No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Robert A. Condon — PETITIONER
(Your Name)

vs.

United States Air Force — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Armed Forces
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert A. Condon 94312
(Your Name)

1300 N. Warehouse Road
(Address)

Fort Leavenworth, KS 66027
(City, State, Zip Code)

419-877-0342
(Phone Number)

QUESTIONS PRESENTED

1. DO THE PROTECTIONS OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA STILL APPLY TO MILITARY MEMBERS, AND, IF SO, DID THE MILITARY JUDGE ERR WHEN HE REFUSED TO DISMISS ALL CHARGES WITH PREJUDICE AFTER HE RULED THAT APPELLANTS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL HAD BEEN VIOLATED?

2. DOES ORDERING AN INDIVIDUAL TO TESTIFY AS A VICTIM, AGAINST THEIR WILL, REPRESENT AN UNLAWFUL COMMAND INFLUENCE UPON THE FAIRNESS OF A CRIMINAL TRIAL THROUGH MILITARY COURTS-MARTIAL?

3. DID THE COURT OF APPEALS FOR THE ARMED FORCES ERR WHEN THEY REFUSED TO REMAND APPELLANTS CASE TO THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS SO THAT COURT COULD CONSIDER WHETHER THE PROSECUTION FAILED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS UNDER BRADY?

4. DID THE COURT OF APPEALS FOR THE ARMED FORCES ERR WHEN THEY DECLINED TO GRANT FOR REVIEW THE PRIOR DISSENTING OPINION FROM A SENIOR JUDGE OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS, A LOWER APPELLANT COURT?

5. DID THE MILITARY JUDGE ERR IN ADMITTING APPELLANT'S INVOCATION OF HIS RIGHT TO COUNSEL IN HIS AFOSI INTERVIEW AT TRIAL OVER DEFENSE OBJECTION, AND, IF SO, DID THE COURT OF APPEALS FOR THE ARMED FORCES ERR WHEN UPHOLDING THIS RULING DURING APPELLANT REVIEW?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all partied to the proceeding in the court whose judgment is the subject of this pretention is as follow:

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at No. ACM 38765; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[X] reported at No. 17-0392; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 01 March 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 01 March 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. The Sixth Amendment to the United States Constitution: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial...

2. The Federal Speedy Trial Act of 1974, 18 United States Code (U.S.C): During federal criminal prosecution, the information of indictment must be filed with-in 30 days from the date of arrest... Trial must commence with-in 70 days from the date the information or indictment was filed...

3. Uniformed Code of Military Justice (UCMJ); Rules for Courts-Martial (R.C.M) 707 Speedy Trial (Attachment 34): The basic period from arrest or summons to trial under The Federal Speedy Trial Act 18 U.S.C is 100 days. The period of 120 days was selected for courts-martial as a reasonable outside limit given the wide variety of locations and condition in which courts-martial's occur... when an accused has been held in pretrial confinement for more than 90 days, a presumption arises that the accused right to a speedy trial united Article 10, UCMJ has been violated.

4. UCMJ R.C.M Article 10 (Attachment 34): When a person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him, or release him. A violation of Article 10 is considered a constitutional violation and the only remedy is dismissal of charges with prejudice.

5. UCMJ R.C.M Rule 304 (Attachment 35): any commissioned officer may order pretrial restraint of any enlisted person.

6. UCMJ R.C.M Rule 704 (Attachment 36): Testimonial Immunity

7. UCMJ R.C.M Article 37: No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a courts-martial

8. UCMJ R.C.M Rule 701 (Attachment 37) Discovery

STATEMENT OF THE CASE

On 25 September 2014 Appellant was tried at a General Courts-Martial (GCM) by a jury of 8 military members assigned to the Special Operations Command, Hurlburt Field, Florida. Contrary to his pleas, Appellant was found guilty of a charge and two specification of violating Article 92, Uniform Code of Military Justice (UCMJ); a charge and two specification of violating Article 120, UCMJ; a charge and a specification of violating article 120a, UCMJ; a charge and specification in violating of Article 125, UCMJ; a charge and specification in violation of Article 128, UCMJ; and a charge and four specifications of violating Article 134, UCMJ.

Appellant was sentenced to confinement for 30 years and a dishonorable discharge.

The investigation into Appellants conduct began on 6 September 2013, when his estranged girlfriend, A1C ML, alleged that on the evening of 4 September 2013, when she was at Appellants house, an argument broke out over her refusal to engage in sex. A1C ML alleged Appellant violently assaulted her and proceeded to sexually assault her. The allegation from A1C ML occurred in an off base, private residence, in the jurisdiction of the Okaloosa County Sheriff's Office with no shared jurisdiction with the United States Air Force (USAF).

Based on the claims of A1C ML, The Air Force Office of Special Investigations (AFOSI) launched an investigation into Appellants conduct. This Investigation included over 20 Special Agents, who conducted over 100 interviews across the country (Attachment 1). These interviews included co-workers, friends, and family of Appellant. At one point AFOSI began arbitrarily selecting people from Appellants phone, calling them, and questioning them on the nature of their relationship with Appellant or if they had engaged in sexual activity with Appellant (Attachment 2). AFOSI Agents informed each individual who was interviewed what Appellant was accused of.

Of the 103 people interviewed in this entire investigation only 4 were in relation to A1C ML's allegation.

During this investigation AFOSI identified and interviews Special Agent AD (SA AD). SA AD had been a co-worker of Appellants and had dated Appellate on and off since 2012. The lead investigators in this case, SA Sawyer and SA Paradis, identified SA AD as a victim. SA AD later provided a request not to testify against Appellant citing that the investigation was never something she wanted to be part of and that she had been given a grant of immunity that was later "used as a tool to manipulate [SA AD] into testifying" (Attachment 3 & 4). SA AD also stated that she felt "professionally responsible" for the other accusers because she had a "duty to protect others and help them find justice". SA AD stated "the Governments actions have left a much more significant impact on [SA AD] life than anything between [Appellant] and her". SA AD closed the letter by stating that she understood Appellant may not be prosecuted on the charges relating to her if she did not testify and that she was okay with that outcome.

SA AD was ordered to testify against her will and Appellant was convicted of the charged offenses relating to SA AD (Attachment 5).

On 9 October 2013 SA Paradis conducted an interview of JD. JD provided a typed and signed statement on the nature of her relationship with Appellant. Later that day SA Paradis went by himself to meet JD at a Starbucks where he directed JD to change her previous statement (Attachment 6). The changed statement was then used to make JD a victim and the statement directly resulted in Appellant being placed into pre-trial confinement on 10 October 2013 where Appellant waited 344 days for his trial to begin. The Jury ultimately acquitted Appellant of all charges related to JD.

In March of 2017, Appellants family hired a private investigation to assist with Appellants post trial process. The investigator found records of a prior criminal conviction of A1C ML (Attachment 7). This prior conviction was never disclosed in discovery even though it clearly should have been known to the prosecution due to the extensive background check conducted by AFOSI on A1C ML (Attachment 8).

LAW AND ARGUMENT

1. **DO THE PROTECTIONS OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA STILL APPLY TO MILITARY MEMBERS, AND, IF SO, DID THE MILITARY JUDGE ERR WHEN HE REFUSED TO DISMISS ALL CHARGES WITH PREJUDICE AFTER HE RULED THAT APPELLANTS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL HAD BEEN VIOLATED?**

The constitutional right to a speedy trial is a fundamental right of the military accused protected by both the Sixth Amendment and Article 10. *United States v. Mizgala,* 61 M.J. 122 (C.A.A.F. 2005). The Sixth Amendment provides that the accused shall enjoy the right to a speedy and public trial. The Federal Speedy Trial Act, 18 United States Code (U.S.C) 3161 states that information or indictment must be filed within 30 days from the date of arrest... and that trial must commence within 70 days from the date the information of indictment was filed. Rule 707 of the UCMJ allows an addition 20 days to this clock due to the "wide variety of locations and conditions in which courts-martial occur." Rule 707 also states that after an accused is held in confinement for more than 90 days, a presumption arises that the accused's constitutional right to a speedy trial under Article 10 has been violated. In such cases the Government must demonstrate due diligence in bringing the case to trial. Rule 707 also states that if an accused has been denied his or her constitutional right to a speedy trial, the only available remedy is dismissal with prejudice *Strunk v. United States, 412 U.S. 434 (1973).*

The UCMJ follows the test set forth in *Barker v. Wingo,* 407 U.S. 514 (1972). This test analyzes the following factors: the length of the delay; the reasons for the delay; whether the accused made a demand for a speedy trial; and the prejudice to the appellant.

On 10 October 2013 Appellant was placed into pretrial confinement. Per the rules of the UCMJ, military personnel placed in pretrial confinement are not eligible for release on bail and will remain in pretrial confinement until ordered out of confinement by a superior officer. Appellant was held without formal charges for 133 days. On 31 January 2014 the Government

first preferred charges on Appellant (Attachment 9 & 10). On 28 May 2014 the Military Judge presiding over Appellants case ruled that Appellants right to a speedy trial had been violated. The Military Judge dismissed all charges without prejudice (Attachment 11 P. 137 L. 10-11). That same day the Government recharged Appellant with all the original charges, with the addition of 4 charges not previously charged (Attachment 12). The additional charges increased Appellants potential confinement by 15.5 years. Appellant remained in pretrial confinement for 344 days until his trial began on 25 September 2014.

1. *Length of delay*

Appellant was ordered into pretrial confinement of 10 October 2013. The trial started on 19 September 2014. The total length of delay was 344 days.

2. *Reason for delay*

The reasons given for the delay in bringing this case to a speedy trial lack any semblance of reasonableness. The Military Judge cites in his ruling that the following reasons excuse the Government of responsibility "given the complexity of this case, the nature of the allegations of sexual assault, sexual assault in today's environment, the fact that the accused allegedly impacted other trial already conducted, the workload in this office, the technical and science data that had to be collected and analyzed" (Attachment 10, P 136, L 7-14). These reasons are not consistent with the evidence presented in this case or the standards set forth by the United States Supreme Court.

a. The complexity of the case.

The Government argued and the Judge agreed that this case was overly complex and involved many moving parts which delayed preferal of charges and ultimately delayed the trial, this is not accurate.

During testimony SA Sawyer, the lead investigator in this case, stated that the last substantive step taking in this investigation was conducted in November of 2013 (Attachment 14, P. 369 L. 17-20). SA Sawyer also stated that most of what was done in December 2013, and

January & February of 2014, was digging into Appellants background in order to get to know who he was (Attachment 14, P.368 L. 16-20). According to the packet of evidence sent to the defense with the preferal of charges the last piece of evidence in this case was collected on 4 November 2013 (Attachment 16). A period of 88 days passed between the last piece of evidence being collected and charges being presented to Appellant.

The Government went as far with this reason as to exclude 30 days from the speedy trial clock so the investigative background checks SA Sawyer was conducting could continue longer. On 10 January 2014 the Government applied for and was granted an exclusion of 30 days from the speedy trial clock due to the "complexity of the case" (Attachment 15). This exclusion was done ex-parte and approved by a military officer who was not a military judge. This exclusion was not served on the defense until 5 February 2014 (Attachment 16).

Of the 103 interviews conducted in this investigation only 21 people testified in the Governments case in chief (Attachment 17). Of these 21 people, 13 were experts or other law enforcement officials who worked on the case. 8 were actually interviewed in the course of the investigation into Appellant; the other 95 people interviewed had nothing substantive to add to this case. Less than 7% of the "complex investigation" resulted in evidence for the Governments case.

Investigative breakdown by Allegation (Attachment 1 & 17):

A1C ML: Interviewed 6 September 2013

No other interviewed witnesses were presented by the Government for A1C ML

SA AD: Interviewed 13 September 2013

Other witnesses include:

B. Faber: interviewed 17 September 2013

J. Tuck: Interviewed 17 September 2013

SA K. Banyas: Interviewed 24 September 2013

JD: Interviewed 9 October 2013

No other interviewed witnesses were presented by the Government for JD

A. Blake: Interviewed 17 October 2013

Used as a uncharged propensity witness

Forgery:

SA V. Politte: Interviewed 1 October 2013

Maj. Combs: Not interviewed by AFOSI

SMSgt. Moore: Not interviewed by AFOSI

Obstruction of Justice:

LT S. Madsen: Not interviewed by AFOSI

AM2. Henry: Not interviewed by AFOSI

Not one interview identified after Appellant was place into pretrial confinement was used in the trial against appellant.

b. The nature of the allegations of sexual assault, sexual assault in today's environment.

The Judge references the allegation type and the nature of sexual assault in today's environment as an acceptable reason for delay. There is no legal standard that allows an individual's constitutional rights to be suspended due to the nature of a crime in relation to the current political environment in the United States.

c. Impacted other trial already conducted, the workload in this office

The excuse of a busy office or overcrowded court docket as a reason for violating the right to a speedy trial is covered in *Strunk v. United States*, 412 U.S. 434 (1973)

d. The technical and science data that had to be collected and analyzed.

The technical and science data required in this case would be the most legal and acceptable reason for delay. The problem with this excuse is that a majority of this evidence was collected and processed long before the Government preferred charges. The last piece of DNA evidence presented was received on 4 November 2013 (Attachment 1). The only delay

with technical material was the Appellants cell phone which could not be processed until charges were preferred. The Government did not prefer charges because they did not have all the technical evidence, however, the Government could not get the technical evidence they needed until the preferal of charges (Attachment 18 P. 56-57). This excuse turns into a problem with no clear end.

e. Other reasons for delay

There are several other reasons why the Government delayed action in this case that are not listed in the Judges reason for delay.

1. The Government had the evidence in this case for over 100 days when they sent charges to Appellant, however, according to an email sent with the charges, the Government made no attempt to coordinate with the Defense regarding possible preliminary hearing dates until 14 days before their ready date (Attachment 19). This gave a huge advantage to the Government, with over 6 months of preparation the Government was already prepared to go to the preliminary hearing, while the Defense was expected to prepare for the hearings and clear their schedules in only 14 days or accept a delay.

2. The Government had originally docketed this case for five days. After the first dismissal the Government decided to add charges which required addition witnesses. Once the trial stated in June the Judge stated the trial dates were not long enough and require at least 11 days, ultimately the trial had to be rescheduled (Attachment 20 P.23 L.4-8, P. 27 L. 1-12) (Attachment 20a). Due to a busy docketing schedule the choice was given to the Defense to either break the trial into two parts, allowing the Government to present their case and then come back several weeks later and present the defense, or ask for a continuance, the Defense decided to ask for a continuance (Attachment 20 P. 26 L.1-15) (Attachment 21).

f. Evidence presented also shows that Appellant made every attempt in his power to speed the process along. On 26 March 2014 Appellant waived the five day waiting period between referral of charges and arraignment in order to speed up the legal process (Attachment 21a P.4 L.19-20).

3. *Appellants assertion of his right to a speedy trial*

Appellant made 4 separate assertions to his right for a speedy trial (Attachment 16 & 22). The first was on 16 October 2013. On that same day the Government responded acknowledging they had received the original Defense request (Attachment 22a)

4. Prejudice

The prejudice in this case weighs heavily against the Government. The well-recognized interest of as accused to a speedy resolution of the charges against him include the prevention of oppressive pretrial incarceration; minimization of anxiety and concern; and limiting the possibility that the defense will be impaired. *Barker v. Wingo,* 407 U.S. 514 (1972). Appellant was prejudice in the following ways:

a. Memory loss

On 52 separate occasions witnesses in this case mentioned memory loss or impairment. The most detrimental of these are found in the testimony of SA AD who specifically stated that the amount of elapsed time had negatively affected her memory and testimony (Attachment 23 P. 6)

b. Evidence loss

On 9 September 2013 Appellants phone was taken by AFOSI. The chain of custody on this phone was incomplete and the phone was not tested with the other electronic media in this case. At some point, while in the custody of the Government, the phone stopped working and over 1000 text messages between Appellant and both A1C ML and SA AD were lost. These messages would have provided key evidence to the nature of both these relationships leading up to the accusations. A computer expert later testified that the destruction of this phone was consistent with the normal wear and tear of the cell phone (Attachment 23 P.9). Had this phone been tested earlier, it is likely the data would have been recovered.

c. Oppressive pretrial confinement

Appellant was placed in solitary confinement for nearly 79 days for no other reason than it was convenient to the Government. This confinement had a major negative impact on Appellants Defense in this trial.

On 10 October 2013 Appellant was placed into pretrial confinement and held at the Santa Rosa County Jail (SRCJ). Appellant remained at SRCJ for 6 days and was then moved to the military brig at the Naval Air Station (NAS) in Jacksonville, Florida. While at NAS, Appellant retained a civilian attorney local to Jacksonville, Florida and was only 2 hours away from his assigned military council. Appellants Defense council made it clear to the Government on 08 November 2013 that, while at NAS, Appellant was able to meet with his attorney weekly and make unmonitored phone calls with his attorney at will (Attachment 24b).

On 26 May 2014 Appellant was moved back to SRCJ, over 5 hours away from his hired attorney. While at SRCJ Appellant was kept in an 8 foot by 16 foot cell in solitary confinement. Appellant was only able to call his attorney during his 1 hour out of his cell and even then from a monitored phone in a common room where other inmates could hear his conversations. Appellant lost contact with his attorney for weeks at a time and was unable to prepare for his trial in any way. Appellate Defense council submitted several complaints to the Government on this matter (Attachment 24 & 24a). The first complaint, dated 6 June 2014, went completely ignored, while the second complaint, dated 11 July 2014, was met with an administrative brick wall and signed with a smiley face (Attachment 24c).

The only accommodation to Appellants request came when, on several occasions, AFOSI Special Agents picked Appellant up from the jail in order for Appellant to make his attorney calls. The AFOSI Agents, who were members of the agency which was actively investigating Appellant, would give him one of their cell phones, and stand outside the vehicle while Appellant made his attorney calls (Attachment 25 P. 209 L.1-5). The AFOSI personnel responsible for transporting Appellant stated he appeared tired and unkempt when they would pick him up from SRCJ (Attachment 25 P.213 L. 1-3).

After the Defense continuance was granted Appellant was moved once more, this time from SRCJ to a different pretrial confinement facility in Charleston, South Carolina,

almost 4 hours from his attorney in Jacksonville. Appellant spent the 60 days prior to trial in Charleston before being moved to the Okaloosa County Jail where he remained for the duration of his trial. All told, Appellant was moved 6 times to four separate pretrial facilities which never allowed Appellant a chance to settle into the comfort of a routine or prepare for his upcoming trial.

On 25 September 2014 the Military Judge ruled that Appellants pretrial conditions had been overly harsh and granted 1 for 1 credit for the time spent in the SRCJ (Attachment 26).

d. Loss of expert witness

Due to the Governments failed scheduling of the trial, and the required continuance, Appellant lost access to the expert forensic psychologist who had over 6 months with Appellants case and Appellant was forced to request a new expert who had less than 30 hours with Appellants case (Attachment 27).

e. Jury exposure to Appellants pretrial confinement

When the case was originally dismissed on 28 May 2014 the Government recharged Appellant with 4 additional charges. Essentially the Government admittedly violated Appellants right to a speedy trial and was in a stronger position because of it due to the additional charges, which were only allowed to be added because the Governments violation of Appellants right to a speedy trial.

All 4 of the added charges were focused on Appellants time in pretrial confinement and this directly exposed the Jury to the 344 days Appellant spent in pretrial confinement. Given the nature on pretrial confinement in the military, most military members understand that it is only used in situations where the accused imposes a serious threat to society. The presentation of this information for the Jury to hear was directly prejudicial to Appellants defense.

It is clear by the evidence presented that Appellants right to a speedy trial was not only violated but that it is a constitutional violation and should have been dismissed with prejudice. This issue was only reviewed 1 time in the past 5 years. The military Judge ruled against Appellant on 28 May 2014, (Attachment 11) then affirms his ruling on 25 September 2014, (Attachment 26). Both rulings were done verbally from the bench and without the follow up of a written explanation. Both levels of military appellate court declined to look into this issue any further. The original defense motions are attached for further review (Attachment 28).

Both of the minimal rulings by the Military Judge and the refusal of review by both levels of appellate review have left this issue as a festering wound to the military justice system. The information provided shows a clear violation of Appellants right to a speedy trial in every manner of the rule. The military not only violated the Speedy Trial Act but also their own 120 standard set forth in Rule 707 of the UCMJ which is already longer than the amount of time set forth by the Speedy Trial Act.

This decision is also contrary to anything found either in *Strunk v. United States, 412 U.S. 434 (1973) or Barker v. Wingo,* 407 U.S. 514 (1972). The Supreme Court has held that "the ultimate responsibility for such circumstances must rest with the government rather than the defendant." [412 U.S. 434, 437].

The Court has also held that "The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases" [467 F.2d, at 973]

In Appellants case the Military Judge did rule there was failure to afford a speedy trial but the Military Judge was hesitant to find the appropriate relief. As Appellant has displayed, this delay is completely in the hands of the Government and as such it is clearly a constitutional violation of Appellants Sixth Amendment rights and should result in a dismissal of all charges with prejudice.

2. DOES ORDERING AN INDIVIDUAL TO TESTIFY AS A VICTIM, AGAINST THEIR WILL, REPRESENT AN UNLAWFUL COMMAND INFLUENCE UPON THE FAIRNESS OF A CRIMINAL TRIAL THROUGH MILITARY COURTS-MARTIAL?

According to Rule 37 of the UCMJ no person subject to this chapter may attempt to coerce or, by unauthorized mean, influence the actions of a courts-martial.

Rule 704 of the UCMJ immunity is to be granted when someone is likely to refuse to testify due to invoking their privilege against self-incrimination. Rule 704 also protects against an individual when the Government has engaged in discriminatory use of immunity to obtain a tactical advantage or, the Government, through its own overreaching, has forced the witness to invoke the privilege against self incrimination.

On 13 September 2013 SA AD was interviewed by AFOSI. On 31 January 2014 Appellant was charged with crimes against SA AD. On 03 October 2013 a grant of immunity was drafted and issued for SA AD concerning an alleged threat Appellant made against SA AD (Attachment 3). On 21 February 2014 the grant of immunity was served on SA AD (Attachment 3). On 28 April 2014 SA AD submitted a specific request not to testify against Appellant. SA AD cited that she felt manipulated by the Government and that she never wished to be part of the investigation when it first started (Attachment 4). On 17 September 2014 SA AD state on the record that she did not want to testify against Appellant, that it was the Governments choice for her to testify, and that she had in fact been ordered to testify against her will (Attachment 5)

The facts presented clearly show that the Government manufactured a need for SA AD to require immunity. The Government also produced the grant of immunity 4 months before they presented it to SA AD, which suggest that the grant of immunity was not created at SA AD's request, but was created as a weapon to be used to gain a tactical advantage over a woman who was unwilling to agree with the Governments fabricated version of what occurred between her and Appellant. When SA AD requested not to testify the Government deployed the grant of immunity to manipulate and to coerce SA AD's cooperation and testimony to match their theory of the events between SA AD and Appellant.

If it were not for this manipulation of SA AD through the grant of immunity, which the Government only procured through their unethical and overreaching methods, Appellant would not have faced a single charge related to SA AD. This sort of action is directly contrary to the rules of both Rule 37 and Rule 704 and the American justice system. Tactics like this should not be allowed and this court should make it clear that the Government cannot force someone to be a victim.

3. DID THE COURT OF APPEALS FOR THE ARMED FORCES ERR WHEN THEY REFUSED TO REMAND APPELLANTS CASE TO THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS SO THAT COURT COULD CONSIDER WHETHER THE PROSECUTION FAILED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS UNDER BRADY?

On 6 September 2013 A1C ML accused Appellant of sexual assault. During the course of the investigation AFOSI conducted a background check on A1C ML. AFOSI checked 6 separate law enforcement databases for derogatory information regarding A1C ML. Each check conducted on A1C ML resulted in a finding of "nothing pertinent to this investigation" (Attachment 8).

In May of 2017, Appellants family hired a private investigator to assist with Appellants post trial rights. The investigator discovered A1C ML had a prior conviction for theft (Attachment 7). This conviction was prior to A1C ML's enlistment in the USAF. This record had never been disclosed to the Defense.

In May of 2017 Appellant filed two motions, one to submit the supplemental assignment of error, and the other for appellate discovery of A1C ML's enlistment records (Attachment 29). Both were denied by Court Of Appeals for the Armed Forces (CAAF).

While the conviction for theft on its own may not weigh heavily as a factor of integrity, A1C ML would have been required to fill out several enlistment forms in order to join the USAF, one of these forms would have been the Department of Defense (DD) Form 369 (Attachment 7a). Had this prior criminal conviction been shared during discovery and explored

at the time of the trial it would most defiantly have qualified as not just one but several crimes of integrity and weighed heavily as impeachment evidence against A1C ML.

Considering that no such record was disclosed to the Defense during discovery there are two possible scenarios. Scenario 1 is that A1C ML never disclosed this prior criminal conviction, which would mean that A1C ML also committed the offense of submitting a false official statement by completing an untruthful DD Form 369, which would also mean A1C ML joined the USAF by committing the offense of fraudulent enlistment, both of which are felony offenses. The second scenario is that the Government was completely aware of the conviction and decided to hide it from the Defense in order to gain a tactical advantage which is a direct violation of *Brady v. Maryland*, 373 U.S. (1963). In either scenario Appellant deserves the right to have this new information addressed and weighed against A1C ML's testimony which helped put him in prison for 30 years.

The prosecution had a duty to seek out such information under *Brady v. Maryland*, 373 U.S. (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995); and in response to the defense discovery request. The Government has substantial resources and was more than capable of finding this information, as prior stated by SA Sawyer as many as 20 Special Agents worked on Appellants case (Attachment 14).

Evidence on the record shows that on several occasions A1C ML lied under oath and the addition of this excluded information would have been crucial in showing further dishonesty on her part (Attachment 29). The presence of a criminal conviction is information clearly allowed at trial for impeachment of a witness *Giglio v. United States*, 405 U.S. 150 (1972).

The question before this court and that must be answered is, if this conviction did not matter to this case, then why was it hidden? If this remained hidden from the Defense for over 5 years and was only found due to the persistence of Appellants family, then what else may be hidden?

The United State Air Force completely disregarded the rules of *Brady v. Maryland*, 373 U.S. (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995) in this case. What is worse is that when Appellant discovered the violation and brought it to the attention of the United States Court Of Appeals for the Armed Forces Appellant was ignored without explanation (Appendix B). The ruling in this matter is contrary to the prior ruling of the Supreme Court.

The original motion to submit supplemental assignment of error and the motion for appellate discovery are attached for review (Attachment 28 & 29).

4. **DID THE COURT OF APPEALS FOR THE ARMED FORCES ERR WHEN THEY DECLINED TO GRANT FOR REVIEW THE PRIOR DISSENTING OPINION FROM A SENIOR JUDGE OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS, A LOWER APPELLANT COURT?**

On 10 March 2017 The United States Air Force Court of Criminal Appeals (AFCCA) ruled to affirm Appellants conviction and sentence of 30 years.

Senior Judge Brown wrote a 6 page dissent to this opinion in which he cited that Appellant only received a sentence of 30 years because of his prior career as a Special Agent with AFOSI. Senior Jude Brown also stated that, in several ways, the evidence of this case was fairly weak and it stood to reason that Appellants interactions with both A1C ML and SA AD may have resulted due to a mistake of fact to their consent by Appellant (Attachment 30).

On 19 July 2017 CAAF granted review on two issues, neither of which addressed anything found in Senior Judge Brown's dissenting opinion (Attachment 30a).

5. **DID THE MILITARY JUDGE ERR IN ADMITTING APPELLANT'S INVOCATION OF HIS RIGHT TO COUNSEL IN HIS AFOSI INTERVIEW AT TRIAL OVER DEFENSE OBJECTION, AND, IF SO, DID THE COURT OF APPEALS FOR THE ARMED FORCES ERR WHEN UPHOLDING THIS RULING DURING APPELLANT REVIEW?**

The Government may not use a defendant's assertion of his Fifth Amendment rights as substantive evidence against him. *Griffin v. California*, 380 U.S. 609, 614 (1965). Also, the Government may not use the defendant's right to remain silent after being informed of his *Miranda* rights as impeachment. *Doyle v. Ohio*, 426 U.S. 610 (1976).

On 9 September 2013 Appellant was interviewed by AFOSI. During this interview Appellant invoked his right to council and the interview was terminated. 15 minutes later law enforcement officers reentered the interview room and told Appellant they were going to break down the door of his residence if he did not supply law enforcement with a key to the door. Because of this interaction Appellant re-approached AFOSI to continue the interview, this time waiving his right to council.

During Appellants trial the Government presented the video of Appellants interview in its entirety, this video included Appellants invocation of his Fifth Amendment rights (Attachment 17 Prosecution Exhibit 6). The Defense objection to this was overruled by the Military Judge.

In Appellants case the invocation of his rights could have easily been edited out and never presented to the Jury. Be it out of laziness or for a tactical advantage this was not accomplished and as a result the jury was exposed to Appellants invocation of his Fifth Amendment rights. As previously asserted in Senior Judge Brown's dissenting opinion (Attachment 30), Appellants status as an AFOSI agent was heavily used against him, and this, linked with Appellants invocation of his Fifth Amendment right, couldn't help but resonate in the minds of the Jury.

The Military Judge's decision to allow the invocation to be heard by the members of the jury and the decision of CAAF upholding the ruling of the Military Judge are both directly contrary to the ruling of the Supreme Court in *Griffin v. California*, 380 U.S. 609, 614 (1965) and *Doyle v. Ohio*, 426 U.S. 610 (1976).

Appellant's briefings at both levels of appellate review are attached for the review of the court:

AFFCA Appellant briefing (Attachment 31)

CAAF Appellant petition (Attachment 32)

CAAF Appellant briefing (Attachment 33)

REASON FOR GRANTING THE PETITION

In April of 2003, at the age of 19, I joined the United States Air Force. Upon my enlistment I took an oath to protect and defend the Constitution of the United States of America. I joined the military after the terrorist attacks on 9/11, while my country was at war, with my eyes wide open to the dangers my decision may entail. I deployed several times during my enlistment, serving in support of my fellow countrymen during Hurricane Katrina, serving combat tours in Iraq and Afghanistan, and deploying in support of Special Operation missions in Jordan, Burkina Faso, and Niger (Attachment 38). I accepted the risks involved with these deployments and made the greatest effort to serve with honor and distinction.

On 6 September 2013 I was accused of a crime. I expected the same Constitutional protections that I had fought for would protect me in my time of need. So far I have been wrong.

According to Rule 304 of the UCMJ "A commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer... and any commissioned officer may order pretrial restraint of any enlisted person" (Attachment 34). This rule gives an incredible power to every commanding officer in the United States military, a power that is only checked by Rule 707 and The Speedy Trial Act. In this case these rules were completely ignored and if that is allowed without correction it means the rules will continue to be ignored and any enlisted, officer, or civilian, who falls under the authority of a military commander, can be detained and held without trial indefinitely.

The Government violated every rule set forth by The Sixth Amendment, The Speedy Trial Act of 1974, *Strunk c. United States, 412 U.S. 434 (1973),* and *Barker v. Wingo,* 407 U.S. 514 (1972) and worse yet, the only real reason the Military Judge had to uphold the Governments decision and his own ruling was "the nature of the allegations of sexual assault and sexual assault in today's environment" (Attachment 10, P 136, L 7-14). This reason is the absolute opposite of what is set forth in the United States Constitution. The people must not be victim to the social trends of the nation; "today's environment" should not come into play as

a reason why a citizen's Constitutional rights are violated as though objective reality is different today from yesterday or tomorrow.

The Government further violated my rights when they ordered SA AD to testify as a victim against me against her will. There would be no charges relating to SA AD if it were not for the Governments involvement. The Government created a victim and manipulated her into testifying the way they wanted her to in order to fit their desired narrative of what occurred. This cannot be allowed in the American court system.

The Government further violated my rights by ignoring the standards set forth in the Fifth Amendment, *Griffin v. California*, 380 U.S. 609, 614 (1965), and *Doyle v. Ohio*, 426 U.S. 610 (1976). I asserted my right to remain silent and ask for an attorney and this was used against me at trial. This issue has been debated at every level of my appellate review yet it is still being upheld even though there is significant case law against it.

The final straw in this case comes with the violations of *Brady v. Maryland*, 373 U.S. (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *Kyles v. Whitley*, 514 U.S. 419 (1995). The accusations from A1C ML were the catalyst that started the investigation into my conduct. If the Government had done their due diligence when they received the allegation then the accusations against me may have ended before my life was torn apart and I was sentenced to 30 years in prison. A1C ML is a known and established liar; she lied to get into the military and she lied once she was in. It wasn't by the honesty of the Government that this information came to light. On the contrary it took the persistence of my family and the investigator they hired. This is not the standard of American justice; the accused is not required to hire an investigator to make sure the Government did their job; the Government is required to seek this information out, it is their duty.

The one bright spot in the military justice system so far is the dissenting opinion of Senior Judge Brown of the Air Force Court of Criminal Appeals (Attachment 30). The question remains, however, what good is a dissenting opinion if the higher court does not read it?

The case against me was not conducted on some distant battle field or on a military deployment. It was conducted in Okaloosa County, Florida in the United States of America. There is an entire American law enforcement system set up specifically to investigate and take to trial offense committed within the United States. For their own reasons my charges were taken by the military, and in applying military rules, the military violated my Constitutional rights without concern for maintaining the legitimacy of the American legal process.

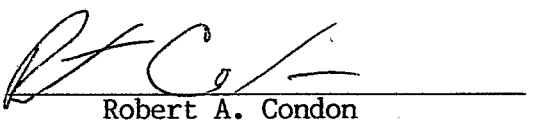
If the Supreme Court does not rule in this case any member of the military can be placed in pretrial confinement indefinitely—as I was—can have their right to remain silent exploited and have their right to discovery violated—as mine were—and have victims created and manipulated to testify against them—as SA AD was. This case is extremely important to national interest, especially "in today's environment". If the citizen of the United States were to discover that the United States Air Force suspended the Constitutional rights of one of its members in the interest of "sexual assault in today's environment", or worse, took an unwilling participant and created a victim out of her through bullying, intimidation, and manipulation, the population's loss of faith in not only the United States Armed Forces, but the judicial system as a whole, would been extensive.

On 1 March 2018, the day my case was affirmed by the highest level of appellant review of the armed forces, a man named Michael Tracy McFadden from Grand Junction, Colorado was released from prison. McFadden had been convicted of molesting 6 separate young boys and girls and had been sentenced to over 300 years in prison. McFadden was released by the Colorado Court of Appeals because the court decided McFadden's right to a speedy trial had been violated. I felt numb when I realized a man, who had as many victims as I had forward deployments, and was serving a sentence 10 times the length of mine, was released from prison while the constitutional errors in my case were ignored and my conviction was upheld. I am not asking for special treatment because of my military service. I only want the same Constitutional protections afforded to every other American citizen.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Robert A. Condon

Date: May 15, 2018