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1 [The R.M.C. 803 session was called to order at 1044, 12 July
2 2016.]

3 MJ [CAPT WAITS]: The commission will come to order. Let
4 the record reflect that all parties who were present when the
5 commission recessed are once again present.

6 All right, Mr. Rushforth, the next item was the
7 discussion about the discovery that you -- that recently came
8 to your attention that involved a member of the prosecution's
9 trial team.

10 DC [MR. RUSHFORTH]: Yes, Your Honor. Yesterday we -- it
11 was called to my attention that a witness or a potential
12 witness to certain events that figure in two or three of the
13 common allegations is also now a member of the prosecution
14 team, and that's all I know right now. I don't know anything
15 about what that person may or may not be able to testify to,
16 what facts he witnessed. I know nothing.

17 All I wanted to do, Your Honor, was put that on the
18 record, and say that speaking for myself and my team, it
19 raises potential issues, and we're going to seek to explore
20 them. That's all.

21 MJ [CAPT WAITS]: Okay.

22 DC [MR. RUSHFORTH]: And I don't know whether those will
23 turn out to be serious issues or issues that are not so

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 serious.

2 MJ [CAPT WAITS]: Does the government want to be heard
3 about anything related to this potential issue?

4 ATC [LCDR SPENCER]: Your Honor, just very briefly, this
5 witness was -- or this individual is currently a member of the
6 prosecution team, but the government does not anticipate him
7 being a witness for the government in any way. His statement,
8 which the defense has had for -- since last year, speaks for
9 itself. It's very limited. He had very limited contact or
10 interaction during the incident in question, so the government
11 does not intend to call him as a witness.

12 Certainly if the defense wishes to raise it as an
13 issue, the government will address it at that time.

14 MJ [CAPT WAITS]: Very well. All right. So it's on the
15 record, and maybe more to follow or not.

16 So let's move on to the next issue, which is the
17 defense brought up in the 802 yesterday that they are without
18 a defense security officer as of last week and it may be
19 another month or two before that person is replaced. Do you
20 want to be heard on that, Mr. Rushforth?

21 DC [MR. RUSHFORTH]: Yes, Your Honor, very briefly. I
22 approach this from a certain perspective, which is the
23 perspective of civilian counsel that doesn't deal every day or

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 certainly historically has not dealt every day with Top Secret
2 materials and with SAP materials. And I, for obvious reasons,
3 take those responsibilities dealing with such highly
4 classified materials extremely seriously, and I very much have
5 relied on our DSO to inform me as I'm getting into this case
6 what is classified at what level and what I can do and what I
7 can't do.

8 And the notion of proceeding in any way, shape or
9 form with anything in this matter without a DSO frankly gives
10 me the heebie-jeebies, to use a technical term. It is not
11 something that I contemplate wanting to have to do. There are
12 issues every day that come up, not about -- not just about
13 what do I do with this Top Secret document, but rather, is
14 this document, even though it's not designated Top Secret,
15 does it contain Top Secret information?

16 There was an episode some time back where we were
17 going to go public with some earlier material from
18 Mr. Al-Tamir's habeas case, and it has been public. But just
19 before it was sent to me, to my e-mail server at McKool Smith
20 in Washington, the government informed us that it was
21 classified.

22 If that material had come in McKool Smith's e-mail
23 server, there would have been hell to pay, not only from the

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government and from the prosecution and from the commission,
2 but also from McKool Smith, frankly, if our server was somehow
3 searched because it had received classified information.
4 Those are issues that are absolutely critical.

5 MJ [CAPT WAITS]: How was your DSO involved in that?

6 DC [MR. RUSHFORTH]: I don't remember. I frankly
7 discussed it with other members of my team and other members
8 of my team could speak to that. I did not speak directly to
9 my DSO about that. But I know that he is the officer charged
10 under the protective order with informing us and keeping us on
11 the straight and narrow regarding classified information.

12 MJ [CAPT WAITS]: Okay. Let's get some facts on the
13 record or at least some proffers about what we're talking
14 about here.

15 There was -- someone gave me a summary yesterday, I
16 think it was Major Kincaid gave me a summary of what we're
17 talking about here. The DSO that you had who was permanently
18 assigned, and correct me if I'm misstating this, left -- is
19 also a reservist, military reservist, was mobilized, has been
20 gone for a year. In the interim, you've had a temporary fill
21 for one year. That person has left as of last week, and
22 you're anticipating that the person who you had before, a year
23 ago, the reservist, will be returning in a month, and then

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 there might be some time required to get him his SAP read-on
2 back, redone, and back on your case as a DS0.

3 So this is really -- the way I am seeing this, is
4 this is a gap in your temporary interim DS0 leaving and your
5 former permanent DS0 returning to your team. So if someone
6 else needs to ----

7 DC [MR. RUSHFORTH]: Your Honor has accurately stated the
8 facts as far as I know them, but I'll ask Major Kincaid to
9 address them as well.

10 MJ [CAPT WAITS]: Okay. Major Kincaid, can you make a
11 proffer? You can come to the podium if you'd like.

12 DDC [MAJ KINCAID]: Yes, Your Honor, your summarization of
13 yesterday's 802 conference where we discussed the DS0 is an
14 accurate representation of the sequence of events involving
15 our prior DS0, his replacement whose departure has now left us
16 without the necessary parties to prevent us from creating
17 spills and, in fact, to help us respond to spills.

18 Mr. Rushforth has mentioned one earlier potential
19 spill that was averted. We had another one involving
20 discovery -- actually, there have been three involving
21 discovery marked or identified as unclassified by the
22 government, produced to us on NIPR or via CD-ROM and stored on
23 NIPR that turned out to have classified information. Our DS0

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 discovered it before we released it to interested parties,
2 specifically the defense team, that would have wound up
3 potentially on McKool Smith's servers if that's how they chose
4 to handle the delivery. We wound up not delivering that.
5 This position is too crucial not to only keep ourselves out of
6 trouble but to the government's classification identification
7 system.

8 I would also point out that the amended protective
9 order specifically requires the appointment of a DSO to the
10 defense team as part of the defense team. And when the
11 defense had previously briefed this, the government responded
12 that we could just go grab a DSO from another defense team and
13 get their guidance. We absolutely cannot do that for that
14 reason. They are not generic. They are not fungible.

15 So to the extent we do not get a DSO and we are
16 heading into or wind up heading into significant litigation
17 involving the evidence that has thus far been disclosed and
18 the volumes of evidence we expect will have to be compelled to
19 be disclosed by this commission, we are going to have to have
20 that DSO.

21 Thank you, Your Honor.

22 MJ [CAPT WAITS]: Okay. Do you want to resume,
23 Mr. Rushforth?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MR. RUSHFORTH]: Your Honor, I think we've stated our
2 need and our position.

3 MJ [CAPT WAITS]: Okay. Government, what is your response
4 to this what could be a couple-month gap in a DSO being
5 assigned to this particular team?

6 ATC [LCDR SPENCER]: Your Honor, as a threshold question,
7 I would respectfully ask the commission to inquire of the
8 defense whether the defense has requested a replacement DSO.
9 Your order 013K requires -- states upon request of defense
10 counsel for the accused, the convening authority shall provide
11 a defense security officer.

12 MJ [CAPT WAITS]: Okay. I think that's a legitimate
13 question. Okay. You've known that -- I take it you knew that
14 your DSO that left last week was going to be leaving last
15 week?

16 DDC [MAJ KINCAID]: Yes, sir. And in response to the
17 question, if I may anticipate, based on the government's
18 request, we actually did inquire and we did, in fact, receive
19 from the government an extension of our previous temporary
20 DSO. He was actually going to leave earlier, but he agreed to
21 stay for an additional period of time as a result of our
22 request to the convening authority and their contractor
23 they're working with to provide the DSO.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So this actually shows not only that we've complied
2 with our obligations to stay on top of this, but that there
3 has been no substantive reaction to it by the convening
4 authority.

5 MJ [CAPT WAITS]: Well, they extended him, you said. How
6 long did they extend him for?

7 DDC [MAJ KINCAID]: Through the end of last month.

8 MJ [CAPT WAITS]: And how long was that extension?

9 DDC [MAJ KINCAID]: About one month. About 30 days, sir.

10 MJ [CAPT WAITS]: Okay. So did you ask for another DS0 or
11 an extension for the DS0 who left last week?

12 DDC [MAJ KINCAID]: It's a continuing request, sir. We've
13 told them we need a DS0. They gave us an interim. We said we
14 need another DS0. They said we'll get you one. It looks like
15 the next one that is available is going to be the returning
16 DS0. This is getting -- this gets a little complicated
17 because the convening authority is dealing with a contractor.

18 MJ [CAPT WAITS]: Right.

19 DDC [MAJ KINCAID]: I mean, technically because we don't
20 have a DS0, the contractor potentially is in a position of
21 breaching its contract with the convening authority. That's
22 between those two. Right now, all I know is we don't have a
23 DS0, and it's through no fault of our own.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [CAPT WAITS]: Okay. Does that answer your question?

2 ATC [LCDR SPENCER]: Yes, Your Honor. I wasn't suggesting
3 that it was the fault of the defense, I was just ----

4 MJ [CAPT WAITS]: No. Right. That's good that that's on
5 the record. You can't say we have a crisis on our hands and
6 not have done anything to plan for the crisis.

7 ATC [LCDR SPENCER]: Yes, Your Honor. The government's
8 position is that this presumably will be the source of future
9 litigation should the gap go longer than one month as was
10 originally anticipated by the defense. I understand that it
11 might be longer than a month, ostensibly the defense will file
12 a motion or is certainly free to file a motion on that issue.

13 The government does not wish to get into the weeds on
14 the details and the rights and the law with respect to that
15 other than to answer, I believe, it was Major Kincaid's
16 statement, yes, the rule requires the team to have one
17 assigned to them. The rule says nothing about one -- about an
18 individual DSO being assigned to multiple teams.

19 Now, in the case of potential conflicts where you
20 have co-conspirators or where in the 9/11 case, for example,
21 you have defendants that are charged together, I suppose
22 potentially that would be a problem, but the rule does not
23 preclude that.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Additionally, Your Honor, if the defense is concerned
2 about filings outside of the 505 context, the regulation
3 allows them to submit things under seal and the court security
4 officer can do that. Effectively, it shouldn't limit their
5 ability to do what they need to do. That's the government's
6 ultimate position. In terms of the details and going beyond
7 that, the government would request to address that in future
8 litigation.

9 MJ [CAPT WAITS]: Okay. Is it the government's position
10 that the defense team can go directly to the chief security
11 officer of the Office of Special Security without the liaison
12 capacity of a defense security officer on their team?

13 ATC [LCDR SPENCER]: That's correct, Your Honor. That was
14 previously addressed in the government motion.

15 MJ [CAPT WAITS]: Are you talking about in the protective
16 order?

17 ATC [LCDR SPENCER]: No, Your Honor.

18 MJ [CAPT WAITS]: What motion are you talking about?

19 ATC [LCDR SPENCER]: I believe it was the motion to abate
20 the May proceedings.

21 MJ [CAPT WAITS]: Ah. Okay.

22 ATC [LCDR SPENCER]: The government addressed that issue
23 because part of the abatement -- the requested abatement by

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the defense was the DSO issue.

2 MJ [CAPT WAITS]: And at that point the DSO hadn't even
3 left yet, right?

4 ATC [LCDR SPENCER]: That's correct, Your Honor.

5 MJ [CAPT WAITS]: That was just in anticipation of the
6 DSO -- of them having a gap.

7 ATC [LCDR SPENCER]: Correct.

8 MJ [CAPT WAITS]: Okay. All right. Well, given the pace
9 of proceedings here and where we stand, at this time I'm
10 finding that the defense can liaise directly with the chief
11 security officer of the Office of Special Security without the
12 assistance of your own DSO and you're obligated not to release
13 documents without having them reviewed, and that obligation
14 does not change just because you don't have a DSO currently
15 assigned.

16 So that's the court's -- that's the commission's
17 position at this time. If the defense believes that they need
18 some other appropriate relief, then -- as the government has
19 stated, then you're free to request that relief.

20 We're talking about a one- or two-month gap here, and
21 from what I've understood, it's not -- this is not
22 unprecedented. This is just the nature of the beast when
23 you're talking about government contractors. It's a gap. I

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 mean, it's unfortunate. It's not perfect, but it's not --
2 it's not something that cannot be overcome.

3 DC [MR. RUSHFORTH]: Well, Judge, regarding the
4 government's position that we can just go get another DSO from
5 another team, that's fraught with conflicts given all of the
6 co-conspirator allegations in this charge sheet. It is
7 fraught with conflicts, and we wouldn't even think about doing
8 it.

9 And with respect to approaching the court's security
10 officer directly ----

11 MJ [CAPT WAITS]: No, I'm not talking about the court's
12 security officer. I'm talking about the Chief Security
13 Officer of the Office of Special Security, which is referred
14 to at page 8 in paragraph -- it's under the section entitled
15 Defense Security Officer at page 7 of Appellate Exhibit 013D,
16 the amended protective order ----

17 DC [MR. RUSHFORTH]: Well, my question is the same.

18 MJ [CAPT WAITS]: ---- dated 16 September 2014.

19 DC [MR. RUSHFORTH]: I see it in front of me, Judge.

20 My question regarding our conversations with that
21 person raises the same question, which is: Are those
22 conversations privileged?

23 MJ [CAPT WAITS]: Yes.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MR. RUSHFORTH]: How do we know that?

2 MJ [CAPT WAITS]: It says so in the protective order.

3 It's the same privilege that your -- that your DSO has when he
4 talks to them. It's just that you would be -- someone else on
5 your team would be talking directly with them rather than your
6 DSO. I understand it's not ideal, but it can be overcome, and
7 we're talking about a one- to two-month proposition here.

8 DC [MR. RUSHFORTH]: Understood.

9 MJ [CAPT WAITS]: Okay. All right. So the next motion
10 that the Commission is prepared to hear is Appellate
11 Exhibit 058. It's the defense motion for appropriate relief
12 for attribution of speedy trial delay. Who's going to be
13 arguing this one for the defense?

14 DDC [LCDR LOFLAND]: I will, Your Honor.

15 MJ [CAPT WAITS]: And please state the -- who has the
16 burden and what the burden on this motion is, Commander
17 Lofland.

18 DDC [LCDR LOFLAND]: Your Honor, if this commission
19 reaches the underlying issue of speedy trial delay, the
20 defense as the moving party would have the burden of
21 persuasion in accordance with Rule 905.

22 MJ [CAPT WAITS]: Okay. And I guess I -- I'm going to
23 direct you.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MR. RUSHFORTH]: Excuse me, Your Honor.

2 DDC [LCDR LOFLAND]: Pardon me, Your Honor. At the
3 outset, the defense would like to reiterate its objections
4 briefed and stated in Appellate Exhibit 015T and reiterated in
5 058 to briefing this issue at this time. It is the defense's
6 position that this issue is not yet ripe for consideration
7 until such time as Mr. Al-Tamir has been afforded both his
8 rights to counsel of choice and access to all of the discovery
9 to which he is entitled in this case.

10 MJ [CAPT WAITS]: All right. Your objection is noted for
11 the record, and we're going to go ahead and hear the motion
12 today.

13 So what I was about to say was, regrettably, I think
14 the defense did misinterpret the commission's direction in its
15 docketing order for the briefing of this issue. The defense
16 decided to go down the road of constitutional speedy trial.
17 After having referred to a concept called attribution of delay
18 in several pleadings, which from the commission's standpoint
19 recalls a prior version of the Rules for Court-Martial, the
20 R.C.M.s, in which that was an actual concept. That was courts
21 having to attribute delay to one side or the other, the
22 government or the defense, under R.C.M. 707, which was
23 overcome by changes to the Rules for Courts-Martial and which

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are substantially reflected in the Rules for Military
2 Commission or Rule for Military Commission 707, in which the
3 military judge or the convening authority excludes delay.
4 There is no more attribution of delay, and it was, I think, a
5 misplaced use of a term that doesn't have any precedent in
6 military commissions. That's where I was directing the
7 defense.

8 So I'm really not interested today in hearing about
9 the constitutional speedy trial argument. I want you to talk
10 to me about R.C.M. 707. That's where we are.

11 DDC [LCDR LOFLAND]: Well, respectfully, Your Honor, I
12 believe the commission's and the ----
13 [Interpreter voice heard over speaker.]

14 MJ [CAPT WAITS]: Okay. Hold on a second. I did not hear
15 what that was. I assume that was one of the interpreters? If
16 you could please repeat what you just said. Is somebody
17 talking too fast?

18 DDC [LCDR LOFLAND]: Apparently.

19 MJ [CAPT WAITS]: I don't know. My -- is the -- is this
20 monitor operating right now that's talking about -- I haven't
21 been paying attention to it. We're okay? Okay. The court
22 reporter is telling me we're okay.

23 DDC [LCDR LOFLAND]: I didn't receive a caution light up

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 here.

2 MJ [CAPT WAITS]: I haven't seen a caution light yet
3 today. That's why I was wondering if it is even working or if
4 people are being so compliant and speaking in such tempered
5 pace that we should all get an award, but go ahead.

6 DDC [LCDR LOFLAND]: As I was stating, Your Honor, I
7 believe that the commission's and the prosecution's arguments
8 in their response to the defense's motion both are reliant
9 upon the same flawed predicate that was elaborated on earlier
10 by Mr. Rushforth.

11 The bedrock fundamental issue, both in the
12 application of R.M.C. 707 and the issue that the commission
13 wants addressed, is whether or not the Sixth Amendment does
14 apply to these proceedings. It is an inescapable predicate.
15 The government's argument is based frankly on the astonishing
16 assertion that it may engage in a criminal proceeding invoking
17 the sovereign power of the United States without the
18 limitations imposed on any criminal proceeding by the
19 Sixth Amendment.

20 Accordingly, it is the defense's position that the
21 Sixth Amendment speedy trial right, as articulated in
22 Barker v. Wingo and subsequent case law is the applicable
23 standard that should be applied in interpreting Mr. Al-Tamir's

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 speedy trial rights.

2 In that sense, I think we have a fundamental
3 disagreement regarding the applicable legal standard that is
4 applicable, which is yet another reason why the defense's
5 position is that this issue is not yet ripe for consideration.
6 It is one of those constitutional issues that frankly
7 Professor Chemerinsky is expert in addressing and is required
8 by this defense team in order to adequately and thoroughly and
9 competently address before this commission.

10 MJ [CAPT WAITS]: Okay. This may surprise you, but I
11 agree with you, okay? And that's why I just told you that I
12 want you to talk about R.M.C. 707. Because you're using an
13 antiquated term from a predecessor Rule for Court-Martial that
14 hasn't made it into these R.M.C.s, R.M.C. 707, and the term is
15 attribution of delay, attributable delay, where the proper
16 standard under 707 is excludable delay, okay? "Attribution of
17 delay," I've never read that in a constitutional speedy trial
18 motion or case until now.

19 So I agree with you. You're not precluded from
20 bringing up the constitutional speedy trial issue later when,
21 either you do or do not have your expert consultant, another
22 lawyer, assisting you. Today I want to talk about R.M.C. 707.
23 If you don't have anything to say about it, I'll hear from the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 government.

2 DDC [LCDR LOFLAND]: With regards to R.M.C. 707
3 specifically, I will just limit my comments to the two points
4 addressed in the government's response. The government's
5 argument relies on two propositions regarding the application
6 of R.M.C. 707:

7 First, that it is somehow a comprehensive scheme that
8 somehow delimits the Sixth Amendment right. We fundamentally
9 disagree with that premise.

10 Second, that the application of R.M.C. 707 limits the
11 speedy trial right to only those periods post-referral. It is
12 clearly in contravention of Barker v. Wingo, Doggett, most
13 recently the C.A.A.F. decision in Danylo. Speedy trial right
14 attaches from the earlier arrest or apprehension or
15 indictment.

16 The government would have delay limited in this
17 instance through the application of R.M.C. 707 only to the
18 period of post-referral. It is clearly an application of the
19 rule that would be contrary to every legal precedent
20 interpreting the Sixth Amendment.

21 And solely limited to R.M.C. 707, the defense's
22 position is that the government's reading of that rule is in
23 clear derogation of the Sixth Amendment right, and as such it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 cannot be applied in the manner in which the government
2 asserts that it applies to this case. The other -- the
3 remainder of my argument does focus on the Barker factors
4 which Your Honor has indicated you are not prepared to
5 entertain at this juncture.

6 If there are no further questions regarding the
7 application of 707, I would conclude with reiterating that
8 Mr. Al-Tamir does wish to address the Sixth Amendment
9 application of his speedy trial rights and particularly as it
10 pertains to Rule 707 and the rules that are before this
11 commission, particularly as they conflict with those
12 constitutional rights; however, we explicitly desire to
13 reserve further briefing and argument of that until such time
14 as his defense is fully constituted.

15 If Your Honor has no further questions, that
16 concludes my argument based on the limitations you have ----

17 MJ [CAPT WAITS]: Well, I'm going to allow you to defer it
18 based on the fact that my intent was that your arguments be
19 focused on R.C.M. -- on R.M.C. 707, not because of not having
20 a fully constituted defense team. So either way, the result
21 is the same: You can reserve your argument, your motion, your
22 requested relief on the constitutional speedy trial issue to a
23 later time.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [LCDR LOFLAND]: Thank you, Your Honor.

2 MJ [CAPT WAITS]: Trial Counsel?

3 DTC [CDR FLYNN]: Yes, sir. Good morning, Your Honor.

4 MJ [CAPT WAITS]: Good morning.

5 DTC [CDR FLYNN]: Commander Kevin Flynn for the
6 government.

7 Your Honor, it was the government's understanding,
8 and you just confirmed this, that the issue that was -- that
9 you wanted to hear this morning was the issue of attribution
10 of delay under R.M.C. 707.

11 MJ [CAPT WAITS]: Correct.

12 DTC [CDR FLYNN]: That being the case, Your Honor, though
13 we were prepared to give our position on the Sixth Amendment
14 piece of it, I'm not going to get into that.

15 MJ [CAPT WAITS]: Good. Perfect.

16 DTC [CDR FLYNN]: That being said, Your Honor, R.M.C. 707
17 is pretty straightforward. It's really only concerned with
18 two periods of time. The first period of time that the rule
19 is concerned with, Your Honor, is the period of time between
20 the service of charges on the accused and when the accused is
21 arraigned, and the second period of time that the rule is
22 concerned with is the period of time between the service of
23 charges on the accused and when the military judge announces

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 assembly of the military commission, effectively when the
2 members are seated.

3 Your Honor, R.M.C. (a)(1) is that portion of the rule
4 that's concerned with that first period of time. What that
5 says is within 30 days of service of charges, the accused
6 should be arraigned. The second piece, R.M.C. (a)(2), is
7 concerned with the time period between, like I said, the time
8 period between service of charges and the announcement, and
9 that rule says that has to occur within 120 days.

10 Now, Your Honor, just to be sure that all parties are
11 on the same page with respect to the relevant facts concerning
12 this motion, the government would like to point out a few
13 pertinent dates. First, charges were served on the accused on
14 9 June 2014, and I would like to direct Your Honor's
15 attention. We made a mistake in our response. We said
16 charges were served I believe on the 4th or the 3rd of June of
17 2014. They were actually served, Your Honor, on the 9th of
18 June 2014.

19 The second important date for this analysis, Your
20 Honor, is June 18, 2014, which was the date the accused was
21 arraigned.

22 And the third important date, Your Honor -- and it's
23 actually a number of dates. You've already previously

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 determined in numerous orders, including your last docketing
2 order, that the time period between 18 June 2014 and today's
3 date is excludable delay under R.M.C. 707(b)(4)(E)(i) and
4 707(c). The only period of time that's at issue this morning,
5 Your Honor, is the period of time between June 18, 2014 and
6 today's date.

7 Now, I'd like to spend a few moments, I guess,
8 discussing the defense arguments. They were kind of
9 confusing. I think they confused, obviously, what you wanted
10 to hear, but I think what they're saying is that the issue
11 with respect to R.M.C. 707 is not ripe, and if it is ripe,
12 that all delay is on the government.

13 Now, with respect to ripeness, Your Honor, it's the
14 government's position that this issue of attribution of delay,
15 for that specific time period, 18 June 2014 and today, is
16 ripe. It's as ripe as it's going to get, Your Honor.

17 MJ [CAPT WAITS]: Okay.

18 DTC [CDR FLYNN]: The reason ----

19 MJ [CAPT WAITS]: I want to stop you too because you've --
20 I feel as though you've been pulled into the defense's
21 terminology here, okay? You're still using the term
22 "attribution," okay? You filed a -- the government filed in
23 015L a response to the defense's motion to 015K, and you cited

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1 a case of United States v. Lazauskas. Do you remember that?

2 Were you part of this ----

3 DTC [CDR FLYNN]: Yes, sir.

4 MJ [CAPT WAITS]: ---- filing?

5 DTC [CDR FLYNN]: Yes, sir. I probably wrote it.

6 MJ [CAPT WAITS]: Are you familiar with that case?

7 DTC [CDR FLYNN]: I probably wrote the response. I just
8 don't remember.

9 MJ [CAPT WAITS]: It says, you quoted the case. As the
10 military's highest court explained -- this is Lazauskas, 62 MJ
11 39 at 41, C.A.A.F. 2005. The current version of R.C.M. 707
12 since 1991 focuses on whether a period of time is excludable
13 because a delay has been granted, which is in contrast to the
14 prior version, 1984, that focused on a determination as to
15 which party was responsible for the delay. Under R.M.C.
16 707(c) all delays approved by the appropriate authority are
17 excludable so long as approving them was not an abuse of
18 discretion. It does not matter which party is responsible.

19 Okay. So as I said to Commander Lofland in his
20 argument, and now you, okay, you're going back to a prior
21 version of the Manual for Courts-Martial, namely 1984, and
22 you're using a term, "attribution" or "attributable," variants
23 thereof, which no longer exists in the R.C.M.s, and the change

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1 occurred a long time before the Rule For Military Commission
2 came out. And 707 of the R.M.C.s substantially, at least
3 structurally, tracks -- the time periods may be different and
4 the events may be different, but it tracks R.C.M. 707. It's
5 the same idea. It's statutory periods and a concept called
6 excludable delay.

7 So I guess I'm wondering, you know, you -- in your
8 response to this motion, you didn't harken back to Lazauskas,
9 and now I'm hearing you talking about attribution of delay.
10 So you know, I was with you when you filed 015L, and this is
11 in fact why I -- neither side asked for oral argument on this
12 motion. This is -- what you said in 015L is why I directed
13 oral argument on this motion, and now nobody, seemingly, wants
14 to talk about it, defense or the prosecution. That's where I
15 am.

16 And I agree with you that if there's any relief here
17 for the defense at this time, all it is that they can request,
18 as far as I can tell, is reconsideration -- is a motion for
19 reconsideration of every time this commission in this case has
20 excluded delay under R.C.M. -- under R.M.C. 707 as we have
21 progressed over the last two years.

22 They haven't specifically done that because they want
23 to talk about the Constitution. Well, I am applying the law

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1 that applies to the military commission that I read in the
2 MCA, because Congress told me that that's -- and the President
3 told me that that's what applies here, okay?

4 DTC [CDR FLYNN]: Yes, sir.

5 MJ [CAPT WAITS]: So for different reasons than the
6 defense is stating, namely that they don't have a fully
7 constituted defense team, I'm not ready to talk about the
8 Constitution. I'm here today to talk about 707 as it was
9 derived from the R.C.M. and particularly the concept of
10 excludable delay, okay?

11 DTC [CDR FLYNN]: Understood, Your Honor. And I ----

12 MJ [CAPT WAITS]: That was a lot said, but I really -- I
13 don't need -- I don't really want to hear the term
14 attribution, attributable, attribute because it doesn't apply
15 anymore. It doesn't apply in 707 and it doesn't apply in the
16 constitutional context. So ----

17 DTC [CDR FLYNN]: Yes, sir.

18 MJ [CAPT WAITS]: Let's talk about this statute that
19 applies in this commission as it reads ----

20 DTC [CDR FLYNN]: Yes, sir.

21 MJ [CAPT WAITS]: ---- and not what the 1984 Manual for
22 Courts-Martial read. Okay.

23 DTC [CDR FLYNN]: I'm sorry, Your Honor. And that was my

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1 mistake for putting that in our oral argument. Obviously we
2 didn't put that in our response. And I was just trying to
3 convey the fact that this issue is ripe right now. This is
4 the time to hear this issue, Your Honor.

5 And, Your Honor, you did mention what I think was
6 proper burden. The burden is on the defense to show by
7 preponderance of the evidence that your decision with respect
8 to that 18 June 2014 to today's date -- your decision that
9 that was excludable, it is their burden to show that that was
10 either clear error or manifest injustice because it in effect
11 is a motion to reconsider.

12 You've already determined that this time period
13 between 18 June 2014 and today is excludable, and that's --
14 they're asking you to reconsider that, but they're not giving
15 you any specific dates as to what -- I mean, what dates are
16 they taking issue with with respect to that time period? I
17 mean, they haven't told us anything.

18 707(c), R.M.C. 707(c), says, Your Honor, that they
19 should have provided you with a chronology from the date this
20 case started so you would have some idea as to what period of
21 time they were taking issue with, and they haven't done that,
22 Your Honor, at all. They haven't presented you any evidence
23 as to why you should -- you erred when you excluded that

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1 delay. And by excluding that delay under -- you did that
2 under 707(c), Your Honor, and again there's no evidence. They
3 have not carried their burden that you erred. I mean, what
4 specific time period are we talking about? They just haven't
5 given that to you, Your Honor.

6 Now, in their motion and in their argument, they --
7 the defense again gets into this whole Sixth Amendment piece
8 and there was some mention there of pre-referral delay, but
9 R.M.C. 707 does not concern pre-referral delay, Your Honor.

10 Again, there's nothing in front of you -- there's
11 been no evidence presented to show that you erred with respect
12 to that time period, 18 June 2014 and today's date. They've
13 just presented you nothing, Your Honor.

14 Your Honor, I don't know if you have any further
15 questions with respect to the R.M.C. 707. Again, it's a clear
16 rule. I mean, it's only concerned with two periods of time.
17 You've made the decision. You have the authority. You
18 followed the rule. You determined that this time period,
19 18 June 2014 until today's date was excludable. You've done
20 that since the very beginning of this case. It's not --
21 you're not -- you didn't just do this in your latest order and
22 backdate everything.

23 You've done this consistently pursuant to the rule,

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1 and the rule allows you to make the decision that, you know,
2 this is the reasonable delay, and once you make that decision,
3 it's automatically excluded under 707(c).

4 MJ [CAPT WAITS]: Thank you. No questions.

5 DTC [CDR FLYNN]: Thank you, Your Honor.

6 MJ [CAPT WAITS]: Commander Lofland, last word? Anything
7 else?

8 DDC [LCDR LOFLAND]: [Microphone button not pushed; no
9 audio.]

10 MJ [CAPT WAITS]: Okay. Just so I'm clear. Is the
11 defense asking for reconsideration of the excludable delay
12 that the commission has found up until this point?

13 DDC [LCDR LOFLAND]: Your Honor, as part of our
14 anticipated briefing of the underlying constitutional issues,
15 we do anticipate asking this commission to reconsider its
16 prior consideration of excludable delay in the context of the
17 underlying Sixth Amendment question.

18 MJ [CAPT WAITS]: But that's not it right now. That's not
19 what you're for right now.

20 DDC [LCDR LOFLAND]: That's correct. Okay. Thank you.

21 TC [CDR SHORT]: Your Honor?

22 MJ [CAPT WAITS]: Yes.

23 TC [CDR SHORT]: May we take a brief recess?

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1 MJ [CAPT WAITS]: Okay. I don't think -- I don't think
2 recesses can be that brief here in this context, in this forum
3 so I -- does any other judge take recesses for shorter than
4 15 minutes? I don't know. Okay. Mr. Robertshaw, the court
5 reporter, is right in front of me shaking his head, and
6 15 minutes, I think, is the reasonable least amount of time
7 that we can take.

8 So we'll take another 15-minute recess. I have --
9 okay. The clock on the back wall is 1125, so we'll be in
10 recess until 1140 by that clock.

11 Commission is in recess until 1140.

12 [The R.M.C. 803 session recessed at 1125, 12 July 2016.]

13 [END OF PAGE]

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