IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
Private (E-2) **JAMES B. HENDRIX,** United States Army, Appellant	)	Crim. App. Dkt. No. 20170439 USCA Dkt. No. _____/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 Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862(a)(1)(A) (2016) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On April 21, 2017, Private Hendrix was charged with two specifications of sexual assault, in violation of Article 120, UCMJ. (Charge Sheet). On May 11, 2017, the convening authority referred the charge and specifications to a general court-martial. (Charge Sheet). On July 27, 2017, pursuant to a defense motion, the military judge dismissed the charge and specifications with prejudice for violating Private Hendrix's Rule for Courts-Martial [hereinafter R.C.M.] 707 right to a speedy trial. (App. Ex. VIII). The government appealed this ruling pursuant to Article 62, UCMJ. (Appendix A). On December 14, 2017, the Army Court granted the government's appeal and vacated the military judge's ruling. (Appendix A).

In accordance with Rule 19 of this Court's Rules of Practice and Procedure, the undersigned appellate defense counsel files a Petition for Grant of Review contemporaneously herewith. The Judge Advocate General of the Army designated the undersigned military appellate defense counsel to represent Private Hendrix, who hereby enter their appearance and file a Supplement to the Petition for Grant of Review under Rule 21.

Reasons to Grant Review

In this case, the military judge applied binding precedent from this Honorable Court in dismissing The Charge and its Specifications with prejudice. (App. Ex. VIII). In overturning the military judge and vacating his ruling, the Army Court applied Merriam-Webster's dictionary and an unpublished Army Court decision that predated the binding authority cited in the military judge's ruling. (Appendix A). The Army Court did not cite, analyze, or distinguish the binding authority relied upon by the military judge, yet still found his conclusions of law did not "comport[] with current case law" and even "misapplie[d] the case law." (Appendix A).

While such a result should not withstand further appellate review, appellant acknowledges that, "In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (citation omitted). As such, the Army Court's "analysis is not relevant to [this Court's] review." *United States v. Henning*, 75 M.J. 187, 191–92 n.13 (C.A.A.F. 2016). Therefore, while appellant disagrees with the Army Court's analysis, this petition addresses the multiple grounds for review of the trial court decision pursuant to Rule 21(b)(5) of this Court's Rules of Practice and Procedure.

First, and as the military judge determined, the government materially prejudiced Private Hendrix's substantial right to a speedy trial. More specifically, the government violated R.C.M. 707 by engaging in subterfuge by dismissing charges and then, "a mere week later, the exact same charge and specifications were preferred." (App. Ex. VIII). In this timeframe, "No new evidence was obtained" and "no new crimes were charged." (App. Ex. VIII). Instead, the government's actions were solely rooted in the "change of heart of the [alleged victim]," which "cannot be the state of the military justice system." (App. Ex. VIII).

The net effect was to place Private Hendrix's rights "second to [the alleged victim's] whims," and led to "the exact type of perpetual jeopardy [that] both speedy trial and the 'subterfuge' doctrine seek to eliminate." (App. Ex. VIII). The military judge further explained, "It is a dangerous perception if it appears that an Accused, who is considered innocent, can be perpetually held in a flagged state and [in] the perpetual crucible of potential prosecution, simply because an [alleged victim] may change their mind about their participation in court-martial proceedings." (App. Ex. VIII).

In assessing prejudice related to these violations, 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). He also found "the Accused has not been working within his field," "[h]e has been working with the hospital outside of his area of knowledge," "the Accused dramatically increased his alcohol use," "his platoon sergeant noticed personality changes and marked, steady weight gain," and he even experienced "a 60-70 pound weight gain." (App. Ex. VIII).[3]

Second, this Court should grant review of appellant's petition because the Army Court "decided a question of law in a way in conflict" with precedent from this Honorable Court. *See* Rule 21(b)(5)(B). As mentioned above, the military judge correctly applied binding precedent from this Honorable Court in dismissing the Charge and its Specifications, while the Army Court relied on Merriam Webster's dictionary and an unpublished service court decision in vacating the military judge's ruling. (App. Ex. VIII; Appendix A).

Additionally, this Court should grant appellant's petition for review to "decide[] a question of law which has not, but should be, settled by this Court." *See* Rule 21(b)(5)(A). Currently, there are three separate standards being applied in the trial and appellate courts for the meaning of "subterfuge" in the context of R.C.M. 707.

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[3] While acknowledging this Court does not review the Army Court's analysis, appellant notes the Army Court did not address *any* of these findings in finding the military judge abused his discretion in dismissing with prejudice. (Appendix A).

More specifically, while the military judge in this case correctly applied *United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014), the Army Court and the Navy-Marine Corps Court of Criminal Appeals [hereinafter Navy Court] are currently using different standards. In this case, the Army Court applied the "sole purpose" test from its unpublished decision in *United States v. Robison*, 2011 CCA LEXIS 381 (Army Ct. Crim. App. Dec. 2, 2011) (summ. disp.), while the Navy Court has most recently applied the subterfuge standard articulated by this Court in *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007). *See United States v. Doyle*, 2014 CCA LEXIS 806 (N.M. Ct. Crim. App. Oct. 28, 2014); *United States v. Spartling*, 2014 CCA LEXIS 534 (N.M. Ct. Crim. App. Jul. 31, 2014). The other service courts have not addressed subterfuge since this Court's decision in *Leahr*.

In sum, this case includes material prejudice to appellant's substantial right to a speedy trial, the Army Court decision directly conflicts with this Court's decision in *Leahr*, and a clarified standard over subterfuge would create uniformity, predictability, and efficiency in military courts.

Statement of Facts

In spring 2016, the government began investigating appellant for an alleged sexual assault against Private (PV2) EW on March 22, 2016. (App. Ex. VIII, p. 1). On October 3, 2016, PV2 EW's Special Victim's Counsel [hereinafter SVC] informed the trial counsel that PV2 EW did not want to participate in the prosecution of the appellant. (App. Ex. I, encl. 11, p. 1).

Despite this information from the SVC, appellant's company commander preferred one charge with two specifications of sexual assault against the appellant on November 29, 2016, naming PV2 EW as the alleged victim. (Charge sheet; App. Ex. I, encl. 11, p. 1). Therefore, at the time of preferral, the government knew for at least eight weeks that PV2 EW did not want to participate in the prosecution of appellant. (App. Ex. II, encl. 7; App. Ex. II, encl. 15).

On December 8, 2016, the Special Court-Martial Convening Authority [hereinafter SPCMCA] appointed a Preliminary Hearing Officer [hereinafter PHO] to conduct a hearing to review the charge and specifications pursuant to Article 32, UCMJ. (App. Ex. II, encl. 2). The SPCMCA authorized the PHO to "approve *requests* for reasonable delays submitted pursuant to RCM 707." (App. Ex. II, encl. 2, p. 1) (emphasis added). The PHO notified the trial defense counsel of his appointment on December 12, 2016, and set the preliminary hearing for December 22, 2016. (App. Ex. VIII, p. 1).

On December 13, 2016, the trial defense counsel requested delay of the preliminary hearing until January 3, 2017. (App. Ex. VIII, p. 1). The PHO approved trial defense counsel's request, noted the thirteen-day delay between December 22, 2016 and January 3, 2017 was "attributed to Defense," and rescheduled the preliminary hearing for January 6, 2017. (App. Ex. VIII, p. 1-2). The PHO completed his report on January 24, 2017. (App. Ex. VIII, p. 2; App. Ex. II, encl. 6, p. 1-2). Private EW elected not to participate in the preliminary hearing. (App. Ex. II, encl. 15, p. 1).

Attached to his report was a memorandum signed by the PHO categorizing excludable delay. (App. Ex. II, encl. 6, p. 3). In the memorandum, the PHO excluded the periods of December 12–21, 2016 (ten days) and January 4–5, 2017 (two days) as "administrative pre-trial delay." (App. Ex. II, encl. 6, p. 3). The PHO did not specify any good cause for the twelve total days of "administrative pre-trial delay," and neither side ever requested these twelve days be excluded. (App. Ex. VIII, p. 2).

On January 28, 2017, the trial counsel sent an email to PV2 EW's SVC notifying him of the PHO's report. (App. Ex. II, encl. 7). In the email, the trial counsel acknowledged that PV2 EW previously did not want to participate in the prosecution of Private Hendrix, and asked if her decision to participate had changed. (App. Ex. II, encl. 7). Specifically, the trial counsel wrote:

> Last we discussed, you indicated that your client did not want to participate in a court-martial, but would be supportive of a Chapter 10 [Army Regulation 635-200, *Active Duty Enlisted Administrative Separations*, (Dec. 19, 2016)] Separation Offer if one was submitted by defense. To date, there has been no offer submitted by Defense. There are no discussions surrounding a Chapter 10 Separation.

(App. Ex. II, encl. 7). On February 6, 2017, having not received a response to the January 28, 2017 email, the trial counsel sent a follow-up email to the SVC. (App Ex. II, encl. 9). In the email, trial counsel again notified the SVC that defense counsel declined to submit a Chapter 10 request. (App Ex. II, encl. 9). Trial counsel also re-inquired into PV2 EW's willingness to participate in the prosecution of appellant. (App Ex. II, encl. 9).

On February 10, 2017, the SVC responded to the trial counsel, noting PV2 EW's "preference remains unchanged, and she requests the chain of command pursue alternative, adverse administrative actions in lieu of a court-martial." (App. Ex. II, encl. 10). On February 24, 2017, the SVC sent a follow-up email to the trial counsel, stating:

> [M]y client wanted to clarify her position. If the chain of command would take no action other than sending to a General court-martial, she would not want this result and would be willing to participate as a witness. She would still be satisfied with and prefer two outcomes: a GOMOR [General Officer Memorandum of Reprimand] and Initiation of a Separation Action or an Art. 15 and Initiation of a Separation Action.

(App. Ex. II, encl. 12). However, on or about the same day, PV2 EW's Victim Advocate apparently informed PV2 EW's chain of command that she may now be willing to participate in the prosecution of appellant. (App. Ex. II, encl. 15, p. 2).

In response, the trial counsel and Special Victim Prosecutor arranged a meeting with PV2 EW "to clarify her position and discuss her options." (App. Ex. II, encl. 15, p. 2). Despite the running speedy trial clock, it took the government nearly three weeks to schedule this meeting, which eventually occurred on March 14, 2017. (App. Ex. II, encl. 15, p. 2). At the conclusion of the meeting, PV2 EW again refused to participate in the prosecution of appellant. (App. Ex. II, encl. 15, p. 2). Instead, PV2 EW repeated her desire for alternative action that would not require her participation. (App. Ex. II, encl. 15, p. 2; App. Ex. VIII, p. 2).

On March 21, 2017, PV2 EW's SVC sent the trial counsel a memorandum again codifying PV2 EW's desire not to participate in the prosecution of the appellant, and reiterated her preference that the chain of command seek an "Other Than Honorable (OTH) discharge" for the appellant. (App Ex. II, encl. 14). Therefore, PV2 EW's overall position from October 3, 2016 to March 21, 2017 — a span of *169* days — remained consistent: she did not want to participate in a court-martial prosecution of Private Hendrix.

Approximately two weeks later, on April 2, 2017, the trial counsel notified appellant's trial defense counsel that the convening authority planned to dismiss

the charge and specifications preferred against appellant. (App. Ex VIII, p. 2). On April 11, 2017, appellant's trial defense counsel asked trial counsel for an update on the status of the dismissal. (App. Ex VIII, p. 3). The same day, the trial counsel reiterated that the charge and specifications would be dismissed, and the General Court-Martial Convening Authority [hereinafter GCMCA] ultimately dismissed the charge and specifications without prejudice on April 14, 2017. (App. Ex. II, encl. 15, p. 4). Additionally, the GCMCA delegated jurisdiction to subordinate commanders to take action on the alleged misconduct. (App. Ex. II, encl. 15, p. 4).

Four days after the GCMCA dismissed the charge and specifications, government counsel received notice that PV2 EW had changed her mind and was now willing to participate in the prosecution of appellant. (App. Ex VIII, p. 3). On April 21, 2017, appellant's company commander preferred the exact same charge and specifications originally preferred against appellant on November 29, 2016. (App. Ex VIII, p. 3). The SPCMCA in turn adopted the previously completed PHO's report and forwarded the charges to the GCMCA. (App. Ex VIII, p. 3). The GCMCA referred the charge and specifications on May 11, 2017, and appellant was arraigned on June 8, 2017. (App. Ex. I, encl. 9, p. 2; R. at 6–7).

Prior to the arraignment, Private Hendrix moved to dismiss the charge and specifications for violating his R.C.M. 707 right to a speedy trial. (App. Ex. I).

Private Hendrix asserted that the government violated his R.C.M. 707 right to a speedy trial by failing to bring him to trial within 120 days, and engaging in a subterfuge to vitiate his speedy trial rights by re-preferring the identical charge and specifications seven days after dismissal. (App. Ex. I).

During the Article 39(a), UCMJ, hearing on the motion to dismiss, the trial counsel argued that the convening authority's dismissal and re-preferral was not a subterfuge because the government was attempting to comply with Department of Defense Instruction [hereinafter DoDI] 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (March 28, 2013). Specifically, the trial counsel argued the government attempted to acquiesce to the wishes of the alleged victim regarding her desire to participate in the prosecution of Private Hendrix. (R. at 37). The trial counsel further argued that evidence needed to prosecute Private Hendrix (the testimony of PV2 EW) was "not available," which led the convening authority to dismiss the charge and specifications. (R. at 37–38). Apart from PV2 EW's mere preference, which the government already knew at the time of preferral, the trial counsel did not explain *why* her testimony was "not available."

On July 27, 2017, the military judge granted appellant's motion and dismissed the charge and specifications with prejudice. (App. Ex. VIII). The military judge found the government had violated appellant's R.C.M. 707 right to a speedy trial for two reasons. (App. Ex. VIII). First, the military judge found the

120-day clock expired on April 11, 2017, three days prior to the GCMCA dismissing the charge and specifications.[4] (App. Ex. VIII, p. 5). Second, the military judge found that even if the 120-day clock had not expired when the GCMCA dismissed the charge and specifications, the government's dismissal and re-preferral of the same charge and specifications was a subterfuge. (App. Ex. VIII, p. 5). The military judge relied on *Leahr* and *United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999) in making his findings. (App. Ex. VIII, p. 4).

After determining the government violated appellant's R.C.M. 707 right to a speedy trial, the military judge weighed the R.C.M. 707(d)(1) factors and found that three of the four factors weighed in favor of appellant. (App. Ex. VIII, p. 6). Specifically, the military judge found the facts and circumstances of the case leading to dismissal, the impact of a re-prosecution on the administration of justice, and the prejudice to appellant factors weighed in favor of appellant. (App. Ex. VIII, p. 6). The military judge found that, "*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, p. 3) (emphasis added).

[4] The military judge found the PHO improperly excluded the twelve days of "administrative pre-trial delay" because the PHO failed to establish good cause to exclude the delay. In fact, the military judge noted the PHO failed to provide any reason at all for excluding "administrative pre-trial delay." (App. Ex. VIII, p. 5).

Based on all the factors, the military judge dismissed the charge and specifications with prejudice, noting that "dismissing the case without prejudice does nothing to alleviate the speedy trial issue. Doing so would continue to allow the government to dismiss and re-prefer as they saw fit." (App. Ex. VIII, p. 7). The military judge noted his concern with the government's ability to "charge and re-charge the Accused perpetually" based on the fluctuating desires of the alleged victim, and that it "cannot be the state of the military justice system" that the appellant's rights are subordinate to the alleged victim's. (App. Ex. VIII, p. 7).

Following the military judge's ruling, the trial counsel filed a timely notice of appeal. (App. Ex. IX). The government subsequently filed an appeal and supporting brief with the Army Court, which listed three separate "issues presented." (Gov't Appeal and Brief). The second issue outlined the government's sole basis for challenging the military judge's finding of subterfuge: "Whether a Convening Authority's Dismissal of Charges is a 'Subterfuge' *When It is 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).[5] In its appeal, the government did not provide any other reasons for challenging the

[5] The first issue related to the military judge's finding that the 120-day clock expired prior to the dismissal of charges, while the third issue involved whether the military judge abused his discretion in dismissing the charge with prejudice. (Gov't. Appeal and Brief).

military judge's subterfuge finding *except* for its purported "desire to honor the wishes of a[n] [alleged] sexual assault victim" under this DoDI. (Gov't. Appeal and Brief).

In its decision, the Army Court found "the military judge clearly erred when concluding the convening authority's dismissal of the charge was a subterfuge" and "abused his discretion in dismissing the charge with prejudice." (Appendix A, p. 2). The Army Court also concluded the military judge's conclusions of law were "erroneous, as neither [conclusion] comports with current case law" and further stated his analysis "misapplies the case law on subterfuge." (Appendix A, pp. 4, 6).

However, in stating the military judge "clearly erred," "misapplie[d] the case law on subterfuge," and did not "comport[] with current case law," the Army Court did not apply, analyze, or distinguish *Leahr* or *Anderson*, the two cases relied upon by the military judge. (Appendix A). Instead, in overturning the military judge's reliance on multiple decisions from this Honorable Court, the Army Court applied the definition of subterfuge in the Merriam-Webster's dictionary and the legal standard from an unpublished Army Court opinion from 2011. (Appendix A).

Furthermore, in overturning the military judge, the Army Court did not address the government's sole argument on appeal that the military judge erred in his finding of subterfuge because the convening authority's decision was

"motivated by a desire to honor the wishes of a[n] [alleged] sexual assault victim under DoDI 6495.02." (Gov't. Appeal and Brief). The Army Court also did not discuss the government's knowledge that PV2 EW did not want to participate in the prosecution of Private Hendrix before and throughout the charging period, nor did it discuss the military judge's findings of fact related to the prejudice suffered by Private Hendrix in determining a dismissal with prejudice was also an abuse of discretion. (Appendix A).

Summary of the Argument

The military judge did not err in finding the government violated Private Hendrix's R.C.M. 707 right to a speedy trial. After finding the speedy trial violation, the military judge did not abuse his discretion in dismissing the charge and specifications with prejudice. The military judge's findings of fact are not clearly erroneous, he properly weighed the R.C.M. 707(d)(1) factors, and he did not abuse his discretion in concluding that dismissal with prejudice was the only meaningful remedy available to Private Hendrix.

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.

Standard of Review

"In an Article 62, UCMJ, appeal, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *Pugh*, 77 M.J. at 3 (citing *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015)). "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." *Id*. (citing *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004)). The clearly erroneous standard is a "very high one to meet," and "[i]f there is 'some evidence' supporting the military judge's findings, [an appellate court] will not hold them . . . 'clearly erroneous.'" *United States v. Leedy*, 65 M.J. 208, 213 n. 4 (C.A.A.F. 2007) (citations omitted) (internal quotations in original).

Whether an accused received a speedy trial is a legal question that is reviewed *de novo*. *Leahr*, 73 M.J. at 367 (citations omitted). "[T]he military judge's ultimate decision to dismiss the charge in response to the R.C.M. 707 speedy trial motion [is reviewed] for an abuse of discretion." *Robison*, 2011 CCA LEXIS 381 at *3 (citing *Anderson*, 50 M.J. 447).

"Under R.C.M. 707, the military judge is directed to apply certain factors in determining a remedy for a speedy trial violation, and then decide whether those factors lead to the conclusion that the case should be dismissed with or without

prejudice. Under an abuse of discretion standard, mere disagreement with the conclusion of the military judge who applied the R.C.M. 707 factors is not enough to overturn his judgment." *United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)).

"[A]n abuse of discretion occurs when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (internal citation omitted). "The pertinent question . . . is whether the military judge erred in his conclusion that an analysis of the factors listed in R.C.M. 707 supports dismissal of [appellant's] case with prejudice." *Dooley*, 61 M.J. at 262.

Additionally, "[t]he abuse of discretion standard calls for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011) (citations omitted) (internal quotation marks omitted). "Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (quoting *Gore*, 60 M.J. at 187).

Law

An accused must be brought to trial within 120 days of the preferral of charges. *See* R.C.M. 707(a)(1). An accused is brought to trial within the meaning of R.C.M. 707 at arraignment. *See* R.C.M. 707(b)(1); *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016).

"Prior to referral . . . all *requests* for pretrial delay [to the R.C.M. 707 120-day clock] . . . will be submitted to the convening authority or . . . to a military judge." *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005) (citing R.C.M. 707(c)(1)) (emphasis added). "[T]he convening authority may delegate the authority to grant continuances to an Article 32 preliminary hearing officer." R.C.M. 707(c)(1) discussion. Additionally, when the convening authority has delegated to a preliminary hearing officer the "authority to grant any reasonably *requested* delays of the Article 32 [preliminary hearing], then any delays approved by the Article 32 [preliminary hearing] officer also are excludable." *Lazauskas*, 62 M.J. at 41 (internal quotations omitted) (emphasis added). Excludable delay may only be granted after a showing of "good cause." *See United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997); R.C.M. 707(c) analysis at A21-42.

If charges are dismissed by the convening authority, a new 120-day clock begins when charges are re-preferred. R.C.M. 707(b)(3)(A)(i). However, this Court in *Leahr* recognized two exceptions to the general R.C.M. 707(b)(3)(A)

principle that dismissing and re-preferring a charge before the 120-clock expires resets the 120-day clock. 73 M.J. 364. The first exception occurs when dismissal and subsequent re-preferral is a "subterfuge to vitiate an accused's speedy trial rights." *Id*. at 369. The second exception occurs when dismissal and subsequent re-preferral is "for some other improper reason." *Id*. A proper reason is "a legitimate command reason which does not unfairly prejudice an accused." *Id*. [A] convening authority does not have unlimited power to reset the [120-day] clock." *United States v. Robinson*, 47 M.J. 506, 507 (N.M. Ct. Crim. App. 1997).

Charges not brought to trial within the 120-day clock must be dismissed. R.C.M. 707(d). However, for a violation of the 120-day clock, charges may be dismissed with or without prejudice. R.C.M. 707(d)(1). "[A] military judge's decision [to dismiss with or without prejudice] is guided by the factors articulated in R.C.M. 707 and can be reversed only for a clear abuse of discretion." *Dooley*, 61 M.J. at 263.

"In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: [1] the seriousness of the offense; [2] the facts and circumstances of the case that lead to dismissal; [3] the impact of re-prosecution on the administration of justice; and [4] any prejudice to an accused resulting from the denial of a speedy trial." R.C.M. 707(d)(1). "[T]he military judge's decision in [dismissing with or without

prejudice] should be affirmed unless his factual findings are clearly erroneous or his decision in applying the R.C.M. 707 factors was influenced by an incorrect view of the law." *Dooley*, 61 M.J. at 263 (citing *United States v. Taylor*, 487 U.S. 326, 337 (1988)).

"Dismissal [with prejudice] is a drastic remedy and courts must look to see whether alternative remedies are available." *Dooley*, 61 M.J. at 262-63 (citation omitted). However, dismissal with prejudice is "appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *Id*. at 263. "Deference to the military judge's decision is particularly prudent in those cases when a violation of R.C.M. 707 (d)(1) has occurred because, as the legislative history of the Speedy Trial Act [18 U.S.C. § 3162 (2000)] demonstrates, Congress clearly intended trial judges to have 'guided discretion' whether to dismiss with or without prejudice." *Id*. (citing *Taylor*, 487 U.S. at 335) (internal quotations in original). Neither dismissal with or without prejudice is given priority. *Id*. (citation omitted).

As necessary, additional legal principles, cases, and authorities are included in the relevant subsections below.

Argument

The military judge applied the correct standard for subterfuge.

In ruling on Private Hendrix's motion to dismiss for a lack of speedy trial, the military judge properly applied this Court's precedent on subterfuge from *Anderson* and *Leahr*. As a result, the military judge dismissed the charge and specifications of sexual assault with prejudice.

In its opinion, the Army Court found the military judge's "conclusions of law to be erroneous, as neither [conclusion] comports with *current case law* nor follows the facts in the record." (Appendix A, p. 4) (emphasis added). The Army Court also held that the military judge's "approach *misapplies the case law on subterfuge*." (Appendix A, p. 6) (emphasis added). Alarmingly, the Army Court reached these conclusions without citing, analyzing, or distinguishing *Leahr*, the binding precedent applied by the military judge.

Currently, there are three separate standards of subterfuge being applied between 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." (Appendix A, p. 6) (citing *Robison*, 2011 CCA LEXIS 381 at *4) (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." 65 M.J. at 80. 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." 73 M.J. at 369. Essentially, *Leahr* extends the *Tippit* standard to include "other improper reason[s]."

Of the three separate standards of subterfuge being applied between the trial and appellate service courts, the military judge applied the correct one. The Army Court's reliance on Merriam-Webster and its unpublished decision in *Robison* for the subterfuge standard is misplaced. *Robison* derives its "sole purpose" standard from *Robinson*, a 1997 Navy Court case. Notably, the Navy Court *itself* abandoned the *Robinson* subterfuge standard in subsequent cases.[6]

The two most recent Navy Court cases addressing subterfuge applied this Court's standard from *Tippit*, which post-dates *Robinson*. *See Doyle*, 2014 CCA LEXIS 806; *Spartling*, 2014 CCA LEXIS 534. However, in light of *Leahr*, solely relying on *Tippit* is also insufficient.

As the military judge properly concluded, this Court subsequently clarified the subterfuge standard in *Leahr* by citing to *Tippit* and stating, "Absent a situation where a convening authority's express dismissal *is either a subterfuge to vitiate an*

[6] Appellant notes the Army Court is the only appellate court to apply the *Robinson* subterfuge standard since 2006.

accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect." 73 M.J. at 369 (citing *Tippit*, 65 M.J. at 79) (emphasis added). As such, *Leahr* is this Court's most recent application and clarification of the subterfuge standard, and therefore binding on all military courts. Accordingly, the military judge applied the correct standard when ruling on Private Hendrix's motion to dismiss.[7]

The military judge did not err in finding the government violated Private Hendrix's R.C.M. 707 right to a speedy trial.

In his ruling, the military judge found that the government violated Private Hendrix's right to a speedy trial for two separate reasons. First, the military judge found that the convening authority's dismissal of the charge and specifications occurred after the R.C.M. 707 120-clock had expired. (App. Ex. VIII, p. 5). Second, the military judge found that even if the 120-clock had not expired when the convening authority dismissed the charge, the dismissal and subsequent re-preferral did not reset the 120-clock because the dismissal was a subterfuge. (App. Ex. VIII, p. 5). The military judge did not err in reaching either conclusion.

[7] Appellant notes the differing *Robison/Robinson*, *Tippit*, and *Leahr* standards used by trial and appellate courts to support his request for grant of review. However, for the reasons outlined in the next subsection, the military judge would not have erred under the standard from either *Tippit* or *Leahr*.

a. The convening authority's dismissal of the charge and specification occurred after the R.C.M. 707 120-day clock expired.

The military judge found the convening authority dismissed the charge and specifications on day 123 of the R.C.M. 707 120-day clock. As part of his analysis, the military judge determined the PHO improperly excluded the twelve days of "administrative pre-trial delay" because the PHO "did not specify any good cause." (App. Ex. VIII, p. 1). The military judge also noted the time spent to schedule and conduct an Article 32, UCMJ, preliminary hearing is "not a proceeding 'related to the case.' *It is the case*." (App. Ex. VIII. at p. 5) (internal quotations in original) (emphasis added).

Additionally, the military judge found the PHO exceeded his authority in excluding the "administrative pre-trial delay" because the Article 32, UCMJ, appointment memorandum only permits the PHO to "approve *requests* for reasonable delays *submitted* pursuant of [sic] RCM 707." (App. Ex. II, encl. 2, p. 1) (emphasis added). In this case, however, the PHO appeared to exclude the twelve days *without request from either party*. Plain and simple, the PHO lacked the authority to exclude days from the 120-day clock. Accordingly, the military judge correctly determined these twelve days were not excludable, and instead counted towards the R.C.M. 707 120-day clock.

Overall, one hundred thirty-six days elapsed between November 29, 2016 (date of preferral) and April 14, 2017 (date the convening authority dismissed the

charge and specifications). After properly excluding the thirteen-day defense delay postponing the preliminary hearing and *not* excluding the twelve days of the purported "administrative pre-trial delay," the military judge correctly concluded the convening authority dismissed the charge and specifications on day 123.[8] As such, the military judge did not err in finding the convening authority dismissed the charge and specifications after the R.C.M. 707 120-day clock expired.

b. The military judge did not err in concluding the convening authority's dismissal and re-referral of the charge and specifications was a subterfuge.

In his ruling, the military judge also properly concluded the convening authority's dismissal and re-preferral of the charge and specifications did not reset the R.C.M. 707 120-day clock. (App. Ex. VIII, p. 6).

Typically, the 120-day clock resets when charges are dismissed and subsequently re-preferred. R.C.M. 707(b)(3)(A)(i). However, this Court in *Leahr* recognized two exceptions to the general R.C.M. 707(b)(3)(A) principle that dismissing and re-preferring a charge resets the 120-day clock. 73 M.J. at 369. The first exception occurs when dismissal and subsequent re-preferral is a "subterfuge to vitiate an accused's speedy trial rights." *Id*.; *see also Anderson*, 50

[8] The military judge noted in his ruling that January 4–6, 2017, could have been excluded pursuant to the defense request to delay the Article 32 preliminary hearing. (App. Ex. VIII, p. 5). However, the PHO failed to exclude these dates as part of the defense delay request.

M.J. at 448. The second exception occurs when dismissal and subsequent re-preferral is "for some other improper reason." *Id.* The government's slipshod processing of this case violates both exceptions.

In addressing subterfuge, the military judge affirmatively cited both *Anderson* and *Leahr* in determining that the 120-day clock did not reset. The military judge concluded the convening authority's dismissal, and subsequent re-preferral of the identical charge and specifications a "mere week later" when "[n]o new evidence was obtained" and "no new crimes were charged" was a subterfuge. (App. Ex. VIII, p. 5).

In providing his analysis, the military judge explained, "Re-preferring the exact same charges a week later and placing the Accused back [in] the crucible of a court-martial, is the exact type of perpetual jeopardy both speedy trial and the 'subterfuge' doctrine seek to eliminate." (App. Ex. VIII, p. 5) (internal quotations in original). The military judge also pointed out, "In order to preserve its ability to prosecute, the Government dismissed the case at/near/after the expiration of the 120-day clock. 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. 5). When considered in light of the government's knowledge that PV2 EW did not want to participate in the prosecution of Private Hendrix, the military judge certainly did not err in finding the government's dismissal and re-preferral was a subterfuge.

While not specifically addressed by the military judge,[9] the government's processing of this case also violates the second exception expressed in *Leahr* because the government lacked a "proper reason" to dismiss and then re-prefer the same charge and specifications seven days later. A proper reason is "a legitimate command reason which does not unfairly prejudice an accused." *Leahr*, 73 M.J. at 369 (internal quotations omitted).

In this case, the trial counsel repeatedly argued the government was justified in dismissing and re-preferring because of DoDI 6495.02. (R. at 37; App. Ex. II, p. 6–7). The relevant portion of this DoDI states:

> The [alleged] victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command. *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 in accordance with this subparagraph*.

Encl. 4, para. 1(c)(1) (emphasis added).

The government repeatedly argued the reason the convening authority dismissed the charge and specifications, only to re-prefer the exact same charge

[9] *See United States v. Lincoln*, 42 M.J. 315, 315 (C.A.A.F. 1995) ("When the Government appeals an adverse ruling, the defense may assert additional or alternate grounds for affirming the ruling.") (citations omitted).

and specifications seven days later, was to comply with this language. (R. at 37; App. Ex. II, p. 6–7).[10] However, the government's argument fails to account for its inherent inconsistency: the government acted in direct contradiction of DoDI 6495.02 throughout its attempted prosecution of Private Hendrix.

Again, the instruction itself states that PV2 EW's "decision to decline to participate in an investigation or prosecution *should be honored by all personnel charged with the investigation and prosecution of sexual assault cases*," which specifically includes "commanders." However, in direct contravention to PV2 EW's desires, it was a company commander who preferred charges against Private Hendrix. Put most simply, in this case, the government repeatedly and consistently failed to follow the same language it relied upon both at trial and an appeal. (R. at 37; App. Ex. II, p. 6–7; Gov't Appeal and Brief)

On this point, the overall timeline of this case is highly instructive. On October 3, 2016, PV2 EW's SVC notified the government that PV2 EW did not want to participate in the prosecution of Private Hendrix. (App. Ex. I, encl. 11, p. 1). Additionally, PV2 EW repeatedly made it clear that she desired the chain of command to seek an OTH discharge for appellant through alternative

[10] Even on appeal, the government's sole basis for challenging the military judge's finding of subterfuge was: "Whether a Convening Authority's Dismissal of Charges is a 'Subterfuge' *When It is 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).

administrative action in lieu of proceeding to a court-martial. (App. Ex. II, encl. 10; App. Ex. II, encl. 12; App. Ex. II, encl. 14). Despite having full knowledge of PV2 EW's "decision to decline to participate," the government ignored PV2 EW's wishes and preferred a charge with two specifications against Private Hendrix on November 29, 2016. (Charge Sheet).

Most troubling, the email chain between the trial counsel and PV2 EW's SVC seems to imply the government may have potentially preferred the charge and specifications to help facilitate a request for administrative discharge pursuant to Chapter 10, Army Reg. 635-200, *Active Duty Enlisted Administrative Separations* (Dec. 19, 2016). Based on the record, the only way that preferral of charges would align with PV2 EW's wishes is the government thought it would potentially push Private Hendrix into submitting a Chapter 10 request. However, when he did not submit such a request, it appears the government was stuck.

Again, before it preferred the charge and specifications, the government had nearly two months' notice that PV2 EW did not want to participate in the prosecution of appellee. The government also knew that without PV2 EW's 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."). Despite this knowledge, the

government repeatedly, consistently, and blatantly ignored the wishes of PV2 EW, in direct contradiction of DoDI 6495.02, the same authority it argued authorized the dismissal and re-preferral in this case.

If the government had actually complied with PV2 EW's wishes, it would not have preferred the charge and specifications after she first declined to participate. If the government had actually complied with PV2 EW's wishes, it would have dismissed the charge and specifications in February 2017 after the SVC again confirmed PV2 EW did not want to participate. (*See* App. Ex. II, encl. 10). If the government had actually complied with PV2 EW's wishes, it would have dismissed the charge and specifications in March 2017 after meeting with PV2 EW and hearing yet again that she did not want to participate. (*See* App. Ex. II, encl. 14).

While the government argues it attempted to comply with DoDI 6495.02, the record shows the exact opposite: the government had no interest in respecting PV2 EW's wishes not to participate. Instead, the government either hoped that PV2 EW would change her mind about testifying or played a game of chicken with Private Hendrix to see whether he would submit a request for administrative separation in lieu of court-martial. When Private Hendrix chose not to submit such a request, the government then violated his R.C.M. 707 right to a speedy trial.

Once the government preferred the charge and specifications against PV2 EW's wishes, the government was left with two options. First, the government could have complied with DoDI 6495.02 and dismissed charges in February 2017, when the SVC reiterated that PV2 EW did not want to participate in the prosecution. Second, the government could have issued a subpoena to PV2 EW, thereby requiring her attendance at a court-martial. Either option would have prevented the violation of Private Hendrix's R.C.M. 707 right to a speedy trial. Instead, the government blatantly disregarded both Private Hendrix's speedy trial rights and the desires of the alleged victim. As stated by the military judge, "[t]hat cannot be the state of the military justice system." (App. Ex. VIII, p. 6).

While the trial counsel also argued the government dismissed and re-preferred based on the unavailability of PV2 EW's testimony, this is an inaccurate oversimplification of what actually happened. (R. at 37–38). At no time was PV2 EW *unavailable* to participate, she was simply *unwilling*. To date, the government has not provided any actual reason why PV2 EW was *unavailable* to testify at trial. In sum, acting in blatant disregard of DoDI 6495.02 for over six months, only to change course after exceeding the 120-day clock, does not constitute "a legitimate command reason." *See Leahr*, 73 M.J. at 369 (internal quotations omitted). Therefore, the military judge did not err in finding the dismissal and re-preferral failed to reset the R.C.M. 707 120-day clock.

The military judge did not abuse his discretion by dismissing this case with prejudice.

Under the facts of this case, the military judge did not abuse his discretion in dismissing the charge and its specifications with prejudice.

In weighing the four R.C.M. 707(d)(1) factors, the military judge noted the seriousness of the alleged offense is not at issue in this case. However, the military judge found the other three factors weigh heavily in Private Hendrix's favor. The record supports the military judge's findings and conclusion. In fact, this case is worse than *Dooley*, in which this Court upheld the decision of the military judge.

In *Dooley*, the military judge weighed the R.C.M. 707(d)(1) factors and ultimately dismissed the case with prejudice. 61 M.J. at 259. In assessing the facts and circumstances leading to dismissal factor, the military judge found the government showed a "lack of urgency" in processing the case. *Id*. at 263. The military judge also found the prejudice to the accused factor weighed heavily in favor of the appellant, as he was "suffering prejudice daily" because he was "a photographer's mate not allowed to work in his rating and a second class petty officer not permitted to supervise troops." *Id*. At 264–65. Essentially, the

appellant was being held "without due process" because he was forced to work outside of his field. *Id*.[11]

"Prejudice may take many forms, thus such determinations must be made on a case-by-case basis in the light of the facts." *Id*. at 264 (citation and internal quotations omitted). Prejudice can include "any restrictions or burdens on his liberty, such as disenrollment from school or the inability to work due to withdrawal of a security clearance." *Id*. (citations omitted). Prejudice can also include working outside of an accused's area of qualification. *Id*. at 265.

Again, this case is worse than *Dooley*. In assessing prejudice, 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). He also found "the Accused has not been working within his field," "[h]e has been working with the hospital outside of his area of knowledge," "the Accused dramatically increased his alcohol use," "his platoon sergeant noticed personality changes and marked, steady weight gain," and he even

[11] In *Dooley*, the seriousness of the offense factor weighed in favor of the government, and the effect of a re-prosecution on the administration of justice factor was "relatively neutral." *Id.* at 263–64.

experienced "a 60-70 pound weight gain." (App. Ex. VIII).[12] Additionally, the accused testified that his depression went to "new depths" as a result of the re-preferral. (R. at 17-18).

As outlined above, the military judge made several specific findings related to the prejudice endured by Private Hendrix. All told, the military judge succinctly found the prejudice suffered by Private Hendrix as a result of the government's violation of his right to a speedy trial "cannot, and should not, be considered normal anxiety." (App. Ex. VIII, p. 7).

Furthermore, when compared to *Dooley*, the government did not just process the case with a "lack of urgency," they did not even speak directly to the alleged victim until approximately 90 days after preferral. (*See* App. Ex. II, encl. 15. p. 2). The government knew all along that: 1) it could not prove its case without the alleged victim's testimony, and 2) that she did not want to participate.

Finally, the military judge also did not abuse his discretion in finding the impact of re-prosecution on the administration of justice weighs heavily in favor of Private Hendrix. In his ruling, the military judge expressed his concern that dismissal without prejudice fails to remedy the violation in this case: "It is a dangerous perception if it appears that an Accused, who is considered innocent,

[12] Again, while this Court does not review the Army Court's analysis, appellant notes the Army Court did not address *any* of these findings in finding the military judge abused his discretion in dismissing with prejudice. (Appendix A).

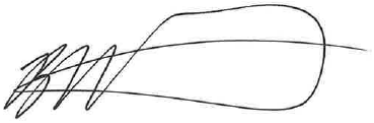
can be perpetually held in a flagged state and [in] the perpetual crucible of potential prosecution because an [alleged victim] may change their mind about their participation in court-martial proceedings." (App. Ex. VIII, p. 6).

This Court recognized this same concern in *Cooley*: "[W]e are also mindful that, in theory, the opportunity to dismiss charges without prejudice for violating R.C.M. 707's speedy trial clock offers an opportunity for endless delay." *United States v. Cooley*, 75 M.J. 247, 261 (C.A.A.F. 2016). Additionally, in *Dooley*, this Court noted, "We believe the military judge was correct to note that the plain meaning of R.C.M. 707 may be thwarted if trial is allowed to proceed in this case. The rule requires the military judge to dismiss the case but, if the military judge dismisses without prejudice and the government decides to re[-]prosecute the accused, the remedy leads to further delay." 61 M.J. at 264.

In sum, the military judge did not abuse his discretion in weighing the R.C.M. 707(d)(1) factors and dismissing this case with prejudice. As this Court has explained, "the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Mott*, 72 M.J. at 329. Under the troubling facts of this case, the military judge's decision to dismiss the case with prejudice meets this standard. Anything less would render Private Hendrix's R.C.M. 707 and speedy trial rights meaningless.

Conclusion

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



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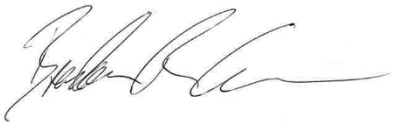

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CERTIFICATE OF COMPLIANCE WITH RULE 21(b)

1. This supplement to the petition for grant of review complies with the type-volume limitation of Rule 21(b) because it contains 8,598 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. _____/AR was delivered to the Court and the Government Appellate Division on 9 February 2018.

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APPENDIX A

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON, HAGLER, and SCHASBERGER
Appellate Military Judges

UNITED STATES, Appellant
v.
Private E2 JAMES B. HENDRIX
United States Army, Appellee

ARMY MISC 20170439

Headquarters, U.S. Army Cyber Center of Excellence and Fort Gordon
Richard J. Henry, Military Judge

For Appellant: Captain Samuel E. Landes, JA (argued); Colonel Tania M. Martin, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Catharine M. Parnell, JA; Captain Samuel E. Landes, JA (on brief).

For Appellee: Captain Benjamin J. Wetherell, JA (argued); Lieutenant Colonel Christopher D. Carrier, JA; Major Brendan R. Cronin, JA; Captain Cody D. Cheek, JA; Captain Benjamin J. Wetherell, JA (on brief).

14 December 2017

MEMORANDUM OPINION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAGLER, Judge:

Appellee was charged with two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012 & Supp. III 2016) [hereinafter UCMJ]. At a pretrial hearing, appellee moved to dismiss with prejudice the charge and its specifications for a Rule for Courts-Martial [hereinafter R.C.M.] 707 speedy-trial violation. The military judge granted the motion. In reaching his decision, the military judge concluded the convening authority's previous dismissal of the charge was a subterfuge.

The case is before this court pursuant to a government appeal of a military judge's ruling in accordance with Article 62, UCMJ. We find the military judge clearly erred when concluding the convening authority's dismissal of the charge was a subterfuge. We further find the military judge abused his discretion in dismissing the charge with prejudice. We take appropriate action in our decretal paragraph.

BACKGROUND

Private (PV2) EW made an unrestricted report to Criminal Investigation Command claiming appellee sexually assaulted her on 22 March 2016. On 29 November 2016, appellee's commander preferred a charge, and on 6 January 2017, a preliminary hearing was conducted, in which PV2 EW did not participate. During the investigation and pretrial phases of this case, PV2 EW, through her special victim counsel (SVC), vacillated on whether she would or would not be willing to participate as a witness in a court-martial against appellee.

Ultimately, on 21 March 2017, the SVC provided a "Victim Input" memorandum to government counsel in which he represented, "[a]t this time, it is [PV2 EW's] stated preference and desire that this matter not be referred to a General Court-martial, and instead, she respectfully requests the chain of command convene an Administrative Separation Board . . . ." Further, the SVC stated:

> [PV2 EW] does not wish to participate as a witness at both a Motion Hearing and Trial. A court-martial would require [PV2 EW] to be subjected to an invasive cross-examination and risk the disclosure of her mental health records. In addition, since reporting these allegations, [PV2 EW] has begun the difficult process of rebuilding her life. She has gotten married and is in the process of being medically retired from the Army. She does not wish to revisit everything that happened to her. An Administrative Separation Board would not require the same level of participation as a court-martial, but would still hold the subject accountable. Moreover, it would yield a more timely resolution. [Private EW] fully understands and is satisfied with the Administrative Separation Board process and believes it is an appropriate way to adjudicate and resolve this matter.

On 2 April 2017, government counsel notified appellee's trial defense counsel that the convening authority intended to dismiss the charge and its specifications. On 14 April 2017, the convening authority, on the advice of his staff judge advocate (SJA), dismissed the charge and its specifications and released the case to the subordinate commander for disposition. Four days after the dismissal, PV2 EW's

SVC notified government counsel that PV2 EW was now willing to testify. Three days later, appellee's company commander re-preferred the same charge against appellee.

The subordinate commander adopted the previous preliminary hearing findings, and the convening authority referred the case to a general court-martial on 11 May 2017. On 4 June 2017, appellee filed a motion to dismiss for a R.C.M. 707 speedy-trial violation. The military judge heard evidence on the motion following appellee's arraignment on 8 June 2017.

On 27 July 2017, the military judge ruled on the motion in writing, concluding the convening authority's dismissal occurred three days after the 120-day speedy-trial clock under R.C.M. 707 had run. In his ruling on the motion, the military judge made thirty "Factual Findings." Of particular note are the following:

> 20. 14 April 2017 – Based on the advice of Government counsel, the [convening authority] dismissed the charge and its specifications without prejudice.[1] The [convening authority] also released the authority to dispose of [appellee's] misconduct to his subordinate commanders.
>
> 21. 18 April 2017 – Following the dismissal of the charge, [PV2 EW], through her SVC, communicated to the Government that she had changed her mind, was now willing to testify, and desired that the allegations be referred to a General Court-Martial.
>
> 22. 21 April 2017 – [Appellee's] company commander preferred an identical charge with identical specifications as had been previously preferred.

Although he did not state so explicitly, it is clear from his ruling that the military judge believed the convening authority's dismissal of the previous charge violated R.C.M. 707, as it occurred after the 120-day clock had run:

> This Court finds that, assuming *en arguendo* that the 120-day clock was not surpassed strictly based on the numbers, it was still violated because the re-preferral of the exact same charges

[1] The military judge found the convening authority's dismissal was "[b]ased on the advice of Government counsel . . . ." This finding fails to reflect that the SJA provided written advice on disposition to the convening authority on 14 April 2017, including his recommendation to dismiss without prejudice and to return the case to the special court-martial convening authority for disposition.

> was subterfuge and the clock did not restart. This Court was notified of the latest referral on 17 May 2017. This would be Day 156 according to the Court's calculations. Therefore, as [appellee] was not brought to trial/arraigned until 8 June 2017, the 120-day clock has been surpassed.

We read the military judge's holding to contain two separate conclusions of law: 1) the convening authority's dismissal of the original charge after the 120-day clock had run is a violation of R.C.M. 707; and 2) the dismissal was a subterfuge and did not restart the 120-day clock, thus, the clock continued to run from the time of the initial preferral. We find both conclusions of law to be erroneous, as neither comports with current case law nor follows from the facts in the record.

LAW AND DISCUSSION

A. Standards of Review

Under Article 62, UCMJ, we are limited to "reviewing the military judge's decision only with respect to matters of law," and are "bound by the military judge's findings of fact unless they were clearly erroneous . . . ." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007). We review the military judge's conclusions of law de novo. *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006) (quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)). We review the military judge's ultimate remedy—dismissal with prejudice—for abuse of discretion. *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999) (citing *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1996)).

B. Applicable Law

A convening authority's dismissal of a charge is a subterfuge when the sole purpose of the dismissal is to avoid the running of the 120-day speedy-trial clock. *United States v. Robison*, 2011 CCA LEXIS 381, at *4 (Army Ct. Crim. App. 2 Dec. 2011) (summ. disp.) (citing *United States v. Robinson*, 47 M.J. 506, 511 (N.M. Ct. Crim. App. 1997). Absent a subterfuge, once charges are dismissed, the speedy-trial clock is restarted. *United States v. Anderson*, 50 M.J. 447, 448 (C.A.A.F. 1999).

R.C.M. 707(d)(1) lays out the factors a court shall consider in determining a remedy for a failure to comply with the rule: 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.

C. Review and Conclusions of Law

1. Was the convening authority's dismissal a subterfuge?[2]

Merriam-Webster defines "subterfuge" as "deception by artifice or stratagem in order to conceal, escape, or evade." *Subterfuge*, https://www.merriam-webster.com/dictionary/subterfuge (last updated 11 Dec. 2017). Military appellate courts have found a dismissal of a charge is subterfuge if its "sole purpose" is to avoid a speedy-trial violation, and that such a dismissal does not reset the 120-day speedy-trial clock. Thus, if the convening authority's 14 April 2017 dismissal was a subterfuge, it would not stop the R.C.M. 707 speedy-trial clock. If it was not a subterfuge, then the speedy-trial clock was reset by the second preferral of the charge, and specifications on 21 April 2017.

Although the military judge concluded the convening authority's dismissal was a subterfuge, neither his findings nor the record reveals any deception or underlying purpose to avoid the speedy-trial clock. On the contrary, the record contains ample support to conclude the convening authority's dismissal, and the subsequent decision to re-prefer, had a perfectly valid reason: the availability of evidence at trial.

The convening authority made his decision after receiving his SJA's advice, which clearly laid out the rationale for recommending dismissal: "[PV2 EW's] testimony is essential to prove, beyond a reasonable double, that [appellee] committed sexual assault. . . . 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."

The military judge's ruling acknowledges this motive: "The driving force behind the dismissal and re-preferral was the changing willingness of [PV2 EW] to participate in the court-martial." But to support his finding of subterfuge, the military judge found that the government's purpose in dismissing *without prejudice* in this case was to stop the clock and preserve the ability to prosecute at a later time. This purpose does not strike us as evidence of deception or a concealed purpose to work around R.C.M. 707. After all, the whole point in a "without prejudice" dismissal is to allow the government to reinstitute proceedings "against the accused for the same offense at a later date." *See* R.C.M. 707(d)(1).* Under the military

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[2] We review the military judge's determination that the convening authority's dismissal was subterfuge on the facts presented, rather than the more general situation in which the convening authority was motivated by Dep't of Def. Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (28 Mar. 2013).

* Corrected

judge's rationale, any such dismissal "without prejudice" would tend to show subterfuge.

This approach misapplies the case law on subterfuge. 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. *Robison*, 2011 CCA LEXIS, at *4 (citing *Robinson*, 47 M.J. at 511). The military judge's own finding that PV2 EW's changing willingness to participate was the "driving force" shows the sole purpose of dismissal was not to avoid the speedy-trial clock.

As further evidence of subterfuge, the military judge found that during the period between dismissal and re-preferral, "No new evidence was obtained, no new crimes were charged. The only difference was the change of heart of [PV2 EW]." Yet his finding overlooks the significance of PV2 EW's testimony and that without it, the government would not have sufficient evidence available at trial. After dismissal, PV2 EW's decision to participate completely changed the viability of the case from the government's perspective. The government's subsequent preferral, even of a mirror-image charge, was entirely consistent with the purpose of dismissal and with the change in circumstances (i.e., sufficient evidence being available for trial) that followed the dismissal.

We find the unavailability of the victim as an essential witness was a legitimate reason to dismiss the charge. The SJA's advice shows this was the basis for the convening authority's decision, and the military judge's finding that PV2 EW's willingness to participate was the "driving force" supports this view. On its face, the convening authority's disposition is clear—he declined to refer the charge, dismissed it without prejudice, and significantly, released disposition authority to a subordinate commander. Nothing in the convening authority's disposition suggests this was simply a mechanism to reset the speedy-trial clock or that he actually intended, at that time, to re-prefer and go forward with the case.

Given the government's valid purpose for dismissal and the absence of any improper motive or deception regarding that purpose, the military judge's conclusion that the dismissal was a subterfuge was clearly erroneous and an abuse of discretion.

As there was no subterfuge, the R.C.M. 707 speedy-trial clock was reset following the second preferral of the charge on 21 April 2017. At the time of arraignment, forty-eight days had elapsed since the second preferral, and there was no R.C.M. 707 speedy-trial violation.

2. *Did the military judge abuse his discretion in dismissing the charge with prejudice?*[3]

As we find no R.C.M. 707 violation in the charge referred to trial, the military judge's dismissal constituted an abuse of discretion. Had we reached a different conclusion (i.e., finding a R.C.M. 707 violation because the convening authority's dismissal was a subterfuge), we would still find the military judge's remedy—dismissal with prejudice—to be an abuse of discretion.

A recurring theme throughout the military judge's ruling as found in Appellate Exhibit VIII is the risk of "perpetual" prosecution or jeopardy:

> Re-preferring the exact same charges a week later and placing [appellee] back under the crucible of a court-martial, is the exact type of perpetual jeopardy both speedy trial and the "subterfuge" doctrine seek to eliminate.
>
> When questioned by this Court, Government counsel acknowledged, because sexual assault has no statute of limitations, under their rationale they could continue to charge and re-charge [appellee] perpetually. As [appellee] stated it, he felt his "rights come second to [PV2 EW's] whims." That cannot be the state of the military justice system.
>
> . . . .
>
> It is a dangerous perception if it appears that an [a]ccused, who is considered innocent, can be perpetually held in a Flagged state and under the perpetual crucible of potential prosecution, simply because an [alleged victim] may change their mind about their participation in court-martial proceedings. This is particularly true when, as in the instant case, an SVC has been assigned and utilized. Further protections of an [alleged victim] cannot come at the expense of the fairness of our system and the rights of [appellee].
>
> . . . .

[3] As noted in appellee's answer to the government's brief, the applicable standard of review is abuse of discretion, not simply error, so we review the military judge's dismissal *with prejudice* for an abuse of discretion.

> [D]ismissing this case without prejudice does nothing to alleviate the speedy trial issue. Doing so would continue to allow the Government to dismiss and re-prefer as they saw fit.

As this theme was prominent in the military judge's discussion of subterfuge and in his ultimate dismissal with prejudice, it offers valuable insight into the military judge's exercise of discretion in this case.

Yet the record contains little support for these statements. There is only the single dismissal by the convening authority and a subsequent referral to general-court-martial less than one month later. There is no basis in the record to conclude the convening authority and military judge would allow the government to withdraw, dismiss, re-prefer, and refer these charges against appellee *ad infinitum*, as the military judge suggests. To give credence to the military judge's assertions, one must assume as fact that appellee would be foreclosed from raising speedy-trial issues at future proceedings. Similarly, we would have to agree with the military judge that PV2 EW's decision to decline or participate as a witness means her "protections" or "whims," as the judge variously described them, outweigh the rights of the accused or the fairness of the system. Finally, we would have to agree with the military judge's position that the SVC's involvement in this case somehow exacerbates the "dangerous perception" of perpetual prosecution.

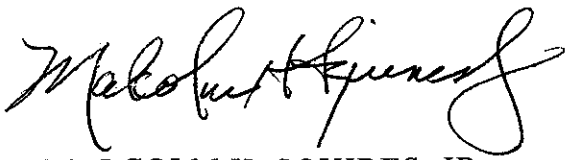
This court does not accept these statements as true or supported by the record. Nor can we give deference to any finding that relies heavily upon them. Cases must be decided on their facts, not on some future or hypothetical fact pattern. It is clear from his ruling that these concerns loomed large in the military judge's decision to dismiss this case with prejudice, a decision we find to be an abuse of discretion.

CONCLUSION

The appeal of the United States pursuant to Article 62, UCMJ, is GRANTED. The ruling by the military judge, dismissing the charge and its specifications with prejudice, is VACATED. The record will be returned to the military judge and convening authority for action not inconsistent with this opinion.

BURTON, Senior Judge, and SCHASBERGER, Judge, concur.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

APPENDIX B

United States v. Doyle

United States Navy-Marine Corps Court of Criminal Appeals

October 28, 2014, Decided

NMCCA 201300442

Reporter
2014 CCA LEXIS 806 *

UNITED STATES OF AMERICA v. JOHN F. DOYLE III, CHIEF ENGINEMAN (E-7), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by *United States v. Doyle, 2014 CAAF LEXIS 1232 (C.A.A.F., Dec. 22, 2014)*

Review denied by *United States v. Doyle, 2015 CAAF LEXIS 150 (C.A.A.F., Feb. 18, 2015)*

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 1 August 2013. Military Judge: CDR John A. Maksym, JAGC, USN. Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan. Staff Judge Advocate's Recommendation: CDR T.D. Stone, JAGC, USN.

Counsel: For Appellant: LT Jennifer L. Myers, JAGC, USN.

For Appellee: LCDR Keith B. Lofland, JAGC, USN; Capt Suzanne M. Dempsey, USMC.

Judges: Before J.A. FISCHER, R.Q. WARD, K.M. MCDONALD, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant pursuant to his pleas, of six specifications of violating a lawful general order (sexual harassment) and five specifications of wrongful sexual contact in violation of Articles 92 and 120, Uniform Code of Military Justice, *10 U.S.C. §§ 892* and *920*. The military judge sentenced the appellant to eight years' confinement, reduction to pay grade E-1, a fine of $50,000.00 and a dishonorable discharge.

In accordance with the pretrial agreement (PTA), the convening authority (CA) approved two years' confinement, a $2,000.00 fine, reduction to pay grade E-1, and the dishonorable discharge. The CA also deferred automatic forfeitures, then waived automatic forfeitures for **[*2]** six months, and suspended both the adjudged

and automatic reduction below pay grade E-5 for six months from the date of his action.

The appellant's sole assignment of error (AOE) claims that the military judge abused his discretion by denying his speedy trial motion under RULE FOR COURT-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012).[1]

After carefully considering the record of trial, the AOE, and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ*.

Background

Prior to trial, the appellant filed a motion to dismiss arguing that the Government's dismissal and repreferral of the original charges amounted to a subterfuge to avoid the remedy under R.C.M. 707(d)(1). The original charges were preferred on 26 October 2012. On 14 January 2013, the charges were dismissed and subsequently repreferred on 16 January 2013 - 81 days after the original charges were preferred. The appellant was arraigned on 13 April 2013. After a hearing, the military judge denied the motion, finding that the charges were dismissed and repreferred **[*3]** to correct an "irregularity"[2] on the original charge sheet, rather than to evade the R.C.M. 707 speedy trial clock.

At no time prior to trial was the appellant confined or restricted.

On 1 August 2013, the appellant pleaded guilty unconditionally pursuant to a PTA.

Waiver

R.C.M. 707(e) states that except when a conditional plea is entered pursuant to R.C.M. 910(a)(2), "a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense." We find that the appellant pleaded guilty unconditionally and, thus, appellant's failure to enter a plea in compliance with R.C.M. 910(a)(2) waived his ability to raise the speedy trial issue with the court. *United States v. Lee, 73 M.J. 166, 170 (C.A.A.F. 2014)*; *United States v. Tippit, 65 M.J. 69, 75 (C.A.A.F. 2007)*.

Speedy Trial

Even assuming *arguendo* that the appellant had preserved the speedy trial issue, we find appellant's AOE to be without merit.

We review a military judge's decision to deny relief under R.C.M. 707 for an abuse of discretion. *United States v. Anderson, 50 M.J. 447, 448 (C.A.A.F. 1999)*. Consequently, we will not overturn the military judge's findings of fact unless they are clearly erroneous. We have considered the military judge's findings and adopt them as our own. We further concur with the

[1] This issue is raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

[2] Record at 78.

military judge that the appellant's motion is without merit.

Here, the military judge found that the dismissal and subsequent **[*4]** repreferral was not a subterfuge to avoid an R.C.M. 707 violation. Rather, the military judge found that correcting the irregularity in the original charge sheet was a legitimate reason for the CA to dismiss and reprefer the charges. *Tippit, 65 M.J. at 80*. We agree.

Thus, we find that the military judge did not abuse his discretion by denying the appellant's motion for speedy trial relief under R.C.M. 707. The record amply supports that the reasons for repreferral were not designed as a subterfuge to avoid an R.C.M. 707 violation. We also agree with the military judge that a new 120-day speedy trial period started on the date the dismissed charges were repreferred.

Conclusion

The findings and the sentence, as approved by the CA, are affirmed.

End of Document

United States v. Robison

United States Army Court of Criminal Appeals

December 2, 2011, Decided

ARMY 20110758

Reporter
2011 CCA LEXIS 381 *; 2011 WL 6135093

UNITED STATES, Appellant v. Private First Class JUSTIN D. ROBISON United States Army, Appellee

Notice: NOT FOR PUBLICATION

Subsequent History: Subsequent appeal at *United States v. Robison, 2012 CAAF LEXIS 274 (C.A.A.F., Mar. 9, 2012)*

Prior History: **[*1]** Headquarters, III Corps and Fort Hood. Patricia Lewis, Military Judge. Colonel* Stuart W. Risch, Staff Judge Advocate.

Counsel: For Appellant: Colonel Patricia A. Ham, JA; Lieutenant Colonel Imogene M. Jamison, JA; Lieutenant Colonel Peter Kageleiry, Jr.; Major Jacob D. Bashore, JA (on brief).

For Appellee: Major Amber J. Williams, JA; Captain Chad M. Fisher, JA (on brief).

Judges: Before KERN, BERG and YOB Appellate Military Judges.

Opinion by: YOB

Opinion

SUMMARY DISPOSITION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO ARTICLE 62 UNIFORM CODE OF MILITARY JUSTICE

YOB, Judge:

Private First Class Justin Robison, appellee, left his unit at Fort Hood, Texas, on March 11, 2001. On May 9, 2001, his commander preferred a charge against appellee for desertion under Article 85, Uniform Code of Military Justice, *10 U.S.C. § 885*, [hereinafter UCMJ]. On December 27, 2010, civilian authorities apprehended appellee and returned him to military control pursuant to an outstanding warrant for the desertion charge. On the day appellee returned to military control, the Rule for Courts-Martial (R.C.M.) 707 speedy trial clock for the nine-year-old charge began to run.

On March 29, 2011, ninety-three days after appellee returned to **[*2]** military control, the special court-martial convening authority dismissed the May 9, 2001 desertion charge. On April 26, 2011, the summary court-martial convening authority preferred a new desertion charge against appellee. After appellee waived his right to an investigation pursuant to *Article 32, UCMJ*, the general court-martial convening authority, on June 16, 2011, referred the

* Corrected

charge to a general court-martial.

At arraignment, appellee brought a speedy trial motion under R.C.M. 707. On August 26, 2011, the military judge granted the R.C.M. 707 motion, issued findings and dismissed the charge with prejudice. Pursuant to *Article 62, UCMJ*, government counsel appealed the ruling of the military judge that terminated the proceedings. We have considered the record from the initial proceedings and briefs submitted by the parties in reaching our conclusion that the military trial judge erred in dismissing the charge in this case with prejudice for a violation of appellee's right to a speedy trial.

Under *Article 62, UCMJ*, we are limited to "reviewing the military judge's decision only with respect to matters of law," and are "bound by the military judge's finding of fact unless they were **[*3]** clearly erroneous." *United States v. Cossio, 64 M.J. 254 (C.A.A.F. 2007)*. We review the military judge's ultimate decision to dismiss the charge in response to the R.C.M. 707 speedy trial motion for an abuse of discretion. *United States v. Anderson, 50 M.J. 447 (C.A.A.F. 1999)*, citing *United States v. Hatfield, 44 M.J. 22 (C.A.A.F. 1996)*. Abuse of discretion by a military judge occurs when the judge uses incorrect legal principles or the judge's application of correct legal principles to the facts is clearly unreasonable. *United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)* (citing *United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 1998))*. Applying this standard of review and after considering the record of trial and the briefs submitted by the parties, we find the military judge incorrectly applied the law related to R.C.M. 707 speedy trial claims and erroneously dismissed the charge with prejudice.

Appellee was not under pretrial restraint when charges were dismissed or at anytime thereafter. Therefore, under R.C.M. 707(b)(3)(A), the speedy trial clock that started when appellee returned to military control on December 27, 2010, stopped on March 29, 2011, when appellee's special **[*4]** court-martial convening authority dismissed the charge. Absent a finding that the dismissal was a subterfuge, the speedy trial clock would be considered reset when, after the government dismissed the old charge, it preferred a new charge on April 26, 2011. *United States v. Tippit, 65 M.J. 69, 79 (C.A.A.F. 2007)* (citing *United States v. Anderson, 50 M.J. 447, 448 (C.A.A.F. 1999))*.

We agree with the holding of the Navy-Marine Court of Criminal Appeals that a convening authority's dismissal of a charge is only a subterfuge when the sole purpose of the dismissal is to avoid the running of the 120-day speedy trial clock. *United States v. Robinson, 47 M.J. 506, 511 (N.M. Ct. Crim. App. 1997)*. This court has held that dismissal of a charge for the purpose of securing additional documentary evidence permits the restart of the R.C.M. 707 speedy trial clock. *United States v. Hayes, 37 M.J. 769, 772 (A.C.M.R. 1992)*.

The instant record documents at least two legitimate reasons for the government to dismiss the old charge: (1) to prefer a new charge with newly acquired information in an additional element, and (2) to secure

additional evidence. There is no evidence that the government's sole reason **[*5]** for dismissal was to avoid the running of the speedy trial clock.

The new desertion charge significantly differed from the original, nine-yearold charge. The new charge included an additional element alleging that the desertion was terminated by apprehension and setting forth the date of termination. We conclude the government needed to dismiss the old charge to add this element. In addition, it is clear the government was actively if not expeditiously obtaining additional documentary evidence concerning appellee's service. This is understandably difficult to obtain given the long period of time appellee absented himself from military control. Moreover, appellee bears part of the responsibility for this hunt for additional records, given that appellee represented to trial counsel in February 2011, through a letter from his retained civilian counsel, that appellee had actually been discharged from the Army and that he was thereby incorrectly accused and charged with an offense based on his absence.

The military trial judge found that the government created "the appearance of a subterfuge" in dismissing the charge, as opposed to analyzing whether the dismissal constituted an actual subterfuge. **[*6]** In this respect, the military judge erred by applying an incorrect legal standard. Applying the correct analysis, we find the R.C.M. 707 speedy trial clock stopped at dismissal of the old desertion charge, and started anew with preferral of the new desertion charge.

We conclude that the government's purpose in dismissing the old charge was not to stop the speedy trial clock. Given this holding, we need not consider whether any speedy trial violation resulted in prejudice to appellee or whether the prejudice resulted in a Constitutional violation of appellee's *Sixth Amendment* right to a speedy trial. There is no need for a prejudice analysis because there was no R.C.M. 707 speedy trial violation.

The military trial judge's dismissal with prejudice of the April 26, 2011 charge and its specification constituted an abuse of discretion. The ruling by the military trial judge on the defense's R.C.M. 707 motion dismissing the charge against appellee with prejudice is reversed. The record of trial is returned to The Judge Advocate General of the Army for remand to the military judge presiding over appellee's court-martial for further action consistent with this opinion.

Senior Judge KERN and **[*7]** Judge BERG concur.

End of Document

United States v. Spratling

United States Navy-Marine Corps Court of Criminal Appeals

July 31, 2014, Decided

NMCCA 201400060

Reporter
2014 CCA LEXIS 534 *; 2014 WL 3778694

UNITED STATES OF AMERICA v. ZACHARY W. SPRATLING, GAS TURBINE SYSTEM TECHNICIAN (MECHANICAL) THIRD CLASS (E-4), U.S. NAVY

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 18 October 2013. Military Judge: CAPT Robert Blazewick, JAGC, USN. Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL. Staff Judge Advocate's Recommendation: CDR N.O. Evans, JAGC, USN.

Counsel: For Appellant: LT Jessica Fickey, JAGC, USN.

For Appellee: Maj Paul Ervasti, USMC; Maj David N. Roberts, USMC.

Judges: Before J.R. MCFARLANE, K.M. MCDONALD, M.K. JAMISON, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of committing an indecent act and receiving child pornography in violation of Articles 120 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 920* and *934*. The members sentenced the appellant to confinement for a period of 60 days and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In his sole assignment of error, the appellant argues that the military judge erred in not dismissing Charge I (receipt of child pornography) based on a violation of the appellant's speedy trial rights under RULE FOR COURT-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).[1] After consideration of the pleadings of the parties **[*2]** and the record of trial, we conclude that the findings and sentence are correct in law and fact and that no error

[1] This assignment of error is raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c)*, UCMJ.

Background

On 14 January 2013, the Government preferred an initial set of charges against the appellant. Appellate Exhibit XXIV. This included the following charges: indecent act under *Article 120*, UCMJ, for sending KS, a minor, a photograph of a penis; receipt of five images of child pornography (nude images of KS) under *Article 134*, UCMJ; and, indecent act under *Article 134*, UCMJ, for sending KS, via interstate commerce, a digital image of a penis.

Following a pretrial investigation under *Article 32*, UCMJ, the Government preferred substantially the same charges on 18 March 2013 and the CA referred these charges to a general court-martial on 25 March 2013.[2] The appellant was arraigned on this set of charges on 22 April 2013.

As part of the pretrial litigation during his initial court-martial, the appellant moved to dismiss Charge I (*Article 120*, UCMJ) and its sole specification based on the claim that it was unreasonably multiplied with Specification 2 of Charge II (*Article 134*, UCMJ). AE II at 101. The military judge agreed and without consulting the Government, directed the dismissal, without prejudice, of Charge I and its sole specification as unreasonably multiplied with Specification 2 of Charge II. *Id.* at 280.

On 30 June 2013, the Government preferred **[*4]** two new charges against the appellant. Charge I (*Article 134*, UCMJ) alleged that the appellant received four images of child pornography and Charge II (*Article 120*, UCMJ) alleged an indecent act by the appellant for sending a digital image of a penis to KS. Based on the *Article 34*, UCMJ, advice of the staff judge advocate, the CA referred these charges on 1 July 2013 to the same general court-martial (GCMCO 03-13) as those charges preferred on 18 March 2013.[3]

On 2 July 2013, the Government served the appellant with the new set of charges. On 3 July 2013, the appellant moved for a continuance until 19 July 2013. Over Government opposition, the military judge granted the appellant's request for a continuance. On 29 July 2013, the appellant was arraigned on the new set of charges.

At his arraignment, the appellant moved to dismiss the new set of charges based on an improper referral.[4] AE IV. The military

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[2] Specification 1 of Charge II preferred on 18 March 2013 alleged receipt of six images of child pornography while the specification preferred on 14 January 2013 alleged receipt of five images of child **[*3]** pornography. AE XXIV. Other than a change to the date in specification 1 of Charge II and an addition of the number "4" to identify a particular digital image in that specification, the charges preferred on 18 March 2013 were substantially the same as the charges preferred on 14 January 2013; however, only the charges preferred on 18 March 2013 were actually referred by the CA and subsequently dismissed. Charge Sheet of 18 Mar 2013. For purposes of this assignment of error, the appellant argues that the speedy trial clock started on 14 January 2013. Because the Government did not contest this date, we will accept without deciding the appellant's argument of a 14 January 2013 start date.

[3] On 9 July 2013, at the direction of the CA, the trial counsel withdrew and dismissed Charge II and its two specifications (preferred on 18 March 2013 and referred on 25 March 2013). AE XXIV at 10-12.

[4] The appellant's motion to dismiss for improper referral alleged a

judge denied the motion. Record at 81; AE VI. The appellant submitted a new proposed Case Management Order **[*5]** (CMO) that set new trial milestones. The military judge approved the CMO and, based on the request by the appellant, set the case for trial on 15 October 2013. AE I; AE LXX at 3.

On 6 September 2013, the appellant, for the first time, moved to dismiss the charges based on a violation of his speedy trial rights under R.C.M. 707 and the *6th Amendment*. AE XXIV. On 2 October 2013, the military judge denied the motion. AE XXVI. The appellant moved for reconsideration based on the fact that trial defense counsel had been denied the opportunity to present oral argument. The military judge reconsidered, heard oral argument on the motion, and essentially ratified his earlier 2 October 2013 ruling. AE LXX.

Speedy Trial Claim

On appeal, the appellant argues that the military judge erred in not dismissing the charge alleging receipt of child pornography, based on violation of his speedy trial rights under R.C.M. 707.[5] Appellant's Brief at 8. Specifically, the appellant argues **[*6]** that because the dismissal of the child pornography charge was a "subterfuge to avoid exceeding the 120 day time period" under R.C.M. 707, the speedy trial clock was not reset by the 30 June 2013 preferral. Appellant's Brief at 8. Instead, the appellant argues that he was not brought to trial on the child pornography charge until day 185 — violating his right to a speedy trial under R.C.M. 707. We disagree with the appellant's underlying premise and his speedy trial calculation.

We review *de novo* a military judge's conclusion of whether an accused received a speedy trial under R.C.M. 707. *United States v. Cooper, 58 M.J. 54, 57-58 (C.A.A.F. 2003)*; *United States v. Doty, 51 M.J. 464, 465 (C.A.A.F. 1999)*. "The military judge's findings of fact are given 'substantial deference and will be reversed only for clear error.'" *Doty, 51 M.J. at 465* (quoting *United States v. Edmond, 41 M.J. 419, 420 (C.A.A.F 1995))*. Having examined the record of trial, including the extensively litigated pretrial **[*7]** motion, we find that the military judge's findings of fact are clearly supported by the record. AE LXX at 2-3. Accordingly, we adopt them as our own.

The appellant's argument is premised on whether the dismissal of the child pornography charge was a subterfuge to avoid violating R.C.M. 707. In this case, the military judge specifically ruled that the trial counsel's dismissal on 9 July 2013 of the child pornography charge at the direction of the CA, was neither improper nor a subterfuge. AE LXX at 4-6. We agree.

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subterfuge by the Government that essentially argued that the CA's decision to re-refer charges had the effect of overturning the military judge's prior ruling that had dismissed the ***Article 120*** Charge. AE IV.

[5] The appellant does not argue a violation of his speedy trial rights under either the ***Fifth*** or ***Sixth Amendment***. Additionally, the appellant concedes that because the indecent act charge under ***Article 120,*** UCMJ, was dismissed by the military judge, his speedy trial rights were not violated as to that charge. Appellant's Brief of 7 Apr 2014 at 8 n.8. Thus, we consider only the speedy trial implications of Charge I (receipt of child pornography).

Absent a subterfuge, the speedy-trial clock is reset once charges are dismissed. *United States v. Anderson, 50 M.J. 447, 448 (C.A.A.F. 1999)*; R.C.M. 707(b)(3)(A). If charges are re-preferred, a new 120-day period begins on the date of re-preferral. *United States v. Tippit, 65 M.J. 69, 73 (C.A.A.F. 2007)*; R.C.M. 707(b)(3)(A).

In this case, the appellant was not subject to any type of pretrial restraint. The child pornography charge (Charge I) was preferred on 30 June 2013 and the appellant was brought to trial on that charge on 29 July 2013. The military judge excluded the dates from 8 until 19 July 2013 based on a defense-requested continuance. Thus, for accountability under R.C.M. 707, the military judge concluded that the appellant was brought to trial on day 13. R.C.M. 707(c) (stating that defense pretrial delays approved by the military judge shall be excluded for purposes of calculating **[*8]** the speedy trial requirements under R.C.M. 707). We agree. Accordingly, the appellant was clearly brought to trial on the child pornography charge within the 120-day requirement outlined in R.C.M. 707.

Forum Request

Although not raised by the appellant as an assignment of error, we note that the military judge did not obtain on the record the appellant's personal request for trial by enlisted members. The appellant submitted a request signed by his trial defense counsel; however, it was not personally signed by the appellant. AE LXXV. While this failure represented a violation of *Article 25(c)(1)*, UCMJ, under the circumstances of this case, there was substantial compliance with *Article 25* and the error did not prejudice the substantial rights of the appellant. *United States v. Townes, 52 M.J. 275, 276-77 (C.A.A.F. 2000)*.

Conclusion

The findings and the sentence as approved by the CA are affirmed.[6]

End of Document

[6] Although not raised by the appellant, there remains a question of whether the military judge properly calculated the maximum punishment of confinement for twenty-five years. Record at 834. The appellant's offenses occurred between September and October of 2010. At that time the maximum punishment for receipt of child pornography was confinement for twenty years. Title *18 U.S.C. § 2252A(a)(2)*. However, **[*9]** on 13 December 2011, the President issued Executive Order (EO) 13593, which amended the Manual to include listing child pornography as an offense under *Article 134*, UCMJ. The EO set the maximum punishment for receipt of child pornography at ten years. Rule for Court-Martial 1003 is silent on the question of whether a "listed" offense or "closely related" offense must be in Part IV of the Manual at the time the offenses are committed *and* at the time of trial to apply for purposes of sentence calculation. If R.C.M. 1003 requires both, the military judge correctly advised the members using the analogous child pornography offense under Title *18 U.S.C. § 2252A(a)(2)*. If, however, R.C.M. 1003 only requires that the "listed" or "closely related" offense be in the Manual at the time of trial, the military judge should have advised the members that the appellant was facing confinement for fifteen years (ten years for receipt of child pornography and five years for committing an indecent act). We need not answer this question because even assuming that the military erred in his maximum punishment calculation, we find that based on the sentence adjudged, the maximum sentence calculation was of no overriding concern or influence on the members sufficient to demonstrate **[*10]** a colorable claim of prejudice. *Art. 59(a)*, UCMJ.

APPENDIX C

Army Regulation 635–200

Personnel Separations

Active Duty Enlisted Administrative Separations

Headquarters
Department of the Army
Washington, DC
19 December 2016

UNCLASSIFIED

Headquarters
Department of the Army
Washington, DC
19 December 2016

*Army Regulation 635–200

Effective 19 December 2016

Personnel Separations

Active Duty Enlisted Administrative Separations

By Order of the Secretary of the Army:

MARK A. MILLEY
General, United States Army
Chief of Staff

Official:

GERALD B. O'KEEFE
Administrative Assistant to the Secretary of the Army

History. This publication is a mandated revision.

Summary. This regulation implements DODI 1332.14 and DODI 1332.30. Statutory authority for this regulation is established under Sections 1169, 12313(a), and 12681, Title 10, United States Code.

Applicability. This regulation applies to the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve, unless otherwise stated.

Proponent and exception authority. The proponent of this regulation is the Deputy Chief of Staff, G–1. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency, in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and for- warded through their higher headquarters to the policy proponent. Refer to AR 25–30 for specific guidance.

Army management control process. This regulation contains management control provisions in accordance with AR 11-2, but it does not identify key management controls that must be evaluated.

Supplementation. Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval from the Deputy Chief of Staff, G–1 (DAPE–MPE), 300 Army Pentagon, Washington, DC 20310–0300.

Suggested improvements. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Deputy Chief of Staff, G–1 (AHRC–PDP–T), 200 Stovall Street, Alexandria, VA 2332–0418.

Distribution. This regulation is available in electronic media only and is intended for command levels A, B, C, D, and E for the active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve.

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*This publication supersedes AR 635-200, dated 6 June 2005.

(1) Approve separation when recommended by the board if the criteria in b(1) through (3), above, are established, and direct the characterization of the Soldier's service per paragraph 9–4. The separation authority may not authorize the issuance of a discharge certificate of less favorable character than that recommended by the board.
(2) Approve retention when recommended by the board.
(3) Disapprove a recommendation of separation by the board and direct retention of the Soldier.
d. For discharge suspension, see paragraph 1–18.

9–6. Authority for separation
The authority for separation (see para 1–19) will be included in directives or orders directing Soldiers to report to the appropriate separation transfer point (STP) for separation.

9–7. Confidentiality and release of records
Records of separation proceedings and action under this chapter, including separation documents referencing reason and authority for separation, are confidential by operation of Federal law. Records may be disclosed or released only per AR 600–85, chapter 6, sections III and IV.

Chapter 10
Discharge in Lieu of Trial by Court-Martial

10–1. General
a. A Soldier who has committed an offense or offenses, the punishment for which under the UCMJ and the Manual for Courts-Martial, 2002 (MCM 2002), includes a bad conduct or dishonorable discharge, may submit a request for discharge in lieu of trial by court-martial.
(1) The provisions of RCM 1003(d), MCM 2002 do not apply to requests for discharge per this chapter unless the case has been referred to a court-martial authorized to adjudge a punitive discharge.
(2) The discharge request may be submitted after court-martial charges are preferred against the Soldier or, where required, after referral, until final action by the court-martial convening authority.
(3) A Soldier who is under a suspended sentence of a punitive discharge may likewise submit a request for discharge in lieu of trial by court-martial.
b. The request for discharge in lieu of trial by court-martial does not prevent or suspend disciplinary proceedings. Whether proceedings will be held in abeyance pending final action on a discharge request per this chapter is a matter to be determined by the commander exercising general court-martial jurisdiction over the individual concerned.
c. If disciplinary proceedings are not held in abeyance, the GCMCA may approve the Soldier's request for discharge in lieu of trial by court-martial after the Soldier has been tried. In this event, the officer who convened the court in his/ her action on the case should not approve any punitive discharge adjudged. The officer should approve only so much of any adjudged sentence to confinement at hard labor or hard labor without confinement as has been served at the time of the action.

10–2. Personal decision
a. Commanders will ensure that a Soldier is not coerced into submitting a request for discharge in lieu of trial by court-martial. The Soldier will be given a reasonable time (not less than 72 hours) to consult with consulting counsel (see para 3–7*h*) and to consider the wisdom of submitting such a request for discharge.
b. Consulting counsel will advise the Soldier concerning—
(1) Elements of the offense(s) charged.
(2) Burden of proof.
(3) Possible defenses.
(4) Possible punishments.
(5) Provisions of this chapter.
(6) Requirements of volunteerism.
(7) Type of discharge normally given under the provisions of this chapter.
(8) Rights regarding the withdrawal of the Soldier's request.
(9) Loss of veterans' benefits.
(10) Prejudice in civilian life based upon the characterization of discharge. Consulting counsel may advise the Soldier regarding the merits of this separation action and the offense pending against the Soldier.

c. After receiving counseling (see b, above), the Soldier may elect to submit a request for discharge in lieu of trial by court-martial. The Soldier will sign a written request, certifying that he/she
(1) Has been counseled.
(2) Understands his/her rights.
(3) May receive a discharge under other than honorable conditions.
(4) Understands the adverse nature of such a discharge and the possible consequences.
d. The Soldier also must be advised that pursuant to a delegation of authority per paragraph 1–19*l*, a request for discharge in lieu of trial by court-martial may be approved by the commander exercising special court-martial convening authority (a lower level of approval than the GCMCA or higher authority), but the authority to disapprove a request for discharge in lieu of trial by court-martial may not be delegated.
e. The Soldier's written request will also include an acknowledgment that he/she understands the elements of the offense(s) charged and is guilty of the charge(s) or of a lesser included offense(s) therein contained which also authorizes the imposition of a punitive discharge. (See fig 10–1, para 2.)
(1) The consulting counsel will sign as a witness, indicating that he/she is a commissioned officer of The Judge Advocate General's Corps, unless the request is signed by a civilian counsel representing the Soldier.
(2) A Soldier may waive consultation with counsel. If the Soldier refuses to consult with counsel, a statement to this effect will be prepared by the counsel and included in the file. The Soldier will also state that the right to consult with counsel was waived.
(3) Separation action may then proceed as if the Soldier has consulted with a counsel, or the general court-martial convening authority may disapprove the discharge request.

10–3. Preparation and forwarding

a. A request for discharge in lieu of trial by court-martial will be submitted in the format shown in figure 10–1.
b. The discharge request will be forwarded through channels to the separation authority specified in paragraph 1–19*a* or paragraph 1–19*c*(5) and 1–19*l*.
(1) The discharge request must be reviewed by the office of the staff judge advocate prior to approval by the separation authority specified in paragraphs 1–19*c*(5) and 1–19*l*.
(2) Commanders through whom the request is forwarded will recommend either approval or disapproval and state the reasons for the recommendation.
(3) If approval is recommended, the type discharge to be issued will be recommended also.
c. The following data will accompany the request for discharge:
(1) A copy of the court-martial Charge Sheet (DD Form 458).
(2) Report of medical examination and mental status evaluation, if conducted.
(3) A complete copy of all reports of investigation.
(4) Any statement, documents, or other matter considered by the commanding officer in making his/her recommendation, including any information presented for consideration by the Soldier or consulting counsel.
(5) A statement of any reasonable ground for belief that the Soldier is, or was at the time of misconduct, mentally defective, deranged, or abnormal. When appropriate, evaluation by a psychiatrist will be included.
d. When a Soldier is under a suspended sentence of discharge, a copy of the court-martial orders, or a summary of facts that relate to the conduct upon which the request is predicated, will be forwarded.

10–4. Consideration of request

a. Commanders having discharge authority per paragraph 1–19 must be selective in approving requests for dis- charges in lieu of trial by court-martial. The discharge authority should not be used when the circumstances surrounding an offense warrant a punitive discharge and confinement. Nor should it be used when the facts do not establish a serious offense, even though the punishment, under the Uniform Code of Military Justice, may include a bad conduct or dishonorable discharge.
b. Consideration should be given to the Soldier's potential for rehabilitation, and his/her entire record should be reviewed before taking action per this chapter.
c. Use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation from the Service and that the Soldier has no rehabilitation potential.

10–5. Withdrawal of request for discharge

Unless the trial results in an acquittal or the sentence does not include a punitive discharge, even though one could have been adjudged by the court, a request for discharge submitted per this chapter may be withdrawn only with the consent of the commander exercising general court-martial jurisdiction. (See chap 2, sec III for provisions for completing proceedings initiated before a Soldier departs absent without leave.)

10–6. Medical and mental examination
A medical examination is not required but may be requested by the Soldier under AR 40–501, chapter 8.

10–7. Discharge authority
The separation authority will be a commander exercising general court-martial jurisdiction or higher authority. (See para 1–19*a*.) However, authority to approve discharges may be delegated to the commander exercising special court- martial convening authority over the Soldier (see paras 1–19*c*(5) and 1–19*l*) in cases in which all of the following apply to the Soldier. He/she—

a. Has been AWOL for more than 30 days.
b. Has been dropped from the rolls of his/her unit as absent in desertion.
c. Has been returned to military control.
d. Currently is at the PCF.
e. Is charged only with AWOL for more than 30 days.

10–8. Types of discharge, characterization of service
a. A discharge under other than honorable conditions normally is appropriate for a Soldier who is discharged in lieu of trial by court-martial. However, the separation authority may direct a general discharge if such is merited by the Soldier's overall record during the current enlistment. (See chap 3, sec II.)
b. For Soldiers who have completed entry-level status, characterization of service as honorable is not authorized unless the Soldier's record is otherwise so meritorious that any other characterization clearly would be improper.
c. When characterization of service under other than honorable conditions is not warranted for a Soldier in entry- level status, service will be uncharacterized.

10–9. Disposition of supporting documentation
The request for discharge in lieu of trial by court-martial will be filed in the MPRJ or local file, as appropriate, as permanent material and disposed of per AR 600–8–104. Material should include appropriate documentation (see para 10–3*c*) and the separation authority's decision. Statements by the Soldier or Soldier's counsel submitted in connection with a request per this chapter are not admissible against a Soldier in a court-martial except as authorized under Military Rule of Evidence 410, MCM 2002.

APPENDIX D

Department of Defense
INSTRUCTION

NUMBER 6495.02
March 28, 2013

USD(P&R)

SUBJECT: Sexual Assault Prevention and Response (SAPR) Program Procedures

References: See Enclosure 1

1. PURPOSE. This Instruction, in accordance with the authority in DoD Directives (DoDD) 5124.02 and 6495.01 (References (a) and (b)):

a. Established policy and implements Reference (b) and assigns responsibilities and provides guidance and procedures for the SAPR Program (see Glossary in Reference (b)).

b. Establishes the processes and procedures for the Sexual Assault Forensic Examination (SAFE) Kit.

c. Establishes the multidisciplinary Case Management Group (CMG) (see Glossary) and provides guidance on how to handle sexual assault.

d. Establishes SAPR minimum program standards, SAPR training requirements, and SAPR requirements for the DoD Annual Report on Sexual Assault in the Military consistent with the DoD Task Force Report on Care for Victims of Sexual Assault (Reference (c)) and pursuant to References (a) and (b), section 113 and chapter 47 of title 10, United States Code (U.S.C.) (Chapter 47 is also known and hereinafter referred to as "The Uniform Code of Military Justice (UCMJ)") (Reference (d)), and Public Laws 106-65, 108-375, 109-163, 109-364, 110-417, 111-84, 111-383 and 112-81 (References (e) through (l)).

e. Incorporates and cancels Directive-Type Memorandum (DTM) 11-063 (Reference (m)) and DTM 11-062 (Reference (n)).

2. APPLICABILITY. This Instruction applies to:

a. OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereinafter referred to collectively as the "DoD Components").

a. The DSAID and the DD Form 2910, referred to in this Instruction, have been assigned Office of Management and Budget control number 0704-0482.

b. The annual report regarding sexual assaults involving Service members and improvement to sexual assault prevention and response programs referred to in paragraph 6.v. of Enclosure 2; paragraphs 1.i., 1.j., and 1.l. of Enclosure 3; paragraph 3.h.(2) of Enclosure 5; and sections 1 and 4 of Enclosure 12 of this Instruction is submitted to Congress in accordance with section 1631(d) of Reference (k) and is coordinated with the Assistant Secretary of Defense for Legislatives Affair in accordance with the procedures in DoDI 5545.02 (Reference (t)).

c. The quarterly reports of sexual assaults involving Service members referred to in Enclosures 2, 3, 10, 11, and 12 of this Instruction are prescribed by Reference (a) and have been assigned report control symbol DD-P&R(Q)2205 in accordance with the procedures in Directive-Type Memorandum 12-004 and DoD 8910.01-M (References (u) and (v)).

d. The Service Academy sexual assault survey referred to in section 3 of Enclosure 12 of this Instruction has been assigned report control symbol DD-P&R(A)2198 in accordance with the procedures in References (u) and (v).

8. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from DoD Issuances Website at http://www.dtic.mil/whs/directives.

9. EFFECTIVE DATE. This Instruction:

a. Is effective March 28, 2013.

b. Must be reissued, cancelled, or certified current within 5 years of its publication in accordance with DoDI 5025.01 (Reference (am)). If not, it will expire effective March 28, 2023 and be removed from the DoD Issuances Website.

Jessica L. Wright
Acting Under Secretary of Defense for
Personnel and Readiness

ENCLOSURE 4

REPORTING OPTIONS AND SEXUAL ASSAULT REPORTING PROCEDURES

1. REPORTING OPTIONS. Service members and military dependents 18 years and older who have been sexually assaulted have two reporting options: Unrestricted or Restricted Reporting. Unrestricted Reporting of sexual assault is favored by the DoD. However, Unrestricted Reporting may represent a barrier for victims to access services, when the victim desires no command or DoD law enforcement involvement. Consequently, the DoD recognizes a fundamental need to provide a confidential disclosure vehicle via the Restricted Reporting option. Regardless of whether the victim elects Restricted or Unrestricted Reporting, confidentiality of medical information shall be maintained in accordance with DoD 6025.18-R (Reference (ab)). DoD civilian employees and their family dependents and DoD contractors are only eligible for Unrestricted Reporting and for limited emergency care medical services at an MTF, unless that individual is otherwise eligible as a Service member or TRICARE beneficiary of the military health system to receive treatment in an MTF at no cost to them in accordance with Reference (b).

a. Unrestricted Reporting. This reporting option triggers an investigation, command notification, and allows a person who has been sexually assaulted to access medical treatment and counseling. When a sexual assault is reported through Unrestricted Reporting, a SARC shall be notified, respond or direct a SAPR VA to respond, assign a SAPR VA, and offer the victim healthcare treatment and a SAFE. The completed DD Form 2701, which sets out victims' rights and points of contact, shall be distributed to the victim in Unrestricted Reporting cases by DoD law enforcement agents. If a victim elects this reporting option, a victim may not change from an Unrestricted to a Restricted Report.

b. Restricted Reporting. This reporting option does NOT trigger an investigation. The command is notified that "an alleged sexual assault" occurred, but is not given the victim's name or other personally identifying information. Restricted Reporting allows Service members and military dependents who are adult sexual assault victims to confidentially disclose the assault to specified individuals (SARC, SAPR VA, or healthcare personnel) and receive healthcare treatment and the assignment of a SARC and SAPR VA. When a sexual assault is reported through Restricted Reporting, a SARC shall be notified, respond or direct a SAPR VA to respond, assign a SAPR VA, and offer the victim healthcare treatment and a SAFE. The Restricted Reporting option is only available to Service members and adult military dependents. Restricted Reporting may not remain an option in a jurisdiction that requires mandatory reporting, or if a victim first reports to a civilian facility or civilian authority, which will vary by State, territory, and oversees agreements (see paragraph 1.f. of this enclosure). If a victim elects this reporting option, a victim may change from Restricted Report to an Unrestricted Report.

(1) Only the SARC, SAPR VA, and healthcare personnel are designated as authorized to accept a Restricted Report. Healthcare personnel, to include psychotherapist and other personnel listed in Military Rules of Evidence (MRE) 513 pursuant to Reference (q), who received a

Restricted Report shall immediately call a SARC or SAPR VA to assure that a victim is offered SAPR services and so that a DD Form 2910 can be completed.

(2) A SAFE and the information contained in its accompanying Kit are provided the same confidentiality as is afforded victim statements under the Restricted Reporting option. See Enclosure 8 of this Instruction.

(3) In the course of otherwise privileged communications with a chaplain or legal assistance attorney, a victim may indicate that he or she wishes to file a Restricted Report. If this occurs, a chaplain and legal assistance attorney shall facilitate contact with a SARC or SAPR VA to ensure that a victim is offered SAPR services and so that a DD Form 2910 can be completed. A chaplain or legal assistance attorney cannot accept a Restricted Report.

(4) A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication between a victim and a victim advocate, in a case arising under the UCMJ, if such communication is made for the purpose of facilitating advice or supportive assistance to the victim in accordance with Reference (q).

(5) A sexual assault victim certified under the personnel reliability program (PRP) is eligible for both the Restricted and Unrestricted reporting options. If electing Restricted Reporting, the victim is required to advise the competent medical authority of any factors that could have an adverse impact on the victim's performance, reliability, or safety while performing PRP duties. If necessary, the competent medical authority will inform the certifying official that the person in question should be temporarily suspended from PRP status, without revealing that the person is a victim of sexual assault, thus preserving the Restricted Report.

c. Non-Participating Victim (see Glossary). For victims choosing either Restricted or Unrestricted Reporting, the following guidelines apply:

(1) Details regarding the incident will be limited to only those personnel who have an official need to know. The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command. 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 in accordance with this subparagraph. However, the victim cannot change from an Unrestricted to a Restricted Report. The victim should be informed by the SARC or SAPR VA that the investigation may continue regardless of whether the victim participates.

(2) The victim's decision not to participate in an investigation or prosecution will not affect access to SARC and SAPR VA services or medical and psychological care. These services shall be made available to all eligible sexual assault victims.

(3) If a victim approaches a SARC and SAPR VA and begins to make a report, but then changes his or her mind and leaves without signing the DD Form 2910 (where the reporting