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	APPELLANT'S REPLY BRIEF Crim. App. No. 200600543 USCA Dkt. No. 07-0725/MC

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

Appellant's brief demonstrated the delay in this case warrants meaningful relief – a dismissal of the surviving charges with prejudice. Rather than come to grips with the grim reality of the extraordinary delay that has plagued this case, the Government has struggled to avoid responsibility and, worse yet, shift the blame to Captain Lee. Its position is completely without merit and should be rejected.

A. The Government impermissibly broadens the holding of *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010).

The Government treats the first line of part II of *Bradley* as support for a new rule of "guilty plea waiver."[1] In doing so, it ignores the second sentence, which confines the waiver rule

[1] Appellee's Br. 9-10.

to those issues "relat[ing] to the *factual issue of guilt* of the offense(s) to which the plea was made."[2] This critical phrase materially narrows the broader one preceding it. *Bradley* does not purport to close the door to any and all claims and issues arising beyond a guilty plea. Rather, the proper focus of *Bradley* and the cases on which it relies look to waiver regarding those issues that occur prior to trial and are related to the circumstances underpinning and relating to the providency inquiry and the accused's pleas.

Bradley has no application to post-trial issues that occur before a rehearing. Neither *Bradley* nor any other case the Government cites discusses waiver in anything remotely approaching the current procedural posture of this case.[3] *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011), could be thought to be pertinent, but that case is distinguishable because much of the delay there arose from a lengthy internal investigation by the United States Army Criminal Investigation Laboratory ("USACIL") into professional misconduct by a key government expert witness. Further, it does not appear that the

[2] *Bradley*, 68 M.J. at 281 (emphasis added).

[3] No case cited contains an appellant continuing as a sex offender while the Government and the courts both dragged their feet in face of continual requests from an appellant. This is the reality of Captain Lee's case.

appellant in *Luke* developed much of a record with respect to the prejudice attributable to the delay.[4] As a result, the Court was able to find the delay to be harmless beyond a reasonable doubt.[5]

As fully detailed in Appellant's main brief, the delay experienced by Captain Lee has been anything but harmless. He suffered particularized anxiety and his livelihood was harmed because he had to register as a sex offender for a protracted period. The delay measurably, tangibly, and adversely impacted his life. It cannot be found harmless.

Finally, the Government has offered an imaginative effort to transform post-trial delay into pre-trial delay upon the occasion of an appellate court-ordered rehearing such that *Bradley* would be applicable. The Government in effect would have the Court adopt a novel rule that any post-trial delay that occurs as a case moves back and forth between the appellate courts, *DuBay* hearings, and trial courts is automatically converted to pretrial delay upon the conduct of a rehearing. There is no basis in law to support such a rule. Moreover, the results of such a rule would be perverse: litigative success would turn what should be a blessing into a curse.

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[4] *United States v. Luke*, 69 M.J. at 320-321.

[5] *Id.*

B. The Government's attempt to segment and attribute the delay in this case is artificial and distracts from the Government's responsibility.

The Government attempts to avoid responsibility for the extraordinary delay in this case by blaming Appellant.[6] The parties obviously have very different definitions of delay. To support its view, the Government lists several occasions where it insists Appellant was responsible for delay.[7] Most absurdly, the litany includes time attributable to Appellant's requests for oral argument. Such requests do not give rise to "delay" for purposes of this Court's delay jurisprudence.[8] Oral arguments often play a crucial role in the appellate process and help the Court better frame and resolve issues. A request for oral argument may or may not contribute to the sum total of delay; it is impossible to tell without speculating how long it would have taken the service court, for example, to have decided the case without oral argument. A request for oral argument might lead to a later service court ruling, but it equally possibly might lead to an earlier one by helping make the issues crisper for adjudication. In addition, it would be

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[6] Appellee's Br. 24-25.

[7] Appellee's Br. 24-25.

[8] *See* N-M. Crt. Crim. App. Rules of Practice and Procedure Rule 23.3, *Motion for Oral Argument*.

reprehensible to penalize a litigant who avails himself or herself of the right to seek oral argument by attributing to him or her whatever additional time (if any can be shown) the conduct of oral argument entailed.

The Government should not be permitted to seize upon requests for oral argument and similar entirely permissible action to saddle Appellant with responsibility for the passage of time and take the Government off the hook for literally years of cumulative delay. This position is preposterous. Appellant is confident this Court will analyze the delays in their entirety when making its decision. In this connection, Appellant particularly invites the Court's attention to his main brief, which makes clear how the Government's dilatory, leisurely and flawed conduct of the repeated *DuBay* hearings added a full two and one-half years to the appellate process.[9]

C. Appellant did not seek to save the speedy review issue for a rainy day.

Captain Lee repeatedly objected to the leisurely pace and inefficiency of the *DuBay* and rehearing process, both throughout the sequence of *DuBay* hearings and in the course of subsequent appellate review. Far from keeping the point in his back

[9] *See* Appellant's Br. 22.

pocket, as the Government contends[10], so as to trump any subsequent conviction, he raised the post-trial delay issue at the first possible moment when the case returned to the service court from remand.[11]

The Government contends that delay should have been raised as a supplemental error following the third *DuBay* hearing.[12] It cites no support for this proposition, and we know of none. In fact, raising such a claim at that time would have been premature. At the conclusion of the third *DuBay* hearing there was no way to know what, if any, action the lower court would take. Moreover, because the case was still in the appellate process at that point, additional delay was accruing with every passing month.

The cleaner and only appropriate approach was the one Appellant adopted: raise the issue at the rehearing itself then raise the issue at first chance after the rehearing to the service court. It could not be clearer that Captain Lee neither sat on his hands nor improperly neglected to complain.

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[10] Appellee's Br. 26.

[11] Br. for Appellant, NMCCA No. 200600543 at *1-2 (N-M. Ct. Crim. App. (13 November 2012)).

[12] Appellee Br. 26.

Conclusion

For the foregoing reasons, and those previously stated, this Court should grant the only remaining meaningful remedy: dismissal of the charges and specifications with prejudice.

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I certify that the foregoing was electronically delivered to the Court, and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on December 5, 2013.

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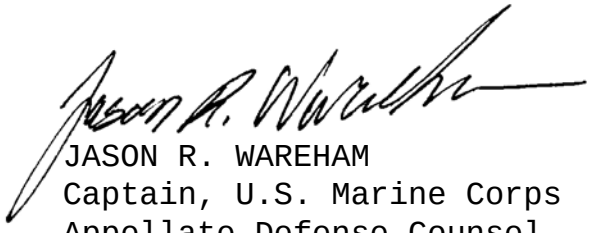

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