

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

UNITED STATES
Appellee

v.

Private (E-2)
XAVIER L. ANDERSON
United States Army
Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 20180447

USCA Dkt. No. 21-0179/AR

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

BRIANNA C. TUOHY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0692
USCAAF Bar No. 37204

JULIA M. FARINAS
Captain, Judge Advocate
Acting Branch Chief
Defense Appellate Division
USCAAF Bar No. 37545

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 36437

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

TABLE OF CONTENTS

Table of Authorities	iii
Issue Presented	1
Statement of Statutory Jurisdiction	1
Statement of the Case	1
Statement of Facts	1
Summary of Argument	4
Law and Argument	5
1. The length of post-trial delay is presumptively unreasonable.....	6
2. The government failed to offer reasons for the delay.....	6
3. Assertion of the right to a timely review and appeal.....	7
4. Appellant was prejudiced by denial of his due process right to speedy post-trial processing.....	7
5. Even if this Court does not find actual prejudice, the post-trial delay is so egregious it violated appellant’s due process rights.....	8
Conclusion	11

TABLE OF AUTHORITIES

Supreme Court of the United States

Barker v. Wingo, 407 U.S. 514 (1972).....5,8

Court of Appeals for the Armed Forces

Toohey v. United States, 60 M.J. 100 (C.A.A.F. 2004).....5

United States v. Jones, 61 M.J. 80 (C.A.A.F. 2005).....5, 8

United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).....5, 6

United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).....9

Army Court of Criminal Appeals

United States V. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003)..... 7, 10

United States V. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).....10

Federal Court Cases

Rheuark v. Shaw, 628 F. 2d 297 (5th Cir. 1980)7

Uniform Code of Military Justice

Article 112a.....2

Article 120.....2

Article 66.....1

Article 67.....1

Articles 862

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

**WHETHER APPELLANT’S DUE PROCESS RIGHT TO A
SPEEDY POST-TRIAL REVIEW HAS BEEN DENIED**

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 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3) (2016).

Statement of the Case

On March 29, 2019 a military judge sitting as a general court-martial convicted appellant, Private (PV2) Xavier L. Anderson, contrary to his plea, of

one specification of sexual assault, in violation of Article 120, UCMJ (2016). (JA 03, 06, 48). Additionally, the military judge found appellant guilty, in accordance with his pleas, of one specification of absence without leave and one specification of wrongful use of marijuana, in violation of Articles 86 and 112a, UCMJ, (2016). (JA 03, 06, 48). The military judge subsequently sentenced appellant to be reduced to the grade of E-1, confined for thirty-eight months, and discharged from the service with a dishonorable discharge. (JA 07). On January 16, 2020, the convening authority approved the sentence as adjudged. (JA 51).

On January 4, 2021, the Army Court affirmed the findings and sentence. (JA 02). This Court granted appellant's petition for grant of review on April 23, 2021 on the issue above and ordered briefing under Rule 25. (JA 01).

Statement of Facts

On September 6, 2018, appellant's sentence was adjudged. (JA 54). After that date, it took the convening authority 497 days to take action in appellant's case, with only 16 days attributed to defense delay for errata. (JA 14-16, 51, 54).

The following chart is a chronology of the pertinent post-trial processing in appellant's case:

Date	Post-Trial Activity	Days Since Previous Activity	Cumulative Days after Sentence Adjudged
Sep 6, 2018	Sentence adjudged. (JA 54).	n/a	0
Feb 5, 2019	Court reporter completes 637-page Record of Trial (ROT). (JA 13).	152	152
Feb 6, 2019	Trial defense counsel (TDC) receives copy of ROT. (JA 25).	1	153
Feb 21, 2019	TDC completes errata. (JA 16).	15	168
Feb 26, 2019	Military judge receives ROT. (JA 25).	5	173
Sep 30, 2019	TDC submits first request for speedy post-trial. (JA 17).	216	389
Sep 30, 2019	Chief of Military Justice (CoJ) emails TDC and states that the record is awaiting authentication from the military judge. (JA 21).	0	389
Nov 5, 2019	TDC reasserts request for speedy post-trial processing. (JA 21).	36	425
Nov 5, 2019	CoJ acknowledges second request for speedy post-trial and informs TDC the ROT is with military judge. (JA 20).	0	425
Dec 9, 2019	TDC submits third request for speedy post-trial. (JA 19).	34	459
Dec 9, 2019	CoJ emails TDC and states it is still with military judge. (JA 19).	0	459
Dec 21, 2019	Military judge completes errata and authenticates ROT. (JA 24-25)	12	471
Jan 6, 2020	Staff Judge Advocate (SJA) signs post-trial recommendation (SJAR). (JA 46).	16	487
Jan 6, 2020	TDC is served copy of the SJAR and authenticated ROT. (JA 56).	0	487

Jan 15, 2020	TDC submits Rule for Courts-Martial [R.C.M.] 1105 matters. (JA 26).	9	496
Jan 16, 2020	Convening authority approves adjudged sentence and 141 days of pretrial confinement credit. (JA 51).	1	497
Subtraction for transmittal and defense review of ROT (16 days)		497 days (trial to initial action) minus 16 days	
Total post-trial processing time from sentence adjudged at trial to convening authority's initial action after deduction		481 days	

The government failed to explain why it took the court reporter 152 days to complete the record of trial. Likewise, nothing in the record of trial explains why it took the military judge 298 days to complete errata and authenticate the record of trial. Additionally, the SJA failed to include any mention in his recommendation to the convening authority of the 481-day post-trial processing time attributable to the government. (JA 46, 49-50).

Summary of Argument

Appellant's due process right to a speedy post-trial review was denied when (1) the convening authority failed to take action within 120 days of the adjudged sentence; (2) the government failed to explain its excessive post-trial processing delay; (3) appellant asserted his right to a timely review on multiple occasions; and (4) appellant was denied the opportunity to be considered by the Army Clemency and Parole Board when he was initially eligible.

Even if this Court finds no actual prejudice, the post-trial delay in this case, especially the extreme amount caused by the military judge, was so egregious that it violated appellant's due process right to speedy post-trial processing. Relief for this unexplained delay is necessary to deter the government from falling into dilatory post-trial processing habits that are detrimental to appellants and the public's perception of the fairness and integrity of the military justice system.

Law and Argument

A convicted service member has a due process right to timely post-trial review of court-martial convictions. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). Whether appellant has been denied the due process right to a speedy post-trial review and appeal is reviewed de novo. *Id.* at 135. In conducting its review this Court considers the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135. (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). In this case, all four factors favor appellant.

When analyzing prejudice under the fourth factor, this Court considers the following 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. 129, 138-39 (quoting *Rheuark v. Shaw*, 628 F. 2d 297, 303 n.8 (5th Cir. 1980)).

1. The length of post-trial delay is presumptively unreasonable.

According to this Court, there is a presumption of unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial." *Moreno*, 63 M.J. at 142.

The convening authority took action 497 days after completion of trial. (JA 51). After subtracting the time for defense review, it took a total of 481 days from the sentence to the convening authority's initial action. This delay is *four times* the standard established in *Moreno*. Therefore, there is a presumption of unreasonable delay, and this first factor strongly favors appellant.

2. The government failed to offer reasons for the delay.

The government failed to provide any reasons for the 152-day delay in preparing the 637-page record of trial. Likewise, there is also no explanation of the military judge's 298-day delay in authenticating the record of trial, where only a small number of unsubstantial changes were indicated on the military judge's errata. (JA 24). The military judge has a responsibility to work closely with the SJA to ensure the timely preparation and completion of the record of trial. *United*

States v. Chisholm, 58 M.J. 733, 737-38 (Army Ct. Crim. App. 2003) aff'd, 59 M.J. 151 (C.A.A.F. 2003). As discussed below, appellant brought the delay to the government's attention on three separate occasions, so they were certainly aware of it. Nonetheless, they completely ignored the issue and offered no explanation or excuse. Therefore, this factor also weighs heavily in favor of appellant.

3. Assertion of the right to a timely review and appeal.

Defense counsel submitted a request for speedy post-trial processing on three separate occasions: September 30, November 5, and December 9, 2019. (JA 17, 19, 20). Although the government acknowledged each request, twice they indicated the record was with the military judge and took no other significant action. (JA 19-23). This factor weighs in favor of appellant.

4. Appellant was prejudiced by his denial of his right to speedy post-trial processing.

On September 6, 2018, appellant was sentenced to 38 months of confinement and granted 141 days of pretrial confinement credit. (JA 07). But for his case being suspended in post-trial limbo, appellant would have been eligible to be considered for clemency after serving nine months of confinement. (JA 61-62). Additionally, appellant should have been eligible for parole in August 2019, after serving one third of his sentence. (JA 64). The government's excessive and inexplicable delay in this case denied appellant the opportunity to be considered by the clemency and parole board until after 16 January 2020 – a delay of five

months. (JA 63-64). This denial created concern and anxiety beyond “the normal anxiety experienced by prisoners awaiting an appellate decision” because appellant was not afforded the same rights as the other inmates in confinement. *Moreno*, 63 M.J. at 140. This is real and actual prejudice. Likewise, as this Court previously held in *United States v. Jones*, an appellant can demonstrate prejudice if unreasonably lengthy delay results in a lost opportunity to be *considered* for a second chance. 61 M.J. at 85. This factor also favors appellant.

5. Even if this Court does not find actual prejudice, the post-trial delay is so egregious it violated appellant’s due process rights.

As stated by this Court in *Moreno*, the four *Barker* factors discussed above “are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation. 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533). Even if this Court does not find actual prejudice under the fourth *Barker* factor, a due process violation can be found “when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Tolerating the delay in this case would certainly adversely affect the perception of fairness and integrity of the military justice system. The military judge held the record of trial, without action, for 298 days before he completed errata and authenticated the record – that is almost twice the amount of time it took

the court reporter to transcribe the record, and the errata sheet only has minor corrections. (JA 24). Then, despite three separate defense requests demanding speedy post-trial processing, nothing in the record indicates the SJA took any steps to explain, or otherwise work with the military judge to address the cause for delay.

The Army Court has addressed the importance of the military judge in ensuring the government is proceeding with due diligence in completing the record of trial, but there is little recourse available when the military judge is the cause for delay. *See Chisholm*, 58 M.J. at 733 (“Both Congress and the President have specifically tasked the military judge with the responsibility to direct the preparation of the record of trial.”). Yet, “an SJA’s responsibility to secure justice and fairness in every case includes ensuring that every soldier receives ‘a fair, impartial, and timely trial, to include the post-trial processing of his case.’” *Id.* at 738 (quoting *United States v. Collazo*, 53 M.J. 721, 725 (Army Ct. Crim. App. 2000)).

The lack of urgency and accountability in processing post-trial matters is apparent in this case where the SJA failed to interject on behalf of appellant, despite three requests for speedy processing, and provided no explanation or even recognition of the post-trial delay in his post-trial recommendation to the convening authority. Rather than ensure appellant received timely post-trial

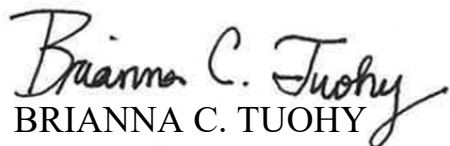
processing, the government took the “hands off” approach and simply accepted the delay in obtaining authentication from the military judge without question.

Likewise, the military judge, an agent of the government albeit a neutral and detached one, failed to ensure he proceeded diligently in appellant’s case. Such disregard for appellant’s right clearly cast a pallor on the military justice system and cannot be tolerated.

As such, the unreasonable and excessive delay in appellant’s case caused in part by the military judge, and wholly ignored by the government, is so egregious as to adversely affect the public’s perception of the fairness and integrity of the military justice system.

Conclusion

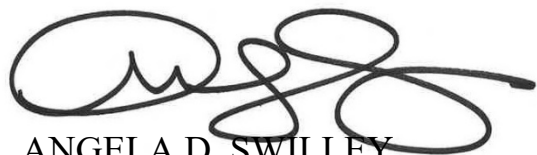
The government's excessive and unreasonable post-trial processing denied appellant's due process right to speedy post-trial review. Appellant respectfully requests this Court grant appropriate relief.



BRIANNA C. TUOHY
CPT, JA
Appellate Defense Counsel
Defense Appellate Division



JULIA M. FARINAS
CPT, JA
Acting Branch Chief
Defense Appellate Division



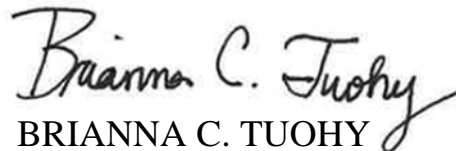
ANGELA D. SWILLEY
LTC, JA
Deputy Chief
Defense Appellate Division



MICHAEL C. FRIESS
COL, JA
Chief
Defense Appellate Division

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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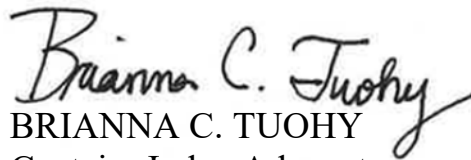
A handwritten signature in black ink that reads "Brianna C. Tuohy". The signature is written in a cursive, flowing style.

BRIANNA C. TUOHY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0692
USCAAF Bar Number 37204

Dated: May 21, 2021

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of *United States v. Anderson*,
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BRIANNA C. TUOHY
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Ft. Belvoir, VA 22060
(703) 693-0692
USCAAF Bar Number 37204