IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim. App. Dkt. No. 200600543
v.	)	
	)	USCA Dkt. No. 07-0725/MC
Jonathan E. LEE, Captain (O-3) U.S. Marine Corps Appellant	)	

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

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STATUTES

Issue Presented

WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN FINDING NO DUE PROCESS VIOLATION WHERE 2,500 DAYS ELAPSED BETWEEN SENTENCING AND REMOVAL OF APPELLANT'S NAME FROM THE TEXAS SEX OFFENDER REGISTRY.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals originally acquired jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. The court found that it had continuing jurisdiction following the rehearing because it had previously exercised jurisdiction. This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A. The first appeal.

At Appellant's first trial in 2005 a military judge sitting as a general court-martial convicted Appellant, after mixed pleas, of three specifications of burglary, one specification of conduct unbecoming an officer and a gentleman, three specifications of fraternization, and five specifications of indecent assault in violation of Articles 129, 133, and 134, UCMJ, 10 U.S.C. §§ 929, 933, and 934 (2000). The Military Judge sentenced Appellant to confinement for three years, forfeiture

of all pay and allowances, and a dismissal. The Convening Authority approved the sentence as adjudged and, except for the dismissal, ordered it executed.

The Court of Criminal Appeals dismissed the conviction of conduct unbecoming and one specification of indecent assault and after reassessing the sentence in light of that action, affirmed the sentence. *United States v. Lee*, No. 200600543, 2007 CCA LEXIS 233 (N-M. Ct. Crim. App. Jun. 26, 2007).

This Court set aside the lower court's decision and remanded for a fact-finding hearing related to a potential conflict of interest with Appellant's Detailed Defense Counsel. *United States v. Lee*, 66 M.J. 387, 390 (C.A.A.F. 2008).

After the *DuBay* hearing, the lower court determined that the military judge who presided over the hearing was disqualified from doing so, and therefore another hearing was required. 2009 CCA LEXIS 385 (N-M. Ct. Crim. App. Nov. 10, 2009). After the court received the results of the second *DuBay* proceeding, additional briefs, and heard oral argument a second time, it determined that additional questions remained unanswered and returned the Record to the Convening Authority to reopen the proceedings. *United States v. Lee*, No. 200600543 (N-M. Ct. Crim. App. Mar. 3, 2011) (order).

About two and a half months later, the lower court received the Record from the third *DuBay* hearing. It received additional

briefs and heard oral argument for the third time before it set aside the findings and sentence. *United States v. Lee*, 70 M.J. 535 (N-M. Ct. Crim. App. 2011). The court authorized a rehearing on all charges except for the indecent assault specification that it previously found factually insufficient and the Article 133 charge that it had previously dismissed as multiplicious in its 2007 opinion. *Id.* at 542.

B. Proceedings after the remand.

After a delay to allow Appellant to prepare to return to active duty, a rehearing was conducted on March 12-13, 2012. At this trial, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of two specifications of conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ. All the other charges were dismissed pursuant to a pretrial agreement. The Military Judge then sentenced Appellant to confinement for nine months, forfeiture of all pay and allowances for nine months, and a reprimand. The Convening Authority disapproved the reprimand pursuant to the pretrial agreement, but otherwise approved the sentence as adjudged and ordered it executed.

Statement of Facts

A. Appellant's misconduct.

About fifty to sixty Marines, including Appellant, attended an event in Londonderry, Ireland over the weekend of January 9-

12, 2004. (J.A. 40.) The event was to commemorate and learn about the contributions of Marines who served in Northern Ireland during World War II. (*Id.*) The officers and enlisted Marines stayed at the same hotel, but on different floors. (J.A. 320.) Appellant was the senior Captain, but he spent the entire weekend with the enlisted Marines, getting drunk and "hanging out" with them in their hotel rooms. (J.A. 319-320.)

Appellant admitted to military investigators that he entered the hotel room of a Marine and fondled the Marines' penis. (J.A. 184-91.) He claimed the encounter was consensual, and denied sexually assaulting other Marines that weekend. (J.A. 189.) However, the evidence at Appellant's first court-martial showed otherwise, and proved that "he sexually assaulted five different enlisted Marines" over the weekend. (J.A. 45.) In 2007, the Court of Criminal Appeals affirmed as factually sufficient numerous convictions related to Appellant's misconduct that weekend, including three specifications of burglary and four of indecent assault. (J.A. 42-43.)

Appellant was represented at his first trial by his civilian counsel and his detailed military counsel, Capt Reh. (J.A. 10.) The civilian counsel was lead counsel throughout the trial. (J.A. 34, 44.) Capt Reh was detailed to Appellant's case in June of 2004 and was scheduled to deploy to Afghanistan the next summer. (J.A. 142.) In the fall of 2004, the decision

was made to transfer Capt Reh to the prosecution office in January 2005 so he could "wind down" his defense cases before the deployment. (J.A. 9, 248.) It appeared, at least initially, that Capt Reh would complete his defense cases before he was reassigned. (J.A. 248.) However, numerous continuances were filed and granted in Appellant's trial schedule, including two times where Appellant's civilian counsel made site visits to Ireland to search out potential evidence. (J.A. 248, 261.) Ultimately, when Appellant's trial concluded in May of 2005, Capt Reh was prosecuting other cases, and the prosecutor in Appellant's case was his direct supervisor. (J.A. 77.)

In 2011, the lower court set Appellant's conviction aside based on this conflict of interest. The court was unable to point to any effect on Appellant's trial or find any prejudicial impact to Appellant from the conflict. (J.A. 15.) However, the court applied "needed prophylaxis" to prevent similar conflicts by deciding that the findings and sentence "should not be approved." (J.A. 15-16.) The court remanded and authorized a rehearing. (J.A. 16.) The United States did not appeal.

At the rehearing in 2012, some of the victims had not thought about Appellant's misconduct in years. (J.A. 356.) One had "moved on" and had his "memories fade" from the incident. (J.A. 354.) Two of the victims provided declarations asking "not to go to trial, to not be here, that they wanted to move on

with their lives." (J.A. 359.) As a result, the defense entered into plea negotiations with the convening authority and personally drafted two new specifications of conduct unbecoming. (J.A. 311.) The specifications alleged that Appellant fraternized and acted inappropriately with enlisted Marines while he was drunk in Ireland. (J.A. 59.) In return for Appellant's guilty plea to those specifications, the Convening Authority agreed to dismiss all the other charges, including the Indecent Assault convictions that had required Appellant to register as a sex offender in Texas following his first conviction. (J.A. 90, 171.)

B. Timeline of events during the first appeal.

The various phases of the first appeal are as follows:

Date	Event	Days since last Event	Days since sentence
May 4, 2005	Original sentencing		0
Oct. 19, 2005	Convening Authority Action	168	168
May 11, 2006	Docketed at NMCCA	204	372
Jun. 26, 2007	NMCCA 1st Decision	411	783
Jul. 12, 2007	Appellant released from Confinement		799
Jul. 10, 2008	CAAF Mandate sent to CA	380	1,163
Apr. 9, 2009	DuBay I findings	273	1,436
Nov. 10, 2009	NMCCA 2nd Decision	215	1,651
Jul. 13, 2010	DuBay II Docketed at NMCCA	245	1,896
Mar. 3, 2011	NMCCA 3rd Decision	233	2,129
May 23, 2011	DuBay III Docketed at NMCCA	81	2,210
Jul. 28, 2011	NMCCA 4th Decision	66	2,276

(J.A. 1-2.) The previous chart does not depict every event or relevant filing, just the major phases in the appeal.

C. The Military Judge denied Appellant's motion for relief from earlier post-trial delay. Appellant then unconditionally pled guilty.

The Convening Authority accepted Appellant's offer to plead guilty and signed the pre-trial agreement on March 1, 2012. (J.A. 172.) Appellant then filed a motion seeking appropriate relief from post-trial delay related to the processing of his case during the first appeal. (J.A. 107.) The Military Judge heard evidence on the motion and denied it. (J.A. 304.) After the Military Judge denied Appellant's motion, she conducted an inquiry into the offenses and pretrial agreement, and Appellant said that he did not have any question about the meaning and effect of his plea. (J.A. 351.) He still wanted to plead guilty. (J.A. 351.)

Summary of Argument

Appellant unconditionally pled guilty but now requests relief based on delay that occurred before his guilty plea. But an unconditional guilty plea waives any defects related to earlier delay. Therefore, the only relevant time period is the time after the guilty plea, and that short delay was not a due process violation.

Even if this Court analyzes the earlier delay, that delay was not a due process violation because the litigation of a

complex issue justifies the length of the appeal. The majority of the delay was due to the procedural back and forth between the Court of Criminal Appeals and the various *DuBay* hearings. Regardless, Appellant benefitted from the delay both during his first appeal and at his rehearing.

Argument

> APPELLANT'S UNCONDITIONAL GUILTY PLEA WAIVED ANY DEFECTS RELATED TO DELAY BEFORE THE PLEA. EVEN SO, THE POST-TRIAL DELAY DURING THE FIRST APPEAL WAS NOT A DUE PROCESS VIOLATION.

A. Appellant waived this issue.

1. An unconditional guilty plea waives all earlier nonjurisdictional defects.

"An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010). The Supreme Court summarized why this is so:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267 (1973). The limits of the waiver doctrine are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained. 68 M.J. at 282 (citing *United States v. Broce*, 488

U.S. 563, 574-76 (1989); *Menna v. New York*, 423 U.S. 61, 61-63 (1975)).

The exception to the general waiver rule is a conditional guilty plea, which is provided for in R.C.M. 910(a)(2). 68 M.J. at 281. Compliance with the regulation is the sole means of entering such a plea and preserving the right to challenge defects at earlier stages of the proceedings; a conditional plea cannot be implied. *Id.* at 282. Appellant's plea was unconditional. (J.A. 169-74.)

2. With a narrow precedent-based exception for Article 10, any issues related to earlier delay in the proceedings are waived by a later unconditional guilty plea.

The right to a speedy trial in the armed forces is governed by various constitutional, statutory, and regulatory provisions. *United States v. Becker*, 53 M.J. 229, 231 (C.A.A.F. 2000) (citing U.S. CONST. amend. VI; *Barker v. Wingo*, 407 U.S. 514 (1972); Arts. 10 and 33, UCMJ; R.C.M. 707(a); *United States v. Kossman*, 38 M.J. 258 (CMA 1993)). In addition, convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted).

The right to a speedy trial is non-jurisdictional in nature. *United States v. Mizgala*, 61 M.J. 122, 124 (C.A.A.F. 2005). Therefore, an unconditional guilty plea waives any

issues related to earlier delay in the proceedings, regardless of whether the delay is raised as a Sixth Amendment speedy trial issue or an R.C.M. 707 violation. *United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007).

By contrast, Article 10, UCMJ, "provides a narrow exception to the normal rule that a speedy trial motion is waived by an unconditional guilty plea." *Id.* (citing *Mizgala*, 61 M.J. at 126). But that statute imposes a "more stringent" standard than the Constitution. *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013). Therefore, this Court looked to the "unique nature of the protections" afforded by Article 10 along with the congressional intent to provide greater protection under the statute to conclude that a litigated Article 10 motion is not waived by a subsequent unconditional guilty plea. *Tippit*, 65 M.J. at 75; *Mizgala*, 61 M.J. at 127.

This Court has also stated that while an appellant's failure to complain about post-trial delay militates against finding a due process violation, it does not apply waiver when an appellant fails to complain about post-trial delay. *United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006); *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004). But the regular doctrine of waiver, and guilty plea waiver, are different tests. So while the simple failure to raise a due process issue earlier in the appeal may not constitute waiver, those cases do not

answer the current issue because neither dealt with a period of post-trial delay followed by a later unconditional guilty plea.

3. Due process claims are similar to speedy trial claims, so the same waiver rules should apply.

Here, guilty plea waiver should apply to Appellant's claim that delay before his guilty plea was a due process violation. The nature of Appellant's claim is similar, if not identical, to a Sixth Amendment speedy trial claim that would be waived by an unconditional guilty plea. At trial, Appellant did not assert the right of a convicted service member to timely review of his conviction——his conviction had already been reviewed and overturned. Rather, he claimed that the Government should not be able to proceed with the rehearing because of delay that had occurred years earlier. Courts hold that this interest is identical to the one presented by a speedy trial motion. After a conviction is overturned, claims that the rehearing may not proceed because of earlier delay in the first appeal usually implicate the Sixth Amendment speedy trial right "in its most pristine sense." *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980).

If Appellant had defense witnesses or evidence become unavailable, and had been unable to mount a defense at the retrial, any speedy trial claim based on those facts would be waived by the later guilty plea. *Tippit*, 65 M.J. at 75. The

result should not be different because Appellant has not even alleged that type of prejudice. He instead argues this as a due process issue, claiming that reversal is necessary to restore the public's confidence in the military justice system and "send the required strong message." (Appellant's Br. at 1, 27.) But regardless of whether Appellant's claim is a due process or speedy trial issue, the label attached to the violation "makes little substantive difference." *Burkett v. Fulcomer*, 951 F.2d 1431, 1445-1446 (3d Cir. 1991). "[A] guilty plea waives all non-jurisdictional defects occurring prior to the time of the plea, including violations of the defendant's rights to a speedy trial *and due process*." *Mizgala*, 61 M.J. at 124 (quoting *Tiemens v. United States*, 724 F.2d 928, 929 (11th Cir. 1984)) (emphasis added). So it does not matter that Appellant raises this issue as a due process issue rather than a speedy trial issue because both claims are similar in nature. Therefore, the same waiver principles should apply equally to claims asserted under both Constitutional provisions.

Unlike Article 10, UCMJ, there is no reason to apply a different guilty plea waiver rule for due process claims related to earlier delay. Servicemembers do not enjoy "due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM." *United States v. Vazquez*, 72 M.J. 13, No. 12-5002/AF,

2013 CAAF LEXIS 220, at *19 (C.A.A.F. 2013). So because the right at issue is grounded in the due process clause, unlike Article 10, UCMJ, there is no reason to provide a broader waiver rule.

It is true that this Court has noted that the unique nature of review under Article 66(c), UCMJ, "calls for, if anything, even greater diligence and timeliness than is found in the civilian system." *Moreno*, 63 M.J. at 142 (citation omitted). That may be justification for applying stricter post-trial processing standards, even when most civilian courts would require longer periods of delay before finding a due process violation. *See e.g. Elcock v. Henderson*, 947 F.2d 1004, 1007 (2nd Cir. 1991) ("We have ruled appellate delays of 6-10 years excessive.") But it is not justification to apply a different waiver rule and allow servicemembers, like Appellant, to negotiate a favorable plea agreement, plead guilty, and then immediately attempt to have their guilty plea set-aside because of delay that occurred before the plea.

Here, Appellant negotiated a favorable pretrial agreement, decided to unconditionally plead guilty, and said that he still wanted to plead guilty after the Military Judge denied his motion for relief from the earlier delay. (J.A. 351.) He did not have any questions about the meaning and effect of his guilty plea or his pretrial agreement, and he freely and

voluntarily entered into it. (J.A. 350.) He was represented by two experienced counsel at the rehearing, including the Chief Defense Counsel of the Marine Corps, who detailed himself to represent Appellant. (R. 3-4.) Like the appellant in *Bradley*, there "is no allegation of ineffective assistance of counsel, or that Appellant (who was getting the benefits of a quite favorable pretrial agreement) did not understand what he was doing." 68 M.J. at 283.

Therefore, any claim related to earlier delay in this case, whether based on the speedy trial clause or the due process clause, was waived by a later unconditional guilty plea. The only relevant time period in analyzing whether post-trial delay constitutes a due process violation is the time period after the sentencing on March 13, 2012.[1] That short delay was not a due process violation.

B. Even if waiver does not apply, the delay associated with the first appeal was not a due process violation.

Assuming this Court decides Appellant did not waive the right to assert error from earlier delay, it reviews *de novo*

[1] Appellant was sentenced on March 13, 2012 and the Convening Authority took action on August 1, 2012, 141 days later. (J.A. 52, 361.) This period barely exceeds the *Moreno* standards, but it is explained by the twenty-day extension given to Defense Counsel to submit clemency matters, the twenty-four days it took the Military Judge to authenticate the Record, and the fact that several other trials required transcription by the court reporters during the same time period. (J.A. 53-54.)

whether he has been denied the due process right to a speedy post-trial review and appeal. *Moreno*, 63 M.J. at 135. This determination involves balancing the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). Those factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.* (citations omitted). "No single factor is required, but a facially unreasonable length of delay triggers the full analysis." *Id.* Even in the absence of specific prejudice, a constitutional due process violation still occurs if, "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." *Id.* at 56 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

If an appellant has been denied the due process right to speedy post-trial review and appeal, this Court will grant relief unless it is convinced that the post-trial delay was harmless beyond a reasonable doubt. *Id.* (citation omitted). This Court may assume a due process violation and proceed straight to the harmless beyond a reasonable doubt analysis. 70 M.J. at 56. Balancing the four *Barker* factors in this case

leads to the conclusion that Appellant has not been denied his due process right to speedy review and appeal.

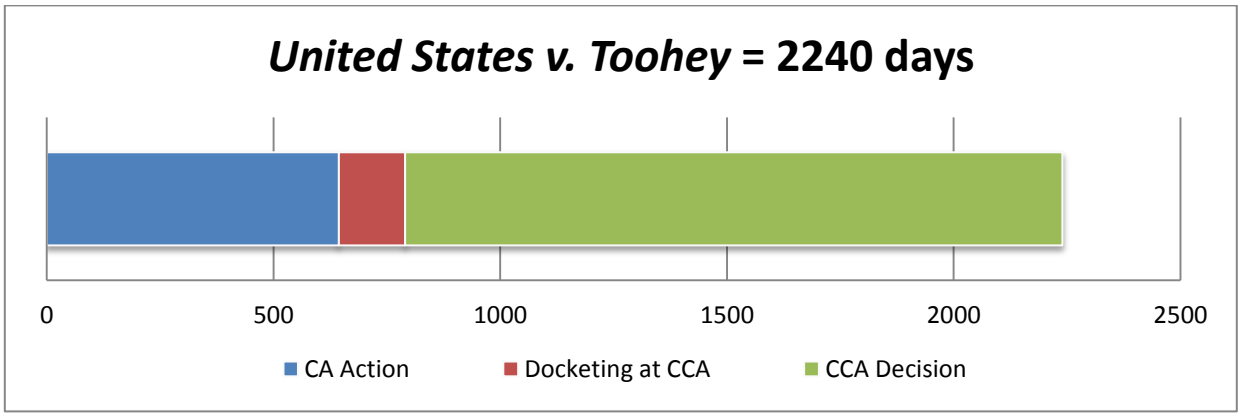
1. Length of the delay.

This Court recently clarified that "even after an initial appellate court decision, the Moreno standard for speedy post-trial review is still applicable as the case continues through the appellate process." *United States v. Mackie*, 72 M.J. 135 (C.A.A.F. 2013). Appellant's first trial concluded on May 4, 2005. (J.A. 21.) After all the various appellate proceedings, the lower court eventually set-aside all the findings and sentence on July 28, 2011, which was 2,276 days (over six years) after the original sentencing. *Lee*, 70 M.J. at 535. This Court found a nearly identical period of delay to be facially unreasonable. *Toohey*, 63 M.J. at 359 ("2,240-day delay is facially unreasonable.")

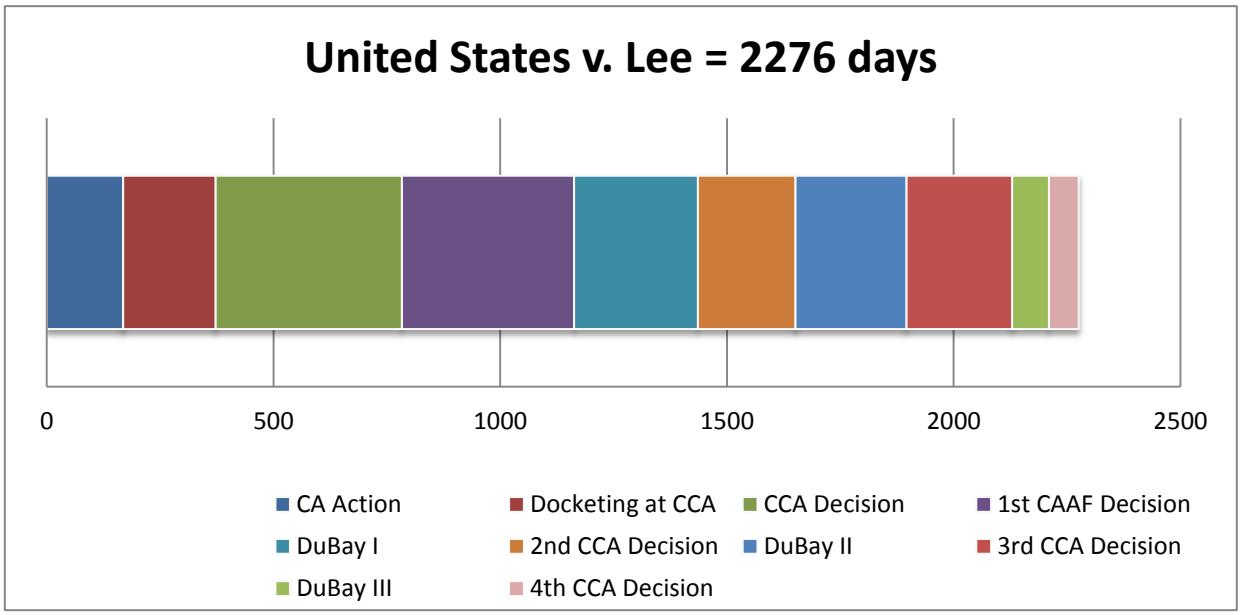
2. Reasons for the delay.

This factor considers the Government's responsibility for the delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. *Moreno*, 63 M.J. at 136.

Here, while the length of delay is similar to *Toohey*, the reasons for that delay and the activities that occurred during the appeals are vastly different, as illustrated in the following graphs:



(Based on dates from 63 M.J. at 359-60.)



(Based on dates listed on page 6 and J.A. 1-2.)

Normally, due process violations involve lengthy periods of delay that are not explained by any valid reason. *See e.g. United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006) (unexplained delay of over three years to file initial appellate briefs); *United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006) (five years to complete first level appellate review in a case that was "neither unusually long nor complex" with no explanation for

the delay); *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006) (six year unexplained delay to complete appellant's appeal of right).

The lower Court issued its first opinion on June 26, 2007. (J.A. 39.) This Court's mandate reversing the lower court's decision and directing a *DuBay* hearing was forwarded to the Convening Authority on July 10, 2008. (J.A. 66.) Subtracting the year in between those dates, when the appeal was pending before this Court, the remaining delay can be divided into two separate periods: (a) the approximate two years from sentencing to the lower court's first opinion; and (b) the approximately three years after this Court directed a *DuBay* hearing in July 2008, until the lower court set aside the findings and sentence in July 2011.

a. <u>The two year period before the first decision of the lower court</u>.

The period of two years before the lower court's first decision contains the most concerning delays. It took the Convening Authority 168 days after trial to complete his action and another 204 days after the action to docket the case with the Court of Criminal Appeals. (J.A. 1.) The delay in the Convening Authority's action can be partially explained by the twenty-day extension granted to defense to submit clemency. (J.A. 160.) But there is no valid explanation for why it took

204 days to docket the case with the lower court. This is the most serious delay that occurred during the entire case. Both of these periods were before this Court's *Moreno* decision. Unfortunately, such delays were not uncommon at the time. However, the number and severity of similar delay has "decreased significantly in recent years." *Arriaga*, 70 M.J. at 56 n.8. Regardless, the reason for this early period of delay should weigh in Appellant's favor.

But the lower court partially made up for the earlier delay when it issued its first opinion in June of 2007. At that time, Appellant received his first level appeal of right a little more than two years after sentencing. The standards set forth in *Moreno*——120 days for Convening Authority Action, thirty days for docketing, eighteen months for a decision——mean that an appellant should receive his first level appeal within twenty-three months after sentencing. The delay in this case only exceeded that standard by about three months.

b. <u>The three years after this Court's opinion</u>.

The second relevant period is the approximately three years starting when this Court remanded for a *DuBay* hearing and ending when the lower court set aside the findings and sentence. This Court found an eleven year appellate delay to be harmless when "the majority of the delay was attributable to the procedural back and forth among this court, the Court of Criminal Appeals,

and the *DuBay* proceedings." *United States v. Luke*, 69 M.J. 309, 321 n.16 (C.A.A.F. 2011). The procedural back and forth during all the appellate proceedings similarly explains the three year period in this case.

The Military Judge found that although there were some "do-overs" in the process to correct past *DuBay* proceedings, those corrections are reasonable justification for delay in the appellate process. (J.A. 176.) She also found that Appellant has "had constant motion with respect to his various appeals" throughout the processing of his case. (J.A. 176.)

Appellant essentially takes issue with the need for the second and third *DuBay* hearings. He claims that if the case had been handled properly, only one *DuBay* hearing would have been needed, and at least a year or two of litigation would have been avoided as a result. (Appellant's Br. at 22-25.) Appellant also claims that after the Court of Criminal Appeals received the Record from the first *DuBay*, it should have summarily remanded for a new hearing, instead of receiving briefing and hearing oral argument. (Appellant's Br. at 25.)

Appellant's claims seem to be infected with "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Knowing all the facts available now, it is possible to see times where the process could have gone faster. But at the time, Appellant was claiming that the potential conflict of

interest was a structural error. (J.A. 20, 34.) If the lower court agreed and found a structural error, it could do so notwithstanding the factual findings of a disqualified *DuBay* judge. In that case, summarily remanding for a second unnecessary *DuBay* hearing, as Appellant requested, would have lengthened the appeal, not shortened it. So the Court of Criminal Appeals was well within its authority to require briefing and oral argument before it made its decision.

Appellant also claims that the third *DuBay* hearing was "completely extraneous" and the need for the final hearing cannot weigh against him. (Appellant's Br. at 11.) But it was Appellant's burden at the *DuBay* proceedings to show a conflict of interest. *Mickens v. Taylor*, 535 U.S. 162, 174 (2002). He did not testify at the first or second *DuBay* hearings regarding what his counsel had disclosed to him about the conflict. The lower court found that his failure to testify led to unsatisfactory answers regarding the disclosure of the conflict to Appellant. (J.A. 61.) By 2011, the lower court was obviously sympathetic to Appellant's position, but was apparently unwilling to disbelieve the testimony of two attorneys based on appellant's "mere affidavit untested by the adversarial process." (J.A. 9, 61-64.) The lower court could have simply found that Appellant had not carried his burden and affirmed. Instead, it remanded for a third *DuBay* hearing,

giving Appellant a blueprint for how to carry his burden. While the court had no authority to order Appellant to testify, Appellant wisely saw the writing on the wall and did so. A few months later, the court found Appellant's testimony more credible than that of his two attorneys, and with that final piece of the puzzle in place, overturned his convictions.

Appellant could have testified at the earlier *DuBay* hearing. The fact that the court gave Appellant another chance to carry his burden should not weigh against the government in determining the reason for the delay from the third *DuBay*.

The three year back and forth between the Court of Criminal Appeals and the various *DuBay* hearings was to resolve a complex appellate issue. This Court's prior opinion and the dissenting opinion did not resolve the open legal issue of how the lower court should analyze the issue, or what prejudice, if any, Appellant would need to show at the *DuBay*. *Compare Lee*, 66 M.J. at 389 (because case law varies on whether defendant must show prejudice, the question remains as to what showing must be made), *with Lee*, 66 M.J. at 391 (Ryan, J., dissenting) (well settled that conflicts of interest are analyzed under the "ineffective assistance of counsel" rubric, which requires a showing of prejudice).[2]

[2] The confusion persists. Appellant now claims that the *DuBay* remand orders incorrectly identified the subject of the hearing

The first appeal involved three *DuBay* hearings, four oral arguments, five court orders or opinions, and "the generation of a record on appeal that dwarfs the original record of trial." (J.A. 6.) This Court should review the Court of Criminal Appeals shepherding of the case through the process with reasonable deference, "recognizing that it involves the exercise of the Court of Criminal Appeals' judicial decision-making authority." *Moreno*, 63 M.J. at 137. Therefore, on the whole, the reason for the delay should not weigh in favor of a due process violation.

3. Assertion of the right to a timely review and appeal.

An assertion of a speedy trial right will be given "strong evidentiary weight" in determining whether a violation occurred. *Barker,* 407 U.S. at 531-532. But because the primary responsibility for speedy processing rests with the government, normally a failure to complain about appellate delay only weighs slightly against an appellant. *Moreno*, 63 M.J. at 138. However, in this case, this factor should weigh strongly against Appellant because finding otherwise will encourage future

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as involving ineffective assistance of counsel. (Appellant's Br. at 22 n.66.) Apparently, this demonstrates government "indifference" to the proper processing of Appellant's case. But the United States believes the subject line correctly states the issue. *Mickens*, 535 U.S. at 166-67 (conflicts analyzed under Sixth Amendment framework for effectiveness of counsel).

appellants to engage in gamesmanship by intentionally choosing not to raise claims of appellate delay.

Here, Appellant claims that he asserted the right to timely review because, scattered throughout the course of complex litigation, there were five instances where he opposed a government enlargement request or a scheduling order. (Appellant's Br. at 27.) But there were even more times scattered throughout that process where Appellant's actions slowed the appeal:

1. He did not file his initial brief with the lower court until four months after his case was docketed, double the amount of time currently allowed. (J.A. 1);

2. He filed one enlargement to respond to the Government's answer. (J.A. 1);

3. In 2009, about two months after he filed his motion to suspend briefing, which he now claims was an assertion of the right to speedy review, he filed his own motion for enlargement to respond to the Government's brief, citing as justification the fact that his civilian counsel was "on vacation." (Appellant's Mot. for Enlargement, Jul. 21, 2009);

4. Then he requested oral argument on the issue, which added another month delay. (Appellant's Mot. for Oral Argument, Aug. 17, 2009);

5. After the lower court received the Record from the second DuBay hearing, he again requested oral argument, which the government opposed. (Gov. Opp. to Mot. for Oral Argument, Aug. 20, 2010.) By that time various *amicus curiae* had joined Appellant's cause, and the resulting oral argument delayed the case by several additional months;

6. After his conviction was set-aside, he requested excludable delay to prepare to return to active duty, a twenty-day extension of time to submit clemency to the Convening Authority, and a thirty-day enlargement to file his initial brief before the lower court. (J.A. 2.)

None of these actions by Appellant are improper, and the United States does not suggest that they are. He simply sought to speed up or slow down the case depending on whether the delay would benefit him or the government. But that is a far cry from consistently asserting a right to speedy post-trial review. *See Toohey*, 63 M.J. at 360 (listing actions taken by the appellant to assert right to timely review).

But the best evidence that Appellant never asserted the right to timely review is that he never raised this as an assignment of error during the review of his previous convictions. Appellant filed his final brief during the first appeal with the lower court in June of 2011, over six years

after his sentencing. Yet Appellant never raised the issue of post-trial delay.

In *Moreno*, the appellant raised meritorious claims of implied bias and post-trial delay. 63 M.J. at 136-38. The meritorious claim of implied bias alone would require a rehearing. But because the appellant raised both claims, this Court was able to consider a "range of options" to address the post-trial delay, and ultimately limited the punishment available at the rehearing to effect relief. *Id.* at 143-44.

If Appellant is able to proceed as he is attempting to do, future appellants will be better off not raising ripe delay issues. That is, if an appellant in Moreno's position thought he was going to be successful on the implied bias issue, he could keep the post-trial delay issue as an insurance policy in the event he was convicted at the rehearing. Worse yet, if the delay led to victims not wanting to participate at the rehearing, or other problems that allowed him to negotiate a favorable plea agreement, he could use the delay to have his later guilty plea overturned.

This attempt to save appellate issues for later should not be encouraged. Appellant could have raised this issue before the lower court in 2011. His failure to do so seems to be a deliberate choice and should weigh heavily against finding a due process violation now.

4. Prejudice.

"In the case of appellate delay, prejudice should be assessed in light of the interests of those convicted of crimes to an appeal of their convictions unencumbered by excessive delay." *Moreno*, 63 M.J. at 138 (quoting *Rheuark v. Shaw*, 628 F.2d at 303 n.8). Those interests are: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id. at* 138-39. In the pretrial context, the Supreme Court has emphasized that the last factor is the most serious. *Barker*, 407 U.S. at 532. Appellant does not claim that the third interest is implicated in his case. (Appellant's Br. at 29.)

a. Appellant suffered no oppressive incarceration because he did not serve any additional confinement due to appellate delay.

For incarceration to be oppressive, an appellant must first succeed on a substantive claim in this court or the court below. *Arriaga*, 70 M.J. at 58 (citations omitted). Here, the lower court declined to approve the findings and sentence in 2011, so that threshold requirement is met.

Then, the pertinent inquiry becomes whether the appellant served additional confinement because his case was not timely processed. *Id.* If so, the additional confinement caused by the delay is oppressive. *Id.* That was the case in *Moreno*, where the appellant served at least four years of confinement before the Court of Criminal Appeals even heard his first appeal of right. 63 M.J. at 139. If his case had been timely processed, he likely would have spent less time in confinement.

That is not the case here. Appellant was released from confinement on July 12, 2007, which was two years, two months, and eight days after his sentencing. (J.A. 231.) The vast majority of delay occurred after that, during the *DuBay* hearings and review before the lower court. With the benefit of hindsight, assuming everything went smoothly during the *DuBay* process and every other phase of the appeal proceeded at the fastest pace possible, the lower court might have issued its opinion overturning Appellant's conviction several years earlier than 2011. But Appellant would have still spent the same amount of time in confinement.

If this Court disagrees, and finds that Appellant did suffer oppressive incarceration, it must then determine what weight to give that factor. The factor of oppressive incarceration will "weigh heavily against the Government" if a conviction is overturned for factual insufficiency. *Moreno*, 63

M.J. at 139 n.15. It follows that the reverse should also be true: when a conviction is overturned for reasons that have nothing to do with an appellant's guilt, the weight given the factor should be lower. Here, the lower court was unable to point to any effect on Appellant's trial arising from any ineffectiveness on the part of the defense team or find any prejudicial impact to Appellant from the conflict. (J.A. 15.) It simply reversed after finding a violation of an ethical rule to apply "needed prophylaxis" in future cases. Therefore, the weight given this factor should be slight.

b. Appellant was not prejudiced by the anxiety and concern of sex offender registration. In fact, the delay allowed him to avoid such registration, so he benefitted from it.

The requirement to register as a sex offender during an appeal may constitute constitutional anxiety that is distinguishable from the normal anxiety experienced by prisoners awaiting appeal. *Moreno*, 63 M.J. at 140. Appellant's claim of prejudice, and really his entire due process claim, rests on the claim that but for the delay, his conviction would have been overturned sooner, and as a result he would have had his name removed from Texas' sex offender registry years earlier. (Appellant's Br. at 8.) But this claim neglects the fact that it was the delay that allowed Appellant to end up in his current position. But for the delay, he would still be a sex offender.

First, Appellant benefitted from the delay during his first appeal. At the final *DuBay* hearing in 2011, Appellant's detailed defense counsel could not remember many of the discussions he had with Appellant back in 2004 and 2005. (J.A. 75.) But he did remember disclosing to Appellant that he would be working for the prosecutor. (J.A. 76.) However, the *DuBay* judge found this testimony not credible due to the attorney's inability to remember other details. (J.A. 76.) Appellant used the delay effectively before the lower court. That court wrote in its opinion: "As the appellant correctly points out in his brief, the passage of time has affected witnesses' ability to remember critical facts, and additionally critical case files have been lost." (J.A. 10.) The court relied on the "somewhat shifting narratives" of the defense counsel over the course of the litigation to resolve this factual issue in Appellant's favor. (J.A. 10.) The case might have turned out differently if it was finished when the events were still fresh in the attorney's mind and before case files were lost.

Second, Appellant benefitted from the delay at the rehearing. The evidence in aggravation at Appellant's first trial was compelling. One victim, who was a Lance Corporal at the time of the sexual assault, did not fight off Appellant as he was being sexually assaulted because he was scared to strike an officer. (J.A. 181.) His failure to fight back caused him

immense shame afterwards; Appellant stole his "manhood." (J.A. 181.) The same victim then looked at other Marine officers with "less trust" because of Appellant's actions. (*Id.*) "[I pray that] if the time comes again that a superior tries to take advantage of me, I won't hesitate to fight them right then and there. Definitely, take everything possible from Capt Lee so he can spend time thinking about what he has lost, just like me." (J.A. 181.)

At the rehearing seven years later, the entire tenor of the case had changed. (J.A. 353-61.) One victim had "moved on" and had his "memories fade" from the incident. (J.A. 354.) He also no longer had the same distrust of superiors that he had after the assault. (*Id.*) Two of the victims provided declarations asking "not to go to trial, to not be here, that they wanted to move on with their lives." (J.A. 359.) The Military Judge found that the delay caused the Government to enter into the plea agreement. "[B]ut the collateral effect of the length of the process has been that the government is moving forward today on only a fraction of the original charges, none of which will require sex offender registration." (J.A. 177.)

In addition, Appellant's case that he had been rehabilitated was much stronger. He was able to present evidence and a plethora of letters and recommendations from

those in his home town claiming that he had been rehabilitated. (J.A. 359-60.)

If the rehearing had occurred sometime between 2006 and 2008, as Appellant now claims it should have, it would have more closely resembled the first trial than the second. In that case, Appellant would likely not be able to negotiate a favorable plea agreement, and would still be subject to sex offender registration. He was not prejudiced by any delay.

C. Any error was harmless beyond a reasonable doubt.

This Court considers the totality of the circumstances in assessing whether a due process violation is harmless beyond a reasonable doubt. *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009). This determination necessarily involves analyzing the case for "prejudice," but that analysis for "prejudice" is separate and distinct from the consideration of prejudice as one of the four Barker factors. *Id.* "Unless we conclude beyond a reasonable doubt that the delay generated no prejudicial impact, the Government will have failed to attain its burden." *Id.*

Here, considering all the circumstances, this Court should conclude that any delay was harmless because Appellant suffered no prejudice from it. The delay benefitted Appellant by contributing to his conviction being overturned, and was the primary factor that allowed him to obtain a favorable result at

the rehearing. Under these circumstances, any delay was harmless.

D. Dismissal with prejudice is not an appropriate remedy.

Here, Appellant claims that setting aside his guilty plea and dismissing with prejudice is appropriate because it is the only meaningful remedy. (Appellant's Br. at 35.) But this Court need not fashion relief that is meaningful if that relief is disproportionate to the possible harm generated from the delay. *Rodriguez-Rivera*, 63 M.J. at 386.

Setting aside Appellant's guilty plea and resulting sentence of nine months of confinement would be disproportionate to any potential harm from the delay. The delay in this case contributed to Appellant's convictions being overturned and led to a much more favorable outcome at the rehearing. As a result, Appellant no longer has to register as a sex offender, no longer has a punitive discharge, and received $389,000 in back pay as a result of the decrease in his confinement. (J.A. 217.) No further relief is necessary or appropriate.

Appellant also attempts to tie the Article 13 issue to the remedy, arguing that dismissal with prejudice is appropriate because the Government did not promptly notify the state of Texas to remove Appellant from its sex offender registry after his conviction was overturned. (Appellant's Br. at 35-39.)

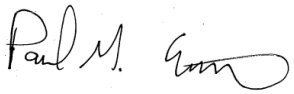
Appellant raised the Article 13 issue with the lower court, but never appealed it to this Court.

At trial, the Military Judge found an Article 13 violation and awarded 123 days of confinement credit, one day for every day Appellant remained on the state registry from September 2011 to January 2012. (J.A. 178-80.) Appellant obtained arithmetic credit and then placed the alleged Article 13 violation into the sentencing crucible, hoping for a lenient sentence. His unsworn statement talked about how "no one lifted a hand" to help him get de-registered for six months after the lower court set aside his conviction. (R. 130.) He received the lenient sentence he requested.

It is not necessary to grant even more relief now based on that same Article 13 issue, which Appellant has not appealed to this Court. Therefore, setting aside Appellant's guilty plea and dismissing the charges with prejudice is disproportionate to any harm that Appellant suffered from delay during his first appeal. He received all the credit he is due when he used the delay to negotiate a favorable plea agreement.

Conclusion

WHEREFORE, the Government respectfully requests that this Court affirm the decision of the lower court.



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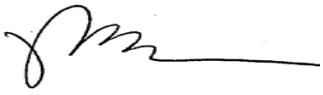

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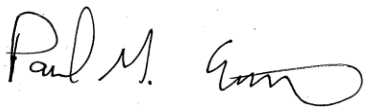

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