A guide for the perplexed.

United States v. Reyes, decided by CAAF on 30 July 2020 focuses on Article 10, UCMJ.

Was the appellant's right to a speedy trial violated? CAAF applies the *Barker v. Wingo factors*.

(1) length of the delay;
(2) reasons for the delay;
(3) was there a demand for a speedy trial; and
(4) So what?

CAAF looked to the following specific factors in finding no denial of a speedy trial. (I appreciate that there is much we do not know without reading the motions and the record—so my comments are based on my perception of what CAAF is saying.)

Pretrial negotiations. Slip op. at 9. This to me is a squishy factor—why should that matter? Both parties wanted a deal and there were lengthy negotiations—and CAAF concludes that if Appellant wanted a speedy trial he should have stopped dealing or, by implication, offered a better deal for the government early. I think the underlying point here is at that there may be a bad tendency to stop or slow down work on a case when there is a good chance of a PTA. As a senior trial counsel, I encouraged trial counsel to keep working on a case—you might not get a deal and if nothing else, you are putting pressure on the defense—in other words, stay diligent. I can see where some might question to timing of negotiations as relevant. If negotiations arose close to trial, why hadn't the trial counsel been already diligent might be a better question? If negotiations were had early (say after the Article 32 hearing) why should that be any cause for delay?

Getting court ordered experts. Slip op. at 10. I do not have any problem with this being a factor in favor of the government, especially on the facts here. I think best practice is to concede the request and prompt action are not chargeable to the prosecution. But let us assume a timely request and it takes weeks, perhaps months, to get a denial, and then the litigation—which causes (as sometimes happens) a continuance. Why should not the government be chargeable with some of that delay?

PCS of military defense counsel. Slip op. at 11. Ah yes, the reasonably common event these days. Anyone know if this is a COVID affected issue these days? The CAAF here is more focused on the lack of prejudice than this "routine" event. *Id.* But, when thinking of prejudice what about this---the PCS'ing attorney is lead counsel, the most experienced counsel, and now the client has lost the value of the counsel being present for in-person meetings and consultations with lead counsel. Is that enough to prejudice? Probably not, but . . .

Discovery. Slip op. 12. I'll say no more on the here facts than,

"There is no question but that the prosecution was negligent in providing the defense with some discovery." *Id.*

Demands for speedy trial. *Id*. If you want a speedy trial—demand one.

> "Although Appellant submitted several motions to dismiss, alleging that his rights to a speedy trial were prejudiced, he did not actually demand a speedy trial. Assuming without deciding that a motion to dismiss for a violation of the right to a speedy trial is a demand for a speedy trial, Appellant demanded a speedy trial four times. This factor, therefore, weighs in Appellant's favor. *But see United States v. Frye*, 489 F.3d 201, 212 (5th Cir. 2007) (stating that "repeated motions for dismissal of the … charge are not an assertion of the right, but are an assertion of the remedy. A motion for dismissal is not evidence that the defendant wants to be tried promptly" (citing *Barker*, 407 U.S. at 534–35))." Slip op. at 13.

Huuum, I suppose the Government is not aware of the right to speedy trial—which is an obligation that should not need a demand or request? Does the CAAF mean that the Government can sit back and not worry about a speedy trial until they get a written demand—is that the implication? Why not just proceed to a speedy trial (that is what commander's want) and place the onus on the defense to ask for delays. I see this as another in the overall concept of 'it's the defense job to police the government because they will not police themselves,' a theory with which appellate courts tend to agree.

There are four times you should consider a speedy trial demand.

1. When the client is held over on his expiration of enlistment for court-martial. In my mind there is at least a due process speedy trial issue because the argument is that the date of the EAOS is day one of the R.C.M. 707 clock. (If anyone has the issue give me a bell and I will be happy to share my motion on this.)

2. Imposition of conditions on liberty or pretrial restraint.

3. At the IRO hearing for a person in PTC.

4. When new charges are preferred.

When thinking speedy trial, you may want to go visit R.C.M. 707(b), M.C.M. 1984.

When we got R.C.M. 707 we also got a list of factors to consider in assigning responsibility for various reasons for delay. Those were changed and reduced in later iterations of the R.C.M.

> (c) Exclusions. The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run—

I suggest putting the back in the rule, but change "shall" to "may" and say the factors are a non-exclusive list. My recollection is that the rigidity of the factors and counting was upsetting to the government in the few cases in which there was a dismissal—a reaction like that of the *Burton* rule, so the rule got changed. I am inclined to consider rebuttable presumption language as well if they were to go back to the older rule. I always thought a list of discrete factors made analysis less perplexing.

Regardless, when there is a speedy trial issue why not use the factors in analyzing and arguing your speedy trial motion today—your checklist if you will—the factors are helpful to both sides and there is some caselaw. And back then we developed a format for the chronology that looks like this (which some of us still use),

Date	**Event**	**Julian Date [1]**	**Elapsed Date**
01 Jan 19	PTC (or preferral or restraint or extension of enlistment)	001	1
14 Jan 19	Art. 32	014	013
2 Feb 19	706 ordered	33	32
29 Feb 19	706 report complete	59	32[2]
5 Jun 19	Trial	156	129?

The point here is that such a chronology complies with your local rules and makes it really easy to figure out the time elapsed.

Well those are some thoughts stimulated by Reyes. Standing by for agreement, disagreement, or more importantly ways we can do better practice.

[1] I use Quadax.com as the easiest to access and use. In the old days the JD used to be on the government desk calendar—are they still there?

[2] 26 days is not unreasonable based on our mutual experiences.