19 April 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant/Cross-Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES ON THE ISSUES GRANTED
v.	)	
	)	USCA Dkt. No. 17-0086/AF
Master Sergeant (E-7), PATRICK CARTER, USAF, *Appellee/Cross-Appellant.*	)	Crim. App. No. 38708

FINAL BRIEF ON BEHALF OF THE UNITED STATES ON THE ISSUES GRANTED

MEREDITH L. STEER, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34301

MARY ELLEN PAYNE, Maj, USAF
Acting Associate Chief, Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

KATHERINE E. OLER, Col, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
United States Air Force
(240) 612-4800
Court Bar No. 30753

INDEX

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

OTHER AUTHORITIES

19 April 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant/Cross-Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES ON THE ISSUES GRANTED
v.	)	
	)	USCA Dkt. No. 17-0086/AF
Master Sergeant (E-7), PATRICK CARTER, USAF, *Appellee/Cross-Appellant.*	)	Crim. App. No. 38708

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

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 Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ, when it dismissed the findings and sentence due to the reasons discussed in the certified issue. This Court has discretionary jurisdiction to review the granted issues under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE & STATEMENT OF FACTS

Appellee/Cross-Appellant was convicted, contrary to his pleas, at a general court-martial composed of officer members on 16-26 February 2010 of one specification of taking indecent liberties with a child under the age of 16, one specification of child endangerment, and one specification of committing indecent acts with a child under the age of 16, in violation of Articles 120 and 134, UCMJ. The convening authority disapproved the finding of guilty with respect to taking indecent liberties with a child under the age of 16, and approved the remaining findings. The approved sentence consisted of a dishonorable discharge, 3 years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On 4 January 2013, the Air Force Court of Criminal Appeals (AFCCA) issued an opinion setting aside and dismissing Appellee's remaining convictions

for failure to state an offense. United States v. Carter, ACM 37715 (A.F. Ct. Crim. App. 4 January 2013) (unpub. op.) (JA at 236-41). On 2 August 2013, this Court affirmed AFCCA's opinion, and on 29 August 2013, this Court denied reconsideration. On 27 November 2013,[1] the filing deadline to petition for a writ of certiorari with the United States Supreme Court elapsed. (JA at 106-10.) The record was then returned to the convening authority. The charges and specifications were received by a commander exercising summary court-martial jurisdiction over Appellee/Cross-Appellant on 31 March 2014. (JA at 21.)

On 10 June 2014 and 21-24 July 2014, Appellee/Cross-Appellant was tried at an "other" trial by a military judge sitting alone at a general court-martial. Appellee/Cross-Appellant was convicted, contrary to his pleas, of one specification of child endangerment and one specification of indecent acts with a child under the age of 16, both in violation of Article 134, UCMJ. The approved sentence consisted of confinement for 40 months, total forfeiture of all pay and allowances, and reduction to the grade of E-1.

On his second appeal to AFCCA, Appellee/Cross-Appellant raised five issues, including whether the convening authority's referral of the Article 134

[1] Ms. H.S. testified that the deadline for filing a petition for a writ of certiorari was 29 November 2013, but undersigned counsel, in referencing the Rules of the Supreme Court of the United States believes the deadline was actually 27 November 2013 since the months of August and October have 31 calendar days.

charge exceeded the scope of AFCCA's remand.[2] On 21 July 2016, AFCCA, in a 2 to 1 decision, determined that the convening authority had exceeded the scope of what was permitted by the original decision. United States v. Carter, ACM 38708 at *16 (A.F. Ct. Crim. App. 21 July 2016) (unpub. op.) (JA at 1-18). Appellee/Cross-Appellant did not directly raise a due process/Moreno issue to AFCCA regarding the post-trial processing of his case, and AFCCA did not reach a decision on the statute of limitations question raised in the granted petition for review.[3]

On 20 August 2016, the United States filed a motion for reconsideration and reconsideration en banc. On 19 September 2016, AFCCA denied the government's motion for reconsideration and reconsideration en banc. On 16 November 2016, The Judge Advocate General (TJAG) filed a certificate for review on the case dispositive issue regarding the scope of the remand. On 18 November 2016, Appellee/Cross-Appellant petitioned this Court for review, also requesting additional time to file his supplement separately under Rule 30 of this Court's rules of practice and procedure. On 7 December 2016, Appellee/Cross-Appellant filed

[2] This was the first time Appellee raised this issue.

[3] The United States recognizes that among other steps as outlined in Appellee/Cross-Appellant's brief, Appellee/Cross-Appellant filed a Writ of Mandamus with this Court on 23 May 2016, citing that 18 months had elapsed on 18 May 2016 since the case was docketed with AFCCA. On 8 June 2016, this Court ordered AFCCA to decide the case within 45 days or provide an explanation of the need for additional time for further consideration. (JA at 494.)

his supplement to the petition for review, and on 16 February 2017, this Court granted review on the issues addressed in this brief.

SUMMARY OF THE ARGUMENT

Appellee/Cross-Appellant has not been denied due process of law as none of the appellate delays were either malicious or unreasonable considering the procedural history of this case. Most importantly, even though AFCCA's decisions during both phases of this case exceeded 18 months, this fact does not conclusively establish unreasonable delay or a "lack of institutional vigilance," but simply triggers inquiry into the other Barker v. Wingo, 407 U.S. 514 (1972), factors. Appellee/Cross-Appellant has benefitted from due process, obtaining appellate relief throughout the stages of this case. Those delays that resulted in favorable decisions for Appellee/Cross-Appellant were not unreasonable and resulted in no evidence of prejudice to Appellee/Cross-Appellant. Even assuming constitutional error, which the United States does not concede, such error is harmless beyond a reasonable doubt.

Additionally, Appellee/Cross-Appellant's conviction for child endangerment in Specification 1 did not violate the statute of limitations for two reasons. First, once TJAG was permitted by the Rules for Courts-Martial to return the case to the convening authority, they were received by the officer exercising summary court-martial jurisdiction within 180 days in accordance with Article 43, UCMJ.

Therefore, the savings clause in Article 43 applied and there was no violation of the statute of limitations.

Second, Article 43's statute of limitations applies to **acts** as described in the statute, as the purpose of a statute of limitations is to put an accused on notice to account for his activities and prepare a defense. United States v. Marion, 404 U.S. 307, 322-23 (1971). The acts alleged in Specification 1, were acts defined by Article 43 as child abuse because they also constituted offenses under Article 120 and indecent acts with a child under Article 134.

Therefore, Appellee/Cross-Appellant has not been denied due process of law and should not be granted relief. Additionally, Appellee/Cross-Appellant's conviction for child endangerment should be affirmed as there was no violation of the statute of limitations.

ARGUMENT

I.

APPELLEE/CROSS-APPELLANT HAS NOT BEEN DENIED DUE PROCESS OF LAW; ALTHOUGH THE POST-TRIAL PROCESSING PERIOD EXCEEDED 18 MONTHS AFTER THE CASE WAS DOCKETED WITH AFCCA, THE APPELLATE DELAYS WERE NOT UNREASONABLE, THERE IS NO EVIDENCE OF ANY ACTIONABLE PREJUDICE, AND EVEN IF A DUE PROCESS VIOLATION IS ASSUMED, APPELLEE/CROSS-APPELLANT IS NOT ENTITLED TO RELIEF SINCE NO RELIEF WOULD BE REASONABLE AND MEANINGFUL.

Statement of Facts Related to the Issue[4]

a. Carter I

Appellee/Cross-Appellant's sentence was first announced on 26 February 2010. (JA at 251.) The convening authority took action 174 days later on 19 August 2010. (JA at 252.) The case was docketed with AFCCA on 26 August 2010, meeting the second Moreno standard for action to docketing. (JA at 321.) AFCCA did not decide Appellee/Cross-Appellant's case until 4 January 2013, exceeding the Moreno standard by 313 days. (JA at 244.) However, the defense took 357 days to submit the assignments of error to AFCCA. (JA at 309.) In fact, Appellee/Cross-Appellant consented to the enlargements of time until he appeared to realize that this Court's decision in United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) may provide a basis for appellate relief. (JA at 301, 309.)

b. Carter II

In the second phase of Appellee/Cross-Appellant's case, the post-trial processing by the convening authority met the Moreno standards. The sentence was announced by the military judge on 24 July 2014. (JA at 102.) The convening authority took action after 103 days on 4 November 2014. (JA at 254.) The case was docketed with AFCCA 15 days later on 19 November 2014. (JA at 475.)

[4] For readability, the United States will refer to the first trial through this Court's decision in United States v. Carter, 72 M.J. 457 (C.A.A.F 2013); *recon den'd* United States v. Carter, 72 M.J. 475 (C.A.A.F. 2013) as "Carter I" and the "other" trial through this current appellate proceeding as "Carter II."

AFCCA issued its second decision on 21 July 2016, exceeding Moreno by 63 days. (JA at 1.)

Standard of Review

"Whether an appellant has been deprived of his due process right to a speedy appellate review, and whether constitutional error is harmless beyond a reasonable doubt" are questions of law and will be reviewed *de novo*. United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006); United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

When evaluating post-trial due process complaints of delay, this Court in Moreno held that it would presume facially unreasonable delay in a case if there was a delay of more than 18 months between the docketing of the case before a Court of Criminal Appeals and the completion of appellate review. Id. at 142. This presumption then triggers a constitutional due process analysis pursuant to Barker, 407 U.S. at 530, to determine if an appellant is entitled to relief. This Moreno/Barker analysis sets forth four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker, 407 U.S. at 530).

All of these factors are to be considered together with the relevant circumstances in the case. Id. at 136.

This is not the first time that the issue of a Moreno/Barker analysis and cases returned to a CCA from this Court has been addressed. In United States v. Roach, 69 M.J. 17 (C.A.A.F. 2010), this Court concluded that the initial decision was completed within 13-months and, therefore, "the case [did] not reach the threshold of elapsed time to initiate review under Barker." Roach, 69 M.J. at 22. This Court reached that decision, despite the fact the case had been up and down the appellate ladder a second time. The decision in Roach was supported in United States v. Mackie, 72 M.J. 135 (C.A.A.F. 2013). In Mackie this Court clarified the Roach decision by saying that in Roach "[n]one of the time between the actions of the CCA and this court exceeded the Moreno standard, nor did they implicate concerns of 'malicious delay.'" Mackie, 72 M.J. at 136 (*citing* Roach, 69 M.J. at 22). Further, the real concern presented in Mackie was not the time between initial docketing and the final decision of this Court or the CCA, but the fact that over two years passed between the time of the court-mandated sanity board and the convening authority's action in that case.[5] This decision makes logical sense because an application of Moreno to a continuum involving initial docketing to final decision for all cases remanded by this Court would automatically result in a

[5] This Court still determined that the delay was harmless beyond a reasonable doubt.

presumption of prejudice in every case regardless of the individual time periods.[6] Therefore, each time this case was docketed created a new time period for Moreno/Barker analysis.

1. Moreno/Barker Analysis

a. Length of Delay

Under Moreno, there is a "presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within 18 months of docketing of the case before the Court of Criminal Appeals." Moreno, 63 M.J. at 142. Because the decision exceeded 18 months during both of the time periods while before the CCA, the delays are presumptively unreasonable. This fact does not conclusively establish unreasonable delay but rather merely triggers inquiry into the remaining three Moreno/Barker factors.

b. Reasons for Delay

i. Carter I

As indicated above, 862 days passed between the time the case was docketed and the Court's initial decision. Forty-one percent of this time constituted defense delay, which the Government opposed, and resulted in the filing of the initial assignments of error 357 days after docketing. Despite,

[6] *See also* United States v. Danylo, 73 M.J. 183, 190 (C.A.A.F. 2014) (speedy trial analysis breaks down periods of delay rather than considering delay as one continuum) (*citing* United States v. Wilson, 72 M.J. 347, 352 (C.A.A.F. 2013); Moreno, 63 M.J. at 136).

Appellee/Cross-Appellant's argument now that the defense delay is the fault of the government because it has inadequately manned the Air Force Appellate Defense Division, there is no evidence that the Air Force Appellate Defense Division was or is inadequately manned beyond the unsupported assertions in the motion filings. (App. Br. at 10-11, 14.) Appellee/Cross-Appellant also does not address that he initially consented to the motions for enlargements of time. (JA at 301, 309.)

The initial deliberation period is not unreasonable in light of the manner in which Appellee/Cross-Appellant presented the issues, the depth of the record,[7] the challenge of the issues, and the CCA's responsibility under Article 66(c). As this Court is well aware, the decision in Fosler was a significant departure from this Court's previous treatment of offenses charged under Article 134; and Fosler, along with the subsequent decision in United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012), created delays in the post-trial appellate processing of cases given the number of cases affected and, until Humphries was decided, further uncertainty in the law. In fact, while Appellee/Cross-Appellant's case was joined, Fosler had been decided, but Humphries was still pending a decision. Humphries was then decided while Appellee/Cross-Appellant's case was before AFCCA. (JA at 248, fn 7.) To further demonstrate the impact that these two decisions had on Appellee/Cross-Appellant's case, the reason the convictions were initially set aside

[7] The appellate filings indicate that the record of trial was 697 pages long, contained 3 prosecution exhibits, 41 defense exhibits, and 33 appellate exhibits. (JA at 303.)

by the CCA was an application of Fosler and Humphries. (JA at 246-47.) The case was then certified to this Court the first time based on the application of Fosler and Humphries. (JA at 469-471.)

In this regard, this Court explained the "more flexible review" of the Courts of Criminal Appeals' deliberative process:

> Courts, of course, are not excluded from the obligation to give defendants a speedy trial. But the function of the appellate courts necessarily casts the delay attendant upon their deliberations in a somewhat different light. . . . We are mindful in the military justice system of the distinct functions of a first level appeal of right court as opposed to a discretionary second level appellate court. The Courts of Criminal Appeals have "unique authority that is the product of the evolution of military justice in the United States." Congress provided their appellate tribunals with "an authority rarely if ever seen in other appellate courts."

Moreno, 63 M.J. at 137-38, n. 12 (internal citations omitted.) Again addressing delays by the CCA, this Court later said in Danylo "[d]espite our significant concern about the processing time at the lower court, we are reluctant to pierce the veil of the CCA's decision-making process and attempt to regulate the day-to-day mechanics of the legal process assigned to the court." Danylo, 73 M.J. at 187. Illustrating the importance of giving consideration to the deliberative process of the appellate court, when this Court considered TJAG's first Certificate for Review,

filed 16 April 2013, it was not summarily affirmed until 2 August 2013, 108 days later. (JA at 469, 473.)

ii. Carter II

In evaluating the unique issue of whether the convening authority exceeded the scope of the remand in Carter I, the CCA exceeded the Moreno standard by 63 days. Appellee/Cross-Appellant did not specifically raise a Moreno issue to the CCA when he filed his second assignments of error, and the opinion is silent on the cause for the delay. Instead, Appellee/Cross-Appellant chose the avenue of filing a petition for extraordinary relief in the nature of a writ of mandamus with this Court, which ordered the CCA to decide his case within 45 days of its order. (JA at 494.) The CCA complied with this Court's order. Given the uniqueness of the issue and that each of the judges on the panel wrote their own opinions, a 63-day delay that ultimately benefitted Appellee/Cross-Appellant is not unreasonable.

For these reasons, the defense delay and the days during which this case was pending the CCA's deliberative process should not be attributable to the government and do not represent unreasonable delay.

c. Assertion of Right to Timely Review and Appeal

i. Carter I

Appellee/Cross-Appellant initially consented to his counsel's enlargements

of time. However, once his initial assignments of error had been filed, Appellee/Cross-Appellant began to demand that his case receive expedited review. (JA at 307.)[8]

ii. Carter II

During the second phase of this case, Appellee/Cross-Appellant filed his assignments of error 32 days after it was docketed with the CCA. (JA at 476 – 78.) Despite the assertion that doing so was in order to assert his right to timely review, Appellee/Cross-Appellant was only permitted 30 days by the Air Force Court's Rules of Practice and Procedure to file an initial brief and assignment of errors. (United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, Rule 2.2(d).) However, in opposing the United States' motions for enlargements of time to file its Answer, Appellee/Cross-Appellant did assert that the government was denying his "right to a speedy trial and the due-process right to timely appellate review." (JA at 482.)

[8] In responding to this request, the counsel for the United States simply pointed out that Appellee/Cross-Appellant had not distinguished his case from any other, particularly after taking 357 days of defense delay, and then turning around and demanding "meaningful sentence relief." (JA at 309.) Appellee/Cross-Appellant failed to "demonstrate a compelling need for expedited review and his request [was] not required in the interests of justice." Id. In Appellee/Cross-Appellant's brief on the granted issues he implies that the government was cavalier towards his case when instead, government counsel was citing the standard for expedited review. (App. Br. at 12.)

Overall, Appellee/Cross-Appellant asserted his right to speedy post-trial review, but only after he submitted his assignments of error during both phases of his case.

d. Prejudice

As this Court knows, it may assume error as AFCCA did in Carter I and assess whether such assumed error is harmless beyond a reasonable doubt as will be addressed below. Under Moreno/Barker, however, there are further specific considerations to be made in relation to prejudice. These sub-factors include: (1) prevention of oppressive incarceration, (2) minimization of anxiety and concern; and (3) limitation of possible impairment to the appellant's grounds for appeal and defenses in the event of reversal or remand. Moreno, 63 M.J. at 138 (citing Rheuark v. Shaw, 628 F.2d 297, 303, n. 8 (5th Cir. 1980).

i. Prevention of Oppressive Incarceration

Appellee/Cross-Appellant has served his full term of confinement and did so while pending review in Carter I. Thus, procedurally, Appellee/Cross-Appellant's situation is similar to that in Moreno where the appellant served his full time of confinement before this Court set aside his entire conviction and granted the appellant a new trial. Moreno, 63 M.J. at 139. Although, as noted by AFCCA in Carter I, Appellee/Cross-Appellant

> remained incarcerated for a longer period than may have been required had his appeal been decided in a timelier

> manner following the June 2012 decision in Humphries, [however] the debatably oppressive nature of his confinement was dramatically tempered by the fact he chose to remain imprisoned beyond his minimum release date of 10 August 2012 because he refused to submit an acceptable mandatory supervised release plan.

(JA at 248.) Additionally, if this Court agrees with the United States on the certified issue, and upholds either of the specifications, Appellee/Cross-Appellant's case will be quite different from that in Moreno.

ii. Anxiety and Concern

This sub-factor requires an appellant to show a "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." Moreno, 63 M.J. at 140. As reinforced in United States v. Merritt, 72 M.J. 483, 491 (C.A.A.F. 2013), proof of anxiety and concern "requires an appellant to demonstrate a nexus between the processing of his appellate review, and ultimately assists [a] court to 'fashion relief in such a way as to compensate [an appellant] for the particular harm." *Citing* Moreno, 63 M.J. at 140. Appellee/Cross-Appellant claims anxiety stemming from knowing that he would have to prepare again for a new trial. (App. Br. at 13.) Appellee/Cross-Appellant fails to distinguish his case from any other in which an individual obtained relief from a CCA that specifically contemplated a new trial (as in AFCCA's opinion in Carter I). If this were enough, all appellants facing a rehearing or "other" trial would be entitled to due process relief without the

requirement of analyzing the Moreno standards or the factors within the Barker analysis. In all, Appellant has failed to meet his burden in this regard.

iii. Impairment of the Ability to Present a Defense at a Rehearing

In consideration of this final sub-factor, Appellant has the burden of identifying "how he would be prejudiced at rehearing due to the delay." Moreno, 63 M.J. at 140-41. (citing United States v. Mohawk, 20 F.3d 1480, 1487 (9th Cir. 1994)). Appellee/Cross-Appellant does not address this factor and presumably, he would have complained about some defect in his ability to present a defense during motions practice at the "other" trial if there had been any such issue.

There is no evidence in this case supporting prejudicial constitutional error. In balancing the four Moreno/Barker factors, a large portion of the delay during Carter I was attributable to Appellee/Cross-Appellant[9] or an unavoidable consequence of the starts and stops inherent in cases involving multiple issues and multiple filings. Simply, the delays in this case were not unreasonable.

2. Assumed Error & Harmless Beyond a Reasonable Doubt

This Court has routinely held that an appellate court may assume error and proceed to a harmless beyond a reasonable doubt analysis without engaging in a separate analysis of each Moreno/Barker factor. *See* United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011). This analysis requires a look at "prejudice" separate

[9] *See* United States v. Parker, 71 M.J. 594, 629 (N.M. Ct. Crim. App. 2012).

and apart from the other factors. United States v. Ashby, 68 M.J. 108, 125 (C.A.A.F. 2009)(citing United States v. Bush, 68 M.J. 96, 102-03 (C.A.A.F. 2009)). As recognized by AFCCA in Carter I, however, "even in instances where post-trial delay was not harmless beyond a reasonable doubt, this court cannot provide relief where 'there is no reasonable, meaningful relief available.'" (JA at 248, *citing* United States v. Rodriguez-Rivera, 63 M.J. 372, 386 (C.A.A.F. 2006.))

Although the government does not concede that the delays caused a constitutional due process violation to occur, the circumstances involved in this case reveal that any purported denial of Appellee/Cross-Appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Appellee/Cross-Appellant argues that his case is similar to that in Moreno, where the appellant ultimately prevailed on a substantive appellate issue on appeal. Of course, while the procedural posture of this case is similar in that the CCA set aside Appellee/Cross-Appellant's convictions for a second time, TJAG certified the issue of whether the convening order truly exceeded the scope of the remand. Appellee/Cross-Appellant's conviction was not set aside due to a defect in the evidence against him, as the victim testified a second time about the child molestation and abuse she suffered at the hands of Appellee/Cross-Appellant. The procedural history of this case should readily dissuade this Court from adopting Appellee/Cross-Appellant's argument.

As stated by the Navy-Marine Corps Court of Criminal Appeals, in a case where, like here, the appellant alleged violations of due process and the statute of limitations among other errors,

> [h]aving been afforded appropriate and continuing due process, involving the extensive litigation of complex issues [which] result[ed] in meaningful relief from error, [Appellee/Cross-Appellant] ask[s] to characterize the timeline necessitated by the affording of due process as a due process violation.

United States v. Lee, 72 M.J. 581, 584 (N.M. Ct. Crim. App. 2013.)

Appellee/Cross-Appellant's case has been up and down the appellate ladder, each time, ensuring him of due process. There is no evidence that the post-trial delays were the result of a lack of institutional vigilance. Rather, Appellee/Cross-Appellant gained appellate relief in Carter I as a result of two decisions of this Court that were a departure from military justice practice at the time, and affected a large number of cases. Dismissing the charges and specifications with prejudice as Appellee/Cross-Appellant asks does not represent reasonable, meaningful relief. Finally, his prayer for relief would have quite the opposite effect on the public's perception of fairness and integrity of the military justice system considering all aspects of this case, including a child victim who has now twice testified about how Appellee/Cross-Appellant sexually abused her. This Court should not provide the windfall relief asked for by Appellee/Cross-Appellant.

II.

PROSECUTION FOR SPECIFICATION 1 OF THE CHARGE WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Standard of Review

Whether the statute of limitations has run is a question of law reviewed *de novo*. United States v. Lopez de Victoria, 66 M.J. 67, 72 (C.A.A.F. 2008).

Law and Analysis

1. The Charge and Specification was received by an officer exercising summary court-martial jurisdiction within 180 days after the appellate dismissal was final.

Article 43, UCMJ, sets forth, with numerous exceptions, a statute of limitations for prosecuting a service member for an offense under the UCMJ. Article 43 provides that if charges are dismissed as defective or insufficient the statute of limitations "will expire within 180 days after the date of dismissal" unless new charges and specifications that allege the same acts or omissions as the original charges are "received by an officer exercising summary court-martial jurisdiction...within 180 days after the dismissal of the charges." Article 43(g)(1)-(g)(2)(B), UCMJ.

Article 43 must be read in conjunction with other portions of the Uniform Code of Military Justice, to include Article 67a(a) and Article 76. *See* Lopez de Victoria, 66 M.J. at 69. (The Court "read[s] the statutes…as an integrated whole,

with the purpose of carrying out the intent of Congress in enacting them, [and the UCMJ] must be interpreted in light of the overall jurisdictional concept intended by the Congress and not through the selective reading of individual sentences within the article.")

To read Article 43 to mean that the 180-day savings period began on the date the charges were dismissed by AFCCA (as argued by Appellee/Cross-Appellant at his court-martial, (JA at 290)), or the date that reconsideration was denied by this Court in Carter I (as argued by Appellee/Cross-Appellant now, App. Br. at 17), ignores the finality of process and appellate scheme put in place by the UCMJ and Rules for Courts-Martial.

Under Article 76, UCMJ, "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed" are not final and conclusive until appellate review is completed. Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the U.S. Supreme Court by writ of certiorari as provided in 28 USC § 1259. Article 67a(a), UCMJ. *See also* Article 66(e) ("The Judge Advocate General shall, unless there is to be further action by…the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals.") Likewise, the "decisions of this Court and the court below are 'not self-executing.'" United

States v. Miller, 47 M.J. 352, 361 (C.A.A.F. 1997), *citing* United States v. Kraffa, 11 M.J. 453, 455 (C.M.A. 1981.)

Additionally, a court-martial is final when "review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces **and**"

> (i) A petition for writ of certiorari is not filed within the time limits prescribed by the Supreme Court,
>
> (ii) A petition for writ of certiorari is denied or otherwise rejected by the Supreme Court, or
>
> (iii) Review is otherwise completed in accordance with the judgment of the Supreme Court.

R.C.M. 1209 (a)(1)(C) (emphasis added.) R.C.M. 1204(c)(4) further states that:

> if the decision of the Court of Appeals for the Armed Forces is subject to review by the Supreme Court, the Judge Advocate General **shall take no action**…until: (A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired.

(emphasis added.) Consequently, jurisdiction over this case once this Court denied reconsideration rested with TJAG, with the above explicit prohibition on taking any action until the time for filing a petition for a writ of certiorari with the Supreme Court expired. So, TJAG could not return the case to the convening authority, who in turn could not send the Charge and Specifications to the officer exercising summary court-martial jurisdiction. Once the time period for filing a petition for writ of certiorari with the Supreme Court expired on 27 November 2013, TJAG could and did return the case to the convening authority. Then, the

officer exercising summary court-martial jurisdiction was in receipt of the sworn charge well within 180 days after the dismissal of the original charge and specifications became final. To read Article 43 in the manner requested by Appellee/Cross-Appellant not only ignores other applicable portions of the UCMJ and Rules for Courts-Martial, it also leads to absurd results. Moreover, while statutes of limitations are to be construed against the government, it must be considered that Article 43 applies any time a charge and specification is dismissed as insufficient for any cause. Article 43 applies when a convening authority or a military judge dismisses a charge because of a defect, as well as when a defect is found by the CCA or this Court. The term "dismissed" in Article 43 is thus by design vague and broad and must be read in conjunction with the remainder of the law.

Here, Appellee/Cross-Appellant does not appear to dispute that, but for the triggering date for the 180-day clock, the child endangerment charge meets the other requirements for Article 43's savings clause. *See* Article 43(g)(2)(B). Specifically, Specification 1 in Carter II was identical to Specification 1 of Charge III in Carter I except for adding the terminal element. (JA at 20, 260.) Article 43(g)(2)(B) permits the government to charge an accused with the same acts or omissions from a prior trial, when the charges or specifications were "dismissed as defective or insufficient for any cause." Article 43(g)(1). AFCCA has interpreted

this to mean that the specifications must allege the same or "substantially the same acts" See e.g. United States v. Vieira, 64 M.J. 524, 528 (A. F. Ct. Crim. App. 2006), *petition den'd*, 65 M.J. 98 (C.A.A.F. 2007), *recon den'd*, 65 M.J. 268 (C.A.A.F. 2007). *See also* United States v. Rose, 2014 CCA LEXIS, *17 (A.F. Ct. Crim. App. 18 February 2014) (interpreting the addition of the terminal element to a charge dismissed pursuant to Fosler to fall within the savings clause of Article 43). There is no question that the specification at issue alleged the exact same act or omission by Appellee/Cross-Appellant and that the savings clause applies.

2. As found by the military judge, child endangerment constitutes child abuse as defined in Article 43(b)(2)(B).

Of the numerous exceptions provided in Article 43, Congress specifically intended through the National Defense Authorization Act for FY 2006 (2006 NDAA) to extend the statute of limitations for offenses involving child abuse. Article 43(b)(2)(A) states that "a person charged with having committed a child abuse offense against a child is liable to be tried by court-martial if the sworn charges and specifications are received during the life of the child" for offenses committed on or after the effective date of the 2006 NDAA. Lopez de Victoria, 66 M.J. at 71. For offenses committed after 24 November 2003, but prior to the effective date of the 2006 NDAA, Article 43(b)(2)(A) provided "a person charged with having committed a child abuse offense against a child is liable to be tried by

court-martial if the sworn charges and specifications are received before the child attains the age of 25 years." Here, the charged timeframe encompasses time before and after the 2006 NDAA amendment to Article 43, UCMJ. But, the victim, G.C., was both alive and had not yet attained the age of 25 at the time of the trial in Carter II. (JA at 299.)

The specification at issue alleged that Appellee/Cross-Appellant did

> on divers occasions, between on or about 1 October 2007 and on or about 31 December 2007, was responsible for the care of [G.C.], a child under the age of 16 years, and did endanger the mental health, physical health, safety, and welfare of said [G.C.], by committing sexual acts with her and instructing her not to tell anyone about the said acts and that such conduct was by design, and that said conduct was of a nature to bring discredit upon the armed forces.

The United States agrees with Appellee/Cross-Appellant's argument that Article 134, "child endangerment" is not one of the enumerated offenses under Article 43(b)(2)(B). However, the charged acts in the specification do constitute offenses under Article 120 and indecent acts with a child under Article 134, which are enumerated offenses under Article 43(b)(2)(B). As stated by Article 43(b)(2)(B), "the term 'child abuse offense' means an **act** that involves abuse of a person who has not attained the age of 16 years and **constitutes** any of the following offenses…" (emphasis added). The statute, thereby, focuses on the **act** that is charged and not the way the government alleges the act on the charge sheet.

This makes sense when considering that the purpose of a statute of limitations is to protect against having to defend against charges when the "basic facts may have become obscured by the passage of time" and being held accountable for "acts in the far-distant past." Toussie v. United States, 397 U.S. 112, 115 (1970). Said another way, the protection of a statute of limitations is on the facts and the acts, not on the name of the statute. Hence, some acts are so egregious that the legislature has determined the protection of a statute of limitations is inappropriate, the most obvious being the premeditated killing of another human being. And, as here, certain acts with a child. Indeed, the terminal element in Article 134 does not, in and of itself, constitute an act, but instead places an accused on notice that when the prohibited act causes an impact on the reputation of the military, the accused may be prosecuted for that act under Article 134. *See* Fosler, 70 M.J. at 230.

Appellee/Cross-Appellant's prosecution for child endangerment was not barred by the statute of limitations because the charge and specification were received within 180 days by the officer exercising summary court-martial jurisdiction after the dismissal in Carter I became final. Moreover, the military judge correctly determined that the acts encompassed by the child endangerment specification constituted child abuse under Article 43(b)(2)(B). Thus, this Court should affirm Appellee/Cross-Appellant's conviction under Specification 1.

CONCLUSION

WHEREFORE the United States respectfully requests that this Honorable Court affirm Appellee/Cross-Appellant's conviction and sentence for the Charge and Specifications.

MEREDITH L. STEER, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34301

MARY ELLEN PAYNE, Maj, USAF
Acting Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 34088

KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4815
Court Bar No. 30753

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 19 April 2017.

MEREDITH L. STEER, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34301

COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☒ This brief contains 6,012 words,

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with 14 characters per inch using Times New Roman.

/s/_____

MEREDITH L. STEER, Major, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 19 April 2017