IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. 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 appointed 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

I. WHETHER THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY WITHDRAWN AND RE-REFERRED.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

Statement of the Case

On 19 July 2023, appellant filed his brief. On 14 November 2023, the government filed its brief. This is appellant's reply brief.

Panel 2

I. WHETHER THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY WITHDRAWN AND RE-REFERRED.

Argument

The government relies on *United States v. Shakur*, 77 M.J. 758, 762 (Army Ct. Crim. App. 2018) (quoting RCM 604(a)) to support the convening authority's "virtually unfettered" authority to withdraw charges. (Appellee Br. at 7). However, the government underplays the convening authority's limitation on their ability to re-refer the withdrawn charges. *Shakur*, at 762. The government disregards the rule that restricts the convening authority's capacity to re-refer after arraignment, which occurred in this case. *See* R.C.M. 604(b), Discussion. Moreover, to re-refer the withdrawn charges, the initial withdrawal must have a proper purpose. *United States v. Hardy*, 4 M.J. 20, 25 (C.M.A. 1977) (holding "there are two factors which will have an effect upon the action that may subsequently be taken: the grounds upon which the withdrawal is occasioned and the time at which it is directed."). Both factors are highly suspect in this case. Moreover, *Hardy* also requires "an affirmative showing on the record for the reason for withdrawal," which is absent in this case. *Id*.

The timing of the withdrawal which occurred the day after appellant's arraignment and demand for speedy trial, raises suspicion. Although the government claims the "discovery" of new evidence was the purpose of the

withdrawal, (Appellee Br. at 7), the facts do not support this conclusion. Even taking the government's explanation at face value, the government was tardy in analyzing the existing evidence and was wholly unprepared for trial for appellant's proposed date. Therefore, using the withdrawal to buy time to perfect their case in the event of appellant's demand for speedy trial should not be upheld as a proper ground for withdrawal.

The government contends the military judge correctly found the photo packet as new evidence because it was not shared with the OSJA, and [redacted] was unaware of appellant's court-martial status. (Appellee's Br. at 8). However, [redacted] knowledge of the court-martial status is immaterial, and the evidence in question was not new and was or should have been known to the OSJA. The UFED extraction was conducted on the appellant's phone on 7 June 2021, and a substantive review and screenshot collection into a DVD was conducted on 8 June 2021. (App. Ex. XIII, pg. 35;41;45). Appellant was placed into pretrial confinement on 6 June and later into severe restrictions until trial. (Charge Sheet).

Even during the Article 39(a) hearing, the government did not dispute the military judge's summary that the UFED report was done months prior. (R. at 116). The photo packet was simply a compilation of messages and screenshots uncovered from 7 June 2021 UFED extractions. (App. Ex. XII, pg. 85). Given appellant's restrictions, the government had the duty to prioritize the litigation of

his case. R.C.M. 707(f) ("[C]onvening authority shall give priority to cases in which the accused is held under those forms of pretrial restraint defined by R.C.M. 304(a)(3)-(4).").

Although [redacted] may have informed the OSJA about the compilation of his findings around this time, there is no explanation as to why it took the government almost two months to finally analyze the extracted data, while appellant's liberty was restricted. Although the government argued at the Article 39(a) session that the packet included information from later "Grayshift" extractions, (R. at 268), the index page of the packet only references UFED extraction data. (App. Ex. XII, pg. 85). Given the prevalence of cell phone extractions, the government's delay in analyzing their findings should not excuse a vitiation of a demand for speedy trial. This court should find that the mere compilation of data from an existing UFED report does not constitute new evidence.

The government's assertion that the packet was new evidence, (Appellee's Br. at 8), seems to stem from the military judge's assumption that the UFED extractions and screenshots can only be read by "super experienced people." (R. at 116). However, this is not supported by the underlying evidence. The packet contains simple screenshots and photos. (App. Ex. XIII, pg. 35-52). Moreover, [redacted] testified that he has only been an agent for ten months and received no additional training besides his "training through AIT and Basic Training." (R. at

98). He also mentioned that he had been "trained to use a UFED and to do an extraction," but never testified that he received specialized knowledge. (R. at 99). Therefore, the military judge's assumption that the evidence had to be analyzed by an expert was wrong.

The government also argues, "[redacted] testimony and the supporting CAS note demonstrate that there was evidence supporting additional charges previously unknown to the prosecution." (Appellee's Br. at 7). However, even assuming the evidence was unknown to the government for good cause, the new charges must be significantly distinct to warrant a new preferral. *See* R.C.M. 401(c)(1) Discussion ("It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original . . . did not adequately reflect the nature or seriousness of the offense.). Here, the government could have simply amended the dates of the charges to reflect the additional evidence with appellant's consent, (R.C.M. 601(e)(2), since the original charge sheet adequately reflected the gravamen of the offenses,[1] (Charge Sheets).

[1] The initial Charge Sheet was comprised of four specifications of Article 112a, one specification of Article 131b, and one specification of Article 81. The subsequent Charge Sheet expanded the list of misconduct by introducing different modalities and included additional dates for the related charges as separate specifications. In response to the appellant's argument for Unreasonable Multiplication of Charges (UMC), the military judge asserted he would address these concerns through concurrent sentencing. (R. at 145). Consequently, the military judge sentenced the appellant in three concurrent groups. (R. at 721).

The impropriety of the "new evidence" classification is underscored by the *Cossio* and *Tippit* case facts the government cites. (Appellee's Br. at 8). Unlike the present case, both cases involved new materials that were unknown to the government. *United States v. Tippit*, 65 M.J. 69, 79 (C.A.A.F. 2006) (finding the withdrawal before arraignment due to ongoing federal and state parallel investigations proper); *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2006) (waiting for the result of a forensic examination of the computer equipment was proper). In both instances, once they obtained the new evidence, the government proceeded with the trial.

Here, there was *no* new evidence obtained and *no* reason for the delay. The military judge insightfully inquired whether the government shared the "new" evidence with appellant promptly. (R. at 117). They had not. (R. at 117). Since the government failed to inform the appellant of the withdrawal, the trial defense counsel had submitted discovery demands on 8 August 2021. (App. Ex. XIII). Even then, the government did not share the "new" evidence until the time of re-preferral. (R. at 118). This was unfair for the appellant's preparations. Not only

was appellant subjected to restrictions, but he was also deprived from timely discovery.[2]

The government primarily argues the military judge's conclusion of no subterfuge was correct, quoting the judge's finding, "Obviously, had [redacted] known about how significant dates were for case activity, he probably would have made his CAS entries much closer in time." (Appellee's Br. at 5). However, this conclusion is not warranted since the government asserted the prosecution obtained the "new evidence" on 6 August 2021, which triggered the sudden withdrawal, the day after the appellant's demand for a speedy trial at the arraignment. Any date before or after 6 August makes the discovery of "new evidence" unrelated to the timing of the withdrawal. Moreover, since the packet was created on 5 August, the earlier date is unavailable. Therefore, the government's defense of this conclusion is illogical.

Furthermore, the government's defense of the military judge's conclusion that the entry must have been delayed is not based on evidence. The unexplained typo and the absence of the "Delayed Entry" label raise concerns about the accuracy of this conclusion. (App. Ex. XIII, pg. 76-77). On these pages,

[2] Throughout the litigation the discovery issues persisted, prompting the SJA's involvement, (R. at 86), and the military judge's order (App. Ex. XXIII) to compel discovery.

surrounding entries contain "Delayed Entry" labels, while the entry in question does not. (App. Ex. XIII, pg. 77). Moreover, [redacted] admitted to lapses in entering data, including failing to document the coordination with the OSJA before he provided the packet, despite his usual practice. (R. at 107). Uncertainties about the reason for the delayed entry further undermine the reliability of the government's position. (R. at 109).

In conclusion, the timing of the withdrawal, nature of the "new" evidence in question, discrepancies in dates, entry labels, and [redacted] testimony cast serious doubt on the government's explanations for their actions which makes the military judge's findings erroneous.

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.

Argument

The government incorrectly argues that appellant does not allege his due process rights were violated. (Appellee's Br. at 13). Appellant asserted the delay was excessive and that there was no reason for the delay. Furthermore, appellant asserts that even if appellant is unable to show particularized prejudice, the court must find prejudice since the delay "rises to a level of egregiousness such that it would adversely affect the public's perception of the fairness and integrity of the

military justice system." *See United States v. Morris*, 2023 CCA LEXIS 197, *3, (Army Ct. Crim. App. 8 May 2023) (citing *United States v. Toohey II*, 63 M.J. 353, 362 (C.A.A.F. 2006))(summ. disp.) (providing *sua sponte* relief for sixty plus day period between trial counsel's precertification and the military judge's authentication for violations of Due Process and Article 66(d)(2)); *see also United States v. Sepulveda*, 2023 CCA LEXIS 223, *3 (Army Ct. Crim. App. 5 May 2023) (summ. disp.) (providing relief for 100 days of delay between the military judge authenticating the record and docketing at the Army Court for violations of Due Process, Article 66(d)(1) and (d)(2)). In this case the court reporter took 216 days to transcribe the record. Since the software creates the draft transcript in real time, this delay is unreasonable. In addition, after the military judge authenticated the record of trial, there was fifty-two days of delay until the Army Court docketed the case. There was no explanation for this delay.

Therefore, appellant is entitled to relief regardless of prejudice.

Conclusion

Accordingly, appellant requests that the findings and sentence be set aside and the case be remanded.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 1 December 2023.

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