

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Jonathan E. LEE  
Captain (O-3)  
U.S. Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. No. 200600543

USCA Dkt. No. 07-0725/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE  
ARMED FORCES:

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## **Introduction**

In an era in which public confidence in the administration of justice within the Armed Forces is at risk, this extraordinary delay in the post-trial review of Captain Lee's case is indefensible. This egregious delay calls on this Court to fashion relief that is meaningful. As we shall explain, the relief he has been afforded thus far is illusory. The only relief that will send the required strong message is dismissal with prejudice.

## **Issue Presented**

**DID THE CCA ERR IN FINDING NO DUE PROCESS VIOLATION WHERE 2500 DAYS ELAPSED BETWEEN SENTENCING AND REMOVAL OF CAPTAIN LEE'S NAME FROM THE TEXAS SEX OFFENDER REGISTRY?**

## **Statement of Statutory Jurisdiction**

This case was originally reviewed by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ).<sup>1</sup> The NMCCA continued to exercise jurisdiction following remand under Article 66(d).<sup>2</sup> Appellant invoked this Court's jurisdiction under Article 67(a)(3).<sup>3</sup>

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<sup>1</sup> 10 U.S.C. § 866(b)(1) (2006).

<sup>2</sup> 10 U.S.C. § 866(d) (2006).

<sup>3</sup> 10 U.S.C. § 867(a)(3) (2006).

### Statement of the Case

In 2004, Captain Lee was charged with three specifications of housebreaking in violation of Article 129, one specification of conduct unbecoming an officer and a gentleman in violation of Article 133, and eight specifications under Article 134, including charges that require registration as a sex offender.<sup>4</sup> In 2005, on mixed pleas, he was found guilty of all charges and specifications<sup>5</sup> and sentenced to confinement for three years, total forfeitures, and a dismissal.<sup>6</sup> In July 2007, after serving his adjudged sentence, Captain Lee was released from confinement, returned to Texas, and registered, as required, as a sex offender.

On initial review, despite Captain Lee's affidavit which explained that he learned after his trial that his detailed defense counsel was working as a prosecutor while still defending him, the NMCCA affirmed the findings and sentence in total. This Court granted review, based primarily Captain Lee's affidavit to determine whether Captain Lee's defense counsel's concurrent duties as a trial counsel created a conflict of interest. Unable to answer the question on the record created

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<sup>4</sup> *United States v. Lee*, 70 M.J. 535 (N-M. Ct. Crim. App. 2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

below, this Court set aside the NMCCA's decision and returned the case to the Judge Advocate General with instructions to conduct a *DuBay* hearing to determine whether a conflict of interest existed and if so, did Captain Lee knowingly waive this conflict of interest.<sup>7</sup> The Judge Advocate General returned the case to the Convening Authority and directed that the *DuBay* hearing be conducted by September 10, 2008.<sup>8</sup>

Incredibly, despite five defense demands for speedy appellate review, it took three *DuBay* hearings over three years and three more trips to the NMCCA before that court substantively reviewed the grave issue surrounding detailed defense counsel's conflict of interest. Error permeated this first *DuBay* hearing, which established a tragic path of errors this case would endure at each step of the process. After determining that the judge detailed to the first *DuBay* hearing was disqualified, the NMCCA ordered a second *DuBay* hearing with specific instructions that the new *DuBay* judge ignore the record from the first *DuBay* hearing.<sup>9</sup> After the second *DuBay* hearing, the NMCCA determined that the record was incomplete because

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<sup>7</sup> *United States v. Lee*, 66 M.J. 387 (2008).

<sup>8</sup> J.A. at 000065.

<sup>9</sup> *United States v. Lee*, 2009 CCA LEXIS 385, 2009 WL 3747173 (N-M.C.C.A. Nov. 10, 2009).



Captain Lee had not testified.<sup>10</sup> It therefore returned the record for a third *DuBay* hearing and ordered Captain Lee to testify.<sup>11</sup> He acquiesced to this order and provided testimony substantially if not entirely echoing the facts already contained in the affidavit provided to the NMCCA in 2007, this Court in 2008, and again to the NMCCA in 2009 and 2010.<sup>12</sup>

After more than three years and three *DuBay* hearings<sup>13</sup>, the NMCCA held, as Captain Lee has maintained since his initial appellate brief more than six years prior, that trial defense counsel failed to properly disclose a conflict of interest.<sup>14</sup> The conflict arose from trial defense counsel's concurrent prosecution of cases at the same time and in the same office where he was still defending this case.<sup>15</sup> Worse yet, trial defense counsel was being evaluated by his own opposing counsel.<sup>16</sup> The NMCCA observed that "the system failed Captain

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<sup>10</sup> J.A. at 000061.

<sup>11</sup> *Id.*

<sup>12</sup> *United States v. Lee*, 70 M.J. 535, 536 (N-M.C.C.A. 2011)(noting consistency of Captain Lee's position between his original 2006 affidavit and the *DuBay* testimony).

<sup>13</sup> *Id.* at 535.

<sup>14</sup> *Id.* at 541.

<sup>15</sup> *Lee*, 70 M.J. at 536.

<sup>16</sup> *Id.*

Lee" and employed its Article 66(c) powers to set aside the findings and sentence and authorize a rehearing.<sup>17</sup> This decision, issued on July 28, 2011, triggered an obligation by the Government to initiate the process to remove Captain Lee from the sex offender registration list.<sup>18</sup> Despite this obligation to promptly notify the state authorities, the Government did not notify the Texas Sex Offender Registry until January 12, 2012 and only did so at the express request of defense.<sup>19</sup> Captain Lee was not actually removed from the registration list until February 29, 2012.<sup>20</sup>

At the rehearing, the military judge found the Government's failure to comply with its obligation to effect Captain Lee's removal from the sex offender registration list was both punitive and prejudicial.<sup>21</sup> The military judge, after Captain Lee properly objected to the dilatory process of his case up until the rehearing, sitting as a General Court-Martial found him guilty, pursuant to his pleas, of two lesser included offenses under Article 133, neither of which triggered a

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<sup>17</sup> *Id.* at 541.

<sup>18</sup> J.A. at 178 citing SECNAVINST 5800.14A, J.A. at 252).

<sup>19</sup> J.A. at 156

<sup>20</sup> J.A. at 178 incorporating J.A. at 83.

<sup>21</sup> J.A. at 277.

requirement to register as a sex offender.<sup>22</sup> The remaining charges and specifications were withdrawn and dismissed pursuant to a pretrial agreement.<sup>23</sup> The military judge sentenced Captain Lee to confinement for nine months, to forfeit all pay and allowances for nine months, and a reprimand.<sup>24</sup> The Convening Authority approved the confinement and forfeitures but disapproved the reprimand pursuant to the pretrial agreement, and ordered the remainder of the sentence executed.<sup>25</sup>

Following the rehearing, Captain Lee raised assignments of error with the NMCCA relating to the dilatory appellate processing of his case including two violations of *United States v. Moreno*.<sup>26</sup> On February 21, 2013, in a single paragraph void of any *Moreno* analysis, the NMCCA disposed of Captain Lee's assignment of error.<sup>27</sup> It declined to find a due process error because he had "been afforded appropriate and continuing due

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<sup>22</sup> J.A. at 361.

<sup>23</sup> J.A. at 281, 352.

<sup>24</sup> J.A. at 47.

<sup>25</sup> *Id.*

<sup>26</sup> *United States v. Moreno*, 63 M.J. 129, 142-43 (C.A.A.F. 2006) (The specific *Moreno* violations are discussed *infra* at p. 19).

<sup>27</sup> *United States v. Lee*, 72 M.J. 581 (N-M. Ct. Crim. App. 2013).

process . . . resulting in meaningful relief from error" in the face of two *Moreno* violations.<sup>28</sup>

Captain Lee moved for *en banc* reconsideration on March 21, 2013, stressing the NMCCA's failure to follow the *Barker v. Wingo*, 407 U.S. 514 (1972), analysis required by *Moreno*.<sup>29</sup> The NMCCA denied reconsideration on April 9, 2013, and Captain Lee thereafter timely filed a petition for grant of review with this Court.<sup>30</sup> This Court granted Captain Lee's petition on the sole question presented on September 24, 2013.

#### **Statement of the Facts**

During his initial court-martial, Captain Lee was represented by both civilian defense counsel and Marine Corps Captain John Reh as detailed defense counsel. Soon after charges were referred, Captain Reh transitioned to the trial shop and began prosecuting cases on behalf of the United States. During the litigation of Captain Lee's case, which featured mixed pleas, Captain Reh's reporting senior was the same trial counsel who was prosecuting Captain Lee. Captain Lee was never informed that Captain Reh worked directly for the prosecutor in his case. Nor was Captain Lee told that his

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<sup>28</sup> *Lee*, 72 M.J. 581.

<sup>29</sup> J.A. at 72.

<sup>30</sup> *Id.*

detailed defense counsel was working with the trial counsel to prosecute a high-visibility homicide case contemporaneously with his court-martial. While confined, Captain Lee learned of Captain Reh's conflict of interest.

Captain Lee served his original three-year sentence (less time off for good behavior) and was released from confinement on July 12, 2007.<sup>31</sup> Immediately thereafter, and as a result of his conviction, imposed after unknowingly being represented by conflicted counsel, he registered with the State of Texas as a sex offender.<sup>32</sup> He remained on the sex offender list for nearly five years, until February 29, 2012.<sup>33</sup>

Due to a disturbing series of delays and errors in the *DuBay* process, none of which had anything to do with the this Court's rationale for initially ordering the hearing, Captain Lee remained on the sex offender registration list for three or four years longer than if his case had been promptly reviewed and the obvious conflict had been identified and addressed by the NMCCA in the first place.<sup>34</sup> These extraordinary and cumulatively indefensible delays are outlined in the agreed upon

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<sup>31</sup> J.A. at 82-168, 175 (incorporating as findings the facts Appellate Ex. LXXXIV and LXXXVII).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> J.A. at 175-180.

timeline contained in the Joint Appendix and, for ease of reading, are also set forth below.<sup>35</sup>

DATE	EVENT
9-JAN-04	ALLEGED INCIDENT
4-MAY-05	ORIGINAL SENTENCING
19-OCT-05	ORIGINAL CA'S ACTION
11-MAY-06	DOCKETED AT NMCCA
11-SEP-06	DEFENSE NMCCA BRIEF FILED RAISING THE CONFLICT ISSUE
12-SEP-06	DEFENSE PETITION FOR NEW TRIAL FILED AT NMCCA
5-OCT-06	GOVERNMENT NMCCA MOTION FOR ENLARGEMENT
2-NOV-06	GOVERNMENT NMCCA BRIEF FILED CLAIMING NO CONFLICT
5-NOV-06	DEFENSE NMCCA MOTION FOR RESPONSE ENLARGEMENT
20-NOV-06	DEFENSE NMCCA RESPONSE TO GOVERNMENT BRIEF FILED
21-NOV-06	GOVERNMENT NMCCA MOTION RESPONSE
27-NOV-06	SENT TO NMCCA PANEL
26-JUN-07	OPINION ISSUED BY NMCCA FINDING NO CONFLICT
28-JUN-07	CMO-DECISION SENT TO NAMALA
6-JUL-07	DEFENSE NMCCA MOTION TO RECONSIDER FILED
12-JUL-07	NMCCA ORDER ISSUED TERMINATING CASE
25-JUL-07	DEFENSE CAAF PETITION FILED
25-JUL-07	DOCKETED AT CAAF
25-JUL-07	PETITION FILED AT CAAF
24-AUG-07	DEFENSE CAAF SUPPLEMENT TO PETITION FILED
4-SEP-07	GOVERNMENT CAAF 10 DAY LETTER FILED
20-NOV-07	DEFENSE CAAF PETITION FOR REVIEW GRANTED
4-JAN-08	DEFENSE CAAF BRIEF FILED
4-FEB-08	GOVERNMENT CAAF BRIEF FILED
11-MAR-08	ORAL ARGUMENT AT CAAF
10-JUL-08	MANDATE FROM CAAF SENT TO FIELD ORDERING DUBAY I
9-JAN-09	DEFENSE MOVES JUDGE WARD TO RECUSE HIMSELF
9-JAN-09	MJ DENIES DEFENSE REQUEST BUT INVITES VOIR DIRE ON THE ISSUE
9-JAN-09	MJ PROPOSED DELAYING DUBAY DUE TO SCHEDULING ISSUES - DEFENSE OBJECTS
12-JAN-09	FIRST DUBAY HEARING PT I - DEFENSE CHALLENGES JUDGE WARD
13-FEB-09	FIRST DUBAY HEARING PT II
9-APR-09	JUDGE WARD ISSUES FINDINGS

<sup>35</sup> See J.A. at 1 (data on the chart are drawn from the Case Management Tracking and Information System ("CMTIS"), J.A. at 82-156, *United States v. Lee*, 70 M.J. 535 (N-M. Ct. Crim. App. 2011), and the Record generally).

14-MAY-09	DEFENSE FILES MOTION TO SUSPEND BRIEFING AND FOR NEW <i>DUBAY</i> DUE TO DISQUALIFIED <i>DUBAY</i> JUDGE
20-MAY-09	DEFENSE MOVES TO ATTACH E-MAILS RECENTLY DISCLOSED BY G PROVIDING ADDITIONAL EVIDENCE THAT JUDGE WARD WAS CONFLICTED
26-MAY-09	NMCCA DENIES MOTION FOR NEW <i>DUBAY</i> AND TO EXPEDITE APPEAL
19-JUL-09	DEFENSE ADDITIONAL BRIEF AND AOS
20-JUL-09	GOVERNMENT RESPONSE TO ADDITIONAL BRIEF
5-AUG-09	DEFENSE RESPONSE TO GOVERNMENT
15-SEP-09	ARGUMENT ON NMCCA LEE II
10-NOV-09	OPINION ISSUED BY NMCCA IN LEE II
14-DEC-09	DEFENSE FILES PTIR OPPOSING DELAY IN HEARING
15-APR-10	LEE <i>DUBAY</i> II HELD
13-JUL-10	LEE III DOCKETED AT NMCCA
12-AUG-10	DEFENSE ADDITIONAL BRIEF AND AOS LEE III
7-SEP-10	GOVERNMENT MTN FOR ENLARGEMENT OF TIME LEE III
17-SEP-10	GOVERNMENT 3RD MOTION FOR ENLARGEMENT OF TIME
21-SEP-10	DEFENSE OBJECTION TO 3RD MOTION FOR ENLARGEMENT
21-OCT-10	GOVERNMENT LEE III BRIEF FILED
27-OCT-10	DEFENSE RESPONSE TO GOVERNMENT LEE III BRIEF
13-JAN-11	LEE III NMCCA ORAL ARGUMENT
3-MAR-11	NMCCA ORDER ISSUED TERMINATING CASE IN LEE III
14-MAR-11	NMCCA SENDS MANDATE FOR <i>DUBAY</i> III TO FIELD
20-APR-11	<i>DUBAY</i> III IS HELD
22-APR-11	GOV MOTION FOR FIRST ENLARGEMENT
12-MAY-11	<i>DUBAY</i> III FINDINGS ISSUED
12-MAY-11	GOV MOTION FOR ENLARGEMENT
13-MAY-11	DEFENSE OBJECTION TO GOVERNMENT ENLARGEMENT
17-MAY-11	NMCCA GRANTS GOVERNMENT ENLARGEMENT
28-JUL-11	NMCCA ISSUES CONTROLLING OPINION
15-SEP-11	GOV GIVES NOTICE TO CAAF DECLINING FURTHER REVIEW
22-DEC-11	DEFENSE REQUEST EXCLUDABLE DELAY TO ALLOW CAPT LEE TO PREPARE ACTIVE DUTY
7-MAR-12	DEFENSE MOTION FOR APPROPRIATE RELIEF (POST-TRIAL DELAY)
12-MAR-12	LEE REHEARING - ART 133 PLEA - RE-SENTENCE
1-AUG-12	CONVENING AUTHORITIES ACTION II
9-AUG-12	REHEARING ROT RECEIVED BY NMCCA
3-Oct-12	DEFENSE FIRST ENLARGEMENT ON NMCCA LEE 2012
13-Nov-12	DEFENSE NMCCA LEE 2012 BRIEF FILED
13-Dec-12	GOVERNMENT NMCCA LEE 2012 BRIEF FILED
18-Dec-12	DEFENSE REPLY TO GOVERNMENT LEE IV BRIEF FILED
12-Feb-13	NMCCA OPINION ISSUED
21-Mar-13	DEFENSE MOTION TO RECONSIDER DECISION FILED
9-Apr-13	NMCCA ORDER DENYING RECONSIDERATION ISSUED
6-Jun-13	CAAF PETITION FILED

The government's failures extend beyond just violating Captain Lee's due process right to speedy appellate review. Once the NMCCA set aside Captain Lee's conviction for the conflict of interest he had raised since 2006, the Government failed to promptly remove Captain Lee from the sex offender registration list as required.<sup>36</sup> The Government's failure violated SECNAVINST 5800.14A ¶ 7.c(5)<sup>37</sup> and Article 13.<sup>38</sup> Alarming, the trial counsel affirmatively disclaimed any responsibility on behalf of the Government at all.<sup>39</sup> The military judge, consistent with *Moreno*, declared that Captain Lee's excess time on the sex offender registration list was prejudicial.<sup>40</sup> As a practically meaningless remedy, the military judge awarded 123 days of confinement credit prior to the

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<sup>36</sup> J.A. at 83, 109, J.A. at 175-180.

<sup>37</sup> J.A. at 82-156, J.A. at 175-180.

<sup>38</sup> *Id.* Of course, had the inexcusable errors in the *DuBay* process not occurred and had a conflict-free judge been assigned to conduct the initial *DuBay* hearing or had the second *DuBay* judge conducted an adequate hearing, the government's obligation to remove Captain Lee from the sex offender registration would have occurred years earlier. The third hearing was completely extraneous by any measure. Either the *DuBay* judge failed or the service court ordered a superfluous additional hearing. No matter, the error cannot weigh against Captain Lee.

<sup>39</sup> J.A. at 300-304.

<sup>40</sup> J.A. at 304.



sentencing hearing.<sup>41</sup> By that point, however, Captain Lee had served his previous sentence.<sup>42</sup> This resulted in 799 days of *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), credit owed to Captain Lee upon commencement of his rehearing.<sup>43</sup> Adding the 123 days to the previous credit, Captain Lee had 922 days credit going into sentencing.<sup>44</sup> With the second adjudged sentence, Captain Lee has roughly 652 days of credit from which, barring action by this Court, he will derive absolutely no benefit.

The military judge's finding regarding Captain Lee's prejudice arising from sex offender registration did not go far enough. The military judge only counted the time period from the service court's 2011 opinion until the rehearing. However, Captain Lee suffered prejudice for the entirety of the time he was a registered sex offender in the State of Texas. During that extended period of time, his photograph and details of his personal life were on display to the public for all to view.<sup>45</sup> His place of work was often inspected.<sup>46</sup> He was subjected to

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<sup>41</sup> J.A. at 175-180.

<sup>42</sup> J.A. at 82-156.

<sup>43</sup> J.A. at 195.

<sup>44</sup> *Id.*

<sup>45</sup> J.A. at 82-156, J.A. at 175-180.

<sup>46</sup> *Id.*

public embarrassment and personal anxiety based on a judicial process that proved to be fundamentally flawed from the beginning.<sup>47</sup>

Further, despite the mandate of R.C.M. 1208, Captain Lee has yet to have his pay properly restored after his rehearing and has as a consequence suffered financially due to this process.<sup>48</sup> As shown in the following table, the long process leading to resolution of his case has cost him tens of thousands of dollars, a loss the Marine Corps can never repay.<sup>49</sup>

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<sup>47</sup> J.A. at 82-156, J.A. at 175-180; *see also Lee*, 70 M.J. 535.

<sup>48</sup> J.A. at 216

<sup>49</sup> J.A. at 216 (describing the chart above as the difference in monies owed in back pay following the set aside of his conviction as calculated by a private accountant verses the Marine Corps' actual payment amount). *See also* J.A. at 199-210.

<b>Capt. Lee Calculations</b>			
	<b>Client Calculated</b>	<b>USMC Calculated</b>	<b>Difference</b>
BAS	\$ 17,031.40	\$ 15,518.00	\$ 1,513.40
BAH	\$ 96,509.50	\$ 91,422.00	\$ 5,087.50
Pay	\$ 439,878.60	\$ 404,287.00	\$ 35,591.60
Leave	\$ 38,185.45	\$ -	\$ 38,185.45
<b>Total</b>	<b>\$ 591,604.95</b>	<b>\$ 511,227.00</b>	<b>\$ 80,377.95</b>
Leave Balance			
May-05			
74 days @ \$204.52	\$ 15,134.48	0	\$ 15,134.48
	<b>\$ 606,739.43</b>	<b>\$ 511,227.00</b>	<b>\$ 95,512.43</b>
<b>No Pay Days</b>			
USMC #'s were based on 9 months confinement and did not include 123 days of judicial credits.			
Below is net of Judicial Credits (255 - 123 = 132 days of pay still owed)			
BAS	\$ 980.00		
BAH 76033	\$ 5,821.00		
Pay	\$ 26,996.00		
Leave	\$ 2,249.72		
132 Judicial Credits equal:	\$ 36,046.72		
Gross Amount	\$ 570,692.71	\$ 511,227.00	
Less: 20% Est Net Withholding	\$ 114,138.54		
Actual Withholdings		\$ 96,666.84	
Net Difference Amount	\$ 456,554.17	\$ 414,571.00	
Marine Corps Net Amt		\$ 414,571.00	
Less: Payment Rec'd	\$ 388,977.00	\$ 388,977.00	
Still Owed based on USMC #'s		\$ 27,374.00	
Net Amount Still Owed based on Client #'s	\$ 67,577.17		

**Notes:**

1. Client had 74 days of leave on the books as of May 2005.
2. USMC #'s were for 9 months confinement and did not include 123 days of Judicial credits.

The extremely slow processing of this case also adversely impacted Captain Lee's employment. As a result of his status as a registered sex offender, it took him over nine months to obtain a Texas insurance license. Usually, that process takes a week.<sup>50</sup> This prevented him from engaging in meaningful employment.<sup>51</sup>

**Issue Presented**

**WHERE MORE THAN 2500 DAYS ELAPSED FROM SENTENCING TO REMOVAL OF CAPTAIN LEE'S NAME FROM THE SEX OFFENDER REGISTRY, THE NMCCA**

<sup>50</sup> J.A. at 82-156, J.A. at 175-180.

<sup>51</sup> *Id.*

**ERRED IN SUMMARILY REJECTING HIS DUE PROCESS CLAIM.**

Whether appellate delay violated an appellant's due process rights is a question of law that is reviewed *de novo*.<sup>52</sup> The NMCCA summarily determined that the appellate delay in Captain Lee's case was appropriate because, in the end, he prevailed in his appeal. This seemingly equity-based decision ignores this Court's precedent and almost encourages foot-dragging by the Government when it becomes apparent the accused is going to prevail in the end.

The court below failed to take into account the sum total of delay, which amounted to more than 2,841 days at the time of its opinion.<sup>53</sup> This delay is facially unreasonable and, at a minimum, required the lower court to conduct a *Barker v. Wingo* analysis with or without the *Moreno* triggers. It was error not to find the delay unreasonable on its face. Had it conducted the requisite analysis, the NMCCA would have had to determine that Captain Lee was entitled to a meaningful remedy given the length of the delay, the basis for the delay (judicial incompetence and Governmental indifference), his repeated

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<sup>52</sup> *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011).

<sup>53</sup> This delay now exceeds 3,000 days at the time of this filing.

assertion of right to timely review, and the prejudice he has suffered because of the delay.

**A. LENGTH OF THE DELAY**

The total delay since Captain Lee's original sentencing is unreasonable on its face. In *Moreno*, the overall period of post-trial review and appeal amounted to 1,688 days.<sup>54</sup> This Court correctly found that delay facially unreasonable.<sup>55</sup> Here, the total delays so far (the case not having run its full course) is more than 3,096 days.<sup>56</sup>

"Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation."<sup>57</sup>

**B. REASONS FOR DELAY**

*The Delay is predominantly the responsibility of the lower courts and the Government.*

"Under this factor we look at the Government's responsibility for any delay, as well as any legitimate reasons

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<sup>54</sup> *Moreno*, 63 M.J. at 142.

<sup>55</sup> *Id.*

<sup>56</sup> Time calculation from May 4, 2005 (sentencing date) to October 24, 2013 (date of this filing).

<sup>57</sup> *Moreno*, 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533).

for the delay, including those attributable to an appellant.”<sup>58</sup>

The following table displays the number of days accruing during events in this case’s procedural history.<sup>59</sup>

<b>DATE</b>	<b>EVENT</b>	<b>DAYS B/W EVENTS</b>	<b>TOTAL DAYS SINCE SENTENCE ADJUDGED</b>
9-Jan-04	Alleged Incident		
4-May-05	Original Sentencing	481	
19-Oct-05	Original CA's Action	168	168
11-May-06	DOCKETED AT NMCCA	204	372
6-JUL-06	CAPT LEE DISCOVERS CONFLICT OF INTEREST <sup>60</sup>	56	428
11-SEP-06	DEFENSE NMCCA BRIEF FILED RAISING THE CONFLICT ISSUE	67	495
12-SEP-06	DEFENSE PETITION FOR NEW TRIAL FILED AT NMCCA	1	496
5-OCT-06	GOVERNMENT NMCCA MOTION FOR ENLARGEMENT	23	519
2-NOV-06	GOVERNMENT NMCCA BRIEF FILED CLAIMING NO CONFLICT	28	547
5-NOV-06	DEFENSE NMCCA MOTION FOR RESPONSE ENLARGEMENT	3	550
20-NOV-06	DEFENSE NMCCA RESPONSE TO GOVERNMENT BRIEF FILED	15	565
21-NOV-06	GOVERNMENT NMCCA MOTION RESPONSE	1	566
27-NOV-06	SENT TO NMCCA PANEL	6	572
26-JUN-07	OPINION ISSUED BY NMCCA FINDING NO CONFLICT	<b>211</b>	783
28-JUN-07	CMO-DECISION SENT TO NAMALA	2	785

<sup>58</sup> *Id.* at 136.

<sup>59</sup> This table arises from and augments the facts contained in the table in the Joint Appendix at p. 1.

<sup>60</sup> J.A. at 211.

6-JUL-07	DEFENSE NMCCA MOTION TO RECONSIDER FILED	8	793
12-JUL-07	NMCCA ORDER ISSUED TERMINATING CASE	6	799
25-JUL-07	DEFENSE CAAF PETITION FILED	13	812
25-JUL-07	DOCKETED AT CAAF	0	812
25-JUL-07	PETITION FILED AT CAAF	0	812
24-AUG-07	DEFENSE CAAF 10-DAY LETTER SUPPLEMENT TO PETITION FILED	30	842
4-SEP-07	GOVERNMENT CAAF 10 DAY LETTER FILED	11	853
20-NOV-07	DEFENSE CAAF PETITION FOR REVIEW GRANTED	77	930
4-JAN-08	DEFENSE CAAF BRIEF FILED	45	975
4-FEB-08	GOVERNMENT CAAF BRIEF FILED	31	1006
11-MAR-08	ORAL ARGUMENT AT CAAF	36	1042
10-JUL-08	MANDATE FROM CAAF SENT TO FIELD ORDERING DUBAY I	<b>121</b>	1163
9-JAN-09	DEFENSE MOVES JUDGE WARD TO RECUES HIMSELF	<b>183</b>	1346
9-JAN-09	MJ DENIES DEFENSE REQUEST BUT INVITES VOIR DIRE ON THE ISSUE	0	1346
9-JAN-09	MJ PROPOSED DELAYING DUBAY DUE TO SCHEDULING ISSUES - <b>DEFENSE OBJECTS</b>	0	1346
12-JAN-09	FIRST DUBAY HEARING PT I - DEFENSE CHALLENGES JUDGE WARD	3	1349
13-FEB-09	FIRST DUBAY HEARING PT II	32	1381
9-APR-09	JUDGE WARD ISSUES FINDINGS	<b>55</b>	1436
<b>14-MAY-09</b>	<b>DEFENSE FILES MOTION TO SUSPEND BRIEFING AND FOR NEW DUBAY DUE TO DISQUALIFIED DUBAY JUDGE</b>	<b>35</b>	<b>1471</b>
20-MAY-09	DEFENSE MOVES TO ATTACH E-MAILS RECENTLY DISCLOSED BY G PROVIDING ADDITIONAL EVIDENCE THAT JUDGE WARD WAS CONFLICTED	6	1477
26-MAY-09	NMCCA DENIES MOTION FOR NEW DUBAY AND TO EXPEDITE APPEAL	6	1483
19-JUL-09	DEFENSE ADDITIONAL BRIEF AND AOS	54	1537
20-JUL-09	GOVERNMENT RESPONSE TO ADDITIONAL BRIEF	1	1538
5-AUG-09	DEFENSE RESPONSE TO GOVERNMENT	16	1554
15-SEP-09	ARGUMENT ON NMCCA LEE II	41	1595
10-NOV-09	OPINION ISSUED BY NMCCA IN LEE II	56	1651
<b>14-DEC-09</b>	<b>DEFENSE FILES PTIR OPPOSING DELAY IN HEARING</b>	<b>34</b>	<b>1685</b>
15-APR-10	LEE DUBAY II HELD	<b>122</b>	1807

13-JUL-10	LEE III DOCKETED AT NMCCA	<b>89</b>	1896
12-AUG-10	DEFENSE ADDITIONAL BRIEF AND AOS LEE III	30	1926
7-SEP-10	GOVERNMENT MTN FOR ENLARGEMENT OF TIME LEE III	26	1952
17-SEP-10	GOVERNMENT <b>3RD MOTION FOR ENLARGEMENT</b> OF TIME	10	1962
21-SEP-10	<b>DEFENSE OBJECTION TO 3RD MOTION FOR ENLARGEMENT</b>	4	<b>1966</b>
21-OCT-10	GOVERNMENT LEE III BRIEF FILED	30	1996
27-OCT-10	DEFENSE RESPONSE TO GOVERNMENT LEE III BRIEF	6	2002
13-JAN-11	LEE III NMCCA ORAL ARGUMENT	78	2080
3-MAR-11	NMCCA ORDER ISSUED TERMINATING CASE IN LEE III	49	2129
14-MAR-11	NMCCA SENDS MANDATE FOR DUBAY III TO FIELD	11	2140
20-APR-11	<i>DUBAY III</i> IS HELD	37	2177
22-APR-11	GOV MOTION FOR FIRST ENLARGEMENT	2	2179
12-MAY-11	<i>DUBAY III</i> FINDINGS ISSUED	20	2199
12-MAY-11	GOV MOTION FOR ENLARGEMENT	0	2199
<b>13-MAY-11</b>	<b>DEFENSE OBJECTION TO GOVERNMENT ENLARGEMENT</b>	<b>1</b>	<b>2200</b>
17-MAY-11	NMCCA GRANTS GOVERNMENT ENLARGEMENT	4	2204
28-JUL-11	NMCCA ISSUES CONTROLLING OPINION	72	2276
15-SEP-11	GOV GIVES NOTICE TO CAAF DECLINING FURTHER REVIEW	49	2325
22-DEC-11	DEFENSE REQUEST EXCLUDABLE DELAY TO ALLOW CAPT LEE TO PREPARE ACTIVE DUTY	98	2423
7-MAR-12	DEFENSE MOTION FOR APPROPRIATE RELIEF (POST-TRIAL DELAY)	76	2499
12-MAR-12	LEE REHEARING - ART 133 PLEA - RE-SENTENCE	5	2504
1-AUG-12	CONVENING AUTHORITIES ACTION II	<b>142</b>	2646
9-AUG-12	REHEARING ROT RECEIVED BY NMCCA	8	2654
3-Oct-12	DEFENSE FIRST ENLARGEMENT ON NMCCA LEE 2012	55	2709
13-Nov-12	DEFENSE NMCCA LEE 2012 BRIEF FILED	41	2750
13-Dec-12	GOVERNMENT NMCCA LEE 2012 BRIEF FILED	30	2780
18-Dec-12	DEFENSE REPLY TO GOVERNMENT LEE IV BRIEF FILED	5	2785
12-Feb-13	NMCCA OPINION ISSUED	56	2841
21-Mar-13	DEFENSE MOTION TO RECONSIDER DECISION FILED	37	2878



9-Apr-13	NMCCA ORDER DENYING RECONSIDERATION ISSUED	19	2897
6-Jun-13	CAAF PETITION FILED	58	2955

**Bold = Significant Delay / Bold/Italics = Defense Demand for Speed / Shading = Post Moreno**

*Defense Delay*

Of the almost 3,100 days of post-trial processing, the defense only specifically requested 117 days<sup>61</sup> of delay. The defense requested all of those days after the conviction was set aside. Seventy-six of those days were to allow Captain Lee to prepare to return to active duty until his scheduled guilty plea. Captain Lee cannot be held responsible for the remaining 2,972 days of delay. This delay exceeds the total delay in *Moreno*, and the record is virtually silent as to the basis for it. The Government did attempt, with the final convening authority's action in this case, to provide an explanation for the 142 days it took the convening authority to act on the rehearing. But explaining only 142 days out of 2,972 days of delay does not save the Government here.

Looking at this case as a whole, this explanation fails in the context of the massive delay. In acting on the rehearing,

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<sup>61</sup> Appellant acknowledges responsibility for the delay arising from four events: 22-Dec-11 Defense Request Excludable Delay To Allow Capt Lee To Prepare Active Duty; 7-Mar-12 Defense Motion For Appropriate Relief (Post-Trial Delay); 3-Oct-12 Defense First Enlargement On NMCCA Lee 2012; 13-Nov-12 Defense NMCCA Lee 2012 Brief Filed. These were the only events where Appellant took greater time than that normally allotted.

the Convening Authority attempted to justify the 142 days of additional delay:

- 1) A two-volume record of trial;
- 2) Two other multi-day members' trials and a four-day Board of Inquiry during the same period;
- 3) The judge taking 24 days to authenticate the record;
- 4) A requested 20-day extension granted to allow the defense to submit clemency matters;
- 5) The Addendum to the Staff Judge Advocate's recommendation;
- 6) Easter, Memorial Day, and Independence Day liberty.<sup>62</sup>

Even subtracting the delay requested by the Defense, the Government still exceeded *Moreno's* 120-day deadline for Convening Authority action. The reasons for the delay are also insufficient, especially in the context of the enormous delay until the rehearing. Notably, the inadequate explanation proffered by the Convening Authority was submitted on the 2,646th day after Captain Lee was first sentenced. This case had been languishing in the appellate process for years. The action on the rehearing should have been the Government's top priority, not a board of inquiry or other courts-martial. The explanation for the delay may be an accurate accounting, but it is no excuse.

*DuBay Convening Authority Delay*

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<sup>62</sup> J.A. at 47.

Much of the delay in this case arose in the dilatory and lackadaisical processing of the case each time the case was remanded for *DuBay* proceedings.

<b>Date</b>	<b>Event</b>	<b>Days Elapsed B/W Events</b>
<b>10-Sep-08</b>	OJAG Remand Letter DuBay I Deadline <sup>63</sup>	
<b>12-Jan-09</b>	DuBay I Starts	124
<b>12-Jan-10</b>	OJAG Remand Letter DuBay II Deadline <sup>64</sup>	365
<b>15-Apr-10</b>	DuBay II Starts	93
<b>2-May-11</b>	OJAG Remand Letter DuBay III Deadline <sup>65</sup>	382
<b>20-Apr-11</b>	DuBay III Starts	(12)

As is seen in this chart, the convening authorities were lackadaisical in processing and scheduling the *DuBay* hearings in the first place. All but the final *DuBay* hearing started after the stated OJAG deadlines for completion and each stated an incorrect basis for the hearing.<sup>66</sup> The delay detailed above was in addition to the approximately sixty days each convening

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<sup>63</sup> J.A. at 66.

<sup>64</sup> J.A. at 68.

<sup>65</sup> J.A. at 70.

<sup>66</sup> In reviewing the convening authorities *DuBay* orders, not one convening authority properly identified the subject issue of conflict. Rather, the convening authorities incorrectly stated that the hearing was regarding ineffective assistance of counsel; another sign of Government indifference. J.A. at 66-71.

authority was given to accomplish the task.<sup>67</sup> As shown, the convening authorities for *DuBay* I and II cumulatively delayed this case by 217 days beyond the requested OJAG dates. This processing is unacceptable. Appellant highlights this issue for this Court to consider employing additional judicial *Moreno*-style deadlines for convening authorities holding future *DuBay* hearings. For this specific case, this delay demonstrates a Government unconcerned with appellants' rights in the face of demands for efficient processing by Appellant.

*The Service and Trial Courts' Delay*

What also looms here is the inordinate delay inflicted by the court system itself; a system charged with protecting and enforcing the principles underlying *Moreno*. In *Moreno*, this Court recognized the responsibility shared by the military justice courts in ensuring the proper management of cases.<sup>68</sup> In this case, the courts were equally complicit in failing to ensure timely processing. The trial and service courts are "the Government" for purposes of assigning responsibility within the meaning of *Moreno* and *Barker*.

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<sup>67</sup> Of course, had the first *DuBay* hearing been properly executed, the subsequent *DuBay* hearings would not have been necessary.

<sup>68</sup> *Moreno*, 63 M.J. at 137 ("Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals.")

The severity of the courts' failure is best illustrated by the conduct of LtCol Ward as the military judge for the first *DuBay* hearing. Inexplicably, he could not grasp the obvious flaw. He was a sitting military judge with independent knowledge of the facts underlying the very conflict of interest he was responsible for investigating. Of course, LtCol Ward was not left to identify this issue on his own. The defense team objected via email before he presided over the hearing.<sup>69</sup> The defense then objected at the hearing itself.<sup>70</sup> Finally, the defense requested the NMCCA to dispense with briefing the underlying issues and return the case to some judge who, unlike LtCol Ward, was conflict-free.<sup>71</sup> Instead of remanding the case at the point, the NMCCA needlessly added six additional months to the process, finally sending the case back for what it later described as a mandatory disqualification.<sup>72</sup> The effects of these judicial failures are evident when compared with the joint timeline.

The original *DuBay* hearing was set to begin on January 9, 2009, some five months after the Judge Advocate General of the

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<sup>69</sup> J.A. at 224.

<sup>70</sup> J.A. at 225.

<sup>71</sup> J.A. at 226.

<sup>72</sup> See *United States v. Lee*, 2009 CCA LEXIS 385, 2009 WL 3747173 (N-M.C.C.A. Nov. 10, 2009).

Navy had directed that the *DuBay* record be completed.<sup>73</sup> Had the courts properly decided the judicial conflict issue, then the remaining appeal could have progressed from there. However, due to this erroneous decision alone, and the service court's failure to remand summarily, as requested, Captain Lee's case effectively marked time between this Court's July 20, 2008, *DuBay* order and the NMCCA's *DuBay* order on November 10, 2009.<sup>74</sup> This wasted almost sixteen months of appellate processing (during which time Captain Lee needlessly remained on the Texas sex offender list) and moved the case no further than it was in 2008.

Nor was this the end of the judicially-created delay. Despite a specific assertion of his right to speedy review, the second *DuBay* hearing took over 150 days to complete.<sup>75</sup> As discussed above, the new military judge was required to begin the process anew. Following a second *DuBay*, the new military judge issued findings of facts and conclusions of law.<sup>76</sup> Yet, this hearing was doomed as well because, as the NMCCA determined, the military judge failed to address several of the

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<sup>73</sup> J.A. at 66.

<sup>74</sup> J.A. at 1.

<sup>75</sup> J.A. at 130.

<sup>76</sup> J.A. at 243.

questions the superior courts directed to be resolved.<sup>77</sup> The NMCCA therefore had to order yet another supplementary *DuBay* hearing.<sup>78</sup> Either this additional *DuBay* was unnecessary or the military judge's findings at the second *DuBay* were incomplete. Regardless, this supplemental *DuBay* hearing added an additional 147 days to the processing of this case and little substance, as Captain Lee essentially took the stand and repeated the substance of the affidavit he provided during his initial appeal and had provided to the military judge during the two previous *DuBay* hearings.<sup>79</sup> In total, the *DuBay* process took over 1,114 days to complete.<sup>80</sup> During this entire time, Captain Lee remained on the Texas sex offender list.

### **C. ASSERTION OF THE RIGHT**

*Captain Lee repeatedly asserted his right to speedy review.*

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<sup>77</sup> J.A. at 61 ("[The *DuBay*] failed to provide satisfactory answers regarding the following four questions: (1) What was the exact nature of any disclosures made to the appellant? (2) What was the appellant's understanding regarding these disclosures? (3) What was the civilian counsel's role in the matter? (4) What effect on the representation can the appellant point to resulting from any claimed conflict of interest on the part of his detailed defense counsel?").

<sup>78</sup> *Id.*

<sup>79</sup> J.A. at 211.

<sup>80</sup> J.A. at 1.

Beginning in 2009, Captain Lee persistently invoked the right to a speedy post-trial process. The chart below documents five separate assertions of the right to speedy review.

Date	EVENT	Days B/W Events	Total Days Since Sentence Adjudged
9-JAN-09	MJ PROPOSED DELAYING DUBAY DUE TO SCHEDULING ISSUES - <b>DEFENSE OBJECTS</b>	0	1346
14-MAY-09	<b>DEFENSE FILES MOTION TO SUSPEND BRIEFING AND FOR NEW DUBAY DUE TO DISQUALIFIED DUBAY JUDGE</b>	35	1471
14-Dec-09	<b>DEFENSE FILES PTIR OPPOSING DELAY IN HEARING</b>	34	1685
21-Sep-10	<b>DEFENSE OBJECTION TO 3RD MOTION FOR ENLARGEMENT</b>	4	1966
13-May-11	<b>DEFENSE OBJECTION TO GOVERNMENT ENLARGEMENT</b>	1	2200
7-Mar-12	<b>DEF MOTION (POST-TRIAL DELAY)</b>	76	2499

Despite two-and-a-half years of demand for speed, the Government continued to be dilatory. This factor weighs heavily in Captain Lee's favor.

#### **D. PREJUDICE**

*As this Court has previously explained, Captain Lee does not need to show prejudice because the delay in this case was egregious and undermines the public's confidence in the military justice system.*

[W]here there is no finding of Barker prejudice, [this Court] will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.<sup>81</sup>

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<sup>81</sup> *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).



Upon finding a due process violation, the burden shifts to the Government to show that that this violation was harmless beyond a reasonable doubt.<sup>82</sup> The judicial and Government delay in this case spans close to *seven years!* This amount of time undermines the public's confidence in this process and obviates the need to demonstrate specific prejudice. There is no possible way the Government can meet this high burden in the face of extended sex offender registration and the negative impact on Captain Lee's employment.

*Should this Court find that the delay was not so egregious as to obviate the need for a showing of prejudice, there was actual prejudice in this case.*

Moreno recognized three categories of prejudice that would support a finding of a due process violation: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of

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<sup>82</sup> *United States v. Toohey*, 63 M.J. at 363 (citing *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967))); *United States v. Cendejas*, 62 M.J. 334, 337 (C.A.A.F. 2006) citing *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004)); *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A. 1994) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)).

reversal and retrial, might be impaired.<sup>83</sup> Captain Lee has unquestionably suffered the first two types of prejudice.

### *1. Oppressive Incarceration*

This Court in *Moreno* said it best:

This sub-factor is directly related to the success or failure of an appellant's substantive appeal. If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive. Under these circumstances, an appellant would have served the same period of incarceration regardless of the delay. However, if an appellant's substantive appeal is **meritorious** and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive.<sup>84</sup>

This form of prejudice is clearly present. Captain Lee was incarcerated through his first appeal to this Court - *an appeal that took 374 days just to be docketed*. During this lengthy period of incarceration, the case suffered from a grave legal defect: his military trial defense counsel was a government prosecutor. Captain Lee's persistence in pursuing this meritorious and paradigm-shifting issue led directly to a historic reform of the system for assignment of defense counsel in the Marine Corps.<sup>85</sup> Due to the Government's post-trial

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<sup>83</sup> *Moreno*, 63 M.J. at 138-39.

<sup>84</sup> *Id.* at 139 (citations omitted) (emphasis added).

<sup>85</sup> Michael Doyle, *Do conflicts among Marine lawyers put justice at risk?*, McClatchy Newspapers, Sept. 7, 2011,

processing delay, he had fully served the confinement portion of his sentence before the issue was resolved.

This situation is identical to the confinement discussion in *Moreno*, where the appellant had already served his confinement.

Moreover, if an appeal is not frivolous, a person convicted of a crime may be receiving punishment the effects of which can never be completely reversed or living under the opprobrium of guilt when he or she has not been properly proven guilty and may indeed be innocent under the law.<sup>86</sup>

For the entirety of Captain Lee's confinement, he was innocent under the law as the system to which he had entrusted himself did not provide him with conflict-free defense. This factor clearly weighs in his favor.

Oddly, the lower court, in a perverse application of the theories noted above, used Captain Lee's meritorious appeal against him. Instead of finding his lengthy incarceration to be that much more prejudicial as a result of the system's failure, it found that his eventual success on appeal cured the incarceration. This is holding the telescope in the wrong direction. By this logic, anyone who eventually prevails on

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<http://www.mcclatchydc.com/2011/09/07/123398/do-conflicts-among-marine-lawyers.html>.

<sup>86</sup> *Moreno*, 63 M.J. at 140 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)).

appeal necessarily suffers no prejudice for any action (or, as here, inaction) leading thereto. Nothing in this Court's jurisprudence supports such a twisted view.

## 2. Anxiety and Concern

TXDPS - Public Sex Offender Registry - LEE, JONATHAN EDWARD Page 1 of 3



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TXDPS - Public Sex Offender Registry - LEE, JONATHAN EDWARD

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T.R.L.P.

H.E.A.T.

Metal Recycling Program

**Sex Offender Registry**

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LEE, JONATHAN EDWARD

**Description**

SID	08019988
Risk Level	NOT REPORTED
Ending Registration Date	NON-EXPIRE
Verification Requirement	QUARTERLY
Sex	MALE
Race	WHITE
Ethnicity	NON-HISPANIC
Height	5'11"
Weight	185 lbs
Hair Color	BLOND OR STRAWBERRY
Eye Color	BLUE
Shoe Size	10
Shoe Width	UNKNOWN
ICO	

**Current Photo**




Photo Reported - 5/12/2009

**Names**

- LEE, JONATHAN EDWARD (PRIMARY)
- LEE, JOHN

**Birthdates**

- 9/7/1966 (PRIMARY)

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**Registration/Verification Information**

Date	Event Type	Agency
08/12/11	CHANGE OF STATUS	JOHNSON CO SO CLEBURNE
07/13/11	VERIFICATION	JOHNSON CO SO CLEBURNE
07/20/07	REGISTRATION	JOHNSON CO SO CLEBURNE

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**Address Information**

Date	Address	
08/12/11	CLEBURNE, TX 76033 JOHNSON	<a href="#">Display on Map</a>

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**Occupation Information**

Date	Employer	Occupation
08/12/11	CLEBURNE TX 76033	SALES

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**Education Information**

Date	School	Employee	Student
08/12/11	NONE		

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**Occupational License Information**

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https://records.txdps.state.tx.us/DPS\_WEB/SorNew/PublicSite/index.aspx?PageIndex=Indi... 2/7/2012

For five years while his case meandered through the appellate process, Captain Lee's face and personal details were displayed to the public. He was branded a sex offender -- a

<sup>87</sup> J.A. at 89.

true social pariah.<sup>88</sup> He was subjected to inspections at work by sheriff's deputies and embarrassment in his private life.<sup>89</sup>

Like in *Moreno*, Captain Lee suffered particularized anxiety and concern at the hands of the sex-offender registration program.<sup>90</sup> While the military judge found the failure to promptly remove him from the registry after July 2012 to be prejudicial and assessed 123 days of those as unlawful pretrial punishment, this Court should look at the entirety of his registration period -- start to finish -- when assessing prejudice. Had the case been properly managed from the start, Captain Lee's name would have been removed from the registry years before. Considering the timeline provided above and applying proper processing guidelines, his name should have been removed in 2006 at best or late 2007/early 2008 at worst. Due to the Government's failures in processing this case appropriately, he remained a social pariah for over five years longer than necessary. This crushing prejudice dwarfs the mere 123 days he was deemed to have been subjected to illegal

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<sup>88</sup> See J.A. at 175-180 (military judge's order acknowledging the pariah status of those on the sex offender list). See also J.A. at 103.

<sup>89</sup> J.A. at 216.

<sup>90</sup> *Id.*

punishment under Article 13, as the military judge found at the rehearing.

Additionally, Captain Lee has suffered financial and employment prejudice because of the glacial pace of the post-trial process. As shown above, the Marine Corps has still not rectified its financial accounting errors. After this Court overturned Captain Lee's conviction, the Government has failed to make him whole. The Government still has not ensured that he has received the proper pay and accounting to place him in the position he was before the initial sentence, which was set aside.

Captain Lee does not ask this Court to order the Marine Corps to take any particular steps on this collateral matter, given *Clinton v. Goldsmith*, 526 U.S. 529 (1999). But that case in no way relieves this Court of the duty to consider this form of prejudice analyzing post-trial delay. This factor weighs in Captain Lee's favor.

#### **E. REMEDY**

The circumstances call for a strong remedy. The obvious, usual remedies do not undo the injury Captain Lee has suffered. There is no way to un-ring the bell of public sex offender registration. Pecuniary measures are unavailable and beyond this Court's power in any event. There is no way for this Court to unwind Captain Lee's treatment as a pariah. The only remedy

that will be meaningful and correct the judicial malaise present in the military justice system is dismissal of the case with prejudice.

*Set Aside*

Merely setting aside the remaining charges and remanding for a second time will do nothing to remedy Captain Lee's situation. In fact, he would be further harmed by extending the judicial process yet again.<sup>91</sup> It makes no sense to remand to the service court, given that body's proven indifference to the passage of time and failure to provide even a complete analysis of Captain Lee's case.<sup>92</sup> No, it is from this Court that a complete remedy must flow. Only one remedy remains: dismissal with prejudice.

*Reduced or No Punishment*

Even the remedy of directing a sentence of "no punishment," as in *Moreno*, would at this late stage be insufficient, as Captain Lee has already served his entire sentence to confinement. Awarding him the Pyrrhic victory of such a

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<sup>91</sup> See *United States v. Lipovsky*, 38 C.M.R. 308, 310 (C.M.A. 1968)(finding dismissal of the charges was the only appropriate remedy for a denial of speedy trial: "Otherwise, the accused is afforded no relief, for ordering a rehearing would be self-defeating in that it would merely mean a staler retrial of already stale charges.").."

<sup>92</sup> See *Lee*, 72 M.J. at 584 (summarily dismissing Captain Lee's claims in three sentences without analysis).

sentence would not deter the Government, future judges, convening authorities, or courts from perpetuating the same inexcusable actions found here.

*Prejudice and Punishment*

This Court may be loath to order a dismissal with prejudice, even though that is the only meaningful remedy.<sup>93</sup> But the proper remedy should reflect the particular facts of the case, rather than some overarching institutional reluctance. This case is easily differentiated from other cases in which the search for a remedy has not led to a dismissal. The difference is that Captain Lee suffered not only material prejudice but actual, severe punishment.

The Government punished Captain Lee through indifference and inaction.<sup>94</sup> Through ignorance of its own rules and failure to properly train its agents, the Government failed to take the required action to remove Captain Lee from the sex offender

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<sup>93</sup> Even in instances where post-trial delay was not harmless beyond a reasonable doubt, the court cannot provide relief where "there is no reasonable, meaningful relief available." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006); *United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011).

<sup>94</sup> J.A. at 175-180 (the military judge specifically found there to be a lack of institutional knowledge regarding the requirements of the SECNAVINST regarding sex offender registration and determined it both to be prejudicial and punishment under Article 13).



registration list following the setting aside of his case.<sup>95</sup> Adding insult to the injury already present was the trial counsel's response at the rehearing to Captain Lee's continuation on the sex offender registry. Both prior to and during the rehearing, the trial counsel affirmatively disavowed any actual duty by the Government to assist a restored appellant in removing his name from a sex offender registration. Rather, the trial counsel, clueless as to the Government's stated responsibility, avers that it is only due to his own good will that he was willing to assist Captain Lee. This is further indication of institutional indifference and derelict knowledge of the requirements of its own rules. This punishment easily distinguishes this case from others this Court has confronted. The existence of both prejudice and punishment and systemic Government failings justifies stepping outside this Court's usual view of remedies. Dismissal with prejudice will be a meaningful remedy and will serve to admonish the Navy Court and other elements of the Navy for their failure to attend in a seamanlike fashion to the matters for which they are responsible. Accountability is a term in common use these days. The remedy Captain Lee seeks is a form of accountability, as well as a way of affording him substantive relief.

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<sup>95</sup> J.A. at 175-180.

The Government's utter failure to educate and train its law enforcement and prosecutors on the requirements promulgated under its own rule (meant to protect the rights of successful appellants) goes beyond mere negligence. A government ignorant of its duty to liberate a freed citizen from the pariah existence of a sex offender list deserves to be treated sternly.

Recklessness is commonly defined as a conscious disregard for likely foreseeable harm: the actor knows of the potential for harm to occur and consciously disregards the substantial likelihood of this harm occurring.<sup>96</sup> The Government was on actual notice, because it wrote the requirement to remove someone promptly from a sex offender registry following appellate relief.<sup>97</sup> Further, it is foreseeable that a failure to comply with this requirement would result in a person remaining on a sex offender registry longer than necessary and, indeed, longer after a case has been overturned on appeal. There is no

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<sup>96</sup> This standard is similar to that adopted for criminal recklessness as espoused by the Model Penal Code § 2.02. *General Requirements of Culpability*. See also Restatement (Third) of Torts-PEH § 2, *Recklessness* (2009); 21 Am. Jur. 2d Criminal Law § 127, *Recklessness*.

<sup>97</sup> SECNAVINST 5800.14A.

reason to excuse a failure to ensure that those responsible for performing this function do their duty in a timely fashion.<sup>98</sup>

The distinction of recklessness is important because a reckless act may carry the same liability for harm as an intentional act; both reckless and intentional acts invoke culpability and may demonstrate bad faith.<sup>99</sup> The importance of this distinction relates to whether the Government in this case acted in bad faith in failing to train its personnel to follow the SECNAVINST on sex offender registration. Bad faith or systemic neglect on the part of the Government has previously served as sufficient justification to dismiss a case with prejudice.<sup>100</sup> The Government here acted recklessly or, at best,

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<sup>98</sup> Restatement (Third) of RestTorts-PEH § 2, *Recklessness* (“(b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.”) (2009).

<sup>99</sup> See, e.g., Model Penal Code § 2.02, *General Requirements of Culpability* (1962); Restatement (Third) of Torts-PEH § 2, *Recklessness* (2009); 21 Am. Jur. 2d Criminal Law § 127, *Recklessness*.

<sup>100</sup> E.g., *United States v. Taylor*, 487 U.S. 326, 338 (1988) (acknowledging that a case violating the Speedy Trial Act may be dismissed with prejudice upon a showing of bad faith or pattern of neglect by the Government); *United States v. Zahir*, 404 F. Appx. 585, 589 (3d Cir. 2010) (citing *United States v. Ferguson*, 565 F. Supp.2d 32, 46 (D.D.C. 2008) (“The Supreme Court has instructed that evidence of bad faith on the part of the Government . . . . supports [though it does not compel] dismissal with prejudice.”)); *United States v. Wells*, 893 F.2d

with systemic neglect, in the training and education of its agents and prosecutors regarding their duties of removing someone from the sex offender list upon appellate success.<sup>101</sup> This was a systemic institutional deficiency that was "a truly neglectful attitude, bad faith, a pattern of neglect, or other serious misconduct [i.e. dereliction of duty]."<sup>102</sup> The Government failed to follow its own requirements under the SECNAVINST. It failed to ensure the rights of appellants protected under that instruction. Captain Lee was prejudiced and punished from the Government's egregious failures. Accordingly, this case warrants dismissal with prejudice.

#### **Conclusion**

This Court should fashion a meaningful remedy in this case that protects not only Captain Lee's rights but preserves the confidence placed in our system by the public. The only

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535, 539 (2d Cir. 1990) ("To dismiss an indictment with prejudice for a violation of the Speedy Trial Act, the court should specifically describe the Government's conduct and find that conduct to be more than an isolated unwitting violation be it a truly neglectful attitude, bad faith, a pattern of neglect, or other serious misconduct.")

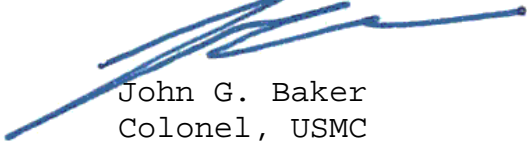
<sup>101</sup> Shockingly, even the prosecutor in the proceedings on remand, while eventually taking steps to assist in the removal of Captain Lee's name from the Texas registry, declared via email and on the record that he did not consider it his job and that the "Government is under no obligation to help" Captain Lee. See J.A. at 300.

<sup>102</sup> *Wells*, 893 F.2d at 539.

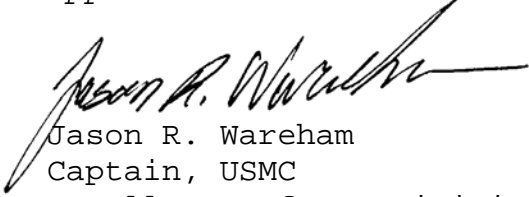
meaningful remedy to satisfy those aims is dismissal with prejudice. By dismissing this case, this Court would properly enforce the policies underlying the standards for post-trial processing that have been developing over the last half decade.

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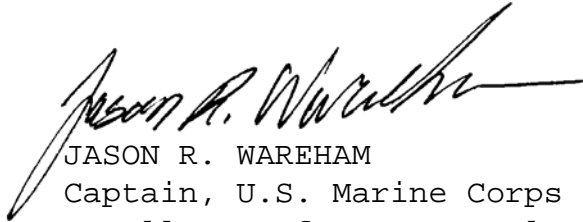
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