IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. 20210676
Private (E-2) **MATTHEW P. WHITE** United States Army, Appellant	Tried at Fort Huachuca, Arizona, on 5 August, 11 November, 14 December 2021, and 27-29 March 2022, before a general court-martial appointed by the Commander, Headquarters, U.S. Army Intelligence Center of Excellence and Fort Huachuca, Lieutenant Colonel Michael Korte, Military Judge, presiding

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

Assignments of Error[1]

I. WHETHER THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY WITHDRAWN AND RE-REFERRED.

II. WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 284 DAYS AFTER SENTENCING.

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

Panel 2

Statement of the Case

On 29 March 2022, a military judge sitting as a general court-martial, convicted Private (PV2) Matthew White (appellant), contrary to his pleas, of one specification of conspiring to obstruct justice, two specifications of wrongful introduction of lysergic acid diethylamide (LSD), and one specification of obstruction of justice in violations of Articles 81, 112a, and 131b, Uniform Code of Military Justice, 10 U.S.C. §881, 912a, and 931b [UCMJ]. (R. at 620). The military judge also found appellant guilty, pursuant to his pleas, of two specifications of wrongful distribution of LSD, one specification of wrongful use of LSD, and one specification of wrongful possession of LSD in violation of Article 112a. On 29 March 2022, the military judge sentenced appellant to twenty-five months confinement and a dishonorable discharge.[2] (R. at 721).

[2] The military judge sentences appellant as follows:

		Concurrent with:
Charge II, The Specification	5 months	Charge IV The Spec
Charge III, Specification 2	3 months	Charge III Spec 3, Spec 5
Charge III, Specification 3	1 month	Charge III Spec 2, Spec 5
Charge III, Specification 5	6 months	Charge III Spec 2, Spec 3
Charge III, Specification 6	3 months	Charge III Specs 7,8,9, and AI, The Spec
Charge III, Specification 7	14 months	Charge III Specs 6,8,9, and AI, The Spec
Charge III, Specification 8	2 months	Charge III Specs 6,7,9, and AI, The Spec
Charge III, Specification 9	10 months	Charge III Specs 6,7,8, and AI, The Spec
Charge IV, The Specification	5 months	Charge II The Spec
Additional Charge I, The Specification	5 months	Charge III Specs 6, 7,8, and 9

The military judge dismissed one specification of wrongful possession and one specification of wrongful use of oxycodone, without prejudice. (R. at 321). The military judge acquitted appellant of one specification of attempting to introduce a controlled substance and one specification of posting a video online in violations of Articles 80 and 134.

On 6 April 2022, the convening authority took no action. (Convening Authority Action). On 12 April 2022, the military judge entered judgment. (Judgment). On 6 January 2023, this court docketed appellant's case. (Referral).

I. WHETHER THE CHARGES AND SPECIFICATIONS WERE IMPROPERLY WITHDRAWN AND RE-REFERRED.

Facts Relevant to Assignment of Error

On 5 August 2021, appellant filed a Motion for Speedy Trial to schedule the trial for 25 August 2021. (App. Ex. VIII). On the same day appellant was arraigned. (App. Ex. VIII, pg. 14). At the hearing, the military judge asked the government to respond to the speedy trial motion by 9 August 2021. (White I, Summarized Transcript).

The following day, on 6 August 2021, the Chief of Military Justice signed a withdrawal and dismissal memorandum citing R.C.M. 604(a), 407(a), and 401(c), but did not specify a reason for the withdrawal. (App. Ex. VIII, pg. 16.).

On 7 September 2021, the government re-preferred the charges and added other specifications mostly involving a 19 April 2021 transaction and other obstruction and conspiracy allegations related to the drug charges. (Charge Sheet).

Appellant moved to dismiss for an improper withdrawal and dismissal. (App. Ex. VII). The government stated the proper reason for the action was a Universal Forensic Extraction Device [UFED] Report received on 6 August 2021 and the ongoing investigation related to the allegations. (App. Ex. XI).

At the Article 39(a) hearing on the motion to dismiss, [redacted] clarified he did not create a UFED report but simply briefed the Staff Judge Advocate (SJA) on his compilation of a photo packet of existing evidence. (R. at 102). The UFED extraction was conducted on 11 June 2021 and the review of evidence was ongoing. (R. at 110; App. Ex. VIII). Although [redacted] said his Case Activity Summary [CAS] entries appropriately reflected his case activity, he clarified the "About 1528 on 6 Jul 21[….] copies of photographic packet containing images were provided to SJA…" date entry was a typo. (R. at 112; App. Ex. XIII, pg. 77). [redacted] also said, he cannot say whether others conveyed the evidence to the Office of the Staff Judge Advocate (OSJA) prior to his brief. (R. at 101;111).

On 11 January 2022, the military judge denied the Motion to Dismiss for improper withdrawal stating the "withdrawal was for a proper purpose" based on new "articulated" evidence provided on 6 August 2021. (App. Ex. XVII, pg. 2, n.

2) (the military judge found [redacted] documented the OSJA findings briefing on the afternoon of 6 August 2021). The entry below and above had a DELAYED ENTRY warning, while the entry in question did not. (App. Ex. XIII, pg. 77).

Subsequently, the defense sent numerous emails and filed motions to compel the government to release [redacted] audit logs to verify this information without avail. (App. Exs. XIX, XXIX). On 10 February 2021, in an email, the military judge wrote: "[redacted], [redacted] Audit logs can be generated to digitally verify or refute critical testimony regarding the chronology of key investigatory events which were subject to significant witness testimony." (App. Ex. XXVII). On 3 March 2022, the military judge ordered the government to produce the record. (App. Ex. XIX).

On 27 March 2022, appellant filed a Motion for Reconsideration of the motion to dismiss based on a 7 March 2022 disclosure of a [redacted] log record revealing the entry in question occurred 8 August 2021, two days after the withdrawal and dismissal. (App. Ex. XXIX). The military judge noted, "[[redacted]] believed at the time that the day he provided on that [redacted] entry (6 August 2021) was the actual time that he coordinated with the OSJA members." (R. at 327). However, he denied the motion based on a notion that delayed entries were not uncommon. (R. at 328). The military judge reasoned "Obviously, had [[redacted]] known about how significant dates were for case activity, he probably would have

made his [redacted] entries much closer in time." (R. at 328).

Standard of Review

This court reviews the issue of improper withdrawal de novo. *United States v. Shakur*, 77 M.J. 758, 761 (Army Ct. Crim. App. 2022).

Law

The convening authority, "may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced." R.C.M. 604(a). However, "there are two factors which will have an effect upon the action that may subsequently be taken: the grounds upon which the withdrawal is occasioned and the time at which it is directed." *United States v. Hardy*, 4 M.J. 20, 25 (C.M.A. 1977). "Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." R.C.M. 604(b). Also, "Charges withdrawn after arraignment may be referred to another court martial under some circumstances." R.C.M. 604(b) Discussion. *See, e.g.*, R.C.M. 601(e)(2); 603(e).

"Charges that are withdrawn from a court-martial should be dismissed (*see* R.C.M. 401(c)(1)) unless it is intended to refer them anew promptly or to forward them to another authority for disposition." R.C.M. 604(a), Discussion. Where a convening authority's "express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason," intent to dismiss

will be not be given effect. *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014). As such, the government is required to make "an affirmative showing on the record of the reason for withdrawal and rereferral of any specification." *Hardy*, 4 M.J. at 25. *See also* R.C.M. 604(a) Discussion. ("When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later-court-martial, if the later referral is more onerous to the accused.").

"[E]ven if a court-martial, as an entity, does exist--in that it is properly convened and constituted in entire conformity with the statute--it, nonetheless, lacks jurisdiction over any given case unless and until that case properly is referred to it for trial." *Hardy*, 4 M.J. at 25. Therefore, improper withdrawal is a jurisdictional error. The proper remedy for such cases can be dismissal of the charges with prejudice. *See United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005) (holding that the military judge did not abuse his discretion in dismissing charges with prejudice under R.C.M. 707(d), in-part because re-prosecution would only cause further delay and because the appellant already served his adjudged sentence to confinement, so the Government had diminished interest in re-prosecuting him).

Argument

The withdrawal in this case was improper because the government was not ready to proceed and the reason for the withdrawal was to vitiate the appellant's speedy trial rights. The government simply argued about an ongoing investigation and never alleged discovery of new evidence. (App. Ex. XI). The military judge's denial of the motion to dismiss is erroneous because there was no new evidence in this case and even if the supposed photo packet was the triggering cause, the government failed to prove the brief took place on 6 August 2021, the day of the withdrawal.

The military judge's sole focus was whether CID briefed the government on the day the case was withdrawn. (App. Ex. XVII). Although the written entry indicated the briefing happened on 6 July 2021, the agent testified the entry was a "typo." (R. at 112). Based on this testimony, the judge found "On the afternoon of 6 August, [redacted] documented the OSJA findings briefing. He believed based on common practice that the 1528 timestamp listed on his 6 August entry was the actual time he coordinated with the OSJA." (App. Ex. XVII). After months of protracted litigation and the military judge's email nudging and then ordering the [redacted] audit production, it was eventually revealed the entry was made on 8 August 2021. However, the military judge found the entry must have been delayed, without a factual base. (App. Ex. XIII, pg. 77). The military judge's assertion that

the actual meeting took place on 6 August 2021 despite discrepancies in the official record was clearly erroneous.

The government had a motive to delay. The military judge correctly observed, "the impact of withdrawal and dismissal for U.S. v. White I was that other Soldiers who were similarly accused of drug related offenses jumped the line and they had their cases resolved sooner." (R. at 135). However, the military judge immediately backtracks, saying "And I don't know if that's beneficial to the government or not." (R. at 136). In making this assertion, the military judge completely ignored the government's self-professed interest to litigate the case after the other cases. (App. Ex. VIII-White I, EDR). As result of the plea agreements they secured, many co-accused Soldiers testified at appellant's trial. Therefore, the delayed timing of the trial was an obvious benefit to the government.

Although the CoJ signed the withdrawal memo on 6 August 2021, the action was presented and approved by the Convening Authority on 11 August 2021. Therefore, the military judge's assertion that the motive to fabricate only arose after appellant's Motion to Dismiss at the second trial, is not supported by facts. After their failure to secure alternative disposition and appellant's speedy trial demands, the defense attorneys observed the prosecutors' annoyance and intent to intimidate by loudly reading the maximum punishment for each specification, in

front of the appellant. (App. Ex. VII). The military judge also had just ordered them to respond to the speedy trial demand by 9 August. Thus, the timing of the withdrawal was highly suspicious.

The military judge's assertion that the CID agent "would have made his [redacted] entries much closer in time," is unpersuasive and unnecessary. (R. at 328). [redacted] already admitted to entering a wrong date of 6 July 2021 and was unsure of the surrounding circumstances of the meeting. Unlike the surrounding entries, the entry in question did not have DELAYED ENTRY marking. Therefore, the military judge's finding "[redacted] made the notation of that meeting about 48 hours after it took place," without explicit explanation from [redacted] or delayed entry marking, is not proper. Moreover, discovery of "new evidence" was not the government's purported reason for the withdrawal. Instead, the government only cited, "it continued its investigation," "what matters not is what happened between '5 August and 6 August.'" (App. Ex. XI). Therefore, the military judge's finding for a reason the government explicitly disavowed, is clearly erroneous.

Ultimately, the military judge did not analyze the following facts: 1) the withdrawal and dismissal occurred after the arraignment; 2) contrary to the proffer, the agent did not discover new evidence; 3) the outstanding speedy trial motion; 4) the CoJ's memorandum of withdrawal and dismissal provided no reason; 5), the convening authority approved the dismissal occurring on 11 August 2021; 6)

appellant's continued restriction in the barracks after the dismissal; 7) the government's late disclosures and discovery; 8) the government's fight not to release the [redacted] audit log until 7 March, about a month after the military judge noted the importance of the evidence and only after his order; and lastly 9) the government's preferral of additional charges in a new trial on 10 February 2022.[3]

Courts have analyzed the facts of each withdrawal and dismissal closely. *See Leahr*, 73 M.J. at 369; *Britton*, 26 M.J. at 26. The military judge did not properly analyze the propriety of the disposition. Instead, he simply concluded the photo packet was "new" articulated evidence despite agents conceding the extraction occurred on 6 June and the packet was just a compilation of existing evidence. (R. at 110; 410). Discovery of new evidence can often defeat the presumption of subterfuge. *Tippit*, 65 M.J. at 79 (finding the withdrawal before arraignment due to federal and state parallel investigation proper); *Cossio*, 64 M.J. at 257 (finding it proper for the government to wait for a forensic examination of evidence before proceeding to trial). Here, however, the case was withdrawn after

[3] The military judge was concerned about having multiple trials, but the government never made that argument and later preferred additional charges in a separate trial in White III. (R. at 122; White III Charge Sheet). *Cf. Leahr*, (finding the government's interest to consolidate a case to be "legitimate command reason.").

the arraignment and two months after the extraction of the evidence. The government's lag in analyzing the evidence is not a proper reason for delay.

In *Leahr*, the court noted the appellant did not "lose the benefit of favorable rulings." *Id.*, at 370. In contrast, appellant's case was withdrawn as soon as the government was ordered to respond to the Speedy Trial request by 9 August. Therefore, appellant may have been deprived of favorable ruling from the pending speedy trial demand.

The prolonged litigation unduly punished appellant. In *Leahr*, the court emphasized appellant was arraigned on the date of the original trial and the trial itself occurred just three weeks later. *Id*., at 369. Improper withdrawal and dismissal and the later re-preferral in this case delayed the trial date for months due to scheduling conflicts from all parties. The government had an expressed agenda to push appellant's case back, due to his role in the incidents. However, this is not a proper cause for withdrawal and clear violation of appellant's speedy trial rights.

In sum, the military judge's finding that the alleged 6 August 2022 CID brief was a proper reason for withdrawal was not supported by any of the facts. First, the agent could not remember any details of the brief or surrounding circumstances for the setting of the meeting and had to consult the [redacted] entry to answer questions. Second, the entry supposedly contained a "typo," and the agent explained the correct date was the log date indicated in the record which was 6

August 2022. The military judge concluded, "No evidence presented cast doubt that [redacted] completed his review and compilation of the additional evidence that formed the basis for withdrawal on 5 August 2021[sic]." (App. Ex. XVII, pg. 4). Later, the military judge ordered the government to produce the [redacted] audit, because "[redacted] had told the Defense that he did not remember when that brief happened." [4] Upon production, the 6 August 2021 date was also found not to be the actual entry date. There was no concrete evidence to support whether the briefing in question happened on 6 July, 6 August, or 8 August. The surrounding circumstances and the lack of actual need for new investigation also combats against the military judge's inference.

Therefore, the military judge's ruling was clearly erroneous, and the findings and sentence should be set aside.

II. WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 284 DAYS AFTER SENTENCING.

Facts Relevant to Assignment of Error

On 30 March 2022, appellant demanded speedy trial immediately after the trial, waiving his right to submit post-trial matters. (Request for Speedy Post-

[4] The military judge seems to have erroneously indicated the log entry as 8 August 2021, which turned out to be the actual date. (App. Ex. XXIII, pg. 4).

Trial). Despite this demand, the government took 284 days for process his case.

The staff judge advocate (SJA) issued a memorandum attributing the delay to the processing and prioritization of six other courts-martial based on Court Reporter Regionalization Business Rules. (Post Trial Processing Timeline). However, the memorandum did not mention appellant's 30 March 2022, Request for Speedy Post-Trial processing.

Standard of Review, Law, and Argument

"Claims of unreasonable post-trial delay are reviewed de novo." *United States v. Cooper*, ARMY 20200614, 2022 CCA LEXIS 399, at *2 (Army Ct. Crim. App. 7 July 2022) (summ. disp.). Due process entitles convicted service members to a timely review and appeal of court-martial convictions. *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004). There are "three similar interests" courts consider in the prejudice analysis: "'(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and [his] defenses in case of reversal and retrial, might be impaired.'" *Danylo*, at 188 (quoting *Moreno*, at 138-39). The third factor is "the most serious factor in analyzing the prejudice factor is evaluating the ability of an appellant to assert ... his or her defense in the event of a retrial or resentencing." *Moreno*, at 148 (citations omitted).

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*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). In deciding what findings and sentence should be approved, this court looks to "all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.* at 224.

Article 66(d)(2), UCMJ authorizes courts of criminal appeals to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record . . . ." In the past two years, this court has considered that perhaps the Army needs to take additional steps to improve Army post-trial performance. Although the court has overruled their previous 150-day limit of presumptive unreasonableness, it will find excessive delay "based on an examination of all relevant circumstances" under Article 66(d)(2). *United States v. Winfield*, No. ARMY 20210092, 2023 CCA LEXIS 189, at *6 (Army Ct. Crim. App. Apr. 27, 2023)(mem. op.).

Following adjournment, the government took 285 days to docket appellant's case at this court. The government failed to give a reasonable explanation for the

delay. (Letter of Lateness). Given the availability of real-time transcription technology and the relatively small size of the record, the government offers no persuasive reason for the delay.[5] Given the technology, seven months to complete this transcription was unreasonable, especially since appellant requested speedy processing by waiving his right to submit matters. In the meantime, appellant, who had viable appeal issues languished in prison. *See Danylo*, at 188.

Even if this court finds no prejudice, this court should grant appellant relief for the government's inexcusable failures throughout the litigation of this case.

Conclusion

Accordingly, appellant requests the court to set aside the findings and sentence .

[redacted]

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[redacted]

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[5] U.S. Army Report on Military Justice for Fiscal Year 2020, 31 December 2020, available at Combined Final Article 146a Reports FY20.pdf (defense.gov). The report states the U.S. Army JAG Corps "modernized its court reporting technology. […] Using the new technology, the words spoken at a proceeding are automatically recognized, by speaker, and a written transcript is produced nearly simultaneously. The court reporter then edits the transcript for accuracy immediately after the proceeding."

APPENDIX A

Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests this court consider the following matter:

I. WHETHER APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION, ARTICLE 10, UCMJ, AND R.C.M. 707

Appellant was placed into pretrial confinement on 7 June 2021. (Charge Sheet). Between 11-29 June 2021, appellant was placed into restriction in the lab. (Charge Sheet). Appellant was subsequently placed in the barracks with severe restrictions such as no contact with anyone, no electronics without supervision, and once a week trip to shoppette until the commencement of the trial. (R. 153-176; Charge Sheet). Appellant asserted his speedy trial rights on 5 August 2021. On 14 December 2021, appellant expressly renewed his 5 August 2021 assertion of speedy trial rights and specifically requested relief under the Sixth Amendment and not just R.C.M. 707. (R. at 119). Appellant's Motion to Dismiss was based on the premise that dismissal was a subterfuge to vitiate appellant's speedy trial rights. (App. Ex. VII). The military judge found "the evidence of an ongoing investigation around the time of a formal speedy trial request, coupled with new articulated evidence presented after the speedy trial request, overcomes the initial concerns regarding the withdrawal's timing." (App. Ex. XVII). In doing so, the

court noted, "No evidence presented cast doubt that [redacted] completed his review and compilation of the additional evidence that formed the basis for withdrawal on 5 August 2021[sic]." (App. Ex. XVII, n.5). The military judge only analyzed his findings under an R.C.M. 707 framework.

Standard of Review

Issues of speedy trial are reviewed de novo. *United States v. Hendrix*, 77 M.J. 454, 456 (C.A.A.F. 2018). The courts review the decision as a legal question, "giving substantial deference to a military judge's findings of fact that will be reversed only if they are clearly erroneous." *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citations omitted). A finding of fact is clearly erroneous when "there is no evidence to support the finding" or when "although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018) (citation omitted).

Law

The Sixth Amendment provides, *inter alia*, "…the accused shall enjoy the right to a speedy […] trial." In the military, this right applies upon preferral of charges or imposition of pretrial restraint. *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). In determining if a defendant's right to a speedy trial was violated, courts apply the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530,

(1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right; and (4) prejudice to the appellant. *United States v. Tippit,* 65 M.J. 69, 73 (C.A.A.F. 2007); *see also United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007).

The standard of 120 days "although not directly applicable to the Sixth Amendment analysis, is still a useful basis for comparison" for the assessment of facially unreasonable delays. *United States v. Arma*, No. 2014-09, 2014 CCA LEXIS 802, at *14 (A.F. Ct. Crim. App. Oct. 22, 2014) (finding 260-day delay facially unreasonable). Analysis of a Sixth Amendment speedy trial claim requires consideration of the entire period of delay from arrest or preferral of charges until commencement of trial on the merits. *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) (citing *United States v. MacDonald*, 456 U.S. 1, 6-8 (1982).

When a speedy trial issue involves multiple charges, the proceedings as to each set of charges or specifications must be considered separately. *See United States v. Talavera*, 8 M.J. 14, 17 (C.M.A. 1979). "Accountability for delay regarding additional charges will relate back to the earliest of these dates: (1) when the accused was notified of preferral of those charges; (2) when confinement was based on misconduct resulting in that set of charges; or (3) for an accused already in confinement, when the government possessed 'substantial information'

on which to base preferral of charges." *United States v. Honican*, 27 M.J. 590, 591-92 (A.C.M.R. 1988).

Purposeful or oppressive delay by the government to proceed with reasonable diligence in bringing the charges to trial also causes a violation of Article 10. *See United States v. Parish,* 38 C.M.R. 209, 214 (C.M.A. 1968) (dismissing the charges for failure to bring a confined accused to trial in ninety days, "since a plea of guilty does not deprive an accused of the protection afforded him by Article 10 and 33."). In determining "[w]hether a particular restriction amounts to arrest for the purposes of Article 10, UCMJ," the courts consider "such factors as the geographic limits of constraint, the extent of sign-in requirements, whether restriction is performed with or without escort, and whether regular military duties are performed." *United States v. Patterson*, No. 201600189, 2017 CCA LEXIS 437, at *9 (N-M Ct. Crim. App. June 30, 2017) (citing *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011)), *see also United States v. Williams*, 16 U.S.C.M.A. 589, 592 (C.M.A. 1967) (". . . Restriction to quarters or to barracks is in fact arrest 'and the designation of the restraint as restriction would have no effect.'") (quoting *United States v. Haynes*, 15 U.S.C.M.A. 22 (C.M.A. 1964)).

In *United States v. Cooley*, 75 M.J. 247, 260 (C.A.A.F. 2016), the Court held "the delay of 289 days is unreasonable and a sufficient trigger for a full Article 10 analysis," since the government possessed all evidence for "virtually identical

charges" at the earlier date. Although it uses the same framework as the Sixth Amendment, Article 10, UCMJ provides a more "stringent" and "exacting" speedy trial standard. *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010).

When assessing reasons for delay, the Supreme Court considers bad-faith delay and official negligence. *United States v. Doggett*, 505 U.S. 647, 656-57 (1992); *See also United States v. Simmons,* 2009 CCA LEXIS 301, *42 (Army Ct. Crim. App. Aug. 12, 2009) (stating "The weight we ascribe to government negligence also varies depending on the gravity of the negligence at issue – simple negligence weighs lighter than gross negligence."); *United States v. Hester*, 37 C.M.R. 652, 655 (U.S. A.B.R., 1967) (finding delay "to include the additional charges is suspect and raises the issue of whether it was done in good faith or to mask the elapsed time by manufacturing a reason for extending the pretrial time.").

Before referral, the convening authority can exclude delays for a good cause. R.C.M. 707(c)(1). Although *post hoc* approvals are not prohibited per se, "the Government runs substantial risk by seeking approval from a convening authority only after a delay has occurred." *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997) (citing *United States v. Dies*, 45 M.J. 376, 378 (C.A.A.F. 1996)); *See also United States v. Matli*, No. ACM 34596, 2003 CCA LEXIS 60, at *11 (A.F. Ct. Crim. App. Feb. 4, 2003) ("After-the-fact exclusion of time from the government's speedy trial accountability is no longer an option."). An abuse of

discretion occurs if the delay was granted absent "good cause." *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

Three interests of the accused are considered for prejudice: (1) the prevention of oppressive pretrial incarceration; (2) minimization of the accused's anxiety and concern; and (3) limiting the possibility the defense will be impaired. *United States v. Guyton*, 82 M.J. 146, 155 (C.A.A.F. 2021) (internal quotations omitted). Of these, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Guyton*, 82 M.J. at 155. Prejudice to an accused can include such things as "restrictions or burdens on his liberty, such as disenrollment from school or the inability to work due to withdrawal of a security clearance." *United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005).

Upon finding a speedy trial violation, when determining whether the dismissal should be with or without prejudice, the courts can consider: (1) the seriousness of the offense, (2) the facts and circumstances that led to dismissal, (3) the impact of re-prosecution on the administration of justice, and (4) any prejudice to the accused. R.C.M. 707(d)(1); *See also United States v. Bray*, 52 M.J. 659, 660 (A.F. Ct. Crim. App. 2000).

Argument

Appellant was denied his right to speedy trial without good cause and was prejudiced by this delay. The military judge's finding that the government did not the violate appellant's speedy trial right was clearly erroneous because his findings were not supported by facts and he neglected to address appellant's Sixth Amendment and Article 10, UCMJ assertions.

Appellant's Sixth Amendment right was triggered upon entering PTC on 7 June 2021. *See Vogan*, 35 M.J. at 33. Appellant's confinement continued when he was put in a 24-hour video monitored computer lab between 11 June 2021 and 29 June 2021. (App. Ex. XI). The government conceded that appellant's restrictions continued in his barracks room until he was ordered into PTC again on 29 October 2021. (App. Ex. XII, pg. 32). Appellant was not allowed meet other Soldiers, was required to check in every one or two hours, was only allowed to his cell phone or laptop when approved by a drill sergeant and in common area, unless it was his attorney. (R. at 153-183). After the PTMM again released appellant from PTC, appellant remained in restriction until trial. (R. at 179).

The courts have considered restriction in barracks room as arrest. *Williams*, 16 U.S.C.M.A. at 592. Courts have found similar restraint of being limited to a company area to be an arrest for the purposes of Article 10 under similar restrictions, even if appellant was continuing to perform his duties. *Patterson*, at 9.

Appellant is entitled to a full *Barker v. Wingo* analysis because he was under more stringent restrictions consisting of periodic sign-in requirements and extensive no contact and no electronics orders. Under the Sixth Amendment and Article 10, UCMJ, all *Barker v. Wingo* factors favor appellant.

1. Length of Delay

The SJA-signed Record of Trial Chronology Sheet calculated 295 days of delay, between the accused's placement under military restraint and the commencement of trial upon arraignment. (Chronology Sheet). However, appellant's trial commenced on 27 March, not 29 March 2022. *See Danylo*, 73 M.J. at 189. Therefore, the total Sixth Amendment delay is 293 days.

At referral, the Convening Authority authorized twenty-six days of excludable delays. (Approval of Excludable Delay). Additionally, the convening authority excluded seventeen days for a defense-requested delay of the Article 32 hearing from 29 June 2021 to 19 July 2021. However, appellant waived the hearing on 16 July 2021. (Approval of Excludable Delay.). Therefore, a three-day delay was inexplicably added. Furthermore, an additional three-day delay for the arraignment is also unreasonable. White I's referral on 30 July 2021, appellant's five-day statutory period was expiring on the day of the arraignment. Therefore, it is unclear why the convening authority excluded his statutory waiting period. Therefore, assuming the other *post hoc* delays were not abuse of discretion, only

twenty days of excludable delay are valid. The remaining 273-day delay for the original charge is facially unreasonable.

The Article 10 delay for the charges are 158 days, since appellant was placed into confinement/restriction on 7 June for the charges stemming from same investigation and the arraignment took place on 11 November 2021. Such delays are facially unreasonable. *See Cossio*, 64 M.J. at 257.

2. Reason for the Delay

The government argued investigator ([redacted]) [redacted] completed the UFED report with new evidence that triggered the dismissal and delay. (App. Ex. XI). However, at the Article 39(a) hearing, [redacted] clarified there was no "new evidence," but he simply created a photo packet from existing evidence.

The military judge excused the government's actions to delay the trial because there was no deliberate subterfuge. (App. Ex. XVII). *Cf Doggett*, 505 U.S. at 657, ("Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun."). Once the government had placed appellant in pretrial confinement and then restricted his liberty, it was their utmost duty to bring him to trial as soon as possible or dismiss the charges. Article 10, UCMJ. Under

either the Sixth Amendment or Article 10, UCMJ, the government's failure to prosecute appellant in a timely manner constituted a violation of this duty.

In *Honican*, the court set aside the findings and sentence when the government's speedy trial violation resulted from waiting "for a largely superfluous fingerprint report." 27 M.J. at 593. Here, even though the government had overwhelming evidence of guilt on 7 June 2021, it waited -- unreasonably – to re-prefer charges.

The government obtained appellant's admissions on 6 June 2021 and extracted his phone using a passcode around the same time. (App. Ex. XII). The government contended the DFE photo packet received on 6 August necessitated dismissal of the charges and the "6 July 2021" date on the report was a typo. (R. at 109). The military judge found "new articulated evidence" supporting additional charges supported the withdrawal. (App. Ex. XVII, pg.4). However, an agent creating a photo packet based on the 6 June extraction stretches the definition of "new evidence" beyond the court's definition of new evidence. (R. at 102).

The agents conducted the UFED extraction on 7 June 2021 using appellant's passcode (R. at 413), and again using the GrayKey method on 21 June 2021.[1] Therefore, the government "possessed substantial information" on 24 June 2021

[1] The government did not provide this report to appellant until 10 December 2021. The NCIS checks were not complete by 14 December 2021. (R. at 62).

when they preferred additional charges against appellant and before 30 July 2021, when the government referred the case.

The simplest fix was to adjust the date range and/or add "on divers occasion" to the already specified charges before referral. As in *Cooley*, the government later brought "virtually identical charges" except adding an earlier 19 April 2021, yet the military judge excused the delay without "a particularized showing of why the circumstances require the [delay]." *Cooley*, 75 M.J. at 261 (quoting *United States v. Seltzer*, 595 F.3d 1170, 1178 (10th Cir. 2010).

The *Hester* court set aside charges "where (1) the prosecution should have been aware of the additional charges at the time the original charges were preferred, (2) one of the additional charges was 'merely disorder . . . contributing nothing to the serious offenses charged' and (3) the additional charges raised questions as to the motive of the prosecution." *Hester*, 37 C.M.R. at 652. The additional charges involved some specifications amounting to "mere disorder" and additional possession or introduction of LSD on or around 19-26 April 2021. Therefore, the calculation of these charges should run from the earliest date of confinement.

Despite the lack of evidence that the additional charges were serious and necessary to delay the trial, the military judge concluded there was no improper motive. At the subsequent trial, the government did not introduce any "new

evidence" and failed to prove some of the additional charges despite additional time. (R. at 620).

Most importantly, the government continued to delay discovery, production, notice, and disclosures so egregiously that the military judge was continually chiding, emailing, and ordering the government to follow the law. (R. at 56-58, App. Ex. XVIII; XXIII). The [redacted] log and Mil. R. Evid. 404(b) notices were given a week before trial. As early as 14 December 2021, the military judge warned the government, "one of the consequences of the late disclosure is the possibility of delayed litigation […] And so, we're going to be competing for time and space very soon." (R. at 59). The military judge further elaborated that counsel indicated, "in nearly every e-mail that she […] wants a speedy trial. (R. at 62). The military judge also reasoned the government had a compelling reason to join the charges because without it, "we're dealing with two trials; roughly the same evidence and witnesses." (R. at 122). However, the government started a new trial in February with roughly same evidence and witnesses. (App. Ex. XXII, pg. 9). Coupled with the SJA's statement "Money is not a problem," the government's interest to join the charges were clearly not a compelling reason. (R. at 84). Therefore, the government lacked a good cause to prolong this case and did not review the evidence at hand thoroughly and timely.

3. Demand for a Speedy Trial

Appellant demanded speedy trial and continuously litigated the surrounding issues related to improper withdrawal and dismissal. (R. at 62; 118; App. Ex. VII, VIII, and XXIX). The military judge remarked that appellant was demanding speedy trial in nearly every email. (R. at 62).

5. Prejudice

Appellant submitted numerous speedy trial demands and motions disputing the improper withdrawal without relief. The military judge acknowledged appellant's anxiety awaiting his trial and undue hardship arose from inability to speak to others and awarded partial credit for the duration he was in confinement and restrictions. (R. at 62; 721).

Appellant suffered *Dooley*-like prejudice and more. *Dooley*, 61 M.J. at 264 ("restrictions or burdens on his liberty, such as disenrollment from school or the inability to work due to withdrawal of a security clearance."). Appellant also suffered the most serious prejudice, the delay limiting their ability to prepare. *Guyton*, 82 M.J. at 155. Due to delay, appellant was exposed to more restrictions further impeded appellant's ability to prepare for the trial. *Guyton*, 82 M.J. at 155 (holding "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."). Appellant

was only allowed to communicate with his defense attorneys and family when approved by a drill sergeant.

Despite unreasonable delay, the government provided important discovery items and Mil. R. Evid. 404(b) disclosures, mere days before the trial. (App. Ex. XXIX; App. Ex. XXXIV). The defense was forced to go into the trial without ruling on these important issues and the military judge made the rulings in the middle of the trial. Moreover, appellant did plead guilty without a plea agreement, due to late disclosures and ruling on a serious issue. Therefore, this factor weighs in appellant's favor.

Given all factors weigh in Appellant's favor, his right to a Speedy Trial under the Sixth Amendment and Article 10, UCMJ was violated. Therefore, the findings and the sentence should be dismissed.

II. WHETHER APPELLANT WAS DEPRIVED OF PRETRIAL CONFINEMENT CREDITS

Appellant was in confinement and restriction for 295 days at the commencement of the trial. (Chronology Sheet.) Yet, despite their failure to comply with regulation and appellant's demands for a speedy trial, appellant was awarded mere twelve days of pretrial confinement credit for twelve days of PTC. The military judge gave appellant only twenty-nine days of Mason credit for the days he was confined in a computer lab without any contact with others while "drill sergeant's office, main drill sergeant's office, and the command suit" was

monitoring him twenty-four hours a day through two different cameras. (R. at 155). The company commander admitted to watching appellant sleeping in the computer lab through the feed. (R. at 174). Although he was eventually moved back into his barracks room, the government conceded that restrictions continued until 28 October 2021 when he was placed into PTC again. After release from PTC once again, appellant was placed into restriction until trial. Appellant has languished in restriction despite his repeated demand for speedy trial and the government's supposed dismissal. As appellants' defense counsel and the military expressed at trial the initial delay and following discovery violations begotten more delay, due to the court and counsels' schedule clogging up. Therefore, appellant was entitled to significantly more credits from this undue punishment.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 19 July 2023.

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