

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

UNITED STATES
Appellee

v.

Staff Sergeant (E-6)
DANIEL J. VALDEZ
United States Army
Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 20220274

USCA Dkt. No. 26-0122/AR

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II. WHETHER 952 DAYS OF DILATORY POST-TRIAL DELAY WARRANTS RELIEF, ESPECIALLY SO GIVEN THE GOVERNMENT AGREED APPELLANT'S SENTENCE SHOULD BE SET ASIDE

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 [hereinafter UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).¹

Statement of the Case

On May 19, 2022, a special court-martial consisting of both enlisted and officer members, convicted Appellant, Staff Sergeant Daniel J. Valdez, contrary to his pleas, of one specification of absence without leave, one specification of disrespect toward a superior commissioned officer, one specification of disrespect toward a superior noncommissioned officer, and one specification of battery upon a spouse, in violation of Articles 86, 89, 91, and 128, Uniform Code of Military Justice 10 U.S.C. §§ 886, 889, 891, and 928 (2018) [UCMJ].² (Charge Sheet; R. at 613). On May 20, 2022, the military judge sentenced Appellant to be reduced to the grade of E-5 and to perform hard labor without confinement for thirty days. (R. at 683; STR). On June 6, 2022, the convening authority approved the sentence

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 the Appendix.

² Appellant was acquitted of two specifications of failing to report to his assigned place of duty, one specification of disrespect towards a superior commissioned officer, and one specification of disobeying a superior commissioned officer, in violation of Articles 86, 89, and 90, UCMJ.

but took no action on the findings. (Action). Six months later, the military judge entered judgment on December 22, 2022. (Judgment of the Court).

On December 27, 2024—736 days after the entry of judgment and appeal by SSG Valdez pursuant to Article 66(b)(1)—the Army Court of Criminal Appeals (Army Court) docketed Appellant’s case. (Referral and Designation of Counsel). Appellant submitted his brief to the Army Court on March 27, 2025. On April 25, 2025, the government filed its response in which it agreed with Appellant that relief was warranted based on the “extraordinary post-trial delay,” and recommended the Army Court set aside Appellant’s entire sentence. (Gov’t Br. at 27).

On December 9, 2025, the Army Court summarily affirmed the findings and sentence. *United States v. Valdez*, ARMY 20220274 (A. Ct. Crim. App., Dec. 9, 2025) (App’x A).³

Appellant was notified of the Army Court’s decision. In accordance with Rule 19 of this Court’s Rules of Practice and Procedure, on February 6, 2026, the undersigned appellate defense counsel filed a Petition for Grant of Review, while seeking leave to file the Supplement to the Petition for Grant of Review separately. Additionally, Appellant filed one motion for extension of time. This court granted Appellant’s motion, granting until February 27, 2026, to file the Supplement. The

³ The Army Court released a corrected decision on December 10, 2025.

undersigned counsel hereby file the Supplement to the Petition for Grant of Review under Rule 21.

Reasons to Grant Review

This Court should grant Appellant’s petition for appeal because the Army Court’s summary affirmance of Appellant’s conviction and sentence sanctioned an unacceptable and unusual departure from the ordinary course of judicial proceedings. The Army Court ratified the improper paneling of a member who held an inelastic predisposition towards sentencing, as well as disregarded the concurrence of both Appellant and the government that the post-trial delay of 952 days warranted setting aside Appellant’s sentence.

“Impartial court-members are a *sine qua non* for a fair court-martial.”
United States v. Urieta, 85 M.J. 352, 356 (C.A.A.F. 2025) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). Though *Urieta* is recent, the requirement of fairness and impartiality of panel members is not. The constitutional right to a “fair and impartial” panel is rooted in our nation’s history. Yet in Appellant’s case, the military judge failed to excuse a member who evinced a clear and inelastic predisposition as to mandatory punishment. This prejudicial error rendered Appellant’s court-martial unfair and improper from the outset.

However, Appellant’s case sat in post-trial purgatory, relatively untouched by the government for inordinate stretches of time, which left Appellant unable to

timely challenge his conviction. For instance, there was 199 days between the convening authority's action and entry of judgment, 267 days between entry of judgment and trial counsel's pre-certification, and another 399 days for the government to send the record to the military judge for certification. Though finally completed in October 2024, the government still did not send the Record of Trial to the Army Court for an additional two months. The post-trial delay—inaction solely attributable to the government and inaction without legitimate excuse or reason—was “extraordinary.” The government conceded as much and agreed with Appellant that relief was warranted.

By summarily affirming Appellant's case without elucidation or relief of any kind, the Army Court sanctioned both the improper paneling of the court-martial and the “extraordinary” post-trial delay by the government. Both are antithetical to the fairness of the military justice system. This Court should grant review of Appellant's case pursuant to Rule 21(b)(5)(F).

Issues Presented

I. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO HELD AN INELASTIC PREDISPOSITION AS TO THE IMPOSITION OF PUNISHMENT

Facts Relevant to Assignment of Error

A. First Sergeant MM Told Defense Counsel They “Could Not Change [His] Mind” That Some Punishment Must Be Imposed.

At the outset of voir dire, the military judge instructed prospective members, “With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed, if the accused were convicted.” (R. at 115).

Prior to questioning by counsel, the military judge stated, “It is ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime or crimes for which the accused is to be sentenced, if found guilty.” (R. at 135). He then asked, “Does any member, having read the charges and specifications, believe that they would be compelled to vote on a particular punishment if the accused is found guilty solely because of the nature of the charges?” (R. at 135). All members provided a negative response. (R. at 135).

The members further answered in the affirmative to the military judge’s instruction that they would consider “the full range of punishments, from no

punishment to the maximum punishment.” (R. at 135). The military judge defined “consider” as keeping an “open mind” and to “neither make a choice nor foreclose from consideration any possible sentence[.]” (R. at 135).

Based on several responses during group voir dire, defense counsel sought individual voir dire of First Sergeant (1SG) MM. (R. at 147). Defense counsel asked 1SG MM about Soldiers who had worked for him and whether any had gone absent without leave (AWOL). (R. at 187). First Sergeant MM responded he had several Soldiers who went AWOL, including one who just three weeks prior to the court-martial had been AWOL and upon return was discharged from the Army. (R. at 187).

However, the focus of the questions was on another Soldier who had gone AWOL to his home in Puerto Rico. (R. at 187–88). The Soldier’s brother had been murdered and his mother continued to receive threats, “so the Soldier just felt extremely uncomfortable leaving his family.” (R. at 188). Despite these exceptional circumstances, upon the Soldier’s return to the unit, 1SG MM recommended—and the Soldier received—punishment at a Field Grade Article 15. (R. at 188). First Sergeant MM was more concerned the Soldier did not “communicate” well with his command team and still recommended the Soldier receive non-judicial punishment despite the extraordinary extenuating circumstances. (R. at 188–89).

After several more questions about the Soldiers who went AWOL, defense counsel and 1SG MM had this final exchange:

DC: Do you believe that UCMJ punishment is always appropriate when a Soldier goes AWOL?

1SG MM: I do. If there is not any sort of extenuating circumstances, even for the individual that is dealing with the family issues, you know, what's right is right. And I think all those sorts of misconduct deserve some sort of punishment.

DC: And I can't change your mind that that misconduct doesn't deserve some sort of punishment?

1SG MM: No. *No, you're not going to change my mind.*

(R. at 190–91) (emphasis added).

Trial counsel then asked two follow-up questions. The first question, though confusing, confirmed that 1SG MM believed someone found guilty of AWOL should receive “UCMJ action.” (R. at 191–92). The second question made even less sense, “You would not believe that UCMJ action would be appropriate if someone was found innocent?” (R. at 192). First Sergeant MM agreed that an innocent person could not be punished.

The military judge asked no clarifying questions and did not conduct any rehabilitation. (R. at 192). The military judge did not remind 1SG MM that “no punishment” was within the range of possibilities in accordance with his previous instructions. (R. at 192).

B. Defense Challenged 1SG MM for Actual Bias.

Defense challenged 1SG MM for cause for actual bias based on his inelastic predisposition to imposing punishment. (R. at 203). Defense counsel argued 1SG MM would not change his mind as to punishment and cited their individual voir exchange as evidence of his inelasticity. (R. at 203–04). The military judge responded that he believed 1SG MM did have an open mind. (R. at 204). When defense counsel pushed back and argued 1SG MM said, “some punishment is going to be taken down, going to happen,” the military judge responded, “And how is it actual bias that he said some punishment in the sentencing case?” (R. at 206–07).

Defense counsel again correctly pointed out that 1SG MM stated, “no matter what, [appellant] deserves punishment [if found guilty].” (R. at 207). The military judge responded, “But I don’t think you pressed him on what I asked him about he doesn’t know. He doesn’t know that if found guilty of an Article 86 offense, the minimum punishment is no punishment, right?” (R. at 208).

C. Defense Challenged 1SG MM for Implied Bias.

Defense counsel raised the same concern for 1SG MM’s inelastic disposition in their argument for implied bias. (R. at 208–10). The military judge provided the correct test for implied bias. (R. at 209). Defense counsel then framed their inelastic predisposition argument from the perspective of an objective observer,

and how that person would have concerns that 1SG MM's "answer that [defense counsel] 'can't change his mind,' ...that's not fair...no matter how much extenuation and mitigation, there is going to be some punishment[.]" (R. at 209).

The military judge responded, "So, how is it an implied bias if an objective person is looking, saying, if we were to reach findings then [1SG MM] had to determine the appropriate sentencing in a presentencing proceedings, [1SG MM] would punish him?" (R. at 210). "[1SG MM] just says, 'I would have to punish somebody who was found guilty.'" (R. at 210).

The military judge acknowledged defense counsel had confronted 1SG MM as to punishment, but emphasized 1SG MM's single-worded responses from group voir dire: "You asked him whether [Appellant] had to be punished, but I did ask him if he understood that no punishment would be considered, right?" (R. at 210).

D. The Military Judge Made Incorrect Findings of Fact and Denied Both Challenges for Actual and Implied Bias

Despite 1SG MM's answers that "some punishment" must be imposed and the defense would be unable to "change [his] mind," the military judge denied the defense's actual bias challenge because he "received no information or indication from either group voir dire or individual voir dire that the first sergeant held an inelastic predisposition that would not yield to the evidence presented or the judge's instructions." (R. at 212).

When he made his rulings, the military judge stated, “So I’ve considered the challenge for cause on both the basis of actual and implied bias and the mandate to liberally grant defense challenges.” (R. at 212). In the explanation of his ruling, the military judge found that 1SG MM understood extenuation and mitigation evidence; however, he also found that 1SG MM had recommended suspension of the sentence for the AWOL Soldier, “he demonstrated a knowledge that somebody has to be found guilty, and to the punishment phase...yet, also showed grace and temperament in recommending [suspension of the sentence]. (R. at 212). First Sergeant MM did not recommend suspension of the Soldier’s sentence. (R. at 188–89).

The military judge further noted that he did not believe 1SG MM “was properly tested because he wasn’t aware what the minimum punishment would be.” (R. at 213). Yet the military judge then found 1SG MM was aware of the panel’s ability to not punish the accused, because the court had posed a “question of whether he would consider the range of punishment all the way from no punishment, if that was the minimum, all the way to the maximum punishment.” (R. at 213). The military judge then denied the defense challenge for implied bias. (R. at 213).

1SG MM was impaneled and sat as a member of Appellant’s court-martial. (R. at 221).

Standard of Review

This court reviews the military judge’s ruling on a challenge for actual bias under an abuse of discretion standard and the “challenge is evaluated based on the totality of the circumstances.” *Urieta*, 85 M.J. at 356–57.

An implied bias challenge, in contrast, is reviewed under a standard “that is less deferential than abuse of discretion, but more deferential than de novo review.” *Id.* at 357 (quoting *United States v. Peters*, 74 M.J. 31, 33–34 (C.A.A.F. 2015)). “A military judge who cites the correct law and explains his implied bias reasoning on the record will receive greater deference (closer to the abuse of discretion standard), while a military judge who fails to do so will receive less deference (closer to the de novo standard).” *United States v. Keago*, 84 M.J. 367, 373 (C.A.A.F. 2024) (citing *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016)).

Law

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.” *Keago*, 84 M.J. at 371 (quoting *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)).

“Consistent with that enjoiner, the accused is entitled to have his case heard by members who are not predisposed or committed to a particular punishment, or who do not possess an inelastic attitude toward the punitive outcome.” *United*

States v. Martinez, 67 M.J. 59, 61 (C.A.A.F. 2008) (citing *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2004) and Rule for Courts-Martial (R.C.M.) 912 Discussion)).

“As relevant here, R.C.M. 912(f)(1)(N) provides that a servicemember ‘[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.’” *Keago*, 75 M.J. at 321. This court has held R.C.M. 912(f)(1)(N) envisions two types of bias: actual and implied. *Id.* (citing *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003)).

A. Actual Bias

“Actual bias is also known as ‘bias in fact.’” *Urieta*, 85 M.J. at 356 (quoting *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020)). “‘It is the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.’” *Id.* (quoting *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007) (internal quotations omitted)).

“The test for actual bias is whether a member’s personal bias ‘will...yield to the military judge’s instructions and the evidence presented at trial.’” *Id.* (quoting *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012)).

“Holding an inelastic attitude toward the appropriate punishment to adjudge if the accused is convicted is grounds for an actual bias challenge.” *Hennis*, 79 M.J. at 385.

B. Implied Bias

“Implied bias is ‘bias attributable in law to the prospective juror regardless of actual partiality.’” *Urieta*, 85 M.J. at 357 (quoting *Hennis*, 79 M.J. at 385).

“The test for implied bias is ‘whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.’” *Id.* (quoting *United States v. Woods*, 74 M.J. 238, 243–44 (C.A.A.F. 2015)). This Court assumes the public is aware of the unique nature of the military justice system, specifically in regard to limited peremptory challenges and appointment of members. *Id.* (citing *Woods*, 74 M.J. at 244); *Keago*, 84 M.J. at 372.

C. Liberal Grant Mandate

Given the unique nature of our system, “military judges must err on the side of granting defense challenges for cause.” *Keago*, 84 M.J. at 372 (citing *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007)). The liberal grant mandate exists to ensure “the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings.” *Id.* (quoting *Peters*, 74 M.J. at 34). If a challenge for cause is a “close question, the challenge *should* be granted.” *Id.* (emphasis added).

Argument

First Sergeant MM held an inelastic predisposition as to sentencing and should have been excused. First Sergeant MM specifically stated “some punishment” must be imposed if an accused is found guilty and that defense could not change his mind. Thus, the military judge erred when he denied defense’s challenge of 1SG MM for cause for both actual and implied bias.

A. The Military Judge Described 1SG MM’s Inelastic Predisposition as to Punishment, Yet Paradoxically Denied the Actual and Implied Bias Challenges.

1. The Military Judge Misapplied the Law and Mischaracterized 1SG MM’s Responses.

“Holding an inelastic attitude toward the appropriate punishment to adjudge if the accused is convicted is grounds for an actual bias challenge.” *Hennis*, 79 M.J. at 385. This Court has mandated that military judges grant challenges for cause as to members who have an inelastic predisposition to punishment, even if it is just “some” punishment. For example, in *Martinez*, this Court held the trial judge erred by not granting a challenge for cause when the challenged member’s response was “qualified and inelastic as to the necessity of *some* punishment.” 67 M.J. at 61 (emphasis added). The bias is not whether the member would punish too lightly or too harshly, but rather it is the mere existence of an inelastic belief that punishment must be imposed at all.

While the military judge is presumed to know the law, questions from this military judge posed to defense counsel are direct evidence to the contrary, as the military judge did not apply the correct law as to actual bias. For instance, the military judge asked defense counsel, “And how is it actual bias that he said some punishment in the sentencing case?” (R. at 207). That 1SG MM believed “some” punishment must be imposed is precisely what this Court has articulated to be challengeable bias.

However, it is 1SG MM’s response that defense could not change his mind which presents the ultimate issue, because ““the test is whether the member’s attitude is of such a nature that he will not yield to the evidence presented and the judge’s instructions.”” *Hennis*, 79 M.J. at 385 (quoting *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979)).

It is the immovability from the position that creates the grounds for a challenge, a challenge that should have been granted by the military judge. Here, what is left glaring on the record is 1SG MM’s last response to defense counsel: “No. No, you’re not going to change my mind.” (R. at 191). “You’re not going to change my mind” is the perfect demonstration of inelasticity. As such, he not only held an inappropriate belief about the imposition of punishment, but it was also inelastic. This is plainly bias—both actual and implied.

First Sergeant MM's responses demonstrate that while he responded affirmatively to the military judge's initial voir dire instructions to keep an "open mind" as to punishment, his bias came to light during the individual voir dire when he stated he could not be swayed by argument or evidence that defense counsel may provide. This Court has consistently admonished military judges to give minimal credence to members' monosyllabic responses to the court's initial voir questions and instructions. *See, e.g., Keago*, 84 M.J. at 374 ("A potential panel member's predictable answers to leading questions [in group voir dire] are not enough to rebut the possibility of bias."). Given this admonishment, the military judge's reliance on 1SG MM's answers to group voir dire questions should not be given much deference. While 1SG MM may have been aware that no punishment was a possibility, he nevertheless told defense counsel that some type of punishment must be imposed. More importantly, he told defense counsel they could not change his mind. It is clear 1SG MM not only held a predisposition as to punishment, but it was inelastic and he indeed would not keep an "open mind."

Further, 1SG MM's answer as to counsel's inability to change his mind was unqualified. But the military judge then misstated the facts when he told defense, "So, I don't think that he said there's nothing to change his mind as an absolute when you're talking about an actual bias." (R. at 204). The military judge's statement is internally inconsistent and clearly a misstatement of 1SG MM's

response to defense. If nothing could change 1SG MM's mind, that most certainly is an "absolute."⁴

The military judge noted 1SG MM's predisposition (that 1SG MM would "have to impose some punishment"), yet denied defense's challenges for actual and implied bias. This was error.

2. The Military Judge Improperly Placed the Burden of Rehabilitation on the Defense as a Reason to Deny the Challenge.

The military judge did not ask 1SG MM a single follow-up question. He attempted no rehabilitation. Yet the military judge appeared to place blame on defense counsel for this lack of rehabilitation of 1SG MM and implied that it was their job to do so. This was error. *See Rogers*, 75 M.J. at 274 (holding it was reversible error when the military judge failed to instruct the member to "disregard her personally held belief" and "effectively endorsed her erroneous understanding" of the law).

At several points during the colloquy with defense and in his ruling, the military judge stated 1SG MM was not "properly tested because he wasn't aware what the minimum punishment would be." (R. at 212). This is despite the fact that defense specifically asked 1SG MM whether they could change his mind "that misconduct doesn't deserve some sort of punishment[.]" (R. at 191).

⁴ "Absolute" means "free from qualification or condition; conclusive." *Black's Law Dictionary*, Ninth Ed. (2009).

Distinct from cases such as *Martinez* and *Rogers*, where the military judges asked subsequent questions in attempts to rehabilitate the members, no such questioning occurred in this case. The defense elicited bias—an inelastic predisposition towards punishment—and properly challenged the member. It was not their job to change 1SG MM’s mind once he evinced the bias.

It is clear from the record what defense was intent on showing, as their questions focused on 1SG MM’s recommendation of punishment for AWOL cases. Trial counsel or the military judge could have attempted to rehabilitate him. “But here, the military judge never asked any clarifying questions or offered any corrections about these issues that might have filled the gaps left by trial and defense counsel.” *Keago*, 84 M.J. at 375. In fact, trial counsel’s questions confirmed 1SG MM believed some “UCMJ action” should be taken in AWOL cases.⁵

The military judge’s denial of defense’s challenges for bias was error. First Sergeant MM should have been excused.

B. The Military Judge Failed to Apply the Liberal Grant Mandate.

Given the unique nature of the military justice system, especially as it pertains to the impaneling of members, military judges are “required to apply the

⁵ While trial counsel asked about “UCMJ action,” it is clear from the record and previous colloquies with 1SG MM that “UCMJ action” meant “punishment.”

liberal grant mandate and excuse members in close cases.” *Keago*, 84 M.J. at 375.

At the very least, 1SG MM’s troubling answers presented a close question.

Namely, 1SG MM believed some “UCMJ action” and “some punishment” was required for Soldiers who went AWOL, and his mind could not be changed.

Defense counsel presented cogent argument that not only was 1SG MM actually biased, but that an objective person looking in at the court-martial would certainly have concerns if they knew a panel member believed some punishment should be imposed. Merely incanting the words “I’ve considered the mandate to liberally grant defense challenges” does not absolve the military judge of error. Had the military judge properly stated the facts and the law, this would not have been a close call. But even if 1SG MM survived actual and implied bias challenges, the liberal grant mandate still applied and defense’s strong reasoning should have carried the day. Just as in *Keago*, the military judge’s failure to apply the liberal grant mandate was error. 84 M.J. at 375.

II. WHETHER 952 DAYS OF DILATORY POST-TRIAL DELAY WARRANTS RELIEF, ESPECIALLY SO GIVEN THE GOVERNMENT AGREED APPELLANT’S SENTENCE SHOULD BE SET ASIDE

Facts Relevant to Assignment of Error

Appellant’s court-martial adjourned on May 20, 2022. (R. at 683). Only six days later, on May 26, 2022, defense counsel submitted matters pursuant to R.C.M.

1106. (Post-trial Matters). The convening authority took fairly quick action and approved the sentence on June 6, 2022. (Action).

However, over six months later (199 days), on December 22, 2022, the military judge finally entered judgement. (Judgment). A full nine months after the entry of judgment (267 days), on September 15, 2023, the chief of justice pre-certified the record. (Pre-Certification). Though no major edits or action was needed, Appellant's case then sat for an additional 399 days.

On October 18, 2024, the military judge who conducted the trial certified the record. (Certification). A week later, on October 25, 2024, the court reporter finalized the complete record of trial. (Court Reporter Certification).

After another month, on November 22, 2024, the deputy staff judge advocate [DSJA] signed a Letter of Lateness. (Letter). In the letter, the DSJA provided excuses as to why the government failed to process Appellant's case for over two years. None of the ten listed reasons for delay (ranging from personnel shortages to training missions) actually mentioned Appellant's specific case. (Letter, pp. 1–2).

On December 27, 2024—another two months of delay after the court reporter's certification—the Army Court docketed Appellant's case. (Referral and Designation of Counsel). The total time elapsed between adjournment of Appellant's trial and docketing his case for appellate review was 952 days.

At the Army Court, the government agreed with Appellant that the delay was “extraordinary” and “warrants relief.” (Gov’t Br. at 27). The government recommended the Army Court “disapprove appellant’s sentence” as an “appropriate” remedy. (Gov’t Br. at 27).

Standard of Review

“Claims challenging the due process right to a speedy post-trial review and appeal are reviewed 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)).

Law

“The right to timely appellate review has both statutory and constitutional roots. A military appellant’s right to a full and fair review of his findings and sentence under Article 66 embodies a concomitant right to have that review conducted in a timely fashion.” *United States v. Toohey*, 60 M.J. 100, 101–02 (C.A.A.F. 2004).

“In conducting a post-trial review of whether an appellant’s Article 66, UCMJ, 10 U.S.C. § 866 (2018) and constitutional rights to timely review have been infringed, [this Court] evaluates the four factors set forth by the Supreme Court in *Barker v. Wingo* for assessing pretrial speedy trial issues.” *Anderson*, 82 M.J. at 86 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four factors

are: “(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.*

(quoting *Moreno*, 63 M.J. at 135). “No single factor is dispositive, and absence of a given factor does not prevent finding a due process violation.” *Id.*

Even without a specific showing of prejudice, this Court can still grant relief in cases where there is unreasonable and unexplained post-trial delay. *Moreno*, 63 M.J. at 362. Further, this Court has recently clarified that excessive post-trial delay can be both a Due Process violation and/or an Article 66(d)(2) violation. But should the delay be found to be only a violation of Article 66(d)(2), a Court of Criminal Appeals may only apply “appropriate relief.” *United States v. Valentin-Andino*, 85 M.J. 361, 367 (C.A.A.F. 2025).

Argument

A post-trial delay of 952 days is facially excessive. Not only is it excessive, but “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 87–88 (quoting *Toohey*, 63 M.J. at 362).

The delay here is so “extraordinary” that the government agreed with Appellant that relief was warranted. Nevertheless, the Army Court affirmed Appellant’s conviction and sentence. Thus, the Army Court effectively sanctioned the OSJA’s flagrant inaction and abhorrent processing of Appellant’s case. This

Court should not let such blatant unfairness stand and should set aside Appellant's sentence based on such an "extraordinary" violation of Appellant's Due Process and Article 66(d)(2) rights, and because it was a concurrence of both Appellant and the government.

A. 952 Days of Delay is a Due Process Violation.

1. The Length of Delay is Facially Unreasonable.

This Court no longer uses a bright line rule to determine de facto unreasonableness. However, this Court has previously found cases that were processed in half the time of Appellant's to be facially unreasonable. *See, e.g., Anderson*, 82 M.J. at 86 (finding 481 days of post-trial delay facially unreasonable). As such, 952 days is facially unreasonable and the excessive delay weighs heavily in favor of Appellant.

2. The Government's Letter of Lateness Provided No Real Justification.

The OSJA provided a letter of lateness, but it did nothing to explain why Appellant's case specifically was delayed. Rather, the letter talked about turnover of personnel in various military justice billets and high operational tempo. But nowhere in the letter does the OSJA provide reasons why it took 199 days to forward the convening authority action to the military judge, why it took 267 days for the chief of justice to pre-certify the record, or why the record sat untouched for another 399 days before the military judge certified the record. This court has 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.” *United States v. Ariaga*, 70 M.J. 51, 57 (C.A.A.F. 2011).

The letter does not even account for why it took over two months to place the record in the mail to send to the Army Court. Delays involving essentially “clerical tasks have been categorized as ‘the least defensible of all’ post-trial delays.” *Moreno*, 63 M.J. at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)). This lack of meaningful justification weighs heavily in favor of Appellant.

3. It Should Not Be Held Against Appellant That the Government Took Almost Three Years to Process His Record.

Appellant did not make a claim for speedy post-trial processing. But it is hardly fair for Appellant to assume the government would take almost three years to even send his case to the Army Court for appellate review. The Supreme Court has stated, “The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants.” *Barker*, 407 U.S. at 527. This Court should place no emphasis on Appellant’s lack of demand for speedy post-trial processing.

4. Prejudice Is Present, but Even If There Was None, This Court Should Not Tolerate Such an Egregious Delay.

As of the filing of this supplement, it is nearly four years since Appellant's trial adjourned. He was convicted of almost exclusively military-specific offenses. While he was convicted of one domestic violence specification, it was clear from the record that his wife did not believe he should have even been charged because she was the aggressor. (R. at 526). The delay has prejudiced Appellant, as a delay of almost four years (plus extra time should a rehearing be authorized) has "limit[ed] the possibility [of Appellant's] grounds for appeal and defenses, in case of retrial, might be impaired." *Anderson*, 82 M.J. at 87 (citing *Moreno*, 63 M.J. at 138–39).

However, should this Court find no prejudice, a due process violation still occurred because "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." *Id.* at 87–88 (quoting *Toohey*, 63 M.J. at 362). Unlike in *Anderson*, where this Court found no prejudice, this case involved delay more easily measured in years rather than days.

But perhaps most importantly, the government agreed with Appellant that the delay was "extraordinary" and that relief was warranted. (Gov't Br. at 27). The government agreed that tolerating such a delay would be anathema to the military justice system.

Collectively, these factors plus the government's concurrence weigh in favor of finding a due process violation.

B. A Delay of 736 Days After the Entry of Judgment is a Violation of Article 66 and Warrants Appropriate Relief.

Judgment was entered on December 22, 2022. The Army Court docketed Appellant's case on December 27, 2024. It took over two years for the government to process Appellant's case and send it to the Army Court. This is a violation of Article 66(d)(2).

As this period of delay was unreasonable and largely unexplained, the Army Court's decision to not provide "appropriate relief" was error. For similarly situated cases with relatively minor charges and years of processing delay, the Army Court has provided relief through the means of setting aside and dismissing charges and sentences. *See, e.g., United States v. Roberts*, 2020 CCA LEXIS 177, at *7–8 (A. Ct. Crim. App., May 27, 2020). Even in cases with more serious charges and far less post-trial delay, the Army Court has granted sentence relief. *See, e.g., United States v. Lathrop*, 2025 CCA LEXIS 63, at *7 (A. Ct. Crim. App., Feb. 14, 2025) (providing confinement relief for three domestic violence specifications when there was a 133-day delay after entry of judgment). The Army Court's failure to decry such a delay in this case and to award Appellant no relief was error.

Conclusion

Appellant respectfully requests this Court grant review and set aside the findings and sentence.



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Appendix A: Army Court Decision

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, FLEMING, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant DANIEL J. VALDEZ
United States Army, Appellant

ARMY 20220274

Headquarters, National Training Center and Fort Irwin
Larry A. Babin, Jr.,* and Matthew Fitzgerald, Military Judges
Lieutenant Colonel Hana A. Rollins, Staff Judge Advocate

For Appellant: Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Eli M. Creighton, JA (on brief); Colonel Philip M. Staten, JA, Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Eli M. Creighton, JA (on reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Justin L. Talley, JA; Major Marc B. Sawyer, JA (on brief).

9 December 2025

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.^{1 2}

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

* Corrected

(continued . . .)

(. . .continued)

² The Judgement of the Court is corrected to reflect the correct date of the Statement of Trial Results, “5/23/2022”, in the “Modifications or Supplements to Statement of Trial Results”.

³ Block 31 of the Statement of Trial Results was incorrectly marked to indicate that appellant was convicted of a crime punishable by imprisonment for a term exceeding one year. In light of *United States v. Williams*, we lack the authority to correct this error. 85 M.J. 121, 126 (C.A.A.F. 2024).

Appendix B: Unpublished Cases

United States v. Lathrop

United States Army Court of Criminal Appeals

February 14, 2025, Decided

ARMY 20230506

Reporter

2025 CCA LEXIS 63 *; 2025 LX 227656; 2025 WL 522462

UNITED STATES, Appellee v. Specialist BRANDON E. LATHROP, JR., United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, III Corps and Fort Cavazos. Tyler J. Heimann, Military Judge. Colonel Terri J. Erisman, Staff Judge Advocate.

Counsel: For Appellant: Major Robert W. Rodriguez, JA, Captain Robert W. Duffie, JA.

For Appellee: Major Justin L. Talley, JA.

Judges: Before FLEMING, COOPER, and SCHLACK, Appellate Military Judges. Senior Judge FLEMING concurs. SCHLACK, Judge, concurring in part and dissenting in part.

Opinion by: COOPER

Opinion

MEMORANDUM OPINION

COOPER, Judge:

Appellant was convicted and sentenced on 26 September 2023. However, his record of trial did not arrive to this court until 23 April 2024—211 days later. Pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), appellant raised matters alleging unreasonable post-trial delay and requests this court grant appropriate relief.¹

Having considered the entire record, we do not find a due process violation. However, we agree the post-trial delay was excessive and in our decretal paragraph,

¹We have given full and fair consideration to the remaining matters personally raised by appellant pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), and find them to be without merit.

grant appropriate relief under [Article 66](#).

BACKGROUND

On 26 September 2023, a military judge sitting as a special court-martial with the authority to adjudge a bad conduct discharge (BCD), convicted appellant, pursuant to his pleas, of three specifications of domestic violence, in violation of [Article 128b, Uniform Code of Military Justice, 10 U.S.C. §928b \(2019\)](#) [UCMJ]. In accordance with his plea [*2] agreement, the military judge sentenced appellant to a bad conduct discharge and 10 months confinement.

Ten days after the court-martial adjourned, the government received appellant's clemency matters under Rule for Courts-Martial [R.C.M.] 1106 where appellant requested waiver and deferral of automatic forfeitures. Upon receipt of appellant's matters, the government determined portions of them included information prohibited by R.C.M. 1109.² The government redacted those portions of the R.C.M. 1106 submission before presenting them to the Convening Authority (CA) for action.³

On 1 December 2023, the CA approved appellant's request to defer and waive automatic forfeitures and took no action on the findings or sentence. On 12 December 2023, the military judge entered judgement and 17 days later, authenticated the record. The court reporter certified the record of trial (ROT) on 29

²Rule for Courts-Martial 1109 (d)(3)(C)(ii) provides: "The convening authority shall not consider any matters that relate to the character of a crime victim unless such matters were presented as evidence at trial and not excluded at trial."

³Block 11 of the Staff Judge Advocate (SJA) advice noted the following: "the matters presented to the convening authority for his review and consideration prior to taking action were redacted due to the matters containing prohibited matters related to the character of the victim that were not presented at trial and not excluded at trial." See R.C.M. 1109(d)(3)(C)(ii).

December 2023, the same day the military judge authenticated it. The ROT was mailed on 5 April 2024 and received by this court on 23 April 2024—211 days from adjournment.

A post-trial delay memorandum (hereinafter "delay memo") for this case, signed by the post-trial paralegal, accompanied the hard copy ROT. The delay memo recited, almost verbatim, the timeline appearing [*3] on the chronology sheet received in the electronic version of the record (E-ROT), with two relevant differences—first, the date the ROT was mailed in the hard copy reflected 5 April 2024, rather than 8 January 2024⁴, and second, the delay memo accounted for a 25 March 2024, Memorandum of Record (MFR) signed by the SJA. Notwithstanding those differences, the delay memo did not explain any of the delay between 29 December 2023 and 5 April 2024.

LAW AND DISCUSSION

We review allegations of unreasonable post-trial delay *de novo*. Whether a post-trial processing timeline is reasonable or dilatory is determined on a case-by-case basis. [United States v. Abdullah, 85 M.J. 501, 2024 CCA LEXIS 479 \(Army Ct. Crim. App. 5 November 2024\)](#); see also [United States v. Winfield, 83 M.J. 662 \(Army Ct. Crim. App. 27 April 2023\)](#); [United States v. Moreno, 63 M.J. 129, 143 \(C.A.A.F. 2006\)](#). "Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice." [United States v. Ponder, ARMY 20180515, 2020 CCA LEXIS 38, at *4 \(Army Ct. Crim. App. 10 Feb. 2020\)](#) (summ. disp.) (quoting [United States v. Bauerbach, 55 M.J. 501, 507 \(Army Ct. Crim. App. 2001\)](#)) (granting relief for excessive post-trial delay in light of government's failure to provide adequate reasons); [United States v. Anderson, 82 M.J. 82, 85 \(C.A.A.F. 2022\)](#). When reviewing for dilatory post-trial processing error, administrative or manpower constraints are not justifiable reasons for delay and delays involving clerical tasks are the "least defensible of all." [Moreno, 63 M.J. at 143](#) (quoting [United States v. Dunbar, 31 M.J. 70, 73 \(C.M.A. 1990\)](#)).

⁴The chronology sheet included in the E-ROT was signed by the Chief of Justice (CoJ) on 9 January 2024. The chronology indicates, erroneously, that the ROT was forwarded to the reviewing authority on 8 January 2024—averring the net days from appellant's sentence to mailing the record to this court was 104 days.

"The [*4] Court of Appeals for the Armed Forces (CAAF) has recognized this court has two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the [Due Process Clause of the Fifth Amendment](#); and (2) [Article 66, UCMJ](#)." [Abdullah, M.J., 2024 CCA LEXIS 479 at *9](#) (quoting [Toohey v. United States, 60 M.J. 100, 101-02 \(C.A.A.F. 2004\)](#)). Whether there is a due process violation resulting from post-trial delay is analyzed using the four factors from [Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 \(1972\)](#): (1) length of delay; (2) reasons for the delay; (3) appellant's assertion of the right to timely review and appeal; and (4) prejudice. [Toohey, 60 M.J. at 102](#). "[N]o single factor [is] required to find that post-trial delay constitutes a due process violation." [United States v. Toohey, 63 MJ 353, 361, \(Toohey II\) \(C.A.A.F. 2006\)](#) (quoting [Moreno, 63 M.J. at 136](#)) (citation omitted).

Where post-trial delay is not a due process violation, this court still has "authority under [Article 66\(d\)\(2\), UCMJ](#), to grant appropriate relief for excessive post-trial delay without a showing of 'actual prejudice'." [United States v. Tardif, 57 M.J. 219, 224 \(C.A.A.F. 2002\)](#) (citation omitted). In determining "excessive delay," this court considers "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" to make its determination. [Winfield, 83 M.J. at 666](#).

Until its certification, the one-volume [*5] ROT exhibits efficient, reasonable post-trial processing. However, once the ROT was certified, reasonable diligence ended, and dilatory post-trial processing began. This ROT was certified on 29 December 2023, but not put in the mail until 5 April 2024. This ROT was not mailed for over three months—longer than it took to transcribe, authenticate, and certify it. Thus, the first [Barker](#) factor weighs in favor of appellant.

The post-trial processing memorandum does little to explain the delay. Unhelpful to our analysis was the accounting for the SJA's 25 March 2024 MFR, explaining why she sealed the unredacted R.C.M. 1106 matters. This seems to have little bearing on the processing of the case, as the SJA determined the R.C.M. 1106 matters contained prohibited material under R.C.M. 1109 prior to giving advice to the Convening Authority, on 1 December 2023, so the relevance of the 25 March 2024 MFR is unknown.

Recently, this court sitting *en banc* in *United States v. Abdullah* re-emphasized the court's interest in the SJA's explanation for post-trial delay and "the importance of providing a detailed explanation and something more than a mere recitation of the timeline of post-trial events." *Abdullah, M.J.*, 2024 CCA LEXIS 479 at *11-12. A recitation [*6] of timelines, with little to no information explaining the 98-day delay between 29 December 2023 and 5 April 2024 is all we have in this case. Thus, we resolve the second *Barker* factor in favor of the appellant.

The third and fourth factor of the *Barker* test weigh in favor of the government, as the appellant did not assert his right to a timely review and there is no prejudice alleged.⁵ 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 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." *Anderson, 82 M.J. at 87* (quoting *Toohy II, 63 M.J. at 362*). We do not find the present case so egregious as to negatively impact the public's perception of the fairness and integrity of the military justice system. Appellant still received a full and complete appellate review and nothing in the record demonstrates bad faith on the part of the Government that would legitimize a perception they intentionally delayed post-trial processing. While the 98-day unexplained delay in mailing the record shows inefficiency, we do not find under the facts and [*7] circumstances of this case that it would cause the public to doubt the fairness and integrity of the military justice system.

In finding no due process violation, we next turn to our authority under *Article 66(d)(2)*, which allows us to provide appropriate relief if the accused demonstrates excessive delay. While 211 total post-trial processing days may not appear particularly lengthy on its face, it is excessive where there is no sufficient explanation for the 98-day delay in mailing a complete and certified

⁵In our analysis of prejudice under *Barker*, we considered 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)*).

record to this court.⁶

Upon a demonstration of excessive delay in the processing of the court-martial, this court may grant appropriate relief, tailored to the circumstances of the case. *Hotaling, 2020 CCA LEXIS 449 at *9* (citing *United States v. Jones, 61 M.J. 80, 86 (C.A.A.F. 2005)* ((quoting *Tardif, 57 M.J. at 225*)). After reviewing the entire record and considering the totality of the circumstances of this case, we find a 15-day reduction to the confinement sentence is appropriate relief.

CONCLUSION

The findings of guilty are AFFIRMED. Only so much of the sentence as provides for confinement for 9 months and 15 days, and a bad conduct discharge, is AFFIRMED.

Senior Judge FLEMING concurs.

Concur by: SCHLACK (In Part)

Dissent by: SCHLACK (In Part)

Dissent

SCHLACK, Judge, concurring in part and dissenting in part,

I concur with my colleagues [*8] that there is excessive delay warranting relief but I think the relief given is inappropriate. I disagree that there is no due process violation.

Following the post-trial changes in the Military Justice Act of 2016 (MJA 16) and this court's decisions in *Winfield* and *Abdullah*, I believe three principles guide review for excessiveness of delay under *Article 66(d)(2), UCMJ* and egregiousness of delay under a *Fifth Amendment* due process analysis: (1) the post-trial process is faster than it was before MJA 16's changes; (2) unit-level explanations must actually explain the

⁶"Depositing documents in the mail does not require any specialized legal training, nor does it require any significant time commitment." *United States v. Hotaling, ARMY 20190360, 2020 CCA LEXIS 449, at *7 (Army Ct. Crim. App. December 11, 2020)*.

reasons for the delay; and (3) comparing the delay in the case at hand to other case delays is improper when the cases do not share the same characteristics, particularly when the other cases occurred pre-MJA 16.⁷

These three principles stem from *Winfield's* abandoning of the timelines that established a presumption of reasonableness. In *Winfield*, this court conceded that "some cases justifiably take longer than 150 days to process for appellate review" and acknowledged that "others should take significantly less time." This court went on to say that we will "scrutinize the unit-level explanations" of the delay to determine whether the delay was reasonable *for that case* (emphasis added). [83 M.J. at 665](#). The effect [*9] of *Winfield*, intended or otherwise, is that the post-trial processing, and the reasonableness thereof, is unique to each case.

In my view, it is illogical to resolve the first *Barker* factor (length of the delay), for example, in favor of the government simply because the government took less time to process a one-day guilty plea record than it did to process a 30 volume, two-week contested trial in some other jurisdiction. Additionally, when a unit provides no justification for a delay in a case that "should take significantly less time" to process, the failure to explain the delay impacts public perception as much as the length of the delay itself in a post-MJA 16 world. Thus, in analyzing this case through a lens colored by the three principles above, I believe the delay in this case is both excessive and egregious.

While I agree with the majority's conclusion that the appellant himself did not experience prejudice resulting from the delay, I do think the circumstances of the delay in this case would adversely impact the public's perception of the fairness and integrity of the military justice system. One might argue that notwithstanding the government's failure to put a one-volume [*10]

⁷I acknowledge that the C.A.A.F compares delay in the case before them to delays in pre-MJA 16 cases. In [U.S. v. Anderson, C.A.A.F](#) cites [United States v. Bush, 68 MJ 96 \(C.A.A.F 2009\)](#), [United States v. Toohey, 63 MJ 353 \(C.A.A.F 2006\)](#), and [United States v. Moreno, 63 MJ 129 \(C.A.A.F 2006\)](#) for the proposition that they have seen worse in the way of length of delay. I note that the C.A.A.F. did not address the effect of the MJA 16 changes on post-trial processing and resolve the difference between this case and [Anderson](#) by differentiating the point in the post-trial processing timeline that the delay took place—with the military judge in [Anderson](#) versus after certification here.

record into the mail for months, the appellant got the benefit of his bargain so "no harm, no foul." That argument gives short shrift to the fact that qualifying appellants are afforded post-trial due process in our system—even when they plead guilty — and while due process rights might not be at their pinnacle following a guilty plea, the process due is certainly a competent one.

If the public knew what caused the delay in this case—that the record was not mailed, without reason—the public's perception of the fairness and integrity of the military justice system would be adversely impacted, in my view, for at least three reasons. First, while the word "integrity" means truthfulness and veracity, it also means *reliability*. The public certainly expects, as it should, that the government is reliable enough to mail what amounted to a ream of paper in a garrison environment. This simple task inexplicably took over three months and the government's failure to explain why it took so long would lead the public to question the system's integrity.

Second, rooted in the complete lack of explanation for the delay here, it is also reasonable for the public to be concerned that had the appellant [*11] been tried at a different camp, post, or station, his certified record would have been mailed faster. In other words, appellant here was afforded less due process than appellants in other military jurisdictions, impacting the public's perception of our system's fairness. Finally, the public's perception of both the integrity and fairness of our system would be impacted because the unexplained delay and the length of the delay did nothing but guarantee appellant completed the bulk of his confinement before a meaningful review of the case could occur. Said differently — considering the record sat certified for months, it is reasonable for the public to perceive the delay was done to ensure the government got its pound of flesh. Considering the government *also* benefits from agreements to plead guilty, this is troublesome from both an integrity and fairness standpoint.

For these reasons, I would have also found a due process violation in this case and granted 98 days of confinement relief.

End of Document

United States v. Roberts

United States Army Court of Criminal Appeals

May 27, 2020, Decided

ARMY 20130609

Reporter

2020 CCA LEXIS 177 *

UNITED STATES, Appellee v. Sergeant First Class
DERRICK L. ROBERTS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, United States Army
Alaska. Stefan R. Wolfe, Military Judge, Colonel Tyler J.
Harder, Staff Judge Advocate.

Counsel: For Appellant: Colonel Elizabeth G. Marotta,
JA; Major Jack D. Einhorn, JA; Major Benjamin A.
Accinelli, JA (on brief); Colonel Elizabeth G. Marotta,
JA; Major Steven J. Dray, JA; Major Benjamin A.
Accinelli, JA (on reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant
Colonel Wayne H. Williams, JA; Major Craig Schapira,
JA; Captain Brian Jones, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and LEVIN,
Appellate Military Judges. Chief Judge KRIMBILL and
Senior Judge BROOKHART concur.

Opinion by: LEVIN

Opinion

SUMMARY DISPOSITION

LEVIN, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of assault consummated by a battery upon a child and one specification of child endangerment, in violation of [Articles 128](#) and [134, Uniform Code of Military Justice](#), [10 U.S.C. §§ 928](#) and [934 \[UCMJ\]](#). The military judge sentenced appellant to be confined for three months, to forfeit \$2,600.00 per month for six months, to be reprimanded, and to be reduced to the grade of E-6. The convening authority approved five months of the adjudged forfeitures [*2] and the remainder of the sentence as adjudged.

The military judge presided over appellant's court-martial on 3 July 2013. The convening authority took action on 15 December 2014. The Judge Advocate General referred appellant's case to this court pursuant to his authority under [Article 69\(d\)\(1\), UCMJ](#), on 10 February 2019, and it was docketed on 14 February 2019.¹ Appellant raises two assignments of error which warrant discussion and relief: sufficiency of the evidence and post-trial delay.²

LAW AND DISCUSSION

Sufficiency of the Evidence

This court reviews legal sufficiency issues de novo. [United States v. Washington, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#). The test for legal sufficiency is "whether 'a reasonable factfinder reading the evidence one way could have found all the elements of the offense beyond a reasonable doubt.'" [United States v. Rosario, 76 M.J. 114, 117 \(C.A.A.F. 2017\)](#) (citation omitted).

Appellant stands convicted of child endangerment by "endanger[ing] the physical health of [TR], by failing to feed him" on divers occasions. The record establishes, and the government concedes, that there is insufficient evidence to support the specification as charged. TR testified that appellant permitted him to eat ramen noodles, red beans and rice, as well as junk food. There was no evidence to contradict this [*3] testimony.

This court is not permitted to alter the findings by

¹ Appellant's sentence was sub-jurisdictional; therefore, this court did not receive his case for automatic review under [Article 66, UCMJ](#).

² This Court need not address appellant's remaining two claims, both of which are mooted by the relief granted to appellant in the decretal paragraph.

broadening a theory of criminality not presented at trial. See [United States v. English, 79 M.J. 116 \(C.A.A.F. 2019\)](#); [United States v. Johnson, ARMY 20131075, 2016 CCA LEXIS 215 \(Army Ct. Crim. App. 31 Mar. 2016\)](#) (mem. op.). Feed, as used in the specification, is a transitive verb meaning "to give food to." See Merriam-Webster Unabridged Online Dictionary, <https://www.merriam-webster.com/dictionary/feed> (last visited 17 May 2020). The government failed to prove that appellant "failed to give food to" TR.

As the government notes, it could have charged appellant with "failing to adequately feed" TR. See [United States v. Theurer, 2015 CCA LEXIS 223, at *5 \(A.F. Ct. Crim. App. 28 May 2015\)](#) (affirming appellant's conviction for child endangerment for "failing to adequately feed and obtain medical care"). It did not. Reading an adverb such as "adequately" into the charge sheet is beyond this court's authority.

Therefore, the evidence for Specification 2 of Charge III, charging appellant with child endangerment, is legally insufficient and we set aside that finding of guilty and dismiss the specification in our decretal paragraph. This leaves appellant convicted of a single charge of assault consummated by a battery upon a child.

Post-Trial Delay

Appellant argues that he was prejudiced by the [*4] delay between the convening authority's action and the docketing of this appeal.³ We agree.⁴

Given the facially unreasonable length of delay, addressed below, we review this post-trial due process violation claim de novo, balancing the four factors set out in [Barker v. Wingo, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 \(1972\)](#): (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

³ Appellant also asserts that he was prejudiced by the 530-day delay between sentencing and the convening authority's action, a delay that prompted the convening authority to reduce forfeitures from six months to five months. We focus our analysis, however, on the greater delay of over four years that followed.

⁴ Specification 6 of Charge II alleged that appellant unlawfully struck his teenage son, TR, on the head with an alarm clock. It is an unfortunate irony that we must once again sound the alarm on an issue involving a failure to keep track of time.

(4) prejudice. [United States v. Moreno, 63 M.J. 129, 136-41 \(C.A.A.F. 2006\)](#).

The first factor weighs in favor of appellant, in that the length of delay from the time the convening authority completed action to the docketing of this appeal is facially unreasonable. [Moreno](#) established time standards for post-trial processing and review, the violation of which gives rise to a presumption of unreasonable delay, including a standard of thirty days from convening authority action to docketing at this court. [Id. at 142](#). Our Superior Court made no exception for cases that are referred to this court pursuant to [Article 69, UCMJ](#). Here, approximately 1,522 days elapsed between the convening authority's completion of the action and the docketing of the appeal, considerably longer than the [Moreno](#) standard.

The second factor also weighs in favor of appellant. Under the second factor, [*5] we look at the government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. In its brief, the government fails to offer any explanation whatsoever for the delay between December 2014 (action) and February 2019 (docketing with this court), instead focusing in a footnote on the four days between the date this case "was referred to this court . . . and docketed." A fifty-month delay, left unexplained, weighs in favor of appellant.

With regard to the third factor, this court is required to examine whether appellant objected to the delay in any way or otherwise asserted his right to a timely review. While the record remains undeveloped, it appears that appellant did not raise the issue of appellate delay until his case was before this court.

However, as the [Moreno](#) court articulated, an appellant should not be required to complain in order to receive timely processing of his appeal, which is the primary responsibility of the government. See [Moreno, 63 M.J. at 138](#). While this factor weighs against appellant, it does so only slightly. See [United States v. Arriaga, 70 M.J. 51, 57 \(C.A.A.F. 2011\)](#).

Finally, the fourth factor weighs in favor of appellant. For almost seven years, appellant has stood [*6] convicted of one of two crimes for which there was insufficient evidence, a conviction which may very well have contributed to significant financial penalties at sentencing. For almost seven years, appellant has suffered the stigma of that conviction and the collateral

consequences that reasonably followed both the conviction and the ensuing sentence. Even absent prejudice, a "constitutional due process violation still occurs if . . . '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.'" [Arriaga, 70 M.J. at 56](#) (citing [United States v. Toohey, 63 M.J. 353, 362 \(C.A.A.F. 2006\)](#)). In this case, though, there is actual prejudice in the form of an unsupported long-standing conviction and financial consequences of his punishment.

Weighing all of the above, we find a due process violation in the appellate review of the appellant's court-martial. Once a denial of a speedy appeal has been found after the balancing of the four [Barker](#) factors, reviewing authorities "should 'tailor an appropriate remedy, if any is warranted, to the circumstances of the case.'" [Moreno, 63 M.J. at 143](#) (quoting [United States v. Jones, 61 M.J. 80, 86 \(C.A.A.F. 2005\)](#)).

In [Moreno](#), our superior court provided a nonexclusive list of relief available for post-trial delays which [*7] includes, in pertinent part, (1) setting aside all or portions of an approved sentence, and (2) dismissal of the charges and specifications with or without prejudice. [Moreno, 63 M.J. at 143](#). Fashioning such a remedy for excessive post-trial delay is within our broad discretion under [Article 66, UCMJ. United States v. Pflueger, 65 M.J. 127, 128 \(C.A.A.F. 2007\)](#).

The due process violation resulting from the post-trial delay in this case warrants meaningful relief as long as relief is available that is not also disproportionate to the harm caused. See [United States v. Rodriguez-Rivera, 63 M.J. 372, 386 \(C.A.A.F. 2006\)](#). We have considered the totality of the circumstances and the types of relief that may be appropriate here. Because appellant has served his full term of confinement, reduction of the confinement would afford him no meaningful relief. Given the length of time that has passed since appellant's conviction, we can have no confidence that disapproving the reduction in rank or the forfeitures would serve any useful purpose. Accordingly, we dismiss the remaining charge and specification as the only meaningful and proportionate relief available under the circumstances.

CONCLUSION

Upon consideration of the entire record, the findings of

guilty and the sentence are SET ASIDE, and the charges and their specifications are DISMISSED. [*8] All rights, privileges, and property of which appellant has been deprived by virtue of the set aside findings and sentence are ordered restored.

Chief Judge KRIMBILL and Senior Judge BROOKHART 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:

I. WHETHER GOVERNMENT COUNSEL ELICITED IMPROPER TESTIMONY WHEN MULTIPLE WITNESSES TESTIFIED TO CONCLUSIONS OF LAW AT THE BEGINNING OF EACH DIRECT EXAMINATION

II. WHETHER GOVERNMENT COUNSEL IMPROPERLY INTRODUCED EXTRINSIC MISCONDUCT DURING PRE-SENTENCING ARGUMENT BY REFERENCING PRIOR ARTICLE 15'S THAT WERE NOT INTRODUCED INTO EVIDENCE

III. WHETHER GOVERNMENT COUNSEL ELICITED IMPROPER TESTIMONY THROUGH THEIR SOLE PRE-SENTENCING WITNESS WHEN THE WITNESS TESTIFIED TO A SPECIFIC SENTENCE

IV. WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL AS TO THE INCORRECT OFFENSE FOR CHARGE V AND ITS SPECIFICATION

V. WHETHER THE MILITARY JUDGE ERRED BY OMITTING AN ELEMENT WHEN HE INSTRUCTED THE PANEL AS TO CHARGE V AND ITS SPECIFICATION

VI. WHETHER APPELLANT WAS PREJUDICED BY THE MIS-LABELING OF CHARGE V AND ITS SPECIFICATION ON THE FINDINGS WORKSHEET (App. Ex. XXII)

VII. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

VIII. WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE MILITARY JUDGE DENIED APPELLANT'S UNANIMOUS VERDICT MOTION

Certificate of Compliance with Rules 24(c) and 37

1. This Supplement to the Petition complies with the type-volume limitation of Rule 24(c) because it contains 6,020 words.
2. This Supplement 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 a copy of the foregoing in the case of United States v. Valdez, Crim. App. Dkt. No. 20220274, USCA Dkt. No. 26-0122/AR was electronically filed with the Court and Government Appellate Division on February 26, 2026.



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