IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman First Class (E-3), **DAVID GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	)	No. ACM S32732
	)	1 September 2022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **8 November 2022**. The record of trial was docketed with this Court on 11 July 2022. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 September 2022.

Respectfully submitted,

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

7 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVID GONZALEZ HERNANDEZ, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32732 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Airman First Class (E-3), **DAVID GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	)	No. ACM S32732
	)	31 October 2022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 December 2022**. The record of trial was docketed with this Court on 11 July 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 16 February 2022, Appellant was convicted, consistent with his pleas, of one charge and one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge and two specifications of wasting or spoiling nonmilitary property, in violation of Article 109, UCMJ; and one charge and one specification of stalking, in violation of Article 130, UCMJ. Record (R.) at 86. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, a total of 4 months and 1 day of confinement, and a bad conduct discharge. R. at 249.

The record of trial consists of five volumes. The transcript is 249 pages. There are three Prosecution Exhibits, 1 Defense Exhibit, 31 Appellate Exhibits, and two Court Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 October 2022.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

1 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVID GONZALEZ HERNANDEZ, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32732 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 November 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman First Class (E-3), **DAVID GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	)	No. ACM S32732
	)	30 November 2022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 January 2023**. The record of trial was docketed with this Court on 11 July 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 16 February 2022, Appellant was convicted, consistent with his pleas, of one charge and one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge and two specifications of wasting or spoiling nonmilitary property, in violation of Article 109, UCMJ; and one charge and one specification of stalking, in violation of Article 130, UCMJ. Record (R.) at 86. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, a total of 4 months and 1 day of confinement, and a bad conduct discharge. R. at 249.

The record of trial consists of five volumes. The transcript is 249 pages. There are three Prosecution Exhibits, 1 Defense Exhibit, 31 Appellate Exhibits, and two Court Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 November 2022.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

1 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVID GONZALEZ HERNANDEZ, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32732 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 December 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3), **DAVID GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	)	No. ACM S32732
	)	28 December 2022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 February 2023**. The record of trial was docketed with this Court on 11 July 2022. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 16 February 2022, Appellant was convicted, consistent with his pleas, of one charge and one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge and two specifications of wasting or spoiling nonmilitary property, in violation of Article 109, UCMJ; and one charge and one specification of stalking, in violation of Article 130, UCMJ. Record (R.) at 86. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, a total of 4 months and 1 day of confinement, and a bad conduct discharge. R. at 249.

The record of trial consists of five volumes. The transcript is 249 pages. There are three Prosecution Exhibits, one Defense Exhibit, 31 Appellate Exhibits, and two Court Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 16 cases; 6 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Five cases have priority over the present case:

1. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1,418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. This Court remanded on 7 December 2022. Because this Court has granted 12 extensions of time prior to the remand, it will be counsel's first priority case upon re-docketing.
2. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel filed the Brief on Behalf of Appellant on 20 December 2022. Counsel expects the Government to file its Answer in late January, with a Reply Brief to follow.
3. *United States v. Li*, ACM S32632 (f rev): The appellant's supplement to the petition for grant of review to the CAAF is due on 17 January 2023.
4. *United States v. Rosales Gomez*, ACM S32713: The appellant's petition for grant of review to the CAAF is due on 24 January 2023.
5. *United States v. Nestor*, ACM 40250: The record of trial consists of six volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Counsel is drafting the Brief on Behalf of Appellant.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 December 2022.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVID GONZALEZ HERNANDEZ, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32732 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 December 2022.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3), **DAVID GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	)	No. ACM S32732
	)	30 January 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 March 2023**. The record of trial was docketed with this Court on 11 July 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 16 February 2022, Appellant was convicted, consistent with his pleas, of one charge and one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge and two specifications of damaging[1] nonmilitary property, in violation of Article 109, UCMJ; and one charge and one specification of stalking, in violation of Article 130, UCMJ. Record (R.) at 86. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, a total of 4 months and 1 day of confinement, and a bad conduct discharge. R. at 249.

[1] Previous requests for enlargement of time mistakenly labeled the specifications as "wasting or spoiling" nonmilitary property.

The record of trial consists of five volumes. The transcript is 249 pages. There are three Prosecution Exhibits, one Defense Exhibit, 31 Appellate Exhibits, and two Court Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 19 cases; 8 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters. He has, however, completed review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully advise Appellant regarding potential errors and draft the AOE brief. Seven cases have priority over the present case:

1. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1,418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 86 Appellate Exhibits. This Court remanded on 7 December 2022. Because this Court granted 12 extensions of time prior to the remand, it is counsel's first priority case upon re-docketing. Counsel is finalizing Appellant's brief for filing with this Court.
2. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel filed the Brief on Behalf of Appellant on 20 December 2022. Counsel expects the Government to file its Answer in early February, with a Reply Brief to follow.
3. *United States v. Nestor*, ACM 40250: The record of trial consists of six volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Counsel is finalizing Appellant's brief for filing with this Court.

4. *United States v. Reimers*, ACM 40141: The petition for grant of review is due to the CAAF on 27 March 2023.
5. *United States v. Leipart*, ACM 39711, 2021-03: The petition for grant of review is due to the CAAF on 27 March 2023.
6. *United States v. Hernandez*, ACM 40287: The record of trial consists of five volumes. The transcript is 226 pages. There are seven Prosecution Exhibits, 27 Defense Exhibits, and 10 Appellate Exhibits. Counsel is currently reviewing the record.
7. *United Stats v. Portillos*, ACM 40305: The record of trial consists of three volumes. The transcript is 124 pages. There are four Prosecution Exhibits, eight Defense Exhibits, 17 Appellate Exhibits, and one Court Exhibit. Counsel is currently reviewing the record.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 January 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAVID GONZALEZ HERNANDEZ, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32732 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 January 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32732**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
David G. GONZALEZ HERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 30 January 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 31st day of January, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **8 March 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

DAVID G. GONZALEZ HERNANDEZ
Airman First Class (E-3),
United States Air Force,
Appellant.

No. ACM S32732

BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MERITS BRIEF**
v.	)	Before Panel 1
Airman First Class (E-3), **DAVID G. GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	)	Case No. ACM S32732 Date filed: 28 February 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Submission of Case Without Specific Assignment of Error

The undersigned appellate defense counsel attests he has, on behalf of Appellant, carefully examined the record of trial in this case. Appellant does not admit the findings and sentence are correct in law and fact. He submits the case to this Honorable Court on its merits with no specific attorney-raised assignments of error during this stage of appellate processing. Appellant does, however, personally raise one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix A.

Respectfully Submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 28 February 2023.

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

APPENDIX A

Pursuant *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matter:

WHETHER THE GOVERNMENT VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS UNDER ARTICLE 10, UCMJ?

Statement of the Case

On 16 February 2022, Appellant was convicted, consistent with his pleas, of one charge and one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge and two specifications of damaging nonmilitary property, in violation of Article 109, UCMJ; and one charge and one specification of stalking, in violation of Article 130, UCMJ.[1] Record (R.) at 86. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, a total of 4 months and 1 day of confinement, and a bad conduct discharge. R. at 249.

The convening authority took no action on the findings or sentence. *See* Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. A1C David G. Gonzalez Hernandez*, dated 9 March 2022. The military judge entered judgment accordingly. ROT Vol. 1, Entry of Judgment in the Case of *United States v. A1C David G. Gonzalez Hernandez*, dated 20 March 2022.

Statement of Facts

Appellant was ordered into pretrial confinement on 22 October 2021. *See* Appellate Exhibit (App. Ex.) XV at 5. He remained in pretrial confinement until his court-martial; the

[1] All references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

military judge awarded 117 days of pretrial confinement credit against the adjudged confinement. R. at 249.

On 24 January 2022, the Defense filed a motion to dismiss for a violation of speedy trial rights under Article 10, UCMJ, and the Sixth Amendment. *See* App. Ex. XIV. The Defense provided 75 pages of documentary evidence in support of the motion. *See* App. Ex. XV, XVI. The Government opposed the motion in writing. *See* App. Ex. XVII. The military judge held an Article 39(a), UCMJ, session to receive additional evidence and argument. R. at 20-85. At the conclusion of the motions hearing, he denied the motion orally on the record. R. at 85. The military judge also authored a written ruling. App. Ex. at XXIX. Appellant pleaded guilty after the motion was denied. R. at 86.

For the purposes of this assignment of error, Appellant adopts the military judge's essential findings of facts; none were clearly erroneous. App. Ex. XXIX at 1-4, paras. 1-29. In his analysis, the military judge found the first three *Barker*[2] factors weighed in Appellant's favor. The length of the delay was facially unreasonable. *Id*. at 8, para. 50. The reasons for delay weighed in favor of Appellant, with the military judge concluding several periods of time were the result of Government "negligence." *Id*. at 10, para. 52. Appellant demanded a speedy trial on multiple occasions; therefore, the military judge also weighed this factor in Appellant's favor. *Id*. at 10-11, para. 53. After weighing the fourth *Barker* (prejudice) in the Government's favor, the military judge concluded, "the government, as whole, moved with reasonable diligence in bringing the case to trial." *Id*. at para. 55. He found the lack of prejudice outweighed the combined weight of the other three factors. *Id*. Acknowledging that prejudice is not necessary to dismiss the case, the

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

military judge determined Appellant's case was not the "exceptionally rare" case where dismissal was appropriate absent a concrete showing of prejudice.

ARGUMENT

THE GOVERNMENT VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS UNDER ARTICLE 10, UCMJ, BECAUSE IT DID NOT PROCEED TO TRIAL WITH REASONABLE DILIGENCE.

Standard of Review

Whether an accused was denied his right to a speedy trial is a question of law reviewed *de novo*. *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020).

Law

When a military member is placed in confinement prior to trial, "immediate steps" must be taken to inform the person of the specific wrong(s) of which he or she is accused and either try or release the person. Article 10, UCMJ, 10 U.S.C. § 810. This statutory right is a "fundamental right." *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005) (citing *United States v. Parish*, 38 C.M.R. 209, 214 (C.M.A. 1968). A litigated Article 10, UCMJ, motion is not waived by a subsequent unconditional guilty plea. *Mizgala*, 61 M.J. at 127.

The speedy trial requirement of Article 10, UCMJ, does not "demand constant motion, but does impose on the Government the standard of 'reasonable diligence in bringing the charges to trial.'" *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016) (citation omitted). Under Article 10, the Government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss. *Mizgala*, 61 M.J. at 125 (citing *United States v. Brown*, 28 C.M.R. 64, 69 (C.M.A. 1959)). Appellate courts should remain mindful of "the proceeding as a whole and not mere speed." *Mizgala*, 61 M.J. at 129.

Adopted into military case law, the United States Supreme Court established a four-factor test to determine "reasonable diligence," assessing: "(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. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). No one factor is "necessary or sufficient to finding of a deprivation of the right of speedy trial." *Cooley*, 75 M.J. at 259 (quoting *Barker*, 407 U.S. at 533).

Generally, "[s]hort periods of inactivity are not fatal to an otherwise active prosecution." *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (quoting *Mizgala*, 61 M.J. at 127). When assessing the reason for delay, appellate courts consider the context, because a "delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531.

The Supreme Court identified three interests, related to the speedy trial protection, to consider when assessing prejudice: (1) "to prevent oppressive pretrial incarceration;" (2) "to minimize anxiety and concern of the accused;" and, most importantly, (3) "to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. But *Barker* does not require an affirmative demonstration of prejudice to prove a denial of the right to a speedy trial. *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam) (6th Amendment speedy trial); *see also United States v. Miller*, 66 M.J. 571, 577 (N.M. Ct. Crim. App. 2008) (finding an Article 10, UCMJ, violation even though the accused suffered no "obvious prejudice").

Analysis

This Court will undertake a fresh, independent legal analysis of the litigated Article 10, UCMJ, motion. To that end, Appellant has no obligation on appeal to identify where and how the

military judge erred in his analysis as he would if this issue were reviewed for an abuse of discretion. That notwithstanding, the military judge's ruling provides a good baseline for assessing the issue before this Court. As mentioned above, Appellant adopts the military judge's factfinding; this Court can and should freely utilize that factual background in its analysis. And, on the whole, the military judge's legal conclusions are mostly sound—but not entirely. Part of the military judge's conclusion that the fourth *Barker* factor favored the Government is the military judge faulted the Defense for its failure to bring evidence to forefront to prove prejudice when it was the *Government's* burden at trial, as it is now, to demonstrate Appellant was *not* prejudiced. *Mizgala*, 61 M.J. at 125.

"Outside of an explicit delay caused by the defense, the Government bears the burden to demonstrate and explain reasonable diligence in moving its case forwards in response to a motion to dismiss." *Cooley*, 75 M.J. at 260. The Government bears the burden of proof for any factual issues whose resolution is necessary to decide the motion; it also maintains the burden of persuasion by a preponderance of the evidence. R.C.M. 905(c)(1); 905(c)(2)(B). The military judge recognized this, but at different junctures in his conclusion of law, he strayed from the standard. *See* App. Ex. XXIX at 11, para. 54 ("There is no evidence of oppressive pretrial incarceration.); *id*. (There is no evidence that the accused suffered particularized anxiety and concern beyond that normal amount experienced by an individual in pretrial confinement.); *id*. (There is no evidence that the defense was impaired in preparing for trial as the result of the accused's pretrial confinement.). On this last point, the military judge stated, "The defense argues that the accused cannot access his personal cell phone or his dormitory to assist in obtaining potentially mitigating evidence, but there is no evidence the defense requested the accused to be allowed to do so and was denied." *Id*. The military judge also faulted the Defense for not providing

evidence of a failed attempt to secure beneficial evidence or witnesses. *Id*. Finally, the military judge rejected the Defense's request to infer the obvious consequences of pretrial confinement, such as falling behind on training, the impact on performance evaluations, and other career effects. *Id*. Once the Defense argued the potential of these deleterious effects, the Government needed to combat it with evidence. It did not.

The Defense had *no* obligation to make affirmative demonstrations on these points because it did not maintain the burden. The Government needed to affirmatively demonstrate, for example, the pretrial confinement conditions were not oppressive. It could have done so by calling the non-commissioned officer in charge of confinement to describe the conditions. It did not. The Government could have met its burden regarding the lack of impairment on the Defense's preparation by presenting visitor logs from the facility showing attorney visits or calling a confinement representative who routinely escorted Appellant to his ADC's office to testify. It did not. The Government could have presented documents demonstrating its compliance with Defense requests for access to witness and evidence under Article 46, UCMJ, or R.C.M. 701 or 703. It did not. Arguably the only prejudice consideration the Government would not be privy to was Appellant's anxiety; however, it could have met its burden as to these two other aspects. It did not. This Court should find the *Government* did not meet its burden for factual determinations or its burden of persuasion as to prejudice, and subsequently conclude the prejudice factor weighs in Appellant's favor. At the very least, the factor does not "significantly" weigh in the favor of the Government. App. Ex. XXIX at 11, para. 54. The weight to ascribe this factor matters because, as discussed below, all three other factors weigh in Appellant's favor and the prejudice must "significantly" weigh in the Government's favor in order to conclude all factors on balance weigh in favor of the Government.

Even if the fourth factor is neutral or slightly favors the Government, *Barker* factors 1-3 outweigh the lack of prejudice, and thus, the charges and specifications should have been—and still should be—dismissed with prejudice. First, the 116-day delay from the entry into pretrial confinement until the court-martial is facially unreasonable. The crimes at issue are not complex and are more akin to "ordinary street crimes" than a vast conspiracy. App. Ex. XXIX at 8, para. 50(b). As the military judge noted, the crimes literally occurred "on the street." *Id*. All the Government would have to do to prove the allegations in its case-in-chief is establish an order, call a few witnesses who saw Appellant violate the order, admit photographs of the vandalized car with receipts, and likely call the victim as a witness for the stalking offenses. For this special court-martial, the allegations are simpler than they are complicated. Second, the reasons for delay favor Appellant. The timeline denotes at least negligence, if not apathy, towards Appellant's incarceration. The preliminary hearing officer (PHO) took a Thanksgiving holiday instead of making the report his primary duty, as he was ordered to do. *Id*. at 10, para. 52(c). Another example of negligence, if not apathy, is the ten days between referral and service from 28 December 2021 until 7 January 2022. The reasonable conclusion to draw from this is that Air Force down days and holidays caused operations tempo to slow down. Appellant, however, sat in pretrial confinement while others enjoyed their breaks. While all individuals who are not incarcerated prefer a slower work environment around the holidays, this delay can still be properly characterized as one that proceeded without "reasonable diligence." Finally, speedy trial demands favor Appellant.

In total, this Court should, *de novo*, weigh the four *Barker* factors in Appellant's favor. The first three factors, as the military judge found, favor Appellant. The fourth factor either favors Appellant because the Government did *nothing* to tilt the factor in its favor or, at worst, is neutral.

Regardless, the prejudice factor is not so weighty—based on the evidence before the court-martial—as to overcome the first three factors on balance. This Court should set aside and dismiss, with prejudice, all charges and specifications, and set aside the sentence.

WHEREFORE, Appellant personally and respectfully requests that this Honorable Court set aside and dismiss the findings, with prejudice, and set aside the sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENT OF ERROR
v.	)	Before Panel 1
Airman First Class (E-3) **DAVID G. GONZALEZ HERNANDEZ** United States Air Force *Appellant.*	)	No. ACM S32732 30 March 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUE PRESENTED

WHETHER THE GOVERNMENT VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS UNDER ARTICLE 10, UCMJ?[1]

STATEMENT OF CASE

The United States agrees with Appellant's statement of the case.

STATEMENT OF FACTS

On 24 July 2021, A.J. made a sworn statement to law enforcement, alleging Appellant had been following her around base on several different days. (App. Ex. V. at 2-3.)

A.J. also reported that she believed Appellant defaced her personal vehicle and slashed all four of her tires. (Id.)

Investigator Ely reviewed video surveillance of several buildings covering the period from 17 – 24 July 2021. (App. Ex. XVIII at 22.) That review revealed an individual in black Army PT gear walking around the parking lot, approaching A.J.'s vehicle, and later running

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

away after kneeling next to the tires. (Id.) Surveillance footage further revealed Appellant driving around A.J.'s dormitory and walking up to her exterior window. (Id.)

On 2 August 2021, Investigator Ely reviewed transactions and receipts from the Kadena Base Exchange, showing the purchase of black spray paint, a black ski mask, black Army PT shorts, a black Army PT shirt, and a yellow reflective belt. (Id.) That purchase was linked to Appellant's debit card. Video surveillance footage also depicted Appellant purchasing those items. (Id.)

On or about 5 August 2021, Security Forces Office of Investigations (SFOI) took possession of A.J.'s vandalized car, including the slashed tires. (Id. at 7.) On 22 September 2021, SFOI seized four knives from Appellant's room with reason to believe the knives would have been used to slash A.J.'s tires. (Id.)

Between on or about 22 September 2021 and 3 January 2022, SFOI sent both the tires and knives to the United States Army Criminal Investigation Laboratory (USACIL) located in Forest Park, Georgia, for scientific analysis. (App. Ex. XXVI at 26-27.) A forensic chemist completed a forensic examination and produced a trace evidence report on those items on 3 January 2022. (Id.) Toolmark and tool evidence examinations were also conducted at USACIL to determine whether the knives seized from Appellant were used in damaging A.J.'s tires. A firearms examiner submitted a report of her analysis on 4 February 2022. (Id.)

On 19 August 2021, Appellant asserted his rights to a speedy trial through his trial defense counsel. (App. Ex. XV at 1.) This demand occurred prior to Appellant entering pretrial confinement and the preferral of charges and was included in trial defense counsel's notice of representation. (Id.)

On 22 September 2021, trial defense counsel informally requested discovery prior to preferral. (Id. at 3.) After preferral, trial defense submitted a formal discovery request on 23 November 2021. (Id. at 16.)

Appellant was observed coming within 100 yards of A.J.'s residence on the evening of 20 October 2021, in violation of a no contact order previously issued by his squadron commander. (Pros. Ex. 1 at 6.)

On 22 October 2021, Appellant was placed into pretrial confinement. (App. Ex. IV at 29.) Following Appellant's entry into pretrial confinement, a neutral and detached officer found probable cause for continued confinement. (Id. at 32.) Appellant's commander submitted a timely review within 72 hours and ordered the confinement be continued. (App. Ex. XVIII at 24.)

On 22 October 2021, investigators also responded to a report of a possible improvised explosive device found in Appellant's personal vehicle. (Id. at 7.) Investigators conducted a search of Appellant's vehicle and located a PVC pipe with one balloon fastened on one end of the pipe with a metal clasp and one laser duct taped to the center of the pipe and a gas can containing an undetermined fluid. (Id.) Those items were seized. (Id.) The fluid was analyzed on 29 October 2021. (App. Ex. XI at 5.)

The pretrial confinement hearing (PTCH) was initially set for 27 October 2021, but was moved to 29 October 2021 following a trial defense request for a delay. (App. Ex. XVIII at 25-26.) On 29 October 2021, the PTCH was held. (App. Ex. V at 29-32.) Trial defense counsel was provided with all supporting documents from the pretrial confinement hearing and pretrial confinement officer's report. (Id.)

On 5 November 2021, 18 LRS/CC preferred charges against Appellant. (*Charge Sheet*, ROT, Vol. 1.) The Government's ready date for the preliminary hearing was 15 November 2021. Trial defense counsel demanded a right to a speedy trial again in the 23 November 2021 discovery request. (App. Ex. XVIII at 16.)

The Preliminary Hearing was conducted on 23 November 2021. (Preliminary Hearing Officer's Report dtd 2 Dec. 2021.) The Preliminary Hearing Officer (PHO) completed his report on 2 December. The PHO was instructed that the preliminary hearing was his primary duty to submit his report and recommendations within eight calendar days. (App. Ex. XVIII at 27-28.) The PHO submitted the report on the ninth day and did not work on the report for six of those days, four due to the Thanksgiving holiday weekend and two as the result of no-notice military duty. (Preliminary Hearing Officer's Report dtd 2 Dec. 2021.)

The PHO advised against preferral of Charge 1, specification 2. (Id.) On 6 December 2021, the case paralegal provided trial defense with a copy of the Preliminary Hearing Report. (Id.)

On 28 December 2021, all preferred charges and specifications were referred against Appellant, including Charge I, Specification 2. (*Charge Sheet*, ROT, Vol. 1.)) The referred charges include one charge alleging a failure to obey a lawful order for violating a no-contact order issued by Appellant's commander, one specification of violation of a lawful general regulation for possession of a destructive device, each in violation of Article 92, UCMJ; one Charge and two Specifications of damaging nonmilitary property, in violation of Article 109, UCMJ; and one Charge with two Specifications of stalking, in violation of Article 130, UCMJ. The referred charge sheet was served on Appellant 10 days after referral. (Id.)

On 11 January 2022, trial government counsel responded to trial defense's first discovery request originally sent on 23 November 2021. (App. Ex. XVIII at 38.) While Appellant was in pretrial confinement, his trial defense counsel was required to coordinate times in advance with the Brig to speak with him on the phone. (Id. at 51.) Appellant's leadership assisted with coordinating with a local auto dealer to keep Appellant from going into arrears with an auto payment. (Id. at 52.) As a result, Appellant received a four-month delay in making car payments and was responsible only for a $25 late fee. (Id.)

Trial defense submitted a by-name request for a forensic psychologist on 21 December 2021. Trial government routed this request to the general court-martial convening authority (GCMCA) on 11 January 2022. (App. Ex. XI at 15.) The Defense also submitted a request for expert assistance in forensic chemistry on 8 January 2022. (Id. at 6.) Trial Government routed these requests to the GCMCA on 11 January 2022. (App. Ex. XVIII at 54.) These requests were denied by the convening authority on 26 January 2022. (App. Ex. XI at 20.)

Trial Government fulfilled discovery obligations through 8 February 2022. (App. Ex. XVI at 5.) Appellant submitted an offer for plea agreement on 8 February 2022. (App. Ex. XXX at 1-5.) The agreement was accepted by the convening authority on 10 February 2022. (Id.)

Appellant was arraigned on 15 February 2022 and the remainder of the court-martial was conducted on 16 February 2022. (R. at 15.) Appellant served 116 days in confinement as of that date. (Id. at 66.)

Appellant adopted the above trial judge's findings of facts in its brief as none were clearly erroneous in its brief. (Appellant's Brief, Appendix A at. 2, dtd 28 Feb 23.)

ARGUMENT

APPELLANT'S SPEEDY TRIAL RIGHTS UNDER ARTICLE 10, UCMJ WERE NOT VIOLATED.

Standard of Review

This Court reviews speedy trial claims *de novo*. United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016).

Law

Article 10, UCMJ provides that when any person subject to the Uniform Code of Military Justice is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. United States v. Cooley, 75 M.J. 247, 251 (C.A.A.F. 2016)

An appellate court is bound by the facts as found by the trial military judge unless those facts are clearly erroneous. Id. at 259. Article 10 is designed to ensure that an accused knows the reason for the restraint of his liberty, and to protect him, while under restraint, from unreasonable or oppressive delay in disposing of a charge of alleged wrongdoing, either by trial or by dismissal. Article 10 does not demand constant motion but does impose on the Government the standard of reasonable diligence in bringing charges to trial. Id.

In determining reasonable diligence for the purposes Article 10, UCMJ, courts must conduct the four-factor analysis articulated by the United States Supreme Court in Barker v Wingo and adopted by the United States Court of Appeals for the Armed Forces ("CAAF"). United States v. Birge, 52 M.J. 209, 211-12 (C.A.A.F. 1999). The four factors assess: (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. Id. None of the four Barker factors alone are a

necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Cooley 75 MJ at 259.

In its examination of reasonable diligence, CAAF is mindful that it is looking at the proceeding as a whole and not mere speed. It is the Government's burden to show due diligence, and it is the Government's responsibility to provide evidence showing the actions necessitated and executed in a particular case justified delay when an accused was in pretrial confinement. Id.

Analysis

The Length of the Delay

The initial question is whether 116 days of pretrial confinement before charges on Appellant was unreasonable.

When examining this initial question, courts "consider the particular circumstances of the case because 'the delay that can be tolerated for an ordinary street crime is considerably less than [that for a serious, complex conspiracy charge." Cooley, 75 M.J. at 260 (holding 289 days was "facially unreasonable" even in a "complex investigation" where investigation was completed 6 months before the eventual trial date).

To determine whether the length of the delay is "facially unreasonable, the Court in turn considers: (a) the seriousness of the offense, (b) the complexity of the case, (c) the availability of proof, and (d) additional circumstances includ[ing] whether Appellant was informed of the accusations against him, whether the government complies with procedures relating to pretrial confinement, and whether the Government was responsive to request for reconsideration of pretrial confinement. Id.

The requirement that "immediate steps shall be taken" does not mean the government must bring court-martial charges against a member being held in pretrial confinement before collecting the evidence to conduct a successful prosecution. Nor does it mean that investigators and prosecutors must busy themselves with case preparation while they are waiting for the evidence necessary to understand the case. "Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." United States v. Tibbs, 35 C.M.R. 322, 325 (C.M.A. 1965).

In Tibbs, the Court of Military Appeals found the government took immediate steps when it seized physical evidence and sent it for scientific testing. Id. Appellant's case is similar to Tibbs in that remnants of the slashed tires along with knives seized from the Appellant were sent to USACIL for forensic examination and a report of the examination was not issued until 4 February 2022 – a mere 13 days prior to Appellant's arraignment. Investigators were only able to identify an individual in black Army PT gear walking around the parking lot, approaching A.J.'s vehicle, and later running away after kneeling next to the tires. It was within the Government's discretion to collect evidence to conduct a successful prosecution - that is to conduct testing to determine if a knife seized from Appellant could be linked to causing the damage on the victim's vehicle.

This Court should also find the seriousness of this case weighed in favor of the United States sending the tire fragments and knives for testing. As the trial judge indicated, "Even when looking solely at those charges and specifications to which the accused intends to plead guilty, the accused allegedly engaged in a pattern of conduct that put a fellow airman in fear of death or bodily harm over the course of several months, including causing significant damage to the victim's vehicle on two occasions and ultimately breaking a no contact order put in place to deter

the accused from further misconduct against the victim." (App. Ex. XXIX at 8.) The seriousness of this case supports the Government's decision to send the tire fragments and knives for testing, especially when the Government could not identify the Defendant in the surveillance footage when the damage was conducted. Just because the crime occurred on the "street" as noted by the trial judge, does not mean the Government should have been limited in gathering necessary evidence for a successful prosecution. There was no eyewitness to the crime, the surveillance footage did not identify Appellant as the individual committing the criminal damage, and there was no confession to the crime by Appellant. There was simply circumstantial evidence Appellant committed the criminal damage, and thus the United States was justified in conducting further investigative steps. Furthermore, it is not contested that the United States informed Appellant of the charges against him in a timely manner and in accordance with necessary procedures, and this should also be construed in the United States favor. There is also no evidence Appellant requested reconsideration of his pretrial confinement prior to the motion filed by his trial defense counsel.

The length of the delay of 116 days to conduct further investigative steps was not facially unreasonable, and thus a full four-factor Barker v. Wingo analysis need not be triggered.

The Reasons for the Delay[2]

Reasons for delay must be evaluated under the totality of the circumstances and on a case-by-case basis to determine their "reasonableness." When considering the reasons for delay, CAAF has adopted the Supreme Court's admonition in Barker that "[d]ifferent weights should

[2] The United States will conduct an analysis of the remaining Barker v. Wingo factors in case this Court were to find the 116-day delay to be facially unreasonable.

be assigned to different reasons," and accordingly, CAAF evaluates reasons of delay on a "continuum" of legitimate to illegitimate reasons for delay:

> A deliberate attempt to delay the trial to hamper the defense should be weighted heavily against the Government. A more neutral reason, such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

United States v. Reyes, 80 M.J. 218, 226 (C.A.A.F. 2020) (*citing* Barker, 407 U.S. at 531 (footnote omitted).

In the case at hand, Appellant contends there was a delay between the Article 32 preliminary hearing and the service of the referred charge on Appellant. The United States acknowledges the PHO provided the report one day late and that it took the United States until 28 December 2021 to refer charges against Appellant and he was served with the referral documents on 7 January 2022. CAAF acknowledges that ordinary staffing/processing time of case may qualify as reasonable grounds for delay in the right circumstances. "Even ordinary judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced." United States v. Hatfield, 44 M.J. 23 (C.A.A.F. 1996). In the case at hand, the United States presented evidence that the base legal office was corresponding with the Numbered Air Force (NAF) on how to proceed with referral considering the PHO's recommendations. (App. Ex. XX at 1 and App. Ex. XXI I at 1-2.) In addition, the legal office and whole 18th Wing was observing a Holiday Schedule which should be realistically balanced in this Court's assessment. App. Ex. XXIV at 1. As pointed out in Hatfield, the Court should consider whether the Government could have readily gone to trial much sooner but negligently or spitefully chose not to. Hatfield, 44 M.J. 23. The trial judge adeptly reasoned that there was

no evidence that the Government spitefully chose not to go to trial sooner. The evidence supports that the United States was working through the PHO's recommendations and making charging decisions with regards to referral during the Holiday season. The minimal delays at most were the result of negligence.

Delays are also attributable to the defense and trial judiciary. The defense requested a delay of the pretrial confinement hearing originally set for 27 October 2021 until 29 October 2021. The defense also requested an extension of the preliminary hearing from 15 November to 22 November 2021. (R. at 41.) The Air Force trial judges attended the Joint Military Judges' Annual Training at Maxwell Air Force Base from 7 – 14 February 2022. Appellant did not object to docketing the case on 14 February 2022 considering the unavailability of the judiciary.

There are legitimate reasons for the United States 100-days of attributable delay. As the trial military judge explained:

> "Certain steps in the referral process take time, such as the administrative collecting of the PHO report, collection of potential members and their court-martial data sheet for submission to the convening authority, the convening authority's legal staff review of the PHO report, and the convening authority's consideration of all these matters in making a decision on referral. Such steps are legitimate and are evidence the reasonable diligence."

(App. Ex. XXIX at 10.) In addition, the defense also requested discovery and expert assistance which the Government was complying with and processing. The reasons for the delay should be found to neither favor the United States nor Appellant. There was negligible delay on the United States, defense, and the judiciary – but the case processed through in a reasonable fashion.

Demand for Speedy Trial

The United States agrees with the trial military judge's analysis of this issue, but the conclusion should be neutral as opposed to favoring either party. Appellant did submit a written

demand for a speedy trial but did so in a stock notice of representation before Appellant was even in pretrial confinement and again in a formal discovery request submitted on 23 November 2021, the day of the preliminary hearing. Emails purporting to be demands for speedy trial lacked any specificity regarding when defense was ready for trial, other than generally stating as soon as possible. Appellant had an opportunity to press for an earlier date for trial when the case was submitted to be placed on the docket, but did not press for a date earlier than the United States proposed ready date. Discovery was still being provided to the defense upon its request between the date of docketing and the date set for trial, and the defense was still pending action on experts it had specifically request be appointed to ensure it was ready for trial. The totality of the circumstances supports a finding that this factor neither favors Appellant nor the United States.

Prejudice

This factor heavily favors the United States. CAAF considers three possible categories for prejudice, but weighs them differently, prioritizing possible impacts on case preparation as most severe.

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Cooley, 75 M.J. at 262 (*citing* Mizgala, 61 M.J. at 129, and Wilson, 72 M.J. at 353).

Appellate courts are not concerned with the normal anxiety and concern experienced by an individual in pretrial confinement but rather with some degree of particularized anxiety and

concern greater than the normal anxiety and concern associated with pretrial confinement. Wilson, 73 M.J. at 354.

While prejudice is not a prerequisite for finding an Article 10 violation, given that the only available remedy for an Article 10 violation is dismissal with prejudice, finding an Article 10 violation with an accused suffering "prejudice" is rare indeed. *See* United States v. Miller, 66 M.J. 571, 577 (N-MC Ct. Crim. App. 2008).

The only evidence of prejudice to Appellant was that he had to pay a $25 fee to delay his car payments by four months which was arranged by his leadership on his behalf and the normal anxiety and concern experience by an individual in pretrial confinement. The record establishes the defense was able to communicate with Appellant and simply had to coordinate times in advance with the brig. Appellant had no oppressive incarceration, and his defense was in no way impaired by his pretrial confinement. Appellant contends the Government did not meet its burden of persuasion as to prejudice. However, there is no evidence of prejudice anywhere in the record, which satisfies the Government's burden of proof. This factor heavily favors the United States. Since a balancing of all the Barker factors favors the Government, Appellant is not entitled to any relief.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claim and affirm the findings and sentence in this case.

JOSHUA M. AUSTIN, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division

Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
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United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 March 2023.

JOSHUA M. AUSTIN, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32732**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
David G. GONZALEZ HERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 7th day of April, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	) **MOTION FOR**) **RECONSIDERATION**) **ON BEHALF OF**
v.	) **APPELLANT**)
Airman First Class (E-3), **DAVID G. GONZALEZ HERNANDEZ,** United States Air Force, *Appellant.*	) Before Panel No. 1)) No. ACM S32732)) 1 September 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

This Court issued a decision in Appellant's case on 2 August 2023, which was received by appellate defense counsel the same day. *See United States v. Gonzalez Hernandez,* No. ACM S32732, 2023 CCA LEXIS 320 (A.F. Ct. Crim. App. Aug. 2, 2023) (unpub. op.). Appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), personally and respectfully requests this Honorable Court reconsider its finding that the Government did not violate his speedy trial rights under Article 10, Uniform Code of Military Justice (UCMJ). This Honorable Court may reconsider its decision because this request is timely submitted within 30 days of delivery of this Court's decision, and no other court has obtained jurisdiction of the case. A.F. CT. CRIM. APP. R. 31.2(a).

Motion for Reconsideration

Appellant contends this Honorable Court overlooked or misapplied material factual or legal matters in resolution of the issue. *See* A.F. CT. CRIM. APP. R. 31.2(b)(1). Appellant maintains that the limitations on his communications with his trial defense counsel and financial difficulties he encountered constitute prejudice, the fourth factor considered under the framework in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Moreover, prejudice is not necessarily required to

find a violation of Article 10. *See United States v. Miller*, 66 M.J. 571, 577 (N-M. Ct. Crim. App. 2008). Even if the prejudice identified by Appellant does not tip this factor in his favor, that alone is not enough to find no Article 10 violation when the Court has weighed all other factors against the government. *See Gonzalez Hernandez,* No. ACM S32732, 2023 CCA LEXIS 320, at *12-*18. Thus, Appellant personally and respectfully requests this Court issue a new opinion, wherein it finds the Government violated his right to speedy trial under Article 10, UCMJ.

WHEREFORE, Appellant personally and respectfully requests this Court grant the motion for reconsideration.

Respectfully Submitted,

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 September 2023.

Respectfully Submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

8 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	OPPOSITION TO MOTION FOR RECONSIDERATION
v.	)	
	)	ACM S32732
Airman First Class (E-3) DAVID G. GONZALEZ-HERNANDEZ, USAF *Appellant.*	)	Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 31(c) of this Honorable Court's Rules of Practice and Procedure, the United States hereby opposes Appellant's Motion for Reconsideration filed on 1 September 2023.[1] In his motion, Appellant asks this Court to reconsider its opinion of his case. *See* United States v. Gonzalez Hernandez, No. ACM S32732, 2023 CCA LEXIS 320 (A.F. Ct. Crim. App. Aug. 2, 2023) (unpub. op.). Appellant claims this Court's opinion "overlooked or misapplied material factual or legal matters in resolution of the issue." (App. Mot. at 1.) Appellant "maintains that the limitations on his communications with his trial defense counsel and financial difficulties he encountered constitute prejudice, the fourth factor considered under the framework in Barker v. Wingo, 407 U.S. 514, 530 (1972)." (Id.) Appellant further claims "prejudice is not necessarily required to find a violation of Article 10" and that an Article 10 violation still occurred because all factors besides prejudice weighed "against the government." (Id. at 1-2, *citing* United States v. Miller, 66 M.J. 571, 577 (N-M Ct. Crim. App. 2008.)

In doing so, Appellant rehashes issues this Court already thoroughly addressed in its decision while failing to explain how this Court either overlooked or misapplied them. A review of this Court's opinion shows this Court did not overlook these issues as it analyzed both the

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

communication issues between Appellant and his trial defense counsel as well as Appellant's financial situation. With regard to attorney communication, this Court noted Appellant, at trial, claimed he suffered prejudice because his "trial defense counsel had to coordinate times in advance with the military confinement facility to speak with Appellant by telephone." Hernandez, 2023 CCA LEXIS 320, *19 (unpub. op.). However, this Court then noted that "while the record contains email correspondence dated 10 January 2022 in which trial defense counsel requested that the military confinement facility arrange for Appellant to call him at a designated time, there is no indication that the call did not happen as requested or that trial defense counsel was ever denied access to Appellant." Id. at *19-20. Here, this Court did not overlook this issue, and Appellant has failed to show how the Court misapplied the matter in its prejudice analysis.

Likewise, this Court detailed how, at trial, Appellant claimed prejudice because he "had trouble paying his bills while in confinement resulting in a late fee on his car payment." Id. at *19. However, this Court then detailed how "Appellant's leadership assisted in coordinating with a local auto dealer to keep Appellant from going into arrears with an auto payment," and that "[a]s a result, Appellant received a four-month delay in making car payments, and was only responsible for a $25.00 late fee." Id. at *19-20. Here again, this Court did not overlook this issue and Appellant has failed to show how the Court misapplied the matter in its prejudice analysis.

Next, Appellant states that "prejudice is not necessarily required to find a violation of Article 10." (App. Mot. at 1-2, *citing* Miller, 66 M.J. at 577). However, this Court never said otherwise. In fact, in coming to its ultimate conclusion that Appellant was not denied his Article 10, UCMJ, right to a speedy trial, this Court balanced all of the Barker factors. Appellant fails to

make note of this analysis in his motion, let alone explain how this Court misapplied its balancing analysis of all of these factors.

Finally, Appellant claims an Article 10, UCMJ, violation still occurred because all factors besides prejudice weighed "against the government." (App. Mot. at 2.) Yet again, however, Appellant fails to either mention or explain how this Court misapplied its balancing analysis of all of the Barker factors.

Here, Appellant simply rehashes prejudice claims that this Court already thoroughly addressed in its decision while failing to explain how this Court either overlooked or misapplied them. Moreover, Appellant has failed to explain how this Court either overlooked or misapplied its analysis of each Barker factor, as well as its balancing analysis of all factors, when coming to its ultimate conclusion that Appellant was not denied his Article 10 right to a speedy trial. Accordingly, this Court should deny his motion.

CONCLUSION

WHEREFORE, this Court should deny Appellant's motion for reconsideration.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 8 September 2023 via electronic filing.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32732**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
David G. GONZALEZ HERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 1 September 2023, Appellant moved this court to reconsider its decision in *United States v. Gonzalez Hernandez*, No. ACM S32732, 2023 CCA LEXIS 320 (A.F. Ct. Crim. App. 2 Aug. 2023). Appellee opposed the motion.

The panel consisting of Chief Judge Johnson, Judge Mendelson, and Judge Gruen voted 3–0 to deny the motion for reconsideration.

Accordingly, it is by the court on this 13th day of September, 2023,

ORDERED:

Appellant's Motion for Reconsideration dated 1 September 2023 is hereby **DENIED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court