

**DEPARTMENT OF THE AIR FORCE
HEADQUARTERS USAF TRIAL JUDICIARY**

UNITED STATES OF AMERICA

v.

CAPTAIN JACOB R. WULFSON
[REDACTED]

)
)
) **Government Response to**
) **Defense Motion to Dismiss:**
) **Speedy Trial**
)

)
)
) **6 February 2026**

The United States Government, by and through counsel, moves this Honorable Court to deny the Defense Motion to Dismiss: Speedy Trial. The Government does request an Article 39a session to present argument and evidence on this issue.

SUMMARY

In this case, the Government withdrew and dismissed previous charges and specifications against the Accused after the Government became aware a critical witness – [REDACTED], an AFMES forensic toxicologist – was unavailable for trial, and a continuance was denied by the prior military judge. Case law, including *United States v. Underwood*, 50 M.J. 271 (C.A.A.F. 1999), makes clear that the withdrawal and dismissal of charges in such a circumstance is not improper and does not warrant relief where there is no demonstrated prejudice to the Accused. Despite Defense's contention, there was no violation of RCM 707 or the Accused's Sixth Amendment right to a speedy trial. The Government did not withdraw and dismiss the prior charges against the accused for an improper purpose, and there has been no prejudice to the Accused. Rather, the Government has declined to move forward with one Article 120 specification, significantly reducing the potential criminal liability of the Accused in the present case.

What sets this case apart from other cases with generic witness availability concerns, and what Defense wholly fails to address, is the gravity and importance of the unavailable witness and his testimony in the previous court-martial. Contrary to the first assigned military judge's ruling, the impact of the loss of the unavailable witness' testimony was not limited to a single specification of the Article 120 charge. Instead, the loss of the witness' testimony impacted the entirety of the charged allegations. As a result, the Government was unable to proceed fully with the remaining specifications unaffected.

Notably, the unavailable witness and the evidence denied underlying his testimony directly impacted the entire sequence of events reported by the named victim and the symptoms she suffered, denying the Government the ability to present the facts and circumstances of the conduct charged in this case. [REDACTED] reported feeling physical effects of intoxication consistent with etizolam, which were well beyond the level of alcohol intoxication expected from the relatively minimal amount of alcohol she consumed. After being assaulted, [REDACTED] reported passing

out fully for approximately 6-8 hours, passing in and out of sleep or consciousness thereafter, and once she became cognoscente, having lingering fatigue, nausea, and vomiting for over 12 hours after the assault. [REDACTED]'s testimony was the only available evidence to provide a rational explanation and context for the extreme effects [REDACTED] reported. Without this evidence and [REDACTED] testimony, members would be left wondering, with no reasonable explanation, as to why [REDACTED] passed out for such a lengthy period and suffered from severe, long-term physical effects following the conduct charged in this case after drinking only a little over one glass of whiskey.

The military judge's ruling denied the Government the opportunity to effectively present its case and obtain a critical witness who was identified and determined unavailable before the deadline for final witnesses set in the military judge's scheduling order in the first court-martial. The Government's actions were taken for a permissible purpose, without prejudice, and as such, Defense's motion should be denied.

FACTS

1. The Government agrees with paragraphs 1-13, 16-19, 21-23, 26-29, 30, and 34 of the Defense Motion. As it relates to paragraph 34, while Defense was first notified of certain witnesses to be called by the Government in the publishing of its Final Witness List on 29 September 2025, periodic discovery disclosures and notices throughout the summer of 2025 and into the fall provided Defense fair notice of the Government's likely intended witnesses, and the evidence related to those witnesses, including [REDACTED] from the SARC facility, [REDACTED] Attachment 13.
2. The Government disputes paragraphs 14, 15, and 24-25, 31-33 because those paragraphs, contrary to their location in Defense's motion, do not present facts for the Court, but rather represent arguments of counsel.
3. The Government has no knowledge of, but also no basis to dispute, paragraph 20 of the Defense motion.

RCM 707 Speedy Trial and Calculations

4. In accordance with The Uniform Rules of Practice Before Air Force Courts-Martial, Rule 3.7, the Government is providing a written case chronology tracking RCM 707 triggering events in this case through this motion.
5. This Accused was not subject to pretrial confinement or any other restrictions on his liberty throughout the pendency of this case or the prior case. Charge sheet. Moreover, no days have been excluded from the speedy trial clock in this case.
6. Charges in this case were preferred on 3 October 2025. Charge sheet. An Article 32 preliminary hearing was held on 6 November 2025, and a report was issued by [REDACTED] on 10 November 2025. Attachment 1. Charges were referred to trial on 19 November 2025 by Lt Col Lisa Wotkowicz, Office of Special Trial Counsel, District 5. A docketing

request in this case was submitted by the [REDACTED] legal office on 8 December 2025, Attachment 2, and the case was docketed for trial by the CDO on 9 December 2025. Attachment 3. The Accused was arraigned on 5 January 2026.

Event	Calendar Date	RCM 707 Day
Preferral	3 October 2025	0
Art 32 Hearing	6 November 2025	34
Art 32 Report Published	10 November 2025	38
Referral of Charges	19 November 2025	47
Docketing Request	8 December 2025	66
CDO Docketed Case	9 December 2025	67
Arraignment	5 January 2025	94

7. In total, from 3 October 2025 until the Accused was arraigned on 5 January 2026, a total of 94 days passed. The Accused's RCM 707 speedy trial date was 31 January 2026. *See id.*

The Charged Conduct at Issue in this Case

8. In late September 2023, [REDACTED] a British national living in [REDACTED] and the named victim in this case, met on Tinder. Attachment 1, pg 18. [REDACTED]
[REDACTED]

[REDACTED] On 1 December 2023, the Accused and [REDACTED] agreed to meet in person at the Accused's apartment in [REDACTED]. Understanding that the meeting could turn sexual, [REDACTED] laid out clear boundaries on what she would agree and not agree to as part of having sex. Specifically, she said:

"So, few ground rules. No means no when said. No hands on my throat. Ever. Condoms please. And if you know you have hsv2 please god tell me, I have an immune condition. A cold sore from someone put me in hospital and I've had chickenpox now 9 time. It's not a joke. Unlike most people I ask as I do need to avoid it like a literal plague...

Blunt. I know. But I need to be..."

The Accused responded, saying "Yes that's fair", and when asked his ground rules, responded "Ah well I don't have any rules tonight". *Id.* at pg. 43.

9. CCTV footage shows [REDACTED] arriving at the apartment while driving in her vehicle at the at 2336 hours on 1 December 2023, and the Accused greeted her outside and escorted her to his apartment. Attachment 4, pg. 18.

10. Prior to arriving at the Accused's hotel, [REDACTED] participated in an exercise class at [REDACTED]. After the class, she socialized at the Gym with her gym instructor, [REDACTED], before returning to her house to shower off prior to driving to the Accused's apartment. *Id.*

11. Once inside his apartment, [REDACTED] and the Accused socialized and the Accused poured [REDACTED] a glass of whiskey containing approximately 3-4 British units of alcohol. *Id.* [REDACTED] drank the whiskey and recalled it tasted strongly of strong liquor. Attachment 5. [REDACTED] drank this drink completely, and the Accused poured her another glass of whiskey, of which she only took a few sips. *Id.*

12. In the Accused's bedroom, [REDACTED] and the Accused engaged in consensual kissing and touching, which progressed to them both taking off their clothes. Things progressed quickly, and when [REDACTED] was on the Accused bed, the Accused began to penetrate [REDACTED]'s vagina with his penis without a condom. Attachment 5. Quickly recalling that she was not on birth control, [REDACTED] attempted to confront the Accused about this. Before she could do so, the Accused placed his hand around her throat and applied pressure to the point she could not speak. *Id.* [REDACTED] recalled the Accused smiling while she felt darkness enclose around her eyes as if she was going to faint until the Accused's actions caused her to passed out.

13. [REDACTED]'s next memory was waking up in the Accused's shower in the fetal position. *Id.* She awoke to the Accused telling her "you've got to get out, you're getting cold." She recalled feeling lukewarm water from the shower hitting her body, and described feeling nauseous, tasting vomit, and feeling a sharp pain in her foot. She also noticed that her hair was matted as if it had been washed repeatedly without follow-on conditioner. *Id.* While in the shower, [REDACTED] heard shouting and what sounded like noise from a crowd, which at some point she associated with the [REDACTED] not far from the Accused's apartment, Attachment 6, Attachment 7, indicating to her that she had been passed out throughout the entirety of the night and into the morning hours of 2 December 2023.

14. The Accused assisted [REDACTED] out of the bathtub and onto the Accused's bed. She described feeling "really unwell," including continued nausea, to the point that she threw up in a towel. Attachment 5, 16:00 – 17:00. Throughout the day, while in the Accused's bed, [REDACTED] lacked access to her phone and repeatedly passed into and out of sleep, but recalled waking to the Accused cleaning his apartment and washing his bedding. She also needed assistance from the Accused to move out of the bed to access his bathroom and toilet. *Id.*

15. After hours of sickness, the Accused eventually told [REDACTED] that he needed to go meet a friend, and he asked her if she wanted him to drive her home. [REDACTED] agreed, but threw up in the Accused's bathroom again before leaving his apartment. The Accused repeatedly apologized, and attempted to provide liquids to [REDACTED] to help her feel better. Attachment 5, 17:00 – 18:00. CCTV footage shows the Accused escorting [REDACTED] with a visible limp and gait, out of the apartment at 1605 on 2 Dec 2023 and to her car, and the Accused driving away from the parking lot. Attachment 4, pg. 18, Attachment 8.

16. Once at her home, [REDACTED] continued to experience nausea, pain, and sickness, and so after speaking to friends, elected to go [REDACTED] hospital for treatment. Attachment 5, 18:00 – 20:00. At [REDACTED] hospital emergency room, [REDACTED] was documented as having petechiae around her eyes from a hemorrhaging of her capillaries, likely from being strangled, as well as other significant injuries from the incident, and was given an IV to restore hydration from her nausea. *See Attachment 9.*

filed its response on Wednesday, 1 October 2025, highlighting not that witness testimony or evidence access could be affected, but that prejudice to the accused would stem from factors outside the court martial, including the fact that his Defense Counsel “could cost the Accused a significant sum of money to travel civilian defense counsel back to [REDACTED] for a second attempt at court martial” and that the Accused was at risk of continued suicide because of the elevated risk associated with being under investigation or under court-martial charges. Defense Motion to Dismiss, Attachment G, pgs. 5-6.

25. In subsequent communications, both before and after the first military judge’s denial of the Government’s motion to continue, AFMES communicated that no member of their staff was available to support the *U.S. v. Wulfson* court-martial, and that the Government shutdown’s impact on civilian staff was complicating AFMES ability to obtain and process short notice expert requests. After numerous written communications/calls, on 3 October 2025, [REDACTED] at AFMES indicated there were no means by which his organization could support the Government’s request for AFMES expert witness assistance during the *US v. Wulfson* court-martial proceeding. Attachment 17.

26. On 2 October 2025, the sitting military judge denied the Government’s motion for a continuance, concluding that the denial of the witness was limited to a single of the three then charged specifications of sexual assault. She noted “the single sexual act in this case has been charged under three separate theories, and denial of the continuance would still leave the Government with two of those theories.” Defense Motion to Dismiss, Attachment H, pg. 6. The Court also noted that the Government was making the request in good faith, that there was “no adequate substitute” for [REDACTED] testimony, and that “the Government inadvertently failed to secure his availability.” *Id.* The Court also found prejudice because the Accused was assigned to an overseas location, and because his “civilian Defense Counsel have already traveled to the [REDACTED] to prepare for trial. Granting the continuance would require him to incur additional expense through no fault of his own if he intends to retain the counsel of his choosing.” *Id.* at pg. 5.

27. Following the military judge’s ruling, Trial Counsel, at the direction of OSTC leadership, withdrew and dismissed the charges and specifications forming the first court-martial because, “The detection of the date rape drug is crucial to the theory of [REDACTED] being incapable of consenting due to the impairment by the date rape drug” and is relevant “all of the charges and specifications, as it highlights why the victim experienced significant memory loss and other physical symptoms following the sexual act.” Defense Motion to Dismiss, Attachment J. “The decision to withdraw and dismiss the charges and specifications [by OSTC] was based solely on the fact that the Government would be unable to effectively present its entire case relevant to the most serious allegation on the charge sheet, that is, the sexual assault. The unavailability of a witness from AFMES who could lay foundation to establish the discovery of Etizolam in [REDACTED]’s system and explain some of the characteristics of that drug during the current trial date would deprive the finder of fact of key evidence relevant to consideration of the charged sexual assault.” *Id.* OSTC concluded, “The reason that the Government is choosing to withdraw and dismiss the charges is our inability to proceed to trial at a time when key and otherwise admissible evidence that is expected to become available in short order is not currently available.” *Id.*

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28. As noted in paragraphs 4-7 above, the Government then expeditiously proceeded to prefer and, after an Article 32 proceeding, to refer and docket new charges to trial. Of note, the Government revised one specification alleging a violation of a lawful order by contacting [REDACTED] charging it as a violation of Article 90, UCMJ, and electing to not proceed with one of the initial Article 120 sexual assault specifications which had alleged a sexual assault while SS was impaired by a physical disability. In all other respects, the charges and specifications remained the same. Charge sheet.

29. Pursuant to the military judge's scheduling order in this court martial, Defense's motions were due, after a specific extension request to the original motions' deadline was sought, on Tuesday, 20 January 2026. Defense Counsel submitted the motion at issue here, without any attempt to show or establish good cause, on 26 January 2026, nearly a week after the extended deadline had passed.

30. The Government has not noticed any material or attempted to obtain an evidentiary ruling in this court-martial which is contrary to the military judge's prior evidentiary rulings in the first court martial. See Government MRE 412 motion, Government Response to Defense MRE 412 Motion, Government Response to Defense UMC Motion, Attachment 18, Attachment 19, Attachment 20.

BURDEN

31. 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).

32. "Under Article 10, the Government bears the burden to show that the prosecution moved forward with reasonable diligence." *United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005).

33. 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).

LAW

Speedy Trial

34. A military member's speedy trial rights come from five sources: the Speedy Trial Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, Articles 10 and 33 of the UCMJ, R.C.M. 707, and case law. *United States v. Vogan*, 35 M.J. 32, 33 (1992).

35. “Upon accused’s timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.” *See* R.C.M. 707(c)(2).

RCM 707

36. RCM 707(a) states that generally an Accused shall be brought to trial within 120 days after the earlier of preferral of charges or the imposition of pretrial restraint. RCM 707(b)(1) lays out specific instructions regarding the calculation of time, explaining that the date of preferral of charges “shall not count for purpose of computing time” however, “[t]he date on which the Accused is brought to trial shall count.” Additional considerations when computing the time for RCM 707 purposes are laid out in RCM 707(b)-(c), although there were no excludable delays issued in this court martial.

37. In fact, RCM 707(c)(1) states that prior to referral, all pretrial delays approved by a military judge or the convening authority shall be excluded from the RCM 707 120-day clock; and after referral, only the military judge has the authority to approve pretrial days that are excluded from the 120-day clock; the RCM does not preclude after-the-fact approval of a delay by the military judge. *United States v. Guyton*, 82 M.J. 146, 148 (C.A.A.F. 2022). This decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority and should be based on the facts and circumstances then and there existing. RCM 707(c)(1), *Discussion*. *Guyton* also noted that under RCM 707, military judges should be given broad latitude in determining what time should be excluded for speedy trial purposes. 82 M.J. at 153.

38. RCM 707(d) governs the remedy for a violation of RCM 707(a). In *United States v. Nichols*, the court explained that such a violation will result in a dismissal of the affected charges. 42 M.J. 715, 719 (A.F.C.C.A. 1995). Dismissal must be with prejudice only if the Accused has been deprived of his constitutional right to speedy trial. *Id*.

Sixth Amendment & Article 10

39. The Sixth Amendment right to a speedy trial may be waived. *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005). “Article 10[, UCMJ,] imposes a more stringent speedy trial standard than the Sixth Amendment” *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (citing *Mizgala*, 61 M.J. at 129) (additional citation omitted).

40. In the military, Sixth Amendment speedy trial protections are triggered upon preferral of charges or the imposition of pretrial restraint. In determining whether an appellant has been denied his right to a speedy trial under the Sixth Amendment, an appellate court considers the following factors: (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. Unless the delay is facially unreasonable, the full due process Sixth Amendment speedy trial analysis will not be triggered. *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2014).

41. Article 10, UCMJ, provides in pertinent part: “When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken to try the

person or to dismiss the charges and release the person.” 10 U.S.C. §§ 810(b)(1), 810(b)(1)(B). 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) (quoting *Mizgala*, 61 M.J. at 129). “Short periods of inactivity are not fatal to an otherwise active prosecution.” *Mizgala*, 61 M.J. at 127 (citation omitted). We “look[] at the proceeding as a whole and not mere speed.” *Id.* at 129 (citation omitted).

42. For an accused not under pretrial restraint at the time of dismissal or mistrial, a new 120-day period begins on the earliest of: (I) the date on which charges are preferred anew; (II) the date of imposition of restraint under R.C.M. 304(a)(2)-(4); or (III) in the case of a mistrial in which charges are not dismissed or preferred anew, the date of the mistrial. R.C.M. 707(b)(3)(ii).

RCM 604 - Withdrawal of Charges

43. RCM 604 provides, in relevant part:

(a) *Withdrawal.*

- (1) Except as provided in R.C.M. 604(a)(2), the convening authority or a superior competent authority may for any reason cause any charge or specification to be withdrawn from a court-martial at any time before findings are announced.
 - (2) For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may withdraw or cause to be withdrawn any charge or specification from the court-martial at any time before findings are announced.
- (b) *Referral of withdrawn charges.* Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

44. Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused. *Discussion* to R.C.M. 604(a); *see also* R.C.M. 604(b). Except for charges over which a special trial counsel has exercised authority and has not deferred, charges that have been properly referred to a court-martial may be withdrawn only by the direction of the convening authority or a superior competent authority in the exercise of that officer’s independent judgment. *Id.*

45. When charges that have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons

for the withdrawal should be included in or attached to the record of the earlier proceeding. *See Discussion* to R.C.M. 604(b).

46. 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. A withdrawal is improper if it was not directed personally and independently by the convening authority, a special trial counsel, or a superior competent authority. *See Discussion* to R.C.M. 604(b).

47. Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. 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. For example, it is permissible to refer charges that were withdrawn pursuant to a plea agreement if the accused fails to fulfill the terms of the agreement. *See RCM 705. See Discussion* to R.C.M. 604(b) (emphasis added).

48. Withdrawal and re-referral of charges is “proper” if there is a legitimate reason which does not “unfairly” prejudice an accused in light of the particular facts of a case. *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999); *see also United States v. Blaylock*, 15 M.J. 190, 195 (C.M.A. 1983); *United States v. Jackson*, 1 M.J. 242, 244 (C.M.A. 1976); and *United States v. Walsh*, 22 U.S.C.M.A. 509, 512 (C.M.A. 1973).

49. In *Underwood*, CAAF held a convening authority’s decision to withdraw and dismiss, and to later re-refer charges to a different court-martial to accommodate a crucial witness’s availability was a proper exercise of authority, and did not warrant dismissal of the charges, let alone dismissal with prejudice. 50 M.J. at 272. In the case, a named victim stated she was unavailable for trial because she had required job training, and the victim did not want her employer to know anything about the trial. *Id.* Rather than subpoena the victim, the Government requested a continuance one week prior to the scheduled trial. *Id.* The military judge denied the government’s request for a continuance. *Id.* To ensure the victim’s testimony was available for the case, the convening authority withdrew and dismissed the charges and specifications, and later referred them to a new court-martial. *Id.* at 273.

50. CAAF, in reviewing the convening authority’s action in light of RCM 604(b)’s standard, concluded that “the convening authority’s withdrawal was proper and his re-referral action was neither unlawful nor unfairly prejudicial to appellant.” *Id.* at 274. Effectively, the Court concluded that ensuring the presence of a key witness is a legitimate Government objective where the new court-martial was not pursued to “flout” a substantive evidentiary ruling of the military judge, and the accused was not unfairly prejudiced by this action. *Id.* at 275. The Court implicitly emphasized that an accused does not have a constitutional right to trial on a specific day, or the right to a trial without a key prosecution witness. *Id.*

51. CAAF also noted that the military judge's "earlier continuance denials created no legally cognizable right to a trial without the prosecution witness on June 20, 1996; nor can the speculative possibility of such an occurrence in any sense be considered substantial." *Id.* at 276. Moreover, the new trial was before the same military judge and was at the same court-martial level, and the appellant was not in pretrial confinement, thus minimizing any potential prejudice. *Id.*

52. Ultimately, *Underwood* makes clear that securing witness availability is a valid reason for a convening authority to dismiss and re-refer charges, even where a potentially more efficient method of securing the witness availability was available to the Government. *Id.*

ARGUMENT

53. The withdrawal and dismissal of charges was accomplished, in line with the situation in *Underwood*, to ensure the availability of a critical witness with evidence affecting the very heart of both the Sexual Assault and Domestic Violence charges and their specifications, not to subvert an evidentiary ruling by the prior military judge. Importantly, the issue was discovered and acted upon prior to the due date for the final witness list in the military judge's scheduling order. While the Government does not dispute it could, and should, have done more earlier to obtain AFMES forensic toxicologist support, the Government at all times acted in good faith to bring the case to trial.

54. In fact, the evidence presented demonstrates the Government continued to diligently investigate, obtain new evidence, and secure witness availability well prior to the scheduled trial date. The previously military judge erred and abused her discretion when she concluded that the loss of the critical witness and his testimony was limited to a single sexual assault specification. Rather, the loss of the testimony to explain that etizolam was found in [REDACTED]'s body affected every Article 120 and 128b charge and specification because it is, as the prior judge noted, evidence for which there was "no adequate substitute" and provides the only conceivable explanation for her extended loss of consciousness and subsequent physical symptoms.

The Effect of the Unavailable Witness on the Prior RCM 707 Clock and Courts-Martial

55. The RCM 707 clock has been satisfied in this case. The Government acted with reasonable diligence in bringing the Accused to Arraignment, and the case to trial. The Accused was arraigned at day 94, well under the 120-day clock required by RCM 707. Moreover, the Government proceeded to secure a trial date that was only a few weeks after the projected date of availability in its original continuance request, despite needing to secure a new preferral, Article 32 preliminary hearing, referral, and docketing with this Court.

56. Defense counsel, by attempting to piece together a complex string of hypothetical possibilities, attempts to argue that because a single witness was unavailable for a specific week of trial in October 2025, that the Government was unready for trial every single week prior to that week, thereby causing the Government's ready date to shift to a date past the 120 day mark, and necessitating dismissal of the charges.

57. Simple common sense explains why this argument is incorrect and does not hold water. At the time of docketing, the Government operated in good faith and set its ready date as 30 April 2025. As the case progressed towards the scheduled date for trial, which was set based on the Defense Counsel's availability, the Government continued to perfect its case by identifying available evidence and witnesses. The fact that [REDACTED] ended up being unavailable during a single week in October 2025 did not mean that he was unavailable every week previously, and that the Government was unprepared to go to trial every single week prior.

58. The Government complied with all aspects of its speedy trial obligations in the first court martial, including RCM 707, which is underscored by Defense's failure to allege or file any motion for a speedy trial violation in the first court martial.

Dismissal of Charges Was for a Proper Purpose

59. The Government's withdrawal and dismissal of the charges in the first court martial was for a proper purpose. To be clear, the Government does not dispute that it could, and should have, attempted to obtain expert toxicological support from AFMES at an earlier date, which would have improved its chances of securing such support. Nor has the Government avoided admitting as much, while also acknowledging that the situation was compounded by other issues, including the then existing Government shutdown. However, the prior military judge fully misunderstood the importance of [REDACTED] testimony, and the denial of that testimony's impact on the entirety of the Government's case. Deciding to not move forward with only the sexual assault etizolam specification would not have minimized the massive impact of the military judge's ruling.

60. It would have, still, left the members wondering why [REDACTED] had such an unexplainable response to a traumatic physical and sexual assault, particularly her loss of consciousness for 6-8 hours and her nausea, vomiting, and physical exhaustion for over a dozen hours after the assault. The prior military judge erred when she failed to account for, or fully acknowledge, the Government inability to adequately present its case to the members in this case.

61. The denial of [REDACTED] testimony would have left the members with only potential option after assessing [REDACTED]'s testimony and credibility: that she made up the allegation and was an incredible witness.

62. While the Government undoubtedly could have done more, it is important to note that the Government was operating within the time frame set by the military judge in her scheduling order when it added him to its witness list and subsequently contacted [REDACTED] to determine and ensure his availability for trial.

63. The situation presented in this case directly parallels that in *United States v. Underwood*, 50 M.J. 271. OSTC's actions represent a proper purpose for withdrawing and dismissing the charges. In *Underwood*, the court affirmed that securing the availability of a crucial witness is a legitimate Government objective. The core principle from *Underwood* is that the government is entitled to present its full and effective case, even where other more advantageous options are

present, so long as the actions to secure key evidence or witness availability is not an improper interference with the judicial process and provided it does not unduly prejudice the accused.

64. [REDACTED] from AFMES is not merely incidental; his testimony is foundational to the Government's entire theory of the case. He is necessary to introduce evidence of the drug Etizolam and to explain its effects, which directly supports the argument that [REDACTED] was incapable of consenting. Without this testimony, the government would be unable to explain the victim's memory loss and physical symptoms, thereby failing to effectively present its entire case relevant to the most serious allegations in court.

65. Moreover, while the Government could have dismissed only the sexual assault specifications and continued forward with the domestic violence and military protective order violations against the Accused, *Underwood* makes clear that it is not improper to ensure that all related charges and specifications are tried together. See *United States v. Koke*, 34 M.J. 313, 315 (CMA 1992) (withdrawal for purposes of judicial economy by trying all known charges at once was a proper reason). Moreover, that would have left the Accused exactly where he is today: facing a pending court martial, again, for the allegations on 1 December 2023.

66. OSTC's stated rationale in withdrawing and dismissing the charges, an "inability to proceed to trial at a time when key and otherwise admissible evidence. . . is not currently available," is a direct echo of the reasoning upheld in *Underwood*. The decision was not made to gain an unfair tactical advantage or find a more favorable court. Instead, it was based solely on the temporary unavailability of an essential witness whose testimony is critical for the finder of fact to have a complete understanding of the circumstances surrounding the alleged domestic violence and sexual assault. This action ensures the case is decided on its full merits, which is the essence of a proper purpose under the standard in *Underwood*.

67. As such, this Court should conclude that the Government acted with a proper purpose when it withdrew and dismissed without prejudice the prior charges and specifications against Capt Wulfson, and subsequently referred the new specifications against Capt Wulfson to trial in this case.

The Accused has Not Been Prejudiced by the Withdrawal and Dismissal

68. Defense counsel raises a number of items to claim that the Accused has been prejudiced in this case, broadly falling into two categories: collateral impacts to the Accused, which can be rectified at the conclusion of this case if needed, and collateral impacts outside the control of the Government. Notably, what the Defense Counsel does not allege, rightly so, is that the delay to this hearing has negatively impacted the Accused's ability to effectively present a defense vis a vis the expected evidence and witness testimony in this case.

69. Defense first highlights that the Accused has been on administrative hold for two years, causing him to not be able to promote, PCS away from the [REDACTED] or to resign. While the Government does not downplay these effects, they are not done with an intent to punish the Accused, nor do they impact his rights at trial in this case. They are merely necessary to ensure he remains within his command until the allegations against him are resolved. While the

Accused's collateral consequences are significant, he continues to receive a paycheck, while remaining a free member of [REDACTED] able to travel, take leave, and be a functional member of the community. He has suffered no restrictions on his liberty or pretrial confinement.

70. Defense also claims that the financial cost of civilian counsel amounts to prejudice. Under the framework in *Underwood*, the additional financial burden of retaining civilian counsel due to a delay from the withdrawal and dismissal and later re-referral of charges does not constitute cognizable legal prejudice. Rather, prejudice exists where the action affects the fairness of the proceedings and the accused's ability to mount an effective defense, not merely the financial consequences of litigation.

71. For prejudice to be legally relevant and cognizable, it must typically involve factors such as the government engaging in impermissible "forum shopping" for a more favorable judge or ruling, the accused suffering extended pretrial confinement, the loss of key defensive evidence or witness availability, or a violation of procedural rules that unfairly disadvantages the accused. While the accrual of additional legal fees is an unfortunate reality for the Accused here it is an ancillary cost of the legal process itself and does not impinge upon the fundamental fairness of the trial. It is similar to those cases where additional litigation or unexpected circumstances require additional court hearings which increase the cost of having a civilian counsel. It is not a prejudicial burden attributable to the Government every time an additional hearing is needed in a court case, nor is it prejudicial here. Accordingly, the action taken here for the proper purpose of securing crucial evidence for the Government's case is not rendered improper simply because it results in increased expenses for the Accused.

72. Additionally, the Government did not at any point in time act in a manner to intentionally increase the costs or burden of this process for the Accused. While the Government does not discount or flaunt the likely additional expense, it does not amount to prejudice in this case.

73. Most notable is what Defense does not raise: that there is any prejudice to the Accused in the form of impact to witness testimony, the critical items courts use to assess whether a delay rises to the level of material harm to the Accused's right to a fair and speedy trial.

74. The fact that Defense is not calling any of its own fact witnesses significantly mitigates the risk of prejudice from the delayed trial date. The core concern with continuances is that the passage of time will erode the memory of defense witnesses or cause them to become unavailable, thereby impairing the Accused's ability to present a defense. Here, since the Defense case did not, and still does not, rely on the recollection of witnesses with actual or collateral knowledge of the charged conduct, this primary source of potential prejudice is non-existent. The defense's ability to challenge the government's case remains intact, and any loss of memory to the Government's witnesses serves only to improve the Accused's chances of a favorable outcome in the case.

75. Additionally, a significant number of the Government's anticipated witnesses, such as [REDACTED] and [REDACTED] will testify through reliance on contemporaneously created medical notes; as their relationship to [REDACTED] was strictly through a professional medical relationship. This reliance on documented records, rather than unaided memory, ensures their testimony remains

grounded in objective evidence recorded at the time of the events, minimizing the risk that the delay will alter the substance of their testimony to the detriment of the Accused.

76. Finally, any argument that [REDACTED]'s potential memory loss is prejudicial to the Accused is unconvincing. In fact, it is more likely to be favorable to the Accused. Any erosion in the [REDACTED]'s memory is a powerful tool for the Defense during cross-examination, as it can be used to question the reliability and accuracy of her testimony. Moreover, [REDACTED]'s account has been captured in numerous recordings and records, which provides a stable baseline for the Defense to exploit any inconsistencies or new uncertainties that arise from memory loss. Therefore, rather than being prejudiced, the Accused may actually be in a better position than it would have otherwise been without a delay.

The Government has complied with Article 10 and the Fifth and Sixth Amendment

77. To be clear, the Government does not discount or downplay the Accused significant right to a speedy trial in both the UCMJ and U.S. Constitution. As demonstrated throughout this motion, the Government has at all times acted with a proper purpose in working to ensure the critical witnesses are available for the case. While the Government does not discount the collateral effect and expense from the employment of civilian counsel, the Government **never** acted to intentionally increase the cost associated with the Accused's right to employ his own experts, or to otherwise intentionally delay this trial. Trial Counsel, like the Accused, and named victim, is working to ensure this case is expeditiously and fairly tried before a panel of members, as is the Accused's right. It is not a speedy trial violation for a single delay to a trial to be accomplished to ensure critical witness availability, as is done regularly in courtrooms across the United States. Nor is the Accused entitled to a trial proceeding on a specific date, despite the hope it might lead to a specific set of more favorable evidentiary circumstances.

78. Nor, as discussed above, has there been any prejudice to the Accused. Defense Counsel did not in the first trial, or this court-martial, identify any fact witness whose memory could be affected by the delay. Nor has there been any indication that any incidental loss of memory by the victim, or other collateral witnesses, will have an impact on the Accused's ability to present an effective defense. In fact, there are a minimal number of witnesses who are anticipated to rely on direct testimony, and for those that are, they are not expected to present evidence favorable to the Accused. Rather, besides the Victim, the bulk of the witnesses, including [REDACTED] and [REDACTED], will rely on contemporaneous medical records to form the foundation for their admissible testimony. If anything, the delay has likely been evidentially favorable to the Accused. Because the Government's actions were done with a proper purpose and did not prejudice the Accused, the Government did not violate the Accused's important protections.

CONCLUSION

79. The Government has complied with RCM 707 and all other applicable statutory and constitutional provisions in this case, has at all times acted with a proper purpose under RCM 604(b), did not prejudice the Accused, and the decision to withdraw and dismiss the charges to secure a critical witness going to the very heart of the facts at issue in this case should not result in the withdrawal and dismissal of the charges in this case, whether with or without prejudice.

REQUESTED RELIEF

80. THEREFORE, the Government respectfully requests that this Court deny the Defense Motion to Dismiss.

81. The Government requests to give additional argument and evidence at the scheduled Article 39(a).

Respectfully submitted on this 6 February 2026.



CHRISTOPHER D. MITCHELL, Maj, USAF
Special Trial Counsel

20 Attachments:

1. US v. Wulfson – PHO Report, dated 10 November 2025, 45 pages
2. US v. Wulfson – Docketing Request, dated 8 December 2025, 1 page
3. US v. Wulfson – Confirmation Memo, dated 9 December 2025, 1 page
4. US v. Wulfson – AFOSI ROI, dated 8 March 2024, 22 pages
5. [REDACTED] Interview Excerpt, undated, 19 minutes and 48 seconds in length
6. “In Pictures: 2023 Christmas Head Boat Race in [REDACTED] is a Festive Delight”,
[REDACTED] dated 8 December 2023, 5 pages
7. 39 Auckland Road – Google Earth, undated, 2 pages
8. CCTV Footage – [REDACTED], 2 December 2023, 1 minute and 53 seconds in length
9. A [REDACTED] Medical Records Excerpt, 2 December 2023, 3 pages
10. [REDACTED] Body Maps – SARC, dated 3 December 2023, 7 pages
11. Etizolam Fact sheet, undated, 1 page
12. [REDACTED] Injury Photos, undated, 5 pages
13. Discovery Teams Page Time Stamp, undated, 1 page
14. Scheduling Order, First Court Martial, dated 28 March 25, 9 pages
15. TC Emails, various dates, 12 pages
16. Defense Final Witness list, First Court Martial, dated 29 September 2025, 2 pages
17. Affidavit – [REDACTED] dated 6 February 2026, 1 page
18. Government Notices, US v. Wulfson, dated 22 December 2025, 4 pages
19. Court Rulings – First Court Martial, US v. Wulfson, various dates, 22 pages
20. Government Notices – First Court Martial, US v. Wulfson, 2 May 2025, 4 pages

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Government's Response to the Defense Motion to Dismiss was served on Defense Counsel and Military Judge on 6 February 2026.



CHRISTOPHER D. MITCHELL, Maj, USAF
Special Trial Counsel