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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DANIEL L. DOUGHERTY
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300060
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 September 2012.
Military Judge: LtCol Charles Miracle, USMCR.
Convening Authority: Commanding General, 2d MAW, Cherry Point, NC.
Staff Judge Advocate's Recommendation: LtCol J.J. Murphy, USMC.
For Appellant: LT Gabriel Bradley, JAGC, USN.
For Appellee: LT Ian MacLean, JAGC, USN.

31 December 2013

OPINION OF THE COURT

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

MCFARLANE, Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of aggravated sexual assault, abusive sexual contact, wrongful sexual contact, and forcible sodomy, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The appellant was sentenced to 371 days of confinement, total forfeitures, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved

the sentence as adjudged, and, except for the punitive discharge, ordered the sentence executed.

The appellant asserts four assignments of error. First, he asserts that the military judge violated his constitutional right to present a defense by precluding a forensic psychologist from testifying that the appellant has a suggestible personality that made it more likely for him to falsely confess in response to coercive interrogation tactics. Second, he asserts that the military judge erred by not crafting additional remedies, beyond those granted in response to a finding of apparent unlawful command influence, when the *voir dire* process uncovered actual unlawful command influence. Third, he asserts that his post-trial speedy trial rights under *Moreno* were violated. Fourth, he asserts that his right to a speedy trial under Article 10, UCMJ, was violated.

After carefully considering the record of trial, the submissions of the parties, and oral argument,[1] we are convinced that the exclusion of expert testimony by the military judge was constitutional error, that the error was not harmless beyond a reasonable doubt, and that the error requires the findings and sentence to be set aside, with a rehearing permitted. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a lance corporal (LCpl) assigned to VMFA-224 in Beaufort, South Carolina, was drinking at a barracks party on the evening of 26 August 2011. The victim, LCpl M, was also drinking in the same barracks, but at a different party. Eventually, LCpl M ended up at the same party as the appellant.

Later, the appellant helped LCpl M back to her room. Once in her room, she passed out on her bed. At some point thereafter, she partially awoke, still intoxicated, when she felt a finger in her vagina. She attempted to resist but could not. Passing out again, LCpl M awoke a second time to the feeling of a penis in her mouth. During both occasions the room was dark, and she could not identify who was in the room. She has no further memories about what happened that night. The next thing she remembers is waking up alone in her room, in the middle of day, wearing only her shirt and bra.

[1] The court heard oral argument from the parties limited to the first assignment of error.

LCpl M, who later testified to being afraid of repercussions for underage drinking, did not make any report until 29 August 2011. That report was restricted. She "un-restricted" her report after a conversation with her commanding officer, during which he encouraged her to "tell the truth" and advised her of Marine Corps policy that victims would not be punished for collateral misconduct. Record at 1185.

On 9 September 2011, the appellant was interviewed by Naval Criminal Investigative Service (NCIS) special agents regarding the incident. The interview was video recorded and is Prosecution Exhibit 1. The recording reflects that over the course of the interview, the appellant changed his story about what happened that night several different times. At the beginning of the interview, the appellant stated that he found LCpl M highly intoxicated, and "passing out . . . against the wall." He stated that he carried LCpl M to her room, helped her get to the bathroom, and then left after 30 to 45 minutes without having engaged in any sexual behavior. Later, after being pressured by his interrogators, the appellant admitted to mutual groping, and claimed that LCpl M had stimulated his penis with her hand, but adamantly denied engaging in other sexual behavior. The agents rejected this version of events, told the appellant he needed to come clean, and said that they had "the DNA evidence." At this point the appellant claimed that he was too drunk to remember what happened that night, and stated that he experienced black outs during the time in question. The interrogators accused the appellant of exaggerating his memory problems, and began asking leading questions suggesting that he had engaged in different types of sexual behavior with LCpl M. The appellant answered most of those questions by saying that he did not remember, but eventually admitted to allegations of putting his penis in her mouth and to trying to penetrate her vagina with his penis. He also admitted to digitally penetrating LCpl M.

Later, while the agents were typing up the appellant's written statement, the appellant emphasized both his level of intoxication and his lack of memory. He characterized his level of intoxication as 9 out of 10 drunk, and stated he "honestly [didn't] remember that night." When asked if LCpl M had been too intoxicated to consent to some of the sexual acts, the appellant first said "No," then was prodded into changing that to "I think so, maybe," and then to "Probably," and then finally changing his answer to "Yes." When later confronted with similar inconsistencies, the appellant stated: "I was so – I couldn't even remember my own name that night." He went on to

say: "I don't understand anything right now, get me out of here."

Given LCpl M's lack of memory regarding the alleged sexual assault, the appellant's confession was the centerpiece of the Government's case. The appellant's defense strategy was to seek to suppress the confession as being involuntary, or in the alternative, to attack the credibility of the confession before the members. To those ends, Dr. Frumkin, a forensic psychologist specializing in false confessions, was sought as an expert witness by the defense. The first military judge assigned to this case[2] granted a defense motion to compel, finding that "Dr. Frumkin will testify about the phenomenon of false confessions in general, as well as conduct a battery of psychological tests on the accused to determine his vulnerability to police interrogation techniques." Appellate Exhibit XVII at 2 (footnote omitted).

Dr. Frumkin reviewed the video recording of the appellant's interrogation and met with him for approximately six and one half hours. During that meeting, Dr. Frumkin conducted a clinical interview and administered nine different psychological examinations, all in an effort to determine if the appellant had psychological factors that would make him more likely to make a false confession. Dr. Frumkin believed that those tests showed that the appellant "yielded to . . . leading questions and shifted to a different response at the 90% range compared to others." AE LV at 2. Dr. Frumkin also believed the appellant to be "particularly vulnerable to providing a false confession" due to his faulty memory regarding what actually transpired. *Id*. Moreover, Dr. Frumkin believed that these two factors, when combined with what he deemed to be coercive and misleading tactics used by the interrogators in this case,[3] placed the appellant "at [a] higher risk for providing false and unreliable statements than the average person." *Id*. at 2-3.

Four months after the first military judge ordered Dr. Frumkin to be provided to the defense, the Government moved the court to rule Dr. Frumkin's testimony inadmissible or, in the alternative, order a *Daubert* hearing to ensure the proposed

[2] A total of four military judges presided over the appellant's case.

[3] Dr. Frumkin's report stated that "NCIS misled [the appellant] as to the evidence against him. They did not accept his initial denials for the offense nor accept his explanations that he had difficulty remembering all that happened. The seriousness of what he was accused of doing was minimized." AE LV at 2.

testimony was reliable and relevant. AE XLVII. The Government's motion did not focus on the scientific reliability of the evidence, but rather on the question of whether the evidence "lacks relevance and [whether] its probative value is substantially outweighed by danger of confusion under M.R.E. 403." *Id*. at 2. On the day trial was set to begin, immediately before seating the members, the military judge ruled that Dr. Frumkin's testimony was inadmissible. AE XC.

In his ruling, the military judge agreed with the prior judge's ruling that "Dr. Frumkin is an expert in the area of forensic psychology [and] that false confessions are a counter-intutive, yet understandable phenomenon." *Id*. at 4. The court later found that "[e]xpert testimony such as that offered by Dr. Frumkin would, in an appropriate case and with an appropriate foundation, be a crucial tool to be made available to a finder-of-fact." AE CI at 3. However, the court ruled Dr. Frumkin's testimony inadmissible because: 1) it would be irrelevant absent "any evidence to suggest that [the accused's] confession was actually false"; 2) it would be "smuggling of testimony" that the accused's confession is false; 3) allowing Dr. Frumkin to testify without evidence that the confession was actually false "would be confusing to the members as well as more prejudicial than probative under Military Rule of Evidence 403"; and 4) the "circumstances surrounding the interrogation . . . can more than adequately be presented and attacked" during cross-examination by the defense team. Record at 584-85.

Following the military judge's ruling, the appellant's trial defense counsel asked for a recess to contemplate their options, noting "this is the defense, and now in the eleventh hour, right before members are getting paneled, we're told that we don't have our defense any longer." *Id.* at 586. On 10 September 2012, the military judge heard additional evidence on this matter during a motion to reconsider. On 12 September 2012, the military judge issued a written ruling, once again finding Dr. Frumkin's testimony regarding the appellant's susceptibility to making a false confession inadmissible. AE CI.

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

Discussion

I. Admissibility of the Expert Testimony

We review a military judge's ruling on the admissibility of expert testimony for abuse of discretion. *United States v. Baker*, 70 M.J. 283, 287 (C.A.A.F. 2011). An abuse of discretion occurs "when: (1) the findings of fact upon which [the military judge] predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). If such an abuse of discretion has the effect of denying the appellant the constitutional "right to present a defense," then the Government bears "the burden of demonstrating that this constitutional error was harmless beyond a reasonable doubt." *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007) (citations omitted).

An accused has a constitutional right to challenge the credibility of a confession admitted into evidence against him "when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This right is separate from an accused's right to challenge the voluntariness of the confession. *Id.* at 689. "[E]vidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Id.* at 688. Indeed, "the physical *and psychological* environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt." *Id*. at 689 (emphasis added).

a. Relevance Absent Evidence that the Confession was Actually False

We first address the military judge's view that the testimony of Dr. Frumkin would be irrelevant absent some evidence that "the accused's confession was in fact false." AE CI at 2. In reaching that conclusion, the military judge explicitly relied upon the Court of Appeals for the Armed Forces (CAAF) opinion in *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005). However, the military judge's reliance on *Bresnahan* is misplaced.

The *Bresnahan* case dealt with a significantly different issue: denial of a defense request for expert assistance. *Bresnahan*, 62 M.J. at 143. The instant case is about whether an expert, who was already retained, examined the appellant, provided a written report, testified at multiple Article 39(a), UCMJ, sessions, and prepared for trial, would be allowed to actually testify at trial. This distinction is significant, as the applicable tests are different. The *Bresnahan* decision addressed whether the defense "failed to meet its burden of necessity," whereas here the question is whether the expert's opinion would be admissible under MILITARY RULES OF EVIDENCE 403 and 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Accordingly, we find that the military judge's reliance on *Bresnahan* was error.

Moreover, even assuming *arguendo* that the reasoning set forth in the *Bresnahan* decision were applicable to the case at bar, we believe that the appellant met the burden set forth therein. The CAAF described *Bresnahan* as a "close call," and cited to three factors for upholding the military judge's decision: 1) the absence of evidence to suggest the appellant's confession was actually false; 2) the lack of evidence suggesting that the appellant suffered from "any abnormal mental or emotional problems"; and 3) the lack of evidence that the appellant had a "submissive personality so weak or disoriented as to make false incriminatory statements in response to accusation of serious criminal conduct." *Id*. (internal quotation marks omitted). In this case, the military judge was presented with evidence, in the form of Dr. Frumkin's testimony, regarding the second and third prongs – i.e., the appellant's emotional and personality traits that made him "very suggestible under pressure in terms of yielding to leading information or shifting to different responses under pressure." Record at 902.

Lastly, regardless of the applicability of *Bresnahan,* we disagree with the military judge's underlying view that an accused must first put on evidence that his confession was actually false before he may challenge the credibility of his confession. We are persuaded instead by the opinion of the United States Court of Appeals for the First Circuit, which held that the credibility of a criminal defendant's confession is always at issue from the moment it is entered into evidence. *See United States v. Shay*, 57 F.3d 126, 131-32 (1st Cir. 1995). The court in *Shay* was analyzing FEDERAL RULE OF EVIDENCE 806, which is exactly mirrored by MIL. R. EVID. 806. *See* MANUAL FOR COURTS-MARTIAL (2012 ed.), Appendix 22, at A22-59 ("Rule 806 is taken from the Federal rule without change.") Adopting the reasoning

of the First Circuit, and recognizing the legislative history of MIL. R. EVID. 806, we hold that the credibility of an accused's confession is subject to attack once admitted into evidence.

b. Impermissible Smuggling

We next consider the military judge's view that Dr. Frumkin's testimony would constitute impermissible smuggling of testimony. The military judge noted that "[t]he Defense agrees that Dr. Frumkin would not be allowed to testify that the statements made by the accused to NCIS were false" and that Dr, Frumkin "could not and would not state an opinion on whether the accused's statements to law enforcement are false." AE XC at 2. Nonetheless, the military judge concluded that by "allowing an expert to testify that the accused . . . was vulnerable or susceptible to falsely confessing, without any shred of evidence that such things actually occurred, the Defense would be attempting to smuggle evidence in front of the finder of fact." *Id*. at 5. The judge further concluded that such testimony was "not the role of an expert and [would be] impermissible based on the facts before [the] Court at this time." *Id*.

In making his ruling, the military judge relied on the cases of *United States v. Williams*, 43 M.J. 348 (C.A.A.F. 1995), and *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987). However, neither *Neeley* nor *Williams* is applicable to this case. Both cases stand for the proposition that a litigant may not smuggle into evidence otherwise impermissible *hearsay* under the guise of explaining the basis for an expert's opinion. *Williams*, 43 M.J. at 353-54; *Neeley*, 25 M.J. at 107. In this case, Dr. Frumkin's extensive Article 39(a) testimony and his written opinion contain no indication of an intent to introduce hearsay evidence of any sort. Nor did the military judge identify anything that would indicate such intent. Rather, the military judge appears to hold that it would be "smuggling," in violation of *Neely* and *Williams*, to allow the appellant to *imply* that his confession was false by offering evidence that he was susceptible to making a false confession. Accordingly, we find that the military judge erred by applying incorrect legal principles to the case at bar.

c. MIL. R. EVID. 403

Additionally, we are not convinced by the military judge's MIL. R. EVID. 403 analysis, which did not clearly demonstrate any balancing he employed. Although military judges' MIL. R. EVID. 403 analyses are generally afforded great deference, MIL. R. EVID.

403 rulings that are unsupported by an on-the-record or written balancing are afforded less deference. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Here, the probative value of the evidence, given the centrality of the confession to the Government's case, as demonstrated by the facts and analysis *supra*, is such that it outweighs any danger of unfair prejudice, any danger of confusion of the issues, or any danger of misleading the members. Accordingly, under the facts and circumstances of this case, we find that the military judge's conclusion of law - that MIL. R. EVID. 403 prohibited Dr. Frumkin from testifying - was a clearly unreasonable application of the correct legal principles to the facts.

d. Alternative Routes to Attack the Confession

Dr. Frumkin's testimony was unique and struck directly at the credibility of the appellant's confession in a way that explained a counter-intuitive phenomenon. The Government conceded, pretrial, that it could not find a suitable replacement for Dr. Frumkin as an alternative to producing him. The military judge's conclusion that the appellant could adequately attack his confession by cross-examination of the agent who interrogated him is unsupported by the record. The agent could not have testified about appellant's psychological makeup, or his susceptibility, or the interplay between the interrogation techniques used and the appellant's unusual psychological makeup. Only Dr. Frumkin could have testified to the appellant's susceptibility to false confessions, and how the techniques employed by the NCIS agents during his interrogation might have affected someone with this susceptibility. Accordingly, excluding Dr. Frumkin's testimony on this basis was a clearly unreasonable application of the correct legal principles to the facts.[4]

e. Was the Exclusion Harmless Error?

In light of the foregoing, we find that the military judge abused his discretion by excluding Dr. Frumkin's testimony. Moreover, given the centrality of the confession to the

[4] We note that other courts have differed in their holdings regarding introduction of expert psychological testimony relating to an accused's susceptibility to falsely confess. *See, e.g., Loza v. Mitchell*, 2011 U.S. Dist. LEXIS 39085 (S.D. Ohio 2011). As noted above, we disagree with the proposition that, when a defendant has been examined by a psychologist and shown to have a susceptible personality, a court may, without abridging the constitutional right to present a defense, categorically limit his defense to introducing evidence of this by cross-examination of a law enforcement agent or displaying a videotape of his interrogation.

Government's case, we find that the military judge's erroneous ruling denied the appellant his constitutional right to present a defense, and that any claim that the error was harmless must be established by the Government "beyond a reasonable doubt." *McAllister*, 64 M.J. at 252. The Government fails to meet that burden here. On appeal, it offers brief conclusory statements regarding its belief that the members would have been unswayed by Dr. Frumkin's testimony. This falls far short of the standard described by *McAllister*. Accordingly, we find that the error was not harmless beyond a reasonable doubt.

II. Unlawful Command Influence

Appellant's second assignment of error avers that the military judge's failure to craft additional remedies, in response to what the appellant describes as actual unlawful command influence, resulted in a tainted panel for sentencing purposes only. Because we found error invalidating both the findings and sentence we do not reach this issue.

III. Speedy Post-Trial Processing

"Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law we review *de novo*." *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)). The Court of Appeals for the Armed Forces set out the rule in *Moreno* that "a delay of 120 days or more between the completion of trial and the convening authority's action is presumed to be facially unreasonable." *Arriaga*, 70 M.J. at 56 (citing *Moreno*, 63 M.J. at 142). Such a delay trigger[s] "a full analysis under the *Barker/Moreno* factors." *Id*. These factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id.* (citations omitted).

The CA's action in this case was signed 138 days after the appellant was sentenced, thus triggering our review under the *Moreno* factors. However, we need not engage in a full analysis here because, even assuming *arguendo* that the delay was unreasonable, we do not find any prejudice. The appellant's claim that errors in the staff judge advocate's post-trial processing of the case were related to the delay are speculative and fall short of establishing prejudice.[5] Moreover, we are

[5] The staff judge advocate's recommendation failed to address two allegations of legal error raised by the appellant in post-trial submissions.

unconvinced that the additional 18 days that the appellant waited for the CA's action caused sufficient anxiety or concern to amount to the level of prejudice that would warrant relief.

IV. Right to a Speedy Trial

When a servicemember is placed in pretrial confinement, "immediate steps shall be taken" to inform the accused of the charges and either bring the accused to trial or dismiss the charges. Art. 10, UCMJ. The procedural framework for analyzing speedy trial violations under Article 10 examines: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005).

Although this framework is derived from the Sixth Amendment test set forth in *Barker v. Wingo*,[6] Article 10 imposes a more stringent speedy trial standard than the Sixth Amendment. *Mizgala*, 61 M.J. at 127, 129. However, Article 10 does not require "constant motion, but reasonable diligence in bringing the charges to trial." *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) (citations and internal quotation marks omitted). "Short periods of inactivity are not fatal to an otherwise active prosecution." *Mizgala*, 61 M.J. at 127 (citations omitted). In conducting our analysis, "we remain mindful that we are looking at the proceeding as a whole and not mere speed." *Id*. at 129. 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, "*giving substantial deference to a military judge's findings of fact . . . ." *Id.* at 127.

Because this issue is raised for the first time on appeal, we do not have the benefit of a fully developed record regarding this issue. However, we find that the record contains sufficient detail to allow us to conduct the required analysis. *Mizgala*, 61 M.J. at 129.

The first factor weighs in favor of the appellant. The appellant was placed in pretrial confinement on 9 September 2011. Charges were preferred on 29 September 2011, served on the appellant on 12 October 2011, and referred to a general court-martial on 14 December 2011. On 15 December 2011, the appellant was arraigned. However, the appellant was not brought to trial until September of the following year – 371 days after

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[6] *Barker v. Wingo*, 407 U.S. 514 (1972).

he was first confined. Given the nature of the offenses, and the fact that the criminal investigation was largely completed before the appellant was apprehended, we find this delay to be facially unreasonable.

The second and third factors weigh heavily in favor of the Government. The delays were at the appellant's request, so as to allow the development of his defense, and to allow for the preparation of multiple pretrial motions. Moreover, not only did the appellant not demand a speedy trial, but he repeatedly rejected offers by the military judge to put his case on the fast track given the length of his pretrial confinement.

Following arraignment, multiple Article 39(a) sessions were held in this case, many of which involved efforts at securing Dr. Frumkin as a Government-funded expert witnesses. On 8 May 2012, the military judge, at the request of the trial defense counsel, pushed the trial date forward to 25 June 2012. The defense, later that same day, revised its request and asked that the trial be pushed to the third full week of July, in order to add an additional defense counsel to prepare a new motion regarding unlawful command influence (UCI). The Government raised the issue of delay, and the military judge opted to leave the dates of trial as they were, noting the "huge concern for the court" of the amount of time that the accused had by then spent in pretrial confinement. Record at 121. The military judge further noted, directly to the accused, that "[y]ou're so convinced that the delay is noteworthy that you're willing to remain in pretrial confinement in order to give your defense counsel enough time to prepare your case and to present motions . . . ." *Id*. at 122. The military judge went on to tell the accused that "if you ever decide that you have had enough and you want to go to trial immediately, all you need to do is communicate that to your defense counsel. . . . I mean, we're talking about weekends, holidays, none of that will bar us proceeding to trial." *Id*.

Despite this extensive discussion of delay by the military judge, multiple additional continuance requests were made by the defense, pushing back the empanelling of members to 7 September 2012. These requests were due in part to contracting issues between Dr. Frumkin and the Government, which precluded the appellant from developing his defense. However, the delays were also based in part upon the defense's desire to more fully develop its UCI claim regarding the Commandant's Heritage Brief. The military judge reluctantly granted the requests, making it very clear to the appellant that he would remain in pretrial

confinement, and securing from the appellant his election to do so rather than go to trial.

Lastly, we find that the forth factor also weighs against the appellant. Prejudice should be assessed in the light of those interests that the speedy trial right was designed to protect. The Supreme Court has identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the appellant; and (3) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of an appellant to adequately prepare his case skews the fairness of the entire system. *Barker*, 407 U.S. at 532 (footnote omitted).

In this case, the appellant was in pretrial confinement for 371 days, which necessarily involved some anxiety and stress, but there is no evidence in the record to suggest that the conditions were harsh or oppressive. Likewise, there is no evidence indicating that, during the delay in this case, any witness became unavailable for trial, any evidence was lost, or any defense strategy was compromised. To the contrary, the evidence shows that the appellant's trial defense team used the time to their advantage. Balancing these factors, we conclude that the prejudice stemming from the appellant's pretrial confinement, if any, was minimal.

While we believe that the delay in this trial was facially unreasonable, we find, under the complex circumstances of this case, that the delay did not rise to the level of an Article 10 violation.

V. Conclusion

The findings of guilty and the sentence are set aside. A rehearing may be ordered. The record is returned to the Judge Advocate General for transmission to the CA for such further action as is deemed appropriate, consistent with this decision. *United States v. Abdirahman*, 66 M.J. 668, 683 (C.A.A.F. 2008).

Senior Judge WARD and Judge MCDONALD concur.

For the Court

R.H. TROIDL
Clerk of Court