IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Private (E-1) **KELVIN T. WINFIELD** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20210092 Tried at Fort Bragg, North Carolina, on 20 October, and 29 December 2020 and 2–3 March 2021, before a general court-martial convened by Commander, Fort Bragg, Colonel Fansu Ku, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error I

WHETHER THE POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 496 DAYS AFTER SENTENCING.

PANEL NO. 3

Statement of the Case

On 3 March 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, two specifications of damaging non-military property and two specifications of assault consummated by a battery, in violation of Articles 109, 128, Uniform Code of Military Justice, 10 U.S.C. §§ 809, 928 (2019) [UCMJ].[1] (R. at 479; Statement of Trial Results). The military judge sentenced appellant to a bad conduct discharge. (R. at 602; Statement of Trial Results). On 18 March 2021, the convening authority approved the findings and sentence as adjudged, and credited appellant with twenty–seven days of pre-trial confinement credit. (Action). The military judge entered judgment on 23 March 2021. (Judgment). The case was docketed with this court on 11 July 2022. (Referral and Designation of Counsel).

[1] The military judge acquitted appellant of a damage to military property charge but found him guilty of the lesser included offense of damaging non-military property. The military judge excepted certain language from both of appellant's assault consummated by battery convictions. (R. at 479; Statement of Trial Results). Appellant was acquitted of various other offenses. (R. at 479; Statement of Trial Results).

Assignment of Error I

WHETHER THE POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 496 DAYS AFTER SENTENCING.[2]

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(d)(1), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

A. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135. Unreasonable delay in post-trial processing is presumed when "more than 150 days elapse between final adjournment and docketing with [the Army Court of Criminal Appeals]." *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App.

[2] The relevant dates for measuring post-trial delay are the date of adjournment and the date of docketing with this court. *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021)

2021).[3] This presumption triggers a four-factor analysis (*Barker* factors) that examines: "(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." *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *Id.* at 136 (citing *Barker*, 407 U.S. at 533). However, the *Barker* analysis is not required if this court

[3] This court should overrule *Brown*, which attempted to adapt the *Moreno* analysis to the Military Justice Act of 2016 (MJA 16) post-trial processing procedures. 81 M.J. at 509–10. *Brown* was decided on a faulty premise: rather than asking *whether Moreno* was still necessary, *Brown* incorrectly focused on *how* to apply *Moreno*. In *Moreno*, CAAF justified its judicially created rules by explaining that some action was needed to deter and remedy excessive post-trial delays. 63 M.J. at 142. Subsequently, however, Congress took *its own* legislative action with MJA 16 and provided a statutory remedy through Article 66(d)(2), UMCJ. Thus, the justification for the judicially created presumptions in *Moreno* no longer exists. *See also United States v. Anderson*, 82 M.J. 82, 88–90 (C.A.A.F. 2022) (Maggs, J., concurring) (questioning the continued viability of *Moreno* in light of MJA 16 and *United States v. Betterman*, 578 U.S. 437 (2016)). Therefore, this court, in overruling the *Brown* test, should adopt a new analysis. The appropriate test for claims of unreasonable post-trial delay is to look at the period of delay *after entry of judgment*; determine whether the "accused demonstrate[d] error or excessive delay"; and then determine whether this court should exercise its discretionary authority to grant appropriate relief. UCMJ art. 66(d)(2). For claims of delay in post-trial processing *prior to entry of judgment* under Article 60c, UCMJ, this court should find that due process is satisfied by the "adequate procedures to redress an improper deprivation of liberty" that already exist, and a CCA's duty under Article 66(d)(1), UCMJ, is to only affirm so much of a sentence that "should be approved." *Betterman*, 578 U.S. at 449–50 (Thomas, J., concurring); UCMJ art. 66(d)(1).

determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Military Courts of Criminal Appeals (CCAs) 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. *Moreno*, 63 M.J. at 138–39. The first sub-factor "is directly related to the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive." *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)). Similarly, for the third sub-factor, the showing of prejudice "is directly related to whether an appellant has been successful on a substantive issue of the appeal and whether a rehearing has been authorized." *Id.* at 140. The second sub-factor requires an appellant to "show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id*.

In situations where the appellant is unable to show they have suffered prejudice, "[the court] cannot find a due process violation unless the delay is so egregious as to 'adversely affect the public's perception of the fairness and

integrity of the military justice system.'" *Brown*, 81 M.J. at 511 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Id.* at 125. This analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id.* Under this review, the court considers "the totality of the circumstances" based on the "entire record." *Id.* The court "will not presume prejudice from the length of the delay alone," but instead requires "evidence of prejudice in the record." *Id.*

B. Sentence Appropriateness.

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Pursuant to Article 66(d)(2), UCMJ, a CCA may provide appropriate relief if the accused demonstrates error or excessive delay in

the processing of the court-martial after the judgment was entered into the record.[4] Similarly, in conducting its sentence appropriateness review under Article 66(d), a CCA has "broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay . . . ." *Ashby*, 68 M.J. at 124 (quoting *United States v. Pflueger*, 65 M.J. 127, 128 (C.A.A.F. 2004)). Therefore, even without a showing of actual prejudice, this court may also grant relief for "unexplained and unreasonable post-trial delay." *Tardif*, 57 M.J. at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).

When there is post-trial processing delay, this court looks to the totality of the circumstances to determine what sentence should be approved. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). There is no "bright-line time limit" for post-trial processing; rather, various factors such as the length of the record, existence of post-trial processing errors, and failure to demand speedy post-trial processing are considered. *Id.* at 681–82. Moreover, even "unacceptably slow" post-trial processing does not immediately render a sentence inappropriate. *Id.* at 683. This is a "highly case specific" review. *Simon*, 64 M.J. at 207.

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[4] While appellant does not argue that there was excessive delay under Article 66(d)(2), UCMJ, the time between entry of judgment and docketing in this case was 475 days, which does not merit relief. (Judgment; Docket).

Argument

Appellant's case exceeded the presumptive 150-day standard under *Brown*. 81 M.J. at 510. However, the government did not violate appellant's due process rights because appellant failed to demand speedy post-trial processing, and there was no prejudice. Further, under the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis. Therefore, this court should affirm the findings and sentence as adjudged.

A. The first *Barker* factor weigh in favor of appellant.

From the date the military judge adjourned appellant's court-martial to the date of docketing with this court, 495 days elapsed, exceeding the timeline provided in *Brown* by 345 days. (R. at 360); 81 M.J. at 510. Thus, the first factor weighs in favor of appellant.

B. The remaining *Barker* factors weigh in favor of the government

Nevertheless, the delay was reasonable given the operational constraints placed upon Fort Bragg's court reporters. First, Fort Bragg only had the benefit of two of its four authorized uniformed court reporters—one of whom had simultaneous responsibility for managing all of the court reporters within the eastern region. (Post-Trial Processing Memorandum). This personnel shortage was further exacerbated by the civilian court reporter's unavailability to transcribe records due to her other duties. (Post-Trial Processing Memorandum). Finally, the

COVID-19 pandemic, which swept across the nation in the weeks following appellant's court-martial, had an outsized effect upon Fort Bragg's court reporters' ability to transcribe records. The pandemic initially prevented court reporters from transcribing records at all. (Post-Trial Processing Memorandum). Then the subsequent resumption, and high volume, of courts-martial further hindered the court reporters' ability to transcribe records. (Post-Trial Processing Memorandum). Should this court nevertheless decide that this factor weighs in favor of appellant, it should at least be mitigated by those operational requirements. *See United States v. Canchola*, 64 M.J. 245, 247 (C.A.A.F. 2007) ("Reviewing courts can then weigh and balance [operational requirements] in determining whether they provide adequate explanation for any apparent post-trial delays.").

Appellant did not demand speedy post-trial processing, nor submit any other post-trial matters. (Email from Captain [CPT] Michael J. Brown, to CPT Christian R. Burne, Subject: US v. Winfield – No Post-Trial Matters (March 5, 2021 1647)). This factor weighs in favor of appellee.

Finally, Appellant suffered no prejudice from any delays in the post-trial processing of his court-martial. This is apparent when considering prejudice in light of appellant's three interests in timely post-trial processing. *Moreno*, 63 M.J. at 138–39. First, appellant offers no substantive assignments of error on appeal.

Next, there is no evidence in the record—nor does appellant allege—that he has suffered any particularized anxiety and concern "distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id*. at 140. Lastly, appellant has not specified how the delay would have impaired his ability to present a defense at a rehearing and has "therefore failed to establish prejudice under this sub-factor." *Id*. at 141. It is clear that appellant has suffered no prejudice.

Because appellant suffered no prejudice, this court "cannot find a due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Brown*, 81 M.J. at 511 (internal quotations omitted). The facts of this case simply do not rise to that level. *See id.* (finding that 373 days between adjournment and docketing at ACCA was "not so egregious as to adversely affect the public's perception of our system's fairness and integrity"); *see also United States v. Arias*, 72 M.J. 501, 507 (Army Ct. Crim. App. 2008) (finding no public perception issue based on a post-trial processing timeline of 294 days).

C. Appellant is not entitled to relief under *Tardif*.

Even absent a due process violation, Article 66(d), UCMJ, requires this court to "determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including . . . unreasonable

post-trial delay." *Tardif*, 57 M.J. at 224. Appellant asks this court to grant sentence relief under *Tardif*. (Appellant's Br. 4). However, such relief is not appropriate in this case. *United States v. Garman* is instructive, as this court reviewed a government delay of 248 days. 59 M.J. at 682. However, it found the delay was not so egregious that it would adversely affect the public's perception of the fairness and integrity of the military justice system, and therefore the appellant was not entitled to sentence relief. *Id.*

Likewise, the 495-day post-trial delay in appellant's case would not cause the public to question the integrity of the military justice system. Although the delay in this case exceeds the presumptive 150-day threshold, the public would not perceive that appellant has been treated unfairly when "all the facts and circumstances reflected in the record" are considered. *Tardif*, 57 M.J. at 224.

Lastly, in light of the seriousness of his misconduct and the absence in the record of any other facts warranting relief, this court should affirm appellant's sentence. Appellant punched his way through a barracks bedroom wall, smashed a television, and then assaulted the room's occupant. (R. at 285, 287, 289–90, 293–94). Appellant then fled the scene, ran in front of a pizza delivery vehicle and assaulted the delivery driver. (R. at 403–05). He faced a maximum possible punishment of forfeiture of all pay and allowances, confinement for 24 months, and a bad conduct discharge. *Manual for Courts-Martial, United States* (2019

ed.), App'x 12. The military judge only sentenced appellant to a bad conduct discharge—a small fraction of his punitive exposure. (R. at 602). Consequently, this court should deny sentencing relief because the delay was not so "egregious under the totality of the circumstances as to render appellant's otherwise appropriate sentence inappropriate." *Garman*, 59 M.J. at 683. *Cf. United States v. Gonzales-Gomez*, 75 M.J. 965, 970 (Army Ct. Crim. App. 2016) (Wolfe, J., concurring) ("There is scant evidence that our routine reduction of justly-earned sentences serves to spur proper post-trial process or deter lethargic post-trial processing."), *rev'd on other grounds*, 77 M.J. 99 (C.A.A.F. 2017). Accordingly, this court should affirm his sentence.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 30 day of September, 2022.

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