IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	ANSWER ON BEHALF OF THE UNITED STATES
Jaason M. LEAHR, Aviation Survival Technician Second Class (E-5) United States Coast Guard, Appellant	)	CGCCA Dkt. No. 1365 USCAAF Dkt. No. 14-0265/CG

ANSWER 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 PRESENTED

I. UNDER R.C.M. 707, THE SPEEDY TRIAL CLOCK RESETS AFTER THE GOVERNMENT DISMISSES CHARGES. THE CONVENING AUTHORITY ORDERED THE CHARGES DISMISSED AND TOOK ACTIONS CONSISTENT WITH A DISMISSAL. FOUR DAYS LATER, THE GOVERNMENT PREFERED NEW CHARGES RELATING TO THE SAME MISCONDUCT. DID THE MILITARY JUDGE ERR IN FINDING THAT THE CHARGES WERE DISMISSED AND THUS THE SPEEDY TRIAL CLOCK HAD RESET?

II. THE GOVERNMENT MAY REFER ANEW CHARGES THAT HAVE PREVIOUSLY BEEN WITHDRAWN, SO LONG AS THAT WITHDRAWAL WAS FOR A PROPER REASON. IN *UNITED STATES V. KOKE*, THIS COURT HELD THAT JUDICIAL ECONOMY IS A PROPER REASON TO WITHDRAW CHARGES. HERE, THE MILITARY JUDGE FOUND THAT THE CONVENING AUTHORITY WITHDREW THE CHARGES FOR THE PURPOSE OF JUDICIAL ECONOMY. DID THE MILITARY JUDGE ERR IN PERMITTING THE GOVERNMENT TO REFER THOSE CHARGES ANEW?

III. A JUDGE MUST RECUSE HIMSELF IF HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED. THE MILITARY JUDGE THANKED A PROSECUTION WITNESS FOR STOPPING HIS CAR ON A DARK

STREET FOR A WOMAN WHO FLAGGED HIM DOWN, AND ASKED DEFENSE COUNSEL BEFORE FINDINGS WHETHER A WITNESS WOULD BE THE SUBJECT TO RECALL AS "A SENTENCING WITNESS." THE DEFENSE DID NOT ASK THE MILITARY JUDGE TO RECUSE HIMSELF. DID HE ERR IN NOT RECUSING HIMSELF *SUA SPONTE*?

STATEMENT OF STATUTORY JURISDICTION

The Coast Guard Court of Criminal Appeals (CGCCA) reviewed this case under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2014). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2014).

STATEMENT OF THE CASE

The United States accepts Appellant's statement of the case.

STATEMENT OF FACTS

Appellant's fiancé, BM, filed a complaint with the Mobile Police Department alleging that he assaulted her by punching her in the head, striking her head on the pavement, slamming her legs in a car door, squeezing her throat with his hands, and punching a glass window next to her head. JA at 009-010. The commanding officer of Coast Guard Aviation Training Center (ATC) placed Appellant in pretrial restraint on 28 February 2011. JA at 007. The government preferred charges on 01 March 2011, including attempted murder, assault consummated by a battery,

kidnapping, burglary, larceny, and communicating a threat. JA at 007-010.

The commanding officer lifted the pre-trial restraint two weeks later on 14 March 2011 and imposed conditions on Appellant's liberty. JA at 007. On 16 June 2011, the government referred the charges to a general court-martial but later dismissed the attempted murder charge. *Id.* at 008-009. After defense counsel requested a "speedy arraignment" due to an upcoming transfer, the government arraigned Appellant on 07 July 2011, eighty four days after his commanding officer imposed pretrial restriction. JA at 110, 216.[1]

In August 2011, during the government's preparation for its case in aggravation, investigators interviewed a Coast Guard petty officer, LS, who alleged that Appellant also assaulted her. JA at 125. LS was stationed with Appellant. In fear that he might retaliate against her, the command transferred Appellant from ATC to Sector Mobile on 29 August 2011 and continued the conditions on liberty. JA at 569.

On 01 September 2011, the convening authority withdrew and dismissed the charges because he desired that Appellant be "tried on all charges at a single trial to best serve the interests of justice and promote judicial economy." JA at 219. On 06 September 2011, the government preferred new charges

[1] Forty nine days of excludable delay were granted due to a defense-requested continuance prior to the Article 32 investigation. JA at 269.

covering the assaults on BM and the allegation by LS.[2] JA at 011. The convening authority referred all charges to general court-martial on 12 October 2011 and arraignment was held sixty three days later on 08 November 2011.

Before trial, the defense moved to dismiss for violation of the speedy trial clock under Rule for Courts-Martial (R.C.M.) 707 and for an improper withdrawal of charges under R.C.M. 604(b). The military judge denied both motions. JA at 042, 058.

On the merits, the prosecution called a good Samaritan, who testified that BM flagged him down on the night of the second assault and asked for help. JA at 059-060. The witness traveled from Alabama to Virginia to attend the trial. *Id.* at 059. After a brief direct and cross, the military judge excused the witness and said: "I want to thank you []-- for coming up, for participating in the process, as well as for your actions." *Id.* at 067. The defense asked for an Article 39(a) session and moved for a mistrial. *Id.* at 070. The military judge denied the request but gave a curative instruction. *Id.* at 075-076. The defense did not ask the military judge to recuse himself.

During the defense's case, as he was excusing a witness from the stand, the military judge asked the defense if the witness would be a "sentencing" witness. *Id.* at 077. The defense did not object, ask for a mistrial, or request the military

[2] The United States will refer to the first set of charges, preferred on 01 March 2011, as *Leahr I* and the second set of charges, preferred on 06 September 2011, as *Leahr II.*

judge recuse himself. During his final instructions to the members, the military judge again told them to disregard extraneous comments and consider only the evidence presented in open court. *Id.* at 079-080.

The members convicted Appellant of larceny, four specifications of assault consummated by a battery, and communicating a threat. They acquitted him of the assault against LS. JA at 081.

SUMMARY OF THE ARGUMENT

The government is not precluded from dismissing charges even if it fully intends that the accused will face charges at some later date. When the charges are dismissed, the speedy trial clock resets to zero days. R.C.M. 707(b)(3)(A). Here, the convening authority contemplated that Appellant would face charges in the future, but he did not intend that he face them on the date of the dismissal. This dismissal was not a de facto withdrawal. The speedy trial clock was reset and the government brought Appellant to trial eighty four days after charges were preferred anew. Appellant received a speedy trial and the military judge did not err when he denied the defense motion to dismiss under R.C.M. 707.

Charges that have been withdrawn from a court-martial may be referred anew, so long as they were not withdrawn for an improper reason. R.C.M. 604(b). This Court held in *United States*

v. Koke, 34 M.J. 313 (C.M.A. 1992) that judicial economy is a proper reason to withdraw charges. The convening authority stated that he was withdrawing the charges in *Leahr I* for that reason and the military judge found this was in fact the reason. JA at 058. Appellant's allegation that the convening authority withdrew the charges not for judicial economy but to admit propensity evidence is unsupported by the record. The military judge did not err when he found that the withdrawal was proper and thus the charges could be re-referred to a new court-martial.

Lastly, a military judge must recuse himself only if his impartiality might reasonably be questioned. R.C.M. 902(a). A judge's opinions about the parties are not typically grounds for recusal so long as the opinion is based on what the judge observed during the trial, rather than on an extrajudicial source. *United States v. Liteky,* 510 U.S. 540, 550-51 (1994). The military judge made a comment indicating that he believed the undisputed testimony of a good Samaritan. The military judge based this statement on what he observed at trial rather than some outside factor. The defense did not move for recusal of the judge, which indicates that they believed he remained impartial. His conduct and actions throughout the trial establish that he was neutral and detached, and recusal was not required nor appropriate.

I. Through his words and actions, the convening authority dismissed the charges in *Leahr I*. This reset the R.C.M. 707 clock and Appellant received a speedy trial.

Standard of Review

Whether an appellant received a speedy trial is a question of law that this Court reviews *de novo*. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). The military judge's findings are given "substantial deference and will be reversed only for clear error." *Id.*

A. The Convening Authority Dismissed the Charges.

The convening authority dismissed the *Leahr I* charges, thus resetting the speedy-trial clock under R.C.M. 707(b)(3)(A). Because Appellant was brought to trial within 120 days of the date of preferral of the second set of charges, there was no error.

Under R.C.M. 707(a)(2), an accused must be brought to trial within 120 days of the imposition of pre-trial restraint. But if charges are dismissed, the speedy trial clock resets to zero days and does not begin to run again until charges are preferred anew. R.C.M. 707(b)(3)(A). Withdrawal of charges without dismissal does not reset the clock. *United States v. Britton,* 26 M.J. 24, 26 (C.M.A. 1988). The trial clock was reset on 01 September 2011, the date of the dismissal in *Leahr I*, and did not begin to run until the government preferred charges in *Leahr*

II. The government arraigned Appellant sixty three days after the second preferral date.

Dismissal differs from withdrawal in that it contemplates that "the accused no longer faces charges, that conditions on liberty and pretrial restraint are lifted, and that he is returned to full-time duty with full rights as accorded to all other servicemembers." *Britton*, 26 M.J. at 26. The government is required to prefer, investigate, and refer all charges anew. *Id.* Charges that are withdrawn but not dismissed need only be re-referred to a court-martial to reinstate them. *Id.* The discussion to R.C.M. 604(a) states: "Charges which are withdrawn from a court-martial should be dismissed (*see* R.C.M. 401(c)(1)) unless it is intended to refer them anew promptly or to forward them to another authority for disposition."

i. A convening authority may dismiss charges even if he contemplates future prosecution.

A convening authority may dismiss charges even if he is contemplating future prosecution of the accused. R.C.M. 707(b)(3)(A) specifies that the speedy trial clock is restarted after re-preferral of dismissed charges. By promulgating this rule, the President intended that some dismissed charges would be preferred anew. Also, the discussion to R.C.M. 306(c)(1) states that the "dismissal of charges at this stage does not bar later disposition of the offenses. . . ."

This Court has also held that the decision to dismiss charges does not preclude future prosecution. The Navy-Marine Corps Court of Military Review held in *United States v. Bolado*:

> R.C.M. 707(b)(3)(A) and *Britton* make clear that an intent to reinstitute charges does not mean that an otherwise clear dismissal of charges is to be treated as a withdrawal under R.C.M. 707. In no way is the intent to reinstitute charges at a later date inconsistent with an intent to dismiss them presently.

34 M.J. 732, 738 (N.M.C.M.R. 1991). This Court granted review and summarily affirmed. *United States v. Bolado*, 36 M.J. 2 (C.M.A. 1992), *cert. denied*, *Bolado v. United States*, 506 U.S. 915 (1992).

The convening authority's intent to reinstitute the charges at a later date does not negate his unambiguous dismissal. The possibility of future prosecution is not a factor in determining whether the disputed action was a dismissal. Appellant did not face charges as of the moment the convening authority dismissed them. That he would face them in the future does not change that fact.

ii. Charges that are withdrawn must be dismissed unless they are re-referred promptly.

The discussion section of R.C.M. 604(a) states that charges should be dismissed if they are not "promptly" referred anew. The term "promptly" means "performed readily and immediately" or "without delay or hesitation." *Webster's Third International*

Dictionary 1816 (1976). Forty one days passed between dismissal of the charges in *Leahr I* and referral of charges in *Leahr II*. The re-referral was not immediate, nor was it without delay or hesitation. Thus the only appropriate characterization of the action is a dismissal.

In *Britton*, this Court found that charges that were dismissed and preferred anew on the same day were withdrawn rather than dismissed. *Britton*, 26 M.J. at 26. Here, five days passed before any action was taken, and forty one days passed before the convening authority referred the new charges. Because the government was not prepared to immediately and without delay refer the withdrawn charges in *Leahr I* to a new court-martial, the convening authority had to dismiss them, which he did.

iii. The convening authority's actions were consistent with a dismissal. This lends weight to his stated intent to dismiss.

The convening authority unambiguously wrote that he was dismissing the charges in *Leahr I*. JA at 219. While not ultimately dispositive, his words should be given substantial deference because his subsequent actions were consistent with that dismissal.

Upon ordering the dismissal, the convening authority directed trial counsel to cross out the referral block on the charge sheet, nullifying it, as directed by R.C.M. 401(c)(1). JA

at 008. The trial counsel notified the defense via email and the convening authority copied the defense on the dismissal order. JA at 115, 219.

Once the decision was made to again go forward with charges, the government went through each step of the charging process. Trial counsel sought a neutral and detached accuser to look at all the evidence, a person different from the accuser in *Leahr I*. JA at 007, 011. After the accuser swore to the charges, the accused was notified. *Id.* at 012. All of these steps demonstrate a clear intent of the government to bring new charges, rather than to revive charges that had been withdrawn but not dismissed.

The language in *Britton* states that the dismissed charges have to be "preferred, investigated, and referred in accordance with the Rules for Courts-Martial." 26 M.J. at 26. By using "investigation" sandwiched between "preferral" and "referral," *Britton* refers to the Article 32 investigation, as that occurs chronologically between preferral and referral both in practice and in the Rules. If *Britton* meant that the criminal investigation itself had to be re-done, "investigation" would have come before "preferral," as the criminal investigation comes first in time and uncovers the facts needed to establish probable cause to go forward.

Appellant reads *Britton* to mean that the government must always hold an Article 32 investigation in every case that derives from a previously dismissed one, but this is an incorrect reading of the UCMJ and the *Britton* holding. The government is not required to conduct an Article 32 investigation into every case referred to general court-martial. Article 32(c), UCMJ, 10 U.S.C. § 832(c) (2014), states: "If an investigation of the subject matter of an offense has been conducted *before the accused is charged* with the offense . . . no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charges" (emphasis added).

To read *Britton* to require an Article 32 investigation in every case in which a previously dismissed case is revived is in direct contradiction to the UCMJ, which contemplates that dismissed charges can be revived without a new Article 32 investigation if the accused does not object. The drafters of the UCMJ allow for a prior Article 32 investigation to be used, with the accused's concurrence. The majority in *Britton* could not have intended to disregard Congress' indisputable intent on this point. *Britton* does not require that the government conduct an Article 32 investigation that is not required by the UCMJ nor desired by the accused.

Here, Appellant did not object to using the prior Article 32 investigation for the new referral, which relieved the government of its obligation to conduct one. Had he objected, the government would have had no choice. But the fact that he did not object does not negate the clear action of the convening authority to dismiss the case and to prefer new charges at a later time.

Upon receipt of the charges and evidence, the convening authority carefully deliberated before making the referral decision. The record shows that the convening authority considered a memorandum submitted by the defense raising concerns about the prosecutor's charging decisions. JA at 144-49. In response, the convening authority reduced an aggravated assault specification to simple assault. JA at 013. The convening authority did not simply rubber-stamp his approval on charges that had been previously dismissed. He considered all the charges that were currently before him in a fresh light before deciding on referral.

Appellant cites to *Britton* for the proposition that the explicit language ordering a dismissal is not binding. App. Brief at 15. However, as the CGCCA noted, this Court found that the convening authority's language in *Britton* was in fact determinative in that case. 26 M.J. at 26 (finding that when the convening authority wrote that he "withdrew" the charges, he

meant a withdrawal); *see also* JA at 004. In *United States v. Tippet*, 65 M.J. 69, 78-80 (C.A.A.F. 2007), another case cited by Appellant, this Court had to interpret what the convening authority meant by the word "withdraw" because he purported to withdraw charges that had never been referred to a court-martial. This Court had no choice there but to try to determine what the commander intended by taking an action that he could not legally take.

Here, where the convening authority unequivocally stated his intent was to dismiss the charges and he took actions that were consistent with that intent, his choice of words, even if not dispositive, should be given great weight.

iv. The conditions on liberty continued because the requirements of R.C.M. 304(c) had been met.

The command's decision to continue the conditions on liberty was not inconsistent with a dismissal. The military judge found that the conditions on liberty imposed on 29 August 2011 were done to protect LS and other witnesses stationed at ATC, and his finding is not clearly erroneous. But even if this Court finds that the conditions on liberty that continued after the dismissal were designed to protect BM, the fact that a servicemember remains subject to conditions on liberty does not necessarily mean that the dismissal was only a de facto withdrawal.

The military judge found that "there was a momentary return to full duty status followed immediately by the reasonable instantaneous imposition of new conditions on liberty related to new charges." JA at 042. His finding is entitled to substantial deference and finds support in the record.

When BM's accusations came to light, Appellant's command placed restrictions on his liberty but he remained assigned to ATC. In August 2011, the government uncovered new allegations raised by LS, who was stationed with Appellant at ATC. Several witnesses were also stationed there. Concerned about Appellant's proximity to and interaction with these individuals, the command decided to temporarily reassign Appellant to Sector Mobile. JA at 186, 190. Three days before the convening authority dismissed the charges in *Leahr I*, the ATC executive officer informed Appellant in writing that he was being assigned temporarily to Sector Mobile and that the conditions on liberty would apply there.[3] JA at 190, 569.

The decision by the command to transfer Appellant to Sector Mobile was based on the new allegations. Prior to LS's report, Appellant had been assigned to ATC for six months during the investigation. The only reason for the transfer of Appellant to Sector Mobile six months later was because LS and other

[3] ATC and Sector Mobile are both located in Mobile, AL, but they are not co-located at the same facility. *See* JA at 190 (TDY orders authorizing Appellant to claim excess mileage from his home to his alternate work site within the local area).

witnesses were stationed at ATC and there was a legitimate concern for their safety. Without this, there would be no reason to transfer Appellant; the arrangements at ATC had been working smoothly for six months.

The military judge agreed with the government that the new conditions on liberty were the result of the allegations made by LS and not a continuation of the former conditions. He wrote: "The conditions on liberty imposed upon AST2 Leahr were not lifted but were modified based on the facts of the new charge. Specifically, this charge included an allegation of assault upon an ATC crewmember. For this reason, AST2 Leahr was sent on temporary duty. . . ." JA at 217.

But even if this Court disagrees with the military judge and finds that the conditions on liberty were imposed only based on BM's allegations, it does not follow that the charges in *Leahr I* were not dismissed.

Pre-trial restriction is imposed to prevent foreseeable serious criminal misconduct and to ensure one's presence at trial. R.C.M. 304(c)(3) Discussion. The imposition of pre-trial restriction, including confinement, is not contingent on the preferral of charges but instead may be imposed any time the factors of R.C.M. 304(c) are met. Preferral of charges is not a factor.

If an accused does not presently face charges, that does not mean that grounds for pre-trial restriction do not exist. In a significant number of cases, restriction or confinement is ordered at the outset of the investigation, long before the government is prepared to prefer charges.

The dismissal of charges does not require a commander ignore evidence that the formerly accused will commit future serious criminal misconduct, notwithstanding the fact that charges are not currently pending. Any reading of *Britton* that requires a command, in possession of evidence satisfying the factors in R.C.M. 304(c), release a member from pre-trial restraint is illogical and in contradiction to the Rules for Courts-Martial.

This issue was settled by this Court in *United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999). There, the accused was placed under pre-trial restriction after it was alleged that he molested a child. *Anderson*, 50 M.J. at 447. After preferral of an indecent acts charge, the child reported that the accused had also committed sodomy. The convening authority withdrew and dismissed the indecent acts charge to allow for further investigation into the sodomy allegation, but notably the accused "remained in restrictive status until a trial on the merits." *Id.* at 448.

The appellant argued that the charges had not been dismissed and that the trial clock had run. This Court analyzed the case under R.C.M. 707(b)(3)(A). It found that "[e]ven though there is continued restraint, a dismissal of the charges stops the 120-day clock and a new 120-day clock is started." *Id.* at 448. The continuation of pretrial restriction did not negate the intent of the convening authority to dismiss, rather than withdraw, the charges. *Anderson* post-dates *Britton* by eleven years and modifies the language in *Britton* that reads that "conditions on liberty and pretrial restraint are lifted" after dismissal. *Britton*, 26 M.J. at 26. This Court did not require the command turn a blind eye to the accused's future serious transgressions simply to ensure that the dismissal would be viewed as such.

There could be situations where a dismissal of charges would require that the accused be released from pretrial restraint, such as when there is insufficient evidence to support the charges and continued restraint. However, to read *Britton* to stand for the proposition that a proper dismissal can only occur if an accused is released from pretrial restraint, regardless of the risk of future serious misconduct, cannot be harmonized with this Court's later decision in *Anderson* or the Rules.

As the military judge found, the command was reacting to new allegations raised by LS when it continued the conditions on liberty, and thus Appellant saw no appreciable change in his liberty status despite the dismissal. However, even if this Court believes that the conditions on liberty were related to BM's allegations, that does not weigh in favor of a conclusion that an unambiguous dismissal was instead a withdrawal.

v. The dismissal was not a subterfuge to interfere with Appellant's defense.

The joinder rule protects an accused from having to face additional charges on the eve of trial without notice or an opportunity to mount a defense. It prohibits the government from launching a last-minute surprise. But the preference in the military justice system is to have all known charges tried at a single court-martial. *See* R.C.M. 601(e)(2) Discussion, R.C.M. 906(b)(10) Discussion. And the Rules allow for severance of offenses only to prevent "manifest injustice." R.C.M. 906(b)(10). The purpose of the joinder rule is not for the accused to insist on separate trials for misconduct that is discovered at separate times but to allow him to prepare for trial without fear that the government will add new charges shortly before.

The government's actions did not circumvent the joinder rule. Rather, the government took legitimate and proper actions

authorized under the Rules for Courts-Martial and this Court. Appellant claims that, because he was arraigned, he could no longer be subject to a single trial. That is not true.

As long as the government completes the required steps to prefer the new charges, the accused is protected from the last-minute attack that the joinder rule is designed to prevent. Absent a showing of manifest injustice, an accused does not have the right to separate trials. He has the right to demand that the government withdraw and dismiss charges in order to join them after arraignment but he cannot avoid having all known charges tried in a single trial so long as he is given adequate time to prepare his defense.

The convening authority properly withdrew and then dismissed the charges against Appellant. In his words and his actions, the convening authority executed a dismissal. Notwithstanding the fact that Appellant remained under conditions on liberty, he no longer faced charges for a period of time in September 2011. The speedy trial clock reset to zero days under R.C.M. 707(b)(3)(A) and Appellant was brought to trial within the prescribed 120-day time period.

B. Appellant was found guilty of violent crimes. If this Court finds a R.C.M. 707 violation, dismissal without prejudice is warranted.

If the government fails to comply with R.C.M. 707(d), the effected charges must be dismissed but the dismissal can be

without prejudice to the government's right to reinstitute proceedings against the accused. R.C.M. 707(d)(1). A court shall consider the following factors, among others, to decide whether to dismiss without prejudice: "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." *Id.*

Appellant was convicted of violent crimes. The members found that he had punched BM in the face with his fist, placed his hands around her throat and squeezed, and threatened to kill her. Despite Appellant's attempts to downplay the seriousness of the charges, the gravity cannot be understated. The violence overwhelmingly weighs in favor of dismissing without prejudice.

There also was no intentional dilatory conduct on the part of the government. If this Court finds that the convening authority erred by believing that he could dismiss the charges and then re-refer them at a later date, his intention was not nefarious or an attempt to interfere with Appellant's rights. As he stated in the dismissal order, his intent was to promote judicial economy while serving the interests of justice. He relied on case law from this Court and the Rules for Courts-Martial to do so. Judicial economy was his only motive.

It is also important to note that the convening authority did not dismiss the charges in a subterfuge to avoid a speedy trial violation nor did the government delay in bringing the case to trial after the dismissal was ordered. *Cf. United States v. Mucthison*, 28 M.J. 1113, 1115 (N.M.C.M.R. 1989) (where the government dismissed the charges after trial counsel realized they would not be prepared to arraign the accused before the speedy trial clock expired). Even after the charges were dismissed and preferred anew, the government still sought and was capable of meeting its original trial date. The military judge found that the government "[took] extraordinary steps to reduce the timing impact of this joinder, going through various steps of investigation and charging in a timely fashion to meet the previously agreed upon trial date of 08 NOV." JA at 042.

Appellant is mistaken when he argues that the new allegations were uncovered belatedly due to government inaction. The government, in preparing for its case in aggravation, found a witness who led investigators to LS. The military judge found that the new allegations were discovered in "the normal course of the government's preparing for the contingency of trial" and that the government's action "was not unreasonable." JA at 042. That finding is not clearly erroneous.

Appellant argues that the charges should be dismissed without prejudice because he twice requested speedy trial (App.

Brief at 26), but that is not an accurate recitation of the facts. Appellant never made a sincere request for a speedy trial. The defense counsel in *Leahr I* informally requested a "speedy arraignment" because of defense counsel's impending transfer. JA at 106. This was not a request by Appellant to exercise his right to a speedy trial but only a request that the arraignment take place before his defense counsel went on leave, a request that the government accommodated. To characterize it as a request for speedy trial for the purpose of showing prejudice against Appellant is disingenuous.

Additionally, Appellant claims that he requested speedy trial on 09 September 2011. App. Brief at 26 n.2. This request was made in an email to trial counsel after the re-preferral of charges and after Appellant was aware that he was facing an additional charge for his alleged misconduct toward LS. JA at 546. However, when the government sought to keep the trial date of 08 November 2011, it was the defense who pushed it back to 28 November 2011. JA at 154-55. It is insincere for Appellant to claim that he requested a speedy trial in September, with full knowledge that he was facing a new charge that he would need to prepare for, but then not take advantage of the soonest proposed trial date. Appellant made the request for a speedy trial but, when the government attempted to comply, he requested more time. Certainly, Appellant was entitled to more time to prepare his

defense but he cannot now claim that he requested a speedy trial. *See United States v. McCullough,* 60 M.J. 580, 589 (Army Ct. Crim. App. 2004) (finding that a defense request for speedy trial made in the midst of a request for delay to accommodate counsel's schedule was not a bona fide request for immediate trial). This Court should not consider Appellant's supposed speedy trial requests as a reason to dismiss with prejudice.

Justice would be frustrated if the government is not permitted to re-prosecute Appellant on the charges which the members found him guilty. It frustrates justice when a person found guilty of a crime by a fair and neutral jury is not held accountable. Even if this Court finds that the government committed a procedural error, one thing remains clear: A panel of fellow servicemembers convicted Appellant of punching a woman in the head with his fist; squeezing her throat with his hands so that she would not scream; pulling her out of a car; breaking a car window next to her head; and threatening to kill her in a way that "nobody would ever know." JA at 013-014; 081.

If the charges are dismissed with prejudice, Appellant cannot be prosecuted for any of his crimes. Even though Appellant cannot serve additional time if he is reconvicted, a retrial would give the government an opportunity to again characterize Appellant's action as those of domestic violence, as the panel found. *Cf. United States v. Proctor*, 58 M.J. 792,

797 (A.F. Ct. Crim. App. 2003) (where an appellant remained subject to prosecution for other offenses not affected by the speedy trial violation, it weighed against retrial on the effected charges).

Lastly, there was negligible impact to Appellant as a result of the additional twenty days that it took to bring his case to trial. Appellant cites no prejudice to his ability to mount a trial defense as a result of the additional twenty days. The crux of his grievance is that the impending trial weighed on him, causing him stress. While there is no doubt that facing a court-martial can be stressful, this Court need only consider the additional stress that Appellant faced as a result of the delay, not the stress that he faced throughout the entire process. He would have been subject to that stress regardless of whether the government tried Appellant at one trial or two.

After the charges in *Leahr II* had been preferred, the government sought to keep the original trial date of *Leahr I,* 08 November 2011. JA at 157. The defense pushed the date back to 28 November 2011. The United States concedes that this additional delay was necessary in order to defend against the new charge. However, the trial in *Leahr II* started only twenty days after *Leahr I* was scheduled to begin. Had the convening authority not dismissed the charges in *Leahr I*, Appellant would have been subject to the stress of an impending trial up to and including

08 November 2011. So when considering Appellant's claim that he was under stress as a result of the excessive delay, this Court need only consider the period from 09 November 2011 to 28 November 2011 as delay.

When the military judge considered this period and its effect on Appellant, he stated: "By extending the date only 20 days at the Defense request, the Accused has not suffered any appreciable prejudice." JA 218. Neither affidavit submitted by Appellant (JA at 578-82) indicates that the period from 09 November 2011 to 28 November 2011 was particularly arduous. Appellant claims that the emotional distress prior to trial caused him to seek counseling and lose weight, but Appellant's own words and that of his pastor state that the stress started long before 08 November 2011. *Id.* Appellant suffered no appreciable prejudice as a result of the twenty-day delay. The majority of his stress was related to the trial itself, which he would have felt regardless.

And Appellant suffered no prejudice as a result of the conditions imposed on his liberty, because those conditions would have been in place regardless of whether the original charges were dismissed. Appellant states that he endured some form of inconvenience for the entire 163 days that it took the government to bring his case to trial. App. Brief at 26-27. While this is technically accurate, Appellant fails to note

that, even if the government did not join the charges and he faced two separate courts-martial, he would have been subject to the same conditions on liberty. These conditions were reasonable precautions to protect the safety of other members.

If the government, upon learning of the new allegation, sought to try the assault against LS at a later trial and proceeded to trial on the original charges only, Appellant would have been under liberty conditions up to his trial date of 08 November 2011. Regardless of the outcome of that first trial, Appellant would have still faced a court-martial at a later date for the remaining assault charge and would still be subject to conditions on liberty based on LS's allegations. The amount of time he was under conditions on liberty was not a result of the delay in bringing his case to trial.

Given the serious and violent nature of the charges and the lack of prejudice to Appellant, the United States requests that, if this Court finds that there was a violation of R.C.M. 707, the charges be dismissed without prejudice.

II. Judicial economy is a proper reason to withdraw charges from a court-martial, according to this Court in *United States v. Koke*.

Standard of Review

"The interpretation of provisions of the R.C.M. . . . are questions of law that [this Court reviews] *de novo*." *United States v. Hunter,* 65 M.J. 399, 401 (C.A.A.F. 2008). The military judge's findings are given "substantial deference and will be reversed only for clear error." *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999).

Argument

"Charges which have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." R.C.M. 604(b). A proper reason is one that does not unfairly prejudice the accused "in light of the particular facts of the case." *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999). The reasons for the withdrawal and re-referral should be included in the record of the earlier proceeding. R.C.M. 604(b) Discussion.

This Court has upheld judicial economy as a proper purpose for withdrawing charges from a court-martial. In *United States v. Koke*, the appellant asserted that the convening authority acted improperly when he withdrew a charge for the sole purpose of "judicial economy." 34 M.J. 313, 313-14 (C.M.A. 1992). This Court disagreed.

Koke's court-martial was convened in Korea. On the first day of trial, after the appellant had been arraigned, the military judge stated that he was inclined to severe the two charges because of problems with the Article 32 investigation into one charge. In response, the convening authority withdrew all charges during a recess. *Id.* at 314. The purpose for the withdrawal was because of "the concept of judicial economy; that is all charges against the accused should be tried together in the same forum." *Id.* The charges were re-referred shortly thereafter and a new court-martial was convened only thirteen days after the dismissal. Koke's parents, who had traveled from the United States to attend the original trial, were not able to return for the new one. *Id.* at 314. Despite this limitation, this Court found that judicial economy was a proper reason for the withdrawal action, and that there was no evidence of an attempt by the government to thwart a ruling of the military judge. *Id.* at 315.

Here, the convening authority withdrew the charges to try all known offenses at a single court-martial "to best serve the interests of justice and promote judicial economy." JA at 219. Because of the expense of assembling a court-martial, the convening authority sought to avoid holding two separate trials. The military judge stated: "I am convinced that greater judicial and cost efficiencies were the goal of the government in

conducting the withdrawal and referral." JA at 058. The judge further stated that "the government was motivated to meet the spirit of the RCM-601 joinder direction and there was no underlying purpose." *Id.* The CGCCA held that the military judge's finding was well-founded and not clearly erroneous. JA at 005.

The government's claim of judicial economy was not a mere pretext for withdrawal. Indisputably, witnesses, the military judge, and counsel would have had to travel for both courts-martial if two were held. The costs of holding two trials would be twice that of holding one. The military judge who heard the case was the only judge designated to preside over Coast Guard general courts-martial. Scheduling a second case in front of him or a military judge from another service would necessarily involve delay to get on the docket. These are legitimate concerns and Appellant, both at trial and to this Court, has shown nothing to indicate otherwise. The military judge did not abuse his discretion in finding that the government's concerns over judicial economy were not pre-textual.

The similarities between this case and *Koke* are noteworthy. Here, the convening authority withdrew the charges against Appellant after he had been arraigned, as happened in *Koke.* The stated purpose for both was judicial economy. In both cases, charges were referred anew. Koke's parents were not able to

testify at sentencing as a result of the delay but even so this Court found no prejudice. Appellant in this case was able to produce all his witnesses. There is no reason for this Court to disturb its holding in *Koke* that judicial economy is a valid reason to withdraw charges after arraignment.

Appellant's contention that the additional charge amounted to inadmissible propensity evidence is unsupported by the record. The military judge gave an appropriate and complete instruction on separating the offenses and evidence. The members acquitted Appellant of the assault of LS but convicted him of assaults against BM. The members did not allow their finding of guilt in one incident to cloud their deliberation such that they found him guilty of all charges.

As in *Koke,* there is no evidence that the government was attempting to thwart a ruling of the military judge by withdrawing and dismissing the *Leahr I* charges. The government had met its obligation to arraign Appellant on time. Nor did the government withdraw the charges in order to re-litigate a pre-trial motion. *Cf. Vanover v. Clark*, 27 M.J. 345, 347-48 (C.M.A. 1988) (where this Court granted a writ-appeal because it found that the government withdrew the charges in an attempt to overturn a ruling excluding evidence).

There was no prejudice to Appellant by trying two assault cases together and no evidence that the government's actions

were a subterfuge to thwart the trial court's rulings. The reason for the withdrawal was simple: judicial economy. As this Court has previously held that judicial economy is a valid reason to withdraw charges, the withdrawal was proper.

III. The military judge's impartiality could not reasonably be questioned after he made a statement thanking a prosecution witness for stopping his car after midnight on a dark street when a woman flagged him down and another statement referring to a "sentencing" witness on the merits. Likewise, these statements did not taint the proceedings such that a mistrial was required.

Standard of Review

When an accused does not raise the issue of recusal of the military judge at trial and raises it for the first time on appeal, the standard of review is plain error. *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011). Even if this Court does not find plain error, it must determine if reversal is warranted under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1998).

Appellant incorrectly states that the standard is an abuse of discretion. That would be true only if the defense had asked the military judge to recuse himself. *See, e.g., United States v. Rivers,* 49 M.J. 434, 444 (C.A.A.F. 1998). Here, Appellant did not make such a request but instead moved for a mistrial. JA at 068. Therefore the standard is plain error.

The military judge's decision to deny a request for a mistrial is reviewed for abuse of discretion. *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999).

Argument

A. The military judge did not commit plain error when he did not recuse himself.

"A military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). "Whether the military judge should disqualify [him]self is viewed objectively . . . Military judges should 'broadly construe' possible reasons for disqualification, but also should not recuse themselves 'unnecessarily'." *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citations omitted). The two comments by the military judge, although perhaps inapt, did not rise to the level of error such that he had to recuse himself.

With respect to the good Samaritan, the military judge said, "I want to thank you . . . for your actions." JA at 067. He did not imply in any way that the witness saved the victim. The military judge also then made one incorrect reference to a "sentencing" witness during the merits phase. JA at 077.

A judge is not expected to refrain from forming opinions about witnesses' credibility. The mere fact that a judge voices

an opinion does not make him bias or partial. The Supreme Court held in *United States v. Liteky*, 510 U.S. 540, 550-51 (1994):

> [T]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant . . . but the judge is not thereby recusable for bias or prejudice, because his knowledge and opinion it produced were properly and necessarily acquired in the course of the proceedings . . . Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.

(citations omitted).

There is no evidence that the military judge formed his opinion about the good Samaritan's actions based on something other than what he heard in his courtroom. He decided that the witness deserved thanks for stopping his car along a dark road after midnight when a woman flagged him down. He formed this opinion after listening to testimony, not based on some extrajudicial knowledge. The fact that he merely formed an opinion does not make him partial.

His misstatement about a sentencing witness was not even an opinion, but rather a benign slip of the tongue from a judge accustomed to presiding over judge-alone guilty dives where sentencing is almost always assured.

Appellant alleges that the military judge believed he was guilty. App. Brief at 38. The fact that he believed one part of

a witness's story does not equate to an opinion of guilt. But even if the record had shown that, it would not be grounds for the military judge to recuse himself unless the record revealed "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. That does not exist here. Appellant points to nothing in the record, spanning over 1800 pages, that shows that the military judge's decisions were tainted or favored one side.

When a trial judge makes comments during the course of a trial that are based on things he observed during the trial, rather than on outside factors, it rarely supports a bias challenge. For example, in *United States v. Logue*, 103 F.3d 1040, 1046 (1st Cir. 1997), the trial judge stated: "I just want to put it on the record that I totally disbelieve the plaintiff in this case. I think he's an absolute and incorrigible liar." In denying relief, the First Circuit noted: "Since there is no evidence that the judge allowed his low opinion of Logue's veracity to mare his conduct of the trial, we will not disturb the judgment. Logue was entitled to an impartial judge, not an ingenuous one." *Id*.

The opinion of the military judge here was not controversial or even disputed. Both parties acknowledged that the good Samaritan stopped his car when BM flagged him down; the defense only argued that Appellant was not pursuing her when she

fled into the road. The good Samaritan testified that he never saw Appellant that night, bolstering the defense's claim that she was not being pursed. JA at 066. The military judge was not required to display "child-like innocence" or naivety when thanking a witness who undisputedly took what society would view to be a noble action by stopping his car on a dark street when flagged down by a woman claiming distress, regardless of the truth of her claims.

The trial defense counsel, although asking for a mistrial, did not request that the military judge recuse himself and the "[f]ailure of the defense to challenge the impartiality of a military judge may permit an inference that the defense believed the military judge remained impartial." *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000). Had the military judge's actions risen to a level such that his impartiality could reasonably be questioned, the defense would have questioned it. The silence at trial can and should be read as an acquiescence that the defense believed the judge remained fair and neutral. In fact, Appellant did not even raise this claim in the court below, further bolstering the inference.

Of course the military judge should not have said anything in front of the members that could appear to be an opinion, but that is a separate issue apart from that raised by Appellant. *See infra,* Part III.b. While the United States does not sanction

these misstatements, they were small errors in an otherwise clean record of trial that indicates that the military judge was fair and impartial.

If this Court finds the military judge should have recused himself, his not doing so did not materially prejudice Appellant's substantial rights and thus relief is not warranted under the plain error doctrine. The military judge gave a thorough cleansing instruction at the time requested by the defense and again before deliberations. As there is no evidence to the contrary, the members are presumed to have followed these instructions. *See, e.g., United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010). The members, not the military judge, found Appellant guilty. That factor can be important in determining error. *See United States v. Bradley*, 7 M.J. 332, 333 (C.M.A. 1979) (where this Court found that the judge could have cured error by directing trial by members). Appellant was convicted because of the overwhelming amount of evidence against him, not because the military judge misspoke.

Lastly, reversal is not warranted under the *Liljeberg* factors. This Court should consider the risk of injustice to the parties, the risk that denial will produce injustice in other cases, and the risk of undermining the public's confidence. *Liljeberg,* 486 U.S. at 864. Relief is warranted under *Liljeberg*

only when the integrity of the judicial process is harmed by affirming the conviction. *Id.*

The first factor, regarding injustice to these parties, does not exist here. There was no error in the proceedings that effected Appellant's rights because the military judge's rulings were impartial, neutral, and fair.

There is also no risk of injustice in other cases because the military judge handled himself properly after making the inopportune comments, crafting a curative instruction and working with the defense to deliver it at the most appropriate time. His actions provide guidance for other judges to follow if they find themselves in a similar situation.

Likewise, the military judge's actions would assure a member of the public that the proceedings were fair. He repeatedly and robustly charged the members with carrying out their duties and stressed the important role that they played as the factfinder. A fully informed member of the public would be left with the unmistakable impression that, while military judges are human after all, they work quickly to dispel concerns, clean up errors, and proceed forward with the interest of justice always at the forefront of their minds.

Appellant was entitled to an impartial judge, and that is exactly what he received. While the military judge did form an opinion relating to the actions of a witness, that is not

grounds for recusal absent some evidence that the opinion was based on extrajudicial factors. Appellant can point to no such evidence, and relief is not warranted.

B. The military judge's actions did not cast substantial doubt on the fairness of the proceedings, and thus a mistrial was not required.

Although not raised by Appellant, the United States is compelled to respond to the argument made by the defense at trial and alluded to in its brief to this Court that the military judge's comments warranted a mistrial. A mistrial is required only when it is "manifestly necessary in the interest of justice because the circumstances arising during the proceedings cast substantial doubt on the fairness of the proceeding." R.C.M. 915(a). It is a "drastic remedy" which should be used only when necessary "to prevent a miscarriage of justice." *United States v. Garces,* 32 M.J. 345, 349 (C.M.A. 1991). No such miscarriage of justice occurred here.

After thanking the good Samaritan for stopping his car when flagged down by BM, the military judge immediately moved to correct the error. He gave a complete and thorough curative instruction at the time requested by the defense. JA at 075, 079-080. Timely recognition of the error can be an important factor in determining whether a mistrial is necessary. *See Harris,* 51 M.J. at 196 ("This is not a case where the errors went unnoticed or uncorrected at the time they occurred"). The

members are presumed to have followed his instructions because there is no evidence to the contrary. *See, e.g., Mullins*, 69 M.J. at 117. The defense did not even move for a mistrial after the "sentencing" comment, presumably because the defense team appropriately concluded that this slight misstatement did not warrant it.

Military judges are not infallible. There is a place in every record of trial where the military judge has misspoken, was unclear, or simply should have said nothing. This case was no exception. Such mistakes do not require a mistrial, absent some "manifest necessity" that does not exist here. There is no doubt that the court-martial was fair and Appellant was justly convicted of the crimes he committed.

CONCLUSION

A critical issue in this case is whether the convening authority actually meant what he wrote in the dismissal order. There is no doubt that he used the word "dismissal" to describe his action, but Appellant argues that he did not mean it. The legal maxim that most aptly describes this issue is *Ex pracedentibus et consequentibus est optima interpretation*; that is, "The best interpretation takes account of what precedes and follows." *Black's Law Dictionary* (8th ed. 2004). Every step that the convening authority took before and after he issued the order was consistent with a dismissal. He did exactly what he

said he was going to do. His actions, and those taken by the trial counsel at his direction, flowed from his intent to dismiss. The law allows for the government to dismiss charges even if it intends to bring them again. Operating under that premise, the convening authority unequivocally dismissed the charges.

Appellant also seeks to revisit the issue of judicial economy, which was succinctly settled by this Court in *United States v. Koke*. This Court found that the time and money saved by holding a single trial was a legitimate and proper reason to withdraw charges from a court-martial, even after arraignment. The *Koke* opinion has no less validity today than it had when it was issued. Appellant suffered no prejudice and cannot distinguish this case from *Koke.* This issue is well settled.

Lastly, the 1800-page record contains the history of a court-martial that indisputably comported to the requirements of due process that it be fair and the military judge impartial. Notwithstanding two innocuous comments, the military judge carried himself in a way such that his impartiality could not reasonably be questioned. It was not even questioned by the defense counsel who heard him make the comments; the defense never moved for his recusal. Their silence speaks the loudest.

WHEREFORE the United States respectfully asks this Court to affirm the findings and sentence.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 9316 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 CourierPS 12-point typeface.

Date: 18 April 2014

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Court on 18 April 2014, and that opposing counsel, Mr. William E. Cassara and LT Cara J. Condit, USCG, were copied on that email at Bill@courtmartial.com and Cara.Condit@navy.mil, respectively.

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