

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

BEFORE

Charles Wm. DORMAN

W.L. RITTER

M.J. SUSZAN

UNITED STATES

v.

**Michael J. CHILDERS
Private (E-1), U.S. Marine Corps**

NMCCA 200500531

Decided 30 September 2005

Sentence adjudged 7 April 2003. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aircraft Group 13, 3d MAW, MarForPac, Yuma, AZ.

CAPT STEVEN COHN, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have carefully examined the record of trial, the appellant's sole assignment of error regarding excessive post-trial delay, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

Post-Trial Delay

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohy v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further

inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here, there was a delay of about 736 days from the date of trial to the date the case was docketed in this court. We find that the delay alone is facially unreasonable, triggering a due process review. Regarding the second factor, reasons for the delay, the primary delay in the processing of this case occurred between authentication of the record and completion of the staff judge advocate's recommendation. Regarding that 15-month period, the staff judge advocate explained that multiple deployments of the Third Marine Aircraft Wing in support of Operations Enduring Freedom and Iraqi Freedom resulted in a severe manpower shortage in the unit's legal staff. However, in the absence of a case-specific explanation, we find inadequate justification for the delay. In considering the third *Jones* factor, we find no evidence that the appellant asserted his right to a timely appeal until 2 months prior to docketing at this court.

Finally, regarding the fourth factor, prejudice, we first find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. Further, we find no evidence of actual prejudice. The trial defense counsel's assertion that he had difficulty locating the appellant for the purpose of requesting clemency is attributable primarily to the appellant's failure to keep his counsel informed of his current address. Thus, balancing the delay with the other three factors, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones*, 61 M.J. at 83.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Id.*; *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Accordingly, we affirm the findings of guilty and the sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court