IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY TO APPELLEE'S ANSWER TO APPELLANT'S SUPPLEMENT TO THE PETITION FOR REVIEW
v.	)	
Private (E-2) **JAMES B. HENDRIX,** United States Army, Appellant	)	Crim. App. Dkt. No. 20170439
	)	USCA Dkt. No. 18-0133/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DISMISSING THE CHARGE AND SPECIFICATIONS WITH PREJUDICE FOR A VIOLATION OF R.C.M. 707.

Statement of the Case

On February 9, 2018, appellant filed a petition and supplement in support of the petition with this Honorable Court. On February 20, 2018, the government filed its answer. Pursuant to Rules 19(a)(5)(A) and 21(c)(1) of this Court's Rules of Practice and Procedure, this is appellant's reply.

Argument

In its brief, the government contradicts itself in discussing the standard for subterfuge, fails to properly account for the procedural posture, cannot answer several of the military judge's critical findings of prejudice (particularly in light of *United States v. Dooley*, 61 M.J. 258 (C.A.A.F. 2005), a case the government fails to even cite, much less address), and erroneously claims the prosecution steadfastly followed regulatory guidance it repeatedly ignored.

1. The government contradicts itself in discussing the standard for subterfuge.

In its answer, the government paradoxically asserts the case law is "settled," but then asks this Honorable Court to choose between two different standards, neither of which represent the *actual* standard promulgated by this Court in *United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014), the case correctly applied by the military judge. Put another way, the government fails to properly distinguish between the separate subterfuge standards articulated in *Leahr*, *Tippit*, and *Robison*.

As noted in appellant's supplement, there are currently three standards of subterfuge being applied in the trial and appellate service courts. First, the Army Court relies on the *Robison* "sole purpose" subterfuge standard: "Appellate courts look to whether the dismissal itself was a subterfuge--whether the 'sole purpose of the dismissal' was to reset the 120-day clock." (Army Court Opinion, p. 6) (citing

United States v. Robison, 2011 CCA LEXIS 381, *4 (Army Ct. Crim. App. Dec. 2, 2011)) (internal quotations in original). Second, the Navy Court currently relies on *Tippit*: a dismissal is a subterfuge when it is "designed to defeat the 120-day speedy trial clock." *United States v. Tippit*, 65 M.J. 69, 80 (C.A.A.F. 2007). Third, the military judge relied on *Leahr*: "Absent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect." *Leahr*, 73 M.J. at 369. Essentially, *Leahr* extends the *Tippit* standard to include "other improper reason[s]."

Despite repeatedly arguing the military judge erred as a matter of law, the government acknowledges that *Leahr* is binding precedent in this case and even quotes *Leahr* when articulating the standard for subterfuge. (Gov't Answer, p. 11) ("In *United States v. Leahr*, this Court reiterated the one exception to [R.C.M. 707(b)(3)]: subterfuge.")[1] (citing *Leahr*, 73 M.J. at 369.). In fact, in arguing *against* a grant of review, the government even asserts that *Leahr* and *Tippit* are "settled case law" in determining if a convening authority's dismissal and re-preferral was a subterfuge, but then immediately contradicts itself by arguing the Army Court "appropriately applied the 'sole purpose' test [from *Robison*] in this

[1] *Leahr* actually provides for two exceptions to R.C.M. 707(b)(3): subterfuge, or "some other improper reason." *Leahr*, 73 M.J. at 369.

case." (Gov't Answer, p. 9, 13 n.2) (internal quotations in original). As such, the government actually urges this Court to apply a subterfuge standard different than what the government itself describes as "settled case law."

Essentially, the government's internally inconsistent arguments for the applicable subterfuge standard highlight the importance of this Court granting appellant's petition. On one hand, the government acknowledges that *Leahr* is the controlling standard in this case. On the other hand, the government spends the next four pages of its argument applying the "sole purpose" standard, but then explains "this Court *could also apply* the 'primary purpose' test to determine whether the convening authority committed subterfuge."[2] (Gov't. Answer, p. 13 n.2) (emphasis added) (internal quotations in original).

This Court has never adopted the "sole purpose" subterfuge standard from *Robison*. Instead, in its most recent analysis of subterfuge, this Court clarified and expanded the subterfuge standard to include "a subterfuge to vitiate an accused's speedy trial rights, *or for some other improper reason*." *Leahr*, 73 M.J. at 369 (emphasis added). Despite acknowledging *Leahr*'s impact on this case, the government argues this Court should apply a standard from an unpublished Army

[2] The Army Court applied the *Robison* "sole purpose" standard in its opinion in this case. (Army Court Opinion, p. 4–6).

Court opinion, with no binding precedential value, that no other appellate court currently applies.

In sum, regardless of which standard this Court finds persuasive, granting the appellant's petition is appropriate. If this Court believes that *Leahr* is the correct subterfuge standard, then appellant has suffered material prejudice to his substantial right to a speedy trial because the Army Court overruled the military judge's application of *Leahr* by applying an unpublished Army Court opinion and the Merriam-Webster's dictionary.[3] If, on the other hand, this Court believes that *Robison*, or any other subterfuge standard, is the appropriate standard, then this Court should grant appellant's petition to provide clarity to military courts that are currently applying conflicting standards.[4]

2. This Court reviews matters of law in Article 62, UCMJ, appeals.

"When reviewing matters under Article 62(b), UCMJ, [appellate courts] may act only with respect to matters of law." *United States v. Baker*, 73 M.J. 283, 288–89 (C.A.A.F. 2011) (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but

[3] The Army Court concluded the military judge's ruling "misapplie[d] the case law" and did not "comport[] with current case law." (Army Court Opinion, p. 4, 6).

[4] For the reasons outlined in appellant's initial supplement, the military judge would not have erred under the standards from either *Tippit* or *Leahr*.

whether those findings are 'fairly supported by the record.'" *Id*. at 289 (internal quotations in original). "On matters of fact with respect to appeals under Article 62, UCMJ, [appellate courts] are bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (citing *Gore*, 60 M.J. at 185).

Given the procedural posture of this Article 62, UCMJ, appeal, the primary questions presented to this court are whether the military judge applied the correct law, and whether he applied it correctly. In its answer, the government does not attack any of the military judge's factual findings that led him to the conclusion that the convening authority's dismissal and re-preferral was a subterfuge. Instead, the government argues that the military judge "decline[d] to *apply the law* out of personal distaste." (Gov't Answer, p. 16) (emphasis added). However, as outlined above, the government's own answer argues that *Leahr* is "settled case law." (Gov't Answer, p. 9–10). The appellant agrees. The military judge also agreed because he specifically relied on *Leahr* in finding the convening authority's actions were a subterfuge.

In sum, the government argues that the military judge failed to "apply the law out of personal distaste," while simultaneously conceding that the military judge applied the correct law. This is a substantial concession in light of the procedural posture.

3. The government acted in complete disregard of DoDI 6495.02 throughout the processing of appellant's case.

The government argues that, "in this case, the desire to honor the wishes of the named victim constituted the 'sole purpose' for dismissing the [original charge]."[5] (Gov't Answer, p. 14) (internal quotation in original). Despite the government's assertion that it attempted to "honor the wishes" of an alleged sexual assault victim, the government did exactly the opposite for over six months. The government acted in direct contradiction of Department of Defense Instruction [hereinafter DoDI] 6495.02 throughout its prosecution of Private Hendrix. The government unequivocally knew at three critical junctures that the alleged victim did not want to participate: when it preferred charges, after the Article 32, UCMJ, preliminary hearing, and after meeting with the alleged victim for the first time more than three months after preferring charges. (*See* App. Ex. II, encl. 15. p. 2).

The instruction itself states that, "If at *any time* the victim who originally chose the Unrestricted Reporting option declines to participate in an investigation or prosecution, that decision should be honored." DoDI 6495.02, encl. 4, para. 1(c)(1) (emphasis added). The government knew at *all* times that the alleged victim did not want to participate, and still chose to move the case forward at every

[5] At the Army Court, the government even specified the relevant issue as: "Whether a Convening Authority's Dismissal of Charges is a 'Subterfuge' *When Itis Motivated by a Desire to Honor the Wishes of a[n] [Alleged] Sexual Assault Victim Under DoDI 6495.02*." (Gov't Appeal and Brief) (emphasis added).

turn. Put most simply, in this case, the government repeatedly and consistently failed to follow the same language it relied upon both at trial and on appeal to justify its preferral and dismissal decisions. (R. at 37; App. Ex. II, p. 6–7; Gov't Answer, p. 2).

In addition to knowing the alleged victim did not want to participate, the government also knew, both before trial and on appeal, that without her testimony, it could not prove its case against Private Hendrix. (*See* App. Ex. II, encl. 15, p. 2) ("Without her testimony, the government would be unable to prove beyond a reasonable doubt that the sex was nonconsensual and, therefore, all the elements of the alleged offense would not be met."); (*see also* Gov't Answer, p. 14) ("[T]he crucial nature of [the alleged victim's] testimony rendered the Government's case inviable.").

Leahr states that a dismissal resets the 120-day clock unless the dismissal is "a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason." 73 M.J. at 369. A proper reason is "a *legitimate command reason* which does not *unfairly prejudice an accused*." *Id*. (internal quotations omitted) (emphasis added). The government had no "legitimate command reason" to dismiss the charge and specifications in this case. The government re-preferred the identical charge and specifications a mere seven days later, when no new evidence was discovered, and no new charges were preferred. The government's purported

compliance with DoDI 6495.02 is not a "legitimate command reason" because the government ignored the alleged victim's desires for over six months, and only asserted compliance when it became advantageous to the prosecution of Private Hendrix.

To date, the government has failed to explain how it complied with DoDI 6495.02 to "honor the wishes" of the alleged victim. Similarly, the government has failed to explain how preferring the charge and specifications nearly two months after knowing the alleged victim did not want to participate in the prosecution of Private Hendrix, while simultaneously knowing it could not prove the allegations without her testimony, complies with DoDI 6495.02.

At trial, before the Army Court, and now before this Court, the government has not provided any explanation as to how the government's actions actually comply with DoDI 6495.02. Instead, the government simply claims, "the desire to honor the wishes of the named victim constituted the 'sole purpose' for dismissing the [original charge]." (Gov't Answer, p. 14) (internal quotation in original). As stated by the military judge, "It would be fantastical to assume the Government was unaware of the time and the impact if they did not dismiss." (App. Ex. VIII, p. 6). The bottom line is the government had no "legitimate command reason" to dismiss and re-prefer the charge and specifications, and the government's actions "unfairly prejudice[d]" Private Hendrix's right to a speedy trial.

4. The convening authority lacked a "proper reason" when he dismissed and re-preferred the charge and specifications.

In its answer, the government notes that a convening authority may dismiss and re-prefer identical charges under certain circumstances where the dismissal is for a "[]proper purpose."[6] (Gov't Answer, p. 13). Specifically, the government notes that "joining additional charges, correcting specifications, [and] obtaining additional evidence" are legitimate reasons for a convening authority to dismiss a charge. (Gov't Answer, p. 13) (citing *Leahr*, 73 M.J. at 367–78; *United States v. Hayes*, 37 M.J. 769, 772 (A. Ct. Crim. App. 1993)). Appellant agrees that the three listed reasons would be "proper" pursuant to *Leahr*, but none of the listed reasons are applicable in this case.

As found by the military judge, between the dismissal and re-preferral, "No new evidence was obtained, [and] no new crimes were charged." (App. Ex. VIII, p. 5). While the government seems to imply the alleged victim's testimony was not available at the time the convening authority dismissed the charge and specifications, this implication is wholly inaccurate.

At no time was the alleged victim *unavailable* to participate; she was simply *unwilling*. The government, both at trial and on appeal, has failed to explain why the alleged victim was *unavailable* to testify. The government could have issued a

[6] It appears the "improper purpose" language articulated by the government is actually the "some other improper reason" prong in *Leahr*.

subpoena to the alleged victim, thereby requiring her attendance at a court-martial. The subpoena process is the same for any witness, regardless of whether the witness testifies for the government or the defense. Irrespective of what a witness's desires are, the government has the authority to ensure the witness is present to testify.

Admittedly, if the government issues a subpoena for an alleged victim who is unwilling to testify at trial, it would conflict with DoDI 6495.02. However, in this case, the government created its own conundrum. Despite its argument to the contrary, the government repeatedly demonstrated it had no intention of following the guidance in DoDI 6495.02 until after the R.C.M. 707 120-day clock had expired. Furthermore, the government's choice not to issue a subpoena does not bear in any way on the alleged victim's actual availability. In sum, the government cannot argue that the alleged victim's testimony was unavailable, and therefore the dismissal was for a "proper reason," when the government itself held the ability to either: 1) comply with DoDI 6495.02 from the beginning, or 2) issue a subpoena to ensure the alleged victim's presence at trial.

5. The government fails to acknowledge the military judge's findings of facts relating to prejudice suffered by the appellant.

The government argues that Private Hendrix "did not demonstrate [] particularized harm" beyond normal "anxiety and concern." (Gov't Answer, p. 20). The government also argues that Private Hendrix "did not demonstrate an[y]

extraordinary stress or anxiety that would justify dismissal with prejudice." (Gov't Answer, p. 22). Both of these arguments fail to account for the totality of the military judge's findings of fact, as well as the import and effect of this Court's decision in *Dooley*.

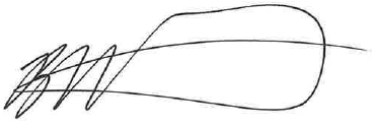
In assessing prejudice related to the speedy trial violation, the military judge found, "*After re-preferral of the charges*, the Accused entered an inpatient treatment program due to alcohol consumption and suicidal thoughts/ideations. The Accused is currently taking medications to deal with the stress of the situation." (App. Ex. VIII) (emphasis added). He also found "the Accused has not been working within his field," and "[h]e has been working with the hospital outside of his area of knowledge." (App. Ex. VIII). The government does not challenge or even address these findings of fact.

Despite the appellant's heavy reliance on *Dooley*, the government's answer fails to analyze, distinguish, or even cite it. Private Hendrix's prejudice in this case is worse than the prejudice in *Dooley*. In *Dooley*, the appellant was essentially held "without due process" because he was forced to work outside of his field throughout the speedy trial violation. 61 M.J. at 264–65. Not only was Private Hendrix, a 35S Signals Collection Analyst, forced to work in a hospital outside of his area of expertise, he entered in-patient treatment for suicidal thoughts/ideations *after* the government re-preferred the charge and specifications. (App. Ex. VIII, p.

3). As noted by the military judge, this particularized and extraordinary prejudice "cannot, and should not, be considered normal anxiety." (App. Ex. VIII, p. 7).

Conclusion

WHEREFORE, Private Hendrix respectfully requests this Honorable Court grant his petition for review.[7]



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[7] The undersigned appellate defense counsel acknowledge that if this Court grants appellant's petition, no further pleadings will be filed in accordance with Rule 19(a)(7) of this Court's Rules of Practice and Procedure. As such, if this Court grants appellant's petition, appellate defense counsel stand ready to present oral argument at this Court's earliest convenience.

CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

1. This supplement to the petition for grant of review complies with the type-volume limitation of Rule 21(b) because it contains 3,131 words.

2. This supplement to the petition for grant of review complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Hendrix*, Crim. App. Dkt. No. 20170439, USCA Dkt. No. 18-0133/AR was delivered to the Court and the Government Appellate Division on 23 February 2018.

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