**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| U N I T E D S T A T E S, Appellee | ) | BRIEF ON BEHALF OF APPELLEE |
| 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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## Index of Brief

Issue Presented:

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

## TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

### Supreme Court of the United States



### United States Court of Appeals for the Armed Forces

## Military Courts of Criminal Appeal



## Federal Courts of Appeal



## Uniform Code of Military Justice

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**TO THE HONORABLE 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 GOVERMMENT FAILED TO ACT WITH REASONABLE DILIGENCE IN BRINGING HIM TO TRIAL.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) [hereinafter UCMJ].[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] UCMJ, art. 66(b), 10 U.S.C. §866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. §867(a)(3).

## Statement of the Case

A military judge sitting alone as a general court-martial convicted appellant, pursuant to his pleas,[3] of violation of a lawful order, wrongful introduction of a controlled substance with the intent to distribute, wrongful distribution of heroin, and wrongful distribution of cocaine, in violation of Articles 92 and 112a, UCMJ.[4] The military judge sentenced the accused to be reduced to the grade of E-1, to be confined for 40 months, and to be discharged from the service with a bad-conduct discharge.[5] The convening authority approved the findings and only so much of the sentence as provides for reduction to the grade of E-1, confinement for 21 months, and a bad-conduct discharge.[6] The convening authority credited the accused with 174 days of confinement against the sentence to confinement.[7]

The Army Court summarily affirmed the findings and sentence on August 28, 2012.[8] This honorable court granted appellant's petition for grant of review on December 17, 2012.[9]

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[3] JA at 96. Appellant plead not guilty to the language "with intent to distribute the said controlled substance" in Specification 1 of Charge IV. (JA at 15, 96). The military judge found the accused guilty of the offense as charged. (JA at 97).
[4] JA at 97.
[5] JA at 101.
[6] JA at 13. The convening authority's action complied with the terms of the pretrial agreement. (JA at 206).
[7] JA at 13.
[8] JA at 1.
[9] JA at 4.

## Statement of Facts

The following chart reflects the significant events in the processing of appellant's court-martial from when he was placed in pre-trial confinement on August 17, 2010 until his trial on February 7, 2011.

| Event | Date | Days Since Last Event | Total Elapsed Time |
|---|---|---|---|
| Appellant placed into pre-trial confinement (PTC)[10] | 17-Aug-10 | 0 | 0 |
| Appellant waives appearance at PTC hearing[11] | 22-Aug-10 | 5 | 5 |
| Military Magistrate approves continued PTC[12] | 23-Aug-10 | 1 | 6 |
| CID completes investigation[13] | 14-Sep-10 | 22 | 28 |
| Charges preferred[14] | 22-Sep-10 | 8 | 36 |
| Article 32 investigating officer appointed[15] | 1-Oct-10 | 9 | 45 |
| Appellant submits first offer to plead guilty[16] | 21-Oct-10 | 20 | 65 |
| Appellant submits draft stipulation of fact[17] | 27-Oct-10 | 6 | 71 |

[10] JA at 110, 195(¶2).
[11] JA at 112.
[12] JA at 114-15.
[13] JA at 196(¶12).
[14] JA at 15-18, 196(¶13).
[15] JA at 176-79, 196(§16).
[16] JA at 172-75, 196(¶20).
[17] JA at 185, 197(¶25).

| Event | Date | Days Since Last Event | Total Elapsed Time |
|---|---|---|---|
| Appellant's Brigade travels to the Joint Readiness Training Center (JRTC) for training[18] | 1-Nov-10 | 5 | 76 |
| Appellant submits revised offer to plead guilty[19] | 10-Nov-10 | 9 | 85 |
| Government forwards offer to plead guilty to chain of command for review[20] | 11-Nov-10 | 1 | 86 |
| Testimonial immunity granted to 4 soldiers associated with appellant's court-martial[21] | 16-Nov-10 | 5 | 91 |
| USACIL completes examination of evidence seized from appellant[22] | 23-Nov-10 | 7 | 98 |
| Appellant's Brigade returns from JRTC[23] | 24-Nov-10 | 1 | 99 |
| Government discusses appellant's offer to plead guilty with the chain of command[24] | 29-Nov-10 | 5 | 104 |
| Convening Authority rejects appellant's offer to plead guilty at the first Commanding General (CG) appointment available following appellant's unit's return from JRTC[25] | 30-Nov-10 | 1 | 105 |

[18] JA at 197(¶26).
[19] JA at 180-84, 197(¶27).
[20] JA at 197(¶28).
[21] JA at 197(¶29).
[22] JA at 121-22, 197(¶30).
[23] JA at 197(¶31).
[24] JA at 197(¶32).
[25] JA at 183, 197(¶33).

| Event | Date | Days Since Last Event | Total Elapsed Time |
|---|---|---|---|
| Government and Defense begin discussing dates for Article 32, UCMJ, investigation[26] | 1-Dec-10 | 1 | 106 |
| New Article 32 investigating officer appointed[27] | 6-Dec-10 | 5 | 111 |
| Accused notified of new Article 32 investigating officer[28] | 8-Dec-10 | 2 | 113 |
| Original date of Article 32, UCMJ, investigation; however, defense counsel was unavailable for the hearing[29] | 10-Dec-10 | 2 | 115 |
| Accused submits Speedy Trial Request[30] | 14-Dec-10 | 4 | 119 |
| Article 32, UCMJ, investigation begins[31] | 14-Dec-10 | 0 | 119 |
| Article 32, UCMJ, investigation completed[32] | 16-Dec-10 | 2 | 121 |
| Article 32, UCMJ, investigating officer's report completed[33] | 20-Dec-10 | 4 | 125 |

[26] JA at 197(¶34).
[27] JA at 124-27, 197(¶35).
[28] JA at 129-30, 187, 198(¶36).
[29] JA at 197(¶34).
[30] JA at 132, 198(¶40).
[31] JA at 198(¶38).
[32] JA at 198(¶41).
[33] JA at 134-37, 198(¶42).

| Event | Date | Days Since Last Event | Total Elapsed Time |
|---|---|---|---|
| Special Court-Martial Convening Authority dismisses, in accordance with the recommendations of the Article 32 investigating officer, a number of charges and specifications against appellant[34] | 21-Dec-10 | 1 | 126 |
| Charges referred to a general court-martial[35] | 22-Dec-10 | 1 | 127 |
| Charges served on appellant and the military judge[36] | 23-Dec-10 | 1 | 128 |
| Military judge begins pre-approved Christmas Leave[37] | 23-Dec-10 | 0 | 128 |
| Military judge returns from Christmas Leave[38] | 27-Dec-10 | 4 | 132 |
| Military judge attempts to set an immediate arraignment; however, defense counsel was unavailable[39] | 28-Dec-10 | 1 | 133 |
| Arraignment[40] | 4-Jan-11 | 7 | 140 |
| Article 39(a) hearing[41] | 7-Jan-11 | 3 | 143 |
| Military judge goes TDY to Fort Dix[42] | 10-Jan-11 | 3 | 146 |

[34] JA at 139, 198(¶43).
[35] JA at 144, 198(¶45).
[36] JA at 198(¶¶46-47).
[37] JA at 211(¶17).
[38] JA at 211 (¶17).
[39] JA at 191.
[40] JA at 199(¶49).
[41] JA at 211 (¶17).
[42] JA at 211 (¶17).

| Event | Date | Days Since Last Event | Total Elapsed Time |
|---|---|---|---|
| Military judge returns from Fort Dix TDY[43] | 15-Jan-11 | 5 | 151 |
| Martin Luther King, Jr., Day (Federal Holiday)[44] | 17-Jan-11 | 2 | 153 |
| Article 39(a) hearing[45] | 18-Jan-11 | 1 | 154 |
| Military judge travels TDY to Fort Leavenworth[46] | 19-Jan-11 | 1 | 155 |
| Military judge returns from Fort Leavenworth TDY[47] | 22-Jan-11 | 3 | 158 |
| Article 39(a) hearing[48] | 25-Jan-11 | 3 | 161 |
| Defense counsel requests a continuance and additional time in order to explore a new offer to plead guilty[49] | 26-Jan-11 | 1 | 162 |
| Trial[50] | 7-Feb-11 | 13 | 174 |

Those additional facts necessary for the resolution of the granted issue are contained herein.

[43] JA at 211 (¶17).
[44] JA at 211 (¶17).
[45] JA at 211 (¶17).
[46] JA at 211 (¶17).
[47] JA at 211 (¶17).
[48] JA at 211 (¶17).
[49] JA at 211 (¶16).
[50] JA at 8.

## GRANTED ISSUE AND ARGUMENT

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

### Standard of Review

This court reviews de novo whether an accused has been denied his right to a speedy trial under Article 10, UCMJ, as a matter of law.[51] The military judge's findings of fact are given substantial deference and are only reversed for clear error."[52]

### Law and Analysis

Article 10, UCMJ, requires that "when any person subject to this chapter is placed in . . . 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."[53] The "touch stone for measurement of

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[51] *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citations omitted).

[52] *Mizgala*, 61 M.J. at 127. However, "[m]ilitary judges must be careful to restrict findings of fact to things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequences, or interpretation.'" *Cossio*, 64 M.J. at 257 (citing Black's Law Dictionary 628 (8th ed. 2004)). Courts therefore only "accept [a] military judge's findings of fact insofar as they establish the events and circumstances" and not "criticism," "apparent belief," or "opinions." *Id.*

[53] UCMJ, art. 10.

compliance with [Article 10 is] . . . reasonable diligence in bringing charges to trial."[54]

This court has adopted the four-part test from *Barker v. Wingo*,[55] as the "framework to determine whether the Government proceeded with reasonable diligence."[56] Those factors are: "(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."[57] In *Barker*, the Supreme Court explained:

> "[N]one of the four factors identified above [are] 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."[58]

In balancing these four factors, military courts look to the proceeding as a whole, the "essential element" being "orderly expedition and not mere speed."[59] They take into account "the logistical challenges of a world-wide system that is constantly expanding" as well as "ordinary judicial

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[54] *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (1965)); *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999); *United States v. Kossman*, 38 M.J. 258, 261-62 (C.M.A. 1993).
[55] 407 U.S. 514, 530 (1972).
[56] *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530).
[57] *Id.*
[58] *Barker*, 407 U.S. at 533.
[59] *Mizgala*, 61 M.J. at 129 (internal quotations and citations omitted).

impediments, such as crowded dockets, unavailability of judges, and attorney caseloads. . . ."[60] "Short periods of inactivity are not fatal to an otherwise active prosecution."[61]

Each of the *Barker* factors is addressed in turn.

I. Length of the Delay

"The first factor under the *Barker* analysis . . . is to some extent a triggering mechanism, and unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into the other factors that go into the balance."[62] Circumstances that are appropriate to consider include: (1) the seriousness of the offense; (2) the complexity of the case; (3) the availability of proof; (4) whether the accused was informed of the accusations against him; (5) whether the government complied with the pre-trial confinement procedures; and (6) whether the government was responsive to requests for reconsideration of pretrial confinement.[63]

The government acknowledges that the 174 days from when appellant was placed in confinement until his trial would likely constitute a facially unreasonable delay, thus triggering the

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[60] *Kossman*, 38 M.J. at 261-262.
[61] *Mizgala*, 61 M.J. at 127 (citation omitted).
[62] *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011)(quoting *Cossio*, 64 M.J. at 257).
[63] *Schuber*, 70 M.J. at 188 (citing *Barker*, 407 U.S. at 530-31 & n.31).

full *Barker* analysis. However, it should at least be noted that many of the circumstances detailed above do weigh in the government's favor. As discussed more fully below, this was not a simple case of narcotics possession requiring only forensic evidence as to the nature of the seized substances. Rather, it involved a distribution network by appellant that necessitated the locating and interviewing of a number of witnesses and processing the cases of, and providing immunity to, four soldiers who could testify against appellant.

Further, the final three circumstances identified above, relating exclusively to the pre-trial confinement procedures, weigh heavily in favor of the government. Appellant was placed on notice of the general charges he was facing upon being placed in pretrial confinement through an initial charge sheet provided to the military magistrate.[64] Based on the record,[65] and under the "presumption of regularity,[66] the government fully complied with the pretrial confinement procedures. Finally, appellant never challenged the validity of his pretrial confinement, either from the outset,[67] or in any later request for reconsideration.

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[64] JA at 114.
[65] JA at 110-115, 170-171.
[66] *Schuber*, 70 M.J. at 188.
[67] JA at 112.

II. Reasons for the Delay

"Under this factor we look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant."[68] While 174 days elapsed between entry into confinement and trial, the government is only actually responsible for half that period of time (87 days). The time directly attributable to the government encompasses reasonable actions by the government to process appellant's case towards trial. This section will address the processing of appellant's case chronologically, and the responsibility for the various periods of time.

A. Entry into Confinement through Investigation and Preferral of Charges (August 17 - September 22)

The first indication of wrongdoing on the part of appellant arose on August 17, 2010, from a confidential source to CID that appellant was a distributor of heroin.[69] That same day CID searched appellant's quarters and he was placed into pre-trial confinement.[70] At the time of appellant's placement into pre-trial confinement, aside from the confidential source and the items discovered in the search of his residence, no other evidence was known to the government regarding his criminal activity.

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[68] *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006).
[69] JA at 165.
[70] JA at 165.

Within two days, by August 19, CID discovered through a search of appellant's phone that he was likely dealing controlled substances to numerous soldiers on Fort Drum, New York, in addition to learning from interviews of another soldier that appellant would travel across state lines by car to Ohio in order to purchase and distribute narcotics.[71] Over the course of the next four weeks, CID investigated the other individuals suspected of purchasing narcotics from appellant.[72] CID was able to identify at least four individuals (in addition to the original confidential source) who purchased various narcotics from appellant.[73] CID completed its investigation into appellant's misconduct on September 14.[74]

The 28 days it took CID to complete an investigation into a multi-faceted drug distribution network by appellant is reasonable under the circumstances, particularly where it involved the crossing of state lines and numerous soldiers from Fort Drum. "The Government has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial."[75] As the Air Force Court of Criminal Appeals has noted, the term "immediate steps . . . does not mean the government must bring court-martial charges against a member

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[71] JA at 166-67.
[72] JA at 167-68.
[73] JA at 167-68.
[74] JA at 196 (¶12).
[75] *Cossio*, 64 M.J. at 258.

being held in pretrial confinement before collecting the evidence to conduct a successful prosecution." Further, the court explained that there is no requirement that "investigators and prosecutors must busy themselves with case preparation while they are waiting for the evidence necessary to understand the case."[76] Before the government could effectively pursue appellant's prosecution, it needed to fully understand the scope of appellant's drug distribution network that CID was investigating. Twenty-eight days is not an unreasonable period of time for such an investigation.

The government preferred charges eight days after CID completed its investigation, on September 22, 2010, which included two specification of conspiracy to possess, introduce, and distribute cocaine and heroin, one specification of violation of a lawful order, one specification of wrongfully introducing heroin, nine specifications of wrongful distribution of various controlled substances, and one specification of attempted distribution of heroin (in all, a total of 4 charges comprising 14 separate specifications).[77] The time it took the government to complete the charge sheet and officially prefer charges against appellant following the completion of the investigation should not be considered unreasonable.

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[76] *United States v. Plants*, 57 M.J. 664, 668-669 (A.F. Ct. Crim. App. 2002).
[77] JA at 117-119.

In all, the government's actions during the 36 days from appellant's entry into pre-trial confinement until the preferral of charges should be considered reasonably diligent for purposes of Article 10, UCMJ.

B. Initial Article 32, UCMJ, Investigation Preparation (September 22 - October 27).

After preferring charges on September 22, the government appointed an Article 32 investigating officer nine days later on October 1, 2010.[78] While generally an Article 32 investigating officer can be appointed more conterminously with the preferral of charges, the nine day delay is reasonable under the circumstances of this case. Here, appellant's entire Brigade, including the appointing authority for the Article 32 investigating officer, went into a local field training exercise on September 22 (the day charges were preferred) and remained in the field until October 7, 2010.[79] While the government was able to secure the appointment of the Article 32 investigating officer during this timeframe, it is logical to conclude that the conduct of the field exercise would have complicated such coordination, thereby reasonably explaining the delay.[80]

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[78] JA at 176-79, 196 (¶16).
[79] JA at 196 (¶¶15, 17). The stipulation of fact detailed that appellant's entire Brigade took part in the field training exercise. (JA at 196 (¶15)). The Brigade Commander appointed the Article 32 investigating officer. (JA at 176-79).
[80] *See United States v. McCullough*, 60 M.J. 580, 585 (Army Ct. Crim. App. 2004)(citing *Kossman*, 38 M.J. at 261-62) ("military

Following the appointment of the Article 32 investigating officer (October 1) until the defense submitted its initial offer to plead guilty (October 27), the processing of appellant's case was admittedly "not stellar"[81] and was "less than commendable."[82] These 26 days apparently resulted primarily from "an Investigating Officer who, despite orders from the Appointing Authority to make the Article 32 Investigation a priority, does not."[83] While the record does not reflect any indication that this time was due to the intentional actions of government counsel, neither does it reflect what steps were taken by the government to compel a dawdling Article 32 investigating officer into action.

However, during this time frame it is clear that the government was still taking action to move appellant's case towards trial. Appellant's case involved at least five other co-actors. The first, SPC T.L., was charged with wrongful distribution of controlled substances on September 22, 2010, and was not convicted at a summary court-martial until October 22, 2010.[84] The remaining four were given testimonial immunity by

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exigencies may constitute a legitimate reason for delay under Article 10, UCMJ.").

[81] *Mizgala*, 61 M.J. at 129; *United States v. Thompson*, 68 M.J. 308, 313 (C.A.A.F. 2010).

[82] *Schuber*, 70 M.J. at 188.

[83] JA at 211.

[84] JA at 196 (¶¶ 14, 21).

the convening authority on November 16, 2010.[85] However, it was not until December 14, 2010, that the Assistant United States Attorney confirmed that the Department of Justice would not prosecute those four soldiers.[86] The Army Court has recognized that the government is entitled to "additional, but not unlimited, extra time under Article 10, UCMJ, to prosecute" co-actors in the order it determines most appropriate.[87] This is because "[p]roceeding too rapidly without regard to culpability might compromise the prosecution of one or more of the co-accused, or result in an unwarranted windfall by forcing the government to provide an inappropriately generous pretrial agreement."[88] The Army Court also cited to the Supreme Court's recognition in *Barker v. Wingo* "that prosecutorial decisions about the order in which to try multiple defendants may provide reasonable grounds for delay."[89] Here, because appellant was the principal actor in this distribution scheme, it was reasonable for the government to resolve the cases of his co-actors before taking action against appellant. Even during the 26 day time period when the investigating officer was not taking his duties as seriously as he should have, the government was still clearly taking steps towards the prosecution of appellant.

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[85] JA at 197 (¶29).
[86] JA at 193-94, 198 (¶¶ 38-39)
[87] *McCullough*, 60 M.J. at 588.
[88] *Id.* at 587.
[89] *Id.* at 588.

C. Plea Negotiations and Action Thereon (October 27 - November 30).

On October 21, appellant submitted his initial offer to plead guilty.[90] Within that offer to plead guilty, appellant agreed to waive his right to a pretrial investigation pursuant to Article 32, UCMJ, conditioned upon the acceptance of his offer to plead guilty.[91] Appellant also agreed to enter into a stipulation of fact.[92]

The government immediately entered into negotiations with appellant's counsel the same day the offer to plead guilty was submitted, and defense counsel agreed to discuss with appellant the submission of a revised offer to plead, as well as to prepare a draft stipulation of fact.[93] These negotiations regarding the offer to plead continued between the government and defense until November 10, 2010.[94] Appellant submitted the draft stipulation of fact on October 27, but did not submit the completed revised offer to plead guilty until November 10, 2010.[95]

A number of Circuits have held that, in the speedy trial context, time spent on plea negotiations is reasonably

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[90] JA at 172-75, 196 (¶20).
[91] JA at 174.
[92] JA at 173.
[93] JA at 196 (¶22).
[94] JA at 196 (¶23).
[95] JA at 197 (¶¶ 25, 27).

deductable from the speedy trial timeline.[96] Here, the military judge refused to conclude that the 19 days from October 22 until November 10 should be considered defense delay because he could not determine why negotiations took so long, or who requested the delay.[97]

Contrary to the military judge's findings, the evidence is clear. Appellant submitted an unacceptable initial offer to plead guilty, and agreed to submit an amended version in addition to a draft stipulation of fact. The onus at that point was undoubtedly on appellant to prepare and submit those documents to the government for action. The fact that it took appellant 19 days to submit those documents on November 10 should not be used against the government, and should appropriately be considered defense delay. The government could not draft appellant's own offer to plead guilty or stipulation of fact. The burden was on appellant to submit those documents, and it was his decision to delay doing so.

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[96] *See United States v. Van Someren*, 118 F.3d 1214, 1218 (8th Cir. 1997); *see also United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987); *United States v. Goodwin*, 612 F.2d 1103, 1105 (8th Cir. 1980); *United States v. Bowers*, 834 F.2d 607, 610 (6th Cir. 1987); *United States v. Fields*, 39 F.3d 439, 445 (3d Cir. 1994); *United States v. Williams*, 12 F.3d 452, 460 (5th Cir. 1994). While these cases dealt with the application of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, this court has at least cited that act for guidance regarding military speedy trial issues. *See United States v. McCullough*, 60 M.J. at 587, n. 31 (citing *Cooper*, 58 M.J. at 57, 60); *Birge*, 52 M.J. at 211; *United States v. Edmond*, 41 M.J. 419, 421 (C.A.A.F. 1995).

[97] JA at 208.

Following the submission of the offer to plead guilty on November 10, the time until the convening authority took action on that offer to plead guilty on November 30 should be considered defense delay as well. "Where the defense . . . requests government action which necessarily requires reasonable time for accomplishment, then the defense waives the government speedy-trial accountability for those periods of time."[98]

While the time it took to take action on appellant's offer to plead guilty is longer than in some cases, it is reasonably explained by the fact that appellant's unit deployed on November 1 from Fort Drum, New York, to the Joint Readiness Training Center (JRTC) at Fort Polk, Louisiana (over 1,500 miles away), and remained there until November 24, 2010.[99] Due to this operational requirement, the military judge appropriately considered the time period from November 10 to November 24 as defense delay.[100] This is especially clear where appellant chose to wait until after his unit went to the JRTC to submit his offer to plead guilty. Had appellant chosen to submit his offer to plead earlier, it is likely the decision regarding that offer would not have been affected by the deployment to the JRTC.

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[98] *United States v. King*, 30 M.J. 59, 66 n.7 (C.M.A. 1990).
[99] JA at 197 (¶26).
[100] *See McCullough*, 60 M.J. at 585 (noting that prosecution is permitted a reasonable amount of additional time to process a case due to extraordinary operational requirements and personnel turbulence resulting from deployment of accused's unit).

The military judge was incorrect by not including the time from November 24 (return from JRTC), to November 30 (rejection of offer by convening authority), as reasonably incidental to the requested government action by the defense. Appellant's unit returned to Fort Drum on Wednesday, November 24, 2010.[101] The next day was Thanksgiving, a federal holiday. Following Thanksgiving, appellant's entire unit was on holiday until Monday, November 29, 2010.[102] On November 29, the first duty day after appellant's unit returned from the JRTC, the government discussed with, and obtained recommendations from, appellant's chain of command regarding the offer to plead guilty.[103] The government then brought appellant's offer to plead guilty to the convening authority the very next day on Tuesday, November 30, which was the first available regularly scheduled appointment with the convening authority.[104] That a unit, to include its commanders, would take a federal holiday and subsequent four-day weekend, particularly after having returned from a training deployment, and only months before embarking on a combat deployment, should reasonably be expected. Where an accused chooses to delay submission of an offer to plead guilty until

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[101] JA at 197 (¶31).
[102] JA at 197 (¶31).
[103] JA at 197 (¶32).
[104] JA at 197 (¶33); R. at 107. The trial counsel explained that the Staff Judge Advocate's weekly meeting with the Commanding General occurred on Tuesdays.

the unit and command is unavailable at a remote training site, knowing that it will return directly into a four-day weekend, should reasonably waive the time it takes to act on that offer to plead for purposes of speedy-trial accountability.

It was also reasonable for the government to not conduct the Article 32, UCMJ, investigation during this timeframe. Appellant's initial offer to plead guilty included a waiver of the Article 32, UCMJ, investigation.[105] As the military judge correctly pointed out, "[i]t is reasonable for the government, after receiving an OTP with a conditional waiver, to delay holding an Article 32 Investigation until that OTP is resolved."[106] Had the government gone ahead with the Article 32, UCMJ, investigation despite knowing that appellant intended to submit a revised offer to plead guilty, appellant would have lost the benefit he would have received from waiving the Article 32, UCMJ, investigation.[107] Further, once the government received appellant's revised offer to plead which again included an Article 32 waiver,[108] there would have been no reason to conduct the Article 32, UCMJ, investigation until after the convening authority took action on the offer to plead guilty.

As a result of the defense-initiated plea negotiations and the reasonable time necessary for the government under the

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[105] JA at 174.
[106] JA at 208 (¶7).
[107] JA at 208 (¶7).
[108] JA at 182.

circumstances to act on appellant's offer to plead guilty, the entire time from October 21 through November 30, 2010 (40 days), should not be considered government speedy-trial accountable time.

D. Article 32, UCMJ, Investigation (November 30 - December 20).

Following the rejection of appellant's offer to plead guilty, the government processed appellant's case rather expeditiously. The next day, on December 1, the government and defense began discussions regarding the date for the Article 32, UCMJ, investigation .[109] The government was prepared to conduct the hearing on December 9; however, the defense was unavailable until December 14.[110] As a result, the time period from December 10-14 (4 days) is appropriately considered defense delay.[111]

The Article 32, UCMJ, investigation was conducted from December 14-16, 2010.[112] The Article 32 investigating officer completed his report only 4 days later on December 20, 2010.[113] The next day, on December 21, the Special Court-Martial Convening Authority reviewed the Article 32 report and dismissed a number of charges based on the investigating officer's

[109] JA at 197 (¶34).
[110] JA at 197 (¶34).
[111] JA at 208.
[112] JA at 198 (¶¶38, 41).
[113] JA at 134-37, 198 (¶42).

recommendations.[114] The day after, on December 22, the convening authority referred appellant's case to trial.[115]

The government's processing of appellant's case during this timeframe was exceptionally expeditious. They conducted the Article 32, UCMJ, investigation on the earliest date available to both parties, and immediately referred the case to trial following the completion of the Article 32 investigation.

E. Referral of Charges Through Arraignment (December 22 - January 4, 2011).

The government properly served the referred charges on the accused and the military judge on December 23, 2010.[116] At that time the military judge was already on approved Christmas leave until December 27, 2010 (4 days).[117] Once the military judge returned from Christmas leave, he attempted to set an immediate arraignment; however, defense counsel was unavailable until January 4, 2011 (7 days).[118]

The foregoing establishes that the entire delay from December 23 (service of referred charges on the military judge) until January 4 (arraignment), 12 days, is appropriately considered both court and defense delay.[119]

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[114] JA at 139, 198 (¶43).
[115] JA at 144, 198 (¶45).
[116] JA at 198 (¶¶46, 47).
[117] JA at 211 (¶17).
[118] JA at 191.
[119] JA at 209 (¶8).

F. Litigation of Article 10, UCMJ, Motion (January 4 - January 25).

"[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.'"[120] "[O]nce an accused is arraigned, significant responsibility for ensuring the accused's court-martial proceeds with reasonable dispatch rests with the military judge."[121]

Following appellant's arraignment on January 4, three Article 39(a) sessions were held on January 7, 18, and 25 in order to litigate appellant's Article 10 motion.[122] The defense presented additional evidence at each of the latter two Article 39(a) sessions in support of its motion.[123] Further, the military judge was unavailable on temporary duty (TDY) from January 10-15, and 19-22 (8 days).[124]

The time it takes to fully litigate an Article 10, UCMJ, motion should not be attributed against the government when assessing the overall speedy trial timeline. The 18 days from the beginning of argument and evidence on the motion until the

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[120] *Cooper*, 58 M.J. at 60 (citing *United States v. Doty*, 51 M.J. 464, 465-66 (C.A.A.F. 1999)).
[121] *Id.*
[122] JA at 211 (¶17).
[123] JA at 81-86, 93-94.
[124] JA at 211 (¶17).

final hearing is most appropriately considered court approved delay, particularly where the court itself requested additional evidence from the parties for purposes of the motion.

Taking into account the overall timeline, to include the federal Martin Luther King, Jr., holiday on January 17, the government should not be held responsible for the time period from January 4-25, 2011 (21 days).

G. Final Delay Before Trial (January 26 - February 7)

Following the conclusion of the litigation concerning the Article 10, UCMJ, motion on January 25, the defense requested that the court grant a delay in the proceedings in order to allow the defense the opportunity to pursue renewed plea negotiations with the government should the court decide to deny its motion for relief under Article 10.[125] The court granted that delay until February 7, 2011, the eventual date of trial.[126]

As a result, the entire period from January 26 - February 7, 2011 (13 days) is appropriately considered defense delay.

H. Summary

Based on the foregoing, a number of periods of time should be excluded from the computation of time attributable to the government for purposes of speedy-trial: October 21 - November 30, 2010 (plea negotiations and processing of appellant's offer

[125] JA at 211 (¶16).
[126] JA at 211 (¶16).

to plead)(40 days); December 10-14 (Article 32 defense delay)(4 days); December 23, 2010 - January 4, 2011 (court and defense unavailability delay)(12 days); January 7 - 25, 2011 (litigation of Article 10 motion)(18 days); and January 26 - February 4, 2011 (defense requested delay)(13 days). In all, this excludable time totals 87 days, reducing the total amount of time attributable to the government in half, to 87 days.

The overall processing of appellant's case by the government was performed with "reasonable diligence under all the circumstances," as Article 10, UCMJ, requires.[127] The 87 days actually attributable to the government would have even satisfied the outdated and overly stringent 90 day presumption of an Article 10, UCMJ, violation.[128] Further, aside from the 20 days from October 1-21 where the original investigating officer failed to adequately perform his duties, the government effectively processed appellant's case towards court-martial.

On the whole, based on the amount of time actually attributable to the government, the government's legitimate interests in dealing with the co-actors first, and the overall processing of appellant's case towards trial, this factor weighs in favor of the government.

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[127] *Mizgala*, 61 M.J. at 129.
[128] *See United States v. Burton*, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 171, 172 (1971) (overruled by *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993)).

III. Speedy Trial Demand

Appellant submitted his speedy trial request on December 14, 2010, 119 days after being placed into pretrial confinement.[129] As the Supreme Court has pointed out with regard to the relation between the deprivation of an accused's speedy trial right and his request for a speedy trial, "[t]he more serious the deprivation, the more likely a defendant is to complain."[130]

Appellant's actions both before and after his speedy trial request on December 14 belie his claim that he desired his case be processed more expeditiously. First, had appellant truly desired that his case be processed more quickly, he would not have waited twenty days (Oct 21 - Nov 10) to submit a revised offer to plead guilty. At that point appellant implicitly controlled the progress of his case, and chose to wait almost three weeks before attempting to move it forward.

Second, appellant was directly responsible for two periods of delay following his request for a speedy trial. Despite the military judge requesting an immediate arraignment on December 28, appellant's defense counsel was unavailable until January 4, 2011, a delay of 7 days. Finally, appellant personally requested a 13 day delay from January 26 until February 7 in

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[129] JA at 132, 198 (¶40).
[130] *Barker v. Wingo*, 407 U.S. at 531.

order to pursue a revised offer to plead guilty. It is disingenuous for one to claim they wish to be brought immediately to trial and then request an almost two week delay of that trial.

Based on the foregoing, this factor should not weigh in favor of appellant, despite his actual speedy trial request, due to his own actions prior to and subsequent to that request.

IV. Prejudice

Pre-trial confinement alone does not establish prejudice.[131] When assessing whether an appellant has been prejudiced as a result of pre-trial incarceration, courts look to the interests that Article 10, UCMJ, was designed to protect.[132] These are to: (1) prevent oppressive pretrial incarceration; (2) minimize anxiety and concern of the accused; and (3) limit the possibility that the defense will be impaired.[133]

Initially, appellant has not asserted that any delay associated with the processing of his case resulted in the impairment of his defense, generally considered the most serious form of prejudice.[134] Appellant can therefore only establish

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[131] *Cooper*, 58 M.J. at 56-57.
[132] *Mizgala*, 61 M.J. at 129.
[133] *Id.* (citing *Barker*, 407 U.S. at 532).
[134] *Barker*, 407 U.S. at 532. Appellant argued at trial that the delay resulted in the inability to locate two witnesses, D.P. and S.B. However, both of these witnesses were located prior to his court-martial and testified during trial.

that he suffered prejudice if he can show either of the first two interests was impacted in this case.

Turning to the first interest, courts have interpreted "oppressive pretrial incarceration" to refer to whether the incarceration was justified. As the Ninth Circuit stated in response to an accused's claim that his incarceration was oppressive, "whether this incarceration is unjustified and thus oppressive depends upon the outcome of his appeal on the merits, or subsequent retrial, if any." "If his conviction was proper, there has been no oppressive confinement: he has merely been serving his sentence as mandated by law."[135] This court has used the same analysis, pointing out that "oppressive incarceration" "is directly related to the success or failure of an appellant's substantive appeal." "If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive."[136] "Under these circumstances, an appellant would have served the same period of incarceration regardless of the delay."[137]

While these cases have interpreted this provision with regard to post-trial incarceration, the analysis can readily be

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[135] *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990); *see also Harris v. Champion*, 15 F.3d 1538, 1565 (10th Cir. 1994); *United States v. Ballato*, 486 Fed. Appx. 573, 575 (6th Cir. 2012)(unpublished).
[136] *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)).
[137] *Id.*, citing *Antoine*, 906 F.2d at 1382.

applied to pre-trial incarceration. In this case, appellant was sentenced to confinement for 40 months (480 days),[138] and the convening authority approved a sentence to confinement of 21 months (252 days).[139] Consequently, whether appellant's trial occurred on day 174 or day 30, he would have remained in confinement for the entire period for which he had been confined, plus an additional 78 days.[140] Further, appellant was fully credited with the entire period of his pre-trial incarceration towards the sentence to confinement. Therefore, despite appellant being incarcerated for 174 days before his trial, he has not been required to serve any unjustified period confinement.

Even assuming this court applies the term "oppressive" in a more colloquial sense, or rather analyzes appellant's assertion of prejudice based on his treatment while confined more appropriately under the second prong (anxiety and concern), appellant still cannot establish prejudice.[141] When analyzing claims of anxiety or concern, military courts "require an appellant to show particularized anxiety or concern that is

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[138] JA at 101.
[139] JA at 13.
[140] Notably, appellant has never challenged the propriety of his pre-trial confinement.
[141] As the Tenth Circuit has indicated, in many instances arguments concerning "oppressive incarceration" "merely duplicates the prejudice of anxiety." *Champion*, 15 F.3d at 1565.

distinguishable from the normal anxiety experienced by prisoners."[142]

Here, appellant claims prejudice based solely upon the treatment he received from fellow inmates. First, appellant specifically disclaimed that this harassment violated Article 13, UCMJ.[143] Second, his own account of what occurred belies any claim that his incarceration was "oppressive" or that he suffered any "particularized anxiety or concern." Neither appellant nor his counsel ever reported this treatment to his chain of command.[144] While appellant claimed he reported the conduct to the guards at the facility, he never presented to the court any formal complaints or transfer requests he may have submitted.[145]

Appellant never testified that he was subjected to any physical violence or actual threats by the other inmates. In fact, appellant considered that many of the inmates were merely "playing" when making comments towards him.[146] Appellant also never testified that he was ever in fear for his safety from the other inmates, nor how any of these comments ever actually affected him. He never testified that the comments made him

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[142] *Moreno*, 63 M.J. at 140.
[143] JA at 98-100. *See Thompson*, 68 M.J. at 313-14 (finding waiver of Article 13 claim "a relevant factor bearing upon the question of prejudice for oppressive confinement . . . .").
[144] JA at 30.
[145] JA at 30.
[146] JA at 25.

nervous, ashamed, sad, angry, or caused any other form of emotional anguish.

Undoubtedly, the supposed comments made by appellant's fellow inmates are reprehensible.[147] However, the fact that appellant would be exposed to persons of low moral fiber *while in prison* should come as no surprise, and is likely not unique to appellant's incarceration. His exposure to non-threatening racist comments, while despicable on the part of the speaker, does not render his incarceration "oppressive" nor did it cause "particularized anxiety or concern." Without even attempting to show what affect these statements had upon him, appellant cannot establish that he was prejudiced by them, particularly where he never utilized the full panoply of resources (his command) available to him while it was occurring to try and prevent them.

Based on appellant's inability to establish prejudice, this factor weighs heavily in favor of the government.

V. Balancing of the Factors

While 174 days will generally trigger a full *Barker* analysis, the processing of appellant's case represented reasonable diligence on the part of the government. Half of the overall delay in appellant's trial was based upon either appellant's own actions or the schedule of the court, not due to the actions of the government. Further, during those periods

[147] JA at 25.

with which the government is responsible for, the government took reasonable measures to process appellant's case as expeditiously as possible. While there may have been minor delays during the processing of this case, those delays did not deny appellant a speedy trial under Article 10, UCMJ.[148] Further, appellant has completely failed to establish that the delay in his trial prejudiced him in any manner. Based on the foregoing, appellant has failed to establish a violation of Article 10, UCMJ.

## Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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[148] *Mizgala*, 61 M.J. at 127.

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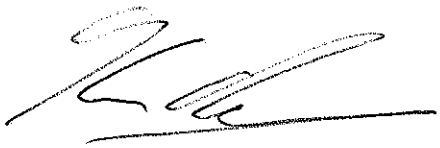

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I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 1, 2013.

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