IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Sergeant (E-5) **DAYTRON ABDULLAH** United States Army, Appellant	)	Crim. App. Dkt. No. ARMY 20230223 USCA Dkt. No. 25-0070/AR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	APPELLEE'S RESPONSE TO APPELLANT'S SUPPLEMENT PETITION OF REVIEW
v.	)	
SERGEANT (E-5) **DAYTRON ABDULLAH,** United States Army, Appellee	)	ARMY 20230223 USCA Dkt. No. 25-0070/AR

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

Issue Presented

WHETHER THE ARMY COURT LAWFULLY CONDUCTED ITS EN BANC REVIEW OF APPELLANT'S CASE.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2022) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On April 20, 2023, a military judge sitting as a special-court martial convicted Appellant, Sergeant Dayton Abdullah, pursuant to his pleas, of one specification each of desertion, absence without leave, disobeying a superior

commissioned officer, and wrongful use of marijuana, in violation of Articles 85, 86, 90, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 886, 890, and 912a [UCMJ].[1] (R. at 63–64; Statement of Trial Results [STR]). The military judge sentenced Appellant to be reduced to the grade of E-1, confined for a total of ninety days,[2] and discharged from the service with a bad-conduct discharge. (R. at 99–100; STR; App. Ex. IV). On July 13, 2023, the convening authority disapproved Appellant's request for deferment of reduction in grade, deferment of automatic forfeitures, and waiver of automatic forfeitures; the convening authority took no other action on Appellant's case. (Action). On September 8, 2023, the military judge entered judgment. (Judgment).

The Army Court issued a memorandum opinion on April 30, 2024, affirming the findings of guilt and approving only so much of the sentence extending to

[1] In exchange for Appellant's pleas, the convening authority agreed to direct the trial counsel to dismiss one specification each of wrongful use of amphetamines, wrongful use of methamphetamines, and wrongful possession of marijuana, in violation of Article 112a, UCMJ. (App. Ex. I, p. 4; R. at 63; STR).

[2] The military judge sentenced Appellant to the minimum term of confinement permitted under his plea agreement, segmenting the confinement as follows:

Charge / Specification	**Sentence**	**To be served…**
Charge I, The Specification	51 days	Consecutively
Charge II, The Specification	6 days	Consecutively
Charge III, The Specification	22 days	Consecutively
Charge IV, Specification 1	11 days	Consecutively
Total	**90 days**	

(App. Ex. I, p. 4; App. Ex. IV; R. at 58, 99–100; STR). Appellant was further credited with 51 days of pretrial confinement credit. (Charge Sheet; R. at 65–66).

ninety days confinement. *United States v. Abdullah*, ARMY 20230223, 2024 CCA LEXIS 100 (Army Ct. Crim. App. Apr. 30, 2024) (mem. op.).

Following the Government's filing of a "Suggestion for *En Banc* Reconsideration," in accordance with Joint Rules of Appellate Procedure for Courts of Criminal Appeals (the Joint Rules or J.R.A.P.) Rule (R.) 27, the Army Court adopted the Appellee's suggestion and issued an order to consider the case *en banc*. *United States v. Abdullah*, ARMY 20230223 (Army Ct. Crim. App. June 14, 2024) (order). On November 5, 2024, the Army Court issued its *en banc* Opinion of the Court on Reconsideration, which vacated the court's prior opinion and affirmed the original findings and sentence. *United States v. Abdullah*, 85 M.J. 501, 2024 LEXIS 479, *33 (Army Ct. Crim. App. Nov. 5, 2024).[3]

Appellant filed the Supplement to Petition for Grant of Review on January 22, 2025. On March 24, 2025, this Court ordered the Appellee file an answer to the supplement.

Statement of Facts

Appellant, a sergeant in the United States Army, repeatedly used illegal substances and demonstrated a disregard for military authority. (Pros. Ex. 1, p. 2). Over the course of five months, he drove while intoxicated, deserted his unit to

[3] Although this case is published, Lexis has not updated the opinion with pin cites to the Military Justice Reporter, therefore the Government refers to the pin cites using the Lexis formatting.

avoid a 100% urinalysis and remained absent for approximately 50 days, disobeyed orders, used illegal drugs, and was absent without leave. (Pros. Ex. 1, p. 2-3).

Following preferral of charges, Appellant entered a plea agreement with the convening authority. (App. Ex. I). In the plea agreement, Appellant agreed to plead guilty to the Specification of Charge I,[4] II,[5] and III,[6] and Specification 1[7] of Charge IV (App. Ex. I, p. 2). The convening authority agreed and directed the Trial Counsel to dismiss Specifications 2–4 of Charge III.[8] (App. Ex. I, p. 4). Additionally, the convening authority agreed to not prosecute Appellant for any uncharged misconduct known to the chain of command or military law enforcement at the time the convening authority approved the agreement. (App. Ex. I, p. 4).

In the plea agreement, Appellant agreed to certain sentence limitations. He agreed that a Bad Conduct Discharge would be adjudged in his case. (App. Ex. I, p. 3). Confinement would be limited to 120 days. (App. Ex. I, p. 4). Appellant

[4] Desertion, in violation of Article 85, UCMJ. (Charge Sheet).
[5] Absence without leave, in violation of Article 86, UCMJ. (Charge Sheet).
[6] Willfully disobeying a Superior Commissioned Officer, in violation of Article 90, UCMJ. (Charge Sheet).
[7] Wrongfully using tetrahydocannabinol, in violation of Article 112a, UCMJ. (Charge Sheet).
[8] Wrongful use of amphetamines, wrongful use of methamphetamines, wrongfully posing marijuana, in violation of Article 112a, UCMJ. (Charge Sheet).

submitted this agreement on April 7, 2023, and the convening authority approved the agreement on April 13, 2023. (App. Ex. I, p. 5).

Appellant pled guilty in accordance with the agreement on April 20, 2023. (STR, R. at 9, 64). The Army Court received the record 163 days later, on September 30, 2023. *Abdullah*, 2024 LEXIS 479, at *6.

The Office of the Staff Judge Advocate included a memorandum detailing the post-trial processing of the case, which explained that personnel changeover *may* have contributed to the lateness and added information on operational tempo. *Abdullah*, 2024 LEXIS 479, at *6-7.

The Army Court ultimately found the post-trial delay in this case did not violate the Due Process Clause of the Fifth Amendment. *Abdullah*, 2024 LEXIS 479, at *33. Further, the court did not grant relief under Article 66. *Id*. Senior Judge Walker wrote the opinion of the court; Chief Judge Smawley, Senior Judge Fleming, Judge Pond, and Judge Parker concurred. *Id*. at *22.

Judge Morris wrote a short concurrence, agreeing that the post-trial delay did not violate the Due Process Clause of the Fifth Amendment or Article 66(d)(2), but stating she would have found the 163-day post-trial delay weighed in favor of Appellant under the *Barker* analysis. *Abdullah*, 2024 LEXIS 479, at *35. (Morris,

J., concurring). Finally, Judge Arguelles[9] and Judge Penland filed dissenting opinions. *Abdullah*, 2024 LEXIS 479, at *36.

The Army Court issued its *en banc* opinion on November 5, 2024. *Id*. at *1.

At the time this opinion was issued, Former-Senior Judge Walker was on terminal leave. (Affidavit dated April 21, 2025). Her terminal leave began on October 10, 2024 and continued until she retired on November 30, 2024. (Affidavit dated April 21, 2025).

Similarly, Former-Chief Judge Smawley began his transition leave September 1, 2024. (Affidavit dated April 21, 2025). He remained on transition leave until his retirement on October 31, 2024. (Affidavit dated April 21, 2025).

Summary of Argument

The Criminal Courts of Appeals are afforded broad discretion in how they conduct Article 66 proceedings, to include whether to review a case *en banc*. In the present case, the Army Court of Criminal Appeals properly utilized this broad discretion..

Further, the Army Court lawfully conducted its review. The participation of Chief Judge Smawley and Senior Judge Walker in the deliberative process and opinion of the court was proper because they were in regular active service of the

[9] Judge Arguelles decided the case while on active duty. *Abdullah*, 2024 LEXIS 479, at *1.

court and maintained their ability to remove themselves from the opinion if they experienced a change of heart prior to the issuance of the opinion. Their participation in this case was in accordance with the Joint Rules, this court's precedent, and historic practices of military courts of appeals over the past 40 years.

Lastly, removing Chief Judge Smawley and Senior Judge Walker from participating in the opinion, resulting in a 4-2 decision, does not change the result from the *en banc* court. Accordingly, because Appellant's assigned error does not materially prejudice Appellant's substantial rights, Appellant's petition for grant of review should be denied.

Issue Presented

WHETHER THE ARMY COURT LAWFULLY CONDUCTED ITS EN BANC REVIEW OF APPELLANT'S CASE

Standard of Review

A Court of Criminal Appeals' actions under Article 66, UCMJ are reviewed for an abuse of discretion. *United States v. Guin*, 81 M.J. 195, 199 (C.A.A.F. 2021). Questions of law are reviewed *de novo*. *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023).

Law and Argument

A. The Army Court properly ordered an *en banc* review of Appellant's case.

The decision of an appellate court to take a case *en banc* is entirely discretionary, provided the court complies with applicable procedural and statutory rules.

Congress has afforded broad authority to Judge Advocates General and Courts of Criminal Appeals to formulate policies and procedures for how they operate. Article 66(a)(1), UCMJ, 10 U.S.C. § 866 (2022). For the purposes of reviewing courts-martial cases, the court may sit in panels or as a whole, in accordance with the uniform rules of procedure for Courts of Criminal Appeals that the Judge Advocates General prescribe. Articles 66(a)(1) and Article 66(h), UCMJ, 10 U.S.C. § 866 (2022).

The Joint Rules are promulgated in accordance with Article 66(h), UCMJ, and Courts of Criminal Appeals may choose to promulgate additional rules. *See* J.R.A.P. R. 2 and 3. Pursuant to these rules, a majority of judges who are in regular active service and not disqualified may, *sua sponte* or in response to a suggestion, order that an appeal or any other proceeding be considered or reconsidered by the Court *en banc*. J.R.A.P. R. 27(a).

While J.R.A.P. R. 27(a) states *en banc* "consideration or reconsideration is not favored and ordinarily will not be ordered," both military and U.S. Federal Courts have provided appellate courts great deference in how they decide what

cases are heard *en banc* and the administrative procedure used to make these decisions. The Joint Rules merely suggest when a Court of Criminal Appeals should review a case *en banc*, but do not take away a court's discretion. *United States v. Felix*, 40 M.J. 356, 358 (C.M.A. 1994), *cert denied*, 513 U.S. 1113 (1995); *see also United States v. Loving*, 41 M.J. 213, 290 (C.A.A.F. 1994) (finding the Joint Rules clearly contemplate that reconsideration is discretionary, not mandatory, and declining to overturn the Court of Military Review's decision not to hear the case *en banc*).

Congress has afforded broad discretion to the civilian federal courts on how to utilize *en banc* proceedings. 28 U.S.C. § 46(c). At each juncture when this issue has arisen, the Supreme Court has endorsed its interpretation of 28 U.S.C. § 46(c) as affording Courts of Appeals the discretion to determine the means by which the *en banc* process was administered. *Western P.R. Corp. v. Western P.R. Co.*, 345 U.S. 247, 259 (1953)("Each Court of Appeals is vested with wide latitude of discretion to decide for itself just how that power shall be exercised."); *see, e.g., Duncan v. Bonta*, No. 23-55805, 2025 U.S. App. LEXIS 6511 at *14-15 (9th Cir. Mar. 20, 2025). Similarly, this court has historically been reluctant to mandate procedures for Courts of Criminal Appeals. *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995).

Appellant asserts the Army Court abused its discretion when it took the present case *en banc*, but he is unable to point to any binding or persuasive authority where a court has imposed such a restriction on the discretion of an intermediary court. While Article 66 and the Joint Rules provide guidelines for when and how this discretion should be utilized, there are no provisions that state when the intermediary court shall not exercise this discretion. J.R.A.P. R. 27(a) merely requires a majority of judges in regular active service order an appeal to be reconsidered *en banc*. Appellant does not challenge whether the appropriate number of judges requested to hear this case *en banc*.

The decision to hear this case *en banc* did not violate statute, the Joint Rules, or this Court's precedent. This court should not disturb the Army Court's discretionary determination to reconsider the case *en banc*.

B. The Army Court correctly followed the statute, the Joint Rules for Appellate Procedure, and its rules; the departure of two judges did not violate those rules.

Senior Judge Walker and Chief Judge Smalley were in "regular active service" at the time of the decision in *United States v. Abdullah*.

Relevant to these proceedings, a judge is in regular active serve if: (1) they are assigned to the court; and (2) they are in the active component of the armed forces, unless defined differently pursuant to J.R.A.P. R. 7(d). J.R.A.P. R. 7(c). "Each service may establish its own definition of "regular active service" in its

service court rules even if inconsistent with Rule 7(c). J.R.A.P. R. 7(d). The Army Court's rules do not further define "regular active service."

A case is decided once an opinion is issued from the court. *United States v. American-Foreign S.S. Corp*, 363 U.S. 685, 687 (1960). Any judge who participates in the opinion must be an active judge in accordance with applicable court rules and statutes. *Id*. at 690–91.[10] The Supreme Court has ruled a judge's vote is unable to be counted if they are deceased prior to publishing the opinion, even when they have fully participated in the case and authored the opinion. *Yovino v. Rizo*, 586 U.S. 181, 185 (2019).

In coming to this conclusion, the Supreme Court highlighted there is no rule "that renders judges' votes and opinions immutable at some point in time prior to their public release." *Id*. at 184. It is generally understood that a judge may change his or her position up to the very moment when a decision is released. *Id*.

1. It is common practice for courts to release opinions after a judge who participated in the decision has left the court.

Although judges are unable to participate in a case or controversy after their death, the law provides different mechanisms to allow judges to continue to vote

[10] Following this decision Congress modified the statute to provide for judges in a retired status to be able to participate in decisions and provide their opinion in *en banc* proceedings they participated in following their departure from the bench. *Yovino v. Rizo*, 586 U.S. 181, 185 (2019).

on a matter when their time in active service on the court has expired, often in the name of judicial efficiency.

For example, in civilian federal courts, 28 U.S.C. § 46 states only judges in "regular active service" may sit *en banc*. "Except that any senior circuit judge of the circuit shall be eligible . . . (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c); *see also Bonta*, 2025 U.S. App. LEXIS 6511 at *26-27 (9th Cir. March 20, 2025) (finding original 11 member *en banc* could retain jurisdiction over matter when it returned to the 9th Circuit later and after five of the eleven original judges had taken senior status).

Continued participation promotes the statute's obvious purpose of judicial efficiency and gives the *en banc* court the benefit of the knowledge and judgement of all the judges who have worked on the case. *Bonta*, 2025 U.S. App. LEXIS 6511 at *25 (citing *Igartua de la Rosa v. United States*, 407 F.3d 30, 32 (1st Cir. 2005) (en banc) (per curiam) (memorandum and order)).

Although there is a distinct difference between a judge appointed to the Court of Appeals for the Armed Forces [CAAF] verse one assigned to the Army Court, this Court has permitted a judge to vote on a matter prior to the expiration of their term of service even when the opinion was published after they were no longer on the bench. *See United States v. Stellato*, 74 M.J. 473, 476 (C.A.A.F.

2015) (noting "former Chief Judge James E. Baker took final action in this case prior to the expiration of his term on July 31, 2015" when the opinion was issued on August 20, 2015)).[11]

Similarly, a Lexis search for cases published by military courts of appeals shows over 200 cases in which an opinion post-dates a judge's departure from the court. Each of these cases utilizes a footnote that states words to the effect of: "the judge 'took final action in this case prior to retirement from active duty.'" *E.g.*, *United States v. Howard*, 9 M.J 873 (N.C.M.R. 1980) (noting the judge retired on June 30, 1980, but the opinion was not issued until July 24, 1980). The reasons listed for departure include retirement, reassignment, transfer, detaching from the court, and permanent change of duty station.

Although not codified in the Joint Rules, this history indicates this has become a common practice amongst the courts of criminal appeals across the services.

2. Chief Judge Walker and Senior Judge Smawley retained their ability to change their vote up until the time the opinion was published.

The determinative factor in *Rizo* was that Judge Reinhardt's vote was not inalterably fixed prior to the issuance of the opinion. 586 U.S. 181, 183 (2019).

[11] This footnote was similarly used in four other cases by this Court in 2015. *United States v. Arness*, 74 M.J. 441, 443 (C.A.A.F. 2015); *United States v. Sullivan*, 74 M.J. 448, 449 (C.A.A.F. 2015); *United States v. Akbar*, 74 M.J. 364, 418 (C.A.A.F. 2015); *United States v. Quick*, 74 M.J. 332, 338 (C.A.A.F. 2015).

Appellant does not allege Senior Judge Walker or Chief Judge Smawley were unable to remove their votes from the decision if they experienced a change of heart prior to the issuance of the opinion.

Additionally, the Supreme Court has repeatedly emphasized the differences between military and civilian societies and justice systems. *See, e.g., Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Weiss v. United States*, 510 U.S. 163, 174-175 (1994); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-20 (1955).

Due to the nature of military assignments, the Army Court's judges do not possess the same control of their dockets that a civilian appellate judge may possess. Military appellate judges must continue to draft opinions, attend oral argument, and discuss cases with other judges while knowing they serve for a finite period of time.[12] This Court should not align its practice with federal court rules where judges are appointed for life and often serve decades before retiring or even dying while they are still on the bench. Military appellate courts must retain the ability to vote on cases and author opinions that may post-date one or more judges' departure from the bench. Not only has this exception existed as a practice of the service courts for over 40 years, but a similar exception is codified for

[12] Judge Advocates "are assigned as appellate military judges for a minimum of three years, except under circumstances described in paragraph 12-15, AR 27-10." Judge Advocate Legal Services Publication 1-1 (Personnel Policies) – 21 January 2025.

civilian appellate courts. 28 U.S.C. § 46(c).

The reason for such an exception is to provide the benefit of the knowledge and judgement of all the judges who worked on the case, and to adequately value the time and experience of those who researched, deliberated and initially decided to take the case in the first place. *See United States v. Hudspeth*, 42 F.3d 1013, 1015 (7th Cir. 1994); *see also Allen v. Johnson*, 391 F.2d 527, 529-30 (5th Cir. 1968)(*en banc*)(per curiam).

At the time the Army Court issued its *en banc* opinion, former Senior Judge Walker was on transition leave but had not yet retired. She remained in the active component of the armed forces and assigned to ACCA until the date of her retirement on November 30, 2025. Senior Judge Walker remained in "regular active service" of the court and was therefor able to participate in the opinion issued by the Army Court.

Separately, so long as Chief Judge Smawley retained the ability to remove his vote from the decision prior to its issuance, his participation in the opinion complied with *Rizo* and was in accordance with the historic practices of the military courts of appeals.

3. Appellant was not prejudiced

If this Court finds Chief Judge Smawley or Senior Judge Walker were precluded from participation in this case, Appellant is unable to show material

prejudice to his substantial rights. *See* Article 59(a), UCMJ.

Although Senior Judge Walker wrote the Opinion of the Court, she was joined by Chief Judge Smawley, Senior Judge Fleming, Judge Pond, and Judge Parker. Judge Morris wrote a short concurrence; she concurred that there was no Due Process violation or relief under Article 66(d)(2), UCMJ only disagreeing with the majority on the first prong of the *Barker* analysis. *Abdullah*, 2024 LEXIS 479, at *35. (J. Morris, concurring).

Because Judge Morris concurred with the result, Appellant can point to no prejudice. Removing Chief Judge Smawley and Senior Judge Walker from the opinion does not change the result from the *en banc* court. *Cf. Rizo*, 586 U.S. at 183, 187 (remanding the case because the deceased judge's vote was decisive to create a majority). Appellant's claims that the position of Judge Walker and Judge Smawley somehow influenced the independent judgments of the other appellate judges is without evidence or logic and asks this Court to delve into the deliberative process of the Army Court.

Conclusion

The United States respectfully request this Court deny Appellant's Petition for Grant of Review.

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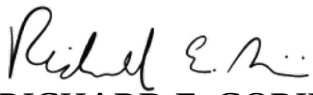

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **3,604** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 21 April 2025and electronically filed to Defense Appellate on April 21, 2025.

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