

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Avery L. ROSARIO
Private First Class (E-2)
U.S. Marine Corps,

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 202400297

USCA Dkt. No. 26-0135/MC

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

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Issue Presented

In evaluating whether Appellant’s Article 10, UCMJ, speedy trial right was violated where Appellant spent 247 days in pretrial confinement, did the lower court err by applying the sixth amendment balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972), which conflicts with, and is not within the text of, Article 10?

Introduction

The lower court resolved Appellant’s Article 10 issue by applying the Sixth Amendment balancing test from *Barker v. Wingo*—and apparently nothing else. Not only is this inconsistent with *United States v. Birge*,¹ it is also inconsistent with the text of Article 10, which makes no reference to *Barker* or a balancing test. This Court should overrule past cases that have watered down Article 10 by importing a non-textual, unworkable balancing test. In its place, this Court should apply the words of the statute and restore the speedy trial right Congress enacted.

Statement of Statutory Jurisdiction

The Navy-Marine Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).² Appellant invokes this Court’s Article 67(a)(3), UCMJ, jurisdiction.³

¹ 52 M.J. 209 (C.A.A.F. 1999).

² *United States v. Rosario*, No. 202400297, 2025 CCA LEXIS 581 (N-M. Ct. Crim. App. Dec. 19, 2025).

³ 10 U.S.C. § 867(b)(3) (2018).

Statement of the Case

A special court-martial composed of a military judge sitting alone found Appellant guilty, consistent with his pleas, of one specification of breach of restriction in violation of Article 87b, UCMJ.⁴ He was sentenced to confinement for one month, reduction to E-1, and forfeitures of \$1,000 for one month.⁵ The NMCCA affirmed the findings and sentence on December 19, 2025.⁶ The Office of the Judge Advocate General mailed Appellant a copy of the CCA's decision on December 23, 2025. Appellant timely petitioned this Court on February 16, 2026.

Statement of Facts

A. The military judge denied Appellant's Article 10, UCMJ, motion.

Appellant was originally charged at a general court-martial with sexual assault of a child under Article 120b, UCMJ, and breach of restriction under Article 87b, UCMJ.⁷ Appellant spent 247 days in pretrial confinement.⁸

A Naval Criminal Investigative Service (NCIS) report of investigation (ROI) shows that San Diego County Sheriff's Department gave missing persons reports

⁴ R. at 41.

⁵ R. at 75.

⁶ *Rosario*, 2025 CCA LEXIS 581, at *8.

⁷ *Id.* at *1-2.

⁸ *Id.* at *3; R. at 75.

to NCIS on November 20 and 28, 2023.⁹ Trial counsel later described the reports as “exculpatory” to Appellant’s sexual assault charges.¹⁰ In fact, only days within disclosing the reports to the Defense, the Convening Authority agreed to dismiss the sexual assault specifications and allow Appellant to plead guilty to one specification of breach of restriction.¹¹ However, trial counsel did not disclose the reports to the Defense until March 15, 2024, which was Day 227 of Appellant’s pretrial confinement.¹² An NCIS agent admitted his “error” for not disclosing the evidence sooner.¹³

At a hearing in which the parties litigated an Article 10, UCMJ, motion, the military judge said he believed the facts showed that NCIS had “potentially exculpatory evidence” as far back as November 2023; that NCIS created a report reflecting this evidence in January 2024; that the Defense did not receive the NCIS report until March 2024; and the trial was set for April 2024.¹⁴ When trial counsel

⁹ Appellate Ex. II. The ROI is contained within the file labeled “Def MTD Art 10 Enclosures TF” on p. 81 of the PDF.

¹⁰ Appellate Ex. III, “RosarioAL22Mar24RAMP1,” at 20:00 (“This is actually a situation where the defendant was benefitted by not going to trial before we had some of this exculpatory evidence which came out in the natural course of the government’s investigation.”).

¹¹ Appellate Exhibit I at 8.

¹² Appellate Ex. II. The information is contained with the file labeled “rosario gem docs” and can be found at pp. 536, 540 of the PDF.

¹³ *Id.* at p. 558 of the PDF.

¹⁴ Appellate Ex. III, “RosarioAL22Mar24RAMPE1,” at 22:00-23:00.

agreed with the timeline, the military judge called it “a big problem.”¹⁵

However, the military judge denied the Article 10 motion after applying the four *Barker v. Wingo* factors.¹⁶ First, regarding the length of the delay, the military judge said he “struggle[d] to find” delay aside from period of about 12 days and found that for the remainder, the Government worked “diligently.”¹⁷

Second, regarding the reasons for the delay, the military judge found the brief period of delay “relatively unimportant” and noted that the Government was pursuing search warrant returns.¹⁸

Third, regarding Appellant’s request for a speedy trial, the military judge believed Appellant did not want a speedy trial. The military judge noted that before the evidence’s late disclosure, Appellant originally asked for a trial date later than the Government’s requested date.¹⁹

Finally, the military judge found that the prejudice consisted of “the normal prejudice and worries and things like that would tend to inure from being in pretrial confinement” but concluded that this was not due to Government action.²⁰ And while he voiced “displeasure” with the Government’s discovery approach in

¹⁵ *Id.*

¹⁶ 407 U.S. 514 (1972).

¹⁷ Appellate Exhibit III “RosarioAL22Mar24RAMP2” at 1:30.

¹⁸ *Id.* at 2:15.

¹⁹ *Id.* at 2:50.

²⁰ *Id.* at 3:15.

some respects, he found that this did not equate to a lack of reasonable diligence in bringing Appellant to trial.²¹ The military judge said there was possible “negligence” in trial counsel’s failure to discover evidence more quickly.²²

Pursuant to a plea agreement, Appellant pleaded guilty to one specification of breach of restriction under Article 87b, UCMJ, at a special court-martial.²³

B. Before the lower court, Appellant cited CAAF precedent explaining that an Article 10 issue may not be resolved solely through *Barker v. Wingo*. Appellant also cited the length of his confinement as prejudicial.

In his brief before the NMCCA, Appellant cited CAAF precedent explaining “that the demands of Article 10, UCMJ, are ‘more exacting’ than the speedy trial requirements under the Sixth Amendment.”²⁴ Appellant also cited CAAF precedent stating that “‘Article 10 issues cannot be resolved simply by determining whether similar delays would have violated the Sixth Amendment under *Barker v. Wingo*.’”²⁵

Among other things, Appellant argued that the amount of confinement he served was oppressive given that “he served 247 days of confinement for an

²¹ *Id.* at 4:00.

²² *Id.*

²³ Appellate Ex. I.

²⁴ Brief and Assignments of Error, *United States v. Rosario*, NMCCA No. 202400297 (Apr. 17, 2025) at 20 (citing *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010)).

²⁵ *Id.* at 21.

offense carrying a maximum of one month” of confinement.²⁶

C. Apparently confusing the constitutional and statutory speedy trial rights, the lower court applied *Barker v. Wingo* in resolving the issue.

In addressing Appellant’s assigned error, the NMCCA appears to have resolved the issue exclusively through the *Barker v. Wingo* factors. The court cited the text of Article 10 and relevant case law interpreting it before explaining: “Our framework to determine whether the Government proceeded with the required reasonable diligence includes balancing the following four factors: (1) the length of delay; (2) the reasons for the delay; (3) whether Appellant made a demand for speedy trial; and (4) prejudice to Appellant.”²⁷

Even though Appellant did not assert a constitutional speedy trial violation, in the header preceding its legal analysis on the issue, the NMCCA wrote: “[t]he *Barker v. Wingo* factors favor the Government, and there was no Article 10 *or constitutional* speedy trial violation in this case.”²⁸ The court then analyzed the issue through the Sixth Amendment *Barker v. Wingo* test.

Under the first *Barker* factor, the NMCCA noted that 247 days would “[o]rdinarily . . . be a long time for a simple breach of restriction charge to be

²⁶ *Id.* at 33.

²⁷ *Rosario*, 2025 CCA LEXIS 581, at *4-5 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

²⁸ *Id.* at *6 (emphasis added).

brought to trial” but noted there were other pending charges that were the subject of the Article 10 motion.”²⁹ The court found this factor favored the Government.³⁰

As to the second factor, the court noted “there was a disclosure of apparently exculpatory evidence, which evidently caused the collapse of the prosecution on the serious child sexual assault charge and its specifications.”³¹ However, it observed that the sexual assault specifications were “withdrawn” and “only the breach of restriction charge was re-referred to this special court-martial” before being “promptly resolved with a guilty plea five days later.”³² The court believed this factor was neutral or “slightly” favored the Government.³³

Under the third factor, the NMCCA found that Appellant “never made a demand for a speedy trial” and that the breach of restriction charge was resolved sooner than his requested trial date on the original charges.³⁴ Again, the court found this factor favored the Government.³⁵

D. The lower court concluded that Article 10 had a “balancing test” that demanded “more than pretrial confinement” to show prejudice.

Finally, under the fourth factor, the NMCCA concluded that “the prejudice

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at *7.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

prong of the Article 10 balancing test requires something more than pretrial confinement.”³⁶ The court noted Appellant’s claims that he experienced “anxiety during pretrial confinement, difficulty reaching his lawyer, failure by his command to conduct proper command visits, not being given a proper uniform, and being disrespected by other prisoners.”³⁷ However, the court concluded that “under the unique facts of this case, this is insufficient prejudice to dismiss the breach of restriction charge, given the weight of the other factors.”³⁸

Reasons to Grant Review

The lower court’s reliance on *Barker v. Wingo* was contrary to the text of Article 10, UCMJ, as well as *United States v. Birge*.³⁹

- A. In *United States v. Birge*, this Court explained that Article 10 issues cannot be resolved simply by applying the *Barker v. Wingo* factors.

In *United States v. Birge*, this Court explained that while it was “appropriate” for a court “to consider the *Barker v. Wingo* factors” in evaluating an Article 10 motion, a court may not exclusively rely on these factors.⁴⁰ Rather, the Court explained, “Congress intended to provide servicemembers with broader rights under Article 10 than are available to civilians under the Sixth

³⁶ *Id.* at *7-8.

³⁷ *Id.* at *8.

³⁸ *Id.*

³⁹ 52 M.J. 209 (C.A.A.F. 1999).

⁴⁰ *Id.* at 212.

Amendment.”⁴¹ This Court added: “[b]ecause Article 10 provides a more stringent speedy trial requirement than the Sixth Amendment, Article 10 issues cannot be resolved simply by determining whether similar delays would have violated the Sixth Amendment under *Barker v. Wingo*[.]”⁴²

Likewise, in *United States v. Mizgala*, this Court noted that “[w]hile the full scope of this ‘more exacting’ Article 10 right has not been precisely defined by this court, it cannot be ‘more exacting’ and at the same time ‘consistent’ with Sixth Amendment protections.”⁴³

Yet here, the lower court appears to have exclusively relied on *Barker v. Wingo* in determining that there was no Article 10, UCMJ, violation in this case. The lower court cited Article 10, UCMJ, and explained that “Article 10 does not require ‘constant motion, but reasonable diligence in bringing the charges to trial.’”⁴⁴ However, following this, the lower court wrote that its “framework to determine whether the Government proceeded with the required reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether Appellant made a demand for speedy

⁴¹ *Id.* at 211.

⁴² *Id.* at 212.

⁴³ 61 M.J. 122, 125 (C.A.A.F. 2005).

⁴⁴ *Rosario*, 2025 CCA LEXIS 581, at *4 (citation omitted).

trial; and (4) prejudice to Appellant.”⁴⁵ There is no indication in the analysis that the lower court considered any other standard beyond *Barker v. Wingo*.

Problematically, the lower court also appears to have been confused as to whether Appellant asserted a constitutional speedy trial right. To illustrate, the lower court wrote in its caption: “The *Barker v. Wingo* factors favor the Government, and there was no Article 10 *or constitutional* speedy trial violation in this case.”⁴⁶ However, Appellant did not assert the less-stringent constitutional speedy trial right.

Even so, the lower court’s invocation of the constitutional standard is revealing in that the court appears to have proceeded as if Article 10 and the Sixth Amendment were coextensive. Applying *Barker*, the court concluded there was “insufficient prejudice [under the fourth factor] to dismiss the breach of restriction charge, given the weight of the other factors.”⁴⁷ Key to the lower court’s analysis appears to have been the presumption that “the prejudice prong of the Article 10 balancing test requires something more than pretrial confinement.”⁴⁸

However, as discussed below, there is no “balancing test” or “prejudice prong” within the text of Article 10 itself.

⁴⁵ *Id.* at *4-5.

⁴⁶ *Id.* at *6 (emphasis added).

⁴⁷ *Id.* at *8.

⁴⁸ *Id.* at *7-8.

B. Under the plain meaning method of statutory interpretation, the *Barker v. Wingo* factors are at odds with the text of Article 10.

This Court has explained that “[f]rom the earliest times, we have held to the ‘plain meaning’ method of statutory interpretation” such that “if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result.”⁴⁹

Unlike the *Barker v. Wingo* test, Article 10 does not require an accused to have demanded a speedy trial. There is no “balancing test” in the text of Article 10 that the lower court referenced.⁵⁰ And contrary to the lower court’s suggestion, the text of Article 10 does not “require[] something more than pretrial confinement.”⁵¹ Rather, the length of pretrial confinement is exactly Article 10’s concern.

In relevant part, Article 10 states that “[w]hen a person subject to [the UCMJ] is ordered into arrest or confinement before trial, immediate steps shall be taken . . . to try the person or to dismiss the charges and release the person.”⁵² The word “immediate” means “occurring without delay; instant[.]”⁵³ Further, to “‘try’ a case is ‘to examine and resolve (a dispute) by means of a trial’; ‘to examine and

⁴⁹ *United States v. Ortiz*, 76 M.J. 189, 192 (C.A.A.F. 2017).

⁵⁰ *Rosario*, 2025 CCA LEXIS 581, at *7-8.

⁵¹ *Id.* at *8.

⁵² Art. 10, UCMJ, 10 U.S.C. § 810(b)(1)(A) (2018).

⁵³ *Wells v. State*, 233 S. 3d 279, 286 (Miss. 2017) (quoting BLACK’S LAW DICTIONARY (10th ed. 2014)).

decide (a case) in a law court’; or simply ‘to examine or investigate judicially.’”⁵⁴

Thus, by the statute’s plain meaning, Article 10 requires the Government to: (1) examine an accused’s case in court without delay, and if this does not occur, either (2) release the accused from confinement or (3) dismiss the charges.

In other words, the focus is on how long it took the Government to bring the detained servicemember to trial. To require the servicemember to satisfy additional obligations or to alleviate the Government’s burden is to erode the statutory right.

Consistent with such a reading, this Court and its predecessor court have consistently spoken of Article 10 as providing *stronger* protections than the Sixth Amendment. For example, in *United States v. Kossman*, the Court of Military Appeals wrote that Article 10 “imposes a more stringent speedy-trial standard than that of the Sixth Amendment.”⁵⁵ Previously, this Court applied a presumption that an Article 10 violation existed if the Government did not bring the accused to trial within three months of pretrial confinement.⁵⁶

By contrast, the Supreme Court in *Barker v. Wingo* was tasked with

⁵⁴ *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003) (quoting BLACK’S LAW DICTIONARY 1520 (7th ed. 1999)).

⁵⁵ 38 M.J. 258, 259 (C.M.A. 1993).

⁵⁶ *Id.* (“In *United States v. Burton* . . . we adopted the suggestion of appellate defense counsel that in the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds three months.”) (citing 21 U.S.C.M.A. 112, 118 (C.M.A. 1971)).

interpreting the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment.⁵⁷ And unlike Article 10, UCMJ, the Sixth Amendment’s speedy trial guarantee contains no reference to “immediate steps,” nor does it provide for the remedy of dismissal of charges. Rather, in more general terms, it states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”⁵⁸ This complete lack of clarity—not present in Article 10—may explain why the Supreme Court developed the balancing test under *Barker v. Wingo*.⁵⁹

The constitutional right is also arguably weaker than Article 10. It is noteworthy that in his dissent in *Kossmann*, Chief Judge Sullivan quoted an authoritative military justice treatise whose authors observed: “Like his or her civilian counterpart, the armed forces member is guaranteed a speedy trial under the sixth amendment. *That right, however, given its present Supreme Court interpretation, is mostly illusory.*”⁶⁰

Regardless, whether “illusory” or not, the constitutional *Barker v. Wingo* standard does not appear within the text of Article 10. Yet the lower court’s

⁵⁷ *Barker*, 407 U.S. at 515-16.

⁵⁸ U.S. Const. amend. VI.

⁵⁹ *Cf. Barker*, 407 U.S. at 521 (noting that “the right to speedy trial is a more vague concept than other procedural rights”).

⁶⁰ *Kossmann*, 38 M.J. at 266 (C.J. Sullivan, dissenting) (quoting F. Gilligan and F. Lederer, *Court-Martial Procedure* § 17-10.00 at 622-23 (1991)).

analysis exclusively focused on *Barker v. Wingo*. Thus, this Court should grant review and reverse the lower court's decision.

C. This Court should overrule—or at least clarify—its previous decisions that may explain why the lower court (a) relied on *Barker v. Wingo* and (b) reasoned that Appellant's lengthy confinement alone was not prejudicial.

Part of the confusion of the lower court may be attributable to this Court's past decisions. For example, in *United States v. Wilson*, Chief Judge Baker wrote that “the Court has never explained how ‘a more stringent speedy-trial standard’ differs from the Sixth Amendment’s speedy trial standard under *Barker*.”⁶¹ He added: “[t]o the contrary, the Court appears to have applied the *Barker* factors without deviation or distinction from the Sixth Amendment precedent.”⁶²

An illustration of this concern was on display in *United States v. Reyes*. There, this Court wrote that “[w]e determine whether the prosecution was reasonably diligent by employing the four-factor test articulated by the Supreme Court in *Barker v. Wingo*” while adding “[n]one of these factors alone are a ‘necessary or sufficient condition to the finding of a deprivation of the right of

⁶¹ 72 M.J. 347, 355 (C.A.A.F. 2013) (Baker, C.J., dissenting).

⁶² *Id.*; see also *Thompson*, 68 M.J. at 314-15 (Stucky, J., concurring) (noting that “[t]he majority states that it analyzes Article 10, UCMJ, violations using the procedural framework established by the Supreme Court in *Barker* for reviewing Sixth Amendment speedy trial claims, but then asserts that ‘Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10 violation.’”).

speedy trial.”⁶³

Likewise, in *United States v. Cooley*, this Court explained that “[i]n determining reasonable diligence for the purposes of Article 10, UCMJ, courts must conduct a four-factor analysis articulated in *Barker*” which this Court said were “adopted by this Court in *United States v. Birge*[.]”⁶⁴ However, as stated above, *Birge* said that Article 10 issues *cannot* be resolved merely by reference to the *Barker* factors.⁶⁵

This Court in *Cooley* also wrote: “[g]iven that Article 10, UCMJ, is triggered only when an accused is *in* pretrial confinement, the prejudice prong of the balancing test triggered by pretrial confinement requires something more than pretrial confinement alone.”⁶⁶ However, this is at odds with the statute’s text.

Ironically, the departure from Article 10’s text in favor of *Barker* may owe its genesis to the case that explained that Article 10’s protections are stronger than the Sixth Amendment. In *Kossmann*, the Court of Military Appeals analyzed the rule from *United States v. Burton* that created a presumed Article 10 violation where the Government failed to bring the accused to trial within three months.⁶⁷

⁶³ 80 M.J. 218, 226 (C.A.A.F. 2020) (citation omitted).

⁶⁴ 75 M.J. 247, 259 (C.A.A.F. 2016) (citing *Birge*, 52 M.J. at 211-12)).

⁶⁵ *Birge*, 52 M.J. at 212.

⁶⁶ 75 M.J. at 262 (emphasis in original).

⁶⁷ 38 M.J. at 259 (quoting *Burton*, 21 U.S.C.M.A. at 118).

The Court in *Kossman* ultimately overruled this precedent.⁶⁸

Relevant here, in analyzing military speedy trial jurisprudence, the Court looked to the 1969 version of the *Manual for Courts-Martial*, which it explained “contained no mechanistic speedy-trial template, but only general guidance as to matters to be taken into consideration by the military judge.”⁶⁹ The Court noted that the *Manual* listed the following factors: “whether the accused has earlier demanded trial and, if so, when; whether any portion of the delay was at the instance of the defense; how much time was reasonably required for pretrial processing, investigation, and preparation; whether the delay or any part thereof was arbitrary or oppressive; and whether the accused was in pretrial restraint and, if so, the nature of that restraint.”⁷⁰ It then wrote: “Essentially, these factors correspond to those identified in *Barker v. Wingo*, 407 U.S. at 523, for the Sixth Amendment.”⁷¹

However, the Court in *Kossman* did not state that the *Barker* factors should apply to Article 10 violations. Nor was the *Manual for Court-Martial* provision applicable solely to Article 10 situations: one of the factors in the *Manual* asked a

⁶⁸ *Id.* at 261.

⁶⁹ *Id.* at 259.

⁷⁰ *Id.* at 259 (quoting Para. 215e, *Manual for Courts-Martial, United States* (1969 ed.)).

⁷¹ *Id.* at 259-60.

court to consider *whether* the accused was restrained. Rather, the *Kossman* court explained that the standard to be applied for an Article 10 motion is whether the Government used “reasonable diligence” in bringing the accused to trial.⁷²

Regardless of the origins of the issue at hand, under application of the *stare decisis* principles, previous decisions, like—*Reyes* and *Cooley*—that have effectively supplanted Article 10 with non-textual standards including *Barker* are poorly reasoned for the reasons explained above.⁷³ In short, *Barker* was developed to interpret the Sixth Amendment—not the statutory right Congress afforded servicemembers under Article 10.

The *Barker* framework is also unworkable. It effectively turns Article 10 on its head by shifting the burden to the accused. As illustrated by this case, the *Barker* balancing test requires an appellant to show that he was prejudiced beyond the length of his pretrial confinement alone.⁷⁴ This is not in the text of the law.

Finally, applying the text of Article 10 would promote public confidence in

⁷² *Id.* at 262 (“For want of a better verbal formula, the pre-*Burton* standard of ‘reasonable diligence’ seems appropriate.”).

⁷³ *United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021) (explaining that under *stare decisis*, a court considers “whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law.”) (citation omitted).

⁷⁴ *Rosario*, 2025 CCA LEXIS 581, at *7-8 (“The Court of Appeals for the Armed Forces has stated that the prejudice prong of the Article 10 balancing test requires something more than pretrial confinement.”).

the law and expectations of servicemembers. It would enforce the language the elected representatives afforded servicemembers.

D. This Court should hold that military judges are to determine whether the Government took “immediate steps” to try the accused.

Rather than applying *Barker v. Wingo* to assess asserted violations of the Article 10 speedy trial, the Court of Military Appeals in *Kossman* explained that military judges have considerable flexibility in assessing Article 10 violations. Unbothered by this concept, the Court wrote: “[j]udges who can decide difficult questions such as whether a confession was voluntary . . . can readily determine whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing.”⁷⁵ To illustrate the discretion of military judges on this issue, the Court earlier wrote that there can be some cases where Article 10 violations occur even when the periods of delay are *less* than the *Burton* standard of three months.⁷⁶

However, where the Court in *Kossman* got it wrong was in departing from the text of Article 10. Rather than leaving it up to the military judges to apply the text of the law to the facts of the case, the Court wrote: “[f]or want of a better verbal formula, the pre-*Burton* standard of ‘reasonable diligence’ seems

⁷⁵ *Kossman*, 38 M.J. at 262.

⁷⁶ *Id.* at 261 (“We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90—or 120—days is involved.”).

appropriate.”⁷⁷

But there is no need to read a “verbal formula” into the words of the statute. As Appellant’s case illustrates, even a verbal formula such as “reasonable diligence” can provide a court with cover to depart from the words of the statute.⁷⁸ In short, instead of the *Barker* factors or a “reasonable diligence” formula, this Court should clarify that military judges are to apply the text of the statute.

Under the plain meaning of Article 10, military judges should analyze an Article 10 motion under the following framework: (1) Did the Government bring the accused’s case to a trial without delay? (2) If not, did the Government release the accused from pretrial arrest or confinement? (3) If not, did the Government dismiss the charges? If the Government does not dismiss the charges under the application of (3), then the proper remedy by a reviewing court is to dismiss the charges with prejudice.⁷⁹ As this Court in *Kossmann* made clear, military judges are well positioned to view the circumstances of the case to determine if the

⁷⁷ *Id.* at 262 (quoting *United States v. Tibbs*, 15 U.S.C.M.A. 350, 353 (1965)).

⁷⁸ *Rosario*, 2025 CCA LEXIS 581, at *4-5 (explaining that the “reasonable diligence includes balancing the following four factors” from *Barker*).

⁷⁹ *Id.* (“The remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges. If it is concluded that the circumstances of the delay are sufficiently excusable or unavoidable as to permit a reinstatement of the charges, there is no violation of Article 10 in the first place. Where the circumstances of delay are not excusable, on the other hand, it is no remedy to compound the delay by starting all over.”).

Government has been “foot-dragging” or not.

In this case, Appellant labored in pretrial confinement for 247 days. Much of Appellant’s pretrial confinement was arguably due to the Government’s failure to timely discover evidence that it called “exculpatory.”⁸⁰ However, the lower court determined there was no prejudice after writing that “the prejudice prong of the Article 10 balancing test requires something more than pretrial confinement.”⁸¹ This Court should return the case to the lower court to revisit the issue applying an Article 10 framework that is faithful to the text of the statute.

Conclusion

There is good cause to grant review. The lower court’s reliance on *Barker v. Wingo* in determining whether Appellant’s speedy trial right under Article 10, UCMJ, was violated was contrary to a previous decision of this Court.⁸² This reading was also contrary to the words of the statute. This Court should grant review and set aside the lower court’s decision.

Respectfully Submitted,



MICHAEL W. WESTER

⁸⁰ Appellate Ex. III, “RosarioAL22Mar24RAMP1,” at 20:00.

⁸¹ *Rosario*, 2025 CCA LEXIS 581, at *7-8.

⁸² C.A.A.F. Rule 21(b)(5)(A).

List of Appendices

A. *United States v. Rosario*, No. 202400297, 2025 CCA LEXIS 581
(N-M. Ct. Crim. App. Dec. 19, 2025).

Certificate of Compliance

1. This supplement complies with the type-volume limitations of Rule 21(b) because it contains fewer than 9,000 words.
2. This supplement complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on March 2, 2026.



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United States v. Rosario

⊖ On Appeal

United States Navy-Marine Corps Court of Criminal Appeals

December 19, 2025, Decided

No. 202400297

Reporter

2025 CCA LEXIS 581 *; 2025 LX 595805

UNITED STATES, Appellee v. Avery L. ROSARIO,
Private First Class (E-2), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS
BINDING PRECEDENT UNDER NMCCA RULE OF
APPELLATE PROCEDURE 30.2(a).

Subsequent History: Petition for review filed by [United States v. Rosario., 2026 CAAF LEXIS 179 \(Feb. 17, 2026\)](#)

Motion granted by [United States v. Rosario., 2026 CAAF LEXIS 168 \(Feb. 17, 2026\)](#)

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Douglas C. Hatch. Sentence adjudged 9 April 2024 by a special court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for 30 days, and forfeiture of \$1,000.00 per month for one month.¹ [*1] .

Core Terms

guilty plea, pretrial confinement, court-martial, military, speedy, reasonable diligence, sentence

Case Summary

Overview

Key Legal Holdings

- Where Appellant spent 247 days in pretrial

¹ Appellant was credited 247 days of pretrial confinement credit.

confinement primarily for sexual assault charges that were later withdrawn, and the military judge found only a 10-12 day period of inactivity during holidays, there was no Article 10 speedy trial violation regarding the breach of restriction charge to which Appellant pleaded guilty.

- Where Appellant litigated an Article 10 motion at a general court-martial regarding sexual assault charges, and the military judge allowed Appellant to 'adopt' that motion at his special court-martial for breach of restriction, the Article 10 issue was preserved for appeal despite Appellant's unconditional guilty plea.

Material Facts

- Appellant was placed on restriction on June 8, 2023, after testing positive for marijuana.
- On June 27, 2023, Appellant breached restriction by leaving Camp Pendleton.
- Appellant was placed in pretrial confinement on August 1, 2023.
- Appellant spent 247 days in pretrial confinement.
- Appellant entered a plea agreement on March 20, 2024, pleading guilty to breach of restriction.

Controlling Law

- [Article 10, UCMJ \(10 U.S.C.S. § 810\)](#) requires immediate steps be taken to inform the accused of charges and bring them to trial when placed in pretrial confinement. The Barker v. Wingo four-factor test determines if the Government proceeded with reasonable diligence: length of delay, reasons for delay,

whether the accused demanded speedy trial, and prejudice to the accused.

steps shall be taken to inform the accused of the charges and either bring the accused to trial or dismiss the charges.

Court Rationale

The court found all Barker factors favored the Government or were neutral. The length of delay was reasonable given active investigation of more serious charges. The Government showed reasonable diligence with only a brief holiday period of inactivity. Appellant never demanded speedy trial on the breach of restriction charge and actually requested a later trial date. Appellant's claimed prejudice was insufficient to warrant dismissal given the weight of the other factors.

Outcome

Procedural Outcome

The court affirmed the findings and sentence, holding there was no Article 10 speedy trial violation.

LexisNexis® Headnotes

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

Military & Veterans Law > Military
 Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > ... > Courts
 Martial > Motions > Dismissals

Military & Veterans Law > Military
 Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

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

HN1 Pretrial Proceedings, Charges & Specifications

A military judge's ruling on a motion to dismiss charges and specifications for a violation of Article 10 is reviewed de novo. Substantial deference is given to the military judge's findings of fact unless they are clearly erroneous. [10 U.S.C.S. § 810](#) provides that when an accused is placed in pretrial confinement, immediate

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

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

HN2 Criminal Process, Speedy Trial

[10 U.S.C.S. § 810](#) does not require constant motion, but reasonable diligence in bringing the charges to trial. The framework to determine whether the Government proceeded with the required reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether Appellant made a demand for speedy trial; and (4) prejudice to Appellant. Short periods of inactivity are not fatal to an otherwise active prosecution. The proceeding is examined as a whole and not merely the speed of the prosecution. The essential ingredient is orderly expedition and not mere speed.

Criminal Law & Procedure > ... > Guilty Pleas > Allocution & Colloquy > Waiver of Defenses

HN3 Allocution & Colloquy, Waiver of Defenses

A guilty plea does not waive a litigated [10 U.S.C.S. § 810](#) motion.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Guilty Pleas

HN4 Criminal Process, Speedy Trial

An unconditional guilty plea has a deciduous effect on previously-litigated motions, with a notable exception being the right to a speedy trial. R.C.M. 705(c)(1)(B).

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial

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

HNS Preliminary Proceedings, Speedy Trial

The Court of Appeals for the Armed Forces has stated that the prejudice prong of the [10 U.S.C.S. § 810](#) balancing test requires something more than pretrial confinement.

Counsel: For Appellant: Lieutenant Commander Michael W. Wester, JAGC, USN.

For Appellee: Major Mary Claire Finnen, USMC, Lieutenant Matthew Parker, JAGC, USN.

Judges: Before DALY, KISOR, and FLINTOFT Appellate Military Judges.

Opinion by: KISOR

Opinion

KISOR, Senior Judge:

Appellant was convicted, consistent with his pleas, of one specification of breach of restriction in violation of [Article 87b, Uniform Code of Military Justice \(UCMJ\)](#).² Appellant asserts a single assignment of error: whether the findings and sentence should be dismissed due to a speedy trial violation under [Article 10, UCMJ](#). The case is before us on direct appeal pursuant to [Article 66\(b\)\(1\)\(A\), UCMJ](#). We find no prejudicial error and affirm.

I. BACKGROUND

Appellant tested positive for a metabolite of marijuana following a urinalysis. As a result, he was placed on restriction on 8 June 2023. The terms of his restriction included an order directing him not to leave Marine [*2] Corps Base Camp Pendleton. Nonetheless, approximately 3 weeks later, on 27 June 2023, Appellant left Camp Pendleton and went to Chula Vista, California, in order to meet a person whom he met online. His goal was to have sex with her. Ultimately, he brought her back to his barracks at Camp Pendleton for that purpose.

The person turned out to be underage. Although she had told Appellant she was not a minor, she was actually 14. She was discovered in his barracks room the next day after Appellant had gone to work. Naval Criminal Investigative Service (NCIS) agents responded and interviewed her and then called child protective services. She alleged that Appellant had sexually assaulted her. The Government ultimately charged Appellant with three specifications of sexual assault of a child in violation of [Article 120b, UCMJ](#), and with breach of restriction. Appellant was placed in pretrial confinement on 1 August 2023.

On 18 March 2024, Appellant, represented by civilian and military counsel, filed a motion to dismiss the [Article 120b](#) charges pursuant to [Article 10, UCMJ](#). The motion did not request any relief with respect to the breach of restriction charge. After a hearing, the military judge denied the motion.

However, the evidence that [*3] Appellant actually knew that the person with whom he had sex was underage was, apparently, dubious at best. Eventually, Appellant and the convening authority entered into a plea agreement whereby the charges and specifications were withdrawn from the general court-martial, and only the breach of restriction charge was re-referred to a special court-martial.³ Pursuant to that plea agreement, Appellant pleaded guilty to one specification of breach of restriction, and the [Article 120b](#) charges, which had been withdrawn, were dismissed by the convening authority "without prejudice, to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld."⁴ Appellant's sentence included thirty days confinement, but Appellant was credited with 247 days of pretrial confinement credit.⁵

Although untethered to the charge in this case, the Article 10 motion, which had been denied in the context of the prior general court-martial, was disinterred and resurrected into the guilty plea in this special court-martial. It thus exists in the corpus of the appeal now before us. We dispatch it here.

II. DISCUSSION

³ App. Ex. I. The plea agreement was signed by Appellant on March 20, 2024 and the Convening Authority on April 2, 2024.

⁴ App. Ex. I at 5.

⁵ R. at 75.

² [10 U.S.C. § 887b](#).

There was no speedy trial violation under [Article 10](#).

The unique facts of this case [*4] reveal that the 247 days of pretrial confinement did not violate [Article 10, UCMJ](#), with respect to the only charge before this Court.

1. Standard of Review.

HN1 We review a military judge's ruling on a motion to dismiss charges and specifications for a violation of Article 10 de novo.⁶ We give substantial deference to the military judge's findings of fact unless they are clearly erroneous.⁷ Article 10 provides that when an accused is placed in pretrial confinement, "immediate steps shall be taken" to inform the accused of the charges and either bring the accused to trial or dismiss the charges.⁸

HN2 [Article 10](#) does not require "constant motion, but reasonable diligence in bringing the charges to trial."⁹ Our framework to determine whether the Government proceeded with the required reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether Appellant made a demand for speedy trial; and (4) prejudice to Appellant.¹⁰ Importantly, "[s]hort periods of inactivity are not fatal to an otherwise active prosecution."¹¹ As we conduct our analysis, we examine the proceeding as a whole and not merely the speed of the prosecution.¹² Put differently, "the [*5] essential ingredient is orderly expedition and not mere speed."¹³

⁶ [United States v. Cooper, 58 M.J. 54, 57 \(C.A.A.F. 2003\)](#).

⁷ [United States v. Cooley, 75 M.J. 247, 259 \(C.A.A.F. 2016\)](#) (citing [United States v. Cossio, 64 M.J. 254, 256 \(C.A.A.F. 2007\)](#)).

⁸ [Article 10, UCMJ, 10 U.S.C. § 810](#); see also [United States v. Mizgala, 61 M.J. 122, 124 \(C.A.A.F. 2005\)](#).

⁹ See [Cossio, 64 M.J. at 256](#) (quoting [Mizgala, 61 M.J. at 127](#)).

¹⁰ [Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 \(1972\)](#).

¹¹ [Mizgala, 61 M.J. at 127](#) (citing [United States v. Tibbs, 15 C.M.A. 350, 353, 35 C.M.R. 322, 325 \(C.M.A. 1965\)](#)).

¹² *Id.* at 129.

¹³ [United States v. Mason, 21 C.M.A. 389, 393, 45 C.M.R. 163,](#)

HN3 A guilty plea does not waive a litigated Article 10 motion.¹⁴

2. Analysis.

a. Whether this issue is preserved

HN4 An unconditional guilty plea has a deciduous effect on previously-litigated motions, with a notable exception being the right to a speedy trial.¹⁵ So at the outset, we confront the rather unusual circumstance of this case: at a prior general court-martial, Appellant litigated an Article 10 motion concerning different charges than the one before this Court of which he stands convicted.¹⁶ Ordinarily, we would agree with the Government's position that Appellant's unconditional guilty plea operated to waive Appellant's Article 10 claim as to the sole charge and specification because Appellant's prior Article 10 motion, litigated in the context of a formerly-existing general court-martial, did not include or address the charge and specification that Appellant pleaded guilty to at this special court-martial. However, the military judge specifically, and without much explanation, allowed the Defense to "adopt" its prior Article 10 motion.¹⁷ After the Defense did so, the military judge, "in turn," adopted his prior ruling on [*6] that motion.¹⁸

Thus, all parties to the special court-martial collectively understood that the prior Article 10 motion survived this guilty plea. In fact, Appellant was specifically advised, during the plea colloquy, that the previously-litigated Article 10 motion was not waivable.¹⁹ We will not disturb the parties' understanding; and so we hold that this particular motion, under the unique facts of this case, survived the guilty plea, and we will review it de novo.

b. The [Barker v. Wingo](#) factors favor the Government, and there was no Article 10 or constitutional speedy trial violation in this case.

[167 \(C.M.A. 1972\)](#) (quoting [Smith v. United States, 369 U.S. 1, 10, 82 S. Ct. 585, 7 L. Ed. 2d 492 \(1959\)](#)).

¹⁴ [Mizgala, 61 M.J. at 127](#).

¹⁵ See R.C.M. 705(c)(1)(B).

¹⁶ Audio Rec'g of General Court-Martial Article 39(a) Session, App. Ex. II (Mar. 22, 2024).

¹⁷ R. at 40.

¹⁸ R. at 40.

¹⁹ R. at 40-41.

(1) Length of delay

The length of the time between the imposition of pretrial confinement and the trial was 247 days. Ordinarily, this would be a long time for a simple breach of restriction charge to be brought to trial, but there were other pending charges that were the subject of the Article 10 motion. In his verbal ruling conducting his Article 10 analysis, the military judge "struggled to find any delay" apart from a short 10-12 day period of inactivity during the 2023 Christmas holiday period.²⁰ We agree that the Government demonstrated reasonable diligence, and this factor favors the Government here.

[*7] (2) Reasons for delay

The other (more serious) charges were being actively investigated by the Government. Eventually, there was a disclosure of apparently exculpatory evidence, which evidently caused the collapse of the prosecution on the serious child sexual assault charge and its specifications. After that happened and all of the charges were withdrawn from the pending general court-martial, only the breach of restriction charge was re-referred to this special-court-martial; it was promptly resolved with a guilty plea five days later. Thus, this factor is neutral or slightly favors the Government.

(3) Whether Appellant made a demand for speedy trial

Appellant never made a demand for a speedy trial on the breach of restriction charge before this Court. In fact, Appellant specifically addressed this factor in his Article 10 motion and only requested the sexual assault and its specifications be dismissed.²¹ Moreover, while the Government requested an 18 March 2024 trial date for this referred charge, the Defense requested that the trial be 16 April 2024.²² Accordingly, in the context of this Appeal, this factor also favors the Government.

(4) Prejudice

HN5 The Court of Appeals for the Armed Forces [*8] has stated that the prejudice prong of the [Article 10](#) balancing test requires something more than pretrial

confinement.²³ Appellant's claim of prejudice has to do with anxiety during pretrial confinement, difficulty reaching his lawyer, failure by his command to conduct proper command visits, not being given a proper uniform, and being disrespected by other prisoners.²⁴ Taken together, under the unique facts of this case, this is insufficient prejudice to dismiss the breach of restriction charge, given the weight of the other factors.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the finding and sentence are correct in law and that no error materially prejudicial to Appellant's substantial rights occurred.²⁵

The findings and sentence are **AFFIRMED**.

End of Document

²⁰ Audio Rec'g of General Court-Martial Article 39(a) Session, App. Ex. II at 1:15 (Mar. 22, 2024).

²¹ Rosario GCM Docs, App. Ex. II at 1 (PDF at 543, 546).

²² Audio Rec'g of General Court-Martial Article 39(a) Session, App. Ex. II at 2:30 (Mar. 22, 2024).

²³ See [United States v. Cooley, 75 M.J. at 262](#).

²⁴ Appellant's Brief at 34.

²⁵ [Articles 59](#) & [66, UCMJ](#).