30 November 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *v.* Staff Sergeant (E-5) MATTHEW C. HARRINGTON United States Air Force *Appellant.*	)	UNITED STATES' ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 2020-02 USCA Dkt. No. 21-0025/AF

UNITED STATES' ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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UNITED STATES, *Appellant,*	)	UNITED STATES' ANSWER TO SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
	)	USCA Dkt. No. 21-0025/AF
v.	)	
Staff Sergeant (E-5) MATTHEW C. HARRINGTON, USAF	)	Crim. App. No. 2020-02
	)	Date: 30 November 2020
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED

APPELLANT'S CONVICTION WAS SET ASIDE DUE TO THE ORIGINAL TRIAL JUDGE'S FAILURE TO ALLOW THE DEFENSE TO INTRODUCE EXCULPATORY EVIDENCE ABOUT THE COMPLAINING WITNESS' BEHAVIOR RIGHT BEFORE THE ALLEGED SEXUAL ASSAULT. THE EXCULPATORY EVIDENCE IS NO LONGER AVAILABLE AFTER A GOVERNMENT DELAY IN BRINGING THE CASE TO A REHEARING. DID THE AIR FORCE COURT ERR BY OVERRULING THE JUDGE'S DECISION TO DISMISS THE CHARGE FOR A SPEEDY TRIAL VIOLATION?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 62, Uniform Code of Military Justice (UCMJ); UCMJ; 10 U.S.C. § 862. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

Appellant is charged with one charge and specification of committing a sexual act by bodily harm against Staff Sergeant (SSgt) FC. SSgt FC alleges that after a party, she fell asleep in a bed and woke up to Appellant having nonconsensual vaginal intercourse with her. Appellant was tried by members at a general court-martial for this charge and specification of sexual assault in violation of Article 120, UCMJ. (Org. R. at 1-1013.) Appellant was convicted and sentenced to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, hard labor without confinement for three months and to be dishonorably discharged from the service. (Org. R. at 1011.)

Appellant requested appellate review. (ROT Vol 6, *Request for Appellate Defense Counsel*, dated 20 November 2016.) Before filing his initial assignment of errors, Appellant asked for and was granted eight enlargements of time to file that brief on appeal, totaling 397 days of delay in the appellate processing of the

case. (R. at 328; App. Ex. CXXV.) The government opposed each of these enlargements. (App. Ex. CXXV.) Appellant's Assignment of Errors was finally filed after his more than year-long delay. The United States timely filed its answer brief, without any requests for delay.

AFCCA set aside the original finding and sentence. United States v. Harrington, No. ACM 39223, 2018 CCA LEXIS 456 (A.F. Ct. Crim. App. 25 September 2018.) (unpub. op.) AFCCA found the judge abused his discretion by improperly excluding M.R.E. 412(b)(1)(B) and 412(b)(1)(C) evidence that Appellant took body shots off SSgt FC's breast, buttocks, mouth and stomach on the night of the alleged assault. Id. A rehearing was authorized. Id.

The case was returned to the convening authority on 4 February 2019. (App. Ex. CVIII at 6.) On 13 May 2019, the same charge and specification of sexual assault in violation of Article 120, UCMJ, was referred to a general court-martial rehearing. (App. Ex. LXI.; LXV.) On 7 June 2019, Appellant was arraigned. (R. at 12.) Motions hearings in the case were held on 7 June 2019, 15-16 October 2019, and 9-11 March 2020. (*See* R. at 1–14; 15–151; 152–385.)

In August 2019, the defense requested a continuance so they could finalize Appellant's representation. (App. Ex. LXIII.) 15 October 2019 was supposed to be the original trial date, but after the defense requested a second continuance, it was changed to a motions hearing and trial was to begin on 9 March 2020. In

October, Appellant moved to dismiss the charge and specification with prejudice for a speedy trial violation under R.C.M. 707 and the Sixth Amendment. (App. Ex. CII, CVII.) The judge issued a ruling denying the defense motion on both grounds. (App. Ex. CVIII.) The judge found the length of the delay from date of receipt of the case to referral, totaling 112 days, was unreasonable under the circumstances, and continued with a full analysis under Barker v. Wingo, 407 U.S. 514 (1972). (Id. at 4.) The judge then found that the reasons for delay were primarily attributable to the government and Appellant made one demand for speedy trial. (Id.) However, the judge found Appellant had not yet suffered prejudice, with the following caveat, "the Court remains—and directs the parties to remain—vigilant for evidence of prejudice to [Appellant] as this case progresses toward trial." (Id. at 5.)

After Appellant asked for his second continuance, trial began on 9 March 2020. (App. Ex. LXII; App. Ex. LXXV, App. Ex. CII.) Defense counsel orally moved the judge to reconsider the speedy trial motion to dismiss under the Sixth Amendment. (R. at 176.) The government opposed. (R. at. 270.)

The judge granted the defense motion to dismiss for speedy trial and dismissed the charge and specification with prejudice. (App. Ex. CXXIX.) The judge concluded he "continued to find the delay unreasonable under the circumstances of the case," and conducted another Barker analysis. (Id. at 5.)

The judge summarily found "nearly all" of the subject delay attributable to the government's processing of the case, weighing this factor in favor of Appellant. (Id. at 6.) The judge next concluded Appellant had demanded speedy trial and weighed this factor in favor of Appellant. (Id.) Finally, the judge found prejudice as he believed Appellant's ability to present a defense was impaired. (Id. at 7.)

The judge found prejudice because: 1) Mr. LB was the only witness who could testify to some of the '"required" M.R.E. 412 evidence, and now some of this evidence was lost; 2) the memories of specific witnesses, TSgt KW, SSgt SC, and Mr. LB, who testified at the prior trial under oath, were adversely affected by the passage of time; 3) M.R.E. 804(b)(1) was not an appropriate remedy to cure the loss of memory because there was a "sufficiently dissimilar" motive to develop the former testimony at the former trial of the same Appellant for the same charge; 4) Appellant should not be *required* to use M.R.E. 803(5) to mount a defense at the rehearing "while simultaneously leaving the Government free to attempt to prove its own case with live witnesses." (Id. at 7-8.)

The judge concluded his initial ruling by saying

> because the Government's success [opposing the admission of the M.R.E. 412 evidence at the 2016 trial] was error . . . if the Government were to prevail on the motion now before this Court, the outcome would be that [Appellant] would be forever foreclosed from presenting the exact evidence which (a) he was capable of presenting at this first trial (b) he was prevented by the Government from presenting, and (c) [AFCCA] has found to be so

> important. This Court agrees with the Defense on the following point: allowing this case to proceed against [Appellant], in the absence of any wrongdoing on the part of [Appellant], would compound the Government's error even further. Moreover, it would specifically violate [Appellant's] Sixth Amendment rights and would permanently skew the fairness of this entire proceeding.

(Id. at 9.)

The government moved for reconsideration of the ruling. (R. at 324; App. Ex. CXXVI.) Trial defense counsel responded. (App. Ex. CXXVIII.) The judge again granted the defense motion to dismiss the charge and specification with prejudice for violating speedy trial. (App. Ex. CXXIX.) The judge further stated, "[a]ccording to that list of [administrative tasks of emailing lawyers, commanders and bringing Appellant back to active duty,] apparently little or no effort was made to interview, prepare or even locate actual live witnesses." (Id. at 4-5.)

Evidence was presented that TSgt KW, Mr. LB and SSgt SC had memory problems as to the facts of the M.R.E. 412 evidence. (R. at 198-240; R. at 331-346.) The judge stated that he considers "the full testimony of TSgt KW, Mr. LB, and SSgt SC to be of such central important to an issue that is essential to a fair trial . . . and the value to [Appellant] has been dramatically reduced as a direct result of the time that has passed during periods of Government inaction." (Id. at 5.) The judge noted "the United States, even if it has not been derelict or negligent, has nonetheless fallen short of its obligation in bringing this case to a

rehearing, and [Appellant] has been directly and substantially prejudiced as a result." (Id. at 6.)

The United States appealed this ruling under Article 62, UCMJ, and AFCCA reversed the trial judge. The CCA completed a full Barker analysis, and found the judge erred in two significant ways: he erred in his finding of "fact" that delay "likely" caused the loss of evidence, and he erred in his conclusion there has been prejudice from the loss of witness memory. United States v. Harrington, 2020 CCA LEXIS 292 at *27-35 (AF. Ct. Crim. App. 2020)(unpub. op.) AFCCA then concluded that "weighing the factors together, we consider the absence of prejudice to outweigh the remaining factors that, taken together, only moderately favor Appellant." Harrington 2020 CCA LEXIS 292 at *36. The remaining facts necessary to resolve this issue are included below.

SUMMARY OF THE ARGUMENT

While the judge made the multiple errors in his ruling, the dispositive error was the judge's finding that the testimony of TSgt KW and Mr. LB was "unavailable" despite the existence of and accessibility to a full recording and transcript of the 2016 trial. Appellant repeats that error in his Issue Presented. As AFCCA correctly determined, the prior transcript, combined with SSgt SC's live testimony, "offer[s] a fairly clear portrayal of the nature of the interactions between SSgt FC and Appellant during the Jenga game, a portrayal that goes beyond the

evidence this court found relevant and admissible [before]." Harrington 2020 CCA LEXIS 292 at *35. Since Appellant did not meet his burden of establishing prejudice from any delay, the judge erred in dismissing the case and AFCCA correctly reversed his ruling. Therefore, this Court should deny further review, and allow the United States to proceed expeditiously to trial on the merits.

ARGUMENT

THE JUDGE ERRED IN DISMISSING THE CHARGE AND SPECIFICATION WITH PREJUDICE.

Standard of Review

This Court reviews the decision of whether an appellant has received a speedy trial "*de novo* as a legal question, giving substantial deference to a judge's findings of fact that will be reversed only if they are clearly erroneous." United States v. Mizgala, 61 M.J. 122, 127 (C.A.A.F. 2005) (See also United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003); United States v. Thompson, 68 M.J. 308, 312 (C.A.A.F. 2010)).

On matters of fact, appellate courts are bound by the judge's factual determinations unless they are unsupported by the record, or are clearly erroneous. United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985). Nonetheless, in entering a finding of fact, the judge must rely on evidence of record which fairly supports

that finding; in absence of any such evidence, the finding is error. United States v. Bradford, 25 M.J. 181, 184 (C.M.A. 1987).

Law and Analysis

With respect to the Sixth Amendment, this Court has stated, "Passage of time . . . may impair memories . . . deprive the defendant of witnesses, and . . . interfere with his ability to defend himself . . . this possibility . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay." United States v. Johnson, 17 M.J. 255, 260 (C.M.A. 1984.)

Citing the Supreme Court case of Betterman v. Montana, 136 S. Ct. 1609, 1613 (2016), this Court recently noted that the right to a speedy trial under the Sixth Amendment of the Constitution ends upon a conviction. United States v. Reyes, 80 M.J. 218, 226 n3 (C.A.A.F. 2020.) Therefore, the relevant period of time to analyze in this case is the period of time from the original preferral of charges in 2016 until the case was dismissed by the trial judge in 2020.

In determining whether an appellant has been denied his right to a speedy trial under the Sixth Amendment, this court balances four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the appellant asserted his right to a speedy trial; and (4) prejudice to the appellant. Barker 407 U.S. at 530. The

judge erred in his analysis of each prong of Barker—none of the factors should weigh in Appellant's favor.

The judge's ruling clearly departs from the state of Sixth Amendment law and the harm this amendment is intended to protect against. AFCCA applied the correct standard of review and law to the judge's ruling. AFCCA specifically pointed out errors of the judge that were not supported by the record, and reversed his ruling. This Court should avoid further delay and deny review of this case.

(1). The judge erred in finding that the length of the delay was presumptively unreasonable.

Appellant must be able to point to 'some delay which is presumptively prejudicial' to trigger Barker's four-factor analysis. Barker, 407 U.S. at 530. As this Court has explained, "an analysis of the first factor is not meant to be a Barker analysis within a Barker analysis." United States v. Schuber, 70 M.J. 181, 188 (C.A.A.F. 2011). "Circumstances that are appropriate to consider under the first factor include the seriousness of the offense, the complexity of the case, and the availability of proof, among others." Barker, 407 U.S. at 530-31, 531 n.31.

The judge's analysis of the first Barker prong is problematic for several reasons. To begin, it is unclear what delay he, or Appellant, alleges is facially unreasonable delay. Thus, it is difficult for the United States to contest his conclusion that this prong weighs in favor of Appellant, where the facts are lacking and the analysis is so conclusory.

Even so, the time it took for the United States to arraign Appellant was not unreasonable. The judge found that the United States properly arraigned Appellant within 120 days, saying "the [R.C.M. 707] clock began running on 4 February 2019. [Appellant] was arraigned on 7 June 2019." (App. Ex. CVIII at 6.) This time, minus excluded time, was 112 days. (App. Ex. CVIII at 3.) There were "about 100 days" from receipt of the case from AFCCA to referral. (App. Ex. CXXIX at 4.)

Despite these facts, the judge inexplicably found presumptively unreasonable delay. Although Barker found 'no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months,'[1] the President has designated 120 days as a presumptively reasonable length of delay from preferral to arraignment.[2] This Court has addressed presumptively unreasonable delays for rehearings, expressly allowing 120 days to bring the case to trial again. *See* United States v. Becker, 53 M.J. 229, 231-32 (C.A.A.F. 2000.) The judge erred by concluding that because this was a rehearing, the charges should have been referred more quickly than 120 days. (App. Ex. CXXIV at 5; App. Ex. CVIII at 4 ¶ 22(a)(iii)).

[1] Barker, 407 U.S. at 523
[2] See R.C.M. 707; Manual for Courts-Martial, United States

It was error for the judge to conclude that the United States complied with the R.C.M.s, but caused unreasonable constitutional delay by referring the rehearing within 120 days. The judge essentially declared that bringing an accused to rehearing within 120 days is *per se* facially unreasonable under the Sixth Amendment. There is simply no law to support this conclusion. Appellant bears the burden of showing this Court why the facts of his case even warrant a full Barker analysis. Appellant failed to meet his burden to do so.

After the passing of the initial 120 day clock, it is unclear what facts or law the judge analyzed to find any other facially unreasonable delay. However, the facts before this Court show that after arraignment, Appellant requested and was granted two continuances, and that the United States was ready for trial on each scheduled trial date. There is nothing about the facts of this case that warrants further analysis, and that should end the inquiry.

Furthermore, neither the judge nor Appellant have provided any cases holding that a 246-day delay is presumptively unreasonable under the Sixth Amendment for purposes of triggering a full Barker analysis. Federal courts have instead suggested the opposite. *See* United States v. Williams, 231 Fed. App 457, 462 (6th Cir. 2007) (finding [a] court must determine, at the outset, whether the delay . . . was 'uncommonly long' or 'extraordinary,'); United States v. Cossio, 64 M.J. 254, 257 (C.A.A.F. 2007) (no full Barker analysis unless there is a period of

delay that appears, on its face, to be unreasonable under the circumstances); United States v. Watford, 468 F.3d 891, 901 (6th Cir. 2006) (finding that under the Sixth Amendment, generally, a delay is presumed prejudicial . . . when it exceeds one year).

Neither the judge nor Appellant has explained why a 246-day delay - which is well under a year - was uncommonly long or extraordinary in the Sixth Amendment context. While AFCCA disagreed with the government's reliance on R.C.M. 707's 120-day deadline for bringing an accused to arraignment as establishing the standard under the Sixth Amendment, AFCCA only assumed there was presumptively unreasonable delay before completing a further Barker analysis. Harrington at 2020 CCA LEXIS 292 at *22-23. This Court should find that a 246-day delay is not presumptively unreasonable, that no further Barker analysis is warranted, and that no grant of review is necessary.

Assuming, the full Barker analysis should be completed, the judge continued to err in his findings of fact and conclusions of law for the remaining factors.

(2). The judge erred in finding that the reasons for delay favored Appellant.

The second Barker factor, "is especially important: 'the flag all litigants seek to capture is the second factor, the reason for delay.'" United States v. Loud Hawk, 474 U.S. 302, 315 (1986). "The Supreme Court places the burden on the state to provide an inculpable explanation for delays in speedy trial claims."

United States v. Seltzer, 595 F.3d 1170, 1177 (10th Cir. 2010). Here, the United States showed that it moved with reasonable diligence to trial.

AFCCA found the United States' actions "less patently offensive to the Sixth Amendment" than the judge, but again "assumed" the government bore responsibility. This assumption is unwarranted, and this factor should not favor Appellant.

Appellant and, in turn, the judge fail to explain why the given reasons for delay were constitutionally unreasonable as a matter of law, and why the delay should be negatively attributed to the United States. The United States met its burden and provided the judge with ample facts showing its reasonable, non-negligent administrative efforts to bring Appellant to trial within the statutory guidelines, including locating the victim and reactivating Appellant to active duty (App. Ex. CXXVI.) Still, the judge summarily dismissed these tasks and the efforts of the Untied States and erroneously concluded the government's steps were "administrative tasks" that "should have been accomplished in parallel" not sequence without any basis in law to make such a conclusion and without further legal analysis. (App. Ex. CXXIX at 5.) To the contrary, the law supports that short periods of inactivity are not fatal to an otherwise active prosecution. United States v. Tibbs, 15 C.M.A. 350, 353 (C.M.A. 1965.) What the facts actually show

is a non-negligent, active prosecution within the presidentially defined timelines. This does not weigh in Appellant's favor and the judge erred in so finding.

The judge also referred to the delay in the case as "[t]he obvious delay in getting the case referred to trial. . ." (App. Ex. CXXIX at 4 ¶ 19.) *Obvious* delay is not unreasonable delay, nor does obvious delay *per se* make the reasons for delay constitutionally unreasonable.

Most importantly, Appellant *requested* both continuances comprising the time period from June 2019 to March 2020. (App. Ex. LXII; App. Ex. LXXV, App. Ex. CII.) In his second request for continuance, Appellant conceded the unimportance of the delay, stating, "Any continuance would be at most a few months. *That continuance is minute* . . . the government is not prejudiced by a continuance . . . *[g]ranting the continuance has a positive impact on the verdict* by guaranteeing that [Appellant] is able to present a complete and adequately confront witnesses against him." (App. Ex. LXXV.) (emphasis added.) The United States opposed this continuance, a fact that the military judge incorrectly failed to consider as he failed to account for it in his analysis in any way. (App. Ex. LXXVI.) This matters in looking to reasons for a delay—somehow, the judge found the government accountable for nearly all of the delay in the rehearing, without giving any analysis to the facts before him that Appellant requested the

delay from October 2019 to March 2020 and the United States opposed. Therefore, his findings of fact on this issue are clearly erroneous.

The judge also erred by solely blaming the government for the delay in securing Mr. LB for the defense's case. The judge found that "the reason for moving the trial date to 9 March 2020 was because until that point, the United States' efforts to secure the presence of [Mr. LB] had been wholly inadequate." (App. Ex CXXIV at 7.) This finding was clearly erroneous for the reasons set forth below.

Originally, Mr. LB appeared only on the witness list for the United States. (R. at 272.) The United States detailed its efforts to find Mr. LB, including requests for assistance from AFOSI. (App. Ex. LXXVI; App. Ex. LXXXVIII.) However, when the government determined it was unable to find Mr. LB, their own witness, the government conveyed Mr. LB was unavailable, and sought in good faith to admit his prior testimony under M.R.E. 804 at the rehearing. (App. Ex. LXXI).

However, while Mr. LB was on the government witness list, the United States ultimately believed Mr. LB's testimony was cumulative, stating "Mr. [LB] was one of four people who were present at the party and are able to testify to what occurred prior to the alleged incident . . . other witnesses that will be present at trial to testify… to the same facts and circumstances." (App. Ex. LXXVI at 3.)

Therefore, because he could not be found as of 8 October 2019, Mr. LB was removed from the government witness list. (R. at 365; App Ex. LXXV at 3, 5.)

Then, on 11 October 2019, defense counsel moved for a continuance of the trial to compel the production of Mr. LB. (App Ex. LXXV.) This was the first mention in the record that *Appellant* was asking Mr. LB to be produced as a relevant and material witness at trial. (App Ex. LXXV at 3, 5.) Under R.C.M. 703(c)(2), Appellant has the duty to submit to the trial counsel a written list of witnesses whose production by the government the defense requests. Nothing in the record supports that Appellant demanded Mr. LB's presence before October 2019. Once the defense asserted, for the first time at trial, a need for Mr. LB to be produced, the defense's remedy was to move for a continuance to compel his production, and that continuance was granted. (App Ex. LXXV) Finally, the judge did not conclude that Mr. LB's presence was necessary at trial until 17 October 2019. (App. Ex. CVI.)

Therefore, it was clear error for the judge to find the government at fault for not securing a witness the defense never requested before October 2019. The government should not be responsible for a delay in producing a defense witness where the defense failed to even request his production until trial. (App. Ex. CXXIX at 4.)

Even if the *entirety* of the delay were a result of trying to locate this defense witness, "a valid reason, such as a missing witness, should serve to justify appropriate delay." Barker, 407 U.S. at 531. *See also* United States v. Danylo, 73 M.J.183, 189 (C.A.A.F. 2014) (where 349-day delay with Appellant in pretrial confinement, due in part to witness immunity/availability, was not unreasonable under Sixth Amendment). In this case, the government produced Mr. LB at the very next scheduled trial date after the Defense's request for him, as Mr. LB was present for live testimony at the March 2020 trial date. (R. at 198; App. Br. at 24.) Mr. LB also admitted under oath that he actively dodged the government's attempts to get him to trial prior to October 2019. (R. at 216.)

The United States' actions were eminently reasonable. The reasons for delay from February 2019 to arraignment in June were almost entirely attributable to administrative tasks, including recalling Appellant to active duty. (*See* App. Ex. CI, CII, CVII.) Administrative tasks and "prosecution strategy" are not unreasonable reasons to delay a case for given prior Sixth Amendment precedent. United States v. Cooley, 75 M.J. 247 (C.A.A.F. 2016.) (where a valid reason, such as a missing witness, should serve to justify appropriate delay.) *See also* United States v. Ewell, 383 U.S. 116, 120 (1966) (noting that prosecution procedures "are designed to move at a deliberate pace," and finding no Sixth Amendment speedy trial violation in a nineteen-month pretrial delay); United States v. Grom, 21 M.J.

53, 57 (C.M.A. 1985) ("[i]n Barker, most of the five-year delay between arrest and trial was due to the prosecution's efforts to obtain a conviction" through the testimony of Barker's co-actor); Danylo, 73 M.J. at 187 (an eight-month delay that was based on prosecution strategy).

The judge found the government was not negligent in its efforts to bring Appellant to trial. App. Ex. CXXIX at 6. Mere "negligence" was "noted by the Supreme Court as among more 'neutral' reasons that are weighted less heavily against the government when deciding this issue." Barker, 407 U.S. at 531. Since the judge did not even find that the government had acted negligently in its delay in bringing Appellant to trial, the judge erred in finding that the delay rose to the level of a constitutional violation.

Finally, the judge erroneously concluded that the "materials the United States has submitted . . . provided insufficient information that would, in any way, excuse the amount of time that the United States took in order to bring [Appellant] properly before this rehearing." (App. Ex. CXXIX at 4.) The judge's conclusion is not supported by any evidence that the government's justifications for the delay in bringing the case to trial were unreasonable under the Sixth Amendment.

The rehearing on the merits commenced within 14 months of the case's return to the convening authority, even after two defense requests for continuances. The period of delay accountable to the government does not weigh heavily, if at

all, in favor of Appellant, and does not rise to the level of a Sixth Amendment speedy trial violation. Therefore, the reasons for delay weigh in the government's favor, and the judge erred in concluding otherwise.

(3). Appellant, at best, made a pro forma request for speedy trial, which should not weigh in his favor.

At trial, the United States conceded Appellant demanded speedy trial once, on 12 June 2019, as part of a larger discovery request. This Court should consider this a *pro forma* speedy trial request because it did not stand alone and was a cursory afterthought in a larger discovery request to counsel. *See* United States v. Schuber, 2010 CCA LEXIS at *14-15 (A.F. Ct. Crim. App. 2 Dec 2010) (aff'd Schuber, 70 M.J. 181). After this *pro forma* speedy trial request, the record shows that Appellant requested two continuances in August and October 2019. (App. Ex. LXIII, LXXXV; LXXV.) Appellant asked for the August continuance to prepare detailed counsel and experts. (App. Ex. LXIII.) Appellant asked for his second continuance on 11 October 2019 in the interest of preparing his defense (App. Ex. LXXV), then 5 days later moved that the case be dismissed for a speedy trial violation because of prejudice to his defense. (App. Ex. CII.)

AFCCA has also analyzed the third Barker factor in light of requests for assistance (i.e. expert assistance, additional defense counsel) by an appellee—"[a]ppellant asserted a demand for a speedy trial . . . However, three weeks later he made his request for an expert consultant . . . we must expect some delay in getting

to trial while this request was being worked." United States v. Adams, 2007 CCA LEXIS 263 at *16-17 (A.F. Ct. Crim. App. 20 Jun 2007)(unpub. op.)(aff'd United States v. Adams, 66 M.J. 255 (C.A.A.F. 2008.) The application of Adams to this case shows that any demand for speedy trial by Appellee in June was not genuine in light of his later requests for additional defense counsel and production of Mr. LB.

Appellant's continuance requests show that his one-time *pro forma* demand for speedy trial was not genuine and reveals Appellant's intent was never to demand speedy trial as a constitutionally protective shield against government unfairness, but rather to brandish it as a sword in order to avoid another trial on the merits. Therefore, it was error for the judge to weigh this factor in favor of Appellant.

(4). Appellant suffered no particular prejudice.

The majority of Appellant's argument, and consequently the judge's and AFCCA's analysis, focused on the prejudice to Appellant from the delays discussed above. AFCCA concluded that it was with "respect to this final Barker factor" that the judge erred. Harrington, 2020 CCA LEXIS 292 at *27-28.

For this prong of the Barker analysis, the Supreme Court said

> [p]rejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration;

> (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. 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

Barker, 407 U.S. at 532. While the judge correctly relied on this quotation from Barker as a starting point in his analysis, he failed to consider how Courts have treated Barker since its publication. Had he done so, he would have reached a different result.

As AFCCA correctly noted, "the burden to demonstrate the existence of prejudice rested with the Defense at trial. *See* R.C.M. 905(c)(2)(A); Danylo, 73 M.J. at 189." Harrington, 2020 CCA LEXIS 292 at *27. The judge did not find that Appellant had met his burden to show the first two forms of prejudice, (i) to prevent oppressive pretrial incarceration, or (ii) to minimize anxiety and concern of the accused, and so the United States will not address them. It is imperative, however, for this Court to consider that Appellant has not been subject to pretrial restraint, or any incarceration for that matter, during his court martial proceedings. In its research, the United States was unable to find a single case in which a court found a prejudicial Sixth Amendment speedy trial violation where the accused was *never* confined. While Justice White's concurrence in Barker anticipated it was *possible* to find prejudice under the Sixth Amendment without confinement, these facts do not present the seminal case in which to find it. Barker, 407 U.S. at 537

(White, J., concurring.) Therefore, as a starting point, this Court should keep in mind that two of the three harms the Supreme Court intended to prevent in Barker were never at issue here.

The judge found that based on the witnesses' fading memories, Appellant's ability to present a defense was so impaired as to necessitate dismissal with prejudice. For several reasons, this conclusion was erroneous. Most glaringly, all of the evidence sought to be admitted and discussed by AFCCA in its first Harrington opinion is captured and available through presentation of the transcript and/or recording from the original M.R.E. 412 hearing. Moreover, the trial counsel offered to enter into a stipulation of fact with the defense regarding these facts. Thus, the judge's conclusion that the evidence was unavailable merely because the defense preferred live witness testimony is clearly erroneous.

A.) Mr. LB is not the only witness who could testify to the evidence that Appellant took body shots off SSgt FC's breast, buttocks and mouth on the night of the charged sexual assault.

The judge concluded that Appellant was prejudiced because he was unable to present certain M.R.E 412 evidence that the Air Force Court found was "required" to be admitted at this rehearing.[3] However, the judge incorrectly

[3] AFCCA noted this error, stating, "the [c]ourt's opinion in Harrington I did not mandate that any particular evidence must be admitted at a rehearing, or that [Appellant] was necessarily entitled to live testimony. Harrington I merely determined that [Appellant] had been prejudiced by the erroneous exclusion of

concluded that Mr. LB was the only witness who could provide some of the testimony. (App. Ex. CXXIX at 7.) To the contrary, the record shows that multiple witnesses who testified at the first trial, or provided statements, can, did, or will testify that Appellant took body shots from the breast, buttocks and mouth of SSgt FC.

The defense may either elicit this testimony from live witnesses, or reference the following portions of the original record to get the M.R.E. 412 evidence to the trier of fact:

Appellant took a shot from victim's stomach	
SSgt SC stated he remembers Appellant taking shots from the stomach of victim.	SSgt SC 2016 testimony (Org. R. at 732.)
Mr. LB still recalls Appellant taking a shot off of victim's bellybutton	Mr. LB 2020 testimony (R. at 211)
SSgt SC still recalls the shot taken from the stomach of victim	SSgt SC 2020 testimony (R. at 334-35)

Appellant took a shot from victim's buttocks	
Victim did have her pants pulled down, below her butt cheeks and have a shot taken in between her but [sic] cheeks. . . . Exposing the entire buttocks	Mr. LB 2016 testimony (Org. R. 68-69.)
SSgt SC stated he remembers Appellant taking shots from the rear of victim.	SSgt SC 2016 testimony (Org. R. at 732.)
SSgt SC still recalls shot taken from the rear of victim	SSgt SC 2020 testimony (R. at 334-35)

evidence in the context of that particular trial." Harrington, 2020 CCA LEXIS 292 at *33-34.

Appellant took a shot from victim's mouth	
TSgt KW testified she saw a shot from the mouth of the victim by Appellant	TSgt KW 2016 testimony (Org. R. at 726-27.)
SSgt SC stated he remembers Appellant taking shots from the mouth of victim.	SSgt SC 2016 testimony (Org. R. at 732.)
SSgt SC still recalls the shot taken from the mouth of victim	SSgt SC 2020 testimony (R. at 334-35)

Appellant took a shot from victim's breast	
Mr. LB saw a body shot taken from the chest area of victim by Appellant, at the choice of Appellant	Mr. LB 2016 testimony (Org. R. 67.)
Generally Jenga players used both their hands to clasp together both their breasts and have somebody stick it down in between the breasts.	Mr. LB 2016 testimony (Org. R. 68-69.)
SSgt SC stated he remembers Appellant taking shots from the chest of victim.	SSgt SC 2016 testimony (Org. R. at 732.)

These charts demonstrate the lack of importance of both Mr. LB and TSgt KW's current memory of the party. Given the variety of ways this M.R.E. 412 information is available to the defense at the rehearing, the current memories of Mr. LB and TSgt KW at the party do not play a constitutionally necessary role in presenting this M.R.E. 412 evidence to the trier of fact.

There is also nothing in the record to suggest that this requested evidence is in contest. Even in 2016, no one argued that these events did not occur, just that they were inadmissible. At the rehearing, the United States was willing to stipulate that they did, in fact, occur. (R. at 364.) All witnesses requested by the defense have been produced for live witness testimony, and the above charts show how

each piece of evidence is still available for Appellant's defense, no matter the state of Mr. LB's and TSgt KW's memory.

What's more, the record simply does not show that the testimony of Mr. LB would have been any more detailed in 2019 or 2020 than it was in 2016, or any more important. In 2016, the judge asked if Mr. LB remembered Appellant taking a body shot from the victim's mouth, and Mr. LB said, "I don't remember very much." (R. at 61-69.) Appellant has made no showing that if Appellant had asked Mr. LB about the mechanics of the buttocks shot at the original trial that he could have answered the question. The defense team in 2020 has the same opportunity it did in 2016 to examine Mr. LB's live testimony to try to raise those facts. Thus, it was error for the judge to conclude essential M.R.E. 412 evidence was even lost, let alone to say the loss of this evidence was the fault of the United States.

As the record reflects, alternatives to testimony were available under M.R.E. 803(5), recorded recollection, and M.R.E. 804(b)(1), former testimony. The judge's conclusion that this M.R.E. 412 evidence of the victim's behavior and body shots from her chest and buttocks was lost with Mr. LB's lapse in memory is in error, and shows why his overall finding of prejudice to Appellant's defense was erroneous. (App. Ex. CXXIV at 4.)

B.) The passage of time and associated memory loss are not *per se* prejudicial, nor was the memory loss caused by the United States' delay.

The judge also erred by blaming the United States, without evidence, for the degradation of memories since 2016, and also by assuming the witnesses' lost memories were per se prejudicial to Appellant. Neither proposition is supported by law or the record.

A wealth of federal cases address this exact point. It is not enough to show that memories are faded—they fade in every case. The point is there must be a showing of prejudice by Appellant. *See* Hakeem v. Beyer, 990 F.2d 750, 763 (3rd Cir. 1993) (general allegations that witnesses' memories have faded during pretrial delay cannot create the prejudice necessary to prevail on a speedy trial claim, absent extreme delay or special circumstances); Witherspoon v. Nagy, 2019 U.S. Dist. LEXIS 97540 at *15 (E.D. Mich., 11 June, 2019); Ciccone v. Blades, 2017 U.S. Dist. LEXIS 161539 at *18-19 (D. Idaho, 29 Sept 2017) (where in the Sixth Amendment context, "the impeachment removed any prejudice [petitioner] could have faced by the witness's inconsistent testimony."') Even when witnesses died between trials, the court did not find prejudice under the Sixth Amendment because "testimony from previous trials was available and was read to the jury. [The appellant] did not put into the record any facts he could have proved

by these deceased witnesses that did not go to the jury through their prior testimony." Beckwith v. Anderson, 89 F. Supp. 2d 788, 805 (S.D. Miss. 2000.)

Besides mere speculation as to actual lost evidence, Appellant has not shown that the supposed deterioration or loss of memory occurred *after* this case was returned to the government for rehearing in February 2019. Appellant cannot establish prejudice if the government's delay did not cause the witnesses' memory loss. Federal courts agree. *See* Cousart v. Hammock, 580 F. Supp. 259, 269 (E.D.N.Y. 1984) (where "[I]t is purely speculative whether the confidential informant became unavailable before or after the point in time at which a retrial would have been held had the delay in the perfection of the appeal not occurred and had petitioner not pled guilty following remand.")

The judge seemed to discount the effect of Appellant delaying the processing of the original appeal for nearly 400 days, from 29 March 2017 to 30 April 2018. (R. at 328.) He failed to address or account for whether any witness's memory degradation could have occurred during that time. Therefore, the judge erroneously concluded that the witnesses' value to the defense has been reduced as a direct result of the time that has passed during government inaction after February 2019. (App. Ex. CXXIX at 6.)

Appellant presented no evidence that TSgt KW's memory loss *worsened* during times of government delay. Actually, it is most likely that her memory also

degraded during the nearly 400 days Appellant delayed his appeal. Regardless, the record shows TSgt KW's memory began to degrade well before the rehearing was authorized, in 2017 with her epilepsy diagnosis. (R. at 303.) Further, the record shows that TSgt KW's testimony in 2016 about these details was that she did not remember much in 2016. (Org. R. at 726-28.) It does not follow then that any memory was lost during the time attributable to some unreasonable delay in processing of the case by the United States. Therefore, Appellant has not met his burden and the judge erred in finding otherwise.

AFCCA found error here where the judge concluded it is likely at least some of the evidence would have been preserved had the government proceeded expeditiously to trial, as this conclusion was not supported by the record. Harrington, 2020 CCA LEXIS 292 at *28-29. AFCCA followed by stating there was "no basis to conclude it is 'likely' these memories were lost . . . between July 2019 and March 2020. Rather, it is equally if not more likely these memories were lost during the more than 31 months that elapsed between the first trial . . . and July 2019." Id. at *30. In his brief to this Court, Appellant alleges that the judge received evidence that TSgt KW remembered more in 2019 than she did in 2020. (App. Br. at 22-23.) However, Appellant cites to argument by counsel, not evidence. (R. at 281.) A review of TSgt KW's actual testimony does not support this argument, and therefore AFCCA was correct in concluding there is "no basis"

for the judge's conclusion. (R. at 220-36.) AFCCA correctly concluded that the "Defense did not carry its burden to demonstrate that the memories were lost as a result of the facially unreasonable delay." Id. at *30-31.

Finally, the mere passage of time is not *per se* prejudicial to Appellant, as the United States bears the burden to prove Appellant guilty beyond a reasonable doubt at trial. "Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case." Johnson, 17 M.J. at 260. This fact simply cannot be reconciled with the judge's finding that the passage of time was per se prejudicial and solely the fault of the United States.

C.) It was error for the judge to find Appellant could not present an adequate defense through the prior testimony of witnesses.

The judge's finding of prejudice heavily relied on his erroneous conclusion that the prior sworn testimony of witnesses was insufficient evidence to mount a defense at a new trial. In reality, this information was available to the defense in several ways. The government was willing to stipulate to the prior testimony as fact. There was also the option to present the evidence using M.R.E. 804(b)(1) former testimony, and M.R.E. 803(5) recorded recollections. Despite the many ways the evidence was available for presentation, the judge was inexplicably concerned about the "fairness" to Appellant that the United States would get to prove its case with live witnesses, and Appellant would not, and erred in finding this constituted prejudice under the Sixth Amendment. However, Appellant's right

to confront witnesses under the Sixth Amendment does not contemplate the right to confront them perfectly. "[An accused] is not entitled to a 'perfect defense' in accordance with this standard, and a 'perfect defense' is not guaranteed under the Sixth Amendment." Williams v. United States, 2014 U.S. Dist. LEXIS 112624 (W.D. Pa. Aug 14, 2014.)

Further, the judge failed to recognize that the government was not seeking to prove its case entirely with live witnesses. The government clearly stated it intended to use alternatives to testimony in order to present its case. AFCCA agreed the judge's concern for "fairness" regarding prior witness testimony was error. It stated, "it appears the military judge implicitly considered live testimony would be superior to recorded prior testimony, but he did not explain why this is so, and we are not convinced this is necessarily the case." Harrington, 2020 CCA LEXIS 292 at *33.

This Court should find the case of Riker v. Benedetti, 2011 U.S. Dist. LEXIS 28533 at *133 (C.D. Cal. Feb 2, 2011), to be persuasive. In sum, Riker found that proper cross examination on memory loss without a showing of more prejudice is not a Sixth Amendment violation. Id. The Riker rationale applies here, because if Appellant were to proceed to trial, he would get a constitutionally fair defense by being able to cross examine the witnesses on their memory loss, undercutting the government's burden of proof beyond a reasonable doubt, and

also having available the evidence of the victim's behavior at the Jenga game. Appellant and the judge fail to show as a matter of law or fact why Appellant's ability to present a defense was prejudiced by the delay in this case or will be impaired at his future trial.

D.) The judge erred when he penalized the United States for the erroneous exclusion of M.R.E. 412 evidence at the 2016 trial.

At the original trial, the government and the named victim objected to the admission of the evidence. Harrington, 2018 CCA LEXIS at *4. Thus, the original judge would have been required to rule on the admissibility of the evidence regardless of the government objection. It was incorrect for the rehearing judge to penalize the government for its objection to this evidence or find that the government gained an unfair advantage through the original trial judge's decision to exclude it.

AFCCA also found the judge's conclusion on this point to be error,

> Third, the military judge appears to lay at least some degree of responsibility for the erroneous exclusion of evidence at the first trial on the Government. This is unwarranted. Regardless of whether the Government opposed the introduction of the evidence, SSgt FC opposed it through her SVC, and the military judge was obliged to conduct a hearing and make an independent determination of admissibility. See [M.R.E.] 412(c)(2).

Harrington, 2020 CCA LEXIS 292 at *34.

Appellant did not allege bad faith on the part of the original trial judge or the government in his original appeal. The original trial judge, and the dissenting judge from the CCA in Harrington I, did not see the exclusion of the M.R.E 412 evidence so clearly as error. See Harrington, 2018 CCA LEXIS 456 at *12 (dissenting op.) To now penalize the government for a good-faith objection to evidence which falls under a rule presuming exclusion is a step too far, and AFCCA agreed:

> The prior error was made by the previous military judge, not by the Government. We see nothing inappropriate in the Government having litigated the [M.R.E.] 412(c)(2) motion in good faith, such that equity somehow now favors Appellee as a result. Nor do we perceive that the Government is "persist[ing]" in pursuing any improper benefit, where it fully agrees with the admissibility of the prior testimony, and has expressed its willingness to stipulate to the prior testimony as fact.

Harrington, CCA LEXIS 292 at *34.

E.) The judge's erroneous conclusions would set an insurmountable bar for future rehearing prosecutions.

The United States acted in good faith to ensure a fair trial in several ways. First, it notified Appellant of witness memory issues when they became known (App. Ex. CXI.) Also, the government sought to declare at least TSgt KW unavailable as allowed by M.R.E. 804(a)(3) (App. Ex. CXXI.) Further, the government intended to admit her prior sworn testimony under M.R.E. 804(b)(1) or, in the alternative, have her read portions of her testimony from the witness

stand as recorded recollections under M.R.E. 803(5). The government was even willing to stipulate to her testimony as fact. (R. at 364-66.) A stipulation of fact is the most powerful of evidence; the finder of fact must accept it, and it is not subject to any credibility determination. Such a stipulation would eliminate the need to for Appellant to confront witnesses who contradicted those facts. The government's offer to stipulate shows a good-faith effort to afford Appellant a fair trial, and Appellant's rejection of that offer undercuts his argument for actual prejudice to his defense by lost information.

Further, the judge's ruling creates an almost impossibly high bar for the government to navigate when rehearings are authorized. Necessarily, military witnesses from the first trial will have since moved around the world, separated, and inevitably forgotten details from their prior testimony. In those cases, their prior, sworn, cross-examined testimony will likely be the best evidence that still exists, and the M.R.E.'s provide mechanisms for presenting that former testimony. It is hard to imagine a rehearing case in which an accused could not make the same argument made here—that there may be details that prior counsel did not develop that can now never be known because of the degradation of memory. That is not the standard for prejudice under the Sixth Amendment and Barker v. Wingo.

The judge in his ruling on reconsideration also shifted the focus from a lack of due diligence in the processing of the case to the government's supposed failure

to preserve witness memory. That logic would essentially be holding that it is the United States and trial counsel's burden to, with no request from the defense, within some number of days after a remand, contact all known and potential witnesses, and to determine whether their memory is the same as it was at the original trial.[4] It was arbitrary and fanciful for the judge to hold the United States responsible for failing to sua sponte assess the state of memories and preserve evidence. This is not, nor has it ever been, the law.

Even if the United States had a sua sponte responsibility to assess and preserve the testimony of these witnesses in February or May 2019, the facts do not support a conclusion that it would have mattered. Appellant put on no evidence that the deterioration of memories occurred during the period from February 2019 until now, or that testimony preserved in 2019 would have been better than that available to Appellant at the March 2020 rehearing. Certainly, there was no indication that any testimony preserved in 2019 would have been better than the sworn testimony recorded at the 2016 trial, some ten months after the charged event.

After reviewing Appellant's brief, the United States struggles to pin-point what evidence he believes is lost or otherwise unavailable for the defense's use at

[4] Trial defense counsel had the *same* ability as the government to contact witnesses, determine the state of their memory concerning evidence Appellant anticipated he would seek to admit

trial, nor should the United States be at fault for its non-existence. Appellant is asking this Court to both infer the evidence they want now existed in 2016 and conclude its loss is the fault of the United States, both without any evidence.

In Barker, the Supreme Court stated, "unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." Barker at 521. Because multiple witnesses may be unable to remember the events from years ago, these delays will most likely only harm the burden of proof carried by the United States. Therefore, allowing the United States to proceed to trial results in no constitutional or manifest injustice to Appellant warranting the severe sanction levied by the judge of dismissal with prejudice. This Court has "emphasize[d] that dismissal is a drastic remedy . . . if an error can be rendered harmless, dismissal is not an appropriate remedy." United States v. Stellato, 74 M.J.473, 488 (C.A.A.F. 2015) (citing United States v. Gore, 60 M.J 178 (C.A.A.F. 2004)). In other words, when the entire substance of evidence requested is available to an appellant in some form, there is no rational reason to apply the most extreme remedy, dismissal with prejudice, to a case.

The government's processing and preparation of this rehearing was not perfect, but it was far from unreasonable and certainly not unconstitutional, especially given that Appellant was never confined and otherwise free to live his

life. The issues attendant to locating witnesses and degradation of witness memory are issues that will inevitably occur with almost any rehearing. The facts show the government brought Appellant to his rehearing in a reasonable and timely manner, and should be permitted to take him to trial on the merits. None of the Barker factors weigh in favor of Appellant. Even after finding or assuming the first factors weighed slightly in Appellant's favor, AFCCA correctly concluded "weighing the factors together, we consider the absence of prejudice to outweigh the remaining factors that, taken together, only moderately favor [Appellant]. Accordingly, we find the military judge erred in granting the defense motion to dismiss." Harrington, 2020 CCA LEXIS 292 at *36. This Court should similarly find a Barker analysis weighs against Appellant, and deny review.

CONCLUSION

WHEREFORE, the United States requests that this Honorable Court find no violation of Appellant's Sixth Amendment right to a speedy trial, deny review of this case, and expeditiously allow the case to the trial court for further proceedings.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian counsel, and the Air Force Appellate Defense Division on 30 November 2020 via electronic filing.

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/s/_____

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Date: 30 November 2020