

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Staff Sergeant (E-6)
QUINCY T. OTTLEY,
United States Army,

Appellant

Docket No. ARMY 20210148

Tried at Fort Stewart, Georgia on 30
March 2021, before a special court-
martial convened by the Commander,
3d Infantry Division, Colonel Bret
Batdorff, Military Judge, presiding.

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

Assignment of Error

**WHETHER THE DILATORY POST-TRIAL
PROCESSING OF THIS CASE WARRANTS
RELIEF WHERE THE CASE WAS NOT
DOCKETED BY THE ARMY COURT OF
CRIMINAL APPEALS UNTIL 184 DAYS AFTER
SENTENCING.**

Statement of the Case

On 30 March 2021, a military judge sitting as a special court-martial convicted appellant, in accordance with his pleas, of one specification of indecent recording and one specification of attempted indecent recording, in violation of Articles 120c and 80, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 880 (2018) [UCMJ]. (R. at 51). The military judge sentenced appellant to be reduced

to the grade of E-1, confinement for 180 days, and a bad-conduct discharge.¹ (R. at 75). The military judge credited appellant with one day of confinement credit. (R. at 75). On 14 May 2021, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant both made, and attempted to make, an indecent recording of a female soldier showering.

On the morning of 21 June 2020, appellant was caught using his cellphone to record the private area of Corporal (CPL) ■■■ without her consent, in the female shower tent located in his brigade's training area in Poland. (R. at 19-25; Pros. Ex. 1, para 6). After he was caught recording CPL ■■■ appellant fled the female shower tent and hid in the woods. (Pros. Ex. 1, para. 13). He told one of the junior soldiers in his squad—for whom he was the squad leader—to bring him a change of clothes. (Pros. Ex. 1, para. 13). Leadership ordered a 100-percent battalion accountability formation, and appellant failed to report because he was still hiding in the woods. (Pros Ex. 1, para. 12).

Once appellant returned to the company area, the military police arrested appellant and seized his cell phone. (Pros. Ex. 1, para. 15). Appellant tried to avoid responsibility by stating he had forgotten to put in his contact lenses and

¹ The military judge sentenced appellant to confinement for 180 days for both the Specification of Charge I and for Specification One of Charge II, to be served concurrently, pursuant to the Plea Agreement. (R. at 75).

accidentally walked into the female shower. (Pros. Ex. 1, paras. 13, 16). Law enforcement performed a digital forensic extraction on appellant's phone which recovered two videos: (1) the indecent recording of CPL [REDACTED] genital area and (2) another attempted indecent recording, dated 20 June 2020, of an unknown shirtless female soldier in the female shower tent who did not appear to realize she was being recorded. (Pros. Ex. 1, paras. 17–19; R. at 28–34).

B. The post-trial processing of appellant's case.

On 30 March 2021, the military judge adjourned appellant's court-martial. (Statement of Trial Results; R. at 75). On 9 April 2021, he submitted post-trial matters and requested that the convening authority defer automatic forfeitures, disapprove or defer the adjudged reduction in rank, and waive automatic forfeitures for the maximum term allowed by law. (Post-Trial Matters). He also "assert[ed] his right to speedy post-trial processing." (Post-Trial Matters). On 11 May 2021, the staff judge advocate (SJA) signed his clemency advice. (SJA Clemency Advice). On 12 May 2021, the convening authority approved the findings, sentence, and appellant's request for deferment of automatic forfeitures and waiver of automatic forfeitures for six-months after entry of judgment, to be paid to the accused's spouse, and disapproved appellant's request to defer his reduction in grade. (Action). On 14 May 2021, the military judge entered judgment. (Judgment).

On 8 September 2021, the trial counsel completed the precertification review. (Trial Counsel Pre-Certification). On 16 September 2021, the military judge authenticated the record. (Authentication). On the same day, the court reporter certified the record of trial. (Court Reporter Certification). On 30 September 2021, this court docketed appellant’s case. (Docketing Notice). The total number of days from adjournment to docketing was 184 days. (R. at 75; Docketing Notice).

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

Appellate courts conduct 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), 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. 2021). 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 the court 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 (citing *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. *Ashby*, 68 M.J. 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, the 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). Under 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 entry of judgment was entered into the record." 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, the 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 reviewing a sentence for appropriateness under Article 66(d)(1), the court is "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.* (citation omitted). The heart of "sentence review is to 'do justice.'" *Id.* at 223 (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). The court looks to the totality of the

circumstances to determine what sentence should be approved in light of the post-trial processing. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). 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.

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 suffered no prejudice, the delay was only thirty-four days in excess of the standard, and the delay was not egregious. Further, based on 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. Appellant’s claim fails because he has not been prejudiced.

1. The first three *Barker* factors all weigh slightly in appellant’s favor.

First, 184 days elapsed between the adjudged sentence and the docketing of this case by this court, exceeding the timeline established in *Brown*. *Id.*; (Docketing Notice). Although the delay only exceeded the timeline established in *Brown* by thirty-four days, it nonetheless triggers review. *Id.* Regarding the second *Barker* factor, the bulk of the delay occurred between entry of judgment on

14 May 2021 and the trial counsel's precertification of the record on 8 September 2021. (Judgment; Trial Counsel Pre-Certification). Appellant correctly points out that there is no explanation in the record for this delay, (Appellant's Br. 2), and this factor weighs in his favor. Finally, regarding the third *Barker* factor, appellant asserted his right to speedy post-trial processing on 9 April 2021. (Speedy Post-Trial Processing Request). Therefore, this factor weighs in appellant's favor.

2. There is no prejudice.

Finally, appellant has failed to demonstrate that he suffered harm or legal prejudice flowing from the post-trial processing of his case. Appellant argues that not receiving his DD Form 214 has prejudiced him in two ways: (1) the Department of Veterans' Affairs will not process his request for benefits without the form and (2) he has been denied three employment opportunities. (Appellant's Br. 5). This court should reject appellant's claim of prejudice based on its speculative and conclusory nature. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). While appellant references "Defense Appellate Exhibit A" in support of his cited prejudice, no such exhibit is available in the record of trial, and this court denied appellant's Motion to Attach said exhibit on 2 December 2021. (Appellant Br. at 5; Appellant's Motion to Attach at 2).

This lack of supporting evidence is dispositive. In *United States v. Dunbar*, in addressing the appellant's allegation that he had been denied employment due to

non-possession of his DD Form 214, the Court of Appeals for the Armed Forces (CAAF) noted that the appellant had “failed to document his employment problems and their connection with his lack of discharge, and his affidavit fail[ed] to state whether he ever had contacted the Navy regarding his problems.” 31 M.J. 70, 73 (C.A.A.F. 1990). The CAAF concluded that the appellant had not shown prejudice and stated that relief may not be “predicated upon claims of prejudice that are unverified and unverifiable.” *Id.* Here, just as in *Dunbar*, appellant has failed to carry his burden to allege his prejudice with the requisite specificity, and his failure to do so leaves the government unable to rebut appellant’s claims.

Additionally, appellant’s sole basis for appeal is this dilatory post-trial processing assignment of error. (Appellant’s Br. 1). Without substantive grounds for appeal, appellant cannot claim prejudice on the basis of oppressive incarceration or potential harm at a rehearing, as the prejudice analysis “is directly related to the success or failure of an appellant’s substantive appeal.” *Moreno*, 63 M.J. at 139–40. Further, appellant has failed to indicate any “particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Id.* at 139. Ultimately, appellant provides an insufficient basis for particularized prejudice, and this *Barker* factor weighs in the government’s favor.

Lastly, appellant has not shown that the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system” and overcome the absence of prejudice. *Brown*, 81 M.J. at 511 (citing *Toohey*, 63 M.J. at 362). Appellant’s case is readily distinguishable from *Toohey* because: (1) the length of delay here was merely 184 days, as compared to 2,240 days in *Toohey*, and (2) appellant requested speedy trial one time as compared to *Toohey* where the appellant in requested it five times. 63 M.J. at 360–61. Therefore, under the “difficult and sensitive balancing process,” the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

B. The delay does not merit relief under this court’s sentence appropriateness analysis.

Even where no due process violation occurs, this court must still determine “on the basis of the entire record” what sentence “should be approved.” UCMJ art. 66(d). Appellant’s sentence is appropriate based the totality of the circumstances: the seriousness of his crimes, the maximum allowable punishment for his conviction, and favorable action taken by the convening authority. *See Garman*, 59 M.J. at 678 (noting that this court “look[s] to the totality of the circumstances of the post-trial process” when assessing whether relief is warranted).

First, the seriousness of appellant’s crimes weighs against any relief. Here, appellant, a noncommissioned officer at the time of the offenses, committed

egregious invasions of privacy when he made two recordings of female soldiers in the female shower tent without their knowledge or consent. (Pros. Ex. 1, paras. 18, 19). He recorded these soldiers in a deployed environment, where trust between a unit's members is vital to the unit's success. These crimes were aggravated by the fact that appellant tried to evade responsibility when he fled to the woods and enlisted the help of a subordinate to attempt to conceal his offense. (Pros. Ex. 1, paras. 13, 14, 16).

Based on the seriousness of the offense, this court should not accept appellant's request to set aside his bad-conduct discharge. (Appellant's Br. 7). In *United States v. Feeney-Clark*, a case appellant cites to, (Appellant's Br. 5), the court stated, "[p]unitive discharges . . . are qualitatively different from other components of a court-martial sentence, such as confinement." ARMY 20180694, 2020 CCA LEXIS 256, at *8 n.5 (Army Ct. Crim. App. 29 July 2020) (mem. op.) (citing *United States v. Zarbatanr*, 70 M.J 169, 175 (C.A.A.F. 2011)). Here, just as in *Feeney-Clark*, "[t]o disapprove appellant's discharge under the facts and circumstances of his case would be nothing more than an act of clemency by this court, something beyond [the court's] Article 66, UCMJ authority." *Id.* Thus, setting aside the punitive discharge would be extreme in light of his serious misconduct. See *United States v. Collins*, 44 M.J. 830, 833 (Army Ct. Crim. App. 1996) (holding that disapproval of the bad-conduct discharge—even when all

confinement had been served—would be “totally disproportionate to the harm suffered, would provide appellant with a major windfall, and would be too drastic a remedy in light of the seriousness of appellant’s misconduct”).

Furthermore, the maximum punishment weighs against relief in this case. Appellant faced a maximum punishment of reduction to the grade of E-1, forfeiture of two-thirds pay per month for twelve months, confinement for one year, and a bad conduct discharge.² (R. at 34). Yet, in accordance with his plea agreement, he received confinement for half that time, reduction to the grade of E-1, and a bad-conduct discharge. (R. at 75; App. Ex. III). Additionally, appellant’s plea agreement stated that the military judge *must* adjudge a bad conduct discharge. (App. Ex. III, p. 2). Therefore, setting aside appellant’s bad-conduct discharge would violate the very terms of the agreement that appellant voluntarily agreed to.

Moreover, the convening authority took favorable action when he approved appellant’s request for waiver of automatic forfeitures for six months after the entry of judgment for the benefit of appellant’s wife. (Action). In fact, this favorable action provided support to appellant’s wife and daughter throughout the period of his incarceration. This weighs in favor of no further relief.

² Pursuant to the plea agreement, the maximum punishment appellant could receive was 180 days. (App. Ex. III).

In *United States v. Bodkins*, another case appellant cites to, (Appellant's Br. 6), the court asserted that "[courts] may rely upon continuing eligibility for limited military benefits as a factor in assessing the impact of post-trial delay, but it must do so in a manner that focuses on the circumstances of the particular case." 60 M.J. 322, 324 (C.A.A.F. 2004). Here, appellant's post-trial matters make clear that he is concerned with continuing support for his wife and daughter, (Post-Trial Matters), which the convening authority provided by approving appellant's request for deferment and waiver of forfeitures. (Action). Thus, "the circumstances of th[is] particular case" weigh against granting further relief. *Id.*

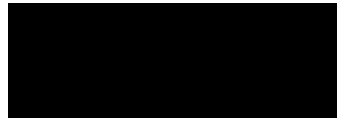
Consequently, when considering the totality of the circumstances, including the post-trial processing, the seriousness of appellant's offenses, and the lack of prejudice, appellant deserves no relief from his adjudged sentence. *Garman*, 59 M.J. at 678.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.



MARK T. ROBINSON
MAJ, JA
Branch Chief, Government
Appellate Division



CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief, Government
Appellate Division



CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

APPENDIX

United States v. Private El Joseph L. Feeney-Clark United States Army

United States Army Court of Criminal Appeals

July 29, 2020, Decided

ARMY 20180694

Reporter

2020 CCA LEXIS 256 *; 2020 WL 4370958

UNITED STATES, Appellee v. Private E1 JOSEPH L. FEENEY-CLARK United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Feeney-Clark, 80 M.J. 400, 2020 CAAF LEXIS 625 (C.A.A.F., Nov. 13, 2020)

Prior History: [*1] Headquarters, Fort Campbell. Matthew A. Calarco, Military Judge. Lieutenant Colonel Patrick L. Bryan, Staff Judge Advocate.

Counsel: For Appellant: Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain Thomas J. Travers, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA, Captain Allison L. Rowley, JA (on brief).

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER, Appellate Military Judges.

Opinion

MEMORANDUM OPINION

Per Curiam:

The unreasonable and unexplained post-trial delay in this case raises substantial questions as to the

appropriateness of appellant's sentence. Unfortunately, given that appellant's pre-trial confinement credit exceeds his adjudged sentence of 107 days of confinement, we are unable to provide appellant meaningful relief. However, given that Fort Campbell has had no less than six cases in less than twelve months with inexcusable post-trial delays highlighting a lack of due diligence in post-trial processing, we would be remiss if we did not address the excessive post-trial delay in this case.

BACKGROUND

We review this case under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866(d)(1) [UCMJ]. On appeal, [*2] appellant's sole assignment of error concerns the dilatory post-trial processing of his case. Appellant alleges the government allowed 303 days to elapse between sentencing and action and requests relief pursuant to *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The government is accountable for each of the 303 days that elapsed between announcement of sentence and the convening authority's action. *United States v. Banks*, 75 M.J. 746, 751 (Army Ct. Crim. App. 2016). The facts and circumstances in this case do not justify the lengthy and unexplained delay between submission of clemency matters and action.

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two

specifications of absence without leave [AWOL] in violation of Article 86, UCMJ. The panel convicted appellant of a two-week AWOL as charged. Appellant was also charged with one specification of desertion, with the intent to remain away permanently, terminated by apprehension in violation of Article 85, UCMJ. However, the panel found appellant guilty of the lesser included offense of absence without leave in violation of Article 86, UCMJ.

Appellant was sentenced to confinement for 107 days and a bad-conduct discharge. He was credited with 266 days of confinement credit for both pre-trial confinement [*3] and unlawful pre-trial punishment in violation of Article 13, UCMJ.¹ The convening authority approved the adjudged sentence.²

¹ The military judge awarded appellant 58 days of confinement credit for unlawful pre-trial punishment in violation of Article 13, UCMJ, for: (1) the command's failure to ensure appellant was in a proper military uniform and in compliance with Army appearance and grooming standards for his pre-trial confinement hearing, Article 32 preliminary hearing, and a meeting with his defense counsel; (2) appellant's confinement in an area of a Montgomery County jail in which he was confined to his cell for more than twenty-three hours per day; (3) lack of command health and welfare visits to appellant at the Montgomery County jail for a period in excess of two weeks; (4) publication of appellant's mug shots on two separate websites by Montgomery County law enforcement in blatant violation of Army regulation (there was testimony that representatives of Fort Campbell are aware of this practice and had not sufficiently addressed it with Montgomery County Sheriff's Office at the time of appellant's court-martial in December 2018); and (5) the command's failure to ensure appellant received the pay to which he was entitled for the entire 208-day period of his pre-trial confinement.

² The convening authority's action and the promulgating order in this case do not reflect the 266 days of confinement credit against the adjudged sentence, as required. Any awarded but not yet applied credit shall be applied to appellant's approved

After completion of appellant's trial, the government took 208 days to transcribe and authenticate the record, and sign the Staff Judge Advocate Recommendation (SJAR). Most concerning for the court is the 88 days that elapsed between the military judge's authentication of the record and the completion of a templated one-page SJAR with no explanation for such a lengthy delay. It then took the government an astonishing 65 days to serve appellant with the record of trial and the SJAR and an inexplicable 34 days after action by the convening authority to transmit the record of trial to this court.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant also requests that this court except the language "and with the intent to remain away permanently therefrom" from the Specification of Charge II pursuant to the panel findings of guilt to the lesser included offense of absence without leave as opposed to the charged offense of desertion.³ We agree with appellant as discussed herein and provide relief in our decretal paragraph.

LAW AND DISCUSSION

A. Excessive Post-trial Delay

This court has two [*4] distinct responsibilities in addressing post-trial delay. *See United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006). First, as a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process violation. *See U.S. CONST. amend V; Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). Second, the

sentence to confinement.

³ Additionally, we have given full and fair consideration to the other matters personally raised by appellant pursuant to *Grostefon* and find them to be without merit.

court may grant an appellant relief for excessive post-trial delay under our broad authority to determine sentence appropriateness under Article 66(c), UCMJ. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

We review de novo appellant's claim that he has been denied his due process right to a speedy post-trial review. *Moreno*, 63 M.J. at 135. A presumption of unreasonable post-trial delay exists when the convening authority fails to take action within 120 days of completion of trial. *Id.* at 142. When a presumption of unreasonable post-trial delay exists, our superior court employs the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), for determining whether a due process violation has occurred: (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.*

In assessing the fourth factor of prejudice, we consider three sub-factors: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their [*5] 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, migM—Wimpaired." *Moreno*, 63 M.J. at 138-39 (quoting *Rheurk v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

The first factor weighs in favor of appellant as 303 days is presumptively unreasonable. The processing in this segment of the case is "completely within the control of the Government," *Moreno*, 63 M.J. at 136, and no exceptional circumstances were offered to explain this delay. The SJA completed a memorandum acknowledging the post-trial processing time in this case was presumptively unreasonable in that it exceeded the

120-day guideline outlined in *Moreno* by 183 days. However, the SJA's memorandum was meaningless as it was nothing more than a recitation of the post-trial processing timeline. It provided no explanation for the derelict post-trial processing of this case between authentication of the record and completion of SJAR, and between completion of the SJAR and service on the appellant. Thus, the record is completely devoid of any explanation for those two lengthy periods of time totaling 153 days. Therefore, the second factor also weighs in favor of appellant.⁴ The third factor weighs in favor of the [*6] government as appellant did not assert any objection to the post-trial processing of his court-martial until his submission before this court. Regarding the fourth factor, appellant has not alleged or demonstrated any particularized prejudice in his appeal under any of the *Moreno* prejudice sub-factors. As such, the fourth factor weighs in favor of the government. In balancing all four factors, we do not find that appellant was denied his due process right to a speedy post-trial review.

A finding of unreasonable post-trial delay but no prejudice, however, does not end this court's analysis. Article 66(d)(1), UCMJ, imposes an obligation on this court to assess the appropriateness of appellant's sentence in light of presumptively unreasonable and unexplained delay in the post-trial processing of his case. *See generally United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224; *United States v. Ney*, 68 M.J. 613, 616-17 (Army Ct. Crim. App. 2010).

The post-trial processing in this case is anything but the example of diligence and efficiency expected of the military, particularly for a case in which the court-reporter transcribed the 1,079-page record of trial in 65 days but it took the government another 238 days to

⁴We note that the government concedes that the first two factors weigh in appellant's favor. (Appellee Br. 4).

complete action. This is not the first case in which this court has had to address dilatory post-trial[*7] processing by the Fort Campbell Office of the Staff Judge Advocate. We have granted relief in the form of confinement credit for excessive post-trial delay in three other cases from this jurisdiction in the past eight months: *United States v. Kazzee*, ARMY 20180241, 2019 CCA LEXIS 508 (Army Ct. Crim. App. 12 Dec. 2019) (summ. disp.), *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38 (Army Ct. Crim. App. 10 Feb. 2020) (summ. disp.) and *United States v. Natter*, ARMY 20180503, 2020 CCA LEXIS 150 (Army Ct. Crim. App. 4 May 2020) (mem. op.). Ensuring accurate and timely post-trial processing is the responsibility of all military justice practitioners. *United States v. Mack*, ARMY 20120247, 2013 CCA LEXIS 1016, at *5-7 (Army Ct. Crim. App. 9 Dec. 2013) (summ. disp.) (Pede, C.J., concurring). "All practitioners, especially staff judge advocates, must ensure that the rights of the accused are not compromised, and that the interests of the government are protected." *Id.* at *7. As we have noted in other excessive post-trial delay cases, "[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system." *United States v. Carroll*, 40 M.J. 554, 557 n.8 (A.C.M.R. 1994).

Having considered the entire record, the government's failure to satisfy its obligation to provide adequate reasons for excessive post-trial delay, and the particular facts and circumstances of this case, we find a reduction in appellant's sentence to confinement would be appropriate. [*8] However, appellant was sentenced to 107 days of confinement and a bad-conduct discharge. He was credited with a total of 266 days of credit for pre-trial confinement and unlawful pre-trial punishment. Given that appellant's confinement credit exceeds his sentence, any reduction in confinement would be meaningless. The only other relief we could

provide would be to disapprove appellant's bad-conduct discharge. However, we do not believe it would be appropriate to disapprove appellant's punitive discharge.⁵

B. Desertion Language in Absence Without Leave Conviction

Appellant was charged with one specification of desertion, with the intent to remain away permanently, terminated by apprehension in violation of Article 85, UCMJ as follows:

In that PVT Joseph L. Feeney-Clark, U.S. Army, did, on or about 26 February 2018, without authority and with the intent to remain away therefrom permanently, absent himself from his unit, to wit: B Battery, 1-320th Field Artillery Regiment, 101st Airborne Division Artillery, located at Fort Campbell,

⁵Inexcusable post-trial delay like that found in appellant's case, delay that has become all too commonplace at Fort Campbell, Kentucky, has resulted in this court granting meaningful relief usually in the form of disapproval of a portion of the approved sentence. For the reasons noted in the body of the opinion, any adjustment to appellant's approved confinement results in no meaningful relief, leaving disapproval of his discharge as the only meaningful relief available. Punitive discharges, however, are qualitatively different from other components of a court-martial sentence, such as confinement. *See United States v. Zarbatany*, 70 M.J. 169, 175 (C.A.A.F. 2011) (internal citations omitted). Further, and more importantly, we find appellant's discharge to be appropriate when considering the timing, duration, and circumstances surrounding appellant's two unauthorized absences. To disapprove appellant's discharge under the facts and circumstances of his case would be nothing more than an act of clemency by this court, something beyond our Article 66, UCMJ authority. *See generally United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

Kentucky, and did remain so absent in desertion until he was apprehended on or about 27 May 2018.

The panel found appellant not guilty of the [*9] offense of desertion, as charged, but guilty of the lesser included offense of absence without leave in violation of Article 86, UCMJ. In doing so, the panel excepted the language "in desertion" and "he was apprehended" from the Specification of Charge II. However, the panel did not except the language "with the intent to remain away therefrom permanently" which it should have done in order to properly conform the specification to its finding of guilt of an AWOL offense. Appellant requests that this court except the language "with the intent to remain away therefrom permanently" in order to properly conform the specification to an AWOL offense. We agree with appellant that the panel should have excepted the language regarding the intent to remain away permanently.

CONCLUSION

The Specification of Charge II is amended as follows:

In that PVT Joseph L. Feeney-Clark, U.S. Army, did, on or about 26 February 2018, without authority, absent himself from his unit, to wit: B Battery, 1-320th Field Artillery Regiment, 101st Airborne Division Artillery, located at Fort Campbell, Kentucky, and did remain so absent until on or about 27 May 2018.

The Specification of Charge II as amended is AFFIRMED. [*10] The remaining findings of guilty are AFFIRMED. The sentence is AFFIRMED.

CERTIFICATE OF SERVICE, U.S. v. OTTLEY (20210148)

I certify that the foregoing was sent via electronic submission to the Defense

Appellate Division at [REDACTED]

[REDACTED] on the 22nd day of December, 2021.

[REDACTED]
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