

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220552

Private (E-1)

NOAH P. HULIHAN

United States Army,

Appellant

Tried at Fort Liberty, NC, on
20 October and 31 October to 1
November 2022, before a general
court-martial appointed by the
Commander, XVIII Airborne Corps,
Colonel G. Bret Batdorff, military
judge, presiding.

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

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**

Statement of the Case

On 1 November 2022, a military judge, sitting as a general court-martial convicted appellant, Private (PVT) Noah P. Hulihan, in accordance with his pleas, 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 (2019) [UCMJ].

PANEL 3

(R. at 145-46; Statement of Trial Results).¹ The military judge sentenced appellant to thirty-four months confinement and a dishonorable discharge. The appellant was awarded three days of judicially ordered credit. (Statement of Trial Results [STR]). On 7 December 2022, the Convening Authority took no action on the findings or sentence. (Convening Authority Action). On 13 December 2022, the military judge entered the judgment. (Entry of Judgment). On 4 October 2023, the record was received by and referred to this court for appellate review and appellate was designated counsel. (Referral and Designation of Counsel).

Statement of Facts

On 28 October 2022, appellant agreed to plead guilty to some of the charged misconduct. (App. Ex. XIV). The OSJA mandated the inclusion of a provision in appellant's plea agreement to waive his right to receive a copy of his record of trial without a showing of "impracticability" as required by R.C.M. 1112(e)(2). (Def. App. Ex. A; App. Ex. XIV, p. 2, para. 6(f)). The government, instead, agreed to send a copy of the ROT to the appellant's trial defense counsel. (App. Ex. XIV, p. 2, para. 6.d; Def. App. Ex. A). To date, that has still not taken place. (Def. App. Ex. A).

¹ Appellant's Counsel is referring to this case as *Hulihan III* since there are two other cases involving Appellant that pre-dated this case.

A. The OSJA offers excuses for the post-trial delay in appellant’s case, but namely, cites the “prioritization of the prior cases” without explaining why *Hulihan II*, a prior case, still has not been completed.

Appellant was sentenced on 1 November 2022. (R. at 240; Statement of Trial Results). On 9 November 2022, appellant waived his right to submit matters pursuant to Rule for Court-Martial (R.C.M.) 1106. (Clemency Advice; Email *US v. Hulihan III – D – No 1106 matters*). On 7 December 2022, the XVIII Airborne Corps’ Staff Judge Advocate advised the convening authority. (Clemency Advice). On 13 December 2022, the military judge entered the judgment. (Entry of Judgment).

Approximately one-month later on 9 January 2023, the government sent a request for a transcript to a civilian transcription service. (Memorandum of Record, Post-Trial Processing Timeline [Delay MFR], p. 3, para. 1(d)(3)). Less than thirty days later on 6 February 2023, the service returned a transcript for the court-reporter to review. (Delay MFR, p. 3, para. 1(d)(3)).

More than seven months after receiving the transcript, on 21 August 2023, the trial counsel certified the precertification review. (Trial Counsel Authentication and Certification). Additionally, the errata sheet indicates that trial counsel identified 31 corrections to be made in the record. (Errata Sheet).

On 22 August 2023, the military judge authenticated the record. (Military Judge Authentication and Certification). The military judge identified four

corrections to be made in the record. (Military Judge’s Errata Sheet). The record of trial was not received and docketed by this court until 4 October 2023, 337 days after sentencing. (Referral and Designation of Counsel).

The transcript of the trial is just 240 pages long. To explain the post-trial processing in this case, the XVIII Airborne Corps Chief of Military Justice (CoJ) drafted a memorandum of record dated 27 September 2023. (Delay MFR).² The Delay MFR cites personnel shortages, court-reporter inexperience, and a backlog of post-trial actions as reasons for the general post-trial delay from the XVIII Airborne Corps Office of the Staff Judge Advocate (OSJA).

The Delay MFR also provides a timeline for the processing of appellant’s case:

On 21 February 2023, the OSJA claimed to have successfully processed all previously backlogged cases through post-trial. (Def. App. Ex. B, p. 2, para. 1(a)(5)).

² This date alone indicates that after the military judge authenticated the record, it took more than a month to simply mail the document. *See United States v. Sutton*, ARMY 20150268, 2016 CCA LEXIS 699, *2-3 (Army Ct. Crim. App. 30 Nov. 2016) ([summ. op.](#)) (Wherein this court provided appellant ten days of relief in response to the government taking forty-three days to mail out the record of trial. The court went on to say that the “[p]ost-trial delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court is the ‘least defensible’ type of post-trial delay and ‘worthy of the least patience.’” (citing *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)).

Yet, no one reviewed appellant's record until 22 May 2023. (Delay MFR, p. 2, para. 1(d)(1)).

The court reporter provided the original record of trial to counsel on 20 July 2023. (Review of Original Assembled Record of Trial MFR). The transcript was generated, reviewed, and errata was received from counsel on 21 August 2023. (Delay MFR, p. 3, para. 1(d)(3)). Over those 32 days, the trial counsel identified 31 corrections needing to be made in the record, an average of one correction a day. (Errata Sheet).

Twenty-one days later, on 11 September 2023, the record of trial was sent to the CoJ for review. (Delay MFR, p. 3, para. 1(d)(3)).

On 27 September 2023, the OSJA sent the record to this court. (Chronology Sheet).

In justifying the substantial lull in reviewing appellant's record, the CoJ explained that “[d]ue to the *prioritization of the prior cases* over 150 days post adjournment, the active movement on this case was halted until more progress could be made on older cases.” (Delay MFR, p. 3, para. 1(d)(3)) (emphasis added).

B. The OSJA, despite its memorandum to this Court, did not prioritize at least one prior case – appellant’s previous court-martial.

On 13 May 2022, appellant pled guilty to three specifications of sexual assault of a child in violation of Article 120b, UCMJ. (Def. App. Ex. C).³ The transcript for this court-martial is 265 pages long. (Def. App. Ex. D). This court did not receive the record for appellant’s previous court-martial until 3 January 2024. (Def. App. Ex. E).

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

Standard of Review

Allegations of unreasonable post-trial delay are reviewed *de novo*. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Winfield*, 83 M.J. 662, 664 (Army Ct. Crim. App. 27 April 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).

³ This case would be *Hulihan II*.

A. The Due Process Clause

The Due Process Clause guarantees a service member's right to timely appellate review. *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.” *Moreno*, 63 M.J. at 136. This court has found as little as a sixty day gap to trigger the full analysis. *United States v. Morris*, ARMY 20210624, 2023 CCA LEXIS 197, *2-3 ([summ. disp.](#)); *United States v. Jefferson*, ARMY 20220448, 2023 CCA LEXIS 382, *4-5 (Army Ct. Crim. App. 6 July 2023) ([summ. disp.](#)) Where the delay is facially unreasonable, this court “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 then 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, *5 (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.” *United States v. Baylor*, ARMY 20210576, 2023 CCA LEXIS 462, at *10 ([mem. op.](#)); *see also Morris*, ARMY 20210624, 2023 CCA LEXIS 197, *2-3 ([summ. disp.](#)) (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 *8.

In *Hotaling*, the government took 350 days to process a 417-page transcript for a guilty plea and waited “nearly 200 days” to complete “purely ministerial” tasks. *Hotaling*, 2020 CCA LEXIS 449, at *1-2, *7.

This court cited the governments “persistent post-trial processing delays,” to include “multiple deployments impacting legal personnel”, the resignation of its post-trial paralegal, and other personnel and administrative issues as an insufficient justification. *Id* at *7-8. 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

This unremarkable case did not warrant 337 days of post-trial delay. Relief is warranted under both the Due Process Clause and Article 66, UCMJ.

Given the pervasive pattern of dilatory post-trial processing and that the XVIII Airborne Corps OSJA has repeatedly submitted explanatory memoranda that contradict themselves about the existence and priority of backlogs (including here, in *Hulihan II* and *III*), the public perception combined with the first two *Barker* factors warrant relief under both the DP clause and Article 66 even without a request for speedy post-trial processing.

First, the government's explanation for the delay is inadequate. The Delay MFR is largely boilerplate with which this court is familiar with. *See e.g., United States v. Wilson*, ARMY 20220309. Much of the Delay MFR explains circumstances that pre-date the adjournment of appellant's case.

Appellant's record is only 240 pages long. (R. at 240). His court-martial was uncontested. Yet, it took almost one year to process the record. *Hotaling* is an apt comparison for appellant's case, as it was deemed unreasonable to take 350 days to process an almost double 417-page record. *Hotaling*, 2020 CCA LEXIS 449, at *1, *3.

Second, as *Arriaga* makes clear, the personnel and administrative issues the Delay MFR cites are excuses that pre-date the adjournment of this case. Namely, staff turnover between February 2022 and October 2022 and personnel shortages between May 2022 and July 2022. Moreover, PCS'ing personnel for the later dates are something the OSJA should know and plan for, not something that is unexpected as *Arriaga* suggests.

But despite this tumult and the holiday season, the OSJA was able to clear twenty-four post-trial actions between November 2022 and February 2023. (Delay MFR, p. 3, para. 2; Def. App. Ex. B, p. 2, para. 1(a)(5)).

Yet for reasons unknown, the OSJA only cleared eleven post-trial actions between February 2023 and 27 September 2023. (Delay MFR, p. 3, para. 2; Def. App.

Ex. B, p. 2, para. 1(a)(5)). Here, the only post-*Baylor* personnel issue adversely impacting the OSJA's post-trial delays were their court reporters assisting the Fort Jackson OSJA. However, there is no indication how many cases were even assisted on or if cases were even tried during that time.

Lastly, to accept the OSJA's delays would diminish the public's perception of the fairness and integrity of the military justice system. It is clear that there was little to no order in the OSJA's processing of post-trial actions.

In light of its purported personnel and administrative issues, the OSJA halted "the active movement on this case" for nearly five months due to the "prioritization of prior cases." But there was obviously no prioritization as appellant's unique circumstances make clear.

Appellant's previous court-martial adjourned in May 2022, was also uncontested, and had a similarly sized transcript.

In their memorandum for *United States v. Baylor*, the XVIII Corps Acting CoJ claimed that the OSJA had cleared the backlog of previous post-trial records. Someone failed to account for appellant's previous court-martial, which fell in the queue behind this record, and was not sent to this court until the tail end of 2023.

So not only was there no "prioritization", there was no accountability. Lastly, even without a showing of prejudice, the post-trial delay here is so egregious that it must be deemed a due process violation of appellant's rights.

On its own merits, appellant's case is a disappointing reflection of the military justice system's commitment to effectuating a Soldier's right to a timely appeal. But, the egregiousness is compounded when considering the additional burden the OSJA imposed on appellant.

As detailed in appellant's *Grostefon* matters and in an affidavit from his trial defense counsel, the OSJA mandated the inclusion of a provision in appellant's plea agreement to waive his right to receive a copy of his record of trial without a showing of "impracticability" as required by R.C.M. 1112(e)(2). (Def. App. Ex. B; App. Ex. XIV, p. 2, para. 6(f)).

Not only does the mandatory inclusion of this term demonstrate an attempt to curtail the implications outlined by this court in *Hotaling*, it is also in contravention of Rule for Courts-Martial [RCM] 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 SJA recognized that the delay in providing appellant with a copy of his record of trial prejudiced his post-trial processing rights yet recommended no clemency to the convening authority, 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 delay appellant experienced and the OSJA's awareness of the incessant "backlog," no relief was recommended to the convening authority. (Delay Memo; SJA Clemency Advice). The OSJA's disregard of its "persistent post-trial processing delays" and attempt to evade its legal obligations under RCM 1112(e)(1)(A) to provide the accused a copy of the record cannot go unfettered if the goal is to maintain the perception of fairness and integrity in the military justice system.

While the OSJA relieved themselves of their obligation under RCM 1112, they were still dilatory in the post-trial processing of appellant's case. Appellant's defense counsel still has not received the record of trial as agreed upon with the OSJA. (Def. App. Ex. B; App. Ex. XIV, p. 2, para. 6(f)).

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 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)).

However, there is one additional fact that makes this case much worse than *Hotaling*. The *Hotaling* court's finding of "persistent post-trial processing delays" within the Fort Campbell OSJA was based on the existence of eight other cases aside from the appellant's, as opposed to the double digits representing the cases

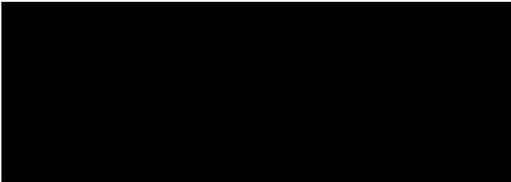
infected with post-trial delay arising out of Fort Liberty.⁴ Also in *Hotaling*, the government pointed to arguably more compelling administrative impacts of the COVID-19 pandemic and combat deployments, neither of which affected the OSJA in this case since the delay memo indicates that only the Staff Judge Advocate (SJA) and Deputy SJA rotated forward in a rotating capacity; no military justice personnel went forward. Likewise, the *Baylor* memo also shows that another O-6 was available to assist while they were absent. For these reasons, the public's perception of this OSJA's poor administration and failure to act with

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. Dickerson*, ARMY 20220118 (519 days); *United States v. Hulihan II*, 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.

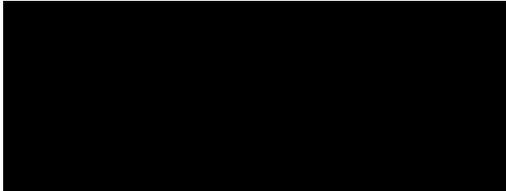
regard for the appellant's rights would also reflect adversely upon the military justice system.

Conclusion

Appellant respectfully requests this court grant appropriate sentence relief while sending a message to commanders and military justice practitioners that this dilatory post-trial processing will not be tolerated.



Stephen R. Millwood
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Robert D. Luyties
Major, Judge Advocate
Branch Chief
Defense Appellate Division



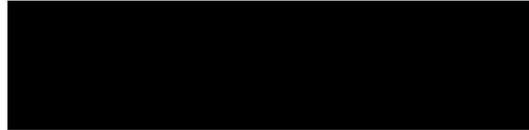
Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division



Philip M. Staten
Colonel, Judge Advocate
Chief
Defense Appellate Division

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 5, 2024.



MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division