IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	BRIEF ON BEHALF OF APPELLANT
Jaason M. LEAHR Aviation Survival Technician Second Class (E-5) United States Coast Guard, Appellant	)	CGCCA Dkt. No. 1365 USCAAF Dkt. No. 14-0625/CG

BRIEF ON BEHALF OF APPELLANT

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

ISSUES PRESENTED

I. WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO DISMISS FOR VIOLATION OF APPELLANT'S RIGHT TO SPEEDY TRIAL UNDER R.C.M. 707.

II. WHETHER THE GOVERNMENT'S WITHDRAWAL OF CHARGES AND RE-REFERRAL TO ANOTHER COURT-MARTIAL WAS IN VIOLATION OF R.C.M. 604(b) BECAUSE THEY WERE PREVIOUSLY WITHDRAWN FOR AN IMPROPER REASON.

III. WHETHER APPELLANT WAS DENIED A FAIR TRIAL WHEN THE MILITARY JUDGE TWICE SUGGESTED IN FRONT OF THE MEMBERS THAT APPELLANT WAS GUILTY, FIRST BY "THANKING" A WITNESS FOR HIS EFFORTS TO PROTECT THE VICTIM, AND THEN BY ASKING DEFENSE COUNSEL BEFORE FINDINGS WHETHER A WITNESS WOULD BE SUBJECT TO RECALL AS "A SENTENCING WITNESS."

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for the jurisdiction of the Coast Guard Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for the jurisdiction of this Court to consider Appellant's petition for grant of review is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant was tried at New Orleans, Louisiana and Norfolk, Virginia on 8-9 November and 28 November – 2 December 2011 by a general court-martial convened by Commander, Coast Guard Force Readiness Command. Appellant was charged with one specification of larceny under Article 121, UCMJ (Charge I); seven specifications of assault under Article 128, UCMJ (Charge II)(six involving BM and one involving LS); one specification of burglary under Article 129, UCMJ (Charge III); and two specifications of communicating a threat and one specification of kidnapping under Article 134, UCMJ (Charge IV). Appellant elected trial by members with enlisted representation, and pleaded not guilty to all charges and specifications.

In mixed findings, Appellant was found not guilty of burglary; not guilty of two of the six specifications of assault involving BM; not guilty of the assault specification involving LS; and not guilty of kidnapping; he was otherwise found guilty of the larceny specification; guilty of four of the assault specifications involving BM (including the lesser included offense in specification 3); and guilty of two specifications of communicating a threat. The members sentenced Appellant to be reduced to E-1, to be confined for three months, and to be discharged from the Coast Guard with a bad-conduct discharge; the convening authority approved the findings and sentence.

Appellant appealed to the Coast Guard Court of Criminal Appeals, which affirmed the findings and sentence on 22 October 2013. This Court granted review on 18 February 2014.

STATEMENT OF THE FACTS

On 28 February 2011, Commanding Officer, Coast Guard Aviation Training Center (CG ATC), imposed pretrial restriction upon Appellant due to allegations of misconduct against Ms. BM. (JA at 007-010.) On 1 March 2011, five charges were preferred against Appellant alleging violations of Articles 80, 121, 128, 129 and 134, UCMJ (hereinafter "original charges") based on the allegations of Appellant's conduct against Ms. BM. (Id.)

Appellant was detailed trial defense counsel, who subsequently requested a continuance of a scheduled Article 32 investigation from 29 March 2011 to 9 May 2011. (JA at 268.) Trial defense counsel accepted excludable delay for this period of time. (Id.) The Article 32 Investigation was ultimately held on from 17 to 18 May 2011. (JA at 220.)

On 16 June 2011, the convening authority referred the original charges to trial by general court-martial. (JA at 008.) The government subsequently dismissed the one charge and specification alleging a violation of Article 80, UCMJ. (JA at 009.)

On 20 June 2011, Appellant requested a "speedy arraignment" based on trial defense counsel's upcoming transfer. (JA at 110.) On 7 July 2011, Appellant waived his five day statutory waiting period from service of charges to arraignment and was arraigned. (JA at 219.)

On 9 August 2011, Coast Guard Investigative Service (CGIS) Special Agent (S/A) Chris Whitmarsh conducted an interview with AST1 Fernando Jorge, USCG, who had previously testified at the prior Article 32 investigation as a government witness. (JA at 125; 253; 219.) During this interview, S/A Whitmarsh learned of an additional unrelated allegation of misconduct against Appellant that involved an altercation with AET3 LS, USCG. (JA at 125.)

Appellant was subsequently transferred from CG ATC to Sector Mobile based on this new allegation and informed that his previously imposed restrictions would remain in effect during and after this transfer. (JA at 569; 575-577.)

On 1 September 2011, the convening authority issued a letter purporting to withdraw and dismiss the original charges. (JA at 219.) In this letter, the convening authority stated that this action was based on the discovery of the new allegation against Appellant and his desire for Appellant to be "tried on all charges at a single trial to best serve the interests of justice and promote judicial economy." (Id.)

Five days later on 6 September 2011, charges and specifications were again preferred against Appellant (hereinafter "new charges"). (JA at 011-014.) These charges and specifications were nearly identical to those the convening authority had withdrawn and dismissed with the exception of a

single additional specification of Article 128, UCMJ, which was based upon the alleged altercation with AET3 LS. (See JA at 007-014.)[1]

The convening authority directed that a new Article 32 investigation take place on 15 September 2011 to investigate the additional specification. (JA at 012; 530.) On 9 September 2011, Appellant submitted a demand for speedy trial through counsel. (JA at 546.) Trial defense counsel subsequently requested to reschedule the Article 32 investigation from 15 to 28 September 2011, and agreed to accept delay for this period of time. (JA at 545.) The second Article 32 investigation was held on 29 September 2011 and only considered evidence related to the newly preferred charge regarding AET3 LS. (JA at 515-518.) The investigating officer's recommended disposition of the charge was disposal at an Article 15 proceeding or dismissal. (Id.)

The convening authority referred the new charges for trial by general court-martial on 12 October 2011. (JA at 012.) Appellant was again arraigned on 8 November 2011. (JA at 019.)

At trial, the defense filed several motions, including a motion for dismissal based on a violation of Rule for Courts-Martial (R.C.M.) 707, and a motion for dismissal based on an

[1] The original charges also included a charge of attempted premeditated murder, but that charge was dismissed without prejudice on 20 June 2011 based on the recommendation of the original Investigating Officer and upon the advice of the Staff Judge Advocate. See JA at 009; 074.)

improper reason for withdrawal of charges under R.C.M. 604(b). (JA at 085; 163.) The military judge denied both of these motions. (JA at 042; 058.)

Further facts necessary for the resolution of the issues can be found in the argument below.

SUMMARY OF THE ARGUMENT

Appellant was denied his right to a speedy trial under R.C.M. 707. Appellant was placed in pre-trial restriction, charges were preferred and investigated pursuant to Article 32, UCMJ, and Appellant was arraigned. After Appellant was arraigned the convening authority purported to withdraw and dismiss the charges because of a fresh allegation of misconduct and the convening authority claimed a desire that Appellant be "tried on all charges at a single trial to best serve the interest of justice and promote judicial economy." The charges were re-preferred, only the new charge was investigated pursuant to Article 32, UCMJ, after which the charges were re-referred and Appellant was re-arraigned. Including periods of excludable delay, Appellant was arraigned 163 days after the original charges were preferred. Because he said that he intended to re-refer the charges to a different court-martial, because he did not order the original charges re-investigated, and because he re-referred the new charges only five days after the original charges were withdrawn (including a holiday weekend), the

convening authority clearly never intended to dismiss the original charges; the result was a mere withdrawal and the 707 speedy trial clock continued to run. Appellant was brought to trial over 120 days after the preferral of charges, and the charges must therefore be dismissed with prejudice.

The withdrawal of charges and re-referral to another court-martial was in violation of R.C.M. 604(b), which prohibits re-referral where charges were withdrawn for an improper reason. The purported reason was to try all known charges at a single court-martial. While it is true that all known charges should be tried at a single court-martial, withdrawal and dismissal after arraignment solely for the purpose of thwarting the limitation in R.C.M. 601(e)(2) prohibiting joinder of offenses after arraignment without the consent of the accused is an improper purpose.

In addition, Appellant was denied a fair trial because the military judge was disqualified under R.C.M. 902(a) and (b)(1). He made two comments in front of the members suggesting that he believed Appellant was guilty, first when he "thanked" a government witness for taking action, which can reasonably be interpreted as a belief on the part of the military judge that the victim had been in some sort of peril from which she needed to be saved; and second when he asked the defense counsel in front of the members whether a particular witness would be

subject to recall as "a sentencing witness." Both of these statements suggest that the military judge believed Appellant was guilty. He made these statements in the presence of the members. He therefore had a sua sponte duty to recuse himself under R.C.M. 902(b)(1) because he was personally biased in favor of the government, and under R.C.M. 902(a) because a reasonable person knowing all of the circumstances would conclude that the military judge's impartiality might reasonably be questioned.

ARGUMENT

I. WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO DISMISS FOR VIOLATION OF APPELLANT'S RIGHT TO SPEEDY TRIAL UNDER R.C.M. 707.

Standard of Review

Whether an accused received a speedy trial under R.C.M. 707 is question of law that is reviewed de novo. United States v. Doty, 51 M.J. 464, 465 (C.A.A.F. 1999).

Argument

R.C.M. 707 requires the government to bring an accused to trial within 120 days of the earlier of preferral of charges or the imposition of pre-trial restraint. R.C.M. 707(a). The day of the preferral of charges does not count for the purposes of computing time. R.C.M. 707(b)(1). An accused is brought to trial within the meaning of R.C.M. 707 at the time of arraignment. Id. Any pre-trial delay approved by the military judge or the convening authority shall be excluded when

determining whether the 120 day period has run. R.C.M. 707(c). The sole remedy for a violation of R.C.M. 707 is a dismissal of the affected charges. R.C.M. 707(d). Charges dismissed pursuant to R.C.M. 707 can be dismissed with or without prejudice based on a consideration of the following factors: "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." R.C.M. 707(d)(l).

The calculation of delay under R.C.M. 707 can be impacted by a convening authority's exercise of his or her authority to withdraw and/or dismiss charges. See R.C.M. 401(c)(l); R.C.M. 604(a). Withdrawal of charges and dismissal of charges, however, each have a distinct effect on the R.C.M. 707 speedy trial clock.

A dismissal of charges will reset the 120 day clock, and a new 120 day period will begin upon the earlier of either the date of re-preferral or the date of imposition of restraint. R.C.M. 707(b)(3)(A). Charges should ordinarily be dismissed when they fail to state an offense, are unsupported by available evidence, or some other sound reason warrants dismissal. R.C.M. 401(c)(1), Discussion. Dismissal of charges contemplates that "the accused no longer faces charges, that conditions on liberty

and pretrial restraint are lifted, and that he is returned to fulltime duty with full rights as accorded to all other servicemembers." United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988). When a convening authority dismisses charges, further disposition of the charged offenses is not barred. R.C.M. 401(c)(l). However, if a convening authority wishes to pursue previously dismissed charges at a court-martial, "[t]he charges must be repreferred, investigated and referred in accordance with the Rules for Courts-Martial, as though there were no previous charges or proceedings." Britton, 26 M.J. at 26.

Alternatively, the convening authority may withdraw charges or specifications from a court-martial at any time before findings are announced. R.C.M. 604(a). Withdrawn charges are taken out of the court-martial proceeding to which they were referred, but "[t]he charges are nonetheless viable and may be re-referred without re-preferral and reinvestigation." United States v. Bolado, 34 M.J. 732, 737 (N.M.C.M.R. 1991), aff'd 36 M.J. 2 (C.M.A. 1992)(summary disposition), cert. denied 506 U.S. 915 (1993). The discussion of R.C.M. 604 notes that "[c]harges which are withdrawn from a court-martial should be dismissed ... unless it is intended to refer them anew promptly or to refer them to another authority for disposition." R.C.M. 604(a), Discussion. Withdrawing referred charges does not automatically

result in a dismissal of charges absent further action by the convening authority. United States v. Tippit, 65 M.J. 69, 78 (C.A.A.F. 2007)(citing Britton, 26 M.J. at 26). Withdrawn charges can be referred to another court-martial by the convening authority unless the convening authority withdrew the charges for an improper reason. R.C.M. 604(b). In contrast to a dismissal of charges, withdrawal of charges does not stop or reset the R.C.M. 707 speedy-trial clock. Britton, 26 M.J. at 26.

The convening authority's action on 1 September 2011 was a withdrawal rather than a dismissal, and thus did not stop the R.C.M. 707 speedy trial clock. As a result, the government brought Appellant to trial 163 days after the preferral of charges, exceeding the 120 day limit prescribed by R.C.M. 707. Therefore, Appellant respectfully requests this Court to set aside the affected charges and sentence and dismiss them with prejudice.

A. The convening authority's action on 1 September 2011 was a withdrawal of charges that did not serve to stop the R.C.M. 707 speedy trial clock.

To correctly determine the number of days on the R.C.M. 707 speedy trial clock on the day that Appellant was brought to trial, this Court must determine whether the convening authority's action on 1 September 2011 constituted a dismissal of charges or merely a withdrawal. This distinction is critical

because, "unless the convening authority acts to dismiss the charges, and not merely withdraw the charges, R.C.M. 707(b)(2) does not apply, and the speedy-trial clock continues to run." See United States v. Lorenc, 30 M.J. 619, 621-22 (N.M.C.M.R. 1990)(citing Britton, at 26).

The convening authority's 1 September 2011 action was a withdrawal of charges rather than a dismissal, and therefore did not stop the speedy trial clock. Although the convening authority refers to his action as a "withdrawal and dismissal" in his l September 20ll letter, this Court should find that the convening authority's action constituted only a withdrawal. This Court and the service Courts of Criminal Appeals have long held that the terminology used by the convening authority is not determinative as to whether an action is a dismissal or withdrawal. See Tippit, 65 M.J. at 78-80; Britton, 26 M.J. at 26; United States v. Robinson, 47 M.J. 506, 509-510 (N.M.C.C.A. 1997); Lorenc, 30 M.J. 622; Bolado, 34 M.J. at 737-38; United States v. Mucthison, 28 M.J. 1113 (N.M.C.M.R. 1989). Instead, these courts have analyzed various factors to determine whether the intent of the convening authority was more aligned with a dismissal or withdrawal.

In Britton, for example, this court found that the convening authority intended to withdraw the charges rather than dismiss them because the convening authority re-preferred the

same charges on the same day, and because the accused remained under the same constraints imposed at the initial preferral. 26 M.J. at 26. This court found that these factors indicated that the convening authority intended for the charges to remain pending rather than be dismissed. Id. In contrast, the Navy-Marine Corps Court of Military Review found in Bolado that the convening authority intended to dismiss the charges. 30 M.J. at 622. In so ruling, the court considered that the accused was not under any form of restraint and was returned to full duty before re-preferral, as well as the fact that no further action was taken towards the accused for over two months. Id.

As these cases make clear, this Court is not bound by the convening authority's labeling of his action as a "withdrawal and dismissal." Instead, this Court must look at the underlying facts and circumstances and find that the convening authority's intent was for the charges previously referred against Appellant to remain pending while an additional specification was preferred and subsequently referred. As such, the convening authority's intent was consistent with a withdrawal of charges, rather than a dismissal.

Nowhere is the convening authority's intent more clear than in the language used in his 1 September 2011 letter purporting to withdraw and dismiss the charges against Appellant. In that letter, the convening authority states his reason for

withdrawing the charges as follows: "In anticipation of the possibility that this new allegation will cause AST2 Leahr to become the subject of a newly preferred additional charge which would warrant referral to a court-martial, I desire that the accused to be [sic] tried on all charges at a single trial to best serve the interests of justice and promote judicial economy." (JA at 219.) In contrast with the concept of dismissal articulated in Britton, the convening authority's language here clearly and unambiguously indicates that he never intended for Appellant to "no longer [face] charges" as a result of this action. 26 M.J. at 26. Nowhere in this letter is there any indication that the convening authority intends to do away with the charges pending against Appellant or to dismiss them for any significant period of time. The convening authority's clear intent was to withdraw, rather than dismiss, the charges.

The length of time between the convening authority's action and the reinstitution of charges is further indication of the convening authority's intent to withdraw rather than dismiss the charges. Similar to the span of time between withdrawal and re-preferral in Britton, the span of time between the convening authority's action and the re-preferral of charges was notably short. In Britton, the court found that the convening authority's "withdrawal and repreferral on the same day [showed] that his intent was not to dismiss the charges at all." Id.

While the five day period from 1 to 6 September is admittedly longer than the same day re-preferral conducted in Britton, it included a three-day federal holiday weekend in observance of Labor Day. Thus, there was only one working day between the date of withdrawal and the date of re-preferral. This short span of time reflects the convening authority's intention to proceed with the government's case against Appellant that had initially begun on 1 March 2011.

Appellant's status during that five day period further supports Appellant's position that the convening authority intended to merely withdraw the charges. According to Britton, dismissal contemplates that, "conditions on liberty and pretrial restraint are lifted, and that [the accused] is returned to full-time duty with full rights as accorded to all other service members." Id.; see also Bolado, 34 M.J. at 738 (finding that the fact that accused "was under no form of restraint and was returned to regular military duties" before re-preferral of charges was a factor indicating a dismissal rather than withdrawal). In this case, Appellant received a memorandum on 29 August 2011 notifying him that the previously imposed conditions on his liberty would continue to apply during his local temporary duty assignment transfer, which was ordered as a result of the new allegations in the soon to be preferred specification against Appellant. (JA at 569.) Specifically,

that memorandum stated that "the conditions on liberty in [a memorandum of 20 July 2011] continue to apply during your local temporary duty assignment to Sector Mobile." (Id.) This memorandum was issued only three days before the convening authority issued his letter withdrawing and dismissing the charges, and the conditions on Appellant's liberty remained in effect during the five day period before the charges were re-preferred. (JA at 569; 219.)

The military judge further erred when he found at trial that Appellant had experienced "a momentary return to full duty status followed immediately by the reasonable instantaneous imposition of new conditions on liberty." (JA at 042.) This finding is unsupported by the record, which reveals no indication that Appellant was ever returned to a full duty status, even momentarily, following the convening authority's action. In fact, the very language utilized in the 29 August 2011 memorandum indicates that his restrictions were to "continue," indicating that no break occurred. (JA at 569.) Furthermore, the fact that this memorandum was issued before the convening authority's action to withdraw and dismiss the charges, suggests there was never an intent for Appellant to return to a full duty status, even momentarily, upon the "dismissal" of the charges, and indicates that this action constituted a withdrawal.

The procedures employed by the government in moving forward with the charges against Appellant towards the second referral are also consistent with a withdrawal of charges. The court in Britton distinguished a dismissal from a withdrawal by drawing the following contrast:

> Reinstitution of [dismissed] charges requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules for Court-Martial, as though there were no previous charges or proceedings ... On the other hand, R.C.M. 604(a) authorizes a convening authority or other superior competent authority to withdraw charges ... [and the] referral of withdrawn charges to another court-martial.

Britton, 26 M.J. at 26. In this case, after the convening authority re-preferred the charges, along with the newly-added seventh specification of Charge II, a second Article 32 investigation was conducted. (JA at 515-518.) This investigation, however, was limited in scope to the newly preferred Charge II, Specification 7. (JA at 515;011-014.) If the government was truly proceeding "as though there were no previous charges or proceedings," the original charges should have been re-investigated along with the new specification. Instead, the government relied on the original Article 32 investigation, indicating the government's view that the current proceeding was a continuation of the original prosecution, and not a new and separate one.

The Coast Guard Court of Criminal Appeals acknowledged Appellant's argument that dismissal contemplates that an accused no longer faces charges and the 1 September 2011 document shows that the convening authority never intended for Appellant to no longer face charges, but "rejected[ed] the notion that this logic supersedes the Convening Authority's plain language in the document of 1 September 2011." (JA at 004.) Respectfully, while it is true that the "plain language" says "dismissal," it is also true that all the other language suggests an intention to proceed with the original charges, and the charges were therefore withdrawn but not dismissed.

In light of Britton and its progeny, it is clear that the convening authority's intent was to withdraw rather than to dismiss the charges. As such, the withdrawal neither stopped nor reset the 120-day speedy trial clock.

B. The charges should be dismissed because the government violated R.C.M. 707 by failing to bring Appellant to trial within 120 days of the preferral of charges.

Although R.C.M. 707 states that arraignment typically stops the speedy trial clock, this Court in Britton established that the withdrawal of charges after arraignment means that the arraignment does not stop or reset the speedy trial clock. R.C.M. 707(b)(1); Britton, 26 M.J. at 26. As in Britton, the government exceeded 120 days in bringing Appellant to trial. The charges were preferred on 1 March 2011, Appellant was

arraigned for the first time on 7 July 2011, and then the charges were withdrawn on 1 September 2011. Appellant was arraigned for the second time on 8 November 2011. Based on these dates, Appellant was brought to trial 163 days after the preferral of charges in his case, accounting for 79 days of excludable delay.

Thus, just as in Britton, the withdrawal of charges means that the original arraignment did not stop the speedy trial clock, and the government violated R.C.M. 707 by failing to bring Appellant to trial within 120 days of the preferral of charges.

C. This Court should dismiss the charges with prejudice.

Dismissal of affected charges is the sole remedy for the government's failure to comply with R.C.M. 707. R.C.M. 707(d). The dismissal can be with or without prejudice. R.C.M. 707(d)(1). The charges must be dismissed when the accused has been deprived of his or her constitutional right to speedy trial. Id. In determining whether to dismiss the charges with or without prejudice, the following factors apply: "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of speedy trial." Id. R.C.M. 707 does not prioritize either dismissal with or without prejudice,

thus providing the Court with wide discretion to impose whichever remedy it deems proper based on the application of these factors. United States v. Dooley, 61 M.J. 258, 263 (C.A.A.F. 2005)(citing United States v. Taylor, 487 U.S. 326, 335 (1988)).

As the military judge found no violation of R.C.M. 707, he did not consider the factors outlined in R.C.M. 707(d)(1) to determine whether to dismiss with or without prejudice. (JA at 042). This Court, however, should consider these factors and find that the charges should be dismissed with prejudice. See United States v. Proctor, 58 M.J. 792, 797 (A.F.C.C.A. 2003) (applying the R.C.M. 707(d)(l) factors in a case where the military judge had previously found no speedy trial violation and thus had not previously applied the factors); United States v. Bray, 52 M.J. 659, 663 (A.F.C.C.A. 2000)(finding that the factors listed in R.C.M. 707(d)(l) are the proper factors to consider when determining the remedy for an R.C.M. 707 violation on appeal).

In weighing the seriousness of the offenses, arguably, all charges referred to general courts-martial are serious by their very nature. While Appellant does not intend to diminish the seriousness of these charges, the seriousness of an offense should not, by itself, trump the speedy trial rights of servicemembers. Otherwise, the government would be rewarded for

dilatory prosecution of serious offenses — a result the President clearly intended to avoid in promulgating R.C.M. 707 in the first place. Thus, the seriousness of the offenses, while a consideration, must be weighed against the other factors. On balance, this factor weighs in favor of Appellant.

This Court must next consider "the facts and circumstances leading to dismissal." R.C.M. 707(d)(1). The fatal government action was its decision to withdraw the charges in order to add an additional specification of Article 128, UCMJ, after Appellant had been arraigned. The government's stated reasons for doing so were to "serve the interests of justice and promote judicial economy." (JA at 219.) It should be noted that the additional specification the government sought to add had allegedly taken place in August of 2010, but was belatedly discovered due to the government's failure to interview its own witness who had previously testified at the first Article 32 investigation. (JA at 553.)

The government was barred from bringing the additional charge to the existing court-martial by R.C.M. 601, which prohibits the joinder of offenses after arraignment without consent of the accused. R.C.M. 601(e)(2). While this rule does not create a constitutional or statutory right, it does serve to benefit the accused by creating "a certain stability to the trial process and firm[] the matters against which an accused

must defend." United States v. Hayward, 47 M.J. 381, 383 (C.A.A.F. 1998). In order to circumvent R.C.M. 601(e)(2)'s restriction, the government withdrew the charges and re-preferred them anew. Essentially, the government prolonged the time that Appellant faced trial and suffered restrictions on liberty in order to correct its own mistakes made during the course of its initial investigation. There was nothing precluding the government from proceeding to trial on the already arraigned upon charges. Further, simply preferring the additional charge against Appellant to a separate court-martial would have complied with both the letter and the spirit of R.C.M. 707 and 601. In taking the steps that it did, the government was clearly attempting to ease the burden of prosecution by sidestepping several Rules for Courts-Martial that were put in place in order to afford an accused some right or benefit. As such, this factor weighs in favor of dismissal with prejudice.

Next, this Court must consider the effect of retrial on the administration of justice. R.C.M. 707(d)(1). In Dooley, the court found that if the charges were to be dismissed without prejudice and were re-prosecuted, then "the remedy [would lead] to further delay." 61 M.J. at 264. The court further found that "the plain meaning of R.C.M. 707 may be thwarted" in such a scenario. Id. In this case, where Appellant has twice

requested speedy trial[2], dismissal without prejudice would frustrate the administration of justice by subjecting Appellant to further delay. Additionally, this Court should consider the portion of Appellant's sentence that has already been served. In the past, courts have looked to the punishment already completed in applying this factor. See Dooley, 61 M.J. at 264 ("[T]he Government's interest in re-prosecuting Appellant is diminished because he [has already] served seven months of confinement"). Appellant has already served the entirety of confinement he was sentenced to, thereby diminishing any government interest in re-prosecuting. Consideration of this factor weighs in favor of dismissal with prejudice.

Finally, this Court must consider the prejudice to the Appellant incurred as a result of the delay. R.C.M. 707(d)(l). Courts have noted that "prejudice can take many forms, thus 'such determinations must be made on case-by-case basis in light of the facts.'" Dooley, 61 M.J. at 264. Prejudice can include "any restrictions or burdens on [Appellant's] liberty." Id. Appellant endured some form of restriction on his liberty for the entire 163 days that it took the government to bring his case to trial. (See JA at 563-569.) Further, Appellant submitted multiple requests to have these restrictions lifted.

[2] Appellant first requested a "speedy arraignment" of the charges on 22 June 2011. (JA at 110.) Appellant subsequently requested a speedy trial on 9 September 2011. (JA at 546.)

(See JA at 570-574.) Accordingly, the government's delay in bringing Appellant to trial caused prejudice by prolonging the period of time during which Appellant was subject to these restrictions.

Furthermore, courts have found that reassignment of an accused while he or she awaits court-martial can amount to prejudice. See Dooley, 61 M.J. at 264-65 (Upholding the military judge's finding of prejudice as a result of a transfer to the Transient Personnel Unit "because [Appellant] is a photographer's mate not allowed to work in his rating and a second class petty officer not permitted to supervise troops"). Likewise, Appellant was reassigned to the engineering facilities division at Sector Mobile and was forced to work out of his rating as an Aviation Survival Technician, one of the hardest and most selective rates in the Coast Guard. Appellant, a second class petty officer, was also not permitted to supervise junior personnel in this position. (See JA at 575-577; 579.) As a result of the delay Appellant was forced to work out of his rate in a position that was not career-enhancing and in which he did not have the opportunity to supervise or lead other Coast Guardsmen for a period of approximately 91 days, causing particularized prejudice to his Coast Guard career. This Court should find that this prejudice weighs heavily in favor .of dismissing the charges with prejudice.

Additionally, this Court should consider prejudice in the form of mental and emotional stress Appellant experienced as a result of the excessive delay in bringing him to trial. The Supreme Court has held that the speedy trial guarantee recognizes a presumption of emotional distress on an ordinary person based on the uncertainties of an upcoming trial. Strunk v. United States, 412 U.S. 434,439 (1979). In this case, Appellant's anxiety and emotional distress prior to trial led him to seek regular counseling. (JA at 578-582.) Further, his anxiety over his upcoming court-martial resulted in an unhealthy weight loss, which raised concerns over his health with those who knew him. Id. The prolonged delay in bringing Appellant to trial certainly exacerbated the impacts of this anxiety on Appellant's physical and mental health, and should be considered by this Court to find that the charges should be dismissed with prejudice.

Based on a consideration of the factors outlined in R.C.M. 707(d)(l), dismissal of the charges with prejudice is warranted, and the military judge erred in failing to dismiss the charges.

Appellant’s right to a speedy trial under R.C.M. 707 was violated, and as a result Appellant suffered material prejudice to a substantial right. The findings and sentence must therefore be set aside. WHEREFORE Appellant so prays.

II. WHETHER THE GOVERNMENT'S WITHDRAWAL OF CHARGES AND RE-REFERRAL TO ANOTHER COURT-MARTIAL WAS IN VIOLATION OF R.C.M. 604(b) BECAUSE THEY WERE PREVIOUSLY WITHDRAWN FOR AN IMPROPER REASON.

Standard of Review

Whether the withdrawal of charges and re-referral to another court-martial was for a proper reason is reviewed de novo. See generally United States v. Koke, 34 M.J. 31 (C.M.A. 1992).

Argument

A convening authority may withdraw charges and specifications from a court-martial for any reason prior to the announcement of findings. R.C.M. 604(a). Previously withdrawn charges can be referred to another court-martial, "unless the withdrawal was for an improper reason." R.C.M. 604(b). The government must articulate good cause for the withdrawal of charges from a court-martial and the subsequent re-referral of those charges to another court-martial. R.C.M. 604(b), Discussion. The government bears the burden of showing by a preponderance of the evidence that the withdrawal and re-referral were not done for an improper reason. See United States v. Mann, 32 M.J. 883, 887 (N.M.C.M.R. 1991).

The Court of Appeals for the Armed Forces has construed a "proper" reason under R.C.M. 604(b) as "a legitimate command reason which does not 'unfairly' prejudice an accused in light

of the particular facts of a case." United States v. Underwood, 50 M.J. 271, 276 (C.A.A.F. 1999). The discussion of R.C.M. 604(b) provides further guidance as to what constitutes a proper reason for withdrawal and notes that the determination "depends in part on the stage in the proceedings at which the withdrawal takes place." R.C.M. 604(b), Discussion. That section provides a non-exhaustive list of proper reasons for withdrawal before arraignment, after arraignment, and after the presentation of evidence on the issue of guilt. Id. The discussion identifies "receipt of additional charges, absence of the accused ... and routine duty rotation of the personnel constituting the court-martial" as proper reasons for withdrawal prior to arraignment. Id. The discussion further states that, after arraignment, charges "may be referred to another court-martial under some circumstances." Id. (emphasis added). "The scope of what constitutes a proper reason for withdrawal permitting re-referral narrows as the charge progresses along the judicial process ... before the convening authority exercises his prerogative to withdraw." Mann, 32 M.J.at 889.

The government's stated reason for the withdrawal of charges was to try the unrelated charge pertaining to the altercation between AET3 LS and Appellant at the same court-martial as the charges pertaining to Ms. BM and Appellant. R. at Withdrawal and Dismissal. As Appellant had already been

arraigned on the charges related to BM at the time that the government became aware of AET3 LS' allegation, its options were limited by R.C.M. 601(e)(2)'s prohibition on the joinder of charges after arraignment without the consent of the accused. R.C.M. 601(e)(2). This Court has stated that, "[t]he purpose of R.C.M. 601(e)(2) is simply to 'create[] a certain stability to the trial process and firm[] the matters against which an accused must defend." Hayward, 47 M.J. at 383. This sentiment appears to reflect a desire to comport with the discussion section of R.C.M. 601(e)(2) in the Manual, which states that, "[o]rdinarily all known charges should be referred to a single court-martial." R.C.M. 601(e)(2), Discussion.

The government's withdrawal of charges represents a clear circumvention of R.C.M. 601(e)(2). In the convening authority's action withdrawing the original charges, he states that his decision to do so is based on his desire for the accused "to be tried on all charges at a single trial to best serve the interests of justice and promote judicial economy." (JA at 219.) The government's proffered justification indicates a clear desire to comport with the non-binding preference expressed in the discussion section of R.C.M. 601(e)(2), but in so doing thwarts the plain language requirements of R.C.M. 601(e)(2) itself. Under the unique facts of this case and the specific charges involved, "judicial economy" constitutes an

"improper reason" for withdrawal under R.C.M. 604(b), especially considering that the additional charge was unrelated to the original charges, had occurred over six months before the original charges were preferred, and was belatedly discovered due to the government's failure to timely interview its own witnesses. As Appellant had already been brought to trial at the point of withdrawal, the convening authority's action, performed in the name of "judicial economy," was not a "legitimate command" action. Rather, it constituted an interference with an ongoing court-martial proceeding and a circumvention of the clear language and purpose of R.C.M. 60l(e)(2).

It is worth noting that the Investigating Officer recommended dismissal of the new charge because, while there was sufficient evidence to support each element of assault, the victim had significant credibility problems, a claim of self-defense would "likely be a strong defense," and the IO did "not believe it can be proved with the evidence and witnesses that were available." (JA at 517.) It is also worth noting that Appellant was acquitted of this charge. (JA at 081.) While the recommendation for dismissal and Appellant's subsequent acquittal are not dispositive, they are certainly factors supporting a conclusion that the government's claim of "judicial economy" was a mere pretext.

The military judge's ruling on the defense motion indicates an improper analysis of the R.C.M. 604(b) and R.C.M. 601(e)(2) framework. The military judge found at trial that the preponderance of the evidence showed that "the government was motivated to meet the spirit of the R.C.M. 601 joinder direction and there was no other underlying purpose." (JA at 058.) The military judge further found that, "I am convinced that the greater judicial and cost efficiencies were the goal of the government in conducting the withdrawal and re-referral." Id. The military judge's ruling essentially finds that judicial economy and a motivation to "meet the spirit of R.C.M. 601" are proper reasons for withdrawal of charges after arraignment. The ruling further ignores the explanatory language in the discussion section of R.C.M. 604(b), discussing the different standards for withdrawal at different points in a court-martial proceeding. The military judge's decision is a clear misapplication of R.C.M. 604(b) and the relevant caselaw.

Appellant has been prejudiced by the withdrawal and subsequent improper re-referral of charges. As previously addressed, Appellant's liberty was restricted during the period of withdrawal and re-referral of charges in this case. (JA at 569.) Second, the improper joinder of charges in this case, which the withdrawal sought to effect, permitted the government to present testimony regarding the alleged assault on AET3 LS

which, absent the joinder, would have been inadmissible propensity evidence under Military Rule of Evidence 406(b). Mil. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith"). As the underlying offenses relating to BM dealt with allegations that Appellant, a male, physically assaulted BM, a female, the introduction of evidence regarding a separate alleged physical altercation between Appellant and a female would certainly weigh in the minds of members and impact their view of Appellant's propensity towards violence against women. Although the military judge did give a standard limiting instruction on the facts of one offense to prove another, it was not tailored and did not sufficiently relieve the prejudice to Appellant. As a result of these circumstances, Appellant was unfairly prejudiced by the withdrawal and improper re-referral and is entitled to relief.

The withdrawal and re-referral of charges to another court-martial was done in violation of R.C.M. 604(b), for the improper purpose of thwarting Appellant’s right to a speedy trial under R.C.M. 707, and Appellant suffered material prejudice to a substantial right as a result — both to his right to a speedy trial and his right to a trial free from inadmissible propensity evidence. The findings and sentence must therefore be set aside. WHEREFORE Appellant so prays.

III. WHETHER APPELLANT WAS DENIED A FAIR TRIAL WHEN THE MILITARY JUDGE TWICE SUGGESTED IN FRONT OF THE MEMBERS THAT APPELLANT WAS GUILTY, FIRST BY "THANKING" A WITNESS FOR HIS EFFORTS TO PROTECT THE VICTIM, AND THEN BY ASKING DEFENSE COUNSEL BEFORE FINDINGS WHETHER A WITNESS WOULD BE SUBJECT TO RECALL AS "A SENTENCING WITNESS."

Standard of Review

The disqualification of a military judge under R.C.M. 902 is reviewed for an abuse of discretion. United States v. Rivers, 49 M.J. 434, 444 (C.A.A.F. 1998).

Argument

During the course of Appellant's court-martial, Mr. Jason Bechtol testified for the government that he came to the aid of BM on the night of 11 April 2010. After he testified, neither side requested that he be subject to recall. (JA at 067.) The military judge said to him, in the presence of the members, "Mr. Bechtol, I want to thank you . . . for coming up, for participating in this process as well as for your actions." Id. (emphasis added). The court-martial was recessed. The defense stated,

> I'm extremely concerned about your comment to Mr. Bechtol, "Thank you for your actions that night." That was indicative that he perhaps saved BM from something, and that was imparted to the members. So, you commented on evidence, in front of the members, and I'm going to ask for a mistrial at this point. Because we now have, we now have the Military Judge commenting on a witness' testimony, and the comment that was made is —

(JA at 068.) The military judge stated, "I hear your concern," but denied the motion for a mistrial and offered to give "the normal instruction that I give on comments of the judge that are given to the members." The defense requested that the instruction be given at the end of the day. (JA at 070.) The military judge went on to say that he didn't say to the witness "You got it right," and he "simply said thank you to him for serving as a Good Samaritan," that he "would do so again," and he was "confident that the members appreciated it for that — that that was the basis" of the comment. (JA at 071-072.)

At the end of the day the military judge excused the members, and instructed them,

> You may have heard comments from me, during the course of the day today, which might seem to indicate an opinion as to the weight or credibility of the evidence and guilt or innocence of the accused. Disregard those comments. My comments are not evidence. Evidence is what you hear out of the witnesses. As I've said before, you have the hard job of deciding, and the hard job of sorting out the evidence, and you must rely on the evidence, and not on the comments that I have made.
>
> You alone have the independent responsibility of deciding this issue. Each of you must consider only the evidence presented in open court, and you must impartially resolve the ultimate issue of the guilt or innocence of the accused, in accordance with the law, the evidence admitted in open court, and your own conscience.

(JA at 075.)

Later in the trial, after the testimony of one of the defense witnesses, Chief Petty Officer Dennis Kaczmarek, the military judge asked if he was subject to recall, and the defense counsel said that he was not. The military judge asked in front of the members, "He's not a sentencing witness?" The defense counsel responded, "Potentially could be, sir." The military judge released the witness but told him he was subject to recall. (JA at 077.)

In front of the members trial counsel stated, "Your Honor, the government would also like to render its objection to the sentencing witnesses sitting in the back of the court room." (Id.) The defense asked for a 39(a) "to discuss this instead of in front of the members." (Id.) After the members apparently departed the courtroom, the defense said, "Your Honor it's improper for any party to refer to sentencing prior to findings in front of the members and proper procedure of the government counselor would have been to request a 39(a) to address this instead of doing it in front of the members." (JA at 077-078.) The military judge responded, somewhat cryptically, "Understood, and that I brought up the issue of sentencing and I do that as my standard language to a witness, I'm characterizing her comment in the same way." (Id.)

An accused has a constitutional right to an impartial judge. United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F.

2001). Rule for Courts-Martial 902(a) provides for disqualification of a military judge "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(b)(1) provides for disqualification "Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings." R.C.M. 902(d)(1) imposes upon the military judge a "sua sponte" duty to "decide whether the military judge is disqualified."

This Court has said that when a military judge's impartiality is challenged on appeal, the test is "whether, taken as a whole in the context of this trial, the court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011)(citing United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000). Whether the military judge was impartial is reviewed "objectively" for "any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned." Martinez, 70 M.J. at 158 (citing United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982).

The military judge twice suggested in front of the members that he believed Appellant was guilty. The first time was when

he "thanked" Mr. Bechtol for his "actions," which, as the defense noted, telegraphed to the members that the military judge believed Mr. Bechtol had "saved" MB in some way, and that Appellant was therefore guilty. According to the military judge, while he understood the defense's position, this was no big deal because "the nature of [his] comment was such that it reflected upon the statement of the witness, whose credibility was not otherwise challenged." (JA at 071.) It makes no difference that Mr. Bechtol's credibility was not challenged. The comment suggests that the military judge believed *BM's* version of events when she claimed she was a victim. And BM's credibility *was* challenged. Then the military judge later questioned the defense counsel, in front of the members, whether Chief Kaczmarek would be "a sentencing witness," suggesting a belief that Appellant's conviction was a foregone conclusion. A reasonable person knowing all the circumstances would conclude that the military judge had not only formed an opinion about Appellant's guilt, but had told the members what that opinion was.

The military judge should have disqualified himself under both R.C.M. 902(a) and 902(b)(1). With respect to R.C.M. 902(b)(1), which requires recusal where the military judge "has a personal bias or prejudice concerning a party . . .", the military judge was clearly biased against Appellant and in favor

of the government. He expressed his bias when he suggested to the members that Appellant was guilty, first by "thanking" Mr. Bechtol for coming to the aid of BM, and then by suggesting in front of the members that he expected the case to go to sentencing.

The military judge was also disqualified under R.C.M. 902(a), the purpose of which is to "promote public confidence in the integrity of the judicial process." Martinez, 70 M.J. at 159. Whether the military judge's conduct warrants reversal "to vindicate the confidence in the military justice system" is determined by application of the three part test set forth in Liljeberg v. Heath Services Acquisition Corp, 486 U.S. 847, 860 (1988). Martinez, at 159. That test considers "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." Id.

With respect to the "risk of injustice to the parties," the injustice to Appellant has already borne fruit. His conviction rests, in part, on the belief on the part of the members that it was OK to find him guilty because the military judge already had. To the extent that setting aside the conviction would result in injustice to the government, it should be recalled that the government exacerbated the problem by bringing up in

front of the members the presence of sentencing witnesses in the courtroom immediately after the military judge asked whether Chief Kaczmarek was a sentencing witness. (JA at 077.)

With respect to whether denial of relief would cause injustice in other cases, Appellant leaves that determination to this Court's sound discretion.

Finally, with respect to the risk of undermining public confidence in the judicial process, considering the record as a whole, this Court should conclude that reversal is warranted because the military judge told the panel, in essence, that he thought Appellant was guilty.

Appellant did not receive a fair trial because the military judge was biased against him, and twice suggested in the presence of the members that he thought Appellant was guilty. The findings and sentence must therefore be set aside. WHEREFORE Appellant so prays.

RELIEF REQUESTED

Based on the foregoing, the findings and sentence in this case must be dismissed with prejudice. WHEREFORE Appellant so prays.

Respectfully submitted,

/s/

William E. Cassara
PO Box 2688
Evans, GA 30809
CAAF Bar No. 26503
706-860-5769
Bill@courtmartial.com

/s/

Cara J. Condit
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Building 58, Suite 100
Washington, D.C. 20374-5124
CAAF Bar No. 35620
202-685-4623
Cara.Condit@navy.mil

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 8,368 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New 12-point typeface.

Date: March 19, 2014

/s/

William E. Cassara
PO Box 2688
Evans, GA 30809
CAAF Bar No. 26503
706-860-5769
Bill@courtmartial.com

/s/

Cara J. Condit
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Building 58, Suite 100
Washington, D.C. 20374-5124
CAAF Bar No. 35620
202-685-4623
Cara.Condit@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Court on March 19, 2014, and that opposing counsel, LCDR Amanda Lee, USCG, was copied on that email at Amanda.M.Lee@uscg.mil.

I certify that eight copies of the Joint Appendix, consisting of two volumes, were delivered to the Court in paper form in accordance with Rule 24(f) on March 19, 2014, and to opposing counsel on March 18, 2014. The contents of the Joint Appendix were agreed upon by the parties.

/s/

William E. Cassara
PO Box 2688
Evans, GA 30809
CAAF Bar No. 26503
706-860-5769
Bill@courtmartial.com

/s/

Cara J. Condit
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Building 58, Suite 100
Washington, D.C. 20374-5124
CAAF Bar No. 35620
202-685-4623
Cara.Condit@navy.mil