**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **U N I T E D S T A T E S,** | ) | **Misc. Dkt. No. 2010-15** |
| **Appellant** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Airman Basic (E-1)** | ) | |
| **STEVEN A. DANYLO,** | ) | |
| **USAF,** | ) | |
| **Appellee** | ) | **Panel No. 2** |

ORR, Senior Judge:

On 20 September 2010, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure.

The appellee was charged with one specification each of wrongful use of marijuana and cocaine, both on divers occasions, one specification each of wrongful distribution of marijuana and cocaine, both on divers occasions, and one specification of wrongful introduction of marijuana onto a military installation, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge in this case dismissed the charges and specifications without prejudice because he found that the government violated Rule for Courts-Martial (R.C.M.) 707. Additionally, the military judge found a denial of a speedy trial under Article 10, UCMJ, 10 U.S.C. § 810, and dismissed the charges and specifications with prejudice. The government has brought a timely appeal of his rulings to this Court under Article 62, UCMJ.

*Background*

The general court-martial of Airman Basic Danylo began on 10 August 2010 at Sheppard Air Force Base (AFB), Texas. After arraignment, the appellee's trial defense counsel made a motion to dismiss the charges and specifications, claiming a denial of a speedy trial under Article 10, UCMJ, a violation of R.C.M. 707, and a violation of the Sixth Amendment of the Constitution of the United States. The military judge granted the motion with respect to Article 10, UCMJ, and R.C.M. 707, and dismissed the charges and specifications with prejudice.

The military judge authenticated the proceedings on 12 August 2010. On the morning of 13 August 2010, the trial counsel asked the military judge to reconsider his earlier decision to dismiss the charges with prejudice. In accordance with R.C.M. 908, the trial counsel notified the military judge of the government's intent to appeal his decision under Article 62, UCMJ, later that same day. On 17 August 2010, the appellee's trial defense counsel submitted his reply asserting that the trial judge lacked jurisdiction to reconsider his decision because the government had already filed an appeal. He argued that jurisdiction now belonged solely with this Court. The military judge was not persuaded by this argument and agreed to reconsider the motion to dismiss. On 23 August 2010, the military judge conducted an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session and trial counsel presented evidence to further explain the delays in the case. The military judge again ruled that the government violated R.C.M. 707(d) and dismissed the charges without prejudice. He also ruled that the government denied the appellant a speedy trial in violation of Article 10, UCMJ, and dismissed the charges with prejudice.

The government filed a timely appeal and it is now properly before us for decision. In their first assignment of error, the government asserts that the military judge erred by granting the appellee's motion to dismiss based on a denial of his right to a speedy trial under Article 10, UCMJ. In response, the appellee avers that this Court may not consider the evidence presented during the government's motion to reconsider because this Court does not have jurisdiction to consider that evidence. In a second assignment of error, the government contends that the military judge erred in his ruling dismissing the charges and specifications on R.C.M. 707 grounds when appellee's administrative placement in Transition Flight at Sheppard AFB after repeated misconduct did not qualify as "arrest" pursuant to R.C.M. 304(e). We heard oral argument on the appeal on 20 January 2011. While we generally accept the military judge's essential findings of fact, we disagree with his legal conclusions.[1] We hold there was no speedy trial violation under Article 10, UCMJ, nor a violation of R.C.M. 707(d) and set aside the dismissal of the charges and specifications.

*Jurisdiction and Scope of Review*

The United States may appeal an order or "ruling of the military judge which terminates the proceedings with respect to a charge or specification" in cases in which a punitive discharge may be adjudged. Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A). Each of the dismissed specifications in this case carries a maximum punishment that includes a punitive discharge. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶¶ 37.e.(1)(a)-(b), 37.e.(2)(a), 54.e.(2) (2008 ed.).

Despite our fact-finding powers under Article 66(c), UCMJ, 10 U.S.C. § 866(c), in ruling on issues under Article 62, UCMJ, we "may act only with respect to matters of law." Article 62(b), UCMJ, 10 U.S.C. § 862(b). On matters of fact, we are bound by the

[1] The military judge's findings of fact and his case chronology appear in the Appendix at the end of this opinion.

military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985). *See, e.g.*, *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989) (affirming the Coast Guard Court of Military Review's reversal of the trial judge's ruling suppressing evidence and remanding the case to determine if the technical violations rendered accused's urinalysis unreliable as a matter of fact). "Nonetheless, in entering a finding of fact, the military judge must rely on evidence of record which fairly supports that finding; in the absence of *any* such evidence, the finding is error as a matter of law." *United States v. Bradford*, 25 M.J. 181, 184 (C.M.A. 1987). "The courts may make a *de novo* ad hoc judgment on the meaning of relevant facts when dealing with constitutional issues." 2 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 25-83.00 at 556 (2d ed.1999) (citing *United States v. Abell*, 23 M.J. 99, 102-03 (C.M.A. 1986)). "Similarly, the appellate courts normally should have the power to reverse when the trial judge misunderstood the legal significance of a fact found by the judge when that misunderstanding causes an error as to the court's ultimate finding." *Id.* (citing *United States v. Shakur*, 817 F.2d 189 (2d Cir. 1987)).

*Article 10, UCMJ, Speedy Trial Analysis*

As previously stated, the government asserts that the military judge erred by granting the appellee's motion to dismiss based on a denial of his right to a speedy trial under Article 10, UCMJ. We agree.

Article 10, UCMJ, states:

> Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

The question of whether an accused has received a speedy trial is a question of law that is reviewed de novo. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). "The military judge's findings of fact are given 'substantial deference and will be reversed only for clear error.'" *Id.* at 465 (citing *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995) (quoting *United States v. Taylor*, 487 U.S. 326, 337 (1988)), *vacated on other grounds by* 516 U.S. 802 (1995) (mem.)). In reviewing claims of a denial of a speedy trial under Article 10, UCMJ, constant motion is not demanded, rather the government must use "reasonable diligence in bringing the charges to trial." *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.A.A.F. 1965)). Brief inactivity in an otherwise active prosecution is

not unreasonable or oppressive. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (quoting *Tibbs*, 35 C.M.R. at 325).

Although Article 10, UCMJ, creates a more stringent speedy trial standard than the Sixth Amendment, our superior court has instructed, "the factors from *Barker v. Wingo*[, 407 U.S. 514 (1972),] are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala*, 61 M.J. at 127 (citing *United States v. Cooper*, 58 M.J. 54, 61 (C.A.A.F. 2003); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)). Those factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appell[ee] made a demand for a speedy trial; and (4) prejudice to the appell[ee]." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530). The Supreme Court pointed out that the four factors are related and must be considered together with other relevant circumstances in the "difficult and sensitive balancing process." *Barker*, 407 U.S. at 533. We believe that the "other relevant circumstances" include circumstances unique to the military, which include the requirements of Article 10, UCMJ.

In applying these factors, we note the following findings of fact made by the military judge. First, the appellee went into Transition Flight on 9 April 2010 and on 10 April 2010, the appellee's status in Transition Flight was reduced to "Condition 1." Next, on 16 April 2010, the appellee was ordered into pretrial confinement based upon allegations that he committed an assault and communicated a threat. On 3 May 2010, the appellee submitted a demand for a speedy trial. The appellee was arraigned on 10 August 2010, a total of 121 days after the military judge determined that the speedy trial clock began.

Given the fact that both sides agree that the appellee was in pretrial confinement for at least 116 days and made a demand for a speedy trial, we consider both of these factors favorable to the appellee's assertion of an Article 10, UCMJ, violation. We now address the two remaining *Barker* factors in turn. We first discuss the issue of prejudice to the appellee as a result of the delay. The Supreme Court has identified the following appellee's interests which must be considered when testing for prejudice in the speedy trial context:

> (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 (footnote omitted), *quoted in Mizgala*, 61 M.J. at 129. In his decision, the military judge specifically found there was no loss of evidence or impact on case preparation to the defense as a result of the pretrial delay. He found that the appellee suffered no obvious prejudice aside from his anxiety awaiting trial while confined. He

determined that the prejudice suffered by the appellee was minor. We agree.

We now turn to the remaining *Barker* factor which is the reasons for the delay. The military judge held that the trial counsel failed to show the government acted with reasonable diligence. He stated:

> Nearly every action on the part of the Government in processing this case results in an inexplicable period of inaction. There were no complex issues present in this case, no issues of trial counsel hand-off, no difficult scientific evidence, and no unexplained contingencies out of the Government's control. The inactivity is short, yet frequent, and typically unexplained.

He further described the government's processing of the case as "inattentive at best, incompetent at worst."

The military judge primarily focused on the time periods between when the appellee entered into pretrial confinement until the time charges were preferred and the time period from preferral to referral in concluding that Article 10, UCMJ, was violated. While we generally accept the judge's findings of fact, we hold the judge was incorrect in concluding from his findings of fact that there was insufficient evidence to show that the government acted with reasonable diligence. As our superior court noted in *United States v. Cossio*, 64 M.J. 254 (C.A.A.F. 2007), the military judge must be "careful to restrict findings of fact to things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequence, or interpretation.'" *Id.* at 257.

In this case, we believe the government took the immediate steps required by Article 10, UCMJ. The requirement that "immediate steps shall be taken" does not mean the government must bring court-martial charges against a member being held in pretrial confinement before collecting the evidence to conduct a successful prosecution. Nor does it mean that investigators and prosecutors must busy themselves with case preparation while they are waiting for the evidence necessary to understand the case. "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Tibbs*, 35 C.M.R. at 325.

After placing the accused in pretrial confinement, the government took steps to investigate allegations of additional misconduct by the appellee that occurred while he was in Transition Flight. Additionally, the government convened a pretrial confinement review hearing and prepared the charges to inform the appellee of the specific wrongs of which he was accused. The evidence was sent to higher headquarters for review prior to preferral. Next, they worked to provide defense counsel discovery materials, discussed a possible pretrial agreement and when the negotiations broke down, they arranged for the Article 32, 10 U.S.C. § 832, UCMJ, hearing. Because the potential charges involved four other Airmen, the government's initial strategy was to work with their respective defense

counsel to seek their clients' cooperation to testify against the appellee. After all four of the other defense counsel informed the government that their clients would not testify without immunity, the government altered their strategy and took immediate steps to obtain immunity for the other witnesses. After interviewing the immunized witnesses, the government and the appellee's defense counsel participated in a docketing conference and the government ready date was 9 August 2010. The appellee's defense counsel stated that they would be ready to proceed on 10 August 2010 and the trial was set for 10 August 2010 without an exclusion of time under R.C.M. 707.

The parties successfully negotiated and signed a pretrial agreement on 6 August 2010 and the appellee was arraigned on 10 August 2010, the day defense counsel stated they would be ready. Ironically, 10 August 2010 was the 121st day after the appellee's defense counsel argued that the speedy trial clock started. However, the right to speedy trial is a shield, not a sword. *Cf. United States v. Cherok*, 22 M.J. 438, 440 (C.M.A. 1986); *Burris*, 21 M.J. at 144. An accused cannot be responsible for or agreeable to a delay and then turn around and demand dismissal for that same delay. Under the circumstances in this case, the military judge erred in holding the government failed to act with reasonable diligence during the period from 10 April through 9 August 2010.

After a thorough review of the case law, the record of trial, the military judge's findings of fact and conclusions of law, oral arguments, and the briefs from both the appellant and appellee, we conclude that, as a matter of law, the government acted with reasonable diligence and the appellee was not denied his Article 10, UCMJ, right to a speedy trial. We are cognizant of the fact that the appellee is in pretrial confinement and the parties have asked for expedited review. Given the amount of evidence presented in the Article 39(a), UCMJ, hearing on 10 August 2010, we were able to reach our determination without considering the government evidence presented in the motion to reconsider. As a result, we leave the discussion of whether this Court has jurisdiction to consider the evidence presented in the motion to reconsider for another day.

*R.C.M. 707 Speedy Trial Analysis*

The government contends that the military judge erred when he dismissed the charges and specifications without prejudice because he found that the government violated R.C.M. 707. The Rule states: "The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) Entry upon active duty under R.C.M. 204." R.C.M. 707(a). We focus our analysis on whether the government imposed restraint under R.C.M. 304 because the appellee is not a member of a reserve component as is required by R.C.M. 204 and he was arraigned 52 days after the preferral of charges. The military judge determined that the restrictions the government imposed in Transition Flight "Condition 1" at Sheppard AFB amounted to arrest as defined in R.C.M. 304(a)(4). When he combined the number of days the appellee spent in "Condition 1" with the 116 days the

appellee spent in pretrial confinement, the military judge concluded that the government had failed to comply with the 120-day speedy trial rule.

At trial, the appellee through counsel asserted that the overly rigorous conditions he experienced as a member of Transition Flight did not serve a legitimate, non-punitive purpose and amounted to restriction tantamount to confinement. These conditions included not being allowed base liberty without an escort, being essentially locked down in the Transition Flight building and denied access to personal items. As a result, the appellee argued that these conditions served as a basis to trigger the R.C.M. 707 speedy trial clock. In response, the trial counsel argued that the conditions for members entering Transition Flight are almost identical to those members entering Phase I training. Additionally, he averred that the purpose of Transition Flight is to maintain good order and discipline in the Military Training Facility by segregating those members who may cause disciplinary problems.

The military judge specifically found that Transition Flight was designed to house Airmen who are designated a disciplinary problem or disruptive to their units. He determined that Condition 3 basically met the stated goal of maintaining good order and discipline, and is a condition on liberty that does not affect the speedy trial clock. Conversely, he found that Condition 1 is dissimilar to technical training school scenarios because it is far more restrictive than the training flights. After making findings of fact, the military judge granted the motion finding that the conditions imposed upon the appellee in Condition 1 amounted to "arrest" as defined in R.C.M. 304(a)(3). Accordingly, he determined that pretrial restraint began on 10 April 2010.

"We review de novo the ultimate legal question of whether certain pretrial restrictions are tantamount to confinement." *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citing *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989)). "If the level of restraint falls so close to the 'confinement' end of the spectrum as to be tantamount thereto, an appellant is entitled to appropriate and meaningful administrative credit against his sentence." *United States v. Smith*, 20 M.J. 528, 531 (A.C.M.R. 1985).

R.C.M. 304(a)(3) defines arrest as:

> [T]he restraint of a person by oral or written order not imposed as punishment directing a person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms.

R.C.M. 304(h) provides that, "Nothing in this rule prohibits limitations . . . for operational or other military purposes independent of military justice, including administrative hold or medical reasons."

In conducting our review of the conditions of restriction, we look to the totality of the conditions imposed. *Smith*, 20 M.J. at 530. In *King*, our superior court outlined the factors to consider in determining whether restrictions are tantamount to confinement, to include:

> [T]he nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

*King*, 58 M.J. at 113 (second alteration in original) (quoting *Smith*, 20 M.J. at 531-32).

Additionally, we considered the stated operational purpose of Transition Flight at Sheppard AFB. Specifically, Air Education and Training Command Instruction (AETCI) 36-2216, *Administration of Military Standards and Discipline Training*, ¶ 23.1 (17 Jun 2004), states, "Technical training NPS [Nonprior service] Airmen who are discipline problems will be segregated from the MTF [military training flight], pending a discharge or court martial [sic], to prevent a negative influence on the morale and discipline of other Airmen.

After reviewing the record before us, and considering the nature and scope of the appellee's pretrial restriction and the conditions imposed upon him, the military judge's findings of fact are not clearly erroneous. However, we disagree with his conclusions of law. Even after accepting the fact that the appellee was denied privileges at times, his pretrial restriction was not an "arrest" as defined in R.C.M. 304(a)(3). Considering his presence on an installation devoted almost exclusively to training new Airmen, we find the conditions imposed on the appellee and others in Transition Flight were necessary in that environment to maintain good order and discipline on the installation and amongst Airmen awaiting separation from the Air Force. The conditions the appellee experienced upon his entry into Transition Flight on a military training installation in this case are most akin to conditions on liberty under R.C.M. 304(a)(1) or a form of administrative restraint under R.C.M. 304(h) imposed for operational purposes independent of military justice. To decide otherwise, we would have to ignore the stated operational purposes of Transition Flight and place our judgment above the expertise of the commanders tasked

with the responsibility of training new Airmen. In this case, we conclude the appellee's placement in Transition Flight did not constitute an arrest or restriction in lieu of arrest. Accordingly, the R.C.M. 707 120-day speedy trial clock was not triggered until 16 April 2010, when the appellee was placed in pretrial confinement. Because the appellee was arraigned on 10 August 2010, he was not denied his right to a speedy trial in violation of R.C.M. 707.

*Conclusion*

We hold there was no violation of speedy trial in this case under Article 10, UCMJ, R.C.M. 707, or under the Sixth Amendment of the Constitution of the United States. The decision of the military judge dismissing the charges and specifications with prejudice for a violation of speedy trial under Article 10, UCMJ, is set aside. The decision of the military judge dismissing the charges and specifications without prejudice for a violation of speedy trial under R.C.M. 707 is also set aside and the case is remanded to the trial court for further proceedings.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 9th day of March, 2011,

**ORDERED:**

That the United States Appeal Under Article 62, UCMJ, is hereby **GRANTED**.

Chief Judge BRAND and Judge WEISS concur.

FOR THE COURT

OFFICIAL


STEVEN LUCAS
Clerk of the Court

# APPENDIX

## Military Judge's Findings of Fact and Case Chronology

**DEPARTMENT OF THE AIR FORCE**
**UNITED STATES AIR FORCE TRIAL JUDICIARY**

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| UNITED STATES | ) | |
| | ) | Findings and Conclusions re: |
| v. | ) | Defense Motion to Dismiss |
| | ) | for Speedy Trial Rights |
| AB STEVEN A. DANYLO II | ) | Violation |
| 362d Training Squadron (AETC) | ) | |
| Sheppard AFB, TX | ) | 10 August 2010 |

The Defense requested the Court dismiss with prejudice all charges and specifications pursuant to RCM 707, Article 10, UCMJ, and the Sixth Amendment of the Constitution of the United States. After considering all of the evidence and testimony presented by the parties and the arguments of counsel, the Court finds and concludes by a preponderance of evidence the following:

**FACTUAL FINDINGS**

1. On 12 March 2010, the Accused submitted a urine sample which tested positive for THC on 26 March 2010. That same day, the Accused was questioned in regards to the positive sample.

2. That same day, the Accused was ordered to wear his military uniform at all times and was required to check in with military training leaders every half hour during the duty day and every hour after duty hours until he went to sleep. These conditions were implemented for accountability reasons of the command.

3. On 9 April 2010, the Accused was transferred to "Transition Flight" at Sheppard AFB, TX. This order came from the Accused's commander, Lt Col James F. Mullin, 362d TRS/CC, because AB Danylo was pending investigation of alleged drug use.

4. Transition Flight is designed to house Airmen who are designated a disciplinary problem or disruptive to their units.

5. After assignment to Transition Flight, or "T-Flight," the Accused was placed in "Condition 3," the most lenient "condition" stage of T-Flight. Under "Condition 3," Accused was restricted to the limits of Sheppard AFB, Texas, was prohibited from using tobacco and alcohol, sitting or laying on his bed from 0600 – 1800, visiting the community center, clubs, swimming pools and bowling alleys. Dormitory rooms at T-Flight were subject to inspection at any time and members were required to sign in- and out-of the T-Flight dormitory. Condition 3 allowed BX, commissary, and base theater access with prior flight chief approval. Cell phones were authorized at any time after duty hours and weekends within the dormitory and use of personal electronic devices such as MP3 players, DVD players, etc. were allowed.

6. While in T-Flight, members were given a handbook to explain what is expected of them. Members are also given a briefing as to the rules expected of them. Failure to abide by these rules could result in loss of some privileges or disciplinary action. The personnel who ran T-Flight were not security forces personnel and they did not have a lot of experience in dealing with such a disciplinary environment.

7. T-Flight is dissimilar to tech school training scenarios because it is far more restrictive than the training flights. According to one witness, SSgt Herrera, T-Flight is "locked down" so that movement to, from, and within T-Flight is strictly controlled. A total of 29 cameras monitor T-Flight by a desk NCO at a control desk at all times, day or night. Dormitory doors are not allowed to be closed by residents. T-Flight members are not expected to return to duty and are all pending disciplinary action in the form of trial or ultimately administrative separation. A charge of quarters also periodically checks on Airmen throughout the night during sleep times.

8. On Saturday, 10 April 2010, the Accused's status in T-Flight was reduced to "Condition 1." Although testimony was somewhat equivocal on this date, the government's witness clarified that she was fairly certain that the Accused was reduced to "condition 1" on this date. In "Condition 1," according to official guidance, all base liberties are "restricted: Only Chapel, military appointments, 1 trip to mini-mall per week, 1 trip to library per week" are permitted. In addition, escorts are required at all times when an Airman leaves T-Flight dormitory, including meals. T-Flight members are expected to march to and from meals. Cell phones are only authorized until 2100 hours after duty hours or weekends. No electronic devices are permitted of T-Flight members in "Condition 1." Doors may be removed from dormitory rooms of Airmen in "Condition 1" but no evidence was presented indicating that the Accused's door was removed. In addition, a curfew was in effect from 2200 until 0530 Monday through Friday where Airmen are required to be in their assigned rooms. During this time, the Accused was not allowed any personal visitors. The Accused was prohibited from engaging in any unit events and was prohibited from sitting or laying on any bed in the facility between 0600 and 2000 hours, Monday through Friday and 0700 – 1930 on the weekends.

9. On or about 12 April 2010, AB Danylo shoved AB Hansknecht, another individual assigned to T-Flight, on the body with his hands.

10. On 15 April 2010, the AFOSI Report of Investigation into the Accused's drug use was complete, facts which are reflected in Charge I and its specifications.

11. On 16 April 2010, the Report of Investigation into the facts surrounding the Accused's conduct forming the basis of Charges II and III was completed.

12. On or about 16 April 2010, after other members of T-Flight stated the Accused had assaulted and communicated a threat, the Accused was ordered by his commander into pretrial confinement at the Wichita County Jail Annex.

13. A Pretrial Confinement reviewing officer was not notified until 1640 hours on 19 April 2010.

14. A pretrial confinement review hearing was conducted three days later on 22 April 2010 by Lt Col Bridget C. Gregory, the Pretrial Confinement Review Officer. After sworn statements presented and documents were produced as evidence in the hearing, Lt Col Gregory found that the Accused had committed drug offenses as well as a subsequent assault while in T-Flight. Lt Col Gregory further found that lesser forms of restraint had been inadequate and that there was a foreseeable risk that the Accused would engage in serious criminal misconduct that could threaten not only the Sheppard AFB community, but also the good order, discipline, and readiness of the Sheppard mission.

15. On 3 May 2010, the Accused submitted a demand for speedy trial to 82 TRW/CC through the 82 TRW/JA requesting immediate steps be taken to inform the Accused of the specific wrong of which he was accused and try him or release him.

16. On 4 May 2010, the Accused was transferred from the Wichita County Jail Annex to the Kirtland AFB, NM Regional Military Confinement Facility.

17. On 5 May 2010, trial counsel updated the charges against the Accused and began routing to his chief of military justice at the legal office.

18. On 10 May 2010, the defense sent a discovery request to the government.

19. On 12 May 2010, the trial counsel routed charges for approval by numbered air force.

20. Eight days later, on 20 May 2010, the 82 TRW legal office provided a copy of the draft charges to the Accused's counsel.

21. On 26 May 2010, the 82 TRW legal office requested senior trial counsel support on case.

22. On 27 May 2010, additional discovery was sent to the defense. The Defense asked the Government whether Accused's interview was recorded and if so, to provide a copy of the recording.

23. On 31 May 2010, the Government informed the defense that no recording existed.

24. On 4 June 2010, the Government interviewed a witness to alleged assault allegation.

25. On 12 June 2010, the Government decided to pursue immunity for witnesses against Accused.

26. On 14 June 2010, the 82 TRW legal office contacted Defense and notified him that the Article 32 Investigation hearing was scheduled for the week of 28 June 2010.

27. On 23 June 2010, an Article 32 investigating officer was appointed and the government interviewed a second witness, Detective Burks.

28. On 28 June 2010, an Article 32 Investigation hearing was held. On 1 July 2010, the investigating officer completed the report recommending all charges to be referred to trial by general court-martial without change.

29. On 6 July 2010, the Article 32 report was sent to the Defense.

30. On 8 July 2010, the referral package was sent to the numbered air force along with immunity letters.

31. On 19 July 2010, all charges were referred to trial by general court-martial by the convening authority.

32. On 20 July 2010, immunity letters were received back from the numbered air force.

33. On 23 July 2010, referral documents signed four days prior are received by the legal office.

34. On 26 July 2010, the referred charges were served on the Accused.

35. At a docketing conference held on 30 July 2010, the Government indicated a case ready date of 9 August 2010.

36. On 2 August 2010, the Government interviewed three witnesses to be used in the case against the Accused.

37. On 4 August 2010, another witness was contacted but initially refused to answer under a grant of immunity without prior discussion with his counsel.

38. There were at least three other cases tried by court-martial since the Accused's entry into pretrial confinement by the Sheppard legal office, none of which included pretrial restraint on the part of an accused.

## CONCLUSIONS OF LAW

39. The Defense alleges a speedy trial violation under RCM 707, Article 10, UCMJ, and the Sixth Amendment.

### RCM 707

40. RCM 707(a) provides that: the accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges; (2) the imposition of restraint under RCM 304(a)(2)-(4); or (3) entry onto active duty under RCM 204. In determining whether

an accused has been brought to trial within 120 days of the imposition of restraint, the military judge must first determine whether there was an imposition of restraint.

41. The remedy for failure to comply with the right to a speedy trial under RCM 707(a) is dismissal of the affected charges with or without prejudice. Charges must be dismissed with prejudice if the accused has been deprived of his constitutional right to a speedy trial. In other cases, the court shall consider, among other factors, the seriousness of the offense, the facts and circumstances of the case that lead to dismissal, the impact of a re-prosecution on the administration of justice and any prejudice to the accused resulting from the denial of a speedy trial in determining whether to dismiss charges with or without prejudice (RCM 707(d)).

42. The Defense has properly raised the speedy trial issues, therefore the Government has the burden of proving by a preponderance of the evidence that there was no denial of a speedy trial. RCM 905(c)(1) and (2)(B).

43. The Defense contends the RCM 707 clock was triggered upon the Accused's entry into T-Flight on 9 April 2010 in "Condition 3" status. The Defense argues the Accused's assignment to T-Flight constituted conditions that were tantamount to confinement. Specifically, they categorize the environment as restriction in lieu of arrest under RCM 304(a)(2). As such, they request the Court to start the RCM 707 speedy trial clock on 9 April 2010 and continue it to arraignment.

44. The court disagrees that the Accused's mere assignment to T-Flight on 9 April 2010 constituted restriction in lieu of arrest. During assignment to T-Flight, the Accused was limited to the confines of Sheppard AFB, but was given full access to the installation to include the exchange, commissary, and theater with permission of the flight chief. In addition, no escort was required to attend with the Accused to these locations if they occurred. The Accused was allowed to have a significant amount of freedom of movement and activity, despite the greater control over his location by virtue of the government's need to account for him. This case is akin to those instances where off-base pass is denied an individual which rises to the level of a condition on liberty that does not affect the speedy trial clock. *See United States v. Wilkinson*, 27 M.J. 745 (A.C.M.R. 1988).

45. RCM 304(a)(3) states that an "arrest" which triggers the R.C.M. 707 120-day rule is the restraint of a person by oral or written order not imposed as punishment directing the person to remain within specified limits. When under "arrest," the individual is suspended from performing full military duties and typically performs ordinary cleaning or taking part in routine training and duties.

46. On 10 April 2010, Accused was placed into "Condition 1" while in T-Flight. While in this status, Accused was restricted not only to the confines of Sheppard AFB, but to the T-Flight dormitory itself. Any departure from the dormitory was unauthorized unless it involved an official appointment or one of the approved movements per the Phase A Condition Table found in the attachment to Appellate Exhibit A (1 trip to

mini-mall per week, 1 trip to library per week, meals). Even so, the trip had to be accompanied by escort with sign-in and sign-out requirements. Strict curfews were in effect, no sitting or lying on beds was allowed prior to "sleep" times and no electronic devices of any type were allowed except for a few hours of personal cell phone usage which would still be conducted under observation. No visitors were allowed, though family visitors who traveled from far distances may be allowed to visit with those in T-Flight, Condition 1, determined on a case-by-case basis.

47. RCM 304(a)(3) states that an "arrest" which triggers the R.C.M. 707 120-day rule is the restraint of a person by oral or written order not imposed as punishment directing the person to remain within specified limits. When under "arrest," the individual is suspended from performing full military duties and typically performs ordinary cleaning or taking part in routine training and duties.

48. This court finds that the conditions in T-Flight starting on 10 April 2010 rise to the level of arrest under RCM 304(a)(3). The Defense citation of *U.S. v. Murr*, 2007 WL 1245946 is particularly instructive on this matter. There, although determining the issue of pretrial confinement credit, the facts are quite similar to those in this case. In looking at such a case, the totality of the circumstances must be taken into account. Factors to consider are the nature of the restraint (moral or physical); the area or scope of the restraint; the types of duties, if any, performed during the restraint; and the degree of privacy enjoyed during the restraint. Other factors of consideration are whether the Accused was required to sign-in and out with some supervising authority; whether a charge of quarters periodically checked on the Accused; whether escorts were armed or unarmed; to what degree visitation was allowed; what support facilities were available to the Accused; the sleeping arrangements; and whether private property was allowed to be kept.

49. In this case, it is clear that the Accused was clearly under an arrest-type setting. His restraint was physical in nature, with the confines of the dormitory being his limits and with "common areas" as his only other avenue of freedom. The Accused enjoyed virtually no privacy, with regular and unscheduled inspections being the norm, without having the benefit of being alone (or even sitting on his bed) alone during the daylight hours. Every location in the facility except the bathrooms and dormitory rooms were under surveillance, with the dormitory room doors required to be open during the day. The Accused performed only "details" during his time or physical conditioning. It was clear from the witness testimony that the Accused was required to be in the dormitory at all times and on those rare occasions when he was out of the dormitory, strict sign-in and sign-out logs were maintained for the T-Flight members and their escorts. The escorts were unarmed and not trained Security Forces personnel, but misconduct on the part of the T-Flight member could subject the escort to privilege revocations. All personal visitation of the Accused by friends was forbidden, with the only authorized visitation allowed was from the Accused's chain of command. Although the Accused could go to the chapel and military appointments under escort after signing-out, he was forbidden from visiting any base facilities except for 1-per-week visits of the mini-mall and library. Sleeping

arrangements were not specifically testified to during the motion, but it was clear that frequent checks on sleeping T-Flight members were normal. Finally, the Accused was not allowed to keep any private property of any kind, to include his personal clothing or personal vehicle keys, which were confiscated, inventoried, and locked away.

50. The Government has cited *U.S. v. Glaze*, 2009 WL 2997009, as controlling case law in this hearing. There, an Accused's conditions in T-Flight at Sheppard AFB were not found to be tantamount to confinement. This court distinguishes the facts in issue here by pointing out that the individual in the *Glaze* case was allowed base liberty with an escort. In essence, the Accused in that case was allowed free access to all base recreational and quality of life facilities so long as an escort was provided. Here, the Accused is in a "lockdown" status, with no ability to come or go as he pleases, with or without an escort. Even on those once-per-week occasions when a trip to the mini-mall or library is authorized, it is under strict supervision of an escort. The conditions of liberty lost by the Accused in this case appears to be far more onerous than those reported in the *Glaze* case and as such, does not control this court's ruling.

51. Based upon this court's ruling that the Accused's conditions in T-Flight while in "Condition 1" amounted to arrest as defined in R.C.M. 304(a)(3), pretrial restraint occurred on 10 April 2010 for purposes of calculating restraint under RCM 707(b). Accordingly, based on the first day of credit being 11 April 2010, through date of arraignment, the Accused is to be credited with 122 days of pretrial restraint.

52. Pursuant to R.C.M. 707(d), the government has failed to comply with the requirements of the rule and dismissal of the affected charges is required. The dismissal can be with or without prejudice based upon weighing the following factors: 1) Seriousness of the offense, 2) Acts and circumstances that lead to dismissal, 3) Impact of re-prosecution, and 4) Any prejudice to the accused...." RCM 707(d). *United States v. Bray*, 52 MJ 659, 663 (AFCCA 2000).

53. The offenses in this case are serious insofar as they allege a variety of drug use and introduction charges. In addition, Charge 2 alleges a physical assault and battery upon another Airman. The circumstances that lead to this dismissal were not clear to the government in that they clearly believed that the speedy trial clock started upon imposition of pretrial confinement. Nonetheless, their conduct in processing this case was inattentive at best, incompetent at worst. Their lack of progress was not wholly intentional, but rather resulted from a lack of effort placed in trying the Accused in a timely manner. The impact of re-prosecution will have little effect on the ability to try or defend the charges, but it would impact the Accused's status while sitting in pretrial confinement for an even longer period of time. Witnesses should be readily available and no victims have been shown to be awaiting justice that would be negatively impacted. Finally, although the Defense has attempted to show prejudice to the Accused's case, all claims were purely speculative. No evidence would be spoiled due to a re-prosecution and no witnesses would be unavailable for trial. Although the Accused has clearly suffered some anxiety while waiting for this trial in

pretrial confinement, such anxiety is not uncommon or of a condition that would lead this court to believe his case would be significantly worse off upon re-prosecution.

54. Based upon the above-factors, this court rules that in the interest of justice, on the basis of an R.C.M. 707 analysis, the charges shall be dismissed without prejudice. However, further inquiry into dismissal with prejudice under Article 10, UCMJ, is discussed below.

**ARTICLE 10, UCMJ**

55. Article 10, UCMJ states: "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

56. *US v. Mizgala*, 61 MJ 122 (CAAF 2005) discusses the issue where an accused is incarcerated pending disposition of charges under the UCMJ, Congress has placed the onus on the Government to take "immediate steps" to move that case to trial. Further, it should be noted that delays under Article 10 cannot be condoned if the accused is in arrest or confinement.

57. The U.S. Court of Military Appeals abrogated the old Burton/Driver bright-line, "90-day rule in *United States v. Kossman*, 38 MJ 258 (CMA 1993). There, the court announced the standard for measuring compliance with Article 10 is "reasonable diligence." The Court said, "where it is established that the Government could readily have gone to trial much sooner than some arbitrarily selected time demarcation, but negligently or spitefully chose not to do so, we think an Article 10 motion would lie." *Kossman* at 261. Citing *United States v. Tibbs*, 35 CMR 322, 325 (CMA 1995), the Court also made clear that "the touch stone [for measuring compliance with Article 10] is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."

58. Assessing a speedy trial violation under the Sixth Amendment in conjunction with an Article 10 violation is instructive because it involves balancing the four factors enunciated by the United States Supreme Court in *Barker v. Wingo*. "Although Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10 violation, the factors from *Barker v. Wingo* are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *United States v. Mizgala*, 61 MJ 122, 128 (2005). An Article 10 analysis is stricter and also involves a review of the proceeding as a whole; the key is expedition not speed. *Mizgala* at 130.

59. The Court finds the Government did not act with reasonable diligence. The Government has repeatedly pointed to the fact that the delays in this case were relatively short and none appear to be obviously egregious. However, this court finds

that the lack of long periods of inactivity processing this case is less persuasive that the sheer number of short spans with little to no action towards moving forward. Nearly every action on the part of the Government in processing this case results in an inexplicable period of inaction. There were no complex issues present in this case, no issues of trial counsel hand-off, no difficult scientific evidence, and no unexplained contingencies out of the Government's control.

60. The inactivity is short, yet frequent, and typically unexplained. For example, the Accused was placed into T-Flight, "Condition 1" on 10 April 2010 and the reports of investigation dealing with all evidence in these cases were available to the Government on 16 April 2010. At that point, the Accused was placed into pretrial confinement to await an impending court date that would not occur for nearly four months. This court finds no reason why the Government at that point could not have begun to draft charges and proof analysis, arrange for witness testimony, and in the case(s) of certain witnesses, undertake obtaining immunity for the witnesses.

61. It took the Government two full days to appoint a pretrial confinement review officer and another three days to hold the pretrial confinement hearing. At this point, the Accused had been in pretrial confinement for just six days without a hearing and waited another day before the report was issued. No witnesses were interviewed and no charges had been drafted, despite the fact that the nature of the offenses were presented for the pretrial confinement officer.

62. A full 13 days elapsed while the Accused was in pretrial confinement before the Government "began working on charges and proof analysis" on 29 April 2010. No explanation for this time period is given, particularly in light of the fact that the Government had all the reports, knew of their evidence, and should have known exactly what charges the Accused would be facing. Of note, despite "working on" the charges, the Government would not actually route a draft of these same charges for in-house review by the Chief of Military Justice until another 6 days later.

63. In the interim period, the Accused demanded speedy trial on 3 May 2010. No response was given by the government to either draft charges or to move the case along when Defense submitted a discovery request on 10 May 2010.

64. Five days after the draft charges were sent to the legal office's Chief of Military Justice, the charges were routed to the numbered air force on 12 May.

65. It wasn't until another 8 days elapsed on 20 May 2010 that the Government finally sent the Defense draft charges against the Accused, a full 34 days after the accused was sent to pretrial confinement.

66. There was apparently no movement to bring the Accused to trial for another six days until 26 May 2010, when the legal office sent an electronic request to Senior Trial Counsel for assistance on the case. This court cannot envision why a simple phone

call or email to a senior trial attorney is considered "work" on this case, but it appears to be the only justification posited by the Government between 20 and 27 May 2010.

67. On 27 May 2010, additional discovery was sent to the Defense and the Defense requested whether or not a recording of the Accused's statement exists. Four more days elapsed for the Government to make this relatively straightforward phone call or visit to investigators to determine the answer was "no" on 31 May 2010.

68. Another 4 calendar days elapsed when the Government decided to interview its first witness, Benjamin Duncan on 4 Jun 2010, now 49 days since the Accused was placed into pretrial confinement.

69. Eight more days elapsed with apparently no movement on bringing this case to trial when the Government decided on 12 June 2010 to pursue immunity for the witnesses against the Accused. It is particularly astounding to this court that it took the Government 57 days after the Accused was placed into pretrial confinement before it determined that immunity should be sought for other actors involved, a fact it should have known from the outset of these events. Even more appalling is the fact that despite this belated decision on 12 June 2010, immunity for these same witnesses wasn't actually obtained until 20 July 2010, another 38 days in the future.

70. On 14 June 2010, the Article 32 Investigation was scheduled for 28 June, another 14 days in the future.

71. On 22 June 2010, charges were finally preferred against the Accused, 67 days since the Accused was placed into pretrial confinement. On this same day, Mr. Duncan was interviewed for a second time along with the Accused's first sergeant.

72. On 23 June 2010, the Article 32 Investigating Officer was appointed and a detective was interviewed on this case.

73. Five more days elapsed with no recorded activity by the Government when the Article 32, UCMJ, Investigation was held. Witnesses and evidence were presented to the investigating officer, who 3days later on 1 July 2010 recommended the charges be referred to trial by general court-martial without any changes.

74. It had at this point been 76 days since the Accused was been placed into pretrial confinement. The Government can point to three witnesses interviewed, some discovery turned over, and an Article 32 being held as proof of their progress in bringing this case to trial. The Government also argued that other events were occurring the legal office such as legal assistance, administrative law issues, and other case preparation which interfered with its ability to bring this case to trial. However, this assertion only underscores the Government's lackadaisical attitude with respect to the urgency of this case. Such administrative law issues do not sway this court to believe that the Government had prioritized its responsibilities improperly. Its primary concern should have been to bring this case to trial as quickly as possible in

light of the fact that the Accused had been spending every hour of his life in confinement without having had his day in court.

75. After the Article 32 investigating officer's recommendation was finished, it took another 5 days until 6 July 2010 before the report was sent to the defense and another two days until 8 July 2010 until the report was sent to the numbered air force. At the same time, the immunity requests were sent to the same place.

76. 11 days later on 19 July—with apparently no preparation being performed on this case by Government counsel—the charges against the Accused were referred to trial by general court-martial. One day later on 20 July 2010, the immunity letters which were envisioned back on 12 June 2010 were finally received from the numbered air force.

77. For some unexplained reason, the referral documents weren't received back from the numbered air force at the local legal office for another 4 days on 23 July 2010.

78. The charges were not served on the accused until 26 July 2010 and a docketing conference was finally held on 30 July 2010. The Accused had been in pretrial confinement at this point for 105 days.

79. Despite having immunity letters signed by the general court-martial convening authority since 20 July, the Government stated that they could not be ready until 9 August, presumably because they had not interviewed the witnesses at that point.

80. On 2 August, 108 days after the Accused had been placed into pretrial confinement, trial counsel interviewed three witnesses to be used against the Accused.

81. On 4 August 2010, another witness who was granted immunity, requested to speak with his defense counsel prior to speaking to the Government counsel. These matters were apparently worked out shortly thereafter or on that same day.

82. On 5 August 2010, Government and Accused agreed to pretrial agreement, which was signed by the numbered air force commander the next day, 6 August 2010.

83. It has been recognized the right established under Article 10, UCMJ "exists separately from and is superior to the provisions of RCM 707." *United States v. Calloway*, 47 M.J. 782, 785 (NMCCA 1998). It is well established an accused and his counsel are under no obligation to speed a case along because the obligation to proceed with dispatch is solely that of the government's, and that responsibility is heavier when an accused is in pretrial confinement. *United States v. McClain*, 23 U.S.C.M.A. 453, 456 (CMA 1975). Under Article 10, the Government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss. *See United States v. Mizgala*, 61 M.J. 122, 125 (CAAF 2005). In fact, the test for assessing an alleged violation of Article 10 is

whether the Government acted with "reasonable diligence" in proceeding to trial. *See United States v. Birge*, 52 M.J. 209, 211 (CAAF 1999).

84. While an Article 10 violation cannot simply be determined by evaluating whether similar delays would have violated the Sixth Amendment, consideration of the factors in *Barker v. Wingo*, 407 U.S. 514, (1972) are appropriate to assist in helping to determining if a violation under Article 10 occurred. Applying those factors in *Birge*, the court noted the appellant: (1) made no demand for a speedy trial; (2) submitted no motion to dismiss or any other motion for relief predicated on the lack of a speedy trial; (3) the appellant entered a pretrial agreement within 2 days of trial; (4) appellant received credit for pretrial confinement on his sentence; (5) there was no evidence of willful or malicious conduct on the part of the Government to create the delay; (6) appellant suffered no prejudice to the preparation of his case as a result of the delay. See id. The factors considered in *Wingo* are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's responsibility to assert his right; and (4) prejudice to the defendant. *See Barker v. Wingo*, 407 U.S. 514, 530-532 (1972). In evaluating prejudice to the defendant, it was suggested one look at the interests the 6th Amendment was designed to protect including: (i) to prevent oppressive incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *See id.* at 532.

85. In the case at hand, the Accused did make a demand for speedy trial and submitted a timely motion to dismiss. The Accused did enter a pretrial agreement prior to trial and will presumably receive credit for his pretrial confinement on his sentence. The Government's action in this case was not malicious and the Accused suffered no obvious prejudice, aside from his anxiety awaiting trial while confined. Reviewing the *Wingo* factors in this case, the court finds that the length of the delays, while short in nature, were recurring and frequent but without sufficient justification. The Accused asserted his rights but has failed to show prejudice. Nevertheless, on the whole, the Government's actions in this case failed to indicate reasonable diligence in bringing this case to trial, particularly in light of the fact that the Accused was demanding trial and waiting in pretrial confinement.

86. Unlike RCM 707, where the actions of both the government and the defense are evaluated to determine what time should and should not be excluded for speedy trial purposes, Article 10 focuses on the actions of the government. I find it is not the defense counsel's responsibility to prod the government to trial. The government, alone, is responsible for assuring they have moved forward with reasonable diligence.

87. Article 33 very clearly requires charges be preferred against an accused within 8 days of being placed into confinement, unless impracticable. Further, if it is impracticable, the commanding officer is required to inform the GCM authority as to the reasons why. The Government, despite a demand for trial on day 7 after the Accused was entered into pretrial confinement, waited another 50 days to prefer charges and this was not reasonable under the backdrop of Article 33.

88. From the date of preferral to the date of referral, 27 days passed. Under Article 30(b), the convening authority is to take immediate steps and notify the accused of the charges as soon as practicable. That did not happen in this case. I find inadequate excuse to justify why the government took so long to move on this case from the time the Accused was placed into pretrial confinement until referral of charges. In light of all the underlying circumstances, I find the government did not use reasonable diligence in this case. This was an uncomplicated case with straightforward charges to include the Accused's statement admitting wrongdoing. The focus of Article 10 is on the government and under I find that the government has not pursued this case with reasonable diligence, thereby violating Article 10 of the UCMJ.

89. Pursuant to *U.S. v. Kossman*, 38 M.J. 258 (CMA 1993), the remedy for violation of Article 10 must remain dismissal with prejudice of the affected charges. *Id.* At 262. If the delays were inexcusable, there is no remedy to compound the delay by starting over.

**SIXTH AMENDMENT**

90. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." A Constitutional right to a speedy trial does not arise until after an indictment is filed or charges are preferred. *United States v. McGraner*, 13 MJ 408 (CMA 1982). The test to determine whether a Sixth Amendment violation exists is found in *Barker v. Wingo*, 407 U.S. 514 (1972). A *Barker* analysis involves balancing the following factors: the length of the delay, the reason for the delay, assertion of a right to a speedy trial, and prejudice to the accused.

91. The delay in this case equates to over 120 days from the date the Accused was placed in pretrial restriction in the form of arrest under R.C.M. 304(a)(3). Although this exceeded the statutorily determined number of days outlined in the Manual for Court-Martial, it is not dispositive of the issue. Second, there is not sufficient good reason that would justify the delays. Third, the Accused demanded his right to a speedy trial on 3 May 2010. However, the prejudice to the Accused is minor, with no compelling showing of loss of evidence or impact to case preparations.

92. Therefore, because I find that the Accused has not shown prejudice in this case and will not be affected by re-prosecution, despite the plodding efforts of the government in bringing this case to trial, I find that the Accused's 6th Amendment rights were not violated in this case.

**RULINGS**

The Defense motion to dismiss all charges pursuant to R.C.M. 707 is GRANTED. The charges are dismissed without prejudice.

The Defense motion to dismiss all charges pursuant to Article 10, UCMJ is GRANTED. The charges are dismissed with prejudice.

The Defense motion to dismiss all charges pursuant to the 6th Amendment of the Constitution is DENIED.

MATTHEW D. VAN DALEN, Maj, USAF
Military Judge

Attachment:
Speedy Trial Chronology

**United States v. AB STEVEN A. DANYLO**

## CASE CHRONOLOGY

| DATE | CASE EVENT | Account-able Days | JULIAN DATE | Days Elapsed (speedy trial clock) |
|---|---|---|---|---|
| 26 Mar 10 | Accused's urinalysis reported positive for THC. Accused questioned by AFOSI. | 0 | 85 | 0 |
| 2 Apr 10 | Accused required to remain in uniform at all times throughout day and call MTL every half hour during duty day/every hour on weekend | 0 | 92 | 0 |
| 9 Apr 10 | Accused is placed in to Transition Flight, "Condition 3" | 0 | 99 | 0 |
| 10 Apr 10 | T-Flight placed into "Condition 1" | 0 | 100 | 0 |
| 11 Apr 10 | Speedy trial clock begins | 1 | 101 | 1 |
| 12 Apr 10 | Accused is reported for assaulting AB Hansknecht | 2 | 102 | 2 |
| 15 Apr 10 | AFOSI completes ROI for drug offenses | 5 | 105 | 5 |
| 16 Apr10 | Accused allegedly communicates a threat while in T-Flight | 6 | 106 | 6 |
| 16 Apr 10 | Accused ordered into pretrial confinement | 6 | 106 | 6 |
| 16 Apr 10 | Evidence collected for actions as the basis of Charge II | 6 | 106 | 6 |
| 17 Apr 10 | 82 TRW/JA received ROIs | 7 | 107 | 7 |
| 19 Apr 10 | PCRO notified at 1640 hrs of duties | 9 | 109 | 9 |
| 22 Apr 10 | Pretrial confinement hearing held | 12 | 112 | 12 |
| 23Apr 10 | Pretrial confinement report | 13 | 113 | 13 |
| 29 Apr 10 | TC began working on charges and proof analysis | 18 | 118 | 18 |
| 3 May 10 | Accused demands speedy trial | 22 | 122 | 22 |
| 4 May 10 | Accused transferred to military confinement facility (Kirtland AFB) | 23 | 123 | 23 |
| 5 May 10 | TC updated charges and routed through CMJ | 24 | 124 | 24 |
| 10 May 10 | Defense sends discovery request | 29 | 129 | 29 |
| 12 May 10 | Charges routing for approval by NAF | 31 | 131 | 31 |
| 20 May 10 | TC sends draft charges to defense | 39 | 139 | 39 |
| 26 May 10 | TC requests STC support | 45 | 145 | 45 |
| 27 May 10 | More discovery sent to defense; defense asks whether Accused interview recorded | 46 | 146 | 46 |
| 31 May 10 | Gov't informs defense that no recording exists | 50 | 150 | 50 |
| 4 Jun 10 | Witness to assault, Benjamin Duncan, interviewed | 54 | 154 | 54 |
| 12 Jun 10 | Government decides to pursue immunity for witnesses against AB Danylo | 62 | 162 | 62 |
| 14 Jun 10 | Article 32 date set for 28 June 2010 | 64 | 164 | 64 |
| 22 Jun 10 | Charges preferred against Accused. Charges are substantially the same as those provided to defense on 3 May 2010. Gov't re-interviews Benjamin Duncan and interviews Accused's First Sergeant | 72 | 172 | 72 |
| 23 Jun 10 | Article 32 IO appointed. Gov't interviews Detective Burks | 73 | 173 | 73 |

| | | | | |
|---|---|---|---|---|
| 28 Jun 10 | Article 32 Investigation held | 78 | 178 | 78 |
| 1 Jul 10 | IO completes report of investigation; recommends referral of charges without changes. | 81 | 181 | 81 |
| 6 Jul 10 | Article 32 IO report sent to defense | 86 | 186 | 86 |
| 8 Jul 10 | Referral package sent to NAF; immunity requests sent at same time | 88 | 188 | 88 |
| 19 Jul 10 | Charges against Accused referred to trial by GCM | 99 | 199 | 99 |
| 20 Jul 10 | Immunity letters received from NAF | 100 | 200 | 100 |
| 23 Jul 10 | 82 TRW/JA receives referral documents from NAF | 103 | 203 | 103 |
| 26 Jul 10 | Charges served on the accused | 106 | 206 | 106 |
| 30 Jul 10 | Docketing conference held. Gov't ready date given as 9 Aug 10 | 110 | 210 | 110 |
| 2 Aug 10 | Gov't interviews AB Coyne, Amn Hansknecht, and A1C Cody | 113 | 213 | 113 |
| 4 Aug 10 | A1C McNearney contacted but requested counsel prior to interview. Issue resolve after counsel contacted. | 115 | 215 | 115 |
| 10 Aug 10 | Scheduled trial date | 121 | 221 | 121 |