DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE JUDICIARY

UNITED STATES OF AMERICA	)	**DEFENSE MOTION TO DISMISS**
	)	**ARTICLE 10 VIOLATIONS**
v.	)	
	)	
SRA LOGAN A. MCLEOD	)	
AFLCMC Detachment 5 (AFMC)	)	
Maxwell AFB, Alabama	)	
	)	**11 April 2022**

MOTION

NOW COMES the Accused, SrA Logan McLeod, by and through defense counsel, and moves this Honorable Court to DISMISS with prejudice the Charges pending against SrA McLeod in the present case.

SUMMARY

This Honorable Court should GRANT the Defense's Motion to Dismiss for Article 10 Violations due to multiple unreasonable delays in SrA McLeod's case while he was in pretrial confinement. There are two chief unreasonable delays in SrA McLeod's case: 1) pretrial confinement to referral, which includes the 62 days between confinement and preferral, 27 more days between preferral and Article 32 report and the 15 days between Article 32 report and referral service – resulting in a 102 day delay; and 2) pretrial confinement to arraignment, which has resulted in SrA McLeod having to wait 128 days in pretrial confinement before he is arraigned (117 days based on the Government's availability). As noted below, the Government put SrA McLeod in pretrial confinement after conducting a sting/TCAP operation in August and September 2021. All of the evidence needed to go forward with the preferral of charges was in the Government's possession on or near the date of his arrest. Nevertheless, SrA McLeod waited until 29 December 2021 before charges were referred for trial against him, and until 24 January 2022 to reach arraignment. As outlined in greater detail below, there is no basis for the unreasonable delays in the processing of his case. The case law cited in this brief makes clear that such delays cut against the Government and in favor of an accused awaiting trial in pretrial confinement. Based on the law and the facts of this case, Defense respectfully requests the Charges against SrA McLeod be dismissed with prejudice, pursuant to Article 10, UCMJ.

Appellate Exhibit____

FACTS

1. The Defense provides the following chronology:

Date	Event	Elapsed Days[1]	Gov't RCM 707 Days	Art 10 Days
19 Sep 21	**SrA McLeod enters Pretrial Confinement**	**1**	**0[2]**	**1**
23 Sep 21	Pretrial Confinement Hearing Conducted	4	3	4
24 Sep 21	PCRO's Decision Memorandum Complete	5	4	5
19 Nov 21	**Preferral of Charges**	**62**	**61**	**62**
6 Dec 21	**Article 32 Hearing Conducted**	**79**	**78**	**79**
15 Dec 21	Article 32 Report Complete	88	87	88
22 Dec 21	**Additional Preferral of Charges**	**95**	**94**	**95**
29 Dec 21	**Referral of Original and Additional Charges**	**102**	**101**	**102**
24 Jan 22	**SrA McLeod is Arraigned**	**128**	**117 (time excluded)[3]**	**128**
27 Apr 22	**Anticipated Motions Date**	**221**	**210**	**221**
22 Aug 22	**Anticipated Trial Date**	**338**	**327**	**338**

2. 62 days elapsed between the day SrA McLeod entered pretrial confinement and the Preferral of Charges (not counting the additional preferral).

3. 27 days elapsed between the Preferral of Charges and the Article 32 Preliminary Hearing Report.

4. 15 days elapsed between the Preliminary Hearing Report's publication and the Referral of Charges.

5. In total, 102 days elapsed between SrA McLeod's Pretrial Confinement and the Referral of Charges.

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[1] Elapsed days and Art 10 Day headings include the day of event in its calculation.
[2] "Rule for Courts-Martial 707(b) *Accountability.*
(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904" (emphasis added).
[3] The Government was ready to arraign SrA McLeod on 13 Jan 22; however, due to Defense counsel sickness and unavailability, the arraignment occurred on 24 Jan 22. Time was excluded between those two dates.

Procedural History

6. On 18 September 2021, SrA McLeod was arrested in Montgomery, Alabama and placed into pretrial confinement on 19 September 2021.[4] (Attachment 1). His arrest was the result of a sting/TCAP operation using federal law enforcement agents and a confidential informant. A pretrial confinement hearing was held on 23 September 2021 and SrA McLeod remains in pretrial confinement to this day. *Id.*

7. After 62 days of confinement, Lt Col [redacted] preferred one Charge and 12 Specifications of Attempt, in violation of Art 80, UCMJ; and one Charge and Specification of Obstruction, in violation of Art 131b, UCMJ against SrA McLeod. The Attempt Specifications featured a variety of violations, which included two Specifications of Attempted Murder; three Specifications of Attempted Rape; three Specifications of Attempted Kidnapping; two Specifications of Attempted Drug Distribution, and two Specifications of Producing/Distributing Child Pornography.

[redacted]

9. On 22 December 2021, Lt Col [redacted] preferred an Additional Charge and 10 Specifications of Attempt in violation of Article 80, UCMJ. The additional Specifications included the following: two Specifications of Attempted Conspiracy involving A.B.; and eight Specifications of Assault in violation of Art 128, UCMJ. These additional Specifications appear to be in-line with what was recommended by the Art 32 PHO; however, none of her recommendations for dismissal were followed at that time. *See Id.*

10. On 29 December 2021, all Charges and Specifications (to include the Additional Charge) were referred to a General Court-Martial. During docketing, **the Government stated that its ready date for trial was 13 January 2022.** (Attachment 31). The Defense gave its ready-date as 22 August 2022; which is the agreed-upon trial date. *Id.*

11. On 24 January 2022, SrA McLeod was arraigned. For the purposes of arraignment, the Government proposed 13 January 2022; however, due to sickness and the unavailability of Defense counsel at that time, arraignment on this matter was completed on 24 January 2022. The Defense agreed to exclude time between these dates for the purposes of R.C.M. 707 calculation. (Attachment 3).

[redacted]

[4] Details regarding the arrest and the interrogation that followed are discussed below.
[5] This is a fictious name created by law enforcement for the purposes of their investigation. Accordingly, no expurgation is required.

The Substantive Case Against SrA McLeod

13. On 4 August 2021, Ms. [redacted] contacted Air Force Office of Special Investigations (AFOSI) with information that SrA McLeod was engaged in a scheme to potentially kidnap and sexually assault both adults and children. (Attachment 5). [redacted] noted that she had been feigning cooperation with SrA McLeod in a scheme to kidnap and rape her friend, A.B. *Id.* She also reported that SrA McLeod [redacted], and had fantasies to kidnap, rape, mutilate and murder children and their parents. *Id.* Attached to her message, [redacted] provided screenshots of text messages and a transaction statement that were purportedly connected to an ongoing scheme. *Id.*

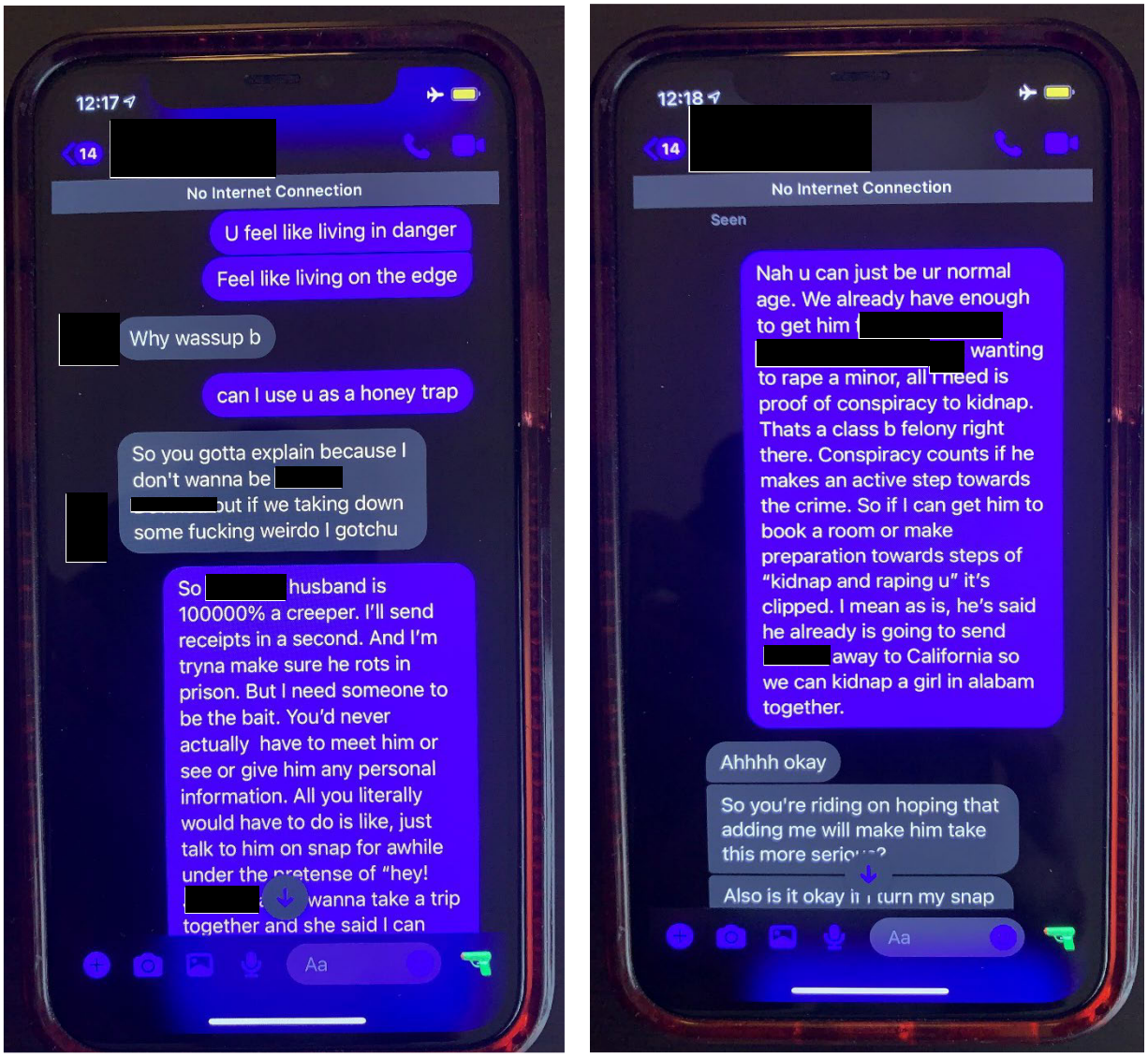
14. In response to this tip, AFOSI began its investigation into SrA McLeod and made [redacted] a confidential informant. (Attachments 6 and 7). AFOSI met with [redacted] on 8 Aug 21. (Attachment 7). During that interview, [redacted] disclosed that she met SrA McLeod in June 2020 while she was dating SrA McLeod's wife, [redacted]. During this first encounter, [redacted] travelled to Maxwell AFB and had sex with both SrA McLeod and [redacted] at the same time. Two months later, [redacted] travelled to New York to visit [redacted] and her husband. Bad blood between [redacted] and [redacted] began to accrue when [redacted] began having sex with [redacted] husband and [redacted] ex-boyfriend. After [redacted] objected to this state of affairs, [redacted] accused [redacted] husband of raping her. This eventually led to a breakup between [redacted] and [redacted] when [redacted] left New York. *Id.*

15. Several months after [redacted] left New York, [redacted] was purportedly contacted by SrA McLeod over Snapchat. *Id.* According to [redacted] SrA McLeod was interested in kindling a relationship between the two, but she let him know that—since her pregnancy—she was not interested. During the course of this back-and-forth, SrA McLeod started joking about kidnapping and relayed that his biggest fantasy was kidnapping his sister-in-law S. when she was 13 years-old. Conversations between the two continued into June 2021 when SrA McLeod allegedly told [redacted] that he wanted to kidnap and rape a 12 year-old school girl. From here, the conversations escalated and—from [redacted] perspective—appeared to escape the realm of role-play. SrA McLeod allegedly stated that he wanted to kidnap and rape [redacted] and commissioned art of a 15 year-old girl tied up in a barn and crying. *Id.*

16. The conversation then purportedly turned to murder and mutilation; discussing SrA McLeod's desire to watch people slowly die during rape and torture schemes. SrA McLeod expressed that he wanted [redacted] to come to Alabama and rent an Air B&B;[6] from there, they would look for someone to kidnap. [redacted] suggested that they kidnap and rape her friend A.B. She also, via text, enlisted A.B. to act as an unwitting victim in order to ensnare SrA McLeod. Following these disclosures, AFOSI collected a host of screenshots and text messages from [redacted] regarding SrA McLeod (to include a payment from SrA McLeod for

[6] "Air B&B" is online service that allows individuals to rent their properties to travelers and is considered an alternative to a standard hotel.

the Air B&B). The following is a screenshot of [redacted] communications with A.B. about the matter (which was turned over to AFOSI) is displayed below:



(Attachment 8)

17. Finally, [redacted] reported reaching out to law enforcement on 4 August 2021 because she suspected that SrA McLeod had broken into her New York-based home. (Attachment 7). Apparently, her air conditioning unit had been moved and she immediately surmised that it might be SrA McLeod who had traveled from Alabama. *Id.* At the end of her interview, [redacted] completed a written statement on an AF IMT 1168 and agreed to have her Apple account and phone searched and seized by AFOSI. (Attachment 9).

18. On 13-17 August 2021, AFOSI coordinated with the Federal Bureau of Investigation to conduct a host of investigative activities on SrA McLeod. (Attachment 10). This included

surveillance of his house, collecting his receipts, reviewing his credit card transactions, and obtaining emails regarding SrA McLeod's reservations at the Air B&B. *Id.* On 18 August 2021, [redacted] signed consent forms to allow AFOSI to intercept oral and wire communications between her and SrA McLeod. (Attachment 11). These consents included permission to intercept communications on her phone, Google accounts and other mediums on which she could communicate with SrA McLeod. *Id.* Throughout August 2021, [redacted] continued to communicate with SrA McLeod about the scheme to kidnap, drug, and rape A.B. (Attachment 13).

19. After monitoring SrA McLeod's communications with [redacted] throughout August 2021, AFOSI and Homeland Security Investigations (HSI) initiated a joint undercover operation known as 'Hide and Seek' on 1 September 2021. (Attachment 12). The stated goal of this operation was to have [redacted] introduce SrA McLeod to a human trafficker named "Blazer." Blazer would be an undercover HSI agent and work with SrA McLeod to develop plans at the prepaid Air B&B in Montgomery, Alabama. *Id.* Specifically, Blazer would offer to have two females available to be rented for sexual activity. In exchange, SrA McLeod would confirm his participation by sending pictures of items when contacted by Blazer and getting a COVID-19 test.

20. As that operation was put into motion, Agents continued to monitor SrA McLeod; tracking him to various stores—such as Walgreens and Dick's Sporting Goods—as he allegedly acquired items for the proposed plan and took a COVID test (Attachment 14). They also continued to collect daily communications between SrA McLeod and [redacted] (Attachment 15). Additionally, 'Blazer' began communicating with SrA McLeod on 4 September 2021; likewise, their communications were also captured. (Attachment 16). On 10 September 2021, SrA McLeod met with Blazer at a truck stop to formalize their arrangements. Blazer provided SrA McLeod with a blue dinosaur figurine and SrA McLeod provided him three fifty-dollar bills. The extent of their interaction was caught on hidden camera. (Attachment 21).

21. Law enforcement's target date for SrA McLeod's arrest was set at 18 September 2021. (Attachment 17). In reference to that target date, plans and preparations were made to collect/process any evidence on-scene as quickly as possible. *Id.* In a memorandum, dated 8 September 2021, agents noted "[c]oordination with Digital Forensics personnel have been made to ensure a DFC is available at take down to safely secure any digital evidence." *Id.*

22. As September 2021 progressed, SrA McLeod's plans with Blazer and [redacted] evolved. (*See* Attachments 15 and 16). Allegedly, the plan to drug, kidnap, and rape A.B. on 18 September 2021 had been replaced with a plan to rape the two females provided by Blazer at the Air B&B. The aliases of the fictitious females were 'Caitlin' (a 14-year old girl) and 'Sarah' (Caitlin's mother). Allegedly, the plan was now to rent Caitlin and Sarah for two weeks from Blazer. During that time, SrA McLeod and [redacted] would rape both females and kill Sarah in front of Caitlin while the two were tied to one another. SrA McLeod would capture this conduct on video and sell it to Blazer for distribution as partial payment for his services. *Id.*

23. On 18 September 2021, the day of the arrest, law enforcement secured search warrants for SrA McLeod's vehicle, home, and electronic devices at 1600 hours. (Attachment 18). Agents

then initiated 'Operation Green Lynx,' an arrest/takedown plan for SrA McLeod. (Attachment 19). While the exact timing of the arrest is not documented (to the Defense's knowledge), there are indicators as to when it occurred. Specifically, the last messages sent by SrA McLeod to [redacted] occur at 1758 on 18 September 2021. (Attachment 15). These messages involve [redacted] directing SrA McLeod to the meeting/arrest location. During the arrest by Montgomery SWAT, officers seized SrA McLeod's cellphone and a blue dinosaur from his pocket. (Attachment 20). They also discovered that SrA McLeod's car was full of equipment to allegedly carry out his planned activities. (Attachment 29).

24. At 1940 that evening, SrA McLeod was interviewed by SA [redacted] and SA [redacted] at AFOSI. That interview lasted until 0627 the following day, 19 September 2021. (Attachment 22). During this interview process—which is the subject of a Defense Motion to Suppress—SrA McLeod gave agents detailed and incriminating statements about his activities with [redacted] (Attachment 23). He also gave agents the passcode to his phone. *Id.* at p.5. SrA McLeod was then entered into Pretrial Confinement. (Attachment 1).

25. On the day SrA McLeod was arrested, agents also executed a search of his residence. (Attachment 24). According to notes taken by agents conducting the raid, they collected the following evidence:

> (1) one black Android cellphone with the operating system (OS) powered on (no mention of password protection);
> (2) one black desktop computer (no mention of password protection);
> (3) one Macbook Pro (password was noted to be Umbrella16);
> (4) one black Apple iPhone with the operating system (powered off);
> (5) one Dell Optiplex 9020 (powered off);
> (6) one WIFI device (plugged in);
> (7) one router (unplugged);
> (8) two modems (one plugged in, the other not);
> (9) one Tablet (powered off);
> (10) one writing pad accessory;
> (11) one LG cellphone (OS powered on)(no mention of password protection);
> (12) MSI Laptop (OS powered on)(no mention of password protection); and
> (13) Samsung SSD Drive.
>
> *Id.*

26. On 18 September 2021, the day of the executed search warrant, extractions of various items were performed on-scene at the residence by digital forensics professionals. (Attachment 30). It was not until 8 October 2021 (21 days after SrA McLeod was put into pretrial confinement and digital evidence secured) that AFOSI made a *request* to Department of Defense Cyber Crime Center (DC3) to have the above-items analyzed and the phone provided by SrA McLeod (the one he provided the password for). (Attachment 25). DC3 completed its report on 21 December 2021; noting that only two items provided anything of evidentiary value: the cellphone provided by SrA McLeod and a Macbook Pro. (Attachment 26). Of the evidence produced in this report, the following was noted: (1) pictures of a blue dinosaur (which were already in the possession of

AFOSI due to previous data-collection); and (2) internet history and search terms that suggested SrA McLeod had an interest in bondage and other BDSM-related sex. *Id.*

27. In the immediate days following SrA McLeod's arrest on 18 September 2021, AFOSI followed-up with his family and friends. (Attachment 27). They also collected receipts on 22 September 2021 from LoveStuff Montgomery for SrA McLeod's purchase of a leather leash and a 'cock cage.' (Attachment 28).

BURDEN

28. 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).

29. The analysis of R.C.M. 707 in Appendix 21 of the Manual for Courts-Martial (M.C.M.), 2016 ed., states: "This rule applies the accused's speedy trial rights under the 6th Amendment and Article 10, UCMJ, and protects the command and societal interest in the prompt administration of justice. The analysis of R.C.M. 707 in the M.C.M. 2019 edition, notes that it specifically incorporates the 2016 M.C.M.'s version of R.C.M. 707. *See generally Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Walls*, 9 M.J. 88 (C.M.A. 1980)." *See also United States v. Laminman*, 41 M.J. 518, 521 (C.G.C.C.A. 1994) ("This [R.C.M. 707] rule is intended to protect the speedy trial rights under the sixth amendment and Article 10. . . . Accordingly, it is our conclusion that RCM 905(c)(2)(B) places the burden of proof on the prosecution whenever the defense moves to dismiss for lack of speedy trial, whether the motion is framed under the terms of Article 10 or RCM 707.").

30. "Under Article 10, UCMJ, outside of an explicit delay caused by the Defense, the Government bears the burden to demonstrate and explain reasonable diligence in moving its case forward in response to a motion to dismiss. *See United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005). This explanation must be 'a particularized showing of why the circumstances require the [delay].' *See Seltzer*, 595 F.3d at 1178. Unexplained periods of delay will weigh against the Government, [*United States v. Wilson*, 72 M.J. 347, 355 (C.A.A.F. 2013), but '[b]rief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive.' [*United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)] (citation omitted)." *United States v. Cooley*, 75 M.J. 247, 260 (C.A.A.F. 2016).

LAW

Article 10 and Supporting Case Law

31. UCMJ Article 10 states:

> Any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require. When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement. When a person subject to this chapter is ordered into arrest or

> confinement before trial, immediate steps shall be taken—to inform the person of the specific offense of which the person is accused; and to try the person or to dismiss the charges and release the person.

32. "Under Article 10, UCMJ, the government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss." [*United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005)]. '[T]he legal question whether the Government has used reasonable diligence in discharging its duty under Article 10, UCMJ, to take immediate steps to try an accused is reviewed de novo on appeal.' [*United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003)]. However, we grant substantial deference to the military judge's findings of fact, and we will reverse them only if they are clearly erroneous. *Id.* at 58 (citing *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999))." *United States v. Simmons*, No. ARMY 20070486, 2009 CCA LEXIS 301, at *16 (A. Ct. Crim. App. Aug. 12, 2009) (unpublished, but citing precedential case law and statutes).

33. ***"Absent [the protection against pretrial confinement found in the Federal Rules of Criminal Procedure] or other equivalent protections for [airmen] confined pending trial, the mandate of Article 10, UCMJ, and other manual provisions gain additional gravity and must be rigorously enforced and upheld.*** *See United States v. Gregory*, 21 M.J. 952, 959 n.3 (A.C.M.R. 1986) ("We remind the government that bail is not available to our service members, so the pretrial confinement due process procedures found in R.C.M. 305 become most significant in helping to maintain the delicate constitutional balance that so strongly separates military service in a democracy from military service in a police state.")." *Id.* at *27 (emphasis added).

34. "Preferral is a critical event in the military justice system, in particular for those held in confinement. As discussed, [ ] military accused lack many procedural time limit protections applicable to federal defendants. While the [airman] is entitled to the assistance of defense counsel when he is ordered into confinement, counsel may be appointed solely for pretrial confinement purposes; another counsel may ultimately be detailed once preferral occurs. *See* R.C.M. 305(f). ***[Airmen] are not entitled to pretrial discovery upon inception of pretrial confinement*** (*see* R.C.M. 701(a)(1) [(discovery rights attach at referral in accordance with R.C.M. 602)]), and may be aware of only the minimal evidence required to continue the confinement. ***Most important, there is no appeal to a military judge regarding the confinement decision prior to the convening authority referring the case (and even then, a military magistrate's decision is only reviewable for an abuse of discretion).*** The government is in sole control of the confinee until referral, if indeed the case is ever eventually referred to trial." *Id.* at *31-33 n.25 (emphasis added).

35. "Article 10, UCMJ, is a 'fundamental, substantial, personal right.' *Mizgala*, 61 M.J. at 126. It is one of several protections in the UCMJ ***intended to prevent [airmen] from being 'put in the clink and held there for weeks, sometimes months, before being brought to trial.'*** *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 906 (1949) (statement of Mr. Anderson, Member, Subcomm. of the Comm. on Armed Services) (hereafter *H.R. 2498*), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950)." *Id.* at *27 (emphasis added). *See Cooley*, 75 M.J. at 259 (citing the same section of *H.R. 2498* when considering an Article 10 violation).

Barker v. Wingo Four-Factor Analysis

36. "In determining reasonable diligence for the purposes of Article 10, UCMJ, courts must conduct a four-factor analysis articulated in *Barker*, and adopted by this Court in *United States v. Birge*, 52 M.J. 209, 211-12 (C.A.A.F. 1999). The four factors assess: (1) the length of the delay; (2) the reasons for the delay; (3) whether the [accused] made a demand for a speedy trial; and (4) prejudice to the [accused]. None of the four *Barker* factors alone are a 'necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.' *Barker*[.]" *Cooley*, 75 M.J. at 259 (internal citations omitted).

37. "[A]lthough Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10 violation, the factors from *Barker v. Wingo* are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation." *Mizgala*, 61 M.J. at 127 (citations omitted).

38. "Our inquiry 'necessitates a functional analysis of the right in the particular context' of this particular case. *Barker*, 407 U.S. at 522. The analysis is 'a balancing test, in which the conduct of both the prosecution and the [accused] are weighed.' *Id.* at 529." *Simmons*, 2009 CCA LEXIS 301, at *38-39.

39. "Although the procedural framework is derived from the Sixth Amendment test set forth by the Supreme Court in *Barker v. Wingo*, we have emphasized that because Article 10 imposes a more stringent speedy trial standard than the Sixth Amendment, 'Sixth Amendment speedy trial standards cannot dictate whether there has been an Article 10 violation.'" *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (internal citations omitted).

40. "We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. [*Barker*, 407 U.S. at 533]." *Simmons*, 2009 CCA LEXIS 301, at *38-39.

41. "However, it is the Government's burden to show due diligence, and it is the Government's responsibility to provide evidence showing the actions necessitated and executed in a particular case justified delay when an accused was in pretrial confinement." *Cooley*, 75 M.J. at 259 (internal citations omitted).

Length of Delay as the First Barker Factor

42. In determining how *Barker's* first factor affects our inquiry, "we consider the particular circumstances of the [appellant's] case because 'the delay that can be tolerated for an ordinary street crime is considerably less'" than that which can be tolerated for more serious, complex cases. United States v. Lin, 78 M.J. 850, 860 (N-M Ct. Crim. App. 2019); *United States v. Cooley*, 75 M.J. 247, 260 (C.A.A.F. 2016) (quoting *Barker*, 407 U.S. at 531). The length of the delay has been described by our superior court as a "triggering mechanism" for a speedy trial

review and can be dispositive. *Cooley*, 75 M.J. at 260 (citing *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007)).

43. When determining whether the length of delay is reasonable, the analysis: "is not meant to be a *Barker* analysis within a *Barker* analysis," but should include the seriousness of the offense, the complexity of the case, the availability of proof, and "additional circumstances includ[ing] whether Appellant was informed of the accusations against him, whether the [g]overnment complied with procedures relating to pretrial confinement, and whether the [g]overnment was responsive to requests for reconsideration of pretrial confinement." *Id.* (citing *Cooley*, 75 M.J. at 260 (quoting *Schuber*, 70 M.J. at 188) (citing *Barker*, 407 U.S. at 530-31, 531 n.31)).

44. "We remain mindful that we are looking at the proceeding as a whole and not mere speed: 'The essential ingredient is orderly expedition and not mere speed.'" *Mizgala*, 61 M.J. at 129 (quoting *United States v. Mason*, 21 C.M.A. 389, 45 C.M.R. 163, 167 (C.M.A. 1972). "[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into the other factors that go into the balance." *Schuber*, 70 M.J. at 188.

Reasons for Delay as the Second Barker Factor

45. "Different weights should be assigned to different reasons" articulated for the delay. Lin, 78 M.J. at 861 (citing Cooley, 75 M.J. at 260 (citing Barker, 407 U.S. at 531)). "Deliberate attempts by the government to delay the proceedings in order to hamper the defense weigh heavily against the government." *Id. "* In analyzing the reasons for delay, we also acknowledge that the government 'has the right (if not the obligation) to thoroughly investigate a case before proceeding to trial.'" *Id.* (citing Cossio, 64 M.J. at 258 (citations omitted)). "In contrast, delay caused by the defense weighs against the appellant." *Id.*; Cooley, 75 M.J. at 260 (citing Vermont v. Brillon, 556 U.S. 81, 90, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009)).

Demand for Speedy Trial as the Third Barker Factor

46. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is deprived of the right." *United States v. Wilson*, 72 M.J. 347, 353 (C.A.A.F. 2013) (quoting *United States v. Johnson*, 17 M.J. 255, 259 (C.M.A. 1984)).

Prejudice as the Fourth Barker Factor

47. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Mizgala*, 61 M.J. at 129

48. Notwithstanding the *per se* rejection by the CAAF, "[o]bviously the disadvantages for the

accused who cannot obtain his release are even more serious. ***The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious."*** *Simmons*, 2009 CCA LEXIS 301, at *64 (citing *Barker*, 407 U.S. at 532-33) (internal citation omitted) (emphasis added).

49. "To begin, we are mindful that the Supreme Court has squarely held that '*Barker v. Wingo* ***expressly rejected the notion that an affirmative demonstration of prejudice was necessary*** to prove a denial of the constitutional right to a speedy trial.'" *Simmons*, 2009 CCA LEXIS 301, at *64 (citing *Moore v. Arizona*, 414 U.S. 25 (1973)) (citations omitted) (emphasis added).

50. In *United States v. Miller*, 66 M.J. 571, 577 (N-M.C.C.A. 2008), the Navy-Marine Court of Criminal Appeals (N-MCCA) upheld an Article 10, UCMJ, dismissal with prejudice even though the Accused failed to demand a speedy trial (as a tactical decision) or show any real prejudice by the delay. The N-MCCA held: "most importantly, the Government has not met its burden of demonstrating that it diligently sought to follow the proceedings of the mental status examination or to expedite it when it obviously lagged." *Id.* The N-MCCA went on to state: "[e]ven in the absence of a demand for speedy trial or obvious prejudice, we find that these circumstances tilt the balance against the Government. As a result, we conclude there has been a violation of the appellee's right to a speedy trial under Article 10, UCMJ." *Id.*

51. "In fact, 'the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *Simmons*, 2009 CCA LEXIS 301, at *64 (citing *United States v. Mason*, 21 U.S.C.M.A. 389, 394, 45 C.M.R. 163, 168 (1972)).

Reasons Not Found Supporting Delays under Barker

52. "To determine how the first factor [(length of the delay)] affects our Article 10, UCMJ, inquiry, we consider the particular circumstances of the case because ***'the delay that can be tolerated for an ordinary street crime is considerably less than [that] for a serious, complex conspiracy charge.'*** *Barker*, 407 U.S. at 531." *Cooley*, 75 M.J. at 260 (emphasis added).

53. "As a general matter, factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision, consistent with the Government's Article 10 responsibilities." *Thompson*, 68 M.J. at 313.

54. Inexperienced trial counsel is also not a valid reason for delay. "We categorically reject this as a legitimate reason for delay. Faced with a similar 'inexperienced' argument more than forty years ago when it was proffered to explain the lack of diligence of non-lawyer commanders, the Court of Military Appeals forcefully rejected it as well. The court responded: 'As to the inexperience of the officers involved, we do not believe this is a legally or factually sufficient explanation. Whether they thought they were doing their job is irrelevant. The plain fact of the

matter is that the delay occurred.'" *Simmons*, 2009 CCA LEXIS 301, at *43-44 (citing *United States v. Parish*, 17 U.S.C.M.A. 411, 417, 38 C.M.R. 209, 215 (1968).

55. The totality of the proceedings, balancing the *Barker* factors, is the controlling analysis. In *United States v. Laminman*, 41 M.J. 518 (C.G.C.C.A. 1994), the Coast Guard Court of Criminal Appeals (CGCCA) cited the military judge's findings that: "the total picture is really one that I can't find is marked by reasonable diligence." *Id.* at 523. The trial judge went on to say: "So two weeks to put on a court martial is not bad, after [the accused] asked for the speedy trial, ***but the period before that is what troubles me.*** The thing is that the meager evidence on the reasons for why it took so long . . . does not convince me that the government was pursuing the case with reasonable diligence." *Id.* (emphasis added).

56. In reviewing the military judge's conclusions in *Laminman*, the CGCCA agreed that "[t]he Government failed to present evidence explaining the reasons for the various delays in charging the accused, ordering the Article 32 investigation, detailing a defense counsel, and in commencing the Article 32 hearing at the outset. . . ." *Id.* Such a failure "left the trial judge without evidence to conclude that the Government acted with reasonable diligence during these periods." *Id.* Of particular importance was the "judge's express finding concerning a period in excess of a month, from 11 January to 15 February. In that regard, she stated: 'I specifically find that there is insufficient evidence to support a conclusion that the Government was pursuing the case with reasonable diligence.'" *Id.*

57. Similarly, the CAAF stated in *Cooley*: "the Government has not met its burden to provide particularized and appropriate reasons justifying the delay. . . ." 75 M.J. at 262.

58. The remedy for Article 10 violations is ***dismissal with prejudice.*** "Moreover, as reaffirmed by *Kossman* at 38 M.J. 262, the dismissal which she ordered for violation of Article 10 is with prejudice." *Laminman*, 41 M.J. at 520. *See also Cooley*, 75 M.J. 518 (affirming the Article 10 dismissals with prejudice).

ANALYSIS

59. This Honorable Court should GRANT this Motion to Dismiss <u>with</u> Prejudice under Article 10, UCMJ. To begin, the Government is unable to demonstrate that it has proceeded with reasonable diligence in this matter. A 128-day delay between SrA McLeod's incarceration and arraignment was unnecessary and not in any way justified by the evidence. To that end, this case is not as complex as the Charges appear on their face. SrA McLeod's alleged plan was rather straight-forward, and the Government had all of SrA McLeod's texts, Google chats, recorded meetings and confessions on 18 September 2021 (and had been monitoring him for the previous two months); and yet, it took 62 days for Charges to even materialize. **In essence, the Government had all of the evidence it needed to prefer charges <u>on the day of SrA McLeod's incarceration</u>; but failed to do so for 62 days.** The Government may proffer that it was waiting for digital evidence to be analyzed; however, this is not borne out by the facts. Not only was there a 21 day delay in requesting such an analysis, the report came out 33 days ***<u>after</u>*** Charges were preferred (a visceral demonstration that Charges could have been preferred without such evidence). Additionally, Charges were not referred until 102 days had elapsed while

SrA McLeod waited in pretrial confinement; likewise, he was not arraigned until 128 days had passed. Such failures have unnecessarily deprived SrA McLeod of "the norm" of liberty in violation of his rights as a military member and as a citizen of the United States. *Salerno*, 481 U.S. at 755. This motion is the first time SrA McLeod is able to effectively argue for his rights to be upheld, and it is incumbent upon this Honorable Court to "rigorously enforce[]" his Article 10 right to a speedy trial. *Simmons*, 2009 CCA LEXIS 301, at *27. Therefore, the Charges currently pending against SrA McLeod should be dismissed with prejudice.

The Four Factor Barker Analysis

60. **Length of the Delay:** This factor is a triggering mechanism, and if found in SrA McLeod's favor, triggers the rest of the analysis. This factor weighs in SrA McLeod's favor. There are two chief unreasonable delays in SrA McLeod's case: (1) pretrial confinement to referral, which includes the 62 days between confinement and preferral, 27 more days between preferral and the Article 32 report and the 15 days between Article 32 report and referral service – resulting in a 102 day delay; and (2) pretrial confinement to arraignment, which has resulted in SrA McLeod having to wait 128 days in pretrial confinement before he is arraigned, 117 days based upon the Government's availability. Both the one-hundred-and-two (102 days) and the one-hundred-and twenty-eight (128) days, which will have elapsed from the time SrA McLeod was ordered into pretrial confinement and Arraignment are enough to satisfy the first factor under *Barker* and trigger a full *Barker* analysis. *See United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (pretrial confinement of 117 days sufficient to trigger "the full *Barker* inquiry"); *Thompson*, 68 M.J. at 312 (145 days spent in pretrial confinement "is sufficient to trigger an Article 10 inquiry"); *Simmons*, 2009 CCA LEXIS 301 at *12 (107 days of pretrial confinement sufficient to trigger full *Barker* analysis); *Mizgala*, 61 M.J. at 123 (117 days of pretrial confinement triggered full *Barker* analysis); *Laminman*, 41 M.J. at 519 (109 days of pretrial confinement attributable to the Government sufficient to trigger full *Barker* analysis). Thus, this Honorable Court should conduct a full *Barker* analysis.

61. **The reasons for the delay:** There are no good reasons that can be offered by the Government to justify the delays in this case, and thus, this factor weighs heavily in favor of Defense.

Confinement to Preferral

62. First, sixty-two (62) days elapsed between the day SrA McLeod entered pretrial confinement and Preferral of Charges—even though all substantive evidence had already been collected and SrA McLeod had made a full confession on video and in a written statement. As discussed below, AFOSI's investigative work was already complete when SrA McLeod entered pretrial confinement. Thus, there were no complicating factors to justify a 62-day delay.

63. During this unreasonable delay, it remains unclear as to what AFOSI was doing. They appear to have casually followed-up with SrA McLeod's wife and two friends in late September and October 2021. They also collected two receipts from LoveStuff Montgomery for items found in SrA McLeod's car on the night of his arrest. This kind of *de minimus* investigative work does not necessitate delay. As to the digital evidence, AFOSI had forensic professionals

on-the-ground on 18 September 2021 to collect and forensically extract items of interest. No difficulties with passwords or devices were noted. However, for some unknown reason, AFOSI did not send a request to have these items examined until 21 days had elapsed. Tellingly, **the request even notes that SrA McLeod is in pretrial confinement**. Regardless, the Government did not wait until these devices were analyzed; rather, they proceeded to prefer charges 33 days before the report even came out. Accordingly, there is no credibility to the assertion that the examination of digital evidence prevented the Government from moving forward.

64. In *Simmons*, the Government tried to justify their delays on the investigators still working the case. 2009 CCA LEXIS at *50-52. However, the ACCA noted that the main interviews were already conducted and "the case did not involve complex evidentiary issues." *Id.* The Government in *Simmons* did not have to worry about co-accused, procedural complexities, or granting immunity. SrA McLeod's case is similar to *Simmons* in that there is no co-accused, procedural complexities, nor grants of immunity. Additionally, there is no new physical evidence in this case that would have delayed a preferral or referral.

65. The *Simmons* Court went on to state regarding additional interviews the Government sought to conduct: "[w]e fully expect the government to continue to investigate charged or potential offenses up to and even during trial on those offenses. However, the additional investigation undertaken in this case after [investigators] completed most of [their] interviews on 5 January 2007, as reflected in the record of the speedy trial motion, was *de minimus*." The record in SrA McLeod's case reflects the same: *de minimus* investigative activity after SrA McLeod entered pretrial confinement, and certainly not enough investigative activity to justify 62 days of delay before preferral.

Preferral to Article 32 Report

66. Next, 27 days elapsed between the Preferral of Charges and the Article 32 Preliminary Hearing Officer's (PHO) Report being completed. There is no justification for the length of this delay.

Article 32 Report to Referral

[redacted]

Referral to Arraignment

68. One-hundred-and twenty-eight (128) days elapsed before Arraignment. Although the Defense does concede that its availability impacted the date of Arraignment by 11 days, it should be noted that the Government's availability of 13 January 2022 would have still resulted in an unreasonable delay of 117 days.

69. The Government has not moved this case forward with reasonable diligence. The case has sat, and it has lagged, whether at the local legal office or at the NAF. It has not been moved with the "immediate steps" that Article 10 demands, nor the "reasonable diligence" required by case law. The investigation was straightforward and essentially complete (at the time of SrA McLoed's apprehension and his placement in pretrial confinement). They had admissions, physical evidence, text messages, Google messages, recorded meetings, corroborating testimony, and prior investigative steps. Additionally, "factors such as staffing issues, responsibilities for other cases, and coordination with civilian officials reflect the realities of military criminal practice that typically can be addressed by adequate attention and supervision, consistent with the Government's Article 10 responsibilities." *Thompson*, 68 M.J. at 313. Lastly, "inexperience of the officers involved" is not a "legally or factually sufficient explanation" for delays. "The plain fact of the matter is that the delay[s] occurred." *Parish* 38 C.M.R. at 215. The second *Barker* factor weighs heavily in favor of Defense.

70. **Whether the Accused made a demand for a speedy trial:** SrA McLeod had not made a formal demand for a speedy trial. However, this *Barker* factor should not be weighed against the Defense. *See Laminman*, 41 M.J. at 523 ("So two weeks to put on a court martial is not bad, after [the accused] asked for the speedy trial, ***but the period before that is what troubles me.*** The thing is that the meager evidence on the reasons for why it took so long . . . does not convince me that the government was pursuing the case with reasonable diligence.") (emphasis added).

71. Just like *Laminman*, the same can be said for the Government in this case. While the Government contended their "ready date" was 13 January 2022, sixteen (16) days after Service of Referral, this only begs the question: Then what took so long? What necessary investigative or procedural steps took place between the imposition of pretrial confinement, preferral, the Art 32 report, referral and arraignment, enough to justify a 128 day delay? What can the Government point to, to show that a 62 day delay between pretrial confinement and preferral was needed? As noted *supra*, many important rights of the accused, namely discovery rights, appointment of experts, etc., only attach after referral under R.C.M. 602; during that time, a confinee of the Government, like SrA McLeod, is at the Government's mercy, with very little recourse.

72. There can only be two answers to these questions: First, either the Government can—and must—point to some "particularized and appropriate reasons justifying the delay," *Cooley*, 75 M.J. at 262; or (Second), this case is not complicated and the Government failed in its responsibility to move forward with "reasonable diligence." Defense is aware of no justifiable reason(s) for the 128 day delay between pretrial confinement and arraignment (not to mention the other particularized periods of concern) and must conclude that the Government merely failed in moving the case with reasonable diligence, thereby violating SrA McLeod's Article 10 right to a speedy resolution.

73. **Prejudice to the appellant:** "To begin, we are mindful that the Supreme Court has squarely held that *Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the Constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25 (1973) (citations omitted) (emphasis added). *See also Miller*, 66 M.J. 571, 577 (finding the balance of the *Barker* factors weighed in favor of an Article 10 violation even though the accused suffered no "obvious prejudice").

74. The three recognized interests of prejudice are: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *Mizgala*, 61 M.J. at 129 (internal quotation marks omitted) (quoting *Barker*, 407 U.S. at 532).

Minimizing Anxiety and Concern of the Accused

75. While in pretrial confinement, SrA McLeod has been assaulted, and has had to deal with severe and persistent anxiety. The assault resulted from another inmate jumping on SrA McLeod and repeatedly striking him in the head and face. This goes above-and-beyond the extreme anxiety one must feel when confronted with these kinds of charges; in addition to that, word has gotten out to other inmates within the facility about the charges facing SrA McLeod. Each day, he lives in constant fear of another attack.

Defense Impairment

76. SrA McLeod's pretrial confinement has greatly restricted his ability to communicate with his Defense Counsels (Capt Ryder, Capt Beshore, and Capt Rivera-Chambers) and assist in his own defense. While the confinement facility does take inbound phone calls for inmates, having a client locked away in a cell makes communication difficult. Additionally, his incarceration at the Lowndes County Jail (which is a facility that is more than 30 minutes away by car for the local Defense counsel (Capt Ryder) makes it more difficult for Defense to prepare for his court-martial. While SrA McLeod's ADC willingly makes this trip to facilitate SrA McLeod's defense, it is time consuming and restrictive of how often they can communicate. Additionally, our appointed experts are unable to access or coordinate with him without great difficulty. In sum, this communication impairment has negatively affected SrA McLeod's ability to prepare for trial.

77. Based on the foregoing, the fourth *Barker* factor weighs in SrA McLeod's favor and against the Government.

CONCLUSION

78. This Honorable Court should GRANT Defense's Motion to Dismiss for Article 10 Violations with Prejudice as the *Barker* factors weigh in favor of SrA McLeod. The scale under Article 10, UCMJ, is tipped in his favor and the law dictates that the Charges against him should be dismissed with prejudice. By the time he was arraigned, SrA McLeod had waited multiple months while the Government slowly, unreasonably, moved his case along. There was nothing

about the Government's delay that could be justified. A simple peek behind the Charges and Specifications reveals that this case should have proceeded last year. Instead, the Government delayed. Considering the diligence of the investigation that preceded his pretrial confinement, the nature of the Charges and Specifications, and the fact that SrA McLeod was put into pretrial confinement with little recourse, his case should have been the Government's **number one priority** as the M.C.M. demands. Instead he waited, and waited, and waited for the Government to take any action. "Plainly, the drafters did not envision [airman], ***presumed innocent, with no access to bail, and held merely to ensure their presence at trial, spending thirty, sixty, or even more days of confinement prior to the government even preferring charges."*** *Simmons*, 2009 CCA LEXIS 301, at *31 (emphasis added). SrA McLeod waited 62 days for Preferral, another 27 days for a PHO report, and 15 days after the PHO report for service of Referral. In total, he waited 128 days before arraignment. Such unreasonable delays require an Article 10 remedy on his behalf.

RELIEF REQUESTED

79. THEREFORE, the Defense respectfully requests this Honorable Court to DISMISS the Charges and Specifications against SrA McLeod pursuant to Art 10, UCMJ.

80. The Defense requests an Article 39(a) hearing on this matter.

Respectfully Submitted,

[redacted]

STEPHAN A. RYDER, Capt, USAF
Area Defense Counsel

31 Attachments:
1. PCRO Memorandum, dated 29 Sep 21 (4 pages)
2. Art 32 Report, dated 15 Dec 21 (28 pages)
3. Arraignment Correspondence, dated 4-21 Jan 22 (7 pages)
4. Joint Status Update – Dismissal, dated 23 March 2022 (1 page)
5. Initial AFOSI Contact by [redacted] dated 4 Aug 21 (3 pages)
6. AFOSI Record of Initial Contact, dated 5 Aug 21 (3 pages)
7. Interview Notes of [redacted] dated 8 Aug 21 (14 pages)
8. Texts between [redacted] and A.B., undated (2 pages)
9. [redacted] AF IMT 1168 & iPhone/Apple Consents, dated 8 Aug 21 (13 pages)
10. Evidence Collection Documentation, dated 13-17 Aug 21 (24 pages)
11. Consents to Intercept Communications, dated 18 Aug 21 (6 pages)
12. Operation Hide and Seek, dated 1 Sep 21 (5 pages)
13. August Google Communications, various dates (40 pages)
14. Additional Surveillance and Evidence collection, dated 7 Sep 21 (23 pages)
15. September Google Communications, various dates (123 pages)
16. Communications with Blazer, various dates (30 pages)
17. AFOSI Pre-Arrest Coordination, dated 8 Sep 21 (3 pages)

18. Search Warrants, dated 18 Sep 21 (36 pages)
19. Operation Green Lynx, dated 17 Sep 21 (7 pages)
20. Bodycam Footage of Arrest, dated 18 Sep 21 (1 disc)
21. Truck Stop Footage, dated 10 Sep 21 (1 disc)
22. SrA McLeod Interview Time Documentation, dated 18-19 Sep 21 (3 pages)
23. Interview Notes for SrA McLeod, dated 18-19 Sep 21 (11 pages)
24. Search Warrant Notes on Residence, dated 18 Sep 21 (20 pages)
25. AFOSI Request to DC3 for Forensic Analysis, dated 8 Oct 21 (6 pages)
26. DC3 report, dated 21 Dec 21 (14 pages)
27. Family and Friends Interviews, various dates (14 pages)
28. Receipts from LoveStuff Montgomery, various dates (4 pages)
29. Photo of SrA McLeod's Car, undated (1 page)
30. On-Scene Extraction Report, dated 7 Oct 21 (3 pages)
31. CDO Memorandum, dated 7 Jan 22 (1 page)

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document on the Military Judge and Trial Counsel via e-mail on 11 April 2022.

[redacted]

STEPHAN A. RYDER, Capt, USAF
Area Defense Counsel