IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20210382
Staff Sergeant (E-6) **JEFF I. GORDON II,** United States Army,	Appellant	Tried at Fort Leonard Wood, Missouri, on 12 April 2021, 27 April 2021, 7 June 2021, and 28 June 2021 before a general court-martial convened by Commander, United States Army Maneuver Support Center of Excellence, Lieutenant Colonel Jessica Conn, Military Judge, presiding.

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

Assignments of Error[1]

I. WHETHER THE APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ AND IS ENTITLED TO DISMISSAL OF ALL CHARGES AND SPECIFICATIONS WITHOUT PREJUDICE.

II. WHETHER DELAYED POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS UNTIL 856 DAYS AFTER SENTENCING.

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[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 2

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Statement of the Case

On 28 June 2021, a military judge sitting as a general-court martial convicted appellant, pursuant to his pleas, of one specification of sexual assault of a child in violation of Article 120b, Uniform Code is Military Justice, 10 U.S.C. § 920b [UCMJ] and one specification of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. (Statement of Trial Results [STR]; R. at 240). The military judge sentenced appellant to confinement for nine months and twenty-five days and a dishonorable discharge. (STR; R. at 302). The military judge credited appellant with 304 days of pretrial confinement credit.[2] (R. at 302; STR). The convening authority took no action on the adjudged sentence. (Action). On 10 August 2021, the military judge entered judgment. (Judgment).

Statement of Facts

A. Original preferral of charges involving Mrs. [redacted]

On or about 20 January 2019, appellant engaged in an argument with his spouse, Mrs. [redacted] after which he struck her face with his hand out of anger. (R. 220–23).[3] They had argued earlier that day and it escalated that evening. (R. 220).

[2] Appellant was released from pre-trial confinement on 26 June 2021. (Permanent Release Memorandum, dtd 25 June 2021).

[3] Specification I of Charge II. (Charge Sheet).

The Criminal Investigation Command (CID) began investigating the same day. (App. Ex. LXXXIX, p. 1). But Mrs. [redacted] attempted to retract her statements on at least three occasions. (R. at 24; App. Ex. II, p. 2; App. Ex. CLIII, p. 2; App. Ex. CLIV, p. 31–32). From February to March 2019, the government attempted to contact Mrs. [redacted] without success. (App. Ex. LXXXIX, p. 1). The investigation continued, nevertheless. (App. Ex. LXXXIX, p. 1–2).

On 19 August 2019, the government preferred charges against appellant. (App. Ex. LXXIX, p. 2; App. Ex. CLIV, p. 2). These charges included allegations of domestic violence against Mrs. [redacted] in violation of Article 128b, UCMJ, and for wrongful use of anabolic steroids in violation of Article 112a, UCMJ. (App. Ex. CLIV, p. 2). The convening authority referred these charges ("Gordon I") to a General Court-Martial on 14 November 2019. (App. Ex. CLIV, p. 2).

On 2 December 2019, the court issued a pretrial order, scheduling trial for 14 April 2020. (App. Ex. LXXXIX, para. 27). Due to travel restrictions in light of the COVID national emergency, the government filed a Motion for Continuance on 17 March 2020 for a trial date after 12 May 2020. (App. Ex. LXXXIX, para. 30). The court granted the government's motion and scheduled trial for 26–30 October 2020. (App. Ex. CLIV at 2).

B. Receipt of new criminal allegations against appellant involving Miss [redacted]

On or about 20 August 2020, appellant was alone with his children, including his twelve-year-old stepdaughter Miss [redacted] at their home on Fort Leonard Wood, Missouri. (R. 213–14). At some point, appellant went upstairs with Miss [redacted] and while hugging her, placed his hands in her pants. (R. 213). Appellant went past Miss [redacted]'s underwear and made direct contact with her vulva to arouse his sexual desire. (R. 214–17).

Later, Miss [redacted] told her mother appellant had touched Miss [redacted]'s genitalia periodically over a span of several years and multiple duty stations. (App. Ex. CLIV, p. 2; App. Ex. LXXXVII, p. 87). Mrs. [redacted] reported these allegations against appellant to the government on 21 August 2020. (App. Ex. CLIV, p. 2; App. Ex. LXXIX, p. 3). The CID began investigating the same day. (App. Ex. LXXIX, p. 3).

On 28 August 2020, appellant's commander ordered him into pretrial confinement (PTC) in part to prevent appellant's foreseeable serious misconduct , including obstruction of justice by intimidating and pressuring both victims to recant. (App. Ex. CLIV, 2–4; App. Ex. CLIII, p. 14–15; App. Ex. L, p. 21-22).

Due to the allegations involving Miss [redacted] the General Court Martial Convening Authority (GCMCA) withdrew and dismissed without prejudice the Gordon I charges on 25 September 2020. (App. Ex. CLIV, p. 3). On 30

September 2020, defense counsel filed their first demand for speedy trial. (App. Ex. CLIV, p. 3). The withdrawal was done to prosecute all known offenses in a single proceeding. (App. Ex. CLIV, p. 27).

C. Preferral of charges involving Miss [redacted] and re-preferral of original charges involving Mrs. [redacted]

On 8 October 2020, appellant's company commander preferred charges of Rape of a Child, Sexual Assault of a Child, and Sexual Abuse of a Child in violation of Article 120b, UCMJ, and re-preferred two specifications of Article 128b.[4] (App. Ex. CLIV, p. 3; App. Ex. LXXIV, p. 89).

Defense submitted a second speedy trial demand to the court on 14 October 2020.[5] (App. Ex. LXXIV, p. 89). On the same day, the government served appellant with the preferred charge sheet while the Special Court Martial Convening Authority appointed the Preliminary Hearing Officer (PHO). (App. Ex. CLIV, para. 13). The preliminary hearing occurred on 27 October 2020. (App. Ex. LXXIX, p. 91). Trial counsel received the Preliminary Hearing Officer (PHO) report on 1 November 2020. (App. Ex. LXXIX, p. 88).

[4] The charge alleging a violation of Article 112a, UCMJ for wrongful use of anabolic steroids was never re-preferred. (App. Ex. LXXIV, p. 89).
[5] The demand stated appellant remained in pretrial confinement with no charges pending. (App. Ex. CLIV, p. 3).

Four days prior to the preliminary hearing, trial counsel received a Memorandum for Record (MFR) from Miss [redacted]'s Special Victims Counsel (SVC). (App. Ex. LXXIV, p. 90). Upon receipt of the PHO report, the government identified apparent inconsistencies between the report and Miss [redacted]'s MFR regarding Specification I of Additional Charge, the allegation of rape of a child between on or about 1 April 2013 and on or about 30 November 2015 at or near Ewa Beach, Hawaii. (STR). The government conducted an interview with Miss [redacted] and her SVC on 10 November 2020 to clarify those inconsistencies. (App. Ex. LXXIV, p. 90). Ultimately, the government dismissed the original Specification 1 of Charge I on 23 November 2020. (App. Ex. CLIV, p. 5; App. Ex. LXXIV, p. 90).

D. The Government prefers an additional charge.

On 30 November 2020, the government preferred an additional charge of Sexual Abuse of a Child, in violation of Article 120b, UCMJ. (App. Ex. CLIV, p. 5; App. Ex. LXXIV, p. 90). The government served the defense and appellant with the additional charge on 1 December 2020. (App. Ex. LXXXVIII, p. 14). The same day, the preliminary officer contacted the parties to schedule the second preliminary hearing. (App. Ex. CLIV, p. 5). That hearing occurred on 10 December 2020 and trial counsel received the PHO report the next day. (App. Ex. CLIV, p. 5; App. Ex. LXXIV, p. 92).

On 18 December 2020, the convening authority referred the preferred charges from 8 October 2020 and 30 November 2020 ("Gordon II"). (App. Ex. LXXIV, p. 92). The government filed the referral documents with the court on 21 December 2020. (App. Ex. LXXIV, p. 92).

E. Defense request for a Rule for Court-Martial (R.C.M.) 706 inquiry.

On 28 December 2020, defense requested a R.C.M. 706 inquiry to evaluate appellant's mental capacity and mental responsibility . (App. Ex. CLIV, p. 6; App. Ex. LXXIV, p. 92). Defense requested the government route this request through the GCMCA rather than the military judge. (App. Ex. CLIV, p. 5). The convening authority approved the defense's request on 8 January 2021. (App. Ex. LXXIV, p. 92). The sanity board convened on 1 March 2021 and completed their report on 11 March 2021. (STR). The government received the short form report on 13 March 2021, which indicated a current diagnosis of [redacted] (R. at 289; App. Ex. CLIV, p. 15).

F. Scheduling trial.

In the 28 December 2020 Electronic Docket Request (EDR), the government indicated to the court it was ready for trial as soon as 11 January 2021. (App. Ex. CLIV, p. 6). On 8 January 2021, civilian counsel attempted to email a defense motion to dismiss for a speedy trial violation and a motion to release appellant from PTC to the court and the government. (App. Ex. CLIV, p. 7). The

government received the motion to dismiss on 12 January 2021 and requested an extension until 14 January to file a response. (App. Ex. CLIV, p. 7). The court issued a pretrial order on 12 January 2021 setting arraignment and motions for 12 February and scheduling trial pursuant to Defense's request for 27 April–1 May 2021. (App. Ex. CLIV, p. 6).

At the motions hearing on 12 February 2021, the court dismissed Specifications 1 and 2 of Charge I without prejudice for failure to state an offense. (App. Ex. CLIV, p. 8). Subsequently, on 30 March 2021 the government informed the court that the convening authority had decided to re-refer all general courts-martial cases because the convening authority had selected a new court-martial panel ("Gordon III"). (App. Ex. CLIV, p. 8). The government sent a re-referred charge sheet to the military judge on 30 March 2021 with appellant's signed acknowledgment of receipt. (App. Ex. CLIV, p. 8).

The government initially sent the confinement facility, Mid-West Joint Regional Correctional Facility (JRCF), an incorrect copy of the referral, but remedied this error the following day. (App. Ex. CLIV, p. 9; App. Ex. LXXXVII 90–91). During the motions hearing on 12 April 2021, the government informed the court of the error; namely, that JRCF served appellant with the wrong signature page. (R. at 3–4, 20; App. Ex. CLIV, p. 10; App. Ex. LXXXVII, p. 90–91). Despite the prompt action of the government to remedy the error, JRCF personnel

had served the incorrect documents from 30 March, rather than the correct documents the government sent on 31 March 2021. (App. Ex. CLIV, p. 10). The court permitted the government time to serve appellant and duly so served him that afternoon. (App. Ex. CLIV, p. 11). Nevertheless, this new referral did not impact the date of trial; the government requested the original trial date of 27 April, which defense did not oppose.[6] (App. Ex. CLIV, p. 9).

On 24 April 2021, the government provided defense a MFR of the pretrial interview and witness preparation of Miss [redacted] new MRE 404(b) disclosures, new Section III disclosures, and approximately fifty pages of new discovery. (App. Ex. CLXV, p. 125–126; App. Ex. CLIV, p. 9). Defense filed its supplemental request for discovery on 25 April to which the government responded the next day. (App. Ex. CLIII–IV). On 26 April, defense filed a motion requesting a continuance until June 2021. (App. Ex. CLIV, p. 11). Over the government's objection, the court granted defense's motion to allow defense to further investigate the case based on the government's new information. (App. Ex. CLIV, p. 12).

On 30 April 2021, the military judge issued a ruling denying defense's

[6] The Convening Authority withdrew and immediately re-referred the charges on 29 March 2021 under a new convening order and the government served the court with the charges on 30 March 2021. (App. Ex. CLIV, p. 18). On 9 April 2021, the Convening Authority withdrew and dismissed without prejudice six specifications of alleged child sexual offenses (Specifications 1, 2, 4, 5, and 6 of Charge I and "Specification 1" of the Additional Charge). (R. 10-11, App. Ex, CLIV, p. 33).

motion to dismiss for violations of R.C.M. 707, Article 10, UCMJ, and Sixth Amendment right to a speedy trial. (App. Ex. CLIV). Defense filed its supplemental request for discovery on 12 May to which the government responded on 17 May. (App. Ex. CLIII–IV). On 7 June 2021, the military judge issued rulings denying four defense motions, including their motion to compel discovery. (App. Ex. CLXV p. 11; R. 190–91). On 16 June 2021, appellant entered into a plea agreement with the GCMCA which included a maximum sentence of ten months for each specification to run concurrently. (App. Ex. CLIX, p. 3). Trial ensued on 28 June 2021 and the military judge sentenced appellant to nine months and twenty-five days in confinement with 304 days of PTC credit. (STR). As such, appellant was released from PTC on 26 June 2021 with time served. (STR; Permanent Release Memorandum, dtd 25 June 2021).

Assignment of Error I

WHETHER APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ AND ENTITLED TO DISMISSAL OF ALL CHARGES AND SPECIFICATIONS WITHOUT PREJUDICE.

Additional Facts

On 30 April 2021, the military judge denied a defense motion to dismiss for speedy trial violation. (App. Ex. CLIV). In rendering her decision, the military judge excluded the following periods of delay for purposes of R.C.M. 707(c): 21

December through 12 February 2021 because the defense did not request an earlier date and accepted the 12 February arraignment date; and 30 March 2021, when the court received the referred charge sheet, through 12 April 2021, the date of scheduled arraignment as court approved delay. (App. Ex. CLIV, p. 14–15, 18). She further determined the re-referral of charges on 29 March 2021 did not add any delay and thus, did not result in any prejudice because the trial was set for the Defense's original trial date of 27 April 2021. (App. Ex. CLIV, p. 30, 34).

Standard of Review

Whether appellant received a speedy trial under Article 10, UCMJ is a question of law reviewed de novo. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)). This court shall give substantial deference to the military judge's findings of fact and reverse only when those findings are clearly erroneous. *Id.*

Law[7]

Article 10, UMCJ provides that once an appellant enters PTC, "immediate steps shall be taken to inform of the specific wrong of which he is accused and to try him or dismiss the charges." *United States v. Reyes*, 80 M.J. 218, 225

[7] Appellant's litigated speedy trial motion under Article 10 was not waived by his subsequent unconditional guilty plea. *See United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007); *Mizgala*, 61 M.J. at 127.

(C.A.A.F. 2020). The standard for reviewing an alleged violation of Article 10 is whether the government acted with "reasonable diligence" in bringing the charges to trial. *United States v. Kossman*, 38 MJ 258, 262 (C.M.A. 1993). Article 10 imposes reasonable diligence on the government but does not demand constant motion. *Mizgala*, 61 M.J. at 129 (quoting *United States v. Tibbs*, 15 U.S.C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965)).

To evaluate whether the government proceeded with reasonable diligence and took "immediate steps," the military courts have adopted the four-factor framework the Supreme Court announced in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Birge*, 52 M.J. 209, 211–212 (C.A.A.F. 1999). The *Barker* factors assess: (1) the length of the delay; (2) the reasons for the delay; (3) appellant's assertion of his right; and (4) prejudice to appellant. *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) *(*citing *Barker*, 407 U.S. at 530). In applying these factors, the court looks to the proceeding as a whole and not mere speed. *Mizgala,* 61 M.J. at 129 *(*citing *United States v. Mason*, 21 U.S.C.M.A. 389, 393, 45 C.M.R. 163, 167 (1972) (reaffirming the position that delay "must be evaluated with a look to the total circumstances shown of record.")). No single *Barker* factor is a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016) (quoting *Barker*, 407 U.S. at 533).

Under Article 10, UCMJ, it is the government's burden to show diligence and provide evidence "showing the actions necessitated and executed in a particular case justified delay when an accused was in pretrial confinement." *Reyes*, 80 M.J. at 226. While the remedy for Article 10 violation is dismissal with prejudice of the affected charges, if the court concludes the circumstances of the delay are "sufficiently excusable or unavoidable as to permit a reinstitution of the charges, there is no violation[.]" *Kossman*, 38 M.J. at 262.

Argument

The length of delay in this case was 304 days. Assuming arguendo this delay is facially unreasonable, the *Barker* factors cumulatively weigh against relief under Article 10, UCMJ. *Barker*, 407 U.S. at 53. Thus, appellant warrants no relief under Article 10, UCMJ.

A. Length of Delay.

Under Article 10, the length of delay is measured from the date the accused enters PTC until commencement of the trial on the merits. *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016); *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014). Where the period of delay may be facially unreasonable, a full speedy trial analysis considering the particular circumstances of the case is appropriate. *Wilson*, 72 M.J. at 352 (finding a 174-day delay pretrial unreasonable). In determining whether the delay weighs against the government,

the court must consider the seriousness of the offenses involved, the complexity of the case, and the availability of proof. *Cooley*, 75 M.J. at 260 (considering in addition whether appellant was informed of the accusations against him, whether PTC procedures were complied with, and the government's responsiveness to any request for consideration of the accused's placement into PTC).

In this case, the length of delay was 304 days. In considering this period, the military judge found the offenses were serious in nature, the offenses required complex investigation, the government informed appellant of his charges, and defense was in part amenable to the timeline. (R. at 239; App. Ex. CLIV, p. 24–26). *See Cooley*, 75 M.J. at 260 (reasoning "delay that can be tolerated for an ordinary street crime is considerably less than [that] for a serious, complex conspiracy charge") (quoting *Barker,* 407 U.S. at 531). Additionally, the government was responsive to appellant's requests for reconsideration of pretrial confinement. (App. Ex. CLIV, p. 25). Namely, appellant requested reconsideration of his pretrial confinement on 8 January 2021 and 15 April 2021. (App. Ex. CLIV, p. 25). The government filed its response on 15 January 2021, only four days after the defense's request to the court. (R. 253). Similarly, on the second request, the government responded on 22 April 2021, only seven days after the defense's motion was filed. (App. Ex. LVI). Considering the seriousness of the allegations, the complexity of the investigation, and the government's timely

responses and remedies to defense's requests, this *Barker* factor weighs in favor of the government.

B. Reason for Delay.

The length of delay may be significant but the court must assess delays "by the proceedings as a whole." *United States v. Thompson*, 68 M.J. 308, 313–314 (C.A.A.F. 2010) (adopting *Mizgala*'s approach in looking at the proceedings as a whole and treating the procedural framework as an integrated process rather than a series of discrete factors). Thus, it is appropriate to break down the periods of delay and analyze the reasons for each. *Danylo*, 73 M.J. at 190 (holding that the period of delay should be broken down, with a separate analysis for the reasons of each period) (citing *Wilson,* 72 M.J. at 352 (adopting the military judge's separation of the pretrial delay into distinct time periods requiring individual analysis)).

In considering the reasons for delay, "different weights should be assigned to different reasons." *Cooley*, 75 M.J. at 260 (quoting *Barker,* 407 U.S. at 531). Deliberate government attempts to delay trial in order to hamper the defense should weigh heavily against the government. *Wilson*, 72 M.J. at 353 (citing *Barker*, 407 U.S. at 531). More neutral reasons such as negligence should weigh less heavily. *Wilson*, 72 M.J. at 353 (quoting *Barker*, 407 U.S. at 531). However,

delays attributable to the defense weigh against the appellant. *Vermont v. Brillon*, 556 U.S. 81, 90 (2009).

The test is reasonable diligence, not "textbook prosecution." *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011). Even where the Government "seems to have been in a waiting posture," and "processing by the Government ... was not stellar," if the proceeding as a whole displays "general movement forward during the full range of the pretrial period," periods of delay can be reasonable. *Mizgala*, 61 M.J. at 129.

1. Relevant Dates.

In this case, the relevant dates for consideration are:

Date	Case Event	Days Elapsed	Record Cite
28 Aug 2020	Appellant enters PTC. Appellant's company commander informs him of the nature of the offenses for which he is being held pursuant to R.C.M. 305(e).	0	App. Ex. CLIV, p. 2.
25 Sep 2020	Convening authority dismisses without prejudice the charges and specifications preferred on 19 August 2019.	28	App. Ex. CLIV, p. 3.
30 Sep 2020	Defense submits first demand for speedy trial.	5	App. Ex. CLIV, p. 3.

8 Oct 2020	Charges are preferred against appellant for Rape of a Child, Sexual Assault of a Child, and Sexual Abuse of a Child in violation of 120b, and Domestic Violence, in violation of Article 128b, UCMJ. Government re-prefers two specifications of Domestic Violence that were withdrawn on 25 September 2020, but not the charge and specifications in violation of Article 112a**.**	8	App. Ex. CLIV, p. 3.
14 Oct 2020	Defense submits second demand for speedy trial. Appellant is served with the preferred charge sheet in PTC.	6	App. Ex. CLIV, p. 3.
23 Oct 2020	Trial Counsel (TC) receives a MFR from Miss [redacted]'s SVC.	9	App. Ex. CLIV, p. 4.
27 Oct 2020	Preliminary hearing is conducted.	4	App. Ex. CLIV, p. 4.
1 Nov 2020	TC receives the PHO report, dated 27 October 2020.	5	App. Ex. CLIV, p. 4.
10 Nov 2020	Government interviews Miss [redacted] to confirm their understanding of the 23 October MFR.	9	App. Ex. CLIV, p. 4.
23 Nov 2020	Government lines out and dismisses the original Specification 1 of Charge 1 and re-numbers the remaining specifications.	13	App. Ex. CLIV, p. 5.
30 Nov 2020	Government prefers an additional charge of Sexual Abuse of a Child.	7	App. Ex. CLIV, p. 5.

1 Dec 2020	The government notifies appellant of the additional charge.	1	App. Ex. CLIV, p. 5.
10 Dec 2020	Second preliminary hearing is conducted for the additional charge.	9	App. Ex. CLIV, p. 5.
11 Dec 2020	TC receives the PHO report, dated 10 December 2020.	1	App. Ex. CLIV, p. 5.
18 Dec 2020	GCMCA refers the charges preferred on 8 October 2020 and the additional charge preferred on 30 November. Government sends referred charges to JRCF for service.	7	App. Ex. CLIV, p. 5; App. Ex. LXXXIX, p. 4.
21 Dec 2020	Appellant is served and acknowledges receipt of the referred charge sheet. Government submits the referral documents to the court.	3	App. Ex. CLIV, p. 6.
28 Dec 2020	Defense requests a R.C.M. 706 inquiry to be routed through the CA, not the military judge.	7	App. Ex. CLIV, p. 6.
4 Jan 2021	TC provides completed EDR to the court.	7	App. Ex. LXXXIX, p. 4.
8 Jan 2021	GCMCA approves the defense's request for a 706 inquiry. Defense attempts to email motions to the court and the government.	4	App. Ex. CLIV, p. 6.

9 Jan 2021	The military judge proposes dates for trial. Defense requests 27 April to 1 May 2021 trial dates.	1	App. Ex. CLIV, p. 7; App. Ex. LXXXIX, p. 4.
11 Jan 2021	Government receives defense's motions from 8 Jan 2021.	2	App. Ex. LXXXIX, p. 5.
12 Jan 2021	Government requests an extension until 14 January to file responses to the defense's motions. The military judge dockets trial for 27 April to 1 May 2021 and schedules motions hearing for 12 February 2021.	1	App. Ex. CLIV, p. 7–8.
15 Jan 2021	Government responds to the defense motion.	3	App. Ex. LXXXIX, p. 5.
1 Feb 2021	TC files a Supplemental Response to the Defense Motion and provides the chronology.	17	App. Ex. LXXXIX, p. 5.
12 Feb 2021	Article 39(a) session is conducted. The military judge dismisses Specifications 1 and 2 of Charge I without prejudice for failure to state an offense.	11	App. Ex. CLIV, p. 8.
13 Mar 2021	TC receives R.C.M. 706 short report.	29	App. Ex. LXXXIX, p. 5.
29 Mar 2021	GCMCA re-referred the 8 October and 30 November charges. Government sent the referred charges to the JRCF for service.	16	App. Ex. LXXXIX, p. 5–6.

30 Mar 2021	TC informs the court that the GCMCA re-referred all general courts-martial cases because the GCMCA had selected a new court martial panel. JRCF serves appellant with the incorrect version of the referred charge sheet.	1	App. Ex. CLIV, p. 8.
31 Mar 2021	Government sends JRCF corrected copies of the referred charges for service. JRCF serves appellant with referral documents containing incorrect signature page. Government submits referral documents to the court. The military judge requests the parties submit a new EDR.	1	App. Ex. CLIV, p. 8–9; App. Ex. LXXXIX, p. 6.
5 Apr 2021	TC files a new EDR with the court, requesting the original trial date of 27 April 2021. Defense does not oppose the trial date.	5	App. Ex. CLIV, p. 9.
7 Apr 2021	The military judge sets the trial for 27 April 2021. The military judge asks the defense if they are available for motions on 26 April 2021 and defense represents they are not.	2	App. Ex. CLIV, p. 9–10.

8 Apr 2021	The military judge sets arraignment for 12 April 2021 and the motions and trial for 27 April 2021.	1	App. Ex. CLIV, p. 9–10.
9 Apr 2021	GCMCA withdraws and dismisses without prejudice Specifications 1, 2, 4, 5, and 6 of Charge I and Specification 1 of Additional Charge I. Government informs defense counsel of the GCMCA's actions.	1	App. Ex. CLIV, p. 10; App. Ex. LXXXIX, p. 6.
12 Apr 2021	Article 39(a) session is conducted. Government learns appellant was served with the incorrect charge sheet and serves appellant with the correct charge sheet.	3	App. Ex. CLIV, p. 11.
15 Apr 2021	Both parties file motions.	3	R. at 15.
21–22 Apr 2021	Government conducts pre-trial preparation with Mrs. [redacted] and discovers new information.	6–7	App. Ex. C
23 Apr 2021	Government receives corroborating evidence relating to Mrs. [redacted]'s new disclosures.	1	App. Ex. CIV
24 Apr 2021	Government provides defense with additional Mil. R. Evid. 404(b) notice, Section III disclosures and fifty pages of new discovery arising from Mrs. [redacted]'s 21 April pre-trial preparation, and bate stamped evidence.	1	App. Ex. C–CIV
26 Apr 2021	Defense files a motion for appropriate relief requesting a continuance until 28 June 2021.	2	App. Ex. CLIV, p. 11–12.

	Defense requests an arraignment and motions hearing on 27 April 2021. Government files their response to the defense's motion for a continuance.		
27 Apr 2021	Appellant is arraigned. Motions hearing is conducted. The military judge grants defense's request to continue trial until 28 June 2021.	1	App. Ex. CLIV, p. 12.
12 May 2021	Defense files a supplemental discovery request.	15	App. Ex. CXXIV.
17 May 2021	The government denies defense's supplemental discovery request.	5	App. Ex. CXXV.
7 Jun 2021	Motions hearing is conducted.	21	R. at 110; App. Ex. CLXV
14 Jun 2021	The military judge denies in part defense's motions to compel discovery.	7	App. Ex. CLXV
16 Jun 2021	Appellant and defense counsel sign a plea agreement.	2	App. Ex. LIX.
17 Jun 2021	The convening authority signs the plea agreement.	1	App. Ex. CLIX, p. 4.
28 Jun 2021	Guilty plea proceedings are conducted. The military judge convicts and sentences appellant.	12	R. at 302.

2. The government acted with reasonable diligence overall.

The delays in bringing appellant to trial were reasonable and appropriate under the circumstances. *Mizgala*, 61 M.J. at 129. Appellant does not allege, and there is no evidence, that the delays were a "deliberate attempt to delay trial in order to hamper the defense." *Wilson*, 72 M.J. at 353. Rather, the record reflects the delays can be attributed to serious allegations of sexual assault gradually surfacing at different points of a complex investigation, involving multiple jurisdictions and memory of a twelve-year-old minor.[8] *See United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (stating that it is "not unreasonable for the Government to marshal and weigh all the evidence, including forensic evidence, before proceeding to trial").

i. 21–28 August 2020: The government did not delay in investigating allegations that Miss [redacted] gradually disclosed.

The government did not delay in investigating Miss [redacted]'s allegations and diligently investigated new allegations as Miss [redacted] gradually disclosed them. On 21 August 2020, the day Miss [redacted] first disclosed the allegations, the government acted swiftly to coordinate a child forensic interview, notify trial counsel and the staff judge advocate of the interview, and perform a search of the residence.

[8] CID coordinated with Honolulu Police Department, Comanche County Sherriff's Department, and Lawton Police Department in Oklahoma to report the disclosures. (App. Ex. LXXXVII, p. 26).

Owing to CID's diligence, the government interviewed Miss [redacted] and the Missouri Child Division conducted a child forensic interview of Miss [redacted] on 21 and 22 August, respectively. (App. Ex. LXXXVIII, p. 91–92).

During the forensic interviews, the government became aware of two additional incidents of digital penetration: one that occurred around appellant's birthday on 14 August 2020 and another that occurred several years prior in the family's home in Oklahoma. (App. Ex. CLIII, para. 6). Miss [redacted] and Mrs. [redacted] informed the government that the last known incident of sexual abuse was on 20 August 2020, but there had been multiple occasions—in the words of Mrs. [redacted] "more times than she could remember." (App. Ex. LXXXVIII p. 5). Miss [redacted] continued to disclose allegations in her journal, and it was not until approximately 27 August, that the government became aware of new incidents requiring investigation.[9] (App. Ex. LXXXVIII, p.15). Mrs. [redacted] requested that the government only photograph the journal and not collect it so that Miss [redacted] would continue writing and not "feel like she was being punished for making

[9] On 27 August 2020, Mrs. [redacted] notified the government Miss [redacted] had been writing in her journal and making further disclosures regarding appellant. (App. Ex. LXXXVII (Exhibit 1 - CAS Summary 8/20, p. 15)).

disclosures." (App. Ex. LXXXVIII, p.15). The government honored Mrs. [redacted]'s request and retained limited access to the journal. (App. Ex. LXXXVIII, p.15).[10]

Even with limited access to the journal and Miss [redacted]'s continuing disclosures, CID worked diligently to confirm the addresses of appellant as well as the addresses where the incidents Miss [redacted] reported occurred. (App. Ex. LXXXVIII, p. 25). This was not without difficultly as neither Miss [redacted] nor Mrs. [redacted] could confirm their addresses for the 14 August and 20 August incidents.[11] (App. Ex. XXXIV). Despite the barriers in retrieving evidence, continuing disclosures, and the sole testimony of a child witness, the government acted with reasonable diligence in thoroughly investigating each allegation.

ii. 28 August – 8 October 2020: The forty-two-day period from pretrial confinement to re-preferral of Gordon II was not unreasonable when the government was actively investigating the charges.

The twenty-nine-day period between initial confinement on 28 August to dismissal of the Gordon I charges on 25 September was not unreasonable as the convening authority's decision to withdraw and dismiss the originally referred charges of domestic violence was in favor of trying the new allegations of child sexual offenses in a single proceeding. (App. Ex. CLIV, p. 27). Appellant was

[10] CID was unable to collect the journal and then to review it as evidence until 8 and 9 December 2020, respectively. (App. Ex. LXXXVIII, p.38–39).
[11] As of 22 September 2020, the government had insufficient information about the exact timeframe for the Oklahoma allegations. (App. Ex. LXXXVIII, p. 29).

already facing general court-martial for the domestic violence charges involving Mrs. [redacted] until the receipt of new information prompted new charges that occurred within the same complicated family dynamic. The government acted in good faith to charge all known offenses in a single proceeding. (App. Ex. CLIV, p. 27).

Less than two weeks after the convening authority withdrew the original charges, the government preferred Gordon II on 8 October 2020. The government moved expeditiously to prefer the charges despite, as previously detailed, the active and complicated investigation. (R. at 43; App. Ex. LXXXVII, p. 88). The government has the right, if not the duty, to thoroughly investigate a case before proceeding to trial. *Cossio*, 64 M.J. at 258 (finding no speedy trial violation though the technical processing of the charges was not exemplary). Further, the brief eight-day period between withdrawal of the charges and re-preferral was not unreasonable. *Kossman*, 38 M.J. at 262 (quoting *Tibbs*, 15 U.S.C.M.A. at 353 ("[B]rief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.")).

iii. 9 October – 20 December 2020: The government's efforts to resolve complications in the Ewa Beach, Hawaii allegations prompted the forty-five-day period of delay between the first and second preliminary hearing.

The government, while balancing the complexity of the investigation, the complications arising from twelve-year-old Miss [redacted]'s memory, and the

inconsistencies that resulted from the first PHO report, moved with reasonable diligence to bring these charges to trial. (App. Ex. CLIV, p. 31–32). The first preliminary hearing occurred on 27 October 2020, and the government did not receive the PHO report until 1 November 2020. Upon receipt of the PHO report, the government identified apparent inconsistencies between the findings of the PHO and Miss [redacted]'s memorandum sent on 23 October 2020. (App. Ex. CLIV, p. 4). At the time, the government was still awaiting receipt of the trace evidence and DNA reports and did not receive the reports until 6 November 2020. (App. Ex. LXXXVIII, p. 35). Notably, the results of the received reports were unclear. (App. Ex. CXVI, p. 35). Still, the government continued to act and conducted an interview with Miss [redacted] to resolve the inconsistencies regarding the Hawaii allegations four days later on 10 November 2021. (App. Ex. CLIV, p. 4).

Thus, even if this court finds negligence at this juncture, the government acted with reasonable diligence thereafter, in clarifying the inconsistencies, confirming their understanding of Miss [redacted]'s memo, and preferring an additional charge to reflect the information on 30 November 2020. (App. Ex. LXXXIX, p. 4). *See United States v. Simmons*, ARMY 20070486, 2009 CCA LEXIS 301, at *9 (Army Ct. Crim. App. 12 Aug. 2009) (mem. op.) ("A finding of government negligence that is responsible for a period of delay . . . does not prohibit a conclusion that the government acted with reasonable diligence overall.").

The second preliminary hearing took place a mere ten days later (10 December 2020). (App. Ex. CLIV, p. 29). Eight days after the government received the PHO report, the government referred charges.[12] (App. Ex. CLIV, p. 29). The forty-five-day period from the first pretrial hearing to the completion of the second pretrial hearing included general movement forward in the pretrial process. *See Thompson,* 68 M.J. at 313. The government was prepared to go to trial as early as 11 January 2021. (App. Ex. CLIV, para. 28).

In sum, during the aforementioned periods of delay, the government completed the necessary steps including investigating the offenses, obtaining evidence, and coordinating the investigation with multiple jurisdictions to refer the charges. For these reasons, this factor, as the military judge found , weighs in the government's favor. (App. Ex. CLIV, p. 32).

iv. 21 December 2020 – 12 April 2021: There are periods of judicial delay.

The military judge received the referred charges on 21 December 2020, and arraignment took place on 12 February 2021, in part due to defense's availability. (App. Ex. CLIV, p. 14–15). Likewise, the court received the 29 March 2021 referred charge sheet on 30 March 2021 and scheduled arraignment for 12 April

[12] The government received the PHO report on 11 December and all pending charges and the additional charge were referred on 18 December 2020.

2021. (App. Ex. CLIV, p. 15–16). Moreover, the court approved a delay during the period between 12–27 April 2021. (App. Ex. CLIV, p. 16). Thus, this court should find these periods are excusable periods of delay.

v. 28 December 2020 – 20 April 2021: There are periods of delay attributable to defense.

First, defense requested an R.C.M. 706 inquiry on 28 December 2020. The defense requested that it be routed through the GCMCA rather than the military judge, who was available to receive such request via email that same day. (App. Ex. CLIV, para. 26). As such, the GCMCA did not approve the request for another eleven days. (App. Ex. CLIV, para. 26–27). The government received the R.C.M. 706 short form on 13 March 2021. (App. Ex. CLXII, p. 15).

Further, the government filed the EDR with the court on 28 December 2020 and indicated that it would be ready for trial on 11 January 2021. (App. Ex. CLIV, para. 28). Thereafter, defense filed its motion to dismiss for a speedy trial violation and motion to release the accused from PTC to both the court and the government. (App. Ex. CLIV, para. 29–31). Due to an email error, the government did not receive their motions until four days after its intended delivery, necessitating the government's request for an extension to file their responses until 14 January 2021. (App. Ex. CLIV, para. 31).

Moreover, it was the defense who was unavailable for trial at this date and requested a trial date of 27 April to 1 May 2021.[13] (App. Ex. CLIV, para. 30). In the 5 April 2021 EDR request submitted pursuant to the court's request, the government requested the same trial date of 27 April that defense originally requested. (App. Ex. CLIV, para. 37–39).

But for defense's unavailability and request to continue, the government was prepared to go to trial on 11 January 2021. (App. Ex. CLIV, para. 28). Delays attributable to defense should weigh against appellant. *Brillon*, 556 U.S. at 90.

vi. 21 April 2021 – 28 June 2021: The parties entered into a plea agreement after the government discovered additional evidence during pre-trial preparation and defense requested a two-month continuance.

Six days before trial, the government conducted pre-trial witness preparation with Mrs. [redacted] on 21 and 22 April 2021, during which Mrs. [redacted] disclosed new information relating to the Article 128b violations. (App. Ex. CVI, p. 2). The government served these disclosures on defense three days after their initial disclosure to the government and only one day after the government received corroborating evidence. (App. Ex. C–CII, p. 6, 8; App. CIV; App. Ex. CVI, p. 2–

[13] While there were additional investigative and procedural steps taken from January to April 2021, these actions were taken after defense requested a trial date at the end of April 2021.

3). On 25 April 2021, defense filed supplemental discovery requests to which the government immediately responded. (App. Ex. CIII, CVI).

On 26 April 2021, the night before trial, defense filed its request for a continuance until 28 June 2021. (App. Ex. CLIV, para. 46). Over the government's objection, the military judge granted defense's request for additional time to investigate the case. (App. Ex. CVI; App. Ex. CLIV, paras. 46–47). Between May and June 2021, the parties litigated and the court conducted a motions hearing. (App. Ex. CLXV).

On 17 June 2021, eleven days before trial, the parties entered into a written plea agreement. (App. Ex. CLIX). Appellant's guilty plea hearing commenced on 28 June 2021 as scheduled.

3. Demand for Speedy Trial

Appellant filed two demands for speedy trial; he filed his first thirty-three days after entering PTC. (App. Ex. LXXXVI). Because appellant made his first speedy trial demand shortly after apprehension, this factor weighs in his favor. *Cossio*, 64 M.J. at 257 (holding an appellant's speedy trial demand made twenty-three days after his apprehension weighed in his favor).

4. Prejudice

The final *Barker* factor weighs in the government's favor. Prejudice "should be assessed in the light of the interests of [appellants] which the speedy trial right

was designed to protect." *Mizgala*, 61 M.J. at 129 (quoting *Barker*, 407 U.S. at 532). Courts review three specific interests in determining prejudice:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of [an appellant] adequately to prepare his case skews the fairness of the entire system.

Id. An affirmative demonstration of prejudice alone is not necessary to prove the denial of the accused's right to a speedy trial, but the defense's reading of *Moore v. Arizona* is too narrow. (Appellant's Br. 21). The Supreme Court's opinion in *Moore* reinforces the premise of *Barker* that no one factor has a talismanic power, rather the court shall consider the factors with other such circumstances as may be relevant before deciding whether the government violated appellant's right to a speedy trial. *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (citing *Barker*, 407 U.S. at 533). Thus, the court must weigh the prejudice factor as it has the other three factors in its speedy trial analysis.

In this case, appellant contends the following prejudice stemming from the delay: (1) continued oppressive pretrial confinement; (2) increased anxiety and concern of appellant; and (3) possible impairment of the defense due to last minute disclosures. (Appellant's Br. 21). The government addresses each in turn.

a. The circumstances of appellant's pretrial confinement were not overly harsh or oppressive as to demonstrate prejudice.

First, although appellant was subject to pretrial confinement, the evidence does not support that it was oppressive. Appellant points to several issues of confinement to be oppressive including his denial of his Lexapro medication to treat [redacted] and the inadequate services for treatment of these symptoms while in PTC. (Appellant's Br. 21). The delay in appellant's Lexapro medication was not due to his status as a pretrial detainee, but rather because he failed to follow JRCF's procedure to request a refill.[14] (App. Ex. CLXIX, p. 3). Appellant was on notice of this procedure during reception.[15] (App. Ex. LXXIX). As indicated by CPT [redacted], M.D., all inmates at JRCF have full access to medication as medically indicated. (App. Ex. CLXIX, p. 4). Thus, any initial delay in receiving his medication is due to appellant's failure to timely request the medication. Appellant was solely responsible for ensuring he had access to his prescription medication and informed of how to do so. (App. Ex. CLXIX, p. 8).

Further, appellant made a personal decision to forgo taking the medication altogether. (App. Ex. CLXIX, p. 3). In addition, by declining an appointment for

[14] JRCF requires inmates to request a refill within ten days prior to depleting their supply of medication as to allow time for processing. (App. Ex. CLXIX at 3).
[15] All inmates receive instruction on this process during reception. (App. Ex. LXXIX).

his behavioral health treatment and medicine management on 10 December 2020 due to a conflict, appellant delayed his access to treatment until the next available appointment on 7 January 2021. (App. Ex. CLXIX, p. 3). Thus, the record does not support that appellant's conditions of confinement were overly harsh or oppressive as to demonstrate prejudice.

b. Appellant suffered some degree of anxiety greater than normal due to his [redacted]

In support of prejudice, appellant claims he experienced increased anxiety and concern as a result of (i) pretrial delay, (ii) pretrial incarceration, and (iii) as a symptom of his [redacted] (Appellant's Br. 21–22). However, for anxiety to amount to prejudice, it must exceed the normal anxiety and concern associated with an upcoming trial and PTC. *Wilson*, 72 M.J. at 354.

With respect to appellant's anxiety arising from pretrial delay and incarceration, such anxiety does not rise beyond the normal incidents of confinement and should not weigh in appellant's favor. *Id.* (finding an appellant feeling depressed while in confinement was normal pretrial anxiety); *see United States v. Guyton*, 82 M.J. 146, 155 (C.A.A.F. 2022) (citing *Barker*, 407 U.S. at 534) (holding that appellant's assertion that he experienced "stress flowing from the pending charges" due to a pretrial delay of 273 days did not demonstrate prejudice); *cf. Barker*, 407 U.S. at 534 (finding minimal prejudice where the

defendant was "living … under a cloud of suspicion and anxiety" as he waited four over years for trial).

However, with respect to compounded anxiety resulting from his [redacted] the record reflects appellant's diagnosis of [redacted] without further detail. (App Ex. CLXII). To the extent this court considers anxiety attributable to his [redacted] diagnosis sufficient to demonstrate his anxiety and concern had "exceeded the norm," this factor would weigh in appellant's favor. *Wilson*, 72 M.J. at 354 (citing *Cossio*, 64 M.J. at 257). Nevertheless, the government respectfully submits this court should afford less weight to this factor as the record contains no objective information about the severity and specificity of his symptoms.[16] (R. at 289–92; App. Ex. CLXII).

c. Appellant has not shown that the delays impaired his ability to prepare his defense.

Appellant has not shown that any of the delays impaired his ability to prepare a defense. *See Danylo*, 73 M.J. at 189 (finding appellant's failure to demonstrate prejudice fatal to his claim of a Sixth Amendment violation) (citation omitted); *United States v. Becker*, 53 M.J. 229 (C.A.A.F. 2000) (finding a 300-day

[16] The government acknowledges appellant's subjective descriptions on appeal and recalls at trial, appellant alleged experiencing a "strong resurgence of [redacted] symptoms" including severe anxiety, but also that it was the uncertainty of what charges the government may bring that compounded his anxiety. (R. at 61–66; App. Ex. LII, p. 1, 52; App. Ex. LIII, p. 1, App. Ex. LXVIII, p. 2).

delay did not amount to a Sixth Amendment violation when appellant failed to provide any evidence that his ability to present a defense had been impaired). Of the three interests in the prejudice analysis, impairment of the defense is the most heavily weighted "because the inability of [an appellant] adequately to prepare his case skews the fairness of the entire system." *United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984) (quoting *Barker*, 407 U.S. at 532).

Appellant fails to show how any delay resulted in an impairment of his ability to defend himself. There is no indication that the processing time in this case compromised appellant's trial preparation, defense evidence, trial strategy, or ability to present witnesses. *Mizgala*, 61 M.J. at 129. Regarding the first preliminary hearing, the government had not identified the inconsistencies between Miss [redacted]'s memo until receiving the preliminary hearing report on 1 November 2020. Upon receipt, the government acted to clarify those inconsistencies and scheduled an interview with Miss [redacted] the very same day. The government promptly remedied any prejudice resulting from the inconsistencies the judge heard in the first preliminary hearing when they lined out and dismissed the original Specification of Charge 1 on 23 November 2020.

Further, the motion to continue trial for two months was at defense's request . The government was prepared to go to trial on 27 April 2021 and opposed the continuance. The court granted the motion to allow the defense the

opportunity to adequately prepare for trial. There is a lack of prejudice to the accused where the accused received exactly what he asked for. *Brillon*, 556 U.S. at 90 (citing *Barker*, 407 U.S. at 531 for the premise that delay caused by the defense weighs against the appellant). Based upon the interests forementioned, appellant has not suffered prejudice and the court should deny relief.

Conclusion

Although one *Barker* factor weighs in favor of appellant, a consideration of the factors along with the facts and circumstances of the trial, and the lack of prejudice to appellant, show appellant has failed to establish the government violated his right to speedy trial under Article 10, UCMJ. *Barker*, 407 U.S. at 533. Thus, the alleged speedy trial violation warrants no relief because the *Barker* factors cumulatively weigh against relief under Article 10, UCMJ. *Id*.

Assignment of Error II

WHETHER DELAYED POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS UNTIL 856 DAYS AFTER SENTENCING

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83, M.J. 662, 666 (Army Ct. Crim. App. 2023).

Law

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution, and determining sentence appropriateness under Article 66(d), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

A. Fifth Amendment Procedural Due Process.

Under the Fifth Amendment, servicemembers convicted at courts-martial have a due process right to post-trial processing without unreasonable delay. *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006) (citing *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004). In reviewing a case where appellant alleges unreasonable delay in post-trial processing, the Court must determine whether the delay materially prejudiced appellant to require a remedy. *United States v. Tardif,* 57 M.J. 219, 224 (C.A.A.F. 2002). Appellate courts analyze post-trial delays and due process using the *Barker* factors that examine: "(1) the length of the delay; (2) the reasons for the delay; (3) appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Barker,* 407 U.S. at 530; *Moreno*, 63, M.J. at 135.[17] No single factor requires the court to find that post-trial delay

[17] Additionally, Courts of Criminal Appeals (CCAs) will also further examine prejudice in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the

constitutes a due process violation rather the court must balance the four *Barker* factors. *Toohey II*, 63 M.J. at 361 (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533). However, if the court determines that any due process violation is harmless beyond a reasonable doubt, a *Barker* analysis is not necessary. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Where an appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, "in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey II*, 63 M.J. at 362. If the court finds a due process violation, the burden then shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). To determine whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Id.* This prejudice analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id.* Under this review, the court considers "the totality of the circumstances" based on the "entire

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grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 139–40. None of these factors are implicated in this case, and appellant does not allege any prejudice.

record." *Id.* The court "will not presume prejudice from the length of the delay alone," but instead requires "evidence of prejudice in the record." *Id.*

B. Sentence Appropriateness.

If there is no material prejudice to appellant and a due process violation is absent, this court should next consider whether to grant relief for excessive post-trial delay based on the CCA's sentence appropriateness authority under Article 66(d)(1), UCMJ. *Tardif*, 57 M.J. at 224. This Court is to "determine what findings and sentence should be approved, based on the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay," under Article 66(c), UCMJ.

Pursuant to Article 66(d)(2), UCMJ, a CCA "may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record." Because Article 66(d)(2), UCMJ, does not define "excessive delay," "in considering whether a delay is excessive this court will broadly focus on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay." *Winfield*, 83 M.J. at 666. Even if there is excessive delay, "Article 66(d)(2) dictates [that this court] 'may provide appropriate relief' and leaves the determination as to whether to provide relief and

what type of relief is appropriate, to [this court's] discretion." *Id.*

Argument

Based on the *Barker* factors, the government did not violate appellant's due process rights. Further, in considering the totality of circumstances in this case, appellant warrants no relief under a sentence appropriateness analysis because he did not suffer prejudice, his sentence is appropriate, and there is no harm to correct. Finally, appellant has not demonstrated error or excessive delay under Article 66(d)(2), UCMJ. Thus, this court should affirm the findings and sentence.

A. The first *Barker* factor weighs in favor of appellant.

The first factor weighs in favor of appellant. A period of 856 days elapsed between the date appellant's court-martial adjourned to when this court referred the case to counsel. (STR; Referral and Designation of Counsel).

B. The remaining *Barker* factors weigh in favor of the government.

With respect to the second factor, in *United States v. Winfield*, this court overturned *Brown*'s 150-day timeline and stated that it would "scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing[.] *Winfield*, 83 M.J. at 665–66 (noting the court's interest in the aspects of the case that contributed to delay including actual operational exigencies, court reporter availability and resource shortfalls).

The Office of the Staff Judge Advocate (OSJA), in their detailed explanation

of post-trial processing of the case, provided legitimate reasons for the delay, including those considerations that the court mentioned in *Winfield*. Namely, the unit faced operational exigencies in their sole court reporter resigning, taking on a new court-reporter with a delay in training, and vacancy in the military court reporter position. (Post-Trial Delay Memo at 1). The loss of continuity in personnel and institutional understanding of the procedural history of the case rendered the processing and completion of the record of trial difficult. (Post-Trial Delay Memo at 2). Further, the presiding judge retired and was unavailable to complete the errata and authenticate the record of trial while the lead trial counsel on the case had left active duty. (Post-Trial Delay Memo at 2). In addition, the record of trial contained numerous deficiencies that needed remedy. (Post-Trial Delay Memo at 2–3). The OSJA provided detailed and legitimate reasons for delayed post-trial processing of this case and thus, the second factor weighs slightly in the government's favor. *See Winfield*, 83 M.J. at 666.

The third *Barker* factor also weighs in favor of the government. Appellant never demanded speedy post-trial processing. While this does not waive appellant's speedy post-trial rights, the third *Barker* factor, nevertheless, favors the government. *Moreno*, 63 M.J. at 138. The Supreme Court in *Barker* succinctly stated: "We emphasize that failure to assert the right will make it difficult for [an appellant] to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532.

Thus, the third *Barker* factor favors appellee.

Regarding prejudice, appellant asserts generalized, rather than particularized anxiety or concern "of waiting to know the outcome of his case." (Appellant's Br. 28). However, case law makes clear these claims are insufficient. *See, e.g., United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022) (citations omitted); *United States v. Bush*, 68 M.J. 96, 100 (C.A.A.F. 2009) (rejecting claims of employment prejudice in the absence of independent supporting evidence). Thus, the fourth *Barker* factor weighs in favor of appellee. *Toohey II*, 63 M.J. 361.

C. The delay does not impugn the fairness or integrity of the military justice system.

Appellant fails to show that the delay was so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system" and overcome the absence of prejudice. As such, the "difficult and sensitive balancing process" of the facts of this case show that appellant did not suffer a due process violation. *Id.* at 145. Even if this court found a due process violation, appellant has pointed to no specific harm, as argued above, so any due process violation is harmless beyond a reasonable doubt. *See Bush*, 68 M.J. at 104 (holding that seven-year post-trial delay due process violation was harmless beyond a reasonable doubt); *see also United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008) (holding that appellant did not suffer detriment to his legal

position in his appeal as a result of an almost seven-year delay between adjournment and completion of appellate review).

D. Article 66(d)(2) analysis does not merit the appellant to relief.

Under the specific facts of this case, the delay was not excessive. To the extent this court finds excessive delay, article 66(d)(2) "dictates [this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Winfield*, 83 M.J. at 666. In this case, appellant asks this court set aside his dishonorable discharge. (Appellant's Br. 29).

However, considering the nature of the charges to which appellant pleaded guilty, such a remedy is not appropriate and would result in a windfall to him. *Winfield*, 83 M.J. at 666. Appellant pleaded guilty to one specification of domestic violence in violation of article 128b and one specification of sexual assault of a child in violation of article 120b. (STR). Based solely on the specifications to which appellant pleaded guilty, he faced a maximum sentence of thirty-two years of confinement, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. (R. at 223–24); Manual for Courts-Martial, United States (2019 ed.) [MCM], App'x 12. Appellant's plea agreement limited his confinement to a maximum of ten months' confinement, about one-third of the maximum sentence he was facing. (R. at 222–23).

Furthermore, dishonorable discharge is the mandatory minimum punishment for sexual assault of a child. MCM, App'x 12. (App. Ex. XIV; R. at 234). Appellant received a term of confinement within the range for which he bargained in his plea agreement. (R. at 233–34; App. Ex. CLIX; STR). Therefore, this case warrants no relief. *See generally United States v. Morris*, ARMY 20210624, 2023 CCA LEXIS 197, at *2 (Army Ct. Crim. App. 8 May 2023) (summ. disp). As such, any sentence relief is inappropriate in this case.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence and deny relief.

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[18] On 17 June 2024, this panel approved the government's motion for leave to allow student representation in this case.

CERTIFICATE OF SERVICE, U. S. v. GORDON (20210382)

I hereby certify that a copy of the foregoing was sent via electronic submission to Mr. Peter Kageleiry, civilian appellate defense counsel, at [redacted], and the Defense Appellate Division at [redacted], on the 1st day of August, 2024.

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