IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States Appellant/Cross-Appellee v. Patrick Carter Master Sergeant (E-7) U.S. Air Force Appellee/Cross-Appellant	APPELLEE/CROSS-APPELLANT'S BRIEF USCA Dkt. No. 17-0086/AF Crim.App. No. 38708

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

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INDEX

TABLE OF AUTHORITIES

SERVICE COURTS OF CRIMINAL APPEALS CASES

STATUTES

ISSUES PRESENTED

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS DISMISSED THE CHARGE AND SPECIFICATIONS IN THIS CASE IN 2013 AND AGAIN IN 2016. BUT IT EXCEEDED THE EIGHTEEN-MONTH PRESUMPTION OF UNREASONABLE DELAY BEFORE DOING SO EACH TIME. HAS APPELLEE BEEN DENIED DUE PROCESS WHERE HE COMPLETED HIS SENTENCE TO THREE YEARS OF CONFINEMENT 158 DAYS BEFORE THIS COURT AFFIRMED THE LOWER COURT'S FIRST DISMISSAL OF THIS CASE ON AUGUST 2, 2013?

II.

WHETHER APPELLEE'S PROSECUTION FOR CHILD ENDANGERMENT WAS BARRED BY THE STATUTE OF LIMITATIONS WHERE MORE THAN FIVE YEARS HAD ELAPSED AND APPELLEE WAS NOT BROUGHT TO TRIAL WITHIN 180 DAYS OF THIS COURT'S AFFIRMANCE OF THE LOWER COURT'S DISMISSAL OF THAT SPECIFICATION?

Statement of Statutory Jurisdiction

The lower court had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

Master Sergeant (MSgt) Patrick Carter, Appellee/Cross-Appellant, was tried by a general court-martial composed of officer members between 16 and 26 February 2010. JA 250-52. The members acquitted MSgt Carter of one specification of raping a child under age 12, one specification of raping a child over 12 but under age 16, one specification of digitally penetrating a child over 12 but under age 16, one specification of sodomy of a child under age 12, and one specification of sodomy of a child over 12 but under age 16 in violation of Articles 120 and 125, Uniform Code of Military Justice (UCMJ), respectively. 10 U.S.C. §§ 920, 925 (2007).

He was convicted, by exceptions and substitutions, of one specification of indecent liberties with a child under 16, one specification of child endangerment, and one specification of indecent

liberties with a child under 16 in violation of Articles 120 and 134, UCMJ. 10 U.S.C. §§ 920, 934 (2007). JA 250-52.

The members sentenced MSgt Carter to a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to E-1. JA. 251. On August 19, 2010, the Convening Authority (CA) disapproved the members' finding with respect to the specification of indecent liberties with a child under 16 in violation of Article 120(j), approved the remaining two specifications, and approved only so much of the sentence that provided for a dishonorable discharge, three years confinement, forfeiture of all pay and allowances, and reduction to E-1. JA 254.

In the wake of this Court's decision in *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), and after MSgt Carter's case had been docketed with AFCCA for 677 days, MSgt Carter petitioned this Court for a writ of habeas or corpus or, in the alternative, a writ of mandamus ordering AFCCA to issue a decision in his case. JA 316.

On July 13, 2012, this Court denied MSgt Carter's petition. JA 336. MSgt Carter filed a second petition on September 19, 2012, and on

October 11, 2012, this Court ordered AFCCA to show cause why the requested relief should not be granted on the following issue:

> WHETHER PETITIONER IS ENTITLED TO EXTRAORDINARY RELIEF WHERE HIS CASE HAS BEEN PENDING BEFORE THE AIR FORCE COURT OF CRIMINAL APPEALS FOR MORE THAN 24 MONTHS AND THE AIR FORCE COURT HAS DENIED MULTIPLE MOTIONS FOR EXPEDITED DECISION.

JA 337, 358.

On November 27, 2012, this Court ordered the Air Force Court of Criminal Appeals (AFCCA) to "decide the case within 45 days or provide this Court with an explanation of the need for further consideration." JA 441.

Thirty-eight days later, on January 4, 2013, the AFCCA set aside the remaining two specifications and dismissed them pursuant to *Humphries*. JA 244. The AFCCA did not authorize a rehearing. JA 248-49.

On January 14, 2013, MSgt Carter filed a third Petition for Writ of Habeas Corpus seeking his immediate release from confinement given AFCCA's dismissal of the only remaining specifications. JA 442. On January 22, 2013, this Court denied MSgt Carter's third petition

without prejudice. JA 468. MSgt Carter completed his three-year sentence on February 25, 2013, and was released from confinement after 1095 days.

On April 16, 2013, the Judge Advocate General of the Air Force (TJAG) certified three issues to this Court. JA 469. On August 2, 2013, this Court summarily affirmed AFFCA's dismissal of the two remaining charges pursuant to *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) and *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013). JA 473. The Court denied the government's petition for reconsideration on August 29, 2013. JA 474.

On January 16, 2014, TJAG, citing this Court's affirmance of the AFCCA's decision, ordered all rights restored, and further ordered the CA to take action "in accordance with the decision of the Court of Appeals for the Armed Forces[.]" JA 233.

But that did not end this case. After consulting the Air Force Appellate Government Division, the CA elected to proceed with an "other trial" pursuant to R.C.M. 810(e). JA 213.

MSgt Carter was arraigned at his "other trial" on June 10, 2014—285 days after this Court denied the government's petition for

reconsideration. JA 95, 102. In addition to the two Article 134 offenses dismissed by AFCCA, the CA also referred the indecent liberties charge and specification his predecessor had disapproved in 2010. JA 225-29, 254. The military judge granted a defense motion to dismiss the previously disapproved charge and specification for violating the prohibition on double jeopardy. JA 279. But he allowed the court-martial to proceed with the charge and specifications previously dismissed by AFCCA, and affirmed by this Court. JA 220, 296.

Ultimately, the military judge, sitting as a general court-martial, tried MSgt Carter between 21 and 24 July 2014. JA 95, 102. Contrary to his pleas, MSgt Carter was convicted of one charge and one specification of child endangerment and one specification of taking indecent liberties with a child in violation of Article 134, UCMJ. 10 U.S.C. § 934 (2012). JA 282. MSgt Carter was sentenced to confinement for forty months, forfeiture of all pay and allowances, and reduction to E-1. JA 283. On November 6, 2014, the CA purportedly approved the adjudged sentence even though it was greater than the sentence previously approved in this case in violation of Article 63, UCMJ. 10 U.S.C. § 863 (2012). JA 255.

MSgt Carter's case was again docketed with the AFCCA on November 19, 2014. JA 475. MSgt Carter filed his brief on December 21, 2014. Among other assigned errors, MSgt Carter sought enforcement of this Court's decision affirming AFCCA's previous dismissal of the charge and specifications. JA 476.

On January 16, 2015, counsel for MSgt Carter took the unusual step of opposing the government's Motion for Enlargement of Time Out of Time. JA 482. He noted

> this Court dismissed the very charges at issue in this appeal more than two years ago, and the Court did not authorize a rehearing. *Carter*, 2013 CCA LEXIS 1. The Government has had thirty days in which to explain why it believes this Court's decision was merely advisory, and it should be afforded no additional time in which to do so. [MSgt Carter] has already been subjected to three years of oppressive incarceration, and this 'meaningless ritual' has gone on long enough. *Moreno*, 63 M.J. at 135.

JA 483.

Nevertheless, AFCCA granted two government requests for enlargement of time, and the government filed its Answer on March 20, 2015. JA 479, 485. AFCCA did not issue its decision on May 19, 2016, when the eighteen-month presumption of unreasonable delay expired

for a second time in this case. *See United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006).

On May 23, 2016, MSgt Carter petitioned this Court for a fourth extraordinary writ, and on June 8, 2016, this Court ordered AFCCA to decide this case within forty-five days or provide the Court with an explanation of the need for further consideration. JA 492, Forty-three days later, on July, 21, 2016, the lower court affirmed it had previously dismissed the charge and specifications in this case, and that the "other trial" now before this Court exceeded the scope of the AFCCA's remand. JA 4-15. Judge Brown dissented, but noted the "other trial" he believed to be authorized was "subject to applicable speedy trial, double jeopardy and statute of limitations considerations." JA 16.

Thirty days later, the government moved for reconsideration and reconsideration *en banc* with AFCCA. JA 28. On August 26, 2016, the *en banc* court denied reconsideration by an evenly divided vote, and the panel denied reconsideration on September 19, 2016. JA 23.

Fifty-eight days later, on November 16, 2016, TJAG filed a second certification in this case. JA 500. MSgt Carter filed a cross petition on

November 18, 2016. This Court granted review of two issues raised by MSgt Carter on February 16, 2017. JA 242.

Statement of Facts

Additional facts are set forth below.

Argument

I

THE AIR FORCE COURT OF CRIMINAL APPEALS DISMISSED THE CHARGE AND SPECIFICATIONS IN THIS CASE IN 2013 AND AGAIN IN 2016. BUT IT EXCEEDED THE EIGHTEEN-MONTH PRESUMPTION OF UNREASONABLE DELAY BEFORE DOING SO EACH TIME. APPELLEE HAS BEEN DENIED DUE PROCESS WHERE HE COMPLETED HIS SENTENCE TO THREE YEARS OF CONFINEMENT 158 DAYS BEFORE THIS COURT AFFIRMED THE LOWER COURT'S FIRST DISMISSAL OF THIS CASE ON AUGUST 2, 2013.

Standard of Review

A court reviews *de novo* whether an appellant has been denied the due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Additional Facts

The CA first took action in this case on August 19, 2010, 174 days after completion of trial. JA 254. This case was docketed with the lower court on August 26, 2010, and decided 862 days later on January 4, 2013. JA 244. This case was again docketed with the lower court on November 19, 2014, and was decided 610 days later on July 21, 2016. JA 1, 475.

Law & Analysis

This Court applies a presumption of unreasonable delay "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." *Moreno*, 63 M.J. at 142. In *Moreno*, this Court set forth a four-part test to analyze claims of excessive post-trial delay:

(1) the length of the delay;

(2) the reasons for the delay;

(3) assertion of the right to timely review; and

(4) whether the delay prejudiced the appellant.

Moreno, 63 M.J. at 135. "Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single

factor being required to find that post-trial delay constitutes a due process violation." *Id.* at 136.

This Court has already determined the amount of delay that occurred in this case to be facially unreasonable, and the first *Barker/Moreno* factor weighs in MSgt Carter's favor. *Id.*

The reasons for the delay also weigh heavily in MSgt Carter's favor. This Court has repeatedly stressed "the responsibility for providing the necessary resources for the proper functioning of the appellate system, including the Courts of Criminal Appeals, lies with the Judge Advocates General, who are required by Congress to establish those courts and, within the boundaries of judicial independence, to supervise them." *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014). But the "trend of delay at the Air Force CCA" continues. *United States v. Merritt*, 72 M.J. 483, 492 (C.A.A.F. 2013).

The defense took 357 days—August 26, 2010 to August 18, 2011—to submit its brief during AFCCA's first review of this case. Each of the defense requests for enlargement noted appellate defense counsel's assignment of "approximately 39 cases pending initial assignment of errors before this Court." JA 303. As in *Moreno*, MSgt Carter is not

"responsible for the lack of 'institutional vigilance' which should have been exercised in this case." *Id.* at 137 (citing *Diaz v. JAG of the Navy*, 59 M.J. 34, 39 (C.A.A.F. 2003)). "The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *Moreno*, at 137 (citing 10 U.S.C. § 870).

MSgt Carter's case was fully submitted to AFCCA by January 10, 2012, where it remained for 360 days before AFCCA dismissed the charge and specifications. JA 244, 311. MSgt Carter's case was returned to the AFCCA on November 19, 2014, and MSgt Carter submitted his brief the following month on December 21, 2014. JA 475, 476. This case was again fully submitted to AFCCA by March 26, 2015, and it remained pending decision for 483 days. JA 1, 490. The AFCCA panel that decided the case was not assigned until June 6, 2016, which suggests that a decision on MSgt Carter's appeal could have been rendered very quickly had the AFCCA acted with greater institutional vigilance. JA 493. The "unreasonable delays in this case are either unexplained or the responsibility of the Government." *Moreno*, 63 M.J.

at 137. Accordingly, the second *Barker/Moreno* factor weighs heavily in MSgt Carter's favor.

MSgt Carter has repeatedly asserted his right to timely appellate review before both AFCCA and this Court beginning with his first motion for expedited review, which was filed with AFCCA on October 6, 2011, and denied on October 14, 2011. JA 307. Notably, the government opposed MSgt Carter's motion arguing he had "not demonstrated a compelling need for expedited review and his request is not required in the interests of justice." JA 309. Accordingly, the third *Barker/Moreno* factors weighs heavily in MSgt Carter's favor.

When assessing prejudice, this Court considers three factors: (1) prevention of oppressive incarceration (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *Moreno*, 63 M.J. at 138-139. Here, MSgt Carter has suffered oppressive incarceration where he served his entire three-year sentence before repeatedly prevailing on appeal. Like the appellant in *Moreno*,

"he has suffered some degree of prejudice as the result of oppressive incarceration." *Id.* at 139.

MSgt Carter also experienced "constitutionally cognizable anxiety," *Id.* at 140, where he was informed his case was dismissed by AFCCA on January 4, 2013, received a letter from TJAG executing that decision on January 16, 2014, and restoring all rights and privileges, and nevertheless subsequently ordered to leave aging and ailing family members in his care in order to report for an "other trial." JA 233, 284.

Even if MSgt Carter could not demonstrate prejudice, this is a case where after balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. *See United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006). In fact, it is difficult to imagine a case that could more affect the public's perception of the fairness and integrity of the military justice system than this case.

MSgt Carter's right to timely appellate review "must be recognized, enforced and protected by the Government, by the appellate attorneys, by the Court of Criminal Appeals, and by this Court." *Diaz*,

59 M.J. at 39. A balancing of the four *Moreno* factors establishes a due process violation in this case. More than ten years after *Moreno*, the government continues to demonstrate the lack of "'institutional vigilance' that should have been exercised in this case." *United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006) (citation omitted).

WHEREFORE, this Honorable Court dismiss the charge and specifications with prejudice.

II

APPELLEE'S PROSECUTION FOR CHILD ENDANGERMENT WAS BARRED BY THE STATUTE OF LIMITATIONS WHERE MORE THAN FIVE YEARS HAD ELAPSED AND APPELLEE WAS NOT BROUGHT TO TRIAL WITHIN 180 DAYS OF THIS COURT'S AFFIRMANCE OF THE LOWER COURT'S DISMISSAL OF THAT SPECIFICATION.

Standard of Review

This Court reviews issues involving a statute of limitations *de novo*. *United States v. Vieira*, 64 M.J. 524, 528 (A.F. Ct. Crim. App. 2006).

Law & Analysis

The "primary guarantee" against pre-accusation delay is the military statute of limitations, Article 43, UCMJ. *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995) (citing *United States v. Marion*, 404

U.S. 307, 323 (1971)). Article 43(b)(1), UCMJ, provides that a person is "not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges." 10 U.S.C. § 843 (2012). Article 43(g)(1), UCMJ, does not bar the prosecution of charges that are dismissed as defective or insufficient for any cause even if the statute of limitations has expired, as long as the new charges and specifications: 1) are received by an officer exercising summary court-martial jurisdiction within 180 days after the dismissal and; 2) allege the same acts or omissions that were alleged in the dismissed charges or specifications. *Id.* Additionally, Article 43(b)(2)(A) provides that the statute of limitations will not run "during the life of the child" for defined "child abuse offense[s]." *Id.* The statute goes on to define specific offenses that qualify for the more expansive statute of limitations, cross-referencing specific Articles of the UCMJ and federal criminal statutes. *See id.*

One of the specifically enumerated offenses constituting child abuse is "indecent acts in violation of section 934 of this title," *i.e.*, Article 134, UCMJ. 10 U.S.C. § 43(b)(2)(B)(v) (2012). MSgt Carter does not challenge his conviction for Specification 2 of Charge II on the basis of

the statute of limitations. But he was also charged with child endangerment in Specification 1 of Charge II, which is not an enumerated exception to the five-year statute of limitations and its 180-day savings clause. Accordingly, MSgt Carter moved to dismiss Specification 1 of Charge II on the basis that the statute of limitations had run. JA 292.

Citing *Toussie v. United States*, 397 U.S. 112, 114-15 (1970), the military judge acknowledged "that statutes of limitations are to be read narrowly, and not for the benefit of the prosecution." JA 298. Nevertheless, he concluded child endangerment fell "within the ambit of child abuse." JA 299. He further held the prosecution had complied with "the plain language of the statute," even though child endangerment is not listed in Article 43, UCMJ. JA 299. In fact, the statute lists more than twenty specific offenses that constitute "child abuse," including kidnapping and indecent acts, which like child endangerment are found in Article 134, UCMJ, but not child endangerment itself. 10 U.S.C. § 843(b)(2)(B) (2012).

The military judge further held that, even if child endangerment was not contained within the "plain language of the statute," the officer

exercising summary courts-martial jurisdiction received the charge and specifications within 180 days of when "the appellate process concluded." JA 299. But that receipt did not happen until March 31, 2014, 214 days after this Court denied the government's Petition for Reconsideration on August 29, 2013. JA 21, 474. Nevertheless, the military judge concluded that the 180-day period had not begun to run when the charge was dismissed as provided by statute. JA 299. Instead, the military judge concluded the 180-day period had not begun to run until December 24, 2013, "when JAJM was notified that SCOTUS denied the government's petition for writ of certiorari." JA 299.

This holding directly contradicts the statute, a point conceded earlier by the military judge himself:

> [I]t's an important point to note that the appellate process ended when the Court of Appeals for the Armed Forces or the Air Force court had the final say, *the Solicitor General's decision one way or the other is not part of the appellate process. The idea that the Solicitor General's decision-making is part of the appellate process it simply isn't.*

JA 271 (emphasis added). Contrary to his ruling, both the record and the lack of a Supreme Court docket entry make clear that the Solicitor General never petitioned the Supreme Court for a writ of certiorari.

The United States waited 117 days, the period between August 29, 2013, and December 24, 2014, to notify Ms. Simmons she could execute AFCCA's January 4, 2013, decision. JA 297. According to the statute, the government had until February 25, 2014, to send the charges to an officer exercising summary-court martial jurisdiction. 10 U.S.C. § 843(g)(2)(A) (2012). The government's failure to comply with Article 43, UCMJ, requires that Specification 1 of Charge II be dismissed. If "Congress desires a different result, it may exercise its prerogative to amend the statute so as to effect its legislative will." *United States v. Kubrick*, 444 U.S. 111, 125 (1979).

WHEREFORE, this Honorable Court should set aside Specification 1 of Charge II and authorize a rehearing as to sentence.

Respectfully submitted,

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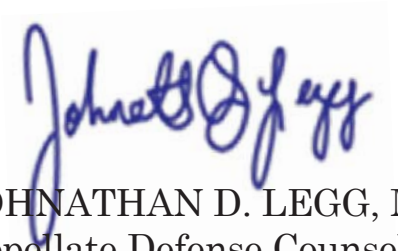

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on March 20, 2017, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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