UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic IVAN D. MANN
United States Air Force

ACM 36109

15 March 2006

Sentence adjudged 12 July 2004 by GCM convened at Robins Air Force Base, Georgia. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Nikki A. Hall and Major John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jeffrey A. Ferguson.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

A military judge sitting as a general court-martial at Robins Air Force Base (AFB), Georgia, convicted the appellant, contrary to his pleas, of one specification of failure to obey a lawful order, one specification of larceny, three specifications of forgery, one specification of unlawful entry, and one specification of breaking restriction,

in violation of Articles 92, 121, 123, and 134, UCMJ, 10 U.S.C. §§ 892, 921, 923, 934.[1] The appellant was sentenced to a bad-conduct discharge, confinement for 12 months, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence as adjudged. The appellant has submitted two assignments of error: (1) Whether the military judge erred in denying the appellant's motion to dismiss all charges and specifications for denial of his right to a speedy trial; and (2) Whether the post-trial processing of his case, which took four months from the end of his trial to action, warrants a substantial reduction in his sentence. We have examined the record of trial, the assignments of error, and the government's response thereto. We find no merit as to these assignments of error. However, we return the case to the convening authority for a new action for the reasons set forth below.

Speedy Trial

The appellant was restricted to his dormitory room at Robins AFB on 4 December 2003 and placed in pretrial confinement on 30 January 2004. He was arraigned and brought to trial on 7 July 2004, 216 days after being restricted. At trial, the appellant moved to dismiss all charges and specifications, arguing he had been denied his right to a speedy trial under Rule for Courts-Martial (R.C.M.) 707, Article 10, UCMJ, 10 U.S.C. § 810, and the Sixth Amendment to the United States Constitution. On appeal, the appellant renews his claim. The military judge excluded 98 days of the 216 days under R.C.M. 707(c), finding that the convening authority had properly excluded 83 days in response to the defense request for a physical and mental evaluation of the appellant, and 15 days were properly excluded by the Chief Circuit Military Judge. The military judge thus determined the appellant was brought to trial on day 118 for purposes of R.C.M. 707.

Whether an appellant has received a speedy trial is a question that we review de novo. *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999); *United States v. Bray*, 52 M.J. 659, 661 (A.F. Ct. Crim. App. 2000). However, we give substantial deference to the military judge's findings of fact and they will be reversed only for clear error. *Cooper*, 58 M.J. at 58; *Doty*, 51 M.J. at 465.

The evidence presented at trial clearly supports the military judge's well-reasoned findings of fact and conclusions of law. We adopt them as our own.[2] We agree with the

[1] The appellant was found not guilty of two specifications of failure to go; one specification of larceny; one specification of forgery; one specification of obtaining services under false pretenses; one specification of unlawful entry; and two specifications of making false official statements, in violation of Articles 86, 107, 121, 123, 130, and 134, UCMJ, 10 U.S.C. §§ 886, 907, 921, 923, 930, 934. The military judge dismissed with prejudice one specification of failure to go, one specification and charge of larceny of an X-Box computer game system, and two specifications of breaking restriction, in violation of Articles 86, 121, and 134, UCMJ.

[2] The military judge's ruling on the motion is attached to this opinion as an appendix.

military judge that the appellant was not denied his right to a speedy trial under R.C.M. 707, Article 10, UCMJ, or the Sixth Amendment to the United States Constitutuion. *See Barker v. Wingo*, 407 U.S. 514 (1972); *Cooper; Doty; United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993). We hold that the military judge did not err in denying the appellant's motion to dismiss the charges and specifications.

Post-Trial Delay

The appellant's trial ended on 12 July 2004. The record of trial is seven volumes and the transcript of the trial is 526 pages. There are 62 appellate exhibits; Prosecution Exhibits 1-16; and Defense Exhibits A-LL. The transcript of the record of trial was completed on 26 August 2004. The military judge authenticated the record of trial on 26 September 2004, and the staff judge advocate's recommendation (SJAR) was completed on 4 October 2004. The appellant and his counsel submitted written matters on 12 October 2004, and the addendum to the SJAR was completed on 10 November 2004. On 10 November 2004, the convening authority took action on the case.

The appellant now contends that the post-trial processing of his case from the end of his trial until action was excessive and inexcusable. Therefore, he asks this Court to provide him with meaningful sentence relief.

An appellant has a right to a speedy post-trial review of his case. *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). An unreasonable delay in the post-trial review process will be tested for prejudice. *Id.* (citing *United States v. Banks*, 7 M.J. 92, 94 (C.M.A. 1979)). Delay "will not be tolerated if there is *any* indication that the appellant was prejudiced as a result." *Williams*, 55 M.J. at 305 (quoting *United States v. Shely*, 16 M.J. 431, 433 (C.M.A. 1983)).

We are cognizant of this Court's power under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant relief even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *see also United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004). We find that the post-trial processing in this case was not excessive or unreasonable. We do not find any prejudice or other harm to the appellant resulting from the post-trial processing of this case. Based on all the facts and circumstances in the record before us, and mindful of our obligation under Article 66(c), UCMJ, as expressed in *Tardif* and *Bodkins*, we are convinced that the findings and sentence approved by the convening authority should be affirmed. We therefore decline to grant relief on this ground.

The Convening Authority's Action

The military judge found that the appellant had been subjected to unlawful pretrial punishment, in violation of Article 13, UCMJ, 10 U.S.C. § 813, and awarded him 57 days

credit for the violation. However, the convening authority, in his action, failed to reflect the illegal pretrial punishment credit directed by the military judge, as required by R.C.M. 1107(f)(4)(F). Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the erroneous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. §866, will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

APPENDIX

(The court reconvened at 0910 hours, 7 July 2004.)

MJ: Please be seated, the court will come to order.

ATC: All parties present when the court recessed are again present.

MJ: Anything else from counsel before I rule on the motion to dismiss for a lack of speedy trial?

DC: Nothing further from the defense, Your Honor.

TC: Nothing from the government.

MJ: I make the following findings of fact by the preponderance of the evidence. In November and early December 2003, security forces investigators at Robins Air Force Base, Georgia, received information that Airman Basic Long, Senior Airman Dotson, and Airman Mann may have engaged in certain criminal activity and they may have acted in some way in concert in some of that activity. The security forces' report of investigation on the three is dated 9 November 2003 and is Appellate Exhibit IV. Security forces investigators continued to investigate matters related to AB Mann after that date.

On 4 December 2003, AB Mann was interviewed by security forces investigators and made admissions to some of the suspected activity. Thereafter on the same day, AB Mann's commander ordered him restricted to his dormitory room with certain limited exceptions. AB Mann was also given a no contact order.

On 21 December 2003, Capt Green, an area defense counsel from Andrews Air Force Base was detailed to represent AB Mann. Capt Green filed a notice of representation and discovery request on 30 December 2003. After the restriction and shortly after the purported

acts, information was received by the government that AB Mann may have broken restriction twice in December 2003, failed to go to his place of duty at the time required twice during December 2003; failed to go once during January 2004, and broke restriction once during January 2004. On 29 December 2003, AB Mann was offered nonjudicial punishment for the two failures to go and two breakings of restriction in December 2003. Additionally as a result, on 30 January 2004, AB Mann was ordered into pretrial confinement. A hearing was held that day and the pretrial confinement was continued. A second pretrial confinement hearing was held on 5 February 2004. AB Mann was again continued in pretrial confinement.

On 6 February 2004, the office of the staff judge advocate received a security forces' report of investigation on AB Mann regarding alleged forgeries. That report of investigation is dated 12 January 2004, that is Appellate Exhibit VII. Also on 6 February 2004, the defense submitted a lengthy discovery request and a demand for speedy trial.

On 9 February 2004, AB Long was tried by general court-martial by military judge alone. Based upon a pretrial agreement, he pled guilty. The trial counsel in AB Mann's case was also trial counsel in AB Long's court-martial.

On 1 January 2004, the defense submitted a revised supplemental discovery request and a second demand for speedy trial.

On 19 February 2004, the defense submitted a third demand for speedy trial and made a request for notice of the charges against AB Mann. During much of February 2004, the trial counsel was hampered in her case preparation by an illness.

On 24 February 2004, the defense requested reconsideration of the decision to continue pretrial confinement because, in part, of the fact that charges had not yet been preferred.

On 25 February 2004, the trial counsel provided the defense a written response to the requested reconsideration. The response included reference to the fact that AB Mann was given notice of the allegations at the time of his restriction and then at his pretrial confinement hearings; and that the general court-martial convening authority was informed of the status of AB Mann's case and the reasons for the delay in preferral of charges. This is Appellate Exhibit XVI. Also on 25 February 2004 charges were preferred against AB Mann.

On 2 March 2004, the pretrial confinement reviewing officer sent a written notice to the defense that he had reconsidered his decision to continue pretrial confinement and decided to continue pretrial confinement of AB Mann. The special court-martial convening authority appointed an Article 32 investigation officer on 8 March 2004. The trial counsel requested the investigation be held on 11 March 2004.

On 10 March 2004, the investigating officer set the hearing for 11 March 2004 and the defense was so notified that day. The defense requested a delay until 15 March 2004 because defense counsel was at Andrews Air Force Base and needed this time to travel after obtaining travel orders.

On 12 March additional charges were preferred against AB Mann. The Article 32 investigation was held on 15 and 16 March 2004. The investigation was reopened on 19 March 2004. The investigating officer completed her report on 30 March 2004. The investigating officer made several specific recommendations, including bringing a second additional charge.

On 17 March 2004, the defense requested "a complete medical and mental health examination including a sleep evaluation; a complete neurological examination including a CAT Scan and MRI; a thorough battery of psychological tests including at a minimum an intelligence indicator such as Shipley or Wechsler Adult Intelligence Scale; a personality inventory, such as the Minnesota Multiphase Personality Inventory; and a series of other tests to indicate bizarre thought processes, such as the Rorschach Ink-Blot Test; Thematic Appreciation Test, Bender Gestalt Test; or other test as deemed appropriate by the board. These tests should be administered and interpreted by a board-certified clinical psychologist. All test results should be documented and retained for defense use. We also request the health care provider address the degree he or she feels the pending charges affected any test results. We further request that the health care provider address the following questions concerning AB Mann's current mental condition.

a) Does AB Mann have a mental disease or effect?

1) If so, what is the clinical psychiatric diagnosis utilizing the American Psychiatric Association Diagnostic and Statistical Manual for DSM IV?

2) Is this mental disease service disqualifying?

3) What is AB Mann's prognosis?

b) What is AB Mann's intelligence level?

The defense requests the health care provider consider but not be limited to all of the following materials in reaching their findings: AB Mann's mental health records, AB Mann's medical records, AB Mann's official personnel file to include performance reports, AB Mann's

personnel information file (PIF), all notes and reports of interviews of AB Mann conducted by 78th SFS or any other law enforcement official.

If the government has any additional information it feels is pertinent, request that it be included in the file going to the health care provider and a copy made for defense counsel."

The defense concluded that "while the defense is not specifically requesting a sanity board be convened at this time, we do not object to such proceedings if you believe that it be more appropriate." That is quoting from Appellate Exhibit XXIII.

Contemporaneous with the request, AB Mann authorized release of his medical records and then shortly thereafter provided a copy of his civilian medical records that are Appellate Exhibit XXXVII. Also on 17 March 2004, the prosecution and defense agreed to conduct an arraignment of AB Mann on 29 March 2004. On 23 March 2004, the government received another request for reconsideration of pretrial confinement. The pretrial confinement reviewing officer decided to wait until completion of the Article 32 report. The pretrial confinement reviewing officer made another decision to continue pretrial confinement of AB Mann on 12 April 2004.

On 30 March 2004, after receiving a written legal review by the staff judge advocate on the defense-requested physical and mental examinations, the special court-martial convening authority ordered mental, physical, and neurological examinations of AB Mann and granted a delay under RCM 707, effective from 17 March 2004 until all required examinations and reports were completed and received by all appropriate parties. The order also directed an inquiry into AB Mann's mental capacity or responsibility.

AB Mann submitted a request for discharge in lieu of court-martial on 12 April 2004. Between 26 April 2004 and 8 June 2004, the trial counsel checked several times on the status of the order and the examinations and reports.

A sanity board report was issued on 8 June 2004. It is Appellate Exhibit XXVII.

On 19 May 2004, the government received a request for a confidential defense expert consultant. The request was approved by the special court-martial convening authority on 4 June 2004.

On 14 June 2004, AB Mann's commander recommended denial of his request for discharge in lieu of court-martial.

On 18 June 2004, the staff judge advocate provided written advice to the general court-martial,convening authority in accordance with Article 34, Uniform Code of Military Justice. On that day, the general court-martial convening authority referred the charges and the additional charges to trial by general court-martial.

On 21 June 2004, a second additional charge was referred to trial with the original charges and served on AB Mann.

On 22 June 2004, the trial counsel and defense counsel had a telephonic conference with Col Thomas Cumbie, Chief Circuit Military Judge, Eastern Circuit, US Air Force Trial Judiciary, regarding setting a trial date. Col Cumbie informed counsel there was no judge available that week and verified that the defense counsel was not available the following week because of an existing scheduled trial at Andrews Air Force Base. Col Cumbie also verified that the defense counsel would be available on 7 July 2004. Col Cumbie concluded that after the

week of 28 June 2004, the first day that a judge would be available would be 12 July 2004. He set the trial for 12 July 2004 excluding the time period 23 June 2004 to 7 July 2004 for speedy trial computation because of defense counsel unavailability.

I was detailed as military judge in both cases. The case at Andrews Air Force Base was unexpectedly continued on 1 July 2004 to a date in August 2004. I, after the request of the trial counsel in AB Mann's case and the concurrence of the defense counsel, moved the trial date up to 7 July 2004.

AB Mann was arraigned on 7 July 2004. AB Mann and his family have experienced emotional hardship because of his pretrial restraint from 4 December 2003 until today. AB Mann has lost his freedom of movement during that time. MSgt Jones, AB Mann's former first sergeant, is less able to remember details about events related to AB Mann's case because of the passage of time.

Amn Rodway, a defense requested witness, has separated from active duty. He lives in Marietta, Georgia, and can't afford to travel to Robins Air Force Base and therefore will be more difficult to obtain as a witness.

From all of these facts I make the following conclusions: AB Mann has spent a total of 216 days in pretrial restraint, which began upon his restriction on 4 December 2003.

The following is my analysis, rationale, and my conclusions of law: Once speedy trial is raised, the prosecution must prove by a preponderance of the evidence that it has complied with the applicable time limits. RCM 707 requires that an accused be brought to trial within 120 days of imposition of pretrial restraint. The time starts the day after such imposition and ends on

the day that the accused is arraigned. Under the rule, certain events affect the time period. There were no such events in this case. However, the rule also provides for excludable delays. Importantly in this case, all pretrial delays approved by a military judge or the convening authority are excluded. There are two such approved periods in this case.

First, the period 17 March 2004 to 8 June 2004, not counting 8 June. This is 83 days. This period of time was approved by the convening authority in response to the defense request for physical and mental examinations of the accused.

The second period of time was the period of 23 June 2004 to 7 July 2004. This delay was approved by the Chief Circuit Military Judge for the Eastern Circuit because of the unavailability of the defense counsel. As it turns out, there was some misunderstanding between counsel and the Chief Circuit Military Judge regarding the defense counsel's unavailability. The reality is that this period of approved delay was because of the unavailability of a judge immediately and then the unavailability of the defense counsel. This period totaled 15 days, which does not count 22 June 2004, the date the delay was granted.

A third period of four days, because of a defense requested delay in the Article 32 investigation was not an excludable delay under the rule because it was not approved by the convening authority. Therefore, the total excludable delay under the rule is 98 days.

As a result, I conclude that AB Mann was brought to trial on day 118. Thus, I hold that RCM 707 has been complied with. However, this does not end the analysis. As case law makes clear, the Constitution and particularly, Article 10 of the Uniform Code of Military

Justice, impose requirements on the government that transcend the technical compliance with the time standard of RCM 707.

The sixth amendment to our federal constitution provides an accused a right to a speedy trial. The fifth amendment, due process requirement, also gives the accused a right to speedy disposition and processing of his case. The Supreme Court said in the case of Barker versus Wingo, 407 US 514, 1972, that four factors should be considered by courts in determining whether speedy trial has been complied with: 1) the length of delay; 2) the reasons for the delay; 3) whether the accused has made a timely assertion of his right to a speedy trial; and 4) whether the accused has suffered specific prejudice.

As I earlier stated, the length of delay was 216 days. The reasons for the delay are numerous and are contained in my findings of fact.

In summary, the reason for the delay was for the government to carry out all the acts that were necessary to bring the accused to trial. The accused did make timely assertion of his right to a speedy trial and the accused suffered the prejudice of being restrained for 216 days and being denied the opportunities he would have had as an active duty member had he not been so restrained.

I find that the accused has not suffered any specific prejudice with respect to his case and ability to defend himself. As a result, I hold that the accused has not been denied his fifth and sixth amendment rights to due process and speedy trial.

There still remains the requirements of Article 10 under the Uniform Code of Military Justice. Article 10 requires that when an accused is placed in pretrial restraint, immediate steps

must be taken to either try the accused or dismiss the charges and release him. I hold that the requirements of Article 10 were triggered on 4 December 2003 when the accused was restricted.

The United States Court of Appeals for the Armed Forces has said in several cases that Article 10 requires the government to act with reasonable diligence. Further, the Air Force Court of Criminal Appeals has said in the case of United Stated versus Plants, 57 MJ 664, Air Force Court of Criminal Appeals, 2002, that immediate steps does not mean that the government counsel must bring an accused to trial before collecting evidence or otherwise busy themselves with preparing the case while waiting for evidence.

In this case, I hold that the government took immediate steps to try the accused. The government acted with reasonable diligence. The delay in this case was for appropriate investigation of emerging evidence of a series of potentially criminal acts by the accused; fulfillment of all procedural and substantive requirements of the Uniform Code of Military Justice to bring the charges to trial by general court-martial; and to appropriately respond to all of the demands and the requests made by the defense; and to finally set a trial date agreeable to the parties.

We do not live in a perfect world. If we did, one might ask why it took the defense counsel nine days from her detail to represent the accused to give the government notice of that representation. Certainly, in the world we operate in, with all of the various demands being placed on our time, I cannot conclude that those nine days were not reasonable.

Likewise, given all of the circumstances in the case, I conclude the accused has received a speedy trial. His lengthy confinement is an unfortunate reality that has obviously

acts, information was received by the government that AB Mann may have broken restriction twice in December 2003, failed to go to his place of duty at the time required twice during December 2003; failed to go once during January 2004, and broke restriction once during January 2004. On 29 December 2003, AB Mann was offered nonjudicial punishment for the two failures to go and two breakings of restriction in December 2003. Additionally as a result, on 30 January 2004, AB Mann was ordered into pretrial confinement. A hearing was held that day and the pretrial confinement was continued. A second pretrial confinement hearing was held on 5 February 2004. AB Mann was again continued in pretrial confinement.

On 6 February 2004, the office of the staff judge advocate received a security forces' report of investigation on AB Mann regarding alleged forgeries. That report of investigation is dated 12 January 2004, that is Appellate Exhibit VII. Also on 6 February 2004, the defense submitted a lengthy discovery request and a demand for speedy trial.

On 9 February 2004, AB Long was tried by general court-martial by military judge alone. Based upon a pretrial agreement, he pled guilty. The trial counsel in AB Mann's case was also trial counsel in AB Long's court-martial.

On 1 January 2004, the defense submitted a revised supplemental discovery request and a second demand for speedy trial.

On 19 February 2004, the defense submitted a third demand for speedy trial and made a request for notice of the charges against AB Mann. During much of February 2004, the trial counsel was hampered in her case preparation by an illness.

On 24 February 2004, the defense requested reconsideration of the decision to continue pretrial confinement because, in part, of the fact that charges had not yet been preferred.

On 25 February 2004, the trial counsel provided the defense a written response to the requested reconsideration. The response included reference to the fact that AB Mann was given notice of the allegations at the time of his restriction and then at his pretrial confinement hearings; and that the general court-martial convening authority was informed of the status of AB Mann's case and the reasons for the delay in preferral of charges. This is Appellate Exhibit XVI. Also on 25 February 2004 charges were preferred against AB Mann.

On 2 March 2004, the pretrial confinement reviewing officer sent a written notice to the defense that he had reconsidered his decision to continue pretrial confinement and decided to continue pretrial confinement of AB Mann. The special court-martial convening authority appointed an Article 32 investigation officer on 8 March 2004. The trial counsel requested the investigation be held on 11 March 2004.

On 10 March 2004, the investigating officer set the hearing for 11 March 2004 and the defense was so notified that day. The defense requested a delay until 15 March 2004 because defense counsel was at Andrews Air Force Base and needed this time to travel after obtaining travel orders.

On 12 March additional charges were preferred against AB Mann. The Article 32 investigation was held on 15 and 16 March 2004. The investigation was reopened on 19 March 2004. The investigating officer completed her report on 30 March 2004. The investigating officer made several specific recommendations, including bringing a second additional charge.

On 17 March 2004, the defense requested "a complete medical and mental health examination including a sleep evaluation; a complete neurological examination including a CAT Scan and MRI; a thorough battery of psychological tests including at a minimum an intelligence indicator such as Shipley or Wechsler Adult Intelligence Scale; a personality inventory, such as the Minnesota Multiphase Personality Inventory; and a series of other tests to indicate bizarre thought processes, such as the Rorschach Ink-Blot Test; Thematic Appreciation Test, Bender Gestalt Test; or other test as deemed appropriate by the board. These tests should be administered and interpreted by a board-certified clinical psychologist. All test results should be documented and retained for defense use. We also request the health care provider address the degree he or she feels the pending charges affected any test results. We further request that the health care provider address the following questions concerning AB Mann's current mental condition.

a) Does AB Mann have a mental disease or effect?

1) If so, what is the clinical psychiatric diagnosis utilizing the American Psychiatric Association Diagnostic and Statistical Manual for DSM IV?

2) Is this mental disease service disqualifying?

3) What is AB Mann's prognosis?

b) What is AB Mann's intelligence level?

The defense requests the health care provider consider but not be limited to all of the following materials in reaching their findings: AB Mann's mental health records, AB Mann's medical records, AB Mann's official personnel file to include performance reports, AB Mann's

personnel information file (PIF), all notes and reports of interviews of AB Mann conducted by 78th SFS or any other law enforcement official.

If the government has any additional information it feels is pertinent, request that it be included in the file going to the health care provider and a copy made for defense counsel."

The defense concluded that "while the defense is not specifically requesting a sanity board be convened at this time, we do not object to such proceedings if you believe that it be more appropriate." That is quoting from Appellate Exhibit XXIII.

Contemporaneous with the request, AB Mann authorized release of his medical records and then shortly thereafter provided a copy of his civilian medical records that are Appellate Exhibit XXXVII. Also on 17 March 2004, the prosecution and defense agreed to conduct an arraignment of AB Mann on 29 March 2004. On 23 March 2004, the government received another request for reconsideration of pretrial confinement. The pretrial confinement reviewing officer decided to wait until completion of the Article 32 report. The pretrial confinement reviewing officer made another decision to continue pretrial confinement of AB Mann on 12 April 2004.

On 30 March 2004, after receiving a written legal review by the staff judge advocate on the defense-requested physical and mental examinations, the special court-martial convening authority ordered mental, physical, and neurological examinations of AB Mann and granted a delay under RCM 707, effective from 17 March 2004 until all required examinations and reports were completed and received by all appropriate parties. The order also directed an inquiry into AB Mann's mental capacity or responsibility.

burdened this young man and his family, but for all of the reasons stated, the government has complied with Article 10 of the Uniform Code of Military Justice. Therefore, the defense motion to dismiss for a lack of speedy trial is denied.

MJ: Defense counsel, do you have your next motion?

DC: Sir, if I may, prior to the next motion, I have a question for clarification in your ruling.

MJ: Certainly.

DC: You talked about the delay from 23 June 2004 to 7 July 2004. In your findings, if I understand them, you mentioned that the period of 23 June 2004 to 28 June 2004 that there was no judge available. The next week, which would be the week of 30 June 2004, I was in trial. That was a delay that was a result of me being in trial. Am I to understand that the six days, from 23 June 2004 to 28 June 2004 are also attributable to me even though I was available for trial?

MJ: No. I thought I made that clear when I said that there was a misunderstanding regarding your availability, that the week of 22 June 2004 you were available.

DC: That leads me to another question. You said that AB Mann was brought to trial on day 118. The government and the defense both agreed that if all of the delays, meaning the 83 days prior to the referral of charges, four days for the Article 32 delay, and then the 83 days for the medical exam were excluded, we would be at day 114. I believe in your findings and conclusions you said that the four day delay was not excludable because it was not approved by the convening authority. If I add correctly, that would be day 118. If the six days from 23 June

2004 to 28 June 2004 are not attributable to the defense and if they were not properly excluded, by my addition I get 124 days. I just wanted to verify my math.

MJ: Your adding is correct, but your conclusion that I held that period of time from 23 June 2004 during that week that you were available, is not excludable, is incorrect. My holding was that that was properly excluded by Col Cumbie.

DC: I just wanted to clarify, sir, to make sure that my understanding was correct. Thank you, sir. Prior to moving on to the next motion--we are prepared for that, but we would like a brief comfort break.

MJ: Certainly.

DC: We would like to ask for ten to fifteen minute recess to verify that witnesses are available.

MJ: The court is recess.

(The court recessed at 0929 hours, 8 July 2004.)

(The court reconvened at 1057 hours, 8 July 2004.)

MJ: Please be seated, the court will come to order.

ATC: All parties present when the court recessed are again present.

MJ: Before we proceed on, there is one issue I wanted to resolve. I was looking at the three charge sheets. I couldn't--my findings were that the second additional charge was preferred, referred, and served on 21 June. Then I remembered back there was some debate over the service of that. What was the date of the service?

TC: The actual date of the service on the accused is 1 July as I indicated on the pen and ink change to that second additional charge sheet, Your Honor. I could further elaborate on that now or at the appropriate motion.

DC: Sir, regarding the concern with the service of that second additional charge, block 15, the defense is satisfied, based upon the showing the certificate of service by trial counsel signed by Amn Mann, that the service did occur on 1 July 2004.

MJ: Thank you. I'm modifying my findings on the previous motion to find that the second additional charge was served on Amn Mann on 1 July 2004. Also, I was examining the copy of the charges and specifications of the additional charges and specifications and the second additional charge and specification that I was provided and comparing those against the respective charge sheets. Charge III, Specification 3, was modified and the word "undated" was struck and the words, "3 December 2003" were added.

TC: Yes, Your Honor. At the time of the Article 32 hearing, the defense made an objection to this change as being a major change. The Article 32 investigating officer, in her

burdened this young man and his family, but for all of the reasons stated, the government has complied with Article 10 of the Uniform Code of Military Justice. Therefore, the defense motion to dismiss for a lack of speedy trial is denied.

MJ: Defense counsel, do you have your next motion?

DC: Sir, if I may, prior to the next motion, I have a question for clarification in your ruling.

MJ: Certainly.

DC: You talked about the delay from 23 June 2004 to 7 July 2004. In your findings, if I understand them, you mentioned that the period of 23 June 2004 to 28 June 2004 that there was no judge available. The next week, which would be the week of 30 June 2004, I was in trial. That was a delay that was a result of me being in trial. Am I to understand that the six days, from 23 June 2004 to 28 June 2004 are also attributable to me even though I was available for trial?

MJ: No. I thought I made that clear when I said that there was a misunderstanding regarding your availability, that the week of 22 June 2004 you were available.

DC: That leads me to another question. You said that AB Mann was brought to trial on day 118. The government and the defense both agreed that if all of the delays, meaning the 83 days prior to the referral of charges, four days for the Article 32 delay, and then the 83 days for the medical exam were excluded, we would be at day 114. I believe in your findings and conclusions you said that the four day delay was not excludable because it was not approved by the convening authority. If I add correctly, that would be day 118. If the six days from 23 June

2004 to 28 June 2004 are not attributable to the defense and if they were not properly excluded, by my addition I get 124 days. I just wanted to verify my math.

MJ: Your adding is correct, but your conclusion that I held that period of time from 23 June 2004 during that week that you were available, is not excludable, is incorrect. My holding was that that was properly excluded by Col Cumbie.

DC: I just wanted to clarify, sir, to make sure that my understanding was correct. Thank you, sir. Prior to moving on to the next motion--we are prepared for that, but we would like a brief comfort break.

MJ: Certainly.

DC: We would like to ask for ten to fifteen minute recess to verify that witnesses are available.

MJ: The court is recess.

(The court recessed at 0929 hours, 8 July 2004.)

(The court reconvened at 1057 hours, 8 July 2004.)

MJ: Please be seated, the court will come to order.

ATC: All parties present when the court recessed are again present.

MJ: Before we proceed on, there is one issue I wanted to resolve. I was looking at the three charge sheets. I couldn't--my findings were that the second additional charge was preferred, referred, and served on 21 June. Then I remembered back there was some debate over the service of that. What was the date of the service?

TC: The actual date of the service on the accused is 1 July as I indicated on the pen and ink change to that second additional charge sheet, Your Honor. I could further elaborate on that now or at the appropriate motion.

DC: Sir, regarding the concern with the service of that second additional charge, block 15, the defense is satisfied, based upon the showing the certificate of service by trial counsel signed by Amn Mann, that the service did occur on 1 July 2004.

MJ: Thank you. I'm modifying my findings on the previous motion to find that the second additional charge was served on Amn Mann on 1 July 2004. Also, I was examining the copy of the charges and specifications of the additional charges and specifications and the second additional charge and specification that I was provided and comparing those against the respective charge sheets. Charge III, Specification 3, was modified and the word "undated" was struck and the words, "3 December 2003" were added.

TC: Yes, Your Honor. At the time of the Article 32 hearing, the defense made an objection to this change as being a major change. The Article 32 investigating officer, in her