

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230140

Private First Class (E-3)

JORGE M. MORENO, III,

United States Army,

Appellant

Tried at Fort Stewart, Georgia, on 15 March 2022, 19 July 2022, and 16 March 2023 before a general court-martial appointed by the Commander, Headquarters and Fort Stewart, LTC Albert. G. Courie, III, and COL John H. Cook, military judges, presiding.

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

Assignment of Error I¹

**WHETHER THE OSJA'S 203-DAY POST-TRIAL
DELAY WARRANTS RELIEF UNDER THE DUE
PROCESS CLAUSE OR ARTICLE 66, UCMJ, AND
WHETHER THE OSJA'S FAILURE TO TIMELY
PROVIDE APPELLANT WITH A COPY OF THE
RECORD OF TRIAL MERITS AN ADDITIONAL 54
DAYS OF DELAY.²**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

² While the Chronology Sheet indicates the transcript was mailed to this court on 11 October 2023, the Postal Service Control Form indicates mailing occurred on 29 September 2023. Referral and Designation took place on 4 October 2023, indicating the 11 October 2023 date on the Chronology Sheet is an error.

Statement of the Case

On 16 March 2023, a military judge sitting as a general court-martial convicted appellant, PFC Jorge M. Moreno, III, in accordance with his plea, of one specification of sex assault in violation of Article 120 of the Uniform Code of Military Justice [UCMJ].³ (R. at 131; Charge Sheet). The military judge sentenced appellant to sixteen (16) months of confinement and a Dishonorable Discharge. (R. at 187).

On 19 April 2023, the convening authority [CA] took no action on the finding and sentence. (Action). However, the CA approved the appellant's request for deferment of the automatic reduction in grade and automatic forfeitures, effective 30 March 2023, to terminate upon entry of judgment. (Action). The CA also approved appellant's request for waiver of automatic forfeitures, upon entry of judgment, for six (6) months to be paid directly to appellant's spouse. (Action). On 28 April 2023, the military judge entered judgment.⁴ (Judgment).

³ One specification of sex assault under Art. 120, UCMJ, was dismissed without prejudice upon acceptance of the guilty plea, to ripen into prejudice upon completion of appellate review.

⁴ The Entry of Judgment (EOJ) should be corrected to properly reflect the CA waived automatic forfeitures which included pay and allowances given appellant was tried at a general court-martial. Appellant recommends the court strike out the following language: "in the amount of total forfeiture pay per month."

Statement of Facts

Following the entry of judgment, it took the government 154 days to get the 187-page transcript certified. (Chronology; Court Reporter Certification). When the presiding judge, COL John Cook, received the transcript on 21 September 2023, he authenticated 110 pages and returned it to the office of the staff judge advocate [OSJA] with the errata sheet on the same day. (Errata). LTC [REDACTED], assumed to be authenticating on behalf of LTC Albert Courie (the original presiding judge), reviewed pages 1-77 and returned his errata sheet to the OSJA on 28 September 2023. (Errata).

Included in the record of trial [ROT] are the appellant's confinement orders, assigning him to the Midwest Joint Regional Correctional Facility, Fort Leavenworth, KS (Orders; Transfer Memo) and his Post-Trial Appellate Rights Advisement [PTAR] electing personal service at the confinement facility. (App. Ex. XIX). What was *not* included in the record was any explanation for the delay.

This court docketed appellant's case on 4 October 2023. (Referral and Designation of Counsel). However, despite requesting a copy of the record be mailed to him at the confinement facility (App. Ex. XIX), the OSJA did not send the appellant a copy until 27 November 2023 after multiple requests by appellant defense counsel. (Def. App. Ex. A).

Standard of Review

Claims of unreasonable post-trial delay are reviewed de novo. *United States v. Winfield*, 83 M.J. 662, 665 (Army Ct. Crim. App. 2023).

Law

A servicemember's right to timely appellate review is rooted in both the Due Process Clause of the Fifth Amendment as well as in Article 66, Uniform Code of Military Justice (UCMJ). *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) ("*Toohey I*").

A. The Due Process Clause

The Due Process Clause guarantees a service member's right to timely appellate review. *Toohey I*, 60 M.J. at 102; *Winfield*, 83 M.J. at 665.

The court will consider the following *Barker* factors to determine whether the delay constitutes a due process violation: (1) length of the delay, (2) the reasons thereof, (3) whether the appellant asserted their right to timely review and appeal, and (4) any resulting prejudice. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). This balancing test does not require that all factors be satisfied in order to find a due process violation. *See Barker*, 407 U.S. at 533.

Where the court finds no prejudice under the *Barker* analysis, a due process violation may still occur if "in balancing the three other factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the

fairness and integrity of the military justice system.” *United States v. Baylor*, ARMY 20210576, 2023 CCA LEXIS 462, *1, *10.

B. Article 66, UCMJ

Even if a due process violation is not found, this court may still grant an appellant relief for excessive post-trial delay under Article 66(d), UCMJ, in determining the appropriateness of the sentence. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). When determining whether delay is excessive, this court focuses on the totality of the circumstances to “balance 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 667. Under this analysis, the court will determine what findings and sentence should be approved based on the facts and circumstances within the record, to include any “unexplained and unreasonable post-trial delay.” *United States v. Hotaling*, ARMY 20190360, 2020 CCA LEXIS 449, *1 (Army Ct. Crim. App. 11 Dec. 2020) ([mem. op.](#)).

In *United States v. Sepulveda*, 172 days elapsed between adjournment and appellate docketing. *Sepulveda*, ARMY 20220241, 2023 CCA Lexis 223 (Army Ct. Crim. App. 5 May 2023) ([summ. disp.](#)). This court found that “[t]he span of over 100 days between the military judge authenticating the record of trial and docketing with this court is unexplained and unacceptable.” *Id.* While the appellant

did not allege prejudice, this court granted relief under Article 66(d)(1), Article 66(d)(2), and The Due Process Clause of the Fifth Amendment. *Id.*

Argument

While the appellant did not assert his right to timely post-trial review, when taken together, the *Barker* factors weigh in his favor.

The reason for the government's 203-day delay is unexplained. Therefore, this court is without context when considering whether the unreasonable delay was justified. It could have potentially been valuable to apprise the court why it took the government over 150 days to compile and certify this particular record. (Chronology). Given the one (1) day it took COL Cook to review and authenticate his portion of the transcript, it can be ascertained that this case, concerning a one-specification guilty plea, was not particularly complex. (Errata). Additionally, there were *at least* two non-commissioned officer [NCO] court reporters overseeing the processing of this 441-page record. (Court Reporter Certification).

Despite the record including a copy of the appellant's confinement orders and PTAR election, the OSJA failed to complete the *ministerial* task of service on the appellant "for over six months [214 days], which itself far exceeds the total permissible post-trial processing timeline." *Hotaling*, ARMY 20190360, 2020 CCA LEXIS 449 at *9. (Def. App. Ex. A). Not only was appellant's right to timely post-trial review disregarded by the government, but so were this court's

admonitions to the field. *See e.g., id.* at *11; *Baylor*, ARMY 20210576, 2023 CCA LEXIS 462, at *10-11.

In addition to the adverse effect tolerance of this type of delay poses on the public's perception of the fairness and integrity of the military justice system, the appellant was prejudiced by this unnecessary impediment to his already restricted ability to participate in the appellate process. However, should this honorable court find there has been no due process violation, Article 66 sentencing relief is appropriate when considering the totality of these circumstances—including the delay in the delivery of the record of trial.

Article 66(d)(2), UCMJ, concerns delay after the signing of the EOJ. Here, there were approximately 214 days between the signing of the EOJ and the appellant's receipt of a copy of the ROT, due to him pursuant to Rule for Court-Martial [RCM] 1112(e)(1)(A). (Judgment; Def. App. Ex. A). While historically the concern has been with simply getting the transcript to this court, this court now has the opportunity to analyze how the OSJA's failure under this rule affected the appellant's ability to timely present his matters. Given that the additional delay in receiving the ROT and appellant's ability to review the materials is directly attributable to the OSJA's post-trial failure to follow both the Rules for Court-Martial and Army Regulation, this matter is ripe for consideration and inclusion.

Conclusion

WHEREFORE, appellant respectfully requests this honorable court reassess and affirm only so much of the sentence as provides for a Dishonorable Discharge and 223 days of confinement (i.e., 480 days adjudged minus 257 days delay).



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on March 19, 2024.



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