IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20110146
Private First Class (E-3) **MAURICE S. WILSON,** United States Army, Appellant	)	USCA Dkt. No. 13-0096/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issue

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF ARTICLE 10, UCMJ, WHEN THE GOVERNMENT FAILED TO ACT WITH REASONABLE DILIGENCE IN BRINGING HIM TO TRIAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On January 4, 7, 18, 25 and February 7, 2011, a military judge sitting as a general court-martial tried Private First Class (PFC) Maurice S. Wilson at Fort Drum, New York. Pursuant to his plea, the military judge convicted PFC Wilson of two specifications of heroin distribution and one specification of

violating a lawful order, in violation of Articles 92 and 112a, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892 and 912a (2006). Contrary to his plea, the military judge convicted PFC Wilson of introducing a controlled substance with the intent to distribute, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2006). The military judge sentenced appellant to reduction to Private E-1, forty months confinement, and a bad-conduct discharge. (JA 8). The convening authority, except for confinement, approved the adjudged sentence. He approved only twenty-one months confinement and credited Private First Class Wilson with 174 days confinement against the sentence to confinement. (JA 13).

On August 28, 2012, the Army Court summarily affirmed the findings of guilty and the sentence. (JA 1). On October 31, 2012, appellant filed a Petition for Grant of Review. This Honorable Court granted appellant's petition for review on December 17, 2012. (JA 4).

Statement of Facts

The following timeline illustrates the procedural events from initiating confinement to sentencing.

Day	*Date*	*Event*
1	17 Aug 10	PFC Wilson is placed in confinement
29	14 Sep 10	CID issues their final report (JA 46)
37	22 Sep 10	Charges preferred
46	01 Oct 10	Article 32 IO appointed
61	16 Oct 10	Article 32 IO leaves for TDY
66	21 Oct 10	Defense submits OTPG
68	23 Oct 10	Article 32 IO returns from TDY
77	01 Nov 10	Brigade leaves for JRTC Rotation
86	10 Nov 10	Defense submits revised OTPG
100	24 Nov 10	Brigade returns from JRTC Rotation
106	30 Nov 10	Convening Authority rejects OTPG
112	06 Dec 10	New Article 32 IO appointed
114	08 Dec 10	PFC Wilson notified of new 32 IO
119	14 Dec 10	PFC Wilson demands speedy trial
121	16 Dec 10	Article 32 held
125	20 Dec 10	Article 32 IO submits recommendation
127	22 Dec 10	Convening Authority refers charges
128	23 Dec 10	Referred charges served on PFC Wilson
141	04 Jan 11	PFC Wilson arraigned
141	04 Jan 11	PFC Wilson files motion to dismiss under Article 10, R.C.M. 707, Fifth and Sixth Amendments
143	07 Jan 11	Government requests Military Judge to exclude delay under R.C.M. 707(c)
145	08 Jan 11	Military Judge denies PFC Wilson's dismissal motion and grants government's request for excludable delay
175	07 Feb 11	PFC Wilson tried and sentenced

(JA 195).

Private First Class Wilson was assigned to 3rd Brigade Combat Team, 10th Mountain Division (Light Infantry), located at Fort Drum, New York. On August 17, 2010, a confidential source reported to the police that PFC Wilson was selling drugs out of

his barracks room. A search was conducted pursuant to a search authorization. *Id.* Private First Class Wilson was immediately placed into pretrial confinement in a civilian medium security prison located in Lowville, New York. (JA 21-22, 195).

During the course of his confinement, PFC Wilson was the only African-American inmate in his twenty-man bay and was subjected to constant racial slurs such as "fucking nigger" and "monkey". (JA 24-26). Inmates displayed tattoos of Nazi symbols, to include the swastika, and shaved haircuts to identify themselves as skinheads, a racist neo-Nazi group. (JA 26). In addition, these inmates would make references to "old slavery times" in the presence of PFC Wilson. (JA 25). To avoid these racial attacks, PFC Wilson requested protective custody and, in the alternative, a private cell in a different bay. However, prison officials denied the requests. (JA 85). Private First Class Wilson endured this treatment for 174 days.

On September 14, 2010, the Army Criminal Investigation Command (CID) closed its investigation and issued its final report. (JA 46). Eight days later on September 22, 2010, the government finally preferred charges against PFC Wilson. From the date of confinement to preferral of charges, PFC Wilson was in pretrial confinement for thirty-seven days. On October 1, 2010, Captain (CPT) Jackson R. Irish was appointed as the Article 32, UCMJ, investigating officer. (JA 195-96) His

appointment order dictated that the Article 32, UCMJ, investigation "take priority over all normal duties, TDY and leave" and to be initiated within seven days of the appointment. (JA 176-78) However, on October 16, 2010, CPT Irish left on temporary duty (TDY) for a conference in Tucson, Arizona and did not return until October 27, 2010. (JA 196-97).

On December 6, 2010, over two months after the initial Article 32, UCMJ, appointment, Captain (CPT) John Mossman was appointed as the new Article 32, UCMJ, investigation officer because CPT Irish was scheduled to be TDY again. (JA 197). Private First Class Wilson was in confinement for a total of 114 days when he learned of the second Article 32, UCMJ, investigation officer appointment. On December 14, 2010, PFC Wilson submitted a demand for speedy trial. (JA 198). However, PFC Wilson was not arraigned until January 4, 2010, after spending 141 days in pretrial confinement. (JA 199).

On January 4, 2010, defense counsel filed a motion with the court to dismiss the charges for violating the Fifth and Sixth Amendments of the U.S. Constitution, Article 10, UCMJ, and R.C.M. 707. (JA 102). The court heard arguments beginning on January 7, 2010 and the military judge issued his decision, denying PFC Wilson's motion, on February 7, 2011. (JA 21-94, 207). With respect to the R.C.M. 707 violation, the military judge retroactively excluded government time and found a total

of 109 days of government delay. The military judge also found that the defense did not meet its burden to establish a Fifth Amendment due process violation. (JA. 207-14).

In analyzing the Sixth Amendment and Article 10, UCMJ, violations, the military judge used the test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), and applied the *Barker* factors to PFC Wilson's case. Although the military judge was "troubled by certain time periods in this case," and found that the government did not move forward with "constant motion," the military judge found the government acted with reasonable diligence and denied the motion to dismiss. *Id.*

Summary of Argument

The appellant was denied his right to a speedy trial while in pretrial confinement. The government failed to uphold its basic responsibility to exercise reasonable diligence to bring the appellant to trial in a timely manner. Due to the excessive delay at no fault of appellant, PFC Wilson requests this Court dismiss the charges and their specifications with prejudice.

Standard of Review

A military judge's conclusions as to whether the government used reasonable diligence to take immediate steps to try an accused is a question of law this Court reviews *de novo*. The military judge's findings of fact are given "substantial

deference" unless they are clearly erroneous. *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003).

Argument

Private First Class Wilson's right to a speedy trial flows from various sources, including the Sixth Amendment, Article 10, UCMJ, and Rule for Courts-Martial (R.C.M.) 707 of the Manual for Courts-Martial [hereinafter M.C.M.]. *Cooper*, 58 M.J. at 57. Private First Class Wilson asserts that his right to a speedy trial was denied under Article 10, UCMJ.

When a service member is confined prior to trial, "immediate steps shall be taken . . . to try him or to dismiss the charges and release him." UCMJ, art. 10. Article 10, UCMJ, provides broader rights to speedy trial than does R.C.M. 707. *United States v. Kossman*, 38 M.J. 259, 261 (C.M.A. 1993). The test applied to determine compliance with Article 10, UCMJ, is whether the government has acted with "reasonable diligence." *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999); *Kossman*, 38 M.J. at 262. "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *United States v. Tibbs*, 15 C.M.A. 350, 353, 35 C.M.R. 322, 325 (C.M.A. 1965). However, an "overall lack of forward motion" violates Article 10, even if in compliance with R.C.M. 707. *United States v. Hatfield*, 44 M.J. 22, 24 (C.A.A.F. 1996).

The basic framework for determining whether the government proceeds with reasonable diligence is set forth in *United States v. Tippit*, 65 M.J. 69, 72 (C.A.A.F. 2007) and *Barker v. Wingo*, 407 U.S. 514 (1972). This test requires a balancing of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant. *Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005). Ultimately, an Article 10, UCMJ, motion will prevail when it is established that the government "could have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to do so." *Kossman*, 38 M.J. at 261.

In *United States v. Simmons*, 2009 WL 6835721, at *4-9 (Army Ct. Crim. App. 2009) (attached), the Army Court of Criminal Appeals (ACCA) thoroughly analyzes the importance of Article 10, UCMJ, its legislative history, and the Article's purpose to avail service members greater protections than those confined in civilian jurisdictions.

A. Analysis of Article 10, UCMJ.

The Supreme Court emphasized that "[i]n our society, liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding constitutionality of Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, the federal pretrial

detention statute, against a facial challenge). While liberty is also the "norm" for soldiers facing trial by court-martial, soldiers have no right to bail and no access to a military judge until referral. In addition, R.C.M. 305, which sets forth the procedures that control pretrial confinement of soldiers, contains few of the protections the Supreme Court found critical to its holding in *Salerno*.

Specifically, 18 U.S.C. § 3060 sets strict time benchmarks the government must meet while progressing to trial. These time limits do not apply to military accused; rather, the only set time limit applicable to military personnel is the 120-day clock of R.C.M. 707, which ends at arraignment. Furthermore, military personnel are not privy to a bail system which would enable an alternate route to freedom for the accused. Absent these equivalent protections for soldiers confined pending trial, the mandate of Article 10, UCMJ, gains additional importance and must be rigorously enforced and upheld.

Article 10, UCMJ, requires the government to take "immediate steps" to "try" an accused, which means "to determine legally the guilt or innocence of a person" or to conduct "examination or investigation into guilt or innocence." *Cooper*, 58 M.J. at 59 (internal quotations and citations omitted). It is one of several protections in the UCMJ intended to prevent soldiers from being "put in the clink and held there for weeks,

sometimes months, before [being] brought to trial." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the House Comm. On Armed Services*, 81st Cong. 906 (1949) (Statement of Mr. Anderson, Member, Subcomm. Of the Comm. On Armed Services) (hereafter *H.R. 2498*), *reprinted* in *Index and Legislative History, Uniform Code of Military Justice* (1950). Underlying these "protections" was "the idea . . . to provide that there be a speedy trial but not one that is so speedy that the man cannot prepare his own defense." *H.R. 2498* at 905. In direct contrast to the government's actions in PFC Wilson's case, the drafters sought to protect soldiers, presumed innocent, without access to bail, and held merely to ensure their presence at trial, from spending weeks in confinement prior to the government even preferring charges.

Article 10, UCMJ, is "more stringent" or "more exacting" than the Sixth Amendment, and provides "greater protections for persons subject to the UCMJ than does the Sixth Amendment speedy trial right." *Cooper*, 58 M.J. at 60 (citing *Kossman*, 38 M.J. at 259) ("greater protections"); *see also Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) ("more stringent"); *Mizgala*, 61 M.J. at 124 ("more exacting") (citations omitted). Therefore, "Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10[, UCMJ,] violation." *Id.* at 127.

In sum, the Sixth Amendment applies to all soldiers facing court-martial whereas Article 10, UCMJ, only applies to soldiers in pretrial confinement. Although the *Barker* Sixth Amendment test is used to determine whether Article 10, UCMJ, has been violated, this Court should place greater scrutiny on the government's handling of PFC Wilson's case. For common drug offenses, PFC Wilson endured pretrial confinement for 174 days.

B. *Barker v. Wingo* Factors

Applying the *Barker* factors in Private First Class Wilson's case leads to the conclusion that the government did not proceed with reasonable diligence.

1. Length of Delay

Private First Class Wilson sat in confinement for thirty-seven and forty-six days, respectively, until the government preferred charges and appointed an Article 32, UCMJ, investigating officer. (JA 195-96). One-hundred and twenty-one days, over four months, passed before the government held the Article 32, UCMJ, investigation. (JA 198). Only on day 175 did the government decide to bring PFC Wilson before the court to try him. (JA 199). At no point throughout the entire duration of PFC Wilson's incarceration did defense make a formal or written request for delay. (JA 106). On the contrary, PFC Wilson sought to expedite his case, submitting multiple offers

to plead guilty and demanding a speedy trial. (JA 196-97, 203-6).

2. Reasons for Delay

Due to the admitted failure of the government to request excludable delay during PFC Wilson's 174 day pretrial confinement, the government asked the military judge to retroactively exclude large time periods between October 17, 2010 and January 4, 2011. (JA 36-64). However, the military judge's retroactive exclusion does not apply to appellant's Article 10, UCMJ, claim. During the military judge's inquiry, the government claimed it took reasonable measures to make progress in the investigation. (JA 42). The military judge did not agree:

> MJ: I mean, here is the thing that is not making a lot of sense to me. It seems to me that the government seems to believe that you can only do one thing at a time. Meaning . . . for example, and we will get to this in a second, I'm negotiating with the defense over a possible alternative disposition that I can't be working to get immunity or to figure out immunity issues, or much less on the same day that I decide I'm not going to accept an offer to plead guilty that I can't cut the immunity orders and say let's go to trial. So I guess part of the problem the court wrestles with is when it looks at the facts in this case it seems to be an "either–or" mentality, "I can only be doing one thing on this case at a time."

(JA 48).

A. Preferral of Charges Delay

As to the delay to prefer charges, the government stated it took thirty-seven days after appellant's confinement to complete the investigation and that CID did not make the evidence available to the government. (JA 45-47). No explanation or testimony exists to explain why the government's own evidence was not accessible during those thirty-seven days. There is also no evidence that the trial counsel requested access to the CID investigation or any request to expedite the investigation due to PFC Wilson's pretrial confinement. There was no forward motion for over a month and PFC Wilson was forced to remain in confinement without knowing the specific charges against him. This delay is in spite of the fact that the government had to show probable cause to confine PFC Wilson, a higher standard than that required to charge him. R.C.M. 305(h)(2)(B) and R.C.M. 307(b)(2).

B. The Article 32 Investigation Delay

As to the egregious 121-day delay of the Article 32, UCMJ, investigation, the government averred that the first Article 32, UCMJ, investigation officer was sent on temporary duty (TDY) for a week and then to the Joint Readiness Training Center [hereinafter JRTC] for a month. (JA 47-50). This travel was in

spite of the special court-martial convening authority's order to the investigation officer to prioritize the investigation over all normal duties, TDY, and leave. (JA 55-57, 176). When the military judge asked why "this individual officer is so important to the war effort and to the JRTC training environment . . . that he couldn't hold that Article 32 investigation, that he was order[ed] to hold in a timely manner" the government simply replied that the officer needed to be at the training. (JA 56-57). The military judge did not agree:

> MJ: Let me be clear about something here, Counsel my concern is you are telling me, "Hey, we wouldn't do it because we were at JRTC," and you have got a guy in jail, that you put in jail, and he has got a right to a fair and speedy trial, and yes, operational constraints could make a huge difference, but when you are telling me that a guy who has been ordered, "Thou shall be there," suddenly is not there and I am supposed to say, "Well it is excusable because he was on a training mission." Look units [sic] budget all the time for training, for officers and enlisted members to be out of the loop, for losses, for gains, and make accommodations, for example for when they go in the box at JRTC they train without certain individuals as part of the training mechanism.

(JA 56).

Despite his travel schedule, the government continued to rely on the same Article 32, UCMJ, investigation officer to complete his duties. The government waited seventy-six days, more than full two months, before appointing a second Article 32

officer, fully aware that the first Article 32, UCMJ, officer would attend JRTC. (JA 197-98). At any point in time, the government could have responsibly appointed another Article 32, UCMJ, officer to avoid the unconscionable delay of 121 days. Even better, the government should have ascertained the travel, training schedule, and ultimate unavailability of the *first* investigation officer prior to appointing him.

Only after PFC Wilson's speedy trial demand and the appointment of a second Article 32, UCMJ, investigation officer did the Article 32, UCMJ, investigation take place on day 121. (JA 198). (App. Ex. IV). The government's decision to place PFC Wilson in pretrial confinement and then to drag the subsequent investigation demonstrates a clear lack of reasonable diligence.

3. Demand for Speedy Trial

Private First Class Wilson demanded speedy trial on December 14, 2010 and was arraigned twenty-three days later. *Id.* In addition to those demands, appellant filed a motion to dismiss for government's failure to provide a speedy trial. (JA 102-46).

4. Prejudice to Private First Class Wilson

The prejudice factor weighs greatly in PFC Wilson's favor despite the Supreme Court holding that "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the

constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25, 25 (1973); *see also United States v. Miller*, 66 M.J. 571 (upholding military judge's dismissal of charges and specifications due to a violation of Article 10, UCMJ, even in the absence of either a demand for speedy trial or prejudice). In light of *Barker*, this Court's prejudice analysis should consider the following interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern; and (3) to limit the possibility that defense will be impaired. *Barker*, 407 U.S. at 532 (footnote omitted).

The first and second interests are a primary concern here as the conditions of PFC Wilson's confinement were oppressive. While the government took weeks to accomplish the simple task of preparing charges and passively awaited the return of the Article 32, UCMJ, investigation officer for over two months, PFC Wilson remained in pretrial confinement. (JA 20, 195-98). While at the incarceration facility, PFC Wilson was subjected to persistent racial harassment. As the only African-American male in an entirely white cell population, PFC Wilson was called "nigger" and "monkey." Inmates walked by PFC Wilson and talked about "old slavery times" and said there were "fucking niggers in here." (JA 24-25). Private First Class Wilson was forced to endure this treatment and wait on the government's investigation, all the while surrounded by his Nazi-tattooed

cell mates for 174 days. (JA 26). Although PFC Wilson informed the confinement facility supervisors about the racial harassment and threats, they took no action to either protect him or stop the harassment. (JA 85).

The government also abused the second interest-to minimize pretrial confinee's anxiety and concern. Private First Class Wilson was not informed of his charges until after spending thirty-seven days in confinement. In addition, PFC Wilson was arraigned twenty-two days after demanding a speedy trial. (JA 195-99). The government or military judge issued no explanation as to why PFC Wilson's arraignment could not take priority over weekend pass, scheduled leave, or other courts-martial with non-confined defendants. Rather, it appears that PFC Wilson was forced to endure his oppressive confinement until the government and military judge found a date convenient to them to arraign PFC Wilson.

The complexity of PFC Wilson's case cannot explain the government's lengthy delay. Private First Class Wilson was charged and convicted of a false official statement and simple drug offenses. (JA 8-10). The government's argument that the investigation was complex and required an inordinate amount of time to prosecute is simply unreasonable. The government found drugs in PFC Wilson's barracks room, tested those drugs, and placed PFC Wilson in confinement. The investigation was open

and shut within four weeks when CID issued their final report (an event with no importance to the prosecution of PFC Wilson's case) on September 14, 2010, day twenty-nine of PFC Wilson's confinement. (JA 46). The government did not require an additional 146 days to bring PFC Wilson to trial.

In conclusion, under the *Barker v. Wingo* analysis, PFC Wilson was subject to an oppressive duration of pretrial confinement attributed to the government's unreasonable lack of forward progress. This is despite PFC Wilson's demand for speedy trial, degrading pretrial confinement conditions, and offers to plead guilty. If the government exercised reasonable diligence, PFC Wilson would have been brought to trial months earlier. Instead, PFC Wilson was unnecessarily forced to remain in confinement.

The government was inactive at the very start of PFC Wilson's case and remained ineffective and inefficient right up to the moment PFC Wilson was brought to trial.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court dismiss the charges and their specifications.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 4,017 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface (12-point, Courier New font) using Microsoft Word, Version 2007 with no more than ten and a half inch characters per inch.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Wilson,* Crim.App.Dkt.No. 20110146, USCA Dkt. No. 13-0096/AR, was electronically filed with both the Court and Government Appellate Division on January 30, 2013.

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APPENDIX

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
GALLUP,[1] TOZZI, and HAM
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class DAVID M. SIMMONS
United States Army, Appellant

ARMY 20070486

Headquarters, 2d Infantry Division
Gregory A. Gross, Military Judge
Lieutenant Colonel Walter M. Hudson, Staff Judge Advocate (pretrial)
Lieutenant Colonel Kevin M. Boyle, Staff Judge Advocate (post-trial)

For Appellant: Colonel Christopher J. O'Brien, JA; Lieutenant Colonel Steven C. Henricks, JA; Major Sean F. Mangan, JA; Captain Christopher W. Dempsey, JA (on brief).

For Appellee: Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Captain Philip M. Staten, JA (on brief).

12 August 2009

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAM, Judge:

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of absence without leave, failure to go to his appointed place of duty, failure to obey a lawful order, and disorderly conduct, in violation of Articles 86, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. § 886, 892, and 934 [hereinafter UCMJ].[2] The military judge sentenced appellant to a bad

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[1] Senior Judge GALLUP took final action in this case prior to his retirement.

[2] Appellant was also arraigned on additional charges and specifications of failure to go to his appointed place of duty, failure to obey a lawful order, rape, assault (two specifications), and kidnapping, in violation of Articles 86, 92, 120, 128, and 134, UCMJ. The government dismissed those charges and specifications after arraignment but prior to trial.

conduct discharge, confinement for four months, and reduction to Private E1. The convening authority approved the adjudged sentence and credited appellant with 148 days of confinement against his sentence to confinement, which included 133 days credit for pretrial confinement and an additional 15 days credit for unlawful pretrial punishment in violation of Article 13, UCMJ.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant contends the military judge erred by failing to dismiss the charges and specifications due to a violation of his Article 10, UCMJ, right to a speedy trial. We agree. The government's processing of appellant's case did not demonstrate reasonable diligence. Because the remedy for a violation of Article 10, UCMJ, is dismissal with prejudice of the affected charges, we do not address appellant's second assignment of error alleging dilatory post-trial processing.

FACTS

Appellant was absent from his unit without leave from 27 November 2006 until he was apprehended and placed into pretrial confinement on 18 December 2006.[3] On 15 December 2006, while appellant's absence was ongoing, his wife, CS, alleged that appellant raped her that day. Agents for the Army's Criminal Investigation Division (CID) interviewed CS on 15 December 2006, questioned appellant on 18 December 2006, and finished the bulk of their interviews in the case on 5 January 2007 (with the exception of follow-up interviews of one or more potential witnesses on 14 February 2007 and 5 March 2007).[4] There is no indication

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[3] The parties stipulated, and the military judge found as fact, that appellant's pretrial confinement began on 18 December 2006, and we use this date for purposes of examining the speedy trial issue. Near the end of appellant's trial on the merits, the military judge revised the initial inception date of appellant's pretrial confinement from 18 December to 19 December 2006. Accordingly, for purposes of pretrial confinement credit, appellant was in pretrial confinement for 133 days. Appellant was apprehended late in the evening of 18 December 2006, but apparently not actually ordered into confinement until the early morning hours of 19 December 2006. Whether appellant was confined 133 or 134 days prior to his trial is not critical to our analysis of the speedy trial issue. In fact, appellant was brought to trial on day 135 of his confinement, although the day of trial is not counted as a day of pretrial confinement because it is counted as a day of post-trial confinement. *See United States v. DeLeon*, 53 M.J. 658, 660 (Army Ct. Crim. App. 2000).

[4] A telephonic interview on 5 March 2007 involved a potential "involuntary manslaughter" charge. Appellant's wife miscarried sometime in the summer of 2006 and, during her initial statement on 15 December 2006 concerning the alleged rape,

(continued . . .)

there was any physical evidence in the case; accordingly, there is no evidence that any forensic evaluations were performed.

From appellant's apprehension on 18 December 2006 until 3 April 2007, the date the military judge arraigned appellant and litigated the defense motion to dismiss the charges and specifications due to a violation of Article 10, UCMJ, (a period of 107 days), the government believed and contended that, under the Status of Forces Agreement[5] between the United States and the Republic of Korea, the Republic of Korea had primary jurisdiction over the case. Under the government's understanding of the SOFA, this meant that "the [United States] could not prosecute these Soldiers upon those charges over which [the Republic of Korea] had criminal jurisdiction until it was either released by [the Republic of Korea] or the Soldiers had been fully prosecuted by the [Republic of Korea]."

Consistent with the government's interpretation of the SOFA, the government sought a waiver of the Republic of Korea's right to primary jurisdiction on 8 January 2007. Three days later, on 11 January 2007, the government obtained a waiver from the Republic of Korea (day twenty-five of appellant's pretrial confinement). In its brief in response to appellant's motion to dismiss for violation of Article 10, UCMJ, the government argued to the trial court its perceived lack of primary jurisdiction was a legitimate reason for delay in preferring charges or proceeding further against appellant, and contended no time from initiation of confinement on 18 December 2006 until 11 January 2007 should count against it for Article 10, UCMJ, purposes.

(. . . continued)
she "made a comment" to the investigating agent about the miscarriage. The CID agent's activity summaries, considered as evidence by the military judge during the speedy trial motion, reveal trial counsel was looking into a "death of an unborn child allegation" under Article 119a, UCMJ, against appellant due to an alleged assault seventeen days before the miscarriage. The agent activity summaries reveal directions to the lead investigating agent on 15 February 2007 to contact the local Troop Medical Clinic "reference the child." It took agents until 5 March 2007 to make one phone call concerning this allegation, which revealed that "the OB Dr. [sic] doesn't feel [appellant] caused miscarriage," and the government never charged appellant with that offense.

[5] Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, United States-ROK [hereinafter SOFA], Article XXII, 17 U.S.T. 1677, T.I.A.S. No. 6127. The SOFA was amended on 19 January 2001, however, the amendments are not relevant to the provision discussed herein.

In support of its argument, the government filed an affidavit with the court from its chief of military justice, Major (MAJ) B, repeating this understanding of the SOFA.[6]

In fact, the SOFA clearly and specifically grants primary jurisdiction to the United States "over members of the United States armed forces . . . in relation to . . . offenses solely against the person of . . . a dependent."[7] On the day the parties litigated the speedy trial motion, the military judge corrected the government's mistaken reading of the SOFA, and the government conceded that the United States had primary jurisdiction over the offenses all along.

Captain (CPT) B, the initial trial counsel on the case, was new to Korea and military justice. He was trial counsel for a brigade of approximately 4200 soldiers, and, although he was working on approximately "28 open cases either being investigated or waiting for preferral" or action by the convening authority, he had only "two or three [general courts-martial] actually preferred and one [special court martial]." There is no evidence that any other case CPT B was working on, preferred or merely "open," involved a soldier in pretrial confinement.[8] Captain B had no training on the SOFA, and he never read it. The government assigned a more experienced counsel to the case in late January or early February to replace CPT B. Captain B and his brigade were involved in an annual field training exercise from 8-29 January 2007.

The government preferred charges against appellant on 17 January 2007, thirty-one days after ordering him into pretrial confinement, six days after receiving the unnecessary waiver of primary jurisdiction from the Republic of Korea, and

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[6] As part of the evidence on the speedy trial motion, the government also submitted a memorandum from appellant's company commander to the general court-martial convening authority. The memorandum, dated 3 January 2007, informed the convening authority that charges were not forwarded within eight days as required by Article 33, UCMJ, because "the matters alleged against him are still under investigation." The memorandum did not mention the government's belief that the Republic of Korea had primary jurisdiction over the offenses, or that the United States needed to seek and obtain release of jurisdiction before proceeding.

[7] SOFA, Article XXII, 17 U.S.T. at 1695, para 3(a)(i). *See also* United States Forces, Korea Reg. 1-44, Criminal Jurisdiction Under Article XXII, Status of Forces Agreement, para. 7c.

[8] Major B's affidavit, submitted by the government on the speedy trial motion mentions one soldier in pretrial confinement in addition to appellant. The affidavit does not state whether this other soldier was in the same brigade as appellant, or whether the trial counsel for appellant's case was also responsible for the other confined soldier's court-martial.

while the annual training exercise was ongoing. The special court-martial convening authority (SPMCA) appointed an officer to conduct a pretrial investigation under Article 32, UCMJ, on 24 January 2007. The SPCMCA later excused this officer and, on 1 February 2007, appointed a second investigating officer (day forty-six of appellant's pretrial confinement).

The SPCMA's appointment memorandum directed the investigating officer to "conduct the investigation within seven (7) calendar days of receipt" of the memorandum, and delegated to the investigating officer the authority to grant delays "up to seven days." The memorandum also specified that the pretrial investigation "takes priority over all normal duties, [temporary duty], and leave." Despite the SPCMA's direction, the investigating officer waited until 6 February 2007 before he even contacted counsel for the government or the defense to set a date for the pretrial investigation, and initially scheduled the investigation to begin on 9 February 2007, beyond the seven days the SPCMA gave him to complete the investigation (day fifty-four of appellant's pretrial confinement). After granting the defense a seven-day delay until 16 February 2007, the investigating officer did not conduct the investigation during the normal duty day but during the evening. He also refused to proceed with the investigation over a four-day weekend because he had prior plans to visit friends in Seoul.[9] The pretrial investigation concluded on 22 February 2007 (day sixty-seven of appellant's pretrial confinement). The investigating officer received the twenty-four page summarized transcript on 5 March 2007, but did not forward his report to the SPCMA until 13 March 2007, nineteen days after testimony in the investigation concluded and forty-one days after the convening authority appointed him and directed that he complete the investigation in seven days (day eighty-six of appellant's pretrial confinement). The investigating officer forwarded his report only after prodding by both government and defense counsel, including the defense counsel's request to the investigating officer for "any and all haste in this process."[10] There is no evidence that the investigating officer sought additional time from the convening authority to complete the report. The government is responsible for all the days except for seven days of defense requested delay. On the day the investigating officer forwarded his report, the defense submitted a request for reconsideration of the military

[9] Although the defense counsel initially thought he would be unavailable on the four-day weekend, he was available and willing to proceed had the investigating officer agreed. The investigating officer testified that he did not continue the hearing over the weekend because "[he] went down to visit some friends in Seoul," and, in response to the question, "Is that the only reason that you didn't continue?" the investigating officer responded, "Yes, that was my reason."

[10] Appellant's defense counsel made this request in an email he sent to the investigating officer on 8 March 2007.

magistrate's decision to continue appellant's pretrial confinement, which was denied on 22 March 2007.

On 24 March 2007, eleven days after receiving the investigating officer's report, the convening authority referred all charges and specifications to a general court-martial. Due to concerns over the length of time appellant had already spent in pretrial confinement, the staff judge advocate requested an "emergency" meeting with the convening authority to refer appellant's case to a general court-martial. The military judge arraigned appellant and heard the defense motion to dismiss for violation of Article 10, UCMJ, on 3 April 2007 (day 107 of appellant's pretrial confinement). During the hearing on the motion, the military judge stated that the government forwarded its docket request to defense counsel on 26 March 2007 and requested a trial date of 13 April 2007. The government's requested trial date was based upon the fact that the primary witness in the case, appellant's wife, was out of the country and was expected to return to Korea on 12 April 2007. Consequently, they requested a trial date the day following her expected return. The defense, on the other hand, completed the docket request on 28 March 2007 and "requested an immediate trial the following day on [29 March 2007]," which the military judge considered a request for speedy trial.

Despite the defense request on 28 March 2007 for "immediate trial," the military judge initially docketed the case for 7 May 2007 – forty days later. The military judge selected this trial date "because there was nothing else available on the docket." Despite knowing the government's primary witness was not supposed to return to Korea until 12 April 2007, the military judge stated "the fact the [appellant's] wife is in the Philippines had nothing to do with [the military judge] docketing the case on 7 May 2007. If the government wanted to proceed, they would have had to get the wife back here or go to trial without her. So that had nothing to do with the docketing of the case." Subsequently, 30 April 2007 became available for trial and the military judge rescheduled appellant's case for that date.

Appellant ultimately went to trial on 1 May 2007. On that day, the government dismissed the offenses involving appellant's wife, including rape and kidnapping, and appellant pled guilty to the remaining military offenses. Appellant spent a total of 134 days in pretrial confinement awaiting trial, and received a sentence including, *inter alia*, confinement for four months; less time than he served awaiting trial, not including an additional fifteen days credit for unlawful pretrial punishment.[11]

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[11] The unlawful pretrial punishment appellant suffered, which the government conceded at trial, involved: 1) the government's failure to pay appellant the entire time he was in pretrial confinement; 2) appellant was unshaven and remained

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While in confinement, and through no fault on his part, appellant lost his apartment, which was rented to new tenants. A friend of appellant's informed appellant that CS sold all of appellant's personal possessions in order to purchase a plane ticket to the Philippines. Due to a finance error, appellant was not paid the entire time he was in confinement, which resulted in closure of his bank account due to lack of activity. Appellant was caught in a proverbial "Catch-22:"[12] he "wasn't being paid because . . . [he was] in the finance system as AWOL and then [finance couldn't] start [his] pay back up again without an account for it to go into."

The military judge concluded that "[a]lthough there were several days of delay that the Government cannot justify, the total processing time was not unreasonable." The military judge found the government's mistaken understanding of the SOFA caused "unnecessary delay," and the "delay in concluding the Article 32, UCMJ, hearing and obtaining the report from the [investigating officer was] unjustified." The military judge balanced these delays against the brigade training exercise and the fact that "the initial trial counsel was new to the unit and had a heavy caseload." Despite these "few days [that] were wasted due to the government's errors," the military judge found the government acted with "reasonable diligence . . . [t]he facts show that the reason for the delay was not due to government malice or deliberate dragging of its collective feet." Finally, the military judge concluded appellant was not prejudiced as his "ability to defend against the charges was not affected by any delay," and denied the defense motion to dismiss.

LAW AND ANALYSIS

The government brought appellant to trial on 1 May 2007, the 135th day of his confinement, at which he entered unconditional guilty pleas to the remaining

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improperly handcuffed, shackled, and restrained by a waistband during a portion of his Article 32, UCMJ, pretrial investigation; and 3) appellant's command provided an improper uniform for wear during the Article 32, UCMJ, investigation. The Article 32, UCMJ, investigating officer noticed appellant's appearance, and commented that "walking in in [sic] shackles and handcuffs makes a person look guilty already." We express no view on whether these actions constitute unlawful pretrial punishment in violation of Article 13, UCMJ.

[12] The term "Catch-22," comes from Joseph Heller's 1961 novel of the same name and means a "problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." http://www.merriam-webster.com/dictionary/catch-22 (last visited 3 August 2009).

offenses.[13] Prior to his pleas, appellant fully litigated his motion to dismiss for violation of Article 10, UCMJ. Accordingly, appellant preserved the issue for appellate review. *See Mizgala*, 61 M.J. 127.

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[13] The military judge arraigned appellant on 3 April 2007, 107 days into appellant's pretrial confinement. Although the arraignment stopped the speedy trial clock for purposes of Rule for Courts-Martial [hereinafter R.C.M.] 707's 120-day clock, arraignment does not "stop the clock" for purposes of Article 10, UCMJ. *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003); *see also* R.C.M. 707. Rule for Courts-Martial 707 allows a maximum of 120 days between preferral of charges or imposition of restraint and when an accused is "brought to trial." An accused is "brought to trial" within the meaning of R.C.M. 707 at the time he is arraigned. Article 10, UCMJ, however, requires the government to take "immediate steps" to "try" an accused, which means "to determine legally the guilt or innocence of a person" or to conduct "examination or investigation into guilt or innocence." *Cooper*, 58 M.J. at 59 (internal quotations and citation omitted). Similarly, the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, codified at 18 U.S.C. §3161 *et seq.* [hereinafter "Speedy Trial Act"], which governs trials in the federal district courts, states that, in general, when a plea of not guilty is entered, trial "shall commence" within seventy days from filing the information or indictment. 18 U.S.C. §3161(c)(1). Trial "commences" for purposes of the Speedy Trial Act "when the voir dire process begins." *See United States v. Scaife*, 749 F.2d 338, 343 (6th Cir. 1984), and cases cited therein. The Speedy Trial Act excludes numerous events from the seventy-day time period including:

> delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion . . . delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court . . . [a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness . . . [and] [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. §3161(h). We note as a point of analytical comparison that appellant's

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"Under Article 10, UCMJ, the government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss." *Id.* at 125. "[T]he legal question whether the Government has used reasonable diligence in discharging its duty under Article 10 [,UCMJ,] to take immediate steps to try an accused is reviewed de novo on appeal." *Cooper*, 58 M.J. at 59. However, we grant substantial deference to the military judge's findings of fact, and we will reverse them only if they are clearly erroneous. *Id.* at 58 (citing *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)).[14] "Findings of fact" are

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case potentially included many of these events. Rule for Courts-Martial 707(c) also lists excludible time periods, including all "pretrial delays approved by a military judge." Article 10, UCMJ, however, does not address any specific excludible time periods; rather, the entire period of time from inception of confinement or arrest until trial is examined when considering whether the government exercised reasonable diligence. *See generally United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005) (discussing differences between Speedy Trial Act and Article 10, UCMJ).

[14] The dissent correctly states that the legal question of whether an accused has received a speedy trial is reviewed de novo, and that findings of fact are reversed only if they are clearly erroneous. (Dissent at *32) (citing *Mizgala*, 61 M.J. at 127). The dissent then goes on to grant the military judge an additional "degree of discretion" to which it views the military judge "is entitled in Article 10, UCMJ, cases." (Dissent at *33). The dissent appears to rely on the language in *Kossman* that its holding returning to the "reasonable diligence" standard for assessing compliance with Article 10's "immediate steps" requirement "vest[ed] military judges with a degree of discretion," and notes that judges "can readily determine whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing." *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). The Court later ruled that the "reasonable diligence" determination is not "so subjective and fact-dependent that [the appellate court] is unable justly to review that determination de novo." *Cooper*, 58 M.J. at 58. While we do not view *Kossman* and *Cooper* as necessarily inconsistent with each other, *Cooper* is clear that the military judge gets no deference on the legal question in this case, and any suggestion by the dissent to the contrary is erroneous, in the court's view. Further, the military judge's conclusion in this case that "the reason for the delay was not due to government malice or deliberate dragging of its collective feet," does not answer the ultimate legal question of whether, despite the lack of malice or deliberate foot-dragging – the existence of either of which would weigh heavily against the government – the government proceeded with reasonable diligence. *See United States v. Miller*, 66 M.J. 571, 574 (N.M. Ct. Crim. App. 2008)

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limited to "things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequence, or interpretation.'" *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (quoting Black's Law Dictionary 628 (8th ed.) (defining "fact")). While we do not find the military judge's findings of fact clearly erroneous, they are incomplete in several respects.[15] Applying the de novo standard of review to the military judge's conclusions of law, we disagree that the government proceeded with reasonable diligence and that appellant was not prejudiced.

"In our society, liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding constitutionality of Bail Reform Act of 1984, 18 U.S.C. §3141 *et seq.*, the federal pretrial detention statute, against a facial challenge).[16] While liberty is also the "norm" for soldiers facing trial by court-martial, soldiers have no right to bail and no access to a military judge until referral. In addition, R.C.M. 305, which

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(noting that an absence of malice does not equate to a finding that the government proceeded with reasonable diligence).

[15] For example, the military judge's written findings of fact did not mention that appellant demanded a speedy trial; neither does it appear that he weighed this factor in his legal analysis. While the military judge found CPT B was a new trial counsel who arrived with "28 open cases" in appellant's brigade, including appellant's, that fact alone does nothing to illuminate the trial counsel's activity or actual level of work during the relevant time period. The military judge failed to specify that only *two or three general courts-martial, and one special court-martial* were actually *preferred*; the others were still "either being investigated or waiting for preferral or [Commanding General] action," an important distinction. As discussed further, *infra,* there is a complete lack of evidence shedding light on the quality and quantity of trial counsel's workload. Similarly, there is a complete lack of evidence concerning the military judge's docket, as also discussed further *infra*. In addition, the military judge's findings were not as detailed as those set forth earlier in this opinion, all facts that we find relevant to resolving the Article 10, UCMJ, issue.

[16] The court went on to "hold that the provisions of the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing [with prompt appellate review of the judicial officer's decision] to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *Salerno*, 481 U.S. at 755. In addition, the government must prove its case for detention due to dangerousness by clear and convincing evidence and the "maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 742, 752.

sets forth the procedures that control pretrial confinement of soldiers, contains few of the protections the Supreme Court found critical to its holding in *Salerno*.[17]

In addition to the more stringent rules for detention contained in the Bail Reform Act, federal defendants also enjoy protections contained in the Federal Rules of Criminal Procedure and other provisions of the U.S. Code that set strict time limits the government must meet while progressing to trial for all defendants – even those not confined.[18] For example, once arrested, with or without a warrant, the

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[17] Compared to the procedural protections included in the Bail Reform Act that the Supreme Court upheld in *Salerno*, the drafters of one learned treatise opine the military procedures authorizing "preventive detention [. . . are] insufficient and unconstitutional." 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE, § 4-32.00 (2d ed. 1999) [hereinafter GILLIGAN & LEDERER]. The Bail Reform Act limits preventive detention to especially serious offenses and offenses involving minor victims (and provides presumptions in favor of detention for some offenses). Rule for Courts-Martial 305, in contrast, permits detention for "offenses which pose a serious threat to . . . the effectiveness, morale, discipline, readiness, or safety of the command." R.C.M. 305(h)(2)(B). These rationales "are sufficiently vague and broad to permit preventive detention for virtually any offense." GILLIGAN & LEDERER at § 4-32.00. Moreover, the government's burden to detain a soldier for either dangerousness or risk of flight is merely a preponderance of the evidence. *Id.* In contrast, to prove dangerousness in the Bail Reform Act, the government's burden is by clear and convincing evidence. 18 U.S.C. §3142(f). There are other issues with military detention as well:

> [T]here is little guidance given as to who should be confined and who should not. Further, the basic procedural system for review of pretrial confinement, a review system that is often conducted by nonlawyers, does not give the accused the right to present or cross-examine witnesses. In fact, [R.C.M. 305] only provides for the presence of the accused and counsel *if practicable*. The whole military edifice is further weakened by the provisions of [R.C.M] 305(m) setting forth *exceptions* that forestall application of key portions of the pretrial confinement review process at sea or when the Secretary of Defense chooses to suspend the rules because of operational requirements.

Id. (emphasis in original, footnotes omitted).

[18] The Rules have the force and effect of law and are binding on federal district court judges. *United States v. Whitted*, 454 F.2d 642, 644 (8th Cir. 1972).

government "must take the defendant without unnecessary delay before a magistrate judge." FED.R.CRIM.P. 5(a). At this appearance, the magistrate must determine under the Bail Reform Act whether to detain the defendant or release him, with or without conditions. FED.R.CRIM.P. 5(d).[19] If the defendant remains in custody following the initial appearance, no more than ten days later, the magistrate judge must conduct a preliminary hearing. FED.R.CRIM.P. 5.1(c).[20] While the magistrate can extend this time period one or more times with the defendant's consent, in the absence of such consent of the accused, the judge or magistrate judge "may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay." FED.R.CRIM.P. 5.1(d). If the government fails to hold the hearing within the proscribed time limits, the defendant "shall be discharged from custody or from the requirement of bail or any other conditions of release . . .." 18 U.S.C. §3060(d).[21] These time limits do not apply to military accused; rather, the only set time limit applicable to military personnel is the 120-day clock of R.C.M. 707, which ends at arraignment. Accordingly, the government faced no sanction in this case when it did not begin the Article 32, UCMJ, investigation until fifty-four days after appellant was confined.[22]

Absent these or other equivalent protections for soldiers confined pending trial, the mandate of Article 10, UCMJ, and other manual provisions gain additional gravity and must be rigorously enforced and upheld. *See United States v. Gregory*, 21 M.J. 952, 959 n.3 (A.C.M.R. 1986) ("We remind the government that bail is not available to our servicemembers, so the pretrial confinement due process procedures found in R.C.M. 305 become most significant in helping to maintain the delicate

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[19] The defendant may request up to a five-day delay prior to the detention hearing in order to consult with counsel and/or to prepare for the hearing. 18 U.S.C. §3142(f).

[20] If the defendant is not in custody, the government must conduct the hearing within twenty days of the initial appearance. FED.R.CRIM.P. 5.1(c). Effective 1 December 2009, the time limit to conduct a hearing where the defendant is in custody increases to fourteen days, and if not in custody, to twenty-one days.

[21] If the government obtains an indictment or issues an information prior to the preliminary hearing, the defendant is not released from custody or other conditions. 18 U.S.C. §3060(e). The hearing is not required if the defendant waives it, or is charged with a misdemeanor and consents to trial by the magistrate judge. FED.R.CRIM.P. 5.1(a).

[22] Article 33, UCMJ, discussed *infra*, also applies but there is no sanction for noncompliance absent prejudice. *See United States v. Rogers*, 7 M.J. 274, 275 n.2 (C.M.A. 1979).

constitutional balance that so strongly separates military service in a democracy from military service in a police state."); *see also* GILLIGAN & LEDERER, § 4-32.00.[23]

Article 10, UCMJ, provides that when a soldier is confined "prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him." Article 10, UCMJ, is a "fundamental, substantial, personal right." *Mizgala*, 61 M.J. at 126. It is one of several protections in the UCMJ intended to prevent soldiers from being "put in the clink and held there for weeks, sometimes months, before [being] brought to trial." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 906 (1949) (statement of Mr. Anderson, Member, Subcomm. of the Comm. on Armed Services) (hereafter *H.R. 2498*), *reprinted* in *Index and Legislative History, Uniform Code of Military Justice* (1950). In addition, the mandate of Article 33, UCMJ, requires that:

> [w]hen a person is held for trial by general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for the delay.

Article 30, UMCJ, requires that "upon preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline . . .." Finally, Article 98, UCMJ, subjects "any person . . . who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense" under the UCMJ to criminal prosecution.

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[23] GILLIGAN & LEDERER conclude:

> These shortcomings may not prove determinative. The Rules for Courts-Martial do provide a number of procedural protections for the confined accused. *Further, both Article 10, UCMJ[,] of the Code and its implementing Rules create the most demanding and useful speedy trial protection in the United States.* When balanced against the special nature of the armed forces, it may be that they suffice to make the preventive detention provision constitutional.

GILLIGAN & LEDERER at § 4-32.00 (emphasis added; footnote omitted).

Underlying all these provisions was "the idea . . . to provide that there be a speedy trial but not one that is so speedy that the man cannot prepare his own defense." *H.R. 2498* at 905. The UCMJ's drafters envisioned that, although charges may not be prepared immediately upon confinement, as the commanding officer of the confined soldier may not even know at that time one of his soldiers is confined,[24] "the information is laid before some officer who within a day or two must draw the formal charge." *Id.* at 908. "The formal charges are drawn and within 8 days they must be, if it is a general court-martial case, transferred to the general court-martial authority." *Id.* at 909. The drafters were confident that this combination of statutory requirements fully protected an accused in pretrial confinement from unnecessary delay. *See United States v. Tibbs*, 15 U.S.C.M.A. 350, 358-59, 35 C.M.R. 322, 330-31 (1965) (Ferguson, J., dissenting); s*ee generally United States v. Parish*, 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968); *United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956). Plainly, the drafters did not envision soldiers, presumed innocent, with no access to bail, and held merely to ensure their presence at trial, spending thirty, sixty, or even more days of confinement prior to the government even preferring charges.[25] *But see, e.g. Mizgala*, 61 M.J. at 128 (charges preferred 75 days after initiation of pretrial confinement did not violate Article 10, UCMJ).

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[24] "Any commissioned officer may order pretrial restraint of any enlisted person." R.C.M. 304(b)(2). In contrast, "Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer." *Id.* at 304(b)(1); *see also* R.C.M. 305(c) (referring to R.C.M. 304 with reference to who may order confinement). Accordingly, an enlisted person may be confined without the person's immediate commander's knowledge.

[25] Preferral is a critical event in the military justice system, in particular for those held in confinement. As discussed, *supra*, military accused lack many procedural time limit protections applicable to federal defendants. While the soldier is entitled to the assistance of defense counsel when he is ordered into confinement, counsel may be appointed solely for pretrial confinement purposes; another counsel may ultimately be detailed once preferral occurs. *See* R.C.M. 305(f). Soldiers are not entitled to pretrial discovery upon inception of pretrial confinement (*see* R.C.M. 701(a)(1)), and may be aware of only the minimal evidence required to continue the confinement. Most important, there is no appeal to a military judge regarding the confinement decision prior to the convening authority referring the case (and even then, a military magistrate's decision is only reviewable for an abuse of discretion). The government is in sole control of the confinee until referral, if indeed the case is ever eventually referred to trial.

The protections of Article 10, UCMJ, do not exist solely to protect the accused.[26] The command also has an undeniable interest in "concluding cases quickly so as to avoid mission infringement." 2 GILLIGAN & LEDERER, COURT, §17-81.00 (2008 Supp.); *see United States v. Burris*, 21 M.J. 140, 145 (C.M.A. 1985) ("The right to a speedy trial belongs to an accused, but it also promotes the ends of justice as far as the command is concerned. Nothing is more disruptive to a commander than to have members of his command sitting around waiting for a court-martial to proceed"). In addition, expeditious disposition of offenses at courts-martial furthers the command's goal of maintaining good order and discipline, and also enforces one of the principle reasons for sentencing, that of general deterrence.

Article 10, UCMJ, jurisprudence has seen three major iterations since it became law in 1950. First, from 1950-1971, military courts held that Article 10, UCMJ, did not require "constant motion, but reasonable diligence in bringing charges to trial." *Tibbs*, 15 U.S.C.M.A. at 353, 35 C.M.R. at 325 (citations omitted). Second, in 1971, after two decades of speedy trial issues and violations, military justice entered the "*Burton* era," which lasted until 1993. The so-called "*Burton* rule" announced by the Court of Military Appeals in *United States v. Burton*, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (C.M.A. 1971), held that "in the absence of a defense request for continuance, a presumption of an Article 10[,UCMJ,] violation [existed] when pretrial confinement exceed[ed] three months. In such cases, this presumption plac[ed] a heavy burden on the Government to show diligence, and in the absence of such a showing the charges [were] dismissed."[27] The government was normally unable to overcome the presumption of prejudice, resulting in dismissal of even the most serious offenses. *See United States v. Henderson*, 1 M.J. 421 (C.M.A. 1976) (dismissing charges and specifications of premeditated murder and conspiracy to commit premeditated murder). The "90-day rule" lasted until 1993, when the Court of Military Appeals overruled *Burton* and returned again to the "reasonable diligence" standard, the third major iteration of Article 10, UCMJ, jurisprudence, which is still the law today. *Kossman*, 38 M.J. at 262.

The "*Burton* rule" has long been in the dustbin of history. The rule's primary accomplishment, however, was its mandate that courts-martial of soldiers in confinement awaiting trial – presumed innocent, with no right to bail, and no access

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[26] Similarly, the protections of the Speedy Trial Act are intended to safeguard "societal interests as well as" those of a federal defendant. *See Zedner v. United States*, 547 U.S. 489 (2006).

[27] The court later simplified the time period to ninety days. *United States v. Driver*, 23 U.S.C.M.A. 243, 49 C.M.R. 376 (1974).

to a military judge until referral – had *priority* over other cases.[28] In fact, the *Manual for Courts-Martial, United States*, (2005 ed.) [hereinafter *MCM*] still states that "[p]riority shall be given to persons in arrest or confinement." R.C.M. 707 (a)(1), discussion.[29] Simply stated, by establishing a 90-day "line in the sand" which, when crossed, placed a heavy burden on the government to avoid dismissal, *Burton* made absolutely certain that no soldier sat "in the clink" awaiting trial.

The end of the *Burton* era, and the return to a "reasonable diligence" standard, meant that the certainties of absolute chronology were replaced by the uncertainties of a relative concept – "reasonable diligence." Consequently, the question in an Article 10, UCMJ, context must always be: What is "reasonable diligence?" "Article 10, [UCMJ,] does not require instantaneous trials, but the mandate that the Government take immediate steps to try arrested or confined accused must ever be borne in mind." *Kossman*, 38 M.J. at 262. While "brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive . . . where it is established that the Government could have readily gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to . . . an Article 10[, UCMJ,] motion would lie." *Id.* at 261-62.

Article 10, UCMJ, is "more stringent" or "more exacting" than the Sixth Amendment, and provides "greater protections for persons subject to the UCMJ than does the Sixth Amendment speedy trial right." *Cooper*, 58 M.J. at 60 (citing *Kossman* 38 M.J. at 259) ("greater protections"); *see also Cossio*, 64 M.J. at 256 ("more stringent"); *Mizgala*, 61 M.J. at 124 ("more exacting") (citations omitted). Therefore, "Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10[,UCMJ,] violation." *Mizgala*, 61 M.J. at 127 (citations omitted). The Sixth Amendment applies regardless of whether the defendant is confined prior to trial or restrained in any manner, whereas the heightened protections of Article 10, UCMJ, are afforded only to those "in arrest or

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[28] Similarly, during the same time period, the then Court of Military Appeals also mandated a ninety-day rule for post-trial processing which, if violated, resulted in dismissal with prejudice of all charges and specifications. *Dunlap v. Convening Authority*, 23 U.S.C.M.A. 135, 48 C.M.R. 751 (1974).

[29] Rule for Courts-Martial 707 is similar to the Speedy Trial Act, and is, in many ways, the military version of the Speedy Trial Act. *See United States v. Dooley*, 61 M.J. 258, 263 n.44 (C.A.A.F. 2005). The Speedy Trial Act also requires that trial of those detained solely because they are awaiting trial "shall be accorded priority." 18 U.S.C. § 3164(a)(2). Because the Speedy Trial Act contains this requirement as part of its statutory language, it is binding law; in contrast, the *MCM* contains the requirement for priority in the non-binding discussion to R.C.M. 707. *See United States v. Lazauskas*, 62 M.J. 39, 43 (C.A.A.F. 2005) (Gierke, C.J., concurring in the result) (courts are free to disagree with the discussion to R.C.M. 707).

confinement." However, the framework of analysis employed to determine whether there is a Sixth Amendment violation is "an apt structure for examining the facts and circumstances surrounding an Article 10[,UCMJ,] violation." *Id.* (citing *Cooper*, 58 M.J. at 61; *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)).

Using that framework, we examine "(1) the length of the delay; (2) the reasons for the delay; (3) whether appellant made a demand for speedy trial; and (4) prejudice to the appellant." *Mizgala*, 61 M.J. at 129 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).[30] We examine the proceeding "as a whole and not mere speed." *Id.* at 129 (citation omitted). Our inquiry "necessitates a functional analysis of the right in the particular context" of this particular case. *Barker*, 407 U.S. at 522. The analysis is "a balancing test, in which the conduct of both the prosecution and the [appellant] are weighed." *Id.* at 529.

> We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Id. at 533.

1. The Length of the Delay

As to the first factor, length of delay, appellant remained in pretrial confinement for 134 days prior to being brought to trial under Article 10, UCMJ, on day 135, longer than his adjudged confinement of four months, not including an additional fifteen days credit for violation of Article 13, UCMJ. Only seven days resulted from defense requested delay. This factor weighs in appellant's favor.

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[30] Congress enacted the Speedy Trial Act because it thought the four-part test set forth by the Supreme Court in *Barker v. Wingo* "provide[d] no guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay." *United States v. Mehrmanesh*, 652 F.2d 766, 772 n.1 (9th Cir. 1980) (Fletcher, J., dissenting) (*citing* H.R. REP. NO. 93-1508, 93d Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 7401, 7405). The Act was Congress' attempt to "devise[] a scheme to circumvent the *Barker* opinion and put teeth into the speedy trial guarantee." *Id.* at 769. One might question why military courts now examine whether the government violated Article 10, UCMJ, – a provision more exacting than the Sixth Amendment – by analyzing it under a four-part test Congress determined lacked "teeth" to enforce even the lesser right to speedy trial guaranteed by the Sixth Amendment.

2. The Reasons for the Delay

Next we turn to the reasons for the delay. As the Supreme Court instructed in *Barker*, "different weights should be assigned to different reasons." 407 U.S. at 531. The government proffered several reasons for its delay, none of which we find persuasive. This factor weighs heavily in appellant's favor.

a. *Negligent interpretation of the SOFA agreement*

The first period that concerns us is the time period from the inception of appellant's confinement until the preferral of charges, 18 December 2006 until 17 January 2007, a delay of thirty-one days. Until the day of the speedy trial motion, when the military judge corrected the government's mistaken view, the government negligently interpreted its own SOFA with the host country. In fact, in its brief to the trial court, the government argued that it should bear no responsibility for proceeding with appellant's case until Korea released jurisdiction over the offenses on 11 January 2007, in other words, the first twenty-five days of appellant's confinement.

The Supreme Court has addressed the impact of government negligence as it affects a Sixth Amendment speedy trial analysis:

> [b]etween diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.

United States v. Doggett, 505 U.S. 647, 656-57 (1992). In contrast, when analyzing whether the government has proceeded with reasonable diligence under Article 10, UCMJ, *Kossman* instructs that where the government is negligent, "an Article 10, [UCMJ,] motion would lie." *Kossman*, 38 M.J. at 261. "An Article 10[,UCMJ,] violation rests in the failure of the Government to proceed with reasonable diligence. A conclusion of unreasonable diligence may arise from a number of different causes and need not rise to the level of gross neglect to support a violation." *Mizgala*, 61 M.J. at 129 (*citing Kossman*, 38 M.J. at 261).

On its face, the government's negligent, i.e. *unreasonable* interpretation of its own SOFA seems the polar opposite of *reasonable* diligence. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun."

Doggett, 505 U.S. at 657. However, a finding of government negligence that is responsible for a period of delay in bringing an accused to trial does not prohibit a conclusion that the government acted with reasonable diligence overall. *See United States v. Lazaukas*, 2004 CCA LEXIS 199, *13 (A.F. Ct. Crim. App. Aug. 19, 2004) (unpub.) The weight we ascribe to government negligence also varies depending on the gravity of the negligence at issue – simple negligence weighs lighter than gross negligence. The length of delay the negligence causes is also a consideration; a longer delay resulting from government negligence weighs more heavily against it than does a shorter delay.

The government's conduct here, in misreading its own international agreement from the inception of appellant's pretrial confinement until the day the military judge heard the speedy trial motion 107 days later, was, in our view, negligent. The government's negligence in misreading the SOFA, regardless of whether it is characterized as simple or gross, only stymied the government's processing of appellant's case until the Republic of Korea completed the unnecessary waiver of primary jurisdiction on 11 January. We believe that even gross negligence for a portion of a court-martial's processing time does not automatically result in violation of Article 10, UCMJ; rather, it is part of the "difficult and sensitive balancing test" we must perform to determine whether, *in toto*, the government proceeded with reasonable diligence. This reason for delay is weighted heavily against the government.

b. *"New" trial counsel with "heavy caseload"*

Captain B, the original trial counsel, was new to the brigade and new to military justice. This was one of the military judge's primary justifications in favor of finding no Article 10, UCMJ, violation. We categorically reject this as a legitimate reason for delay. Faced with a similar "inexperienced" argument more than forty years ago when it was proffered to explain the lack of diligence of non-lawyer commanders, the Court of Military Appeals forcefully rejected it as well. The court responded: "As to the inexperience of the officers involved, we do not believe this is a legally or factually sufficient explanation. Whether they thought they were doing their job is irrelevant. The plain fact of the matter is that the delay occurred." *Parish*, 17 U.S.C.M.A. at 417, 38 C.M.R. at 215.[31]

The record of the speedy trial motion also makes clear that CPT B had a number of other trial counsel with whom to consult, a chief of criminal law, and a

[31] By virtue of his position alone, we judicially note that CPT B was required to be a judge advocate, a graduate of an accredited law school, licensed to practice law after successfully passing the bar exam, trained extensively in military justice at the Judge Advocate Officer Basic Course, and certified by The Judge Advocate General of the Army as competent to appear in general courts-martial. *See* UCMJ, art. 27(b).

staff judge advocate. Unlike the hapless non-lawyers in *Parish*, CPT B also had available to him all the wonders of the technological age. It is no excuse whatsoever that he was "new." We refuse to view the question of whether the government acted with reasonable diligence through a prism of the government counsel's experience and adjust it or appellant's right to a speedy trial accordingly. Moreover, the government assigned another more experienced trial counsel to appellant's case in late January or early February, and there is no evidence why this could not have occurred earlier.

As to the "heavy caseload," CPT B had *two or three preferred general courts-martial and one special court-martial* in addition to appellant's. Although the military judge found as fact that the trial counsel had "28 open cases," this number alone is not very helpful to our analysis. Simply having an unpreferred "case" means little. Certainly, if an incident is tracked on a weekly spread sheet during a continuing investigation, it is an important consideration. Further, in the normal course of events, preferred and referred courts-martial generally have priority over other incidents still under investigation or in some stage of pre-preferral, unless a confined soldier is involved.

It would have been more helpful if additional evidence was presented at trial including, but not limited to, the stage these "cases" were at in the military justice process; the complexity of the cases; the trial counsel's duties with respect to the cases; the trial counsel's involvement or lack of involvement with each case; the number of hours the trial counsel spent on those cases compared to appellant's court-martial; or how many other personnel were also working on those cases and their respective duties. It would have also been helpful if more evidence was presented concerning matters such as the complexity of the referred courts-martial; the trial dates of the referred courts-martial; the selected forum of the referred courts-martial, either military judge alone or trial by members; and information relating to any potential overseas witnesses that might cause a delay in the courts-martial. This additional evidence would have assisted the military judge in conducting the appropriate balancing of the relevant factors and assisted us in our review of this case.

The complete lack of evidence concerning the trial counsel's "cases," other than numbers, leaves us with nothing more than a trial counsel who was carrying a very *light* load of three or four other pending courts-martial. Furthermore, there was no evidence that any of the trial counsel's "cases," preferred or not, other than appellant's, involved a soldier in pretrial confinement, which would potentially claim equal priority with appellant's case. The trial counsel, although new and inexperienced, recognized as much when he testified that "of the 28 cases that were open at this time," appellant's ranked "pretty high because at that point he was in pretrial confinement." His actions, however, did not match his words.

c. *Brigade Training Exercise 8-29 January 2007*

We recognize that operational considerations are relevant when weighing the reasons for delay. *Kossman*, 38 M.J. at 261; *see also United States v. McCullough*, 60 M.J. 580, 585 (Army Ct. Crim. App. 2004). The military judge listed this factor in both his findings of fact and conclusions of law. With regard to this reason for delay, we note several issues. First, the government claimed until the day of the speedy trial motion that it lacked primary jurisdiction over the case until the Korean government released jurisdiction on 11 January 2007. Thus, for a portion of the training exercise the government was under the mistaken belief that it could not proceed in any event. Second, the government finally charged appellant on 17 January 2007, during the exercise, and presented little evidence that the exercise hampered either the preferral or the forwarding the charges.[32] Third, the training event was not a worldwide deployment like the court faced in *McCullough;* the event at issue was a long-planned training exercise held annually. Once again, the government assigned a different trial counsel to appellant's case in late January or early February; if operational considerations were hampering processing, there is no reason the government could not have assigned additional counsel earlier. There is no evidence that any other trial counsel in addition to CPT B, the brigade trial counsel, were participating in the exercise.

While operational considerations are relevant, they are not an absolute excuse. That is particularly the case where, as here, the annual exercise was not of the extraordinary nature the court faced in *McCullough*, which also included "personnel turbulence resulting from deployment of significant portions of the division overseas." *McCullough*, 60 M.J. at 585.

d. *Delay in scheduling, holding, and completing the pretrial investigation and investigating officer's report*

The time the Article 32, UCMJ investigating officer took to complete the pretrial investigation – a total of forty-one days from his appointment to the day he forwarded the completed report to the SPCMCA (all but seven days attributable to the government) – was excessive and not reasonably diligent. Four separate time

[32] The trial counsel testified that in order to prefer and forward the charges, he needed signatures from "various commanders." That is the norm in our collective experience. The trial counsel also testified that not all the commanders from whom he needed signatures were in the same location. That is also the norm. The only logistical wrinkle due to the field exercise was that one of the commanders was at a remote training location, so the trial counsel had to obtain a HMMWV in order to reach the commander for his signature. In our collective experience, it is not extraordinary for either trial or defense counsel to travel to a field site in order to meet with either a commander or witness.

periods indicate dilatory processing. First, the period from preferral on 17 January 2007 through appointment of a viable investigating officer on 1 February 2007 (sixteen days, including the day of preferral and day of appointment); second, the period from appointment through the initial scheduling of the investigation for 9 February 2007 (nine days, including the day of appointment); third, the timing of the investigation, held only after duty hours and delayed so the investigating officer could visit friends in Seoul over a four-day weekend; and fourth, the period from close of the investigation on 22 February 2007 to completion of the investigator's report on 13 March 2007 (nineteen days). The investigating officer completed his report only after prodding by counsel. Despite orders to complete the investigation within seven days, the investigating officer waited six days to even contact counsel to arrange scheduling. The defense requested and was granted a seven-day delay, which ameliorates this particular time period somewhat. However, the investigating officer completely failed to appreciate the priority his duty required.[33]

e. *Delay to complete the CID investigation.*

CID began its investigation of appellant on 15 December 2006, when CS alleged appellant raped her. CS provided a sworn statement to CID on that date. It appears that CS' statement was the primary evidence against appellant on the most serious charges, rape and kidnapping, both of which were dismissed prior to trial on the merits. Although these original charges were obviously serious, the case did not involve complex evidentiary issues. As noted earlier, there is no indication there was any physical evidence and, as such, no apparent need for time-consuming forensic evaluations. There were no co-accused, nor the procedural complexities of granting witness immunity. *Cf McCullough*, 60 M.J. at 586. The lead CID agent testified that he completed additional interviews relevant to these alleged offenses by 5 January 2007, with only minor exceptions. As a result, the government is hard-pressed to argue that the CID investigation caused delay in proceeding during the same timeframe.

As to the interviews completed on 14 February and 5 March 2007, respectively, we fully expect the government to continue to investigate charged or potential offenses up to and even during trial on those offenses. However, the additional investigation undertaken in this case after CID completed most of its interviews on 5 January 2007, as reflected in the record of the speedy trial motion, was *de minimus*. There is also no explanation in the record for CID's delay in

[33] We recognize that the military judge found that the court reporter requested an additional three days to complete the summarized transcript of the Article 32, UCMJ, investigation because of an office move; the military judge also found that the investigating officer did not receive the transcript for six more days. This does not help the government; in fact, it further demonstrates that even routine office moves had priority over appellant's case.

making the single phone call necessary to end investigation into the potential death of an unborn child offense. The phone call did not occur until 5 March 2007, nearly three months after the allegation surfaced during CID's interview of CS on 15 December 2006. We recognize that the government has the right, if not the obligation, to thoroughly investigate a case before trial. *Cossio*, 64 at 258. In this case, any additional investigation into crimes for which appellant was never ultimately tried did not justify the delay in processing this case, especially where there is no explanation for investigators' failure to complete simple tasks in a timely manner. *Cf. United States v. Dog Taking Gun*, 7 F.Supp. 2d 1118, 1122 (D. Mont. 1998) (lack of diligence of Federal Bureau of Investigation is not a basis to exclude time under the Speedy Trial Act).

f. *The docketing of appellant's case and availability of witnesses.*

"[B]y the time an accused is arraigned, a change in the speedy-trial landscape has taken place. This is because after arraignment, 'the power of the military judge to process the case increases, and the power of the [Government] to affect the case decreases.'" *Cooper*, 58 M.J. at 60 (quoting *Doty*, 51 M.J. at 465-66). "As a result, once an accused is arraigned, significant responsibility for ensuring the accused's court-martial proceeds with reasonable dispatch rests with the military judge. The military judge has the power and responsibility to force the Government to proceed with its case if justice so requires." *Id.* Regardless of the control of the military judge, "the Government must itself move diligently to trial and the entire period up to trying the accused will be reviewed for reasonable diligence on the part of the Government." *Id.*

In the Army, the military judge's power to process the case increases even prior to arraignment. Upon referral, the standing Rules of Practice Before Army Courts-Martial require the trial counsel to deliver a charge sheet and convening order to the military judge within twenty-four hours of referral and, within three to four days after referral, the military judge must receive a docket request containing both parties' desired trial dates. Rules of Practice Before Army Courts-Martial [hereinafter "Army Rules"], para. 1(a) (1 May 2004).[34] The military judge has "sole responsibility to set or change trial dates." *Id.* at para. 1(b).

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[34] Specifically Army Rules, para. 1(a) requires that:

> [a]bsent extraordinary circumstances, within 24 hours of referral, the trial counsel will cause the charges to be served on the accused and defense counsel and simultaneously provide a copy of the charge sheet(s), convening order(s), and a complete copy of the accused's

(continued . . .)

The defense received the government's docketing request on 26 March 2007. In accordance with the Army Rules, the defense responded to the government's docket request on 28 March 2007 and requested an "immediate trial," indicating it was ready to proceed on 29 March 2007. During the hearing on the speedy trial motion, the military judge also became aware of additional defense prodding to move the case, specifically the defense notice to the investigating officer to proceed with "any and all haste." Finally, the military judge became aware during the motions session that the defense had requested the military magistrate release the appellant from pretrial confinement, which was denied, and also requested a discharge in lieu of trial by court-martial. Nonetheless, the military judge initially scheduled appellant's case for trial on 7 May 2007 – forty days after the defense requested "immediate trial." The military judge's explanation for selecting this date was "because there was nothing else available on the docket." Subsequently, 30 April 2007 became available and the military judge rescheduled appellant's case for that date, and appellant ultimately went to trial on 1 May 2007, thirty-four days after the defense requested "immediate trial."

(. . . continued)

> Enlisted or Officer Record Brief and DA Form 2-1 to the judge. These may be provided the judge by telefax. Not later than the next duty day after referral, the trial counsel will also initiate a docketing request . . . and send it to the detailed defense counsel, . . . and, within three days of receipt from the trial counsel [the defense counsel will] return it to the trial counsel, who will . . . forward it to the judge. The trial counsel must inform the military judge in the docketing request of any restraint on the accused. The judge will normally schedule an [R.C.M.] 802 conference (including conference calls) with trial and defense counsel within three days after receipt of the referred charges to set an arraignment and/or trial date. The judge in his/her discretion may set, or permit his/her docketing clerk to set, arraignment dates. Any period of delay from the military judge's receipt of the referred charges until arraignment is considered as pretrial delay approved by the judge per [R.C.M.] 707(c), unless the military judge specifies to the contrary, based upon a failure of any party to comply with these docketing rules. If counsel are unavailable to proceed on the scheduled date, they must request a continuance in writing. The judge will ordinarily . . . set the trial date within 20 days of service of charges. The judge may use a docketing order to direct dates for compliance regarding discovery and notice.

Similar to the lack of evidence concerning the trial counsel's "heavy" caseload, the government did not attach the military judge's docket as evidence during the speedy trial motion. If the military judge's docket and other evidence explaining it were in the record, that evidence would have allowed us to review how many other pending cases involved soldiers in pretrial confinement; the offenses charged in those cases; the forum selected, either military judge alone or trial before a panel of officers or enlisted personnel; and the number of contested and guilty plea cases pending before the military judge. Additional information about the other cases would also have been helpful in our analysis including: the complexity and anticipated length of the other cases; whether counsel, witness, or expert availability necessitated certain trial dates to the exclusion of others; and an explanation why other cases could not be moved so appellant's case could be tried earlier. Finally, evidence concerning the availability of other judges to try cases already on the docket or to try appellant's case or an explanation why other judges were unavailable would have been relevant. In short, there is no evidence that appellant's case was given a higher priority than any other case despite his confinement and demand for "immediate trial." *See United States v. Calloway*, 47 M.J. 782, 785 (N.M. Ct. Crim. App. 1998) (noting that although the fact that cases were tried before appellant's "does not establish that the government could have tried the appellant's case earlier, it is some evidence that the appellant's case was given a much lower priority than Article 10, UCMJ[,] . . . permits for a pretrial confinee").

We are sympathetic to the many competing interests military judges face when managing a trial docket. These include logistical challenges, attorney caseloads, availability of civilian counsel and expert and other critical prosecution and defense witnesses, temporary duty travel of judges and counsel, and other "realities of military practice." *See Kossman*, 38 M.J. at 261-62. These "ordinary judicial impediments" including the "crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced." *Id.*

However, when a soldier confined awaiting trial requests or demands "immediate" or speedy trial, that fact encumbers the docketing decision, and forces the government to give priority to the confined soldier's case above others not similarly situated. "Article 10, UCMJ[,] makes no provision for excusing the government from the standard of reasonable diligence because the delays accommodate the military judge's trial schedule." *Calloway*, 47 M.J. at 787. In the face of a crowded docket, the government has several options, including delaying cases of those awaiting trial who are not confined, or requesting the assistance of another military judge who is available to hear the case of the confined soldier at an earlier date. Apparently, the government did not examine those or any other options in this case. "The government is not relieved of its responsibility under Article 10, UCMJ, merely because a specific military judge is not readily available to conduct the accused's trial." *Id*; *cf. United States v. Johnson*, 120 F.3d 1107, 1111 (10th Cir. 1997) ("Neither a congested court calendar nor the press of a judge's other business

can excuse delay under the [Speedy Trial] Act.") (quoting *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986)). *See also* 18 U.S.C. §3161(h)(7)(C) ("no continuance . . . [under the Speedy Trial Act] shall be granted because of general congestion of the court's calendar . . ..").

The government did not present evidence to the military judge to allow the military judge to "realistically balance" appellant's expressed desire for an "immediate trial" and appellant's time already spent in pretrial confinement against the acknowledged "judicial impediment" of his already existing docket. Simply stated, without evidence to the contrary, the government and the military judge put appellant's case at the end of the line when it should have been given priority.

The dissent believes that "the military judge is entitled to a presumption that he balanced his docket," even in the absence of any evidence that he did, and in the absence of the evidence upon which he based his balancing. This is not a question of negating a presumption that the military judge knows the law and follows it. This is a question of evidence – or, more particularly, *lack of evidence* – concerning the docketing decision. It is the government which must demonstrate – with *evidence* – that it proceeded with reasonable diligence. "[W]here the military judge has peculiar knowledge of the circumstances purportedly warranting delays in bringing an accused to trial, such knowledge must be made a part of the record when the issue is raised in a motion to dismiss under Article 10, UCMJ." *Calloway*, 47 M.J. at 786. As in *Calloway*, "[t]he *evidence* does not establish the unavailability of other military judges or why certain other less urgent cases were given priority over that of the appellant's on the docket." *Id.* (emphasis added). In fact, there is no evidence at all on this issue. "The [g]overnment failed to establish a proper record, and it is not for appellate courts to launch a rescue mission." *Burris*, 21 M.J. 145 (C.M.A. 1985). Therefore, this reason weighs against the government.

The availability of CS, the government's primary witness to the rape and kidnapping charges, was a potential issue that affected the timing of appellant's trial. She left Korea on 12 March 2007 with the government's knowledge, and was not supposed to return until 12 April 2007. The government chose its requested trial date, 13 April 2007, due to CS' unavailability prior to that date. Witness availability is a relevant consideration for purposes of scheduling trial dates. *Barker*, 407 U.S. at 531; *McCullough*, 60 M.J. at 587. However, the military judge did not consider CS' availability when setting appellant's trial date, and specifically disavowed that consideration on the record. Even considering this fact, and its requested trial date of 13 April 2007, the government remained mute in the face of the military judge's initial docketing decision for 7 May 2007, twenty-four days after its requested date.

3. Whether appellant demanded speedy trial

The third factor we consider is whether appellant demanded speedy trial. The military judge did not address this factor in his ruling. Neither appellant nor his defense counsel intoned the phrase "demand speedy trial," nor have we ever required any specific phraseology. *See United States v. Munoz-Amado*, 182 F.3d 57, 62 (1st Cir. 1999) (the defendant should give "some indication prior to his assertion of the speedy trial violation that he wishes to proceed to trial"). The military judge noted that defense counsel "requested immediate trial," in his docketing request dated 28 March 2007. This is virtually semantically indistinguishable from a "demand" for a "speedy trial." "Immediate" is, in fact, faster than "speedy."[35] Because of the defense delay in making their desire known to the government, we consider this factor weighs neither in the government nor appellant's favor.

4. Prejudice

Finally, we examine the fourth *Barker* factor – whether appellant was prejudiced. As to this factor, the military judge concluded:

> The accused was not prejudiced by the delay in processing this case. The accused's ability to defend against the charges was not affected by any delay. While the accused was sitting in pretrial confinement, the defense requested, and was granted, a week delay in the Article 32[,UCMJ,] hearing.

To begin, we are mindful that the Supreme Court has squarely held that "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25, 25 (1973); *see also Miller*, 66 M.J. 571 (upholding military judge's dismissal of charges and specifications due to a violation of Article 10, UCMJ, even in the absence of either a demand for speedy

[35] In addition, on 8 March 2007, appellant's counsel urged the pretrial investigating officer to use "any and all haste" to complete his report. On 13 March 2007 appellant also formally requested the military magistrate release him from confinement, which was denied. *See Birge*, 52 M.J. at 212 (noting request for release from pretrial confinement a factor in Article 10, UCMJ, speedy trial analysis). Finally, appellant testified during the speedy trial motion that "nothing has happened so far, other than going to an Article 32[, UCMJ,] and then after that, nothing," and that he was "in jail for [approximately] 105 days and nobody can tell me what's going on . . .. It just seems like it's getting delayed and delayed and nothing is happening for me." In sum, it is clear appellant and his defense counsel were interested in getting to trial as soon as possible, at least from March forward.

trial or prejudice). Moreover, any "reading of *Barker* which confines 'prejudice' to impairment to the defense was explicitly rejected in . . . *Moore*." *United States v. Dreyer*, 533 F.2d 112, 115 (3d Cir. 1976) (citing *Moore*, 414 U.S. at 26-27).[36] In fact, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States v. Mason*, 21 U.S.C.M.A. 389, 394, 45 C.M.R. 163, 168 (1972).

We therefore examine the question of prejudice in light of three important interests the Supreme Court identified in *Barker*: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern; and (3) to limit the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532 (footnote omitted).

> [O]bviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.

Id. at 532-33 (footnotes omitted).

As to the first type of prejudice, *Barker* did not define "oppressive pretrial incarceration," and we are mindful that the Sixth Amendment guarantee of a speedy trial applies to all those facing trial, unlike Article 10, UCMJ, which is limited to those in "arrest or confinement." Nonetheless, "oppressive" confinement is more than just the fact of confinement itself. *See Cooper*, 58 M.J. at 56-57 (stating that a view of the law that all that is needed to prove prejudice is pretrial confinement itself is incorrect). Although the government conceded that appellant was punished prior to trial in violation of Article 13, UCMJ, we conclude that the specific violations the parties agreed occurred in this case also do not equate to "oppressive" pretrial incarceration.

The military judge found, and we agree, that appellant's defense was not impaired by the length of time it took to bring him to trial. In fact, the opposite is probably true: appellant's wife and main accuser left Korea never to return.

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[36] It is not clear from the military judge's conclusions whether he considered any type of prejudice other than detriment to the appellant's defense. We will presume that he did.

As to the third type of potential prejudice identified by *Barker*, anxiety and concern, "[t]he majority in *Barker* also recognized that an accused is 'disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.'" *Dreyer*, 533 F.3d at 115 (quoting *Barker*, 407 U.S. at 533) (finding a violation of the Sixth Amendment right to a speedy trial where the defendant suffered an "unacceptable degree of damage" by reason of the delay). Delay "wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.'" *Moore*, 414 U.S. at 27 (quoting *Marion*, 404 U.S. at 307 at 320).

"A proper reading of *Barker*, therefore, must include within the meaning of prejudice any threat to . . . the accused's significant stakes – psychological, physical and financial – in the prompt termination of a proceeding which may ultimately deprive him of life, liberty, or property." *Dreyer*, 533 F.3d at 115 (internal quotations and citation omitted). Accordingly, the failure of the government to pay a pretrial confinee entitled to receive pay and allowances while in confinement may raise his anxiety and concern. *Cf. Cossio*, 64 M.J at 257-58 (showing the accused was paid "after an early finance glitch that was remedied" indicated a lack of prejudice). Further, "pretrial delay while pending an ultimately unsupported rape charge" may heighten an accused's anxiety and concern. *United States v. Ortizrodriguez*, 2007 CCA LEXIS 564, *14 (N.M. Ct. Crim. App. Dec. 18, 2007) (unpub.).

Appellant undoubtedly suffered greater than average anxiety and concern during his pretrial incarceration. As set forth above, appellant lost his apartment and all of his personal possessions. More significantly, appellant was without pay for the entire time he was pending trial. Appellant also testified, essentially unrebutted, about loans of his that went unpaid, phone calls to his mother from creditors, and his bank closing his account due to inactivity, which then hampered the government from restarting appellant's military pay. Finally, appellant was confined for serious charges involving rape, kidnapping, and assault that the government determined it could not even submit to trial. In sum, this final *Barker* factor also weighs in appellant's favor.[37]

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[37] We also note that appellant's sentence included confinement for four months, less time than the 134 days appellant already served in pretrial confinement awaiting trial, (adjusted by the military judge to 133 days of pretrial confinement credit) not including the additional fifteen days credit for violation of Article 13, UCMJ, for a total of 148 days credit against appellant's sentence to confinement. None of the additional days of credit are required to be, and none were, applied against other

(continued . . .)

5. Balancing the Four Factors

Balancing the four *Barker* factors, we conclude that three of the four factors weigh squarely against the government and the fourth factor is neutral. The length of delay was interrupted by an arraignment and motions session on day 107 of appellant's pretrial confinement. Nonetheless, appellant was not tried until the day of his guilty plea, day 135, and ultimately faced trial only for comparatively minor military offenses. Our description of the delays in appellant's case demonstrate the error of the military judge's conclusions that there were only "several days of delay that the [g]overnment [could not] justify," and "a few days were wasted due to the government's errors." At the least, we count: thirty-one days delay to prefer charges including twenty-five days delay due to a negligent SOFA interpretation; sixteen days from preferral to appointment of the Article 32, UCMJ, investigating officer (after initially appointing an officer who had to be replaced); thirty-four days delay due to the Article 32, UCMJ, investigating officer's dilatory approach to the pretrial investigation (forty-one total days minus seven days defense delay); and thirty-four days delay from the time appellant requested "immediate trial" on 28 March 2007 to his trial on 1 May 2007, for a total of 135 days from inception of pretrial confinement to trial. This is substantially greater than "several" or "a few" days.

The reasons for delay, in particular the government's negligent interpretation of its own SOFA agreement, and the asserted justification that one of the trial counsel was "new," weigh heavily in appellant's favor. *See Barker*, 407 U.S. at 531 ("different weights [are to be] assigned to different reasons" for delay). Appellant formally requested release from confinement in March, and requested an immediate trial after referral. Appellant's request to the Article 32, UCMJ, investigating officer to exercise "any and all haste in this process" was also made in early March, nearly three months into his pretrial confinement, rendering this factor neutral in our analysis. Although appellant's defense was not prejudiced by the delay, no such prejudice is required. We find prejudice based upon the evidence the defense presented at trial of greater than average anxiety and concern while appellant was confined.

Based upon the facts of this case, we hold the government did not exercise reasonable diligence.

(. . . continued)
portions of appellant's sentence. In effect, appellant received no benefit from the extra twenty-eight days credit he received above and beyond his sentence to confinement. *Cf. United States v. Smith*, 56 M.J. 290 (C.A.A.F. 2002) (no right is violated by failure to grant equivalent credit where pretrial confinement credit exceeds adjudged confinement - the Executive branch had the prerogative to extend such credit, and had not done so). This is also a consideration in our prejudice analysis.

CONCLUSION

Applying a de novo standard of review to the legal question in this case, and after engaging in a "difficult and sensitive balancing process," *Barker*, 407 U.S. at 533, we hold that the government violated appellant's right to a speedy trial guaranteed by Article 10, UCMJ. Accordingly, the findings and sentence are hereby set aside and the charges and specifications are hereby DISMISSED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision, are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge GALLUP concurs.

TOZZI, Judge, dissenting:

Based upon the facts of this case, I disagree with the majority's holding that Article 10, UCMJ, was violated. While the processing of this case was not a model of efficiency, I would affirm appellant's convictions because the government demonstrated reasonable diligence in bringing appellant's case to trial and appellant did not suffer prejudice.

Article 10, UCMJ, provides in pertinent part that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." Article 10, UCMJ, however, does not require "constant motion, but reasonable diligence in bringing the charges to trial." *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citing *United States v. Tibbs*, 15 U.S.C.M.A. 350, 353, 35 C.M.R. at 325 (1965); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993); *United States v. Johnson*, 1 M.J. 101 (C.M.A. 1975)). The determination as to "whether the Government proceeded with reasonable diligence includes [but is not limited to] balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *Id.* at 129 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)). As the *Barker* Court noted:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533.

The standard of review is central to the analysis of Article 10, UCMJ, violations. "We review the decision of whether an accused has received a speedy trial de novo as a legal question, giving *substantial deference* to a military judge's findings of fact that will be reversed only if they are clearly erroneous." *Mizgala*, 61 M.J. at 127 (emphasis added) (citations omitted). As our superior court held in the seminal case on Article 10, UCMJ, "[i]f our decision today vests military judges with a degree of discretion, so be it. Judges who can decide difficult questions such as whether a confession was voluntary, *see United States v. Martinez*, 38 MJ 82 (CMA 1993), can readily determine whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing." *United States v. Kossman*, 38 M.J. 258 at 262.

Based upon the substantial deference given to military judge's findings of fact and the degree of discretion to which a military judge is entitled in Article 10, UCMJ, cases, on balance, I agree with the military judge that the *Barker* factors favor the government in this case. As the military judge stated, the delay in the processing of appellant's case was not a result of the government's "deliberate dragging of its collective feet."

The length of the delay was not *per se* unreasonable. As the military judge noted, and the majority highlighted, a portion of the delay was unjustified. After the initial delay of twenty-five days caused by an improper interpretation of the Republic of Korea Status of Forces Agreement, however, the government constantly moved the case forward until arraignment on 3 April 2007, albeit not without obstacles and missteps. In spite of an ongoing CID investigation that involved the victim's medical records; the detailing of an Article 32, UCMJ, investigating officer who was later dismissed; the detailing of a second Article 32, UCMJ investigating officer who delayed the Article, 32 UCMJ, hearing over the government's objection and completed the investigative report only after counsel repeatedly requested the report; and the relocation of the Camp Stanley, Korea Legal Office, the government's collective actions illustrate and support the military judge's finding that the government processed the case with reasonable diligence.

Furthermore, the decision of the military judge to set a trial date of 1 May 2007 was not unreasonable. In evaluating speedy trial claims, "ordinary jurisdictional impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced." *Kossman*, 38 M.J. at 261-62. I find the military judge realistically balanced these factors. "It is undisputed that military judges are presumed to know the law and to follow it, absent clear evidence to the contrary." *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (citations omitted). Although the military judge did not conduct an explicit balancing on the record, it is clear that he understood appellant was in pretrial

confinement. It is also clear that the military judge is in a better position than this court to appreciate the various factors relevant to maintaining his docket, to include determinations involving counsel caseloads. Under these circumstances, I believe a military judge is entitled to a presumption that he balanced his docket, considered counsel's caseloads and the availability of other judges to hear the case, and arrived at a reasonable trial date.

In analyzing prejudice, we look at the three interests identified by the Supreme Court in *Barker*: preventing oppressive pretrial incarceration; minimizing anxiety and concern; and limiting the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. As the majority notes, the parties agreed at trial that the delay did not amount to oppressive pretrial incarceration. Similarly, the majority concurs with the military judge's finding that appellant's defense was not prejudiced by the delay. In finding prejudice, the majority focuses on appellant's anxiety and concern and finds "prejudice as a result of the greater than average anxiety and concern appellant suffered while confined."

The primary cause of appellant's alleged anxiety and concern stemmed from his failure to receive pay while in confinement. Although this admittedly caused appellant some hardship, it is only tangentially related to his confinement. Appellant's failure to receive pay was a result of an administrative finance error, unrelated to the underlying reasons for appellant's pretrial confinement. The prejudice associated with this financial error simply does not outweigh the other *Barker* factors.

In short, the military judge, based upon the evidence presented at trial, explicitly found that "[t]he facts show that the reason for the delay was not due to government malice or deliberate dragging of its collective feet." Our court must "remain mindful that we are looking at the proceeding as a whole and not mere speed: '[T]he essential ingredient is orderly expedition and not mere speed.'" *Mizgala*, 61 M.J. at 129 (quoting *United States v. Mason*, 21 U.S.C.M.A. 389, 393, 45 C.M.R. 163, 167 (1972). "Constant motion is not the standard so long as the processing reflects reasonable diligence under all the circumstances." *Id.* at 129. Under the circumstances of this case, I find the government proceeded with reasonable diligence and would affirm the military judge's ruling denying the defense motion for relief under Article 10, UCMJ. Therefore, I respectfully dissent.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court