IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220118
Specialist (E-4) **JACOB A. DICKERSON,** United States Army, Appellant	Tried at Fort Liberty, North Carolina, on 29 December 2021 and 14 March 2022, before a general court-martial appointed by the Commander, XVIII Airborne Corps, Fort Liberty, Colonel G. Bret Batdorff and Colonel Stephan E. Nolten, military judges, presiding.

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

Assignment of Error I

WHETHER THE EVIDENCE FOR THE CHARGE OF DERELICTION OF DUTY IS LEGALLY AND FACTUALLY SUFFICIENT WHERE THE DUTY WAS NOT STATED AND REQUIRED APPELLANT TO SELF-INCRIMINATE IN ORDER TO COMPLY.

Assignment of Error II

WHETHER FORT LIBERTY'S FLAGRANT POST-TRIAL PROCESSING DELAY WAS BOTH UNREASONABLE AND UNCONSTITUTIONAL, THUS WARRANTING RELIEF.

PANEL 3

Statement of the Case

On 14 March 2022 a military judge alone sitting as a general court-martial convicted appellant, Specialist [SPC] Jacob A. Dickerson, in accordance with his pleas, of one specification of wrongful use of a controlled substance in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a (2018) [UCMJ] and one specification of dereliction in the performance of duties by culpable inefficiency, in violation of Article 92, UCMJ, 10 U.S.C. § 892.[1] (R. at 62; Charge Sheet). That same day, the military judge sentenced appellant to seventy-five (75) days confinement and a bad conduct discharge.[2] (R. at 113; Statement of Trial Results).

On 6 April 2022, the convening authority (CA) took no action on the findings and sentence, and granted appellant's request for waiver of automatic forfeitures for the benefit of his dependents for a period of three months. (Action). On 13 September 2022, the military judge entered Judgment. (Judgment). This

[1] Charge I, Specification 1 was dismissed following arraignment and prior to findings. Prejudice ripened upon the announcement of the sentence. As such, Charge I, Specification 2 should be renumbered to reflect "the Specification."

[2] The military judge sentenced appellant as follows:

Charge I, Specification 2	75 days
Charge II, The Specification	75 days

The military judge ordered all sentences to confinement to run concurrently. (R. at 113; Statement of Trial Results).

court docketed appellant's case on 15 August 2023. (Referral and Designation of Counsel Letter).

Statement of Facts

Following a deployment and treatment for one of several service-related injuries, SPC Dickerson was suffering from an addiction to military prescribed opioids when he admittedly purchased and used Oxycodone on 24 September 2021. (R. at 29, 77, 91, 95). He had most recently been prescribed a similar pain medication, Vicodin, in June of 2021, just three months prior to this incident. (R. at 34-35). The husband and father of two little girls accepted full responsibility for his missteps and immediately sought treatment from the time of his arrest, through his day in court, and vowed to continue to seek treatment. (R. at 95-99).

During the sentencing phase of the appellant's court-martial, his former platoon sergeant, Lieutenant [redacted], with whom he deployed, described him as a trusted leader and mentor for other junior soldiers. (R. at 82). And his former squad leader, Staff Sergeant (SSG) [redacted] stated the appellant was "very dedicated" to his role as a law enforcement officer. (R. at 86). He spoke highly of the resilience the appellant displayed after the incident and of his willingness to "atone for his actions." (R. at 87). He went on to say he witnessed the appellant's remorse for disappointing the Army, the Military Police Corps, and his family. (R. at 89). Staff Sergeant (SSG) [redacted] also testified about the growth the appellant

experienced following his election to commit to an intensive treatment program. (R. at 89-92).

Additional facts are incorporated below.

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Additional Facts

The Specification of Charge II, alleges that SPC Dickerson, by "culpable inefficiency, failed to perform his duties as a Military Police officer when he attempted to wrongfully coordinate a drug deal for Oxycodone while on duty, and by using a Military Police vehicle." (R. at 62; Charge Sheet). Following the Art. 32 preliminary hearing, the PHO noted in his report that The Specification of Charge II for did not allege an offense. (Def. App. Ex. C). He specifically pointed out that the specification did not allege the "failed task." (Def. App. Ex. C, p. 3).

Through his stipulation of fact, appellant admitted that he had been ordered to "report all illegal activity to dispatch" and "tasked to oversee security from his MP vehicle" at the Bragg Boulevard Gate, between 0430 and 1230 on 24 September 2021. (Pros. Ex. 1, para. 4). He further admitted that

around 1100, he placed a call while inside of his MP vehicle to arrange to buy Oxycodone after finishing his shift. (Pros. Ex. 1, para. 4). The stipulation of fact further provides that appellant "had no reasonable or just excuse for using his time on duty as an MP to coordinate an illegal purchase of a controlled substance." (Pros. Ex. 1, para. 8).

During the providence inquiry, appellant further admitted that he had no legal reason or excuse for "taking away from [his] time on duty…to plan a drug deal" or for "not sharing the knowledge [he] had about this individual selling drugs." (R. at 39-40). When the military judge asked appellant what he was looking for while monitoring the gate, appellant answered, "Just anyone illegally, just trying to get access to that space without authorization." (R. at 44). And if any such issue were present, he was to "call it up on dispatch and pursue, until called off." (R. at 44). The appellant also provided that the phone call took about ninety (90) seconds and confirmed that it was the only call he made during his eight (8) hour shift. (R. at 44-45). He further added that his "attention wasn't fully on the gate at the time." (R. at 45).

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002), 10 U.S.C. § 866(d)(1)(A-B) (2021). In conducting its de novo review, the court does not

abandon its logic and common sense. *Id.* at 402–03 (Baker, J. concurring).

Law

A. Legal sufficiency.

In its legal sufficiency review, this court determines whether a reasonable fact finder could have found all the essential elements beyond a reasonable doubt, while considering the evidence in the light most favorable to the prosecution. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, this court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

B. Factual sufficiency.

Upon an appellant's specific showing of a deficiency in proof, and after giving appropriate deference for not having personally observed the witnesses, this court may modify the findings or sentence where it is clearly convinced that the finding of guilty was against the weight of the evidence. *United States v. Scott*, 83 M.J. 778, 779 (Army Ct. Crim. App. 2023) (quoting Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12). The court will not presume either guilt or innocence but will make an independent finding as to whether the evidence establishes proof of each element beyond a reasonable doubt. *See Washington*, 57 M.J. at 399; *Scott*, 83 M.J. at 779 (rejecting a rebuttable presumption of

guilt).

"Beyond a reasonable doubt" means that if "the record leaves [this court] with a fair and rational hypothesis other than guilt," the court is required to set aside the conviction for insufficient evidence. *United States v. Whisenhunt*, 2019 CCA Lexis 244, at *6 (Army Ct. Crim. App. 3 June 2019) (unpub. op.) (citing *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003).

C. Dereliction of Duty.

The Specification of Charge II, Dereliction of Duty, requires proof of three (3) elements: (1) the accused had certain duties; (2) the accused knew or reasonably should have known of the duties; and (3) the accused was, through culpable inefficiency, derelict in the performance of those duties.

The Military Judges' Benchbook [Benchbook] defines culpable inefficiency as "[i]nefficiency for which there's no reasonable or just excuse…a reckless, gross, or deliberate disregard for the foreseeable results of a particular (act) (or) (failure to act)." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, p. 282 (29 Feb. 2020). Dereliction is defined as "a failure in duty, a shortcoming, or delinquency." *Id*. at p. 1111. A person is "derelict" in the performance of duty when he fails to perform them or when he performs them in a culpably inefficient manner. *Id*.

Argument

While SPC Dickerson admitted he had a known duty to report all crimes, as a matter of law, it is not a dereliction of duty to fail to "report one's own criminal conduct." (R. at 39); *see United States v. Hickson*, 22 M.J. 146, 154 (C.M.A. 1986). While the court in *Hickson* did not base its holding on the matter, it further found that "prosecution for an accused's failure to report his own crime may present self-incrimination issues…" *Id*. To the extent that appellant had a duty to report the person from whom he purchased the Oxycodone, he would have necessarily had to also report his own criminal activity; thus still implicating his right against self-incrimination.

Further, the record is void of any evidence which establishes that there was any illegal activity the appellant should have reported during his shift. First, his phone call would have been protected by the Fifth Amendment's guarantee against compelled self-incrimination. Appellant had no basis of knowledge to report any other illegal activity in which the dealer could have been involved from 0400 to 1230 on September 24, 2021. Specialist Dickerson was no longer under the order "to report all illegal activity to dispatch" when he drove to meet the supplier in Parkton, NC, in his personally owned vehicle (POV) after his shift ended and he had turned in his MP vehicle.

If the court's finding of guilt as to the dereliction of duty offense was based

on the appellant's admitted duty to "to oversee security from his MP vehicle," the record fails to prove any purported failure in his oversight of security or that such oversight was culpably inefficient. There is no fact in the record to support a proposition that anyone attempted to enter the gate without authority or that the appellant was delayed or failed to pursue such an individual. In fact, there is no evidence that a single vehicle passed through the gate during those ninety (90) seconds. (R. at 44-45). There is also no evidence that the appellant did not complete his assigned task for the day or that anyone perceived any shortcomings in his performance on 24 September 2021.

In *United States v. Craion*, this court held that "when examining whether a departure from duty that is not expressly authorized can be the basis of a dereliction charge, one must consider both the basis of the departure and the duration of time devoted to it." 64 M.J. 531, 550 (Army Ct. Crim. App. 2006). The court found "forsaking of one's military duties to commit a crime" to be "inherently unreasonable." *Id*.[3] While making a singular ninety (90) second phone call from the MP vehicle from which one is watching the gate for unauthorized entrants for eight (8) hours straight, may not be expressly authorized, neither is it

[3] This court upheld the lower court's conviction of willful dereliction of duty where the appellant's multiple incidents of sexual conduct amounted to crimes, ranging from seven to ten minutes each, while he was supposed to be moving or accounting for supplies "in a timely manner," as alleged in the specification. *Craion*, 64 M.J. at 551.

per se illegal.

The appellant did not forsake his duty to watch the gate in order to commit a crime as he did not make the purchase while on duty and neither did he make the purchase using his MP vehicle. (Pros. Ex. 1, para. 5). Further, the ninety (90) seconds during which his "attention wasn't fully on the gate" is *de minimis* considering the 28,710 seconds during which he was not distracted by the phone call and the lack of evidence of a single vehicle entering the gate at that time. (R. at 44-45). It is also significant that similar instances of engaging in an unsanctioned ninety (90) second act, such as a bathroom break, would not constitute a dereliction of duty. Given these facts and the absence of any evidence of "a failure . . . shortcoming, or delinquency" of his "military police duties," appellant's dereliction conviction is neither factually nor legally sufficient.

WHEREFORE, the defense respectfully requests this honorable court grant appellant relief by setting aside the findings and punishment as to the Specification of Charge II.

Assignment of Error II

WHETHER FORT LIBERTY'S FLAGRANT POST-TRIAL PROCESSING DELAY WAS BOTH UNREASONABLE AND UNCONSTITUTIONAL, THUS WARRANTING RELIEF.

Additional Facts

Appellant, through his defense counsel, asserted his right to speedy

post-trial processing so that he may move on with his life. (Defense Demand Memo). In an effort to help accelerate the post-trial processing, SPC Dickerson agreed to the government's requirement to waive his right to receive a copy of his record of trial. (App. Ex. II, para. 6.d.). Despite SPC Dickerson's demand for speedy post-trial processing, "there was no transcription action on reviewing the record of trial in *US v. Dickerson* between March 2022 and…" 2 December 2022. (Delay Memo, para. 1.d.(1), (3)).

The OSJA declined to take any action on SPC Dickerson's record of trial until 2 December 2022, when it sent the transcript to a third-party contractor. (Delay Memo, para. 1.d.(3)). The transcript was completed and returned to the court reporter for review within two (2) business days. (Delay Memo, para. 1.d.(3)). Approximately 180 days elapsed between the time the OSJA received the completed record and the time the presiding judge authenticated it on 17 June 2023. (Chronology Sheet). The 114-page record was finally certified by one of their four court reporters three days later. (Delay Memo, para. 1.d.(4); Chronology Sheet).

The OSJA provided a four-page memo, dated 1 August 2023, alleging administrative and personnel reasons for their 519-day delay. (Delay Memo). In its summary paragraph, the memo cites to ". . . the overall lack of personnel resources necessary to address the existing backlog of actions . . . the high operational tempo

in XVIII Airborne Corps to include an unforeseen 2022 deployment, high personnel turnover . . . the lack of experienced personnel in key positions, and the challenges of the transcription service . . .” to account for 519 days of delay in getting this record to this court. (Delay Memo, para. 2).

In *United States v. Baylor*, the appellant challenged the post-trial processing of his case which also arose out of the XVIII Airborne Corps, Fort Liberty. ARMY 20210576, 2023 CCA LEXIS 462, at *9 (Army Ct. Crim. App. 30 Oct. 2023) (mem. op.). The justification memo signed by the O-6, then-acting chief of military justice [COJ], reported to this court that “all previously backlogged cases were successfully processed through post-trial despite the personnel change, continuing case referral, and new backlog” as of 21 February 2023. (Def. App. Ex. A., para. 1.a.(5)). However, at that time, this case was still pending post-trial processing with the same OSJA. (Chronology Sheet).

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.

Upon a claim of unreasonable post-trial delay, the court will first determine whether the length of the delay is "facially unreasonable." *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2005). Where the delay is presumed to be unreasonable, it "will scrutinize even more closely the unit-level explanations," taking into account the totality of the circumstances surrounding the post-trial processing delays. *Winfield*, 83 M.J. at 665. In *United States v. Arriaga*, the CAAF established that personnel and administrative issues are not legitimate reasons justifying an otherwise unreasonable post-trial delay. 70 M.J. 51 (C.A.A.F. 2011).

The court will analyze the following *Barker* factors to determine whether the delay constitutes a due process violation: (1) the 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. *United States v. Hotaling*, ARMY 20190360, 2020 CCA LEXIS 449, *1 (Army Ct. Crim. App. 11 Dec. 2020) (mem. op.) (citing *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." *Baylor*, ARMY 20210576, 2023 CCA LEXIS 462, at *10; *see also United States v. Morris*, ARMY 20210624, 2023 CCA LEXIS 197, *2-3 (where this court found a Due Process violation after balancing the *Barker* factors and held that the unexplained sixty plus days of inactivity between the trial counsel's "pre-certification review" and the military judge's authentication rose 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.").

B. Article 66, UCMJ

Irrespective of finding a due process violation, 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). 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." *Hotaling*, 2020 CCA LEXIS 449, at *1.

In *Hotaling*, this court set aside the bad-conduct discharge and affirmed the

30-day confinement and reduction to the grade of E-1 where the appellant pleaded guilty to all three specifications alleging neglect. *Hotaling*, 2020 CCA LEXIS 449, at *1. He was charged for "failing to maintain sanitary living quarters" for each of his three children over a 12-day period. *Id*. The government took 350 days to process a 417-page transcript and waited "nearly 200 days" to complete "purely ministerial" tasks. *Id*. at*4-5. In assessing the appropriateness of the sentence, the court considered the unique facts of the case including the appellant's first sergeant's "strikingly favorable testimony of appellant's performance as a Soldier" even though other members of his command did not tend to agree. *Id*. This court set aside the BCD after citing to the OSJA's "persistent post-trial processing delays" and its insufficient justification including "multiple deployments impacting legal personnel," resignation of its post-trial paralegal, and other unconvincing personnel and administrative issues. *Id*. Unlike here, the OSJA in *Hotaling*, also dealt with obstacles presented by the COVID-19 pandemic which, even when combined, did not save the government's persistent failures.

Argument

After analyzing the first three *Barker* factors, this court should find that a delay as egregious as this, will only serve to impute a negative public perception of the fairness and integrity of this military justice system. Relief is warranted under both the Due Process Clause and Article 66, UCMJ, accordingly.

A. Analysis under the *Barker* factors weigh in favor of the appellant.

1. This delay of 519 days is manifestly unreasonable.

Here, the government does not overcome even the most generous presumption of a *reasonable* delay. Despite the simplistic nature of this record, with at transcript consisting of a mere 114 pages, it took the OSJA 520 days to process a record containing two (2) specifications, relating to a singular incident, in an uncontested proceeding. (Delay Memo, para. 1; Charge Sheet; ROT Index). This delay was significantly longer than the unreasonable 350-days taken in *Hotaling* to process a transcript that was more than three-times the length of the transcript in this case. *Hotaling*, 2020 CCA LEXIS 449, at *1, *3.

2. As with *Baylor*, this OSJA attributes its egregious delay to unpersuasive personnel and administrative issues.

Although it proffered four (4) pages of explanation, it is still unclear what specifically hindered the OSJA's processing of *this* record on significant dates over the course of those 519 days. In September 2022, why did it take the OSJA approximately six (6) months to receive the Entry of Judgment [EoJ] and why did its receipt not trigger any follow-on action? (Chronology Sheet). Then, when it received the completed transcript from the contractor on 5 December 2022, what hindered the civilian post-trial paralegal from completing the brief review for the two weeks she remained in the role? (Delay Memo at para. 1.d.(3)).

While the memo does not acknowledge the receipt of the appellant's demand for speedy post-trial processing, it does state that somewhere between October 2022 and 17 June 2023, the government made a tactical decision to "halt[]" the "active movement on *this* case" in order to prioritize its more seriously delayed cases. (Delay Memo at para. 1.d.(3)) (emphasis added). This administrative decision for which the appellant "bear[s] no responsibility" is in no way a legitimate reason excusing this unreasonable delay. *Moreno*, 63 M.J. at 138.

In a dull attempt to justify this egregious delay, the OSJA cited to "operational impacts" which were no different from those encountered by any other OSJA in the U.S. Army J.A.G. Corps. Notably, these personnel impacts did not impede their office from continuing to prefer and refer new cases, despite their self-inflicted backlog of courts-martial. (Delay Memo, para. 1.d.(1)).

This purported negative impact is incongruent with the circumstances offered in *Baylor* in which the acting COJ reported that as of February 2023, "all previously backlogged cases were successfully processed through post-trial despite the personnel change, continuing case referral, and new backlog." *Baylor*, ARMY 20210576, 2023 CCA LEXIS 462, at *9. Also, like the memo offered in *Baylor*, the memorandum proffered here is eerily similar to those included in its plethora of cases suffering from severe post-trial delay and currently up for this court's

review.[4] These conflicting statements coupled with the "copy and paste" job employed to efficiently close-out the post-trial process in bulk, illustrate "the SJA's disagreement with the court about the import of…unreasonable post-trial delay." *Hotaling*, 2020 CCA LEXIS 449, at *10.

The OSJA feebly highlights a requirement for their SJA and DSJA to rotate deployments to a non-combat zone, in a supportive capacity. (Delay Memo, para. 1.a.). While it acknowledges that the COJ assumed additional responsibilities during those brief periods, it is remarkably silent on how this task implicated the

[4] Appellant respectfully requests this court take judicial notice of a pervasive pattern of post-trial processing delays occurring at Fort Liberty (as it did in *Hotaling*). *See*, *e.g.*, *United States v. Hulihan*, ARMY 20220552 (502 days); *United States v. Hulihan*, ARMY 20220246 (790 days); *United States v. Boothby*, ARMY 20210445, 2023 CCA LEXIS 507 (Army. Ct. Crim. App. 28 Nov. 23) (summ. disp.) (583 days); *United States v. Wilson*, ARMY 20220309 (464 days); *United States v. Wilson,* ARMY 20210462, 2023 CCA LEXIS 505 (Army Ct. Crim. App. 29 Nov. 2023) (summ. disp.) (577 days)*; Baylor*, ARMY 20210576, 2023 CCA LEXIS 462 (637 days); *United States v. Torres*, __ M.J.. __, 2023 CCA LEXIS 414 (Army Ct. Crim. App. 22 Sep. 2023) (586 days); *United States v. Padgett*, ARMY 20220169 (511 days); *United States v. Johnson*, ARMY 20220074 (467 days); *United States v. Goins*, ARMY 20220088 (545 days); *United States v. Nelson*, ARMY 20220302 (446 days); *United States v. Alfred*, ARMY 20220126 (234 days); *United States v. Robertson*, ARMY 20220149 (572 days); *United States v. Resutek*, ARMY 20220431 (405 days); *United States v. Washington*, ARMY 20230198 (191 days); *United States v. Robinson*, ARMY 20230109 (224 days); *United States v. Cunningham*, ARMY 20220140 (605 days); *United States v. Borja*, ARMY 20220303 (524 days); *United States v. Nguyen*, ARMY 20230319 (386 days); *United States v. Turrubiatresi*, ARMY 20220131 (538 days); and *United States v. Green*, ARMY 20210656 (608 days). In each of these twenty-one (21) cases, the respective delay memo cites strikingly similar administrative and personnel deficiencies.

productivity of the Deputy COJ or any number of the personnel of the Military Justice [MJ] office. (Delay Memo, para. 1.a.).

The OSJA's memo repeatedly points to the same administrative and personnel issues arising over various blocks of time beginning in February 2022, most of which appear to be irrelevant given that SPC Dickerson's case was completed on 14 March 2022 and the transcription service was not farmed out to the third-party contractor until almost nine (9) months later. (Delay Memo, para. 1.a., 1.d.(3)). For this reason, it is difficult to reconcile what specifically was occurring with the office's various court reporters and when. Similarly, it is unclear how these personnel issues specifically impacted the present case for more than 180 days after the appellant's conviction.

Although the transcript was returned to the OSJA from the third-party civilian contractor just two (2) business days after they submitted it, its subsequent cursory review would not be completed for more than seven (7) months—a time during which there was no reported deployment, the civilian post-trial paralegal was still on staff and had not expressed an intent to leave, and the review was ultimately assigned to one of the two certified court reporters. (Delay Memo, para. 1.a.- d.). Even with its purported lack of personnel and apparent administrative mismanagement, there is no justifiable reason for their strategic reprioritization of SPC Dickerson's case to come at his expense.

The generic nature of this memorandum is evident, and it is particularly deficient in its failure to specifically address the events which directly attributed to why "there was no transcription action on reviewing the record of trial in *US v. Dickerson* between March 2022 and..." December 2022. (Delay Memo, para. 1.d.(1)). Frankly, the OSJA's time and resources could have been better spent advising the CA on the existence of its 41-case backlog, personnel concerns, the impacts to post-trial processing, and the laws designed to protect the accused's rights to arrive at a more appropriate disposition decision for these minor offenses.

3. Appellant's demand for speedy post-trial processing was never acknowledged.

Defense counsel submitted appellant's demand for speedy post-trial on 23 February 2023. (Defense Demand Memo). This nudge did not faze the office in the least. Neither the COJ nor his deputy was prompted to simply pick up the pre-certified record the OSJA had been sitting on for eighty (80) days and put it on the desk of one of its four qualified court reporters. (Delay Memo, para. 1.d.(3), (4)). The request, just like the record, went unacknowledged. Meanwhile, the processing clock continued to toll for another 159 days before the OSJA finally forwarded the record to this court. (Chronology Sheet).

4. Tolerance of this dilatory behavior would only serve to further diminish the public's perception of the fairness of this military justice system.

Even absent a showing of prejudice, there is no question that this delay

resulted in a Due Process violation based on the OSJA's feeble attempt to justify its 519-day delay, solely attributed to a myriad of indistinct personnel and administrative issues. (Delay Memo). Their "flagrant disregard" of the appellant's due process rights was compounded by their election to ignore his explicit assertion of such right. (Defense Demand Memo). *Hotaling,* 2020 CCA LEXIS 449, at *2 (where this court found that the government's "flagrant disregard of timely post-trial processing" warranted relief for the appellant).

In recognizing the potential impacts of its pervasive post-trial processing issue, the government included in his pre-trial agreement a term in which SPC Dickerson waived his right to receive a copy of his record of trial. (App. Ex. II, para. 6.d.). Not only does mandatory inclusion of this term demonstrate an attempt to curtail the implications outlined by this court in *Hotaling*, but it is also in contravention of Rule for Courts-Martial [R.C.M.] 705(c)(1)(B) (prohibiting the enforcement of a term of a plea agreement if it deprives the accused of…the *complete and effective* exercise of post-trial and appellate rights) (emphasis added). 2020 CCA LEXIS 449, at *10 (where the SJA recognized that the delay in providing appellant with a copy of the ROT prejudiced his post-trial processing rights yet recommended no clemency to the CA, this court found that the recommendation demonstrated the SJA's disagreement with the court about the "import of and relief for unreasonable post-trial delay."). Despite the inconceivable

delay appellant experienced and the SJA's awareness of an incessant "backlog," no relief was recommended on this basis. (Delay Memo; SJA Clemency Advice). This OSJA's disregard of its "persistent post-trial processing delays" and attempt to evade its legal obligations under RCM 1112(e)(1)(A) cannot go unfettered if the goal is to maintain a perception of fairness and integrity in the military justice system.

The government's mandatory 'Record of Trial Waiver' is especially ineffective[5]. While they are providing themselves the relief of performing one less obligation under the RCM, they were still dilatory in the post-trial processing of appellant's case. The appellant's trial defense counsel still have not received the ROT and report there are other similar cases for which receipt of the ROT is still pending. (Def. App. Ex. B; Def. App. Ex. C). This provision was clearly designed for the OSJA to relieve itself of its legal duty and attempt to mitigate their post-trial processing issue at the expense of the accused; yet they failed to minimally provide a copy to the appellant's counsel as it promised per the terms of the agreement.

Just as this court did in *Hotaling*, it is imperative that it "yet again remind military justice practitioners that '[i]ncidents of poor administration reflect

[5] See appellant's *Grostefon* matters regarding the impermissibility of this purported waiver at Appendix A.

adversely on the United States Army and the military justice system." *Hotaling*, 2020 CCA LEXIS 449, at *11 (citing to *United States v. Carroll,* 40 M.J. 554, 557 (A.C.M.R. 1994)). The facts considered by the court in *Hotaling* were not as egregious as those in SPC Dickerson's case where the delay was much longer, the transcript much shorter, there were fewer specifications to examine and the facts, less complex.

In addition, the *Hotaling* court's finding of "persistent post-trial processing delays" within the Fort Campbell OSJA was based on the existence of eight (8) other cases aside from the appellant's, as opposed to the double digits representing the cases infected with post-trial delay arising out of Fort Liberty. Also in *Hotaling*, the government points to arguably more compelling administrative impacts of the COVID-19 pandemic and combat deployments, neither of which affected the OSJA in this case. For these reasons, the public's perception of this OSJA's poor administration and failure to act with regard for the appellant's rights would also reflect adversely upon the military justice system.

In his closing argument, the trial counsel vehemently expressed, "Your Honor, the command, the peers, the lower enlisted, the other agencies and entities, are watching this and are watching to see if Specialist Dickerson is held accountable. This Court has the ability to send a message to the command and the Soldiers of 16th MP brigade, as well as the rest of military. That this type of

behavior is not tolerated." (R. at 102). The appellant presents this same plea to this court and respectfully requests that it send a message to commanders, government counsel, military judges, and the public— "[t]hat this type of behavior is not tolerated." As the trial counsel so eloquently closed, "How can the public continue to place their faith and trust in us when we cannot hold our own accountable?" (R. at 103). The appellant asks that his discharge be set aside accordingly.

B. Relief is also warranted pursuant to Article 66(d), UCMJ.

Setting aside appellant's sentence would also be appropriate relief in this case of excessive post-trial delay under an Article 66, UCMJ, analysis. The appellant's sentence of seventy-five (75) days confinement and a bad-conduct discharge is inappropriately severe in light of the totality of the circumstances and given the government's "flagrant" dilatory post-trial actions. *See United States v. Brown*, 81 M.J. 507, 511 (Army Ct. Crim. App. 8 Mar. 2021).

Despite simply covering a guilty plea with two rudimentary specifications, it took the government almost 300 days to certify the 114-page transcript and another 42 days to mail it. (Chronology Sheet). The fact that the record was transcribed and returned by the third-party contractor in less than two (2) business days reflects just how uncomplicated this case was. (Delay Memo, para. 1.d.(3)). While further analysis of any suspected complexity is unwarranted, the drawn-out chronology is rather noteworthy. The unit's four-page recitation of ordinary personnel and

administrative matters "is simply not persuasive and does not justify the large periods of time appellant's record went untouched." *Winfield,* 83 M.J. at 666.

When considering the extenuating and mitigating circumstances presented by the defense at court-martial, including the testimony of his former leaders and fellow soldiers who showed up for him the way SPC Dickerson faithfully showed up for them, you see a soldier, husband, and father who is remorseful and committed to rehabilitation. (R. at 82-92). You see as the judge saw—that SPC Dickerson is not some rogue MP officer who exploited his job in order to facilitate crimes as suggested by the government. (R. at 102-103). He was broken, physically, by his service to the U.S. Army and became dependent upon the Army issued pain medications as he continued to serve. (R. at 97-98).

Despite the unfortunate circumstances he has been confronted with since 24 September 2021, he remained "very dedicated" to his role as a law enforcement officer. He is capable of rehabilitation and worthy of an opportunity. He actually deserves to receive the medical treatment of which he has been stripped because of this bad-conduct discharge.[6] It is simply implausible that this one-time misuse of a Schedule II controlled substance is the sole basis for which he will not be able to

[6] Discharge pursuant to a general court-martial is a statutory bar to all benefits for that period of service. *See* 38 U.S.C. § 5303(a). It is not clear that anyone involved in the process appreciated the disparate impact the referral decision would have on appellant.

receive the treatment he is committed to seeking and so desperately needs.

In light of his character, the nature of the offenses, and the government's recklessness in the handling of his case, appellant requests this court affirm only the period of confinement adjudged for the Specification of Charge I.

Conclusion

WHEREFORE, the defense respectfully requests this honorable court grant appellant relief by setting aside the finding and sentence as to the Specification of Charge II and the bad-conduct discharge; affirming the appropriateness of seventy-five (75) days confinement.

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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 13 February 2024.

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