

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20230142

Staff Sergeant (E-6)  
**DARREN M. GALE,**  
United States Army,

Appellant

Tried at Joint Base Lewis-McChord,  
Washington, on 18 November 2022,  
and 15 February, 13 and 20 March  
2023, before a general court-martial  
appointed by the Commander,  
Headquarters, 7th Infantry Division,  
Colonel Matthew Fitzgerald, military  
judge, presiding.

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

**Assignments of Error<sup>1</sup>**

**I. WHETHER THE DILATORY POST-TRIAL  
PROCESSING OF THIS CASE WARRANTS  
RELIEF WHERE THERE WAS AN UNEXPLAINED  
NINETY DAY DELAY BETWEEN THE  
CONVENING AUTHORITY ACTION AND ITS  
TRANSMITTAL TO THE MILITARY JUDGE.**

**II. WHETHER BLOCK 8 OF THE ENTRY OF  
JUDGMENT SHOULD BE CORRECTED FROM  
“ENLISTED PANEL” TO “MILITARY JUDGE  
ALONE.”**

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<sup>1</sup> Appellant acknowledges the government’s concession for Assignment of Error II, and that the government moved to attach the document referenced in Assignment of Error III. As such, this reply brief only addresses Assignment of Error I.

### **III. WHETHER THE RECORD OF TRIAL IS MISSING THE ADDITIONAL COURT-MARTIAL CONVENING ORDER REFERENCED BY THE TRIAL COUNSEL.**

#### **Statement of the Case**

On 14 December 2023, appellant filed his brief. On 10 January 2024, the government filed its brief. On 16 January 2014, this court granted appellant's extension motion to file a reply brief. This is appellant's reply brief.

### **I. WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THERE WAS AN UNEXPLAINED NINETY DAY DELAY BETWEEN THE CONVENING AUTHORITY ACTION AND ITS TRANSMITTAL TO THE MILITARY JUDGE.**

#### **Argument**

Among other infirmities, the government's brief: (1) misapplies this court's guidance and warnings in asserting that no explanation is required for a ninety-day transmittal delay; (2) ignores the clear requirement, by both rule and regulation, that the convening authority action must be "promptly" sent to the military judge; and (3) implicates significant policy concerns by condoning unexplained pre-judgment delay when Article 66(d)(2) only covers post-judgment delay. As outlined below, this court should reject the government's arguments and grant the requested relief.

**1. The government misapplies this court’s guidance and warnings in asserting that no explanation is required for a ninety-day transmittal delay.**

In this case, the government still has not provided an explanation for the ninety-day delay between the convening authority action and its transmittal to the military judge. In attempting to justify this lack of explanation, the government asserts “there was no post-trial delay to explain” and “neither this court nor its superior court have established a requirement that an explanation is required in every court-martial to detail the post-trial processing, let alone those of less than 150 days.” (Gov’t Br. at 8). Respectfully, this both incorrectly reframes the issue and misapplies this court’s guidance.

To be clear, appellant is not arguing that “an explanation is required in every court-martial to detail the post-trial processing.” (Gov’t Br. at 8). However, contrary to the government’s position, this ninety-day transmittal delay is *exactly* the type of delay that requires explanation. Indeed, appellant’s brief pointed to this court’s clear guidance and warnings regarding unexplained delays and inactivity. (Appellant Br. at 5-7, 9-10). Most strikingly, appellant highlighted this court’s recent analyses in *Morris* and *Jefferson*,<sup>2</sup> which found due process violations in unexplained transmittal delays to the military judge. (Appellant Br. at 6-7, 9-10).

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<sup>2</sup> *United States v. Morris*, ARMY 20210624, 2023 CCA LEXIS 197 (Army Ct. Crim. App. 8 May 2023) ([summ. disp.](#)); *United States v. Jefferson*, ARMY 20220448, 2023 CCA LEXIS 382, (Army Ct. Crim. App. 6 July 2023) ([mem. op.](#)).

Here, in claiming “there was no post-trial delay to explain,” the government does not even attempt to distinguish the violation in *Morris* and erroneously asserts that *Jefferson* merely “indicates that an OSJA must still provide an explanation for delays over 150 days.” (Gov’t Br. at 8-9). This assertion is doubly troubling, as none of *Jefferson*’s analysis hinged on that outdated demarcation, and the government’s own brief acknowledges the broad language in *Winfield* stating this court will “scrutinize even more closely the unit-level explanations for post-trial processing delays, *including those less than 150 days.*” (Gov’t Br. at 9) (citing 83 M.J. 662, 665-66 (Army Ct. Crim. App. 2023)) (emphasis added).

Simply put, this court should soundly reject the government’s assertion that “there was no delay to explain” for a ninety-day delay between the convening authority action and its transmittal to the military judge. Again, based on this court’s clear guidance, this is the exact type of delay that must be memorialized “with thorough, credible, and relevant specificity,” and any OSJAs who fail to provide such an explanation “do so at the peril of their units’ cases on appeal.” *Winfield*, 83 M.J. at 665-66.<sup>3</sup>

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<sup>3</sup> As an administrative matter, appellant notes the government inadvertently misattributed a quote to appellant’s brief. See Gov’t Br. at 8 (“Appellant claims the government ‘[i]nexplicably...failed to give any explanation for the post-trial delay, leaving this court with nothing to scrutinize.’ (Appellant’s Br. 7).” This quoted language was not part of appellant’s brief, and appellant merely highlights its inadvertent inclusion to prevent any confusion of the court.

**2. The government ignores the requirement by rule and regulation that the convening authority action must be “promptly” sent to the military judge.**

Appellant’s brief highlighted that, by rule and regulation, the convening authority action (or memorialization of no action) must be “promptly” sent to the military judge. (Appellant Br. at 8, 10). In response, the government fails to acknowledge or address this language. This is not a trivial omission.

Unlike most other forms of post-trial delay, the unexplained transmittal delay in this case contradicted a specified mandate for expediency. Put differently, this is not an area in which the government lacks guidelines for the timeliness of specific tasks. Here, both the rule and regulation could not be any clearer: they mandate a prompt transmittal.

Moreover, this required urgency makes sense for several reasons: it involves a simple transmittal, and it starts a separate five-day clock for the military judge to enter judgment. *See* AR 27-10, para. 5-51(b)(1). There is simply no rational explanation for failing to comply with this rule and regulatory requirement, and the government has not even attempted to provide one.

**3. The government’s brief implicates significant policy concerns by condoning pre-judgment delay when Article 66(d)(2) only covers post-judgment delay.**

As a matter of policy, this court should also reject the government’s attempts to condone the ninety-day transmittal delay in this case, including stating “there was no post-trial delay to explain” and “there was no delay.” (Gov’t Br. at 8, 10).

This court should find unexplained pre-judgment delay to be particularly pernicious, as it impacts the analysis under Article 66(d)(2), UCMJ. This statute authorizes service courts to provide relief for “error or excessive delay in the processing of the court-martial *after* the judgment was entered.” (emphasis added). In other words, through its textual limitations, Article 66(d)(2) does not address pre-judgment delay. As outlined in appellant’s brief, pre-judgment delay is still covered by the Due Process Clause and Article 66(d)(1), but the broader language of Article 66(d)(2) does not apply. (Appellant’s Br. at 5-8).

This presents significant policy concerns. If the government can claim, as it did here, that “there was no delay” in failing to deliver the convening authority action to the military judge for ninety days, then it can effectively preclude or mitigate claims for relief under Article 66(d)(2). Essentially, under its logic, the government could delay the entry of judgment in every case to avoid starting the Article 66(d)(2) clock, and then seek to argue the appellant did not meet the heightened criteria under the Due Process Clause or Article 66(d)(1). Such a result is clearly problematic.

Thus, in addition to finding the delay in this case violated precedent, rule, and regulation, this court should reject the government’s contrary arguments as a matter of policy.

#### **4. This court should grant relief.**

Appellant reiterates his prior arguments as to why relief is both available and appropriate under the Due Process Clause and Article 66(d)(1), UCMJ. (Appellant Br. at 9-12). As outlined above, the government's contrary arguments are inapt.

As a final matter, the government urges this court to avoid providing appellant with a "windfall" under Article 66.<sup>4</sup> (Gov't Br. at 11). However, the CAAF has previously deconstructed this issue by explaining, "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The Courts of Criminal Appeals have authority under [Article 66] . . . to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Here, even if this court does not find a due process violation, this court is not required to "tolerate the intolerable" and should "tailor an appropriate remedy." *Id.* Specifically, based on the unexplained transmittal delay that violated precedent, rule, regulation, and the clear instructions of DD Form 490, appellant asks this court to reduce his sentence to confinement by at least fifteen days.

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<sup>4</sup> The government analyzes this issue under Article 66(d)(2), but appellant is only requesting Article 66 relief under Article 66(d)(1). (Gov't Br. at 10-12).

## Conclusion

Wherefore, appellant respectfully asks this honorable court to grant the requested relief.



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### **Certificate of Filing and Service**

I certify that a copy of the foregoing was electronically submitted to Army  
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