IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20180103
Sergeant First Class (E-7) **FLOYD C. GUYTON,** United States Army, Appellant	)	USCA Dkt. No. 21-0158/AR

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Issue Presented[1]

WHETHER APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER RCM 707 AND THE SIXTH AMENDMENT TO THE CONSTITUTION.

[1] This court granted appellant's petition on two issues, ordering that briefs be filed on Issue I only. *United States v. Guyton*, No. 21-0158/AR, 2021 CAAF LEXIS 352, at *1 (C.A.A.F. 19 April 2021).

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

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WHETHER APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER RCM 707 AND THE SIXTH AMENDMENT TO THE CONSTITUTION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). On 19 April 2021, this Court granted appellant's petition for review. *United States v. Guyton*, No. 21-0158/AR, 2021 CAAF LEXIS 352, at *1 (C.A.A.F. 19 April 2021).

Statement of the Case

An enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of rape and one specification of larceny of military property valued under five hundred dollars, in violation of Articles 120 and 121, UCMJ, 10 U.S.C. §§ 920, 921. (JA 519, 524). The panel adjudged a sentence of a reprimand, reduction to E-1, total forfeiture of pay and allowances, confinement for two years, and a dishonorable discharge. (JA 520). The convening authority deferred automatic and adjudged forfeitures, waived the automatic forfeiture of all pay and allowances, and directed disbursement to the custodial account of appellant's minor son. (Action). Otherwise, on June 27, 2019, the convening authority approved the sentence as adjudged. (Action).

On December 16, 2020, the Army Court of Criminal Appeals (ACCA) affirmed Specification 1 of Charge II, excepting the words "military property," and affirmed the remaining findings of guilty. *United States v. Guyton*, No. 21-0158/AR, 2020 CCA LEXIS 462, at *34–35 (Army Ct. Crim. App. 16 Dec. 2020) (mem. op.). The ACCA reduced appellant's sentence to confinement by four months based on dilatory post-trial processing and affirmed the remaining portions of the sentence. 2020 CCA LEXIS 462, at *35. On April 19, 2020, this Court granted appellant's petition for review. (JA 001).

Statement of Facts

a. Appellant sexually assaulted his wife when he penetrated her anus with his finger without her consent.

Over the course of his eighteen-year marriage to HG, appellant subjected his wife to verbal, physical, and sexual abuse. (JA 47–49, 51, 53, 57–58, 68). HG was financially dependent on appellant throughout their relationship where she was an "isolated military wife," and appellant expected HG to "[t]ake care of the home." (JA 52, 62–63). They raised four children, and sometimes appellant verbally and physically abused HG in front of them. (JA 44, 57, 94).

Whether HG was interested or not, they had sex "every day for many years." (JA 64).[2] Approximately three or more times, HG consented to anal sex even though she did not enjoy it. (JA 67). In the last few years of their marriage, appellant developed a "fetish" and began attempting to insert his finger into HG's anus—something she "very much did not enjoy." (JA 67, 91).

Finally, after an eye-opening conversation with her daughter, HG felt determined to leave appellant. (JA 74). On August 30, 2015, HG told appellant she wanted a divorce. (JA 74). During this time, appellant and HG slept apart, and

[2] When HG told appellant she did not want to have sex, he would say, "Girl, don't make me break out the therapist." (JA 67). HG understood this as a reference to the words "the" and "rapist" combined, and she was scared by the threat. (JA 67).

when appellant would try to sleep in the bed with HG, she would "switch" rooms and sleep in her son's room. (JA 75).

On the evening of September 9, 2015, appellant and HG discussed the terms of the divorce in the garage, which sparked an argument. (JA 80–81). When HG ended the conversation, she went inside and told appellant that he could sleep on the couch. (JA 82). She went into her bedroom to take a shower. (JA 82). When she came out of the bathroom, appellant was on the bed naked. (JA 84). As HG tried to get dressed in her pajamas, appellant grabbed her underwear and told her, "[y]ou won't be needing these." (JA 85). He threw her on the bed and climbed on top of her, even though she said, "no you can't—you can't do this." (JA 85). He had sex with her, ejaculated, and cleaned himself off with a rag.[3] (JA 88).

Afterwards, HG went upstairs to sleep in her son's vacant room. (JA 88–89). She closed the door, locked it, and "[c]ried [herself] to sleep." (JA 90). HG awoke to appellant pulling her pajama pants down and dripping lubricant on his penis. (JA 90). Appellant again had sex with HG.[4] (JA 90). Then, he "inserted his finger into [her] anus."[5] (JA 91). HG testified it felt like appellant was

[3] This conduct formed the basis for Specification 1 of Charge I. Appellant was found not guilty of this specification.
[4] This conduct formed the basis for Specification 2 of Charge I. Appellant was found not guilty of this specification.
[5] This conduct formed the basis for appellant's conviction on Specification 3 of Charge I.

"scratching" the inside of her anus. (JA 91). HG twice screamed in pain. (JA 91). The tumult was loud enough that it woke SS, HG's daughter, who described her mom's scream as "hysterical." (JA 105). After appellant ejaculated, he grabbed a "red rag" from the bathroom in the hallway, tossed it on the ground, and told HG to "clean yourself up with this." (JA 92).

After appellant left the room, HG felt "devalued," "humiliated," and "something in [her] at that point just snapped." (JA 93). Instead of leaving the house like she typically did, she confronted appellant—all while feeling "panicky, scared, defiant," and the "adrenaline [was] pumping really hard." (JA 95). Finally, HG called the police and said, "Oh, I need help. My husband raped me." (JA 96). After an interview with the police, HG went to the emergency room and "received a rape kit." (JA 96). The sexual assault nurse examiner saw an injury inside HG's anal canal that was "visible to the naked eye." (JA 103).

b. Upon further investigation, the government discovered additional criminal misconduct.

On August 11, 2016, the government preferred charges against appellant under Article 120, UCMJ. (JA 275). In February 2017, the government learned appellant potentially had stolen government property. (JA 265, 302). HG explained appellant brought ammunition home from work and kept it in the wall lockers in their garage or shed. (JA 99).

Law enforcement initiated an investigation and discovered appellant stole approximately 550 rounds of 9mm ammunition from a lot number that his unit drew in 2015. (JA 302). Based on this information, the government withdrew and dismissed the original charges on February 23, 2017. (JA 305). On May 17, 2017, in addition to the sexual assault charges, the government preferred two additional specifications of larceny under Article 121, UCMJ. (JA 313–14).

c. The government brought appellant to trial after discovering additional criminal misconduct and after correcting a problem with the court-martial convening order.

The Appendix contains a timeline of relevant events.[6] (Appendix). The key facts are detailed below.

1. Pretrial events for *Guyton I*.

Law enforcement officers began to investigate appellant's sexual assaults of his wife on September 9, 2015, and appellant received an administrative flag on September 21, 2015. (JA 96, 197). On August 11, 2016, the government preferred charges against appellant (four specifications of Article 120, UCMJ). (JA 215). Appellant requested 26 total days of delay prior to the preliminary hearing. (JA 318). The convening authority referred The Charge and its specifications to a general court-martial on October 25, 2016. (JA 265, 275–76). After referral,

[6] This is a comprehensive timeline compiled for clarity and occasionally cited to throughout Appellee's brief.

appellant had no restrictions on his liberty, but continued to serve as a "senior communications sergeant" in a supervisory role. (JA 113, 298).

The government requested a trial date on or after January 23, 2017. (JA 298). Appellant requested a later trial date of February 20, 2017. (JA 299). The military judge arraigned appellant on January 13, 2017—when appellant deferred entry of pleas and forum—and scheduled the trial for March 6–10, 2017. (JA 265, 308–311).

On February 21, 2017, the government learned appellant may have stolen government property and initiated an investigation. (JA 302, 509). Two days later, the convening authority withdrew and dismissed without prejudice *Guyton I*. (JA 236, 305). During subsequent litigation, appellant conceded, "[t]he withdrawal of charges in *Guyton (I)* was guided by legitimate means; the command received evidence that required further investigation." (JA 180).

2. Pre-trial events for *Guyton II*.

On May 30, 2017, the government preferred new charges against Appellant (*Guyton II*)—the prior four specifications under Article 120, UCMJ, and two new specifications under Article 121, UCMJ. (JA 313–24). On 6 June 2017, the Special Court Martial Convening Authority (SPCMCA) appointed a preliminary hearing officer (PHO) to conduct another preliminary hearing in appellant's case. (JA 266, 316–17). After receiving one extension from the SPCMCA due to

scheduling conflicts, the PHO ultimately held the hearing on the date appellant requested, July 17, 2017,[7] and attributed twelve days of delay to appellant. (JA 318–20, 396–97). On August 16, 2017, the convening authority referred *Guyton II* to trial by a general court-martial under Court-Martial Convening Order (CMCO) #1. (JA 315).

Trial counsel submitted the referred charges to the military judge on August 22, 2017. (JA 400). She included the completed electronic docket request where the government said they would "be ready for trial on or after: 30 days from arraignment." (JA 401). Appellant requested a delay until November 13, 2017, which the government opposed and recommended a trial date of October 23–27, 2017. (JA 402–04). Appellant was arraigned on October 4, 2017. (JA 509). Appellant did not object to this arraignment date, request an earlier date, nor did he request that the post-receipt delay be attributed to the government. Instead, he litigated several motions at this Article 39(a), UCMJ session. (JA 109–10, 168, 249, 525–56). The military judge deemed the forty-three days in-between receipt

[7] After receiving an extension, and again coordinating with all parties and in an effort to schedule the preliminary hearing on "the first available date," the PHO set the preliminary hearing for Sunday, July 16, 2017. (JA 364). Appellant's counsel responded: "I hate to be difficult and do not wish to be a fly in the ointment. When I gave my conflicts I did not anticipate any possibility that the hearing would be set on a Sunday." (JA 363). Appellant's counsel opted to attend his birthday celebration on July 16, 2017, and persuaded the PHO to schedule the hearing "throughout the period of the 17th through the 23rd." (JA 363).

of the referred charges and arraignment to be judiciary delay and excluded them from the R.C.M. 707 clock. (JA 513). Consistent with appellant's request, the military judge docketed trial for November 13–16, 2017. (JA 110).

Court-Martial Convening Order #1 included panel members that the convening authority had previously excused. (JA 207, 315). On November 9, 2017, four days before appellant's trial was scheduled to begin, the military judge reviewed the panel documents and brought the discrepancies between the CMCOs and draft seating chart to the parties' attention. (JA 509). Prior to the court's assembly on November 13, 2017, defense made an oral motion to dismiss due to lack of jurisdiction and filed a written motion that evening, based on lack of jurisdiction.[8] (JA 207, 509). The government received a twenty-four-hour continuance to consult with the convening authority. (JA 509). That evening, appellant demanded speedy trial. (JA 165, 272).

On November 14, 2017, the convening authority withdrew the *Guyton II* charges and referred them "to a subsequent convening order." (JA 273, 408, 510).

[8] In appellant's motion at trial, he used the term "interlopers." (JA 207–15). This term was used by Judge Ferguson in his separate, concurring opinion in *United States v. Harnish*, 12 U.S.C.M.A. 443, 444, 31 C.M.R. 29, 30 (1961), to refer to members who sat on a court-martial but who had not been appointed by the convening authority to do so. *United States v. Cook*, 48 M.J. 434, 437 (C.A.A.F. 1988). It would appear these so-called "interlopers" were actually panel members previously selected in accordance with Article 25, UCMJ criteria, but the convening authority later permanently excused them. (JA 210–11).

He did not dismiss the charges. (JA 110–11, 238, 408). Appellant agreed this step mooted his motion to dismiss based on the previously excused members. (JA 510).

c. Pretrial events for *Guyton III*.

On November 22, 2017, the convening authority referred the same charges from *Guyton II* to a new general court-martial in accordance with the staff judge advocate's advice (*Guyton III*). (JA 414–16). He convened the panel for *Guyton III* in CMCO #12, dated November 22, 2017. (JA 414). Trial counsel submitted these referred charges to the court on the same day. (JA 111, 422). The military judge set arraignment for December 8, 2017 and accepted sixteen days of judicial delay. (JA 509).[9]

In their third electronic docket request to the court, the government requested a new trial date of December 11, 2017, while appellant requested "a delay until 27 February 2018." (JA 421–22). Trial counsel opposed the later trial date and proposed January 4–7, 2018 (overlapping the weekend), and February 5–9, 2018, as trial dates that were available for appellant. (JA 424). Trial counsel referenced Rule 1.1 of the Rules for Court and noted this period to be "pretrial delay approved by the judge." (JA 427). Even still, trial counsel requested the arraignment "take place next week as we try to move this case forward." (JA 427).

[9] This period of judicial delay included the federal holiday of Thanksgiving, which occurred on Thursday, November 23, 2017. Appellant referenced these "Thanksgiving non-duty days" in his motion to dismiss. (JA 250).

The military judge scheduled arraignment for December 7, 2017, and trial for February 27, 2017—the date appellant requested. (JA 425–26). Appellant requested arraignment occur one day later on December 8, 2017. (JA 250). Appellant did not ask the military judge to attribute the post-receipt delay to the government, despite the government's mention of it in e-mail traffic with the military judge. (JA 425–27). On December 8, 2017, the military judge arraigned appellant, who again deferred entry of pleas. (JA 169, 250, 510). The parties agreed to carry over their previous motions from *Guyton II*, with the exception of the motion, now mooted, to dismiss based on previously excused members. (JA 510). The military judge adopted all of his prior rulings. (JA 510, 524–25). Appellant filed subsequent motions in *Guyton III*. (JA 510).

On December 18, 2017, Appellant moved to dismiss based on alleged speedy trial violations and defective referral. (JA 167). On January 5, 2018, the military judge held an Article 39(a), UCMJ, session where the parties litigated Appellant's motion to dismiss, and the parties filed written supplements to their motions a few days later. (JA 106–64, 444, 479). On February 21, 2018, the military judge issued an eleven-page written ruling and denied Appellant's motion. (JA 508–18). Appellant's trial began on 27 February 2018, as he had requested. (JA 513).

Granted Issue

WHETHER APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER RCM 707 AND THE SIXTH AMENDMENT TO THE CONSTITUTION.

Standard of Review

Speedy trial is a question of law reviewed de novo. *United States v. Hendrix*, 77 M.J. 454, 456 (C.A.A.F. 2018) (citing *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014)).

Summary of Argument

Appellant's right to speedy trial was not violated, neither under Rule for Courts-Martial (R.C.M.) 707 nor the Sixth Amendment. The military judge appropriately excluded post-receipt judicial delay from the R.C.M. 707 calculations, especially in light of Rule 1.1 of the Rules of Practice Before Army Courts-Martial [Rule 1.1.] and binding Army precedent. Further, Rule 1.1 does not violate appellant's right to speedy trial, because it is an appropriate exercise of judicial authority that promotes efficiency and fairness. Finally, while pending court-martial, appellant experienced no pretrial restraint, maintained a job commensurate with his rank, and received pay—thus, there was no prejudice. His claim falls far short of a speedy trial violation, and this court should affirm the judgment of the Army Criminal Court of Appeals.

Law & Argument

I. Speedy Trial pursuant to Rule for Courts-Martial 707.

Under R.C.M. 707, the government must bring an accused to trial within 120 days of preferring charges. R.C.M. 707(a)(1). The accused is "brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904." R.C.M. 707(b)(1). When charges are dismissed and repreferred, a new 120-day period begins from the date of repreferral. R.C.M. 707(b)(3)(A)(i). If charges are withdrawn and not dismissed, the R.C.M. 707 "speedy-trial clock continues to run." *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988).

In calculating whether the R.C.M. 707 clock has run, "pretrial delays approved by a military judge or the convening authority shall be [] excluded." R.C.M. 707(c). "The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge" and "should be based on the facts and circumstances then and there existing." R.C.M. 707(c) discussion. Among the enumerated examples of reasons to grant delay in the rule's discussion are "time requested by the defense" and "additional time for other good cause." R.C.M. 707(c) discussion. "The purpose of this rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable." Drafters' Analysis, *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*] App'x 22 at

A21-40. Protecting the prompt administration of justice is "best served if the [approval] authority is provided with an opportunity to act in advance of a requested delay." *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

When a military judge grants excludable delay, this decision is reviewed for an abuse of discretion. *United States v. Lazauskas*, 62 M.J. 39, 42 (C.A.A.F. 2005) (reviewing the military judge's decision to exclude two periods of delay for an abuse of discretion.); *see also United States v. Weatherspoon*, 39 M.J. 762 (C.M.R. 1994) ("[T]he granting of a delay is reviewable for abuse of discretion and reasonableness of length."). When a judge takes action in a discretionary manner, a reviewing court cannot set aside such action unless it "has a definite and firm conviction that the court below committed a clear error of judgment," and appellate courts will only reverse "if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

a. The military judge correctly excluded judicial delay, and the government did not violate appellant's right to speedy trial pursuant to R.C.M. 707.

From repreferral on May 30, 2017, in *Guyton II* and appellant's final arraignment on December 8, 2017, in *Guyton III*, 192 total days passed.[10] (JA 509; Appendix). Eighty-one days of excludable delay are contained within this 192-day

[10] The date of repreferral of charges "shall not count for purpose of computing time" under this rule. R.C.M. 707(b)(1).

time period: twenty-two days of delay attributed to the appellant to accommodate his requests when scheduling the Article 32 preliminary hearing and fifty-nine days of judicial delay.[11] (JA 512–13). Appellant only takes issue with the post-receipt judicial delay—narrowing the question to whether 170 days elapsed on the R.C.M. 707 clock, or just 111 days. (Appellant's Br. 10) ("It is these last two periods of delay totaling 59 days that are at issue in this case.").

Upon appeal to this court, appellant recognizes that some delay between receipt of the charges and arraignment is necessary "in most cases." (Appellant's Br. 15). However, he finds fault with the lack of explanation or the reasonableness of the length in *this* case. (Appellant's Br. 15). For the reasons below, this argument fails because the military judge did not abuse his discretion when he attributed fifty-nine days to the judiciary. The military judge followed the Rules of Practice and binding precedent. His decision was reasonable.

[11] The judicial delay is broken into two periods: The military judge first excluded forty-three days from when the government sent the *Guyton II* referred charges to the trial court on 22 August 2017 to arraignment on 4 October 2017. (JA 400, 509). The second period of time that the military judge excluded was sixteen days from when the government sent the *Guyton III* referred charges to the trial court on 22 November 2017 to arraignment on 8 December 2017. (JA 509).

1. The military judge reasonably relied upon the Rules of Practice Before Army Courts-Martial when excluding the post-receipt judicial delay in this case.

The military judge did not abuse his discretion in excluding post-receipt delay from the R.C.M. 707 clock because he relied upon controlling trial judiciary regulations. The Army Trial Judiciary established the Rules of Practice Before Army Courts-Martial on November 1, 2013. (JA 558). Within these guidelines, the judiciary established "Docketing Procedures and Continuances." (JA 559). According to Rule 1.1, the receipt of referred charges triggers pre-approved delay: "Any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per RCM 707(c), unless the judge specifies to the contrary." (JA 559).

Rule 1.1 establishes a default rule, and the military judge operated appropriately within it. Specifically, trial counsel need not request judicial delay at all because it is pre-approved, unless the military judge specifies otherwise. *United States v. Hawkins*, 75 M.J. 640, 641 (Army Ct. Crim. App. 2016). Once the military judge receives the charges, it is out of the government's hands and "completely under the control of the trial judiciary." *Id*. at 642. The construction of the rule does not limit the amount of delay the trial judiciary may accept; instead, "[a]ny period of delay" may be excluded. (JA 559).

Here, it appears all parties operated under Rule 1.1 without issue. Trial counsel referenced Rule 1.1 in e-mail traffic with the military judge prior to appellant's final arraignment in *Guyton III* and still requested an early arraignment date "as we try to move this case forward." (JA 427). Appellant had no objection. (JA 425–28). Appellant did not inform the military judge that this was a misuse of Rule 1.1, nor did appellant request the type of detailed accounting he now claims the military judge *should have* given. (Appellant's Br. 15). Instead, appellant asked for a one-day delay for arraignment and a six-week delay beyond the government's proposed trial dates. (JA 250, 421–24, 510). Then, when appellant's only chance of success at his speedy trial motion hinged upon this post-receipt judicial delay, appellant then lodged an attack against Rule 1.1.[12] (JA 167). The military judge appropriately denied his motion to dismiss because his speedy trial rights were not violated.

The military judge appropriately relied on Rule 1.1 when excluding the two periods of delay. (JA 513). He specifically excluded these fifty-nine days based on Rule 1.1 because the "referred charges [were] received by Court" and both periods constituted "approved pretrial delay." (JA 513). In his analysis, he

[12] Appellant conceded as much at trial when he said, "if that time is excluded, under the rule then there is no violation of R.C.M. 707." (JA 139). This did not constitute waiver because appellant moved to dismiss before the final adjournment. R.C.M. 907(b)(2)(A).

correctly concluded there were no "unusual circumstances" that would change the default rule. (JA 515). Consequently, the military judge's adherence to the long-promulgated Rules of Practice was not an abuse of discretion. *See United States v. Hill*, ARMY 20130331, 2016 CCA LEXIS 407, *5 (Army Ct. Crim. App. 23 Jun. 2016) (summ. disp.) (overruling a similar claim regarding Rule 1.1 as "without merit"). Indeed, especially in light of the "strict" standard of review applicable to a military judge's decision to exclude periods of delay, *Lazauskas*, 62 M.J. at 42, this military judge's decision was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F 2000) (internal quotations omitted).

2. The military judge reasonably relied upon binding precedent when excluding the post-receipt judicial delay in this case.

The military judge also appropriately excluded the post-receipt delay because he operated under two ACCA opinions that held Rule 1.1 was in accord with R.C.M. 707(c). *See Hawkins*, 75 M.J. at 641 ("[w]e have previously found Rule of Court 1.1 is not inconsistent with R.C.M. 707(c)(1)."); *United States v. Torres*, ARMY 20111168, 2014 CCA LEXIS 180, at *11–12 (Army Ct. Crim. App. 19 Mar. 2014) (mem. op.) ("At the outset, we reject appellant's argument that Rule of Court 1.1 is inconsistent with R.C.M. 707(c)(1)."). When the military judge referenced both of these cases in his written analysis and as he was bound by *Hawkins*, he could not have abused his discretion in complying with precedent.

(JA 514–15). Therefore, when assessing whether the military judge's decision was "outside the range of choices reasonably arising from the applicable facts and the law," appellant simply cannot prevail under this standard of review. *United States v. Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013) (holding a military judge "abuses his discretion when . . . 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.").

The amount of time the military judge granted was also reasonable. *Thompson*, 46 M.J. at 475. The first period accounted for forty-three days and the second period accounted for sixteen days. (JA 400, 509). In light of additional Army precedent, these two periods were reasonable lengths of delay. *See United States v. Arab*, 55 M.J. 508, 512 (Army Ct. Crim. App. 2011) (finding "a delay of thirty days between a docketing request and arraignment is not, per se, unreasonable"); *see also Hill*, 2016 CCA LEXIS 407, at *4 (the military judge received the referred charge sheet and arraigned the appellant sixty-five days later). While a military judge's exclusion of judicial delay is not unfettered and does not continue infinitely, nothing in this case indicates the delay was "an egregious or blatantly negligent trial delay"—a standard this court has used in similar situations. *See United States v. Reap*, 41 M.J. 340, 342 (C.A.A.F. 1995) (excluding time from the R.C.M. 707 clock where the government's Article 62, UCMJ appeal was not

"just a delaying tactic, frivolous, or meritless," and did not suggest "that there exists an appreciable risk that delay would impair the ability to mount an effective defense").

Finally, the military judge made findings of fact that were not clearly erroneous, and he accounted for the delays in his eleven-page written ruling. (JA 508–18). Accordingly, as there was no "absence of an abuse of discretion by the officer granting the delay, there is no violation of R.C.M. 707." *Lazauskas*, 62 M.J. at 42.

b. Pre-approved judicial delay under Trial Judiciary Rule 1.1 does not violate an appellant's procedural right to a speedy trial.

Just as the military judge did not abuse his discretion when he excluded the post-receipt delay, this court should also find—pursuant to a de novo review of the speedy trial issue—that pre-approved judicial delay does not violate an appellant's procedural right to speedy trial. *See United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F 1999) ("The conclusion whether an accused received speedy trial is a legal question that is reviewed de novo."). Pre-approved judicial delay does not violate an appellant's right to a speedy trial because it promotes efficient, fair processing of courts-martial and complies with R.C.M. 707(c). Additionally, the pre-approved judicial delay in this case was appropriate. Therefore, appellant's right to a speedy trial under R.C.M. 707 was not violated.

1. Pre-approved judicial delay does not violate an appellant's right to speedy trial because it promotes efficient, fair processing of courts-martial and complies with R.C.M. 707(c).

Military judges have broad authority to exercise reasonable control over court-martial proceedings to promote the purposes of the UCMJ and the *Manual for Courts-Martial*. R.C.M. 801(a)(3). Further, a military judge has specific authority given in R.C.M. 701 to exclude periods of delay. R.C.M. 701(c)(1). The trial judiciary is a reliable docketing authority with their own incentives to keep their calendar running efficiently. *See United States v. Thomas*, 22 M.J. 57, 58 (C.M.A. 1986) ("Recognizing that the military judgue [sic] is tasked with insuring that courts-martial are conducted in a fair, orderly, and efficient manner, we are willing to accord him the authority and latitude necessary to perform this difficult job."). As such, Rule 1.1's inception originates from a well-trusted and accountable body—the judiciary.

Notably, Rule 1.1 promotes efficiency. Documents must be delivered to the court "within 24 hours of referral" and parties must complete the electronic docket request "within one duty day of receipt from the defense counsel." (JA 559). The rule even places quick timelines on the docketing military judge; an arraignment and trial date will "[n]ormally" be set within "one duty day of receipt." (JA 559). Rule 1.1 leaves no question as to its goal: diligent processing of courts-martial.

Likewise, a docketing judge—a neutral and detached authority—ensures procedural due process is followed when he or she selects the dates applicable to an accused's trial schedule. *See* American Bar Association [ABA] Standard 12-4.5(a), Speedy Trial and Timely Resolution of Criminal Cases, 3d ed. (2006) ("Control over the trial calendar . . . should be vested in the court."). The fast-paced, internal requirements of Rule 1.1, statutory waiting periods, and de-conflicting of the parties' availability bring an inherent reasonableness to the court's practice and procedure.

Here, appellant ignores the two mandatory five-day statutory waiting periods included in the fifty-nine-day period of time. Article 35, UCMJ; R.C.M. 602; *see also United States v. Cherok*, 22 M.J. 438, 440 (C.M.A. 1986) ("Article 35 provides a shield with which an accused may prevent too speedy a trial, not a sword with which an accused may attack the Government for failing to bring him to trial sooner.") He also ignores the inevitable, time-consuming task of issuing a pretrial order, as the military judge did in this case.[13] (JA 109–10, 168, 249). A pretrial order necessarily requires de-conflicting the trial court's calendar with the parties' calendars because the military judge prescribes the manner and order in

[13] Without providing a numerical value that *would have* been appropriate for the military judge to exclude, appellant allots the entire fifty-nine-day period into a category he deems unreasonable. (Appellant's Br. 15). This matched appellant's argument at trial, although he only arrived at "a total of 56 days" for the disputed time. (JA 137, 142).

which the proceedings may take place, including "when, and in what order, motions will be litigated." R.C.M. 801(a)(c) discussion. The policy to approve any post-receipt judicial delay fairly takes into account these unavoidable time gaps, and it is something over which this court should afford much protection. *Cf. United States v. Browers*, 20 M.J. 356, 361 (C.M.A.1985) (Cox, J., concurring) ("appellate courts . . . must zealously defend the military trial judge's authority to manage the proceedings over which he presides").

Rule 1.1 also promotes fair processing of courts-martial. After referral, "the government has little control over when the accused is to be arraigned." *Hawkins*, 75 M.J. at 642; *see also Reap*, 41 M.J. at 342 (excluding time from the R.C.M. 707 clock where "the pace of this authentication process was in the hands of the military judge, not the Government."). Further, docketing considerations and the respective duty location of the military judge may even limit the military judge's control over when the accused is arraigned. As a practical matter, the R.C.M. 707 clock should not continue to run based on availability of military judges and the docket.

This notion is even supported in the exact precedent appellant cites to argue the opposite, (Appellant's Br. 13): "delay resulting from circumstances 'beyond the control of the prosecution'" were among several of the extraordinary circumstances justifying a delay. *United States v. Wolzok*, 23 U.S.C.M.A. 492,

494, 50 C.M.R. 572, 574 (1975) (citing *United States v. Driver*, 23 U.S.C.M.A. 243, 245, 49 C.M.R. 376, 378 (1974)).

Were the government's clock to continue to tick after sending the referred charges to the court, disparate outcomes would result depending solely on the judiciary's caseload, and whether a particular jurisdiction had a resident military judge. In other words, through no fault of the government, an arraignment may be more likely to occur after the 120-day mark based on the jurisdiction alone. Ultimately, given that the trial counsel has no control over the court's calendar, any delay from waiting on an arraignment date is indeed beyond the control of the prosecution. Therefore, Rule 1.1 promotes uniform processing of courts-martial.

Pre-approved judicial delay also complies with R.C.M. 707(c). This is not a situation in which a local rule of practice attempts to override the rules established by the President—something it cannot do. *See, e.g., United States v. Williams*, 23 M.J. 362, 366 (C.M.A. 1987) (finding the Army Rules of Practice invalidly imposed an additional time requirement in conflict with the *MCM*). Instead, this pre-approved delay falls squarely within the excludable delay allowed for in R.C.M. 707(c): "All other pretrial delays approved by a military judge . . . shall be similarly excluded." *See also United States v. Dies*, 45 M.J. 376, 378 (C.A.A.F. 1996) (noting the "excludable delay" rule "does not say that those, and only those, stays and delays are excludable").

Moreover, in every general court-martial, there will be at least a brief delay after the convening authority refers the charges under R.C.M. 601(a) and arraignment. Therefore, Rule 1.1's exclusion of this inherent delay from the referral process nests with the R.C.M.s. Importantly, there is no blanket exclusion for post-receipt delay, but rather the military judge must consider the parties' calendars and specific events of the case. That is, the decision to grant or deny a reasonable delay—something within the "sole discretion" of the military judge—should be "based on the facts and circumstances then and there existing." R.C.M. 707(c)(1) discussion. Accordingly, R.C.M. 707(c) provides the trial judiciary latitude to predetermine excludable periods, exactly as Rule 1.1 prescribes.

Such pre-approved judicial delay also promotes the policy behind R.C.M. 707(c) because it avoids the after-the-fact exclusion that the policy sought to prevent. Drafters' Analysis, *MCM*, App'x 22 at A21-40; *see also Dies*, 45 M.J. at 377–78 (noting the prior version of R.C.M. 707 often resulted in "pathetic side-shows of claims and counter-claims, accusations and counter-accusations, proposed chronologies, and counter-proposed chronologies, and always the endless succession of witnesses offering hindsight as to who was responsible for this minute of delay and who for that over the preceding months"). Rule 1.1 relieves any party of "specifically requesting judicial delay," given the default rule of excluding time between receipt of the referred charges and arraignment. *Hawkins*,

75 M.J. at 642. As the ACCA noted in *Hawkins*, Rule 1.1 avoids unnecessary litigation. *Id.* As such, the approval authority has acted "in advance of a requested delay," and Rule 1.1 provides predictability to all parties and avoids litigation as a result. *Thompson*, 46 M.J. at 475.

Finally, although the Speedy Trial Act does not apply to the military, this court has cited it for guidance concerning military speedy trial issues and it weighs in favor of the government here. 18 U.S.C. §§ 3161-3174; *United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005); *Dies*, 45 M.J. at 378. Section 3161(h)(7)(A) excludes any period of delay "resulting from a continuance granted by any judge on his own motion" if the judge "granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. §3161(h)(7)(A). The court must set forth, "either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Id.*

Rule 1.1 rings valid under a comparison of the Speedy Trial Act because the factors weighed in excluding periods of delay under the Speedy Trial Act are the same factors a military trial judge considers after receiving referred charges. *Compare* 18 U.S.C. § 3161(h)(7)(B)(i)–(iv) (considering, among other factors, adequate preparation in a particular case, whether arrest precedes indictment, and

continuity of counsel) *with* Rule 1.1 (requiring "specific, factual support for all requested dates," and whether the accused "is in pretrial confinement"). Certainly, the lone factor of court congestion is not a valid reason for granting continuances based on the "ends of justice." 18 U.S.C. § 3161(h)(7)(C); *see also United States v. Ramirez*, 788 F.3d 732, 736 (7th Cir. 2015) (noting it was improper when "the district court repeatedly blamed its crowded calendar for its inability to schedule a sooner trial date"). However, Rule 1.1 operates more like an appropriate continuance under § 3161(h)(7)(A) because the docketing military judge, upon receipt of the referred charges, takes into account *not only* docket availability, but *also* the availability of all parties and judicial economy when determining trial dates. (JA 515). The Speedy Trial Act instructs the judge to take into account these very factors, and consider whether "the failure to grant such a continuance" would "deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation." 18 U.S.C. § 3161(h)(7)(B)(iv); *see also* ABA Standard 12-4.5(a) Speedy Trial and Timely Resolution of Criminal Cases, 3d ed. (2006) ("The court should exercise responsibility for case scheduling. . . taking account of information relevant to case scheduling that may be provided by both the prosecutor and defense counsel."). By way of example and specific to appellant's case, appellant's attorneys requested multiple, delayed trial dates—ostensibly to complete other obligations already

docketed and prepare for trial—and the military judge took those requests into account when setting the arraignment and trial dates. (JA 402–03, 422–23, 509).

Accordingly, when a docketing judge receives the charges and reviews the parties' availability in the electronic docket request, the considerations inherent in setting the trial dates match those mandated in the Speedy Trial Act. 18 U.S.C. § 3161(h)(7)(B)(iv). Thus, Rule 1.1's pre-approval of judicial delay is an appropriate exclusion of time because the dates ultimately selected for appellant are based on the information his counsel provides, and the delay is similarly pre-excluded in the federal sector. *See United States v. Correia*, 531 F.2d 1095, 1100 (1st Cir. 1976) ("[W]e would not wish to see district judges squeezed by strict speedy trial deadlines without considerable discretion to keep their dockets moving within the prescribed periods.").

2. The pre-approved judicial delay in appellant's case was appropriate.

As the military judge explained, there was sufficient rationale for why all of the post-receipt judicial delay in appellant's case was appropriately excluded from the R.C.M. 707 clock. Here, each of the two periods of delay were required based on reasonable factors that often play into docketing decisions. (JA 515). The military judge accounted for these factors: "Scheduled arraignment dates are subject to a whole host of non-so-unusual (sic) factors, including docket availability, the availability of all parties, and the judicial economy that is

sometimes inherent in combining arraignment and motions in a single hearing." (JA 515). Importantly, two of these factors—the availability of the parties and judicial economy—are routinely referenced as legitimate rationales for docketing cases. These two factors weigh against appellant here.

First, appellant's schedule was of obvious concern to the military judge because he approved each of appellant's requested arraignment and trial dates. Contrary to appellant's suggestion that the military judge suggested he could "take all of the time he wants without explanation," (Appellant's Br. 15), the military judge provided a legitimate explanation and specifically took appellant's requested trial date into account. (JA 515). As evidence of the military judge's consideration of appellant's calendar, when the government opposed appellant's requested trial date in *Guyton II*, the military judge still deferred to appellant and docketed trial for the exact date of appellant's request. (JA 110, 401–04). The military judge also "combin[ed] arraignment and motions in a single hearing." (JA 509, 525–56). Appellant had no objection to his arraignment date and did not seek to litigate these motions any sooner—indeed, it appeared based on his requested trial date that he was not prepared and the delay worked to his benefit. Furthermore, in *Guyton III*, despite trial counsel's opposition to appellant's requested "delay until 27 February 2018" for trial, the military judge deferred to appellant and set trial to begin on the exact date he requested. (JA 422, 424–26).

Additionally—and in sharp contrast to appellant's professed desire for a speedy trial—appellant was in no hurry to go to trial. Beyond the repeated delay requests mentioned above, appellant requested his arraignment for one day after that which the military judge had first proposed. (JA 250). Appellant never objected to the excludable delay, and in fact, did not even raise the issue until filing a speedy trial motion, despite trial counsel referencing Rule 1.1 when sending the referred charges to the court. (JA 167, 427). Repeatedly, the military judge bent his schedule and afforded appellant his requested trial dates, all while accepting the judicial delay following receipt of the referred charges.[14] Thus, under these circumstances, this was an appropriate use of judicial authority.

The second factor the military judge highlighted—judicial economy—is a common, legitimate concern for all courts. *See United States v. Wall*, 79 M.J. 456, 460 (C.A.A.F. 2020) (noting that "[a]s a matter of judicial economy, it makes sense to resolve this issue now"). Most notably, the military judge ordered all parties to file motions before the arraignment date of 4 October 2017 in *Guyton II*, so that they could "take up the motions at issue" when they went on the record, efficiently moving appellant's case to trial. (JA 509, 525). Even after "carry[ing] over" the motions from *Guyton II*, the military judge set early deadlines for new

[14] This military judge was obviously cognizant of the processing time in appellant's case as he even created a detailed week-by-week timeline of events when he authenticated the record of trial. (JA 557).

motions in *Guyton III* well in advance of the next Article 39(a), UCMJ session and the docketed trial date. (JA 27–29). This diligent pattern demonstrates the military judge moved appellant towards trial while taking into account the legitimate concern of judicial economy.

The conversation within the electronic docket request further confirms the military judge took judicial economy seriously in appellant's case. (JA 421–24). The trial counsel proposed alternative available dates, all of which post-dated appellant's arraignments—indicating they likely could have occurred no sooner than they did. First, in *Guyton II*, trial counsel's proposed trial date postdated appellant's arraignment date of 4 October 2017. (JA 510). Again, in *Guyton III*, when trial counsel objected to appellant's requested February trial date, trial counsel could only find two alternative time slots that appeared available. (JA 424). These vacancies also postdated appellant's arraignment date of 8 December 2017. (JA 509). This pattern demonstrated the arraignment date likely could have occurred no sooner than it did. Thus, the military judge was appropriately minimizing the use of the court's time and resources, scheduling arraignments and trial dates close in time to motions hearings and other open windows on the docket.

Therefore, although the military judge did not conduct a week-by-week analysis of the court's availability, he explained: "Based on Court's own obligations, docket, and the specific Defense request, the Court docketed trial for

the week of 27 February 2018." (JA 510). While it seems appellant would require the military judge to provide more than these "conclusory statements," (Appellant's Br. 14), the military judge's explanation was exactly the type of information necessary to show that the post-receipt delay—based in large part on appellant's delay requests—was not a violation of appellant's R.C.M. 707 right to speedy trial. Overall, appellant suffered no procedural speedy trial violation, and this court should affirm the judgment of the Army Service Court.

II. Appellant's Sixth Amendment Speedy Trial claim also fails.

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial. U.S. Const. amend. VI. In military prosecutions, the accused's Sixth Amendment speedy trial protections are generally triggered upon preferral of charges. *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014). The entire period from preferral of charges until commencement of trial on the merits is part of the Sixth Amendment speedy trial claim analysis. *Id.* at 189.

The four-factor test that the Supreme Court established in *Barker v. Wingo*, 407 U.S. 514 (1971), is an apt structure for determining whether a constitutional violation occurred. *Id.* at 186. The *Barker* analysis examines: 1) the length of the delay; 2) the reasons for the delay; 3) the appellant's assertion of the right to a timely review and appeal; and 4) prejudice. *Barker*, 407 U.S. at 530. "[T]hese

factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id*. at 533.

Here, appellant suffered no constitutional violation of his right to speedy trial pursuant to the Sixth Amendment. While the length of the delay triggers a review, an assessment of the remaining *Barker* factors favors the government. Most importantly, the complete lack of prejudice seals this claim's fate, and his assignment of error fails.

a. The length of the delay triggers a review.

1. *Guyton I* was properly withdrawn and dismissed, and it does not factor into the Sixth Amendment speedy trial analysis.

As an initial matter, *Guyton I* should not be considered as part of appellant's Sixth Amendment claim because he waived that issue. Now on appeal, appellant issues a broad condemnation of the process and disagrees with the military judge's conclusions about *Guyton I*.[15] (Appellant's Br. 17). However, at trial, appellant

[15] Appellant takes issue with the withdrawal and dismissal of the charges in *Guyton I* and blames "the government's own negligence." (Appellant's Br. 17). To be clear, the government's withdrawal and dismissal of *Guyton I* was perfectly appropriate. The convening authority may "for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced" *even when* further prosecution is contemplated. R.C.M. 604(a); R.C.M. 604(b) discussion. Appellant originally came under investigation for the rape of his wife—a crime dissimilar from larceny of government property. (JA 96). Not until February 2017, after HG notified law enforcement "through [her] advocate," did the government learn that appellant had been storing government-owned ammunition in his garage. (JA 99–100, 265, 302). The government needed to investigate this newly discovered misconduct, which resulted in additional

waived any claim that the withdrawal and dismissal of *Guyton I* was improper, "leav[ing] no error to correct on appeal." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). Specifically, in his written brief at trial, appellant conceded to the military judge, "[t]he withdrawal of charges in *Guyton (I)* was guided by legitimate means; the command received evidence that required further investigation." (JA 180). Likewise, during oral argument at the Article 39(a), UCMJ session, he agreed there was no "bad faith" behind the government's decision, only that it operated to his detriment. (JA 156).

At trial, it was evident to all parties that the convening authority properly withdrew and dismissed *Guyton I*, and appellant cannot smuggle this claim into his Sixth Amendment assignment of error. Therefore, the time consumed in *Guyton I* is disconnected to the first *Barker* factor. *See Danylo*, 73 M.J. at 190 (refusing to consider "the period of delay as one continuum" and noting "[i]n our speedy trial jurisprudence, we break down periods of delay, analyze the reasons for each, and may express concern with some but not other periods of delay.").

2. The length of the delay between preferral of *Guyton II* and trial on the merits in *Guyton III* triggers a review.

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charges upon appellant—a legitimate government purpose. *See United States v. Leahr*, 73 M.J. 364, 367–68 (C.A.A.F. 2014) (finding it appropriate for the convening authority "to join an additional charge, consonant with the preference for joinder of all known offenses at a single court-martial"). Given the distinct nature of these two offenses, and the manner in which the information came to light, nothing the government did was negligent.

Between re-preferral of *Guyton II* on August 16, 2017, and trial on the merits on February 27, 2018, a total of 273 days passed. (JA 313, 513; Appendix). Importantly, appellant was never confined, restricted, or otherwise unable to prepare his defense during this time. Still, although appellant cited no basis for why this amount of time triggers a review in his case, appellate courts have conducted a review on less time. *See, e.g., United States v. Grom*, 21 M.J. 53, 56 (C.M.A. 1985) (finding a period of 244 days sufficient to trigger a review, taking the 120-day mark in R.C.M. 707(a) "as an indication of the amount of pretrial delay that is ordinarily tolerable in a military context," even where appellant was not in pretrial confinement). However, even if this court finds 273 days to be facially unreasonable, there was still no Sixth Amendment violation.

b. The reasons for the delay weigh little, if at all, in appellant's favor.

Two reasons account for the majority of time between *Guyton II*'s preferral and commencement of trial: defense requested delay and misguided management of the original court martial convening order. In light of the severity of appellant's case, however, the context surrounding the 273-day delay ultimately weighs against appellant. *See Barker*, 407 U.S. at 531 ("The delay that can be tolerated for an ordinary street crime is considerably less than [that] for a serious, complex conspiracy charge.").

1. Appellant is responsible for 111 of the 273 days.

Appellant caused almost half of his delay when he requested later trial dates than the government—narrowing the period of delay on the government's clock to 162 days. *See United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016) (noting in an Article 10, UCMJ context that "explicit delay caused by the defense" is exempted from the government's obligation to demonstrate necessity of the delay). First, after the *Guyton II* preferral, appellant was responsible for twelve days of delay so that the PHO could hold the preliminary hearing on the date appellant requested. (JA 318–20, 396–97). Following referral, even though the government recommended a trial date of October 23–27, 2017, appellant requested a delay until November 13, 2017; this resulted in a twenty-one-day delay. (JA 402–04; Appendix). Then, after the GCMCA convened *Guyton III*, although the government requested a new trial date of 11 December 2017, appellant requested "a delay until 27 February 2018." (JA 422). This resulted in a seventy-eight-day delay. (Appendix). All told, appellant was responsible for 111 of the 273 days because of his repeated delay requests. (Appendix). This detail provides context for a large portion of the 273 days it took for appellant's trial to begin, and weighs in the government's favor.

2. Withdrawing *Guyton II* was reasonable in light of the severity of appellant's offenses and because it was necessary to correct the required convening orders.

As the military judge explained, a "critical issue on the first scheduled day of [*Guyton II*'s] trial" was "the convening order confusion." (JA 516). Specifically, the convening authority affirmatively excused certain primary panel members, but five of these excused members continued to appear on the court martial convening order for *Guyton II*, and one "reported for panel duty on 13 November 2017." (JA 210–11). Appellant objected based on jurisdiction, given the presence of previously excused members. (JA 211).[16]

While this "morass" was admittedly the government's fault, it does not weigh as heavily against the government as subterfuge or another bad-faith motivation. (JA 516). Appellant does not—and cannot—show "willful or

[16] There was also some confusion regarding the CMCO in *Guyton III*, but appellant makes no mention of this in relation to his speedy trial claim. (Appellant's Br. 16–24). Indeed, this matter is unrelated to appellant's assignment of error. For clarity, the situation involved the military judge's inquiry as to whether there had been a "new panel" from this convening authority. (JA 510). The military judge instructed the government to explain whether this new CMCO was relevant to *Guyton III*. (JA 511). Both parties supplemented their written motions based on the court's question. (JA 444, 479, 511). As it turned out, while the convening authority had signed paperwork purporting to select a new standing panel that superseded all previous convening orders, (JA 455–68), the convening authority had yet to complete this new panel selection. (JA 468, 479). He "began the process" but "requested the Staff Judge Advocate obtain additional details and present them to [him] in revised panel selection documents" so that he could finalize his selections. (JA 468). On February 14, 2018, prior to appellant's trial, the convening authority completed this new panel selection and the trial counsel provided CMCO #1, dated February 13, 2018, that superseded CMCO #12, dated November 22, 2017. (JA 481, 512). There was no defective referral of *Guyton III*, and appellant's trial proceeded before a properly-constituted panel. (JA 518).

malicious conduct on the part of the Government to create the delay." *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999); *see also Barker*, 407 U.S. at 531 (noting that while "deliberate attempt[s] to delay the trial in order to hamper the defense should be weighted heavily against the government," a "more neutral reason such as negligence . . . should be 'weighted less heavily'").

Appellant argues that this negligence still weighs heavily against the government because it did not "take care to ensure that the new convening order was in proper form" following notice from the senior defense counsel (SDC). (Appellant's Br. 19). This picture is incomplete. On February 15, 2017—in a case totally unrelated to appellant's—the SDC e-mailed a judge advocate not detailed to appellant's case the following message:

> If you could give me a call, I wanted to give you a heads up on panel issues we are having. We have a case docketed for 6 MAR and I think CPT [J] is struggling to identify the panel discovery docs.

(JA 208, 256).[17] There is no evidence that this e-mail was related to the same CMCO as appellant's trial, nor is there evidence that the "panel issues" were related to the permanently excused panel members on CMCO #1. (JA 159). It continues to be an unfair accusation, given the vague nature of the e-mail and the lack of specificity or connection to appellant's trial.

[17] The military judge incorrectly stated that this e-mail occurred on 22 August 2017. (JA 509).

Once the military judge brought the CMCO discrepancy to the parties' attention days before appellant's trial, the government's "only realistic option" was to withdraw, which mooted appellant's motion to dismiss. (JA 510, 516). Withdrawing charges was a reasonable choice given the seriousness of the offense, and it was a reasonable course to take in this case. (JA 516); *see Hendrix*, 77 M.J. at 456–57 (defining withdrawal as "a legitimate command reason which does not unfairly prejudice an accused") (internal quotations omitted). Appellant's charges included multiple specifications of rape by unlawful force as well as larceny of government property. (JA 313–14). He faced a maximum punishment of confinement for life. *MCM*, App'x 12. Even in light of the CMCO mistakes, *Barker v. Wingo* suggests some flexibility given "the seriousness of the offense, the complexity of the case, and the availability of proof." *Barker*, 407 U.S. at 530–31, 538 n.31. For this reason, any administrative missteps should be weighed less heavily against the government.

Finally, the government's quick actions to remedy the situation demonstrate a reasonable diligence towards trial, notwithstanding the circumstances. First, within eight days of the convening authority's withdrawal of *Guyton II*, he again referred the charges under a new CMCO in accordance with new Staff Judge Advocate advice. (JA 273, 408, 414–16, 510). Trial counsel submitted these referred charges to the court that same day. (JA 427). Notably, despite the trial

counsel's understanding that judicial delay would not count against the government's clock, she still attempted to remedy the earlier mistake when she requested the arraignment "take place next week *as we try to move this case forward*." (JA 111, 422) (emphasis added).

In light of the government's sincere remedial actions, the military judge correctly found "no subterfuge or improper purpose" behind this delay and concluded it did "not arise to the level of a constitutional concern." (JA 516); *see also Hendrix*, 77 M.J. at 458 ("[W]e are confident the military judge will recognize when circumstances begin to improperly infringe upon the accused's Sixth Amendment rights."). As such, this portion of the delay should not weigh heavily against the government.

c. The timing of Appellant's speedy trial claim—and subsequent request for a lengthy delay—undermines his claim.

Although appellant demanded speedy trial, the tactical timing of the demand, as well as appellant's subsequent delay request, contradicts the authenticity of his claim. On the same evening the government consulted with the convening authority regarding the CMCO issues, appellant demanded speedy trial. (JA 165, 272). Appellant's demand arrived on the heels of his motion to dismiss based on the previously excused members. (JA 165, 272). Yet, when given the option to proceed to trial in December 2017, appellant requested "a delay until 27 February 2018." (JA 421–22).

Appellant's speedy trial demand was an obvious attempt to prevent the government from being able to fix the jurisdictional issue and force a dismissal of the charges. (JA 207, 509). Stratagems such as "demanding a speedy trial now, when the defense knows the Government cannot possibly proceed, only to seek a continuance later, when the Government is ready, may belie the genuineness of the initial request." *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993); *see also Perry v. State*, 436 So. 2d 426, 427 (Fla. Dist. Ct. App. 1983) (noting a "line of [Florida] cases which hold that a demand for speedy trial may be disregarded where the defendant's actions and conduct belie his implicit claim in his demand that he is ready for trial"). Importantly, appellant never demanded a speedy trial before the CMCO issue occurred. Then, *after* his speedy trial demand, appellant requested a delay and continued to file additional motions—this indicated he was not ready to go to trial after all. (JA 510–11); *see United States v. Reyes*, 80 M.J. 218, 228 (C.A.A.F. 2020) (noting "[a]ppellant was not seeking a speedy trial" when appellant filed a motion to dismiss on a speedy trial violation, but then "requested a further delay").

Appellant conceded as much when he admitted on the record that they had "no option from [an] effective representation point of view" but to request a delay. (JA 162–63). This is a disfavored strategy, one which devalues his demand such

that this court "affords it only slight weight in his favor." *United States v. Wilson*, 72 M.J. 347, 353 (C.A.A.F. 2013).

d. The delay did not prejudice appellant.

Appellant fails to articulate any prejudice he suffered and thus he is not entitled to relief. In his only effort to demonstrate prejudice, appellant points to his continuous administrative flag. (Appellant's Br. 22). For reasons explained below, this fails to demonstrate prejudice in light of that which "the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532.

Prejudice should "be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Mizgala*, 61 M.J. at 129 (quoting *Barker*, 407 U.S. at 532). These interests are to prevent oppressive pretrial incarceration, minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired. *Id*. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984). Based on these considerations, the prejudice prong weighs heavily in the government's favor.

1. Appellant did not endure oppressive confinement conditions.

Appellant correctly conceded that because he was "not incarcerated pending trial," this first interest was not violated. (JA 177). His total lack of pretrial

restriction is especially damaging to appellant's constitutional claim. (JA 127). Cases that have previously gone before this Court contained unpleasant pretrial confinement conditions that still failed to rise to legal prejudice. *See, e.g.*, *Thompson*, 68 M.J. at 311 (finding that the conditions were not overly oppressive for purposes of prejudice under Article 10 where the appellant was housed "in isolation," fed through a food chute, and remained "shackled" at her father's funeral); *Wilson*, 72 M.J. at 350 (finding that conditions were not overly oppressive where the appellant was confined as the only African American in an environment with white supremacists who would make racial slurs). Here, appellant was not even "told he couldn't leave post or that he couldn't go certain places." (JA 127). On the contrary, he continued to travel with his unit around North Carolina and California. (JA 116). Notably, even when the trial counsel attempted to serve appellant with the referred charges in *Guyton II*, they had to find him at a different location than Fort Bragg because he was with his unit conducting a training exercise. (JA 400). This pattern not only demonstrated appellant's ongoing freedom, but an absolute lack of restrictions of any sort. This factor strongly weights against appellant.

2. Appellant's anxiety towards trial was normal.

Appellant's only effort at establishing any kind of prejudice is to suggest his administrative flag caused "anxiety and concern." (Appellant's Br. 21–22);

Mizgala, 61 M.J. at 129. This is insufficient. Administrative flags fail to meet the prejudice prong because they are unrelated to the interests that "the speedy trial right was designed to protect." *Mizgala*, 61 M.J. at 129 (quoting *Barker*, 407 U.S. at 532); *see also United States v. Harrington*, 2021 CAAF LEXIS 434, at *23 (C.A.A.F. 2021) (Maggs, J., dissenting) (noting that in conducting the prejudice analysis, the "issue actually is whether any [prejudice] was *caused by the government's delay*") (emphasis in original).

Here, flags are a mandatory administrative consequence that are put into place at the onset of a "disciplinary or administrative action *until that action is concluded*." Army Reg. 600-8-2, Suspension of Favorable Action, para. 2–1(*c*) (April 5, 2021) [AR 600-8-2] (emphasis added). In other words, any governmental delay did not *cause* the flag—instead, the flag was placed upon appellant as part of a routine, regulatory requirement once he was subject to disciplinary action.

Furthermore, while these flags prevent "favorable" actions, AR 600-8-2, para. 2–1(*a*)(1), this in no way amounts to the "anxiety and concern" that the Sixth Amendment aims to prevent. *Mizgala*, 61 M.J. at 129. Courts are "concerned not with the normal anxiety and concern experienced by an individual in pretrial confinement, but rather with some degree of particularized anxiety and concern greater than the normal anxiety and concern associated with pretrial confinement." *Wilson*, 72 M.J. at 354. This ordinary collateral consequence is not something that

amounts to the requisite particularized anxiety, especially because flags "are not used for punishment or restriction, but only as an administrative tool." AR 600-8-2, para. 2–1(*b*). As a matter of Army precedent, administrative flags are exactly that—something simply due to "applicable Army regulations." *See United States v. Macario*, ARMY 20160760, 2018 CCA LEXIS 494, at *10–11 (Army Ct. Crim. App. 12 Oct. 2018) (mem. op.) (noting "appellant cites to no case from this Court or our superior Court for the proposition that a proper flagging action pursuant to Army regulation has any effect on the R.C.M. 707 speedy-trial clock").

Appellant's behavior also demonstrates he was not experiencing particularized anxiety while pending trial. Appellant remained in a supervisory role and conducted airborne operations. (JA 113–14). He continued to serve as a jumpmaster—a "pretty significant duty." (JA 115, 495–507). For this reason, *Dooley* is inapplicable. 61 M.J. 258, 264 (C.A.A.F. 2005) (noting that prejudice "can also include any restrictions or burdens on his liberty, such as disenrollment from school or the inability to work due to withdrawal of security clearance"). Appellant remained an active working noncommissioned officer in 3d Special Forces Group (Airborne) and "maintained his TS-SCI security clearance" despite the flag. (JA 113, 271).

Although appellant finds it "offensive to suggest" that his maintenance of a positive attitude was indicative that he was not prejudiced, (Appellant's Br. 23),

that view conflicts with the record: Appellant was *always* positive—before the flag, receipt of charges, and while pending trial. (JA 124). Appellant's rear detachment commander, who knew him for "7 to 8 years," testified that Appellant was "*still* [being] charismatic as he can be and has a positive attitude *like he had before*." (JA 113, 119, 124) (emphasis added). If anything, Appellant's positive attitude, despite the flag, did not "really change[] a beat" the entire time. (JA 124). This evidence demonstrates the opposite of the particularized prejudice required in a constitutional context and weighs against Appellant.

3. Appellant's trial preparation was unimpeded.

The "most serious" factor—the "inability of a defendant adequately to prepare his case"—is entirely absent here. *Johnson*, 17 M.J. at 259. If anything, the delay operated to Appellant's benefit. Time and again, Appellant requested later trial dates. (JA 244–46, 422–23). When providing an explanation, Appellant stated he considered "the witnesses that we have, the experts that have already been assigned . . . and to accommodate those schedules." (JA 162). In other words, Appellant picked the dates that best worked for him.

This matches *Barker*, where the Supreme Court noted, "Barker did not want a speedy trial." 407 U.S. at 534. Instead, "the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced . . . he

definitely did not want to be tried." *Id.* at 535. Such is the situation here, and it weighs heavily against Appellant.

Finally, Appellant points to nothing in his preparation for trial, defense evidence, trial strategy, or ability to present witnesses that was impacted adversely by the delay in this case.[18] Neither Appellant nor the record demonstrates any indication of loss of evidence or impact to case preparation due to the delay. Even at trial, appellant's counsel could only rely on possibility: "Every day the risk grows of losing evidence, losing witnesses, and losing memories *that might* all be relevant to presenting an effective defense." (JA 177). Such speculation does not amount to prejudice. Therefore, nothing about Appellant's situation "skews the fairness of the [military justice] system," and his assignment of error fails. *Johnson*, 17 M.J. at 259.

[18] While the trial defense counsel argued the delay caused two witness issues, appellant does not appear to raise that before this court. (JA 174–75; Appellant's Br. 21–23). Either way, the military judge correctly held that none of these alleged witness issues amounted to prejudice of a constitutional nature. (JA 517). The first unavailable witness, CW2 ST, was unavailable before the withdrawal and dismissal of *Guyton I* (JA 170, 477–78), and the second witness (BG) was never unavailable to appellant, as he intended to be a defense witness. (JA 517). Indeed, BG testified favorably for appellant at trial, and the government never cross-examined him on the "falling out" he had with his mother. (JA 512; R. at 945, 964–69). Even if appellant were to submit this argument to the court, it would fail.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Criminal Court of Appeals.

KAREY B. MARREN
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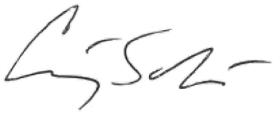

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APPENDIX

Guyton I			
Date	**Pre-Trial Activity**	**Cite**	**Total Days**
9 September 2015	HG called the police and appellant came under investigation for sexual assault.	JA 75	0
21 September 2015	The command placed administrative flags on appellant.	JA 195	0
11 August 2016	*Guyton I* charges preferred for three specifications of Article 120, UCMJ.	JA 275	0
17 August 2016	SPCMCA appointed a Preliminary Hearing Officer (PHO).	JA 283	0
18 August 2016	PHO set the original Article 32 date for 26 August 2016.	JA 278	0
23 August 2016	Defense requested a delay for the Article 32 until 13 September 2016.	JA 280	0
18 August 2016–13 September 2016	PHO attributed 26 days to defense delay.	JA 265	0
13 September 2016	Article 32 Preliminary Hearing.	JA 508	0
27 September 2016	PHO published Article 32 report.	JA 281	0
25 October 2016	SJA provided GCMCA Article 34 advice and recommended a general court-martial (GCM).	JA 187	0
25 October 2016	Convening authority referred charges to GCM under CMCO #1, dated 25 October 2016.	JA 184, 276	0
26 October 2016	Trial counsel served referred charges upon appellant and judiciary.	JA 107, 276, 297	0
26 October 2016	Trial counsel signed EDR requesting trial date of 23 January 2017.	JA 298	0

31 October 2016	Defense requested a delayed trial date of 20 February 2017. Government did not object.	JA 107, 299–301	0
13 January 2017	Arraignment (appellant deferred entry of plea and forum) and motions hearing (five motions).	JA 306–310	0
February 2017	Prior to charges being withdrawn and dismissed, a defense merits and presentencing witness was killed during a deployment to Africa.	JA 511	0
15 February 2017	The senior defense counsel e-mailed the deputy staff judge advocate—an attorney not detailed to appellant's case—about "panel issues, including a struggle to identify the panel discovery docs."	JA 208, 216–17, 256	0
20 February 2017	Date of trial that defense counsel originally requested in the EDN.	JA 299	0
21 February 2017	Government learns of additional criminal misconduct.	JA 302	0
23 February 2017	Convening authority withdrew and dismissed The Charge without prejudice.[19]	JA 236, 305	0
6-10 March 2017	Date of original trial.	JA 508	0
Guyton II			
Date	**Pre-Trial Activity**	**Cite**	**Total Days**
30 May 2017	Charges preferred for sexual assault and larceny.	JA 313	0
6 June 2017	Article 32 PHO appointed. SPCMCA authorized "10 calendar days" of authorized delay if necessary.	JA 266, 316–17, 321	7
13 June 2017	PHO sets the Article 32 date for 20 June 2017, and upon receiving delay requests and requesting an extension from the SPCMCA, later proposed 26 June 2017.	JA 266, 318–20, 331, 340,	14

[19] Withdrawal and dismissal of charges sets "a new 120-day time period" under R.C.M. 707, and the new clock begins on the date of re-preferral. R.C.M. 707(3)(A)(i).

		350, 365–66	
13 June 2017	Defense requests twelve total days of delay.	JA 266, 318, 324, 349, 354, 513	14
13 June 2017	PHO set new Article 32 date for 17 July 2017 and submitted a new delay request to the SPCMCA. PHO accounted for all delays.	JA 363, 384	14
17 July 2017	Second Article 32 Preliminary Hearing.	JA 509	48
26 July 2017	PHO published the Article 32 report.	JA 398	57
16 August 2017	GCMCA approved SJA's advice under Article 34, UCMJ to send case to GCM.	JA 196–97	78
16 August 2017	GCMCA re-referred charges to a GCM under CMCO #1, dated 25 October 2016.	JA 509	78
17 August 2017	Appellant served with referred charges.	JA 192	79
17 August 2017	Government submitted EDR, indicating it would be ready for trial '30 days after arraignment," without requesting a specific trial date.	JA 243, 402, 509	79
22 August 2017	Defense requested a delay, asking for a trial date of 13 November 2017.	JA 244–46	84
22 August 2017	Government opposed the November trial date, and proposed an earlier trial date of 23–27 October 2017.	JA 404	84
22 August 2017	Government sent referred charges to military judge.	JA 400, 513	84
4 October 2017	Second arraignment.	JA 266, 509	127
4 October 2017	Article 39(a), UCMJ session, where the parties litigated several motions.	JA 525–556	127
November 2017	BG, a defense witness and the son of the accused and HG, had "a falling out with his mother" and said he would be testifying on behalf of the defense, prior to charges being withdrawn.	JA 512	155
7–8 November 2017	Government published CMCOs #10 and #11, which applied to *U.S. v. Guyton* only. Some members were temporarily excused.	JA 405–07, 509	161–62

9 November 2017	Military judge noticed discrepancies between the CMCOs and the draft seating chart and notified the parties.	JA 261–62, 509	163
10 November 2017	Government submitted corrected copies of CMCOs # 5, 9, 10, and 11 to the trial court.	JA 258–59, 509	164
13 November 2017	Prior to calling the members, defense made an oral motion to dismiss with prejudice due to lack of jurisdiction, based on the presence of five potential previously excused members. The defense filed their written motion that same day.	JA 207, 510	167
13 November 2017	The military judge granted the government a 24-hour recess to consult with the convening authority.	JA 510	167
13 November 2017	Appellant filed a demand for speedy trial.	JA 165, 510	167
13–16 November 2017	Trial date for *Guyton II*.	JA 509	167–69
14 November 2017	Convening authority withdrew the charges and specifications.	JA 110, 238, 510	168
16 November 2017	Chief of Justice memorialized in an MFR that charges were withdrawn "so that they can be referred to trial for court-martial under a subsequent convening order."	JA 241, 510	170
Guyton III			
22 November 2017	SJA provided Article 34, UCMJ advice to GCMCA, recommending GCM and the case be referred by CMCO #12, dated 22 November 2017.	JA 203	176
22 November 2017	GCMCA re-referred *Guyton III* to GCM under CMCO #12, dated 22 November 2017.	JA 201, 418–19, 510	176
22 November 2017	Government sent referred charges to military judge.	JA 411	176
22 November 2017	Government sent EDR to court stating that it would be ready for trial on or after "11 December 2017 *dependent upon Defense's request for any experts."	JA 201, 421, 510	176

29 November 2017	Defense requested a delay until 27 February 2018.	JA 422–23, 510	183
29 November 2017	Government opposed the defense delay and requested trial from 4–7 January 2018, which would include a weekend, or 5–9 February 2018.	JA 424, 510	183
29 November 2017	"Based on Court's own obligations, docket, and the specific Defense request, the Court docketed trial for the week of 27 February 2018."	JA 425, 510	183
6 December 2017	First available date for *Guyton III* arraignment.	JA 426	190
7 December 2017	MJ intended to set *Guyton III* arraignment but defense requested one-day delay.	JA 426	191
8 December 2017	Appellant arraigned in *Guyton III*. Appellant deferred entry of pleas. Appellant agreed his motion to dismiss based on previously excused members was moot, but the demand for speedy trial remained in place.	JA 25–27, 266, 510	192
11 December 2017	Earliest date government was available for trial.	JA 513	195
15 December 2017	Defense provided written notice of appellant's plea and forum, indicating a plea of not guilty and election of an enlisted panel.	JA 510	199
18 December 2017	Defense filed motion to dismiss for violation of speedy trial.	JA 511	202
18 December 2017	Military judge notified parties of a CMCO from the same convening authority and asked for information as to whether it was relevant to *Guyton III*.	JA 32–36, 469, 511	202
21 December 2017	Defense filed a motion to compel production of witnesses.	JA 510	205
4 January 2018	Original date of motions hearing that had to be postponed due to inclement weather.	JA 471	219
5 January 2018	Military judge held an Article 39(a), UCMJ session where parties litigated the motions. Trial counsel informed the military judged the GCMCA had not yet picked a new panel.	JA 511	220
5 January 2018	GCMCA signed a MFR stating that he had not completed panel selection on 18 December 2017.	JA 511	220

13 February 2018	GCMCA completed panel selection for a new CMCO #1, superseding CMCO #12, dated 22 November 2017.	JA 512	259
27 February 2018	First day of trial, as defense requested.	JA 513	273

United States v. Hill

United States Army Court of Criminal Appeals

February 27, 2018, Decided

ARMY 20130331

Reporter
2018 CCA LEXIS 111 *

UNITED STATES, Appellee v. Private E1 BENJAMIN C. HILL, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Hill, 77 M.J. 374, 2018 CAAF LEXIS 247 (C.A.A.F., Apr. 30, 2018)

Motion granted by United States v. Hill, 77 M.J. 433, 2018 CAAF LEXIS 296 (C.A.A.F., May 24, 2018)

Review denied by United States v. Hill, 2018 CAAF LEXIS 647 (C.A.A.F., Oct. 12, 2018)

Prior History: [*1] Headquarters, III Corps and Fort Hood. Kirsten V. Brunson, Military Judge (arraignment and trial). Patricia H. Lewis, Military Judge (motion to dismiss). Colonel Stuart W. Risch, Staff Judge Advocate (pretrial). Colonel Ian G. Corey, Staff Judge Advocate (post-trial).

United States v. Hill, 2017 CCA LEXIS 430 (A.C.C.A., June 27, 2017)

Core Terms

military, waived, Specification, propensity, plain error, sexual contact, instructions, aggravated, defense counsel, no objection, sentence, affirmative statement, failure to object, convinced, motions

Case Summary

Overview
HOLDINGS: [1]-Appellant's assignments of error on reconsideration were all related to the U.S. Court of Appeals for the Armed Forces' decision regarding Hills instructional error. The instant court addressed appellant's new arguments regarding the military judge's sua sponte instructional obligations, but upheld its previous determination the error was waived; [2]-The court further choose to notice the Hills error, here, and conducted a plain error analysis. It determined that the Hill--Army 20130331 Hills error resulted in prejudice with respect to only one of the affected specifications and took appropriate action.

Outcome
The court stated that the finding of guilty of Specification 2 of Charge I was set aside and conditionally dismissed for judicial economy pending further appeal, if any, to the U.S. Court of Appeals for the Armed Forces. The remaining findings of guilty were affirmed. Reassessing the sentence, the court affirmed the sentence as approved by the convening authority.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

HN1 **Trial Procedures, Instructions**

The military judge bears the primary responsibility for assuring a panel is properly instructed, and once instructed a panel is presumed to follow the law absent clear evidence to the contrary. However, a sua sponte duty does not undermine principles of waiver and forfeiture.

Military & Veterans Law > ... > Trial Procedures > Instructions > Objections

HN2 **Instructions, Objections**

Even a structural error implicating constitutional provisions of due process is subject to waiver and

forfeiture. The United States Court of Appeals for the Armed Forces (CAAF) recently reiterated that an accused's right to a required instruction on findings is not waived (that is, extinguished on appeal) by a failure to object without more; refer also to R.C.M. 920(f), Manual Courts-Martial (stating failure to object to an instruction or to omission of an instruction constitutes forfeiture). However, this does not mean that a required instruction cannot be waived. Rather, the phrase "without more" implies a required instruction can be waived with more than a mere failure to object. Supporting this proposition, Gutierrez held that a mandatory instruction could be affirmatively waived by the defense. Although dealing with the affirmative defense of mistake of fact under Rule 902(e)(3), Manual Courts-Martial, the principle in Gutierrez of affirmative waiver is equally applicable to all mandatory Rule 902(e) instructions. While there are no magic words to establish affirmative waiver, the court is required to look at the record to see if there was a "purposeful decision" at play.

Military & Veterans Law > ... > Trial Procedures > Instructions > Objections

HN3 **Instructions, Objections**

As a general proposition of law, a statement of "no objection" constitutes an affirmative waiver of the right or admission at issue.

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

HN4 **Evidence, Admissibility of Evidence**

Propensity evidence stemming from charged conduct has never been per se admissible. The instruction has always been subject to challenge under the U.S. Court of Appeals for the Armed Forces' decision in Wright.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN5 **Judicial Review, Courts of Criminal Appeals**

In every case before it, the U.S. Army Court of Criminal Appeals is required to conduct a plenary review. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c). With respect to extinguished error the court is required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.

Evidence > Burdens of Proof > Burden Shifting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 **Burdens of Proof, Burden Shifting**

To show plain error, an appellant must demonstrate: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights of the accused. When the error at issue is one of constitutional dimension, once an appellant meets his burden of establishing plain error, the burden shifts to the Government to convince the court that this constitutional error was harmless beyond a reasonable doubt. The U.S. Court of Appeals for the Armed Forces has issued additional guidance regarding the prejudice analysis of Hills error within the context of plain error review.

Counsel: For Appellant: Major Yolanda McCray Jones, JA; Captain Ryan T. Yoder, JA (on brief); Major Christopher D. Coleman, JA; Captain Ryan T. Yoder, JA (on reply brief); Colonel Mary J. Bradley, JA; Lieutenant Colonel Christopher D. Carrier, JA; Captain Ryan T. Yoder (on motion for reconsideration).

For Appellee: Colonel Mark H. Sydenham, JA; Major John K. Choike, JA; Major Matthew T. Grady, JA (on brief); Colonel Tania M. Martin, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Cormac M. Smith, JA; Captain Jeremy Watford, JA (on specified response to issues on reconsideration).

Judges: Before MULLIGAN, FEBBO, and WOLFE, Appellate Military Judges. Judge FEBBO and Judge WOLFE concur.

Opinion by: MULLIGAN

Opinion

MEMORANDUM OPINION ON RECONSIDERATION

MULLIGAN, Senior Judge:

Appellant's assignments of error on reconsideration are

all related to our superior court's decision regarding *United States v. Hills* instructional error. *See* 75 M.J. 350 (C.A.A.F. 2016). We address appellant's new arguments **[*2]** regarding the military judge's sua sponte instructional obligations, but uphold our previous determination the error was waived. *See United States v. Hill*, ***ARMY 20130331***, 2017 CCA LEXIS 430 (Army Ct. Crim. App. 27 June 2017). We further choose to notice the *Hills* error, here, and conduct a plain error analysis. We determine the HILL—***ARMY 20130331*** *Hills* error resulted in prejudice with respect to only one of the affected specifications and take appropriate action.[1]

BACKGROUND

A military panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications each of violating a lawful general regulation, aggravated sexual contact, and housebreaking in violation of Articles 92, 120, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, 930 (2006 & Supp. IV 2011). The panel sentenced appellant to a bad-conduct discharge and confinement for two years. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge and confinement for one year and eleven months and credited appellant with eighty-four days of confinement against the sentence to confinement.

This case is again before us on a defense motion to reconsider. We previously addressed appellant's arguments regarding the *Hills* error, concluding **[*3]** trial defense counsel waived any objection to the improper propensity instructions and improper government argument. *Hill*, 2017 CCA LEXIS 430, *5. We further held in the alternative that even if *Hills* were a "new rule" appellant failed to establish the error resulted in material prejudice to a substantial right under a plain error analysis. *Hill*, 2017 CCA LEXIS 430, * 6-7. We granted defense appellate counsel's new motion to reconsider and the case is again before us to complete our Article 66, UCMJ, review.

[1] In light of our decision to notice the waived error, we need not address appellant's assignment of error regarding ineffective assistance of counsel. We also have fully considered appellant's assignment of error regarding prosecutorial misconduct and determine it does not warrant discussion or relief.

LAW AND DISCUSSION

A. The Hills Error Here was Waived.

As we noted in our initial opinion on reconsideration, defense counsel's affirmative statements of no objection to the improper propensity instructions and failure to object to the improper argument waived the issues for appeal. We applied our superior court's decision in *United States v. Swift*, 76 M.J. 210 (C.A.A.F. 2017), and *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), to determine that appellant's affirmative statements waived the propensity errors as he was fully aware of the issues and had numerous opportunities to contest their admission and use at trial. *Hill*, ***ARMY 20130331***, 2017 CCA LEXIS 430, * 5.

Appellant argues that our reliance on both *Ahern* and *Swift* was misplaced because, unlike the evidentiary issues involved in those cases, here, the military judge had a sua sponte obligation to ensure **[*4]** the mandatory instruction regarding the presumption of innocence was not undermined. *See* Rule for Court-Martial (R.C.M.) 920(e)(5)(A). We agree with appellant; ***HN1***[] the military judge bears the primary responsibility for assuring a panel is properly instructed, and once instructed a panel is presumed to follow the law absent clear evidence to the contrary. However, a sua sponte duty does not undermine principles of waiver and forfeiture.

HN2[] Even a structural error implicating constitutional provisions of due process is subject to waiver and forfeiture. *See gen. Weaver v. Massachusetts*, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017). The United States Court of Appeals for the Armed Forces (CAAF) recently reiterated "that an accused's right to a required instruction on findings is not *waived* (that is, extinguished on appeal) by a failure to object without more . . ." *United States v. Davis*, 76 M.J. 224, 225 (C.A.A.F. 2017); *See also* R.C.M. 920(f) (stating failure to object to an instruction or to omission of an instruction constitutes forfeiture). However, this does not mean that a required instruction cannot be waived. Rather, the phrase "without more" implies a required instruction can be waived with more than a mere failure to object.

Supporting this proposition, the CAAF in *United States v. Gutierrez*, held that a mandatory instruction could be affirmatively waived by the **[*5]** defense. 64 M.J. 374, 376 (C.A.A.F. 2007) (citing *United States v. Barnes*, 39 M.J. 230, 233 (C.M.A. 1994)). Although dealing with the affirmative defense of mistake of fact under R.C.M.

902(e)(3), the principle in *Gutierrez* of affirmative waiver is equally applicable to all mandatory R.C.M. 902(e) instructions. While "there are no magic words to establish affirmative waiver," we are required to look at the record to see if there was a "purposeful decision" at play. *Id.* at 377 (citing *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999).

In *United States v. Hoffman*, we found an appellant's "repeated failure to object—and statement of no objection" to an erroneous propensity instruction constituted an affirmative waiver. 76 M.J. 758, 766-67 (Army Ct. Crim. App. 2017). Although we did not address the sua sponte nature of the military judge's obligations under R.C.M. 920(e)(5)(A) at that time, as it was not raised, we found that the repeated failures and affirmative statements of appellant's counsel indicating no objection constituted a purposeful decision. *Id.; See also Swift*, 76 M.J. at 217 (***HN3***[] "as a general proposition of law, [a statement of] 'no objection' constitutes an affirmative waiver of the right or admission at issue.").

Similar to *Hoffman*, appellant's affirmative statements here show a purposeful decision. Prior to trial, the government filed a motion in limine, specifically asking the court to use the charged offenses of aggravated sexual **[*6]** contact as propensity evidence for each other. The defense counsel did not file a response. We note the absence of such a response or argument would constitute mere forfeiture under R.C.M. 920(f). However, at an Article 39(a), UCMJ, session the military judge and defense counsel discussed the filed motions:

> Military Judge: We did in the 802 discuss the government's two motion[s]. I've got a motion in limine regarding 413 and 404(b) evidence and also a motion in limine precluding mention of collateral consequences. [Defense counsel] indicated in the 802 session that [they] had no objection to either of those motions, correct?
>
> Defense Counsel: That's right, ma'am.
>
> Military Judge: Okay, so those two government motions are granted.

HN4[] Propensity evidence stemming from charged conduct has never been *per se* admissible. As we explained in *Hoffman*, the instruction has always been subject to challenge under the CAAF's decision in *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). Each of the threshold findings required under *Wright* represented a ground on which appellant could have argued a propensity inference should have been disallowed in the case. Indeed, at a minimum the instruction could have been challenged based on Military Rule of Evidence (Mil R. Evid.) **[*7]** 403. And, yet appellant's statement of "That's right, ma'am" indicated an affirmative and purposeful decision not to challenge the motions on *any* grounds.

At another Article 39(a), UCMJ, session prior to trial, the military judge summarized the motions before the court and indicated "The government filed a motion in limine, and motion--- notice to present evidence under MRE 413 and MRE 404(b), and that is Appellate Exhibit VIII. That is unopposed, so that motion is granted." Appellant remained silent, affirming the military judge's understanding and indicating a purposeful decision.

At the close of trial and prior to panel instructions, trial counsel again requested the inclusion of the erroneous propensity instruction. After typing the instructions and allowing both sides to review them, the military judge asked both counsel, "Any objection to the instructions or corrections?" The defense counsel again responded, "No, ma'am." As in *Hoffman* we hold these repeated failures to object and affirmative statements indicating the defense had no objection to the instruction constituted a purposeful decision, thereby affirmatively waiving the issue.

B. Noticing the Waiver.

HN5[] In every case before us, we are required **[*8]** to conduct a plenary review. UCMJ, art. 66(c). With respect to extinguished error we are "required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error." *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (citing *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002). Here, while we find waiver, we also find plain error. To avoid injustice, based on the facts of this case, we choose to notice the waived error and conduct a plain error review.

HN6[] To show plain error, an appellant must demonstrate: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights of the accused. *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017). As the error at issue is one of constitutional dimension, "[o]nce [appellant] meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable

doubt." *Paige*, 67 M.J. at 449 (quoting *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005)).

The CAAF has issued additional guidance regarding the prejudice analysis of *Hills* error within the context of plain error review. *See United States v. Guardado*, 77 M.J. 90 (C.A.A.F. 2017). Here, we are not convinced the erroneous propensity instruction did not play a role in appellant's conviction **[*9]** of Specification 1 of Charge I, the aggravated sexual contact against Private First Class (PFC) MA. *Id.* at 95. However, we are convinced the instruction did not play a role with respect to

Specification 2 of Charge I, the aggravated sexual contact against PFC JW. *Id.* Specification 1 of Charge I alleged an aggravated sexual contact against PFC MA. On 20 March 2011, PFC MA awoke to being held down by three individuals, including appellant, who had entered his room without his permission. Private First Class MA testified that as the individuals held him down, they pulled his pants down and one of them put his finger in PFC MA's anus. Private First Class MA said it was appellant because appellant's "hand was in that area." Private First Class MA testified that he fought to get away the whole time, but could not. The incident lasted less than a minute. The conviction was based solely on the testimony of the victim of the event. There was no testimony from an eyewitness or corroborating physical evidence. The lack of supporting evidence makes it difficult to conclude the instruction was harmless. We therefore grant appropriate relief as stated in our decretal paragraph.

This is different from Specification **[*10]** 2 of Charge I, the aggravated sexual contact against PFC JW. Private First Class MA was an eyewitness to this crime and corroborated PFC JW's accusation. On a single occasion between 14 and 20 April 2011, appellant and other soldiers entered PFC MA and PFC JW's containerized housing unit without permission. They held PFC JW down and took off his pants. Appellant "shoved multiple fingers up [PFC JW's] butt." Again, the attack lasted less than a minute. Private First Class MA witnessed the attack from his bed, but was afraid to try and stop it. In light of PFC MA's eyewitness testimony to this event, which corroborated PFC JW's credible testimony, we are convinced the instruction was harmless and "did not contribute to the verdict by 'tipping the balance in the member's ultimate determination.'" *Guardado*, 77 M.J. at 94 (quoting *Hills*, 75 M.J. at 358).

CONCLUSION

Upon consideration of the entire record, rather than authorize a rehearing, the finding of guilty of Specification 2 of Charge I is set aside and *conditionally* DISMISSED for judicial economy pending further appeal, if any, to our superior court. *See United States v. Britton*, 47 M.J. 195, 203 (C.A.A.F. 1997) (Effron, J., concurring); *United States v. Hines*, 75 M.J. 734, 738 n.4 (Army. Ct. Crim. App. 2016); *United States v. Woods*, 21 M.J. 856, 876 (A.C.M.R. 1986). Our dismissal is conditioned on the remaining guilty findings surviving the "final judgment" **[*11]** as to the legality of the proceedings. *See* UCMJ art. 71(c)(1) (defining final judgment as to the legality of the proceedings). The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the amended findings, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we AFFIRM the sentence as approved by the convening authority. The panel found appellant guilty of Specification 1 of Charge III, a housebreaking charge that encompassed the criminal intent to commit the actions dismissed in Specification 1 of Charge I. The housebreaking charge was unaffected by the erroneous instructions and resolved appellant's intention to commit aggravated sexual contact upon entering PFC MA's room, leaving only the question of whether appellant attempted or actually committed the action. In light of this determination, we are convinced the panel would have sentenced appellant to at least that which was adjudged. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered to be restored. *See* UCMJ art. 75(a).

Judge FEBBO and Judge WOLFE concur.

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United States v. Macario

United States Army Court of Criminal Appeals

October 12, 2018, Decided

ARMY 20160760

Reporter
2018 CCA LEXIS 494 *; 2018 WL 5018393

UNITED STATES, Appellee v. Private E2 VINCENT MATTHEW B. MACARIO, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Macario, 2018 CAAF LEXIS 774 (C.A.A.F., Dec. 13, 2018)

Related proceeding at United States v. Rodriguez, 2019 CCA LEXIS 65 (A.C.C.A., Jan. 31, 2019)

Review denied by United States v. Macario, 2019 CAAF LEXIS 76 (C.A.A.F., Feb. 4, 2019)

Prior History: **[*1]** Headquarters, Fort Riley. J. Harper Cook, Military Judge. Lieutenant Colonel Joseph B. Mackey, Staff Judge Advocate.

Core Terms

sentence, disparate, mouth, rape, assault, penis, shed, closely related, coactor, sexual

Case Summary

Overview
HOLDINGS: [1]-Evidence that a servicemember forced another servicemember's wife's ("victim's") mouth open and inserted his penis into her mouth while a second servicemember was having nonconsensual sexual intercourse with the victim was legally and factually sufficient to affirm the servicemember's conviction of rape by force, in violation of UCMJ art. 120, 10 U.S.C.S. § 920; [2]-The Government did not violate the servicemember's right to a speedy trial when it charged him jointly with the other servicemember, but then dismissed the charges and referred charges against him alone; [3]-The servicemember was not entitled to relief from his sentence of a dishonorable discharge and 66 months' confinement, even though his coactor was sentenced to a dishonorable discharge and ten months' confinement, because the sentences were not highly disparate.

Outcome
The court affirmed the findings and sentence.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

The United States Army Court of Criminal Appeals ("ACCA") reviews claims of legal and factual insufficiency de novo, examining all of the evidence properly admitted at trial. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. The test for factual sufficiency is whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the ACCA is itself convinced of an appellant's guilt beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Judicial Review, Courts of Criminal Appeals**

The United States Army Court of Criminal Appeals ("ACCA") reviews sentence appropriateness de novo. The ACCA may affirm only such findings of guilty and a sentence, or such part or amount of a sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c). When the ACCA conducts a sentence appropriateness review, it reviews many factors, to include: the sentence severity; the entire record of trial; the appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 **Judicial Review, Courts of Criminal Appeals**

One of the many aspects of sentence appropriateness is so-called "sentence comparison." The United States Army Court of Criminal Appeals considers sentence comparison in the overall rubric of sentence appropriateness only in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases. An appellant seeking sentence comparison relief must show that his sentence is "highly disparate" from a "closely related" defendant's sentence. If a defendant is able to show both, the burden shifts to the Government to provide a rational basis for the disparity. However, an appellant with an otherwise appropriate sentence is not necessarily entitled to a "windfall" just because a coactor received a more lenient sentence.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 **Courts Martial, Sentences**

Whether a sentence is highly disparate is determined by comparison of adjudged sentences taking into account the disparity in relation to the potential maximum punishment.

Counsel: For Appellant: William E. Cassara, Esquire (on brief); Captain Zachary Szilagyi, JA; William E. Cassara, Esquire (on reply brief).

For Appellee: Lieutenant Eric K. Stafford, JA; Major Wayne H. Williams, JA; Captain KJ Harris, JA (on brief).

Judges: Before WOLFE, SALUSSOLIA, and ALDYKIEWICZ Appellate Military Judges.

Opinion

MEMORANDUM OPINION

Per Curiam:

Appellant challenges his rape conviction on factual and legal sufficiency grounds, claims that his sentence was impermissibly harsh when compared to his coactor's sentence, and contends that he did not receive a speedy trial. Finding no error, we affirm.[1]

BACKGROUND

Appellant's rape conviction stemmed from his actions

[1] A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of rape by force, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. §920 (2012) [UCMJ]. The military judge acquitted appellant of one specification of sexual assault and one specification of adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934 (2012). The military judge sentenced appellant to a dishonorable discharge, confinement for 66 months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence. This case is before us for review pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c).

inside a small shed next to his family's quarters on Fort Riley, Kansas, in the early morning hours of 27 September 2015. The victim, MS, was appellant's next-door neighbor, and was married to Army Private First Class (PFC) JA. Prior to 26-27 September 2015, MS and PFC JA had been friendly with appellant and his wife. MS had also recently met appellant's friend, Army Specialist (SPC) Rodriguez.

On the evening **[*2]** of 26 September 2015, MS and PFC JA quarreled loudly. Specialist Rodriguez—who, along with others, had been visiting appellant next door—heard the fight, and approached MS outside of her house. Specialist Rodriguez asked if "everything was okay," and invited her and PFC JA to go to a bar with the group. MS declined, but said SPC Rodriguez could text her when the group returned from the bar so that they could come to appellant's house to socialize. MS then returned home, took two shots of alcohol, and reconciled with PFC JA. Later, the couple drank a shot together (MS's third).

Around 0200 or 0300 on 27 September 2015, appellant and SPC Rodriguez knocked on MS's and PFC JA's door. PFC JA was asleep, but MS was still awake, watching a movie. Appellant and SPC Rodriguez invited MS and PFC JA to appellant's house. MS initially declined because PFC JA was asleep, but ultimately agreed. At appellant's house, appellant handed MS a beer, asked about the loud fight, and told MS that she "deserved better" and should leave PFC JA. MS told appellant that the two had "made up" and that she "loved" PFC JA. MS drank the beer, along with three more shots of alcohol.

A group from the gathering, including **[*3]** MS, appellant, SPC Rodriguez, and SPC Wick, walked to a nearby park. At the park, while MS and SPC Wick sat on the swings, appellant and SPC Rodriguez engaged in a conversation behind them on a bench. On the walk back to appellant's house, SPC Rodriguez lagged behind the group. MS went back to him; SPC Rodriguez put his hands on MS's hips, and attempted to kiss her. MS pushed SPC Rodriguez away, telling him, "You are drunk. Let's just forget about it."

As the group approached appellant's house, appellant "rush[ed]" up to MS and SPC Rodriguez and said that PFC JA was "looking for" MS and was "really mad."[2] Appellant said that he and SPC Rodriguez would talk to PFC JA, and that, in the meantime, they would "hide" MS in a small storage shed located to the rear of MS's and PFC JA's quarters. Feeling "confused" as to "why [PFC JA] was mad," and feeling the effects of the alcohol, MS acceded as the two guided her inside the shed and closed the door.

Five to ten seconds later, appellant and SPC Rodriguez entered the shed. MS asked, "what's going on," to which SPC Rodriguez responded by asking MS if she could "keep a secret." MS responded "yes." At that, appellant began touching MS's chest, and **[*4]** SPC Rodriguez began touching her waist. MS said repeatedly, "[n]o, I don't want to do this," and "Stop. I love [PFC JA]." Specialist Rodriguez pulled MS's sweatpants down, bent her over so that her head was facing appellant, and penetrated her vulva with his penis. Appellant simultaneously "took one of his hands and put his fingers on the outside of [MS's] cheeks and began pushing in," "prying" MS's mouth open. With his other hand, appellant inserted his penis into MS's mouth. Appellant and SPC Rodriguez "both began thrusting." MS, "panicking," and realizing there was "no way out," tried to "block . . . out" the assault. The next thing MS remembered was appellant and SPC Rodriguez opening the shed door, adjusting their pants, and stepping out.

Immediately after the assault, MS woke up her husband, called her mother, and called the military police. DNA analysis later detected SPC Rodriguez' semen in MS's mouth (to a certainty of 1 in 4.3 quadrillion); MS's DNA in SPC Rodriguez' underwear (1 in 67 quadrillion); MS's DNA on Rodriguez' penis swab (1 in 73 quadrillion); MS's DNA on appellant's underwear (1 in 40 quadrillion); and MS's DNA on appellant's penis swab (1 in 32 trillion), and **[*5]** scrotum (1 in 82 billion).

LAW AND DISCUSSION

A. Legal and Factual Sufficiency

Appellant asserts that the charged "force" element in his rape by force claim, grabbing of MS's mouth with his hand, was legally insufficient to sustain a conviction for rape by force, and that the government's evidence was also factually insufficient. We disagree, and find the evidence both legally and factually sufficient.

HN1[↑] We review claims of legal and factual insufficiency de novo, examining all of the evidence properly admitted at trial. Art. 66(c), UCMJ; 10 U.S.C. §

[2] This was untrue. Private First Class JA was still asleep at home.

866(c). *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The test for factual sufficiency is whether after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

As to appellant's legal sufficiency claim, we find that appellant's actions in grabbing MS's face, and forcing her mouth open in order to insert his penis into her mouth, while MS was both **[*6]** under the influence of alcohol and simultaneously being sexually assaulted by SPC Rodriguez in a small shed, amounted to "force" as defined by 10 U.S.C. § 920(g)(5)(B) (2012). Specifically, appellant's actions amounted to "the use of . . . physical strength or violence . . . sufficient to overcome [or] restrain" MS in order to effectuate the sexual act of putting appellant's penis into MS's mouth. Moreover, the offense of rape by force was complete upon "penetration, however slight" of MS's mouth by appellant's penis. 10 U.S.C. § 920(g)(1)(A) (2012).

Regarding factual sufficiency, for the reasons explained in the Background section *supra*, and based on the totality of the record, we are convinced, beyond a reasonable doubt, of appellant's guilt.

B. Sentence Appropriateness

At SPC Rodriguez' separate court-martial, held approximately one week after appellant's at Fort Riley, a panel found SPC Rodriguez guilty of two specifications of sexual assault by bodily harm, and one specification of adultery in violation of Articles 120(b)(1)(B) and 134, 10 U.S.C. §§ 920(b)(1)(B) and 934 (2012), UCMJ. The panel sentenced SPC Rodriguez to a dishonorable discharge, ten months of confinement, and reduction to E-1. Appellant contends that his 66-month confinement sentence **[*7]** was impermissibly harsh in comparison to SPC Rodriguez' sentence. We disagree, and affirm appellant's sentence.

HN2[] This court reviews sentence appropriateness de novo. *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Art. 66(c), UCMJ; 10 U.S.C. § 866(c). "When we conduct a sentence appropriateness review, we review many factors to include: the sentence severity; the entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017).

HN3[] One of the "many aspects of sentence appropriateness" is so-called "sentence comparison." *Id.* at 840 (citing *United States v. Snelling*, 14 M.J. 267, 268 (C.A.A.F. 1982)). We consider sentence comparison in the overall rubric of sentence appropriateness only in "those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *Martinez*, 76 M.J. at 840 (internal quotation marks and citations omitted). An appellant seeking sentence comparison relief must show that his sentence is "highly disparate" from a "closely related" **[*8]** defendant's sentence. *Id.* If a defendant is able to show both, the burden shifts to the government to provide a rational basis for the disparity. *Id.* However, an appellant with an otherwise appropriate sentence is not necessarily entitled to a "windfall" just because a coactor received a more lenient sentence. *Id.* at 841-42.

Contrary to the government's claims, appellant's and SPC Rodriguez' cases were clearly "closely related." Appellant and SPC Rodriguez simultaneously assaulted MS, and were for a time co-accused's on the same charge sheet. The fact that appellant was convicted of rape and SPC Rodriguez was convicted of sexual assault is not a meaningful distinction for these purposes. *See, e.g., United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) ("coactors involved in a common crime" are closely related). While appellant's and SPC Rodriguez' sentences to 66 months and 10 months of confinement are disparate, they are not *highly* disparate when compared to their respective maximum punishments of life (appellant) and 61 years (SPC Rodriguez). *See Martinez*, 76 M.J. at 841 (***HN4***[] "Whether a sentence is highly disparate is determined by comparison of the adjudged sentences taking into account the disparity in relation to the potential maximum punishment.") (citing, *inter alia,* ***[*9]*** *Lacy*, 50 M.J. at 289). Here, both appellant's and SPC Rodriguez' sentences represented very small percentages of their respective potential maximum sentences.

Ultimately, however, even assuming *arguendo* that appellant could show both that his case was closely related to SPC Rodriguez', and that their sentences were highly disparate, and the government could offer no countervailing rationale for the disparity, appellant would nonetheless be entitled to no relief. Appellant's sentence to 66 months confinement was not an unduly harsh sentence for this forcible rape.[3] The fact that a panel chose later to hand down a misdemeanor-level sentence for sexual assault in SPC Rodriguez' court-martial, for offenses that carried a maximum penalty of 61 years, does not transform appellant's otherwise reasonable sentence into an unreasonable one. Stated differently, appellant is not entitled to a windfall just because his coactor received one. *See Martinez*, 76 M.J. at 842 ("appellant is not entitled to a windfall from an otherwise appropriate sentence just because a coactor, who may even be more culpable, received a more lenient sentence").

C. Speedy Trial

Appellant asks that we dismiss his rape conviction based on a speedy trial violation.[4] Finding **[*10]** no such violation, we decline to do so.

First, appellant contends that his arraignment took place 257 days after preferral of charges, in violation of the requirement that he be "brought to trial" within 120 days. Rule for Courts-Martial [R.C.M.] 707(a); *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016). Appellant's 257-day calculation is wrong because it fails to account for the government's valid withdrawal and dismissal of the original charges after the original preferral, well before 120 days. Following repreferral, appellant was arraigned on Day 81.[5]

Second, appellant contends that, because he was "flagged" pursuant to applicable Army regulations throughout the pendency of the 257 days, the speedy trial clock did not reset, even assuming a valid purpose for the government's withdrawal and repreferral.[6] In support of this contention, appellant cites to our sister court's decision in *United States v. Robinson*, 47 M.J. 506 (N.M. Ct. Crim. App. 1997).

Robinson is inapposite. In *Robinson*, the Navy-Marine Corps Court of Criminal Appeals found a dismissal action taken on the 120th day (115th chargeable day) to be a "subterfuge, done *solely to avoid the 120-day clock*." 47 M.J. at 510 (emphasis added). We find no such subterfuge here, where the withdrawal and dismissal **[*11]** were not only for a proper purpose, but also occurred well in advance of the 120-day mark. While *Robinson* does discuss the Navy's "legal hold" concept, which appellant would have us analogize to the

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[3] Indeed, while not dispositive, it is noteworthy that appellant's trial defense counsel argued at sentencing that "a sentence of five years would be the most appropriate punishment in this case."

[4] Appellant simultaneously identified the speedy trial issue as both a *Grostefon* issue and as an enumerated assignment of error in the body of his brief. *See United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We note that the Army Court of Criminal Appeals Internal Rules of Practice and Procedure [A.C.C.A.R.] 15.5 provides that counsel should raise *Grostefon* issues "by footnote or in an Appendix to [appellant's] Brief." Whether considered as a *Grostefon* matter or as an enumerated assignment of error, we find appellant's speedy trial claim to be without merit.

[5] While appellant's brief makes no mention of it, the parties litigated this same speedy-trial issue at some length pretrial, and the military judge made detailed findings of fact and conclusions of law. The first set of charges were preferred in this case on 22 January 2016. On that original charge sheet, appellant and SPC Rodriguez were charged jointly. The convening authority subsequently withdrew and dismissed the joint charges on 3 May 2016, a date that the military judge calculated, and appellant agreed, was effectively day 72 of the R.C.M. speedy-trial clock due to certain excluded time. The military judge further found that the convening authority had properly withdrawn and dismissed appellant's charges after the government reconsidered its joint-trial strategy. Upon repreferral, the government separately charged appellant and SPC Rodriguez, and the two proceeded to separate trials. We agree with the military judge that the convening authority's rationale for the withdrawal and dismissal was valid and not a subterfuge, and therefore the 3 May 2016 withdrawal and dismissal reset the speedy-trial clock. *See* R.C.M. 707(b)(3)(A)(i); *United States v. Hendrix*, 77 M.J. 454, 456-57 (C.A.A.F. 2018).

The government repreferred charges against appellant on 18 July 2016. Charges were referred and delivered to the military judge on 7 October 2016 and appellant was arraigned on 7 November 2016. Because the speedy-trial clock effectively stops upon the military judge's receipt of the charges unless otherwise specified, appellant's arraignment following repreferral took place on day 81. *See United States v. Hawkins*, 75 M.J. 640, 641-42 (Army Ct. Crim. App. 2016).

[6] Army Reg. 600-8-2, Personnel-General: Suspension of Favorable Personnel Actions (Flag), para. 2-2 (11 May 2016).

Army's "flag," the *Robinson* court did not base its holding on the fact that the appellant there was on a "legal hold," but rather, because the Court found that the dismissal action itself was a subterfuge. *Id.* at 510-11. Moreover, appellant cites to no case from this Court or our superior Court for the proposition that a proper flagging action pursuant to Army regulation has any effect on the R.C.M. 707 speedy-trial clock. Thus, appellant's *Robinson* speedy-trial argument fails.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

End of Document

United States v. Torres

United States Army Court of Criminal Appeals

March 19, 2014, Decided

ARMY 20111168

Reporter
2014 CCA LEXIS 180 *; 2014 WL 1217980

UNITED STATES, Appellee v. Private First Class VICENTE C. TORRES, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Torres, 2014 CAAF LEXIS 930 (C.A.A.F., Sept. 11, 2014)

Prior History: **[*1]** Headquarters, United States Army Cadet Command and Fort Knox. Timothy Grammel, Military Judge. Colonel Robert J. Cotell, Staff Judge Advocate.

Core Terms

military, charges, weapon, specification, approve, defense counsel, arraignment, pretrial, trial counsel, speedy trial, Courts-Martial, multiplication, firing, convening, referral, clock, confinement, excludable, sentence, delays

Case Summary

Overview
HOLDINGS: [1]-The 28-day delay for the Unif. Code Mil. Justice art. 32, 10 U.S.C.S. § 832 was excluded under R.C.M. 707, Manual Courts-Martial as the Special Court-Martial Convening Authority, a proper authority, granted the delay; [2]-The 28-day delay was properly approved to allow for the processing of appellant's Individual Military Counsel request and to resolve scheduling conflicts; [3]-Rule of Practice Before Army Courts-Martial 1.1 was not inconsistent with R.C.M. 707(c)(1); [4]-The 11-day delay between the military judge's receipt of the referred charges and arraignment was properly excluded; [5]-There was no per se requirement under R.C.M. 707(c)(1) that a delay be granted in writing; [6]-There was not an unreasonable multiplication of charges, even though the violation of a lawful order and wrongful discharge of a weapon charges were based on same firing of a weapon.

Outcome
Findings of guilty and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN1 **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

Under R.C.M. 707(a), (b)(1), Manual Courts-Martial, the date on which pretrial restraint is imposed shall not count for purposes of computing time under the rule; however, the date on which an accused is brought to trial--arraignment--shall count.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

Whether an accused received a speedy trial under R.C.M. 707, Manual Courts-Martial is a legal question that the appellate court reviews de novo. However, the military judge's findings of fact are given substantial deference and will be reversed only for clear error. Rule 707 provides that the accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4), Manual Courts-Martial; or (3) entry on

active duty under R.C.M. 204, Manual Courts-Martial. Rule 707(a)(1)-(3).

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] **Courts Martial, Convening Authority**

R.C.M. 707, Manual Courts-Martial allows authorized personnel to approve delays, and therefore "exclude" time from the Rule 707 120-day clock. Rule 707(c). Prior to referral, any request for pretrial delay must be submitted to either the convening authority, the Unif. Code Mil. Justice art. 32, 10 U.S.C.S. § 832 officer (if the convening authority has properly delegated delay authority), or if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. Rule 707(c)(1). After referral, only a military judge can approve any pretrial delay. Rule 707(c)(1). All pretrial delays approved by authorized personnel are excludable unless the decision to approve the delay was an abuse of discretion. There must be "good cause" for the delay and the length of time requested must be "reasonable" based on the facts and circumstances of each case.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

When the appellate court reviews a military judge's denial of a motion for violation of speedy trial pursuant to R.C.M. 707, Manual Courts-Martial, the appellate court must answer two questions: (1) was the delay granted by a person authorized to grant the delay; and (2) was the decision to grant the delay an abuse of discretion. An abuse of discretion occurs when either there was not good cause for granting the delay, or the amount of delay granted was unreasonable under the facts and circumstances of the case.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN5[] **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

R.C.M. 707, Manual Courts-Martial focuses on whether a period of time is excludable because a delay has been granted, which is in contrast to the prior version that focused on a determination as to which party was responsible for the delay. It no longer matters which party is responsible for the delay under R.C.M. 707.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN6[] **Courts Martial, Convening Authority**

The Special Court-Martial Convening Authority is a proper authority to exclude delay. R.C.M. 707(c)(1), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN7[] **Courts Martial, Convening Authority**

Though a convening authority is not empowered to issue blanket exclusions of time under R.C.M. 707, Manual Courts-Martial, he may reasonably grant delays predicated on the interval of time between certain events. A "delay" is defined as any interval of time between events. When a delay is granted, the defense

may not insist that the proceeding take place immediately following the delay; rather, counsel must reasonably cooperate to reschedule the proceeding.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

HN8 **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

Waiver has been found where the period of delay was not challenged by the appellant at the trial level.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN9 **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

Rule of Practice Before Army Courts-Martial 1.1 states that any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per R.C.M. 707(c), Manual Courts-Martial unless the judge specifies to the contrary.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN10 **Trial Procedures, Judicial Discretion**

The argument that Rule of Practice Before Army Courts-Martial (Rule of Court) 1.1 is inconsistent with R.C.M. 707(c)(1), Manual Courts-Martial is rejected. Rule of Court 1.1 reiterates the authority already granted to military judges under R.C.M. 707 to exclude pretrial delay after referral. As the Preamble to the Rules of Court states: the Rules of Court supplement the Rules for Courts-Martial (R.C.M.) and, together with the R.C.M., govern trials by courts-martial presided over by judges assigned to or affiliated with the United States Army Trial Judiciary. Since Rule of Court 1.1 recognizes that military judges have discretion in deciding whether to approve delay between referral and arraignment, there is no inconsistency between Rule of Court 1.1 and R.C.M. 707(c)(1).

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN11 **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

The discussion to R.C.M. 707(c)(1), Manual Courts-Martial states that pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing. The discussion sections in the Manual for Courts-Martial are non-binding. There is no per se requirement under R.C.M. 707(c)(1) that the military judge must grant any delay in writing.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

HN12 **Pretrial Proceedings, Charges & Specifications**

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. R.C.M. 307(c)(4), Manual Courts-Martial. The prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. The U.S. Court of Appeals for the Armed Forces has listed five factors to help guide the court of criminal appeals' analysis of whether charges have been unreasonably multiplied: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in

the drafting of the charges?

Counsel: For Appellant: Lieutenant Colonel Imogene M. Jamison, JA; Major Richard E. Gorini, JA; Captain Robert A. Feldmeier, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Elisabeth A. Claus, JA; Captain Sean P. Fitzgibbon, JA (on brief).

Judges: Before LIND, KRAUSS, and BORGERDING, Appellate Military Judges.

Opinion by: LIND

Opinion

MEMORANDUM OPINION

LIND, Senior Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of failure to obey a lawful order for loading and firing a privately owned weapon within the cantonment area of Fort Knox; one specification of willfully discharging a firearm under such circumstances as to endanger human life; one specification of carrying a concealed weapon; and one specification of obstruction of justice in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934 (2006) [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge, twenty-four months confinement, forfeiture of **[*2]** all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 199 days of confinement against the sentence to confinement.

This case is before the court for review under Article 66, UCMJ. Appellant raises several assignments of error, two which merit discussion but no relief. We hold appellant's right to a speedy trial under Rule for Courts-Martial [hereinafter R.C.M.] 707 was not violated, and appellant's convictions for both violating a lawful order and willfully discharging a weapon did not constitute an unreasonable multiplication of charges for findings or sentencing. We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they are without merit.

FACTS AND PROCEDURAL BACKGROUND

Appellant was suspected of firing his privately owned weapon in a barracks parking lot at Fort Knox, Kentucky on or about 17 July 2011. Appellant's chain of command restricted appellant to his battalion's Charge of Quarters (CQ) desk that same day. Appellant remained at the CQ desk until 21 July 2011. On that evening, appellant's chain of command **[*3]** restricted appellant to his off-post quarters until 28 July 2011—the date appellant entered into pretrial confinement at a local county jail. The original charges were preferred on 28 July 2011. The additional charges were preferred on 14 September 2011.

The Article 32, UCMJ, investigation [hereinafter Article 32] was scheduled for 24 October 2011. On 20 October 2011, appellant submitted an Individual Military Counsel (IMC) request. The day prior, on 19 October 2011, appellant submitted a request for delay of the Article 32 addressed to the Special Court-Martial Convening Authority (SPCMCA). The requested delay was for the period of time until the IMC request was " processed, barring any prior scheduling conflicts." On 22 October 2011, the SPCMCA granted the delay. On 28 October 2011, the IMC request was denied; however, the trial counsel was not informed of the denial until 3 November 2011. Trial counsel forwarded the denial to defense counsel on 4 November 2011. Defense counsel was on temporary duty working on other courts-martial from 31 October to 4 November 2011. Trial counsel was on leave from 5 November to 8 November 2011. On 9 November 2011, trial counsel, defense counsel, and **[*4]** the investigating officer rescheduled the Article 32 for 21 November 2011, the first available date when all parties would be available. On 18 November 2011, appellant filed a request for speedy trial. The Article 32 was held on 21 November 2011. Charges were referred on 8 December 2011 and immediately sent to the military judge for docket ing. On 9 December 2011, the military judge docketed the trial for 19 December 2011. Appellant was arraigned on 19 December 2011.

At trial, appellant made a motion to dismiss for, *inter alia*, a violation of his right to a speedy-trial under R.C.M. 707. The military judge found the triggering date for the 120-day rule was the imposition of pretrial restraint on 17 July 2011. The military judge denied appellant's motion to dismiss, finding that the 28-day delay for the Article 32 was properly approved prior to referral, and the 11-day delay between receipt of referred charges and arraignment was properly approved by the military judge. The military judge then

"subtracted" these days and calculated the total delay at 116 days, within the 120-day requirement of R.C.M. 707.[1]

LAW AND ANALYSIS

Appellant's Right to a Speedy Trial under R.C.M. 707

HN2[] Whether an accused received a speedy trial under R.C.M. 707 is a legal question that we review de novo. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (citing *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999)). However, the military judge's "findings of fact are given 'substantial deference and will be reversed only for clear error. '" *Id*. (quoting *Doty*, 51 M.J. at 465).

R.C.M. 707 provides that the "accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) entry on active duty under R.C.M. 204." R.C.M. 707(a)(1)-(3).

HN3[] The rule allows authorized personnel to approve delays, and therefore "exclude" time from the R.C.M. 707 120-day clock. R.C.M. 707(c). Prior to referral, any request for pretrial delay must be submitted to either the convening authority, the Article 32 officer (if the convening authority has properly delegated delay authority), or "if authorized under **[*6]** regulations prescribed by the Secretary concerned, to a military judge for resolution." R.C.M. 707(c)(1); *United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005); R.C.M. 707(c)(1) discussion. After referral, only a military judge can approve any pretrial delay. R.C.M. 707(c)(1). All pretrial delays approved by authorized personnel are excludable unless the decision to approve the delay was an abuse of discretion. *See Lazauskas*, 62 M.J. at 41 (citing R.C.M. 707(c)); *United States v. Arab*, 55 M.J. 508, 512 (Army Ct. Crim. App. 2001). There must be "good cause" for the delay and the length of time requested must be "reasonable" based on the facts and circumstances of each case. *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997); *see also* R.C.M. 707(c)(1) discussion; R.C.M. 707(c) analysis at A21-42.

In sum, ***HN4***[] when this court reviews a military judge's denial of a motion for violation of speedy trial pursuant to R.C.M. 707, we must answer two questions: (1) was the delay granted by a person authorized to grant the delay; and (2) was the decision to grant the delay an abuse of discretion. *Arab*, 55 M.J. at 512. An abuse of discretion occurs when either there was not good cause **[*7]** for granting the delay, or the amount of delay granted was unreasonable under the facts and circumstances of the case. *Thompson*, 46 M.J. at 475.

On appeal, appellant argues that the military judge erred by finding the 28-day delay for the Article 32 was excludable and that the military judge abused his discretion by "improperly rel[ying] upon Rule of Practice Before Army Courts-Martial 1.1 to stop the 120 day clock" and by failing to approve the 11-day delay between his receipt of the referred charges and arraignment "in writing."

Appellant's first argument arises because the military judge's findings failed to identify *who* actually granted the 28-day delay for the Article 32: the military judge found only that "the request was approved." We also note that in his conclusions of law, the military judge held the 28-days are "attributable to the defense as a defense requested delay." However, as our superior court noted in *Lazauskas*, ***HN5***[] "the current version of R.C.M. 707 focuses on whether a period of time is excludable because a delay has been granted, which is in contrast to the prior version that focused on a determination as to which party was responsible for the delay." 62 M.J. at 41 **[*8]** (citing *United States v. Dies*, 45 M.J. 376, 377-78 (C.A.A.F. 1996)); *see also United States v. Nichols*, 42 M.J. 715, 720-21 (A.F. Ct. Crim. App. 1995) (analyzing the "sweeping revision" of R.C.M. 707(c)). Given that it no longer "matter[s] which party is responsible" for the delay under R.C.M. 707, the military judge's conclusion of law that the 28-days "are attributable to the defense" is an incorrect view of the law. *Lazauskas*, 62 M.J. at 41. The record nonetheless establishes the delay was excludable because a proper authority approved the 28-day delay and the approval was not an abuse of discretion.

HN6[] The SPCMCA is a proper authority to exclude delay. R.C.M. 707(c)(1). Trial counsel entered, as part of an appellate exhibit, an email from the SPCMCA dated 22 October 2011 granting the Article 32 defense requested delay. A chronology contained in a stipulation of fact signed by appellant, trial counsel, and defense counsel, admitted as an appellate exhibit for the R.C.M. 707 motion hearing, stated that on 22 October 2011, the

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[1] ***HN1***[] Under R.C.M. 707(a), (b)(1), the date on which pretrial restraint is imposed shall **[*5]** not count for purposes of computing time under the rule; however, the date on which an accused is brought to trial—arraignment—shall count.

"appointing authority" granted the defense's request for delay of the Article 32. The Article 32 officer's appointment memorandum, signed by the SPCMCA, was included **[*9]** as an enclosure to the defense motion to dismiss.[2] Each of these documents was received by the trial court for consideration for the speedy trial motion without objection. We therefore find that an authorized person, the SPCMCA, granted the delay at issue.

We further hold that the SPCMCA did not abuse his discretion in approving the 28-day delay. Appellant's request for delay was based on the need to account for the time necessary to process his IMC request and resolve scheduling conflicts. This is certainly good cause for delay under the circumstances. ***HN7***[] Though a convening authority is not empowered to issue blanket exclusions of time under R.C.M. 707, he may reasonably grant delays predicated on the interval of time between certain events. *United States v. Proctor*, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003) (citing *Nichols*, 42 M.J. at 721) (defining a "delay" as "any interval of time between events" and holding that a convening authority was not empowered to grant "blanket exclusions of time" under R.C.M. 707). The 28 days here **[*10]** excluded reasonably constitutes the time required to process the IMC request and resolve scheduling conflicts. Although we recognize there was a delay of approximately one week between the actual denial of the IMC request (28 October 2011) and notification of the denial to defense counsel (4 November 2011), the record establishes that defense counsel was on temporary duty working on other courts-martial for five of those days but was available on 29 and 30 October 2011 for the Article 32. When a delay is granted, the defense may not insist that the proceeding take place immediately following the delay; rather, counsel must reasonably cooperate to reschedule the proceeding. *United States v. McKnight*, 30 M.J. 205, 208 (C.M.A. 1990). That is what occurred in this case between the trial counsel, defense counsel, and the investigating officer in re-scheduling the Article 32 to 21 November 2011, the earliest date all parties were available. The 28-day delay for the Article 32 was therefore properly excluded from the R.C.M. 707 120-day clock.

Appellant's second argument challenges, for the first time on appeal, the 11-day delay granted by the military judge after referral. At trial, appellant **[*11]** did not argue the military judge abused his discretion by either "improperly rel[ying] upon Rule of Practice Before Army Courts-Martial 1.1 to stop the 120 day clock" or by not rendering his decision to approve the delay in writing. We find appellant waived any challenge to the 11-day delay. *See Arab*, 55 M.J. at 511-12 (finding ***HN8***[] waiver where the period of delay was not challenged by appellant at the trial level).

Assuming, arguendo, the issue was not waived, we examine the merits of appellant's argument, which arose from the military judge's statement in his conclusions of law that: "The R.C.M. 707 clock stopped on receipt of referred charges by the military judge and any time after that was a court approved delay . . . ." The pertinent portion of Rule of Practice Before Army Courts-Martial [hereinafter Rule of Court] 1.1 ***HN9***[] states: "Any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per R.C.M. 707(c), unless the judge specifies to the contrary."[3]

At the outset, ***HN10***[] we reject **[*12]** appellant's argument that Rule of Court 1.1 is inconsistent with R.C.M. 707(c)(1). Rule of Court 1.1 reiterates the authority already granted to military judges under R.C.M. 707 to exclude pretrial delay after referral. As the Preamble to the Rules of Court states: the Rules of Court "supplement the Rules for Courts-Martial and, together with the R.C.M., govern trials by courts-martial presided over by judges assigned to or affiliated with the United States Army Trial Judiciary." Since Rule of Court 1.1 recognizes that military judges have discretion in deciding whether to approve delay between referral and arraignment, we find no inconsistency between Rule of Court 1.1 and R.C.M. 707(c)(1).

Reviewing the record as a whole, we find the military judge knew that appellant's arraignment—and not the receipt of referred charges—"stopped" the R.C.M. 707 clock. Earlier in the motions hearing, the military judge corrected defense counsel during argument, telling him that: "[R.C.M.] 707 is until the beginning of trial — arraignment. . . . Also under Rules of Practice Before Army Courts-Martial, once a judge receives referred charges and then any delay after that is a judge approved delay under **[*13]** R.C.M. 707." Our review of

[2] The pretrial allied papers also contain defense counsel's request for the Article 32 delay addressed to the SPCMCA. *See generally Arab*, 55 M.J. at 512 n.5.

[3] The Rules of Practice Before Army Courts-Martial, dated 15 September 2009, were in effect at the time of appellant's court-martial.

the record also supports a finding that the military judge had authority to approve the 11-day delay, and the military judge did not abuse his discretion in approving the delay in this case. *See Arab*, 55 M.J. at 512; *Lazauskas*, 62 M.J. at 42. Therefore, the 11-day period between the military judge's receipt of the referred charges and arraignment was properly excluded.

Finally, we reject appellant's argument that the military judge must grant any delay in writing.[4] ***HN11***[] The discussion to R.C.M. 707(c)(1) states: "Pretrial delays *should* not be granted ex parte, and *when practicable*, the decision granting the delay, together with supporting reasons and the dates covering the delay, *should* be reduced to writing." (emphasis added). The discussion sections in the *Manual for Courts-Martial* are non-binding. There is no per se requirement under R.C.M. 707(c)(1) that the military judge must grant any delay in writing.

After conducting a de novo review, we find appellant's right to a speedy trial **[*14]** under R.C.M. 707 was not violated. The proper authorities excluded the delay, and the authorities did not abuse their discretion in excluding the delay because the delays were both granted for good cause and for reasonable periods of time.

Unreasonable Multiplication of Charges

Appellant avers and the government concedes that the violation of a lawful order for loading and firing his weapon within the cantonment area of Fort Knox[5] constitutes an unreasonable multiplication of charges as applied to findings with willfully discharging a weapon in a manner to endanger human life because both charges involved the same firing of the weapon. We disagree and find appellant is not entitled to relief.

HN12[] "What is substantially one transaction should not be made the basis for **[*15]** an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). The prohibition against unreasonable multiplication of charges "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (quoting *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001)). In *Quiroz*, our superior court listed five factors to help guide our analysis of whether charges have been unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

55 M.J. at 338-39.

Upon application of the *Quiroz* factors, we find no unreasonable multiplication of charges as applied to findings.[6] Appellant did not object at trial. **[*16]** Each offense is aimed at a distinct criminal interest: the gravamen of the failure to obey a lawful order in this case is the violation of a regulation allowing commanders to control the use of personally owned weapons in certain areas on-post for the purposes of good order, discipline, and safety, while the gravamen of the willful firing of a weapon in a manner that endangers human life focuses on the protection of human life on or off a military installation. Appellant not only loaded and fired the weapon within the cantonment area of Fort Knox, but he aimed the firing at a barracks building while a soldier was entering the building. The

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[4] In this case, the military judge announced his decision to approve the 11-day delay on the record in the presence of all parties with a court-reporter transcribing the proceedings.

[5] The Article 92, UCMJ, specification alleged: "In that [appellant], having knowledge of a lawful order issued by Colonel (O6) [E.C.S.], to wit: Fort Knox Regulation 210-1, paragraph 2-4, dated 4 Mar 10, an order which it was his duty obey, did, at Fort Knox, Kentucky, on or about 17 July 2011, fail to obey the same by wrongfully loading and firing his privately owned weapon within the cantonment area of Fort Knox, Kentucky."

[6] Although not raised or briefed by the parties, we have analyzed whether, under the facts of this case, the same specifications are an unreasonable multiplication of charges as applied to sentencing. **[*17]** *Campbell*, 71 M.J. at 23 ("[T]he concept of unreasonable multiplication of charges may apply differently to findings than to sentencing."). We find no unreasonable multiplication of charges as applied to sentencing.

two charges accurately represent appellant's criminality. The number of charges and specifications does not *unreasonably* increase appellant's punitive exposure given that his punitive exposure increased only by six months confinement. Finally, as conceded by appellant, there is no evidence of prosecutorial overreaching or ab use in the drafting of charges.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge KRAUSS and Judge BORGERDING concur.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **13,949** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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June 14, 2021

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 14, 2021.

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