness testified that the characteristics she saw in D and S were consistent with a child who may have been sexually abused.

There was no objection to this testimony by the defense. The military judge, however, *sua sponte*, classified this testimony as involving human lie detector testimony and promptly and properly instructed the members not to consider it as evidence that a crime had been committed. There was no comment or objection to the military judge's instruction. In response to a member's question, the witness stated that she has had occasions where her initial interview indicated abuse, but later turned out to be false accusations, essentially conceding that she was not infallible. Again, there was no objection. Finally, the military judge sustained a defense objection on the basis of human lie detector testimony to a member's question asking for specifics from the children's interviews that led her to believe they had been abused.

We agree with the Government that there was no objection lodged at trial to the now-complained of portions of the testimony. We apply a plain error analysis and find none. *See United States v. Robbins*, 52 M.J. 455 (C.A.A.F. 2000). Even assuming that objection had been made at trial, we find nothing impermissible in the witness's testimony. *See United States v. Cacy*, 43 M.J. 214, 217-18 (C.A.A.F. 1995).

Admission of Chat Room Dialogue as Evidence of Other Acts

At trial, the defense moved to preclude the admission into evidence of chat room conversation dialogue found on a computer in the appellant's home. In his seventh assignment of error, the appellant alleges that the military judge abused his discretion by denying this motion and admitting the evidence. The dialogue consisted of two written sentences discovered on the appellant's computer hard drive: "anyone else have sex with their dad" and "I wasn't lucky enough to have sex with my little girl, but watching her in the shower was good enough!!!".

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006); *United States v. Hays*, 62 M.J. 158, 163 (C.A.A.F. 2005)(citing *United States v. Grant*, 56 M.J. 410, 413 (C.A.A.F. 2002). We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Such evidence, however, may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

The appellant correctly states that, in order to be admissible, this evidence must meet each of three different

standards. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989.) They are: (1) Does the evidence reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts? (2) What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence? (3) Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"? *Id*. The appellant alleges that the chat room exchanges in this case fail all three standards of admissibility. We disagree.

We find similarity between the facts of the instant case and those in the *Hays* decision, where our superior court addressed the issue of whether e-mails and computer images offered to show motive and intent amounted to improper evidence pursuant to MIL. R. EVID. 404(b). In *Hays,* the appellant alleged that the introduction of images that depicted minors engaging in sexually explicit conduct and pictures of adults engaging in bestiality was error in a case that ultimately involved a finding of guilty to the crime of soliciting another person to commit the offense of carnal knowledge. The court upheld the military judge's ruling that the evidence was admissible as proof of motive and intent. *Hays*, 62 M.J. at 164-65. We see no reason to reach a different conclusion here.

Applying the *Reynolds* test to the facts at bar, we note that the military judge concluded under the first *Reynolds* factor that the "evidence reasonably supports a finding that the members would conclude by a preponderance of the evidence that that [sic] the accused had access to this computer at the relevant time and participated in this chat room conversation either actively or passively." Appellate Exhibit XXIV. This conclusion is supported in the record by evidence that the dialogue was found on the appellant's computer, located in his on-base residence and that there were indicia of ownership, such as folder titles and nicknames referring to the appellant. *Id.* The appellant argues that there was insufficient evidence to establish that he was the person who used the dialogue in question and that the evidence should not, therefore, have been admitted as evidence of his prior acts. We find, as did the military judge, that the record contains sufficient evidence, direct and circumstantial, that it was the appellant who authored the chat dialogue in question. At trial, the appellant was free to argue the issue of possession to the members.

Turning to the second *Reynolds* factor, we note that the military judge also found that the evidence of chat room dialogues made a fact of consequence, that the appellant "committed the offense of possession of child pornography and child sexual abuse," more probable than not. *Id.* The military judge found that the dialogue in question indicated that the appellant "had a motive and intent to see images of children naked and/or involved in sexual situations involving children, specifically sexual situations between children and parents." *Id.* The military judge further noted in his findings that the

Government was required to show "that the accused had knowledge of the child pornography at issue and that he has specific intent with regard to the indecent act offenses." *Id.*

Finally, the military judge applied the third *Reynold's* prong by employing the balancing test under MIL.R.EVID. 403, finding that the "probative value of the evidence substantially outweighs the danger of unfair prejudice." *Id*. The military judge stated that the chat room dialogue was "very probative as to whether the accused would knowingly be involved in child pornography possession and sexual abuse of children." *Id*.

This finding is supported also in precedent. Faced with similar facts, the court in *Hays* stated that, "[a]lthough the pictures and language in the e-mails were offensive, that is the nature of much of the evidence in cases involving child pornography." *Hays*, 62 M.J. at 164 (citing *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986)(noting that defendants in child pornography cases unavoidably risk the introduction of evidence that would offend an average juror)). The court in *Hays* went on to state that, "[i]n light of the nature of the offense and the other evidence admitted, the prejudicial impact of these exhibits did not substantially outweigh their probative value in demonstrating Appellant's intent and motive." *Hays*, 62 M.J. at 165 (citing *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993)(explaining that any prejudicial impact due to the "shocking nature" of a pornographic video depicting incest was diminished because the same conduct was already before the court members)).

Remote Testimony of Child Witnesses

In his eighth assignment of error, the appellant claims that the military judge erred in allowing the child victims to testify via remote audio and video. A military judge must allow the child victims of sexual abuse to testify remotely if there is a "substantial likelihood, established by expert testimony that the child would suffer emotional trauma from testifying." MIL. R. EVID. 611(d)(1) and (3)(B). The Supreme Court has stated that such trauma must be more than *de minimis* and based on the accused's presence in the courtroom during testimony, not simply from a fear of testifying in general. *Maryland v. Craig,* 497 U.S. 836, 856 (1990). A military judge may base this finding on the unrebutted testimony of an expert alone "if such testimony provides the military judge with sufficient information." *United States v. McCollum,* 58 M.J. 323, 333 (C.A.A.F. 2003). A military judge's finding of necessity for remote testimony is reviewed *de novo* and will not be reversed on appeal unless such a finding is clearly erroneous or unsupported by the record. *Id.* at 332.

The military judge found that requiring the child victims to testify "in the direct presence of the accused, would cause serious fear, and emotional trauma to both of them," and that the

"impact would be more than *de minimis.*" AE XXIII. This ruling was concretely supported in the record by expert testimony. The expert witness testified that, in her opinion, the two victims would suffer trauma from testifying in the presence of their father. Record at 93, 99. The expert also testified that the trauma would be "acutely traumatic" and "very distressing" to the children. *Id.* at 100. Asked to define the type of emotional trauma she was referring to, the expert labeled it "[f]ear, perhaps even terror." *Id.* at 97. The expert's opinion was based on her personal sessions with the victims, at least portions of which were conducted separately. *Id.* at 96. The expert witness testified that, although the children would probably be able to testify in the appellant's presence, that his presence would inhibit their testimony. *Id.* at 97, 100. The expert stated that their testimony would be limited by fear and that it would be "very difficult" for them to "tell their story." *Id.* at 97-98, 100.

The appellant also argues that the military judge erred because the fear that the children would suffer must be sufficiently serious that it would prevent the child from testifying in person, citing MIL. R. EVID. 611(d)(3). The appellant cites language from subsection (A) under the rule, while the military judge specifically relied on the language under subsection (B) of the rule. Under subsection (B), there is no requirement that the child be unable to testify, just that more than *de minimis* harm would result from the child testifying in front of the appellant.

In this case, the military judge correctly applied the law and had an adequate record before him to determine that remote testimony was required in this case. The military judge allowed the children to testify from a remote location using two way audiovisual communications. The military judge afforded the appellant the opportunity to absent himself from the courtroom and avoid the use of remote testimony, but the appellant declined that option. The military judge also allowed an attendant to be seated next to the children, on camera, while they testified and allowed the defense to split counsel between the courtroom and the witness room. The appellant was afforded private and instantaneous communication with his counsel seated in the witness room. This issue is without merit.

Speedy Review and Appellate Processing

In his twelfth assignment of error, the appellant claims that he was denied speedy review of his court-martial. In related assignments of error 16, 17, and 18, the appellant alleges that he was denied effective assistance of appellate defense counsel.[6]

[6] Filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

1. Appellate history of the case.[7]

The court-martial was conducted in Port Hueneme, California, and the 1,032-page record of trial prepared locally. The court-martial adjourned following sentencing on 6 April 2001. On 13 September 2001, the trial counsel, LT Cook, attached a memorandum to the record stating that he had attempted to serve a copy of the record on the assistant trial defense counsel, LT Keith, in Port Hueneme, due to the transfer of the lead trial defense counsel, LT Park, to Washington, D.C. LT Keith refused to conduct a review of the record or to sign the counsel review page on the record of trial. On 24 January 2002, the military judge sent an email to both LT Keith and LT Park, indicating that the record, which had been delayed in transit to Washington, D.C., due to post office concerns regarding Anthrax, had finally been received by LT Park, but that LT Park had refused to sign the counsel review page. The military judge indicated his intent to authenticate the record in seven days without defense counsel review if no response was tendered. Thereafter, on 5 February 2002, the military judge authenticated the record and sent an email to both trial defense counsel stating that he had been notified that both had read his prior email, that he had waited 13 days with no response, and that he had therefore authenticated the record without trial defense counsel review. On 11 March 2002, LT Cook again attached a memorandum to the record indicating that LT Park had been provided the record, but had not availed himself of the opportunity to review the record, creating unreasonable delay, and stating that the record had been forwarded to the military judge for authentication.

The staff judge advocate's recommendation (SJAR) was served on LT Park on 20 March 2002. He submitted a clemency request on the appellant's behalf on 29 March 2002, including the appellant's self-drafted submission of matters for the convening authority's consideration under RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The appellant's submission contained 38 enclosures. In LT Park's clemency submission, he requested relief for unreasonable post-trial delay, stating that it took over six months to prepare the record of trial and that the appellant had been prejudiced by his inability, without a convening authority's action, to apply to the Naval Clemency and Parole Board at the minimum possible time, which was nine months following trial. LT Park failed to note that LT Keith's refusal to review the record of trial and his own refusal to confirm receipt of the record significantly contributed to the delay in authentication of the record. The convening authority took action without granting clemency.

The record of trial was docketed with this court on 21 May 2002, 410 days after sentencing. The appellant claims that the original appellate defense counsel did not contact him until 12

[7] An exhaustive chronology of the appellate history of this case is attached as Appendix A.

August 2003, after submitting eight motions for enlargement of time. Thereafter, on 14 August 2003, the appellate defense counsel filed a motion to have sealed evidence opened. On 4 December 2003, the appellant complained, in writing, to his appellate defense counsel regarding the adequacy of his representation, acknowledging at that point that his counsel had read half of the record of trial and had identified ten issues of potential interest. On 15 December 2003, the appellate defense counsel received notice that the appellant had filed ethics complaints against him with both the Judge Advocate General and the Nebraska Supreme Court. On 12 January 2004, the appellate defense counsel moved to withdraw from representation due to the conflict of interest created by the complaints.

The appellant was assigned a new appellate defense counsel, who submitted a motion for a 14th enlargement of time, which the appellant specifically joined in, on 16 January 2004. One reason for the request was to allow time to examine whether there was any merit in the issue of a lack of due diligence on the part of the first appellate defense counsel. Five days later, the appellant filed an *in propria persona* motion with the court requesting deferment of his sentence pending appellate review. Although the appellant was represented by counsel, the court accepted this *in propria persona* filing, which should have been denied and returned for filing by appellate counsel. The court responded by denying the motion and scheduling a chambers conference with counsel to set a briefing schedule in the appellant's case. On 29 January 2004, the appellant's counsel indicated that he was awaiting clarification from his client regarding the scope of counsel's authority to act on the appellant's behalf.

On 1 February 2004, the appellant complained, in writing, to the Deputy Director, Appellate Defense Division, regarding the quality of his representation. On 6 February 2004, the appellate defense counsel replied, in writing, to the complaints that the appellant had made regarding the quality of representation and timely communications, disputing many of the appellant's complaints and providing explanations for the timing of his efforts on the appellant's behalf. On 10 February 2004, the appellant again successfully filed an *in propria persona* pleading requesting, in a rambling narrative, reconsideration of the court's denial of his motion for deferment of his sentence. Two days later, the appellant's counsel, with the appellant's consent, filed for the 15th enlargement of time. Counsel indicated that there was an ongoing and unresolved issue regarding whether the appellant would file his own brief with the court or allow counsel to file on his behalf. The appellant resolved the issue of scope of representation on 10 February 2004, by signing a representational power of attorney.

The appellant faxed a request for information to the clerk of this court on 12 March 2004, requesting all information regarding the chambers conferences held on 29 January and 4 March

2004. In response, the clerk of court provided the resulting court order setting forth a briefing schedule for the case. Thereafter, on 30 March 2004, the appellant sent a letter to his appellate defense counsel, via an email from the Civil Rights Defense League, complaining about a lack of timely communication and diligent representation in his case. The appellate defense counsel replied via email on 31 March 2004, reminding the appellant that he had been in contact with him recently and had informed the appellant that he was reading the record of trial and preparing notes on the record. On 7 April 2004, the appellant wrote to the Director, Appellate Defense Division, complaining about the quality of representation he was receiving.

On 7 April 2004, the appellant filed two more lengthy and rambling *in propria persona* documents with the court. Neither document contains a cogent legal argument or facts that would establish an issue of merit before the court, except for the issue of speedy review. In these documents, the appellant variously claims that the judges of this court "appear to be working on a secret plot to overthrow the Constitution of the United States," "are not honorable judges," and "are pretending that their sworn oath to uphold the Constitution of the United States is frivolous." Affidavit of Prejudice Against Panel 2 for Cause and related filings of 7 Apr 2004. The appellant also filed *in propria persona* pleadings on 8 and 15 April 2004, claiming a lack of subject matter jurisdiction over his case. Again, the documents contain no cogent legal argument in support of the claim, nor do they contain any facts upon which to establish even a colorable appellate issue, except to continue to complain about a lack of speedy review. The relief requested in the various pleadings was denied on 19 April 2004. On 29 April 2004, the appellant moved, *in propria persona*, to attach various correspondence between himself and counsel, the appellate defense division, and the Judge Advocate General, regarding his representation.

On 10 May 2004, the appellate defense counsel filed a motion to compel production of documents related to the search of the appellant's home and seizure of his personal computer. On 12 May 2004, the appellant filed an *in propria persona* motion to attach a document entitled *Affidavit of Prejudice Against Panel 2 for Cause*, which had already been filed with the court on 7 April 2004. On 24 May 2004, the appellant filed three *in propria persona* documents with the court, repeating allegations of post-trial delay, ineffective assistance of counsel, and unlawful conduct by this court in denying his repeated requests for relief. All of the appellant's pleadings contained vitriolic and meritless attacks on this court. On 1 June 2004, the appellant filed a second request for information regarding the chambers conferences held on 29 January and 4 March 2004. On 7 June 2004, the appellant revoked his representational power of attorney. On 9 June 2004, the second appellate defense counsel requested leave to withdraw from the appellant's case.

On 17 June 2004, the court responded to the appellant's request for information and directed the appellant to respond to the court regarding ongoing matters, including his counsel's request to withdraw, either personally or through civilian defense counsel. On 21 June 2004, the appellant again filed an extensive *in propria persona* document, repeating many of the nonsensical arguments from his prior filings and continuing to complain about the practices of this court, including the practice of the clerk of court signing out the written orders of the court. On 28 June 2004, the appellant filed three *in propria persona* documents in response to this court's order of 17 June 2004. The court set deadlines of 5 August and then 7 Sep 2004 for the appellant to file a brief in this case. On 6 August 2004, the appellant filed an *in propria persona* request with the court for transcripts of this court's hearings in his case, appellate judges' notes, and copies of orders issued by the court.

On 12 August 2004, the appellant once again filed a lengthy and rambling *in propria persona* document with the court, alleging not only a lack of timely post-trial processing, but also alleging a lack of subject matter jurisdiction, that this court is using it's jurisdiction "to overthrow or subvert the Constitution of the United States," denying "the United States Constitution's very existence," and committing "constructive treason." Appellant's *in propria persona* filing of 12 Aug 2004 at 18. For added emphasis, the appellant attached a copy of the Constitution to his filing. The court responded to the appellant's varied claims and filings on 25 August 2004.

On 1 September 2004, the Judge Advocate General forwarded to the Naval Inspector General complaints that the appellant had sent to the Secretary of the Navy regarding his case. Included in the complaints were allegations on the appellant's part that the convening authority, the appellate judges, the assigned trial defense and appellate defense counsel, and the appellate defense counsels' supervisors had committed various forms of criminal misconduct based on their respective roles in the processing of his court-martial. On 7 September 2004, the appellant filed more extensive *in propria persona* documents asking the court to void its earlier orders and repeating many of the earlier caustic and irrelevant complaints of the appellant about this court. In these pleadings, the appellant reiterates that he is indigent and that the court's order to him to file a brief, either through civilian counsel or personally, violates his due process rights. On 15 September 2004, the court issued an order explaining to the appellant that he has failed to request a third appellate defense counsel in light of his termination of the representation by the second appellate defense counsel and that he is ordered to file a brief by 18 October 2004, either through civilian counsel or on his own. The order further states that the case would be submitted for consideration on its merits if no brief was filed.

On 17 September 2004, the Assistant Judge Advocate General (Military Justice) appointed a third appellate defense counsel to represent the appellant. This appellate defense counsel was

appointed from outside the appellate defense division due to the allegations of misconduct leveled by the appellant against the first and second appellate defense counsel and their supervisors. The third appellate defense counsel, although no longer assigned to the appellate defense division, had extensive previous experience in appellate litigation. In spite of being provided with new appellate counsel not then associated with the appellate defense division, the appellant continued to file documents *in propria persona* on 21 September, 13 October, and 21 October 2004.

On 2, 14, and 16 November 2004, the appellant filed *in propria persona* documents with the court now alleging inadequacy of counsel with regard to his third appellate defense counsel, who, at that time, had just finished reading the lengthy record of trial. Not surprisingly, on 23 November 2004, the third appellate defense counsel filed a motion to withdraw from representing the appellant. On 29 November, this court ordered the appellant and the Government to show cause why the motion to withdraw should not be granted. Although given a deadline of 29 December 2004 to respond, the appellant did not respond until 21 January 2005. In that *in propria persona* filing, the appellant continued to attack his assigned counsel, as well as this court, in vitriolic and baseless allegations of misconduct. On 27 January 2005, the Government responded to the court's show cause order, asking that the motion to withdraw be denied and that other alternatives to satisfy the appellant's concerns with representation be explored. The third appellate counsel thereafter filed an objection to the Government response and to the claims of ineffective assistance made by the appellant and attached a finished, but unsigned 38-page brief and assignments of error containing his name and the name of the second appellate defense counsel.

On 3 March 2005, this court granted the third appellate defense counsel's motion to withdraw and directed the Government to inform the court as to what provision would be made to afford the appellant new appellate counsel. On 10 March 2005, the Government responded that they were exploring options for providing counsel to the appellant. On 1, 4, and 30 March 2005, the appellant filed additional *in propria persona* documents with the court. On 29 March 2005, a fourth appellate defense counsel was appointed. The appellant thereafter filed *in propria persona* documents on 11, 20, 21, and 26 April and 3, 4, 12, and 16 May 2005. The fourth appellate defense counsel filed a motion to compel production of documents on 11 May 2005 and filed motions for enlargement on 11 May and 15 June 2005. The appellant filed *in propria persona* documents with the court on 14 and 19 July 2005, while his appellate counsel filed a motion for enlargement on 20 July 2005.

On 9 August 2005, with leave of the court, the fourth appellate defense counsel filed a 71-page brief and assignments of error containing 21 assigned errors. Nonetheless, the appellant filed an additional *in propria persona* document on 12

August 2005. A supplemental brief and assignments of error was filed on 25 October 2005. An assistant appellate defense counsel was assigned on 1 September 2005. After four enlargements, the Government filed a 52-page answer. All Government enlargments were opposed and the appellant filed *in propria persona* documents with the court on 29 November and 7 and 19 December 2005. A reply on behalf of the appellant was filed by counsel on 14 March 2006 and the appellant filed an *in propria persona* reply on 20 March 2006. The appellant moved for oral argument on 4 April 2006 and oral argument was held on 29 June 2006.

2. Post-trial delay due process analysis.

We first analyze claims of denial of speedy post-trial processing as due process violations. Our superior court has adopted the Supreme Court's due process analysis for pretrial delay in analyzing post-trial delay in military courts-martial. *Toohey v. United States (Toohey I),* 60 M.J. 100, 102 (C.A.A.F. 2004)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Accordingly, we balance four factors in order to determine whether the appellant has suffered a due process violation as the result of post-trial delay: the length of the delay; the reasons for the delay; the appellant's assertion of his right to a timely appeal; and prejudice to the appellant resulting from the delay. *Id*. The length of delay itself is a threshold factor and must be facially unreasonable before we are required to complete the due process analysis and balance the delay with the other three factors. *Toohey I,* 60 M.J. at 102.

A. First *Barker* factor -- length of delay as a threshold determination and as balanced against the remaining three *Barker* factors.

We look first at the period of time from sentencing until the record was docketed with our court. While 410 days is not optimal for processing even a complex, 1,032-page record of trial from sentencing to convening authority's action, it is not unreasonable under the circumstances of this case. Following docketing, however, the appellant contends, and the Government does not rebut, that the first appellate defense counsel failed to contact the appellant for a period of over one year after the case was docketed with this court and counsel was assigned.

We note that the case was docketed on 21 May 2002. According to the appellant, he was not contacted by his counsel until 12 August 2003, almost 15 months later. Such a delay in providing the most basic of attorney services is unreasonable on its face. The appellant's case has now been in the appellate process for almost three years since the second appellate defense counsel was assigned. This period is also, on its face, unreasonable for this record of trial and triggers a full due process analysis. *Id.* In addition, the overall delay in this case is facially unreasonable and triggers a full due process

analysis. *Id.* The length of delay itself also favors the finding of a due process violation.

B. Second *Barker* factor -- reasons for the delay.

The Government advances as reasons for the initial 363-day period between sentencing and docketing with this court the lack of cooperation by defense counsel and the slowing of mail delivery in Washington, D.C., due to the threat of anthrax contamination. This further supports our earlier finding that this delay is not unreasonable. On the other hand, the Government provides no explanation for why the initial appellate defense counsel failed to contact the appellant in a timely fashion or why supervisory attorneys allowed this to occur.

Once the second appellate defense counsel was assigned, however, the reasons for delay are abundant. The lengthy delay between assignment of the second defense counsel and filing of briefs before our court is wholly explained by the constant appellate activity generated in this case by the appellant himself. During that period of time, the appellant filed 52 *in propria persona* documents with the court. He has effected the withdrawal of the second and third assigned appellate defense counsel. The appellant filed complaints against his counsel, this court, and various officials of the military departments. As the foregoing, exhaustive description of the appellate processing of this case discloses, the appellant was the beneficiary of some appellate action in almost every week of each year that has gone by since January 2004.

While we disdain the appellant's unfounded attacks on departmental officials and members of this court, we recognize that the appellant is well within his rights to aggressively pursue his appeal and to file as many pleadings in support thereof that the court may permit. We also recognize, however, that each such submission requires time and effort by attorneys, appellate judges, and support staff.

On the whole, one portion of the delay, from docketing to assignment of the second appellate defense counsel, weighs in favor of finding a due process violation. Under the circumstances of this case, however, the greater portion of the delay, from assignment of the second appellate defense counsel until briefs were filed with the court, weighs heavily against finding a due process violation.

C. Third *Barker* factor -- demand for speedy review.

The appellant first voiced his concern with the dilatory processing of his case in clemency matters submitted to the convening authority on 29 March 2002, 357 days after trial. This factor would normally weigh heavily in the appellant's favor. In this case, however, after the assignment of his second appellate counsel, the appellant undertook an appellate journey where his

constant filings with the court and communications with and about his appellate defense counsel made it virtually impossible for the record of trial to be moved to final briefing at any greater pace. On the whole, the third factor, the appellant's demand for speedy review, must weigh in favor of finding a due process violation, but we decline to give it great weight based on the unique circumstances of this case.

D. Fourth *Barker* factor -- prejudice flowing from the delay.

We note that there is no evidence of actual harm or specific prejudice flowing from the delay. As for the appellant's claim that he was denied timely application to the clemency and parole board, based on the facts and circumstances of this case, we find that there was not even a remote possibility that the clemency and parole board would have taken any action favorable to the appellant and note that no favorable action has been taken in the time since. This claim of prejudice is wholly speculative and does not favor relief. *See United States v. Bigelow*, 57 M.J. 64 (C.A.A.F. 2002).

The appellant remains confined following trial and has not suffered any oppressive incarceration as a result of the delay, nor has he experienced "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision" such that he has suffered prejudice in the form of "constitutionally cognizable anxiety." *Moreno,* 63 M.J. at 139-40. The appellant ultimately advances no meritorious issues warranting relief and has asserted no error requiring a rehearing, and does not establish how he would be prejudiced by the delay in the event of a rehearing. *Id*. No rehearing has been ordered at which the delay might become a factor.

We do not find that the length of the delay itself is so extreme as to raise a strong presumption of evidentiary prejudice. *Moreno*, 63 M.J. at 45. Any presumption that could have been established by the delay is also effectively rebutted by the extensive appellate pleadings in this case, establishing clearly that the appellant has been afforded every opportunity to be heard on appeal. Even assuming, *arguendo*, that a due process violation could be found, under the totality of the circumstances of this case, we conclude that any such error would be harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006)

3. Post-trial delay under Article 66, UCMJ.

Failing to find a due process violation, we must also determine whether the delay affects the findings and sentence that should be approved in each case under Art. 66, UCMJ. *United States v. Brown,* 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). Having considered the factors we articulated in *Brown*, we conclude that the delay in this case does not affect the findings

and sentence that should be approved. Accordingly, we decline to provide any relief.

4. Effective assistance of appellate defense counsel.

The appellant claims that his appellate defense counsel were ineffective. In reviewing allegations of ineffective assistance of counsel we conduct a *de novo* review. *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)(citing *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997)). In conducting that review, we are bound to adhere to the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

This court need not, however, reach the question of deficient representation if we can first determine a lack of prejudice. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004)(quoting *Strickland*, 466 U.S. at 697). In order to constitute prejudicial error, the appellant's appellate defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

We find no possible prejudice to the appellant flowing from the performance of his various appellate defense counsel in this case. This issue is without merit.

Conclusion

It is not necessary to address the remaining assignments of error, as they are without merit.[8] We have reviewed the record,

[8] III. THE TRIAL COUNSEL REPEATEDLY COMMITTED PROSECUTORIAL MISCONDUCT DURING APPELLANT'S TRIAL, SUCH MISCONDUCT WAS PLAIN ERROR, RESULTING IN SUBSTANTIAL CUMULATIVE PREJUDICE TO APPELLANT.

IV. THE MILITARY JUDGE ERRED BY LIMITING TRIAL DEFENSE COUNSEL'S CLOSING ARGUMENT TO EXCLUDE ANY REFERENCE TO THE GOVERNMENT FAILING TO PROVE APPELLANT'S GUILT FOR A "LACK OF EVIDENCE."

V. THE MILITARY JUDGE ERRED WHEN HE GRANTED THE GOVERNMENT'S CHALLENGE FOR CAUSE OF CHIEF PETTY OFFICER EDMONSON DURING MEMBER SELECTION.

IX. THE MILITARY JUDGE ERRED UNDER MIL. R. EVID. 403 AND 404(B) WHEN, WITHOUT EVEN A LIMITING INSTRUCTION, HE ALLOWED THE GOVERNMENT TO PRESENT LARGE-SCREEN PROJECTIONS OF "CHILD PORNOGRAPHY," INCLUDING IMAGES OF PEOPLE MOLESTING CHILDREN, IN THIS CHILD MOLESTATION CASE.

X. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN, JUST PRIOR TO FINDINGS, HE ALLOWED THE GOVERNMENT TO EXPAND THE LOCATION IN WHICH APPELLANT ALLEGEDLY COMMITTED THE OFFENSES FROM DISCRETE CITIES TO "AT OR NEAR CALIFORNIA" AND TO REMOVE LANGUAGE OF "DIVERS OCCASIONS" FROM CHARGE II.

XI. THE MILITARY JUDGE COMMITTED PLAIN ERROR IN FAILING TO INTERRUPT TRIAL COUNSEL'S OPENING STATEMENT WHEN COUNSEL MADE COMMENTS THAT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO APPELLANT AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT. THE MILITARY JUDGE ALSO COMMITTED PLAIN ERROR WHEN HE

the appellant's assignments of error, the Government's response, and all pleadings and filings of the parties. The finding of guilty to Specification 3 of Charge III is set aside. The remaining findings, as approved by the convening authority, are affirmed.

Because of our action on the findings, we must reassess the sentence in accordance with the principals set forth in *United*

FAILED TO INTERRUPT TRIAL COUNSEL'S SENTENCING ARGUMENT THAT IMPROPERLY COMMENTED ON APPELLANT'S RIGHT TO PLEAD NOT GUILTY AND TO REMAIN SILENT.

XIII. THIS COURT DENIED APPELLANT THE RIGHT TO COUNSEL WHEN IT ALLOWED COUNSEL TO WITHDRAW AND THEN DIRECTED THE CONFINED APPELLANT TO FILE HIS BRIEF "ACTING ON HIS OWN OR THROUGH RETAINED CIVILIAN COUNSEL".

XIV. A SENTENCE THAT INCLUDES A DISHONORABLE DISCHARGE AND CONFINEMENT FOR TEN YEARS IS INAPPROPRIATELY SEVERE. (Pursuant to *Grostefon*.)

XV. THIS COURT HAS LOST JURISDICTION TO HEAR THIS CASE BY FAILING TO ENFORCE ITS MANDATORY RULES OF COURT AND BY IMPROPERLY ALLOWING COUNSEL TO WITHDRAW FROM APPELLANT'S CASE. (Pursuant to *Grostefon*.)

XVI. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS FIRST ATTORNEY FROM THE APPELLATE DEFENSE DIVISION FAILED TO CONTACT THE CLIENT UNTIL NEARLY TWO YEARS AFTER RECEIVING THE CASE. (Pursuant to *Grostefon*.)

XVII. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS SECOND ATTORNEY FROM APPELLATE DEFENSE REFUSED TO MAKE BOTH MINOR AND MAJOR CHANGES TO APPELLANT'S BRIEF AND THEN HAD HIMSELF REMOVED FROM THE CASE. (Pursuant to *Grostefon*.)

XVIII. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS THIRD APPELLATE ATTORNEY REQUESTED TO BE RELIEVED AS COUNSEL AND ENCLOSED A PARTIALLY COMPLETED BRIEF ON BEHALF OF APPELLANT TO THIS MOTION. (Pursuant to *Grostefon*.)

XIX. THE MILITARY JUDGE WAS NOT IMPARTIAL AND MATERIALLY PREJUDICED APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL. (Pursuant to *Grostefon*.)

XX. APPELLANT'S COMMAND ISSUED MULTIPLE MILITARY PROTECTIVE ORDERS PREVENTING HIM FROM SEEING HIS CHILDREN. (Pursuant to *Grostefon*.)

XXI. OFFICIALS AT MIRIMAR BRIG RETALIATED AGAINST APPELLANT FOR COMPLAINING ABOUT NOT BEING ABLE TO SEE HIS DAUGHTER, [A], BY HAVING APPELLANT TRANSFERRED TO THE DISCIPLINARY BARRACKS AT LEAVENWORTH, A FACILITY DEEMED CONDEMNED BY THE ARMY CORPS OF ENGINEERS AND OTHERS. (Pursuant to *Grostefon*.)

SUPPLEMENTAL I. THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS' REFUSAL TO ENSURE PERSONAL SERVICE OF ALL PLEADINGS, MOTIONS, AND OTHER LEGAL DOCUMENTS UPON APPELLANT IS A DENIAL OF DUE PROCESS AND INTERFERED WITH APPELLANT'S ABILITY TO PARTICIPATE IN HIS OWN APPEAL UNDER THE FIFTH AND SIXTH AMENDMENTS. (Pursuant to *Grostefon*.)

SUPPLEMENTAL II. THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FAILING TO ANSWER THE COURT OF APPEALS FOR THE ARMED FORCES SPECIFIC QUESTIONS, THEREBY DENYING APPELLANT PROPER ARTICLE 66, UCMJ, REVIEW. (Pursuant to *Grostefon*.)

States v. Cook, 48 M.J. 434, 438 (C.A.A.F. 1998) and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). We are satisfied beyond a reasonable doubt that in the absence of Specification 3 of Charge III, the sentence adjudged would be no lower than that originally adjudged. *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006). We find that the sentence continues to be appropriate for the offenses and the offender and affirm the sentence as approved by the convening authority. The supplemental court-martial promulgating order shall reflect our action. Following our corrective action, we conclude that the remaining findings and the sentence are correct in law and fact and that no error exists that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Senior Judge VOLLENWEIDER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court

Chronology of Post-trial Processing

Event	Date	Days	Cumulative Elapsed Days
Date of trial (sentence)	6 Apr 01	0	0
ROT reviewed by trial counsel	12 Oct 01	199	189
ROT mailed to trial defense counsel	18 Oct 01	6	195
ROT received by trial defense counsel	11 Dec 01	54	249
Authentication of ROT	5 Feb 02	56	305
SJAR served on trial defense counsel	20 Mar 02	2	348
Clemency request (demand for speedy review)	29 Mar 02	9	357
CA's action	4 Apr 02	6	363
ROT docketed at NMCCA	21 May 02	47	410
1st AppDC contacts App	12 Aug 03	448	858
AppDC motion to open sealed evidence	14 Aug 03	2	860
Notice to AppDC of ethics complaint by App	15 Dec 03	123	983
AppDC motion to withdraw	12 Jan 04	28	1011
14th enlargement (App joins in request)	16 Jan 04	4	1015
In propria persona (IPA), motion for deferment of sentence	21 Jan 04	5	1020
IPA motion for reconsideration	10 Feb 04	20	1040
15th enlargement	12 Feb 04	2	1042
Appellant request for court information	12 Mar 04	29	1071
IPA filings (2)	7 Apr 04	26	1097
IPA filing	8 Apr 04	1	1098
IPA filing	15 Apr 04	7	1105
IPA motion to attach	29 Apr 04	14	1119
Appellant letter of complaint to SECNAV	4 May 04	5	1124

Event	Date	Days	Cumulative Elapsed Days
Motion to compel	10 May 04	6	1130
IPA motion to attach	12 May 04	2	1132
IPA affidavit	19 May 04	7	1139
IPA filing (3)	24 May 04	5	1144
Appellant request for	1 Jun 04	8	1152

court information			
Appellant revokes Appellate POA	7 Jun 04	6	1158
2nd appellate defense counsel asks to withdraw	9 Jun 04	2	1160
NMCCA order to appellant	17 Jun 04	8	1168
IPA filing	21 Jun 04	4	1172
IPA response to order	28 Jun 04	7	1179
NMCCA order granting request to withdraw and directing appellant to file a brief by 29 Jul	29 Jun 04	1	1180
Appellant 2nd letter of complaint to SECNAV	6 Jul 04	7	1187
IPA motion to void court order of 29 Jun	5 Aug 04	30	1217
NMCCA order denying motion to void and directing appellant to file a brief by 7 Sep 04	5 Aug 04	0	1217
IPA filing	12 Aug 04	7	1224
NMCCA order in answer to 12 Aug IPA filing and reiterating 7 Sep deadline for brief	25 Aug 04	13	1237
JAG letter forwarding appellant's letters of complaint to Naval IG	1 Sep 04	7	1244
IPA filing and Affidavit	7 Sep 04	6	1250
NMCCA order in answer to 7 Sep IPA filing and establishing an 8 Oct deadline for brief	15 Sep 04	8	1258

Event	**Date**	**Days**	**Cumulative Elapsed Days**
Appointment of third appellate defense counsel	17 Sep 04	2	1260
IPA filing	21 Sep 04	4	1264
IPA filing	13 Oct 04	22	1286
IPA filing (2)	21 Oct 04	8	1294
IPA filing	24 Oct 04	3	1297
NMCCA order in answer to 17 Sep and 13, 21, and 24 Oct IPA filings	28 Oct 04	4	1301
IPA filing	2 Nov 04	5	1306
IPA filing	16 Nov 04	14	1320

3rd AppDC motion to withdraw	23 Nov 04	7	1327
NMCCA show cause order	29 Nov 04	6	1333
IPA response to show cause order	21 Jan 05	53	1386
Gov't response to show cause order	27 Jan 05	6	1394
IPA filing	15 Feb 05	19	1413
IPA filing	1 Mar 05	14	1427
NMCCA order granting Motion to withdraw	3 Mar 05	2	1429
IPA filing	4 Mar 05	1	1430
Gov't response to court order of 3 Mar 05	10 Mar 05	6	1436
IPA filings (2)	10 Mar 05	0	1436
4th AppDC appointed	29 Mar 05	13	1449
IPA filing	30 Mar 05	1	1450
NMCCA order responding to prior pleadings	7 Apr 05	8	1458
IPA filing	11 Apr 05	4	1462
AppDC motion to set briefing schedule	14 Apr 05	3	1465
IPA filing (2)	20 Apr 05	6	1471
Motion to serve app.	21 Apr 05	1	1472
IPA filing (3)	26 Apr 05	5	1477
NMCCA order responding to prior pleadings	27 Apr 05	1	1478
IPA filing	3 May 05	6	1484
IPA filing	4 May 05	1	1485
Motion to compel (2)	11 May 05	7	1492

Event	**Date**	**Days**	**Cumulative Elapsed Days**
17th motion for enlargement by AppDC	11 May 05	0	1492
IPA filing (2)	12 May 05	1	1493
IPA filing	16 May 05	4	1497
NMCCA order responding to prior pleadings	2 Jun 05	17	1514
18th motion for enlargement by AppDC	15 Jun 05	13	1527
Gov't motion to attach	16 Jun 05	1	1528
IPA filing	14 Jul 05	28	1556
IPA filing (2)	19 Jul 05	5	1561
19th motion for enlargement by AppDC	20 Jul 05	1	1562
NMCCA order responding to prior pleadings	3 Aug 05	14	1576
AppDC motion to file brief in excess of 50 pages	8 Aug 05	5	1581
AppDC motion to attach	8 Aug 05	0	1581

Brief and assignments of error filed	9 Aug 05	1	1582
IPA filing	12 Aug 05	3	1585
Assignment of assistant Appellate defense Counsel	1 Sep 05	20	1605
Motion to file a briefing schedule	2 Sep 05	1	1606
1st motion for enlargement by Gov't	8 Sep 05	6	1612
Opposition to Gov't enlargement	15 Sep 05	7	1619
Supp assignments of error filed	25 Oct 05	10	1629
2nd motion for enlargement by Gov't	31 Oct 05	6	1635
Opposition to Gov't enlargement	4 Nov 05	4	1639
IPA filing of opposition to Gov't enlargement	29 Nov 05	25	1664
IPA filing (2)	7 Dec 05	8	1672
NMCCA order responding to prior pleadings	19 Dec 05	12	1684

Event	**Date**	**Days**	**Cumulative Elapsed Days**
IPA filing (2)	19 Dec 05	0	1684
3rd motion for enlargement by Gov't	30 Dec 05	11	1695
Opposition to Gov't enlargement	4 Jan 06	5	1700
4th motion for enlargement by Gov't	26 Jan 06	22	1722
Opposition to Gov't enlargement	27 Jan 06	1	1723
Gov't motion to file a brief in excess of 50 pages	23 Feb 06	27	1750
Gov't brief filed	23 Feb 06	0	1750
AppDC reply filed	14 Mar 06	19	1769
IPA motion to file a reply brief	20 Mar 05	6	1775
IPA reply filed	20 Mar 06	0	1775
AppDC motion for oral argument	4 Apr 06	15	1790
Order granting oral argument for 1 Jun 06	24 Apr 06	21	1811
Gov't motion to correct errata	17 May 06	33	1844
Gov't motion to cite supplemental authority	17 May 06	0	1844
Oral argument	29 Jun 06	43	1887