IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20180447
Private (E-2) **XAVIER L. ANDERSON,** United States Army, Appellant	)	USCA Dkt. No. 21-0179/AR

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

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. This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On June 12, July 6, and September 4–6, 2018, Appellant was tried at Fort Bliss, Texas before a military judge sitting as a general court-martial. (JA 57). The military judge convicted Appellant, contrary to his plea, of one specification

of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2016). (JA 03, 06, 48). In addition, 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). On September 6, 2018, the military judge sentenced appellant to 38 months' confinement, reduction to E-1, and a dishonorable discharge. (JA 07, 47).

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 above issue and ordered briefing under its Rule 25. (JA 01).

Statement of Facts

The transcript of this mixed plea, contested sexual assault trial comprised637 pages and five-volumes. The record of trial included nineteen prosecution exhibits, eight defense exhibits, and thirty-three appellate exhibits. (JA 57–60).

The following chart illustrates the chronology of events in the post-trial processing of appellant's case:

Date	Post-Trial Activity	Days Since Prev. Activity	Cum. Days After Sentence Adjudged
6 Sep 18	Sentence adjudged. (JA 54).	N/A	0

5 Feb 19	Record of trial (ROT) completed by court reporter. (JA 13).	152	152
15 Feb 19	Trial counsel returns errata. (JA 13).	10	162
21 Feb 19	Defense counsel returns errata. (JA 16).	6	168
26 Feb 19	Military Judge (MJ) receives ROT. (JA 25).	5	173
30 Sep 19	TDC submits first request for speedy post-trial processing. (JA 17) (two additional requests were submitted on 5 Nov 19 and 9 Dec 19).	216	389
21 Dec 19	MJ authenticates ROT. (JA 25).	82	471
6 Jan 20	The Staff Judge Advocate's (SJA) recommendation (SJAR) signed. (JA 46).	16	487
6 Jan 20	SJAR and ROT served on appellant thru defense counsel as agreed. (JA 56).	0	487
15 Jan 20	DC submits R.C.M. 1105 post-trial matters. (JA 26).	9	496
16 Jan 20	Addendum to SJAR signed. (JA 49).	1	497
16 Jan 20	Convening Authority Action. (JA 51).	0	497
	497 days (announcement of sentence to initial action) minus 16 days (defense delay for return of errata[1])		
Total post-trial processing time	**481 days attributable to the government**		

[1] Appellant accepts responsibility for 16 days of defense attributed delay for errata return. (Appellant Br. at 4).

Summary of Argument

The Army court correctly affirmed Appellant's findings of guilty for sexually assaulting an impaired fellow soldier, for absenting himself from his unit without leave, and for wrongful use of marijuana, (JA 02, 04–05). The Army court also correctly affirmed Appellant's sentence of thirty-eight months' confinement, reduction to E-1, and a dishonorable discharge. (JA 02, 07, 54). This Court should affirm the Army court's decision because Appellant's due process rights were not violated, as he suffered no prejudice from the post-trial delay, and the delay was not "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). Furthermore, even if the Court finds a due process violation, the government has met its burden of showing that the constitutional error is harmless beyond a reasonable doubt." *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009).

Argument

I. The post-trial delay did not violate appellant's due process.

A presumption of unreasonable delay in post-trial processing exists when the convening authority fails to take action within 120 days of the completion of trial. *United States v. Moreno*, 63 M.J. 129, 142 (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. When assessing whether a facially unreasonable delay resulted in a due process violation, the court weighs the four factors outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). *Ashby*, 68 M.J. at 124. The four-factor analysis examines: 1) the length of the 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 135–38 (citing *Barker*, 407 U.S. at 530). The court balances all four factors, with "no single factor being required to find that post-trial delay constitutes a due process violation." *Id*. at 136 (citing *Barker*, 407 U.S. at 533).

Military courts will also further examine prejudice, one of the *Barker* factors, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Id.* at 138–39. With a meritless substantive appeal, an appellant would serve the same sentence regardless of post-trial delay, undermining an appellant's claim of prejudice. *Id*. at 139.

While the first and third of the four *Barker* factors favor appellant, this court should find that the post-trial processing delay of 481 days in this case did not violate appellant's due process rights because the delay was not unreasonable and, in either event, appellant cannot demonstrate prejudice.

A. The government bears responsibility for 481 days of post-trial processing.

The government acknowledges its ultimate responsibility for the delay.

B. The totality of the circumstances demonstrate the reasonableness of the delay.

Although 152 days to assemble the record of trial exceeds the 120-day standard, the government's subsequent actions demonstrate the even-handedness with which it balanced diligent processing with the interests of fairness to appellant.

The government understands that a presumption of unreasonable delay in post-trial processing exists when the convening authority fails to take action within 120 days of the completion of trial. *Moreno*, 63 M.J. at 142. Yet, the vast majority of the delay in this case, 298 days, was time the ROT was with the military judge for authentication. (JA 25). Although the remaining delay still exceeds the *Moreno* standard, it is less egregious than when the Court considers all of the delay as one mass without evaluating its context, control, and causes. "Military judges are not fungible, and the detailing of additional military judges would not have reduced *this* judge's requirement to personally authenticate *this* record." *United States v. Banks*, 75 M.J. 746, 752 (Army Ct. Crim. App. 2016). While the military judge's delay is rightly attributed to the government, the extensive tasks to be accomplished by this military judge does mitigate the length of delay. There is no

indication or explanation in the record to account for the military judge's delay. However, the realities, circumstances, and operational tempo that any military judge faces in the Fort Bliss circuit are indeed daunting and mitigating.

C. Appellant asserted his right to speedy post-trial processing.

Appellant submitted a post-trial memorandum asserting his right to speedy post-trial processing. (JA 17).

D. The delay did not prejudice appellant.

Finally, appellant has not demonstrated prejudice. When determining prejudice, the court analyzes 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 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)). Appellant does not qualify under any of these three sub-factors.

In his attempt to establish prejudice, appellant's brief argues: 1) appellant "would have been eligible to be considered for clemency after serving nine months of confinement;" 2) "appellant should have been eligible for parole in August 2019, after serving one third of his sentence;" 3) the government's delay resulted in a five-month delay in Appellant being considered by the clemency and parole

board; and 4) the delay created beyond-normal concern and anxiety as he awaited an appellate decision. (Appellant Br. at 7–8). However, Appellant offers no support to the assertion that this post-trial delay has, in fact, impacted his life in any meaningful way.

Appellant's claim that he has suffered prejudice because his opportunity for parole was delayed lacks merit. The possibility of parole is highly speculative. But even should the court consider it, appellant did not succeed in obtaining parole when he was considered. Appellant was confined at the Midwest Joint Regional Correctional Facility (MWJRCF), Fort Leavenworth, KS and had a Minimum Release Date (MRD) of June 17, 2021.[2] Thus, neither clemency nor parole were granted once they were available to Appellant, and the notion that such would have been granted earlier had he only been considered is fanciful. The Army Court has found the presumption of unreasonable delay rebutted even when all but one *Barker* factor weighed against the government. *See United States v. Ney*, 68 M.J. 613, 616–17 (Army Ct. Crim. App. 2010). Absent any actual evidence that appellant would have been granted clemency or parole, assertions of prejudice on that ground are merely speculative. *Id.* at 617.

[2] Supplemental filing of supporting documents will be completed upon the Court's request.

While appellant claims unusual anxiety, there is no indication or evidence that Appellant suffered "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140. Without more, appellant fails to meet his burden of making a colorable showing of prejudice. Because appellant was not prejudiced, this court should not find a due process violation. *See Banks*, 75 M.J. at 746 (finding no due process violation for post-trial processing of 440 days where there was no reasonable explanation for the delay, the appellant did not demand speedy post-trial review, and the appellant did not establish prejudice).

II. The post-trial delay is not so egregious it violated appellant's due process rights.

In the absence of a finding of prejudice, the court "will find a due process violation only 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). While the 481 days of government attributable delay in this case is not ideal, it is not so egregious as to affect the public's perception of fairness, especially when the vast majority of the delay, 298 days, is attributable to a single non-fungible military judge servicing a demanding and geographically-sprawling judicial circuit.

A finding of delay so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system should be reserved for appropriately severe cases. The seminal cases relied upon to address a due process violation based on egregious delay involve extreme and unexplainable circumstances that are not analogous to the instant case. In *United States v. Toohey*, convening authority action did not occur until 644 days after trial, the service court did not docket the case until 805 days after trial, and overall 2,240 days elapsed between the completion of trial and Appellant's completion of Article 66 appellate rights. *Toohey*, 63 M.J. at 357. In *United States v. Moreno*, while the 490 days between the end of trial and the convening authority's action was excessive, the brunt of the delay and the Court's condemnation involved the 925-day period from when the case was docketed at the Court of Criminal Appeals until briefing was complete, which included eight enlargements. *Moreno*, 63 M.J. at 136–37. In *United States v. Bush*, 316 days elapsed between Appellant's sentencing and convening authority action, yet it was the over six years' delay between convening authority action and docketing with the service court that created the severity of the delay. *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009).

The facts of Appellant's case simply do not merit a determination that the delay involved was so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system and therefore constituted a

due process violation. The military judge's authentication of the Record of Trial carried 298 days of the delay. (JA 25). Although the remaining delay still exceeds the *Moreno* standard, it is less aggravating and more accurately understood when considered in proper context. While the military judge in this case did not meet the standard required, it is important to consider the unique position held by a military judge and his competing priorities. "Military judges are not fungible, and the detailing of additional military judges would not have reduced *this* judge's requirement to personally authenticate *this* record." *Banks*, 75 M.J. at 752. The transcript of Appellant's mixed plea, contested sexual assault trial filled 637 pages and five-volumes, including nineteen prosecution exhibits, eight defense exhibits, and thirty-three appellate exhibits. (JA 57–60). There is no indication or explanation in the record to account for the military judge's delay, yet the realities, circumstances, and operational tempo that any military judge faces in large judicial circuits are uncontestably daunting and serve as mitigation to the delay in this case.

III. Even if the Court finds a due process violation, the government has met its burden of showing that the constitutional error is harmless beyond a reasonable doubt.

The post-trial delay in this case is harmless beyond a reasonable doubt. If the court finds a due process violation, the court "will grant relief unless [it] find[s] that the Government has met its burden of showing that the constitutional error is harmless beyond a reasonable doubt." *Ashby*, 68 M.J. at 125. The court considers

the totality of the circumstances in assessing harmlessness beyond a reasonable doubt, which "necessarily involves analyzing the case for 'prejudice.'" *Id.* This court reviews de novo both the determination of a post-trial delay due process violation and the question of whether such a violation is harmless beyond a reasonable doubt. *Bush*, 68 M.J. at 102 (internal citations omitted).

In determining harmlessness for post-trial delays, the post-trial delay does not necessarily have to impact directly the findings or sentence, but instead the Court will review the record de novo to determine whether other prejudicial impact is present from the delay. *Bush*, 68 M.J. at 102. In *United States v. Bush*, 316 days elapsed between Appellant's sentencing and convening authority action. *Id*. at 98. However, the excessive delay that formed the nucleus of the finding of a due process violation was the over six years it took before the case was docketed with the service court. *Id*. However, even in the face of such truly excessive delay, the court will only grant relief if it finds that the government failed to show the error was harmless beyond a reasonable doubt. *Ashby*, 68 M.J. at 125. In *Bush*, this Court affirmed the service court's conclusion that "the delay in the post-trial review of this case 'is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system,'" and the lower court's holding that Bush's due process right to speedy post-trial review had been violated. *Id*. at 97 (citing *United States v. Bush (Bush CCA II*), 67

M.J. 508, 512 (N-M. Ct. Crim. App. 2008) (quoting *Toohey*, 63 M.J. at 362)). This Court also affirmed the lower court's conclusion that the government had met its burden to show that the post-trial error was harmless beyond a reasonable doubt and the lower court's denial of relief. *Id*. at 97 (citing *Bush (Bush CCA II*), 67 M.J. at 512).

Just as in *United States v. Bush*, this Court should find that any post-trial error was harmless beyond a reasonable doubt. In *Bush*, Appellant argued he was denied employment years after his release from prison specifically because he lacked his final discharge papers, or Department of Defense (DD) Form 214. *Id*. at 99. However, Appellant did not provide anything to corroborate his assertion of specific employment prejudice nor any information to explain his inability to provide corroboration. *Id*. at 101.

Similar to *Bush*, in the instant case "the record is bereft of any evidence of prejudice to appellant as a result of the delay." *Id*. at 104. Also just like *Bush*, in this case the record does not support a finding of *Barker* prejudice, and in "cases where the record does not reflect *Barker* prejudice, as a practical matter, the burden to establish harmlessness may be more easily attained by the Government." *Id*. Appellant has only made meritless assertions of prejudice, with no corroboration offered nor any explanation for why corroboration could not be offered. "Finding no convincing evidence of prejudice in the record, we will not presume prejudice

from the length of the delay alone." *Ashby*, 68 M.J. at 125 (citing *Toohey*, 63 M.J. at 363).

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the service court and deny Appellant's requested relief.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellee complies with the type-volume limitation of Rule 24(c) because it contains 2,932 words.

2. This Brief on Behalf of Appellee 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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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 21, 2021.

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