

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

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

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

Granted Issue

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On November 30, 2012, an officer panel sitting as a general court-martial convicted Private (PV1) Carlos A. Gonzalez-Gomez, contrary to his pleas, of

willfully disobeying a noncommissioned officer, false official statement (four specifications), engaging in an indecent act, abusive sexual contact, wrongful sexual contact, and forcible sodomy, in violation of Articles 91, 107, 120 and 125, UCMJ, 10 U.S.C. §§ 891, 907, 920 and 925 (2006). The panel sentenced PV1 Gonzalez-Gomez to six years confinement and a dishonorable discharge. The convening authority approved the sentence as adjudged.

On November 30, 2016, the Army Court set aside and dismissed two specifications¹ and provided 180 days credit to PV1 Gonzalez-Gomez's sentence to confinement for post-trial delay. (JA at 7). On March 21, 2017, this Honorable Court granted the appellant's petition for review and ordered briefs on the above stated issue.

Statement of Facts

On April 16, 2015, appellant's defense counsel filed his initial brief with the Army Court, containing two assignments of error including dilatory post-trial processing. The government replied on November 10, 2015, conceding both issues. (JA at 46, 50). The Army Court, *386 days* after the government's concession on both issues, issued its opinion of the court on November 30, 2016, granting appellant 180 days credit for dilatory post-trial processing. (JA at 7). Thus, 782

¹ The Army Court set aside and dismissed the abusive sexual contact and wrongful sexual contact specifications as an unreasonable multiplication of charges with the forcible sodomy specification. (JA at 6).

days elapsed between docketing and the Army Court’s opinion, which was issued 1461 days after PV1 Gonzalez-Gomez’s sentence. On November 29, 2016, one day prior to the Army Court’s opinion, PV1 Gonzalez-Gomez was released from confinement. (JA at 60). The table below shows the Army Court’s delay:

Date	Action	Days since last event	Total days
10 Oct 14	Case docketed with Army Court	0	0
16 Apr 15	Brief on Behalf of Appellant	188	188
10 Nov 15	Government <i>concedes both issues</i>	208	396
29 Nov 16	Appellant released from confinement	385	781
30 Nov 16	Army Court Opinion granting 180 days relief	1	782

Summary of Argument

Appellant’s due process rights were violated where it took 782 days from docketing at the Army Court to opinion. Appellant was prejudiced by this delay because he was granted 180 days sentence relief by the Army Court but was released from confinement *one* day prior to the Army Court’s opinion.

Standard of Review

The due process right to timely post-trial processing is reviewed de novo. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011).

Law

An appellant has a constitutional right to timely post-trial processing and appeal of his court-martial. *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006). Delay is presumptively unreasonable when it takes more than eighteen months between convening authority action and a Court of Criminal Appeal's decision, triggering further analysis. *Id.* at 142-143. *See also United States v. Gonzales-Gomez*², 75 M.J. 965, 969 (A. Ct. Crim. App. 2016)(Wolfe, J., concurring)(finding a due process violation in this case).

When determining if a delay violated constitutional due process requirements, a military appellate court analyzes: (1) length of delay; (2) reason for delay; (3) assertion of the right to a timely review and appeal; and 4) prejudice. *Moreno*, 63 M.J. at 135. These factors are balanced and no one factor is required. *Id.* at 136.

This Court may also provide relief for unreasonable delay. *See Moreno*, 63 M.J. at 143. This Court noted:

[t]he nature of that relief will depend on the circumstances of the case, the relief requested, and may include, but is not limited to: (a) day-for-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon

² Appellant cites to the Army Court's opinion in this case as issued and reported, although spelled incorrectly.

the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice. Clearly this range of meaningful options to remedy the denial of speedy post-trial processing provides reviewing authorities and courts with the flexibility necessary to appropriately address these situations on a case-by-case basis.

Id.

Argument

The Army Court's extraordinary delay of 782 days was unreasonable. *See Moreno*, 63 M.J. at 142-43. The Army Court took *141 days longer* than the convening authority took to process appellant's case. Further, all of the *Barker* factors discussed in *Moreno* weigh in appellant's favor. *Id.*

1. Length of Delay.

782 days of delay is presumptively unreasonable. While the Navy-Marine Corps Court of Criminal Appeals took only 197 days to complete review in *Moreno's* case after briefs were filed; the Army Court took *386 days*. *Id.* at 133.

This case and *Moreno* can be easily compared. Appellant's counsel took only 188 days to file appellant's brief at the Army Court while *Moreno's* counsel sought, and received, *eighteen* enlargements, taking nearly two years to file. The government and defense counsel combined in *Moreno* took 925 days to complete briefs, while appellant's case was briefed in 396 days with both issues conceded by

the government. Even worse, the Army Court took 189 days longer to decide appellant's case than the Navy-Marine Corps Court did in *Moreno*.

2. Reasons for Delay.

In this case, the Army Court failed to provide any reason whatsoever for their extraordinary delay in this case, especially in light of the simplicity of the issues raised and the government's concession. Also, PV1 Gonzalez-Gomez's counsel took the least amount of time out of any party in his appeal. The government took twenty more days to file their brief than appellant and the Army Court took 198 more days than appellant to issue their opinion.

At the Army Court, the only two issues raised were post-trial delay and an unreasonable multiplication of charges. (JA at 1). These were not difficult issues of first impression that required a tremendous amount of study. To quote the Army Court in this case, "[o]ne of the most common assignments of error at this court are claims of unreasonable multiplication of charges." *Gonzales-Gomes*, 75 M.J. at 968. The Army Court is also "faced with numerous cases of excessive post-trial delay" *Id.* at 696 (Wolfe, J. concurring). Critically, the government conceded both issues. (JA at 46, 50).

3. Assertion of the Right to Timely Review and Appeal.

Although appellant did not explicitly demand expedited post-trial appellate processing, he implicitly asserted this right by raising the issue of dilatory post-trial

processing as an assigned error. By its very nature, a request for relief resulting from dilatory post-trial delay necessarily includes a request that further delay should not be tolerated. Regardless of whether or not this Court determines that a request for speedy resolution of appellate processing is necessarily included in the assignment of error of dilatory post-trial processing, the “primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.” *Moreno*, 63 M.J. at 138. It is reasonable to assume a convicted person wants a prompt resolution of their appeal. *Moreno*, 63 M.J. at 138.

4. Prejudice

The idea of prejudice hinges on (1) preventive of oppressive incarceration pending appeal; (2) anxiety and concern; and (3) impairment of appellant’s ability to present a defense at a rehearing. In essence, this prong depends on appellant’s success on any portion of his appeal.

Had PV1 Gonzalez-Gomez’s appeal been processed in a timely manner, it would have been resolved before his release from incarceration. Here, PV1 Gonzalez-Gomez had two meritorious assignments of error and received substantial confinement credit from the Army Court. However, because 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 PV1 Gonzalez-Gomez to benefit from the Army Court's relief as he would have been released from confinement 180 days earlier.

Because of the Army Court's extraordinary delay, 386 days after the government's concession, PV1 Gonzalez-Gomez was severely prejudiced having spent 180 extra days in confinement. This is similar to Moreno, who was released prior to the Navy-Marine Corps Court of Criminal Appeals' decision in his case. *Moreno*, 63 M.J. at 138.

While the Army Court did not find a due process violation with respect to dilatory post-trial processing, it nonetheless articulated the very prejudice resultant from the delay within its analysis of the unreasonable multiplication of charges. The Army Court stated by not dismissing the unreasonably multiplied specifications at trial, PV1 Gonzalez-Gomez "stood convicted of three specifications of sexual misconduct for one act. There appears to be universal agreement that only a single specification was appropriate and legally correct." *Gonzales-Gomez*, 75 M.J. at 967. The Army Court went further and stated that "during the pendency of the appeal, appellant stands convicted of more offenses than is just under the circumstances." *Id.* The Army Court, ironically, recognized the additional prejudice to PV1 Gonzalez-Gomez during the pendency of his

appeal that ensued based on the convening authority's delay, while failing to recognize the same prejudice resulting from their own excessive delay.

5. Relief is Required

This Court should set aside and dismiss the charges and sentence in PV1 Gonzalez-Gomez's case. Directing day-for-day credit for each day of unreasonable and unexplained delay would have no meaningful effect as PV1 Gonzalez-Gomez served the full term of adjudged confinement. *See Moreno*, 63 M.J. at 142. This Court should set aside and dismiss the charges and sentence.


This Court expects Courts of Criminal Appeals "to document reasons for delay and to exercise institutional vigilance." *Moreno*, 63 M.J. at 142. In addition to the reasons mentioned above, this Court should provide relief due to the overall indifference to institutional vigilance. The Army Court, in a strongly worded opinion criticizing the convening authority's delay, failed even more. The unexplained delay between docketing and opinion, and even Government concession to opinion, to quote the Army Court "is simply too long, and could 'adversely affect the public's perception of the fairness and integrity of the military justice system . . .'" *Gonzales-Gomez*, 75 M.J. at 969. This lack of legitimate explanation for delay from the Army Court evidences a lack of institutional


vigilance. “An appeal that is inordinately delayed is as much a meaningless ritual as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial proceedings.” *Moreno*, 63 M.J. at 134 (internal quotations and citations omitted).

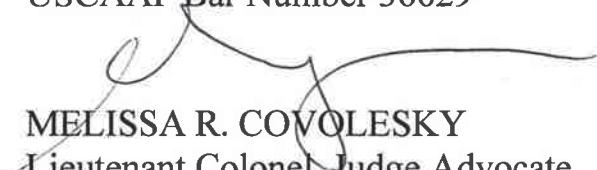
Because of the unreasonably lengthy delay by the Army Court, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by PV1 Gonzalez-Gomez as a result of oppressive incarceration, he was denied his due process rights to speedy review and appeal. *See Moreno*, 63 M.J. at 140; *see also Gonzales-Gomez*, 75 M.J. at 969 (Wolfe, J., concurring)(finding a due process violation in this case).

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss the charges and sentence in his case.


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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Gonzalez-Gomez, Crim. App. Dkt. No. 20121100, USCA Dkt. No. 17-0200/AR, was electronically filed with the Court and Government Appellate Division on April 6, 2017.


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