DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA	§	**RULING: R.C.M 604 & SPEEDY TRIAL**
v.	§	
CAPTAIN JACOB R. WULFSON	§	
[redacted]	§	3 March 2026

RELIEF SOUGHT

On 26 January 2026, the Defense filed a Motion to Dismiss: Speedy Trial.[1] On 6 February 2026, the Government responded in writing, opposing the motion.[2] The Court held an Article 39(a) hearing on 27 February 2026.

Having reviewed the documentary evidence submitted by the parties, the appellate exhibits submitted by counsel, the testimony of a witness, and the arguments of counsel, this Court finds and concludes as follows:

FINDINGS OF FACT

1. This is the second court-martial convened to address the current charges against Accused. As for the first iteration of this court-martial, on 5 March 2025, the Government referred the following charges and specifications:

a. Charge I included one specification of violating a lawful order for contacting the alleged victim, [redacted] in violation of Article 92, Uniform Code of Military Justice (UCMJ).

b. A Charge and an Additional Charge with three total specifications for sexual assault in violation of Article 120, UCMJ:

Charge II, Spec: A sexual act against [redacted] charged as "without consent"

Additional Charge, Spec 1: A sexual act against [redacted] charged as while [redacted] was incapable of consenting because she was impaired by a drug (Etizolam)

[1] Appellate Exhibit (AE) XI.
[2] AE XII, XIII, XV, XVII.

Additional Charge, Spec 2: A sexual act against [redacted] charged as while [redacted] was incapable of consenting because she was impaired by physical disability (inability to speak).[3]

c. Charge III included one specification of domestic violence in violation of Article 128b, UCMJ, for strangling [redacted] during the same charged sexual assault of Charge II.

2. As will be discussed at length below, on 3 October 2025, the Government withdrew and dismissed these charges and specifications.

3. On 19 November 2025, the Government referred essentially the same charges and specifications against Accused:

a. Charge I includes one specification of violating a lawful order for contacting the alleged victim, [redacted] in violation of Article 92, Uniform Code of Military Justice (UCMJ).

b. A Charge (II) with two specifications for sexual assault in violation of Article 120, UCMJ:

Charge II, Spec 1: A sexual act against [redacted] charged as "without consent"

Charge II, Spec 2: A sexual act against [redacted] charged as while [redacted] was incapable of consenting because she was impaired by a drug (Etizolam)[4]

c. Charge III includes one specification of domestic violence in violation of Article 128b, UCMJ, for strangling [redacted] during the same charged sexual assault of Charge II and the Additional Charge.

4. The difference between the first set of Charges and the current one is that the Government has not charged a sexual act while the victim was "was incapable of consenting because she was impaired by physical disability (inability to speak)."

5. During the Fall of 2023, Accused and [redacted] a [redacted], connected on Tinder, communicated on that platform, and then moved their conversations to WhatsApp. That conversation became sexual in nature and the two essentially planned to get together and have sex. Immediately before that get together, however, [redacted] advised Accused of certain "ground rules" she had: "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. ..."

6. On 1 December 2023, [redacted] drove to Accused's home, arriving at 2336 hours. During an interview with agents from the local Office of Special Investigations (OSI), [redacted] reported that in Accused's home the two drank some alcohol (with Accused having already started drinking before she arrived) and headed into Accused's bedroom. There they engaged in consensual

[3] Each of these specifications relate to the same incident and the Government brought those Specifications "in the alternative" for exigencies of proof.

[4] Again these two specifications relate to the same incident and the Government brought those Specifications "in the alternative" for exigencies of proof.

intimacy (*i.e.*, kissing and fondling), and began to have sex with Accused on top of [redacted] At some point [redacted] realized Accused was not wearing a condom and she attempted to confront him. As she did, Accused place a hand around her throat and squeezed, rendering her unable to speak or breath. Though she attempted to fight Accused off, he had pinned her arm down on the bed. [redacted] lost consciousness.

7. According to her report to OSI, [redacted] first memory after regaining consciousness was of laying in a fetal position in Accused's shower/bathtub and feeling pain in her foot and later discovering she had suffered substantial bruising.[5] At 1605 hours on 2 December 2023, Accused drove [redacted] back to her home. CCTV video of [redacted] and Accused leaving Accused's residence showed [redacted] walking with a noticeable limp. When home, [redacted] spoke with friends and her ex-partner (a retired Royal Air Force doctor) and told them that Accused sexually assault her (*e.g.,* he had non-consensually choked her during sex, strangled her to unconsciousness).

8. Shortly after Accused had dropped [redacted] at her home, he texted her: "Again I am so sorry. I'm horrified with myself. I need to spend some time thinking about who I am and if I should be drinking at all I think" and "I'm so anxious." When it appeared that [redacted] did not intend to report him for an alleged sexual assault, Accused texted her: "Thank you for keeping me safe and not ruining my life. I will never make a mistake like that again. I have been in my house shaking I feel so badly about what has happened. I will need to reconsider a lot of who I am now and what I want and need as well." During that text conversation, Accused claimed lack of memory of details of the previous night due to his level of intoxication.

9. [redacted] sought medical treatment later on 2 December, after the text conversation with Accused as well as conversations with her friends. She underwent a sexual assault forensic examination (SAFE) during which she reported the lack of condom use and strangulation to unconsciousness.

10. As part of those examinations, [redacted] provided a sample, which later testing in the Armed Forces Medical Examiner System (AFMES) disclosed the presence of Acetone, Etizolam, Codeine and Dihydrocodeine, Norcodeine, Hydrocodone, Norhydrocodone, and Morphine. [redacted]s medical history accounted for the presence of all these substances, except Etizolam. An OSI search of Accused's home on 4 December 2023 did not uncover any Etizolam and a review of Accused's medical records did not disclose a prescription for that medication, which is generally used to treat insomnia and anxiety.

11. Accused was brought into OSI for an interview at some time on 4 December and invoked his Article 31 rights.

12. Some time on 4 December, [redacted] met Accused at his request in a public place. He continued to plead for [redacted] not to report him for his actions and disclaimed memory of events due to his level of intoxication. [redacted] met Accused again on 5 December, again in a public place, during which he

[5] Medical examination on 2 December 2023 revealed left eye lid bruising, left eyebrow hematoma, three linear abrasions towards hairline, right forearm 8mm bruises, anterior chest bruises, 5-10mm bruises above left breast, bilateral knee bruises, normal knee range of motion, bruised left third toe with tenderness on palpation, as well as findings consistent with strangulation.

told her that he had been out drinking with friends before she came to his house on 1 December and again that he did not remember what had happened. He also implored her to drop her allegations and not participate in any case, to include not allowing her SAFE kit to be provided to OSI as he told her the case could not go forward without it. Accused also promised to go to alcohol classes (ADAPT) and asked her to speak to his lawyer. When [redacted] agreed to speak to his lawyer, Accused handed her his phone and she spoke to Accused's area defense counsel, who provided her the contact information for Victims Counsel services.

13. Accused also contacted [redacted] on 3 January 2024, told her he was going to ADAPT and continued to ask her to drop her allegations or not participate in any case. Accused continued to contact her in January and February, apparently only stopping when [redacted] confronted him with the fact his commander had issued him a military protective order on 6 December 2023 prohibiting Accused from contacting or meeting with her.

14. Etizolam is an illicit drug not available by prescription in the [redacted], but available by prescription in Italy, and it is commonly found on the illicit drug market in Europe and the United States and sold on the internet as a power or tablet. Etizolam as a powerful depressant that causes rapid onset of "drowsiness and muscle weakness with motor incoordination, slurred speech, confusion, disorientation, sedation, anterograde amnesia (blackout) and loss of consciousness with death at higher dose."

15. The Government preferred Charge I- III in the first iteration of this court-martial on 31 July 2024 (but which only charged sexual assault by the mechanism of "without consent"). The Special Court-Martial Convening Authority (SPCMCA) excluded time prior to the Article 32 preliminary hearing (8-15 August 2024 and 9 September – 12 November 2024). The preliminary hearing took place on 12 November 2024.

16. On 7 October 2024, the Court of Appeals for the Armed Forces (CAAF) had issued its decision in *United States v. Mendoza*,[6] which appeared to substantially change the legal landscape for how the Government could or could not prove sexual assault under Article 120, UCMJ. The Office of Special Trial (OSTC) thus requested to re-open the Article 32 hearing for consideration of charges in the alternative as to the charged sexual offense.

17. The SPCMCA excluded time prior to the re-opened Article 32 preliminary hearing (6-30 December 2024), and the re-opened preliminary hearing took place on 21 January 2025.

18. On 28 February 2025, the Government preferred the Additional Charge with its two specifications of Article 120 adding the mechanisms of impairment by a drug and by physical disability. On 5 March 2025, the Convening Authority referred all charges to general court-martial.

19. On 24 March 2025, the Chief District Military Judge for Europe set arraignment for 2 July 2025, set trial for 6 October 2025, and excluded 6 – 14 March 2025 and 24 March – 1 July 2025 from speedy-trial calculations under R.C.M. 707. Arraignment occurred on 2 July 2025.

[6] 85 M.J. 213 (C.A.A.F. 2024).

20. [redacted]

21. Also during that pretrial motions practice the Defense raised a motion related to unreasonable multiplication of charges as to the various sexual-assault charges. The Court deferred ruling and did not rule on that motion prior to the end of the first iteration of this court-martial (and has done the same in this iteration of the court-martial).

22. [redacted]

23. Consistent with the Scheduling Order the first iteration of this court-martial, on 22 May 2025 the Government filed its preliminary witness list, which did not include any expert witnesses. Nevertheless, it was clear from the nature of the case that there was a potential need for expert assistance for both parties in a number of fields. Basic Confrontation Clause law[7] also required the Government to offer as an expert witness the forensic analyst who actually conducted the (or an) examination of [redacted]'s blood sample that disclosed the presence of Etizolam (here, John Kristofiv from AFMES).

24. Final witness lists were due 29 September 2025. Government's list included an expert toxicologist, a medical provider, and experts from the United States Army Criminal Investigations Laboratory (USACIL), and John Kristofic from AFMES.

25. However, on 25 September 2025, apparently having negligently failed previously to secure the attendance of the expert from the AFMES who performed and certified the tests that uncovered the presence of Etizolam in [redacted]'s sample, the Government submitted such a request to AFMES. AFMES advised that that expert (John Kristofic) was not available to travel to support trial the week of 6 October 2025. Though the Government continued to search for alternatives, it quickly realized there were none.

[7] *Smith v. Arizona*, 602 U.S. 779 (2024)(holding that testimonial out-of-court statements of forensic analysts cannot be introduced through surrogate analysts who did not participate in their creation).

26. Thus, on 29 September 2025, the Government moved to continue the first iteration of this court-martial. On 1 October 2025, the Defense opposed Government's motion. On 2 October 2025, the Court denied Government's request for a continuance after considering R.C.M. 906(b)(1) and weighing the *Miller* factors.[8]

27. On 3 October 2025, the Convening Authority (OSTC) withdrew and dismissed without prejudice all the Charges.

28. On 3 October 2025, OSTC preferred the instant Charges (*i.e.*, the same Charges and Specification as in the first iteration of this court-martial minus the sexual-assault by incapacitation by physical disability specification). On that day, the Government documented the reasons for withdrawal and referral to another court-martial:

> The decision to withdraw and dismiss the charges and specifications 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 key characteristics of the drug during the current trial date would deprive the finder of fact of key evidence relevant to consideration of the charged sexual assault.

29. The revived Charges were investigated by an Article 32 preliminary hearing officer and then referred to general court-martial on 19 November 2025. The undersigned as Chief District Military Judge for Europe docketed trial for 13 April 2026, with arraignment to occur on 5 January 2026. Arraignment occurred on 5 January 2026.

30. Thus in this iteration of the court-martial, 94 days passed from preferral to arraignment.

31. Accused has suffered career impacts, financial loss, and emotional turmoil related directly to facing the Charges, to the process of withdrawal and referral to a new court-martial, and the additional six-month delay in bringing this matter to resolution. More specifically, as a pilot, he has been unable to fly and thus accrue flight hours or receive $700 a month in flight-incentive pay. The inability to fly has results in him being unable to apply for advanced-training (Weapons Course) opportunities (selection of which is not guaranteed) or secure highly sought after assignments after receiving such advanced training (which are not guaranteed). His security-clearance is temporarily suspended. He has been selected for promotion to the rank of major but has been unable to promote. He has also incurred the expenses of civilian defense counsel to represent him in this matter and those counsel had borne the cost of travelling to [redacted] in preparation for the original trial. Accused has also born the anxiety of the pendency of this court-martial.

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[8] *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). The Court relied on lack of surprise (lack of diligence, but not the absence of good faith), that the unavailable expert was only important to one specification and not dispositive as to that specification, the likely lengthy delay, and prejudice in the form of that delay in the form of additional expense for civilian defense counsel's travel and time.

32. Nevertheless, during the pendency of charges in this matter, Accused has performed useful service to the Air Force as a Wing Safety Officer and Assistant Director of Operations. He has not lost any basic pay or allowances, or been placed in pretrial confinement, or had his movements otherwise restricted (save for no-contact order). He is free to go on leave and has done do during the pendency of this court-martial.

CONCLUSIONS OF LAW

33. Burden: As to issues raised under R.C.M. 604(b), improper referral, the Defense as the moving party bears both the burden of proof for any factual issue whose resolution is necessary to decide this motion, and the burden of persuasion, by a preponderance of the evidence.[9] R.C.M. 905(c)(1) establishes that the burden of proof as to any factual issue necessary to resolve this motion is a preponderance of the evidence.

34. Pursuant to R.C.M. 905(c)(1) and (c)(2)(b), the Government generally bears both the burden of proof for any factual issue whose resolution is necessary to decide the speedy-trial aspects of this motion, if any, and the burden of persuasion, by a preponderance of the evidence.

35. The Court has reviewed the legal authorities cited by the parties in their arguments on the motion.

36. **R.C.M. 604(b)**: Limitations on a convening authorities' ability to refer to a new court-martial charges that were withdrawn and dismissed without prejudice reside in R.C.M. 604. R.C.M. 604(b) provides: "Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." (emphasis added). As to improper reasons, the *Discussion* to the Rule notes: "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 the court-martial."

37. Recently, in *United States v. Gale*,[10] the Air Force Court of Criminal Appeals (AFCCA) provided a lengthy explanation of the legal standards relevant to "improper reasons."

> Our superior court has interpreted this "improper reason" limitation as imposing a two-prong standard for re-referral, opining: "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." *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999) (citations omitted).
>
> *b. "Improper Reason" Test*
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> Prong 1 of the "improper reason" analysis essentially boils down to whether the convening authority's specified intent is in fact a subterfuge or an ulterior motive. *See Leahr*, 73 M.J. at 369 (citations omitted)(affirming the propriety of dismissal

[9] R.C.M. 905(c)(1), (c)(2)(A); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).
[10] *United States v. Gale*, 2025 CCA LEXIS 265 (A.F.C.C.A. June 12, 2025).

of charges "[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"). Our superior court has recognized that judicial economy can constitute a proper purpose for re-referral of withdrawn and dismissed charges. *Id.* (citing *United States v. Koke*, 34 M.J. 313, 315 (C.M.A. 1992)). Moreover, absent bad faith, withdrawal and dismissal with an eye towards eventual re-preferral and re-referral of the same charges is not per se improper. *See United States v. Hendrix*, 77 M.J 454, 457 (C.A.A.F. 2018) (holding, in the R.C.M. 707 context, "[w]e disagree with the military judge's conclusion that the convening authority's dismissal of charges with the intent to re[-]prefer implies subterfuge or an improper reason").

Prong 2 of the analysis evaluates whether the effect of the withdrawal and dismissal resulted in material, detrimental impact upon a "legally cognizable right." *See Underwood*, 50 M.J. at 276 (citations omitted). In applying this "unfair prejudice" prong of the *Underwood* test, our superior court has observed that various circumstances could create unfair prejudice including: (1) the second court-martial was not the same type as the first; (2) Appellee lost the benefit of a favorable trial ruling; (3) Appellee was in pretrial confinement during the withdrawal and re-referral process; and (4) Appellee moved for relief based upon prejudicial delay. *Id.* (citations omitted). We view these circumstances as descriptive rather than prescriptive of the prejudice analysis. That is to say, there are circumstances in which prejudice might arise outside of the four "for instances" listed by the CAAF in *Underwood*. Indeed, in applying *Underwood* in *Leahr*, our superior court observed another circumstance that could create prejudice, to wit: "did [it] harm [the a]ppellant's ability to present his defense at the second court-martial." *Leahr*, 73 M.J. at 369.[11]

38. In *Underwood*, the Accused faced charges of rape, forcible sodomy, indecent assault, and providing alcohol to a minor. Shortly before the re-scheduled trial date (a date that the Government had agreed to), one of the victims advised the Government that she was unavailable for the trial date due to having secured a new job, and being trained for that job, and she did not want her new employer to be aware of the court-martial proceeding which they would if the Government issued her a subpoena; thus, she asked the Government to seek delay, which it did (rather than subpoena her).

39. The Government requested a delay which the trial court denied (strangely doing so in an R.C.M. 802 session), and the trial court affirmed that denial on Government's request for reconsideration. Two days later, three days before the new trial date, the convening authority withdrew the charges (and effectively dismissed them) and the accused's commander immediately re-preferred them. The "new" charges proceeded to an Article 32 preliminary hearing, re-referral, and eventually were docketed for trial some five months after the original (and re-scheduled) trial date.

40. In this new iteration of the court-martial, the trial judge (the same that had been detailed to the original trial and who denied the continuance requested), explained his reasoning:

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[11] *Gale*, 2025 CCA LEXIS 265, *15-18.

So, the reason for the delay wasn't happening and then the agreed upon date was no longer a good date and it was somewhat irritating. So, therefore, part of my process of holding the Government's feet to the fire was they had done kind of a sloppy job of managing this case and when I gave them the choice of what to do in the sense of if you're going to go on the date scheduled, you'll have some choices to make. *One of the choices I anticipated they might do is withdraw these charges, but if they did that they'd have to go back to the convening authority and explain why we're doing this and I thought that might be a good management lesson for the prosecution of this case, so that was not shocking to me that they would withdraw the charges. Nor was it a shock to me that they re-referred the charges.*

Now, had the Government been able to go to trial on the 28th of June, I think was the day they requested.
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MJ: *Had they been able to go on 28 June, then they would have thwarted my ruling, but they couldn't do that, so my ruling which denied a continuance as far as based on the facts and the law was not thwarted. The Government did not get to do what they wanted to do which was go to trial with all these charges on the 28th of June 1996. Their choice, if they chose to go forward, was to do it at some date down the road.* Before doing that, they would have to re-prefer, have another investigation providing the accused additional benefits, additional inquiries, additional opportunity for an investigating officer to recommend it not go to trial, additional opportunity for the convening authority to decide not to take these charges to this forum or to a different forum and that's what did transpire in this case.

So, the bottom line is, your Motion is Denied. *I see no interference at all with this court in any manner*. The convening authority exercised prosecutorial discretion as to what he and his lawyers chose to do after this case ended the first time.[12]

41. CAAF in *Underwood* found no error in the trial court's reasoning or result. Though accused [appellant] asserted that CAAF's prior precedent in *Vanover v. Clark*[13] required a finding of improper reason under R.C.M. 604 when the "'practical effect' of the convening authority's withdrawal and subsequent re-referral was to overturn the military judge's ruling," CAAF noted that that precedent applied to evidentiary rulings, not procedural ones like continuance: "In *Vanover*, an evidentiary ruling specifically prohibiting the admission of certain acts of uncharged misconduct at the first court-martial was flouted by charging the excluded misconduct at the second court-martial ...The trial judge's earlier continuance denials created no legally cognizable right to a trial without the prosecution witness on [the trial date]; nor can the speculative possibility of such an occurrence in any sense be considered substantial."[14] CAAF held that withdrawing and re-referring to accommodate a witnesses schedule (and not to

[12] 50 M.J. at 273-74 (emphasis in original).
[13] 27 M.J. 345, 348 (CMA 1988).
[14] 50 M.J. at 275, 276.

subpoena that witness) was a proper purpose and appellant had not suffered "undue prejudice" as a result of the re-referral on the legal standard discussed in *Gale*, above.

42. **<u>R.C.M. 707</u>**: Pursuant to R.C.M. 707(a)(1), (2), an accused must "be brought to trial within 120 days after the earlier of [p]referral of charges [or] [t]he imposition of restraint under R.C.M. 304(a)(2)-(4) …." For purposes of R.C.M. 707, an "accused is brought to trial … at the time of arraignment."[15]

43. All reasonable pretrial delays approved by a military judge or the convening authority are excluded.[16] As CAAF established in *United States v. Thompson,*[17] such excusals must be supported by "good cause" for the delay and the length of time requested must be "reasonable" based on the facts and circumstances of each case. R.C.M. 707(c) "does not preclude after-the-fact approval of a delay by" the military judge.[18]

44. When it comes to docketing cases for trial, the authority of the trial judiciary to exclude time is at its zenith. As CAAF noted in *Guyton*:

> We give the military judge's explanation and approach particular weight for several reasons. First, the provisions of R.C.M. 707 make it clear that a military judge has broad latitude in deciding whether certain delays in the processing time of a case—from preferral to arraignment—are excludable for speedy trial purposes. Second, it is difficult to think of an area where an appellate court should grant more deference to a trial judge than in the docketing of cases. *See* R.C.M. 801(a)(1)("The military judge shall … [d]etermine the time ... for each session of a court-martial."). There are a host of moving parts that a military judge must consider when deciding upon court dates, and thus this is an area where our Court should tread lightly.[19]

45. **<u>Fifth Amendment</u>**: The Fifth Amendment provides that "no person shall be deprived of life, liberty, or property, without Due Process of law." That Due Process Clause affords accuseds, among other rights, protection against egregious trial delays.[20]

46. CAAF applies a two-prong test for determining whether delays constitute a Fifth Amendment violation. First, an accused must show prejudice, *e.g.,* "the actual loss of a witness, as well as the substance of their testimony," or the loss of physical evidence; and second, there must be "proof to show an egregious or intentional, tactical delay."[21]

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[15] R.C.M. 707(b)(1); *United States v. Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022).
[16] *See* R.C.M. 707(c)(1).
[17] 46 M.J. 472, 475 (C.A.A.F. 1997).
[18] *Guyton*, 82 M.J. at 151 (citing *Thompson*, 46 M.J. at 475)); *see also Heppermann*, 82 M.J. 794 (same).
[19] *Guyton*, 82 M.J. at 153.
[20] *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Vogan*, 35 M.J. 32, 34 (C.M.A. 1992); *see also United States v. Douglas*, 2017 CCA Lexis 407 *22 (A.F.C.C.A., 15 June 2017).
[21] *Reed*, 41 M.J. at 452 (citing *United States v. Tousant*, 619 F.2d 810, 814 (9th Cir. 1980); *United States v. Dennis*, 625 F.2d 782, 794 (8th Cir. 1980); *United States v. Comosona*, 614 F.2d 695, 697 (10th Cir. 1980)).

47. In *United States v. Marion*,[22] the Supreme Court noted that with respect to prejudice, "the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost" is not by itself "enough to demonstrate that [an accused] cannot receive a fair trial and to therefore justify the dismissal of the indictment" on Fifth Amendment due process grounds.[23] Along these lines, CAAF in *Reed* noted: "Speculation by the [accused] is not sufficient. The defense may establish prejudice by showing: (1) the actual loss of a witness, as well as the substance of their testimony and the efforts made to locate them; or (2) the loss of physical evidence."[24]

48. __Sixth Amendment__: The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ..." This right attaches "only when a formal criminal charge is instituted and a criminal prosecution begins."[25]

49. To determine whether an accused has been denied this Sixth Amendment right, the courts apply the four-factor test that in 1972 the Supreme Court established in *Barker v. Wingo*.[26] The four factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the [accused] made a demand for a speedy trial; and (4) prejudice to the [accused]."[27] In undertaking this analysis, it is important to keep in mind that "that pretrial delay is often both inevitable and wholly justifiable."[28] Further, no one *Barker* factor is "necessary or sufficient to finding of a deprivation of the right of speedy trial."[29]

50. As to length of the delay, the appropriate "start date" for Sixth Amendment analysis is when the instant "criminal proceedings" began. As the United States Supreme Court in *United States v. Macdonald*[30] held:

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[22] 404 U.S. 307 (1971).
[23] 404 U.S. at 326.
[24] 41 M.J. at 452 (internal quotation marks and citations omitted). *See also United States v. Fujiwara*, 64 M.J. 695, 700-01 (A.F.C.C.A. 2007)("Mere speculation or conclusory allegations unsupported by the evidence are insufficient."); *United States v. Cochran*, 1999 CCA Lexis 298, *3 (A.F.C.C.A., 15 November 1999)(a 2-year pre-preferral delay did not violate the Fifth Amendment: "In testing for prejudice, speculation and conclusory allegations of prejudice are not sufficient. An appellant must establish either the actual loss of a witness including the substance of the witness' testimony and efforts made to locate the witness, or the loss of physical evidence.")
[25] *United States v. Macdonald*, 456 U.S. 1, 6 (1982). *See also Marion*, 404 U.S. at 313 ("On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him.").
[26] 407 U.S. 514 (1972). *See also Guyton*, 82 M.J. at 154 (C.A.A.F. 2022); *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021); *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016).
[27] 407 U.S. at 530; *Guyton*, 82 M.J. at 154; *Harrington*, 81 M.J. at 189; *Wilder*, 75 M.J. at 138; *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014)(quoting *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005)); *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013).
[28] *Doggett v. United States*, 505 U.S. 647, 656 (1992).
[29] *United States v. Cooley*, 75 M.J. 247, 259 (C.A.A.F. 2016)(quoting *Barker*, 407 U.S. at 533).
[30] 456 U.S. 1 (1982).

> Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, *see United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977), or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending. ...Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the [Fifth Amendment] Due Process Clause, not the [Sixth Amendment] Speedy Trial Clause.[31]

51. In a more general sense, delays in the hundreds of days, anything longer than the R.C.M. 120-day clock, are generally sufficient to trigger a full *Barker* analysis.[32]

52. As to reasons for the delay, the courts apply something of a sliding scale. *Barker* itself lays this out:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.[33]

53. Under the military's speedy trial jurisprudence, courts "break down the periods of delay, analyze the reasons for each, and may express concern with some but not other periods of delay." [34] Generally, "[s]hort periods of inactivity are not fatal to an otherwise active prosecution."[35] Where the delay is based on the prosecution's trial strategy, a time-consuming approach is permissible if the strategy is "not unusual or inappropriate" under the circumstances.[36] Ordinary "judicial impediments, such as crowded dockets, unavailability of judges, and attorney caseloads, must be realistically balanced."[37] As is likely obvious, delays that are attributable to the defense do not weigh in favor of a Sixth Amendment violation.[38]

54. Finally, as to prejudice, while it is an important part of the *Barker* analysis, in *Moore v. Arizona* the Supreme Court has held that *Barker* does not require an affirmative demonstration of prejudice to prove a denial of the constitutional right to a speedy trial.[39] CAAF in *Guyton* laid out the standards applied to a *Barker* prejudice analysis:

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[31] 456 U.S. at 7.
[32] *See United States v. Grom*, 21 M.J. 52, 56, n.4 & 58 (C.M.A. 1985)(holding that 244-day delay triggered the *Barker* analysis and stating 120-day requirement under R.C.M. 707 was "an indication of the amount of pretrial delay that is ordinarily tolerable in a military context.").
[33] *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020)(quoting *Barker*, 407 U.S. at 531).
[34] *United States v. Danylo*, 73 M.J. 183, 190 (C.A.A.F. 2014) (citations omitted).
[35] *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (quoting *Mizgala*, 61 M.J. at 127).
[36] *Danylo*, 73 M.J. at 187.
[37] *United States v. Kossman*, 38 M.J. 258, 261-62 (C.M.A. 1993).
[38] *Wilson*, 72 M.J. at 352.
[39] 414 U.S. 25, 26 (1973) (per curiam).

Under *Barker*, "prejudice should be assessed in the light of" the three interests of the accused "which the speedy trial right was designed to protect[:] ... (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired." *United States v. Cooley*, 75 M.J. 247, 262 (C.A.A.F. 2016) (citation omitted) (internal quotation marks omitted). "Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532).[40]

55. Further as to prejudice, *Barker* continued that "[t]here is also prejudice if defense witnesses are unable to recall accurately events of the distant past. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.[41]

56. The statute of limitations, Article 43, UCMJ, here for the Article 92 lawful-order violation and Article 128 domestic-violence charges is five years while there is no limitation for the sexual-assault charges.

ANALYSIS

57. **Referral**: *Underwood* controls, it is almost exactly on point (regardless of the manner by which the trial court there ruled on Government's request for continuance and reconsideration of the denial). Here, as they conceded, the Government was negligent in securing attendance of a key witness, asked the trial court for a continuance, had the charges withdrawn and dismissed when denied that requested continuance, and had the charges re-referred to ensure availability of a key witness and availability of all relevant evidence at court-martial (and implicitly ensure all charges against Accused were tried in one court-martial).[42]

58. Improper Reason: The Defense has failed its burden of demonstrating that ensuring availability of all relevant witnesses and evidence (and trying all offenses in one court-martial) was an improper reason for withdrawal and referral to another court-martial. Yes, the Government did more than just a "sloppy job of managing this case," they were negligent, but there is no evidence that they acted in bad faith with an intent to deny Accused a constitutional right (*i.e.*, speedy trial), or the benefit of a favorable or potentially favorable evidentiary ruling. The evidence before the Court is that the Government wanted to and intended to go to trial as scheduled but was unable to do so because a key witness was unavailable on the date of trial. The convening authority has a legitimate command interest in judicial economy and a full and fair presentation to the trier of fact all the relevant facts related to whether a member of the Air Force committed a charged criminal act. Further, that decision did not come without cost to the Government; the Government was required to procedurally start anew with preferral, submitting

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[40] 82 M.J. at 155.
[41] *Barker* at 532.
[42] United States v. *Giles*, 59 M.J. 374, 379 (C.A.A.F. 2004)("general policy in the military favoring trial of all known charges at a single court-martial.").

the case to a preliminary hearing officer (who could have suggested a different course of action with regard to the preferred charges), re-referring charges thereafter, and re-setting this matter for trial. Though no equal to the prejudice from delay to Accused, there are real consequences of withdrawal and referral to another court-martial.

59. Defense's counter is that the Government's intent was to "flout" the trial court's ruling denying a continuance and that was improper.[43] But CAAF disposed of such an argument in *Underwood* with its analysis of *Vanover* (as also explained in *Gale*), essentially holding that a convening authority's exercise of prosecutorial discretion can have the "practical effect" of obviating a trial court's procedural ruling, but that it and of itself does not make the convening authority's action improper. Here the convening authority's decision to withdraw and dismiss charges and start anew did not "flout" this Court's ruling; the convening authority acknowledged that ruling and took what action was available to it to meet its purpose, a proper one, of ensuring availability of all relevant witnesses and evidence at court-martial (and trying all offenses in one court-martial).

60. <u>Undue Prejudice</u>: Regardless if the reason was proper, if Accused suffered unfair prejudice from withdrawal and referral to another court-martial, there is still a violation of R.C.M. 604(b). That unfair prejudice is absent here.

61. Here, this iteration of the court-martial is the same type as the original (general court-martial), but with one less specification. As noted above, Accused has not lost the benefit of any favorable evidentiary ruling. Nor has Accused has been languishing in pretrial confinement. Further, as CAAF held in *Underwood* held, losing the tactical benefit of a continuance is not a "legally cognizable right to a trial without the prosecution witness on [a specific the trial date]." Moreover, there is no evidence before the Court that Accused's ability to present a defense at this iteration of the court-marital has been lessened from that ability at the original trial date; *i.e.*, there is no assertion that a witness or piece of evidence that was available to the defense is no longer so available. Any diminution in memories of Government witnesses by the relatively short delay is unlikely and, even if present, works to the disadvantage of the Government in proving their case beyond a reasonable doubt. The unfair prejudice necessary to satisfy Prong 2 of an R.C.M. 604(b) analysis just is not present here.

62. The Court recognizes that it found the "prejudice to opponent" prong of the *Miller* factors as to continuance was one of the factors that weighed against granting Government's request given the time and expense to Accused of continuing to employ civilian defense counsel. But that prejudice analysis underlies an R.C.M. 906(b)(1) remedy; it is not commensurate to "unfair prejudice" as that phrase is intended for R.C.M. 604(b) purposes. Unfair prejudice as to R.C.M. 604(b), as explained in *Underwood* and its progeny, focuses on whether Accused is structurally disadvantaged by withdrawal and referral to another court-martial; whether he faces greater consequence (different type) with fewer tools (favorable rulings, loss of evidence) as a result of the change. Here he does not. The convening authority's decision to withdraw the original charges and refer them to this court-martial does not run afoul of R.C.M. 604(b) limitations.

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[43] Defense does not argue the withdrawal and referral to another court-martial was done with an intent to interfere with the impartiality of a court-martial.

63. **<u>Speedy Trial</u>**:

64. <u>R.C.M. 707</u>: Referral in this iteration of the court-martial occurred 94 days after the R.C.M. 707 triggering event--preferral. There is no R.C.M. 707 violation here.

65. <u>Sixth Amendment</u>: Speedy trial analysis under the Sixth Amendment is triggered when the criminal prosecution began. That was 94 days prior to arraignment in this iteration of the court-martial. That is not long enough to trigger a full *Barker* analysis. Yet even during those 94 days, there is no evidence before the Court of unreasonable inaction in moving this iteration of the court-martial towards trial.

66. Nor has there been a showing of constitutional levels of prejudice. Accused is not in pretrial confinement and there is no evidence that his defense on the merits has been negatively impacted by the passage of time since preferral of the instant charges (since 3 October 2025). Accused has suffered the anxiety all those charged with criminal offenses do, has lost additional benefits available to him due to his career field (incentive pay), and his opportunities for advancement through assignment and advanced training have been placed on hold. He also has had to pay his civilian defense counsel. These, however, as sympathetic as the Court may be to delay in resolving the charges against him, are not sufficiently prejudicial impacts standing alone to require dismissal of the current iteration of this court-martial on speedy-trial grounds.

67. <u>Fifth Amendment</u>: Accused does maintain his Fifth Amendment right to be protected against egregious trial delays, regardless of whether those trial delays were caused by proper withdrawal and referral to another court-martial. The investigation into the present charges began in early December 2023 and as a result of the withdrawal and referral to another court-martial, will not be resolved at trial until April 2026, a passage of more than two years (understanding that some of that delay is as a result of availability of Accused's defense counsel).

68. The question under the Fifth Amendment is whether this passage of time resulted in first, the "the actual loss of a witness, as well as the substance of their testimony," or the loss of physical evidence; and second, there is "proof to show an egregious or intentional, tactical delay."[44] As discussed at length throughout, neither of these exist: (1) there is no evidence before the Court of the loss of evidence or witnesses, and (2) though at times negligent, there is no evidence before the Court that the Government has acted with an intent to secure tactical advantage by dragging the case out (and frankly, the passage of two years from start to conclusion of a case involved charges of sexual assault is, unfortunately, not egregious in the military justice system). There is no Fifth Amendment Due Process violation here either.

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[44] *Reed*, 41 M.J. at 452 (citing *United States v. Tousant*, 619 F.2d 810, 814 (9th Cir. 1980); *United States v. Dennis*, 625 F.2d 782, 794 (8th Cir. 1980); *United States v. Comosona*, 614 F.2d 695, 697 (10th Cir. 1980)).

RULING

WHEREFORE, Defense's Motion to Dismiss: Speedy Trial is **DENIED.**

SO ORDERED this 3rd day of March 2026.

[redacted]

BRIAN M. THOMPSON, Colonel, USAF
Chief District Military Judge, [redacted]