

Speedy Trial Demands

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Introduction

Often, a new Judge Advocate possesses a limited understanding of military speedy trial law. He knows there is a 120-day clock that starts with preferral or pretrial confinement (PTC). If he is going to be prosecuting, he resolves to get his cases tried within 120 days. If he is destined for defense, he resolves to count the days and move to dismiss if the Government is too slow. Such an understanding is dangerously incomplete. To use the speedy trial provisions of the Rules for Courts-Martial (RCM), the Uniform Code of Military Justice (UCMJ), and the Constitution, defense counsel must understand the role of demands for speedy trial. Trial counsel must understand how to act in the face of such demands.

I. *Barker v. Wingo*—Why Speedy Trial Demands Are Made

The Sixth Amendment to the U.S. Constitution gives the accused “the right to a speedy and public trial.” The leading Supreme Court case interpreting this right is *Barker v. Wingo*. In that (civilian) case, the accused, Barker, and his co-accused, Manning, were indicted in September 1958. The Government believed it could not convict Barker without the testimony of Manning. Manning was first tried in October 1958, but due to hung juries and appellate reversals, he was not finally convicted until December 1962.

Throughout this period, the Government requested and was granted sixteen continuances of Barker’s trial. The defense did not object at all until February 1962, when it moved to dismiss the indictment (on grounds that do not appear in the record). The defense did not start opposing the Government’s requests for continuance until March 1963 (when Manning’s conviction became final). The defense did not explicitly invoke Barker’s right to a speedy trial until October 1963, when it moved to dismiss the case on that basis. The trial court denied the motion and Barker was tried that month.¹ The case came to the Supreme Court on appeal from a habeas corpus denial. At oral argument, defense appellate counsel conceded that Barker “probably did not want to be tried” at any point. Appellate counsel agreed that Barker was hoping for Manning to be acquitted, in which case Barker would never have been convicted.²

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¹ *Barker v. Wingo*, 407 U.S. 514, 517–18 (1972).

² *Id.* at 534–35.

In deciding the case, the court listed four factors to be considered in determining whether a case should be dismissed for speedy trial violations: (1) the length of the delay, (2) the reasons for the delay, (3) the accused’s assertion of his right, and (4) the prejudice suffered by the accused on account of the delay. None of these factors was a *sine qua non* for relief; all were to be considered in light of the circumstances of each individual case.

In Barker’s case, the third factor was fatal to the defense, as the Court explained:

We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted *ex parte*. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.³

In describing the virtues of its four-part test, the Court gave helpful guidance to defense counsel in making such demands effective:

[The rule] allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.⁴

³ *Id.* at 536. Despite the Court’s use of the words “due process,” the case deals strictly with Sixth Amendment speedy trial issues. The Fifth Amendment is not mentioned.

⁴ *Id.* at 528–29.

A defense counsel (DC) hoping to get speedy trial relief for his clients would do well to demand speedy trial, and demand it with “frequency and force,” to incline the courts his way.

II. Military Speedy Trial Doctrines and the Relevance of Demands to Each

The 120-day clock set by RCM 707 is not the only source of speedy trial law in the military. The Government may violate a Soldier’s other speedy trial rights even while complying with that rule. In most cases, explicit speedy trial demands improve the defense’s chance of obtaining speedy trial relief.

A. Rule for Courts-Martial 707.

In general, RCM 707 requires the Government to bring a Soldier to arraignment within 120 days of preferral.⁵ Between preferral and referral, the convening authority may grant delay, excluding periods of time from consideration (he typically delegates this authority to the Article 32 investigating officer, who may exclude the time taken for the investigation and the preparation of his report). After referral, the military judge may grant delay.⁶ Delays after arraignment do not count toward the 120 days, and if the Government dismisses charges and reprefers, the clock starts anew.⁷

If the Government nonetheless fails to bring the accused to arraignment within 120 days, and the defense moves to dismiss, the judge must grant that motion. However, the judge may dismiss with or without prejudice, and has extremely broad discretion in deciding which type of dismissal to grant.⁸ Naturally, if the judge dismisses without

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(a) (2008) [hereinafter MCM]. The clock also begins to run if the accused is restricted in lieu of arrest, arrested, placed in pretrial confinement (PTC) or brought onto active duty for Uniform Code of Military Justice (UCMJ) purposes. The question of whether a restriction is severe enough to be “in lieu of arrest” is beyond the scope of this article. See *United States v. Muniz*, No. 20000668, 2004 WL 5862921, at *1-2 (A. Ct. Crim. App. Mar. 25, 2004).

⁶ MCM, *supra* note 6, R.C.M. 707(c).

⁷ *Id.* R.C.M. 707(b)(3). However, a “sham” or “subterfuge” dismissal and repreferal—designed solely to avoid the strictures of Rule for Court-Martial (RCM) 707—will be treated as a nullity and can lead to dismissal. See *United States v. Robison*, No. 20110758, 2011 WL 6135093, at *2 (A. Ct. Crim. App. Dec. 2, 2011); *United States v. Robinson*, 47 M.J. 506, 510 (N-M. Ct. Crim. App. 1997). If the Government reprefers charges for the same offense *without* dismissing the old ones, the clock continues to run. For example, in an extended absence without leave (AWOL) case, the Government often prefers charges in order to get a “deserter warrant” for the accused’s arrest. If the Government never dismisses those charges when the accused is captured, it can violate RCM 707 without knowing it. *United States v. Young*, 61 M.J. 501, 504 (A. Ct. Crim. App. 2008).

⁸ Unless the speedy trial violation is of constitutional dimension, in which case the military judge must dismiss with prejudice. *United States v. McClain*, 65 M.J. 894, 897–98 (A. Ct. Crim. App. 2008).

prejudice, the Government can reprefer and bring the case to trial again, often leaving the defense no better off than it was before dismissal.

While a military judge’s discretion to choose dismissal with or without prejudice is in general unfettered, RCM 707 directs him to consider four factors in deciding which to grant: (1) the seriousness of the offense, (2) the facts and circumstances of the case that led to dismissal, (3) the impact of a re-prosecution on the administration of justice, and (4) any prejudice to the accused resulting from the denial of a speedy trial.⁹

A speedy trial demand is not listed among these factors. However, the Court of Appeals for the Armed Forces has at least once considered the accused’s “interest in a speedy trial” in weighing the trial judge’s decision to dismiss without prejudice.¹⁰ Furthermore, well-crafted speedy trial demands can assist the defense in establishing prejudice, often the most contentious point in RCM 707 litigation.

B. The Sixth Amendment.

Rule for Court-Martial 707 is designed to enforce the Sixth Amendment.¹¹ It does not, and cannot, limit the protections of the Sixth Amendment itself. If the Government’s conduct violates the Sixth Amendment right to speedy trial, the Military Judge must dismiss with prejudice, whether or not RCM 707 has been violated.¹²

In courts-martial, the Government’s accountability under the Sixth Amendment begins with preferral, just as it does under RCM 707.¹³ Neither the convening authority, the military judge, nor anyone else has the power to suspend the operation of the Sixth Amendment. In general, a longer delay period (five months or more) is needed to make a good case for dismissal under the Sixth Amendment,¹⁴ but

⁹ *Id.* at 897. Rule for Court-Martial 707 is the only speedy trial doctrine that depends on the severity of the offense.

¹⁰ *Id.* at 898 (court upheld dismissal without prejudice; fact that accused showed little interest in a speedy trial weighed against him).

¹¹ MCM, *supra* note 6, app. 21, at A21-41 (analysis of RCM 707).

¹² See *id.* R.C.M. 707(d)(1); *McClain*, 65 M.J. at 897; *United States v. Novelli*, 544 F.2d 800, 803 (5th Cir. 1977) (citing *Strunk v. United States*, 412 U.S. 434, 439–440 (1973)); *United States v. McLemore*, 447 F. Supp. 1229, 1239 (D. Mich. 1978) (citing *United States v. Mann*, 304 F.2d 395, 397 (D.C. Cir. 1962)).

¹³ In a case with multiple preferrals, Sixth Amendment accountability can be measured from the *first* preferral, even if the accused is ultimately brought to trial on different charges. *United States v. Grom*, 21 M.J. 53, 56 (C.M.A. 1985).

¹⁴ See *id.* at 56 (“Delays of as little as five or six months have caused the federal courts to inquire into the remaining *Barker* factors.”) In *United States v. Robison*, No. 20110758, 2011 WL 6135093, at *1–2 (A. Ct. Crim. App. Dec. 2, 2011), the Government’s delays were such that the defense might have secured dismissal on Sixth Amendment grounds, or at least forced the court to conduct a *Barker v. Wingo* analysis (eight months passed

dismissals and repreferrals do not necessarily start things over, and delays after arraignment are considered for Sixth Amendment purposes.

Sixth Amendment cases in the Armed Forces are decided using the *Barker v. Wingo* factors, including the accused's "assertion of his right." A speedy trial demand is exactly that, and is highly important in a Sixth Amendment case.

C. Article 10, UCMJ.

Article 10 of the UCMJ requires that "[w]hen any person subject to [the UCMJ] is placed in arrest or confinement prior to trial, immediate steps shall be taken to . . . try him or to dismiss the charges and release him."¹⁵ Sufficiently serious restrictions may count as "arrest" and trigger the article.¹⁶ As read by the appellate courts, this requires the Government to exercise "reasonable diligence" at all stages in bringing the accused to trial.¹⁷ The sole remedy for a Governmental violation is dismissal with prejudice.¹⁸

Article 10 is stricter than either the Sixth Amendment or RCM 707.¹⁹ Courts can dismiss a case under Article 10 before the 120-day speedy trial clock runs out.²⁰ The time exclusions of RCM 707 do not apply (though they may be relevant to the reasonableness of Government delays). Post-arraignment delays are considered and may violate Article 10.²¹ An unconditional guilty plea, which waives the accused's speedy trial rights under RCM 707 and the Sixth Amendment, does not waive Article 10 rights.²²

between the accused's return to military control, with charges already preferred, and his trial). But the defense raised only RCM 707 grounds in its motion to dismiss, and the Government's dismissal and repreferral eliminated those issues. This author once made a similar mistake. In an RCM 707 case, the defense should always consider whether Sixth Amendment grounds exist for dismissal, and raise the constitutional argument in addition to the RCM 707 argument when the facts justify it. A Sixth Amendment motion, if successful, leads to dismissal with prejudice.

¹⁵ 10 U.S.C. § 810 (2006).

¹⁶ See *United States v. Schuber*, 70 M.J. 181, 186–87 (C.A.A.F. 2011).

¹⁷ *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999) (citing *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)).

¹⁸ *Kossman*, 38 M.J. at 262.

¹⁹ *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010); *United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003) (citing *Kossman*, 38 M.J. at 259).

²⁰ *United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996) (upholding trial court that granted dismissal when 106 days would have passed between entry into pretrial confinement and trial, based on trial court's finding that 48 days of that delay were unreasonable).

²¹ *Cooper*, 58 M.J. at 60.

²² *United States v. Mizgala*, 61 M.J. 122, 124–27 (C.A.A.F. 2005); MCM, *supra* note 5, R.C.M. 707(e).

Although the military judge's primary inquiry in Article 10 cases is whether the Government has proceeded with reasonable diligence, the Court of Appeals for the Armed Forces considers it "appropriate" for the judge to consider the *Barker v. Wingo* factors in deciding whether to dismiss.²³ If the military judge denies dismissal, the appellate courts will certainly consider those factors in deciding whether to overrule the trial judge. Thus, speedy trial demands are important in cases involving pretrial confinement.

D. The Fifth Amendment.

The Fifth Amendment, as interpreted by the military appellate courts, guarantees a speedy trial as an element of due process. The Fifth Amendment protects the accused against delays that prejudice the accused's ability to mount an effective defense, especially if such delays are deliberate, "tactical" delays by the Government.²⁴ Delays before pretrial can violate the Fifth Amendment. Prejudice is necessary but not sufficient to require dismissal, and the military judge must examine the Government's reasons for delay in deciding whether to dismiss.²⁵

Fifth Amendment speedy trial case law is sparse. Speedy trial demands have not arisen in this case law. Fifth Amendment speedy trial doctrine is concerned with whether the accused can still mount an effective defense, and whether the Government has misbehaved in denying him that chance, not with whether he wants to be tried speedily (or at all).

E. Speedy Post-Trial Processing.

Military courts have held that the Sixth Amendment guarantees speedy processing after trial as well as before. Speedy post-trial cases apply the *Barker v. Wingo* factors, but focus primarily on prejudice. The lack of a defense demand for speedy post-trial processing does not appear to carry much weight.²⁶ However, it does carry some.²⁷

²³ *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 2001).

²⁴ *United States v. Vogan*, 35 M.J. 32, 33–34 (C.M.A. 1992) (citing *United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977) ("[A] tactical delay . . . incurred in reckless disregard of circumstances, known to the prosecution, that there exists an appreciable risk that delay would impair the ability to mount an effective defense" can violate the Fifth Amendment) (internal quotes omitted)).

²⁵ *United States v. Reed*, 41 M.J. 449, 452 (C.A.A.F. 1995).

²⁶ See *United States v. Moreno*, 63 M.J. 129, 139 (C.A.A.F. 2006) (applying the *Barker v. Wingo* factors to post-trial delay, but holding that the failure of the accused to assert his right does not weigh heavily against him in post-trial delay cases). See also Major Andrew D. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4, 13 (concluding that the Court of Appeals for the Armed Forces does, and should, decide post-trial delay cases entirely on the question of prejudice), but see *United States v. Scott*, No. 20091087, 2011 WL 6778538, at *1–2 (A. Ct. Crim.

III. Defense Counsel: How to Make Speedy Trial Demands

The following tips are for defense counsel in deciding whether and how to file a speedy trial demand. Sample demands are provided at the end of this article.

A. Make Sure Your Client Wants a Speedy Trial, and Get His Explicit Permission.

Under *Barker*, speedy trial demands serve primarily to demonstrate that the client himself wants a speedy trial.²⁸ If the client does not in fact want a speedy trial, making such a demand is counterproductive. The client need not sign the demand himself—that is a decision for the defense counsel—but the defense has to be ready to assert in good faith that the accused himself wants a speedy trial.

Not every case is right for speedy trial demands. Sometimes time is on the defense's side, as anger fades, units redeploy, hostile leaders PCS, or well behaved clients improve their own positions. For example, a client facing BAH theft charges may be able to raise the money and pay off the entire debt before trial – the strongest mitigation imaginable. If the client needs time to do that, rushing the case may not be in his interest. In a case based on minor military misconduct (short-term AWOL, disrespect, etc.), a few months of “good soldiering” can go a long way toward mitigating the punishment. If the client is behaving himself, Government delays can help the defense. In a slow post-trial situation, the client is on involuntary excess leave, and he and his family are receiving health care and other benefits while waiting for his appeal to be decided. Keeping those benefits for as long as possible may matter more than uncertain relief from the appellate courts. The decision to assert the client's speedy trial rights is an artistic one that must be made in light of the individual case.

B. Make the Demand in Writing, in a Document Written for That Purpose.

In *Barker*, the Supreme Court stated that courts can “weigh the frequency and force of the objections [to slow trial processing] as opposed to attaching significant weight

App. Dec. 23, 2011) (granting relief for excessive post-trial delay in the absence of prejudice).

²⁷ *United States v. Brandt*, No. 20100294, 2011 WL 6760358, at *2 (A. Ct. Crim. App. Dec. 23, 2011) (denying relief for post-trial delay, in part because the accused did not explicitly request speedy post-trial processing); *United States v. Garman*, 59 M.J. 677, 678 (A. Ct. Crim. App. 2003) (denying relief for slow post-trial processing in part because “trial defense counsel's objection to slow post-trial processing was dilatory”).

²⁸ *See United States v. Grom*, 21 M.J. 53, 57 (C.M.A. 1985) (“The third *Barker* factor weighs in the accused's favor, as he did demand trial. This indicates that he actually desired a speedy trial, unlike the situation in *Barker* where the defendant, for tactical reasons or otherwise, did not.”).

to a purely pro forma objection.”²⁹ A memo plainly requesting speedy trial on behalf of the client will have some force. A line of boilerplate buried in a standard discovery request will carry little weight.³⁰

Since the demand serves primarily to demonstrate the accused's own wish, there is no set rule as to where the demand should be addressed. Logical addressees are the commander who “owns” the case or the Office of the Staff Judge Advocate. Whoever the addressee is, the trial counsel (TC) should receive a copy. If the defense ends up filing a motion to dismiss on speedy trial grounds, the demand(s) should be an attachment to the stipulated timeline.

C. Include the Prejudice Being Suffered by Your Client in the Demand.

Sixth Amendment and RCM 707 cases often turn on the subject of prejudice. The relevant prejudice is pretrial restriction or confinement, anxiety, and “disruption of life.”³¹ Thus, a Soldier who is not allowed to do his usual job while pending charges is suffering recognizable prejudice. So is a flagged Soldier who wants to take courses or was close to promotion before he was flagged. So is a leader who is not allowed to supervise Soldiers. To some extent, so is anyone who is anxious to learn his fate. If you litigate a speedy trial motion, you will have to ask your client about the prejudice he suffered, and convince the Military Judge he suffered it. If you demonstrably made a note of it long before filing the motion, your proof will carry more credibility. And a particularized demand that includes the prejudice being suffered by a specific client is the

²⁹ *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

³⁰ In *United States v. Schubert*, 70 M.J. 181, 191 (C.A.A.F. 2011) (Erdmann, J., and Effron, C.J., concurring in part and dissenting in part), the Army Court of Criminal Appeals gave little weight to six speedy trial demands by the accused because they were included in discovery requests instead of being separate documents. (The concurring judges at the CAAF thought the demands should have been given more weight.)

³¹ *United States v. MacDonald*, 456 U.S. 1, 8 (1982):

The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

See also Strunk v. United States, 412 U.S. 434, 438 (1973); *United States v. Dooley*, 61 M.J. 258, 260 (C.A.A.F. 2005) (accused suffered prejudice under RCM 707 because he was a photographer's mate who was not permitted to work in his rating and a second class petty officer who was not allowed to supervise Sailors). However, prejudice to the accused's ability to try a case can be the basis for a Sixth Amendment motion to dismiss. *Moreno*, 63 M.J. at 141 n.19.

opposite of *pro forma*, so that the military judge and the appellate courts have an extra reason to take it seriously.

Other good reasons exist for explicitly informing the Government of the prejudice your client is suffering. The problem may be something the Government can fix. If they do, your speedy trial motion may be weakened, but your client has meaningful relief right away. If the Government can fix the problem, but fails to, their delays will look all the less reasonable, and the Military Judge will have all the more reason to find sufficient prejudice and grant speedy trial relief. And if the prejudice your client suffers amounts to Article 13 punishment, explicitly complaining about it to the Government increases your chance for relief under that article.³² In these areas, military law favors open communication over secrecy and ambush.

Before committing a client's tale of woe to writing, it is often wise to check the story independently, whether in person or through a trustworthy paralegal.

D. Make Demands Early and Often.

If a speedy trial demand is appropriate, the first one cannot be made too soon. It can be made before any charges are preferred.

In *Barker*, the Supreme Court stated that courts could “weigh the frequency and force of the objections [to trial delays] as opposed to attaching significant weight to a purely *pro forma* objection.”³³ Thus, repeated demands are better than a single demand.

The case law does not set down any specific “frequency” for demands. One demand per month should be enough to satisfy the most stringent of military judges.³⁴ If

³² See *United States v. McCarthy*, 47 M.J. 162, 166 (C.A.A.F. 1997) (when accused did not complain about conditions of PTC, that was evidence he was not being punished); *United States v. Starr*, 53 M.J. 380, 382 (C.A.A.F. 2000) (accused did not complain to his command about pretrial conditions later claimed as punishment, and therefore could not establish punitive intent on their part as required for Article 13, UCMJ, relief); *United States v. Combs*, 47 M.J. 330, 332 (C.A.A.F. 1997) (citing *United States v. Palmeter*, 20 M.J. 90, 97 (C.M.A. 1985) (“[T]he failure to voice a contemporaneous complaint of the alleged mistreatment is powerful evidence that it was not unlawful”). Of course, if a defense counsel believes his client's rights are being violated, he ought to be making other efforts to end the violation, such as communicating with the trial counsel or helping his client request redress under Article 138, UCMJ. See Major M. Patrick Gordon, *Sentencing Credit: How to Set the Conditions for Success*, ARMY LAW., Oct. 2011, at 7, 16 & n.85, for further discussion.

³³ *Barker*, 407 U.S. at 529.

³⁴ The author recommends less frequent demands—one every two to three months—in post-trial situations, as a matter of taste. Under *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the Government is supposed to process the case to action within 120 days of trial, so the first demand should precede that deadline by two or three months, to give the Government reasonable time to meet it. The second one should come after the Government fails to meet it. See *United States v. Garman*, 59 M.J. 677,

the client starts suffering new prejudice, it may well be time for a new demand.

E. Conform Your Conduct of the Case to the Demand.

The defense's monthly demands for speedy trial are supposed to demonstrate the client's eagerness to be tried speedily. Defense counsel's *conduct* will be examined to see if it demonstrates that eagerness.³⁵ If you are demanding speedy trial, your response to the electronic docketing notice should be consistent with that wish – ask for trial on the earliest date practicable (consistent with your duty to prepare for the case).³⁶ File your discovery requests early, or in an appropriate case, file no discovery request at all.³⁷ Before requesting a sanity board under RCM 706, consider whether you can get what you need in some other way.³⁸

678 (A. Ct. Crim. App. 2003) (“dilatory” post-trial objection of defense counsel led to court denying relief for slow post-trial processing). Even the first demand should be enough to establish that the client is more interested in speedy post-trial processing than in keeping the benefits of his involuntary excess leave status. This is the most important point.

³⁵ See *United States v. Titcombe*, No. 37618, 2011 WL 6026907, at *2 (A.F. Ct. Crim. App. Dec. 1, 2011) (defense counsel's demands for speedy trial held to be *pro forma* “in light of contemporaneous statements of defense counsel's unavailability”).

³⁶ See *United States v. Simmons*, No. 20070486, 2009 WL 6835721, at *15 (A. Ct. Crim. App. Aug. 12, 2009). In that Article 10 case, the defense made no explicit demand for speedy trial, but did request “immediate” trial in the docketing notice. The court held that the third *Barker* factor weighed neither in the Government's nor the defense's favor (i.e., the defense's conduct partly substituted for a speedy trial demand, since it at least suggested that the accused wanted to be tried speedily). A docketing request, even one that explicitly notes the defense's intent to raise speedy trial issues, is not itself a speedy trial demand. *United States v. Arab*, 55 M.J. 508, 513 n.6 (A. Ct. Crim. App. 2001).

³⁷ In a typical AWOL or drug use case, the Government has probably handed over all its evidence up front. What will discovery add? (It may well add something, but defense counsel should think about it before filing the request.) In a rape case, the alleged victim often has a serious legal, psychological, or chemical background that the Government is reluctant to investigate or help the defense investigate. Discovery may be vital in such a case. Responding to discovery can help a trial counsel to organize his thoughts and prepare his case; if the trial counsel is lazy or overwhelmed, the defense may want to take advantage of that fact by demanding no discovery. Defense counsel must decide whether the advantages of demanding (and litigating) discovery outweigh the advantages of foregoing it. No right should **ever** be exercised just to make the Government work harder, to make the case more expensive, or to avoid an ineffective assistance claim.

³⁸ If the client is already undergoing psychiatric treatment, defense counsel should routinely ask the client for a release of information (DD Form 2870), so that the defense counsel can talk to the client's providers and examine his records. This may provide counsel with everything he needs to know about whether the client is competent to stand trial or has psychiatric care issues that need to be raised at trial. Before giving the Government weeks of “reasonable” delay by invoking the RCM 706 process, the defense counsel must ask himself why he needs it. See *United States v. Colon-Angueira*, 16 M.J. 20, 22 (C.M.A. 1983) (51 days delay for a 706 board held reasonable); *Arab*, 55 M.J. at 512 (140 days reasonable); *United States v. Freeman*, 23 M.J. 531, 535-36 (A. Ct. Crim. App. 1986) (43 days reasonable).

Consider waiving the Article 32 investigation. Sometimes the Article 32 serves important purposes for the defense. It can commit a Government witness to testimony the defense needs. It can convince the command to drop a weak case, or increase their willingness to deal away some of the charges. Sometimes, however, the Article 32 gives nothing to the defense. It alerts the Government to weaknesses it can fix (such as fatal drafting errors on the charge sheet), and forces them to interview witnesses and prepare their case well before trial—which the defense does not always want them to do. Defense counsel should always think carefully before deciding whether to have an Article 32 hearing or to waive it.³⁹

Exercising the accused's right to an Article 32 investigation will not be held against the defense in a speedy trial case. However, an intelligent waiver of that right may enhance the defense case for relief—especially in an Article 10 case. Government delays pursuant to an Article 32 may be held reasonable. If there is no investigation, there is one less excuse for delay. In the RCM 707 context, waiving the Article 32 also deprives the Government of the opportunity to exclude large swaths of time from the 120-day window.

Avoid asking for continuances and extensions of time (this applies to the post-trial context as well).

IV. Trial Counsel: How to Forestall and Respond to Speedy Trial Demands.

If the TC receives a speedy trial demand, it may signal that the defense anticipates a speedy trial issue in that case. How should the TC respond? Even before receiving such demands, how should a TC prevent such issues?

A. Don't Panic.

A defense speedy trial demand does not lay any additional duty on the Government. The TC need not respond explicitly, either orally or in writing. If the Government is carrying out its duty to provide the accused with a speedy trial, and to move the case forward with reasonable speed, defense speedy trial demands can be taken in stride.

³⁹ Defense counsel may be tempted to have an Article 32 investigation (and demand large numbers of witnesses) to make a case difficult to try, or to give the Government a chance to make errors that will justify later relief. Such strategies are ethically dubious and not effective. In fact, meaningful relief for Article 32 errors is extremely difficult to obtain. See Major John A. Maloney, *Litigating Article 32 Errors After United States v. Thomas*, ARMY LAW., Sept. 2011, at 4, 12. It would ill serve a client in PTC to sacrifice a solid Article 10 issue for an Article 32 will-o'-the-wisp.

B. In Non-PTC Cases, Do Not Prefer Early.

In cases without PTC, speedy trial accountability under RCM 707 and the Sixth Amendment usually begins with preferal.⁴⁰ The Government controls the date of preferal. Why prefer early? The TC can interview witnesses, study evidence, prepare a case, line up an Article 32 investigating officer, and even conduct the investigation itself before preferring charges.⁴¹ If the TC is ready for trial on the day of preferal, because he did not prefer until he was ready, he will be well armed against speedy trial issues, no matter how many demands his opponent files.

If the accused is AWOL and charges are preferred to secure a warrant, the TC should make sure those charges are dismissed or acted upon as soon as the accused is returned to military control.⁴²

C. Give PTC Cases High Priority.

In cases involving PTC, early preparation is not possible. Typically, the TC learns about the case on the day of the crime. Pretrial confinement follows immediately. The DC, if he is wise, makes his first speedy trial demand within a few days of PTC. In the event of litigation, the military judge is going to examine every delay under the most rigorous speedy trial standards that exist in military law. To win this litigation, the TC should give these cases the highest priority, and push to try them as soon as possible. He will have to justify every delay. Telling the judge, "my caseload was very heavy," is unlikely to help. The blame in speedy trial cases attaches to the *Government*, not to the individual TC, and if the TC was too busy to move the case along to the judge's satisfaction, the Government may be held responsible for understaffing the military justice office.⁴³ If the TC's caseload really is heavy, he may need to

⁴⁰ *United States v. Grom*, 21 M.J. 53, 56 (C.M.A. 1985). As noted above, accountability can also begin with arrest, restriction in lieu of arrest, the entry onto active duty of a reserve component Soldier for UCMJ purposes, or the return to military control of an AWOL Soldier against whom charges have been preferred.

⁴¹ See 10 U.S.C. § 832(d) (2006) (crimes may be investigated under Article 32 even if the accused has not yet been charged).

⁴² The TC should remember that "military control" can begin even while the accused is in civilian confinement, once the military is made aware of his arrest. *United States v. Mullins*, No. 20090821, 2010 WL 3620239, at *1-2 (A. Ct. Crim. App. Mar. 25, 2010). If the command is not going to get him out of civilian confinement right away, this triggers the formal requirements of RCM 305.

⁴³ See *United States v. Simmons*, No. 20070486, 2009 WL 6835721, at *10 (A. Ct. Crim. App. Aug. 12, 2009). In that case, the inexperienced prosecutor (brand new both to his command and to military justice) had twenty-eight open cases at the time of trial, though only four or five had been preferred. The appellate court did not find the trial counsel's inexperience or his heavy caseload to be sufficiently mitigating—in fact, it refused to consider his inexperience at all. Even delays by the military judge (in docketing the case) counted against the Government for Article 10 purposes. *Id.* at *12-13.

work extra hours and sacrifice some weekends to move the PTC cases along. His reward will be seeing these cases tried on the merits.

To avoid being overloaded with “priority one” PTC cases, the TC, as first-line legal advisor to his company commanders, must educate them on the true standards and purposes for PTC. Some commanders are tempted to use PTC as an especially effective punishment (both faster and more severe than an Article 15), or to get an irritating Soldier out of the way. If this becomes routine, the TC will be overwhelmed with PTC cases.

D. Track Your Case Progress

Military Justice Online (MJO) tracks some aspects of case progress, at least the parts handled by the Government’s paralegal staff. Case analysis software such as CaseMap or Case Notebook will also track (with verifiable dates) various actions taken by counsel in preparing a case. The logged actions can be printed and used as evidence of reasonable diligence.

Less formal tools can also be used. The author once worked for a chief of justice who provided a blank “time sheet” for every TC for every court-martial. Each day, each TC had to write the date and what actions he took on that case. Counsel were admonished to “touch every case every day,” even if only to reread some evidence. Had that office ever had to litigate a speedy trial issue (and under that chief’s leadership, it did not), these sheets would have been useful evidence. Even if the TC does not do this for every case, he should do something like it when he sees speedy trial issues on the horizon – especially if the accused is in PTC.

The history of the Government’s efforts will be easier to reconstruct, and justify, if it was being written down as it happened. When the DC explicitly lists prejudice in his speedy trial demands, he avoids the appearance that he cooked up the prejudice while preparing his motion. When the TC tracks his actions on a case, even in an informal way, he avoids the appearance that he cooked up his “reasonable diligence” while preparing his answer. (And he will not have to struggle with his memory when the judge questions him about it.)

E. If the Defense Is Claiming Prejudice, Learn the Truth of the Matter, and Consider Fixing It.

Ongoing prejudice that can spell speedy trial relief overlaps with pretrial punishment that can justify Article 13 credit. As advisor to the accused’s commander, the TC should candidly advise him of the limits of his authority, and periodically ask about the accused’s status. If the defense is claiming some kind of ongoing prejudice, the TC should

check into the truth of the matter, and consider whether the issue ought to be fixed.⁴⁴

For example, a command may decide not to let the accused work, because the command no longer trusts him. This is not unlawful Article 13 punishment, but it is prejudice for Sixth Amendment and RCM 707 purposes. It may be the right answer for that Soldier and that unit. But perhaps another unit on post has an opening, a job that Soldier can do, to the mutual benefit of all concerned. In a combat zone where most Soldiers carry weapons, the commander may take away the accused’s weapon, out of concern that the Soldier will “snap” and do something dangerous. The accused may complain that he is somehow “stigmatized” by this. Perhaps the commander can accomplish his true purpose by taking the bolt and ammunition, but letting the Soldier keep the rest of the weapon.⁴⁵

V. Conclusion

The speedy trial regime created by the Constitution, the UCMJ, and the RCM, as interpreted by the military courts, strongly encourages straight play. Defense counsel are most likely to get relief if they say openly, often, and in writing, that their clients *want* speedy trial, and show themselves ready to try a case speedily. A defense counsel who demands speedy trial should conduct the case accordingly. He should press for early trial. He should avoid unnecessary actions that excuse Government delays.

The Government’s duty to provide the accused with a speedy trial is the same regardless of whether the defense demands speedy trial or not. Speedy trial demands improve the defense’s chance for relief, but only if the Government has denied the accused a speedy trial in the first place. By simply ensuring that each accused gets a speedy trial within the meaning of the law, the Government can avoid all such dismissals, and see cases tried on the merits.

⁴⁴ As a matter of professional courtesy, the trial counsel should follow up with the defense afterwards, to explain how the problem is being addressed (if it is), or why the defense’s allegations are not true. This kind of communication should be going on between trial and defense counsel all the time, regardless of whether speedy trial issues have arisen.

⁴⁵ See Gordon, *supra* note 32, at 13 & n.65.



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
JOINT BASE ELMENDORF-RICHARDSON BRANCH OFFICE
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

REPLY TO
ATTENTION OF:

APVR-RJA-TDS

6 January 2012

MEMORANDUM FOR Office of the Staff Judge Advocate, U.S. Army – Alaska, Joint Base Elmendorf-Richardson, Alaska

SUBJECT: Request for Speedy Trial by SPC Purity Driven-Snow, HHC, 3rd Maneuver Enhancement Brigade

1. I am a defense counsel with USATDS – JBER Field Office, and I represent SPC Driven-Snow with respect to her pending court-martial. Charges were preferred against her two days ago. Through me, she is requesting that these charges be forwarded and brought to trial as speedily as is practicable.
2. SPC Driven-Snow has been flagged since September 2011 based on the pending allegations. She previously intended to attend the Warrior Leader Course and compete for promotion to E-5, but has been unable to do so because of her flag. She has been unable to take online courses in ammunition handling for the same reason. During the same time, her pass privileges have been revoked, and her season tickets to the Anchorage Opera have been rendered valueless.
3. Furthermore, because of the pending charges, SPC Driven-Snow has been removed from her MOS-specific duties in the S-3 shop, and will not be allowed to join the unit in field exercises next month. She has no duties at all except for occasional ice scraping details. Her professional development is at a standstill, and is likely to remain so until her trial is complete.
4. Like every Soldier and every citizen, SPC Driven-Snow has the right to a speedy trial if she is going to be tried at all. She is eager to get this trial over and done with, so she can go back to doing meaningful work and building her career.
5. Accordingly, through me, SPC Driven-Snow requests that the command process her charges and trial with all speed, or else drop charges, unflag her, and let her go back to work.
6. POC is the undersigned at 907-384-xxxx.

EDWARD MARSHALL-HALL
CPT, JA
Defense Counsel



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
JOINT BASE ELMENDORF-RICHARDSON BRANCH OFFICE
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

REPLY TO
ATTENTION OF:

APVR-RJA-TDS

25 December 2011

MEMORANDUM FOR Commander, Warrior Transition Battalion, Joint Base Elmendorf-Richardson, Alaska

SUBJECT: Request for Release or Speedy Trial, PVT Eustache Dauger, Warrior Transition Battalion, Joint Base Elmendorf-Richardson, Alaska

1. PVT Dauger was placed in pretrial confinement today and was immediately moved to civilian confinement in the Anchorage Correctional Complex. No charges have been preferred against him as of yet, and he has not been informed of the accusations that form the basis of his pretrial confinement. Now, through me, he requests that he be released or tried as soon as possible.
2. PVT Dauger is assigned to the Warrior Transition Battalion due in part to issues that require medication (see attached medical records and medication list). The Alaska Department of Corrections does not permit a confinee's unit (or anyone else) to bring him medication. Instead, they require proof that the person has the prescription, and that the medication meets their standard for "emergency care," at which point they issue the medication themselves. The civilian authorities have refused to provide this medication to PVT Dauger.
3. Furthermore, PVT Dauger has a wife and child in the area, and being separated from them is very painful. He is not planning to leave town and abandon his family, or forego the medical care provided by the Army (or, upon his departure from the Army, the Veteran's Administration). If he is to be tried, he has every reason to stay in town and face trial.
4. PVT Dauger is anxious to see his case tried speedily, if it is to be tried at all, especially if he has to wait for trial in jail. He wants the benefit of his right to a speedy trial.
5. For these reasons, through me, PVT Dauger requests that he be released from confinement or else tried with all speed.
6. POC is the undersigned at 907-384-xxxx.

Encl
as

VERITABLE LOHENGRIN
CPT, JA
Defense Counsel



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
JOINT BASE ELMENDORF-RICHARDSON BRANCH OFFICE
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

REPLY TO
ATTENTION OF:

APVR-RJA-TDS

3 January 2012

MEMORANDUM FOR Office of the Staff Judge Advocate, United States Army – Alaska, Joint Base Elmendorf-Richardson, Alaska

SUBJECT: Request for Speedy Post-Trial Processing by PV2 Jean Splash.

1. On 2 November 2011, then-SGT Splash was convicted of one specification of abusing a public animal and six specifications of jumping from vessel into the water. His sentence to confinement is complete, but his record of trial is not. Through me, he is requesting that the record of trial be prepared as quickly as possible.
2. In anticipation of his upcoming separation, PV2 Splash has been contacting potential employers in the area. Two of these have refused him employment because he does not yet have a DD 214 (see attached employer's letters). He cannot get a DD 214 until his case goes through appellate review, and this cannot happen until the GCMCA acts on the sentence.
3. Also, PV2 Splash is anxious to know what the final result of his court-martial will be, and whether he can continue to serve.
4. Therefore, through me, PV2 Splash requests that post-trial processing of his case take place swiftly. I also request that this request itself be made part of the record of trial.
5. POC is the undersigned at 907-384-xxxx.

Encl
as

SAMR BJARNISON
CPT, JA
Defense Counsel