DEPARTMENT OF THE AIR FORCE
IN THE UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES v. CAPTAIN JACOB R. WULFSON [redacted]	DEFENSE MOTION TO DISMISS: SPEEDY TRIAL 26 January 2026

MOTION

NOW COMES the Accused, Captain Jacob R. Wulfson, by and through counsel, and pursuant to the Sixth Amendment to the Constitution of the United States, and Rules for Court-Martial (R.C.M.) 309, 604(b), 707, and 907(b)(2)(A), respectfully requests this Honorable Court dismiss the charges and their specifications in the above noted case, with prejudice.

SUMMARY

Charges were initially preferred against Capt Wulfson on 31 July 2024. Additional charges were then preferred on 28 February 2025. Charges were referred to court martial on 6 March 2025. The Accused was arraigned on 2 July 2025, and trial was scheduled to begin on 6 October 2025. On 25 September 2025, Trial Counsel realized they had forgotten to obtain the Armed Forces Medical Examiner System (AFMES) toxicology expert necessary to present toxicology evidence at trial. Unable to obtain the subject certifying toxicologist from AFMES, Trial Counsel requested a continuance from the Court on 29 September 2025. The Court denied Trial Counsel's request for a continuance on 2 October 2025. On 3 October 2025, OSTC dismissed all charges and specifications in the above-named case, citing its need to reconvene when able to present all relevant evidence.

FACTS

<u>Account of Time from Preferral(s) to Arraignment</u>

1. Capt Jacob Wulfson was originally charged with one specification under Charge I, violation of UCMJ, Article 92; one specification under Charge II UCMJ, Article 120; and one specification under Charge III UCMJ, Article 128b. The Government then added an additional Article 120 charge with two specifications, both referencing the same transaction reflected in Charges II and III. [EXH A 1st Referred Charge Sheet].

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2. Initial Charges I through III were preferred on 31 July 2024. [EXH A].

3. On 22 August 2024, the [redacted] appointed [redacted] as the first Preliminary Hearing Officer (PHO) in this case. In his first memorandum, 8-15 August and 9 September - 12 November 2024, were earmarked as excludible delay. [EXH B – Initial PHO Memo].

4. Subsequently, the first Article 32 hearing in this case was conducted on 12 November 2024. [EXH C – First PHO Report]. Of note, because the subject Article 32 hearing was conducted on 12 November 2024, that day is actually not excludable delay. R.C.M. 707(b)(1).

5. On 5 December 2024, on request from OSTC, the [redacted] reopened the Article 32 hearing in this case to enlarge the PHO's scope of analysis. [EXH D – Second PHO Memo]. Namely, OSTC sought the analysis of two addition theories of guilt under Article 120 as well as enlargement of the covered timeframe for Charge I.

6. In the second PHO memorandum, dated 5 December 2024, the days 6-30 December 2024 were listed as excludable delay, and the hearing was set for 21 January 2025. [EXH D – Second PHO Memo].

7. At the second Article 32 hearing in this matter, the Government sought to introduce its two additional theories of guilt under Article 120; however, the PHO was not persuaded to enlarge the scope of his analysis for the Article.

> This amended report covers the originally charged offenses, as detailed in PHO Exhibit 1, as well as the enlarged charge I was directed to analyze by the convening authority on 5 December 2024. Specifically, I was asked to analyze an alternate theory of criminal liability, i.e., sexual assault when the victim was incapable of consenting to the sexual act due to physical disability, under Article 120(b)(3)(B), UCMJ, as applicable to the Specification of Charge II. I did not formally enlarge the hearing to consider theories of criminal liability under Article 120(a)(5), UCMJ, or Article 120(b)(3)(A), UCMJ, despite GC's request for me to do so at the beginning of the hearing, because (1) that was contrary to the convening authority's direction, and (2) I found that DC were not put on adequate notice of this request, undermining their client's ability to adequately exercise his rights at the hearing. This report, however, does address the current state of the evidence that would be applicable to an Article 120(a)(5) or Article 120(b)(3)(A) offense as may bear on the convening authority's decision to reopen this hearing at a later date to properly address those potential charges, while affording the accused his required procedural due process rights.

8. [EXH E 2nd PHO Report at 2-3]. The PHO published his second report on 29 January 2025 without officially addressing OSTC's central request in reopening the proceeding. That said, the

PHO contended that Charge II along with what would become Additional Charge, Specification 1, were not viable theories of guilt, given the evidence provided by Trial Counsel. [EXH E at 16-17].

9. Additionally, Trial Counsel also requested an additional twenty-six (26) days of excludable delay, however, the PHO did not grant the Government additional time. [EXH E at 17].

10. On 6 March 2025, *United States v. Wulfson* was referred to General Court Martial. [EXH A Referred Charge Sheet – Wulfson 1]. Based on the Court's subsequent docketing memo, 6-14 March were excluded for purposes of coordination between the parties and court. [EXH F at 7 Docketing Memo]. The trial judge at the time set trial dates on 17 March 2025, with Capt Wulfson's arraignment set for 2 July 2025, and with trial scheduled to commence on 6 October 2025. [EXH F at 7].

11. Importantly, in the trial court's docketing memorandum, it identified the Government's ready date as 30 April 2025. [EXH F at 7].

12. Capt Wulfson was arraigned on 2 July 2025, with the time between 24 March and 1 July 2025 deemed excludable delay. [EXH F at 7].

Government Request for Continuance and Subsequent Dismissal

13. The Defense incorporates the Government's Motion for Appropriate Relief (request for a continuance), the Defense reply brief, and the trial court's ruling herein as Exhibits F, G, and H, respectively. The facts, circumstances, and events involved in the subject filings are important, as they begot the Government's decision to dismiss charges against Capt Wulfson.

14. Since the original preferral of charges in this case, the Government has been tracking the theory underlying Additional Charge, Specification 1, i.e., the "Etizolam issue." As the Defense highlighted in EXH H, our reply brief, Trial Counsel went so far as to contract with a private toxicologist prior to the reopening of the Article 32 hearing in this case; however, as of 22 May 2025, the date the trial court ordered the parties to exchange preliminary witness lists, the Government had failed to identify a single expert in its case. [EXH H at 3].

15. On 25 September 2025, the Government reached out to the Armed Forces Medical Examiner Services (AFMES) for the first time to secure [redacted]s production. [EXH F at 39-41]. Of import, [redacted] was the individual who analyzed [redacted]'s urine for drugs; hence, only his production would satisfy the Confrontation Clause requirement established in *Smith v. Arizona*. 602 U.S. 779, 144 S. Ct. 1785 (2024).

16. AFMES replied later on 25 September 2025, notifying the Government that none of its experts would be able to travel to the [redacted] for trial on 6 October 2025, but that AFMES could accommodate the requested testimony via other options such as VTC, telephone, or written affidavit. [EXH F at 39].

17. On 26 September 2025, Trial Counsel spoke with Defense Counsel about joining in a request for a continuance of *U.S. v. Wulfson*. We declined to join the Government. The Government then informed the military judge, [redacted] of their intent to request a

continuance due to its inability to secure [redacted]s production at trial; and on 29 September 2025, Trial Counsel filed EXH F, along with its final witness list [EXH G at 15-16], which listed several experts, to include [redacted] the Government's expert toxicologist, and [redacted] the AFMES certifying technician.

18. [redacted] gave the Defense two days to reply, which we did on 1 October 2025. [EXH G].

19. On 2 October 2025, [redacted] issued her ruling, denying the Government's request for a continuance. [EXH H].

20. On the morning of 3 October 2025, the Defense's forensic psychologist and forensic nurse examiner arrived to the [redacted] for trial.

21. At 17:55 on 3 October 2025 Trial Counsel sent the Defense an email containing the following verbiage:

> Per direction of OSTC HQ, all charges and specifications against Capt Wulfson have been withdrawn and dismissed. New charges will be preferred shortly, and he will be notified by his CC on Monday. We will notify the military judge, CDO, and all witnesses that the charges have been withdrawn and dismissed.

22. [EXH I]. This email also came with a memorandum, the subject of which reading, "Decision on Withdrawal and Dismissal of Charges – *United States v. Jacob Wulfson*[.]" [EXH J]. Approximately two minutes later, at around 17:57, Trial Counsel recalled the email message and attachment, replacing it with another email containing the same verbiage, but a different attachment: the dismissal of charges.[1] [EXH K].

23. About two minutes later, at 17:59, Trial Counsel emailed the military judge, informing her of the dismissal of charges along with the reflective charge sheet, which had just been sent to the Defense.

24. If there was any question as to why Trial Counsel dismissed charges against Capt Wulfson on 3 October 2025, Trial Counsel's memorandum clearly spells out the Government's motivation: it was unable to obtain a continuance from the trial judge, so it granted itself one at the expense of Capt Wulfson. [EXH J; *see* EXH H at 5-6 (noting the trial judge's finding, that a continuance would prejudice the Accused)].

Second Preferral

25. The Government shut down on 1 October 2025, a situation that was anticipated by the parties and trial court in advance. On 1 October 2025, upon [redacted] request, Trial Counsel

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[1] The subject email could not be recalled from Civilian Defense Counsel's computers, feasibly because we use a different operating system and mail application; but the same message was recalled on detailed Area Defense Counsel's Outlook.

produced PDOT's 1 October 2025 memorandum delineating applicable government shutdown protocols, namely that courts martial preferred prior to 1 October 2025 would proceed on schedule with full funding. Conversely, barring exceptional circumstances, new charges could not be preferred after 1 October 2025, i.e., while the government remains in shutdown. [EXH L].

26. On 6 October 2025, OSTC preferred largely the same charges against Capt Wulfson, minus Additional Charge, Specification 2. [EXH M New Preferral]. The government was shut down when the subject new charges were preferred.

27. On 6 October 2025, Defense Counsel submitted a preliminary discovery request inquiring about the Government's authority and reasoning for preferring new charges during the government shut down. [EXH N]. The Government never replied to that request.

Requests for Speedy Trial

28. [redacted] initially notified OSTC of Capt Wulfson's request for a speedy trial in his Notice of Representation, dated 4 December 2023, immediately following the Accused's apprehension. [EXH O].

29. On 25 March 2025, one day after Judge Thompson set *U.S. v. Wulfson* for trial in his scheduling order, dated 31 March 2025, [redacted] the original Area Defense Counsel on this case, submitted another request for speedy trial with our initial discovery request. [EXH P 1st Discovery Request; EXH F at 9 Scheduling Order].

Additional Information Regarding the Government's Forensic Nurse Examiner

30. [redacted] went to the local, [redacted]o accomplish her sexual assault forensic examination (SAFE) on 3 December 2023. As of 22 May 2025, the Government had not included anyone from [redacted]n its initial witness list. [EXH G at 11].

31. It was not until 7 August 2025 that Trial Counsel began reaching out to [redacted] in search of the nurse who conducted [redacted]s SAFE. [EXH Q at 11].

32. According to this correspondence between Trial Counsel and the clinic, the nurse who conducted the subject SAFE and collected the kit evidence no longer worked at [redacted] or anywhere. Furthermore, [redacted] was unwilling to supply a substitute for the requested nurse witness. [EXH Q].

33. The dialogue in this correspondence, from 11 August through 24 September 2025 is informative, in that it shows how Trial Counsel failed to secure this key witness, but somehow believed it could proceed forward with [redacted] the individual who first informed Trial Counsel that [redacted]ould not substitute anyone in for the attending sexual assault nurse examiner (SANE). [EXH Q at 1-9].

34. On 29 September 2025, Trial Counsel published its final witness list, notifying the Defense of its intent to call [redacted] as well as the majority of its other witnesses, for the first time.

LAW

Speedy Trial (R.C.M. 707)

35. R.C.M. 707 provides that "the accused shall be brought to trial within 120 days after the earlier of: (1) preferral of charges; (2) the imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) entry on active duty under R.C.M. 204." R.C.M. 707(b)(3)(A)(ii)(I) provides that for an accused who is not under pretrial restraint at the time of dismissal or mistrial, a new 120-day period begins on the earliest of "the date on which charges are preferred anew[.]" R.C.M. 707(b)(3)(A)(iii) states "[i]n a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under subsection (a) shall continue to run."

36. R.C.M. 707(d) directs that the remedy for failure to comply with the rule will be dismissal of the affected charges. The dismissal will be with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether dismissal shall be with or without prejudice, the court "shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial."

37. The accused's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether he was deprived of the right. *United States v. Wilson*, 72 M.J. 347 (C.A.A.F. 2013).

38. The constitutional right to a speedy trial is guaranteed by the Sixth Amendment but is vaguer than the hard-line procedural right outlined in R.C.M. 707. When considering the constitutional dimensions of a speedy trial, "a balancing test necessarily compels courts to approach...cases on an ad hoc basis." *Baker v. Wingo*, 407 U.S. 514, 530 (1972). Some of the factors that determine whether or not the accused has been deprived of his constitutional rights are; (1) length of the delay, (2) reasons for the delay, (3) the accused's assertion of the right to a speedy trial, and (4) prejudice to the accused. *Id.*

a. First, the length of the delay is the threshold to determining if further analysis is necessary. *United States v. Cossio*, 64 M.J. 254 (2007). If the court finds the delay is unreasonable, it must analyze the remaining factors. *Id.* There is little guidance in regards to what is "unreasonable," but previously, a rigid standard of 90 days was used. *United States v. Burton*, 44 CMR 166 (1971). The establishment of a 120-day rule in R.C.M. 707 does provide some statutory presumption of unreasonableness.

b. Second, in analyzing the reason for the delay, the court must look at the circumstances which directly caused the delay. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005). This includes government responsibility, legitimate reasons for delay, and delay attributable to the accused. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Factors taken into account in the past have been, but are not limited to, Article 32 hearings, further investigation or the discovery of new evidence, and when a legal office was partially destroyed. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *United States v. Cossio*, 64 M.J. 254 (2007).

c. Third, the sooner the accused affirmatively asserts his right to a speedy trial, the more it favors him. *See Moreno*, 63 M.J. 129. In *Moreno*, the court cited the Supreme Court's language in *Barker*, stating that, where the defendant has asserted his speedy trial right, he is "entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." 63 M.J. at 138 (internal citation omitted).

d. Fourth, and finally, is prejudice to the accused. *Barker v. Wingo*, 407 U.S. 514 (1972); *Mizgala*, 61 M.J. 122 at 127;. Prejudice should be assessed in the light of the interests of an accused which the speedy trial right was designed to protect. *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005); *Barker v. Wingo*, 407 U.S. 514 (1972). Those interests are: (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. *Id.*

R.C.M. 604 in Conjunction with R.C.M. 707

39. R.C.M. 604(a) allows for charges and specifications to be withdrawn for any reason before findings are announced. "Charges that are withdrawn from a court-martial should be dismissed unless it is intended to refer them anew promptly or to forward them to another authority for disposition." R.C.M. 604(b) allows for the referral of withdrawn charges from one court-martial to another "unless the withdrawal was for an improper reason." The Discussion section to R.C.M. 604(a) states that, "Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused. The Discussion to R.C.M. 401(c)(1) states that, "A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate."

40. The Discussion to R.C.M. 604(b) denotes that "improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial." The Discussion goes on to say that "whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in large part on the stage in the proceedings at which the withdrawal takes place." According to the Discussion, the proceedings should be analyzed as: (1) before arraignment and (2) after arraignment. "Before arraignment, there are many reasons for a withdrawal that will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority, a special trial counsel or a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of the personnel constituting the court-martial. Charges withdrawn *after arraignment* may be referred to another court-martial under *some* circumstances." The discussion gives one example of a permissible withdrawal after arraignment – an accused failing to fulfill the provisions of a plea agreement.

41. The Court of Appeals for the Armed Forces (C.A.A.F.) has imposed a two-prong standard for re-referral – the "improper reason" test. *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999). "Our case law has construed 'proper' in this context as (1) a legitimate command reason which (2) does not 'unfairly' prejudice an accused in light of the particular facts of a case." *Id.*

42. Prong one of the 'improper reason' analysis comes down to whether the convening authority's specified intent is in fact a subterfuge or an ulterior motive. In *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014), the Court held that dismissal is appropriate absent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason. In that case, the Court held that when charges are dismissed, the R.C.M.s contemplates that "reinstitution of the charges requires the command to start over. The charges must be re-preferred, investigated, and referred . . . as though there were no previous charges or proceedings." *Id.* citing *Britton*, 26 M.J. at 26. Once charges are dismissed, absent a subterfuge, the speedy-trial clock is restarted. *Id.*

43. Prong two of the analysis evaluates whether the effect of the withdrawal and dismissal resulted in material, detrimental impact upon a "legally cognizable right." *Underwood*, 50 M.J. at 276. In applying this prong, C.A.A.F. has observed that various circumstances could create unfair prejudice including: (1) the second court-martial was not the same time as the first; (2) accused lost the benefit of a favorable trial ruling; (3) accused was in pretrial confinement during the withdrawal and re-referral process; and (4) accused moved for relief based upon prejudicial delay. *Id.* This list has been interpreted as "for instances" and not an exhaustive list. *Leahr*, 73 M.J. at 369 (finding another circumstance that could create prejudice, to wit: "did [it] harm [the court-martial]").

44. The Court of Appeals for the Armed Forces in *United States v. Tippit* found that awaiting completion of an ongoing investigation in order to "fully ascertain the number and nature of offenses constituted a legitimate reason for dismissing the charges with a view towards later re-preferral." 65 M.J. 69, 79 (C.A.A.F 2007). In support of this statement, C.A.A.F. points to the discussion section of R.C.M. 401(c) in which it states "it is appropriate to dismiss a charge and prefer another charge anew when, for example, the original...did not adequately reflect the nature or seriousness of the offense." *Id.*

45. Later, in *United States v. Hendrix*, C.A.A.F. applied the legal reasoning of *Leahr*, when determining whether an Accused's R.C.M. 707 rights were violated by a convening authority's dismissal and re-preferral. 77 M.J. 454 (C.A.A.F. 2018). The court stated, "[a]bsent a situation where a convening authority's express dismissal is either a subterfuge to vitiate an accused's speedy trial rights, or for some other improper reason, a clear intent to dismiss will be given effect." *Id.* at 457 (internal citation omitted). The court further adopted reasoning from *Leahr* by defining a "proper reason" as "a legitimate command reason which does not 'unfairly prejudice' an accused." *Id.* (internal citation omitted). Finally, the court assessed "subterfuge" by use of its ordinary dictionary definition. Specifically, subterfuge was defined as "deception by artifice or stratagem in order to conceal, escape, or evade." *Id.* (internal citations omitted).

Prosecutorial Decision-Making

46. Prosecutorial misconduct occurs when Trial Counsel "overstep[s] the bounds of that propriety and fairness which should character[ize] the conduct of such an officer in the prosecution of a criminal offense." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (alteration in original) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). Prosecutorial misconduct does not automatically require a new trial or the dismissal of charges against an accused. Relief is granted only if Trial Counsel's misconduct "actually impacted on a substantial right of an accused (i.e. resulted in prejudice)." *United states v. Frey*, 73 M.J. 245, 249 (C.A.A.F. 2014) (quoting *Fletcher*, 62 M.J. at 178). The inquiry is objective and no showing of malicious intent on behalf of the prosecutor is required. *United States v. Hornback*, No. NMCCA 201200241, at *3-5 (N-M Ct. Crim. App. Feb. 21, 2013).

47. Trial Counsel are tasked with "[ensuring] prosecutions comply with the constitutional, legal and ethical standards applicable to prosecutors, and any resulting convictions are legally sustainable." LSAM Vol 16, paragraph 021402(B). C.A.A.F affirms the special position and power of Trial Counsel by stating, "we heartily endorse the principle that, '[a] trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice…' And as eloquently stated by Justice Sutherland eighty years ago, we note that '[t]he [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Stellato*, 74 M.J. 473, 490 (C.A.A.F. 2015) (quoting Dep't of the Army, Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, R. 3.8 Comment (May 1, 1992)). A specific goal of the R.C.M.'s, Military Rules for Evidence (M.R.E.), and professional conduct rules is to eliminate gamesmanship by counsel. *See* Discussion to R.C.M. 701.

48. Air Force Instruction 51-110 speaks directly to charging decisions in Standard 3-3.9:

> It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.

49. Air Force Instruction 51-110 speaks directly to disposal of charges in Standard 3-.9:

> (a) A trial counsel should avoid unnecessary delay in the disposition of cases. A trial counsel should not fail to act with reasonable diligence and promptness in prosecuting an accused.

> (b) A trial counsel should not intentionally use a procedural device for delay for which there is no legitimate basis.
>
> [...]
>
> (d) It is unprofessional conduct intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
>
> DISCUSSION: In military practice, in some circumstances, noncompliance with procedural rules and unnecessarily delaying a trial is itself an offense. See Article 98, UCMJ; Rule 3.2, Expediting Litigation; Rule 3.3, Candor Toward the Tribunal, subsection (a)(1); and Rule 3.4, Fairness to Opposing Party and Counsel, subsections (a), (c), and (d).

Government Employment of Expert Assistance

50.R.C.M. 703(d)(1) states as follows:

> Experts for the prosecution. When the employment of a prosecution expert witness or consultant is considered necessary, counsel for the Government shall, in advance of employment of the expert, and with notice to the defense, submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

ARGUMENT

Improper Dismissal of Charges

51. Dismissal of charges here was accomplished to subvert a military judge's ruling. Therefore, the dismissal is by definition improper. The Government might argue that its purpose was proper, in that it dismissed the subject charges in order to secure its witnesses. As we have and will show, this case is not like the others noted in our law section. This is not a situation where a Government witness got on the wrong plane or found a new job. Here, the Government simply forgot to put together a list of experts for trial.

52. When Trial Counsel realized their folly, they made a motion for a continuance. The trial court denied the Government's motion. It then opted to dismiss charges to give itself a continuance for a purpose that was already deemed not proper. As the Court can see, the previous trial judge determined for trial counsel a resolution to their problem, and it was not more time. [EXH H].

53. All parties and the trial court already stated that the length of delay proposed in the Government 's request for a continuance was significant, and the trial judge found that this delay

would prejudice the Accused. As we will show in our R.C.M. 707 analysis, Capt Wulfson has been prejudiced by this delay.

54. In terms of this R.C.M. 604 analysis, Capt Wulfson has been prejudiced in another way. In denying the Government's continuance, the previous trial judge also inadvertently denied the Government a path to prosecuting Capt Wulfson under its Additional Charge, Specification 1. To this, the Government might reply in unison, "*exactly*," but the trial court's denial of the requested continuance was not an evidentiary ruling; rather, it was a crisis of the Government's own making. In following, when the Government improperly dismissed its case, it deprived Capt Wulfson of not merely a "favorable ruling," but of a favorable verdict. *Leahr*, 73 M.J. 364 at 369.

The Government Already Ran Out of Time

55. With the math most favorable to the Prosecution, as of Capt Wulfson's arraignment, the Government was over its speedy trial clock by nine days.

The Clock is Still Ticking – Improper Purpose

56. Trial Counsel told the court it was prepared to try *U.S. v. Wulfson* on 30 April 2025. [*See* EXH F at 7]. Come 9 May 2025, the date by which the trial court ordered the Government to request expert assistance, the Government had failed to requisition a single expert; and as of 22 May 2025, its first witness list did not include a toxicologist, let alone [redacted] from AFMES. [EXH G at 11]. Furthermore, the same list did not include an expert in sexual assault forensic examinations, let alone anyone from [redacted]

57. The Government filed for a continuance on 29 September 2025, because it would not be ready for trial on 6 October 2025. The Government was not ready for trial because it had failed to reach out to its key witnesses until months after its ready date, notwithstanding its failure to appreciate the necessity of such witnesses to its case. In fact, the Government failed to contact whom it considers one of its most important witnesses, [redacted] until a mere six duty days prior to the start of trial, which drove Trial Counsel's request for a continuance.

58. The trial court denied the Government's request for a continuance for, among other reasons, Trial Counsel's lack of due diligence. Instead of abiding the trial court's order, OSTC dismissed charges with the intent to prefer the same charges anew at a date when Trial Counsel could be ready for trial. [EXH J]. Hence, the Government gave itself a continuance in obvious violation of R.C.M. 604(b), not to mention AFI 51-110.

59. Here, Trial Counsel might argue that it did have a legitimate purpose for dismissing the subject charges. That would be untrue. When the trial judge ruled that Trial Counsel did not have a legitimate purpose for delay, it did not have a legitimate purpose for delay; furthermore, the Government was then on notice that it did not have a legitimate purpose for delay...when it dismissed charges against Capt Wulfson for purposes of delay.

60. What is more, the Government requested a continuance and then dismissed the subject case, telling the trial court the following:

> On 25 Sep 25, the Government was notified by AFMES that [redacted] the only available member of the AFMES staff who certified the results of [redacted]s urine examination, was unavailable to travel or testify during the currently scheduled trial date.

61. [EXH F at 2]. In its memorandum, dated 3 October 2025, Trial Counsel stated the following to posterity:

> On 25 September 25, the Government was notified by AFMES that no member of the AFMES staff was available to travel or testify during the currently scheduled trial date. Despite repeated efforts by the trial team to secure someone from AFMES to testify, AFMES did not have anyone available to do so, a fact compounded by the Government shutdown on 1 October 2025.

62. [EXH J]. The first correspondence between Trial Counsel and AFMES was initiated on 25 September 2025 at 1007.

> I apologize for the last minute request, but I am the lead prosecutor on US v Wulfson, a GCM at [redacted] Would you be available to serve as a witness as to your findings on this case the week of 6 October? We would be flexible as to when you travelled, but you would likely be testifying on either Tuesday or Wednesday.
>
> I sincerely apologize for the last minute request. Thank you!

63. [EXH F at 41]. The last AFMES correspondence in evidence came on 25 September 2025 at 2000, the same day.

> None of the AFMES experts are available to travel for the scheduled trial.
>
> Other alternatives are available, such as VTC, telephonic, and affidavit.

64. [EXH F at 39]. Trial Counsel never asked the Defense if it would allow [redacted] to testify via VTC or telephone, or if the Defense would support a stipulation of fact prior to the Government requesting a continuance and then dismissing charges. Put simply, the Government still had unexhausted remedies at its disposal when it dismissed *U.S. v. Wulfson.*

65. Here, the Government might argue that Capt Wulfson did not interject to affirmatively waive his Confrontation Clause protections in the interest of thwarting delay. For one, it is not Capt Wulfson's job to identify the Government's witnesses in advance of trial so that he can then

not confront them. Secondly, the Defense did not expect Trial Counsel to dismiss the case after the military judge's ruling.

66. In sum, the only way the Court can rule in favor of the Government here is if it classifies OSTC's "carelessness and lack of preparation" as a proper purpose for dismissing a case.

67. Certainly, Capt Wulfson cannot dismiss his own case when all else fails. The Government must be similarly situated for the rules of fairness to prevail here.

68. In following, Capt Wulfson's speedy trial clock began ticking again as soon as charges were dismissed on 3 October 2025.

The Government Shutdown Should Not be Assessed Against Capt Wulfson

69. The government shut down on 1 October 2025 was event that both parties and the trial court saw coming. Furthermore, on 3 October 2025, the Government dismissed charges against Capt Wulfson, stating that its plan was to prefer and refer the same charges against him the following week, which it did. [EXH I; EXH M].

70. The Government preferred new charges against the Accused, to our knowledge, in direct violation of the PDOT's 1 October 2025 shutdown guidance. [EXH L]. Then, on 7 October 2025, Trial Counsel contacted Defense Counsel about our schedule in setting a new Article 32 date. This time, undersigned counsel did not provide Trial Counsel with our schedule to be used in the Government's excludable delay tabulation. Instead, we requested discovery on how OSTC managed to prefer new charges against Capt Wulfson during a government shutdown. [EXH N]. Then, we requested that a military judge be appointed for Capt Wulfson's Article 32.

71. In this chain of events, Civilian Defense Counsel (CDC), supplied the Government with our availability in accordance with the Air Force Instruction 51-201, 12.2.1.2.2. Detailed ADC replied, sta[redacted]ould not supply the Government with her schedule because funding for her travel t[redacted]was on indefinite hold for new cases. Importantly, Capt Wulfson's ADC is stationed in[redacted]

72. In following, because OSTC preferred charges against Capt Wulfson during a government shutdown without any justification, there was no funding for the Article 32 hearing. Trial Counsel then sought to coordinate for purposes of manufacturing excludable delay. This is subterfuge; hence, Capt Wuflson's speedy trial clock continues to tick. That said, the Defense now raises a more unique question: *did Capt Wulfson's speedy trial clock ever stop ticking?*

The Clock has Been Ticking Since 2 July 2025 or Longer

73. The lion's share of excludible delay in this matter was on account of the difference between the parties' respective "ready" dates. [*See* EXH F at 7]. The Defense's ready date was 12 August 2025. According to Trial Counsel, it was ready for trial on 30 April 2025, but the Government was never actually ready for trial.

74. The Government was not ready for trial on 22 May 2025. [*See* EXH G at 11]. It was not ready as of August. It was not ready as of September. It was not ready for trial on 6 October 2025. Indeed, in its 3 October 2025 memorandum, Trial Counsel stated that it dismissed charges in order prefer and refer the same charges to make themselves ready for trial. [EXH J]. It is objectively possible that Trial Counsel are still not ready for trial.

75. Candor to the tribunal is a factor here, as always. During the investigation phase of a criminal case, the government is afforded a great deal of time, especially where the accused is not placed in pre-trial confinement. Here, Capt Wulfson was under investigation for nearly eight months in between his 3-4 December 2023 arrest and the first preferral of charges.

76. During the investigation phase, the Government is also afforded a great deal of space. With narrow exceptions, compulsory process does not become available to the accused until after the referral of charges. Thus, when the Government discloses evidence to the accused at preferral or after referral, it has typically already created a proof matrix for its charges and generated work product associated with not only determining probable cause for the crimes alleged, but also a prosecution event at trial. In effect, the Government always has a head start.

77. Indeed, by the time the defense receives any evidence in a case such as the present, OSTC has already assumed investigative cognizance. In essence, the trial counsel are not merely finding things out as OSI investigates, but are part of the investigation's decision-making process in the lead up to preferral. Meanwhile, an accused may not even yet rate detailed defense counsel.

78. Beyond scheduling conflicts, the defense's ready date is reflective of the time it takes to catch up with the prosecution and is entirely speculative. The defense issues its ready date in the absence of a complete evidentiary picture and expertise. For example, an ADC confers with his or her client and issues the government a speedy trial request along with his or her notice of representation. Then, the government discloses DNA evidence at preferral. Suddenly, the same ADC requires the assistance of a DNA expert, an expert who never had any scheduling input with the military judge, but nevertheless, creates a delay attributable to the defense. Meanwhile, trial counsel has already had access to the same USACIL DNA expert it will call at trial for months.

79. If arraignment is akin to the plane's departure for trial, it is fair to say that the plane cannot leave in the absence of its travelers. The date of arraignment is important for our calculations here because it terminates the government's 120-day speedy trial clock. In order for an arraignment to be set, however, the passengers must signify that they are ready to proceed. The government cannot assert its readiness for trial simply to terminate the speedy trial clock, otherwise, the entire speedy trial clock becomes arbitrary.

80. Here, the Government stated that it was ready for trial to commence on 30 April 2025. The plane departed on 2 July 2025. On descent to trial, the Government disclosed for the first time that it had left its case in chief at home and needed to go back and get it. Perhaps the circumstances would have been more understandable if the Government were not also the travel agency in this scenario.

81. If the Government arbitrarily reported its ready date just to terminate its speedy trial clock, that is subterfuge, where its lack of preparedness then becomes the cause of unjustifiable delay. Here, the Government might argue that the Defense was not ready on 30 April 2025 either, hence, Capt Wulfson could not have had his day in court any earlier than 12 August 2025; but we are not sure that the Defense's schedule is the key factor here, given that it is the Government's ability to proceed, which dictates the termination of the speedy trial clock. In following, the subject speedy trial clock was stopped on 2 July 2025, not 12 August 2025.

82. It is understood that the government's case does not have to be perfected by arraignment. *See United States v. Evans*, 55 M.J. 732, 743 (N-M Ct. Crim. App. 2001). Here, however, the Government, never had a case to bring before the members. It blew through each of the trial court's milestones with respect to expert acquisition and was still turning over substantive evidence the week before trial. This assessment is not a supposition either. The Government told the trial court and Defense as much, and the trial court ruled concurrently. [EXH F; EXH G; EXH H; EXH J].

83. The Defense's position here is the Government's: we are still waiting for Trial Counsel to locate and secure its witnesses for production at *U.S. v. Wulfson*. In following, charges were preferred against Capt Wulfson on 31 July 2024, and he was still awaiting a proper arraignment come 5 January 2026, which means that the Government is well beyond its speedy trial requirement, and we cannot calculate by how much because the clock may still be ticking.

Reopened Article 32 Excludable Delay

84. The Defense, having now had the opportunity to more thoroughly review this matter, contends that no excludable delay should be awarded to the Government for the reopened Article 32 in this matter.

85. On 9 December 2024, [redacted] the PHO issued an Article 32 schedule to the parties. [EXH S]. In that schedule, [redacted] ordered the parties as follows:

> No later than **10 December 2024**, GC shall provide to the Defense Counsel (DC) the following information or matters:
>
> a. Article 32 appointment letter;
>
> b. Statements, within the control of military authorities, of witnesses GC intends to call at the preliminary hearing;
>
> c. Evidence GC intends to present at the preliminary hearing; and
>
> d. Any matters provided to the convening authority when deciding to direct the preliminary hearing.

> 6. No later than **20 December 2024**, GC and DC shall provide me and the opposing parties the following notices:
>
> a. Notice of the name and contact information for each witness the party intends to call at the preliminary hearing;
>
> b. Notice of any other evidence the party intends to offer at the preliminary hearing;
>
> c. Notice of any additional information the party intends to submit under R.C.M. 405(l); and
>
> d. Notice of, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces the degree of guilt of the accused for an offense charged.

86. [EXH S at 1]. The Government did not supply the Defense or the PHO with the evidence in support of its Etizolam theory until the evening before the subject Article 32 hearing. [EXH G at 9-10]. The Government did not supply the Defense or the PHO with this evidence, central to its decision to reopen the Article 32, until the eve of the hearing because it did not receive the evidence until 19 January 2025. [EXH G at 9-10]. In following, the PHO refused to reopen the subject hearing because, among other reasons, the Government had not supplied the PHO with enough evidence to do so, and it had not provided the Accused with proper notice of its new theory or theories of guilt under Article 120. [EXH E at 5-6, 17].

87. Nevertheless, Trial Counsel requested additional time for excludable delay, citing the Defense's scheduling conflicts. [EXH E at 17]. The PHO did not allocate the excludable delay to the Government, and to our knowledge, the Government did not request the additional time from the Convening Authority or trial court. That said, similar to our position on arraignment, Trial Counsel were not prepared for the subject reopened Article 32 hearing on 6 December 2024, their "ready" date. [EXH E at 17].

88. What is more, this reopened Article 32 played little role in the Government's trial planning, as it preferred the Additional Charges absent a probable cause hearing on 28 February 2025. [EXH A at 3]. d

89. Objectively, the Government was not ready for the Article 32 hearing it chose to reopen. Because it was not ready, the PHO refused to hear the Government's case regarding the subject Additional Charges. Capt Wulfson now wants this time back, as he did not initiate the reopening of the Article 32, and his Defense was not the true cause of delay to the hearing, which, in pertinent part, never took place.

90. An additional twenty-four days be added back to Capt Wulfson's speedy trial surplus to account for the originally deemed excludable delay, i.e., 6-30 December 2024.

<u>The Government is Out of Time, in Part, Due to a Lack of Dilligence</u>

91. The Government is out of time; and as the Court has read, its time has further lapsed due to an inability to meet deadlines. Trial Counsel have incorrectly represented an ability to present issues and try their case in order to toll Capt Wulfson's speedy trial clock.

92. This began with the PHO in the first Article 32 hearing. As we laid out in [EXH G], the Government was aware of the facts and circumstances underlying its Additional Charges in January or February of 2024, meaning, when it initially preferred charges on Capt Wulfson, it left the Additional Charges out. Then, within a couple weeks of the original PHO report, it sought to reopen the hearing.

93. Then, the Government failed to produce its evidence for the reopened hearing despite almost two months' lead time from [redacted] effectively told the Government that it had failed to observe clear deadlines and rejected its Additional Charges without a hearing for this reason.

94. Instead of rectifying the matter, the Government moved forward with what could be viewed as defective referral. We point the Court to the PHO's unofficial analysis of the Government's Additional Charges. [*See* EXH E at 19]. Believing the charge sheet was solidified, we worked with the Government and trial court to move *U.S. v. Wulfson* to trial as quickly as possible, while at the same time, contemplating the expert assistance we would need to defend the Accused.

95. When Capt Wulfson was arraigned on 2 July 2025, that signified the Government's readiness to go to trial, but it had not made any headway with its Etizolam theory. [EXH T 404(b) ruling (noting that the Government identified Capt Wulfson's significant other, an Italian national, as the procurer of Etizolam, but had never asked her about the drug, let alone identified her as a Government witness on its first 22 May 2025 witness list)].

96. In effect, the Government, as of 2 July 2025, arraigned Capt Wulfson on, *inter alia*, an Etizolam date rape charge, which it had never developed a good faith basis for, let alone probable cause. Indeed, there is no record of OSI or Trial Counsel ever asking [redacted]f she gave herself Etizolam prior to her urinalysis.

97. On 23 September 2025, after detailed ADC advanced the Government our first list of traveling experts, Trial Counsel began frantically looking for the AFMES expert responsible for processing [redacted]s urinalysis. Then, on 29 September 2025, it filed its final witness list with the trial court, which included, among other new experts and lay witnesses, [redacted] who Trial Counsel already surmised could not participate in *U.S. v. Wulfson*. Shortly thereafter, it filed its request for a continuance, stating that "[o]n 25 September 2025, the Government was notified by AFMES that [redacted] the only available member of the AFMES staff who certified the results of [redacted] [redacted]s urine examination, was unavailable to travel or testify during the currently scheduled trial date." [EXH F at 2].

98. We would argue that Trial Counsel omitted significant context from its filing to argue an issue of extremis, versus one of human error. The Defense is not suggesting that Trial Counsel should have self-flagellated on a shame tour through [redacted] Certainly, Defense Counsel

have made similar mistakes over the course of years; however, there is a time when it becomes imperative to disclose a gloss-free version of events to avoid what we now view as not only a problem of time, but also perception and, arguably, real prosecutorial misconduct.

Length of Delay

99. In requesting a continuance, the Government acknowledged that the length of delay would be "potentially significant." [EXH F at 4]. The Defense and trial court agreed with Trial Counsel here. [*See* EXH G at 4; EXH H at 5]. Since, the delay has been and will continue to be significant.

100. The Government might argue here that the "length of delay" to be measured in this analysis is not the same that was contemplated in *United States v. Miller*. 47 M.J. 352, 358 (C.A.A.F. 1997). We would disagree. Regardless, this does not negate the fact that the length of delay has been significant as a matter of judicial fact. [*See* EXH H at 5].

101. The Government may also argue that much of the delay yet to come will be attributable to the Defense's schedule, and that assertion would be speculative, but irrelevant. When the Government dismissed this case in October of 2025, it knew that Capt Wulfson was not only represented by three attorneys with trial calendars, but also that there were five Defense experts produced for trial at [redacted]

102. The notion that the Defense could dispatch all of its assistance for however many months, then re-assemble our team on Trial Counsel's signal, lest Capt Wulfson is to blame for not being ready, is preposterous.

Requests for Speedy Trial

103. The speedy trial request does not signal immediate readiness. Indeed, speedy trial requests, in the Air Force, customarily go out with notices of representation and initial discovery requests, i.e., before an accused may even know what evidence he or she faces. Instead, the speedy trial request is the defense's means to inform the outside world that the accused wishes to proceed without delay. Naturally, the request itself does not create a government obligation not already in existence; rather, it is evidence of an accused's preference.

104. One does not have to assert his or her right to a speedy trial, per se, because the same right is fundamental; but one must evidence his or her interest in having a speedy trial. In effect, the request for a speedy trial is as much of a technical requirement as the government's 120-day deadline; but neither of these things are arbitrary. Where the 120-day rule is the legal determination of what constitutes a facially reasonable amount of time to bring an accused to trial, the speedy trial request is an accused's personal concurrence with that time frame for his or her case.

105. Here, detailed ADC made two requests for a speedy trial on behalf of Capt Wulfson, one on 4 December 2023 with his notice of representation, and then again on 31 March 2025 with our initial discovery request. [EXH O; EXH P]. Both requests went out at key points in the

case's lifecycle: when Capt Wulfson first came to the ADC office, the day of/after his apprehension, and when the military judge's scheduling order was published. Because these requests were made with immediacy and repeatedly, this favors Capt Wulfson. *See Moreno*, 63 M.J. 129 at 138.

106. The Government might argue that the Defense, nevertheless, did not object when delay occurred in the course of things, for instance, in the lead up to the two Article 32 hearing dates. The Defense asserts that our lack of objection in these instances is of no consequence here, because the factual reality of the Government's inability to accomplish the Article 32 rehearing is so apparent. Given that the rehearing was, for all intents and purposes, canceled due to the Government's lack of preparedness, it should not enjoy excludable delay simply because it previously told the PHO it was ready...when it was not.

107. Finally, the Defense *did* object to the Government's proposed delay on 1 October 2025. [EXH G]. We won our objection. [EXH H]. Furthermore, it was not until this litigation on the eve of trial that it became apparent to the Defense and trial court that Trial Counsel had never been ready to prosecute Capt Wulfson. Rather, the Government – like the Article 32 reopening – had just been advertising readiness to terminate its speedy trial clock and pass undue delay onto the Accused. In effect, the difference in readiness between the Government and Defense was inverted all along; and this fact only became apparent when the prejudice to Capt Wulfson simultaneously became apparent to people other than Capt Wulfson and Defense Counsel, i.e., a military judge.

108. Under the Sixth Amendment and Article 10 of the UCMJ, the Government had a legal duty to demonstrate a reasonable amount of due diligence in bringing Capt Wulfson to trial in a reasonable amount of time. Capt Wulfson prompted this duty in two speedy trial requests, putting the Government on notice of his desire to have his day in court without unreasonable delay. Indeed, his right to this is fundamental under the Sixth Amendment and Article 10.

Prejudice to the Accused

109. The prejudice to the Accused in further delaying this matter has already been articulated and certified by the prior trial judge. [*See* EXH I at 5-6].

110. Capt Wulfson has not been confined; but he has been on legal hold for more than two years now, meaning he is an American service member, who cannot promote, PCS, or resign. Capt Wulfson is now restricted to living on or around [redacted], where he has been since 16 April 2022, indefinitely. As the trial judge noted, he has been essentially restricted to living in a foreign island nation since 3 December 2023. [EXH H at 5-6].

111. For the sake of calculating time and money, Capt Wulfson had orders to [redacted] at the time of his apprehension, requiring him to report no later than 30 April 2024. Based on the Government's proffer, and the trial court's understanding, which has now proven true, Capt Wulfson may not see his trial until spring of 2026, meaning he will be held in a foreign country without recourse for more than two years. [EXH F at 4; EXH H at 5].

112. To make matters worse, Capt Wulfson made the rank of Major, but was unable to promote due to the same pretrial legal hold; hence, the Government's delay is penalizing not only the Accused's time, but his finances as well. Furthermore, this does not even speak to the cost Capt Wulfson must now shoulder to maintain his counsel of choice. [*See* EXH H at 5-6].

113. Trial Counsel might argue that Capt Wulfson chose to incur the extra cost of civilian defense counsel – Undersigned Counsel – but this is also the point. Here, we are talking about prejudice to the Accused, not generally. What is more, the Government failing to identify its experts until the week before trial is not a "just the cost of doing business" scenario. Indeed, this particular scenario is unique.

114. There are so many fail safes baked into the court martial process, especially the traditional Air Force court martial process. For example, mostly unique to the Air Force, there are joint status updates. In the Air Force, the military judge will typically require a series of touch points on the way to trial, and that was the case in Capt Wulfson's court martial. At no point prior to 26 September 2025 did the Government ever signal to Defense Counsel or the trial court that it had failed to identify its key witnesses.

115. Simultaneously, the Defense identified the need for several experts in this case early on: a toxicologist, a DNA analyst, a Sexual Assault Nurse Examiner (SANE), a forensic psychologist, and a Digital Forensic Examiner (DFE), all of which were requisitioned via DEAO funds, unbeknownst to Government Counsel. In following, we proposed a lead time for this trial to deconflict these experts' schedules, along with our own, at the least expense to Capt Wulfson's time. In essence, Capt Wulfson sacrificed his time and lost O-4 wages in order to prepare for a trial, which could define him; but, in theory, the Government should have incidentally benefitted from that time as well.

116. Recall, the Government had an eight-month investigatory head start in this case. From the original preferral to trial, the Government had an additional thirteen months to prepare. All and all, the Government had nearly two years to make ready for this case the first time. We found out at the eleventh hour, in the twenty-first month of the Government's time, that Trial Counsel had done nothing to advance its case.

117. What has occurred in *United States v. Wulfson* is not "just the cost of doing business." If it were, the military judge would have granted Trial Counsel's request for a continuance. [*See* EXH H at 5-6]. Nevertheless, the Government now seeks to create additional monetary expense for Capt Wulfson, out of the simple belief that it can. The fact that Capt Wulfson must now spontaneously plan to produce his counsel of choice a second time further serves to impede his own ability to travel to and from the United States himself due to cost considerations. In effect, because Capt Wulfson opted to bring on civilian defense counsel at his own expense, the Government is now leveraging that expense again him through opaque mismanagement.

118. The Prosecutors flippantly propose that Capt Wulfson sacrifice his time and money to his own prosecution. We think that is problematic, but there is more. Capt Wulfson has already sacrificed his time and money to fight this case. He did not make these sacrifices to drive a

leisurely pace for Trial Counsel; to the contrary, his defense team worked with the time we had to be prepared for trial on 6 October 2025.

119. Meanwhile, the Government could not even generate a coherent trial plan because it had no experts to consult with. It had no ability to generate a trial strategy, let alone a trial plan, because it had not spoken to the new individuals, who suddenly appeared on its 29 September 2025 final witness list without any notice. Indeed, Trial Counsel never furnished the Defense with its experts' CVs; and, with exception to [redacted], we did not receive any new OSTC interview notes.

120. In following, OSTC not only issued itself a continuance to secure its witnesses' production for trial, but also to finally build out its trial strategy; and again, the Government gave itself a continuance, because of – and despite – a trial judge's ruling, at Capt Wulfson's expense. Now, Trial Counsel have the added luxury of knowing who the Defense will be calling in its case. Now, Trial Counsel can really explore its theory or theories of guilt. In fact, Trial Counsel have already begun to do this. All one has to do is compare the previous charge sheet to the present. [*Compare* EXH A *to* EXH M].

121. The Government's decision to postpone trial for months clearly prejudices the Accused, but it prejudices the accused as well. This is not just a matter of public perception. It is real prejudice in a universal sense. We contend that Capt Wulfson is innocent of the charges, but guilty or not guilty, regardless of who the accused is, the trial process is feasibly the most stressful experience in any accused's life. [*See* EXH G at 5-6, *e.g.*, 31].

122. Where OSTC can unilaterally nullify a military judge's scheduling order to obtain witnesses, build new trial plans from the ground up, and take advantage of information gleaned from a dismissed court martial, that is not merely a perception problem. It is a constitutional problem, and a problem in every other sense, because it is cheating. The kind of unfairness the Government now proposes prejudices the Accused and other accused servicemembers, as well as those yet to be accused. It is a prejudice to the Armed Forces.

CONCLUSION

123. The Defense requests this Court to grant its motion and order the dismissal of all charges and specifications. The Government has violated Capt Wulfson's Sixth Amendment and Article 10 rights, and it remains – and will remain – in violation of these same rights beyond the foreseeable future.

124. We further ask this Court to dismiss the subject charges and specifications with prejudice because of the manner the Government violated Capt Wulfson's Sixth Amendment and Article 10 rights.

EVIDENCE AND BURDEN OF PROOF

125. The Government bears the burden of proof and persuasion on a "motion to dismiss for... denial of the right to speedy trial under R.C.M. 707." R.C.M. 905(c)(2)(B). Regardless of whether the Defense bases its motion to dismiss for denial of speedy trial in the Sixth Amendment to the Constitution, Article 10 (UCMJ), or R.C.M. 707, the Government bears the

burden of proof and persuasion. *United States v. Laminman*, 41 M.J. 518, 521 (C.G.C.C.A. 1994).

126. " 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. 122 at 125. The Government must prove by a preponderance of the evidence that it has complied with the applicable time limits. *See, e.g., id.*; *United States v. Givens*, 30 M.J. 294, 299 (C.M.A. 1990); *United States v. Cook*, 27 M.J. 212, 123 (C.M.A. 1988) (determining whether the Government proceeded "with a constant view towards day 120"); *United States v. Burris*, 21 M.J. 140, 141 (C.M.A. 1985).

127. "[I]t 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." *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016) (citations omitted).

128. The Uniform Rules of Practice Before Department of the Air Force Courts-Martial, effective 1 August 2025, Rule 3. 7, require the Government to prepare a written chronology of events prior to trial, in a specific format, when the defense moves to dismiss for a speedy trial violation. *See also United States v. Ramsey*, 28 M.J. 370, 374 (C.M.A. 1989).

Enclosure

A. *U.S. v. Wulfson*, Original Referred Charge Sheet, dtd 05 March 2025
B. PHO Appointment Memo, dtd 22 August 2024
C. PHO Report, dtd 21 November 2024
D. Reopening of Article 32 Preliminary Hearing Memo, dtd 5 December 2024
E. PHO Report, dtd 29 January 2025
F. Gov MFAR (Continuance), dtd 29 September 2025
G. Def Reply to Gov MFAR, dtd 1 October 2025
H. Ruling: Gov Motion for Continuance, dtd 2 October 2025
I. Email Correspondence from Trial Counsel to Defense Counsel, dtd 3 October 2025
J. Gov Memo, Decision on Withdrawal and Dismissal of Charges, dtd 3 October 2025
K. Dismissal of Charges, dtd 3 October 2025
L. Memo for All Travel Approval Authorities, dtd 1 October 2025
M. *U.S. v. Wulfson*, Preferral Package, dtd 3 October 2025
N. Def Preliminary Specific Discovery Request, dtd 6 October 2025
O. Def Notice of Representation/Speedy Trial Request, dtd 4 December 2023
P. Def First Discovery Request/Speedy Trial Request, dtd 25 March 2025
Q. Email Correspondence between Trial Counsel and Mountain Healthcare, initiated 7 August 2025
R. Def Request for Appointment of a Military Judge as PHO (undated)
S. Supplemental Article 32 Hearing Scheduling Order, dtd 9 December 2024
T. Ruling: M.R.E. 404(b), dtd 15 July 2025

RELIEF REQUESTED

The Defense requests this Court to order the dismissal of all charges and specifications with prejudice.

Respectfully submitted this 17th day of October 2025.

[redacted]

[redacted]imothy Bilecki
Civilian Defense Counsel

CERTIFICATE OF SERVICE

I certify that on the date listed above, I served a copy of this document on the military judge and trial counsel via email and electronic filing.

[redacted]

[redacted]IMOTHY BILECKI
Civilian Defense Counsel