IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
	)	BRIEF ON BEHALF
v.	)	OF APPELLANT
	)	
FLOYD C. GUYTON, Jr. Sergeant First Class (E-7), United States Army, Appellant	)	ACCA Dkt. No. 20180103 USCAAF Dkt. No. 21-0158/AR

BRIEF ON BEHALF OF APPELLANT

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

ISSUE PRESENTED

APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER R.C.M. 707, AND THE SIXTH AMENDMENT TO THE CONTITUTION.

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for the jurisdiction of the Army Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for the jurisdiction of this Court to consider Appellant's petition for grant of review is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant was tried at Fort Bragg, North Carolina, on 8 December 2017; 5 January 2018; 26 February – 3 March 2018; and 7 March 2018, before a general

court-martial convened by the Commanding General, 1st Special Forces Command. Appellant was charged with one specification of sexual assault and two specifications of rape under Article 120, UCMJ (Charge I), and two specifications of larceny in violation of Article 121, UCMJ. (Charge Sheet).

Appellant pleaded not guilty to all Charges and specifications. (JA 042). He elected to be tried by members with enlisted representation. (R. at 91). The members found Appellant guilty of one specification of rape and one specification of larceny; he was found not guilty of the sexual assault specification and the remaining rape and larceny specifications. (JA 519). Appellant was sentenced to a reprimand; reduction to E-1; total forfeitures; confinement for two years; and to be dishonorably discharged from the service. (JA 520).

Pursuant to Article 66(d), UCMJ, the Army Court of Criminal Appeals reviewed Appellant's conviction and sentence, affirmed the findings of guilty by exception with respect to one of the findings, and, in accordance with *United States v. Tardif*, 57 M.J. 57 M.J. 219 (C.A.A.F. 2002), reduced the sentence by four months due to unreasonable and unexplained post-trial delay. *United States v. Guyton*, 2020 CCA LEXIS 462 (Army Ct. Crim. App. Dec. 16, 2020) (mem. op.) (JA 002-023).

On 19 April 2020 this Court granted review of this issue, as well as an issue relating to the Army Court of Criminal Appeals' decision with respect to its

affirming of punishment disapproved of by the convening authority, ordering the filing of briefs on this issue only. (JA 001).

STATEMENT OF THE FACTS

The facts necessary for the resolution of the issues can be found in the argument below.

SUMMARY OF THE ARGUMENT

Appellant was denied his right to speedy trial under Rule for Courts-Martial (R.C.M.) 707 because the military judge abused his discretion in granting to himself, without explanation, a total of 59 days of post-receipt delay. Appellant was denied his right to a speedy trial under the Sixth Amendment to the Constitution for the 273-day period between the re-preferral of charges and the start of trial.

ARGUMENT

I.

APPELLANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL UNDER R.C.M. 707, AND THE SIXTH AMENDMENT TO THE CONTITUTION.

Standard of Review

Whether an accused received a speedy trial is reviewed de novo. *United States v. Reyes,* 80 M.J. 218, 226 (C.A.A.F. 2020).

Statement of Facts

On 9 September 2015, the incident giving rise to the original charges occurred. (Charge Sheet). Appellant's record was "flagged" on 21 September 2015. (JA 195). Investigation into Appellant commenced on 30 September 2015. (JA 508). Charges were initially preferred against Appellant on 11 August 2016 (*Guyton I*). (JA 508). A preliminary hearing pursuant to Article 32, UCMJ, was held on 13 September 2016, and the charges were referred to a general court-martial on 25 October 2016. (JA 508). Trial was set for 6-10 March 2017. (JA 508). On 22 August 2017, the U.S. Army Trial Defense Service (TDS) Senior Defense Counsel at Fort Bragg notified the government of "panel issues, including a struggle to identify the panel discovery docs." (JA 509). On 16 February 2017, the government published Court-Martial Convening Order (CMCO 4), "an apparent standing CMCO for *United States v. Guyton*." (JA 509). On 21 February 2017, based on information provided by appellant's estranged spouse, Ms. HG, CID opened an investigation into appellant concerning stolen government property. (JA 509). On 23 February 2017, the charge in *Guyton I* was withdrawn and dismissed without prejudice by the convening authority. (JA 509). On 30 May 2017, the original charge and two larceny charges were re-preferred (*Guyton II*). (JA 509). A second hearing pursuant to Article 32, UCMJ was held on 17 July 2017. (JA 509). The charges were re-referred to a general court-martial on 16

August 2017, and served on Appellant on 22 August 2017. (JA 509). The defense requested a trial date of 13 November 2017. (JA 509). Arraignment was scheduled for 4 October 2017, followed by trial from 13-16 November 2017. (JA 509).

On 9 November 2017, the Court brought to the parties' attention apparent discrepancies between the convening orders and draft seating charts. (JA 509). On 10 November 2017, the government submitted to the court corrected copies of certain convening orders. (JA 509). On 13 November, the date the trial was scheduled to begin, the Court asked the parties whether the correct members were present for trial, and the defense made an oral motion to dismiss with prejudice due to lack of jurisdiction because there were five potential interlopers. (JA 509-10). The Court granted the government a 24-hour recess to consult with the convening authority. (JA 510). That same date, the defense filed a written motion to dismiss with prejudice, as well as a separate demand for speedy trial. (JA 510).

The next day, 14 November 2017, the government notified the Court that the new Commander of the 1st Special Forces Command (Airborne) had withdrawn the charges effective that date. (JA 510). On 16 November 2017, the Chief of Justice, 1st Special Forces Command, memorialized in a Memorandum for Record that the charges had been withdrawn "so that they can be referred to trial for court-martial under a subsequent convening order." (JA510). On 22 November 2017,

the charges and specifications were re-referred to general court-martial (*Guyton III*). (JA 510).

The government stated in the Electronic Docket Request that it would be ready for trial on or after 11 December 2017, and requested arraignment no later than the first week of December. (JA 510). The defense requested a trial date of 27 February 2018 based on obligations of defense counsel. (JA 510). The government opposed the delay, requesting a trial date of 4-7 January 2018 (which would include a weekend), or, alternatively, a trial date of 5-9 February 2018. (JA 510). The Court, based on its own obligations and the defense request, docketed trial for the week of 27 February 2018. (JA 510).

Appellant was arraigned in *Guyton III* on 8 December 2017, but deferred entry of pleas. (JA 510). The defense withdrew as moot its motion to dismiss in *Guyton II*, but the demand for speedy trial remained in place. (JA 510). On 18 December 2017 the defense filed a motion to dismiss for a violation of his right to speedy trial. (JA 511). The government filed its response on 22 December 2017. (JA 511).

A pretrial session pursuant to Article 39(a), UCMJ, was scheduled for 5 January 2018. (JA 511). The day before that session, the Court informed the parties that it was aware that the convening authority may have picked a new panel for CMCO #1 on 18 December 2017. (JA 511). Based on documents the Court

received, it appeared to the Court that CMCO #1 was intended to be a new standing panel for 1st Special Forces Command; that the convening authority completed panel selection on 18 December 2017; and that the staff judge advocate subsequently identified administrative shortcomings, and no actual CMCO #1 was actually produced. (JA 511). It was unclear to the Court whether the convening authority ever personally withdrew the selections made on 18 December. (JA 511). The Court instructed the government to be prepared to address whether CMCO #1 superseded CMCO #12 to which *Guyton III* had been referred, or was otherwise not relevant to *Guyton III*. (JA 511).

At the 5 January 2018 Article 39(a), UCMJ, session, trial counsel stated that the convening authority had not completed panel selection on 18 December 2017, and CMCO #12 remained the only convening order applicable to *Guyton III*. (JA 511). The intent of the convening authority with respect to whether CMCO #1 applied to *Guyton III* was still unclear to the Court. (JA511). The military judge provided the parties the opportunity to submit their positions on this issue in writing. (JA 511). The defense filed its supplement on 10 January 2018 (JA 444), and the government filed its supplement on 16 January 2018. (JA 479). Included within the defense supplement was a memorandum for record dated 5 January 2018 signed by the convening authority (and apparently subsequent to the 5

January 2018 Article 39(a), UCMJ, session) affirming that he had not completed panel selection on 18 December 2017. (JA 468).

The military judge made findings of fact with respect to a government witness, CW3 ST, who testified to Appellant's valuable contributions to the unit while in a "flagged" status, and described Appellant's duties, including assisting on the ground; serving as assistant to the NCOIC; participating in a two-week training mission to California and a training exercise in North Carolina. (JA 511). CW3 ST also noted that a person who is flagged cannot be promoted, receive awards, or perform actual jumpmaster duties. (JA 512). According to CW3 ST, Appellant was removed from his Team Sergeant position and has not served as Team Sergeant since September 2015, and has not deployed. (JA 512). Although CW3 ST believed Appellant was performing duties typical to his rank and qualifications, he also noted that if Appellant had not been flagged, he would likely be serving as an acting Team Sergeant or senior communications chief. (JA 512).

Appellant had not been in pretrial confinement or pretrial restraint at any time.

On 14 February 2018 the government provided CMCO #1 dated 13 February 2018, which by its terms supersedes CMCO #12, dated 22 November 2017. (JA 512).

Law and Analysis

Two sources of the right to a speedy trial in the military justice system are applicable to this case. Rule for Courts-Martial 707 provides that the accused must be brought to trial within 120 after preferral of charges. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions "the accused shall enjoy the right to a speedy and public trial . . ." and is triggered by preferral or confinement. *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014).

A. Rule for Courts-Martial 707

Charges in *Guyton II* were preferred against Appellant on 30 May 2017. On 16 November 2017 the charges were withdrawn but not dismissed, so the R.C.M. 707 speedy trial clock continued to run. *United States v. Leahr*, 73 M.J. 364, 376 (C.A.A.F. 2014). The charges were re-referred on 22 November 2017, and Appellant was arraigned on 8 December 2017, 192 days after preferral of charges.

In the ruling on this issue, the military judge created a "Summary of R.C.M. 707 Speedy Trial Timeline," in which he identified certain days "attributable to" the government. (JA 512). Ultimately, the military judge found "Total speedy trial days attributable to the Government since preferral of *Guyton II* (30 May 2017): 71 days." (JA 513). The military judge also noted in the timeline two periods of "pretrial delay" that had been approved by the Court, totaling 59 days.

> As indicated above, the Court finds a total of 71 days attributable to the Government from the time of preferral of charges on 30 May 2017, and the scheduled start of trial 27 February 2018, well within the 120-day requirement of R.C.M. 707. The Defense bases its conclusion that the Government has exceeded 120 days wholly on its argument that judicial delay, such as the time between the receipt of charges by the Court and the scheduling of arraignment, should not be excludable delay for speedy trial purposes.

(JA 515).

Initially, Appellant notes that the manner in which the military judge arrived at his conclusion that there was no violation of R.C.M. 707 is somewhat unusual. Rather than starting with the 192 days between preferral of charges and subtracting excludable delay from that total, it appears that the military judge added up "delays" "attributable" to one side or the other, and concluded that there were 71 days of delay attributable to the government. By Appellant's count from the military judge's timeline, there are four periods of potentially excludable delay, totaling 81 days rather than 71: (1) 10 days of "preapproved" delay by the convening authority granted to the PHO; (2) 12 days of defense-requested delay (in three discrete periods) granted by the PHO; (3) 43 days of "pretrial delay" between receipt of charges by the Court and arraignment prior to withdrawal of the charges; and (4) 16 additional days of "pretrial delay" between receipt by the Court of re-referred charges and arraignment. (JA 512-13). It is these last two periods of delay totaling 59 days that are at issue in this case.

When the 81 days of potentially excludable delay is subtracted from the 192 days between preferral and the final arraignment, the result is 111 days. While this presumptively falls within the 120 days required by R.C.M. 707, Appellant respectfully submits that the military judge abused his discretion in granting himself 43 days of excludable delay between the time the charges were first received by the Court and the time Appellant was first arraigned and an additional 16 days delay between receipt of the rereferred charges and re-arraignment.

Appellant acknowledges that R.C.M. 707(c) by its terms grants the military judge the authority to approve excludable delay. Appellant also acknowledges that the Army Court of Criminal Appeals, in *United States v. Hawkins*, 75 M.J. 640, 641, n.2 (Army Ct. Crim. App. 2016), held that Rule 1.1 of the Army Rules of Court, governing the docketing of cases, categorically excluding periods of delay between receipt of charges and arraignment unless the military judge specifies otherwise "creates a default rule of excludable delay in order to avoid unnecessary litigation and is made with the understanding that after referral, the government no longer has control over when an accused is brought to trial."

But none of that means that the military judge's discretionary authority to grant such delay is unfettered. It has long been the law that the decision to grant or deny a reasonable delay is a matter within the sole discretion of the military judge, and any granting of a delay is reviewable for "abuse of discretion and

reasonableness of length." *United States v. Weatherspoon*, 39 M.J. 762, 766 (A.C.M.R. 1994). As the Drafter's Analysis to R.C.M. 707(c) makes clear, "This subsection . . . follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. . ." and

> Military judges and convening authorities are required, under this subsection, to make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances. Decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted.

See United States v. Thompson, 46 M.J. 472, 474-475 (C.A.A.F. 1997); *see also United States v. Lazauskas*, 62 M.J. 39, 45 (C.A.A.F. 2005) (Baker, J., concurring) ("the decision to grant must be reasonable based on the reasons, facts or circumstances presented. Otherwise, such a grant would constitute an abuse of discretion.") Similarly, a panel of the Army Court of Criminal Appeals, in an unpublished decision, concluded that although Rule 1.1 provides the military judge the authority under R.C.M. 707(c) to exclude post-receipt delay, that decision is reviewed for an abuse of discretion. *United States v. Bodoh*, 2018 CCA LEXIS 81 (Army Ct. Crim. App. Feb. 16, 2018) (rev'd in part on other grounds, *United States v. Bodoh*, 78 M.J. 231 (C.A.A.F. 2019)).

The military judge abused his discretion in this case in excluding the post-receipt periods of delay. First of all, although the military judge cited *Hawkins* for

the proposition that "after referral, the Government has little control over when the accused is to be arraigned," and *Hawkins*, 75 M.J. at 642, does indeed include that quote, this Court said long ago,

> Although many, if not all, Army court-martial jurisdictions now assign docketing responsibility to a docketing judge rather than an attorney in the staff judge advocate's office, we do not view this administrative charge as a rational basis for relieving the government of its obligation to bring the accused to trial in a timely manner.

United States v. Wolzok, 1 M.J. 125, 127 (C.M.A. 1975). While *Wolzok* was decided under the rubric of the long-abandoned *Burton/Driver* Rule[1] then applicable to members in pretrial confinement, the assertion that the government is obligated to bring the accused to trial despite the fact that the charges are in the hands of Army judiciary is as true today as it was in 1975. And the reason is obvious. As between the accused, the government, and the military judge, the accused is the only one who is in *no position* to do anything with respect to the charges, while the government can withdraw the charges if the military judge fails to order the parties to appear for arraignment.

[1] *See United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971) (providing for a presumption of an Article 10, UCMJ, violation when pretrial confinement exceeds three months); *United States v. Driver*, 49 C.M.R. 376 (C.M.A. 1974) (modifying the Burton presumption from three months to 90 days). *See also United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993) (overruling *Burton* and *Driver* in light of R.C.M. 707).

In any event, other than to say that the 4 October 2017 arraignment and motions hearings were "scheduled together for judicial economy," there is no explanation in the military judge's ruling for the 43-day delay between receipt of charges and arraignment. There was no evidence that any of the post-receipt delay was at the request of the defense. There was no evidence with respect to the military judge's availability or why some other military judge could not have presided over an arraignment. Other than to make the conclusory statements that "Scheduled arraignment dates are subject to a whole host of non-so-unusual [sic] factors, including docket availability, the availability of all parties, and the judicial economy that is sometimes inherent in combining arraignment and motions in a single hearing," the military judge has provided no facts from which this Court can conclude that 43 days of post-receipt delay – more than one third of the 120 days mandated by the Rule – was not an abuse of discretion.

As the Analysis of the Rule makes clear, the military judge was obligated to "to make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances." Manual for Courts-Martial (2016 ed.), App. 21, R.C.M. 707(c). Other than to say that the decision was within his authority to make, the military judge did not explain on the record any determination with respect to good cause for the delay, or why 43 days was necessary under the circumstances.

The military judge also erred with respect to his failure to explain the reason for the sixteen-day delay between the receipt of re-referred charges and arraignment. While sixteen days may not seem like an excessive amount of time on its face, under the circumstances of this case, this delay occurred after a demand for a speedy trial had already been made. A delay of sixteen days under the circumstances of this case was unreasonable, nor was there any explanation given for the delay.

The military judge appears to suggest that simply because R.C.M. 707(c) provides him with the authority to grant periods of excludable delay, and Rule 1.1 makes that exclusion self-executing unless specified otherwise, that he can take all of the time he wants without explanation. That is simply not the case. Appellant respectfully submits that while some period of time for post-receipt delay would likely be necessary in most cases, the post-receipt delay in this case totaled 59 days with no explanation of either the cause of the delay or the reasonableness of its length.

The military judge abused his discretion in granting to himself 43 days and 16 days of unexplained post-receipt delay. The remedy is to set aside findings and dismiss the charges. Given the posture of this case, the charges should be dismissed with prejudice inasmuch as dismissing the charges without prejudice would merely result in more delay.

B. Speedy Trial under the Sixth Amendment

The Sixth Amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Speedy trial protections under the Sixth Amendment in the military are triggered upon preferral of charges. *Danylo*, 73 M.J. at 186. Analysis of a speedy trial claim under the Sixth Amendment for an accused not in pretrial confinement "requires consideration of the entire period of delay from preferral of charges until commencement of trial on the merits." *Id.* at 190. In analyzing a speedy trial claim under the Sixth Amendment, this Court must consider "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005) (citing *Barker v. Wingo*, 507 U.S. 514, 530 (1972)). No single factor is "either a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial," and instead are "related factors and must be considered together with such other circumstances as may be relevant." *Barker v. Wingo*, 507 U.S. at 533.

1. Length of Delay

In his 21 February 2017 ruling, the military judge concluded that it had been "close to 250 days since charges were preferred in Guyton II." (JA 516). Trial on the merits commenced on 27 February 2017. Thus, by the time trial on the merits

commenced, the delay between preferral of charges and trial on the merits was 273 days. The military judge found that "[a]lthough the time for *Guyton I*, preferred on 11 August 2016, is a relevant factor, the withdrawal and dismissal of the charge in *Guyton I* for a facially valid reason is a significant intervening factor that mitigates constitutional speedy trial concerns." (JA 516). Ultimately, however, the military judge concluded that the length of delay from preferral of charges "is a factor that weighs against the Government." (JA 516).

Because it was the government's own negligence that led to the withdrawal and dismissal of charges in *Guyton I*, Appellant disagrees that the withdrawal and dismissal of those charges "mitigate[d] constitutional speedy trial concerns."

2. Reason for the Delay

The military judge concluded that the government "bears the brunt of responsibility for the slow unfolding of this case," and the government "bears full responsibility for the convening order confusion that was raised within days of the scheduled trial, and became a critical issue on the first scheduled day of trial . . ." (JA 516). The military judge found that the issue "could have been avoided with proper diligence in managing subsequent convening order, excusals, and substitutions," but found "no subterfuge or improper purpose in the convening authority's decision to withdraw charges on 14 November 2017," because "this was the only realistic option at the time given the Government's inability to resolve

convening orders and panel selection documents." (JA 516). The military judge went on to say that the government "is not to be lauded for this morass and is responsible for the delay associated with it," but in the end concluded "even this delay does not arise [sic] to the level of a constitutional concern," apparently because "[a]part from this notable exception, the scheduled trial date of 27 February 2018, a date specifically requested by the Defense, ultimately arose from a whole host of not-so-unusual factors, including docket availability, expert availability, and requested defense delay." (JA 516).

There are a number of problems with this finding. First of all, the military judge erred in concluding that he must first find "subterfuge or improper purpose" in considering whether the reasons for the delay weighed against the government. The Supreme Court has held in the Sixth Amendment context,

> [b]etween diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.

United States Doggett, 505 U.S. 647, 656-57 (1992). The Supreme Court went on to say, "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* at 657.

In an unreported case, a panel of the Army Court of Criminal Appeals cited *Dogget* for the proposition that simple negligence is a factor for consideration in the Sixth Amendment context, and stated,

> The weight we ascribe to government negligence also varies depending on the gravity of the negligence at issue – simple negligence weighs lighter than gross negligence. The length of delay the negligence causes is also a consideration; a longer delay resulting from government negligence weighs more heavily against it than does a shorter delay.

United States v. Simmons, 2009 CCA LEXIS 301, *42 (Army Ct. Crim. App. Aug. 12, 2009) (mem. op.).

Although he clearly laid the bulk of the delay at the government's feet, the military judge in this case never made any findings with respect to whether the government's conduct was negligent – only that there was no subterfuge or improper purpose. It is obvious from the manner in which this case unfolded that the government was grossly negligent with respect to the convening orders in this case, starting with the convening order in *Guyton I*.

Once the government was informed by the TDS Senior Defense Counsel of issues involving the convening order, rather than take care to ensure that the new convening order was in proper form, the government negligently caused further delay by promulgating court-martial convening orders and vicing orders that included interlopers, resulting in a defect which, according to the military judge, left the government with withdrawal as "the only realistic option at the time given

the Government's inability to resolve convening orders and panel selection documents." (JA 516). Under the circumstances, Appellant does not dispute the finding that the 14 November 2017 withdrawal was the government's "only realistic option." He does, however, dispute the suggestion that *because* withdrawal was the only option, the government should be excused from its own negligence, particularly where that negligence resulted in further delay for what was essentially the same sort of error causing the withdrawal in *Guyton I*.

Another problem with the conclusions of the military judge is his finding that "apart from th[e] notable exception" of the government's negligent conduct, "the scheduled trial date of 27 February 2018, a date specifically requested by the Defense, ultimately arose from a whole host of not-so-unusual factors, including docket availability, expert availability, and requested Defense delay." (JA 516). The defense was ready for trial in *Guyton I*, which had been set for 6 March 2017. When that charge was withdrawn and dismissed, the defense was ready for trial in *Guyton II*, which was set to begin on 13 November 2017. It is therefore particularly harsh for the military judge to conclude, as he did, that the Defense is responsible for any of this delay. Obviously, if the government had acted competently in what this Court in *United States v. Dowty*, 60 M.J. 163, 166 (C.A.A.F. 2004), called the "routine task frequently facing the command staff judge advocate," none of this would have been in issue, and all of the reasons cited

by the military judge – docket availability, expert availability, and requested Defense delay – would not have happened. Not to put too fine a point on it, but although the defense cited scheduling conflicts for both the civilian and military defense counsel as well as the defense expert as its reason for choosing 27 February 2017 as a trial date in *Guyton III*, the need for delay based upon those conflicts is a direct result of the government's negligence.

3. Demand for a Speedy Trial

The military judge found that this favor weighed in favor of Appellant, and it does. Appellant made his demand for a speedy trial on 13 November 2017. The military judge went on to conclude, "In spite of this timely assertion, however, the Government has demonstrated that it has moved with reasonable diligence since the time of this demand." The government is required to move with reasonable diligence whether there is a demand for speedy trial or not, so even if the government moved with reasonable diligence after the demand was made, this factor nevertheless weighs in favor of Appellant.

4. Prejudice

The military judge in this case concluded that "while there was unnecessary delay in this case, that delay does not arise [sic] to the level of a Constitutional violation, nor did delay in this case cause actual prejudice to the accused or effectively deny the accused his right to speedy trial." (JA 516). Among the

reasons cited by the military judge were findings that Appellant was "still performing meaningful duties within the unit; maintains a positive attitude; and . . . is still well-regarded by the members of his unit." (JA 517).

Although the military judge did not specifically find as a fact that Appellant had been removed from the E-8 advancement list, he did find that Appellant had been "continuously flagged, for either law enforcement investigation or adverse action" since 30 September 2015. (JA 508). To be clear, Appellant *was* selected for promotion to E-8 on 2 February 2015 with a promotion sequence number of 27. (JA 195). His record was flagged on 21 September 2015. (JA 195). With respect to Appellant's performance while he was awaiting trial, it is true that Appellant was still in a pay status and was performing military duties. But the military judge wholly ignored the evidence that Appellant had been removed from his Team Sergeant position, had not served on a team since 2015, and had not deployed since facing charges. The military judge ignored the fact that while in a flagged status Appellant could not be promoted, receive awards, or perform actual jumpmaster duties, and that if Appellant were not flagged he would be serving as an acting Team Sergeant or senior communications chief.

As this Court held in *United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005), prejudice to an accused can include such things as "restrictions or burdens on his liberty, such as disenrollment from school or the inability to work due to

withdrawal of a security clearance." In addition to removing Appellant from the promotion list, he was also removed as Team Sergeant and had not, in fact, served on a team since 2015, and had not deployed. Nor was he permitted to perform his duties as jumpmaster. At the risk of overstating the obvious, these are all things of particular importance to members of an elite and insular community such as the Special Forces.

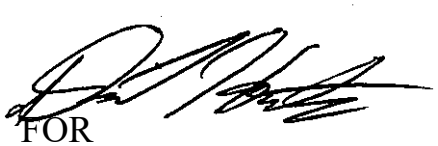
In this regard, it is offensive to suggest, as the military judge did in this case, that merely because Appellant had continued to perform the duties assigned to him in the face of pending charges, that he "maintains a positive attitude," or was "well-regarded by the members of his unit" means that Appellant has not been prejudiced by the government's lack of diligence. First of all, even if Appellant wasn't outwardly showing the stress flowing from the pending charges does not mean he wasn't feeling it. Second, Appellant was a soldier with almost eighteen years of service when the investigation commenced, and over twenty years of service by the time he was brought to trial; he certainly would have known that while these charges were pending, doing *anything other than* showing up for work every day, doing what was required of him, and displaying a positive attitude would have worked to his detriment. Finally, for the military judge to suggest that because Appellant kept his chin up in the face of mounting adversity the government should get a pass for its dilatory conduct only adds insult to injury.

Appellant suffered prejudice as a result of the delay in this case. This factor weighs in Appellant's favor. And since all of the *Barker v. Wingo* factors weigh in Appellant's favor, his right to a Speedy Trial under the Sixth Amendment was violated, and the findings and the sentence should be set aside.

Conclusion

WHEREFORE Appellant so prays.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,051 words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Guyton, Crim App. Dkt. No. 20180103, USCA Dkt. No. 21-0158/AR was electronically filed brief with the Court and Government Appellate Division on May 13, 2021.

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