

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MICHAEL J. FOSTER  
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201200235  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 2 February 2012.

**Military Judge:** LtCol Nicole K. Hudspeth, USMC.

**Convening Authority:** Commanding General, 2d Marine Logistics Group, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol S.R. Stewart, USMC; **Addendum:** Maj T.H. Campbell, USMC.

**For Appellant:** CAPT Diane L. Karr, JAGC, USN.

**For Appellee:** LT Ann E. Dingle, JAGC, USN.

**7 February 2013**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of one specification of aggravated sexual assault of a child,<sup>1</sup> one specification of possessing child pornography and one specification of wrongfully soliciting another to produce child

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<sup>1</sup> On appeal, both parties erroneously identify Charge I as abusive sexual contact with a child. Appellant's Brief of 14 Aug 2012 at 1; Appellee's Answer of 13 Sep 2012 at 1.

pornography, in violation of Articles 120(d) and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920(d) and 934. The military judge sentenced the appellant to confinement for six years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence but, pursuant to a pretrial agreement, suspended execution of confinement in excess of 24 months.<sup>2</sup>

The appellant asserts that his right to a speedy trial under Article 10, UCMJ, was violated. After careful consideration of the record and the briefs of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Background**

The appellant, then 22 years old, first met LA, then 15 years old, online in a teenage "flirt chat room." They met in person several days later and commenced a relationship. Over the next several months, the appellant engaged in sexual intercourse with LA on several occasions. The appellant also asked LA if he could videotape the two of them engaged in sexual intercourse, and to photograph herself nude and forward those photographs to him. In addition, the appellant retained possession of a quantity of digital images and videos containing child pornography that he had downloaded from the Internet.

The appellant was ordered into pretrial confinement on 30 June 2011, where he remained until trial on 2 February 2012. He was arraigned on 31 October 2011. A Defense Motion to Dismiss Charges for lack of a speedy trial was filed with the trial court on 19 December 2011 and denied by the military judge on 5 January 2012. Appellate Exhibits VI, VII, and XIII. On 18 January 2012, the appellant and detailed defense counsel signed a pretrial agreement offer, which was agreed to by the CA on 26 January 2012. On 2 February 2012, consistent with the terms of the pretrial agreement, the appellant entered guilty pleas and was sentenced by the military judge.

Additional facts necessary to resolve the assigned error are included herein.

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<sup>2</sup> To the extent that the convening authority's action purported to execute the dishonorable discharge, it was a legal nullity. See *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

## Speedy Trial

The appellant asserts that the Government did not move with "reasonable diligence" during the 109 days of confinement prior to arraignment or in the more than three months between arraignment and trial, resulting in violation of his right to a speedy trial under Article 10, UCMJ. We disagree.

"When a servicemember is placed in pretrial confinement, 'immediate steps shall be taken' to inform the accused of the charges and to either bring the accused to trial or dismiss the charges." *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (quoting Article 10, UCMJ). The standard of diligence under which we review claims of a denial of speedy trial under Article 10 "is not constant motion, but reasonable diligence in bringing the charges to trial." *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965) (internal quotation marks and additional citations omitted).

"Article 10 creates a more exacting speedy trial demand than does the Sixth Amendment.'" *Thompson*, 68 M.J. at 312 (quoting *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005) (citations omitted)). However, the factors applicable to analyzing speedy trial issues under the Sixth Amendment provide an appropriate procedural framework for analyzing Article 10 issues, including: (1) the length of the delay, (2) the reasons for the delay, (3) whether the accused made a demand for a speedy trial, and (4) prejudice to the accused. *Mizgala*, 61 M.J. at 129 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

Whether the appellant was denied his right to a speedy trial under Article 10, UCMJ is a question of law that we review *de novo*. *Id.* at 127. We give substantial deference to the military judge's findings of fact unless those findings are clearly erroneous. *Id.*; *United States v. Cooper*, 58 M.J. 54, 57-59 (C.A.A.F. 2003).

We have reviewed the military judge's findings of fact, and finding no clear error, adopt them as our own. We will now apply the *Barker* factors.

### (1) Length of the Delay

Approximately one week after the appellant was ordered into pretrial confinement charges were preferred and a hearing in accordance with Article 32, UCMJ, was scheduled to commence two weeks later. Following approximately two weeks of defense requested delay, the appellant submitted an unconditional waiver of an Article 32 investigation. Approximately two months later the special court-martial CA forwarded the charges recommending trial by general court-martial. Approximately one week later the CA referred charges to a general court-martial; the appellant was arraigned on those charges approximately three weeks later.

Following arraignment, it was more than three months before the appellant was brought to trial. In the interim, there was one Article 39(a), UCMJ, hearing during which, *inter alia*, the appellant's Motion to Dismiss for lack of a speedy trial was heard and denied. Record at 71-94; AE VI, VII, XIII.

We will assume without deciding that the "length of the delay" between the appellant's placement in pretrial confinement and arraignment and his actual trial includes a period of delay "that appears, on its face, to be unreasonable under the circumstances" and inquire into the other factors. *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007).

## **(2) Reasons for the Delay**

A significant portion of the pre-arraignment delay was attributable to two significant events: (1) the time it took for Defense Computer Forensics Laboratory (DCFL) review of the computer files of suspected child pornography and to complete final forensic analysis, and (2) investigative efforts to identify and interview three additional potential victims based upon review of texts, chats and images developed during forensic review of the appellant's hard drive and other computer files. The forensic evidence developed by DCFL and Navy investigators in follow-up may have provided critical evidence on each of the offenses to which the appellant ultimately entered pleas of guilty.

The post-arraignment delay was attributable to the trial schedule agreed upon by the parties. AE I.

We agree with the military judge's assessment that although "arguably the Government could have moved faster in some respects, this is not a case where the Government negligently or spitefully chose not to do so." AE XIII at 2; *see also United*

*States v. Kossman*, 38 M.J. 258, 261-62 (C.M.A. 1993). On balance, we find that reasons for the delay weigh in favor of the Government.

**(3) Demand for a speedy trial**

The appellant made no demand for speedy trial. Although the appellant did not move to dismiss the charges for lack of a speedy trial 49 days after arraignment and 172 days after being ordered into pretrial confinement, that motion included no demand for a speedy trial and acknowledged the appellant's agreement to the trial schedule. AE VI at 3; Record at 85-94; see also *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999). Therefore, this factor weighs in favor of the Government. See *Thompson*, 68 M.J. at 313.

**(4) Prejudice**

The appellant asserts as prejudice the 189 days of pretrial confinement prior to a hearing on his motion to dismiss and claims that his ability to adequately prepare a defense was inhibited by the delayed provision of the final DCFL report.

Although the appellant, no doubt, experienced some anxiety and stress due to the extended period of pretrial confinement, there is no evidence in the record that the conditions of that confinement were harsh or oppressive. Nor is there any indication in the record that his preparation for trial, defense evidence, trial strategy, or ability to present witnesses, on both the merits and sentencing, were compromised by the processing time in this case. We also consider that the appellant: (1) entered pleas of guilty pursuant to a pretrial agreement devoid of any hint of prosecutorial bad faith; (2) received credit for pretrial confinement on the sentence, and (3) that there is no evidence of willful or malicious conduct on the part of the Government to create the delay. See *Birge*, 52 M.J. at 212 (quoting *Barker*, 407 U.S. at 530).

Balancing those factors, we find that prejudice, if any, was minimal and that this factor also weighs in favor of the Government.

Having carefully examined the record of trial, including the pretrial motion, we agree with the military judge that the Government exercised "'reasonable diligence' in this case." AE XIII at 2 (footnote omitted). Although "the technical processing of the charges was not exemplary," the Government

exercised reasonable diligence in thoroughly investigating the case before proceeding to trial. *Cossio*, 64 M.J. at 258. There is no evidence that "DCFL improperly prioritized or otherwise unreasonably delayed the forensic examination of the computer evidence," and in fact the "Government actually leaned forward by getting a trial date before it had the completed DCFL analysis[.]" *Id.* Under these circumstances, we find no violation of Article 10, UCMJ, and decline to grant relief.

### **Conclusion**

The findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court