IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **MARCO A. REYES** United States Army Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 19-0339/AR Crim. App. Dkt. No. 20160704

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

Issues Presented

I. WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE'S MOTION TO DISMISS THE CHARGES AND SPECIFICATIONS FOR A VIOLATION OF APPELLANT'S RIGHT TO A SPEEDY TRIAL UNDER ARTICLE 10, UCMJ.

II. WHETHER THE RECORD OF TRIAL IS COMPLETE UNDER ARTICLE 54, UCMJ, WHERE IT CONTAINS ONLY A SUMMARIZED TRANSCRIPT OF THE ARTICLE 39(a), UCMJ, SESSIONS THAT OCCURRED PRIOR TO THE WITHDRAWAL AND RE-REFERRAL OF THE CHARGES.

ISSUE PRESENTED I

LAW AND ARGUMENT

1. The only question Article 10, UCMJ, asks is whether immediate steps to try SPC Reyes were taken.

Article 10, UCMJ, states that if an accused is placed into pre-trial confinement, then (1) "immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him" or (2) "dismiss the charges and release him." Article 10 therefore presents a binary choice: either the government takes immediate steps or the charges are dismissed. This protection in Article 10 is a "fundamental, substantial, personal right" of an accused. *United States v. Mizgala*, 61 M.J. 122, 126 (C.A.A.F. 2005).

In assessing whether the government took immediate steps, this Court looks to "general movement forward during the full range of the pretrial period." *United States v. Thompson*, 68 M.J. 308, 313 (C.A.A.F. 2010). In this case, that full range is from July 31, 2015 until October 24, 2016. (JA at 120; 177). Lastly, a showing of gross negligence or governmental bad faith is not required; the only question is whether the government proceeded with reasonable diligence. *Mizgala*, 61 M.J. at 129. Defense delays and requests may alter what reasonable diligence is, but they do not alleviate the government from meeting this standard when it holds an accused in pre-trial confinement.

2. Delay in this case was triggered by a lack of reasonable diligence from the government.

The defense submitted an offer to plead guilty [OTP] to the convening authority on December 9, 2015. (JA 126). Over a month later, the government informed the defense that they would not show the convening authority the OTP unless it was accompanied by an agreed upon stipulation of fact. (JA 129). But the government had no authority to do so. Signing a stipulation of fact is a standard term of a pre-trial agreement that an accused agrees to perform *if* the agreement is accepted by the convening authority. That had not happened. In fact, the convening authority declined to accept the OTP and thereby voided the stipulation of fact the government insisted upon waiting for.

Compounding the delay, again in December 2015, the defense informed the convening authority that it required expert assistance in, amongst other things, forensic psychiatry and Spanish translation. (JA 127). The convening authority denied their request on January 4, 2016 and, four days later, the defense moved to compel. (JA 129). After the government delayed the motions hearing nine days (JA 130), the military judge ordered the government to produce the expert assistance. (JA 132). Despite being informed in December of the defense's need for expert assistance and the military judge agreeing in early February that the need was necessary, it was the trial counsel who asked the court to delay the trial in April due to their inability to timely secure expert assistance. (JA 264-65).

Tellingly, the defense motion to dismiss for a Sixth Amendment speedy trial violation in April, only applied to the impacted specifications relating to the missing experts, in contrast to the Article 10 motion they filed simultaneously. (JA 265). In contrast to their Article 10, UCMJ, motion, the Sixth Amendment speedy trial motion impacted less than half of the specifications and only one of the nine specifications alleging rape and sexual assault—by far the most serious allegations on the charge sheet. (JA 136). This clearly suggests that the defense was ready to proceed to trial on almost all of the most serious charges in the case in April 2016. Instead, the trial ended up delayed another six months.

Turning to the delay from August until October, it is true that "delay caused by the defense weighs against the defendant." *United States v. Cooley*, 75 M.J. 247, 260 (C.A.A.F. 2016) (quoting *Vermont v. Brillon*, 556 U.S. 81, 90 (2009)). But what *caused* this delay was not the defense request for a continuance, rather the fact that the government allowed more than a year of pre-trial confinement to elapse, then seized the entirety of the accused's prison phone records, and then data dumped it all onto the defense on August 20, 2016—six days before trial. (JA 138-41). The court should not countenance the government's excuse that it did not learn of the conversations until August 5, 2016—the date Ms. Martinez, the cooperating co-conspirator notified the trial counsel through her attorney. (JA 139). Ms. Martinez was on the charge sheet for a year and testified for the

prosecution at a motions hearing in February. (JA 258). If the government wanted to know if she and SPC Reyes had communicated, it could have exercised reasonable diligence and asked her. It didn't.

3. Appellants need not choose between their right to counsel and rights under Article 10, UCMJ.

Specialist Reyes asserted his rights to speedy trial in February, April, August, and October 2016. That the judge elected to question him as to the acceptability of the trial dates is irrelevant. Either the government moved with reasonable diligence or it didn't. Moreover, his response had no legal effect. When the military judge questioned the accused about trial date acceptability, she had already granted the government's April continuance motion and counsel had already conferred about the new dates. (JA 136-37; 265). Similarly, in August, after rejecting SPC Reyes' Article 10 motion, his counsel would fall below professional norms if they did not review the newly disclosed mountain of statements made by their client and at least one of the government witnesses set to testify at trial.

Specialist Reyes did suffer particularized anxiety and concern as he testified to in the motions hearing. (JA 44). This case is readily distinguishable from *United States v. Montanino*, 40 M.J. 364 (C.M.A. 1994). In *Montanino*, the defense counsel, assigned to duty in the Sinai, remained a part of Trial Defense Services, but Trial Defense Services declined to arrange for him to return for

necessary proceedings. *Id* at 365. In this case, the government, not Trial Defense Services, chose to reassign SPC Reyes' counsel outside of Trial Defense Services and to a different unit at a different installation. Given that this occurred almost a year after his counsel had begun representing him, greater anxiety and concern about the potential for continuing competent representation are to be expected. (JA 44).

4. The military judge's remedies demonstrate the government's lack of reasonable diligence.

As the government points out, the military judge excluded evidence due to "tardy Section III disclosures." (Gov't Br. 33). She also excluded, due to late disclosure, audio files in October weeks before trial and screenshot evidence sent to the trial counsel, CPT BW, that he negligently forgot to disclose to defense for a year. (JA 178-179). However, contrary to the government's arguments, these things do not stand for a lack of prejudice, they demonstrate the lack of reasonable diligence. And if the government does not exercise reasonable diligence, Article 10, UCMJ, only contemplates one remedy—dismissal with prejudice.

ISSUE PRESENTED II

LAW AND ARGUMENT

1. Appellants continuing pre-trial confinement necessitates a verbatim transcript from *Reyes I* to form a complete record.

Appellant alleged an Article 10 violation in February 2016. (JA 257). He alleged both an Article 10, UCMJ, violation and a Sixth Amendment speedy trial violation in April 2016. (JA 263-265). A summary transcript precludes this Court, and counsel, from assessing the legal correctness of the court's decision. While the February Article 10, UCMJ, pleadings eventually ended up in the record, the April pleadings did not. Moreover, because there is no verbatim transcript, counsel and the Court must instead speculate as to whether the parties agreed upon any proffers or facts during those proceedings. This preclusion of appellate review of the accused's assertions, related to his right to a speedy trial and Article 10, UCMJ, should not stand and renders his record incomplete under Article 54, UCMJ.

Similarly, although *Reyes II* purported to stand alone, it did not do so with respect to experts. It is clear from the record that the issues surrounding experts litigated in *Reyes I* carried forward into *Reyes II* despite it ostensibly being a separate court-martial. It is equally clear that the experts litigated in *Reyes I* that the judge did not compel (the private investigator (JA 260) and forensic neurologist (JA 264)) were not relitigated. The prosecution ensured that the experts that were granted and compelled carried forward without a new request to

the convening authority to have them appointed for this other court-martial. Presumably, if the defense thought he needed the other experts in *Reyes I*, they thought he needed them in *Reyes II* since the charges were virtually the same. However, the behavior of the parties and the lack of verbatim transcript prevents a complete record and review of the merits of these expert requests.

2. If this Court does not decide Issue I in Appellant's favor, he is not opposed to a remand.

On brief, the government acknowledges that it "is able to obtain and construct a verbatim record of *Reyes I*." (Gov't Br. 44). Appellant's position is that his Article 10, UCMJ rights have been violated and delaying relief only compounds the violation. However, if this Court disagrees or declines to reach Issue I, he does not oppose a remand and a new Article 66, UCMJ, review with possession of the complete verbatim transcript that accurately reflects the proceedings from his pre-trial confinement until action.

CONCLUSION

Wherefore, appellant requests this Court grant the relief requested herein.

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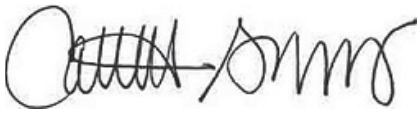

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and the Government Appellate Division on March 2, 2020.

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