IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Sergeant (E-5) **DAYTRON ABDULLAH,** United States Army, Appellant	**SUGGESTION FOR *EN BANC* RECONSIDERATION** Docket No. ARMY 20230223 Tried at Fort Carson, Colorado, on 20 April 2023, before a special court-martial convened by the Commander, Headquarters, Fort Carson, Colonel Jacqueline L. Emanuel, Military Judge, presiding.

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

COMES NOW, the undersigned appellate government counsel pursuant to Rules 27 and 31.2(e) of this court's Rules of Appellate Procedure to suggest that the court reconsider its ruling in this case *en banc*. Reconsideration *en banc* is necessary to secure uniformity across all panels of this court in their analysis of Fifth Amendment Due Process violations in claims of unreasonable post-trial delay and the corresponding remedy in such cases. Further, the majority opinion abused its discretion in evaluating harmlessness under Court of Appeals for the Armed Forced (CAAF) and this court's precedent. Finally, the court's remedy in this case informs the field—and the public—that even without a showing of prejudice to appellant, this court prioritizes post-trial efficiency over the pre-trial efficiency and public benefit gained by effective, mutually beneficial plea agreements.

Panel No. 2

On 20 April 2023, a military judge sitting as a special-court martial convicted appellant, pursuant to his pleas, of one specification each of desertion, absence without leave, disobeying a superior commissioned officer, and wrongful use of marijuana, in violation of Articles 85, 86, 90, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 886, 890, and 912a [UCMJ].[1] (R. at 63–64; Statement of Trial Results [STR]). After a considerably strong presentencing case by the appellant, in contrast to the minimal case presented by the government, the military judge sentenced appellant to be reduced to the grade of E-1, confined for a total of ninety days, and discharged from the service with a bad-conduct discharge (BCD). (R. at 99–100; STR; App. Ex. IV). The adjudged sentence was the minimum permitted under the terms of the plea agreement; the reduction and BCD were specifically agreed upon by the parties and required, and the adjudged confinement for each of the four specifications, as well as the total period, was the minimum of the range permitted for each. (App. Ex. IV). No discretionary punishments were adjudged.

Appellant's court-martial adjourned a week before this court issued its opinion in *United States v. Winfield*, 83 M.J. 662 (Army Ct. Crim. App. 2023). In

[1] In exchange for appellant's pleas, the convening authority agreed to direct the trial counsel to dismiss one specification each of wrongful use of amphetamines, wrongful use of methamphetamines, and wrongful possession of marijuana, in violation of Article 112a, UCMJ. (App. Ex. I, p. 4; R. at 63; STR).

abandoning the strict 150-day post-trial processing timeline this court had adopted in *United States v. Brown*, 81 M.J. 501 (Army Ct. Crim. App. 2021) in favor of a case-by-case approach, this court in *Winfield* reinforced its expectation that units continue to explain post-trial processing delays. *Winfield*, 83 M.J. at 666.

The Fort Carson Office of the Staff Judge Advocate (OSJA) took 161 days[2] to process and mail appellant's 101-page record of trial. The record included a justification memorandum from the Post-Trial Non-Commissioned Officer in Charge (NCOIC); however, in performing its Article 66(d), UCMJ review, a majority of the panel reviewing the case deemed it "far short" of expectations. *United States v. Abdullah*, __ M.J. __, slip. op. at 5, 6 (Army Ct. Crim. App. 30 Apr. 2024). Despite no demand for speedy post-trial processing by appellant, no assertion of any other assignments of error, and no finding of prejudice to appellant (*see United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (adopting the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972))), the majority opinion still found the delay and reasons provided "so egregious that tolerating it would adversely affect the public's perception of the military justice system."

[2] The record of trial was docketed with this court on 30 September 2023, bringing the total processing time, including the date of adjournment and days in transit, to 164 days, including periods of 11 days each for submission of appellant's post-trial matters and the military judge's errata. (Referral and Designation of Counsel; R. at 101; Chronology; Post-Trial MFR; Post-Trial Matters).

Abdullah, __ M.J. __, slip. op. at 7 (citing *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). For the same reasons, and despite no articulable prejudice to appellant but the minimal sentence he had specifically bargained for, the majority found the delay not harmless beyond a reasonable doubt and set aside both the punitive discharge and four-grade reduction. *Id.* In doing so, the majority chastised "the government" for its "continued, blatant violation of our well-established precedent." *Id.*

Admittedly, the memo and chronology sheet failed to adequately explain several lapses in processing—namely, the 73 days[3] between receipt of post-trial matters from appellant and convening authority action, the 21 days[4] between action and transmittal of that action to the military judge, or the overlapping 95 days[5] between trial counsel's errata and forwarding of the record to the military judge for her errata. Nevertheless, the 161 days the OSJA took to prepare and mail the record comes nowhere close to this court's and its superior court's precedent when evaluating such "egregious" delays. (*See e.g.*, *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (seven-year post-trial delay attributed to the government was

[3] The post-trial memo indicates appellant's post-trial matters were received from defense on 5 May 2023, but they are dated and date stamped (via digital signature) 1 May 2023. The government accepts 1 May 2023 as the likely date the matters were received. Convening authority action occurred on 13 July 2023.
[4] 13 July to 3 August 2023.
[5] 8 June to 11 September 2023.

harmless beyond a reasonable doubt because appellant could not show prejudice); *United States v. Anderson*, 82 M.J. 82, 88 (C.A.A.F. 2022) (finding a delay of 481 days "not severe enough to taint public perception of the military justice system. It did not involve the years of post-trial delay we saw in cases such as *Moreno*, *Toohey*, and *Bush*. There is no indication of bad faith on the part of any of the Government actors. There is also no indication of prejudice.").

While the post-trial processing memorandum in appellant's case is far from perfect and the lulls in admittedly clerical tasks are clearly concerning, the majority's conclusion that the OSJA's 161-day processing of the record so affects the "public's perception of the fairness and integrity of the military justice system" that the remedy calls for setting aside appellant's punitive discharge and rank reduction is an abuse of the court's discretion. In a case where a junior leader pled guilty for his repeated breakdowns in discipline, was sentenced to the minimum under the terms of his informed and negotiated plea agreement, and asserted no other assignments of error or prejudice in the post-trial processing delay, the majority's remedy is an extreme swivel away from, rather than toward, restoration of the public's perception of the military justice system. Likewise, it sets an unworkable and dangerous precedent, albeit not a binding one, that significantly undermines convening authorities' incentives to negotiate plea agreements going forward.

Further, the majority opinion runs afoul of CAAF precedent. In *United States v. Ashby*, the CAAF found the ten years of post-trial processing a due process violation under the *Barker* factors, despite no finding of particularized prejudice under the fourth *Barker* prong. 68 M.J. 108, 124 (C.A.A.F. 2009). Analyzing whether the violation was harmless beyond a reasonable doubt, the CAAF considered the totality of the circumstances and found "no convincing evidence of prejudice in the record" and would not "presume prejudice from the length of the delay alone." *Id.* at 125 (citing *Toohey*, 63 M.J. at 363). Absent such prejudice, the CAAF ruled the decade-long delay harmless beyond a reasonable doubt and declined to grant relief. *Id.* Likewise, review of the entire record here, under the totality of the circumstances, evinces no prejudice to appellant. Thus, even if the government did violate appellant's due process rights, any such violation is harmless beyond a reasonable doubt and no relief is warranted.

Finally, the timing of this case is worthy of examination. Appellant's court-martial adjourned prior to this court's opinion in *Winfield*, and the record was docketed with this court only five months after that opinion was released to the field. Each of this court's post-trial delay opinions issued in the intervening period concerned processing records under the old *Brown* standard that *Winfield* had overruled. As Judge Morris noted in her dissent, "[w]hen factoring in the timing of this case . . . the government's slow processing is less blatant disregard of

precedent, than it is an indication that they were slow to implement the necessary changes to their post-trial processes." *Abdullah*, __ M.J. __, slip. op. at 8 (Morris, J. dissenting). Apparently frustrated with "the government" for its "continued, blatant violation" of this court's requirements for such delays to be satisfactorily explained, the majority appears to punish the Fort Carson OSJA in this case for the oft-tardy processing the court has seen Army-wide. *Id.* at 7. Notably, this is a frustration voiced most forcefully by Panel 3 in its opinions released in the year since *Winfield*, and the result has been disparate treatment of the post-trial delay issue by one panel when compared to the other two.[6]

As the majority opinion in this case misapplied the harmless beyond a reasonable doubt standard in evaluating prejudice-free claims of post-trial delay, strayed significantly from CAAF and this court's precedent, and granted an extreme remedy that chips away at both public confidence in the military justice system and convening authorities' incentives to accept future offers to plead guilty, *en banc* reconsideration is appropriate.

[6] Appellee acknowledges that the opinion in this case was issued by Panel 3 at the time of its publication, that Panel 3 is currently vacant, and that its pending cases have been transferred to Panel 2. *Compare* Memorandum for Chief Judge, Senior Judges, and Associate Judges, Subject: USACCA Panel Composition (18 Apr. 2024) *with* Memorandum for Chief Judge, Senior Judges, and Associate Judges, Subject: USACCA Panel Composition (10 May 2024).

Conclusion

WHEREFORE, the United States respectfully suggests this honorable court reconsider its ruling in this case *en banc*.

[redacted]

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CERTIFICATE OF FILING AND SERVICE,
U.S. v. ABDULLAH (20230223)

I certify that a copy of the foregoing was sent via electronic submission to this Honorable Court and to Defense Appellate Division at [redacted], on the _____ day of May 2024.

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