11 October 2013

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

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**UNITED STATES,**
Appellee,

v.

Airman Basic (E-1)
**STEVEN A. DANYLO**
Appellant.

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Crim. App. No. 37916

USCA Dkt. No. 13-0570/AF

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***GRANT BRIEF***

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LAW REVIEW

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

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| **UNITED STATES,** *Appellee,* | ) | **BRIEF ON BEHALF OF APPELLANT** |
| v. | ) | USCA Dkt. No. 13-0570/AF |
| Airman Basic (E-1) **STEVEN A. DANYLO,** USAF, *Appellant*. | ) | Crim. App. No. 37916 |

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

## Issues Granted

**I.**

**WHETHER THE MILITARY JUDGE ERRED WHEN HE ONLY CONSIDERED THE PERIOD OF TIME FOR APPELLANT'S ARTICLE 62 APPEAL FOR THE PURPOSES OF APPELLANT'S SPEEDY TRIAL MOTION.**

**II.**

**WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHEN HIS COURT-MARTIAL OCCURRED 350 DAYS AFTER HE WAS PLACED IN PRETRIAL CONFINEMENT.**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ.

## Statement of the Case

On 10 and 23 August 2010 and 31 March 2011, Appellant was tried by a general court-martial composed a military judge sitting alone convened at Sheppard Air Force Base (AFB), Texas.

The Charges and Specifications on which he was arraigned, his pleas, and findings of the court-martial were as follows:

| Chg | UCMJ Art | Spec | Summary of Offense | Plea | Finding |
|---|---|---|---|---|---|
| I | 112a | | | G | G |
| | | 1 | Did, a/n Wichita Falls, TX, on divers occasions b/w o/a 1 Jan 10 and o/a 31 Mar 10, wrongfully use marijuana. | G | G |
| | | 2 | Did, a/ Wichita Falls, TX, on divers occasions b/w o/a 1 Jan 10 and o/a 31 Mar 10, wrongfully distribute some amount of marijuana. | G | G |
| | | 3 | Did, a/ Wichita Falls, TX, on divers occasions, b/w o/a 1 Jan 10 and o/a 31 Mar 10, wrongfully distribute some amount of cocaine. | G | G |
| | | 4 | Did, a/a Wichita Falls, TX, on divers occasions b/w o/a 1 Jan 10 and o/a 31 Mar 10, wrongfully distribute some amount of cocaine. | G | G |
| | | 5 | Did, a/n Wichita Falls, TX, on divers occasions b/w o/a 1 Jan 10 and o/a 31 Mar 10, wrongfully distribute some amount of cocaine. | NG | W/drawn [1] |
| | | 6 | Did, a/ Sheppard AFB, TX, o/a 13 Mar 10, wrongfully introduce some amount of marijuana onto an installation used by the armed forces or under the control of the armed forces, to wit: Sheppard AFB with intent to distribute the said controlled substance. | G | G |
| II | 128 | | | G | G |
| | | 1 | Did, a/n Sheppard AFB, X, o/a 12 Apr 10, unlawfully shove AB | G | G |

[1] Dismissed by the convening authority after arraignment.

| Chg | UCMJ Art | Spec | Summary of Offense | Plea | Finding |
|---|---|---|---|---|---|
| | | | AWH on the body with his hand. | | |
| III | 134 | | | NG | W/drawn [2] |
| | | | Did, a/n Sheppard AFB, TX, o/a 12 Apr 10 wrongfully communicate to Amn AMC a threat to injure AB AWH by killing him. | NG | W/drawn [3] |

Appellant was sentenced to a bad conduct discharge, and confinement for ten (10) months. On 22 April 2011, the convening authority approved the sentence as adjudged.[4]

On 17 April 2013, AFCCA affirmed the findings and sentence. (Joint Appendix (J.A.) at 1-14). On 11 September 2013, this Honorable Court granted review of the aforementioned issues.

## Statement of Facts

### *A. Speedy trial chronology*

*1. Original speedy trial motion*

On 6 August 2010, Appellant's trial defense counsel filed a motion to dismiss Appellant's case for denial of speedy trial pursuant to the Sixth Amendment of the Constitution, Article 10 of the Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial (RCM) 707. (J.A. at 24-78). The motion alleged

[2] Dismissed by the convening authority after arraignment.
[3] Dismissed by the convening authority after arraignment.
[4] Appellant was granted a pretrial agreement by the convening authority that limited confinement to time already served. App. Exs. (J.A. 732-37)

that, prior to trial, Appellant was transferred to a Transition Flight[5] at Sheppard AFB, Texas, on 9 April 2010 and was ordered into civilian pretrial confinement at Wichita County Annex on 16 April 2010. (J.A. at 24-25). In the Government's response, it averred that Appellant's Report of Investigation (ROI) was completed on 16 April 2010 and that the planning of the disposition of the case was complicated by other individuals involved in the case: Airman (Amn) McNearney, Amn Cody, Amn Coyne, and Amn Hansknecht – all of whom faced a potential court-martial. (J.A. at 80). On 10 August 2010, an Article 39(a) session was conducted, which convened Appellant's court-martial and heard evidence and argument on trial defense counsel's motion. (J.A. at 738-876).

The military judge dismissed the charges pursuant to RCM 707 and Article 10, UCMJ. (J.A. at 118-33, 843-76). He also found that Appellant was "clearly under an arrest-type setting" while in Phase 1 of a "Transition Flight" and determined that 10 April 2010 should be used to calculate the date of restraint. (J.A. 856-58).

[5] Transition Flight is for "airmen that are going to be separated, court-martialed, and separated [sic] from the Air Force." (J.A. at 750).

*2. Motion for reconsideration*

The government filed a motion for reconsideration on 13 August 2013 and an Article 39(a) session was convened on 23 August 2010. (J.A. 134-190, 877).

Captain Terence Dougherty, the Chief of Military Justice at Sheppard AFB testified in support of the government's motion. (J.A. at 879-880). He testified that in May 2010 the legal office devised a strategy to prosecute the "ring" of Airman successfully. (J.A. at 882). Captain Dougherty admitted that the options were to "try and turn the least culpable, or at least on paper the least culpable into quick guilty pleas and give them post-trial immunity to testify against other individuals in the ring." (J.A. at 883). He also admitted that the other "more difficult route" was to grant pretrial immunity to prosecute other members of the ring. *Id*. Captain Dougherty stated that the strategy would be to "turn the small fish first and try [to] avoid the pretrial immunity issue." *Id*.

Captain Dougherty described the various negotiations he conducted with defense counsel in pursuit of this strategy. (J.A. at 884-89). Airman Coyne was offered a deal on 21 May, but which was ultimately not accepted. (J.A. at 884-85). Captain Dougherty spoke with Airman Hansknecht's defense counsel in "back and forth" discussions about the terms of a potential

deal, but was unable to come up with a "real deal" before Appellant's defense counsel permanently changed station. (J.A. at 886). Captain Dougherty admitted that after an "almost two-week gap" a new defense counsel was assigned and a deal was agreed upon. *Id*. Regarding Airman McNearney, he testified that he pled guilty, but some issues arose during his pretrial confinement hearing that led defense counsel to request a sanity board, which was not completed until 4 July. (J.A. at 807). Lastly, for Airman Cody, the Government changed its strategy from offering him an Article 15 to court-martialing him based on further misconduct. *See* (J.A. at 887-88). Captain Dougherty testified that the government changed its plans on 12 June and decided to obtain pretrial immunity for witnesses in order to prosecute Appellant. (J.A. at 888).

The military judge denied the Government's motion for reconsideration. (J.A. at 195-203). He found that the government did not act with reasonable diligence and highlighted the "relatively" straightforward nature of the case. (J.A. at 978).

*3. Article 62 appeal*

Trial counsel indicated the government's intention to appeal the military judge's ruling pursuant to Article 62, UCMJ. (J.A. at 191-92). Appellant remained in pretrial confinement

pending the outcome of his Article 62 appeal. (J.A. at 208, 224-25).

The government submitted its appeal to the AFCCA on 20 September 2010, and Appellate Defense counsel submitted his brief on 8 October 2010. (J.A. at 208). On 16 October 2010, the government requested oral argument on the case. *Id*. However, receiving no response from the Court, Appellate Government counsel filed a motion for expedited consideration of the government's motion for oral argument on 24 November 2010 and 13 December 2010. (J.A. at 227-28). Subsequently, Appellant's defense counsel filed a motion for expedited review of Appellant's case. (J.A. at 229-31). In the government's response, it indicated that it concurred with appellate defense counsel's motion for expedited review and also indicated that it would withdraw its request if an oral argument was not scheduled by 7 January 2011. (J.A. at 234-36). On 14 January 2011, the Court ordered oral argument to be scheduled on 20 January 2011. (J.A. at 237). Argument was heard by the Court on 20 January 2011, and, on 28 February 2011, Appellate defense counsel made another motion for expedited review. (J.A. at 208-340). On 9 March 2011, AFCCA issued an order that granted the government's Article 62 appeal and set aside the military judge's findings.

(J.A. at 6-14).[6]

*4. Appellant's court-martial*

On 25 March 2011, trial defense counsel filed another motion to dismiss for denial of speedy trial. (J.A. at 208-340, 992). On 31 March 2011, another Article 39(a) session was conducted and the military judge heard argument regarding trial defense counsel's motion to dismiss. (J.A. at 986). At the time of trial, Appellant had been in pretrial confinement for 350 days. (J.A. at 993).

The military judge denied trial defense counsel's motion. (J.A. at 724-31, 1020). He noted that trial defense counsel argued that the time frame of the delay should start when Appellant was placed into pretrial confinement. (J.A. at 728). However, he focused his ruling only upon the delays incurred after the Article 62(a) appeal and that the only time that he would look at was from 8 October 2010, the date appellate defense counsel filed his brief, until 9 March 2011, the date AFCCA issued its ruling. *Id*. When analyzing the reason for the AFCCA delay, the military judge noted that the AFCCA had refused to respond to the Government's inquiries regarding background information to explain the reasons for delay in scheduling the

[6] Appellant's petition for grant of review of the Article 62 decision was denied by this Court on 20 June 2011. *United States v. Danylo*, 70 M.J. 216, 217 (C.A.A.F. 2012) (mem.).

argument and finally ruling on the appeal. *Id*.

After the denial of the motion to dismiss, Appellant entered into a conditional guilty plea pursuant to a pretrial agreement, which preserved his speedy trial motion. (J.A. at 732, 1021-22).

***B. Conditions of confinement***

In Appellant's demand for speedy trial filed on 3 May 2010, he alleged that while being held in Wichita County Annex, he was confined with felony-level post-trial prisoners and foreign national prisoners; forced to wear the same jumpsuit as post-trial inmates; housed with other prisoners in a common area; subjected to filthy living conditions; was not provided fresh undergarments; and had limited ability to contact his defense counsel. (J.A. at 62). Trial defense counsel also noted that Appellant was moved from Wichita County Annex to Kirtland AFB, NM, Regional Confinement Facility on 4 May 2010. (J.A. at 25).

During the Article 39a session that address the Government's motion for reconsideration, the defense called Master Sergeant (MSgt) Anthony Long to testify. (J.A. at 954). MSgt Long was the noncommissioned officer (NCOIC) in charge of confinement at Kirtland AFB. *Id*. He testified that Appellant had been in confinement for a few months; that Appellant had been on a couple of medications while he was there; that

Appellant's medication was unable to be filled in the last two weeks because he was unable to get him an ID card; and that Appellant was unable to make mental health appointments because of his lack of an ID card. (J.A. at 955-56, 961).

After the Article 62 appeal was granted by the AFCCA, Appellant's trial defense counsel filed a motion for release from pretrial confinement. (J.A. at 655-719, 1016). Trial defense counsel averred that, while at the Kirtland AFB confinement facility, Appellant had limited access to medical treatment; was denied access to depression and sleep medication and medication for his tic disorder; had limited treatment for back problems; had no access to his contact lenses; denied the opportunity to call and receive mail from his parents; not been allowed to perform physical training or go outside; and was segregated for 23 hours a day in a 7' x 7' cell. (J.A. at 655-56). Trial defense counsel also noted that Appellant was required to be in his cell 23 hours a day, either sitting on a round metal seat, standing, or pacing; was not allowed to put his head in his hands or rests his head; was only allowed to read the Bible; and that he was constantly recorded on a closed circuit security camera. (J.A. at 665-66).

***C. AFCCA's decision***

On 17 April 2013, AFCCA issued a decision that found that Appellant's right to speedy trial had not been violated. (J.A. at 1-14). AFCCA found that the military judge did not err when he focused only upon the delays that occurred after the Article 62 appeal in his 31 March 2011 ruling denying the speedy trial motion. (J.A at 3). It also found that the military judge "clear[ly]" considered the entire period of Appellant's pretrial confinement. *Id.*

***D. Timeline***

The following timeline is offered based on the record:

- 9 April 2010 - Appellant ordered into Transition Flight. (J.A. at 24).
- 10 April 2010 – Appellant was transitioned to Phase 1. (J.A. at 85).
- 16 April 2010 – Appellant was ordered into pretrial confinement at Wichita County Annex and his ROI was completed. (J.A. at 25, 119, 848).
- 22 April 2010 - A pretrial confinement hearing was held. (J.A. at 120).
- 3 May 2010 – Trial defense counsel submitted a demand for speedy trial. (J.A. at 62-66, 848).
- 4 May 2010 – Appellant was transferred to Kirtland AFB Regional Confinement facility. (J.A. at 120).
- 12 May 2010 – Charges were routed up to the Numbered Air Force (2d AF). (J.A. at 120).
- 20 May 2010 – A copy of the charges were provided to the Defense. (J.A. at 67-71, 120).
- 12 June 2010 – Decision was made to get pretrial immunity on all cases. (J.A. 120, 901).
- 20 June 2010 – Immunity letters received from 2 AF/JA. (J.A. at 124).
- 28 June 2010 - Article 32 hearing held. (J.A. at 121).

- 1 July 2010 – Article 32 hearing report was completed. (J.A. at 121).
- 19 July 2010 – Charges referred by the general court-martial convening authority. (J.A. at 121).
- 10 August 2010 – Article 39a session conducted where motions were heard. (J.A. at 738-876).
- 13 August 2010 – Notice of Appeal under Article 62. (J.A. at 191-92).
- 23 August 2010 - Second Article 39a session conducted where motion for reconsideration is heard. (J.A. at 877).
- 30 August 2010 – AFCCA docketed Appellant's Article 62 appeal. (J.A. at 208).
- 31 August 2010 – Trial defense counsel requested that Appellant be released from confinement. (J.A. at 210).
- 20 September 2010 – Government submitted its Article 62(a) appeal to the court. (J.A. at 208).
- 8 October 2010 – Appellant defense counsel filed response to Article 62(a) appeal. (J.A. at 208).
- 16 October 2010 – Appellate Government counsel requested oral argument. (J.A. at 208).
- 4 November 2010 - Trial defense counsel forwarded a request to squadron commander that Appellant be released from confinement. (J.A. at 211).
- 8 November 2010 – Trial defense counsel filed motion for appropriate relief in order to have Appellant released from confinement. (J.A. at 655-719).
- 24 November 2010 - Appellate government counsel filed a motion for expedited consideration of its motion for oral argument. (J.A. at 209).
- 13 December 2010 - Appellate government division filed a second motion for expedited consideration of motion for oral argument. (J.A. at 209).
- 17 December 2010 - AFCCA granted government's motion for expedited consideration. (J.A. at 209).
- 29 December 2010 – Appellant submits motion for expedited review of the Article 62 appeal, requesting oral argument date of 7 January 2011. (J.A. at 209).
- 29 December 2010 – Appellate government counsel concurs with motion and requests 7 January 2011 oral argument date. (J.A. at 209).
- 14 January 2011 - AFCCA ordered oral argument for 20 January 2011. (J.A. at 209).
- 20 January 2011 - Oral argument is heard. (J.A. at 209).

- 7 February 2011 – Trial defense counsel requested release to be reviewed by every commander in chain of command. (J.A. at 211).
- 28 February 2011 - Appellant makes another motion for expedited review to AFCCA. (J.A. at 210).
- 9 March 2011 - AFCCA granted government's Article 62 appeal. (J.A. at 6-14).
- 31 March 2011 – Appellant's court-martial. (J.A. at 986).

Additional facts necessary for the disposition of the case are located in the argument section below.

**Summary of Argument**

The military judge and AFCCA erred when it failed to view Appellant's pretrial confinement as a continuum of events ranging from his placement in pretrial confinement until the eventual disposition of charges, but as discrete time periods that required individual analysis. However, this view fundamentally misapplies the law surrounding Constitutional and extraconstitutional provisions for speedy trial and is in direct contravention to the fundamental protections that these provisions provide. Furthermore, the evidence establishes that the nearly year-long period of pretrial confinement was marked with inexplicable delays and oppressive conditions. Accordingly, this Honorable Court should dismiss the charges with prejudice for violations of the Sixth Amendment to the Constitution and Article 10, UCMJ.

## Argument

### I.

**THE MILITARY JUDGE ERRED WHEN HE ONLY CONSIDERED THE PERIOD OF TIME FOR APPELLANT'S ARTICLE 62 APPEAL FOR THE PURPOSES OF APPELLANT'S SPEEDY TRIAL MOTION.**

*Standard of Review*

Whether an appellant was denied his right to speedy trial is reviewed under a de novo standard of review. *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2005). This Court is bound by the facts as found by the military judge unless those facts are clearly erroneous. *United States v. Wilson,* 72 M.J. 347, 350 (C.A.A.F. 2013).

*Law*

There are three primary speedy trial sources in military law – the Sixth Amendment, Article 10, UCMJ, and RCM 707. *United States v. Ruffin*, 48 M.J. 211, 212 (C.A.A.F. 1998). The Constitutional standard of the Sixth Amendment provides that the accused shall enjoy the right to a speedy and public trial. U.S. Const. amend. VI; *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007). Article 10 provides that, when a service member 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 or to dismiss the

charges and release him." 10 U.S.C. § 810. RCM 707 provides that the accused must be taken to trial within 120 days of the imposition of restraint, among other things.

Powers for government interlocutory appeals were granted under Article 62 in accordance with the Military Justice Act of 1983. Pub.L. No. 98–209, § 10, 97 Stat. 1393 (1983); *United States v. Wuterich*, 67 M.J. 63, 71 (C.A.A.F. 2008). Congress based the legislation on 18 U.S.C. § 3731, the statute applicable to the trial of criminal cases in the federal district courts. *Wuterich*, 67 M.J. at 71; S.Rep. No. 98–53, at 6 (1983) (stating that Article 62 "allows appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution"); *id.* at 23 (stating that "[t]o the extent practicable, the proposal parallels 18 U.S.C. § 3731, which permits appeals by the United States in federal prosecutions").

Article 62(c) states that "any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit." 10 U.S.C. § 862(c).

*Analysis*

The military judge and the AFCCA incorrectly viewed Appellant's pretrial confinement as discrete time periods rather than as a continuum of events leading to the eventual disposition of Appellant's charges at his court-martial. The military judge's ruling, in effect, does not treat Appellant's confinement as continuous, but serves to characterize it as separate periods of time, each requiring a separate speedy trial analysis. However, such an approach is not consistent with the law or the rights envisioned by the speedy trial clause of the Sixth Amendment or extraconstitutional speedy trial provisions, such as Article 10 of the UCMJ.

*1. Appellant's arrest and continued incarceration should be viewed as a continuum of events*

Both the military judge and the AFCCA failed to recognize the fact that the applicable period of time for Appellant's speedy trial analysis should encompass the entire time he spent in pretrial confinement. Continuous pretrial confinement has been a well-established "triggering mechanism" for analysis under the *Barker* factors. *See Cossio*, 64 M.J. at 257. Courts have recognized there is a continuum of events in a court-martial and its appellate review rather than discrete periods. *See Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003) ("review spans a continuum of process from

review by the convening authority under Article 60 . . . to review by a Court of Criminal Appeals under Article 66 . . . to review . . . by this Court under Article 67").

To allow time periods to be parsed into separate periods would be tantamount to finding that Appellant had been placed into confinement and released on separate occasions. However, one of the main factors for analyzing violations of a Sixth Amendment right to speedy trial and an Article 10 violation is the "length of delay." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005). The decision to analyze separate periods of time serves to mischaracterize the entire time of Appellant's *continuous* course of confinement. Such a result goes against the meaning of the Sixth Amendment and would not be justified unless Appellant had been actually released from confinement for a substantial period of time. *See Ruffin*, 48 M.J. 212.

Moreover, limiting the consideration to separate periods would not accord Appellant with the protections provided by the Constitutional and extraconstitutional provisions regarding speedy trial – namely Article 10. In *Barker*, the Supreme Court explained that the Constitutional right to a speedy trial addresses concerns that the accused be "treated according to decent and fair procedures" and the prevention of detrimental

effects on rehabilitation due to "*delay between arrest and punishment*." *Barker,* 407 U.S. at 519-20 (emphasis added). In *United States v. MacDonald*, the Court further stated, "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, *and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges*." 456 U.S. 1, 8 (1982) (emphasis added). Given this guidance, a Sixth Amendment analysis requires consideration of the entirety of an accused's incarceration until the criminal charges are resolved. *See id*.

Moreover, to view this period as one continuum of events would contravene the intent of the extraconstitional provisions concerning speedy trial under Article 10. This Honorable Court has recognized the Congressional intent of extraconstitutional speedy trial provisions such as Article 10 ensuring "that delay cannot be condoned if the accused is in arrest or confinement." *Mizgal*a, 61 M.J. at 124 (quoting *United States v. Wilson,* 10 C.M.A. 337, 340, 27 C.M.R. 411, 414 (1959)). This Court found that Congress enacted various speedy trial provisions in the UCMJ to address concerns about 1) "the length of time that a man will be placed in confinement and held there pending his trial";

2) to prevent an accused from "languish[ing] in a jail somewhere for a considerable length of time" awaiting trial or a disposition of his charges; 3) "to protect the accused's rights to a speedy trial without sacrificing the ability to defend himself"; 4) "to provide responsibility in the event *that someone* unnecessarily delays a trial"; and 5) "to establish speedy trial protections under the UCMJ 'consistent with good procedure and justice.'" *Mizgala*, 61 M.J. at 124 (quoting *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong. 905–12, 980–983, 1005 (1949)). To fail to consider the entire time frame of confinement and exclude any period of time from that continuing course of confinement would fail to properly apply the aforementioned Congressional intent.

Accordingly, any review of time for a confined accused before trial must necessarily view the entire time frame for analysis under the Sixth Amendment or Article 10.

*2. The time of interlocutory appeal should weigh against the government*

At trial, the military judge performed a *Barker* analysis for the separate period of time of the interlocutory appeal; however, his analysis only analyzed the period of time from 9 October 2010, the date of appellate defense counsel's Article 62 brief submission, until 9 March 2011, the date of the AFCCA

ruling. (J.A. at 730-31). This determination was erroneous in that it misapplied the Supreme Court's decision in *United States v. Loud Hawk*, 474 U.S. 302 (1986), which directly addressed applicable time periods for interlocutory review. In *Loud Hawk*, the Court applied the test in *Barker* to "determine the extent to which appellate time consumed in the review of pretrial motions should weigh towards a defendant's speedy trial claim." *Id*. at 314. For the speedy trial question, the Court analyzed the 90-month time from the respondent's initial arrest and indictment until the District Court's dismissal of the indictment after a series of interlocutory appeals. *Id*. at 304, 314. Thus, the military judge's analysis of only the time on interlocutory review appears to be inconsistent with the Supreme Court's precedent.

As such, the military judge should have viewed the period of time from the time of Appellant's arrest, *i.e*. placement in confinement, until the final disposition of charges at his 31 March 2011 court-martial. *See id*. And in addition to the government's sluggish processing of Appellant's case, the delay in this case is compounded by the AFCCA's inexplicable delay in processing the Government's Article 62 appeal. From the time Appellant's case was docketed at AFCCA on 30 August 2010, until the eventual grant of the Government's motion on 9 March 2011,

over six months elapsed. *See* (J.A. at 209). The military judge found that AFCCA's refusal to respond to requests to explain its delay in both scheduling the oral argument and ruling on the appeal was "troubling." (J.A. at 729). Additionally, despite several requests for expedited review and release from confinement, there are several lengthy gaps in AFCCA's processing of the appeal. For example, it took 91 days for the AFCCA to act upon the motion for oral argument; 153 days from the filing of the appellate defense counsel's response to the Government's brief until its decision; and 48 days from oral argument to decision. *See (*J.A. at 6-14, 209). This inexplicable failure to act is compounded by the fact that it had granted motions for expedited review, yet failed to act within a reasonable time frame. *See* (J.A. at 209).

Given the Government's slow processing of Appellant's case and AFCCA's inexplicably lengthy processing of the Article 62 appeal, Appellant's prolonged time in pretrial confinement should be held against the Government, especially in light of the onerous conditions of confinement alleged by Appellant. *See* Argument II, *infra*. While no case has established time standards for processing Article 62 appeals, *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006), is instructive in an appellate setting. In *Moreno*, this Court did not hold the

appellant accountable for any periods of post-trial processing delay after noting that there was no evidence that the enlargements of time were directly attributable to the appellant or that the need for additional time arose from other factors such as case complexity. 63 M.J. at 137. It found that "[u]ltimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals" and declined to hold the appellant "responsible for the lack of 'institutional vigilance' which should have been exercised in this case." *Id*. (quoting *Diaz,* 59 M.J. at 39-40; *see also United States v. Johnson*, 17 M.J. 255, 261 (C.M.A. 1984) (the Court relied heavily on the Government's explanation for the delay "at each point of the process").

And in this case, AFCCA demonstrated a marked lack of institutional vigilance in processing Appellant's case. As indicated by the Appellant's motion to dismiss, since the filing of the Government's Article 62 appeal on 20 September 2010 until AFCAA's eventual decision, AFCCA decided 108 other cases – three being Article 62 appeals. (J.A. at 226). Further, defense averred that Appellant's Article 62 appeal *was the longest of any appeal and that it was the only one where the accused was in pretrial confinement*. (J.A. at 726). There is no reason

established in the record for why other cases or other Article 62 appeals were processed ahead of Appellant's case, especially while Appellant languished in pretrial confinement. Thus, similar to *Moreno*, Appellant should not be held accountable for these periods of time in analyzing his right to a speedy trial.

*3. Article 62(c) should not be used abrogate Appellant's right to a speedy trial under the Sixth Amendment or Article 10, UCMJ*

The right to a speedy trial is one of the most basic rights preserved by the Constitution. *Kloper v. State of NC*, 386 U.S. 213, 226 (1967). This Court has defined speedy trial as a fundamental right of the accused. *Mizgala*, 61 M.J. at 124. "Article 10, however, 'imposes [on the Government] a more stringent speedy-trial standard than that of the Sixth Amendment.'" *United States v. Cooper,* 58 M.J. 54, 60 (C.A.A.F. 2003) (quoting *United States v. Kossman,* 38 M.J. 258, 259 (C.M.A. 1993)). This Court "consistently stressed the significant role Article 10 plays when servicemembers are confined prior to trial." *Mizgala,* 61 M.J. at 124. This Honorable Court declared that "[t]he test for assessing an alleged violation of Article 10 is whether the government has acted with 'reasonable diligence' in proceeding to trial." *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999) (citing *Kossman*, 38 M.J. at 262).

Given this backdrop, at the outset, Article 62(c) cannot affect the Constitutional right to speedy trial. In the article "Speedy Trial Rights in Application," the author describes the dangers of the reliance upon statutory or rule-based speedy trial violations, and posits that, irrespective of the theory of the relationship between constitutional and extraconstitutional rights, a separate analysis of the possible constitutional deprivation is required. Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 Fordham L. Rev. 611 (1980). Accordingly, Article 62(c) cannot exclude time under the Sixth Amendment.

Article 10, UCMJ, is statutorily based and is not directly referenced in Article 62(c)'s preclusion of time provisions. *See* 10 U.S.C. § 810; 10 U.S.C. § 862(c). Moreover, Article 10, unlike RCM 707, does not address any specific excludable time periods in its text; rather, it appears to contemplate the entire period of time from inception of confinement or arrest until trial is examined when considering whether the government exercised reasonable diligence. *See Mizgala,* 61 M.J. at 129 ("[W]e remain mindful *that we are looking at the proceeding as whole* and not mere speed: '[T]he essential ingredient is orderly expedition and not mere speed.'") (quoting *United States v.*

*Mason,* 21 C.M.A. 389, 393, 45 C.M.R. 163, 167 (C.M.A. 1972)); *compare* 10 U.S.C. § 810 with RCM 707(c).

Thus, to allow Article 62(c) to exclude time in its analysis, especially where the AFCCA has evinced a severe lack of institutional vigilance, would necessarily negate the purpose of Article 10 – to prevent the unreasonable delay in the processing of criminal charges. Also, this Court has emphasized the fact that Article 10 provides a more rigorous or more stringent than the 6th Amendment. *See Wilson,* 72 M.J. at 351. To allow Article 62(c) to prevent consideration of the time would necessarily require a less stringent analysis of Appellant's pretrial confinement, a result not intended by Congress. Thus, Article 62(c) should not be used to affect either a Sixth Amendment or Article 10 analysis.

*4. Conclusion*

For the aforementioned reasons, the AFCCA's determination that the period prior to the Article 62 appeal was reasonably processed does not preclude a military judge or court from considering the entire period of time while an accused is in pretrial confinement. Indeed, the period of time prior to the Article 62 appeal and during the interlocutory appeal should be held accountable to the government.

## Argument

## II.

**APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHEN HIS COURT-MARTIAL OCCURRED 350 DAYS AFTER HE WAS PLACED IN PRETRIAL CONFINEMENT.**

Appellant was denied his right to a speedy trial in violation of either the Sixth Amendment right to speedy trial or pursuant to Article 10, UCMJ. *See* Issue I, *supra*. Both tests employ the analytical framework for alleged speedy trial violations expressed by the Supreme Court in *Barker v. Wingo*. *Tippit*, 65 M.J. at 73; *Cossio*, 65 M.J. at 256. The test under *Barker* analyzes the following factors: the length of the delay; the reasons for delay; whether the appellant made a demand for speedy trial; and the prejudice to the appellant. *Barker*, 407 U.S. at 59; *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011); *Cossio*, 65 M.J. at 256; *Mizgala*, 61 M.J. at 129.

*1. Length of delay*

As noted previously, the length of delay should be 350 days, calculated from the date of Appellant's placement into pretrial confinement. *See Argument I, supra*.

*2. Reasons for delay*

The reasons for the delay can only be attributed to government inefficiency and AFCCA delay in adjudicating the Article 62 appeal. *See Issue* I, supra. "As a general matter,

factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision . . . ” *United States v. Thompson,* 68 M.J. 308, 313 (C.A.A.F. 2010). Under an Article 10 analysis, a violation can occur “where it is established that the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to . . . ” *United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993).

Despite the AFCCA’s determination that the Government took immediate steps in processing Appellant’s case, several gaps in the government’s processing of this case remain unexplained. Despite Appellant being subject to conditions tantamount to confinement in 10 April 2010, Appellant was not informed of charges until 20 May 2010 and no actions were taken with an eye toward trial until 21 May 2010. (J.A. at 26, 67-68, 896). Furthermore, it was not until 12 June 2010 when the Government decided to change strategies and decision to get pretrial immunity on the cases. (J.A. at 120). As there is no explanation in the record for these delays, the unexplained time periods may demonstrate a high level of negligence, which may

violate Article 10's speedy trial provisions. *See Kossman*,38 M.J. at 261.

Additionally, as noted previously, this time should be considered in concert with the time spent by AFCCA in processing the Government's Article 62 appeal, as one continuous period. *See* Argument I, *supra*. The unexplained, lengthy delay by AFCCA should weigh in favor of Appellant's speedy trial claims. *See id.*

*3. Appellant's assertion of his right to a timely appeal*

It is uncontested that Appellant made several requests for a speedy trial throughout the course of his appeal. *See* Timeline, *supra*.

*4. Prejudice*

Lastly, the prejudice in this case weighs heavily against the government. "Prejudice ... should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Mizgala,* 61 M.J. at 129. These interests are: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Johnson,* 17 M.J. at 259.

The length of Appellant's pretrial confinement demonstrates the prejudice in this case. As a starting point, Appellant was subjected to pretrial confinement for nearly a year, which *was two months longer than his adjudged sentence*. *See Doggett v. United States*, 505 U.S. 647, 652 (1992) (The Supreme Court noted that lower courts generally found post-accusation delay presumptively prejudicial when it approached one year); *see also United States v. Davidson*, 14 M.J. 81, 84 (C.M.A. 1982) ("We believe Congress recognized that certain psychological and physical deprivations were inherent in such pretrial confinement.").

Additionally, the military judge specifically found that Appellant's confinement "almost certainly caused anxiety, stress, and the loss of ability to carry on a normal lifestyle for . . . 350 days." (J.A. at 730). *See United States v. Dreyer,* 533 F.2d 112, 116 (3d Cir. 1976) (appellant was denied her right to a speedy trial where a delay in her case caused severe mental disturbance and eventually led to an attempted suicide).

Further, due to the length of Appellant's pretrial confinement and the fact that he was released immediately upon the disposition of his charges, Appellant was unable to partake of any potential good conduct time afforded to post-trial

inmates pursuant to Air Force Instruction (AFI) 31-205, "The Air Force Corrections System," paragraph 5.7.

Additionally, due to his confinement in Transition Flight at Sheppard Air Force Base, Wichita County Jail, and the Kirtland Confinement facility, Appellant argued and presented evidence that he was prevented from receiving medications; unable to make mental health appointments; unable to speak to his parents; not allowed to participate in physical training; confined with felony-level post-trial prisoners and foreign national prisoners; forced to wear the same jumpsuit as post-trial inmates; housed with other prisoners in a common area; subjected to filthy living conditions; disallowed fresh undergarments; had limited ability to contact his defense counsel; and placed in segregation 23 hours a day, in a 7' x 7' cell, unable to sit or lay on the bed for hours while in his cell, not allowed to rest his arms against his desk, not allowed to put his head down during the day, and where his only reading material was the Bible. (J.A. at 62, 655-58).

The aforementioned conditions have been held to be highly prejudicial to military members. *See, e.g.*, 10 U.S.C. § 812 ("No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces"); *United States v.*

*Fricke*, 53 M.J. 149, 155 (C.A.A.F. 2000) (this Court determined that being locked in a cell for 23 hours per day for 326 days, while being required to sit at a desk for 15 1/2 of those hours constituted "genuine privations and hardship over an extended period of time" that "might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment"); *United States v. King*, 61 M.J. 225 (C.A.A.F. 2005) (this Court found that the appellant was subjected to punishment during a two-week period in segregation for which the Government offered no explanation); *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007) (this Court found that the military judge abused his discretion in failing to award additional confinement credit for violations of confinement regulations).

*5. Conclusion*

Therefore, Appellant's lengthy pretrial confinement was marked by inexplicable, harmful delays and highly oppressive living conditions, despite constant requests by all parties for expedited consideration. Accordingly, based on the application of the *Barker* factors, this Honorable Court should determine that Appellant's right to a speedy trial has been violated.

**WHEREFORE**, Appellant respectfully requests that this Honorable Court set aside the findings of guilt based on violations of the Sixth Amendment of the Constitution and Article 10, UCMJ.

Respectfully submitted,

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Dated: 11 October 2013

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I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 11 October 2013.

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