UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major RUSSELL C. MELVIN
United States Air Force

ACM 37081

04 March 2009

Sentence adjudged 19 April 2007 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Jennifer Whittier (sitting alone).

Approved sentence: Dismissal and confinement for 6 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Judge:

In accordance with his pleas,[1] the appellant was found guilty of two specifications of willfully disobeying a lawful command of his superior commissioned officer and one specification each of: violating a lawful general regulation, willful dereliction of duty, soliciting another to commit an offense, adultery, and obstructing justice, in violation of Articles 90, 92, and 134, 10 U.S.C. §§ 890, 892, 934. The approved sentence consists of a dismissal and six months confinement.

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[1] At trial, the appellant entered a conditional plea to preserve the speedy trial and jurisdictional issues raised at trial.

The appellant asserts three assignments of error before this Court: (1) the military judge erred in denying the defense motion to dismiss for denial of speedy trial; (2) the appellant's sentence to a dismissal is inappropriately severe;[2] and (3) the Third Addendum to the Staff Judge Advocate's Recommendation (SJAR) contained "new matter" necessitating a new convening authority Action in this case.[3]

Background

The appellant is a reserve officer who was on extended active duty (EAD) orders from 1 June 2003 to 31 May 2006, assigned to the Air Force Reserve Officer Training Corps (AFROTC) Detachment 430, University of Mississippi, Oxford, Mississippi. During this period, the appellant was assigned as an Assistant Professor of Aerospace Studies and Commandant of Cadets for AFROTC Detachment 430, and was responsible for providing leadership training, military discipline, and educational and career guidance to AFROTC cadets.

On 23 February 2006, Brigadier General (Brig Gen) RH, Air Force Officer and Accessions Training School Commander, initiated a commander directed investigation (CDI) into alleged misconduct at AFROTC Detachment 430. Specifically, the investigation addressed allegations that the appellant provided alcohol to minors, had unprofessional relationships with the cadets, and made false official statements during a previous CDI.

Air Education and Training Command Instruction 36-2909, *Professional and Unprofessional Relationships*, ¶ 4.1 (12 Jun 2003) provides, in relevant part, that faculty and staff will:

> 4.1.3. Not establish, develop (or attempt to develop), or conduct a personal, intimate, or sexual relationship with a trainee, student, cadet, or member of a trainee's, student's, or cadet's immediate family. This includes, but is not limited to, dating, handholding, kissing, embracing, caressing, and engaging in sexual activities.
> . . .
> 4.1.10. Not develop (or attempt to develop), establish, or carry on a personal social relationship with a trainee, student, or cadet.
> 4.1.11. Not attend social gatherings or frequent clubs, bars, or theaters on a personal social basis with a trainee, student, or cadet.
> 4.1.12. Not provide alcohol to, consume alcohol with, a trainee, student, or cadet on a personal social basis.

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[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The appellant has not raised a lack of jurisdiction issue on appeal. Nevertheless, this Court has reviewed whether or not the court-martial lacked jurisdiction in this case and has determined the government had jurisdiction to try the appellant under Rule for Courts-Martial (R.C.M.) 202(c).

In the fall semester of 2004, the appellant and a male cadet named Cadet WM took a trip in preparation for the detachment's "swamp stomper," in which the cadets would compete in various outdoor activities and camp over the weekend. On the way back from surveying the site for the event, the appellant stopped at a gas station and bought some beer that he shared with Cadet WM, who was 19 years old at the time. During the weekend of the event, the appellant again provided alcohol to Cadet WM and also provided alcohol to a female cadet, named Cadet ST.

In January 2005, the appellant and several cadets attended the detachment's "land navigation" camping trip at Tishomingo State Park, Mississippi. On the Saturday night of the trip, after the appellant's supervisor, Lieutenant Colonel (Lt Col) KP, left the campground, the appellant drank alcohol with several of the cadets, many of whom were underage. As they drank, the appellant joked with the cadets, saying, "Let's not bring this up with the boss" and "Don't ask, don't tell."

Additionally on the Saturday night of the trip to Tishomingo, the appellant was flirting with a female cadet, named Cadet SD, while sitting around the campfire. As the group retired to bed, Cadet SD followed the appellant to his vehicle where they spent the night together and engaged in sexual intercourse. The appellant subsequently shared with Cadet WM the details of his sexual relationship with Cadet SD.

During the weekend of 19-21 February 2005, the detachment took a trip to Enid Lake at Cossar State Park, Mississippi. The appellant again provided alcohol to the cadets, many of whom were underage, and he allowed female cadets to sleep in his cabin. As a result of the events at Lake Enid, a cadet filed a complaint against the appellant, which resulted in a CDI that was conducted in February of 2005.

On two or three occasions before any of the cadets were interviewed by the investigation officer, Colonel (Col) JP, the appellant advised Cadets WM and ST that they should not admit they consumed alcohol or that they saw anyone else consume alcohol at Enid Lake. The appellant told them that if they admitted to having consumed alcohol, they would be disenrolled from AFROTC because they were underage. The appellant told them, "If you didn't remember seeing anyone drinking . . ., I'm sure I didn't see anything either." The appellant believed the cadets would lie during the investigation so he encouraged them to lie. Upon being interviewed by Col JP, Cadets WM and ST did, in fact, lie by saying they had not consumed alcohol on the trip nor did they witness anyone else consume alcohol on the trip.

The next detachment trip was a base visit to Eglin Air Force Base (AFB), Florida, from 31 March 2005 to 3 April 2005. Because of the recent CDI, the appellant briefed each of the cadets on a new policy that no alcohol would be permitted on any AFROTC Detachment 430 outings. However, during the trip to Eglin AFB, the appellant drank

alcohol with the cadets on the beach. The appellant also engaged in sexual intercourse with Cadet SD in his billeting room.

In the fall of 2005, Cadets WM and ST and two other male cadets, Cadets DN and BH, started to socialize with the appellant on an almost daily basis. At least twice a week they would go to a restaurant bar where they would drink alcohol together. On or about 8 October 2005, the appellant gave Cadet ST a receipt reflecting his purchase for her of a $100 gift card to "Good Vibrations," a sexual novelty store. Over the weekend of 3-5 February 2006, the appellant rented a cabin at Sardis Lake, which is about 15 miles from the University of Mississippi. Cadets WM, ST, and BH were at the cabin with the appellant and a civilian. They played drinking games that led to situations where the appellant sucked on Cadet WM's finger while twisting his nipple. The appellant also sucked on Cadet WM's toe.

From 1 January 2004 to 1 March 2006, the appellant provided alcohol on numerous occasions to cadets who were under the age of 21 years. The appellant was aware that the drinking age in the State of Mississippi was 21 years, and he was aware of the AFROTC Detachment 430 policies that prohibited the consumption of alcohol by minors.

On 23 February 2006, pursuant to the initiation of a second CDI, the appellant was ordered by Lt Col KP, his superior commissioned officer, to avoid all contact with the cadets of AFROTC Detachment 430. Immediately after receipt of the order, while the appellant was standing outside of Lt Col KP's office, he received a call from Cadet ST, and they discussed the upcoming investigation. Later that evening, the appellant contacted Cadets WM and ST and told them that he had a no contact order. The appellant asked them to meet him at Sardis Lake and to arrange for Cadets BH and DN to join them at the meeting. The four cadets met with the appellant in his vehicle and they discussed a plan to affect the outcome of the upcoming investigation. The appellant was very nervous as he believed that the allegations made against him could lead to criminal proceedings. While in his vehicle, the appellant contacted Lt Col KP who confirmed that the source of the allegations was a female cadet, named Cadet SB. The appellant obtained an agreement from the cadets that no matter what happened they would stick to the same story.

During 24-26 February 2006, the appellant met several times with Cadet DN. They met in a parking lot of an elementary school and at Sardis Lake. During these meetings, they discussed strategies to impede the testimony of Cadet SB. The plan was to work through two other cadets who were friends of Cadet SB to hopefully convince her to retract her allegations. Unfortunately for the appellant, the plan did not work.

On 27 February 2006, the appellant spoke by phone to the four cadets (BH, WM, ST, and DN) as they prepared for the testimony they were about to give concerning the

allegations. On 28 February 2006, the appellant spoke with Cadet WM after all four of the cadets were interviewed by the investigating officer, Col NB. Col NB recalled Cadets BH, DN and ST. During Cadet BH's second interview, he admitted to lying previously and then told the truth. This was reported to Cadet WM who communicated this fact to the appellant. The appellant responded by telling Cadet WM that he could still deny everything by telling the investigator that Cadet BH was drunk at the time. After Cadet DN lied to Col NB, he contacted the appellant to inform him that the interview had not gone well. The appellant asked, "what about me?' or words to that effect. As a result of their cooperation with the appellant, Cadets BH, WM, DN, and ST were all disenrolled and terminated from the AFROTC program.

On 27 February 2006, the appellant was directed to report to Maxwell AFB, Alabama, on temporary duty (TDY). On 1 March 2006, the appellant received a written order from Col CD, the Commander of AFROTC South West Region. The appellant was ordered not to have any contact with the cadets at AFROTC Detachment 430, which included telephonic conversation, written correspondence, electronic mail, or contact through a third party. From 1 March 2006 to 15 August 2006, the appellant repeatedly violated the order by text messaging the cadets, having telephone conversations with the cadets, and using a third party to communicate with the cadets.

In December 2005, Cadet SD was commissioned and left for active duty in early 2006. The appellant carried on a sexual relationship with First Lieutenant (1st Lt) SD through July 2006. During this period, the appellant was married. During March and April of 2006, while 1st Lt SD was at Maxwell AFB, Alabama, attending the six-week Air & Space Basic Course, she had sexual intercourse with the appellant on several occasions. They also engaged in sexual intercourse in mid-June 2006 and early July 2006, while they were in Memphis, Tennessee.

Speedy Trial

The appellant is alleging a denial of his right to speedy trial pursuant to the Sixth Amendment;[4] Article 10, UCMJ, 10 U.S.C. § 810; and Rule for Courts-Martial (R.C.M.) 707(a). At trial, the trial defense counsel made a speedy trial motion, which the military judge denied after making extensive findings of fact and conclusions of law. The appellant asserts that a speedy trial violation occurred in this case on any of the following triggering dates: 28 February 2006, when the appellant was sent TDY to Maxwell AFB; 1 June 2006, when the appellant was involuntarily extended on active duty past his EAD date; or 31 August 2006, when the original charges were preferred. The military judge made the following findings of fact pertaining to this motion:

[4] U.S. CONST. amend. VI.

1. . . . . In Mar 2003, the accused voluntarily applied for an [EAD] tour to perform duties as an AFROTC instructor. . . . Orders were properly issued and the accused began a three-year EAD tour on 1 Jun 2003. The accused served the EAD tour as an AFROTC instructor with Detachment 430 at the University of Mississippi at Oxford, MS. During the EAD tour, the accused was managed by the Air Force Personnel Center (AFPC), through the Columbus Air Force Base Military Personnel Flight (MPF).

2. The accused's EAD tour was to end on 31 May 2006. On 23 Feb 2006, [Brig Gen RH], the Air Force Officer and Accessions Training School Commander (AFOATS/CC), initiated a [CDI] into alleged misconduct at Detachment 430.

3. At the time the CDI was initiated, the accused was ordered to Maxwell [AFB], AL, HQ AFROTC, in a TDY status. The TDY was directed in order to protect the good order and discipline within Detachment 430. Given the nature of the allegations and the small, close-knit community nature of the Detachment, good order and discipline dictated that the accused not perform duties at the Detachment while the investigation was ongoing. Unlike a regular military installation, Detachment 430 does not have multiple agencies and thus the accused could not simply be removed from the Detachment and reassigned to another agency or office in the local area.

4. The accused reported to then [Col BY], at the time the AFROTC Vice Commander at Maxwell [AFB], on 27 or 28 Feb 2006. The accused was aware at this time that serious allegations had been made that involved him and that the TDY was a result of the allegations. The accused was placed in the HQ AFROTC Directorate of Operations and performed duties commensurate with his rank, with the exception of not being assigned as a flight chief.

5. The CDI was completed on 23 Mar 2006 and the report provided to command on 5 Apr 2006. This was a reasonable amount of time given the length of the report, the number of exhibits and need for the investigator to travel. Although legal review . . . was still ongoing, the AFOATS Staff Judge Advocate (AFOATS/SJA) prepared a request on 17 Apr 2006 to extend the accused's EAD tour for six months. The request was prepared in accordance with AFI 37-3207, paragraph 1.11. The request was forwarded to AFPC as part of an electronic staff package. [Brig Gen RH], AFOATS/CC, coordinated on the package on 19 Apr 2006. It is clear [Brig Gen RH] was aware of and approved of the request for extension.

6. AFPC approved the extension and extended the accused's EAD tour for six months, establishing a new date of separation of 30 Nov 2006. This occurred no later than 9 May 2006, the date on which AFPC confirmed the extension via email to Ms. Kull. This extension did not affect the accused's initial EAD tour or change his status in any manner prior to 1 Jun 2006.

7. The CDI legal review was completed on 21 April 2006 and in May 2006 draft charges were in the works, discovery was ongoing and the accused's defense counsel was arranging a meeting with AFOATS/CC. The accused received limited information regarding his status and the status and results of the investigation. However, at some point in Apr 2006, the accused was advised by [Col BY] that he would probably not be separating on 31 May 2006 because of the CDI. Also, on 20 Apr 2006, [Maj JK], the accused's defense counsel, formally objected to extension of the accused's EAD tour beyond 31 May 2006. The accused was aware of this objection and therefore aware of the extension. Based upon [Maj JK's] 5 May 2006 email and 22 May 2006 memorandum to [Brig Gen RH], it is clear that at some point in May 2006 the accused and his defense counsel knew a court-martial was likely.

8. Until 1 June 2006, the accused was voluntarily in an EAD status. However, beginning 1 Jun 2006 to the present, the accused's EAD status has not been voluntary. His EAD tour was extended to 30 Nov 2006 over his objection. In Nov 2006, Dec 2006, Jan 2007, Feb 2007, and Mar 2007, the AFOATS/SJA submitted requests to extend the accused's EAD tour for a 30-day period. AFROTC command was aware of each request, AFPC received each request and effected each 30-day extension request. As a result, the accused's EAD tour has continued uninterrupted since 1 Jun 2003. The accused's current date of separation from his EAD tour is 30 Apr 2007.

9. The accused did receive an authorization for separation in Apr 2006. This authorization was generated by the Columbus [AFB] MPF based solely on the accused's initial EAD tour end date of 31 May 2006. The requests for extension submitted to AFPC superseded this authorization and the authorization for separation was never effected.

10. The accused has at all times objected to extension of his EAD status. The accused, through his defense counsel, properly made his desire for a speedy trial known to the government on 19 Apr 2006.

11. On 2 Jun 2006, the government initiated contact via email with defense counsel to set an Article 32 hearing date. Although the defense was

available on 20 Jun 2006, several of the witnesses were at cadet field training and were not available until the end of Jun 2006.

12. On 5 June 2006, the accused notified [Col BY], his supervisor at Maxwell [AFB], that he was scheduled for surgery on 27 Jun 2006 and expected a required convalescent leave time of three weeks. The convalescent leave was approved, the accused traveled to Memphis, TN and had surgery on 27 Jun 2006 as scheduled. On 15 Jul 2006, the accused notified [Col BY] that the required convalescent leave time was extended and requested convalescent leave through 31 Jul 2006. The convalescent leave was approved and the accused remained in Memphis, TN through 31 Jul 2006. On 1 or 2 Aug 2006, the accused returned to Maxwell [AFB].

13. In early Aug 2006, the government and the defense engaged in active negotiations regarding an Article 32 hearing date. The hearing was set for early Sep 2006. The government was engaged in additional investigation, witness interviews and Article 32 hearing preparation through Aug 2006. During Aug 2006, the accused returned to Memphis, TN for some medical tests and leave. Charges were preferred on 31 Aug 2006 and the Article 32 hearing took place on 6 and 7 Sep 2006. The Article 32 report was completed on 22 Sep 2006 and contained numerous recommendations regarding changes to existing specifications and preferral of additional specifications. The government followed the recommendations, to include preferring additional charges on 4 Oct 2006.

14. Charges against the accused were referred on 18 Oct 2006 and served on the accused on 31 Oct 2006. On 6 Nov 2006, the accused submitted a resignation for the good of the service, commonly known as a RILO request. While the RILO was pending, the accused requested regular and excess leave. The request was granted and the accused was on regular leave from approximately 31 Nov 2006 to 11 December 2006 and on excess leave from approximately 11 December 2006 to 9 Feb 2007. At the accused's request excess leave was extended and the accused remained on excess leave from 9 Feb 2007 to 31 Mar 2007.

15. On 1 Mar 2007, the Secretary of the Air Force (SECAF) denied the accused's RILO and notice of the denial was received by the government on 2 Mar 2007. By memorandum dated 12 Mar 2007 the Air Force Judiciary set a 16 Apr 2007 trial date. The Air Force Judiciary excluded all time from submission of the RILO to notice of SECAF action for speedy trial purposes, and all time from 5 Mar 2007 to 16 Apr 2007. The accused was arraigned on 16 Apr 2007.

16. This is not a simple, straightforward one or two charge case. This case involves eight charges and nineteen specifications. The charged timeframe spans from 1 January 2004 to 15 August 2006. The charges involve numerous witnesses in various locations.

17. Since 27 or 28 Feb 2006, the accused has been assigned to HQ AFROTC at Maxwell [AFB] in a TDY status. Other than being subject to a no contact order, initially not being permitted to return to the University of Mississippi area and being required to notify his supervisor of his whereabouts when not in the Maxwell [AFB] area, the accused was not, and has not, been placed under any type of restriction or restraint. The accused has had the same freedoms and liberties that any other military member TDY at Maxwell [AFB] would have.

18. The accused has experienced significant hardship as a result of his extended TDY at Maxwell [AFB] and extension of his EAD status. The accused has been geographically separated from his family, the accused has faced significant challenges in applying for and receiving TDY and regular military pay, the accused and his family have faced significant challenges in receiving medical benefits through Tricare and the accused and his family have experienced significant stress as a result of the uncertainty surrounding the accused's situation and the pending court-martial.

19. Although the accused has faced significant hardship, the accused has been entitled to military pay, TDY pay and family separation pay from 1 Jun 2006 to the present; with the exception of the time the accused was on excess leave. The accused and his family have been entitled to medical benefits from 1 Jun 2006 to the present. Although receipt of pay and medical benefits has been, and remains challenging, ultimately the accused is able to receive the military pay and medical benefits to which he is entitled. Each time the accused has experienced pay or medical benefit difficulties, his supervisor, [Col BY] and others within HQ AFROTC have readily assisted the accused.

We review speedy trial issues de novo. *United States v. Proctor*, 58 M.J. 792, 794 (A.F. Ct. Crim. App. 2003); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003). While doing so, we give substantial deference to the trial judge's findings of fact and will not overturn them unless they are clearly erroneous. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *Proctor*, 58 M.J. at 795.

Several authorities give rise to an accused's right to a speedy trial. This right has been recognized under the Fifth[5] and Sixth Amendments to the U.S. Constitution; Article 10, UCMJ; R.C.M. 707; and case law. *United States v. Vogan,* 35 M.J. 32, 33 (C.M.A. 1992). The appellant has raised the issue under three of these authorities.[6]

R.C.M. 707(a) provides: "The accused shall be brought to trial within 120 days, after the earlier of: (1) [p]referrral of charges; (2) [t]he imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) [e]ntry on active duty under R.C.M. 204." R.C.M. 707(c) permits all pretrial delays approved by the military judge or convening authority to be excluded from the count of days for speedy trial purposes. To be excludable, the reason for the delay must be reasonable. The discussion section of R.C.M. 707(c) gives several examples that would qualify as a reasonable delay. These include:

> time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances . . .; or additional time for other good causes.

R.C.M. 707(c), Discussion.

Based on the aforementioned findings of fact, the military judge concluded that under R. C.M. 707(a), the speedy trial clock started on 1 September 2006, one day after the preferral of charges.[7] In the absence of any excludable delay, 228 days elapsed between the preferral of charges and arraignment. The Air Force Judiciary excluded all the time from submission of the Resignation in Lieu of Court-Martial (RILO) to notice of the Secretary of the Air Force's (SECAF's) action, for a total of 116 days. Additionally, the Air Force Judiciary excluded the period from 5 March 2007 to 16 April 2007, totaling 42 days. After taking into consideration the excludable delays, only 70 days had passed between the preferral of the original charges and arraignment.

The appellant asserts that the speedy trial clock started on 28 February 2006, the date the government gave the appellant a no-contact order and sent him TDY to Maxwell AFB. The appellant claims this was a de facto equivalent of restriction in lieu of arrest

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[5] U.S. CONST. amend. V.

[6] Although the appellant did not specifically rely on Article 10, UCMJ, 10 U.S.C. § 810, at trial, the appellant did not specifically waive this argument and has requested this Court consider his requested relief under Article 10, UCMJ. The appellant has not raised a Fifth Amendment argument.

[7] Under R.C.M. 707(a), the date of preferral of charges does not count for purpose of computing the 120 days, but the date of trial does count.

and pretrial restraint under R.C.M. 304(a)(2)-(4).[8] The appellant argues that since he was forced away from his family and was not free to return home and see his family without taking leave, the government's actions interfered with his liberty and restricted his associations.

The appellant was sent TDY to Maxwell AFB because not doing so would have impacted the good order and discipline of the small community at AFROTC Detachment 430. The only restraints placed upon him were a no-contact order with the members of AFROTC Detachment 430, and initially, he was denied permission to return to the University of Mississippi area and was required to inform his supervisor of his whereabouts when not in the local Maxwell AFB area. Otherwise, the appellant had the same liberties and freedoms available to other Air Force members TDY at Maxwell AFB. The appellant also continued to perform military duties commensurate with his rank. Under these circumstances, the appellant was not restrained under the provisions of R.C.M. 304(a)(2)-(4). Accordingly, the appellant's argument that the speedy trial clock started on 28 February 2006 is without merit.

The appellant's second triggering date is 1 June 2006, when he was involuntarily extended on active duty beyond his EAD date. The appellant asserts that forcing him to remain on active duty, especially when ordered TDY away from his family, is a de facto restraint sufficient to start the speedy trial clock. The appellant's position is without merit. Our superior court has long recognized that "mere retention beyond expiration of service date for the purpose of administering military justice is not, by itself, tantamount to arrest or confinement." *Unites States v. Grom*, 21 M.J. 53, 57 (C.M.A. 1985) (citations omitted).

Finally, even if the triggering date is 31 August 2006, when charges were preferred, the appellant still calculates 186 days elapsed for speedy trial purposes because the Air Force Judiciary and military judge erred by excluding the 158-day period (6 November 2006 to 2 March 2007) while the RILO was pending from the speedy trial computation. Although the appellant filed a speedy trial request on 19 April 2006, there is no evidence that he wanted to proceed to trial during the RILO period. In fact, the appellant requested and was granted both regular and excess leave to tend to some personal matters. Accordingly, the 158-day period was properly excluded from the speedy trial calculation.

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[8] R.C.M. 304(a)(2), *Restriction in lieu of arrest*, provides: "Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted." R.C.M 304(a)(3), *Arrest*, provides: "Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties . . . ." R.C.M. 304(a)(4), *Confinement*, provides: "Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses."

The appellant next argues that he was denied his right to a speedy trial under the Sixth Amendment. It is well settled that the Sixth Amendment right to a speedy trial attaches only when a formal criminal charge is instituted or a criminal prosecution has begun. *United States v. Marion*, 404 U.S. 307 (1971). In the military, the Sixth Amendment speedy trial tracking begins at the time of pretrial restraint or preferral of charges, whichever comes first. *Grom*, 21 M.J. at 55. The Supreme Court established the test for Sixth Amendment speedy trial violations in the case of *Barker v. Wingo,* 407 U.S. 514 (1972). In applying this four-part test, we look at the length of the delay in bringing the appellant to trial, the reasons for the delay, whether the appellant asserted his right to a speedy trial prior to trial, and the extent of any prejudice to the appellant. *Barker*, 407 U.S. at 530; *see also United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F 2000); *Proctor*, 58 M.J. at 798.

As discussed above, we have concluded that the speedy trial clock started on the day of preferral, 31 August 2006. Applying a Sixth Amendment analysis using the *Barker v. Wingo* factors, although a 228-day delay is a presumptively prejudicial delay, most of the delay is attributable to waiting for the results of the RILO. From 1 September 2006 to 31 October 2006, the government was actively engaged in conducting and completing an Article 32, UCMJ, 10 U.S.C. § 832, investigation and report, referral of charges, and service of charges. This is a reasonable amount of time given the nature of the charges and the complexities of the case. As stated above, although the appellant asserted his right to speedy trial on 19 April 2006, there is no evidence that he wanted to proceed to trial while the RILO was pending (6 November 2006 to 2 March 2007). At his request, the appellant took both regular and excess leave for most of this period. From 2 March 2007 to the date of arraignment, 16 April 2007, this case was docketed for trial and the parties prepared for trial. This was not an unreasonable delay given the nature of the case, the number of counsel, and the number of witnesses. Accordingly, all delays in this case were for a valid reason and of an appropriate length. Considering prejudice, although the military judge found that the appellant experienced significant hardship as a result of his extended TDY and experienced some difficulties with receiving his pay and medical entitlements, the military judge likewise found that ultimately the appellant was properly paid and received the medical benefits he was entitled. Therefore, applying the *Barker* factors, the appellant was not denied his right to a speedy trial.[9]

Finally, the appellant asserts that his right to a speedy trial was violated under Article 10, UCMJ. The triggering event for Article 10, UCMJ, is when a service member is placed under pretrial arrest or in confinement. From that point on, the government is compelled to take "immediate steps" either "to try him or to dismiss the charges and release him." Article 10, UCMJ. "The test for compliance with the requirements of

[9] Even if the Sixth Amendment speedy trial clock started on one of the other two triggering dates asserted by the appellant, 28 February 2006 or 1 June 2006, we likewise find that there was not an unreasonable delay given the nature and complexities of the case and all of the delays were for a valid reason and of an appropriate length.

Article 10[, UCMJ,] is whether the government has acted with 'reasonable diligence.'" *Proctor*, 58 M.J. at 798 (citing *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999)). Our superior court has often said it does "not demand 'constant motion [from the government], but reasonable diligence in bringing the charges to trial.'" *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F 2007) (quoting *Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965))). Each of these prior cases maintains that while Article 10, UCMJ, provides greater rights than does the speedy trial clause of the Sixth Amendment, the four-part test set out in *Barker* is a proper analytical tool for deciding Article 10, UCMJ, issues.

Reviewing the record, the briefs, the trial judge's findings and conclusions, and applying the applicable law including the *Barker f*actors, we likewise find the appellant was not denied a speedy trial under Article 10, UCMJ. The government acted with due diligence and all of the delays were reasonable in this case.

Sentence is Inappropriately Severe

The appellant asserts that his sentence to a dismissal is inappropriately severe.[10] This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd* 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The maximum possible punishment in this case was a dismissal, confinement for 23 years and six months, and total forfeiture of all pay and allowances. The appellant's approved sentence was a dismissal and six months confinement.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all other matters contained in the record of trial. The approved sentence which included a dismissal was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe.

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[10] We note that the appellant's trial defense counsel argued for a dismissal in this case.

Staff Judge Advocate's Recommendation

The appellant asserts that the Third Addendum to the SJAR contains "new matter" necessitating a new convening authority Action. On 17 August 2007, the convening authority signed the Action in this case. However, as a result of defects in the AF Form 1359, Report of Result of Trial, the Staff Judge Advocate (SJA) prepared a corrected Report of Result of Trial, served it on the trial defense counsel on 21 August 2007, and provided the defense with 10 days to respond. Prior to the convening authority signing the new Action on 31 August 2007, the appellant's military defense counsel responded on 30 August 2007 that a corrected Report of Result of Trial was unnecessary as it only caused further post-trial delay, thereby diminishing the appellant's request for clemency with regard to reducing confinement and jeopardizing the appellant's post-military employment opportunities.

In a footnote to the Third Addendum to the SJAR, dated 31 August 2007, the SJA commented:

> The defense asserts that imposition of additional delays "nullifies" the accused's request for clemency with regard to confinement (i.e., his prior request for early release). The defense then asserts that the corrections on the AF Form 1359 are "purely administrative" and of no "administrative significance". While it is certainly within the defense's right to take 10 days to respond to the notification of the corrected AF Form 1359, it seems that taking the full 10-day period to advise you that the corrections are inconsequential only further exacerbates their client's purported dilemma with respect to confinement clemency. We note, however, that as of this date, you still have the ability, should you so desire, to grant the accused early release from confinement.

The SJA did not serve the Third Addendum to the SJAR on the defense and no clemency was granted. The appellant asserts that the SJA's comments concerning the defense taking 10 days to respond to the corrected Report of Result of Trial constitutes "new matter" because it adversely questioned why the defense counsel took the full 10 days to respond.

"Whether matters contained in an addendum to the SJAR constitute 'new matter' that must be served upon an accused is a question of law that is reviewed de novo." *United States v. Scott*, 66 M.J. 1, 3 (C.A.A.F. 2008) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). When making these comments in an addendum, the SJA cannot introduce "new matter" without triggering a requirement for service of the addendum on the accused and his counsel. R.C.M. 1106(f)(7).

The Discussion to R.C.M. 1106(f)(7) states: "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. 'New matter' does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation."

"While recognizing that the Discussion is non-binding, [our superior court] has nonetheless cited with approval its illustrations of what is and is not a new matter." *Scott,* 66 M.J. at 3. The appellant's case falls within this category. The alleged "new matter" does not comment about new court decisions, evidence from outside the record, or an issue not previously discussed by the parties. The SJA was just responding to the arguments raised by the defense in the 30 August 2007 clemency submission.[11] Accordingly, we find that the Third Addendum to the SJAR did not contain "new matter" that must have been served on the appellant.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[12] Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

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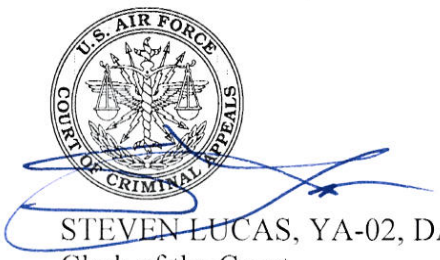

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

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[11] In the future, we recommend staff judge advocates refrain from making similar comments in their Staff Judge Advocate Recommendations as they add little value to the proceedings and tend to create unnecessary appellate issues.

[12] The court-martial order (CMO), dated 31 August 2007, incorrectly states the appellant pled guilty "as amended" to Specification 1 of Charge III. However, the revisions to the specification took place prior to arraignment. The appellant pled to and was found guilty of the specification without any amendments. The Court orders the promulgation of a corrected CMO.