IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Airman Basic (E-1) **CYLE L. DAVIS**, United States Air Force, *Appellant.*	**MERITS BRIEF** Before Panel No. 3 Case No. ACM S32648 Filed on: 18 October 2020

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

The undersigned appellate defense counsel attests that he has, on behalf of Appellant, carefully examined the record of trial in this case. Undersigned counsel does not concede that the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignment of error other than the two issues identified in the appendix and raised by Appellant personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 18 October 2020.

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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982), Airman Basic (AB) Cyle L. Davis, through appellate defense counsel, personally requests that this Court consider the following matters:

Statement of Facts

AB Davis was sentenced on 31 January 2020 to confinement for a total of 210 days and a bad conduct discharge. R. at 110; Vol. 1, Entry of Judgment. Also on 31 January 2020, AB Davis indicated that he did not intend to submit a request for clemency. R. at Vol. 2, 1st Ind. to Memorandum Re: Submission of Matters to the Convening Authority. On 27 February 2020, the convening authority declined to take action on the findings or sentence. R. at Vol. 1, Convening Authority Decision on Action. On 3 March 2020, the findings and sentence were entered in the record. R. at Vol. 1, Entry of Judgment. AB Davis's case was not docketed with the Air Force Court until 55 days after the convening authority's decision on action, on 22 April 2020.

Argument

I.

THE RECORD SHOULD BE RETURNED TO THE MILITARY JUDGE TO RESOLVE AN ERROR IN THE CONVENING AUTHORITY'S ACTION.

Standard of Review

Proper completion of post-trial processing is a question of law this court reviews *de novo*. *United States v. Sheffield*, 60 M.J. 591, 593 (A. F. Ct. Crim. App. 2004).

Law and Analysis

Executive Order 13,825, § 6(b), mandates the version of Article 60, UCMJ, 10 U.S.C. § 860, "as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority...to the extent that Article 60: (1) requires action by the convening authority on the sentence...." *See* 2018 Amendments to the Manual for Courts-Martial, United States, 83 Fed. Reg. 9889, 9890 (1 Mar. 2018). The version of Article 60, UCMJ, in effect on 1 November 2017, stated "[a]ction on the sentence of a court-martial shall be taken by the convening authority." 10 U.S.C. § 860(c)(2)(A) (*Manual for Courts-Martial, United States*, (2016 ed.) (2016 *MCM)).*

"Except as provided in paragraph (4) [of Article 60(c), UCMJ], the convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part." 10 U.S.C. § 860(c)(2)(B) (2016 *MCM*). "Except as provided in subparagraph (B) or (C) [of Article 60(c)(4)], the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part, an adjudged sentence of . . . [a] bad conduct discharge." 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*).

R.C.M. 1104(b)(2)(B) states:

> A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action. If any post-trial action by the convening authority is incomplete, irregular, or contains error, the military judge shall—(i) return the action to the convening authority for correction; or (ii) with

> the agreement of the parties, correct the action of the convening authority in the entry of judgment.

This Honorable Court has recently held that:

> [i]n a case referred after 1 January 2019 where an accused is found guilty of a specification for an offense occurring before 1 January 2019…the convening authority cannot simultaneously 'take no action on the sentence' and satisfy Exec. Order 13,825, § 6(b)(1), which requires 'action by the convening authority on the sentence.'

United States v. Finco, No. ACM S32603, 2020 CCA LEXIS 246, at *12 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.).

The findings of guilt in this case include three specifications involving conduct that occurred entirely before 1 January 2019, one specification involving conduct that occurred entirely after 1 January 2019, and one specification involving conduct that occurred before and after 1 January 2019. AB Davis did not submit a request for clemency and did not submit a motion pursuant to R.C.M. 1104(b)(2)(B). Nonetheless, applying *Finco* to the specifications involving conduct occurring before 1 January 2019 in the instant case, the convening authority's "decision to take no action on the sentence was a plain or obvious error". *Id*. at *15. *But see United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at *4-5 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.) (finding no error where convening authority took no action on the findings or sentence). The appropriate remedy for this error is to remand the case to the military judge for correction of the error.

II.

AIRMAN BASIC DAVIS IS ENTITLED TO SENTENCING APPROPRIATENESS RELIEF RESULTING FROM THE GOVERNMENT'S POST-TRIAL DELAY.

Standard of Review

This Court has the *de novo* power and responsibility to disapprove any portion of a sentence that it determines, on the basis of the entire record, should not be approved. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Whether an appellant has been deprived of his due process right to speedy appellate review is a question of law reviewed *de novo*. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

A presumption of unreasonable delay attaches when "the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action." *Moreno*, 63 M.J. at 142. The Court of Appeals for the Armed Services (CAAF) has cautioned that failures to meet the action-to-docketing deadline are "the least defensible of all [post-trial processing delays] and worthy of the least patience." *United States v. Dunbar,* 31 M.J. 70, 73 (C.M.A. 1990).

A presumption of unreasonable delay "serve[s] to trigger the four-part *Barker* [*v. Wingo*, 407 U.S. 514, 530 (1972)] analysis – not to resolve it. The Government can rebut the presumption by showing the delay was not unreasonable." *Id.*

The *Barker* analysis involves consideration of the following: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135; *Barker*, 407 U.S. at 530. None of these factors "[i]s either a necessary or sufficient condition to the finding of a deprivation of due process." *Barker*, 407 U.S. at 533; *Moreno*, 63 M.J.

at 136. "No one factor is dispositive and all are to be considered together with the relevant circumstances." *Moreno,* 63 M.J. at 136; *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990). If an appellant cannot demonstrate any *Barker* prejudice, this Court may still find a due process violation "when, in balancing the other three 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. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Even where excessive post-trial processing does not amount to a due process violation, this Court may grant relief under Article 66(c), UCMJ. *Tardif*, 57 M.J. at 225. In *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), this Court identified a list of factors to consider in evaluating whether relief under Article 66(c), UCMJ, should be granted for post-trial delay. These factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether the Court can provide any meaningful relief. *Id.* No single factor is dispositive and the Court may consider other factors as appropriate. *Id.*

As this Honorable Court has recently stated,

> [A]dapting the *Moreno* analysis to the new rules will not be a simple matter of substituting the military judge's 'entry of judgment'—or the convening authority's decision whether to take action on the trial results, or the certification or completion of the record of trial, or any other post-trial event—into the place of 'convening authority action' within the *Moreno* framework for determining facially unreasonable delay.

United States v. Moody-Neukom, No. ACM S32594, 2019 CCA LEXIS 521, at *5 (A.F. Ct. Crim. App. 16 Dec. 2019) (unpub. op.). In the context of a case referred after 1 January 2019 and involving offenses occurring after 1 January 2019, this Honorable Court recently stated that,

> [T]he specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules. However we can apply the aggregate standard threshold the majority established in Moreno: 150 days from the day Appellant was sentenced to docketing with this court.

United States v. Livak, -- M.J. --, No. ACM S32617, 2020 CCA LEXIS 315, at *6-7 (A.F. Ct. Crim. App. 14 Sep. 2020). The court reached this conclusion based on the changes to the Rules for Courts-Martial enacted since *Moreno* and the fact that, under the new procedures, "action by the convening authority is no longer required." *Id.* at *5. In this case, however, action *was* required and the 30-day *Moreno* standard should start on the date of the convening authority's decision on action, which occurred on 27 February 2020.

In this case, the first two *Barker* factors weigh in favor of AB Davis. First, assuming action now initiates the appellate process, the government has inexplicably exceeded the 30-day action-to-docketing deadline, and it will require additional delay to correct the errors in the record.[1] The only explanation for these delays is the government's inattention to its post-trial processing responsibilities.

1. Five days elapsed between the convening authority's decision on action and Entry of Judgment, which occurred on 3 March 2020.

With respect to the third *Barker* factor, AB Davis did not assert his right to timely review and appeal when he submitted clemency, but affirmatively does so now in light of the government's errors and the need to correct those errors. In any event, even if this factor weighs against AB Davis, it does so only slightly. *See Moreno*, 63 M.J. at 138 (concluding the government bears "primary responsibility for speedy processing.").

With respect to the fourth *Barker* factor, AB Davis has suffered, and continues to suffer, prejudice as a result of the delay. AB Davis faces ongoing stress and uncertainty regarding the conclusion of his Air Force career and transition back to civilian life.

Even if this Court finds no due process violation, the Court should grant relief under Article 66, UMCJ, consistent with *Tardif* and *Gay*. First, the government's delay is inexplicable and unreasonable. AB Davis is facing a bad conduct discharge in this case after he has been subject to 210 days of confinement. The government's delay in docking the case with this Court is inexplicable and AB Davis faces further delay so the government can correct its errors. This Court can, and should, provide meaningful relief by disapproving the bad conduct discharge.

Unreasonable post-trial delays infringe upon the constitutional rights of individuals accused of crimes and have the demonstrable effect of reducing public confidence in the military justice system. This Court should take action that holds the government accountable for its failures and ensures that it fully comprehends the

importance of timely and correct post-trial processing. Under *Moreno*, *Tardif*, and *Gay*, this Court can and should decline to affirm the bad conduct discharge.

WHEREFORE, AB Davis respectfully requests this Honorable Court grant relief on the foregoing issues.