IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20210676
Private (E-2) **MATTHEW P. WHITE,** United States Army,	Appellant	Tried at Fort Huachuca, Arizona, on 5 August, 11 November, 14 December 2021, and 27–29 March 2022, before a general court-martial convened by the Commander, Headquarters, U.S. Army Intelligence Center of Excellence and Fort Huachuca, Lieutenant Colonel Michael Korte, Military Judge, presiding.

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

Assignments of Error[1]

I. WHETHER THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY WITHDRAWN AND RE-REFERRED.

II. 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 284 DAYS AFTER SENTENCING.

[1] The government has reviewed appellant's *Grostefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL No. 2

Statement of the Case

On 29 March 2022, a military judge sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of conspiring to obstruct justice, two specifications of wrongful introduction of lysergic acid diethylamide (LSD), and one specification of obstruction of justice, in violations of Articles 81, 112a, and 131b, Uniform Code of Military Justice, 10 U.S.C. §§881, 912a, and 931b [UCMJ]. (R. at 721). The military judge also found appellant guilty, pursuant to his pleas, of two specifications of wrongful distribution of LSD, one specification of wrongful use of LSD, and one specification of wrongful possession of LSD in violation of Article 112a, UCMJ.[2] On the same date, the military judge sentenced appellant to twenty-five months confinement and a dishonorable discharge. (R. at 721).[3] On 12 April 2022, the military judge entered judgment. (Judgment).

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[2] The military judge dismissed one specification of wrongful possession and one specification of wrongful use of oxycodone, without prejudice. (R. at 321). The military judge acquitted appellant of one specification of attempting to introduce a controlled substance and one specification of posting a video online in violations of Articles 80 and 134, UCMJ.

[3] The military judge sentenced appellant to several groups of concurrent confinement, as follows:

Concurrent Group 1:

Charge II, The Specification	5 months
Charge V, The Specification	5 months

Concurrent Group 2:

Charge III, Specification 2	3 months
Charge III, Specification 3	1 month

Statement of Facts

Appellant, while still in Advanced Initial Training (AIT), introduced an LSD supply chain onto Fort Huachuca in April 2021 to soldiers with top secret clearances. (R. at 532, 552, 562). Appellant received the LSD in the barracks mail room and used his cell phone to facilitate further LSD distribution and sale on the installation. (R. at 421, 422, 518, 523, 552, 573). Appellant continuously introduced and sold illegal drugs to soldiers from April until June 2021. (R. at 445).

Appellant was initially arraigned on 5 August 2021 on charges of introduction with intent to distribute, distribution, and use of LSD, all stemming from alleged misconduct that occurred between 4–5 June 2021 (*U.S. v. White I*). (App. Ex. XVII). The same day of his arraignment, he made a formal request for a speedy trial and requested a trial date within three weeks. (App. Ex. XVII). The following day, the government withdrew and dismissed the charges and

Charge III, Specification 5	6 months

Concurrent Group 3:

Charge III, Specification 6	3 months
Charge III, Specification 7	14 months
Charge III, Specification 8	2 months
Charge III, Specification 9	10 months
The Additional Charge, The Specification	5 months

specifications without prejudice.[4] Those same charges and specifications were re-preferred on 7 September 2021, along with new charges stemming from other drug-related misconduct by appellant in April–May 2021 (*U.S. v. White II*), which formed the basis of appellant's court-martial and this appeal.

Appellant moved to dismiss the charges and their specifications, alleging the withdrawal and dismissal was a subterfuge to avoid honoring appellant's request for a speedy trial. (App. Ex. VII). At the ensuing Article 39(a) hearing, the government called Military Police Investigator (INV) [redacted], a certified member of the Criminal Investigation Division's (CID's) Drug Suppression Team (DST), to testify to the timeline of the criminal investigation into appellant. (R. at 97). Specifically, [redacted] explained that a forensic extraction of the data from appellant's phone was conducted by another agent in late July, but the data was not reviewed until [redacted] did so on 5 August 2021. (R. at 100). [redacted] then assembled a "photo packet" of the data and briefed the trial counsel on 6 August 2021. (R. at 101). Significantly, [redacted] stated that to the best of his knowledge, the images and conversations that he put in the photo packet were not reviewed or briefed to Office of the Staff Judge Advocate (OSJA) personnel prior to that date.

[4] The Fort Huachuca Chief of Military Justice signed a withdrawal and dismissal memorandum on 6 August 2021 citing Rules for Courts-Martial [R.C.M.] 604(a), 407(a), and 401(c). (App. Ex. VIII, p. 16). The Convening Authority ratified the withdrawal and dismissal on 11 August 2021. (App. Ex. VIII, p. 17).

(R. at 103). [redacted] further testified that he was not aware of the status of the court-martial proceedings at the time he conducted his review and coordinated his OSJA brief, and at the time of the review and brief, the investigation into appellant's drug-related activities and co-conspirators was ongoing. (R. at 114) [redacted] also admitted that his date of "6 July 2021" in the Case Activity Summary (CAS) records in the CID investigative file was a "typo" and confirmed the correct date was 6 August 2021. (R. at 112). On 11 January 2022, the military judge denied appellant's motion to dismiss, finding the "withdrawal was for a proper purpose" based on new "articulated" evidence provided on 6 August 2021.

A subsequent audit of the CAS records indicated that [redacted] entry recording the 6 August 2021 OSJA brief was recorded on 8 August and edited on 9 August 2021. (App. Ex. XXX). Based on the audit, appellant moved for reconsideration of the motion to dismiss. (App. Ex. XXIX). At the prior Article 39(a) hearing, in denying the motion, the military judge noted, [redacted] believed at the time that the day he provided on that CAS entry (6 August 2021) was the actual time that he coordinated with the OSJA members." (R. at 327). However, he denied the motion based on [redacted] earlier testimony that delayed entries were not uncommon. (R. at 328). The military judge reasoned, "Obviously, had [redacted] known about how significant dates were for case activity, he probably would have made his CAS entries much closer in time." (R. at 328).

Assignment of Error I

WHETHER THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY WITHDRAWN AND RE-REFERRED.

Standard of Review

Whether a charge was improperly withdrawn is reviewed de novo. *United States v. Shakur*, 77 M.J. 758, 761 (Army Ct. Crim. App. 2018).

Law

"The convening authority . . . may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced." R.C.M. 604(a) (emphasis added). "Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused." R.C.M. 604(a) discussion. "When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused." R.C.M. 604(b) discussion. "Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." R.C.M. 604(b).

"Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the

withdrawal takes place. . . . Charges withdrawn after arraignment may be referred to another court-martial under some circumstances." R.C.M. 604(b) discussion.

Argument

The withdrawal and re-preferral of charges in this case was proper. "A convening authority is vested with virtually unfettered power to withdraw charges." *United States v. Shakur,* 77 M.J. 758, 762 (Army Ct. Crim. App. 2018). When the government withdraws charges for proper reasons, the charges can be re-preferred and tried.

Here, although the withdraw was soon after the defense requested a speedy trial, [redacted]' testimony and the supporting CAS note demonstrate that there was evidence supporting additional charges previously unknown to the prosecution. The criminal investigation timeline sufficiently demonstrates that new evidence of new alleged offenses and new subjects of interest formed a logical basis to withdraw charges.

Although courts have analyzed the facts of each withdrawal and dismissal closely (*see, e.g., United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988); *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014)), the military judge did properly analyze the propriety of the disposition. Discovery of new evidence can often defeat the presumption of subterfuge. *United States v. Tippit*, 65 M.J. 69, 79 (C.A.A.F. 2007) (finding the withdrawal before arraignment due to federal and

state parallel investigation proper); *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2006) (finding it proper for the government to wait for a forensic examination of evidence before proceeding to trial). The judge correctly concluded that photo packet was "new" evidence because the report and findings had not been previously shared with the OJSA, nor was [redacted] aware of the status of appellant's court-martial. (App. Ex. XVII). As the military judge found, there was no evidence of any intent to circumvent appellant's speedy trial request, and thus, no subterfuge by the government.

Appellant argues that the military judge's finding was not a proper reason for withdrawal and was not supported by any of the facts because, in part, the agent could not remember some of details of the brief or surrounding circumstances of the meeting. (Appellant's Br. 12). However, this is a misinterpretation of [redacted] testimony. [redacted] specifically stated that he reviewed the extraction and found images and conversations. (R. at 100). Additionally, he stated that he prepared the report on 5 August 2021 and that the contents of the forensic extraction were not reviewed previously. (R. at 100). [redacted] further stated that the OSJA was briefed on either 5 or 6 August 2021. (R. at 100).

Appellant focuses on the CAS entries that [redacted] stated were entered on 6 August 2021 at 1528. (R. at 109). The military judge properly concluded, "No evidence presented cast doubt that [redacted] completed his review and compilation

of the additional evidence that formed the basis for withdrawal." (App. Ex. XVII, p. 4). Although [redacted] initially typed the wrong month at the time of the relevant CAS entry and the later audit revealed that the entry was made on 8 August 2021, [redacted] testified, and the military judge found, that such delayed entries are not uncommon. (R. at 328). Thus, the military judge did not abuse his discretion when he found that appellant's investigation was ongoing at the time of his speedy trial request, which included evidence of misconduct previously unknown to the OSJA at the time of appellant's arraignment. Accordingly, the withdrawal and re-preferral of charges was done for a proper purpose. (App. Ex. XVII, p. 4).

Assignment of Error II

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 284 DAYS AFTER SENTENCING.

Additional Facts

On 6 February 2022, the court reporter started transcription of *US v. White II*. (Post-Trial Processing Timeline). On 29 March 2022, appellant's court-martial adjourned. (Post-Trial Processing Timeline). On 30 March 2022, appellant demanded speedy post-trial processing. (Request for Speedy Post-Trial). On 12 April 2022, the military judge entered judgment. (Judgment). On 9 September 2022, the record of trial was completed and forwarded to the trial counsel for errata

and pre-certification review, which was completed on 15 September 2022. (Post Trial Processing Timeline). The record was forwarded to the military judge for certification 31 October 2022, and certification occurred on 13 November 2022. (Post Trial Processing Timeline). On 6 January 2023, this court docketed appellant's case. (Referral).

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); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011); *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022).

Law

Claims of post-trial delay fall into two distinct categories: 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, under the Fifth Amendment, to post-trial processing without unreasonable delay. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). In order to analyze post-trial delays and due process, courts analyze four factors (*Barker*

factors) that examine "(1) the length of the delay; (2) the reasons for the delay; (3) appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Moreno*, 63 M.J. at 135. The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533).[5] However, the *Barker* analysis is not required if this 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).

In situations where appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, "in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. 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.

[5] Courts of Criminal Appeals [CCAs] will further examine the fourth factor, prejudice, 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 139–40. None of those concerns are implicated here.

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. Article 66(d), UCMJ: Sentence Appropriateness and Excessive Delay.

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)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA "may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record." Since Article 66(d)(2), UCMJ, does not define "excessive delay," "in considering whether a delay is excessive, this court will broadly focus on 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." *United States v. Winfield*, 83

M.J. 662, 666 (Army Ct. Crim. App. 2023). Should this court find excessive delay, "Article 66(d)(2) dictates [that this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Id.*

Argument

Appellant does not allege his due process rights were violated under *Barker*; rather, he argues that given transcription technology, the government offers no persuasive reason for delay. (Appellant's Br. 16).

The staff judge advocate (SJA) included a memorandum attributing the delay to the processing and prioritization of six other courts-martial, one of which was subject to an Article 62 appeal. (Post Trial Processing Timeline). In accordance with the Court Reporter Regionalization Business Rules and the region-wide "first-in, first-out," processing, six other courts-martial were prioritized ahead of appellant's case. (Post Trial Processing Timeline). Portions of the transcript were completed and reviewed on several occasions, with the final completion date of 20 October 2022. (Post Trial Processing Timeline).

As appellant has not even attempted to show prejudice, under the "difficult and sensitive balancing process" this court must apply, *Moreno*, 63 M.J. at 145, the facts of this case show that appellant did not suffer a due process violation. *See also United States v. Bush*, 68 M.J. 96, 104 (seven-year post-trial delay attributed

to the government was harmless beyond a reasonable doubt because appellant could not show prejudice). If this court finds excessive delay, Article 66(d)(2) "dictates [this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Winfield*, 83 M.J. at 666.

Appellant, brand new to the Army, used his AIT barracks mail room to receive a significant quantity of LSD, which he then sold to fellow privates who were also in the initial stages of their Army careers. For his misconduct, appellant was convicted of two specifications of wrongful introduction of LSD, one specification of wrongful possession of LSD, one specification of wrongful use of LSD, two specifications of wrongful distribution of LSD, obstruction of justice, and conspiring to obstruct justice. Given the serious of appellant's misconduct, his inability to show prejudice from the delay, and the SJA's justification of prioritizing courts-martial based on a region-wide "first in, first out" basis, this court should not grant appellant any relief. (*see Winfield*, 83 M.J. at n.2).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and the sentence as approved by the convening authority.

[redacted]

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CERTIFICATE OF FILING AND SERVICE,
U.S. v. WHITE ARMY 20210676

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 14th day of November 2023.

[redacted]
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