IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **DAYTRON ABDULLAH** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20230223 USCA Dkt. No. _____/AR

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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) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2022). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2021).[1]

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in Appendix C.

Statement of the Case

On April 20, 2023, a military judge sitting as a special court-martial convicted appellant, Sergeant Daytron Abdullah, in accordance with his pleas, of one specification of desertion, one specification of absence without leave, one specification of disobeying a superior commissioned officer, and one specification of wrongfully using marijuana in violation of Articles 85, 86, 90, and 112a UCMJ, 10 U.S.C. §§ 885, 886, 890, 912a.[2] (R. 63-64; Charge Sheet). The military judge sentenced appellant to a reduction to the grade of E-1, ninety days of confinement, and a bad-conduct discharge.[3] (R. 99-100). The military judge awarded appellant fifty-one days of pre-trial confinement credit against appellant's term of confinement. (R. 65; Statement of Trial Results [STR]). On July 13, 2023, the convening authority reviewed, but took no action on, the findings and sentence.

[2] The military judge granted the government's motion to dismiss Specifications 2-4 of Charge IV after arraignment and prior to findings pursuant to appellant's offer to plead guilty. (R. 63).

[3] The military judge sentenced appellant as follows:

Charge I, The Specification	51 days
Charge II, The Specification	6 days
Charge III, The Specification	22 days
Charge IV, Specification 1	11 days

The military judge ordered all sentences to confinement to run consecutively. (R. 99-100).

(Action). On September 8, 2023, the military judge entered Judgment. (Entry of Judgment). On September 30, 2023, the Army Court docketed the case. (Referral).

On April 30, 2024, a panel of the Army Court affirmed the findings and only so much of the sentence extending to ninety days of confinement. *United States v. Abdullah*, ARMY 20230223, 2024 CCA LEXIS 199 (Army Ct. Crim. App. Apr. 30, 2024) (mem. op.) (contained in App'x A). The Government filed a "Suggestion for *En Banc* Reconsideration," which the Army Court adopted over Appellant's objection. *United States v. Abdullah*, ARMY 20230223 (Army Ct. Crim. App. June 14, 2024) (order). The Army Court sitting in what it stated was *en banc*, on November 5, 2024, issued in an Opinion of the Court on Reconsideration, affirmed the original findings and sentence. *United States v. Abdullah*, , ___ M.J.___, 2024 CCA LEXIS 479 (Army Ct. Crim. App. Nov. 5, 2024) (contained in App'x A). Appellant was notified of the Army Court's decisions.

In accordance with Rule 19 of this Court's Rules of Practice and Procedure, the undersigned appellate defense counsel, on behalf of appellant, filed a Petition for Grant of Review on January 3, 2025, along with a motion for extension of time to file this supplement. The Judge Advocate General of the Army designated the undersigned military appellate defense counsel to represent appellant, who hereby entered their appearance and file a Supplement to the Petition for Grant of Review under Rule 21.

Statement of Facts

The facts about the Office of Staff Judge Advocate's (OSJA) 130-plus delay to complete a 100-page transcript are not in dispute. A paralegal submitted a memorandum for the OSJA stating, in part,

> The Post-Trial section received a new Staff Sergeant in April 2023. Between the months of April and August 2023, the civilian post-trial paralegal was tasked to train the new NCO within post-trial matters. Both Post-Trial team members are dually slotted in Magistrate Court and General Crimes sections within the OSJA. All the above **may** have hindered the processing time for US v. Abdullah while balancing daily tasks within the other sections. . . . There was an increase in court-martials [sic] between the months of May through August. The post-trial team worked diligently to meet all post-trial requirements for pending Courts-Martial as well as those that were back logged.

(OSJA Post-Trial Processing Letter) (emphasis added). This explanation was the focal point of both opinions given its inadequacies and conjecture.

The Army Court three-judge panel analyzed the post-trial delay here using the four-factor test of *Barker v. Wingo*, 407 U.S. 514 (1972). *United States v. Abdullah*, ARMY 20230223, 2024 CCA LEXIS 199, at *6 (Army Ct. Crim. App. Apr. 30, 2024) (mem. op.). After weighing the four *Barker* factors and noting appellant's "very strong sentencing case," as well as the absence of "identifiable individual victims," a majority of the Army Court panel—Judges Arguelles and Penland—determined that relief was warranted under *both* the Due Process Clause

of the Fifth Amendment and Article 66(d)(1), UCMJ. *Id.* at *11-12. The Army Court panel set aside the bad-conduct discharge and the grade reduction, like the relief provided in *United States v. Hotaling*, ARMY 20190360, 2020 CCA LEXIS 449, *1 (Army Ct. Crim. App. Dec. 11, 2020) (mem. op.). *Id.* at *12.

In her separate opinion, Judge Morris stated she would not have found a violation of the Due Process clause but did not directly reference Article 66; she agreed with the majority "that the post-trial delay, specifically the unexplained 96 days the government took to forward the record from the trial counsel to the military judge, was excessive." *Id.* at 12. Judge Morris believed the sentence was appropriate, but that sentencing relief was not appropriate. *Id.* at 13.

The Army Court granted *en banc* review over Appellant's objection on June 14, 2024, adopting the government's "Suggestion for *En Banc* Reconsideration," which vacated the panel's decision. *United States v. Abdullah*, ARMY 20230223 (Army Ct. Crim. App. June 14, 2024) (order). In its filing, the government asserted that reconsideration was necessary:

> to secure uniformity across all panels of [the Army Court] in their analysis of Fifth Amendment Due Process violations in claims of unreasonable post-trial delay and the corresponding remedy in such cases[;] . . . the majority opinion abused its discretion in evaluating harmlessness under [this Court's] and [the Army Court's] precedent[;] . . . [and] the court's remedy in this case informs the field—and the public—that even without a showing of prejudice to appellant, [the Army Court] prioritizes post-trial

> efficiency over the pre-trial efficiency and public benefit gained by effective, mutually beneficial plea agreements.

(Suggestion for *En Banc* Reconsideration) (contained in App'x A).

In its "Opinion of the Court on Reconsideration," issued on November 5, 2024, authored by Senior Judge Walker, the *en banc* Army Court affirmed the findings and sentence, noting that "setting aside appellant's bad conduct discharge is not *appropriate relief* under Article 66(d)." *United States v. Abdullah*, ___ M.J.___, 2024 CCA LEXIS 479, at *2 (Army Ct. Crim. App. Nov. 5, 2024) (contained in App'x A). The eight-judge court's vote was five to two with one judge—Judge Morris—concurring in part, dissenting in part, and writing separately.[4] *Id.* at *35. Judges Arguelles and Penland wrote separate dissenting opinions, with Judge Arguelles also joining in Judge Penland's dissent. *Id.* at *36-57.

While Judge Morris agreed with the majority that the 163-days of post-trial delay did not violate the Due Process Clause or Article 66(d)(2), UCMJ, she nonetheless specifically found the delay was excessive under the first prong of *Barker* and accordingly weighed in favor of the appellant. *Id.* at *35. Judge Morris further wrote that, "[b]y deciding that 163 days to process a record with a 100-page

[4] Judge Morris's concurrence was labeled as "concurring in part," but she effectively dissented in part regarding the majority's analysis of the first *Barker* factor.

transcript that lacked any complex legal issues or errors and,[sic] minimal exhibits was not excessive, the majority has rendered this court's opinion that some cases should take significantly less time, meaningless." *Id.* at *35-36.

Judge Arguelles, in dissent, explained why he believed the Army Court improperly granted *en banc* consideration. *Id.* at *45 ("[*E*]*n banc* consideration is not favored and ordinarily will not be ordered unless necessary to secure or maintain uniformity of the court's decisions or if the proceeding involves a question of 'exceptional importance.'"). Judge Arguelles further noted that "*en banc* review is not appropriate because this case does not involve the misapplication of either the law or [the Army Court's] prior holdings, but rather involves only the application of binding precedent to a unique set of facts and circumstances." *Id.* at *46. "[T]he fact that other judges of this court, after exercising their individual discretion to apply the law to the unique facts and circumstances of this case, might have reached a different result than that of the original panel is not an appropriate basis for *en banc* review." *Id.*

Judge Penland, in his dissent, voiced similar concerns, stating he voted against *en banc* review "because [he believed] those who sought it and those who voted to grant it did so in pursuit of uniform results, rather than a uniform application of relevant law to relevant and unique facts." *Id.* at *46-47. Judge Penland said, "[t]hese are different things. The former is virtually impossible under

our statutory framework and jurisprudence, and it works against judicial independence. The latter reinforces common legal standards to make case-specific decisions." *Id.* at 47.

In a footnote in the majority opinion, the Army Court said that Chief Judge Smawley acted on the case prior to his leaving the court, and Senior Judge Walker acted on the case prior to her retirement. *Id.* at *1 n.1.

In a memorandum issued on July 22, 2024, Colonel Tiffany Pond was identified as the Chief Judge when Chief Judge Smawley left the court. Memorandum for Chief Judge, Senior Judges, and Associate Judges, Subject: USACCA Panel Composition (July 22, 2024) (contained in App'x A). By at least September 30, 2024, Senior Judge Walker was no longer on the Army Court and is now employed by this Court. *See* Memorandum for Chief Judge, Senior Judges, and Associate Judges, Subject: USACCA Panel Composition (Sept. 30, 2024) (contained in App'x A). In other words, both Chief Judge Smawley and Senior Judge Walker had left the Army Court and, in at least one circumstance, appear to have retired prior to the *en banc* opinion being published on November 5, 2024.

Reasons to Grant Review

Should appellate courts grant *en banc* review when all the judges agree on the law but some simply do not like how other judges applied it in an unpublished case? In other words, when the decision is within the range of rationale choices of

a judge, but another judge simply would have applied the law differently, is that appropriate for *en banc* review? Pursuant to Rule 21(b)(5) of this Court's Rules of Practice and Procedure, Sergeant Abdullah asks this Court to review whether: (1) even with deference to a CCA, *en banc* review was appropriate when the judges all agree on the law but would come to different outcomes over unique sets of facts, and (2) an *en banc* decision of a service court decided by divided vote should be vacated and remanded where two of the judges were no longer in regular active service—as that term is defined in the Joint Rules for Appellate Procedure for Courts of Criminal Appeals—at the time the Army Court published its decision. In other words, two of the judges that decided this case were no longer judges.

By publishing an opinion that included two judges who were no longer empowered to participate in the Army Court's proceedings at the time of publication, including a senior judge who authored the majority opinion and had indeed retired from military service, the Army Court departed from established Supreme Court precedent and the accepted and usual course of judicial proceedings in federal courts of appeals. Because the Army Court's opinion may have constituted an evenly divided vote—and is at minimum lacking in uniformity, continuity, and clarity as to what the Army Court considers excessive post-trial delay creating confusion both for Sergeant Abdullah and practitioners in the field—Sergeant Abdullah is left in limbo as to the result and meaning of the Army

Court's precedential opinion and is accordingly unable to properly prepare his petition to this Court; his substantial rights are therefore materially prejudiced.

Issue Presented

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

Standard of Review

Questions of law are reviewed de novo. *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023). A service court's 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).

Law

A. *En Banc* Review in Courts of Criminal Appeals.

Congress has mandated that the service Courts of Criminal Appeals have uniform rules. "The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals." Article 66(h), UCMJ, 10 U.S.C. § 866 (2022). "A majority of judges who are in regular active service, as defined in Rule 7 or Service Court rules, 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*." Joint Rules for Appellate Procedure for Courts of Criminal Appeals Rule [JT. CT. CRIM. APP. R.] 27(a). "When sitting *en banc*, a majority of the judges in regular active service with the [Army Court] shall

constitute a quorum." JT. CT. CRIM. APP. R. 7(a). A judge is in "regular active service" when the judge is assigned to a service court and is:

> (1) in the active component of the armed forces; (2) in the reserve component of the armed forces and serving on active duty with the Court for a period of more than 30 consecutive days; or (3) a civilian judge who is a full-time employee of the agency from which appointed . . . [or] when a reserve component military judge who does not meet the above criteria is duly assigned to a matter.

JT. CT. CRIM. APP. R. 7(c).

"A motion for reconsideration of a panel decision may be accompanied by a Suggestion for Reconsideration by the Court sitting [*en banc*] in accordance with Rule 27." United States Army Court of Criminal Appeal Rules of Appellate Procedure Rule [Army Ct. R.A.P. R.] 31.2(e). *En banc* consideration or reconsideration is not favored and ordinarily will not be ordered unless, among other things, it is "necessary to secure or maintain uniformity of the Court's decisions; the opinion overrules a binding precedent of the Court; [or] the proceeding involves a question of exceptional importance." JT. CT. CRIM. APP. R. 27(a); *see also* Army Ct. R.A.P. R. 27.2(b). Per the Army Court Rule,

> "uniformity of the Court's decision" refers to panels of [the Army Court] and of the other service courts of criminal appeals . . . [and] a "question of exceptional importance" includes a novel question of law not previously considered by a military appellate court and argument that existing case law should be overruled or modified.

Army Ct. R.A.P. R. 27.1(a)-(b).

Reconsideration will not ordinarily be granted without showing that one of the following exists:

> (1) A material legal or factual matter was overlooked or misapplied in the decision;
>
> (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;
>
> (3) The decision conflicts with a decision of the Supreme Court of the United States, the Court of Appeals for the Armed Forces, or another service court of criminal appeals, or this Court; or
>
> (4) New information is received that raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial.

Army Ct. R.A.P. R. 31.2(b); *see also* Army Ct. R.A.P. R. 27.2(b). "An order granting reconsideration vacates the decision to be reconsidered." Army Ct. R.A.P. R. 31.2(c).

En banc review is appropriate where Courts of Criminal Appeals panels have reached inconsistent results or when a panel "might reach a result that would make what is considered to be bad law or law contrary to the majority view." *United States v. Felix*, 40 M.J. 356, 358 (C.A.A.F. 1994). However, unpublished opinions do not serve as "precedent" or make law. "What is of exceptional importance is a question for the majority of the Court of Military Review [now

Courts of Criminal Appeals] to determine." *Id.* at 359. Referencing the previous version of the current Joint Rules for Appellate Procedure for Courts of Criminal Appeals Rule 27, this Court said,

> Rule 17 does not provide an exclusive list of appropriate circumstances for *en banc* review, but merely suggests when Courts of Military Review should probably review cases *en banc*. The term "ordinarily" precedes the list of circumstances where review seems appropriate, and again, defining what is ordinary, out of the ordinary, or exceptional, is within the province of the Court of Military Review. . . . "We are confident that the court is cognizant of its own rules and complies therewith."

Id. This Court ultimately declined to disturb the Court of Military Review's decision to reconsider case *en banc* in *Felix*. *Id.* at 358-59.

Article 66(a), UCMJ, and Rule 27 "establish that *en banc* reconsideration is the appropriate method to overrule a panel decision, at least when that panel decision is still on direct review." *United States v. Townsend*, 49 M.J. 175, 177 (C.A.A.F. 1998) (citing *Felix*, 40 M.J. 356). But this Court "has never held that Article 66(a) or any other legal authority requires that we ensure a panel decision of an intermediate military appellate court is followed by another panel of that same court in a subsequent case." *Id.* While this Court has been "reluctant to mandate procedures for the [Courts of Criminal Appeals]," this has practically always been when a CCA has refused to take a case *en banc* as opposed to granting an *en banc* decision where the court unanimously agrees to the law, but has

different opinions as to its application of a single non-precedential case. *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995) (citing *United States v. Loving*, 41 M.J. 213, 290 (C.A.A.F. 1994) (noting the "Joint Rules clearly contemplate that reconsideration is discretionary, not mandatory, and that reconsideration *en banc* is the exception rather than the rule" and declining to overturn Court of Military Review's decision not to hear case *en banc* in a death penalty case)).

B. *En Banc* Review in Courts of Appeals for the Federal Circuits When Decisions are Published after Judges Leave the Court.

In *United States v. American-Foreign S.S. Corp*, the Supreme Court vacated a Second Circuit decision after it determined "a circuit judge who has retired [was not] eligible under [28 U.S.C. § 46(c)] to participate in the decision of a case on rehearing *en banc*." *United States v. American-Foreign S.S. Corp*, 363 U.S. 685, 685-86 (1960) ("The sole issue presented is whether a circuit judge who has retired is eligible under this statute to participate in the decision of a case on rehearing *en banc*. We have concluded that he is not. . . . [Accordingly, the] judgment must be set aside."). A circuit judge who joined in the majority opinion of the *en banc* court retired almost five months before the Second Circuit issued its opinion. *Id.* at 686. At the time, 28 U.S.C. §46 read, in part,

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in

> active service. A court in banc shall consist of all active circuit judges of the circuit.

28 U.S.C. § 46(c) (1948). The Court said, "[a]n 'active' judge is a judge who has not retired 'from regular active service' [and that a] case or controversy is 'determined' when it is decided." *Id.* at 688 (citing 28 U.S.C. § 371(b) (1954)). The Court opined, in part, "under existing legislation a retired circuit judge is without power to participate in an *en banc* Court of Appeals determination." *Id.* at 691.

The Court has said § 46,

> vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.

W. P. R. Corp. v. W. P. R. Co., 345 U.S. 247, 250 (1953). The Court has also said, "[*e*]*n banc* courts are the exception, not the rule [and are] convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *Am.-Foreign S.S. Corp*, 363 U.S. at 689. Moreover,

> [w]hen such circumstances appear, *en banc* determinations make "for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these

> courts are the courts of last resort in the run of ordinary cases."

Id. (citing *Textile Mills Corp. v. Commissioner*, 314 U.S. 326, 334-335 (1941)). "The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions." *Id.* at 689-90 (citation omitted; "in banc" in original).

"[A] case or controversy is 'determined' when it is decided." *Yovino v. Rizo*, 586 U.S. 181, 185 (2019) (per curiam) (citing *Am.-Foreign S.S. Corp*, 363 U.S. at 688). Where a circuit judge is neither in active service (e.g., due to being deceased) nor in senior status, the judge is "without power to participate in the *en banc* court's decision at the time was rendered." *Id.* A circuit court errs when it counts a deceased judge as a member of the majority; "federal judges are appointed for life, not for eternity." *Id.* at 186.

In *Yovino*, the circuit judge who authored the majority opinion died prior to the decision's publication. *Id.* at 182. Because the Ninth Circuit "deemed [the deceased judge's] opinion to be a majority opinion, . . . it [would constitute] a precedent that all future . . . panels must follow." *Id.* at 183. The Supreme Court found that the "[deceased judge's" vote made a difference. *Id.* The Court was not aware of "any rule or decision of the Ninth Circuit that renders judges' votes and opinions immutable at some point in time prior to their public release[, and] it is

generally understood that a judge may change his or her position up to the very moment when a decision is released." *Id.* at 184. The Court found the Ninth Circuit's actions in *Yovino* were unlawful because 10 U.S.C. § 46(d) defined a "quorum" as "[a] majority of the number of judges authorized to constitute a court or panel thereof," and the Court was "aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time." *Id.* at 186.

The Fourth Circuit has previously found it had erred in permitting a senior judge to sit on an *en banc* hearing. *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980), *cert. denied*, 446 U.S. 951 (1980). The court maintained what it deemed the steadfast remedy by striking its previous judgment and ordering re-argument. *See id.* (citing *Am.-Foreign S.S. Corp*, 363 U.S. 685) ("We think it significant that when American-Foreign Steamship was remanded, the Second Circuit reconsidered the case *in banc*, and this is the procedure we too have followed."). In crafting its remedy, the Fourth Circuit noted the participation of the senior judge was of "great significance," because the *en banc* court split 4-3 with the senior judge voting in the majority. *Id.* at 1119 (spelling "in banc" in original).

Summary of Argument

When the Army Court allowed judges no longer in regular active service—and thereby without power to participate in the *en banc* proceedings below—to author an opinion, it unlawfully conducted its *en banc* review and failed to "secure uniformity and continuity in its decisions." *See Am.-Foreign S.S. Corp*, 363 U.S. at 690.

First, the decision to grant *en banc* itself was an abuse of discretion. Comparing the multiple opinions, and as noted by the dissents, the judges did not disagree about the law; some judges that did not participate in the original decision disagreed with the discretion exercised by the original panel, even though the decision was within the range of rational choices. Thus, the Army Court erred by granting *en banc* consideration, over objection, in the first place.

Second, the Army Court unlawfully conducted its *en banc* review because 1) Senior Judge Walker and Chief Judge Smawley were not in regular active service at the time of the opinion's publication and accordingly were without power to participate in the *en banc* determination; 2) Senior Judge Walker was the majority opinion's author and a senior judge; along with the Chief Judge's participation, it's impossible to carve out their influence on the majority's decision making; and 3) there is material prejudice to appellant's substantial rights because the remaining

votes may have constituted a divided vote as to what the Army Court considers excessive delay.

By allowing Senior Judge Walker to participate in the *en banc* determination, the Army Court "deemed [Senior Judge Walker's] opinion to be a majority opinion, which means that it constitutes a precedent that all future [Army Court] panels must follow." *See Yovino*, 586 U.S. at 183. Without Senior Judge Walker and Chief Judge Smawley's votes, the majority opinion would have been joined in full by only three of the six members of the *en banc* court who were still in regular active service on the date the decision was filed, calling into question whether majority opinion was truly supported by a majority of the court when Judge Morris disagreed as to whether the delay was excessive under the first prong of *Barker*. Both Chief Judge Smawley and Senior Judge Walker's participation undeniably "made a difference" or was of "great significance" in the outcome. *See id.*; *see also Uzzell*, 625 F.2d at 1119. Moreso in Senior Judge Walker's circumstances because she was both the majority opinion's author and held a senior judge position; her influence cannot be untethered from the result here where the Chief Judge also joined in the majority opinion. As there remains a question as to what the Army Court decided *en banc* and what it considers excessive delay—thereby calling into question the "uniformity and continuity in its

decisions"—the appellant has suffered material prejudice to his substantial rights. *See Am.-Foreign S.S. Corp*, 363 U.S. at 689-90.

Accordingly, this Court should vacate the decision and remand the case to the Army Court.

Argument

A. Senior Judge Walker and Chief Judge Smawley were not in regular active service when the Army Court issued its decision.

Only members of the Army Court who are in regular active service may be counted towards a quorum when sitting in panel or *en banc*. JT. CT. CRIM. APP. R. 7(a). A judge is in regular active service when *assigned to a service court* and meets the criteria listed above in JT. CT. CRIM. APP. R. 7(c). At publication, neither Senior Judge Walker nor Chief Judge Smawley were *judges assigned to a service court,* and as reflected in the record, Senior Judge Walker was retired at the time of the opinion's publication, meaning she was no longer in the active component of the armed forces. Both Panel Composition Memorandums contained in Appendix A demonstrate that neither judge was assigned to the Army Court at the time of the opinion's publication; indeed, Chief Judge Smawley left the court at least 106 days prior to the decision, and Senior Judge Walker left at least 36 days prior, had retired, and was employed by this Court. Accordingly,

neither judge was in regular active service when the Army Court published its opinion.

B. A case or controversy is determined when it is decided; neither Senior Judge Walker nor Chief Judge Smawley had the power to participate in the Army Court's *en banc* decision at the time of its publication.

Unlike Article III appellate courts, service court judges cannot take senior status. *See* 28 U.S.C. § 46 (1996). To be sure, the Army Court's opinion notes that Senior Judge Walker and Chief Judge Smawley took final action on this case prior to the former's retirement and prior to the latter's departure from the Army Court. *Abdullah*, ___ M.J.___, 2024 CCA LEXIS 479, at *1 n.1. But the notion that "the votes and opinions in the *en banc* case were inalterably fixed [at that time and] prior to the date on which the decision was 'filed,' entered on the docket, and released to the public . . . is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent." *See Yovino*, 586 U.S. at 184. Moreover, because "a judge may change his or her position up to the very moment when a decision is released," nothing "renders judges' votes and opinions immutable at some point in time prior to their public release." *Id.* Accordingly, because neither judge in this case was in regular active service at the date of publication, neither judge had the power to participate in the Army Court's *en banc* determination.

C. The Army Court unlawfully counted Senior Judge Walker and Chief Judge Smawley's votes; less than a quorum of the remaining six judges may have joined in the Army Court's binding decision.

When a judge assigned to a service court leaves the court due to retirement, permanent change of station, or other reason, the judge is no longer in regular active service. This is analogous to a federal circuit judge dying under the current version of 28 U.S.C. § 46; a military appellate judge may no longer participate in cases or controversies after leaving the court. Echoing the Court in *Yovino*, "[military appellate judges] are appointed for [an appropriate minimum period], not for eternity." *See id.* at 186; *see also* Article 66(a)(1), UCMJ, 10 U.S.C. § 866(a)(1) (2022). Without the votes of the judges who left regular active service prior to the opinion's publication, the Army Court may not have had a quorum joining in its binding decision: only three judges joined fully in the majority opinion, while one concurred in part and dissented in part, and the remaining two dissented. Like the concurring judges in *Yovino*, here, Judge Morris concurred with the majority in part, apparently doing so for a different reason. *Yovino*, 586 U.S. at 183; *see also Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). Accordingly, because the majority opinion may not have been endorsed by a majority of the Army Court *en banc* panel in regular active service, there may have been no quorum.

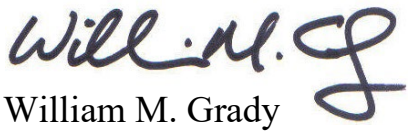
D. Chief Judge Smawley's participation and Senior Judge Walker's influence during her participation in the *en banc* proceedings as both the author of the majority opinion and in her capacity as a senior judge cannot be uncoupled from the unfavorable result for appellant.

Both Chief Judge Smawley and Senior Judge Walker's participation undeniably "made a difference" or was of "great significance" in the outcome here; it would be inappropriately speculative to assume the result would have been the same in their absence. Did one or both judges participate in internal deliberations and circulation of the opinion following their leaving the Army Court when they no longer had the power to participate? And Senior Judge Walker participated as both the author of the majority Army Court's precedential opinion and as a senior judge. In other words, the *participation* of both judges—not just their votes—made a difference in the unfavorable result for appellant.

* * *

Conclusion

For the foregoing reasons, appellant respectfully requests this Court vacate the Army Court's *en banc* decision and remand.



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Appendix A: Army Court Decisions and Memoranda

United States v. Abdullah

United States Army Court of Criminal Appeals

November 5, 2024, Decided

ARMY 20230223

Reporter
2024 CCA LEXIS 479 *; __ M.J. __; 2024 WL 4684478

UNITED STATES, Appellee v. Sergeant DAYTRON ABDULLAH, United States Army, Appellant

Subsequent History: Motion granted by *United States v. Daytron Abdullah, 2025 CAAF LEXIS 4 (C.M.A., Jan. 3, 2025)*

Petition for review filed by *United States v. Daytron Abdullah, 2025 CAAF LEXIS 1 (C.M.A., Jan. 3, 2025)*

Prior History: [*1] Headquarters, Fort Carson. Jacqueline L. Emanuel, Military Judge, Lieutenant Colonel Kenton E. Spiegler, Acting Staff Judge Advocate (pretrial), Lieutenant Colonel Abraham L. Young, Acting Staff Judge Advocate (post-trial).

United States v. Abdullah, 2024 CCA LEXIS 199, 2024 WL 2045391 (A.C.C.A., Apr. 30, 2024)

Counsel: For Appellant: Colonel Philip M. Staten, JA; Major Mitchell D. Herniak, JA; Major Amanda Williams, JA (on brief); Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Mitchell D. Herniak, JA; Major Amanda Williams, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA, (on brief).

Judges: Before the Court Sitting En Banc[1].

WALKER, Senior Judge. Chief Judge SMAWLEY, Senior Judge FLEMING, Judge POND, and Judge PARKER concur. MORRIS, Judge, concurring in part. ARGUELLES, Judge, dissenting.

Opinion by: WALKER

Opinion

OPINION OF THE COURT ON RECONSIDERATION[2]

WALKER, Senior Judge:

Appellant asserts he is entitled to relief for 163 days of post-trial delay. Having considered the entire record, we disagree. Even if we were to conclude that 163 days constitutes excessive post-trial delay in this case, we find: (1) it was not "so egregious that tolerating it would adversely affect the public's perception **[*2]** of the fairness and integrity of the military justice system" *United States v. Anderson, 82 M.J. 82, 87 (C.A.A.F. 2022)* (citation omitted); and (2) setting aside appellant's bad conduct discharge is not *appropriate relief* under *Article 66(d)*.

BACKGROUND

Appellant's course of misconduct involved multiple incidents in which he demonstrated a disregard for military authority, military regulations, and lawful

[1] Chief Judge SMAWLEY took final action on this case prior to his departure from the court. Judge POND took final action on this case prior to her designation as Chief Judge. Senior Judge WALKER took final action in this case prior to her retirement. Judge ARGUELLES decided this case while on active duty.

[2] On 30 May 2024, appellee filed a Suggestion for Reconsideration En Banc. The court adopted appellee's Suggestion for Reconsideration En Banc on 14 June 2024.

military orders.

On 21 October 2022, during a unit Halloween event for children, appellant was apprehended for driving under the influence (DUI) of alcohol on Fort Carson. A breathalyzer test established that appellant's breath alcohol concentration was 0.133. Appellant received a General Officer Memorandum of Reprimand for this incident.

Less than a month later, on 15 November 2022, after providing a urine sample and knowing that it would test positive, appellant left his unit without proper authority and texted his supervisor that "[a]fter yesterday I will no longer be coming in formation none of that. I'm done [ ] Do what y'all gotta do, I'm done." Appellant remained absent from his unit until he voluntarily returned on 5 January 2023.

The day after appellant returned to his unit, his troop commander ordered him not to leave the limits of Fort Carson, **[*3]** not to consume alcohol, and to comply with additional restrictions. Additionally, the Fort Carson garrison commander had prohibited appellant from driving on the Fort Carson installation because of his prior DUI. A mere two weeks later, on 19 January 2023, military police detained appellant as he attempted to enter Fort Carson because he was driving an unregistered vehicle with expired license plates, was not in possession of a valid driver's license, could not provide proof of insurance, and was in possession of alcohol.

On 2 February 2023, when appellant failed to report for duty at his unit, his First Sergeant went to appellant's barracks room to check on him. Upon approaching appellant's barracks room, the First Sergeant detected the odor of marijuana coming from appellant's room. After obtaining a valid search authorization, law enforcement agents discovered alcohol and a hand-rolled cigarette that tested presumptively positive for marijuana by a Narcotics Identification Kit.

On 22 February 2023, knowing the command would deny his leave request, appellant traveled to Texas for five days without permission or authority to do so. After he returned and marijuana was discovered in his **[*4]** barracks room, appellant unsuccessfully attempted to flee from his escorts by running through his unit's operations facility and scaling a motor vehicle pool fence.

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of desertion for his absence from November 2022 until January 2023, one specification of absence without leave for his five day absence in February 2023, one specification of disobeying a superior commissioned officer for his failure to comply with his commander's order not to leave the limits of the Fort Carson installation, and one specification of 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].

At sentencing, the government offered into evidence appellant's Enlisted Record Brief, his Soldier Talent Profile, and a General Officer Memorandum of Reprimand for the driving under the influence offense in October of 2022. Appellant's defense counsel provided evidence in mitigation and extenuation through witness testimony. An investigator with the Fort Carson Criminal Investigation Division testified about appellant's voluntary cooperation in another drug investigation without any promised **[*5]** benefit in return. Notwithstanding, on cross-examination, the investigator noted that appellant could only provide the name of one military individual. Appellant's former team leader described appellant by saying "[t]o this day, I have not had a soldier that I would say has been better performing th[a]n [appellant] was." This same witness also testified as to his knowledge of the importance of appellant's wife and daughter in appellant's life when the two of them were stationed together in Hawaii. Although appellant's wife claimed she would support appellant's Army career and follow him to his next duty station, when the transfer orders to Fort

Carson arrived, she instead remained in Hawaii and initiated divorce and child custody proceedings. Finally, appellant called his former boxing coach and appellant's brother who testified as to appellant's childhood, good character, and "great" rehabilitative potential. Appellant also gave an unsworn statement in which he took full responsibility for his actions and offered a heartfelt apology. Appellant explained how he attained the rank of Sergeant in three years at his first duty station in Hawaii and how after he got to Fort Carson with **[*6]** his family issues, "things started to fall apart in [his] career."

Pursuant to the terms and conditions of the Plea Agreement, the military judge sentenced appellant to a bad-conduct discharge, confinement for 90 days, and reduction to the grade of E-1.[3]

This one-day trial took place on 20 April 2023. Appellant submitted matters under Rule for Courts-Martial [R.C.M.] 1106 on 5 May 2023. On 8 June 2023, the court reporter forwarded the record of trial (ROT), a mere 100 pages, to the trial counsel for his review, which he completed the same day. On 13 July 2023, over two months after appellant submitted post-trial matters, the convening authority took no action on the findings or the sentence. Another 58 days passed before the military judge completed the Entry of Judgment [EOJ] on 8 September 2023. The military judge received the record for her certification on 11 September 2023, 96 days after the trial counsel completed his review. The military judge completed her review and certification 11 days later, on 22 September 2023. This court received the ROT on 30 September 2023, 163 days after the announcement of sentence but only 22 days after Entry of Judgment.

The Office of the Staff Judge Advocate (OSJA) included a Post-Trial **[*7]** Processing Timeline memorandum ("memo") in the record of trial, dated 27 September 2023, signed by the Post-Trial Non-Commissioned Officer in Charge (NCOIC), which in total stated:

> a. Personnel Changeover and Experience. The Post-Trial section received a new Staff Sergeant in April 2023. Between the months of April and August 2023, the civilian post-trial paralegal was tasked to train the new NCO within post-trial matters. Both Post-Trial team members are dually slotted in Magistrate Court and General Crime sections within the OSJA. All the above *may* have hindered the processing time for U.S. v. Abdullah while balancing daily tasks within the other sections. (emphasis added).
>
> b. Operational Tempo. There was an increase in court-martials between the months of May through August. The post-trial team worked diligently to meet all post-trial requirements for pending Courts-Martials as well as those that were back logged.

LAW AND DISCUSSION

We review this case under *Article 66, UCMJ*, upon the government's request for reconsideration. We granted the government's request for reconsideration, en banc, to address appellant's sole assignment of error asserting unreasonable post-trial delay.

We acknowledge that a **[*8]** decision by a panel of this court was vacated upon the court granting the government's request to reconsider that panel's decision en banc. As such, this court has not yet completed its *Article 66, UCMJ*, review of appellant's case. During this court's consideration of

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[3] Although the military judge discussed awarding appellant 51 days of pretrial confinement credit during the plea colloquy, when she announced her sentence on the record, she neglected to say anything about the pretrial confinement credit. The Statement of Trial Results, however, does correctly reflect an award of 51 days of pretrial credit. Appellant is not asserting that he did not receive this credit, but to the extent there is any confusion, we confirm that appellant's sentence should properly reflect the award of 51 days of pretrial confinement credit. *See United States v. McDonald, ARMY 9900233, 2000 CCA LEXIS 330 (Army Ct. Crim. App. 13 Jul. 2000)* (mem. op.).

appellant's case en banc, members of the dissent proposed specifying whether appellant set up matters inconsistent with his guilty plea based upon his statements that he left his unit due to a "hostile work environment" and "was in a terrible mental space. . .and was considering suicide at the time" and if so, whether the military judge abused his discretion in accepting appellant's plea. Appellant did not raise this issue in his pleadings.[4] Even though not raised by appellant, we acknowledge this court has a responsibility to only affirm those findings that are correct in law and fact pursuant to *Article 66(d)(1), UCMJ*. Satisfied that the military judge did not abuse her discretion in accepting appellant's guilty plea, a majority of the court declined to reconsider the providence of appellant's plea and elected to only address the sole issue of post-trial delay in its reconsideration en banc.

We review allegations of unreasonable post-trial delay de novo. **[*9]** *Anderson, 82 M.J. at 85* (citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

The Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the *Due Process Clause of the Fifth Amendment*; and (2) the statutory basis under *Article 66* when there is no showing of "actual prejudice." *Anderson, 82 M.J. at 85* (quoting *Toohey v. United States, 60 M.J. 100, 101-02 (C.A.A.F. 2004)* (holding the right to timely appellate review has both statutory roots under *Article 66* and constitutional roots under the *Due Process Clause*)).[5]

Our superior court adopted the four factors from *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, a *Sixth Amendment* speedy trial case, in order to provide a framework for analyzing post-trial delay and due process: (1) length of delay; (2) reasons for the delay; (3) appellant's assertion of the right to timely review and appeal; and, (4) prejudice. *Moreno, 63 M.J. at 135*. In *United States v. Toohey*, our superior court further held: "[N]o single factor [is] required to find that post-trial delay constitutes a due process violation." *63 M.J. 353, 361 (Toohey II) (C.A.A.F. 2006)* (quoting *Moreno, 63 M.J. at 136*) (citing *Barker, 407 U.S. at 533*). Our superior court recently affirmed the application of these factors in analyzing post-trial delay and due process in *Anderson. 82 M.J. at 85*.

With respect to the length of the delay, in *Moreno*, our superior court established a presumption of reasonableness for post-trial processing where the convening **[*10]** authority took initial post-trial action within 120 days of trial and the case was docketed with this court 30 days later. *63 M.J. at 142*. In light of the changes implemented by MJA 2016, we modified the *Moreno* timeline in *United States v. Brown* by holding that "this court will presume unreasonable delay in cases where more than 150 days elapse between final adjournment and docketing with this court." *81 M.J. at 510*. In

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[4] There are many reasons why appellants may not seek to challenge the providence of their guilty pleas upon appellate review. Based on his pleas alone, appellant could have been sentenced to a total confinement of ten and a half years and a dishonorable discharge, a potential sentence much harsher than that imposed by his plea. After reviewing the record in its entirety, we are satisfied that the military judge did not abuse her discretion in accepting appellant's plea.

[5] Prior to the implementation of the *Military Justice Act of 2016 (MJA 2016)* in January 2019, *Article 66(d)(1), UCMJ*, granted this court the statutory authority to "affirm . . . only the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." The *MJA 2016* amended *Article 66* to add a new *section (d)(2)*, which provides in pertinent part that this court "may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record . . ." There is nothing, however, in the plain language of *Article 66(d)(2)* indicating or in any way suggesting that Congress sought to: (1) overrule *Toohey* or otherwise alter the use of the *Barker* test to analyze a Due Process claim as set forth below; or, (2) overrule CAAF precedent recognizing our discretion to afford relief under *Article 66(d)(1)*. *See United States v. Brown, 81 M.J. 507, 511 n.2 (Army Ct. Crim. App. 2021)* ("We reject any argument that *Article 66(d)(2), UCMJ*, somehow cabins our broad and well-established sentence appropriateness authority under *Article 66(d)(1), UCMJ*, to provide relief for dilatory post-trial processing occurring at other phases of a court-martial.").

Brown, we also reiterated that "just as it was under the old procedures, staff judge advocates are advised to explain post-trial processing delays . . . ." *Id. at 511*.

In *United States v. Winfield*, issued one week after this case adjourned, we abandoned *Brown's* 150-day time limit, finding instead that some cases might justifiably take longer than 150 days to process for review and that others should take significantly less time. *83 M.J. 662, 665 (Army Ct. Crim. App. 2023)*. Instead of imposing a bright-line time limit, we reaffirmed the requirement for an explanation as set forth in *Brown* and held that in determining the reasonableness of the delay, "we will scrutinize even more closely the unit-level explanations for post-trial processing delays." *Id.* As we further explained in *Winfield*, "we are consistently interested to know about a case's transcript **[*11]** length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter availability and utilization for transcription, and resource shortfalls (e.g., insufficient throughput capacity despite court reporter regionalization)." *Id. at 666* (emphasis in original). When considering whether a delay is excessive, this court broadly focuses "on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay." *Id.* However, when considering memorialized justifications for delay, the Court of Appeals for the Armed Forces has held that "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." *United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011)*.

We not only re-emphasize our interest in the Staff Judge Advocate (SJA) providing an explanation for periods of unexplainable post-trial delay, but we also take this opportunity to re-emphasize the importance of providing a detailed explanation and something more than a mere recitation of the timeline of post-trial **[*12]** events. A memorandum with nothing more than a mere timeline and scant information explaining periods of significant delay is unhelpful to this court and will not weigh in favor of the government in our analysis of post-trial delay. Further, the government should never presume on its own what constitutes excessive post-trial delay and fail to provide a post-trial processing memorandum. If there are periods of time in which it may appear there is a lack of reasonable diligence in the post-trial processing of a case, the government would be well-served to provide a memorandum explaining those periods. For example, in this case, it took the convening authority 69 days after the submission of appellant's post-trial matters to act on appellant's sentence and another 21 days to complete the ministerial task of transmitting a draft Entry of Judgment (EOJ) to a military judge after the convening authority's action. The post-trial processing memo provides no explanation for these periods of time. The SJA, responsible for advising the convening authority on referral of charges and post-trial action on the sentence, is ultimately responsible for ensuring efficient post-trial processing. A responsible **[*13]** party within the OSJA with supervisory oversight of the post-trial process, acting on behalf of the convening authority, should provide a detailed explanation for lengthy lapses of progress in post-trial processing. Without such an explanation, this court lacks potentially favorable information for the government when considering the totality of the circumstances that may justify periods of delay in post-trial processing.

Appellant did not assert a due process violation for unreasonable post-trial delay. However, we will address whether there was a due process violation given that this court agreed to reconsider its original holding that the length of delay in this case amounted to a due process violation. *United States v. Abdullah, ARMY 20230223, 2024 CCA LEXIS 199, at *11-12 (Army Ct. Crim. App. 30 Apr. 2024)* (mem. op.). We find no prejudice under the fourth

Barker factor.[6] Nor do we find, "in balancing the other three factors, that the [post-trial] delay was so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson, 82 M.J. at 88*. We will address each of the three remaining *Barker* factors, in turn.

While there were discrete periods of time during the post-trial processing of this case that were not **[*14]** the model of efficiency, we do not find that the 163 days of post-trial processing weighs in appellant's favor. We note that there is no explanation of why it took the convening authority 69 days to take no action on appellant's sentence after the submission of post-trial matters. Without any explanation, we find that the government could have moved with greater efficiency in obtaining the convening authority's decision. We also find that it should not take 21 days, without exceptional circumstances, to transmit the convening authority's action to the military judge for purposes of completing the EOJ. We recognize that the transcript was only 100 pages with four government exhibits and four appellate exhibits. However, in considering the 163 days in its entirety, we do not find that this length of delay is so egregious that it weighs in appellant's favor.

With respect to the purported reasons for the delay, we emphasized in *Winfield* the importance that the SJA provide an explanation for any apparent delay. *83 M.J. at 665-66*. Specifically, we noted our interest in the length of the transcript, competing requirements (e.g., operational exigencies, in-court coverage), military judge availability, court **[*15]** reporter availability and utilization for transcription, and resource shortfalls. *Id. at 666*. We do not find the post-trial processing memo provided by the OSJA adequately explains the periods of time in which the processing of this case lagged. As previously noted, there is no explanation for the 21 days it took to provide the EOJ to the military judge after the convening authority took no action in the case. The ministerial task of drafting the EOJ and transmitting it to the military judge should not take 21 days. Additionally, there is no explanation for the 96 days it took to provide the transcript to the military judge after trial counsel completed reviewing the transcript. The memo does not even address, much less make any effort to give a specific reason for, the 96-day delay. Instead, in two very short paragraphs, it generally describes personnel training and mission issues occurring during appellant's post-trial processing before stating "all of the above *may* have hindered the processing time" in this case. The memo concludes by asserting that there was an increase in the frequency of courts-martial between the months of May and August. Unfortunately, without receiving specific data, **[*16]** this court cannot meaningfully gauge how many courts-martial were processed at Fort Carson in the summer of 2023. In accounting for delays, we harken to our superior court's jurisprudence on the matter that "personnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay." *Arriaga, 70 M.J. at 57*. As such, the second *Barker* factor, the reasons for the delay, weighs heavily in favor of appellant. *See also United States v. Canchola, 64 M.J. 245, 247 (C.A.A.F. 2007)* ("However, a general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government.").

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[6] We note that this court concluded there was no prejudice under the fourth *Barker* factor in our original decision in this case. In assessing the fourth *Barker* factor of prejudice, we consider 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)*). The first sub-factor is directly related to the success or failure of appellant's substantive appeal, and the second sub-factor requires appellant to show particularized anxiety that is distinguishable from the normal anxiety of waiting for an appellate decision. *Id. at 139-40*. Applied in this case, because appellant does not raise any substantive issues on appeal other than post-trial delay and has not demonstrated any "particularized" anxiety, the fourth *Barker* factor also weighs in favor of the government.

As to the third *Barker* factor, because appellant did not assert his right to a timely review and appeal, this factor weighs in favor of the government.

When there is no finding of prejudice under the fourth *Barker* factor, as is the case here, a due process violation only occurs when "in balancing the three other 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." *Anderson, 82 M.J. at 87* (citing *Toohey, 63 M.J. at 362*).

We respectfully disagree with our colleagues **[*17]** in the dissent that unique facts and circumstances exist in this case that would affect the public's perception of fairness and integrity of the military justice system such that a due process violation occurred in this case. First, we do not find that the post-trial delay of 163 days is so extreme that the delay alone would negatively impact the public's perception of our military justice system. There is nothing unique about the length of the post-trial delay in this case. In fact, we find the length of the post-trial delay in this case to be within the range of average post-trial delay. Second, we disagree with the dissent's view that appellant presented a compelling sentencing case. While appellant provided information in mitigation and extenuation through testimony from his brother, his boxing coach, a former team leader, and an investigator as to appellant's assistance in a drug investigation, we do not find that there was anything extraordinary presented that would render appellant's sentencing case unique or compelling. Additionally, we disagree with the dissent's reliance upon there being no identifiable victim in this case as a unique fact upon which to justify the extraordinary **[*18]** relief of disapproving a punitive discharge, particularly one bargained for by both parties. While we concur that there was no crime victim in this case as defined by R.C.M. 1001(c)(2),[7] we find appellant's misconduct inconsistent with the requirement of good order and discipline and efficiency and effectiveness in the appellant's unit. Our military justice system, based in Article I of the U.S. Constitution, is a disciplinary system the purpose of which is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *Manual for Courts-Martial, United States* (2019 ed.) *[MCM]*, pt. I, ¶3. Appellant's continued disregard for lawful military authority and regulations on multiple occasions, particularly as a noncommissioned officer, was significant and certainly not the behavior expected of a noncommissioned officer. For all these reasons, we find there is nothing unique about this case that would have an adverse impact on the public's perception of the fairness and integrity of the military justice system.

We also disagree with the dissent that the government continues to blatantly violate well-established precedent as set by this court **[*19]** in *Winfield*. In a significant majority of the post-trial delay cases that have come before this court since our decision in *Winfield*, the government included a post-trial processing memorandum in the record of tria1.[8] While those may not be the model of

[7] A crime victim is defined as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules." R.C.M. 1001(c)(2).

[8] See *United States v. Hernandez, ARMY 20210429, 2024 CCA LEXIS 183 (Army Ct. Crim. App. 22 April 2024)* (summ. disp.); *United States v. Amador, ARMY 20220216, 2024 CCA LEXIS 95 (Army Ct. Crim. App. 29 Feb. 2024)* (summ. disp.); *United States v. Anthony, ARMY 20220515, 2024 CCA LEXIS 66 (Army Ct. Crim. App. 7 Feb. 2024)* (summ. disp.); *United States v. Cannion, ARMY 20220366, 2024 CCA LEXIS 26 (Army Ct. Crim. App. 22 Jan. 2024)* (summ. disp.); *United States v. Rouson, ARMY 20220319, 2023 CCA LEXIS 508 (Army Ct. Crim. App. 1 Dec. 2023)* (summ. disp.); *United States v. Wilson, ARMY 20210462, 2023 CCA LEXIS 505 (Army Ct. Crim. App. 29 Nov. 2023)* (summ. disp.); *United States v. Sandoval, ARMY 20220198, 2023 CCA LEXIS 496, (Army Ct. Crim. App. 27 Nov. 2023)* (summ. disp.); *United States v. Dunn, ARMY 20210428, 2023 CCA LEXIS 424 (Army Ct. Crim. App. 3 Oct. 2023)*; *United States v. Reaper, ARMY 20210230, 2023 CCA LEXIS 304 (Army Ct. Crim. App. 14 July 2023)* (summ disp.); *United States v. Brimmer, ARMY 20210622, 2023 CCA LEXIS 253 (Army Ct. Crim. App. 9*

perfection in providing detailed explanations for post-trial processing, the mere fact that the government provides such signals that it is attempting to adhere to *Winfield*.

Even were we to hold that the post-trial delay in this case would adversely impact the public's perception of the fairness and integrity of the military justice system, we would not set aside appellant's punitive discharge. While this court possesses broad discretion in fashioning an appropriate remedy for a constitutional violation, we do not possess unfettered discretion. We are mindful of the fact that the appellant and the convening authority entered into a plea agreement pursuant to R.C.M. 705. The result of the plea negotiations was both parties agreeing that the military judge shall adjudge a bad-conduct discharge in exchange for appellant pleading guilty to only some of the charged offenses and for appellant limiting his terms of confinement for each offense to which **[*20]** he pled guilty. To set aside a punitive discharge altogether, under the circumstances of this case, would undermine the process of an accused entering into a plea agreement with a convening authority — an accused should always enter into a plea agreement with the assumption that the terms are binding and enforceable. *See* *United States v. Smead, 68 M.J. 44, 59 (C.A.A.F. 2009)* ("A pretrial agreement in the military justice system establishes a constitutional contract between the accused and the convening authority."). We note that appellant's requested relief for post-trial delay was a 15-day reduction in his term of confinement, not the setting aside of his punitive discharge. Here, appellant knowingly and voluntarily entered into an agreement for a punitive discharge in exchange for a limitation on his confinement and for the dismissal of several specifications of possession and use of controlled substances. To set aside a punitive discharge under the facts and circumstances of this case would demonstrate a disregard for appellant's agreement with the convening authority and would constitute an abuse of this court's discretion. Even more importantly, we find that setting aside the punitive discharge in this case, given the nature and **[*21]** frequency of appellant's misconduct and his agreement to a punitive discharge, would serve to adversely impact the public's perception of the integrity of the military justice system.

We further note that appellant asserts that this court should grant relief not for a due process violation, but rather because the post-trial delay in this case is excessive under *Article 66(d)(2)*. We disagree with the dissent that setting aside the punitive discharge in this case is appropriate relief whether for a due process violation or an *Article 66(d)(2)* violation. *Article 66(d)(2)* dictates that we "may provide *appropriate* relief' upon a demonstration of "error or excessive delay in the processing of the court-martial" after entry of judgment. *Article 66(d)(2), UCMJ* (emphasis added). *Article 66(d)(2)* leaves the determination as to whether relief is provided, and what type of relief is appropriate, to this court's discretion. Appellant committed multiple incidents of continued misconduct over the course of five months, which included driving while intoxicated, illegal use of a controlled substance, deserting his unit, disobeying a commissioned officer, driving a vehicle without a valid driver's license, registration, or insurance, and possession of a controlled substance in his barrack's **[*22]** room. Appellant's misconduct only ceased once he was placed in pretrial confinement. A bad-conduct discharge is an appropriate characterization of appellant's service given the severity and breadth of his misconduct, even accounting for the mitigation evidence he presented during the presentencing hearing. Therefore, even if we were to find the delay here excessive, we find there is no relief that is *appropriate* under the circumstances of this case.

For all the aforementioned reasons, there was no unreasonable post-trial delay in this case in violation of appellant's due process rights or in violation of *Article 66(d)(2), UCMJ*.

June 2023) (summ. disp.); *United States v. Sepulveda, ARMY 20220241, 2023 CCA LEXIS 223 (Army Ct. Crim. App. 5 May 2023)* (summ. disp.).

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge SMAWLEY, Senior Judge FLEMING, Judge POND, and Judge PARKER concur.

APPENDIX

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before PENLAND, MORRIS, and ARGUELLES[1] Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant DAYTRON ABDULLAH United States Army, Appellant

ARMY 20230223

Headquarters, Fort Carson Jacqueline L. Emanuel, Military Judge Lieutenant Colonel Kenton E. Spiegler, Acting Staff Judge Advocate (pretrial) Lieutenant Colonel Abraham L. Young, Acting Staff Judge Advocate (post-trial)

For Appellant: Colonel **[*23]** Philip M. Staten, JA; Major Mitchell D. Herniak, JA; Major Amanda Williams, JA (on brief); Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Mitchell D. Herniak, JA; Major Amanda Williams, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA, (on brief).

30 April 2024

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of desertion, one specification of absence without leave, one specification of disobeying a superior commissioned officer, and one specification of 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]. Pursuant to the terms and conditions of the Plea Agreement, the military judge sentenced appellant to reduction to the grade of E-1, a bad-conduct discharge, and confinement for 90 days.[2] The convening authority took no action on the findings and sentence.

The case is before this court for review pursuant to *Article 66, UCMJ*. Appellant raises one assignment **[*24]** of error, dilatory post-trial processing, which merits both discussion and relief.[3]

BACKGROUND

[1] Judge ARGUELLES decided this case while on active duty.

[2] Although the military judge discussed awarding appellant 51 days of pretrial confinement credit during the plea colloquy, when she announced her sentence on the record, she neglected to say anything about the pretrial confinement credit. The Statement of Trial Results, however, does correctly reflect an award of 51 days of pretrial credit. Appellant is not asserting that he did not receive this credit, but to the extent there is any confusion, we confirm that appellant's sentence should properly reflect the award of 51 days of pretrial confinement credit. *See* *United States v. McDonald, ARMY 9900233, 2000 CCA LEXIS 330 (Army Ct. Crim. App. 13 Jul. 2000)* (mem. op.).

[3] Block 31 of the Statement of Trial Results incorrectly states appellant suffered a conviction for a crime punishable by imprisonment for a term exceeding one year. We will exercise our discretion to correct this error. *See* Rule for Courts-Martial 1111(c)(2); *United States v. Pennington, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021)* (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents . . . .").

After providing a urine sample in November of 2022, and knowing that it would test positive, appellant left his unit and texted his supervisor that "[a]fter yesterday I will no longer be coming in formation none of that. I'm done [ ] Do what y'all gotta do, I'm done." The day after appellant voluntarily returned to his unit in January, his troop commander ordered him not to leave the limits of Fort Carson or to drink alcohol. Several weeks later military police stopped appellant coming onto Fort Carson in an unregistered vehicle with expired license plates, no valid driver's license, no proof of insurance, and in possession of alcohol.

In February of 2023, knowing the command would deny his leave request, appellant went to Texas for five days without permission or authority to do so. After he returned and marijuana was discovered in his barracks room, appellant unsuccessfully attempted to flee from his escorts by running through his unit's operations facility and scaling a motor vehicle fence.

At sentencing, the Government offered into evidence appellant's Enlisted Record Brief, his Solider **[*25]** Talent Profile, and a General Officer Memorandum of Reprimand for a driving under the influence conviction he received in October of 2022. On the other hand, appellant called a number of witnesses, to include an investigator with the Fort Carson Criminal Investigation Division who testified about appellant's voluntary cooperation in another drug investigation without any promised benefit in return. Appellant also called a former team leader who described him by saying "[t]o this day, I have not had a soldier that I would say has been better performing than [appellant] was." This same witness also testified about how he worked with appellant in Hawaii, and explained that is where appellant met his wife, got married, and had a child. Although appellant's wife at the time claimed she would support his Army career and follow him to his next duty station, when the transfer orders to Fort Carson arrived, she instead remained in Hawaii and initiated divorce and child custody proceedings. Finally, appellant called his former boxing coach, as well as family members who offered compelling testimony as to his good character and "great" rehabilitative potential.

Appellant also gave an unsworn statement **[*26]** in which he took full responsibility for his actions and offered a heartfelt apology. Appellant explained how he attained the rank of E-5 in three years at his first duty station in Hawaii, and how after he got to Fort Carson with his family issues, "things started to fall apart in [his] career."

The Record of Trial (ROT) was 101 pages and took 164 days to process. This one-day trial took place on 20 April 2023, and the court reporter forwarded the ROT to the trial counsel for his review on 8 June 2023. Although the trial counsel completed his review the same day, the military judge did not receive the ROT for her certification until 11 September 2023, *96* days later. The military judge completed her review and certification 11 days later on 22 September 2023. The Office of the Staff Judge Advocate (OSJA) submitted a Post-Trial Processing Timeline memo ("memo") dated 27 September 2023 and signed by the Post-Trial Non-Commissioned Officer in Charge (NCOIC), which in total stated:

> a. Personnel Changeover and Experience. The Post-Trial section received a new Staff Sergeant in April 2023. Between the months of April and August 2023, the civilian post-trial paralegal was tasked to train the **[*27]** new NCO within post-trial matters. Both Post-Trial team members are dually slotted in Magistrate Court and General Crime sections within the OSJA. All the above *may* have hindered the processing time for US v. Abdullah while balancing daily tasks within the other sections. (emphasis added).
>
> b. Operational Tempo. There was an increase in court-martials between the months of May through August. The post-trial team worked diligently to meet all post-trial requirements for pending Courts-Martials as well as those that were back logged.

LAW AND DISCUSSION

We review allegations of unreasonable post-trial delay de novo. *United States v. Anderson, 82 M.J. 82, 85 (C.A.A.F. 2022)* citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

Since at least 2002, the Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the *Due Process Clause of the Fifth Amendment*; and (2) the statutory basis under *Article 66* when there is no showing of "actual prejudice." *See United States v. Grant, 82 M.J. 814, 819 (Army Ct. Crim. App. 2022)* ("Absent a due process violation, we still have authority under *Article 66, UCMJ*, to grant relief 'when appropriate under the circumstances") (citing *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*); *Toohey v. United States, 60 M.J. 100, 101-02 (C.A.A.F. 2004)* (holding the right to timely appellate review has both statutory roots under *Article 66* and constitutional roots under the *Due Process Clause*).[4]

In *Toohey*, the CAAF adopted the four-factor balancing test from *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, to determine whether the post-trial delay constitutes a due process violation: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant. *60 M.J. at 102*.

With respect to the length of the delay, in *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*, the CAAF established a presumption of reasonableness for post-trial processing where the convening authority took initial post-trial action within 120 days of trial, and the case was docketed with this court 30 days later. In light of the changes implemented by MJA 2016, we modified the *Moreno* timeline in *United States v. Brown* by holding that "this court will presume unreasonable delay in cases where more than 150 days elapse between final adjournment and docketing with this court." *81 M.J. 507, 510 (Army Ct. Crim. App. 2021)*. In *Brown* we also reiterated that "just as it was under the old procedures, staff judge advocates are advised to explain post-trial processing delays . . . ." *Id. at 511*.

In *United States v. Winfield*, issued one week after this case adjourned, we overruled *Brown's* 150-day time limit, finding instead that some cases might justifiably take longer than 150 days **[*29]** to process for review, and that others should take significantly less time. *83 M.J. 662, 665 (Army Ct. Crim. App. 2023)*. Instead of imposing a bright-line time limit, we reaffirmed the requirement for an explanation as set forth in *Brown*, and held that in determining the reasonableness of the delay, "we will scrutinize even more closely the unit-level explanations for post-trial processing delays." *Id.* As we further explained in *Winfield*, "we are consistently interested to know about a case's transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter

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[4] Prior to the implementation of the *Military Justice Act of 2016 (MJA 2016)* in January 2019, *Article 66(d)(1)*, UCMJ granted this court the statutory authority to "affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." The *Military Justice Act of 2016* amended *Article 66* to add a new *section (d)(2)*, which provides in pertinent part that this court "may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of a court-martial after the judgment was entered into the record . . . ." There is nothing, however, in the plain language of *Article 66(d)(2)* indicating or in any way suggesting that Congress sought to: (1) overrule *Toohey* ***[*28]*** or otherwise alter the use of the *Barker* test to analyze a Due Process claim as set forth below; or, (2) overrule CAAF precedent recognizing our discretion to afford relief under *Article 66(d)(1)*. *See United States v. Gale, ARMY 20230142, 2024 CCA LEXIS 128 at *3 (Army Ct. Crim. App. 21 Mar 2024)* (summ. disp.) ("While *Article 66(d)(2), UCMJ*, concerns itself solely with delays after the entry of judgment, we continue to 'reject any argument that *Article 66(d)(2), UCMJ*, somehow cabins our broad and well-established sentence appropriateness authority under *Article 66(d)(1), UCMJ*, to provide relief for dilatory post-trial processing occurring at other phases of a court-martial.") *(citing United States v. Brown, 81 M.J. 507, 511 n.2 (Army Ct. Crim. App. 2021)*.

availability and utilization for transcription, and resource shortfalls (e.g., insufficient throughput capacity despite court reporter regionalization)." *Id. at 666* (emphasis in original). Because this is a case that should have taken significantly less than 150 days to process, the length of the post-trial delay weighs heavily in favor of appellant.

Likewise, with respect to the purported reasons for the delay, we have continued to emphasize in both *Winfield*, and in a litany of subsequent unpublished decisions, that we expect the OSJA to provide a detailed explanation for any unwarranted delay. *See, e.g.* ***[*30]*** *United States v. Jefferson, ARMY 20220448, 2023 CCA LEXIS 382 at *4 (Army Ct. Crim. App. 2023 6 Sep. 2023)* (summ. disp.); *United States v. Brimmer, ARMY 20210622, 2023 CCA LEXIS 253 at *5 (Army Ct. Crim. App. 9 Jun 2023)* (summ. disp.); *United States v. Garrigus, ARMY 20220259, 2023 CCA LEXIS 335 at *3 (Army Ct. Crim. App. 9 Aug 2023)* (summ. disp.) ("Either way one looks at it - whether under *Brown* or *Winfield* - units owe an explanation for such slow post-trial action. When those who administer military justice in the field ignore binding precedent, we should not tolerate the resultant strain upon our system's credibility."); *United States v. Pulley, ARMY 20220494, 2023 CCA LEXIS 289 at *2 (Army Ct. Crim. App. 6 Jul. 2023)* (summ. disp.).

As such, we are highly troubled that once again, the purported explanation in this case falls far short of justifying or explaining why it took over three months to transfer a 101-page ROT from trial counsel to the military judge.

First, the memo does not even address, much less make any effort to give a specific reason for, the unacceptable 96-day delay. Instead, in two very short paragraphs it generally describes how the post-Trial section received a new NCO that needed training, and that the team was double-slotted in the Magistrate Court and General Crime sections, before stating "all of the above *may* have hindered the processing time" in this case. The memo then concludes with a second paragraph describing "an increase in court-martials [sic] between the months of May through August," and that the trial team worked diligently to meet its obligations. **[*31]** Unfortunately, the memo provides no specific numbers which would allow us to meaningfully gauge how many courts-martial were processed at Fort Carson in the summer of 2023. Nor does it make any reference to reaching out to other installations either within or outside the circuit for help in addressing the "backlog."

To say the memo falls far short of this court's firmly established requirements is an understatement. As such, the second *Barker* factor, the reasons for the delay, weighs heavily in favor of appellant. *See United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011)* ("[P]ersonnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay"); *Winfield, 83 M.J. at 665-66* ("Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal"); *United States v. Jackson, 74 M.J. 710, 719 (Army Ct. Crim. App. 2015)* (rejecting the government's explanation for the delay based on "court reporter shortages and high number of cases tried"); *United States v. Canchola, 64 M.J. 245, 247 (C.A.A.F. 2007)* ("However, a general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government.")

Along the same lines, and further highlighting **[*32]** the OSJA's apparent lack of interest in addressing and fixing these recurring post-trial delay issues, is the fact that preparation of the memo in this case was delegated all the way down to the E-6 level. An SJA may delegate authority to write such a document for submission to this court, but they remain responsible for its content.

As to the third *Barker* factor, because appellant did

not assert his right to a timely appeal, this factor weighs in favor of the government.

In assessing the fourth *Barker* factor of prejudice, we consider 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)*. The first sub-factor is directly related to the success or failure of appellant's substantive appeal, and the second sub-factor requires appellant to show particularized anxiety that is distinguishable from the normal anxiety of waiting for an appellate decision. *Id. at 139-40*. Applied in this case, because appellant does **[*33]** not raise any substantive issues on appeal other than post-trial delay, and has not demonstrated any "particularized" anxiety, the fourth *Barker* factor also weighs in favor of the government.

When there is no finding of prejudice under the fourth *Barker* factor, as is the case here, a due process violation only occurs when "in balancing the three other 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." *Anderson, 82 M.J. at 87* citing *Toohey, 63 M.J. at 362*. This is yet another such a case.

While we recognize that this court has not granted relief for similar delays in other cases, given the unique facts and circumstances of this case, to include the very strong sentencing case put on by appellant and the fact that the offenses at issue do not have any identifiable individual victims, we find that because the government's continued, blatant violation of our well-established precedent adversely affects the "public's perception of fairness and the integrity of the military justice system," relief is justified under the *Due Process Clause*. *See Toohey, 63 M.J. at 362*. For all of the same reasons, the post-trial delay was not harmless beyond a reasonable doubt. *See* ***[*34]*** *United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006)* ("In determining whether relief is warranted for a due process denial of speedy review and appeal, we will consider the totality of the circumstances in the particular case.").

For all of the same reasons, we find relief is also warranted under *Article 66(d)(1)*.

CONCLUSION

Upon consideration of the entire record, the finding of guilty is AFFIRMED. Only so much of the sentence extending to confinement for ninety days is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored.

Senior Judge PENLAND concurs.

MORRIS, Judge, dissenting in part.

I agree with my colleagues that the post-trial delay, specifically the unexplained 96 days the government took to forward the record from the trial counsel to the military judge, was excessive. However, I would not find a violation of the *Due Process Clause of the Fifth Amendment*, because appellant failed to assert any prejudice and I do not find the delay so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. *U.S. v. Anderson, 82 M.J. 82, 87 (C.A.A.F. 2022)* (citing *Toohey, 63 M.J. at 362*). When factoring in the timing of this case, which adjourned prior to this Court's decision **[*35]** in *Winfield*, the government's slow processing is less blatant disregard of precedent, than it is an indication they were slow to implement the necessary changes to their post-trial processes. On the basis of the entire record, factoring in the serious offenses and the failure to assert any prejudice, I find the sentence

appropriate and would not grant any sentencing relief, and therefore I dissent in part.

Concur by: MORRIS (In Part)

Concur

MORRIS, Judge, concurring in part.

While I agree with my colleagues in the majority that the post-trial delay in this case did not violate the *Due Process Clause of the Fifth Amendment* or *Article 66(d)(2)*, I write separately because I would have found the 163-days of post-trial delay excessive and weighed in favor of appellant under prong one of the *Barker* analysis. In *Winfield*, when this court overruled *Brown's* 150-day timeline, we acknowledged that "some cases justifiably take longer than 150 days to process for appellate review. Others should take significantly less time." *Id.* at 665. By deciding that 163 days to process a record with a 100-page transcript that lacked any complex legal issues or errors and, minimal exhibits was not excessive, the majority has rendered this court's opinion that some cases should take significantly **[*36]** less time, meaningless.

Dissent by: ARGUELLES; PENLAND

Dissent

ARGUELLES, Judge, dissenting,

I agree with the majority's conclusions that the Staff Judge Advocate (SJA) is ultimately responsible for the explanation for delays in the post-trial process, and that the post-trial processing memorandum in this case is inadequate. I part ways with the majority, however, as to the nature of the relief warranted.

Contrary to what seems to be the focus of the majority opinion, this case has little to do with the actual length of the post-trial delay (163 days), but rather turns on the government's continued and deliberate failure to abide by the venerable precedent of both this court and the United States Court of Appeals for the Armed Forces (CAAF). Unfortunately, the majority's opinion will serve only to reinforce the message that, notwithstanding the long line of opinions issued by both this court and the CAAF, the government can continue to provide wholly deficient explanations for post-trial delays without any meaningful sanction. Put another way, this court's continued "boy who cried wolf" admonition that "SJA's you need to get your act together and we really mean it this time," while at the same time failing **[*37]** to provide any meaningful sanction, is not likely to instill continued public confidence in the integrity of the military justice system, nor is it likely to compel the government to comply with our prior rulings.

A. Prior Precedent

There is an extensive history of precedent from both this court and the CAAF holding that administrative/manpower constraints are not a justifiable reason for post-trial delay, and that the government is responsible for documenting any delays with thorough, credible, and relevant specificity. For example, in 1990, the CAAF's predecessor Court of Military Appeals held that delays involving clerical tasks were "the least defensible of all" post-trial delays. *United States v. Dunbar, 31 M.J. 70, 73 (C.M.A. 1990)*. In its seminal post-trial delay case issued *eighteen* years ago, the CAAF reiterated: (1) post-trial delays "must be justifiable, case-specific delays supported by the circumstances of that case and not delays based on administrative matters, manpower constraints or the press of other cases;" and (2) convening authorities were expected "to document reasons for delay . . . ." *United States v. Moreno, 63 M.J. 129, 143 (C.A.A.F. 2006)*. *See also United States v. Dearing, 63 M.J. 478, 486 (C.A.A.F. 2006)*. Citing *Moreno*, the CAAF in *United States v. Canchola* held:

> Where operational requirements affect post-

> trial processing **[*38]** delays, staff judge advocates and convening authorities should ensure that those reasons are documented in the record of trial. *Moreno, 63 M.J. at 143*. Reviewing courts can then weigh and balance those reasons in determining whether they provide adequate explanation for any apparent post-trial delays. However, a general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government. *See id. at 137*.

64 M.J. 245, 247 (C.A.A.F. 2007).

In *United States v. Arriaga*, the CAAF again held that "personnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay," and were critical of the fact that the record provided no legitimate reason for the delay. *70 M.J. 51, 57 (C.A.A.F. 2011)* (citing *Moreno, 63 M.J. at 137*). *See also United States v. Jackson, 74 M.J. 710, 719 (Army Ct. Crim. App. 2015)* ("[T]he government's explanations for the delay involve court reporter shortages and high number of cases tried. Our superior court has held 'that personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay.') (citing *Arriaga, 70 M.J. at 57*). More recently, in *United States v. Anderson* the CAAF once again emphasized the government's obligation to provide a "detailed **[*39]** or specific reason for the delay in creating the transcript or authenticating the record of trial." *82 M.J. 82, 86-87 (C.A.A.F. 2022)*.

Lest there be any doubt about the need for the government to provide detailed explanations for post-trial delay, just last year in *United States v. Winfield*, this court held:

> [W]e will scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing, including those less than 150 days. Staff judge advocates who decline to memorialize delays with *thorough, credible, and relevant specificity do so at the peril of their unit's cases on appeal*.

83 M.J. 662, 665-66 (Army Ct. Crim. App. 2023) (emphasis added). Further highlighting the need for a detailed explanation, we explained in *Winfield* that "we are consistently interested to know about a case's transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter availability and utilization for transcription, and resource shortfalls (e.g., insufficient throughput capacity despite court reporter regionalization)." *Id. at 666* (emphasis in original). A concurring opinion reiterated that "the chronology for each case should account for any lengthy **[*40]** processing period with a detailed, original account of all relevant circumstances," and cited *Canchola* for the principle that "staff judge advocates and convening authorities should ensure the reasons for delay *are documented in the record of trial."* *Id. at 667-68* (emphasis in original).

Subsequent to the publication of *Winfield* and *prior* to the date of the post-trial memorandum in this case, this court issued no less than four decisions which reiterated the requirement for a detailed post-trial delay explanation. *See, e.g. United States v. Jefferson, ARMY 20220448, 2023 CCA LEXIS 382, at *4 (Army Ct. Crim. App. 6 Sep. 2023)* (summ. disp.); *United States v. Brimmer, ARMY 20210622, 2023 CCA LEXIS 253, at *5-6 (Army Ct. Crim. App. 9 Jun 2023)* (summ. disp.); *United States v. Garrigus, ARMY 20220259, 2023 CCA LEXIS 335, at *3 (Army Ct. Crim. App. 9 Aug 2023)* (summ. disp.) ("Either way one looks at it - whether under *Brown* or *Winfield* - units owe an explanation for such slow post-trial action. When those who administer military justice in the field ignore binding precedent, we should not tolerate the resultant strain upon our system's credibility."); *United States v. Pulley, ARMY 20220494, 2023 CCA LEXIS 289, at *2 (Army Ct. Crim. App. 6 Jul. 2023)* (summ. disp.)

Although it acknowledges *Winfield*, for the most part the majority ignores the long-line of precedent squarely holding that it is the responsibility of the government to provide detailed and specific reasons justifying its post-trial processing delays. With respect to the *post-Winfield* cases cited above, the majority rationalizes that although **[*41]** the memorandums in those cases "may not be the model of perfection," the mere fact that the government provided a memorandum at all at least "signals that it is attempting to adhere to *Winfield*."

Nowhere in *Winfield*, however, did this court say that we would give the government a pass from its obligation to provide a detailed post-delay explanation so long as the SJA "attempted" to follow our directives, or made the minimal effort to provide something in writing no matter how deficient it might be. Moreover, and in any event, *Winfield* was certainly not the first time that both this court and the CAAF have put the government on notice of its obligation to provide detailed and specific explanations for post-trial delays. As such, the time has long since passed where it might be acceptable for this court to excuse the government's failure to comply on the grounds of "at least they are trying." Likewise, any attempt on the part of this court to *sub silentio* take back what we said in *Winfield* must fail in light of CAAF's rulings on the same issue. *See* *United States v. Tovarchavez, 78 M.J. 458, 465 (C.A.A.F. 2019)* ("[I]t is for this Court, not the ACCA, to overrule our precedent.") (citations omitted).

In sum, notwithstanding the stern language and the **[*42]** "we really mean it this time" tone of the majority opinion, the clear signal this court is once again sending to the field is that, notwithstanding our holdings in *Winfield, Jefferson, Brimmer, Garrigus, et. al.*, and notwithstanding the CAAF's opinions in *Moreno, Canchola, Arriaga, and Anderson*: (1) post-trial delay is simply not a priority for this court; and (2) the government can continue to submit woefully deficient post-trial memos without fear of any significant repercussions.

B. Binding Nature of Plea Agreement

Shedding crocodile tears, the majority argues that setting aside appellant's punitive discharge in this case "would demonstrate a disregard for appellant's agreement with the convening authority . . . ." Any such attempt to bolster the majority's holding in this case by citing to the "binding" nature of plea agreements, however, rings hollow in light of this court's recent opinion in *United States v. Hunter, 84 MJ 715 (Army Ct. Crim. App. 2024)*.

In *Hunter*, the government charged appellant with involuntary manslaughter and negligent homicide after he failed to stop at a stop sign while driving distracted, and then struck and killed an innocent pedestrian in the crosswalk. *Id.* at *2. Seeking to avoid the ten-year maximum penalty exposure **[*43]** for the involuntary manslaughter specification, appellant agreed to plead guilty to negligent homicide *and* to be discharged from the service with a dishonorable discharge. In exchange, and as part of the written plea agreement, the convening authority agreed to dismiss the involuntary manslaughter specification. *Id.* at *1. There was no dispute that the military judge properly advised appellant as to the impact of a dishonorable discharge, and that the convening authority and the government fulfilled all their obligations under the plea agreement. *Id.* at *3-4. Nevertheless, citing its "carte blanche" ability to do justice and its "unfettered discretion," this court in *Hunter* unilaterally vacated appellant's "binding" promise to accept a dishonorable discharge and instead reduced appellant's separation to a bad conduct discharge, simply because three appellate judges decided that a dishonorable discharge (for conduct involving the death of an innocent civilian) was too harsh of a punishment. *Id.* at *6-7, 10. In so doing, the court in *Hunter*: (1) "demonstrated a [complete] disregard for appellant's agreement with the convening authority;" (2) acted contrary to the majority's holding in **[*44]** this case that "we do not possess unfettered discretion;" and, (3) disregarded the fact that the convening authority

almost certainly would not have agreed to dismiss the involuntary manslaughter specification if he or she knew that this court would later set aside the dishonorable discharge.[9]

Along the same lines, in *United States v. Kibler, 84 M.J. 603, 608-609 (Army Ct. Crim. App. 2024)*, this Court had no issue with disregarding both the plain language of the plea agreement and Rule for Courts-Martial 705(e)(4)(B) to set aside and dismiss a defective specification without first allowing the convening authority to opportunity to exercise the authority to withdraw from the plea agreement.

In short, this court's seemingly selective invocation of the binding nature of a plea agreement is far more likely to both disincentivize the convening authority's willingness to accept future offers to plead guilty and undermine public confidence in our system of military justice, than will the simple act of enforcing precedent and holding the government accountable when it consistently fails to comply with our prior rulings.

C. "Victimless" Crime

The majority's further attempt to bolster its holding by criticizing the underlying panel's characterization of the nature of the victim in this case also **[*45]** falls flat. The underlying decision did *not* state that this was a "victimless" crime, but rather held only that "the offenses at issue do not have any *identifiable individual* victims." *United States v. Abdullah, ARMY 20230223, 2024 CCA LEXIS 199 at *11-12, vacated, (Army Ct. Crim. App. 30 Apr 2024)* (mem. op.) (emphasis added).

There is no dispute that the offenses involved in this case did not in fact involve any identifiable individual victims. Moreover, given that this court in *Winfield* cited to appellant's physical assault of two other soldiers as a basis to deny any relief in that case, *83 M.J. at 666*, the fact that there are no individual victims in this case is certainly an appropriate factor to consider in determining the scope of relief.

D. En Banc Review

In pertinent part, United States Army Court of Criminal Appeals Rules of Appellate Procedure Rule 27(a) states that *en banc* consideration is not favored and ordinarily will not be ordered unless necessary to secure or maintain uniformity of the court's decisions or if the proceeding involves a question of "exceptional importance." Neither one of those considerations applies here.

To start with, given that the panel decision below appears to be the *first* case to hold that the government's willful and continued failure to comply with its obligation to provide a detailed explanation for its post-trial delay justifies the remedy of setting **[*46]** aside a discharge, there is simply no conflict between this case and our prior holdings. As such, *en banc* review is not necessary "to secure or maintain uniformity."

Moreover, as eloquently pointed out by Judge Penland in his separate dissenting opinion, *en banc* review is not appropriate because this case does not involve the misapplication of either the law or our prior holdings, but rather involves only the application of binding precedent to a unique set of facts and circumstances. In short, the fact that other judges of this court, after exercising their individual discretion to apply the law to the unique facts and circumstances of this case, might have reached a different result than that of the original panel is not an appropriate basis for *en banc* review.

E. Conclusion

[9] To be clear, the issue is not that the court in *Hunter* acted outside the bounds of its jurisdiction. Rather as explained in greater detail below, this court's seemingly erratic recognition of the binding nature of plea agreements is far more likely to disincentivize a convening authority from entering into future plea agreements than is the act of enforcing our prior precedent.

Upon consideration of the entire record, I respectfully submit that only so much of the sentence extending to confinement for ninety days should be affirmed.

PENLAND, Judge, with whom Judge ARGUELLES joins dissenting,

I rarely vote against en banc review, but I did so here because I believe those who sought it and those who voted to grant it did so in pursuit of uniform results, rather than a uniform application of **[*47]** relevant law to relevant and unique facts. These are different things. The former is virtually impossible under our statutory framework and jurisprudence, and it works against judicial independence. The latter reinforces common legal standards to make case-specific decisions. I recognize my colleagues' different perspectives and interpretations of these and other matters in this case, but that is where I stand.

Now, the suggestion for en banc reconsideration having been adopted, I have carefully considered the views of my colleagues and the parties. It has gone without saying in previous decisions, but I think it is important under the circumstances to explicitly say now: I value my colleagues' judgment and the parties' input. I respectfully dissent.

A. Post-trial Delay

For brevity's sake and because it is no longer operative, I am reluctant to restate the previous panel's majority decision. However, by granting en banc reconsideration, this court vacated it, and one who wants to know what it said might have trouble finding it. I recognize it is uncommon to essentially restate a no-longer-operative decision. However, for transparency's sake and considering the majority's brief reference **[*48]** to that which it now deems an abuse of discretion, I append it below and stand by it in dissent[10].

I do not disagree with the majority's emphasis that plea agreements are contractual in nature, but there are (at least) two other considerations bearing on this part of the problem. First, we often see cases where an accused voluntarily waives certain alleged errors or agrees to certain punishment through a contract with the convening authority. But, that is a significantly different framework, where the parties are dealing with known information. Here, as far as we can tell appellant had no reason to foresee the post-trial processing problems; if they had such forewarning, appellant and the convening authority would have then had the opportunity to negotiate about them before trial. Second, as appropriate as it is to rely on common law contract principles, it is just as important to understand who the parties are. *Article 53a(e)* excludes this court from the list of those bound by a plea agreement. In my view this is deliberate and consistent with *Article 66*'s mandate,[11] which I will address in Part C.

The majority and government appellate counsel take exception to dicta from the now-vacated decision **[*49]** to the effect that the majority therein used that case as an opportunity to voice its frustration with other legal offices' unreasonably slow post-trial processing. That is a fair perception. This court perceives Regiment-level attention and capability available to all legal offices, such that no office in the field should still seem to misapprehend the importance of post-trial processing. And, we and our superior court have provided ample guidance to the field; I will not restate Judge Arguelles's useful reminder on this point. From that backdrop, there is no question that the additive effect of this problem influenced the panel majority. However, our disapproval was *also* uniquely derived from this one legal office's handling of this one case.

Nothing in these remarks should be interpreted as condoning the misconduct of any Soldier, particularly a noncommissioned officer, or

[10] *See* *United States v. Abdullah, ARMY 20230223, 2024 CCA LEXIS 199*, vacated, (Army Ct. Crim. App. 30 April 2024)* (mem. op.).

[11] *See also* *United States v. Hunter, 84 M.J. 715 (Army Ct. Crim. App. 2024)*.

dismissing the importance of pretrial negotiations. Here, though, I assign great weight to the perception that a staff section responsible for actuating constitutional and statutory protections, and unburdened by the operational exigencies of combat or other deployment, moved so slowly (for reasons yet unknown) **[*50]** at multiple, legally consequential intervals to pass actionable information between a commanding general and a military judge.

B. Specifying Issues

I, among others on the en banc court, sought additional briefing on multiple issues; the majority opinion adequately summarizes them, and I will address them in Part D. As often, I proposed this course of action for two reasons: to alert the parties to matters they had (potentially) not considered, and to give them a chance to provide their analysis.

The proposal did not obtain a majority vote. Though inclined to do so, for collegiality's sake I did not seek to specify issues acting alone, despite the following from the Joint Rules of Appellate Procedure:

> Notwithstanding Rule 7(b),[12] a judge on the panel or Court considering a matter may, acting alone, issue all necessary orders, to include temporary orders or stays, provided the orders do not finally dispose of a petition, appeal, or case. A Court may delegate to its Clerk of the Court or other designated staff the authority to act on motions regarding procedural matters. Joint Rule of Appellate Procedure 7(d).

This episode has prompted disagreement on this court about whether the rules require a majority to approve specifying issues.[13] I think **[*51]** we would all agree that collegiality should encourage a judge to try to obtain consensus on such a procedural step. However, in my view the rules do not require unanimity or even majority agreement; my colleagues in the majority obviously see it differently. In *this* case, the providence issues are not so vexing that it is essential to get the parties' positions. But, I remain concerned for a future case where an individual judge determines additional briefing is essential to their decision, yet they are unable to obtain the parties' advocacy (without causing internecine quarrel). I believe the rules are clear, but the authors should be aware of this material interpretive conflict.

C. Scope of En Banc Reconsideration

This court's disagreement about specifying issues is part of a larger, fundamental disagreement about the scope of en banc reconsideration. The majority has "elected" not to consider anything other than the post-trial delay dispute:[14]

> Satisfied that the military judge did not abuse his discretion in accepting appellant's guilty plea, a majority of the court declined to reconsider the providence of appellant's plea and elected to only address the sole issue of post-trial delay **[*52]** in its reconsideration, en banc.

There are two fundamental problems with this statement. First, it is internally inconsistent. Lest there be any confusion, certain individual members of the en banc court have reconsidered the providence of appellant's guilty pleas and certain other members have chosen not to do so. Those who "declined" to reconsider the topic never considered it in the first place. In other words, some in the majority are apparently satisfied with something they have not considered at all. This seems impossible.

---

[12] According to Joint Rule 7(a), "[t]he concurrence of a majority of such judges, whether present and voting or voting telephonically or electronically, shall be required for a final resolution of any matter before the panel or Court en bane, subject to subsections (b), (c), and (d)."

[13] I acknowledge that is our customary practice.

[14] The majority does correctly state that our *Article 66* review is incomplete.

Second, in my view there is no authority for a member of the en banc court to decline to consider any and all issues that materially affect an appellant's substantial rights. Unlike our superior court, whose jurisdiction has both mandatory and discretionary components, our jurisdiction is entirely mandatory. *Article 66* requires us to consider all cases within our jurisdiction, which means we must consider all issues reasonably raised by the record; anything less deprives an appellant of the direct review to which they are entitled.

D. Providence of Appellant's Guilty Pleas

The majority writes, "we do not find that there was anything extraordinary presented that would render **[*53]** appellant's sentencing case unique or compelling." I disagree. Each case is unique, and each compels the need for reliable judgment. Unique facts in this case cast doubt on its reliability.

During the providence inquiry for desertion, appellant and the military judge discussed his duty conditions before the appellant absented himself:

> MJ: [] Did you somehow think that because you were on rear detachment that you didn't have to show up at work?
>
> A: Your Honor, it was a hostile work environment for me. So I just — I left and didn't want to be there, Your Honor.
>
> . . .
>
> MJ: Okay. So you told me that you were experiencing what you believe to be a hostile work environment at the unit. Did you somehow think that that made it okay for you to stop going to work? I understand that you may have been frustrated, you didn't like what was going on or how you felt you may have been treated, but does that justify or did that, in your mind, justify your leaving?
>
> A: Your Honor, it did not justify my actions. I still had — I did a contract to — for this place. I signed the note. I had a duty. So whether I thought it was right or not, it still wasn't my place to leave. But I did, Your Honor. It's no excuse, Your **[*54]** Honor.[15]

During his unsworn statement on sentencing, appellant said, in pertinent part:

> When I got to my second duty station, Fort Carson, things started to fall apart in my career. I was having conflict with my new unit, the rear-d detachment. I didn't like the fact that I had — they didn't like the fact that I had some issues that I came over here with, which was my household goods not getting here on time; my transportation — the transportation of my car not coming here from Hawaii on time. Plus I had issues with my spouse at the time and we were working on getting a divorce. Once my personal life started falling apart, I didn't handle things the right way and I allowed my career to fall apart too. When I was going through these personal issues, my unit at the time thought I was using my family troubles . . . to try to get out of work.
>
> Really, I was in a terrible mental space and I was considering suicide at the time. When this happened, I didn't feel wanted or appreciated or valued at the unit and I kept getting into arguments with my first sergeant. I felt I had reached my limit and I made the poor decision to leave my unit, November 15th, 2022. I did not intend to return until I received **[*55]** a call and I was told I would be moved to a different troop. Once I heard that, I came back and turned myself in. But unfortunately, I continued to make poor decisions after I returned.

The military judge did not reopen the providence inquiry; neither party asked her to do so.

Based on *United States v. Hayes, 70 M.J. 454*

[15] In a paragraph labeled "Disclaimer of Defenses," the parties stipulated: At all times during the events referred to in this stipulation, the Accused was mentally responsible and competent. He was fully capable of understanding the nature and wrongfulness of his actions. The Accused did not have a legal justification or excuse for using any controlled substances.

(C.A.A.F. 2012), the military judge erred by not reopening the inquiry to reevaluate whether appellant's guilty pleas were provident after he mentioned being "in a terrible mental space" and "considering suicide." In *Hayes*, our superior court established something of a sequential framework for this topic. First, did appellant set up matters inconsistent with guilt at any time during the proceeding? Second, if so, did the military judge respond with additional inquiry to assess whether such matters raised more than the mere possibility of a defense? In other words, if appellant makes that first step, the military judge must follow up.

Hayes also established that, depending on circumstances, the threat of suicide can amount to duress as a matter of law. Indeed the circumstances of appellant's case place that issue squarely before us. I recognize *United States v. Franks, 76 M.J. 808 (Army Ct. Crim. App. 2017)*, where a fellow judge held that *Hayes* applied only where a person other than the accused **[*56]** was the subject of suicidal threat. Not only was the decision split thrice, but it is also less than clear whether this view which narrowed a principle announced by our superior court - obtained a majority concurrence. By adopting the en banc suggestion, this court acting in full is now fortuitously able — and required — to revisit *Franks* and evaluate whether it was correctly decided.

In this case, two contrasting phases in the proceeding are dispositive: the providence inquiry and appellant's unsworn statement during sentencing. During the providence discussion, appellant's mention of "hostile work environment" was inconsistent with his guilty plea to desertion. However, in my view, the military judge handled this adequately — if somewhat colloquially — to ensure that appellant was not raising more than the mere possibility of a duress defense at that point. Appellant's later unsworn statement set up two new matters inconsistent with his guilty pleas generally — mental responsibility and duress. The stipulation's disclaimer is far from adequate on this point; instead, it raises questions about its scope and substance.

For these reasons, I believe the military judge erred by continuing to **[*57]** accept appellant's guilty pleas, resulting in prejudice. This causes me to briefly emphasize another basic flaw in the en banc majority opinion. My colleagues in the majority assert appellant experienced no prejudice, yet they decline to evaluate whether his guilty pleas were provident, whether he suffered legal harm as a result, and whether the poorly-explained delay aggravated that harm.

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UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*

UNITED STATES, Appellee
v.
Sergeant DAYTRON ABDULLAH
United States Army, Appellant

ARMY 20230223

ORDER

The Court adopted petitioner's suggestion to reconsider the case *En Banc*. The case is transferred to Panel 1 for further consideration.

DATE: 14 June 2024

FOR THE COURT:

James W. Herring, Jr.
JAMES W. HERRING, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR2

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Sergeant (E-5) **DAYTRON ABDULLAH,** United States Army, Appellant	**SUGGESTION FOR *EN BANC* RECONSIDERATION** Docket No. ARMY 20230223 Tried at Fort Carson, Colorado, on 20 April 2023, before a special court-martial convened by the Commander, Headquarters, Fort Carson, Colonel Jacqueline L. Emanuel, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW, the undersigned appellate government counsel pursuant to Rules 27 and 31.2(e) of this court's Rules of Appellate Procedure to suggest that the court reconsider its ruling in this case *en banc*. Reconsideration *en banc* is necessary to secure uniformity across all panels of this court in their analysis of Fifth Amendment Due Process violations in claims of unreasonable post-trial delay and the corresponding remedy in such cases. Further, the majority opinion abused its discretion in evaluating harmlessness under Court of Appeals for the Armed Forced (CAAF) and this court's precedent. Finally, the court's remedy in this case informs the field—and the public—that even without a showing of prejudice to appellant, this court prioritizes post-trial efficiency over the pre-trial efficiency and public benefit gained by effective, mutually beneficial plea agreements.

Panel No. 2

On 20 April 2023, a military judge sitting as a special-court martial convicted appellant, 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]). After a considerably strong presentencing case by the appellant, in contrast to the minimal case presented by the government, the military judge sentenced appellant to be reduced to the grade of E-1, confined for a total of ninety days, and discharged from the service with a bad-conduct discharge (BCD). (R. at 99–100; STR; App. Ex. IV). The adjudged sentence was the minimum permitted under the terms of the plea agreement; the reduction and BCD were specifically agreed upon by the parties and required, and the adjudged confinement for each of the four specifications, as well as the total period, was the minimum of the range permitted for each. (App. Ex. IV). No discretionary punishments were adjudged.

Appellant's court-martial adjourned a week before this court issued its opinion in *United States v. Winfield*, 83 M.J. 662 (Army Ct. Crim. App. 2023). In

[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).

abandoning the strict 150-day post-trial processing timeline this court had adopted in *United States v. Brown*, 81 M.J. 501 (Army Ct. Crim. App. 2021) in favor of a case-by-case approach, this court in *Winfield* reinforced its expectation that units continue to explain post-trial processing delays. *Winfield*, 83 M.J. at 666.

The Fort Carson Office of the Staff Judge Advocate (OSJA) took 161 days[2] to process and mail appellant's 101-page record of trial. The record included a justification memorandum from the Post-Trial Non-Commissioned Officer in Charge (NCOIC); however, in performing its Article 66(d), UCMJ review, a majority of the panel reviewing the case deemed it "far short" of expectations. *United States v. Abdullah*, __ M.J. __, slip. op. at 5, 6 (Army Ct. Crim. App. 30 Apr. 2024). Despite no demand for speedy post-trial processing by appellant, no assertion of any other assignments of error, and no finding of prejudice to appellant (*see United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (adopting the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972))), the majority opinion still found the delay and reasons provided "so egregious that tolerating it would adversely affect the public's perception of the military justice system."

[2] The record of trial was docketed with this court on 30 September 2023, bringing the total processing time, including the date of adjournment and days in transit, to 164 days, including periods of 11 days each for submission of appellant's post-trial matters and the military judge's errata. (Referral and Designation of Counsel; R. at 101; Chronology; Post-Trial MFR; Post-Trial Matters).

Abdullah, __ M.J. __, slip. op. at 7 (citing *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). For the same reasons, and despite no articulable prejudice to appellant but the minimal sentence he had specifically bargained for, the majority found the delay not harmless beyond a reasonable doubt and set aside both the punitive discharge and four-grade reduction. *Id.* In doing so, the majority chastised "the government" for its "continued, blatant violation of our well-established precedent." *Id.*

Admittedly, the memo and chronology sheet failed to adequately explain several lapses in processing—namely, the 73 days[3] between receipt of post-trial matters from appellant and convening authority action, the 21 days[4] between action and transmittal of that action to the military judge, or the overlapping 95 days[5] between trial counsel's errata and forwarding of the record to the military judge for her errata. Nevertheless, the 161 days the OSJA took to prepare and mail the record comes nowhere close to this court's and its superior court's precedent when evaluating such "egregious" delays. (*See e.g.*, *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (seven-year post-trial delay attributed to the government was

[3] The post-trial memo indicates appellant's post-trial matters were received from defense on 5 May 2023, but they are dated and date stamped (via digital signature) 1 May 2023. The government accepts 1 May 2023 as the likely date the matters were received. Convening authority action occurred on 13 July 2023.
[4] 13 July to 3 August 2023.
[5] 8 June to 11 September 2023.

harmless beyond a reasonable doubt because appellant could not show prejudice); *United States v. Anderson*, 82 M.J. 82, 88 (C.A.A.F. 2022) (finding a delay of 481 days "not severe enough to taint public perception of the military justice system. It did not involve the years of post-trial delay we saw in cases such as *Moreno*, *Toohey*, and *Bush*. There is no indication of bad faith on the part of any of the Government actors. There is also no indication of prejudice.").

While the post-trial processing memorandum in appellant's case is far from perfect and the lulls in admittedly clerical tasks are clearly concerning, the majority's conclusion that the OSJA's 161-day processing of the record so affects the "public's perception of the fairness and integrity of the military justice system" that the remedy calls for setting aside appellant's punitive discharge and rank reduction is an abuse of the court's discretion. In a case where a junior leader pled guilty for his repeated breakdowns in discipline, was sentenced to the minimum under the terms of his informed and negotiated plea agreement, and asserted no other assignments of error or prejudice in the post-trial processing delay, the majority's remedy is an extreme swivel away from, rather than toward, restoration of the public's perception of the military justice system. Likewise, it sets an unworkable and dangerous precedent, albeit not a binding one, that significantly undermines convening authorities' incentives to negotiate plea agreements going forward.

Further, the majority opinion runs afoul of CAAF precedent. In *United States v. Ashby*, the CAAF found the ten years of post-trial processing a due process violation under the *Barker* factors, despite no finding of particularized prejudice under the fourth *Barker* prong. 68 M.J. 108, 124 (C.A.A.F. 2009). Analyzing whether the violation was harmless beyond a reasonable doubt, the CAAF considered the totality of the circumstances and found "no convincing evidence of prejudice in the record" and would not "presume prejudice from the length of the delay alone." *Id.* at 125 (citing *Toohey*, 63 M.J. at 363). Absent such prejudice, the CAAF ruled the decade-long delay harmless beyond a reasonable doubt and declined to grant relief. *Id.* Likewise, review of the entire record here, under the totality of the circumstances, evinces no prejudice to appellant. Thus, even if the government did violate appellant's due process rights, any such violation is harmless beyond a reasonable doubt and no relief is warranted.

Finally, the timing of this case is worthy of examination. Appellant's court-martial adjourned prior to this court's opinion in *Winfield*, and the record was docketed with this court only five months after that opinion was released to the field. Each of this court's post-trial delay opinions issued in the intervening period concerned processing records under the old *Brown* standard that *Winfield* had overruled. As Judge Morris noted in her dissent, "[w]hen factoring in the timing of this case . . . the government's slow processing is less blatant disregard of

precedent, than it is an indication that they were slow to implement the necessary changes to their post-trial processes." *Abdullah*, __ M.J. __, slip. op. at 8 (Morris, J. dissenting). Apparently frustrated with "the government" for its "continued, blatant violation" of this court's requirements for such delays to be satisfactorily explained, the majority appears to punish the Fort Carson OSJA in this case for the oft-tardy processing the court has seen Army-wide. *Id.* at 7. Notably, this is a frustration voiced most forcefully by Panel 3 in its opinions released in the year since *Winfield*, and the result has been disparate treatment of the post-trial delay issue by one panel when compared to the other two.[6]

As the majority opinion in this case misapplied the harmless beyond a reasonable doubt standard in evaluating prejudice-free claims of post-trial delay, strayed significantly from CAAF and this court's precedent, and granted an extreme remedy that chips away at both public confidence in the military justice system and convening authorities' incentives to accept future offers to plead guilty, *en banc* reconsideration is appropriate.

[6] Appellee acknowledges that the opinion in this case was issued by Panel 3 at the time of its publication, that Panel 3 is currently vacant, and that its pending cases have been transferred to Panel 2. *Compare* Memorandum for Chief Judge, Senior Judges, and Associate Judges, Subject: USACCA Panel Composition (18 Apr. 2024) *with* Memorandum for Chief Judge, Senior Judges, and Associate Judges, Subject: USACCA Panel Composition (10 May 2024).

Conclusion

WHEREFORE, the United States respectfully suggests this honorable court reconsider its ruling in this case *en banc*.

[redacted]

KALIN P. SCHLUETER
LTC, JA
Branch Chief, Government
Appellate Division

JACQUELINE J. DEGAINE
COL, JA
Deputy Chief, Government
Appellate Division

[redacted]

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate
Division

CERTIFICATE OF FILING AND SERVICE,
U.S. v. ABDULLAH (20230223)

I certify that a copy of the foregoing was sent via electronic submission to this Honorable Court and to Defense Appellate Division at [redacted], on the _____ day of May 2024.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]

United States v. Abdullah

United States Army Court of Criminal Appeals

April 30, 2024, Decided

ARMY 20230223

Reporter
2024 CCA LEXIS 199 *; 2024 WL 2045391

UNITED STATES, Appellee v. Sergeant DAYTRON ABDULLAH, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Decision reached on appeal by, On reconsideration by, En banc *United States v. Abdullah, 2024 CCA LEXIS 479, 2024 WL 4684478 (A.C.C.A., Nov. 5, 2024)*

Prior History: [*1] Headquarters, Fort Carson. Jacqueline L. Emanuel, Military Judge. Lieutenant Colonel Kenton E. Spiegler, Acting Staff Judge Advocate (pretrial). Lieutenant Colonel Abraham L. Young, Acting Staff Judge Advocate (post-trial).

Counsel: For Appellant: Colonel Philip M. Staten, JA; Major Mitchell D. Herniak, JA; Major Amanda Williams, JA (on brief); Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Mitchell D. Herniak, JA; Major Amanda Williams, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA, (on brief).

Judges: Before PENLAND, MORRIS, and ARGUELLES[1], Appellate Military Judges. Senior Judge PENLAND concurs. MORRIS, Judge, dissenting in part.

Opinion by: ARGUELLES

Opinion

MEMORANDUM OPINION

ARGUELLES, Judge:

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of desertion, one specification of absence without leave, one specification of disobeying a superior commissioned officer, and one specification of 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]. Pursuant to the terms and conditions of the Plea Agreement, the military **[*2]** judge sentenced appellant to reduction to the grade of E-1, a bad-conduct discharge, and confinement for 90 days.[2] The convening authority took no action on the findings and sentence.

The case is before this court for review pursuant to *Article 66, UCMJ*. Appellant raises one assignment of error, dilatory post-trial processing, which merits both discussion and relief.[3]

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[1] Judge ARGUELLES decided this case while on active duty.

[2] Although the military judge discussed awarding appellant 51 days of pretrial confinement credit during the plea colloquy, when she announced her sentence on the record, she neglected to say anything about the pretrial confinement credit. The Statement of Trial Results, however, does correctly reflect an award of 51 days of pretrial credit. Appellant is not asserting that he did not receive this credit, but to the extent there is any confusion, we confirm that appellant's sentence should properly reflect the award of 51 days of pretrial confinement credit. *See United States v. McDonald, ARMY 9900233, 2000 CCA LEXIS 330 (Army Ct. Crim. App. 13 Jul. 2000)* (mem. op.).

[3] Block 31 of the Statement of Trial Results incorrectly states appellant suffered a conviction for a crime punishable by imprisonment for a term exceeding one year. We will exercise our

BACKGROUND

After providing a urine sample in November of 2022, and knowing that it would test positive, appellant left his unit and texted his supervisor that "[a]fter yesterday I will no longer be coming in formation none of that. I'm done [ ] Do what y'all gotta do, I'm done." The day after appellant voluntarily returned to his unit in January, his troop commander ordered him not to leave the limits of Fort Carson or to drink alcohol. Several weeks later military police stopped appellant coming onto Fort Carson in an unregistered vehicle with expired license plates, no valid driver's license, no proof of insurance, and in possession of alcohol.

In February of 2023, knowing the command would deny his leave request, appellant went to Texas for five days without permission or authority to do so. After he returned and marijuana was discovered **[*3]** in his barracks room, appellant unsuccessfully attempted to flee from his escorts by running through his unit's operations facility and scaling a motor vehicle fence.

At sentencing, the Government offered into evidence appellant's Enlisted Record Brief, his Solider Talent Profile, and a General Officer Memorandum of Reprimand for a driving under the influence conviction he received in October of 2022. On the other hand, appellant called a number of witnesses, to include an investigator with the Fort Carson Criminal Investigation Division who testified about appellant's voluntary cooperation in another drug investigation without any promised benefit in return. Appellant also called a former team leader who described him by saying "[t]o this day, I have not had a soldier that I would say has been better performing than [appellant] was." This same witness also testified about how he worked with appellant in Hawaii, and explained that is where appellant met his wife, got married, and had a child. Although appellant's wife at the time claimed she would support his Army career and follow him to his next duty station, when the transfer orders to Fort Carson arrived, she instead remained in **[*4]** Hawaii and initiated divorce and child custody proceedings. Finally, appellant called his former boxing coach, as well as family members who offered compelling testimony as to his good character and "great" rehabilitative potential.

Appellant also gave an unsworn statement in which he took full responsibility for his actions and offered a heartfelt apology. Appellant explained how he attained the rank of E-5 in three years at his first duty station in Hawaii, and how after he got to Fort Carson with his family issues, "things started to fall apart in [his] career."

The Record of Trial (ROT) was 101 pages and took 164 days to process. This one-day trial took place on 20 April 2023, and the court reporter forwarded the ROT to the trial counsel for his review on 8 June 2023. Although the trial counsel completed his review the same day, the military judge did not receive the ROT for her certification until 11 September 2023, *96* days later. The military judge completed her review and certification 11 days later on 22 September 2023. The Office of the Staff Judge Advocate (OSJA) submitted a Post-Trial Processing Timeline memo ("memo") dated 27 September 2023 and signed by the Post-Trial Non-Commissioned **[*5]** Officer in Charge (NCOIC), which in total stated:

> a. Personnel Changeover and Experience. The Post-Trial section received a new Staff Sergeant in April 2023. Between the months of April and August 2023, the civilian post-trial paralegal was tasked to train the new NCO within post-trial matters. Both Post-Trial team members are dually slotted in Magistrate Court and General Crime sections within the OSJA. All the above *may* have hindered the

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discretion to correct this error. *See* Rule for Courts-Martial 1111(c)(2); *United States v. Pennington, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021)* (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents . . . .").

processing time for US v. Abdullah while balancing daily tasks within the other sections. (emphasis added).

b. Operational Tempo. There was an increase in court-martials between the months of May through August. The post-trial team worked diligently to meet all post-trial requirements for pending Courts-Martials as well as those that were back logged.

LAW AND DISCUSSION

We review allegations of unreasonable post-trial delay de novo. *United States v. Anderson, 82 M.J. 82, 85 (C.A.A.F. 2022)* citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

Since at least 2002, the Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the *Due Process Clause of the Fifth Amendment*; and (2) the statutory basis under *Article 66* when there is no showing of "actual prejudice." *See* ***[*6]*** *United States v. Grant, 82 M.J. 814, 819 (Army Ct. Crim. App. 2022)* ("Absent a due process violation, we still have authority under *Article 66, UCMJ*, to grant relief 'when appropriate under the circumstances') (citing *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*); *Toohey v. United States, 60 M.J. 100, 101-02 (C.A.A.F. 2004)* (holding the right to timely appellate review has both statutory roots under *Article 66* and constitutional roots under the *Due Process Clause*).[4]

In *Toohey*, the CAAF adopted the four-factor balancing test from *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, to determine whether the post-trial delay constitutes a due process violation: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant. *60 M.J. at 102*.

With respect to the length of the delay, in *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*, the CAAF established a presumption of reasonableness for post-trial processing where the convening authority took initial post-trial action within 120 days of trial, and the case was docketed with this court 30 days later. In light of the changes implemented by MJA 2016, we modified the *Moreno* timeline in *United States v. Brown* by holding that "this court will presume unreasonable delay in cases where more than 150 days elapse between final adjournment and docketing with this court." *81 M.J. 507, 510 (Army Ct. Crim. App. 2021)*. In *Brown* we also reiterated that "just as it was under the old procedures, staff judge advocates are advised **[*7]** to explain post-trial processing delays . . . ." *Id. at 511*.

In *United States v. Winfield*, issued one week after this case adjourned, we overruled *Brown's* 150-day time limit, finding instead that some cases might justifiably take longer than 150 days to process for review, and that others should take significantly less time. *83 M.J. 662, 665 (Army Ct. Crim. App. 2023)*. Instead of imposing a bright-line time limit,

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[4] Prior to the implementation of the *Military Justice Act of 2016* (MJA 2016) in January 2019, *Article 66(d)(1), UCMJ* granted this court the statutory authority to "affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." The Military Justice Act of 2016 amended *Article 66* to add a new *section (d)(2)*, which provides in pertinent part that this court "may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of a court-martial after the judgment was entered into the record . . . ." There is nothing, however, in the plain language of *Article 66(d)(2)* indicating or in any way suggesting that Congress sought to: (1) overrule *Toohey* or otherwise alter the use of the *Barker* test to analyze a Due Process claim as set forth below; or, (2) overrule CAAF precedent recognizing our discretion to afford relief under *Article 66(d)(1)*. *See United States v. Gale, ARMY 20230142, 2024 CCA LEXIS 128 at *3 (Army Ct. Crim. App. 21 Mar 2024)* (summ. disp.) ("While *Article 66(d)(2), UCMJ*, concerns itself solely with delays after the entry of judgment, we continue to 'reject any argument that *Article 66(d)(2), UCMJ*, somehow cabins our broad and well-established sentence appropriateness authority under *Article 66(d)(1), UCMJ*, to provide relief for dilatory post-trial processing occurring at other phases of a court-martial.") *(citing United States v. Brown, 81 M.J. 507, 511 n.2 (Army Ct. Crim. App. 2021)*.

we reaffirmed the requirement for an explanation as set forth in *Brown*, and held that in determining the reasonableness of the delay, "we will scrutinize even more closely the unit-level explanations for post-trial processing delays." *Id.* As we further explained in *Winfield*, "we are consistently interested to know about a case's transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter availability and utilization for transcription, and resource shortfalls (e.g., insufficient throughput capacity despite court reporter regionalization)." *Id. at 666* (emphasis in original). Because this is a case that should have taken significantly less than 150 days to process, the length of the post-trial delay weighs heavily in favor of appellant.

Likewise, with respect to **[*8]** the purported reasons for the delay, we have continued to emphasize in both *Winfield*, and in a litany of subsequent unpublished decisions, that we expect the OSJA to provide a detailed explanation for any unwarranted delay. *See, e.g. United States v. Jefferson, ARMY 20220448, 2023 CCA LEXIS 382 at *4 (Army Ct. Crim. App. 2023 6 Sep. 2023)* (summ. disp.); *United States v. Brimmer, ARMY 20210622, 2023 CCA LEXIS 253 at *5 (Army Ct. Crim. App. 9 Jun 2023)* (summ. disp.); *United States v. Garrigus, ARMY 20220259, 2023 CCA LEXIS 335 at *3 (Army Ct. Crim. App. 9 Aug 2023)* (summ. disp.) ("Either way one looks at it - whether under *Brown* or *Winfield* - units owe an explanation for such slow post-trial action. When those who administer military justice in the field ignore binding precedent, we should not tolerate the resultant strain upon our system's credibility."); *United States v. Pulley, ARMY 20220494, 2023 CCA LEXIS 289 at *2 (Army Ct. Crim. App. 6 Jul. 2023)* (summ. disp.).

As such, we are highly troubled that once again, the purported explanation in this case falls far short of justifying or explaining why it took over three months to transfer a 101-page ROT from trial counsel to the military judge.

First, the memo does not even address, much less make any effort to give a specific reason for, the unacceptable 96-day delay. Instead, in two very short paragraphs it generally describes how the post-Trial section received a new NCO that needed training, and that the team was double-slotted in the Magistrate Court and General Crime sections, before stating "all of the above *may* have hindered **[*9]** the processing time" in this case. The memo then concludes with a second paragraph describing "an increase in court-martials [sic] between the months of May through August," and that the trial team worked diligently to meet its obligations. Unfortunately, the memo provides no specific numbers which would allow us to meaningfully gauge how many courts-martial were processed at Fort Carson in the summer of 2023. Nor does it make any reference to reaching out to other installations either within or outside the circuit for help in addressing the "backlog."

To say the memo falls far short of this court's firmly established requirements is an understatement. As such, the second *Barker* factor, the reasons for the delay, weighs heavily in favor of appellant. *See United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011)* ("[P]ersonnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay"); *Winfield, 83 M.J. at 665-66* ("Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal"); *United States v. Jackson, 74 M.J. 710, 719 (Army Ct. Crim. App. 2015)* (rejecting the government's explanation for the delay based on "court reporter shortages and high number **[*10]** of cases tried"); *United States v. Canchola, 64 M.J. 245, 247 (C.A.A.F. 2007)* ("However, a general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government.")

Along the same lines, and further highlighting the OSJA's apparent lack of interest in addressing and

fixing these recurring post-trial delay issues, is the fact that preparation of the memo in this case was delegated all the way down to the E-6 level. An SJA may delegate authority to write such a document for submission to this court, but they remain responsible for its content.

As to the third *Barker* factor, because appellant did not assert his right to a timely appeal, this factor weighs in favor of the government.

In assessing the fourth *Barker* factor of prejudice, we consider 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)*. The first sub-factor is directly related to the success or failure of appellant's **[*11]** substantive appeal, and the second sub-factor requires appellant to show particularized anxiety that is distinguishable from the normal anxiety of waiting for an appellate decision. *Id. at 139-40*. Applied in this case, because appellant does not raise any substantive issues on appeal other than post-trial delay, and has not demonstrated any "particularized" anxiety, the fourth *Barker* factor also weighs in favor of the government.

When there is no finding of prejudice under the fourth *Barker* factor, as is the case here, a due process violation only occurs when "in balancing the three other 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." *Anderson, 82 M.J. at 87* citing *Toohey, 63 M.J. at 362*. This is yet another such a case.

While we recognize that this court has not granted relief for similar delays in other cases, given the unique facts and circumstances of this case, to include the very strong sentencing case put on by appellant and the fact that the offenses at issue do not have any identifiable individual victims, we find that because the government's continued, blatant violation of our well-established precedent adversely affects the "public's **[*12]** perception of fairness and the integrity of the military justice system," relief is justified under the *Due Process Clause*. *See Toohey, 63 M.J. at 362*. For all of the same reasons, the post-trial delay was not harmless beyond a reasonable doubt. *See United States v. Allison, 63 M.J. 365, 371 (C.A.A.F. 2006)* ("In determining whether relief is warranted for a due process denial of speedy review and appeal, we will consider the totality of the circumstances in the particular case.").

For all of the same reasons, we find relief is also warranted under *Article 66(d)(1)*.

CONCLUSION

Upon consideration of the entire record, the finding of guilty is AFFIRMED. Only so much of the sentence extending to confinement for ninety days is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored.

Senior Judge PENLAND concurs.

Dissent by: MORRIS (In Part)

Dissent

MORRIS, Judge, dissenting in part.

I agree with my colleagues that the post-trial delay, specifically the unexplained 96 days the government took to forward the record from the trial counsel to the military judge, was excessive. However, I would not find a violation of the *Due Process Clause of the Fifth Amendment*, because appellant failed to assert any prejudice and I do not

find the delay so egregious **[*13]** that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. *U.S. v. Anderson, 82 M.J. 82, 87 (C.A.A.F. 2022)* (citing *Toohey, 63 M.J. at 362*). When factoring in the timing of this case, which adjourned prior to this Court's decision in *Winfield*, the government's slow processing is less blatant disregard of precedent, than it is an indication they were slow to implement the necessary changes to their post-trial processes. On the basis of the entire record, factoring in the serious offenses and the failure to assert any prejudice, I find the sentence appropriate and would not grant any sentencing relief, and therefore I dissent in part.

End of Document

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
UNITED STATES ARMY COURT OF CRIMINAL APPEALS
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060-5546

JALS-CRZ

30 September 2024

MEMORANDUM FOR CHIEF JUDGE, SENIOR JUDGES, and ASSOCIATE JUDGES

SUBJECT: USACCA Panel Composition

1. Effective 23 September 2024, the U.S. Army Court of Criminal Appeals will be composed of the following panels:

POND, TIFFANY D., COL, JA (Chief Judge)
Chief Commissioner – CPT Alexander P. Vanscoy

a. **Panel 2**

FLEMING, DEIDRA J., LTC, JA (Senior Judge)
PENLAND, ROBERT T., JR., COL, JA
COOPER, STEPHANIE R., COL, JA
SCHLACK, JENNY S., LTC, JA
Commissioner – CPT Nicholas W. Masters

b. **Panel 3**

VACANT

c. **Panel 4**

POND, TIFFANY D., COL, JA (Chief Judge)
MORRIS, LAJOHNNE A., COL, JA
JUETTEN, PETER G., COL, JA
PARKER, JENNIFER A., LTC, JA
Commissioner – CPT J. Robert Daniell III

2. The Clerk of Court, on behalf of the Chief Judge, is authorized to assign Reserve Appellate Military Judges Colonel JAMES P. ARGUELLES, Colonel JAMES A. EWING, and Colonel KIRSTEN M. DOWDY to panels as appropriate during periods of active duty.

3. This reorganization affects all cases pending except for:

United States v. FORREST, 20200715 [Walker, Ewing, Parker]
United States v. SMITH, 20230029 [Penland, Morris, Arguelles]
United States v. BROWN, 20220507 [Pond, Fleming, Penland]

SUBJECT: USACCA Panel Composition 30 September 2024

United States v. ALFARO, 20220282 [Pond, Fleming, Morris]
United States v. ABDULLAH, 20230223 [En Banc]
United States v. BAILEY, 20220209 [Fleming, Morris, Cooper]
United States v. ANTHONY, 20220147 [Fleming, Penland, Morris]
United States v. HULLIHAN, 20220552 [Fleming, Penland, Morris]
United States v. HULLIHAN, 20220246 [Fleming, Penland, Morris]
United States v. CHAPMAN, 20220557 [Fleming Penland, Morris]
United States v. DICKERSON, 20220118 [Fleming, Penland, Morris]
United States v. JOSEPH, 20230022 [Fleming, Penland, Morris]
United States v. RESUTEK, 20220431 [Fleming, Penland, Morris]
United States v. PENVEN, 20230087 [Fleming, Penland, Morris]
United States v. BURCH, 20230576 [Penland, Morris, Arguelles]
United States v. THOMPSON, 20190525 [Pond, Ewing, Juetten]
United States v. MALONE, 20230151 [En Banc]
United States v. BRASSFIELD, 20230516 [Fleming, Arguelles, Cooper]
United States v. VILBON, 20230436 [Fleming, Penland, Ewing]
United States v. CUESTA, 20230024 [Fleming, Penland, Ewing]

TIFFANY D. POND
Colonel, JA
Chief Judge

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DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
UNITED STATES ARMY COURT OF CRIMINAL APPEALS
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060-5546

JALS-CCZ

22 July 2024

MEMORANDUM FOR CHIEF JUDGE, SENIOR JUDGES, and ASSOCIATE JUDGES

SUBJECT: USACCA Panel Composition

1. Effective 22 July 2024, the U.S. Army Court of Criminal Appeals will be composed of the following panels:

POND, TIFFANY D., COL, JA (Chief Judge)
Chief Commissioner – CPT Alexander P. Vanscoy

a. **Panel 2**

FLEMING, DEIDRA J., LTC, JA (Senior Judge)
PENLAND, ROBERT T., JR., COL, JA
MORRIS, LAJOHNNE A., COL, JA
COOPER, STEPHANIE R., COL, JA
Commissioner – CPT Nicholas W. Masters

b. **Panel 3**

VACANT

c. **Panel 4**

POND, TIFFANY D., COL, JA (Chief Judge)
WALKER, ELIZABETH A., COL, JA (Senior Judge)
JUETTEN, PETER G., COL, JA
PARKER, JENNIFER A., LTC, JA
Commissioner – CPT J. Robert Daniell III

2. The Clerk of Court, on behalf of the Chief Judge, is authorized to assign Reserve Appellate Military Judges Colonel JAMES P. ARGUELLES, Colonel JAMES A. EWING, and Colonel KIRSTEN M. DOWDY to panels as appropriate during periods of active duty.

3. This reorganization affects all case pending except for:

United States v. FORREST, 20200715 [Walker, Ewing, Parker]
United States v. WILSON, 20230233 [Pond, Penland, Morris]
United States v. TORRESJUAREZ, 20220659 [Pond, Fleming, Penland]

SUBJECT: USACCA Panel Composition 22 July 2024

United States v. ESPINAL, 20220152 [Pond, Fleming, Parker]
United States v. SMITH, 20230029 [Penland, Morris, Arguelles]
United States v. BROWN, 20220507 [Pond, Fleming, Penland]
United States v. ALFARO, 20220280 [Pond, Fleming, Morris]
United States v. ANTEPARA, 20220562 [Walker, Morris, Parker]
United States v. ABDULLAH, 20230223 [En Banc]

TIFFANY D. POND
Colonel, JA
Chief Judge

E-DISTRIBUTION:
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Appendix B: Unpublished Cases

United States v. Hotaling

United States Army Court of Criminal Appeals

December 11, 2020, Decided

ARMY 20190360

Reporter
2020 CCA LEXIS 449 *; 2020 WL 7334091

UNITED STATES, Appellee v. Private E2 BRIAN C. HOTALING, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Fort Campbell. Matthew A. Calarco and Wendy P. Daknis, Military Judges, Colonel Andras M. Marton, Staff Judge Advocate (pretrial), Colonel Laura J. Calese, Staff Judge Advocate (post-trial).

Case Summary

Overview

HOLDINGS: [1]-The government's dilatory post-trial processing, 350 days between sentencing and action, was unreasonable but did not constitute a due process violation. None of the Staff Judge Advocate's (SJA's) listed reasons for the delay provided a justification, but there was no prejudice in the case; [2]-Relief was warranted under Unif. Code Mil. Justice art. 66(d), *10 U.S.C.S. § 866(d)*, and the servicemember's bad-conduct discharge was therefore set aside under the circumstances unique to the case, which included the failure to serve the servicemember with the SJA's recommendation for over six months and the persistent post-trial processing delays arising out of the Fort Campbell Office of the SJA.

Outcome
Findings of guilty affirmed. Bad-conduct discharge set aside.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Dustin B. Myrie, JA; Major John D. Martorana, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and ARGUELLES[1], Appellate Military Judges. Senior Judge BROOKHART and Judge ARGUELLES concur.

Opinion by: KRIMBILL

Opinion

MEMORANDUM OPINION

KRIMBILL, Chief Judge (IMA):

Appellant's case is the latest in a troubling line of cases arising from Fort Campbell fraught with unreasonable post-trial delay. Like its predecessors, this case raises substantial questions as to the appropriateness of appellant's sentence. After considering the circumstances unique to this case, we find that a punitive discharge is not an appropriate sentence for appellant. Accordingly, we set **[*2]** aside appellant's bad-conduct discharge, and affirm only so much of the sentence as

[1] Chief Judge (IMA) Krimbill and Judge Arguelles both decided this case while on active duty.

provides for confinement for thirty days and reduction to the grade of E-1.[2]

Appellant's sole assignment of error concerns the dilatory post-trial processing of his case. Appellant alleges that the government's dilatory post-trial processing, 350 days between sentencing and action, warrants relief under *United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*. We agree relief is warranted for the flagrant disregard of timely post-trial processing in this case.

BACKGROUND

Appellant was a married twenty-four-year-old Soldier who served as a vehicle mechanic. He and his wife had two children of their own and one child from a previous relationship of appellant's wife. All three children were under the age of five years. The government charged appellant with three specifications of negligent failure to create a safe environment for his children. Specifically, appellant pleaded guilty to "failing to maintain sanitary living quarters" for his three minor children over a period of twelve days. Appellant's wife was present in the house for five of the twelve days charged. After the neglect was discovered, appellant was ordered to move into the barracks. Appellant ultimately **[*3]** spent approximately twenty-two months living in the barracks while awaiting trial.

Appellant pleaded guilty to all three specifications alleging neglect. During sentencing, appellant's former First Sergeant, who viewed the condition of appellant's home at the time the neglect was discovered, offered strikingly favorable testimony of appellant's performance as a Soldier. Other members of appellant's command provided less favorable testimony. Appellant was ultimately sentenced to a punitive discharge, confinement for thirty days, and reduction to the grade of E-1.

The military judge announced appellant's sentence on 29 May 2019, and authenticated the 417-page transcript 78 days later.[3] The Fort Campbell Staff Judge Advocate (SJA) completed her recommendation (SJAR) on 17 October 2019, 141 days after the sentence was announced. Alarmingly, the government then failed to serve the record of trial and the SJAR on appellant until 20 April 2020-186 days after the SJA signed the SJAR. Essentially, it took the government over six months to place a copy of the record of trial and SJAR in the mail. In the six months that elapsed between signing the SJAR and serving it on appellant, appellant submitted **[*4]** two separate requests for speedy post-trial processing.[4]

Appellant submitted his post-trial submissions ten days after receiving a copy of the record of trial and SJAR, and supplemented those submissions four days later. In both his initial and supplemental post-trial submissions, appellant confronted the Fort Campbell Office of the Staff Judge Advocate (OSJA) with several of this court's recent opinions in which we provided relief to various appellants because of the Fort Campbell OSJA's inability to effectively and efficiently process cases after a sentence was announced.

In the addendum to the SJAR, the SJA attempted to justify the delay by identifying factors that ostensibly contributed to the post-trial delay in this case. Those factors include multiple deployments impacting legal personnel and post-trial oversight, an unprecedented increase in the volume and complexity of cases (including capital litigation), several unforeseen personnel challenges (including the unexpected resignation of the post-trial

[2] A military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of three specifications of child endangerment, in violation of *Article 134, Uniform Code of Military Justice*, *10 U.S.C. § 934* [UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for thirty days, and reduction to the grade of E-1.

[3] Both of the military judges who presided over this case received the transcript on 31 July 2019 and authenticated it on 15 August 2019.

[4] Appellant submitted his first request on 12 December 2019 (197 days after announcement of the sentence), and his second request on 31 January 2020 (247 days after announcement of the sentence).

paralegal), and the COVID-19 pandemic.

In total, the Fort Campbell OSJA took 350 days (from 29 May 2019 to 13 May 2020) to process appellant's case post-trial, nearly 200 days of **[*5]** which were spent waiting to place documents in the mail.

DISCUSSION

This court has two distinct responsibilities in addressing post-trial delay. *See* United States v. Simon, 64 M.J. 205, 207 (C.A.A.F. 2006). First, as a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process violation. *See* U.S. Const. amend. V; Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 38 (C.A.A.F. 2003). Second, even if we do not find a due process violation, we may nonetheless grant an appellant relief for excessive post-trial delay under our broad authority of determining sentence appropriateness under Article 66(d), UCMJ. *See* United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002).

We review de novo whether an appellant has been denied his due process right to a speedy post-trial review. Moreno, 63 M.J. at 135. A presumption of unreasonable post-trial delay exists when the convening authority fails to take action within 120 days of completion of trial. Id. at 142. In *Moreno*, our Superior Court adopted the four-factor balancing test from Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which we employ when a presumption of unreasonable post-trial delay exists, to determine whether the post-trial delay constitutes a due process violation: "(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.* In assessing the fourth factor of prejudice, **[*6]** we consider 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." Id. at 138-39 (quoting Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

1. Due Process

In this case, the first factor weighs heavily in favor of appellant; 350 days from sentence announcement to action by the convening authority is presumptively unreasonable, as it is nearly three times the authorized processing time.

Related to the second prong, in the post-trial processing memo, the SJA stated that "[m]ultiple deployments . . . [an] increase in volume and complexity of cases . . . unforeseen personnel challenges . . . [and] [f]rom 17 March 2020 to [13 May 2020], the COVID-19 pandemic" contributed to the post-trial delay in this case. Simply put, none of the listed reasons for the delay provides a justification for the inconceivable delay in this case. First, "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011) (citations omitted). **[*7]** Second, even if the purported reasons for the delay somehow justified the government's delay, it still took over six months (186 days) for the OSJA to perform the purely ministerial act of serving the SJAR and the record of trial on appellant. Depositing documents in the mail does not require any specialized legal training, nor does it require any significant time commitment. Third, while the COVID-19 pandemic could justify some amount of delay, the pandemic had virtually no impact on this case. By the SJA's own concession, the pandemic did not impact the OSJA until 17 March 2020, a time by which the government had already failed to simply mail the SJAR and record of trial for over five months. In total, the second factor also weighs heavily in favor of appellant.

The third factor likewise weighs in favor of

appellant, as appellant submitted two separate requests for speedy post-trial processing. Regarding the fourth factor, appellant specifically acknowledges there was no prejudice in his case, nor do we identify any such prejudice based on our review of the record. As such, the fourth factor weighs in favor of the government.

Absent a finding of prejudice, we may still find "a due **[*8]** process violation only when, in balancing the other three [*Moreno*] factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. Here, after balancing the four *Moreno* factors we decline appellant's invitation to find a due process violation. However, this court's analysis does not end there.

2. Article 66, UCMJ

In finding the post-trial delay was unreasonable but not unconstitutional, we turn to our "authority under *Article 66[(d), UCMJ]* to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of *Article 59(a)*." *Tardif, 57 M.J. at 224* (citing *United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000))*. Specifically, we next "determine what findings and sentence 'should be approved' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.*

After considering the totality of the record of trial, we are convinced that appellant's punitive discharge should not be approved. While military courts are unquestionably authorized to provide such relief, *see id. at 225*; *Moreno, 63 M.J. at 143*, we are cognizant that we must "tailor an appropriate remedy [for the post-trial delay] . . . to **[*9]** the circumstances of the case." *United States v. Jones, 61 M.J. 80, 86 (C.A.A.F. 2005)* (quoting *Tardif, 57 M.J. at 225*). In arriving at such an extreme and drastic remedy, we find the combination of four circumstances, unique to this case, warrant setting aside appellant's punitive discharge.

First, it is important to consider at what point during the post-trial process the unreasonable delay occurred. Here, the most unreasonable portion of the delay occurred between the SJA signing the SJAR and service of the SJAR and record of trial on appellant. Once the SJAR was signed, the very next step in the post-trial processing was the service on appellant and his defense counsel. As noted in the *Barker* analysis above, service of the documents is ministerial and in all likelihood only required the OSJA to walk the documents to the mailroom. Despite the relative ease of completing this step, the OSJA failed to serve appellant with the SJAR and record of trial for over six months (186 days), which itself far exceeds the total permissible post-trial processing timeline.

Second, and somewhat intertwined with the first circumstance, is why the unreasonable delay occurred. We addressed this fully above in our analysis of the second *Barker* factor. It bears repeating, however, **[*10]** that the OSJA failed to provide even a plausible justification for the unreasonable delay. No amount of personnel shortage could necessitate a six-month delay in putting a 471-page record of trial and a one-page SJAR in the mail. Such a delay is simply unjustifiable.

Third, the SJA's recommendation to the convening authority in her addendum to the SJAR is particularly troubling. Therein, the SJA acknowledged that, at that time, this court had recently castigated Fort Campbell's post-trial processing in at least three separate opinions.[5] The SJA also "agree[d] that the delay in providing a copy of the Record of Trial to [appellant]

[5] We note appellant's trial defense counsel highlighted this court's concern with Fort Campbell's post-trial processing in appellant's post-trial submissions to the convening authority.

prejudice[d] his rights in the post-trial process."[6] Despite knowing that this court was providing remedies for Fort Campbell's repeated dilatory post-trial processing, and despite the apparent belief that appellant was prejudiced by the same dilatory post-trial processing, the SJA recommended that no clemency was warranted in this case.[7] Essentially, the SJA made a recommendation that she disagreed with this court about the import of and relief for unreasonable post-trial delay.

Finally, the persistent post-trial processing delays arising out of the Fort Campbell **[*11]** OSJA also factor into our analysis. The sluggish post-trial processing in this case is yet another example of Fort Campbell's seeming inability to fulfill its legal obligations with respect to post-trial processing of courts-martial. Within just the past year, this court has cited dilatory post-trial processing at Fort Campbell in eight cases;[8] this case marks the ninth such finding. Despite our repeated repudiation of Fort Campbell's post-trial processing performance, the problem persists. We yet again remind military justice practitioners that "[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system." *United States v. Carroll, 40 M.J. 554, 557 n.8 (A.C.M.R. 1994)*. The time is now to improve post-trial processing at Fort Campbell.

Having considered the entire record, especially the four circumstances listed above, and exercising our authority under *Article. 66, UCMJ*, we find appellant is entitled to relief for the dilatory post-trial processing of his case. Appellant's punitive discharge "should [not] be approved" under the unique facts and circumstances of this case.[9] *See UCMJ art. 66(d)*.

CONCLUSION

The findings of guilty are AFFIRMED. Appellant's bad-conduct discharge is SET ASIDE. Only so much of the sentence as provides for confinement for thirty days and reduction to the grade of E-1 is AFFIRMED. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the sentence set aside by this decision are ordered restored. *See UCMJ arts. 58b(c)* and *75(a)*.

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[6] As noted above, we disagree that appellant suffered any actual prejudice as a result of the delay.

[7] The convening authority's clemency powers were limited by *Article 60, UCMJ*. However, appellant specifically requested a recommendation from the convening authority to this court concerning appropriate clemency in this case.

[8] *United States v. Badgett, ARMY 20190177, 2020 CCA LEXIS 403, at *6 (Army Ct. Crim. App. 4 Nov. 2020 (summ. disp.)* (post-trial processing delay of 343 days warranted sentence credit); *United States v. Hickey*, ARMY 20190072 (Army Ct. Crim. App. 7 Oct. 2020) (decision) (dilatory post-trial processing warranted a two-month reduction in sentence); *United States v. Barchers*, ARMY 20180648 (Army Ct. Crim. App. 30 Sep. 2020) (decision) (granting sentence relief for 129-day lapse between appellant's post-trial submission and convening authority action); *United States v. Feeney-Clark, ARMY 20180694, 2020 CCA LEXIS 256, at *7 (Army Ct. Crim. App. 29 Jul. 2020)* (mem. op.) (finding post-trial delay of 303 days unreasonable, but unable to provide meaningful sentence credit); *United States v. Diaz, ARMY 20180556, 2020 CCA LEXIS 154, at *7 (Army Ct. Crim. App. 11 May 2020) (summ. disp.)* (post-trial processing delay of 303 days warranted sentence credit); *United States v. Notter, ARMY 20180503, 2020 CCA LEXIS 150, at *6 (Army Ct. Crim. App. 4 May 2020)* (summ. disp.) (post-trial processing delay of 337 days warranted sentence credit); *States v. Ponder, ARMY 20180515, 2020 CCA LEXIS 38, at *3 (Army Ct. Crim. App. 10 Feb. 2020)* (summ. disp.) (post-trial processing delay of 296 days warranted sentence credit); and *United States v. Kizzee, ARMY 20180241, 2019 CCA LEXIS 508, at *7 (Army Ct. Crim. App. 12 Dec. 2019)* (summ. disp.) (post-trial processing delay of 274 days warranted sentence credit).

[9] We note that in *Feeney-Clark*, another panel of this court elected not to set aside the punitive discharge, finding the punitive discharge in that case "to be appropriate when considering" the circumstances of that case. *ARMY 20180694, 2020 CCA LEXIS 256, at *5-6 n.5*. Our decision in this case in no way conflicts with the decision in *Feeney-Clark*. Instead, we are merely convinced that appellant's punitive discharge is not appropriate given the unique facts and circumstances of this case. We further reject the Government's contention that *Feeney-Clark* stands for the proposition that our setting aside the punitive discharge in this case amounts to clemency. *Cf.* ***[*12]*** *United States v. Hobbs, 30 M.J. 1095, 1097 (N.M.C.M.R. 1989)* ("[T]o provide relief for the inordinately long and prejudicial post-trial delay, we find the appropriate remedy under the circumstances is disapproval of the badconduct discharge.").

Senior Judge BROOKHART and Judge ARGUELLES concur.

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Appendix C: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this Court consider the following matters:

Relevant Facts

The military judge sentenced appellant on April 20, 2023. Eleven days later, appellant submitted post-trial matters. (Post-Trial Matters). The Convening Authority's Action was not signed until July 13, 2023, and was not forwarded to the military judge until August 3, 2023. On September 8, 2023, the military judge entered judgment, 130 days after defense counsel submitted post-trial matters. (Entry of Judgment).

On September 18, 2023, the trial counsel pre-certified the record. (Trial Counsel Certification). On September 22, 2023, the military judge authenticated the record. (Military Judge Authentication). On September 27, 2023, a court reporter certified the transcript. (Court Reporter Certification). On September 30, 2023, the Army Court docketed the case. (Referral). The transcript is only 100 pages long. (R. 100).

The Office of Staff Judge Advocate (OSJA) submitted a memorandum stating, in part,

> [t]he Post-Trial section received a new Staff Sergeant in April 2023. Between the months of April and August

> 2023, the civilian post-trial paralegal was tasked to train the new NCO within post-trial matters. Both Post-Trial team members are dually slotted in Magistrate Court and General Crimes sections within the OSJA. All the above may have hindered the processing time for US v. Abdullah while balancing daily tasks within the other sections.

(Post-Trial Processing Timeline Letter). The memo also indicated, "[t]here was an increase in court-martials between the months of May through August. The post-trial team worked diligently to meet all post-trial requirements for pending Courts-Martial as well as those that were back logged." (Post-Trial Processing Timeline).

Standard of Review

This Court "review[s] de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)) (conclusions of law are reviewed under the de novo standard).

Law

A convicted soldier's right to Due Process includes a timely review and appeal of his conviction. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). The framework for this Court's analysis of speedy post-trial review and appeal is "the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (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."

United States v. Toohey II, 63 M.J. 353, 359 (C.A.A.F. 2006) (citing *Moreno*, 63 M.J. at 135). "[N]o single factor [is] required to find that post-trial delay constitutes a due process violation." *Id.* at 361 (citation omitted). Where post-trial delay is found to be unreasonable, but not a due process violation, this Court still has recognized the service courts' "authority under Article 66(d)(1), UCMJ, to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)); *see also United States v. Toohey II*, 63 M.J. at 362 (C.A.A.F. 2006) ("[W]here there is no finding of *Barker* prejudice, we will find a due process violation only when, in balancing the other three [*Barker*] 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."). In deciding what findings and sentence should be approved, service courts look to "all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Tardif*, 57 M.J. at 224.

Article 66 authorizes courts of criminal appeals to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record . . . ." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). Even though Article 66(d)(2) does not define

"excessive delay," the Army Court, for example, considers whether delay is excessive by "broadly focus[ing] on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay." *United States v. Winfield*, 83 M.J. 662, 668 (Army Ct. Crim. App. Apr. 27, 2023).

Argument

The *en banc* Army Court erred when it found post-trial delay in this case was not excessive. The delay here was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022). Moreover, setting aside appellant's discharge is appropriate relief under Article 66(d). Following adjournment, the government took 164 days to docket appellant's case consisting of a 100-page transcript in a guilty plea at the Army Court. While appellant submitted his matters pursuant to R.C.M. 1106 on May 1, 2023, the transcript was not certified until September 27, 2023, nearly five months later. (Court Reporter Certification). The reason given by the government—that there were only two paralegals in the post-trial section, a civilian and a staff sergeant new to the section—is not a reasonable explanation for the delay. (Post-Trial Processing Timeline Letter). Thus, despite the Army Court's holding otherwise,

appellant was entitled to a meaningful relief that also addresses the public's perception of the integrity of the military justice system. Because appellant has already served his adjudged confinement, the remaining meaningful relief readily available is the setting aside of his bad-conduct discharge.

Conclusion

Accordingly, for the foregoing reasons, this Court should find that the post-trial delay was excessive, was so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system, and thereby warrants appellant's bad-conduct discharge being set aside.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Abdullah, Crim App. Dkt. No. 20230223, USCA Dkt. 25-0070/AR was electronically with the Court and Government Appellate Division on January 22, 2025.

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