

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20220274

Staff Sergeant (E-6)  
**DANIEL J. VALDEZ,**  
United States Army,

Appellant

Tried at Fort Irwin, California, on 15 February and 17-20 May 2022, before a special court-martial appointed by the Commander, National Training Center and Fort Irwin, Colonel Larry A. Babin and Colonel Matthew S. Fitzgerald, military judges, presiding.

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

**Assignments of Error<sup>1</sup>**

**I. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO HAD AN INELASTIC PREDISPOSITION ABOUT MANDATORY PUNISHMENT**

**II. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR 952 DAYS OF POST-TRIAL DELAY**

**Statement of the Case**

On 19 May 2022, a special court-martial consisting of both enlisted and officers members, convicted appellant, Staff Sergeant Daniel J. Valdez, contrary to his pleas, of one specification of absence without leave, one specification of

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

disrespect toward a superior commissioned officer, one specification of disrespect toward a superior noncommissioned officer, and one specification of battery upon a spouse, in violation of Articles 86, 89, 91, and 128, Uniform Code of Military Justice 10 U.S.C. §§ 886, 889, 891, and 928 (2019) [UCMJ]. (Charge Sheet; R. at 613). On 20 May 2022, the military judge sentenced appellant to be reduced to the grade of E-5 and to perform hard labor without confinement for thirty days. (R. at 683). On 6 June 2022, the convening authority approved the sentence but took no action on the findings. (Action). The military judge entered judgment on 12 December 2022. (Judgment of the Court). This court docketed appellant's case on 27 December 2024. (Referral and Designation of Counsel).

### **Assignments of Error**

#### **I. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO HAD AN INELASTIC PREDISPOSITION ABOUT MANDATORY PUNISHMENT**

##### **Facts Relevant to Assignment of Error**

During group voir dire, 1SG [REDACTED] provided a negative response as to whether he would be compelled to vote for a particular punishment. (R. at 135). 1SG [REDACTED] responded affirmatively to the group voir dire question whether he would consider the full range of punishments. (R. at 135). 1SG [REDACTED] answers to several other group voir questions prompted defense counsel to seek more complete information via individual voir dire. (R. at 147).

During individual voir dire, defense counsel elicited that 1SG [REDACTED] had an ex-girlfriend who had been in an abusive relationship. (R. at 185). 1SG [REDACTED] further iterated that the mention of domestic violence, as in the present case, would “of course” make him think of his ex-girlfriend. (R. at 186). At the time of questioning, he also had a current soldier accused of committing domestic violence, and “it is a little emotionally taxing and tiring to have to constantly have to deal with it.” (R. at 186). 1SG [REDACTED] also noted several occasions as a drill instructor that trainees defied him, as well as several soldiers who disobeyed orders while in a deployed environment. (R. at 183-85).

1SG [REDACTED] noted that even a soldier whose brother was murdered and whose mother was receiving death threats still deserved punishment for AWOL because the soldier did not communicate with command—that soldier received an Article 15 and was punished. (R. at 188-89). Defense counsel’s last questions to 1SG [REDACTED] about his beliefs as to mandatory punishment elicited the following:

DC: Do you believe that UCMJ punishment is always appropriate when a Soldier goes AWOL?

1SG [REDACTED] I do. If there is not any sort of extenuating circumstances, even for the individual that is dealing with the family issues, you know, what’s right is right. And I think all those sorts of misconduct deserve some sort of punishment.

DC: And I can’t change your mind that that misconduct doesn’t deserve some sort of punishment?

1SG [REDACTED] No. No, you’re not going to change my mind.

(R. at 190-91).

Trial counsel then asked two follow-on questions which elicited similar responses from 1SG [REDACTED] (R. at 191-92). The military judge asked no clarifying questions, nor did he conduct any rehabilitation. (R. at 192).

Defense challenged 1SG [REDACTED] for cause for both actual and implied bias. (R. at 203, 208). Citing to their individual voir dire exchange with 1SG [REDACTED] defense counsel noted 1SG [REDACTED] would not change his mind as to punishment, but the military judge responded that he believed 1SG [REDACTED] did have an open mind. (R. at 204). When defense counsel pushed back and argued 1SG [REDACTED] said “some punishment is going to be taken down, going to happen,” the military judge responded, “And how is it actual bias that he said some punishment in the sentencing case?” (R. at 206-07).

Defense counsel again correctly pointed out that 1SG [REDACTED] when questioned in individual voir dire, stated that “no matter what, [appellant] deserves punishment [if found guilty].” (R. at 207). The military judge then placed the lack of rehabilitation on defense counsel, “But I don’t think you pressed him on what I asked him about he doesn’t know. He doesn’t know that if found guilty of an Article 86 offense, the minimum punishment is no punishment, right?” (R. at 208).

The military judge denied defense's challenge for cause for actual bias. (R. at 212).

Defense counsel raised the same concern for 1SG [REDACTED] inelastic disposition in their argument for implied bias. (R. at 208-10). The military judge responded, "So, how is it an implied bias if an objective person is looking, saying, if we were to reach findings then [1SG [REDACTED] had to determine the appropriate sentencing in a presentencing proceedings, [1SG [REDACTED] would punish him?" (R. at 210). "[1SG [REDACTED] just says, I would have to punish somebody who was found guilty." (R. at 210).

In making his ruling, the military judge stated, "So I've considered the challenge for cause on both the basis of actual and implied bias and the mandate to liberally grant defense challenges." (R. at 212). In his recitation of the facts, the military judge noted that 1SG [REDACTED] understood extenuation and mitigation evidence; however, the military judge also noted that 1SG [REDACTED] believed – for the soldier whose brother was murdered – that because the soldier "didn't exercise those options" available to contact command, the soldier deserved punishment. (R. at 212-13). The military judge further noted that he did not believe "[1SG [REDACTED] was properly tested because he wasn't aware what the minimum punishment would be." (R. at 213).

After stating “it’s a close call as to implied bias as well,” the military judge denied the defense challenge for implied bias. (R. at 213). 1SG [REDACTED] was impaneled and sat as a member of appellant’s court-martial. (R. at 221).

### **Standard of Review**

This court reviews claims of error as to a military judge’s ruling on a challenge for actual bias for an abuse of discretion. *United States v. Keago*, 84 M.J. 367, 372 (C.A.A.F. 2024).

On the other hand, this court reviews “implied bias challenges pursuant to a standard that is ‘less deferential than abuse of discretion, but more deferential than de novo review.’” *Id.* (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)).

### **Law**

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. Indeed, [i]mpartial court-members are a *sine qua non* for a fair court-martial.” *United States v. Urieta*, \_\_\_ M.J. \_\_\_, slip op. at 5 (C.A.A.F. 2025) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)) (internal quotation marks omitted).

Rule for Courts-Martial [R.C.M.] 912(f) (2019 ed.) provides the framework for excusing potential panel members for cause. Pertinent to the present case,

R.C.M. 912(f)(1)(N) provides, “A member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” “[T]his language encompasses the two types of bias: actual and implied.” *Keago*, 84 M.J. at 371 (internal citations omitted).

**a. Actual Bias**

“An actual bias challenge is evaluated based on the totality of the circumstances.” *Id.* at 372 (citing *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005)). “A military judge’s ruling on actual bias is afforded great deference” because they are able to observe members and assess credibility. *Id.* (citing *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)).

A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a clearly unreasonable way, or (4) fails to consider important facts. *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

Actual bias is “bias in fact.” *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020) (citation omitted). “The test for actual bias is whether a member's personal bias ‘will . . . yield to the military judge's instructions and the evidence

presented at trial.” *Keago*, 84 M.J. at 372 (quoting *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012)).

“Holding an inelastic attitude toward the appropriate punishment to adjudge if the accused is convicted is grounds for an actual bias challenge.” *Hennis*, 79 M.J. at 385. In every court-martial, without exception, “the accused is entitled to have his case heard by members who are not predisposed or committed to a particular punishment, or who do not possess an inelastic attitude toward the punitive outcome.” *United States v. Martinez*, 67 M.J. 59, 61 (C.A.A.F. 2008).

#### **b. Implied Bias**

Implied bias, on the other hand, focuses on a “bias in law . . . regardless of actual partiality.” *Keago*, 84 M.J. at 372 (quoting *Hennis*, 79 M.J. at 385). The test for implied bias in the military is an objective one, where this court considers the “public’s perception of fairness.” *United States v. Woods*, 74 M.J. 238, 243-44 (C.A.A.F. 2015). This court looks to “whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.” *Keago*, 84 M.J. at 372 (citing *Woods*, 74 M.J. at 243-44).

#### **c. Liberal Grant Mandate**

Because of the unique nature of the military justice system, which includes limited peremptory challenges and the manner of appointment of members, military judges “must err on the side of granting defense challenges for cause.”

*Keago*, 84 M.J. at 372 (citing *Clay*, 64 M.J. at 277). “This ‘liberal grant mandate’ recognizes that ‘the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings.’” *Id.* (quoting *Peters*, 74 M.J. at 34).

When there is a close call for bias, the military judge is “enjoined” to liberally grant the challenge. *Keago*, 84 M.J. at 373 (citing *Clay*, 64 M.J. at 277). The military judge is “mandated to err on the side of granting a challenge” if it is “a close question.” *Peters*, 74 M.J. at 34. This mandate places the responsibility on the trial judge to prevent both the reality and appearance of bias of any potential member. *Clay*, 64 M.J. at 277.

### **Argument**

A member who held an inelastic disposition towards punishment was impaneled on appellant’s court-martial. The military judge erred when he denied defense’s challenge of 1SG [REDACTED] for both actual and implied bias, and as both challenges were a “close call,” the military judge did not correctly apply the liberal grant mandate.

#### **a. The Military Judge Erred by Not Excusing 1SG [REDACTED] for Actual Bias**

##### **1. 1SG [REDACTED] held an inelastic predisposition towards adjudging punishment**

In *Martinez*, the CAAF set aside the sentence when it held that the military judge abused his discretion by not granting the defense’s challenge for cause based

on a member's inelastic predisposition as to sentencing. 67 M.J. at 61. The member in *Martinez*, when pressed as to whether she believed no punishment was an option if the appellant was found guilty, responded in the negative. *Id.* at 60. The military judge attempted some rehabilitation and explained that adjudging no punishment was an option at sentencing. *Id.* at 60-61. Even with some attempt at rehabilitation by the military judge, the CAAF found error in the military judge's denial of defense's objection for cause because of the member's equivocal attitude toward the imposition of punishment. *Id.*

Unlike in *Martinez*, 1SG [REDACTED] opinion was not equivocal. "No. No, you're not going to change my mind." (R. at 191). In direct response to defense counsel's questions, 1SG [REDACTED] stated there simply was nothing that would change his mind—punishment must be imposed. Defense counsel cited this answer numerous times in their argument as to 1SG [REDACTED] actual bias. Yet the military judge, in his push back to defense counsel's argument, denied the actual bias challenge while simultaneously defining actual bias: "And how is that actual bias that he said some punishment in the sentencing case?" (R. at 206). A disposition that *any* punishment must be imposed is an inelastic disposition.

Further, the military judge referenced 1SG [REDACTED] responses from group voir to substantiate his belief that 1SG [REDACTED] did not hold an inelastic disposition. This is error. The CAAF has specifically noted, "a potential panel member's

predictable answers to leading questions [in group voir dire] are not enough to rebut the possibility of bias.” *Keago*, 84 M.J. at 374. While 1SG ██████ did generally acknowledge during group voir dire that a range of punishment is possible, when actually asked his own specific views, he revealed his inelastic disposition. The military judge should not have relied on 1SG ██████ general answers to leading questions as being dispositive; rather, 1SG ██████ specific answers to direct questions is where the actual bias was evidenced.

## **2. The military judge further erred by not conducting inquiry into 1SG ██████ inelastic predisposition**

Not only was 1SG ██████ immovable from his position on punishment when pressed by defense counsel, but there was no true attempt at rehabilitation, let alone a completion of rehabilitation. If a predisposition appears inelastic or unequivocal, it is not the defense’s burden to rehabilitate the member. If any burden exists for rehabilitation, it lays on the doorstep of trial counsel who “should request the military judge to ask additional questions.” *Urieta*, slip op. concurrence at 2. But ultimately, it is the duty of the military judge to ask “clarifying questions or offer[] any corrections about these issues that might have filled the gaps left by trial and defense counsel.” *Keago*, 84 M.J. at 374.

1SG ██████ confirmed that he could not be convinced to consider no punishment when pressed by defense. (R. at 191). Government asked two follow-on questions that were inartful at best. (R. at 191-92). However, once government

counsel finished, the military judge immediately excused 1SG [REDACTED] for the evening. (R. at 192).

Rather than asking any “clarifying questions” or offering “any corrections” as mandated by the CAAF, the military judge did nothing. In fact, the military judge erroneously laid the blame for a lack of rehabilitation at the feet of defense. (R. at 208).

In cases where the CAAF has given deference to a military judge’s decision as to whether a member is actually biased, there has been at least some inquiry by the military judge into the member’s beliefs or some attempt at rehabilitation. *See, e.g., Keago*, 84 M.J. at 385; *Hennis*, 79 M.J. at 388; *United States v. Rogers*, 75 M.J. 270, 275 (C.A.A.F. 2016) (setting aside findings and sentence when a member held an incorrect belief on the law and was “never instructed or corrected by the military judge on those points”).

The military judge in the present case erred by not only incorrectly placing the burden of rehabilitation on defense who had already elicited actual bias, but more so, the military judge erred by conducting no inquiry, providing no instruction, nor attempting any correction of 1SG [REDACTED] beliefs.

### **3. The military judge’s findings of fact were clearly erroneous**

The only equivocation that 1SG [REDACTED] did was when he intimated he understood extenuating circumstances, but qualified that by suggesting even if

there was extenuation, “all those sorts of misconduct deserve some sort of punishment.” (R. at 191). Even for the soldier whose brother had been murdered, in 1SG [REDACTED] eyes that young man deserved punishment. Contrary to what the military judge recited (R. at 205), 1SG [REDACTED] did not recommend suspension for the soldier’s Article 15 sentence. In fact, 1SG [REDACTED] stated that even though he was aware of the soldier’s extenuation and mitigation, he still recommended punishment. (R. at 189).

Actual bias is the immovable predisposition that a sentence must be imposed and the military judge hit on just that: “[1SG [REDACTED] would have to punish somebody who was found guilty.” (R. at 210). Such is the precise nature of bias. The “have to punish” is exactly what the CAAF and this court have decried is an inelastic belief as to punishment and thus, actual bias.

Appellant had a right to a court-martial consisting of panel members “who do not possess an inelastic attitude toward the punitive outcome.” *Martinez*, 67 M.J. at 61. That the military judge recognized 1SG [REDACTED] held such views, but did not grant defense’s challenge, evinces the military judge’s abuse of discretion.

**b. The Military Judge Erred by Not Granting the Challenge for Implied Bias**

While the military judge properly recited the test for implied bias, he incorrectly applied it. As such, this court’s examination of his ruling should be closer to de novo review. *Urieta*, slip op. at 7.

An objective observer, if they knew of 1SG [REDACTED] declared inelastic predisposition as to punishment, would certainly doubt the fairness of appellant's court-martial. The fact that a member who unequivocally held onto his view that punishment must be imposed if appellant was found guilty gives rise to the appearance of unfairness.

The military judge conducted no follow-up questioning of 1SG [REDACTED] to inquire as to whether he was open to other ideas, nor did the military judge provide any curative instruction to 1SG [REDACTED]. The military judge inadvertently acknowledged his own error in not providing any follow-up information to correct 1SG [REDACTED] beliefs when he stated, "He doesn't know. He doesn't know what the max or minimums of the offense before him are." (R. at 210). It is not defense's job to educate the member; it is the duty of the military judge. *See Rogers*, 75 M.J. at 274. Trial counsel failed to rehabilitate 1SG [REDACTED]. Rather, they confirmed that an acquitted person could not be punished.

Just as in *Rogers*, the totality of the circumstances in appellant's case provides the basis that "an objective member of the public would have substantial doubt about the fairness" of having 1SG [REDACTED] sit as a member of appellant's court-martial panel. 75 M.J. at 275.

The military judge conflated the facts, misapplied the law, and did not conduct any rehabilitation of 1SG [REDACTED]. Considering the totality of the

circumstances, this court should apply a standard of review closer to de novo and find the military judge erred in not granting defense's challenge for implied bias.

**c. The Military Judge Did Not Correctly Apply the Liberal Grant Mandate**

Military judges must excuse potential panel members "in close cases." *Keago*, 84 M.J. at 370. "Under the liberal grant mandate, if the military judge finds an implied bias challenge to be a close question, the challenge should be granted." *Id.* at 372. In the present case, the military judge's rulings plainly sat in contravention to this mandate after he said it himself: "It's a close call, as to implied bias as well." (R. at 213).

Even though only a few sentences prior to the "close call" language, the military judge noted he had taken into account the liberal grant mandate, it appears it was merely an empty incantation of the magical words. (R. at 212). Just because the military judge stated the rule does not mean he applied it correctly.

“[I]f after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted.” *Woods*, 74 M.J. at 245 (quoting *Peters*, 74 M.J. at 34)). Even if this court finds 1SG [REDACTED] was not actually nor impliedly biased, it was still a “close call,” as noted by the military judge himself and as such, he was required to excuse 1SG [REDACTED] “The military judge erred by failing to do so.” *Keago*, 84 M.J. at 375.

## **II. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR 952 DAYS OF POST-TRIAL DELAY**

### **Facts Relevant to Assignment of Error**

Appellant’s court-martial adjourned when he was sentenced on 20 May 2022. (R. at 683). The typed transcript is 683 pages, and the electronic record of trial is 1,175 pages. (Record). Appellant’s case was docketed by this court on 27 December 2024—over two years and seven months after adjournment. (Referral).<sup>2</sup>

### **Standard of Review**

Claims of unreasonable post-trial delay are reviewed de novo. *United States v. Winfield*, 83 M.J. 662, 664 (Army Ct. Crim. App. 2023).

### **Law**

#### **a. The Due Process Clause**

The Due Process Clause of the Fifth Amendment to the Constitution guarantees a service member's right to timely appellate review. *United States v. Toohey I*, 60 M.J. 100, 101 (C.A.A.F. 2004); *Winfield*, 83 M.J. at 665. Where the delay is presumed to be 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.

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<sup>2</sup> Appellant provides this court with a timeline of post-trial actions in Appendix B.

This court analyzes delay utilizing the *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. *Winfield*, 83 M.J. at 665 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (internal citations omitted). “No single factor [is] required to find that post-trial delay constitutes a due process violation.” *United States v. Toohey II*, 63 M.J. 353, 361 (C.A.A.F. 2006) (citing *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006) (citations omitted)). Even without specific prejudice, this court can still grant relief in cases where there is unreasonable and unexplained post-trial delay. *Id.* at 362.

**b. Article 66, UCMJ.**

Where post-trial delay is found to be unreasonable, but not a due process violation, this court still has “authority under Article 66[(d)(1), UCMJ] to grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ within the meaning of Article 59(a).” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 52 M.J. 721, 727 (Army Ct. Crim. App. 2000)). Under this analysis, the court will determine whether the 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.).

Article 66(d)(2), UCMJ, authorizes CCAs to “provide appropriate relief if the appellant demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record.” This court may find excessive delay “based on an examination of all relevant circumstances” under Article 66(d)(2). *Winfield*, 83 M.J. at 665-66; *see also United States v. Abdullah*, 85 M.J. 501, ARMY 20230223, 2024 CCA LEXIS 479, at \*10 (Army Ct. Crim. App. 2024).

### **Argument**

The OSJA provided no reasonable explanation for the 952-day delay in this case. As appellant’s rights were materially prejudiced, appellant requests this court set aside both the findings and sentence as appropriate relief for such egregious post-trial delay.

#### **a. The Government Violated Appellant’s Due Process Rights**

##### **1. The post-trial delay is unreasonable**

Since *Winfield*, this court no longer applies a bright line rule of presumed unreasonableness at 150 days of post-trial delay; however, utilizing that old rule for context, appellant’s case is now over six times the length of what was once considered per se unreasonable. 83 M.J. at 665. When a case takes years to be

docketed for appeal, not only is the post-trial delay facially unreasonable, but it exemplifies prejudice.

The length of the delay weighs heavily in favor of appellant as to the first prong of the *Barker* factors. Given the delay in the present case is easier measured in years rather than days, the post-trial delay is unreasonable.

## **2. The OSJA provided no specific explanations as to the delay**

The second factor—explanation for delay—also weighs heavily in favor of appellant. “Administrative or manpower constraints are not justifiable reasons for delay and delays involving clerical tasks are the ‘least defensible of all.’” *United States v. Lathrop*, ARMY 20230506, 2025 CCA LEXIS 63, at \*3 (Army Ct. Crim. App. 14 Feb. 2025) (quoting *Moreno*, 63 M.J. at 143 (internal citations omitted)). “Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice.” *Id.* (quoting *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38, at \*4 (Army Ct. Crim. App 10 Feb. 2020) (summ. disp.) (internal citations omitted)).

### **A. 199 days from action to entry of judgment**

Appellant’s court-martial adjourned on 20 May 2022. (R. at 683). Once the defense submitted appellant’s R.C.M. 1106 matters, the convening authority took action within a week. (Action). Stealing the observations of this court in *United*

*States v. Brown*, 81 M.J. 507, 509 (Army Ct. Crim. App. 2021), “At this point, everything seemed to be on track. What followed is still a mystery.”

Once the convening authority approved the sentence on 6 June 2022, it took 199 days for the OSJA to provide the action to the military judge for entry of judgment. (Judgment).

This court recently admonished an OSJA that took 21 days to provide the convening authority’s action to the military judge for signature. *Abdullah*, 2024 CCA LEXIS 479, at \*12. In the present case, the Fort Irwin OSJA took almost ten times the length of the admonished OSJA in *Abdullah*. This was only the beginning of the odyssey of unexplained time in appellant’s case.

#### **B. Nine months to receive initial pre-certification**

From entry of judgment on 12 December 2022, a full nine months (267 days) elapsed before any member of the OSJA again touched appellant’s case. Only on 15 September 2023, did the acting chief of military justice complete his precertification review.

A civilian service was contracted in June 2023 to complete transcription of appellant’s case. (Delay Memo, p. 2). This is the only point in the delay memo that mentions appellant’s case. However, it still fails to explain why it took three months, from June to September, to complete this transcription.

### **C. One year from transcription to certification of the record**

Inexplicably, after the precertification review, the OSJA did nothing with appellant's case for almost an entire year (332 days), before forwarding the record to the military judge who presided over appellant's arraignment (12 August 2024) (Authentication of the Record of Trial). The military judge who presided over the trial portion of appellant's court-martial finished his review on 18 October 2024—over a year from when the acting chief of military justice finished his precertification review. (Authentication of the Record of Trial).

Once the military judges had completed their portions, it then took another two months for the OSJA to send the full record of trial to this court for docketing. (Referral).

### **D. OSJA's reasons lack relevance and specificity as to delay**

“[W]hen considering memorialized justifications for delay, the Court of Appeals for the Armed Forces has held that ‘personnel and administrative issues...are not legitimate reasons justifying otherwise unreasonable post-trial delay.’” *Abdullah*, 2024 CCA LEXIS 479, at \*11 (quoting *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011)). “A memorandum with nothing more than a mere timeline and scant information explaining periods of significant delay is unhelpful to this court and will not weigh in favor of the government in our

analysis of post-trial delay. *Id.*, at \*12. In the present case, the information is scant, and a timeline is non-existent.

The OSJA cites no other reasons for delay other than personnel issues and transcription issues (which arose a year after appellant's court-martial was completed). (Delay Memo). There is no dictation of specific dates for the processing of appellant's case, nor even a single mention of appellant's case (besides the sentence he received) until the last paragraph when his case is lumped into the case backlogs a transcription contractor assisted with. (Delay Memo, p. 2). It is the quintessential generalized memo that contains no meaningful specificity.

The OSJA provided numerous personnel shortage excuses which included turnover and replacements of military justice personnel who PCS'd during the summer of 2022. (Delay Memo). The excuse falls flat, as multiple personnel were still present post-adjudgment in June 2022 and throughout 2023. There are also excuses noting post-trial processing delays and personnel turnover in 2024—more than two years after completion of appellant's court-martial. (Delay Memo, pg. 2). The memorandum provides zero explanation or context as to why any number of personnel within the OSJA or military justice section could not have completed the ministerial tasks within a two-year timeframe.

Most importantly, what the memorandum does not provide is “relevant specificity” as to the multiple black holes of time that encapsulate the processing

(or lack thereof) of appellant's record of trial. *Winfield*, 83 M.J. at 666. "Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal. *Id.* at 665-66. The OSJA's explanation of delay lacks relevant or specific descriptions as to any of the multiple, long stretches of delay in processing appellant's case. As such, this dearth of explanation weighs heavily in appellant's favor.

**3. The appellant should not be held responsible for the OSJA's lack of efficiency**

The third factor in *Barker* looks to whether appellant asserted his right to timely post-trial processing and appeal. Appellant did not assert that right in this case. "However, as the *Moreno* court articulated, an appellant should not be required to complain in order to receive timely processing of his appeal, which is the primary responsibility of the government." *United States v. Roberts*, ARMY 20130609, CCA LEXIS 177, at \*5 (Army Ct. Crim. App. 27 May 2020). While this factor may weigh against appellant, it should do so "only slightly." *Arriaga*, 70 M.J. at 57.

**4. Appellant was prejudiced by the excessive and unreasonable delay**

Finally, the fourth factor of the *Barker* test weighs in favor of appellant, as he was prejudiced by the dilatory and unreasonable post-trial delay. This is not the anticipated "anxiety and concern" that an appellant may feel in the normal

pendency of his case, but rather the impairment of a right to adjudicate his appeal. *United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022).

Appellant was not afforded the opportunity to timely present his case to this court and to appeal the numerous issues that occurred during his contested trial. Distinct from cases such as *United States v. Bush*, 68 M.J. 96 (C.A.A.F. 2009), *Abdullah*, or *Lathrop*, this was not a guilty plea where both parties received their bargained for benefits. Rather, this was a contested case with numerous issues that plagued appellant's trial. As such, the excessive delay denied appellant the ability to seek meaningful relief with this court. *See United v. Dickerson*, ARMY 20220118, 2025 CCA LEXIS 114, at \*20 (Army Ct. Crim. App. 20 Mar. 2025).

**5. The length of the delay would negatively impact the perception of the fairness and integrity of the military justice system**

Even if this court finds no prejudice, a due process violation may still occur when, “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.” *Anderson*, 82 M.J. at 87 (internal quotations omitted).

Appellant's court-martial encompassed alleged misconduct that occurred two years prior to trial. Justice cannot be seen to place appellant in the position of facing a new trial (for almost exclusively military-specific offenses) roughly six years after the alleged misconduct occurred. Letting a soldier sit in post-trial

purgatory for almost three years post-adjudgment demolishes the integrity of the military justice system.

In looking at the egregious length of delay and lack of accountability from the OSJA, this dilatory processing is so extreme that it would most certainly “negatively impact the public’s perception of our military justice system.”

*Abdullah*, 2024 CCA LEXIS 479, at \*17. Given this due process violation, the appropriate remedy is for this court to set aside the findings and sentence.

**b. 952 Days Is Unreasonable and Excessive Pursuant to Article 66(d)**

In this case, the entry of judgment occurred on 12 December 2022. Over two years later, appellant’s case was docketed at this court on 27 December 2024. (Referral). This is unreasonable and excessive delay under Article 66(d)(2).

But the case is plagued throughout its processing, not just by post-judgment delay as required by Article 66(d)(2). There are multiple periods of unexplained inactivity and several distinct periods of 199 days (between Action and Entry of Judgment) and 399 days (Trial Counsel Pre-Certification and Military Judge Certification) during which it appears no one from the OSJA even touched appellant’s case. This is excessive delay under Article 66(d)(1).

Appellant’s case was not too complex to process, nor extremely long. The transcript is 683 pages and includes only ten admitted exhibits and twenty-three appellate exhibits. (Record). Had any person from the OSJA transcribed just one

page a day after adjournment, the case would still have been processed quicker than it was.

The delay memo only provides excuses for personnel turnover and transcription issues (a year after the court-martial). Personnel turnover is not an acceptable basis for delay. Nowhere in the delay memo does the deputy SJA provide any specific reasons for *this* case's delay, and he did "so at the peril of [his] units' cases on appeal." *Winfield*, 83 M.J. at 665-66.

**c. The Appropriate Remedy is to Set Aside the Findings and Sentence, and Dismiss the Charges**

This court has broad discretion to fashion a remedy that provides meaningful relief. And meaningful relief, when the appellant has long since served out his sentence and suffered the financial burdens of rank reduction, is to set aside the findings and dismiss the charges and their specifications. This court has previously done just so.

In *Roberts*, this court set aside and dismissed findings of appellant's battery against a child, when, after post-trial delay of six years, the court noted, "Because appellant has served his full term of confinement, reduction of the confinement would afford him no meaningful relief. Given the length of time that has passed since appellant's conviction, we can have no confidence that disapproving the reduction in rank . . . would serve any useful purpose." 2020 CCA LEXIS 177, at

\*7. The court then dismissed the charge and specification “as the only meaningful and proportionate relief available under the circumstances.” *Id.* So too, here.

This remedy not only affords appellant deserved relief, but it sends a powerful message that the “peril” noted in *Winfield* carries force—letting cases sit in purgatory results in consequences for the government.

### Conclusion

Appellant respectfully asks this honorable court to set aside the findings and sentence.



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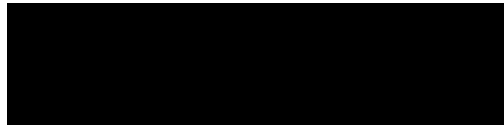
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on March 27, 2025.



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