IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

KEEN A. FERNANDEZ
Airman First Class (E-3), USAF

Appellant

AMICUS CURIAE BRIEF OF UNITED STATES COAST GUARD OFFICE OF LEGAL ASSISTANCE AND DEFENSE SERVICES

IN SUPPORT OF APPELLANT

Crim. App. Dkt. No. ACM 40290 (f rev)

USCA Dkt. No. 24-0101/AF

THADEUS J. POPE, LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (757) 453-5608
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886

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U.S. Air Force Court of Criminal Appeals

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UNITED STATES, *Appellee* v. KEEN A. FERNANDEZ Airman First Class (E-3), USAF *Appellant*	*AMICUS CURIAE* BRIEF OF UNITED STATES COAST GUARD OFFICE OF LEGAL ASSISTANCE AND DEFENSE SERVICES **IN SUPPORT OF APPELLANT** Crim. App. Dkt. No. ACM 40290 (f rev) USCA Dkt. No. 24-0101/AF

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

Pursuant to Rule 26 of this Honorable Court's Rules of Practice and Procedure, the United States Coast Guard Office of Legal Assistance and Defense Services ("CG-LAD") respectfully submits this brief in support of Issue I of Airman First Class Keen Fernandez's ("Appellant") Supplement to the Petition for Grant of Review, filed on 27 March 2024. This Court should intervene to provide crisp, clear guidance to the Courts of Criminal Appeals ("CCA") to reduce unreasonable post-trial delays by the Government and to provide appellants with meaningful relief when such efforts fail. CG-LAD supports Appellant's position that the Government's submission of a defective or incomplete Record of Trial ("RoT") to a service court of criminal appeals does not toll the presumption of

unreasonable post-trial delay under this Court's precedents outlined in *United States v. Moreno*.[1]

INTEREST OF AMICUS CURIAE

CG-LAD represents Coast Guard members on appeal before the Coast Guard Court of Criminal Appeals ("CGCCA"), this Court, and the United States Supreme Court. CG-LAD has routinely observed and opposed Government failures to submit complete RoT in a timely fashion. Submission delays adversely affect appellants' due process right to speedy post-trial processing, often causing personal and professional prejudice. Additionally, even when CCAs do find the Government accountable for delays resulting from an incomplete RoT, appellants are often left without meaningful relief.

By granting Issue I of Appellant's petition, this Court will have an opportunity to provide crisp, clear guidance to the CCAs about whether the submission of an incomplete RoT tolls the presumption of unreasonable post-trial delay. Further, this Court should ensure that the CCAs are not only aligned but are also scrupulously adhering to the legal and analytical obligations required by this Court's due process jurisprudence for claims of unreasonable post-trial delay.[2]

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[1] *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006).
[2] *See generally United States v. Flores*, __ M.J. __ (C.A.A.F. 2024).

ARGUMENT

This Court should grant review of Issue I of Appellant's petition because there is a lack of institutional diligence in post-trial processing across the services. Efforts to reduce post-trial processing delays have been inconsistent and insufficient for decades.

I. Service Courts of Criminal Appeals have held that the submission of an incomplete Record of Trial does not toll the presumption of unreasonable post-trial delay.

Counsel for Appellant noted in their supplement that they are "aware of no case where a Court of Criminal Appeals has given relief to an appellant for the Government's failure to docket a complete record of trial."[3]

In *United States v. Guzman*,[4] the CGCCA dealt squarely with this issue. After *Guzman* was first docketed, the appellant asserted six assignments of error, one of which alleged that the addendum to the Staff Judge Advocate's recommendation was deficient.[5] The CGCCA remanded the case for new post-trial processing, deferring consideration of the appellant's remaining assignments of error.[6] When the case was ultimately re-docketed, the appellant also asserted he

[3] Appellant's Supplement to Petition for Grant of Review at 17.
[4] *United States v. Guzman*, 79 M.J. 856, 865 (C.G. Ct. Crim. App. 2020).
[5] *Id*. at 860.
[6] *Id*. at 860.

was deprived of his due process right to speedy post-trial review and appeal due to delays before and after the remand.[7]

In *Guzman*, the CGCCA concluded that:

> [T]here were three periods of presumptively unreasonable delay: (1) from the conclusion of trial to the original Convening Authority's action; (2) from our decision to the new Convening Authority's action; and (3) from the new Convening Authority's action to docketing with this Court. *Regarding the periods following remand, we agree with our sister Court: "Although Moreno specifically dealt with initial post-trial processing, the same timeliness standards logically apply to cases returned by this court for new post-trial processing.*" *United States v. Turpiano*, No. ACM 38873, 2019 WL 4274053, at *4 (A.F. Ct. Crim. App. Sept. 10, 2019), *review denied*, No. 20-0065/AF, 2020 WL 1183391 (C.A.A.F. Feb. 11, 2020). We thus conclude that there was a total of eighty-eight days of presumptively unreasonable delay. This triggers a full analysis of whether there was a due process violation by considering each of the *Barker* factors.[8]

As part of the Court's *Barker* analysis, the CGCCA considered the Government's reasons for delay during "each stage of the post-trial period,"[9] and scrutinized in particular the period following the remand.[10]

> More troubling to us is the period following our remand. The record of trial was already transcribed, authenticated, and ready for a fresh SJA's recommendation. Yet—bearing in mind that we sent the case back due to errors in post-trial processing—it took [the Government] eighty-five days to accomplish this, then an additional fourteen days to serve the recommendation on Appellant's counsel.[11]

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[7] *Id*. at 860.
[8] *Guzman*, 79 M.J. at 856, 865–66 (emphasis added) (citing *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018).
[9] *Guzman*, 79 M.J. at 866.
[10] *Id*.
[11] *Id*.

The CGCCA noted it then took the Government fifty-one days to respond to the appellant's submitted matters, and an additional thirty-four days from the date of the new Convening Authority action before the case was re-docketed.[12] "[T]he Government offer[ed] no explanation for th[ose] post-remand delays and [the court could] discern no legitimate reasons for them."[13]

After considering the appellant's prejudice, the CGCCA was "dubious that the delays in this case rise to the level of a constitutional due process violation."[14] Nonetheless, the Court provided nominal relief under *Tardif*[15] and Article 66(c), UCMJ, noting the appellant's challenges in substantiating prejudice, and that the Government's "laggard post-trial processing–particularly following remand–evinces a lack of attention to detail and institutional diligence."[16]

In total, the *Guzman* court approved forty-five months of confinement out of the original forty-eight months to which appellant had been sentenced.[17] The appellant had been convicted by a general court-martial of

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[12] *Id*.
[13] *Id*.
[14] *Id*. at 868.
[15] *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).
[16] *Guzman*, 79 M.J. at 868.
[17] *Id*. at 860, 869.

one specification of making false official statements and two specifications of sexual assault, one of which was conditionally dismissed.[18]

Three months is approximately equal to the eighty-eight days of presumptively unreasonable delay that the Court found in this case, meaning the Court essentially gave one-for-one confinement credit for delays caused by the Government's lack of institutional diligence. However, such nominal relief has not deterred Government complacency. Three-for-one credit akin to that awarded for unlawful pretrial punishment may be more effective in scenarios such as this where the Government is at fault.

Similar to *Guzman*, the Air Force Court of Criminal Appeals ("AFCCA") remanded *United States v. Turpiano* for new post-trial processing after holding that the addendum to the Staff Judge Advocate's Recommendation and subsequent Convening Authority's action were defective.[19] Following the new post-trial processing, the Convening Authority disapproved the appellant's dismissal, but approved the three months' confinement, forfeitures, and reprimand.[20] After the appellant re-

[18] *Id*. at 856.
[19] *United States v. Turpiano*, No. ACM 38873, 2019 WL 4274053, at 1 (A.F. Ct. Crim. App. Sept. 10, 2019).
[20] *Id*. at 1 (A general court-martial composed of officer members convicted Major Turpiano, contrary to his pleas, of assault consummated by a battery by touching the breast of Second Lieutenant (2d Lt) RH and touching the mid-section of 2d Lt CE, in violation of Article 128, UCMJ).

asserted and expanded his claim of post-trial processing delays, the AFCCA ultimately held that "the post-trial processing delays both before and after the initial trial and on remand warrant relief," and reduced the appellant's forfeitures.[21]

The CCAs in *Guzman* and *Turpiano* allowed the *Moreno* clock to run against the government even after remand. This Court should grant Appellant's petition for review of Issue I and adopt a service-wide rule requiring CCAs to let the clock run against the Government. Nonetheless, neither the CGCCA in *Guzman* nor the AFCCA in *Turpiano* awarded more than nominal relief. Even when the CCAs hold the Government technically accountable, they are reluctant to afford meaningful relief.[22]

II. The Coast Guard has a nearly 50-year history of dilatory post-trial processing, including missing, lost, and deficient Records of Trial.

One problem that has "persistently plague[d] the Coast Guard" is the Government's failure to docket complete RoTs in a timely fashion.[23] This problem has persisted since at least 1975, when the Coast Guard Court of Military Review noted the "continuing saga" of the Government failing to meet its post-trial

[21] *Id*. at 2.
[22] Appellant's Supplement to Petition for Grant of Review at 16-17.
[23] *United States v. Amparo*, 25 M.J. 722, 715 (C.G.C.M.R. 1987).

processing obligations.[24] Clearly, this issue did not start in 1975, but it has become especially common in the last twenty years, as evidenced by the following list of CGCCA opinions that involved post-trial delays:

> *United States v. Tardif*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003);
> *United States v. Osuna*, 58 M.J. 879 (C.G. Ct. Crim. App. 2003);
> *United States v. Gonzalez*, 61 M.J. 633 (C.G. Ct. Crim. App. 2005);
> *United States v. Holbrook*, 64 M.J. 553 (C.G. Ct. Crim. App. 2007);
> *United States v. Medina*, 69 M.J. 637 (C.G. Ct. Crim. App. 2010);
> *United States v. Bernard*, 69 M.J. 694 (C.G. Ct. Crim. App. 2010);
> *United States v. Kowalski*, 69 M.J. 705 (C.G. Ct. Crim. App. 2010);
> *United States v. Matako*, CGCMS 24454 (C.G. Ct. Crim. App., Mar. 20, 2012);
> *United States v. Hughey*, 72 M.J. 809 (C.G. Ct. Crim. App. 2013);
> United *States v. Caulfield*, 72 M.J. 690 (C.G. Ct. Crim. App. 2013);
> *United States v. Guzman*, 79 M.J. 856 (C.G. Ct. Crim. App. 2020);
> *United States v. Leal*, 81 M.J. 613 (C.G. Ct. Crim. App. 2021);
> *United States v. Tucker*, 82 M.J. 553 (C.G. Ct. Crim. App. 2022);
> *United States v. Armitage*, 2022 WL 4127212 (C.G. Ct. Crim. App. Sept. 12, 2022);
> *United States v. Anderson*, Docket No. 1477 (C.G. Ct. Crim. App. 2022);
> *United States v. James*, 2023 WL 7557349 (C.G. Ct. Crim. App. 2023);
> *United States v. Woods*, 2023 WL 7555387 (C.G. Ct. Crim. App. 2023);
> *United States v. Grijalva*, 83 M.J. 669 (C.G. Ct. Crim. App. 2023);
> *United States v. Chock*, __ M.J. __ (C.G. Ct. Crim. App. 2024); and
> *United States v. Nenni,* __M.J. __ (Docket No. 1494, Case No. CGCMSP 0395) (f rev) (C.G. Ct. Crim. App. 2024).

Over this same twenty years, the CGCCA has identified various causes of unreasonable post-trial delay. In 2005, the CGCCA found Government delay was created by "misplacing" an RoT and subsequently not discovering it until a routine

[24] *United States v. Player*, 2 M.J. 1115, 1117 (C.G.C.M.R. 1975) (Lynch, J., concurring).

office clean-up event over four months later and further found this was an unreasonable delay of post-trial processing warranting disapproval of the initial reduction of rank.[25] The following year, the CGCCA found further unreasonable delay when the Government took 146 days to authenticate a RoT and then nearly an additional month to forward the record after Convening Authority action.[26]

In 2007, the CGCCA highlighted that "[t]o the extent we have set any standard, it is that institutional diligence is required in post-trial processing," further noting how "[h]onest mistakes, administrative problems, and chronic understaffing that significantly delay post-trial processing . . . often do not reflect the required diligence."[27]

Not even two months after the holding in *Holbrook*, the CGCCA reaffirmed the requirement of "institutional diligence" within the post-trial process in *United States v. Greene.*[28] The court determined the Government failed to properly process the RoT with reasons ranging from unexplained delay to poor management.[29] Based on those Government actions and inactions, the Court re-assessed the sentence and reinstated Appellant's rank to E-2 from E-1.[30]

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[25] *United States v. Gonzalez*, 61 M.J. 634, 636-37 (C.G. Ct. Crim. App. 2005).
[26] *United States v. Denaro*, 62 M.J. 663, 667 (C.G. Ct. Crim. App 2006).
[27] *United States v. Holbrook,* 64 M.J. 553, 557 (C.G. Ct. Crim. App. 2007).
[28] *United States v. Greene,* 64 M.J. 625, 628 (C.G. Ct. Crim. App. 2007).
[29] *Greene,* 64 M.J. at 628-29.
[30] *Id.*

In 2021, the Government's more than 600-day delay in authenticating and docketing *United States v. Leal* amounted to a finding of a due process violation, which, considered in conjunction with the Trial Judge's insufficient inquiry regarding unlawful command influence, led the CGCCA to set aside the findings and sentence and dismiss the case with prejudice.[31]

Despite the CGCCA's repeated insistence on proper post-trial processing over the past five decades, the CGCCA has had to render several decisions within the last year alone finding post-trial processing errors. In May of 2023, the CGCCA, in *United States v. Grijalva*, determined that while prejudice was not shown as a result of the Government's 203-day docketing delay, in light of *Tardif*, the 53-day delay was nonetheless unreasonable and warranted one-month confinement relief.[32]

In November 2023, the CGCCA found post-trial processing delays in both *United States v. James* and *United States v. Woods.*[33] In *James*, the Court found 274 days of post-trial delay after it took more than 180 days to recreate the RoT and docket the case, as one volume of the RoT was lost.[34] Although it ultimately did

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[31] *United States v. Leal*, 81 M.J. 613, 623-24 (C.G. Ct. Crim. App. 2021).
[32] *United States v. Grijalva*, 83 M.J. 669, 675-77 (C.G. Ct. Crim. App 2023).
[33] *United States v. James*, No. 1485, 2023 WL 7557349, at 5 (C.G. Ct. Crim. App. 15 November 2023); *United States v. Woods,* 1481, 2023 WL 7555387, at 3-4 (C.G. Ct. Crim. App. 15 November 2023).
[34] *United States v. James*, No. 1485, 2023 WL 7557349 at 5 (C.G. Ct. Crim. App. 15 November 2023).

not grant relief, the Court identified an unexplained delay which "indicat[es] a lack of institutional diligence."[35] Then in *Woods*, the CGCCA found a 262-day delay warranted one-month confinement relief where the "post-trial processing of th[e] case was substandard in both quality and timeliness, and the reasons for delay, at an institutional level, [we]re insufficient."[36] The CGCCA then acknowledged how these continued delays "bespeak a lack of institutional diligence and are unreasonable, warranting some relief" when dismissing one month of the appellant's (albeit already served) confinement in *United States v. Chock*, due to several minimally or unexplained post-trial processing delays.[37]

The CGCCA noted its awareness that "higher-level officials are working on systemic improvement to post-trial processing."[38] However, four months later in *Chock,* the Court re-emphasized that it "look[s] forward to such [post-trial processing] improvement, which [it is] aware is being pursued."[39] But these Government representations are not reflected in practice, and despite its prodding, the CGCCA has not been successful in keeping the Government accountable.

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[35] *Id*. at 5-6 (The Court noted the Government lost one of two volumes of the RoT in the mail, then took in excess of 180 days to recreate the RoT and docket the case).
[36] *Woods*, 2023 WL 7555387 at 4-5 (noting the Government's explanation for the delay, which the Court found "insufficient" reasons for delay, included a financial management issue and loss of personnel).
[37] *United States v. Chock*, __ M.J. __, at 3 (C.G. Ct. Crim. App. Feb. 20, 2024).
[38] *Woods*, 2023 WL 7555387 at 4.
[39] *Chock*, __ M.J. at 3.

Post-trial delays "can foster the appearance of official indifference[,] tarnish the reputation" of the military justice system,[40] and contribute to deteriorating quality of records.[41] These delays amount to more than just procedural lapses. They reduce post-trial judicial process to "a meaningless ritual."[42] When the Government did explain its errors, the explanations usually involved problems that are "within the control of the government"[43] or are "routine matters in the military services."[44] However, the "accused and convicted members should not pay a price for such matters."[45] The CCAs need fresh guidance on how to reduce post-trial delays arising from the processing of RoTs, and what qualifies as meaningful relief.

CONCLUSION

This Court noted recently in *Flores* that, "[w]e have entered an era where there are many changes afoot in the military justice system.[46] Mischief will result if this Court fails not only *to provide crisp, clear guidance to the CCAs* about the practical effects of those changes, but also if it fails to *ensure that the CCAs are scrupulously adhering to the legal and analytical obligations* that those changes

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[40] *Amparo*, 25 M.J. at 726.
[41] *Woods*, 2023 WL 7555387 at 4.
[42] *Moreno*, 63 M.J. at 135.
[43] *Woods*, 2023 WL 7555387 at 4.
[44] *United States v. Bernard*, 69 M.J. 694, 700 (C.G. Ct. Crim. App. 2010).
[45] *Id*.
[46] *Flores*, __ M.J. at 2 (emphasis added).

have placed upon them."[47] By granting Appellant's petition, this Court will have an opportunity to provide such guidance on this chronic due process issue, ensuring alignment across the services and timely post-trial processing for future appellants.

Respectfully submitted,

POPE.THADEUS.JACKSON.1454277470 Digitally signed by POPE.THADEUS.JACKSON.1454277470 Date: 2024.04.08 16:08:50 -04'00'

THADEUS J. POPE, LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (757) 453-5608
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886

[47] *Id*.

CERTIFICATE OF COMPLIANCE

This Brief on Behalf of Appellant complies with the type-volume limitations of Rule 24(b) and Rule 26(f) because it contains 3601 words, fewer than 7,000.

This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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Digitally signed by POPE.THADEUS.JACKSON.1454277470
Date: 2024.04.08 16:10:37 -04'00'

THADEUS J. POPE, LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (757) 453-5608
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Fernandez*, Crim. App. Dkt. No. ACM 40290 (f rev), USCA Dkt. No. 24-0101/AF, was electronically filed with the Court and with the Government and Defense Appellate Divisions of the United States Air Force on April 8, 2024.

POPE.THADEUS.JACKSON.1454277470 Digitally signed by POPE.THADEUS.JACKSON.1454277470 Date: 2024.04.08 16:09:20 -04'00'

THADEUS J. POPE, LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (757) 453-5608
Thadeus.J.Pope@uscg.mil
C.A.A.F. Bar No. 37886