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	) BRIEF ON BEHALF OF APPELLEE)))) Crim. App. Dkt. No. 20160704)) USCA Dkt. No. 19-0339/AR))

KAREY B. MARREN
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0760
karey.b.marren.mil@mail.mil
U.S.C.A.A.F. Bar No. 37219

CRAIG J. SCHAPIRA
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37218

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

Issues Presented

I. WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE 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.

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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)(a). On 10 December 2019, this Court granted appellant's petition for review. *United States v. Reyes*, No. 19-0339/AR, 2019 CAAF LEXIS 856, at *1 (C.A.A.F. Dec. 10, 2019).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of five specifications of sexual assault, two specifications of conspiracy to obstruct justice, one specification of willful disobedience of a lawful order, two specifications of larceny of a value less than $500.00, two specifications of assault consummated by battery, three specifications of adultery, and three specifications of obstruction of justice, in violation of Articles 81, 90, 120, 121, 128, and 134, UCMJ. (JA at 180–84).[1] The military judge sentenced appellant to confinement for thirteen years, reduction to the grade of E-1, and a dishonorable discharge. (JA 185).

After two days in civilian confinement, appellant's command ordered him into pretrial confinement on 31 July 2015. (JA 14). He spent 455 days in military pretrial confinement and received 457 days of confinement credit. (JA 185). After

[1] The military judge conditionally dismissed Specifications 8 and 9 of Charge VII (wrongfully endeavoring to impede an ongoing investigation, in violation of Article 134, UCMJ) after deciding they were unreasonably multiplied for findings with conspiring to obstruct justice, in violation of Article 81, UCMJ. (JA 183).

adding 90 days of Article 13 credit, the military judge applied a credit of 547 days to appellant's sentence. (JA 185).

Statement of Facts

a. Nature and complexity of appellant's crimes.

Appellant's crimes occurred over a three-year span, in seven cities across North Carolina, and involved three victims and one co-conspirator. (JA 14–19). The nature of his misdeeds included violent crimes, sexual crimes, drug distribution, firearms theft, debit card theft, solicitation, witness tampering, and military-specific crimes. (JA 14–19). All told, appellant faced seven charges under the UCMJ, with a total of thirty-four specifications. (JA 14–19).

b. Timeline of events prior to trial.

The Appendix contains an inclusive timeline of relevant events, and a summary of key facts is detailed below.

1. Pretrial confinement, R.C.M. 706 inquiry, and Article 32 preliminary hearing.

The command placed appellant in pretrial confinement on 31 July 2015 and preferred charges against him on 6 August 2015. (JA 120–21). Shortly after appellant entered pretrial confinement and the government preferred charges, appellant stated he would be ready to proceed with the Article 32 "any time after 31 August 2015." (JA 222). The summary court-martial convening authority

directed a Rule for Courts-Martial [RCM] 706 inquiry on 11 August 2015.[2] (JA 121). When the Article 32 Preliminary Hearing Officer proposed a hearing date of 1 September 2015, appellant said he would not be able to proceed until after the R.C.M. 706 inquiry was complete. (JA 222). Defense formally "accepted delay" from 26 September 2015 until 15 October 2015—totaling twenty days. (JA 122). The command completed the Article 32 hearing on 15 October 2015. (JA 124, 290). Based on the preliminary hearing officer's recommendations, the government dismissed and re-preferred those and additional charges against appellant on 20 November 2015. (JA 125).

2. Referral of charges, docketing, and re-referral of charges.

The general court-martial convening authority (GCMCA) referred appellant's case on 1 December 2015 and appellant was arraigned in *Reyes I* on 9 December 2015, 132 calendar days after the command placed him in pretrial confinement. (JA 120, 125–26). Upon referral, both government and defense signed the electronic docket notification. (JA 125). The government requested 15 March 2016 as the trial date; appellant requested 9 May 2016. (JA 125, 283). The military judge set appellant's trial for 15 April 2016. (JA 126).

At a motions hearing on 4 April 2016, the parties agreed to a new trial date of 26 August 2016. (JA 136, 157). During this time, the military judge directly

[2] *See infra* pp. 14-15 for further discussion regarding the R.C.M. 706 board.

asked appellant about the new trial date to ensure he wanted a continuance, given his status as a pretrial inmate. (JA 137). On the record, appellant personally stated he was "okay with the new trial dates." (JA 137).

On 18 April 2016, the 82d Airborne Division (Rear) (Provisional) Commander withdrew charges and transferred jurisdiction to the 82d Airborne Division Commander. (JA 265). That same day, the new GCMCA referred the case to a general court-martial. (JA 20–21). This became "*Reyes II*." (JA 21). Along with this new referral, the government amended Specifications 8–11 of Charge VII under Article 134, adding an additional terminal element. (JA 18–19). The defense did not object to the withdrawal or subsequent referral. (JA 137).

3. Lengthy pretrial negotiations.

In total, the defense submitted six offers to plead guilty (OTP) and two signed stipulations of fact. (Appendix). The first OTP came on 9 December 2015—the same day as arraignment in *Reyes I*. (JA 126). In response to the OTP, the government sought out victim input, as well as input from appellant's chain of command, before staffing it to the GCMCA. (JA 223–25).

Five more OTPs would follow, and both parties agreed they were conducting "good faith negotiations." (JA 208). After appellant submitted his fourth OTP and a signed stipulation of fact on 2 February 2016, it took just two days for the GCMCA to disapprove it. (JA 130–31). Even after the withdrawal

and re-referral of charges, there was an alternate disposition pending when the parties first appeared on the record for the resulting *Reyes II* on 3 May 2016. (JA 23, 26). Although it took several iterations to reach an agreement, negotiations continued and appellant eventually accepted one of the GCMCA's counter-offers on 16 May 2016. (JA 138, 159). The parties kept the previously-scheduled trial date in *Reyes I* of 26 August 2016 for this mixed plea. (JA 66, 138, 159).

4. The government continually searched for defense expert consultants.

On 8 February 2016, the military judge granted defense's motion to compel two expert consultants: a forensic psychiatrist and a Spanish translator. (JA 132). During an Article 39(a) session, the government stated its willingness to assist defense in securing expert witnesses—"We'll give you whoever you want, whatever price, whatever it takes. Who can you get? Whatever you like, we'll give it to you."—but there was still difficulty in securing expert witnesses because neither government nor defense could find anyone available. (JA 64).

5. The government learns of appellant's additional misconduct.

Appellant unlawfully contacted Ms. Naxajani Martinez, a co-conspirator listed on his charge sheet, while awaiting trial.[3] (JA 57, 83). The government learned of these inappropriate communications on 5 August 2016. (JA 83). The

[3] Appellant was charged with conspiring with Ms. Martinez to obstruct justice by removing incriminating evidence from his home on the day he was ordered into PTC. (JA 250).

trial counsel sought out these recorded phone calls because "*Stellato* tells us to step up, grab that information, and get it." (JA 58).

The government disclosed on 16 August 2016 approximately 1,400 telephone calls, including those made to Ms. Martinez. (JA 82, 100). These calls were in Spanish and required translation, but the government disclosed them immediately upon receipt. (JA 99–100). This was not part of the government's case-in-chief; the military judge equally excluded it. (JA 58, 83).

At a 39(a) session on 26 August 2016, one reason for the unresolved pre-trial negotiations was "the accused's own conduct of recent" with his co-conspirator. (JA 66). The government was "ready to proceed" to appellant's guilty plea despite the provision that says misconduct would authorize the government to withdraw from their deal. (JA 66). Yet, on 24 August 2016, two days before the mixed-plea trial date, appellant demanded speedy trial. (JA 116, 140–41, 188). After the military judge later denied appellant's motion to dismiss on 29 August 2016, appellant requested a continuance until 17-21 October and 24-25 October 2016. (JA 116, 141–423).

6. Negotiations fail and the parties proceed to a fully-contested trial.

On 23 September 2016, appellant formally withdrew from the OTP. (JA 322). The defense received two funding extensions for its Spanish translator on 11 October 2016 and again on 13 October 2016, and the parties continued sorting out

discovery. (JA 322–24). Appellant's trial began on 24 October 2016, 452 days after entering PTC. (JA 8).

Specified Issue

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

Standard of Review

Article 10 claims are reviewed de novo, giving substantial deference to the military judge's findings of fact unless they are clearly erroneous. *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F 2010), *quoting United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

Summary of Argument

The military judge did not err when she denied appellant's speedy trial motions under Article 10, UCMJ. Within fourteen days of appellant entering pretrial confinement, the government had preferred charges, secured a military magistrate's review, and begun scheduling an Article 32 with the Preliminary Hearing Officer. Were it not for the R.C.M. 706 inquiry, which consumed forty-six days, or the subsequent twenty days of defense delay, appellant would have been arraigned in far less than 120 days. The government appropriately dismissed and re-referred charges on 20 November 2015. However, appellant remained in

pre-trial confinement and the referral of *Reyes I* occurred just eleven days later. Once the government re-preferred charges consistent with the Article 32 recommendations, appellant was arraigned just seven days later—132 total days after entering confinement.[4]

Following initial referral, virtually all of the delay in *Reyes I* and *Reyes II* is attributable to appellant. Appellant requested and agreed to numerous continuances, belying his claims that he desired a speedy resolution to his case. Even after the government discovered additional misconduct appellant committed while in confinement and agreed to proceed to trial immediately—without using this new misconduct against appellant—appellant requested a continuance. Appellant cannot now claim to be prejudiced by delays that he created and consented to before his court-martial.

Law & Argument

a. The military judge's findings of fact were not clearly erroneous.

In reviewing the legal question of a speedy trial violation de novo, the court gives substantial deference to the military judge's findings of fact. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). Military judges are vested with a

[4] In accordance with R.C.M. 707(b)(3)(A), a new 120-day time period began in November 2015 when charges were dismissed. However, the government acknowledges appellant remained in pretrial confinement between that dismissal and subsequent re-preferral.

degree of discretion, as they can "readily determine whether the Government has been foot-dragging on a given case, under the circumstances then and there prevailing." *United States v. Hatfield*, 44 M.J. 22, 24–25 (C.A.A.F. 1996).

Appellant does not challenge any of the military judge's factual findings as clearly erroneous. (Appellant Br. 7–9). A review of the record indicates that the military judge's findings are well supported from the evidence. She made 123 findings of fact verbally on the record in support of her ruling denying the defense's final Article 10, UCMJ. (JA 116–46). She adopted the facts directly from the enclosures to the motions both parties submitted; there were no objections to her findings of fact. (JA 117). Accordingly, the military judge's detailed factual findings are supported by the record, are not clearly erroneous, and should receive deference regarding her discretion in the matter.

b. The military judge correctly denied defense's motion to dismiss for violation of appellant's right to a speedy trial because there was no Article 10 violation under the *Barker* factors.

When a servicemember is placed in pretrial confinement "immediate steps shall be taken" to inform the accused to the charges and to either bring the accused to trial or dismiss the charges. Article 10, UCMJ. Article 10, UCMJ is "generally directed toward the advent of a speedy trial, it is specifically addressed to a particular harm, namely causing an accused to languish in confinement or arrest *without knowing the charges against him and without bail*." *United States v.*

Schuber, 70 M.J. 181, 187 (C.A.A.F 2011) (emphasis added) (quoting *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F 2005)).

The test for assessing an alleged violation of Article 10 is whether the Government has acted with "reasonable diligence" in proceeding to trial. *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999) (*quoting United States v. Kossman*, 38 M.J. 258, 262 (CMA 1993)). This is a more "exacting" standard than the Sixth Amendment. *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F 2010). Upon review, it is not "constant motion," that is required, but "reasonable diligence in bringing the charges to trial." *Id*. Short periods of inactivity are not fatal to an otherwise active prosecution. *Id*. (*quoting United States v. Tibbs*, 15 C.M.R. 322, 353 (C.M.A. 1965) (noting that "[b]rief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive")). In other words, the "test is reasonable diligence, not textbook prosecution." *Thompson*, 68 M.J. at 188.

The "essential ingredient is orderly expedition and not mere speed." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005). The "proceeding as a whole and not mere speed" is important. *Mizgala*, 61 M.J. at 127. The procedural framework is not "discrete factors," but an "integrated process." *Thompson*, 68 M.J. at 313. Even where the Government "seems to have been in a waiting posture," and "processing by the Government . . . was not stellar," the overall

proceeding that displays "general movement forward during the full range of the pretrial period" can be reasonable. *Id*. "Outside of an explicit delay caused by the defense," it is the government's burden to show due diligence and it is the government's responsibility to provide evidence showing the actions necessitated and executed in a particular case justified delay when an accused was in pretrial confinement. *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016).

The *Barker v. Wingo* factors are an "apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala*, 61 M.J. at 127. 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 v. Wingo*, 407 U.S. 514, 530 (1972). "[T]hese factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id*. at 533.

1. The length of the delay triggers a review.

The length of delay constitutes a "triggering mechanism" under Article 10. *United States v. Cossio*, 64 M.J. at 254, 257 (C.A.A.F. 2007). "The delay that can be tolerated for an ordinary street crime is considerably less than [that] for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. *Barker v. Wingo* suggests that appropriate considerations include "the seriousness of the offense, the complexity of the case, and the availability of proof." *Schuber*, 70 M.J. at 188

(*quoting Barker*, 407 U.S. at 530–31, 538 n.31). Here, the 457 day period in appellant's case is sufficient to trigger the full *Barker* analysis. (*See United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014) (where "a period of 349 days of pretrial confinement exceeds periods of pretrial confinement that we have previously found to trigger full speedy trial analysis.")).

2. The reasons for the delay were valid and much of the delay after referral is attributable to the defense.

A detailed review of each time period demonstrates an active prosecution moving with reasonable diligence to bring appellant's case to trial. Further, appellant asked for, or consented to, multiple delays throughout the process. (JA 137, 157, 257). "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)). Long-standing jurisprudence recognizes that "many circumstances" could justify "longer periods of delay," and it is critical to consider whether "the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation but negligently or spitefully chose not to." *United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996).

Speedy trial jurisprudence "break[s] down the periods of delay, analyze[s] the reasons for each, and may express concern with some but not other periods of delay." *Danylo*, 73 M.J. at 190 (quoting *United States v. Wilson*, 72 M.J. 347, 352

(C.A.A.F. 2013)). For example, in *United States v. Wilson*, the court found the "timeline provides context and explanations which reflect reasonable pretrial decisions and activities including potential immunity for other actors, the unit's pending deployment to Afghanistan, drug testing by USACIL, and 'complicated' pretrial negotiations." *Wilson*, 72 M.J. 347, 353 (C.A.A.F 2013). In this case, appellant's timeline closely mirrors that in *Wilson* and includes similar investigation and "complicated" pretrial negotiations.

Given a thorough review of each period, appellant's case was reasonably and diligently processed, ultimately weighing in favor of the government.

i. Period One. *31 July 2015 through 15 October 2015:* Pretrial confinement through Article 32 hearing.

Appellant is responsible for much of the delay during this period. The entire period is not wholly attributable to the government, as appellant suggests. (Appellant Br. 13). The government ensured appellant's procedural due process rights were protected and did not object to the delay appellant requested.

Appellant learned the nature of the charges on 6 August 2015, and a military magistrate concluded pretrial confinement was warranted. (JA 120–21). The record demonstrates strict compliance with the regulatory procedure of ensuring appellant's due process rights were protected during this review. (JA 286). The military magistrate's report was thorough and had sixteen enclosures, to include

the "48 Hour PC Determination" and the "72 Hour Review." (JA 288). Appellant was notified of the magistrate's decision on 6 August 2015, just one week after his commander ordered him into pretrial confinement. (JA 287); *see Mizgala*, 61 M.J. at 124 (noting that once an accused knows the charges of which he is accused, the purpose of Article 10, UCMJ is vindicated).

On 11 August 2015, the special court-martial convening authority ordered a mental health evaluation under R.C.M. 706[5] for appellant; then, appellant requested that the Article 32 hearing was delayed until completion of the evaluation. (JA 151). Defense counsel said they could not proceed until the evaluation was complete, despite previously indicating to the preliminary hearing officer that they would "be ready to proceed with the Article 32 any time after 31 August 2015." (JA 151, 222). The R.C.M. 706 results were published on 25 September 2015. (JA 151). Defense requested additional delay from 26 September until 15 October 2015. (JA 151). At no point during this time period did appellant demand speedy trial.

[5] While the special court-martial convening authority ordered the R.C.M. 706 evaluation, and the report was written for the trial counsel, it is unclear which party actually requested it. (JA 121, 186). Appellant contends the government requested this R.C.M. 706 evaluation. (Appellant Br. 2). At trial, government counsel argued "the 706 and Article 32 . . . that's defense delay." (JA 62). The Army Court of Criminal Appeals stated that "appellant requested" the evaluation. (JA 3). Regardless, for purposes of attributing the delay, this time is properly excluded, at least for R.C.M. 707 purposes. *See* R.C.M. 707(b)(3)(C).

Defense is accountable for forty-four days of delay during this period. Defense unequivocally accepted twenty days of delay from the completion of the R.C.M. 706 report until the Article 32 hearing. (JA 122). However, defense is also responsible for the larger window surrounding that period because the preliminary hearing officer proposed 1 September 2015, but appellant refused to proceed until the R.C.M. 706 inquiry was complete. (JA 222).

Moreover, the remaining time in this period demonstrates appropriate processing because the government was complying with protocol in terms of procedural due process to appellant. *See Schuber*, 70 M.J. at 188 (Article 10, UMCJ analysis includes "whether Appellant was informed of the accusations against him, whether the Government complied with procedures relating to pretrial confinement, and whether the Government was responsive to requests for reconsideration of pretrial confinement.") Here, the magistrate reviewed appellant's case, and appellant never made a request for reconsideration. (JA 120–21). Therefore, this period cannot wholly be attributed to the government, and the pretrial processing at this point was reasonably diligent.

ii. Period Two. *15 October 2015 through 9 December 2015:* Article 32 through arraignment in *Reyes I*.

This period demonstrates timely processing of appellant's case because the government took a significant number of steps towards trial and appellant actually

requested a trial date later than what the government requested. (JA 125). The Article 32 hearing was conducted on 15 October 2015. (JA 121). Based on the PHO's report, the government dismissed the charges, preferring new charges consistent with the report on 20 November 2015. (JA 151).

Appellant was arraigned on 9 December 2015. (JA 126). At arraignment, the government requested a 15 March 2016 trial date, and the defense requested a 9 May 2016 trial date. (JA 125, 283). The military judge scheduled the trial date for 11 April 2016. (JA 126). At no point during this time did appellant demand speedy trial. By failing to demand speedy trial and explicitly requesting a trial date five months after the referral of charges, appellant's argument that the government was dilatory during this timeframe is misplaced. (Appellant's Br. 13). Instead, the request for a 9 May 2016 trial date diminishes appellant's argument because it was apparent that he was already willing to remain in confinement from 9 December 2015 until 9 May 2016, a period of 153 days that should be attributable to defense.

iii. Period Three. *9 December 2015 through 8 February 2016:* Arraignment in *Reyes I* through the first motions hearing in *Reyes I.*

This time period shows an active prosecution engaged in good-faith pretrial negotiations with defense. During this time period, defense submitted four OTPs and agreed on a stipulation of fact with the government.[6] (Appendix); *see Wilson*,

[6] This stipulation of fact also necessitated internal reviews, beginning on 20 December 2015, which continued on 28 December 2015 and again on 30

72 M.J. at 353 (noting that "'complicated' pretrial negotiations" can "reflect reasonable pretrial decisions and activities"). After defense submitted an OTP on 9 December 2015, the government quickly staffed it to the GCMCA. (JA 126). On 10 December 2015, the government sought input on the OTP from two victims, scheduling a meeting for "17 or 18 December 2015." (JA 223). The government finally received victim input from Ms. DR through her SVC regarding the OTP on 13 January 2016. (JA 225). This timeline is reasonable given the holiday timeframe and the government's requirement to get victim input on plea deals and go through Ms. DR's attorney, as she was a represented party. *See* Article 6b, UCMJ, 10 U.S.C. § 806b; R.C.M. 705(d)(3)(B) (requiring that "[w]henever practicable, prior to the convening authority accepting a pretrial agreement the victim shall be provided an opportunity to express views concerning the pretrial agreement terms and conditions").

The government displayed efforts to bring the case to completion as quickly as possible, such as when it e-mailed defense counsel a "FYSA" on 19 January 2016 that there is a "CG appointment scheduled for tomorrow. Not sure when the next one will be after that." (JA 207). Defense sent its fourth OTP on 2 February 2016, and just two days later, the GCMCA disapproved it. (JA 130, 227).

December 2015. (JA 224). On 19 January 2016, the government submitted its edited draft of stipulation of fact to the defense and notified defense that this was required to submit the OTP to the convening authority. (JA 129, 207).

During these negotiations, appellant was complicit in scheduling delays. Specifically, the defense consented to delaying an Article 39(a) motions hearing on 28 January 2016. (JA 208–09). The government filed a motion for a continuance so the parties could pursue ongoing OTP negotiations which would "negate the need" for a motions hearing. (JA 208). Despite "concern . . . that the OTP will not be approved" and an e-mail stating they "object[ed] to a course of action that might result in a delay should the Convening Authority disapprove the OTP," the government's motion to continue the motions hearing was unopposed at the Article 39(a) session. (JA 209). As such, the military judge granted the motion to continue the motions hearing until 8 February 2016. (JA 209). This sequence of events exposes the lack of appellant's urgency to proceeding to trial, as he evidently believed his OTP would be approved and there would be no need to litigate the motions.

On 4 February 2016, the GCMCA disapproved the fourth OTP. (JA 116, 131). Three days later, appellant filed his first motion to dismiss the charges for a violation of Article 10, UCMJ. (JA 116, 131). The timing of appellant's motion—192 days after entering pretrial confinement—is a relevant consideration when assessing the government's diligence during Periods One and Two. *See Thompson*, 68 M.J. at 313 ("We also take into account the fact that Appellant did not make a speedy trial request during the entire pretrial day period addressed by

the military judge. She delayed making a request until 141 days after she was placed in pretrial confinement.")

iv. Period Four. *9 February 2016 through 4 April 2016:* The first motions hearing in *Reyes I* through the Article 39(a) hearing where appellant consented to a continuance.

Appellant cannot now complain of a time period spent diligently searching for his expert consultants, especially where he made a non-specific request and later released an expert before trial. (JA 242–43). This time period showed reasonable progress by the government because the government diligently searched for a defense expert witness and appellant consented to a continuance. Additionally, the delay ensured appellant had a fair trial by providing him access to the expert assistance he requested. (JA 64).

The military judge granted defense's motion to compel the production of an expert in forensic psychiatry and a Spanish translator on 8 February 2016. (JA 132). The next day, the government began working to secure these experts.[7] (JA 132–34). The defense request did not specify named individuals, making it more challenging for the government to coordinate production of a suitable expert because processing the request simply took more time. (JA 155). The government contacted multiple legal and medical centers, speaking with at least five points of

[7] On 18 February 2016, the defense counsel told the government that "they would handle the Spanish translator." (JA 155).

contact for forensic psychiatrists across the nation. (JA 217, 228–29). One contact even "stated he would contact one more person and then suggested . . . a list of experts he had provided." (JA 228). None were available. (JA 228–29).

At the Article 39(a) session on 4 April 2016, the parties agreed to a new trial date of 26 August–2 September 2016. (JA 137). The delay was necessary in order to secure the forensic psychiatrist for the defense. (JA 157). "The court questioned the accused about the new trial dates to ensure it was acceptable with the accused because he was in pre-trial confinement." (JA 157). He stated he was "okay" with the new trial dates. (JA 157, 257). Given his consent at trial, this time period should not be wholly factored against the government as appellant suggests. (Appellant Br. 13–14). Finally, appellant "released one of their experts." (JA 242–43). This decision demonstrates that he could have proceeded to trial without the expert but elected to wait until the government secured the expert.

Finding an expert witness validates this delay. As the Supreme Court noted in *Barker v. Wingo*, "a valid reason, such as a missing witness, should serve to justify appropriate delay." 407 U.S. 514, 531 (1972). Here, the government exercised reasonable diligence finding a "missing witness" because experts across the Army were unavailable. Further, the military judge specifically asked appellant if he agreed to the continuance, recognizing his status in confinement. He agreed. (JA 157). The right to speedy trial is a shield, not a sword as appellant

now attempts to wield: "An accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal for that same delay." *United States v. King*, 30 M.J. 59, 66 (C.M.A. 1990).

v. Period Five. *4 April 2016 through 23 August 2016:* Article 39(a) hearing where appellant consented to a continuance through government's response to appellant's misconduct during confinement.

This time period cannot be considered unreasonable when appellant failed to file any motion demanding speedy trial, continued to engage in pretrial negotiations, and committed misconduct while in confinement that necessitated further investigation and decisions as to disposition. On 18 April 2016, the government withdrew and a different convening authority referred charges to another court martial. (JA 137). On 21 April 2016, the defense submitted its fifth OTP, this time to a new convening authority. (JA 137). On 6 May 2016, this convening authority countered. (JA 137). On 16 May 2016, the accused accepted the counter-offer, making this other court martial, *Reyes II*, a mixed-plea case. (JA 138, 159). The trial date was set for 26 August 2016. (JA 138). This reflects reasonable progress towards trial in the form of ongoing pretrial negotiations.

On 5 August 2016, the government discovered that appellant had contacted his alleged co-conspirator throughout his time in confinement. (JA 231). He called her family, spoke to her through family members, and sent her at least thirty letters. (JA 231). Because these calls were in Spanish, the government needed to

translate them prior to deciding on a course of action. (JA 99). Such further investigation reflects reasonable diligence in proceeding to trial. *See Cossio*, 64 M.J. at 255–58 (concluding, as a matter of law, that the government exercised reasonable diligence when it took 85 days to complete a digital forensic report, noting "the Government has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial").

Appellant now complains of the late discovery he essentially created through his own misconduct. (Appellant's Br. 14). Even still, the military judge protected appellant from his misdeeds. She forbade the government from using any of this evidence at his trial, essentially allowing the case to proceed. (JA 83). Moreover, despite the provision allowing them to withdraw from accepted OTP, the government still wished to proceed to trial scheduled for 26 August 2016. (JA 66). As such, appellant had the opportunity to proceed to trial if he so wished, demonstrating this period of time is attributable to appellant, not the government.

vi. Period Six. *24 August 2016 through 23 September 2016:* Government's response to appellant's misconduct during confinement through appellant's withdrawal from the mixed-plea case.

On the evening of Wednesday, 24 August 2016, with a mixed-plea trial scheduled to commence on the morning of Friday, 26 August 2016, the defense filed a motion to dismiss under Article 10. (JA 160). This motion relied on "a reassertion of the issues from the defense motions to dismiss filed on 7 February

2016 and 28 March 2016 in *Reyes I*." (JA 160). The newly-asserted basis for their motion involved a lack of M.R.E. 404(b) and 413 notice, although they already had the substantive information. (JA 160). On 29 August 2016, the military judge denied appellant's Article 10 motion to dismiss, and the defense requested a continuance until 17 October 2016. (JA 116, 143, 303).

Simply put, appellant's request demonstrates that, despite his demand for trial, he was not prepared for one. As with defense's prior requests for speedy trial, the timing of appellant's request in relation to the discovery of appellant's misconduct is a relevant consideration when assessing these time periods. *See Thompson*, 68 M.J. at 313. Appellant cannot allege that the government was dilatory in getting his case to trial when he was the one who requested a delay. (Appellant's Br. 7–8). Consequently, the time period of 26 August 2016 until 17 October 2016, a period of 54 days, is directly attributable to appellant.

vii. Period Seven. *23 September 2016 through 24 October 2016:* Appellant's withdrawal from the mixed-plea case until the beginning of his fully-contested trial.

The reason for the delay during this timeframe was the breakdown of plea negotiations between the parties, a factor this court takes into consideration and should weigh in the government's favor. On 23 September 2016, negotiation of the sixth OTP failed, and appellant withdrew from the agreement. (JA 138, 143). This changed the status of *Reyes II* from a guilty plea, "which had been anticipated

and planned for by the parties for, at that time, over four months," into a fully contested trial. (JA 166). Accordingly, this time period reflects reasonable pretrial activity, especially in light of these ongoing complicated pretrial negotiations. *Wilson*, 72 M.J. at 353. When looking at the activity that occurred during each time period and appellant's repeated requests for delays, this *Barker* factor favors the government.

3. Appellant's tactical assertion of the right to speedy trial

Although appellant demanded a speedy trial, the calculated timing of the demands contradict the genuineness of his claim. 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." *Kossman*, 38 M.J. at 262.

Here, appellant waited 192 days after entering pretrial confinement to make his first speedy trial demand, and he only made this demand after twice requesting a delay—once for the Article 32 and once for a trial date almost two months later than what the government requested. (JA 289–90). Further, appellant's first two speedy trial demands came immediately after he received news detrimental to his case. When appellant made his first demand on 4 February 2016, it was three days after the GCMCA denied appellant's fourth offer to plead guilty. (JA 152, 294). Likewise, on 24 August 2016, appellant demanded a speedy trial after the

government disclosed recorded phone calls of appellant committing additional misconduct during confinement. (JA 159).

Of note, appellant made this demand more than four months after he had explicitly consented to a delayed trial date at an Article 39(a) session on 4 April 2016. (JA 159, 284). Then, when the government was willing to proceed to trial on the date appellant previously consented to—26 August 2016—appellant requested another continuance. (JA 157). These were clear tactical moves designed to catch the government unprepared while it was securing an OTP with appellant.

The C.A.A.F. has disfavored this type of strategy. In *United States v. Wilson*, the appellant demanded speedy trial fourteen days after his offer to plead guilty was denied. 72 M.J. at 353. Given the timing of this demand, it affords "only slight weight" in appellant's favor. *Id*. On the other hand, in *United States v. Cossio*, the C.A.A.F. noted that "Cossio made a demand for a speedy trial twenty-three days after he was apprehended. Thus, this factor weighs in Cossio's favor." *Cossio*, 64 M.J. at 257. Here, appellant's requests match those of *Wilson*. Instead of quickly demanding speedy trial shortly after apprehension, appellant waited 192 days to make the first demand and nearly 200 additional days to make his second request. (JA 152, 159–60). As such, appellant's demands should weigh narrowly in his favor, if at all.

4. The delay did not prejudice appellant

Appellant must show the requisite prejudice to meet this "high standard." *United States v. Tippit*, 65 M.J. 69, 82 (C.A.A.F. 2007) (Ryan, J., dissenting). 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. 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." *See United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984).

When weighing prejudice, C.A.A.F. has listed several considerations:

> (1) appellant made no demand for a speedy trial or to be released from pretrial confinement; (2) appellant made no motion to dismiss or any other motion for relief predicated on a lack of speedy trial; (3) appellant entered a pretrial agreement within 2 days of trial; (4) appellant received credit for his pretrial confinement on his sentence; (5) there is no evidence of willful or malicious conduct on the part of the Government to create the delay; and (6) appellant suffered no prejudice to the preparation of his case as a result of the delay.

United States v. Birge, 52 M.J. 209, 212, 1999 CAAF LEXIS 1275, *9-10 (C.A.A.F. September 30, 1999). A detailed review of similar circumstances show appellant did not suffer prejudice.

i. Appellant was not prejudiced in preparation of his case.

Most importantly, appellant fails to cite to any evidence that his preparation for trial, defense evidence, trial strategy, or ability to present witnesses were adversely impacted by the delay in this case. Neither the appellant nor the record demonstrates any indication of loss of evidence or impact to case preparation due to the delay. Indeed, it is the opposite. The vast majority of the delay went to securing expert witnesses *for appellant* or permitting appellant more time to examine the recordings of the additional misconduct he committed while in confinement. (JA 136–37, 143, 157, 257, 264).

ii. Appellant did not endure oppressive confinement conditions.

Cases that have previously gone before C.A.A.F. contained much harsher pretrial confinement than what appellant faced and still lacked sufficient prejudice. *See 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, the appellant makes no mention of oppressive pretrial confinement, a factor weighing against his prejudice argument.

iii. Appellant's anxiety towards trial was normal.

Appellant makes insufficient, conclusory references to anxiety and distress. (Appellant's Br. 17). 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. Appellant testified that pretrial confinement made him feel "[a]nxious, conflicted, and scared." (JA 43). In his motion to dismiss for violation of Article 10, appellant simply pointed to "his deprivation of liberty," "spen[ding] a number of federal holidays in pretrial confinement away from his family and children," and his command's "limited interaction with him" as prejudice. (JA 196). Appellant was unable to file for divorce or participate in child custody proceedings. (JA 196).

None of these complaints demonstrate the particularized prejudice required. Furthermore, during the time that appellant claimed he felt "conflicted" and "scared," he was also unlawfully communicating with his co-conspirator and unlawful paramour, Ms. Martinez. (JA 83). This cuts against his testimony and establishes that he did not face extreme anxiety in confinement.

iv. Appellant received sentence credit for his time in pretrial confinement.

The military judge credited appellant with 457 total days of pretrial confinement. (JA 003, 185). This day-for-day credit undermines appellant's

prejudice argument. *See Cossio*, 64 M.J. at 257–58 (finding that appellant failed to "establish that [appellant] suffered any *Barker* prejudice"—in part, because "he would be entitled to receive administrative credit upon any sentence to confinement for the days he spent in pretrial confinement"); *see also Danylo*, 73 M.J. at 188 (finding no Sixth Amendment violation or prejudice even when the appellant "was subjected to pretrial confinement for two months *longer* than his adjudged sentence" when "[t]he military judge credited Appellant with the pretrial confinement he served against his adjudged sentenced, and Appellant was entitled to be released immediately following the conclusion of his court-martial") (emphasis added). Finally, unlike most post-trial inmates, appellant was entitled to payment as an E-4 for the entire 457 days of confinement, in accordance with DoD 7000.14-R Financial Management Regulation, Volume 7A, Chapter 1, 010402.F.

v. There was no willful or malicious conduct on the part of the government to create the delay.

At trial, defense made "no allegations of bad faith" towards the government, but believed their discovery management to have been "handled in a very negligent manner." (JA 70). Now on appeal, appellant again generally asserts "[t]he government was negligent in complying with discovery obligations and made numerous *Brady* disclosures that resulted in delay." (Appellant Br. 8). Therefore, appellant already fails to point to any evidence of "willful or malicious conduct on

the part of the Government to create the delay," which is an important factor to this court's analysis and weighs in the government's favor. *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'").

Additionally, none of the discovery issues appellant mentions in his brief resulted in any prejudice to appellant. Appellant points to the 1,400 phone calls that appellant generated via his own misconduct in confinement and the other "last minute disclosures." (Appellant Br. 14–15). While there were certainly late disclosures, they were a result of the government's continued compliance with its ongoing discovery obligations.

First, the government demonstrated good-faith in their discovery practice. On the same day the trial counsel, CPT BW, received defense's discovery request, he sent an e-mail to both defense counsel saying, "We will continue to push discovery to you as quickly as possible. I would like to sit down and do a review with y'all sometime in the near future so that we can really make sure that the government is turning over everything we have." (JA 175). Trial counsel was trying to be an open book for the defense and provide discovery upon receipt and in a diligent manner.

In October 2016, shortly before the scheduled trial, CPT BW realized he had failed to turn over discovery that he had received a year earlier in September 2015,[8] and the defense counsel called him as a witness to testify regarding this late disclosure. (JA 174). CPT BW testified that he thought he had provided the information to the defense but could not confirm. (JA 174). When he realized "he might have made what he defined as a 'terrible mistake,'" CPT BW immediately notified defense that he inadvertently overlooked that information. (JA 174–75).

The military judge found this was "[a]bsolutely not" a deliberate attempt to "hamper the defense." (JA 174). She found this was "not culpable, but only mere simple negligence." (JA 176). The military judge held that "CPT BW's failure has not impacted a substantial right of the accused." (JA 176). She noted that the e-mail traffic she reviewed "discusses comparing case books" throughout their interaction, and she found CPT MJ had a "genuine desire to turn over discovery and to ensure that defense had everything." (JA 175). "CPT [BW] was the only person who knew about the problem and with the knowledge that disclosing his failure would reflect poorly on him and could have possible negative career implications, CPT [BW] chose the only legally correct and morally courageous response and provided the information to the defense immediately." (JA 175–76).

[8] This discovery was twenty-one pages of text messages between two victims, the underlying content of which defense already had via other documents. (JA 174–76).

This was not discovery gamesmanship. This was the government's honest effort to provide everything to defense before trial.

Regarding other disclosures, appellant equally fails to establish prejudice because defense had the underlying content of the information, and the military judge prevented the government from using it as evidence at trial. Appellant already had pages "548-635" of the bates stamped files, it had simply been mislabeled. (JA 228). The government disclosed e-mails relevant to the defense motion to produce a forensic psychiatrist expert assistant, however, the military judge granted the defense expert request even without this evidence. (JA 154).

Further, the military judge precluded the government from admitting evidence from the tardy Section III disclosures provided on 30 September 2016, the forty-two audio files provided on 7 October 2016, or the "screenshot evidence provided to Special Agent M by DR on 8 June 2015 or the screenshot evidence provided to Captain [BW] from DR's SVC on or about 15 September 2015." (JA 178–79). Finally, the military judge allowed appellant "liberal cross-examination" of the victim regarding these communications. *See United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015) (discussing a military judge's authority to fashion an order "as is just under the circumstances," outlined in R.C.M. 701(g)(3), for noncompliance with discovery violations). Consequently, the military judge protected appellant from any late disclosure prejudice.

vi. Appellant voluntarily requested individual military counsel

Appellant now complains of his attorney's reassignment despite his request to keep her. Indeed, appellant was arraigned in *Reyes II* on 16 May 2016 and elected to be represented by Captain VS and Captain NB. (JA 26–27). When appellant made this election, he knew CPT NB was scheduled for a permanent change of station as early as 5 July 2016, as noted on the record. (JA 32). Captain NB was "basically in the middle of her PCS," and she would be "reporting to her new unit around 18 July." (JA 32). There was already a "pending [individual military counsel (IMC)] request" generated. (JA 32). Also, CPT VS remained a detailed military defense counsel at Fort Bragg. (JA 216–17). In setting court dates, the military judge was "amenable" to holding Article 39(a) sessions that worked best with CPT NB's schedule. (JA 33). Appellant submitted his IMC request on 23 June 2016. (JA 51, 189).

In a similar situation, where an appellant willingly postponed the trial until his chosen counsel could return from the Sinai, this court held it to be "abundantly" clear, "beyond reasonable doubt that this was a defense delay. . . ." *United States v. Montanino*, 40 M.J. 364, 365 (C.A.A.F. 1994). Although the counsel in *Montanino* remained actively assigned to Trial Defense Services, the outcome should be the same for appellant here because he specifically requested CPT NB to continue to represent him. *Id*.

Nothing in the record demonstrates CPT VS, his assistant defense counsel, was unable to continue their in-person meetings in North Carolina. Appellant's noncommissioned officer would "pick him up from Lejeune anytime his counsel needs to meet with him, and I get word that—they give the date, I draw the vehicle, I call the brig, set it all up, go there, pick him up, [and] transport him here." (JA 53). He traveled to see his attorney at least twelve times since March 2016 and August 2016. (JA 221, 232). Therefore, because he was already in a confinement situation where he was separated from his counsel, and because he voluntarily requested to keep that counsel even after she was reassigned to Fort Hood, Texas, this fails to demonstrate sufficient prejudice.

The *Barker* factors weigh in favor of the government. There has been no Article 10, UCMJ, violation because much of the delay is directly attributable to appellant. As such, no relief is necessary.

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.

Additional Facts

There were several Article 39(a) sessions in *Reyes I*. (JA 23). On 14 March 2016, the parties litigated the defense's motion to dismiss with prejudice for an Article 10 violation (filed on 7 February 2016), and the military judge deferred issuing a ruling. (JA 131, 263). On 4 April 2016, the military judge denied the motion to dismiss for a violation of Article 10. (JA 264).

On 18 April 2016, the government withdrew and referred the charges. (JA 137, 265). The military judge stated: "This withdrawal action mean[s] *United States versus Reyes I* was finished and a new court-martial came into being as *United States versus Reyes II*." (JA 137). The military judge instructed the parties that if there was something from *Reyes I* that they wanted to "bring forward to *Reyes II*," then they could do so. (JA 25). The defense did not file a motion regarding an improper withdrawal. (JA 137).

The military judge "advised counsel if they had anything from *Reyes I* that they wanted to present to the court in *Reyes II*, that needed to be in some type of written format, whether that be some type of verbatim transcript," stipulation of

expected testimony or fact, or in-person witnesses. (JA 23). The military judge unsealed prior *Reyes I* motions and gave defense access to these motions if they sought to file additional M.R.E. 412 and 513 motions. (JA 24). The parties litigated "essentially, the identical 412 issue" from *Reyes I*. (JA 31).

On 25 August 2016, the defense requested a verbatim transcript of *Reyes I* be produced because the "issues spans [sic] both courts-martial," so they are entitled to an entire and complete record. (JA 88–91). When defense made this request, each side had already submitted errata and the military judge had already authenticated the summarized transcript for *Reyes I*. (JA 88). The military judge asked the defense, "[w]hat authority do you have that the court, in a now authenticated record of trial, should go now and issue written rulings on that case . . . ?" (JA 90). The defense counsel cited Article 10 and *Gaskins* for the need to "build up on the argument for speedy trial" to pursue that avenue of relief. (JA 90). The military judge articulated that *Reyes I* had no "bearing" on *Reyes II*, saying "[t]hat court-martial is essentially, for lack of a better word, evaporated." (JA 91).

Ultimately, the military judge denied the defense motion "[p]ursuant to R.C.M. 1103(b)(2)(C)" as a "withdrawn case in which that case is withdrawn and then was re-referred anew by a new GCMCA does not require a verbatim transcript." (JA 87). The military judge stated she knew of "no authority to

consider facts in one record of trial in order to determine a legal issue in another record of trial." (JA 95). On 28 October 2016, in *Reyes II*—the case now sub judice—the military judge sentenced appellant to reduction to the grade of E-1, confinement for thirteen years, and a dishonorable discharge. (JA 8, 185). A verbatim transcript of this case, *Reyes II*, was generated. (JA 8–13). The record of trial in this case does include the properly summarized transcript of *Reyes I* as an attachment, found in Appellate Exhibit XV. (JA 244–66). R.C.M. 1103(b)(3).

Standard of Review

The question of whether a record of trial is incomplete is a question of law this court reviews *de novo*. *United States v. Henry*, 53 M.J. 108 (C.A.A.F. 2000).

Summary of Argument

The plain language of Article 54, UMCJ and Rule for Courts-Martial (R.C.M.) 1103 do not require a verbatim record of the Article 39(a) sessions occurring prior to the withdrawal and re-referral of the charges. *Reyes I* was withdrawn before findings and never resulted in a sentence. Accordingly, *Reyes I* never triggered the requirements for a verbatim record pursuant to R.C.M. 1103.

Argument

a. *Reyes I* was withdrawn pursuant to R.C.M. 604(a).

When the new convening authority withdrew and dismissed the first court-martial, *Reyes I* became final, discrete, and complete. (JA 137, 265). R.C.M.

604(a) authorized the convening authority to "cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced." There was nothing to suggest this was an improper withdrawal, and appellant did not object or file any defective withdrawal motion.

Finally, no cross-over between the two courts-martial occurred. The military judge instructed both parties that if they wanted to bring anything "forward to *Reyes II*," the onus was on them. (JA 25). *Reyes I* had no "bearing" on *Reyes II*, and the treatment of these two courts-martial were distinct. (JA 91).

b. *Reyes I* did not require a verbatim transcript because it did not result in a sentence.

The summarized transcript of *Reyes I* complies with Article 54, UCMJ, and R.C.M. 1103 because the proceedings were withdrawn and did not result in a sentence. Article 54, UCMJ, states "[e]ach general or special court-martial shall keep a separate record of the proceedings in each case brought before it." Article 54(a), UMCJ. A "complete record of proceedings and testimony" shall be prepared, in accordance with regulations prescribed by the President, for cases "of a sentence of . . . discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), UMCJ.

The President implemented these requirements in R.C.M. 1103. *Manual for Courts-Martial, United States* (2012 ed.) [MCM].[9] Each general court-martial "shall keep a separate record of the proceedings in each case brought before it." R.C.M. 1103(a). The record of trial "in each general court-martial shall be separate, complete, and independent of any other document." R.C.M. 1103(b)(2)(A). There must be a verbatim transcript "of all sessions" when "[a]ny part of the sentence adjudged exceeds six months confinement," or when a "bad-conduct discharge has been adjudged." R.C.M. 1103(b)(2)(B). Importantly, the UCMJ and the R.C.M. contemplate a "complete record of proceedings" for a case that results in a sentence. 10 U.S.C. § 854(c)(2); R.C.M. 1103(b)(2)(B).

R.C.M. 1103(b)(2)(C) states that when a verbatim transcript is not required, "a summarized report of the proceedings may be prepared instead of a verbatim transcript." That is exactly what occurred in *Reyes I*—a separate, complete, and independent record appropriately reflected the proceedings of *Reyes I*. Because *Reyes I* was withdrawn and never resulted in a sentence, it does not meet the criteria of R.C.M. 1103(b)(2)(B), and therefore no verbatim transcript is required.

The President prescribed different rules for withdrawn cases, like *Reyes I*. If the proceedings "were terminated by withdrawal," the record "may consist of the original charge sheet, a copy of the convening order and amending orders (if any),

[9] As *Reyes II* was referred on 18 April 2016, the 2012 MCM applied to his case.

and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet)." R.C.M. 1103(e). Because a verbatim transcript is not expressly required, this is further confirmation that R.C.M. 1103(b)(2)(C) authorizes a "summarized transcript" for *Reyes I*.

Given the unique procedural posture of *Reyes II*, the military judge correctly followed the regulatory command of R.C.M. 1103(e) because the proceedings were terminated by withdrawal. This is a plain and unambiguous interpretation of the Rules for Courts-Martial. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (noting that when interpreting a regulation, "we begin with its text, and, if the text is unclear, we turn to other canons of interpretation and tie-breaking rules to resolve the ambiguity") (internal quotations omitted) (Roberts, C.J., concurring). Therefore, the record need only consist of the "original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet)." R.C.M. 1103(e). The summarized transcript here complies with this provision. (JA 244–66).

c. *Reyes II* was referred to "another" court-martial.

Charges which have been withdrawn from a court-martial "may be referred to *another court-martial*. . . ." R.C.M. 604(b) (emphasis added). Therefore, pursuant to R.C.M. 604(b), the convening authority referred *United States v. Reyes*

to "another court-martial," flapping the back of the original charge sheet and delineating the new court-martial convening order. (JA 20). Indeed, the military judge even referred to this as "*Reyes II*," reminding the parties that *Reyes I*, "for lack of a better word, evaporated." (JA 91).

This separation and distinction followed long-standing courts-martial procedure. "A court-martial is a creature of an order promulgated by an authorized commander . . . which convenes, or creates, the court-martial entity." *United States v. Ryan*, 5 M.J. 97, 101 (C.M.A. 1978). Without "such an order, there is no court." *Id*. Importantly, *Reyes I* and *Reyes II* had separate convening orders. The 82d Airborne Division (Rear) (Provisional) Commander referred *Reyes I* pursuant to Court-Martial Convening Order 1, dated 15 June 2015. (JA 255). An entirely different GCMCA referred *Reyes II* pursuant to an entirely different Court-Martial Convening Order. (JA 20). Given this new order, a new court-martial was created, and *Reyes II* was referred to "another" court-martial. R.C.M. 604(b).

d. The record for *Reyes II* is complete because it is verbatim and has the summarized transcript of *Reyes I* attached.

The military judge's sentence in *Reyes II* included confinement for thirteen years and a dishonorable discharge, triggering the verbatim requirements prescribed in R.C.M. 1103(b)(2)(B). (JA 8, 185). Accordingly, *Reyes II* received a verbatim transcript. (JA 8–13). The record of *Reyes II* also appropriately

attaches matters as outlined in R.C.M. 1103(b)(3)(iii). Where there is a "rehearing or new or other trial of the case," the record of the former hearings should be attached. R.C.M. 1103(b)(3)(iii). In line with these regulations, *Reyes II* is a complete record because it appropriately attached the summarized transcript from *Reyes I*.

Appellant's reliance on *United States v. Gray* is misplaced because this jurisprudence addresses cases of a distinct procedural posture. (Appellant's Br. 19). Those cases were not withdrawn like *Reyes I*. Put simply, those cases *resulted in a sentence*. *See, e.g.*, *Henry*, 53 M.J. at 108 (where the adjudged and approved sentence provided for twenty-five years of confinement, despite missing exhibits from the record); *United States v. Gaskins*, 72 M.J. 225, 226 (C.A.A.F. 2013) (where the adjudged and approved sentence provided for nine years of confinement, despite a missing defense exhibit); *United States v. Gray*, 7 M.J. 296, n.1 (C.M.A. 1979) (where the convening authority approved a dishonorable discharge where the record was missing substantive side-bar conferences). Here, the convening authority had exactly what he needed to approve the sentence. The record of trial from *Reyes II* complied with R.C.M. 1103(b)(3)(iii) and included a verbatim transcript with the required documents—including the summarized transcript of *Reyes I*—attached to the record in Appellate Exhibit XV. (JA 244–66). Therefore, appellant's record was "complete" as Article 54, UCMJ requires.

e. The complete recording of *Reyes I* is currently maintained at Fort Bragg.

Should this court determine that a verbatim transcript is required, it is unnecessary to invoke the drastic remedy that R.C.M. 1103(f)[10] prescribes because the recordings of *Reyes I* are currently maintained at Fort Bragg, and the government could create a verbatim transcript of those proceedings. Case law has only required such drastic remedial action where the government was unable to obtain or adequately reconstruct omissions. *See United States v. Davenport*, 73 M.J. 373, 376–78 (C.A.A.F. 2014) ("The plain language of R.C.M. 1103(f) indicates there are only two options available to the convening authority *when a verbatim transcript cannot be prepared*.") (emphasis added).

Although not required in the government's view, the government is able to obtain and construct a verbatim record of *Reyes I*. Therefore, should this Honorable Court find that a verbatim transcript of *Reyes I* is required, the appropriate resolution would be to return the case to the Convening Authority, direct a verbatim transcript of *Reyes I*, and then allow a new post-trial submission and appellate record to be created.

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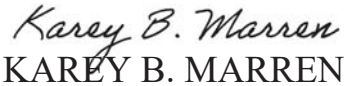
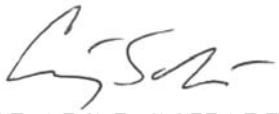
[10] "(1) Approve only so much of the sentence that could be adjudged by a special court-martial, or (2) direct a rehearing as to any offense of which the accused was found guilty if the findings is supported by the summary of the evidence contained in the record, provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court martial." R.C.M. 1103(f).

Conclusion

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



KAREY B. MARREN
Captain, Judge Advocate
Appellate Government
Counsel
U.S.C.A.A.F. Bar No. 37219



CRAIG J. SCHAPIRA
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37218

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 37060

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

APPENDIX

Date	Pre-Trial Activity[11]	Cite	Days in Confinement
31 July 2015	Appellant placed into pretrial confinement	JA 120	0
PERIOD ONE *31 July 2015 through 15 October 2015:* PTC through Article 32 hearing.			
6 August 2015	Military magistrate reviewed the accused's confinement and issued a memorandum outlining the basis for the accused's continued pretrial confinement.	JA 120	7 days
6 August 2015	Charges preferred	JA 121	7 days
7 August 2015	CID collected two phones and one laptop from victim	JA 121	8 days
11 August 2015	SCMCA ordered R.C.M. 706 Inquiry	JA 121	12 days
12 August 2015	Defense initially said they would be ready to proceed with the Article 32 any time "after 31 August 2015"	JA 222, 290	13 days
13 August 2015	Article 32 PHO proposed date of 1 September 2015	JA 121, 222	14 days
19 August 2015	Defense said they would not be able to proceed until after the R.C.M. 706 evaluation was complete.	JA 222	20 days
26 August 2015	Defense requested a delay until R.C.M. 706 was complete.	JA 222	27 days
15 September 2015	Defense accepted delay from 26 September until 15 October 2015 [20 days total]	JA 122	47 days
15 September 2015	CPT BW receives screenshots from DR's SVC, and uploaded them onto the Military Justice shared drive evidence folder. He did not disclose these screenshots to defense until 17 October 2016.	JA 173	47 days
25 September 2015	706 results were published.	JA 124	57 days

[11] This is a non-exclusive timeline compiled for ease of reference.

PERIOD TWO *15 October 2015 through 9 December 2015:* Article 32 through Arraignment in *Reyes I*.			
15 October 2015	Article 32 hearing conducted.	JA 121, 290	77 days
13 November 2015	Article 32 investigation report completed (28 days to publish)	JA 125	106 days
20 November 2015	Charges were withdrawn, dismissed, and re-preferred. **Added charges from 31 July 2015 and 20 August 2015.** Consistent with PHO recommendations.	JA 125, 14–19	113 days
1 December 2015	GCMCA referred charges to trial	JA 125	124 days
1 December 2015	Electronic docket notification: Government requested 15 March 2016; **defense requested 9 May 2016.** Find EDN on record (1st available?)	JA 125	124 days
PERIOD THREE *9 December 2015 through 8 February 2016:* Arraignment in *Reyes I* through first motion hearing in *Reyes I*.			
9 December 2015	**Arraignment *Reyes I*** (@112 days) Military Judge set trial date 15-18 April 2016	JA 126, 291	132 days
9 December 2015	Defense offered 1st OTP	JA 126	132 days
10 December 2015	Government sought input from the victims as it related to proposed OTP. Scheduled meeting for 17 or 18 December 2015.	JA 223	133 days
15-16 December 2015	Government contacted all three victims and an SVC regarding OTP defense submitted.	JA 224	138-139 days
18 December 2015	Government received results of digital forensic exam and provided this additional discovery to defense	JA 127	141 days
20 December 2015	Government drafted initial stipulation of fact for internal review.	JA 127	143 days

23 December 2015	Defense requested four expert consultants. GCMCA denied all but one.	JA 127	146 days
6 January 2016	Defense submitted supplemental request for discovery of text messages.	JA 127	160 days
7 January 2016	Defense submitted 2nd OTP.	JA 128, 224	161 days
8 January 2016	CA disapproved defense's request for a forensic psychiatrist, Spanish translator, and Private Investigator.	JA 224	162 days
12 January 2016	Government granted defense discovery request, assigning examination priority of "expedite" to the request. Defense receives this discovery on 13 January 2016.	JA 128.	166 days
12 January 2016	Defense filed motions to compel three experts. **Non-specific request for Spanish translator.**	JA 129	166 days
12 January 2016	Defense asks Government for a stipulation of fact. Government informs MJ that an OTP was submitted and the government was "working stipulations of fact with the defense counsel."	JA 207, 291	166 days
13 January 2016	Government received victim input from Ms. DR through her SVC regarding the OTP	JA 225	167 days
14 January 2016	Government completed Chain of Command recommendations through the Brigade Commander regarding OTP	JA 225	168 days
19 January 2016	Government submitted first draft of stipulation of fact to the defense. Notified defense this was required to submit the OTP to the convening authority. Defense expressed concern about the "turnaround time."	JA 129, 292	173 days
21 January 2016	Unit coordinated movement of appellant from Camp Lejune to Fort Bragg to meet with defense counsel.	JA 226	175 days
25 January 2016	Defense notified trial counsel providency issues with certain charges they previously agreed to plead.	JA 129, 293	179 days
26 January 2016	Defense signed 3rd OTP and their version of stipulation of fact	JA 130, 293	180 days

28 January 2016	Military Judge granted a continuance for an Article 39(a) hearing. Defense did not oppose this continuance.	JA 209	182 days
28 January 2016	Government returned modifications of the stipulation of fact to the defense.	JA 227	182 days
2 February 2016	Defense sent 4th OTP and stipulation of fact.	JA 130, 227	187 days
2 February	Government responded to Defense's proposed stipulation with amendments. Received signed version of latest stipulation of fact.	JA 294	187 days
4 February 2016	GCMCA disapproved the OTP	JA 131	189 days
5 February 2016	Government provides e-mail traffic with a named victim, Ms. A. that began on 3 December 2015.	JA 152, 209	190 days
7 February 2016	Defense files first motion to dismiss Article 10 in *Reyes I*.	JA 116, 131	192 days
8 February 2016	Military judge granted defense motion to compel a forensic psychiatrist and Spanish translator and denied the defense request for a private investigator.	JA 132	193 days
PERIOD FOUR *9 February 2016 through 4 April 2016:* The first motions hearing in *Reyes I* through defense's motion to dismiss for lack of Speedy Trial.			
9 February – 21 March 2016	Government attempted to find expert forensic psychiatrist and Spanish translator	JA 132–34, 228, 295–96	193-235 days
14 March 2016	Article 39(a) session litigating the first Article 10 motion.	JA 131	228 days
28 March 2016	Defense filed motion to dismiss certain specifications for lack of speedy trial under the Sixth Amendment because the government had	JA 116, 136, 265	242 days

	not provided "the defense with a Spanish translator and forensic psychiatrist" in *Reyes I*.		
PERIOD FIVE *4 April 2016 through 23 August 2016:* Article 39(a) hearing where appellant consented to a continuance through Government's response to appellant's misconduct during confinement.			
4 April 2016	Military Judge denied <u>first</u> defense motion to dismiss for Article 10. Military Judge also denied <u>Sixth Amendment</u> motion. **Parties agreed to a new trial date of 26 August – 2 September 2016.** Military Judge asked appellant about the new trial date to ensure he wanted the continuance because he was in pretrial confinement. Appellant stated he was "okay with the new trial dates."	JA 136–37, 157, 257, 264	249 days
18 April 2016	Charges were **withdrawn, dismissed, transferred** to the commander of the 82d Airborne Division, and re-referred. *Now in *Reyes II**	JA 137	263 days
21 April 2016	Defense submitted its fifth OTP to the convening authority.	JA 137	266 days
6 May 2016	Convening authority submitted a counter offer to the OTP.	JA 137	281 days
9 May 2016	Appellant was arraigned in *Reyes II*. All parties agreed to keep the already-scheduled trial date of **26 August**-2 September 2016. <u>Note:</u> This is the defense's originally-requested trial date.	JA 138	284 days
16 May 2016	Appellant **accepted** the counter offer, making *Reyes II* a mixed-plea case. Article 39(a) motions sessions held and no speedy trial demand.	JA 66, 138, 159	291 days

	OTP included provision that misconduct could cause government to withdraw from the deal.		
16 June 2016	Government provided additional discovery related to a dismissed case in Harnett County, the local civilian jurisdiction. This triggered M.R.E. 412 motion from defense.	JA 138	322 days
23 June 2016	Appellant submitted a Request for Individual Military Counsel (IMC) for his defense counsel, CPT NB.	JA 189,	329 days
5 July 2016	Article 39(a) motions sessions held and no speedy trial demand.	JA 159	341 days
13 July 2016	Appellant's defense attorney, CPT NB, PCS'ed to Fort Hood, TX.	JA 189	349 days
25 July 2016	Government provided defense with complete file related to additional sexual assault allegation by one of the victims.	JA 139	361 days
3 August 2016	Defense signed stipulation of fact for *Reyes II* mixed plea and sent to government.	JA 139	370 days
5 August 2016	Government learned appellant had been contacting Ms. Naxajani Martinez during confinement.	JA 139	372 days
16 August 2016	Government provided audio recordings of the accused from confinement relating to those calls.	JA 140	383 days
18 August 2016	Government provided signed stipulation of fact to the court.	JA 140	385 days
19 August 2016	Government provided additional M.R.E. 404(b) noticed based on recently-discovered calls.	JA 232	386 days
20 August 2016	Government provided audio files of the recorded phone calls from Camp Lejeune to defense / 1419 files	JA 140–41	387 days
PERIOD SIX *24 August 2016 through 23 September 2016:* Government's response to appellant's misconduct during confinement through appellant's withdrawal from the mixed-plea case.			
24 August 2016	Appellant made a speedy trial motion reasserting speedy trial. The mixed-plea trial was scheduled to commence two days later on 26 August 2016.	JA 116, 141, 188	391 days

26 August 2016	Scheduled date of the mixed-plea in *Reyes II* to commence. Instead, MJ took up an Article 39(a) session to litigate the defense's motion to dismiss.	JA 141–42	393 days
29 August 2016	MJ denied defense's motion to dismiss under R.C.M. 701 and Article 10, UCMJ. At this hearing, defense requested a continuance and trial was rescheduled, per the defense counsel and appellant's "consent," to 17-21 October and 24-25 October 2016.	JA 116, 143	396 days
20 September 2016	Defense submitted new OTP. Second OTP in *Reyes II* and the sixth OTP since 9 December 2015.	JA 143	418 days
21 September 2016	Convening authority sent a counter-offer to defense.	JA 143	419 days
22 September 2016	Defense requested more funding for Spanish translator.	JA 143	420 days
23 September 2016	Defense declined CA's second counter-offer. Withdrew from approved OTP of 16 May 2016. *Reyes II* was no longer a mixed-plea case. **Fully contested trial.**	JA 138, 143	421 days
PERIOD SEVEN *23 September 2016 through 24 October 2016:* Appellant's withdrawal from the mixed-plea case until the beginning of his fully-contested trial.			
27 September 2016	Defense filed seven additional motions.	JA 144, 166	425 days
30 September 2016	Convening authority approved additional funding for Spanish translator.	JA 144	428 days
30 September 2016	Government provided Section III disclosures that the military judge ruled they "may not use" against appellant at trial.	JA 178	428 days
7 October 2016	Government provided 42 audio files and the military judge granted suppression	JA 144, 178	435 days
11 October 2016	Defense requested second additional funding request for Spanish translator so that the defense could continue reviewing all the confinement calls disclosed in August.	JA 144	439 days

13 October 2016	Convening authority approved second additional funding for Spanish translator. Defense filed a motion under R.C.M. 701 for *Stellato* discovery violations, "specifically Section III disclosures served by the government on 30 September 2016 and an additional 42 audio files served the evening on 7 October 2016."	JA 144. 166	441 days
17 October 2016	39(a) discussions of victim's fourth phone, CPT MJ realized he had not provided all the screenshots to defense. Government disclosed e-mails and messages from DR.	JA 123, 146	445 days
17 October 2016	government provided messages between CID and a named victim	JA 146	445 days
17 October 2016	At the Article 39(a) regarding CPT BW's late disclosure, he testified that he thought he had provided the information to the defense, but could not confirm. He realized "he might have made what he defined as a 'terrible mistake.'"	JA 174	445 days
24 October 2016	Article 39(a) where the court made findings of fact and conclusions of law, denying the defense motion to dismiss all charges and specifications pursuant to an Article 10 violation.	JA 116–177	452 days
24 October 2016	Appellant pled NG to all charges and specifications; trial began.	JA 009	452 days
28 October 2016	Sentence is announced. Military Judge credited appellant with 457 total days of pretrial confinement.	JA 185	456 days

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 13,273 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.

Karey B. Marren

KAREY B. MARREN
Captain, Judge Advocate
Attorney for Appellee
February 24, 2020

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 February 24, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate General, United States Army
Government Appellate Division 9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822