13 November 2013

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

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

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**FINAL BRIEF ON BEHALF OF THE UNITED STATES**

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**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 349 DAYS AFTER HE WAS PLACED IN PRETRIAL CONFINEMENT.**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ. This Honorable Court has jurisdiction to review AFCCA's decision under Article 67, UCMJ.

## STATEMENT OF THE CASE

Appellant's statement of the case is incorrect. As originally charged, Specification 3 of Charge I alleges that Appellant used, not distributed, cocaine; Specification 5 of

Charge I alleges that Appellant used methamphetamine, not that he distributed cocaine. (J.A. at 15-17.)

**STATEMENT OF FACTS**

On 16 April 2010, Appellant was ordered into pretrial confinement at the Wichita County Jail Annex in Wichita Falls, Texas, after he physically and verbally assaulted Amn Austin Hansknecht on Sheppard AFB. (J.A. at 37-41, 64-66.) At that time, Appellant was already under investigation by the Air Force Office of Special Investigations (AFOSI) for using marijuana, cocaine, and methamphetamine. (J.A. at 40-41, 72.) He was transferred to the Kirtland AFB Regional Military Confinement Facility on 4 May 2010. (J.A. at 120, 204, 720.)

On 22 June 2010, the 362 TRS/CC preferred charges against Appellant for drug use, drug distribution, drug introduction, assault and battery, and communicating a threat. (J.A. at 15-17.) Between 16 April 2010 and 22 June 2010, the base legal office crafted and implemented a prosecution strategy for Appellant and the four other Airmen involved in Appellant's criminal misconduct (A1C Joshua Cody, AB Alex Coyne, Amn Hansknecht, and A1C Joel McNearney). (J.A. at 116-17, 883-88.) The government was ever-mindful of Appellant's status in pretrial confinement, his role as the leader of a base-wide drug ring, and the heavy burden that seeking pretrial immunity for Appellant's fellow miscreants would impose on the legal office

and the convening authority. (J.A. at 116-17, 166, 883, 914.) The government's strategy, therefore, was to bring Appellant to trial *and* avoid potential pretrial immunity issues by seeking quick guilty-plea resolutions with Appellant's less-culpable co-actors. (J.A. at 116-17, 883.) Unfortunately, that strategy did not prove fruitful, so the government changed course and sought to immediately prosecute Appellant by granting pretrial immunity to A1C Cody, AB Coyne, Amn Hansknecht, and A1C McNearney. (J.A. at 888-89.)

After coordinating the schedules of trial counsel, senior trial counsel, trial defense counsel, and the investigating officer, an Article 32 hearing was held on 28 June 2010. (J.A. at 209-10.) Charges were referred to trial by general court-martial on 19 July 2010, (J.A. at 15-17), and trial was docketed for 10 August 2010 based on trial defense counsel's availability. (ROT vol. 2, R. at 1.3.)

Before entering pleas, Appellant brought a motion to dismiss all charges based on a denial of his right to a speedy trial under the Sixth Amendment, Article 10, and R.C.M. 707. (J.A. at 24-78.) The government filed a response, (J.A. at 79-199), that the military judge ultimately found unconvincing. The military judge denied Appellant's motion under the Sixth Amendment; he granted Appellant's motion under Article 10 with prejudice; and he granted Appellant's motion under R.C.M. 707

without prejudice. (J.A. at 188-33.) The government then filed a detailed motion to reconsider and a notice of appeal under Article 62. (J.A. at 134-90, 191-92.) The military judge noted that in "its motion to reconsider, the Government provided substantially more justification," but he upheld his earlier ruling. (J.A. at 195-201.) In response, the government filed a second notice of appeal under Article 62. (J.A. at 193-94.)

On 20 September 2010, the government filed its timely Article 62 appeal with AFCCA. (J.A. at 6.) Cognizant of Appellant's right to a speedy trial, both the government and Appellant petitioned AFCCA for expedited review. (J.A. at 227-39.) On 20 January 2011, AFFCA heard oral argument. (J.A. at 237.) AFCCA granted the government's Article 62 appeal on 9 March 2011, overturning the military judge's decision and remanding the case for further proceedings. (J.A. at 6-14.)[1] In the almost six months between the government's Article 62 appeal and AFCCA's order, AFCCA decided 108 cases, including two other Article 62 appeals and 65 merits cases. (J.A. at 226.)

While Appellant's Article 62 appeal was pending before AFCCA, Appellant submitted multiple written requests to his chain of command to be released from pretrial confinement (J.A. at 247-56, 290, 305-30). He also withdrew from a pretrial

[1] On 20 June 2011, this Court rejected Appellant's petition for grant of review of AFCCA's Article 62 order.

agreement (PTA) in order to motion the military judge for release from pretrial confinement. (J.A. at 294-95, 655-719.) Appellant's requests for release from pretrial confinement were repeatedly denied due to concerns about his future dangerousness and his constant rule-breaking at the Kirtland AFB Regional Confinement Facility. (J.A. at 257, 291, 331-34.) Likewise, the military judge denied Appellant's motion to be released from pretrial confinement, noting that "the flinty reality is that the Accused has become his own jailer by failing to follow the most basic rules and procedures" while in pretrial confinement. (J.A. at 204-07, 720-23.)

Appellant's trial reconvened on 31 March 2011 based on trial defense counsel's availability. (J.A. at 4, 642-45, 986.) Before trial, Appellant negotiated a second PTA that required him to plead guilty to most of the charges and specifications against him, in exchange for a sentence cap of time-served. (J.A. at 732-37.) The PTA was conditioned on the reservation of Appellant's speedy trial claims. (J.A. at 732.)

Trial began with Appellant's second motion to dismiss for a violation of his speedy trial rights. (J.A. at 208-340, 991.) Appellant's motion was "based on the entire length of time it has taken to get this case to trial and it is based on Article 10, the 6th Amendment and the 5th Amendment of the Constitution." (J.A. at 991.) Before issuing his ruling, the

military judge considered the Appellant's 132-page motion (J.A. at 208-340), the government's 315-page response (J.A. at 341-654), and oral argument from both sides (J.A. at 992-1017.) During oral argument, he questioned the government about the entire 349-day time period Appellant was in pretrial confinement. (J.A. at 1005-07.) In his written ruling, however, the military judge focused on "the delays incurred after the Article 62(a) appeal was brought by the government." (J.A. at 728.) The military judge's reasoning was two-fold:

> 1) The AFCCA has already determined that the time period preceding the Article 62 appeal was not violative of the Accused's speedy trial rights and the government's actions were reasonable, so this point is moot; 2) The actions of the government in bringing this case to trial up until the time of the Article 62 appeal should not be imputed upon or held against the AFCCA during their processing of the appeal.

(Id.) Ultimately, the military judge found that Appellant was not prejudiced by the pretrial delays alleged, and he denied Appellant's motion in full. (J.A. at 730-31.)

On issues identical to the ones before this Court, AFCCA upheld the military judge's ruling as well as the approved findings and sentence. (J.A. at 1-5.)

## SUMMARY OF ARGUMENT

The procedural history of this case is complex, but applying the appropriate legal standards to the granted issues is simple. First, the military judge did not abuse his

discretion when he gave deference to AFCCA's binding order, which held that the time period preceding the government's Article 62 appeal did not violate Appellant's speedy trial rights. Second, Appellant was not denied his Sixth Amendment right to a speedy trial because the government processed his case in accordance with a reasonable strategy; AFCCA decided the government's Article 62 appeal within the flexible period of review afforded to appellate courts; and Appellant suffered no prejudice.

## ARGUMENT

### I.

### THE MILITARY JUDGE GAVE APPROPRIATE DEFERENCE TO AFCCA'S ARTICLE 62 ORDER WHEN HE DENIED APPELLANT'S SECOND SPEEDY TRIAL MOTION.

#### *Standard of Review*

This Court should review the military judge's consideration of evidence presented during Appellant's motion hearing for an abuse of discretion. United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004). A military judge only abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

#### *Law and Analysis*

Appellant can only prevail on his first assignment of error if this Court finds that the military judge abused his

discretion by following the directive imposed by AFCCA's Article 62 order, which this Court denied review of on 20 June 2011. According to the "law of the case" doctrine, a trial court is bound by the ruling of a higher appellate court on remand. United States v. Morris, 49 M.J. 227, 230 (C.A.A.F. 1998). *See also* United States v. Smith, 5 M.J. 857, 858-59 (A.C.M.R. 1973); United States v. Beebe, 47 C.M.R. 386, 390 n. 3 (A.C.M.R. 1973). When the military judge correctly denied Appellant's second speedy trial motion in this case, he considered the full length of time that Appellant was in pretrial confinement. (J.A. at 1005-07, 1011.) However, he could not give equal weight to every period of time at issue because AFCCA "already determined that the time period preceding the Article 62 appeal was not violative of the Accused's speedy trial rights and the government's actions were reasonable." (J.A. at 728.) Therefore, the military judge wisely chose not to imbue himself with the power to overturn AFCCA's directive on remand, and he focused his analysis on speedy trial issues that had not already been authoritatively resolved.

Appellant argues that the military judge should have ignored AFCCA's order and analyzed the entire length of time Appellant was in pretrial confinement as one conglomerate mass. (App. Br. at 16-18.) That argument can only rationally exist in a parallel universe that does not include the Supreme Court's

recognition that relevant periods of delay must be analyzed individually. *See* Barker v. Wingo, 407 U.S. 514, 531 (1972) (stating that "different weights should be assigned to different reasons" for delay). *See also*, United States v. Loud Hawk, 474 U.S. 302, 312-17 (1986) (analyzing certain time periods separately and finding that a pre-indictment release from confinement did not count against the government, nor did the appellant's interlocutory appeal); United States v. Wilson, 72 M.J. 347, 352 (C.A.A.F. 2013) (adopting the military judge's separation of the pretrial delay into distinct time periods requiring individual analysis); United States v. Moreno, 63 M.J. 129, 136 (C.A.A.F. 2006) (holding that in the post-trial context, each time period is reviewed individually "because the reasons for the delay may be different at each stage and different parties are responsible for the timely completion of each segment");[2] United States v. Mizgala, 61 M.J. 122 (C.A.A.F. 2005) (expressing concern with "several periods" of the government's case processing); United States v. Cooper, 58 M.J. 54, 59 (C.A.A.F. 2003) (focusing on the delay between arraignment and the reopening of the Article 32 hearing).

[2] Particularly in the arena of post-trial processing, courts have limited their reviews to discrete time periods. *See* United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) (examining only the delay between sentencing and referral to the CCA); United States v. Dunbar, 31 M.J. 70 (C.M.A. 1990) (considering only the delay between trial and docketing at the CCA); United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982) (reviewing only the delay between sentence and final action).

In this case, the military judge considered all of the time raised by Appellant in his second speedy trial motion, (J.A. at 1005-007, 1010), and then he divided the time into appropriate blocks for further review. After considering AFCCA's Article 62 order, the military judge recognized that the time period prior to the Article 62 appeal was "moot". (J.A. at 728.) Such a decision-making methodology complies with the Barker framework and the law of the case. Therefore, the military judge did not abuse his discretion, and AFCCA's ruling on this first issue should be affirmed.

## II.

## APPELLANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.[3]

### *Standard of Review*

"[T]he standard of review on appeal for speedy trial issues is de novo." Cooper, 58 M.J. at 57.

### *Law and Analysis*

The Sixth Amendment guarantees that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. The appropriate test for

[3] At the outset, Appellant's confusion with regard to the granted issue should be addressed and clarified. Although this Court has recognized that a military member's right to a speedy trial emanates from multiple sources, the only issue here is Appellant's Sixth Amendment right. United States v. Ruffin, 48 M.J. 211, 213 (C.A.A.F. 1998) (recognizing that, although there are several "primary sources of law concerning the right to a speedy trial", the Court's analysis would be limited to R.C.M. 707 because it was the sole granted issue). While Appellant makes several arguments regarding Article 10 standards and protections, those arguments should be dismissed as irrelevant.

determining whether a Sixth Amendment speedy trial violation has occurred is based on the four criteria outlined in the Supreme Court's Barker decision, 407. U.S. at 530. That criteria is: (1) the length of the delay; (2) the reasons for the delay; (3) Appellant's demand for speedy trial; and (4) prejudice to Appellant. Id. No single factor is dispositive. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum . . . courts must still engage in a difficult and sensitive balancing process." Id. at 533. In this case, that sensitive balancing test weighs in favor of the government.

***1. The length of the delay triggers an analysis of the rest of the Barker test.***

The first prong of a Barker analysis requires a threshold finding that the length of the delay is "presumptively prejudicial." Absent such a finding, "there is no necessity for inquiry into the other factors that go into the balance." The Barker Court did not create a bright-line rule regarding when the length of a delay is presumptively prejudicial, but instead determined that "the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Id. at 530-31. In Barker, the Court found no Sixth Amendment violation where the appellant spent 10 months in pretrial confinement and approximately four years on bond. Id.

at 517. Since Barker, delays of varying lengths have triggered a Barker analysis even when no Sixth Amendment violation was found. *See, e.g.*, Loud Hawk, 474 U.S. at 304 (90 months); United States v. Grom, 21 M.J. 53, 56 (C.M.A. 1985) (eight months); United States v. Johnson, 17 M.J. 255, 256 (C.M.A 1984 (seven months). In this case, Appellant was placed into pretrial confinement on 16 April 2010, (J.A. at 37-41, 64-66), and he was re-arraigned 349 days later on 31 March 2011. (J.A. at 986.) That 349 days is likely sufficient to trigger a complete Barker analysis.

***2. The reasons for the delay are justified by the legal office's prosecution strategy and AFCCA's deliberative process.***

Finding that a delay is facially unreasonable is only the start of this Court's analysis:

> Closely related to the length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. . . . A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason, such as negligence or overcrowded courts should be weighted less heavily. . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531. The delay in this case stretches for 349 days, but different portions of that delay are justified by actions taken by the legal office to get Appellant to trial, and by AFCAA's deliberations during the Article 62 appeal. Before examining the delay, and the reasons for its existence, a review

of the following chronology is vital:

| Date | Case Event | Elapsed Days | J.A. Page |
|---|---|---|---|
| 26 Mar 10 | Appellant tests positive for THC in a urinalysis.<br><br>Appellant questioned by AFOSI. | 0 | 36-38, 118 |
| 12 Apr 10 | Appellant is reported for assaulting AB Hansknecht. | 0 | 38, 119 |
| 15 Apr 10 | AFOSI completes report of investigation. | 0 | 119 |
| 16 Apr 10 | Appellant ordered into pretrial confinement at the Wichita County Annex. | 0 | 40-41, 64-66 |
| 17 Apr 10 | Appellant's speedy trial clock begins. | 1 | |
| 22 Apr 10 | Pretrial confinement hearing is held. | 6 | 120 |
| 23 Apr 10 | Pretrial confinement report is completed. | 7 | 57-60, 120 |
| 3 May 10 | Appellant demands a speedy trial. | 17 | 62-63 |
| 4 May 10 | Appellant is transferred to Kirtland AFB Regional Confinement Facility. | 18 | 120, 204, 720 |
| 5 May 10 | Draft charges are routed though chief of military justice. | 19 | 137 |
| 10 May 10 | Trial defense counsel submits a discovery request. | 24 | 120 |
| 12 May 10 | Draft charges being are reviewed by Numbered Air Force. | 26 | 120 |
| 20 May 10 | Trial counsel sends draft charges to trial defense counsel. | 34 | 120 |

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| 25 May 10 | Chief of military justice initiates PTA negotiations in the case of U.S. v. Coyne. | 39 | 163-64 |
| 26 May 10 | Trial counsel requests support from senior trial counsel. | 40 | 120 |
| 27 May 10 | Trial counsel responds to trial defense counsel's discovery request. | 41 | 120 |
| | Trial defense counsel asks for Appellant's recorded AFOSI interview. | | 120 |
| | Chief of military justice begins PTA negotiations with trial defense counsel. | | 165 |
| | Chief of military justice negotiates PTAs in U.S. v. Coyne and U.S. v. Hansknecht. | | 163-64, 167-68 |
| 31 May 10 | Trial defense counsel is notified that Appellant's AFOSI interview was not recorded. | 45 | 120 |
| 4 Jun 10 | Trial counsel interviews witness. | 49 | 120 |
| 8 Jun 10 | Pretrial confinement hearing is held in the case of U.S. v. McNearney. | 53 | 138 |
| 10 Jun 10 | Chief of military justice continues to negotiate PTA with trial defense counsel. | 55 | 170 |
| 12 Jun 10 | Government abandons initial trial strategy and decides to seek pretrial immunity for witnesses against Appellant. | 57 | 120, 888 |
| 14 Jun 10 | Article 32 is set for 28 Jun 10. | 59 | 120, 171-73 |
| 22 Jun 10 | Charges are preferred against Appellant. | 67 | 15-17 |

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| 23 Jun 10 | Article 32 investigating officer is appointed. | 68 | 121 |
| | Trial counsel interviews witness. | | 121 |
| 28 Jun 10 | Article 32 Investigation is held. | 73 | 120, 74-76, 174-76 |
| 1 Jul 10 | Investigating officer completes the Article 32 report on the Thursday afternoon before a 4-day weekend. | 76 | 121, 74-76, 174-76 |
| 6 Jul 10 | Article 32 report is sent to trial defense counsel. | 81 | 121 |
| | Chief of military justice begins preparations for a sanity board in U.S. v. McNearney. | | 177-78 |
| 8 Jul 10 | Referral package is sent from base legal office to Numbered Air Force. | 83 | 121 |
| 14 Jul 10 | Written requests for immunity are sent from base legal office to Numbered Air Force. | 89 | 197 |
| 19 Jul 10 | Charges against Appellant are referred to trial by general court-martial. | 94 | 15-17 |
| 20 Jul 10 | Immunity letters are received by base legal office from Numbered Air Force. | 95 | 181 |
| | Chief of military justice continues to make preparations for a sanity board in U.S. v. McNearney. | | 182-83 |
| 23 Jul 10 | Base legal office receives original referred charges from Numbered Air Force. | 98 | 116-17 |
| 26 Jul 10 | Referred charges are served on the Appellant. | 101 | 15-17 |

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| 28 Jul 10 | Initial docketing conference is scheduled. | 103 | 184-86 |
| 30 Jul 10 | Docketing conference is held. | 105 | 184-86 |
| 2 Aug 10 | Trial counsel interviews three witnesses. | 108 | 121 |
| 5 Aug 10 | Appellant submits a PTA offer. | 111 | 296-97 |
| 6 Aug 10 | PTA is signed by the general court-martial convening authority. | 112 | 296-97 |
| 10 Aug 10 | U.S. v. Danylo. | 116 | 738 |
| | The military judge grants Appellant's first motion to dismiss for speedy trial violations. | | 118-33, 195 |
| 12 Aug 10 | Record of trial is completed and authenticated. | 118 | 196 |
| 13 Aug 10 | Trial counsel submits a written motion for reconsideration. | 119 | 134-90 |
| | The government submits a notice of Article 62 appeal. | | 196 |
| 23 Aug 10 | The parties argue the government's motion for reconsideration before the military judge. | 129 | 195 |
| | The military judge denies the government's motion. | | 195-203 |
| | The government submits a second notice of Article 62 appeal. | | 193-94 |
| 30 Aug 10 | The Record of Trial is filed with AFCCA. | 136 | 226 |
| 31 Aug 10 | Appellant requests release from pretrial confinement. | 137 | 247-56 |
| 7 Sep 10 | Appellant's request is denied by his chain of command. | 144 | 257 |

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| 9 Sep 10 | U.S. v. Hansknecht is completed pursuant to a PTA. | 146 | 335 |
| 20 Sep 10 | The government submits its Article 62 appeal brief to AFCCA. | 157 | 226 |
| 5 Oct 10 | U.S. v. McNearney is completed pursuant to a PTA. | 172 | 336-37 |
| 8 Oct 10 | Appellant files a response brief with AFCCA. | 175 | 226 |
| 16 Oct 10 | The government requests oral argument before AFCCA. | 183 | 227 |
| 18 Oct 10 | Appellant withdraws from his PTA. | 185 | 294 |
| 3 Nov 10 | U.S. v. Coyne is completed pursuant to a PTA. | 201 | 338 |
| 4 Nov 10 | Appellant requests release from pretrial confinement. | 202 | 290 |
| 8 Nov 10 | Appellant files a motion for appropriate relief. | 206 | 655-719 |
| 9 Nov 10 | U.S. v. Cody is completed pursuant to a PTA. | 207 | 339-40 |
| 10 Nov 10 | Appellant's request for release from pretrial confinement is denied. | 208 | 291-92 |
| | Trial counsel responds to Appellant's motion for appropriate relief. | | App. Ex. XVI, ROT vol. 8 |
| 23 Nov 10 | The military judge denies Appellant's motion for appropriate relief. | 221 | 204-07, 720-23 |
| 24 Nov 10 | The government files a motion for expedited consideration with AFCCA. | 222 | 227-28 |

| | | | |
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| 13 Dec 10 | The government files a second motion for expedited consideration with AFCCA. | 241 | 229-31 |
| 17 Dec 10 | AFCCA grants the government's motion for expedited consideration. | 245 | 229 |
| 29 Dec 10 | Appellant submits a motion for expedited review, and the government concurs with the request. | 257 | 232-36 |
| 14 Jan 11 | AFCCA sets oral argument for 20 Jan 11. | 273 | 237 |
| 20 Jan 11 | AFCCA holds oral argument on the Article 62 appeal. | 279 | 226 |
| 7 Feb 11 | Appellant requests release from pretrial confinement. | 297 | 305-30 |
| 14-18 Feb 11 | Every member of Appellant's chain of command denies his request for release from pretrial confinement. | 308 | 331-34 |
| 28 Feb 11 | Appellant submits a motion for expedited review. | 318 | 238-39 |
| 9 Mar 11 | AFCCA grants the government's Article 62 appeal and remands the case. | 327 | 6-14 |
| 21 Mar 11 | Trial counsel's case-ready date. | 339 | 642-45 |
| 22 Mar 11 | Appellant submits a second PTA. | 340 | 732-37 |
| 24 Mar 11 | U.S. v. Danylo is re-docketed for 31 Mar 11. | 342 | 986 |
| 28 Mar 11 | The general court-martial convening authority approves Appellant's second PTA. | 346 | 732-37 |
| 31 Mar 11 | U.S. v. Danylo | 349 | 986 |

Based on the chronology, this Court should examine the 349 days

of delay by dividing it into two pieces: the 116 days prior to trial (16 April 2010 - 23 August 2010), and the 191 days used by the AFCCA to decide the Article 62 appeal (30 August 2010 - 9 March 2011).[4]

The 116 days between Appellant's entry into pretrial confinement and his trial was largely spent by the base legal office pursuing a particular prosecution strategy for Appellant and the other members of his drug ring. The chief of military justice explained that strategy during an Article 39(a) session:

> One of the things that the office felt that it needed to do was establish a cohesive prosecution strategy for all the members of the ring. We didn't necessarily look at it as, 'We are going to prosecute Airman Danylo; we are going to prosecute Airman Hansknecht.' We looked at it as, 'We've got this ring and we need to find a way to prosecute the ring successfully.'
>
> . . .
>
> Well, once we had a chance to really look at the ROIs, get trial counsel appointed to the cases, get draft proof analyses done, we realized that all the cases were interwoven and so to successfully prosecute any one member at a fully litigated trial, we were potentially going to need the testimony of several other members of the ring. And our options at that point were to try and turn the least culpable, or at least on paper the least culpable, into quick guilty pleas and then give them post-trial immunity to testify against other individuals in the ring; or what we perceived to be the more difficult route of granting pretrial immunity and using pretrial immunity and immunized testimony to prosecute other members of the ring. Our first option was to try and turn the

[4] The remaining days do not warrant an independent discussion because they are small in number, marked by clearly expedient movement by all parties, or are attributable to Appellant.

> small fish first and try and avoid the pretrial immunity issue.

(J.A. at 881, 883.) It may be easy in hindsight to second-guess the initial strategy of the base legal office, but this Court has specifically warned against such Monday-morning quarterbacking. In Grom, 21 M.J. at 57, the base legal office sought to obtain additional testimony against the accused by waiting for the results of another trial. This Court found "nothing improper in this motive," and went on to say:

> In the present case, it appears that the Government was willing to delay trial in the accused's case until after trial of his alleged co-actors in the reasonable expectation of acquiring admissible evidence on serious additional charges. With the benefit of hindsight, it is obvious that the ends of justice would have been better served if the Government had proceeded to trial with the evidence at hand, instead of delaying trial to obtain additional evidence. . . . That the Government's strategy failed, however, does not turn a permissible reason for delay into an impermissible one.

Id. The Grom scenario is similar the facts of this case. Here, the base legal office sought to obtain evidence against Appellant *and* avoid the complicated issues that arise when pretrial immunity is used in multiple cases by granting post-trial immunity to witnesses from other trials. (J.A. at 883.) The base legal office should not be faulted for selecting a thoughtful pace rather than raging blindly ahead toward multiple faulty prosecutions. As the Supreme Court noted:

> [O]rdinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.

United States v. Ewell, 383 U.S. 116, 120 (1996).

If anything, the base legal office should be applauded for its flexibility. Once it realized that its initial reasonable strategy was not working as expected, (12 June 2010), it immediately implemented a second reasonable strategy. According to the chief of military justice:

> One, our initial goal of trying to get some quick guilty pleas done was not working. Two, we were mindful of the speedy trial clock in Danylo's case because he was in pretrial confinement and so we knew that we couldn't stay the course any longer and had to go ahead and get the pretrial immunity and prosecute Danylo that way.

Once that strategic shift was made, the base legal office successfully preferred charges, investigated the charges at an Article 32 hearing, referred the charges, obtained immunity for several witnesses, and was ready for trial in just 59 days.[5] Because the government was consistently employing various courses of action to bring Appellant to trial, the 116-day delay leading up to trial was reasonable.

The 191 days used by the AFCCA to decide the government's Article 62 appeal was also reasonable. "Given the important

[5] At least part of that time was consumed by a 4-day holiday and trial defense counsel availability.

public interests in appellate review it hardly need be said that an interlocutory appeal by the government ordinarily is a valid reason that justifies delay." Loud Hawk, 474 U.S. at 315. The Supreme Court in Loud Hawk laid out three factors to consider when assessing the purpose and reasonableness of a delay caused by an interlocutory appeal. Id.

The first factor is the strength of the government's position on the appealed issue. In this case, the government's position in this appeal could not be stronger. AFFCA's grant of the government's Article 62 appeal is *prima facie* evidence of the reasonableness of the government's action. Id. at 316. This view was reinforced when this Court denied review of AFCCA's Article 62 decision on 20 June 2011.

The second factor is the importance of the issue being appealed as it relates to the posture of the case. In this case, all charges and specifications had been dismissed by the military judge with prejudice. Without appealing, the government could not protect the Air Force's interest in prosecuting Appellant for abusing drugs, distributing drugs, and assaulting an Airman. The Article 62 appeal was the only avenue available for the government to prosecute this case.

The third factor to be considered is the seriousness of the crimes involved. Appellant was charged with, and convicted of, multiple specifications of drug use, introduction, and

distribution; and one specification of assault consummated by a battery. The Air Force has a strong interest in prosecuting these types of charges because they represent a danger to individual airmen as well as the Air Force mission.

Appellant must recognize that the Loud Hawk factors all weigh in favor of the government, because he does not argue that the filing of the government's Article 62 appeal caused undue delay. Instead, Appellant takes umbrage at the length of time needed by AFCCA to actually decide the appeal. (App. Br. at 22-23.) Appellant notes that "[t]here is no reason established in the record for why other cases or other Article 62 appeals were processed ahead of Appellant's case." (Id.) Appellant is correct that the record is silent regarding AFCCA's deliberative process, but Appellant ignores where the record and the law speak volumes.

One, the record speaks to the fact that the majority of the cases decided while Appellant's Article 62 appeal was processing were simple merits cases, or cases where one of the parties had died. (J.A. at 226.) Two, it is clear from the record that both Appellant and the government sought to expedite the processing of the government's Article 62 appeal. (J.A. at 227-39.) And three, this Court has already held that time used by appellate courts to exercise their judicial decision-making authority is granted deference and is given a "flexible review".

Moreno, 63 M.J. at 137. Appellant cannot reasonably demand, nor should this Court require, that AFCCA open up its deliberative process to the scrutiny of outside observers. Although the government's Article 62 appeal was the largest portion of time at issue, that time was not unreasonable given the strength and importance of the appeal, and the deference given to AFCCA's judicial process.

Because the base legal office prosecuted Appellant as part of a deliberate strategy, and because AFCCA properly wielded its decision-making authority, the second factor in the Barker analysis weighs strongly in favor of the government.

***3. Appellant demanded a speedy trial.***

There is no dispute that Appellant demanded a speedy trial and requested release from pretrial confinement. However, the government's ability to proceed to trial almost immediately after AFCCA's remand should not be ignored. The government's case-ready date for a fully-litigated trial was 21 March 2011, (J.A. 642-45), a mere 12 days after AFCCA remanded the case. (J.A. 6-14.) On the other hand, trial defense counsel was not ready for a fully-litigated trial until sometime after 4 April 2011. (J.A. at 642-54.) Appellant was only able to proceed to trial on 31 March 2011 because his second offer for a PTA was accepted and approved. (J.A. at 732-37.) As a result, this third Barker factor weighs narrowly in favor of Appellant.

***4. Appellant was not prejudiced by the length of delay in his case.***

Prejudice is assessed in light of the interests of an appellant. Three such interests exist. Barker, 407 U.S. at 532. The first is preventing oppressive pretrial confinement. The second is minimizing anxiety and concern. "Anxiety and concern" is defined as a "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." Moreno, 63 M.J. at 140. The third is limiting the possibility that the appellant's ability to present a defense at trial will be impaired. The three interests are not weighed equally, and this final interest is the "most serious", Barker, 407 U.S. at 532, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Johnson, 17 M.J. at 259. Appellant has alleged that the first two forms of prejudice exist in his case. They do not.

First, Appellant has not suffered oppressive pretrial confinement.[6] The description of Appellant's confinement conditions comes from nothing more than the assertions of counsel and unsworn legal memoranda. (App. Br. at 30, citing

[6] Appellant's argument regarding oppressive confinement is merely an attempt to assert issues under Article 12 and Article 13 that Appellant failed to raise before AFCCA or this Court. Because those issues have not been raised, they are waived and not proper for this Court's consideration. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

J.A. at 62, 655-58.)[7] At no point in these proceedings did Appellant testify for the limited purpose of explaining the conditions of his confinement to the military judge, nor did he submit an affidavit to AFCCA for review.[8] Perhaps Appellant never personally asserted that the conditions of his confinement were oppressive because Appellant knows the truth: any hardship that he experienced in pretrial confinement was his own doing. The Supreme Court has recognized the need for confinement facilities to control their inmate populations. Specifically, in Bell v. Wolfish, the Court held that:

> Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. . . . Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction

[7] At trial, the military judge made no findings of fact regarding the conditions of Appellant's pretrial confinement other than to note that "this court lacks the factual basis to find that the Accused's confinement was oppressive." (J.A. at 730.) Now, Appellant's counsel asserts, that Appellant was "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." (App. Br. at 30). Even if these confinement conditions were accurate, they would not rise above "the normal incidents of confinement." Wilson, 72 M.J. at 352.

[8] Compare Appellant's silence with the limited testimony of the accused in Wilson, 72 M.J. at 354. In Wilson, the accused testified during an Article 39(a) session to specifically discuss the conditions of his confinement. Id.

> infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

441 U.S. 520, 546-47 (1979) (internal citations and quotations omitted). In less than a year, Appellant ran afoul of Kirtland AFB Regional Confinement Facility rules and regulations 145 times, (J.A. at 490-635); he obtained 14 inmate disciplinary reports,(J.A. 473-484, 636-38); and he lost multiple privileges.[9] These disciplinary actions were documented and presented to a board, thus ensuring that Appellant was treated according to confinement rules and procedures. (J.A. at 718-19.)

The only evidence in the record cited by Appellant regarding a hardship that he did not create for himself comes from a Kirtland AFB Regional Confinement Facility supervisor. The supervisor testified during an Article 39(a) session that Appellant was unable to immediately refill some prescriptions because his military ID card expired. (J.A. at 955-56, 961.) The supervisor also testified, however, that Appellant did not report any health concerns due his unfilled prescriptions. (J.A. at 961.) By way of comparison, this Court found no oppressive pretrial confinement where the appellant:

> was assigned a cell by himself and he was locked down in the cell for eight hours at night. During the day he spent his time in a large bay area with

[9] Appellant's infractions ranged from speaking to potential witnesses in his court-martial, (J.A. at 479, 481), to masturbating in view of a security camera monitored by female confinement staff. (J.A. at 483.)

> approximately twenty other prisoners. There were three or four other military prisoners but he was the only African-American on the bay. [He] testified that some of the civilian prisoners in the bay directed racial slurs at him and had tattoos of symbols he considered racist.

Wilson, 72 M.J. at 354. Despite the potentially frightening circumstances experienced by the appellant in that case, the Court found that the appellant's experiences were within the "normal" range of what is to be expected in confinement. Id. at 352. Here, Appellant's minor medicinal inconvenience does not rise above the permissible level of oppression experienced by the appellant in Wilson.

Second, Appellant has not suffered any particularized anxiety or concern. Appellant gladly cites part of the military judge's second speedy trial motion ruling:

> [Appellant's pretrial confinement] almost certainly caused anxiety, stress, and the loss of ability to carry on a normal lifestyle for . . . 350 days.

(App. Br. at 29 citing J.A. at 730). But Appellant conveniently ignores the very next sentence of the judge's ruling, which concludes thusly:

> This court is less persuaded, however, that anxiety and stress alone would rise to the level of impairment of the Defense's ability to present its case.

(J.A. at 730.) Appellant then cites to a nonbinding case, United States v. Dreyer, 533 F.2d 112, 116 (3d. Cir. 1976), for the proposition that, when an appellant attempts suicide because

of a trial delay, the appellant's right to a speedy trial has been violated. That may well be the case in the Third Circuit, and its holding is instructive here, but for one key fact: Appellant cites to no evidence in the record showing that he attempted suicide while in pretrial confinement. Appellant asserts that he experienced some anxiety, but he does nothing to define the anxiety, prove its actual existence, or link it to his pretrial confinement.

Third, Appellant's ability to present a defense at trial was not impaired by the 349-day delay in his case. Appellant does not argue that his ability to present a defense was impaired (though he does not exactly concede the point, either).[10] Instead, Appellant argues that he was unfairly denied "good conduct time" because he was released from confinement when his trial ended. (App. Br. at 29-30.) Only Appellant could transmutate a benefit--the termination of confinement--into a detriment. Appellant's argument, which is disingenuous at best, fails to acknowledge two key facts. First, in accordance with the terms of his second PTA, Appellant would have been released from confinement when his trial ended regardless of the sentence imposed. (J.A. at 732-37.) *See* United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979) ("Absent evidence to the contrary,

[10] Indeed, it would be difficult for Appellant to argue that his ability to mount a defense was impaired considering that he pleaded guilty in accordance with a PTA.

accused's own sentence proposal is a reasonable indication of its probable fairness to him."); United States v. Johnson, 41 CM.R. 49, 50 (C.M.A. 1969) (determining that the "sentence accords with the accused's own assessment of what he considered a fair and acceptable sentence, as expressed in his pretrial offer to plead guilty"). Second, given Appellant's pattern of misconduct while in confinement, it is possible that he would not have earned any good conduct time at all. Furthermore, this Court has clearly held that "the possibility of 'good-time' credit should not be considered by the members or the military judge." United States v. McNutt, 62 M.J. 16, 20 (C.A.A.F. 2005). No matter how Appellant tries to frame his prejudice allegations, he has offered zero evidence to suggest that his ability to present a defense was impaired by the delay in his case.[11]

Neither Appellant, nor his ability to present a defense at trial, was prejudiced by the 349-day pretrial delay in this case. As a result, this fourth, and most compelling, factor of the Barker framework weighs decisively in favor of the government.

[11] In an Article 39(a) session, trial defense counsel almost conceded that Appellant's ability to present a defense was not prejudiced when he stated, "As to any other factor, no, we can't say that an exculpatory witness got hit by a bus so at day 125, there's nothing like that I'm aware of". (J.A. at 964.)

## CONCLUSION

It was not error for the military judge to give deference to AFCCA's Article 62 order when he decided Appellant's second speedy trial motion. Appellant's Sixth Amendment speedy trial right was not violated because the base legal office appropriately prosecuted Appellant according to a deliberate trial strategy; the time taken by AFCCA to consider the government Article 62 appeal was not unreasonable given a flexible standard of review; and Appellant suffered no prejudice as a result of the 349-day delay in his case. Wherefore, this Honorable Court should affirm the findings and sentence as approved by AFCCA below.

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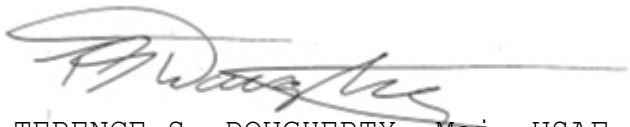

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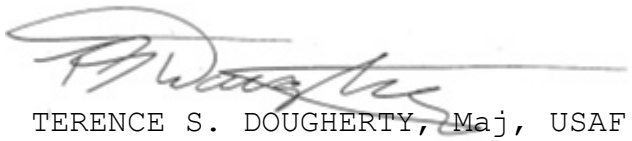

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