IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private (E-1) **CARLOS A. GONZALEZ-GOMEZ** United States Army, Appellant	)	Crim. App. Dkt. No. 20121100
	)	USCA Dkt. No. 17-0200/AR

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Issue Presented:

WHETHER DILATORY POST-TRIAL PROCESSING VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS AND WARRANTS RELIEF WHEN 782 DAYS ELAPSED BETWEEN DOCKETING AT THE ARMY COURT AND OPINION.

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)(2012).

Statement of the Case

On November 30, 2012, a general court-martial comprised of officer members convicted Private (PVT) Carlos Gonzalez-Gomez (appellant), contrary to his pleas, of one specification of willfully disobeying a non-commissioned officer, in violation of Article 91, Uniform Code of Military Justice, 10 U.S.C. § 891 (2006) [hereinafter UCMJ], four specifications of making a false official statement, in violation of Article 107, UCMJ, one specification each of indecent act, abusive sexual contact and wrongful sexual contact, in violation of Article 120, UCMJ, and one specification of forcible sodomy, in violation of Article 125, UCMJ. (JA 065-069). The panel sentenced appellant to be confined for six years and to be dishonorably discharged from the service. (JA 070). The convening authority approved the findings and sentence as adjudged.

On November 30, 2016, the Army Court issued an opinion setting aside and dismissing the specifications of abusive sexual contact and wrongful sexual contact. (JA 007).[1] The court affirmed the remaining findings and only so much of the sentence as provided for a dishonorable discharge and sixty-six months of confinement based, on post-trial delay. (JA 007). On January 25, 2017, Appellant

[1] At trial, the government moved to dismiss these specifications as they were charged in the alternative with The Specification of Charge IV. The military judge declined to dismiss the specifications but did merge them for the purpose of sentencing. (JA 003).

petitioned this Honorable Court for review, and this Court granted Appellant's petition on March 21, 2017.

Statement of Facts

The appellant's case was docketed with the Army Court on October 10, 2014. (JA 009). The appellant filed his initial brief with the Army Court on April 16, 2015. (JA 037). On November 10, 2015, the government filed its brief in response. (JA 052). The government, in its brief, acknowledged the trial counsel's statement that Specifications 2 and 3 of Charge III were charged as alternative theories to The Specification of Charge IV at the appellant's trial. (JA 046). As such, the government agreed that based on this court's precedent, dismissal of Specifications 2 and 3 of Charge III was warranted. (JA 045-047). While the military judge declined to dismiss these specifications at trial, he did merge them with The Specification of Charge IV for the purpose of sentencing. (JA 045). Therefore, dismissal of Specifications 2 and 3 of Charge III by the Army Court had no impact on the sentence adjudged. The government also acknowledged the unexplained delay in the post-trial processing of appellant's case. (JA 049). Despite the appellant failing to show a due-process violation or prejudice as a result of the processing delay, the government did not oppose the granting of minimal sentence relief. (JA 049-050).

On November 29, 2016, the appellant was released from confinement. (JA 060). On November 30, 2016, the Army Court issued an Opinion of the Court setting aside and dismissing Specifications 2 and 3 of Charge III and, based on the dilatory post-trial processing of the appellant's case, affirmed the dishonorable discharge and sixty-six months of confinement vice the seventy-two months originally adjudged. (JA 007). The Army Court was silent as to any prejudice suffered by the appellant and determined that his due process rights had not been violated. (JA 006). The following chart outlines the total delay in the appellate processing of the appellant's case:

Date	**Event**	**Days since last event**	**Total days elapsed**
10OCT14	Case docketed with Army Court	0	0
16APR15	Brief on behalf of appellant	188	188
10NOV15	Brief on behalf of appellee	208	396
29NOV16	Appellant released from confinement	385	781
30NOV16	Army Court issues opinion	1	782
Days from Announcement of Action to Opinion:			**782**

Summary of Argument

This Court should affirm the Army Court's decision and deny the appellant further relief because the appellant has not demonstrated that the delay in the appellate processing of his case amounted to a violation of his due process rights or resulted in any prejudice.

Argument

WHETHER DILATORY POST-TRIAL PROCESSING VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS AND WARRANTS RELIEF WHEN 782 DAYS ELAPSED BETWEEN DOCKETING AT THE ARMY COURT AND OPINION.

Standard of Review

"Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law we review de novo." *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011)(citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

A presumption of unreasonable delay in post-trial processing exists when "appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." *Moreno*, 63 M.J. at 142. That presumption then triggers a four-part analysis, which balances: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id.* at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (additional citations omitted). The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *Moreno*, 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533) (additional citation omitted). The presumption of unreasonable delay only "serve[s] to trigger the four-part *Barker*

analysis—not resolve it. The Government can rebut the presumption by showing the delay was not unreasonable." *Id.* at 142.

1. Length of the Delay

In the appellant's case, 782 days elapsed between the docketing of the appellant's case with the Army Court and the issuance of their opinion on November 30, 2016. (JA 001, 009). As such, the remainder of four-part *Barker* analysis is triggered.

2. Reasons for the Delay

The second *Barker* factor weighs slightly in the appellant's favor. The amount of time for each participant in the appellate processing of this case is such: 188 days for the appellant to file his brief; 208 days for the government to file its brief; and 385 days for the Army Court to issue its opinion. The time taken by the appellant and the government to file their respective briefs in this case is approximately the same and neither period appears out of the ordinary or excessive. See *Moreno*, 63 M.J. at 137 (925 days from the time the case was docketed at the Court of Criminal Appeals until briefing was complete); *United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006) (983 days from the time the case was docketed at the Court of Criminal Appeals until briefing was complete). Neither the time taken by the appellate defense counsel nor the government in

filing briefs in this case display "[a] lack of 'institutional vigilance' which should [be] exercised," during the appellate process. 63 M.J. at 137 (citation omitted).

Nearly one half of the total processing time in appellant's case, 385 days, was the time taken by the Army Court to deliberate and issue its decision. In *Dearing*, the lower court took almost fifteen months after the briefs had been filed to issue an opinion. This Court stated, "Although this was a lengthy period, 'we apply a more flexible review of this period, recognizing that it involves the exercise of the Court of Criminal Appeals' judicial decision-making authority.'" 63 M.J. at 486 (citing *Moreno*, 63 M.J. at 138). The court will "approach this period of time with reasonable deference." *United States v. Toohey*, 63 M.J. 353, 360 (C.A.A.F. 2006). However, the appellant would like this Court to invade the Army Court's judicial decision-making process and determine it to be unreasonable.

The appellant argues that the time taken by the Army Court to deliberate and issue its decision was unreasonable for two reasons. First, the appellant states that the "only two issues raised were post-trial delay and an unreasonable multiplication of charges. These were not difficult issues of first impression that required a tremendous amount of study." (Appellant's Br. 6). Second, the appellant relies heavily on the fact that the government did not contest either issue. (Appellant's Br. 6). However, the appellant's reliance on these two factors is not persuasive. While it is true that the two issues raised by the appellant to the Army

Court, unreasonable multiplication of charges and post-trial delay, are not particularly complex issues, the Army Court does not confine its review of a case to those issues raised by the appellant. Article 66(c), UCMJ, requires that the Courts of Criminal Appeals conduct a plenary review and that they "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [they] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ; see also *United States v. Nerad*, 69 M.J. 138, 141-44 (C.A.A.F. 2010); *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Evans*, 28 M.J. 74, 75-76 (C.M.A. 1989); *United States v. Britton*, 26 M.J. 24, 26-27 (C.M.A. 1988). A complete Article 66, UCMJ, review is a "substantial right" of an accused, *United States v. Jenkins*, 60 M.J. 27, 30 (C.A.A.F. 2004), and a Court of Criminal Appeals may not rely on only selected portions of a record or allegations of error alone. See *United States v. Adams*, 59 M.J. 367, 372 (C.A.A.F. 2004); see also *United States v. Roach*, 66 M.J. 410, 412 (C.A.A.F. 2008) ("[T]he scope of review by the Courts of Criminal Appeals differs in significant respect from direct review in the civilian federal appellate courts.").

As an extension of this mandate, the fact that the government did not contest the issues at the Army Court does not relieve the court of the obligation to review

the entire record and determine if the findings of guilty and sentence are, "correct in law and fact and . . . , on the basis of the entire record, should be approved." Article 66(c), UCMJ. Neither the Army Court, nor this Court, are bound by government concessions. See *United States v. Emmons*, 31 M.J. 108, 110 (C.M.A. 1990); *United States v. Hand*, 11 M.J. 321, 321 (C.M.A. 1981); *United States v. Wille*, 9 C.M.A. 623, 627, 26 C.M.R. 403, 407 (1958); *United States v. McNamara*, 7 C.M.A. 575, 578, 23 C.M.R. 39, 42 (1957); *United States v. Patrick*, 2 C.M.A. 189, 191, 7 C.M.R. 65, 67 (1953). Furthermore, while the Army Court did ultimately agree with the appellant, they went beyond simply recognizing the concession of the government and wrote substantively on each assigned error. Finally, the resultant opinion is an "Opinion of the Court," which serves as binding precedent in the Army and would naturally go through a more rigorous and time consuming review process that a "Memorandum Opinion" or "Summary Disposition."

While the appellate processing of this case exceeds the timeline established in *Moreno*, the delay is well short of the appellate delay in *Moreno* and *Dearing*. Furthermore, half of the processing time is attributable to the Army Court's judicial decision-making process. As such, this factor weighs only slightly in the appellant's favor.

3. Assertion of the Right to Timely Review and Appeal

The third factor weighs slightly in favor of the government. The appellant did not assert his right to timely appellate review of his case at any point prior to the Army Court issuing its opinion. Despite the assertions of the appellant, a demand for speedy appellate review is not implicit in an assignment of error alleging post-trial delay. (Appellant's Br. 7). To espouse the appellant's position would be to render this factor superfluous as any request for relief on appeal would inherently "include[] a request that further delay should not be tolerated." (Appellant's Br. 7). However, the court in *Moreno* held that "[w]hile this factor weighs against [the appellant], the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay." 63 M.J. at 138.

4. Prejudice

In assessing the fourth factor of prejudice, the *Moreno* Court cited to three sub-factors: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Moreno*, 63 M.J. at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297,

303 n.8 (5th Cir. 1980)). "[T]he appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* at 140.

The appellant bases his prejudice argument on a theory of oppressive incarceration. He states, "Had [his] appeal been processed in a timely manner, it would have been resolved before his release from incarceration." (Appellant's Br. 7). The appellant further argues that:

> [B]ecause of the Army Court's extreme delay in processing his case, he was released from confinement *one day* prior to the Army Court's decision granting 180 days credit against a sentence to confinement he had already served. Had the Army Court met the eighteen month standard, the opinion would have been issued 242 days earlier, allowing [him] to benefit from the Army Court's relief as he would have been released from confinement 180 days earlier.

(Appellant's Br. 7-8). The appellant's argument is fatally flawed, however, because it is based on a fundamental misunderstanding of the relief that the Army Court granted. The appellant states numerous times in his brief that the Army Court granted him 180 days of credit against his sentence of confinement. He argues, therefore, that had the Army Court issued its opinion in a timely fashion, he would have been released from confinement 180 days sooner. (Appellant's Br. 8). The Army Court did not, however, grant the appellant credit toward his term of confinement. Instead, the Army Court determined, pursuant to its power under

Article 66(c), UCMJ, that only sixty-six months of confinement should be approved, rather than the six years adjudged. (JA 007). While this is equivalent to a 180 day reduction in the length of the approved sentence, it is not the equivalent of 180 days of credit toward confinement. Confinement credit, such as that granted pursuant to *United States v. Allen* or *United States v. Pierce*, is applied against the approved sentence, but does not serve to alter what the adjudged sentence actually was. 17 M.J. 126 (C.M.A. 1994); 27 M.J. 367 (C.M.A. 1989). See *Moreno*, 63 M.J. at 137 (listing as possible remedies for post-trial delay "reduction in confinement *or* confinement credit"). The Army Court's decision in this case, pursuant to its powers under Article 66(c), UCMJ, altered the adjudged sentence. Had the Army Court intended to award the appellant confinement credit, it would not have reduced the approved sentence, as that would have had the effect of multiplying the relief.

The appellant was originally sentenced to serve six years in confinement for forcible sodomy and other offenses. (JA 070). The appellant actually served four years of that time. (JA 060). The record contains no indication as to why the appellant was released from confinement on November 29, 2016. It is unknown at this time if the appellant was paroled, or if he was released based on a calculation of good time, or if his early release was based on some other reason. The authority to parole eligible prisoners in vested in the Army Clemency and

Parole Board. See Army Regulation 15-130, Army Clemency and Parole Board (23 Oct. 1998). The responsibility for determining how much good time credit, if any, will be awarded, and the release date of a servicemember in confinement is an administrative responsibility, vested in the commander of the confinement facility. See Army Regulation 633-30, Military Sentences to Confinement (2 Dec. 2015); see also Army Regulation 190-47, The Army Corrections System (15 Jun. 2006). Military penal practice parallels federal civilian practice, which vests responsibility for decisions regarding good time credit in the prison warden. See 18 U.S.C. § 4161; 28 CFR Part 523 (2001).

The mere fact that the Army Court reduced the appellant's sentence of confinement does not necessarily mean that his release date would change by a corresponding amount, if at all. This Court lacks the jurisdiction to review determinations of parole, the calculation of good time, and the corresponding release date of a prisoner as they are administrative functions. See *United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007); *United States v. Spaustat*, 57 M.J. 256, 263 (C.A.A.F. 2002). Even if this Court did have jurisdiction to review such administrative matters, it lacks the ability to find the facts necessary to apply the regulations involved. See Article 67(c), UCMJ. Therefore, any assertion that the appellant, who only served forty-eight of an approved sixty-six month sentence,

spent more time in confinement that he would have if the Army Court acted sooner is purely speculative.

The appellant has failed to show prejudice as a result of the Army Court's delay in the appellate processing of his case. Without a finding of prejudice, this court should "find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. This is not such a case. While two of the *Barker* factors weigh in the appellant's favor, they do so only slightly. Furthermore, the egregious delays present in cases such as *Moreno* and *Dearing* are not present in this case. In those cases, the delay was the primary result of personnel issues and inattentiveness by counsel. In the appellant's case, however, the delay only exceeded the *Moreno* threshold by a matter of months, not years, and was due in large part to the decision-making process of the Army Court, which resulted in a well-reasoned opinion that not only reduced the appellant's adjudged sentence but also serves as future precedent for the Army. As the appellant's due process rights were not violated, he is not entitled to relief.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the Army Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 25, 2017.

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