IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20220552
Private (E-1) **NOAH P. HULIHAN** United States Army, Appellant	Tried at Fort Bragg, North Carolina,[1] on 20 October 2022 and 31 October to 1 November 2022, before a general court-martial convened by the Commander, HQ, Fort Bragg, Colonel G. Bret Batdorff, Military Judge, presiding.

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

Assignment of Error[2]

WHETHER XVIII AIRBORNE CORPS' DELAYED POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS UNTIL 337 DAYS AFTER SENTENCING

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[1] At the time of trial, the installation was named Fort Bragg. Effective 2 June 2023, the installation was officially redesignated as Fort Liberty: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38392-AGO_2023-13-000-WEB-1.pdf.

[2] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this Court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error. *Id.* at 437 ("We will expect the Courts of Military Review to specify issues and request briefs of those issues which they believe are deserving of that increased attention.").

PANEL No. 3

Statement of the Case

On 1 November 2022, a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of one specification each of domestic violence, assault consummated by a battery, aggravated assault, and possession of child pornography in violation of Articles 128b, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928b, 928, and 934 [UCMJ]. (R. at 55–56, 145–46; Statement of Trial Results [STR]).[3] The military judge sentenced appellant to be confined for thirty-four months and to be discharged from the service with a dishonorable discharge.[4] (R. at 239; STR).

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[3] Additionally, appellant was charged with two specifications of sexual assault, one specification of wrongfully broadcasting intimate visual images, two specifications of domestic violence, two specifications of abusive sexual contact, one specification of assault consummated by a battery, one specification of wrongfully viewing child pornography, and one specification of wrongful production of child pornography in violation of Articles 120, 117a, 128b, 128, and 134, UCMJ. (Charge Sheet; STR). In accordance with his plea agreement, appellant pleaded not guilty to Charge I and its specifications, Specifications 2 and 3 of Charge II, Specification 1 of Additional Charge I, Specification 2 of Charge II, and Specifications 2 and 3 of Additional Charge III. (Charge Sheet; STR; R. at 55–56; App. Ex. XIV). Appellant also pleaded not guilty to Additional Charge I, but guilty to a violation of Article 128, UCMJ. (R. at 55–56; STR). The government withdrew and dismissed Charge II and dismissed, after arraignment and prior to findings, the other specifications and charges appellant agreed to plead not guilty to. (Charge Sheet; STR; R. at 144).

[4] The military judge sentenced appellant to twenty-four months confinement for Specification 1 of Charge III, six months confinement for Specification 2 of Additional Charge I, six months confinement for Specification 1 of Additional Charge II, and thirty-four months for Specification 1 of Charge III. (STR; R. at 239). All sentences to confinement were to be served concurrently. (STR; R. at 239).

Statement of Facts

A. Appellant strangled his intimate partner.

While stationed at Fort Liberty in July 2021, appellant was dating a junior soldier, Private First Class (PFC) [redacted]. (Pros. Ex. 3, p. 2; R. at 67). While in PFC [redacted]'s barracks room, appellant got into a verbal altercation with her, and to prevent her from leaving the room, he grabbed her by her throat with his hand. (Pros. Ex. 3, p. 2; R. at 71–72). Private First Class [redacted] had trouble breathing and started to lose consciousness. (Pros. Ex. 3, p. 2; R. at 71–72). After being strangled by appellant, PFC [redacted] suffered from a sore throat and neck. (Pros. Ex. 3, p. 2; R. at 71–72).

B. Appellant unlawfully touched a fellow soldier on her thigh.

In March 2020, while stationed at Fort Liberty, appellant met Sergeant (SGT) [redacted] and began communicating with her on via an application on their phone. (Pros. Ex. 3, p. 2; R. at 82). After a month of communicating, SGT [redacted] and appellant met outside appellant's barracks room. (Pros. Ex. 3, p. 3; R. at 83). Appellant entered SGT [redacted]'s car, and after talking for a few minutes, he tried to kiss her. (Pros. Ex. 3, p. 3; R. at 83). Sergeant [redacted] pulled away, and appellant put his hand on her thigh. (Pros. Ex. 3, p. 3; R. at 83). She pushed his hand away and told him "no"; however, appellant placed his hand on her thigh again. (Pros. Ex. 3, p. 3). Sergeant [redacted] again pushed his hand away and told him not to touch her thigh

again, but appellant continued to touch her thigh numerous times. (Pros. Ex. 3, p. 3; R. at 83).

C. Appellant strangled a civilian he met online.

Appellant met Ms. [redacted] online in July 2021. (Pros. Ex. 3, p. 3; R. at 92). When he went to visit his child in Kittanning, Pennsylvania, in August 2021, he asked Ms. [redacted] if they could meet at a hotel, and Ms. [redacted] agree. (Pros. Ex. 3, p. 3; R. at 92). Appellant and Ms. [redacted] met in a hotel room and began to engage in consensual sexual intercourse. (Pros. Ex. 3, p. 3; R. at 92–93). Appellant asked Ms. [redacted] if he could "choke" her during the sexual intercourse, and Ms. [redacted] said she would try as long as it wasn't too hard. (Pros. Ex. 3, p. 3; R. at 92). Appellant wrapped his hand around Ms. [redacted]'s throat and squeezed her throat, which restricted her airway. (Pros. Ex. 3, p. 3; R. at 93). Ms. [redacted] asked appellant to stop because it was too hard; however, appellant continued to squeeze her throat. (Pros. Ex. 3, pp. 3–4; R. at 93). Ms. [redacted] had trouble breathing and felt like she was going to lose consciousness. (Pros. Ex. 3, p. 4; R. at 93). When appellant let go of her throat, Ms. [redacted] put her arms near her throat to prevent appellant from strangling her again, but he placed his hand on her throat and restricted her airway. (Pros. Ex. 3, p. 4; R. at 93–94). As Ms. [redacted] tried to move her body away from him to prevent him from continuing to strangle her, appellant pulled her back and once again strangled her by grabbing her throat. (Pros. Ex. 3, p. 4; R. at 93–94).

D. Appellant knowingly possessed twelve videos and images of a minor child.

In early 2020, appellant met a seventeen-year-old girl online. (Pros. Ex. 3, p. 4; R. at 107–08). Appellant knew she was seventeen. (Pros. Ex. 3, p. 4; R. at 107). After about a week, appellant and the minor began to have sexual conversations. (Pros. Ex. 3, p. 4; R. at 108). He would ask the minor to send him photos or videos showing her nude or engaging in sexual acts. (Pros. Ex. 3, p. 4; R. at 108). He would also send the minor photos and videos of his genitals. (Pros. Ex. 3, p. 4; R. at 108). Appellant saved the photos and videos to his phone. (Pros. Ex. 3, p. 4; R. at 108).

E. Plea Agreement

On 28 October 2022, appellant and the convening authority entered into a plea agreement which required appellant to plead guilty in exchange for sentencing limitations. (App. Ex. XIV). The following sentencing limitations were agreed upon: to serve a minimum of eighteen months and maximum twenty-four months confinement for Specification 1 of Charge III; a minimum of three months and maximum six months confinement for Specification 2 of Additional Charge I; a minimum three months and maximum six months confinement for Specification 1 of Additional Charge II; and a minimum eighteen months and maximum forty-eight months confinement for Specification 1 of Additional Charge III. (App. Ex.

XIV). A dishonorable discharge would be adjudged. (App. Ex. XIV). All other lawful punishments would not be adjudged. (App. Ex. XIV).

F. Post-trial processing.

Appellant's court-martial adjourned on 1 November 2022. (R. at 240). On 9 November 2022, appellant waived submission of his Rule for Courts-Martial [R.C.M.] 1106 matters. (R.C.M. 1106 Waiver). Appellant did not request speedy post-trial processing in his waiver. (R.C.M. 1106 Waiver). On 7 December 2022, the convening authority took no action on the findings or sentence. (Action). The military judge entered judgment on 13 December 2022. (Judgment). The trial counsel completed the pre-certification on 21 August 2023. (Precertification). The military judge authenticated the record on 22 August 2023. (Authentication). The court reporter certified the transcript on 29 August 2023. (Certification). On 27 September 2023, the Office of the Staff Judge Advocate (OSJA) provided a memorandum detailing the post-trial processing of the case. (Post-Trial Processing Memorandum). This court docketed the case on 4 October 2023. (Referral and Designation of Counsel).

Assignment of Error

WHETHER XVIII AIRBORNE CORPS' DELAYED POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS UNTIL 337 DAYS AFTER SENTENCING

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83, M.J. 662, 666 (Army Ct. Crim. App. 2023).

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), 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, appellate courts analyze four factors (*Barker* factors) that examine: "(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." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Moreno*,

63, M.J. 129, 135 (C.A.A.F 2006).[5] 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 (*Toohey II*) (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533).[6] The *Barker* analysis, however, 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 an 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. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining

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[5] Additionally, Courts of Criminal Appeals (CCAs) will also further examine 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 these factors are implicated in this case, and appellant does not allege any prejudice.

whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Id*. 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)(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." Because 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." *Winfield*, 83 M.J. at 666. Even if there is 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

The government did not violate appellant's due process rights, because there was no prejudice. Further, considering the totality of the circumstances in this case, appellant deserves no relief under a sentence appropriateness analysis because appellant did not suffer prejudice, his sentence is appropriate, and there is no harm to correct. Furthermore, appellant has not demonstrated error or excessive delay under Article 66(d)(2), UCMJ. Therefore, this court should affirm the findings and sentence as adjudged.

A. All four *Barker* factors weigh in favor of the government.

From the date appellant's court-martial adjourned to when the case was referred to counsel by this court, 337 days elapsed. (R. at 240; Referral and Designation of Counsel). In overturning *Brown's* 150-day timeline, this court stated that it would "scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing[.] *Winfield*, 83 M.J. at 665. Based on the OSJA's detailed explanation of the post-trial processing of the case, which provided legitimate reasons for the delay, the first and second factors weigh in favor of the Government. *See Winfield*, 83 M.J.

at 666.[7]

Turning to the third *Barker* factor, appellant never demanded speedy post-trial processing. While this does not waive appellant's speedy post-trial rights, the third *Barker* factor, nevertheless, favors the government. *Moreno*, 63 M.J. at 138. The Supreme Court in *Barker* succinctly stated: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532.

Finally, appellant does not allege that he suffered any prejudice. Therefore, the fourth *Barker* factor weighs in favor of the government.

B. The delay does not impugn the fairness or integrity of the military justice system.

Appellant has failed to show that the delay was 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. As such, the "difficult and sensitive balancing process" of the facts of this case show that appellant did not

[7] Appellant argues that the term in his plea agreement that allowed his record of trial to be served on his defense counsel is prohibited. (Appellant's Brief at 12; App. Ex. XIV). However, appellant has failed to show how the provision has prejudiced him or prohibited him from exercising his post-trial and appellate rights since he waived submission of his R.C.M. 1106 matters and his current appellant counsel has a copy of the record of trial. Furthermore, appellant informed the military judge that he understood and agreed with the term of his plea agreement. (R. at 126–27).

suffer a due process violation. *Id.*, at 145. Even in cases where a court has found a due process violation, courts have found the due process violation to be harmless beyond a reasonable doubt in the absence of *Barker* prejudice. *See United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (holding that seven-year post-trial delay due process violation was harmless beyond a reasonable doubt); *See also United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008) (holding that appellant did not suffer detriment to his legal position in his appeal as a result of an almost seven year delay between adjournment and completion of appellate review).

C. Appellant does not merit relief under an Article 66(d)(2) analysis.

Under the specific facts of this case, the delay was not excessive. If this court finds excessive delay, however, 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 asks this court to "grant appropriate sentence relief while sending a message to commanders and military justice practitioners."[8]

[8] In requesting relief, Appellant also asks this court to take judicial notice of the post-trial delays in other cases from the same jurisdiction. (Appellant's Br. 14). The government would ask the court to reject this outright. This court should decide this case based solely on facts in the record, and it should not consider other cases of dilatory post-trial processing that are outside of the record. *See United States. v. Jessie*, 79 M.J. 437, 441 (C.A.A.F. 2020) ("*Fagnan* established a clear rule that the CCAs may not consider anything outside of the 'entire record' when reviewing a sentence under [Article 66(d)], UCMJ." (citing *United States v. Fagnan*, 12 U.S.C.M.A. 192, 194; 30 C.M.R. 192, 194 (1961)). Furthermore, the

(Appellant's Br. 15). No relief is appropriate in this case. Should appellant's request be interpreted as requesting that his punitive discharge be set aside, the government argues that setting aside appellant's dishonorable discharge is not appropriate in this case and would be a windfall to appellant considering the nature of the charge to which he pleaded guilty. *Winfield*, 83 M.J. at 666. *See generally United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) (pronounced qualitative difference between confinement and punitive discharge). Appellant pleaded guilty to one specification each of domestic violence, assault consummated by a battery, aggravated assault, and possession of child pornography in violation of Articles 128b, 128, and 134, UCMJ. (STR). Based solely on the specifications appellant pleaded guilty to, he faced a maximum sentence to confinement of thirteen years and a dishonorable discharge. (R. at 114; *Manual for Courts-Martial, United States*, (2019 ed.), App'x. 12). Appellant's plea agreement limited appellant's confinement to a maximum of forty-eight months confinement, less than one-fourth of the maximum sentence he was facing.

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government would note that the following cases that appellant requests the court take judicial notice of are not yet pending decision before the court: *United States v. Dickerson*, ARMY 20220118; *United States v. Hulihan II*, ARMY 20220246; *United States v. Padgett*, ARMY 20220169; *United States v. Johnson*, ARMY 20220074; *United States v. Goins*, ARMY 20220088; *United States v. Resutek*, ARMY 20220431; *United States v. Robinson*, ARMY 20230109; *United States v. Cunningham*, ARMY 20220140; *United States v. Borja*, ARMY 20220303; and *United States v. Nguyen*, ARMY 20230319. On 21 February 2024, the appellant in *United States v. Wilson*, ARMY 20220309, withdrew his appeal.

(App. Ex. XIV). Furthermore, Appellant's plea agreement specifically bargained for a dishonorable discharge. (App. Ex. XIV). Any sentence relief is inappropriate in this case.

Conclusion

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

[redacted]

CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government Appellate Division

[redacted]

JACQUELINE J. DEGAINE
COL, JA
Deputy Chief, Government Appellate Division

CERTIFICATE OF SERVICE, U.S. v. HULIHAN (20220552)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 2nd day of April, 2024.

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