IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	REPLY BRIEF ON BEHALF 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

REPLY BRIEF ON BEHALF OF APPELLANT

INDEX OF BRIEF

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

United States Supreme Court

Court of Appeals for the Armed Forces

Courts of Criminal Appeals

Other Authorities

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

Appellant hereby replies to the government's Answer, filed on 15 June 2021.

ARGUMENT

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

A. Rule for Courts-Martial 707.

1. The military judge did not correctly exclude judicial delay.

While Appellant agrees with the government that the military judge found 81 days of excludable delay (Gov't Br. at 14), he disagrees that "twenty-two days of delay [were] attributed to the appellant to accommodate his requests when scheduling the Article 32 preliminary hearing." (Gov't Br. at 15). Only twelve of the 22 days of delay authorized by the PHO were attributable to the defense; the

other ten days were pre-approved by the convening authority. But in any event, it is the fifty-nine days of judicial delay that is at issue in this case.

The government argues that the military judge did not abuse his discretion in applying Rule 1.1 of the Rules of Practice Before Army Courts-Martial, because "[i]n his analysis, he correctly concluded there were no 'unusual circumstances' that would change the default rule." (Gov't Br. at 17-18). Respectfully, the military judge awarded to himself *almost half* of the number of days a servicemember would normally be expected to be brought to trial under the Rule promulgated by the President, and he did it without any explanation other than to say there were "no unusual circumstances that would justify considering judicial delay to be non-excludable delay." (JA at 515). This conclusion exposes the problem with the "default rule," which is that it is "*excludable delay*" rather than "non-excludable delay" that requires justification under R.C.M. 707.

The government argues, "in light of the 'strict' standard of review applicable to a military judge's decision to exclude periods of delay, . . . this military judge's decision was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous." (Gov't Br. at 18) (citing *United States v. Lazauskas*, 62 M.J. 39, 42 (C.A.A.F. 2005)); *United States v. McElhaney*, 54 M.J. 120, 123 (C.A.A.F. 2000). If the abuse-of-discretion standard is a strict one as the government argues, this Court should give the military judge's conclusions no deference because he failed to

articulate on the record why he needed 59 days of judicial delay. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014) ("If the military judge fails to place his findings and analysis on the record, less deference will be accorded.") As R.C.M. 707 clearly contemplates, the decision to grant excludable delay "should be based on the facts and circumstances then and there existing," and "when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing." R.C.M. 707(c)(1), Discussion. It can hardly be said that it was "impracticable" for the military judge to describe the supporting reasons in writing, given that the issue was litigated at trail and the military judge drafted an 11-page ruling. And since the military judge did not describe "the facts and circumstances then and there existing" with respect to the military judge's workload, or leave schedule, or availability of other judges to conduct the arraignment, this Court has no facts before it from which it can conclude that the military judge did not abuse his discretion.

The government next argues that the military judge "reasonably relied upon binding precedent" and "operated under two ACCA opinions that held Rule 1.1 was in accord with R.C.M. 707(c)." It is true that Rule 1.1's exclusion of post-receipt delay appears to be self-executing in the absence of an order by the military judge to the contrary. It is also true that *United States v. Hawkins*, 75 M.J. 640 (A.Ct.Crim.App. 2016) is a published decision of the Army Court of Criminal

Appeals in which that Court concluded that Rule 1.1 is not inconsistent with R.C.M. 707(c)(1). But neither *Hawkins* nor Rule 1.1 *required* the military judge to do anything with respect to excludable delay, so the government's characterization of them as "binding precedent" and "controlling authority" don't provide the military judge with the cover urged by the government. And neither *Hawkins* nor Rule 1.1 relieved the military judge of his obligation under R.C.M. 707(c) to exclude only periods of delay that were reasonable under the circumstances. Therefore, the military judge's awarding himself, without explanation, nearly half of the time ordinarily required to bring a servicemember to trial, is, indeed "outside the range of choices reasonably arising from the applicable facts and the law." (Gov't Br. at 19) (quoting *United States Irizarry*, 72 M.J. 100, 103 (C.A.A.F. 2013)).

The government next argues that the amount of time the military judge awarded to himself was reasonable, and cites a number of decisions from the Army Court of Criminal Appeals (ACCA) in support of this contention. Given that excludable delay must be reasonable under the facts and circumstances of each case, comparing Appellant's case to others in which similar periods of delay were deemed not unreasonable is particularly unhelpful. And in any event, they are all distinguishable. *United States v. Arab*, 55 M.J. 508 (A.Ct.Crim.App. 2001) involved a 30-day delay between a docketing request and arraignment. The ACCA

concluded that the delay was "not, per se, unreasonable," and noted that there was no defense challenge at trial so the reason for the judicial delay was not in the record; the place of trial did not have a regularly assigned military judge; and the judge who heard the speedy trial motion was not the same judge who scheduled the case for trial. *Arab*, 55 M.J. at 512. None of those factors were present in this case.

In *United States v. Hill*, 2016 CCA LEXIS 407 (A.Ct.Crim.App. 2016) (summ. disp.) (per curiam), the charges were received on 6 December 2011, and the appellant was arraigned on 10 February 2012, some 66 days later. The reason for the delay was not in the record, but the appellant conceded in his brief to the ACCA that the defense had not been ready for trial and requested a delay until 10 February. *Hill*, at *4. As discussed in more detail below, although with respect to the second period of delay Appellant in this case did request a later trial date, that clearly would not have happened but for the government's negligence causing the withdrawal of *Guyton II*. And it is arraignment that stops the R.C.M. 707 clock, not the date the court-martial is assembled.

The government concedes that the military judge's exclusion of judicial delay is not unfettered and does not continue indefinitely, but argues, citing *United States v. Reap*, 41 M.J. 340, 342 (C.A.A.F. 1995), "nothing in this case indicates the delay was 'an egregious or blatantly negligent trial delay'--a standard this court

has used in similar situations." (Gov't Br. at 19). This is not a "similar situation" and the standard applied in *Reap* is inapplicable to this case. The decision in *Reap* involved, specifically, an appeal taken under Article 62, UCMJ, and a Rule for Court-Martial and a statute that addressed the requirement for excludable delay in that specific circumstance. The Rule at issue was in the 1984 edition of the Manual for Courts-Martial. As this Court noted in *Reap*, at 341, Article 62(c), UCMJ, provides, "Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit." That statutory provision (which still exists today), was reflected in R.C.M. 707(c)(1)(D) of the 1984 Manual. Thus, with the exception for appeals taken by the United States under Article 62, UCMJ, no authority provides for any standard other than reasonableness in the case of excludable delay. This Court should decline the government's invitation to wholly graft the Article 62, UCMJ, standard on to R.C.M. 707.

The government argues that the military judge "accounted for the delays in his eleven-page written ruling." (Gov't Br. at 20). This is what the military judge said about judicial delay:

> 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. However, this position is flatly contrary to R.C.M. 707(c), Rule of Court 1.1, and case law. As the ACCA noted, "a military judge has wide discretion when docketing a case for trial. However, absent unusual circumstances, the exercise of such discretion in setting an arraignment date cannot be the sole basis for causing a violation of speedy trial under R.C.M. 707." *Hawkins,* 75 M.J. at 642, n.5. Scheduled arraignment dates are subject to a whole host of non-so-unusual 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. In this case, as in *Hawkins,* there are no unusual circumstances that would justify considering judicial delay to be non-excludable delay. The Government has demonstrated that there is no R.C.M. 707 violation in this case.

(JA at 515). Nowhere does the military judge actually "account" for any of this delay. He merely says he doesn't have to, that judicial delay "cannot be the sole basis" for an R.C.M. 707 violation, and says there are no "unusual circumstances that would justify considering judicial delay to be non-excludable delay." (JA at 515). As the government has conceded (Gov't Br. at 19), judicial delay can, indeed, be the sole basis for an R.C.M. 707 violation. And, as discussed previously, this application of the "default rule" improperly excused the judge from considering whether exclusion was reasonable because he apparently required a showing that "non-exclusion" was "justified."

B. "Pre-approved" judicial delay under Rule 1.1 violates an accused's right to a speedy trial.

Next, the government argues that this Court should conclude that "pre-approved judicial delay does not violate an appellant's procedural right to a speedy trial" because it "promotes efficient, fair processing of courts-martial and complies with R.C.M. 707(c)." (Gov't Br. at 20). This argument, of course, is inconsistent with the government's concession that "a military judge's exclusion of judicial delay is not unfettered and does not continue indefinitely." (Gov't Br. at 19). How many days of "pre-approved judicial delay" are acceptable before the military judge's discretion becomes "fettered?" How long *can* a military judge delay a case under Rule 1.1? The government does not answer these questions, but implicit in its concession is the notion that there is a limit. In Appellant's view, the limit is reasonableness, and the self-executing nature of Rule 1.1 excuses the military judge from conducting that analysis.

The government argues, "The trial judiciary is a reliable docketing authority with their own incentives to keep their calendar running efficiently." (Gov't Br. at 21). Perhaps. But those incentives do not necessarily align with an accused's incentive in obtaining a speedy trial. For example, "judicial economy" may mean that an accused has to wait to have his day in court. Maybe the wait is de minimis and maybe it's not; maybe the delay is excludable and maybe it isn't. It all depends on the facts and circumstances of the case, and whether the delay is reasonable. Whatever "incentives" the trial judiciary has in moving things along

(or putting them on hold), this Court should not presume that those incentives are sufficient to protect an accused's right to a speedy trial, particularly where the military judge points to the regulation and says it cannot be the "sole basis" for a violation. (JA at 515).

The government argues that the Rule promotes efficiency because it provides for certain milestones to be completed in relatively short periods of time. (Gov't Br. at 21). Ultimately, according to the government, "Rule 1.1 leaves no question as to its goal: diligent processing of courts-martial." (Gov't Br. at 21). Perhaps some of the milestones required by Rule 1.1 are intended to promote diligent processing of courts-martial. But the portion of the rule that purports to give the military judge unlimited authority to delay the case without explanation, a rule which, according to the ACCA and the military judge "cannot be the sole basis for causing a violation of speedy trial under R.C.M. 707," appears to thwart, rather than promote, that goal.

The government argues that Appellant "ignores the two mandatory five-day statutory waiting periods included in the fifty-nine-day period of time," and cites Article 35, UCMJ; R.C.M. 602, and *United States v. Cherok*, 22 M.J. 438, 440 (C.M.A. 1986) for the proposition that "Article 35 provides a shield with which an accused may prevent too speedy a trial, not a sword with which an accuse may attack the Government for failing to bring him to trial sooner." (Gov't Br. at 22).

In *Cherok*, 22 M.J. at 439, the accused refused to waive the five-day waiting period required by Article 35, UCMJ, and then claimed that he did not receive a speedy trial. In this case Appellant was not brought to trial within the five-day waiting period, and was therefore in no position to exercise his right under Article 35, UCMJ, or R.C.M. 602 because the statutory waiting period had already passed. Respectfully, there is a difference between an accused who exercises his right to the waiting period and then complains about the delay, as the accused did in *Cherok*, and an accused who is not brought to trial until after the statutory waiting period has already passed. Indeed, if the five-day waiting period in Article 35, UCMJ, is *always* excludable, then R.C.M. 707 would say so. But it does not, and this Court has never held that the five-day waiting period under Article 35, UCMJ, is always excludable as a matter of law.

And even if the five-day waiting period is excludable (a point Appellant does not concede), it wouldn't change the analysis. Appellant was served with charges in *Guyton II* on 17 August 2017. (JA at 192). Those charges were received by the military judge on 22 August 2017, when the five-day waiting period had already passed. He was served with the charges in *Guyton III* on 22 November 2017 (JA at 201), but was not "brought to trial or required to participate by himself or counsel" within the five-day waiting period (*See* Article 35, UCMJ) and the post-receipt delay overlapped the five-day waiting period.

The government argues that Appellant "ignores the inevitable, time-consuming task of issuing a pretrial order, as the military judge did in this case," and states, "Without providing a numerical value that *would have* been appropriate for the military judge to exclude, appellant allots the entire fifty-nine-day period into a category he deems unreasonable." (Gov't Br. at 22) (emphasis in original); (Gov't Br. 22, n.13). Whether the task of issuing a pretrial order was "time-consuming" in this case is certainly something the military judge could have put on the record. But with respect to *Guyton II*, it couldn't have taken that long because the military judge received the charges on 22 August 2017, and then issued the pretrial order on 25 August 2017. (JA at 249). And Appellant cannot provide a "numerical value that would have been appropriate for the military judge to exclude" because he does not know the reason for the judicial delay in this case because it was *unexplained*.

The government also argues, "The policy to approve any post-receipt judicial delay fairly takes into account these unavoidable time gaps, and it is something over which this court should afford much protection." (Gov't Br. at 23). As a general proposition, Appellant has no quarrel with the notion that the military judge should retain authority to manage the proceedings over which he presides. (Gov't Br. at 23) (citing *United States v. Browers*, 20 M.J. 356, 361 (C.M.A. 1985) (Cox, J., concurring)). What Appellant takes issue with is that the

policy purports to excuse the military judge from his duty to ensure that only reasonable delay is excluded under R.C.M. 707. And in any event, the identification of these "unavoidable time gaps," whatever they may have been, is not in the record, specifically as a result of the application of the policy in this case.

The government argues that Rule 1.1 "also promotes fair processing of courts-martial, apparently because "[a]fter referral, the government has little control over when the accused is to be arraigned." (Gov't Br. at 23) (quoting *Hawkins*, at 642). The government goes on to say, "docketing considerations and the respective duty location of the military judge may even limit the military judge's control over when the accused is arraigned," and "[a]s a practical matter, the R.C.M. 707 clock should not continue to run based on the availability of military judges and the docket." (Gov't Br. at 23). Appellant fails to see how the government's lack of control over when an accused is arraigned, and delays resulting from the unavailability of military judges do anything to "promote fair processing of courts-martial," as the government claims.

And the government claims that its argument that the R.C.M. 707 clock should not continue to run "is even supported in the exact precedent appellant cites to argue the opposite," and argues that "delay resulting from circumstances 'beyond the control of the prosecution' were among several of the extraordinary

circumstances justifying a delay" in *United States v. Wolzok*, 1 M.J. 125 (C.M.A. 1975). (Gov't Br. at 23-24). The government misreads the holding in *Wolzok*. To reiterate, this Court in *Wolzok*, 1 M.J. at 127, said,

> In *United States v. Marshall* . . . we enumerated several extraordinary circumstances justifying a delay beyond 90 days. Among these was delay resulting from circumstances "beyond the control of the prosecution." . . . 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 change as a rational basis for relieving the government of its obligation to bring the accused to trial in a timely manner.

(citations omitted). Appellant knows of no other way to interpret this language except as what it says -- that assigning a docketing judge is not among the extraordinary circumstances excusing the government from bringing a case to trial in a timely manner.

The government next argues, "Were the government's clock to continue to tick after sending the referred charges to the court, disparate outcomes would result depending solely on the judiciary's caseload, and whether a particular jurisdiction had a military judge." (Gov't Br. at 24). What the government appears to be arguing for is an R.C.M. 707 clock that stops, not at arraignment, but at receipt of charges by the court-martial. The obvious problem with that argument is that it conflicts with the President's directive. If the President wanted the clock to stop at receipt of charges, he would have said so in R.C.M. 707. Neither this Court, nor

the Army Trial Judiciary, has the authority to override this directive. *United States v. Williams*, 23 M.J. 362, 366 (C.M.A. 1987). Another problem with the government's argument is that it conflicts with its concession that the military judge's authority to exclude post-receipt delay "is not unfettered and does not continue indefinitely." (Gov't Br. at 19). At the risk of repeating himself, Appellant again notes that the touchstone of this inquiry is one of reasonableness, considered in light of the facts and circumstances of a particular case. What may be reasonable in one case may be unreasonable in another. There is nothing unusual or earth-shattering in that.

Despite having *just argued* that the R.C.M. 707 clock should stop at receipt of charges rather than at arraignment, the government acknowledges that a local rule cannot override the directive of the President, and claims that Rule 1.1 complies with R.C.M. 707. (Gov't Br. at 24). This is apparently so because R.C.M. 707(c) provides for "All other pretrial delays approved by the military judge," and caselaw does not limit excludable delay to delays approved by courts or convening authorities. (Gov't Br. at 24) (quoting R.C.M. 707(c) and *United States v. Dies*, 45 M.J. 376, 378 (C.A.A.F. 1996)). This argument ignores what happened in this case, which is that the military judge, in essence, shrugged and said that the Army Trial Judiciary gave him the authority, and the ACCA said that post-receipt delay couldn't be the sole basis for the claimed violation. The fact that

the military judge "approved" the delay is meaningless when the reason for the delay is not in the record.

The government argues that there will always be a brief delay between referral of charges and arraignment, and "[t]herefore, Rule 1.1's exclusion of this inherent delay from the referral process nests with the R.C.M.s." (Gov't Br. at 25). Respectfully, this was no "brief delay." There were two periods of delay totaling 59 days -- one day shy of half of the time expected under R.C.M. 707.

The government claims, "Importantly, there is no blanket exclusion for post-receipt delay, but rather the military judge must consider the parties' calendars and specific events of the case," and "the decision to grant or deny a reasonable delay . . . should be 'based on the facts and circumstances then and there existing.'" (Gov' Br. at 25). With this, at least, Appellant and the government appear to be in agreement. Where Appellant parts company with the government is where it claims, "Accordingly, R.C.M. 707(c) provides the trial judiciary latitude to predetermine excludable periods, exactly as Rule 1.1 prescribes." Setting aside the notion that anything "predetermined" cannot possibly be based "on facts and circumstances then and there existing," R.C.M. 707(c) vests in *the military judge*, and not the Judge Advocate General of the Army, or the Chief Trial Judge of the Army Trial Judiciary, the authority to exclude delay based on the facts and circumstances of the case. Not to put too fine a point on it, but it is difficult to

image how the Army Trial Judiciary, in promulgating Rule 1.1, could have divined "the facts and circumstances then existing" in Appellant's case.

The government argues that "pre-approved judicial delay also promotes the policy behind R.C.M. 707(c) because it avoids the after-the-fact exclusion that the policy sought to prevent," and "avoids unnecessary litigation." (Gov't Br. at 25-26). It didn't avoid litigation in this case; and it didn't avoid it in *Hawkins*; *United States v. Hill*, 2016 CCA LEXIS 407 (A.Ct.Crim.App. 23 June 2016) (summ. disp.) (per curiam); and *United States v. Bodoh*, 2018 CCA LEXIS 81 (A.Ct.Crim.App. 16 February 2018) (mem. op.). Nor should it. When discretion is vested in the military judge, his or her exercise of that discretion is reviewable by the Service Courts of Criminal Appeals and this Court. Relying on pre-approved delay shields the military judge from any examination into the reasonableness of that exercise of discretion.

Finally, the government cites the Speedy Trial Act as support for its contention that Rule 1.1 "rings valid," even though the Speedy Trial Act specifically requires the judge to find "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," and must set forth those findings orally or in writing. (Gov't Br. at 26) (quoting 18 U.S.C. § 3161(h)(7)(a)). Rule 1.1 doesn't "ring valid" when compared with the Speedy Trial Act, because, unlike the Speedy Trial Act, Rule 1.1 excuses

the military judge from making any findings whatsoever. The government also claims that Rule 1.1 requires "specific, factual support for all requested dates." (Gov't Br. at 24). But that portion of the Rule deals with the required contents of an Electronic Docket Request that is submitted by the parties; it says nothing about the military judge's obligation to exclude only delay that is reasonable under the circumstances.

The government argues that Rule 1.1 is like 18 U.S.C. § 3161(h)(7)(A) because "the docketing military judge, upon receipt of the referred charges, takes into account not only docket availability, but also the availability of all parties and judicial economy when determining trial dates." (Gov't Br. at 27). That may be so, but, as noted, because it is the "default rule," Rule 1.1 relieves the military judge of any obligation to put any of this on the record, depriving this Court of the facts necessary to review his exercise of discretion.

The government argues, "Rule 1.1's pre-approval of judicial delay is an appropriate exclusion of time because the dates ultimately selected for appellant are based on the information his counsel provides." (Gov't Br. at 28). That's simply wrong. Only twelve of the days of delay identified by the military judge were attributable to the defense. (JA at 513). The delay at issue with respect to R.C.M. 707 is the post-receipt delay, which is wholly unexplained.

Citing *United States v. Correia*, 531 F.2d 1095, 1100 (1st. Cir. 1976), the government argues, "Rule 1.1's pre-approval of judicial delay is an appropriate exclusion of time . . . and the delay is similarly pre-excluded in the federal sector." (Gov't Br. at 28). Respectfully, it's not. The government appears to claim that the holding in *Correia*, that "we would not wish to see district judges squeezed by strict speedy trial deadlines without considerable discretion to keep their dockets moving withing the prescribed periods" is the same thing as the default rule in Rule 1.1. (Gov't Br. at 28). *Correia* says nothing about "pre-excluded" delays in the federal court; the Federal Rules of Criminal Procedure discussed in *Correia* (F.R.Crim.P. 48 and 50) say nothing about pre-excluded delays; and, as in this case, such pre-excluded delays would be inconsistent with the Speedy Trial Act's requirement that the reasons for excluding time from the clock must be made on the record, "orally, or in writing." 18 U.S.C. § 1361(h)(7)(A).

The government next argues, "As the military judge explained, there was sufficient rational for why all of the post-receipt judicial delay in appellant's case was appropriately excluded from the R.C.M. 707 clock," and "each of the two periods of delay were required based on reasonable factors that often play into docketing decisions." (Gov't Br. at 28). The government argues that the military judge "accounted for these factors," and quotes the portion of the Ruling in which the military judge stated, "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." (Gov't Br. at 28-29). Respectfully, it wasn't enough for the military judge to say why judicial delay is necessary in some cases. He was required to account for the delay in *this* case.

The government goes on to argue that "two of these factors--the availability of the parties and judicial economy--are routinely referenced as legitimate rationales for docketing cases." (Gov't Br. at 29). That may be, but the military judge did not explain how those factors impacted the R.C.M. 707 speedy trial clock as it relates to post-receipt delay *in this case*. The government next argues that the military judge "provided a legitimate explanation and specifically took appellant's requested trial date into account," and argues, "when the government opposed appellant's requested trial date in *Guyton II*, the military judge still deferred to appellant and docketed trial for the exact date of appellant's request." (Gov't Br. at 29). The government appears to have confused the arraignment date (which stops the R.C.M. 707 clock) with the trial date. Given that the trial is *always* after the arraignment, it is irrelevant for R.C.M. 707 purposes that Appellant requested a later date.

The government again argues that, with respect to *Guyton III*, "despite trial counsel's opposition to appellant's requested delay until 27 February 2018 for trial,

the military judge deferred to appellant and set trial to begin on the exact date he requested." (Gov't Br. at 29) (internal quotations omitted). And again, it is the arraignment, not the start of trial, that stops the speedy trial clock. As discussed in more detail below, Appellant was prepared for trial on 13 November, the charges were withdrawn as a result of the government's negligence, and it is particularly offensive for the government to blame Appellant for this later delay.

The government argues that the "second factor the military judge highlighted--judicial economy-- is a common, legitimate concern for all courts," and cites the military judge's order with respect to motions in *Guyton II* and *Guyton III*. (Gov't Br. at 30-31). In the government's view, "This diligent pattern demonstrates the military judge moved appellant toward his trial while taking into account the legitimate concern of judicial economy." (Gov't Br. at 31). Appellant has never argued, and does not argue now, that "judicial economy" is not a legitimate concern. Instead, he argues that he does not know, and this Court cannot know, the extent to which "judicial economy" factored into the arraignment date set by the military judge.

3. Conclusion

The government apparently agrees that there are 81 days of delay in this case that the military judge found to be excludable. (Gov't Br. at 14-15). When the 81 days of delay are subtracted from the 192 day delay between preferral of charges

and arraignment in *Guyton III*, the result is 111 days. If this Court finds *either* of the two periods of post-receipt delay to be non-excludable, that amount is then added back and the total number of days extends beyond the 120-days authorized by R.C.M. 707. As Appellant noted in his opening brief, some period of post-receipt delay would likely be necessary in most cases, and in every case in which R.C.M. 707 is in play, it is incumbent upon the military judge to put his analysis on the record.

In this case, the two periods of unexplained post-receipt delay are problematic, but for different reasons. The first period of 43 days -- fully one third of the R.C.M. 707 standard -- is unreasonable because of its length, and there is nothing in the record from which this Court can determine that the delay was reasonable. The military judge never explained why it took so long, or why another military judge could not have conducted the arraignment. The second period of delay, although admittedly much shorter, came on the heels of a demand for speedy trial in a case where the charges were already twice withdrawn from court-martial because of mismanagement on the part of the government. There is no explanation on the record for either of these delays.

B. Appellant was denied his right to a speedy trial under the Sixth Amendment.

The government first argues that *Guyton I* was properly withdrawn and therefore "should not be considered as part of appellant's Sixth Amendment claim

because he waived that issue." (Gov't Br. at 33). The military judge in this case certainly thought "the time for *Guyton I*, preferred on 11 August 2016, is a relevant factor," even if the withdrawal and dismissal was valid. (JA at 516). In this regard, Appellant is not trying to "smuggle" *Guyton I* into this case (Gov't Br. at 34); it is merely among the facts and circumstances of this case.

1. Length of Delay.

The government complains that Appellant has "cited no basis for why [273 days between preferral and trial] triggers review in his case," but concedes that "appellate courts have conducted a review on less time." (Gov't Br. at 35) (citing *United States v. Grom*, 21 M.J. 53, 56 (C.M.A. 1985)). This Court has held that the length of the delay "is to some extent a triggering mechanism," but "because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984). The military judge in this case concluded that "the approximately 250 days since preferral is a factor that weighs against the government." (JA at 516).

2. Reasons for the delay.

The government argues that the reasons for the delay "weigh little, if at all, in appellant's favor," in part because "of the severity of appellant's case." (Gov't Br. at 35). Given the procedural posture of this case -- that the charges involving

HG were already headed for trial in *Guyton I*, and by the time *Guyton II* was preferred the government already had all of the evidence it was going to get -- it cannot be said that this trial was more akin to that involving "a serious, complex conspiracy charge." (Gov't Br. at 35) (quoting *Barker v. Wingo*, 407 U.S. 514, 531 (1972)). In other words, it is not the "seriousness" of the offense that matters; it is the complexity of proof.

The government also seeks to lay the bulk of the delay at Appellant's feet because of defense-requested delay. (Gov't Br. at 36). It is true that the defense requested 12 days of delay from the PHO, and 21 days of delay before the start of *Guyton II*. Those days ought, in fairness, to be counted against the defense. Appellant disputes, however, that the 78-day delay between withdrawal in *Guyton II* and trial in *Guyton III* should count against him. He was ready for trial in *Guyton II*, and would have proceeded to trial had the convening authority not withdrawn the charges after the military judge noted issues with the convening order. (JA at 516). As the military judge noted, "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 at 516). Indeed, the government concedes that "this 'morass' was admittedly the government's fault," but claims that it does not weigh as heavily against the government as subterfuge or bad-faith would. (Gov't Br. at 37). The problem with

this argument, coming on the heels of its claim that all of the delay post withdrawal in *Guyton II* is Appellant's fault, is that it ignores the reality that it was the government's own negligence that was responsible for *all* of the delay, including that requested by the defense after withdrawal in *Guyton II* because of the defense counsel's schedule. (JA 403).

The government argues that "the picture" involving Appellant's claim regarding government negligence "is incomplete" because the email from the SDC discussing "panel discovery docs" may have been unrelated to this case. (Gov't Br. at 38). The government also argues in a footnote that the military judge "incorrectly stated that this e-mail occurred on 22 August 2017." (Gov't Br. at 38, n.17). This email clearly was about Appellant's trial, and it was sent on 22 August 2017. The e-mail string at issue begins with an e-mail sent on 13 December 2016 from CPT JB to MAJ CW and MAJ NB (with copies to others); the subject line is "RE: SPC Stoddard's ASB - Ch 14-12c(2) (Final CG Action). (JA at 217). On 13 December 2016 MAJ NB responded to CPT JB and MAJ CW (with copies to others). (JA at 217). On 15 February 2017 MAJ CW responded to MAJ NB, apparently amending the subject to read "panel docs," and included the language "If you could give me a call, I wanted to give you a heads up on the panel issues we are having. We have a case docketed for 6 MAR and I think CPT J is struggling to identify the panel discovery docs." (JA at 217). On 22 August 2017

MAJ CW forwarded that e-mail string to CPT CS and MAJ JM, amending the subject line to "panel docs - Guyton info." She forwarded it again to CPT JM and CPT CS on 10 November 2017, again with the subject line "panel docs - Guyton info." The military judge found as a fact in this case that trial in *Guyton* I was set for 6-10 March 2017 (JA at 508), which aligns with MAJ CW's 15 February email to MAJ NB. This e-mail string was discussed at length in this trial; it clearly related to the CMCOs in this case and no one, including trial counsel, appeared to believe that it didn't; and it is disingenuous of the government to now claim that this email involves "a case totally unrelated to appellant's." (Gov't Br. at 38).

The government next argues that the government's "quick actions" following withdrawal in *Guyton II* "demonstrate reasonable diligence," including referral under a new CMCO eight days later. Under some circumstances, eight days might seem reasonable. But in this case, the panel issues should have been apparent to the government since at least February of 2017 when MAJ CW gave MAJ NB the "heads up." The government argues also that trial counsel sent the charges to the Court the same day they were referred, and "attempted to remedy the earlier mistake" by requesting arraignment the following week "despite trial counsel's understanding that judicial delay would not count against the government's clock." (Gov't Br. 39-40). Respectfully, trial counsel's "understanding" with respect to judicial delay is not in the record. But in any

event, the military judge did conclude that "the Government is not to be lauded for this morass and is responsible for the delay associated with it." (JA at 516).

3. Appellant's demand for speedy trial was valid.

Next the government argues that the speedy trial motion was merely a subterfuge, and Appellant wasn't *really* ready for trial because he "continued to file additional motions--this indicated he was not ready to go to trial after all." (Gov't Br. at 41). Appellant filed two motions in *Guyton III*. One was a motion to compel production of witnesses. It is not clear from the record whether this was an issue in *Guyton II*, but the defense withdrew the motion in *Guyton III* because the issue had been "resolved." (R. at 17-18). The other motion, of course, was the motion to dismiss for lack of a speedy trial, which is the subject at issue in this case.

The government argues that the defense "conceded [he was not ready for trial] when he admitted on the record that they had no option from an effective representation point of view but to request a delay." (Gov't Br. at 41). What the defense counsel said was,

> Also, please take into consideration the fact that the defense was in a position where we were - - we have had no option from that effective representation point of view, but to request time to accommodate the decisions on the government to withdraw and dismiss charges in *Guyton I;* and, subsequently, withdraw charges in *Guyton II.* In order to accomplish our effective representation we have to take into consideration the witnesses that we have, the experts that have already been assigned, at that point and time, to the defense team, and to

> accommodate those schedules. So while we absolutely are holding the position that Sergeant First Class Guyton has suffered prejudice daily and continues to do so, we have an obligation to effectively represent him should this go -- continue forward to trial. And in every instance where the defense has requested that delay, it was done for those reasons, Your Honor.

(JA at 86-87). It is obvious that the defense was ready for trial in *Guyton II*, and only asked for a delay in *Guyton III* to accommodate the schedules of Appellant's counsel and experts.

4. Appellant was prejudiced by the delay.

It is true that Appellant was not incarcerated, or even restricted, but Appellant finds it odd that the government would argue that his constitutional claim fails, even in part, because "when the trial counsel attempted to serve appellant with the referred charges in *Guyton II*, they had to find him at a different location than Fort Bragg because he was with his unit conducting a training exercise." (Gov't Br. at 43). Appellant was where he was required by law to be; that's hardly "ongoing freedom" or "an absolute lack of restrictions." (Gov't Br. at 43).

Citing *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005), the government argues that administrative flags "fail to meet the prejudice prong because they are unrelated to the interests that 'the speedy trial right was designed to protect.'" (Gov't Br. at 44). *Mizgala* says nothing about "administrative flags," and the government's reading conflicts with this Court's holding in *United States*

v. Dooley, 61 M.J. 258, 264 (C.A.A.F. 2005), that 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."

The government argues that Appellant also was not prejudiced because Appellant "requested later trial dates," "considered the witnesses that we have, the experts that have already been assigned . . . and to accommodate those schedules," and claims that Appellant "picked the dates that worked best for him." (Gov't Br. at 46). This, of course, ignores that Appellant was forced to "pick" that trial date because the government was unprepared to go to trial in *Guyton II*.

C. Conclusion.

Appellant was denied the right to speedy trial under R.C.M. 707 and the Sixth Amendment. Based on the foregoing, the findings should be dismissed with prejudice.

WHEREFORE Appellant so prays.

Respectfully submitted,

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Appendix: Unpublished Case

United States v. Hill

United States Army Court of Criminal Appeals

June 23, 2016, Decided

ARMY 20130331

Reporter
2016 CCA LEXIS 407 *

UNITED STATES, Appellee v. Private (E-1) BENJAMIN C. HILL, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: On reconsideration by, Decision reached on appeal by *United States v. Hill, 2017 CCA LEXIS 430 (A.C.C.A., June 27, 2017)*

Prior History: [*1] Headquarters, III Corps and Fort Hood. Kirsten V. Brunson, Military Judge (arraignment and trial), Patricia H. Lewis, Military Judge (motion to dismiss), Colonel Stuart W. Risch, Staff Judge Advocate (pretrial), Colonel Ian G. Corey, Staff Judge Advocate (post-trial).

United States v. Hill, 71 M.J. 678, 2012 CCA LEXIS 397 (A.C.C.A., Oct. 19, 2012)

Core Terms

military, instructions, propensity evidence, confinement, sentence, defense counsel, trial counsel, arraigned, happened, charges, charged offense, balancing test, sexual contact, speedy trial, Military Rule, specification, articulated, bad-conduct, aggravated, permission, convicted, assigned, abused, finger, lasted, minute, admit, pants

Case Summary

Overview
HOLDINGS: [1]-The servicemember first averred the military judge (MJ) abused her discretion by relying on Trial Judiciary Rules of Practice before Army Courts-Martial, Rule 1.1 in her speedy trial calculations, and in the alternative, the servicemember asserted Rule 1.1 was inconsistent with R.C.M. 707(c), Manual Court-Martial. These claims by him were without merit as articulated in Hawkins; [2]-As articulated in Williams, the MJ properly informed the panel that an accused may not be convicted based on propensity evidence alone, and that Mil. R. Evid. 413, Manual Courts-Martial, evidence does not relieve the government of its burden to prove every element of every offense charged. Thus, while there may have been problems with the instructions, any error telling the panel they could not use propensity evidence to support an inference of guilt worked to the servicemember's benefit.

Outcome
The findings and sentence were correct in law and fact and were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Pretrial Proceedings

HN1[] **Courts Martial, Pretrial Proceedings**

The Trial Judiciary Rules of Practice before Army Courts-Martial, Rule 1.1, provides that any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per R.C.M. 707(c), Manual Courts-Martial, unless the judge specifies to the contrary.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Courts Martial > Evidence

HN2[] **Trial Procedures, Burdens of Proof**

As articulated in Williams, (1) an accused may not be convicted based on propensity evidence alone; and (2) Mil. R. Evid. 413, Manual Courts-Martial, evidence does not relieve the government of its burden to prove every element of every offense charged.

Counsel: For Appellant: Major Yolanda McCray Jones, JA; Captain Ryan T. Yoder, JA (on brief); Major Christopher D. Coleman, JA; Captain Ryan T. Yoder, JA (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major John K. Choike, JA; Major Matthew T. Grady (on brief).

Judges: Before MULLIGAN, HERRING, and BORGERDING[1], Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications each of violating a lawful general regulation, aggravated sexual contact, and housebreaking in violation of Articles 92, 120, and 130, Uniform Code of Military Justice, *10 U.S.C. §§ 892*, *920*, *930 (2006 & Supp. IV)*. The panel sentenced appellant to a bad-conduct discharge and confinement for two years. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge and confinement **[*2]** for one year and eleven months and credited appellant with eighty-four days of confinement against the sentence to confinement.

This case is now before us for review pursuant to *Articles 66(c)*, UCMJ. On appeal, appellant assigns four errors, two of which allege a speedy trial violation and two of which allege error in the admission of evidence pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.] 413, which merit brief discussion but no relief.[2] Additionally, appellant's matters submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)* do not merit discussion or relief.

FACTS

In the spring of 2011, appellant, Private First Class (PFC) MA, and PFC JW were assigned to a unit nicknamed "Crazy Troop" located at Contingency Operating Site (COS) Marez, Iraq. Both PFC MA and PFC JW were new to the unit. On 20 March 2011, PFC MA awoke to being held down by three individuals, including appellant, who had entered his room without his permission. Private First Class MA testified that as the individuals held him down, they pulled his pants down and one of them put his finger in PFC MA's **[*4]** anus. Private First Class MA believed it was appellant because appellant's "hand was in that area." Private First Class MA testified that he fought to get away the whole time, but could not. The incident lasted less than a minute.

Private First Class JW was PFC MA's roommate, but was on leave on 20 March 2011. Between 14 and 20 April 2011, appellant and other soldiers entered PFC MA and PFC JW's containerized housing unit (CHU) without permission. They held PFC JW down and took off his pants. Appellant "shoved multiple fingers up [PFC JW's] butt." Again, the attack lasted less than a minute. Private First Class MA witnessed the attack from his bed, but was afraid to try and stop it.

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[1] Judge Borgerding took final action in this case while on active duty.

[2] At trial, defense counsel raised a speedy trial motion arguing that appellant was placed under "restraint" as defined in Rule for Courts-Martial [hereinafter R.C.M.] 304(a)(2)-(4) when his weapon was confiscated and he and the other soldiers involved were all held in one containerized housing unit (CHU) with one escort guarding them at all times. Since this "restraint" began 3 July 2011, defense counsel argued that the R.C.M. 707 speedy trial clock ran long before arraignment, even with approved delay taken into consideration. Judge Brunson initially granted this motion and dismissed the charges with prejudice. The government gave notice they would appeal this ruling. However, Judge Brunson **[*3]** then told the parties she intended to reconsider her ruling because appellant was released from all forms of restraint on 13 August 2011 when he returned to the United States. On 27 March 2012, the government withdrew its appeal and subsequently on 28 March 2012, Judge Brunson reversed her ruling and reinstated the charges. In June 2012, Judge Lewis again dismissed the charges with prejudice ruling that Judge Brunson did not have jurisdiction to reconsider her decision because the government had filed an appeal with this court. The government then appealed Judge Lewis' decision, which this court subsequently reversed. *United States v. Hill, 71 M.J. 678 (Army Ct. Crim. App. 2012)* *pet. denied* ***United States v. Hill, 72 M.J. 159 (C.A.A.F. 2013)***. Appellant's trial took place on 25-26 March 2013.

SPEEDY TRIAL

The government preferred charges against appellant on 13 August 2011. Appellant was arraigned on 10 February 2012, or approximately 181 days later. The charges were referred on 2 December 2011 and sent to the military judge on 6 December 2011. According to the Electronic Docket Request, the government indicated it would be ready for trial on 18 January 2012 and the defense did not oppose this trial date.

It is not clear from the record why appellant was not arraigned until 10 February 2012. However, **[*5]** in his brief, appellant notes that "[t]he reason the delay does not extend from 6 December 2011 to 10 February 2012 is because the defense was not ready for trial and requested a delay until 10 February 2011 (sic), thus excluding that delay from computation in the 120 day time period." On appeal, appellant first avers the military judge abused her discretion by relying on ***HN1***[] Trial Judiciary Rules of Practice before Army Courts-Martial, Rule 1.1 in her speedy trial calculations. Rule 1.1 provides: "Any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per R.C.M. 707(c), unless the judge specifies to the contrary." In the alternative, appellant asserts Rule 1.1 is inconsistent with R.C.M. 707(c). These claims by appellant are without merit as articulated in *United States v. Hawkins, 75 M.J. 640 (Army Ct. Crim. App. 2016)*.

MILITARY RULE OF EVIDENCE 413

Prior to trial, the government filed a Motion in Limine asking the court to admit propensity evidence under Military Rule of Evidence [hereinafter Mil. R. Evid.] 413. Specifically, trial counsel asked the court to use the charged offenses of aggravated sexual contact as propensity evidence of each other. The motion provides an analysis of the *Wright* test and addresses the balancing test under Mil. R. Evid. 403. *United States v. Wright, 53 M.J. 476, 483 (C.A.A.F. 2000)*. Trial defense counsel did **[*6]** not object to this motion and the military judge then granted it with no further discussion.

During the discussion on instructions, trial counsel asked for "the 413 instruction," specifically for using the identity in one incident to prove identity in the other incident as well as the propensity instruction. Trial defense counsel did not object to this instruction

Finally, trial counsel made reference to these instructions in his closing argument, telling the panel that they did not need to "evaluate each [specification] in a vacuum . . . if you believe that one happened, even if you're not certain, but just think more likely than not that it happened, you can use that when evaluating whether or not the other one happened, and vice-versa." Trial defense counsel made no objection to this argument.

Now, on appeal, appellant complains that the military judge abused her discretion in admitting evidence pursuant to Mil. R. Evid. 413 because she did not conduct an analysis of the *Wright* factors and because she failed to do a Mil. R. Evid. 403 balancing test before admitting this evidence. He also argues the military judge erred in giving the Mil. R. Evid. 413 instruction because it was confusing and contrary to *United States v. Huddleston, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)*.

This court provided an extensive **[*7]** discussion of this exact issue in *United States v. Williams, 75 M.J. 621, 626 (Army Ct. Crim. App. 2016)*. The instructions in *Williams* are essentially identical to the instructions given here. ***HN2***[] As articulated in *Williams*, the military judge properly informed the panel that 1) an accused may not be convicted based on propensity evidence alone; and 2) that Mil. R. Evid. 413 evidence does not relieve the government of its burden to prove every element of every offense charged. *Williams, 75 M.J. at 630*, *citing* *United States v. Schroder, 65 M.J. 49, 56 (C.A.A.F. 2007)*. Thus, as in *Williams*, while there may be problems with these instructions, any error telling the panel they could not use propensity evidence to support an inference of guilt worked to the benefit of appellant and was not prejudicial. *Williams, 75 M.J. at 630*; see also *Barnes, 74 M.J. at 701*.

CONCLUSION

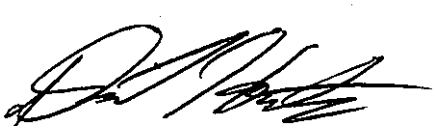
The findings and sentence are correct in law and fact and are AFFIRMED.

End of Document

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 6,933 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 with the Court and Government Appellate Division on June 22, 2021.

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