IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	REPLY BRIEF ON BEHALF OF APPELLANT
v.	
Private (E-2) **XAVIER L. ANDERSON,** 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:

Granted Issue

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

Argument

A. The Government attempts to explain their unreasonable delay with facts not found in the record.

While acknowledging the Government is responsible for 481 days of post-trial delay, Appellee attempts to mitigate by pointing to the reason for the excessive delay after the military judge received the record of trial for authentication but provides absolutely no facts from the record to support its claim that "the totality of the circumstances demonstrates the reasonableness of the delay." (Appellee Br. at 6). Instead, after rightly pointing out, "[t]here is no indication or explanation in the record to account for the military judges delay,"

(Appellee Br. at 6-7), Appellee then attempts to argue "the realities, circumstances, and operational tempo that any military judge faces in the Fort Bliss circuit are indeed daunting and mitigating". (Appellee's Br. at 7). But, Appellee does not now get to create an argument by using generalities without any facts from the record. Put simply, there is no evidence in the record to suggest why the military judge was unable to review appellant's record of trial for almost 300 days because of the duties required of him, and that is because the government failed to provide that explanation when it had the opportunity. Without any explanation of the "extensive tasks to be accomplished by this military judge" (Appellee's Br. at 6), the government is left with 481 days of unexplained delay. That the government explains that over half of the delay was caused by the person who is responsible for ensuring that the "proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources", s*ee* Rule for Court-Martial (RCM) 801(a) Discussion (2019), only makes the delay more egregious.

B. The Government's persistent disregard of post-trial processing times requires intervention by this Court.

The government alleges the post-trial delay in appellant's case is not so egregious that it violates appellant's due process rights. (Appellee's Br. at 9). This is because, according to the government, appellant's case is not similar to the cases in which this Court has found delay sufficient to affect the public's perception of fairness and integrity of the military justice system. (Appellee's Br. at 10). In

other words, because it did not take the government 805 days, *United States v. Toohey*, 63 M.J. 353, 357 (C.A.A.F. 2006); 566 days, *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006); or even 6 years, *United States v. Bush*, 68 M.J. 96, 102 (CA.A.F. 2009), to have appellant's case docketed for appeal, the Court need not concern itself with the excessive and unexplained delay in appellant's case.

A lot has changed in the fifteen years since this Court established its presumption of unreasonable post-trial delay. The Military Justice Act of 2016 overhauled the post-trial process with a goal of streamlining and shortening it. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2968 (2016). Technology has improved such that the most time-consuming process in preparing a record – transcription – can happen in real time. The Office of the Judge Advocate General, "U.S. Army Report on Military Justice for Fiscal Year 2020 at 3 [Army Report on Military Justice FY20]. Finally, the number of courts-martial tried every year has fallen dramatically: the Army now tries *half* the number of cases it did when *Moreno* was decided in 2006. *Cf* Fiscal Year 2006 "Annual Report of the Code Committee on Military Justice," and Army Report on Military Justice FY20.

Yet, despite these statutory, technological, and administrative changes, the government continues to violate this Court's *Moreno* standard, seemingly without concern. Over the last year alone, the Army Court has granted relief in at least 14

cases for unreasonable post-trial delay. *See United States v. Kizzee*, ARMY 20180241, 2019 CCA LEXIS 508 (Army Ct. Crim. App. 12 Dec. 2019) (summ. disp.) (274 days); *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38 (Army Ct. Crim. App 10 Feb. 2020) (summ. disp.) (296 days); *United States v. Notter*, ARMY 20180503, 2020 CCA LEXIS 150 (Army Ct. Crim. App. 4 May 2020) (summ. disp.) (337 days); *United States v. Diaz*, ARMY 20180556, 2020 CCA LEXIS 154 (Army Ct. Crim. App. 11 May 2020) (sum. disp.) (308 days); *United States v. Feeney-Clarke*, ARMY 20180694, 2020 CCA LEXIS 256 (Army Ct. Crim. App. 29 July 2020) (mem. op.) (303 days); *United States v. Badgett*, ARMY 20190177 (Army Ct. Crim. App. 4 Nov. 2020) (summ. disp.) (320 days); *United States v. Rivera*, No. ARMY 20190608, 2021 CCA LEXIS 262 (A. Ct. Crim. App. May 27, 2021) (288 days); *United States v. McKee*, No. ARMY 20190680, 2021 CCA LEXIS 264 (A. Ct. Crim. App. May 27, 2021) (285 days); *United States v. Meadows*, No. ARMY 20190260, 2021 CCA LEXIS 263 (A. Ct. Crim. App. May 27, 2021); (276 days from sentencing to docketing); *United States v. Brown*, 81 M.J. 507 (A. Ct. Crim. App. 2021) (373 days from sentencing to docketing); *United States v. Hemmingsen*, No. ARMY 20180611, 2021 CCA Lexis 180 (A. Cr. Crim. App. April 15, 2021) (322 days) *United States v. Christensen*, No. ARMY 20190197, 2021 CCA LEXIS 159 (A. Ct. Crim. App. Mar. 29, 2021); *United States v. Figueroa*, No. ARMY 20200059, 2021 CCA LEXIS 265 (A. Ct.

Crim. App. May 27, 2021) (214 days); *United States v. Guyton*, No. ARMY 20180611, 2020 CCA LEXIS (A. Ct. Crim. App. April 15, 2021) (322 days). Unfortunately, there are many more cases where the Army Court has chosen not to exercise its authority to grant such relief, as was the situation in the present case.[1] It is clear from reviewing the Army Court's statistics, as well as Appellee's brief, that the message of *Moreno* is being ignored.

C. A 481-day unexplained delay in post-trial processing after three requests for speedy post-trial is egregious and undermines the validity of the military justice system.

Unfortunately, appellant's case is not unique in the unexplained 481-day delay appellant endured. Yet it is the blatant disregard of appellant's three explicit pleas for his speedy trial rights that make this case particularly egregious and embarrassing to the military justice system. (JA at 17, 19, 20).

[1] In FY19, the Army Court received 362 cases for the first time (not a remand from CAAF or returned from the convening authority after remand). The Office of the Judge Advocate General, "U.S. Army Report on Military Justice for Fiscal Year 2019", at 3 (December 31, 2019). Of those 362 cases, in 191 (53%) the initial action was completed by the convening authority outside of the 120 days prescribed in *United States v. Moreno*. *Id*. Likewise, the Army Court received 442 cases for the first time in FY20. The Office of the Judge Advocate General, "U.S. Army Report on Military Justice for Fiscal Year 2020", at 2 (December 31, 2020). Of those, 77 were processed under pre-MJA 16 processing, and the average processing time for those cases was 243 days from sentencing to convening authority action. *Id.* Only six of the 77 cases completed initial action by the convening authority within the 120 days prescribed by *United States v. Moreno*. *Id*.

Many of the circumstances that led this Court's predecessor to take the bold and necessary action in *Dunlap* exist today. *Dunlap v. Convening Authority, Combined Arms Center*, 23 U.S.C.M.A. 135 (C.M.A. 1974). There is a persistent issue of the government violating post-trial delay processing timelines with no or inadequate explanation provided. While the ability of the Convening Authority to affect the sentence has changed, the import of their role in the finality of the sentence, particularly for confined personnel, is still present.[2] Such egregious delays certainly adversely affect the public's view of the military justice system.

The delay in appellant's case is unreasonable, unexplained, and occurred despite his three requests that his rights be respected. The government has shown repeatedly that it cares little about violations of appellants' due process rights in the post-trial process, despite that process being easier than ever before. This Court has long been the watchdog of such rights, and the government's blatant disregard for its standards require bold and necessary action from this Court.

[2] U.S. Dep't of Army, Reg. 15-130, Army Clemency and Parole Board, para. 3-1(c) states: The ACPB shall consider a prisoner for clemency, restoration to duty, or reenlistment when the court-martial convening authority has taken action on the sentence, the prisoner's case has been reviewed by an MCF disposition board or by an appropriate Federal correctional or probation official, and the prisoner meets the eligibility criteria.

Conclusion

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

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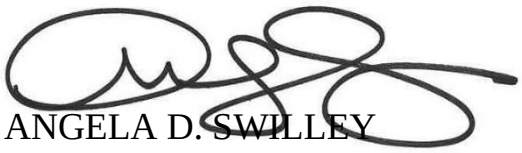

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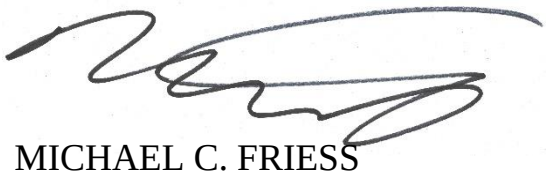

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Anderson, Crim App. Dkt. No. 20180447, USCA Dkt. No. 21-0179/AR was electronically filed brief with the Court and Government Appellate Division on July 1, 2021.

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