30 May 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Master Sergeant (E-7)

Timothy L. Merritt, Sr.
USAF,
Appellant.

USCA Dkt. No. 13-0283/AF

Crim. App. No. 37608

BRIEF IN SUPPORT OF PETITION GRANTED

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Master Sergeant (E-7) **Timothy L. Merritt, Sr.,** United States Air Force, Appellant	USCA Dkt. No. 13-0283/AF

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

Issues Granted

I.

WHETHER APPELLANT'S CONSTITUTIONAL RIGHT TO FAIR NOTICE THAT AN ACT IS CRIMINAL WAS VIOLATED IN SPECIFICATION 2 OF THE CHARGE, WHERE THE ALLEGED OFFENSE OCCURRED IN MAY 2006 BUT CONGRESS DID NOT CRIMINALIZE THE INTENTIONAL VIEWING OF CHILD PORNOGRAPHY UNTIL OCTOBER 2008.

II.

WHETHER APPELLANT'S DUE PROCESS RIGHT TO TIMELY APPELLATE REVIEW WAS VIOLATED WHERE THE AIR FORCE COURT DECIDED APPELLANT'S CASE ONE THOUSAND AND TWENTY-FOUR DAYS AFTER IT WAS DOCKETED.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2008).

This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On August 31-September 2, 2009, Master Sergeant (MSgt) Timothy L. Merritt (appellant) was tried at Spangdahlem Air Base, Germany, by a military judge sitting as a general court-martial. Contrary to his pleas, appellant was found guilty of one specification of receiving child pornography and one specification of viewing child pornography, in violation of Article 134, UCMJ. On January 19, 2010, the convening authority approved the adjudged sentence of reduction to the grade of E-2, confinement for twenty-four months, and a bad-conduct discharge. (J.A. at 20)

On February 16, 2011, appellant filed a brief with the Air Force Court alleging five issues. On August 10, 2012, appellant submitted a motion for expedited review to the Air Force Court. J.A. at 174. Appellant also filed a motion to file a supplemental assignment of error for the following issue:

> WHETHER THE VIOLATION OF THE 18-MONTH POST-TRIAL PROCESSING STANDARD FOR COMPLETION OF THE FIRST LEVEL OF APPELLATE REVIEW WARRANTS RELIEF UNDER *UNITED STATES v. TARDIF*, 57 M.J. 219 (C.A.A.F. 2002).

(J.A. at 170)

On December 14, 2012, the Air Force Court issued an Opinion of the Court affirming the findings and sentence. *United States v. Merritt*, 71 M.J. 699 (A.F. Ct. Crim. App. 2012).

Statement of the Facts

In October 2006, the German police initiated "Operation Kimmel," an investigation into the transmission and receipt of suspected child pornography over the Internet. (J.A. at 59, 74-80) During the investigation, a German Internet service provider (ISP) identified appellant as a potential recipient of child pornography. (J.A. at 68). The investigators approached the Air Force Office of Special Investigations (OSI) detachment at Spangdahlem Air Base, Germany, which opened its own investigation. (J.A. at 82).

On September 13, 2007, OSI Special Agent (SA) Davis properly advised appellant of his rights and the offense of which he was suspected. (J.A. at 90). Appellant waived his rights and agreed to provide a written sworn statement. *Id*. SA Davis interviewed appellant who said that he searched the Internet for adult pornography of Hispanic and Asian women between May 6-13, 2006. (J.A. at 102). Appellant admitted that while searching the Internet, he came across banners and pop-up advertisements with "young individuals, under 18, in sexual poses or having oral intercourse" and that he clicked on several images. (J.A. at 89, 102). Appellant provided a written sworn

statement in which he described nineteen pornographic images he observed with children between three and seventeen years of age. (J.A. at 102).

In Specification 2 of The Charge, the government charged appellant with viewing child pornography under Article 134, UCMJ. Specification 2 reads:

> In that [appellant] did, at or near Spangdahlem Air Base, Germany, on divers occasions, between on or about 6 May 2006 and on or about 13 May 2006, wrongfully and knowingly view one or more visual depictions of minors engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[1]

(J.A. at 11-12).

Appellant was sentenced on September 2, 2009. (J.A. at 20). This case was docketed with the Air Force Court on February 24, 2010. On February 16, 2011, after the Air Force Court granted six enlargements of time, appellant submitted his brief with five assignments of error. (J.A. at 119-47). On August 11, 2011, after the Air Force Court granted four enlargements of time, the government submitted its answer. (J.A. at 148-69). Appellant requested one enlargement of time to reply to the government's answer. On August 25, 2011, appellant submitted his reply to the government's answer.

[1] The military judge found by exceptions that appellant's conduct was service discrediting under clause 2 of Article 134, UCMJ. (J.A. at 20)

On August 10, 2012, appellant moved for expedited review of his case before the Air Force Court. On August 17, 2012, the Air Force Court summarily denied the motion. (J.A. at 174). Also on August 10, 2012, appellant moved to submit a supplemental assignment of error to the Air Force Court for its violation of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and for relief pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). The Air Force Court granted this motion on August 30, 2012. (J.A. at 170). On September 4, 2012, the government requested one enlargement of time to submit its answer to the supplemental assignment of error. (J.A. at 163). On October 1, 2012, the government filed its answer.

On September 5, 2012, appellant filed a petition for extraordinary relief in the nature of a writ of mandamus[2] with this Court, requesting that this Court order the Air Force Court to expeditiously decide his case. On September 18, 2012, this Court ordered the government and the Air Force Court to show cause on or before September 28, 2012, why the requested relief should not be granted. On September 26, 2012, the government replied to appellant's petition for extraordinary relief. The next day, appellant replied to the government's response.

[2] Appellant's petition was styled as a "Petition for Writ of Mandamus," but this Court's show cause order recognized it as a petition for extraordinary relief in the nature of a writ of mandamus.

The Air Force Court issued its opinion in appellant's case on December 14, 2012, 1199 days after appellant was sentenced and 1024 days after the case was docketed. A total of 351 days passed between the submission of appellant's reply brief to the government's answer to the original five assignments of error and his request for expedited review. Eighty-seven days passed between this Court's show cause order and the Air Force Court's decision. A total of 477 days, or one year, three months, and nineteen days, elapsed between the submission of appellant's reply brief and the Air Force Court's decision following this Court's show cause order.

The Air Force Court found that "the overall delay of more than 540 days[3] between the trial and completion of review by this Court is facially unreasonable." *Merritt*, 71 M.J. at 708. The Air Force Court examined the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), but did not conduct a separate analysis of those factors. *Id*. at 10 (citing *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)). The Air Force Court "considered the totality of the circumstances and the entire record" and concluded that "any denial of the appellant's right

[3] Appellant does not know how the Air Force Court calculated a delay of 540 days between the trial and its decision. From trial to the lower court's opinion, 1199 days, or three years, three months, and twelve days elapsed.

to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted." *Id*.

Additional facts necessary to resolve the certified issues are contained in the arguments below.

Summary of Argument

Due process requires that a person have fair notice that an act is criminal before being prosecuted for it. Appellant did not have fair notice that viewing child pornography was a crime at the time of the alleged offense. Neither the Manual for Courts-Martial, federal law, state law, military case law, military customs and usage, or military regulations notified appellant that the alleged conduct was forbidden and subject to criminal sanction.

The Air Force Court violated appellant's due process right to timely review and appeal of his conviction by allowing his case to languish for nearly a year leaving appellant no choice but to seek expedited review. The excessive length of the delay, the complete lack of explanation for the Air Force Court's delay, appellant's assertion of his right to timely review, and the prejudice caused by the excessive delay warrant relief by this Court. Furthermore, the Air Force Court's system is broken. Appellant's case is but one in a legion of cases in which the Air Force Court has abdicated its responsibility to provide timely appellate review. The systemic appellate delay

in the Air Force poses a serious risk to the military justice system and its ability to provide meaningful relief to wrongly convicted and/or wrongly confined servicemembers.

Argument

I.

APPELLANT'S CONSTITUTIONAL RIGHT TO FAIR NOTICE THAT AN ACT IS CRIMINAL WAS VIOLATED IN SPECIFICATION 2 OF THE CHARGE, WHERE THE ALLEGED OFFENSE OCCURRED IN MAY 2006 BUT CONGRESS DID NOT CRIMINALIZE THE INTENTIONAL VIEWING OF CHILD PORNOGRAPHY UNTIL OCTOBER 2008.

Standard of Review

Whether the military judge correctly understood and applied the proper legal principle in denying appellant's motion to dismiss for violating his right to fair notice is a question reviewed de novo. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003) (citing *United States v. Hughes*, 48 M.J. 214, 216 (C.A.A.F. 1998)).

Law and Argument

"Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)). "It also requires fair notice as to the standard applicable to the forbidden conduct." *Id*. (citing *Parker v. Levy*, 417 U.S. 733, 755 (1974)). Article 134, UCMJ, the General Article, criminalizes,

inter alia, service-discrediting conduct by servicemembers. Manual for Courts-Martial, United States, Part IV, ¶ 60.b.(1)-(2) (2008 ed.) (MCM). The elements of the offense are (1) that the accused did or failed to do certain acts and (2) that, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed services. *Id.* Certain specified offenses are included under this Article, but "[i]f conduct by an accused does not fall under any of the listed offenses . . . a specification not listed in this Manual may be used to allege the offense." *Id.* at ¶ 60.c.(6)(c). Thus, "[i]t is well settled that conduct that is not specifically listed in the MCM may be prosecuted under Article 134." *Saunders*, 59 M.J. at 6 (citing *Vaughan*, 58 M.J. at 31).

In *Parker*, the Supreme Court held that Article 134, UCMJ, was not facially void for vagueness.[4] 417 U.S. at 756-57. It also "noted that interpretations by this Court, military authorities, as well as the examples in the [MCM] have limited the broad reach of the literal language of Article 134." *Vaughan*, 58 M.J. at 31 (citing *Parker*, 417 U.S. at 753-54). Though the broad reach of the literal language of Article 134 is limited, "'further content may be supplied even in these areas

[4] The Supreme Court explained, "Void for vagueness means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker*, 417 U.S. at 757.

[of uncertainty] by less formalized custom and usage.'" *Id*. (quoting *Parker*, 417 U.S. at 754).

As a matter of due process, a servicemember must have "'fair notice' that his conduct [is] punishable" before the government can charge him with a service discrediting offense under Article 134. *Bivins*, 49 M.J. at 330. This Court has identified several sources of fair notice, including "the MCM, federal law, state law, military case law, military custom and usage, and military regulations." *Vaughan*, 58 M.J. at 31.[5]

Appellant was charged with "wrongfully and knowingly view[ing]" child pornography at or near Spangdahlem Air Base, Germany, between on or about 6 May 2006 and on or about 13 May 2006. (J.A. at 11-12). Viewing child pornography was not specifically listed in the MCM as an Article 134 offense at the time of appellant's alleged conduct, such that the MCM did not

[5] *See* MCM, Pt. IV, at ¶ 60.c.(4)(b)-(c) (permitting offenses under federal and state law to be charged under Article 134); MCM, pt. IV at ¶¶ 60-114 (listing specified Article 134 offenses); Article 137, UCMJ, 10 U.S.C. § 937 (2008) (requiring explanation to members of punitive UCMJ Articles 77-134, 10 U.S.C. §§ 877-934 (2008); *United States v. Boyett*, 42 M.J. 150, 153-54 (C.A.A.F. 1995) (noting that a court may take judicial notice of regulations as evidence of military custom); *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991) (citing Article 137 and military customs on civilian dress as evidence of notice for prosecution for "cross dressing").

provide fair notice to appellant.[6] Appellant will now examine the remaining sources of fair notice.

A. Federal Law

The Congress enacted the Child Pornography Prevention Act (CPPA) in 1996. Pub. L. No. 104-208, 110 Stat. 3009-26, 18 U.S.C. §§ 2251-60 (2006). At that time, §§ 2252 and 2252A of the CPPA prohibited "certain activities relating to material involving the sexual exploitation of minors." *Id*. These "certain activities" included the transportation, shipping, receiving, distributing, possessing, manufacturing, selling, reproducing, advertising, promoting, presenting, soliciting, offering, sending, and providing such material in a variety of contexts. *Id*. The "certain activities" did not include viewing child pornography. In other words, the CPPA expressly excluded viewing child pornography as a punishable offense. Because federal law did not prohibit the mere viewing of child pornography at the time of the offense in May 2006, appellant had no fair notice that such conduct was criminal.

From 1996 until October 8, 2008, no CPPA provision even referenced the viewing of child pornography. On that date, the Congress amended § 2252A of the CPPA to prohibit from that point

[6] On December 13, 2011, the President signed Executive Order 13593 regarding the 2011 Amendments to the MCM. As of January 12, 2012, possessing, receiving, or viewing child pornography is an enumerated offense under Article 134, UCMJ. 76 Fed. Reg. 78458.

forward "knowingly accessing with intent to view" child pornography. Pub. L. No. 110-358, 18 U.S.C. § 2252A(a)(5)(B) (2008). Even this amendment does not prohibit the mere viewing of child pornography; instead, it criminalizes the accession of child pornography whether or not someone actually viewed it.[7] Thus, the current law still does not prohibit the mere viewing of child pornography.[8]

Regarding other sources of federal law, the Air Force Court stated, "Various federal circuits have held that the act of viewing child pornography violated the Child Pornography Protection Act, 18 U.S.C. § 2251-60, even though 'viewing' was not specifically listed in the statute until 2008." *Merritt,* 71 M.J. at 705 (citing *United States v. Pruitt*, 638 F.3d 763 (11th Cir. 2011); *United States v. Bass*, 411 F.3d 1198 (10th Cir. 2005)). The Air Force Court either misapplied or misconstrued the law. Neither decision cited by the Air Force Court addressed the viewing of child pornography as an offense in and of itself. In *Pruitt*, the defendant was convicted of the receipt of child pornography and in *Bass*, the defendant was convicted of possession of child pornography, both in violation

[7] The Air Force Court incorrectly stated that 18 U.S.C. § 2252A "was amended in 2008 to add viewing of child pornography as a listed offense." *Merritt*, 61 M.J. at 705, n.3.
[8] Appellant notes that this Court has held that the CPPA does not have extraterritorial application. *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005).

of 18 U.S.C. § 2252A. In *Pruitt*, the 11th Circuit explained that one "'knowingly receives' child pornography . . . when he intentionally views, acquires, or accepts child pornography on a computer from an outside source." 638 F.3d at 766. The 11th Circuit made clear that the actual crime was the receipt of child pornography and that one could commit the offense by viewing such material but that viewing alone was not the crime. The Air Force Court clearly misunderstood the 11th Circuit's explanation of its reasoning. Furthermore, the alleged offense occurred in 2007 before the Congress amended the CPPA to prohibit accessing child pornography with the intent to view it. In *Bass*, the defendant argued that he could not have been found guilty of knowing possession of child pornography for viewing such images over the Internet where he did not know the images were automatically stored to his computer. 411 F.3d at 1202. The 10th Circuit focused on the definition of "possession" in 18 U.S.C. § 2252A(a)(5)(B). There was no discussion whatsoever of whether viewing child pornography is a crime unto itself. The Air Force Court wholly misunderstood the decisions in *Pruitt* and *Bass* and attempted to insert the viewing of child pornography into the CPPA. The Air Force Court cannot escape the fact that merely viewing child pornography was not a crime in May 2006 and appellant did not have fair notice that his alleged conduct was criminal.

B. State Laws

The Air Force Court reasoned that because "states can constitutionally proscribe the possession and viewing of child pornography," then appellant had fair notice that the alleged conduct was criminal. *Merritt*, 61 M.J. at 705. The Air Force Court was partially right: states can proscribe the viewing of child pornography, yet the overwhelming majority does not. A review of the criminal codes of all fifty states reveals that Alaska, Florida, New Jersey, Oregon, Pennsylvania, and Utah criminalize the viewing of child pornography.[9] Oregon and Wisconsin criminalize the accession of child pornography with the intent to view it.[10] Thus, seven states prohibit some form of viewing child pornography. Stated differently, 86% of states do not criminalize the viewing of child pornography. Furthermore, appellant's alleged conduct occurred in Germany, such that state laws are wholly inapplicable and any reliance on state law is misguided. *See Saunders*, 59 M.J. at 8 (Assimilative Crimes Act, 18 U.S.C. § 13 (2000), did not apply where the alleged offense of harassment occurred in Germany).

C. Military Case Law

[9] *See* ALASKA STAT. § 11.61.123 (2009); FLA. STAT. ANN. § 827.071 (2010); N.J. STAT. ANN. § 2C:24-4 (2010); OR. REV. STAT. §§ 163.688 and 163.689 (2010); 18 PA. CONS. STAT. ANN. § 6312 (2010); and UTAH CODE ANN. § 76-5a-3 (2010).

[10] *See* OR. REV. STAT. §§ 163.686 and 163.687 (2010) and WIS. STAT. ANN. § 948.12 (2010).

Military case law has not recognized the mere viewing of child pornography as a crime. In an apparent effort to find some foundation for its conclusion that appellant had fair notice, the Air Force Court relied on this Court's decisions in *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000), and *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004), to support its conclusion that appellant knew or should have known that the alleged conduct was service discrediting. *Merritt*, 61 M.J. at 704-05. Once again, the Air Force Court misapplied or misconstrued the law. These two decisions are inapposite to appellant's case. First, both cases concerned servicemembers who pled guilty to possessing child pornography, as opposed to the instant case, where appellant contested the offense of viewing of child pornography. Second, possession of child pornography was a violation of the CPPA, which was in effect at the time of the alleged offenses. Here, as discussed above, the mere viewing of child pornography was not a punishable offense in May 2006.

The Air Force Court also relied on dicta from this Court's decision in *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), to support its conclusion. The Air Force Court quoted, "It is intuitive that the viewing of child pornography discredits those who do it, as well as the institutions with which the persons are identified." *Merritt*, 71 M.J. at 705 (quoting *Medina*, 66

M.J. at 27). *Medina* concerned the Army Court of Criminal Appeals' amendment of two specifications from clause 3 to clause 2 of Article 134, UCMJ. Whether or not the viewing of child pornography discredits the viewer and his or her affiliated institution is irrelevant. At the time of the alleged offense, there was no federal statute prohibiting the alleged conduct and military case law did not recognize the offense.

D. Military Custom, Usage, and Regulations

Though fair notice could arise from military custom and usage, they are "clearly not defined by elements or with mens rea specificity." *Saunders*, 59 M.J. at 8 (quoting *Parker*, 417 U.S. at 754.) Though the military courts of appeal and this Court have long recognized the criminal nature of the possession of child pornography, there is no definable custom or usage regarding the viewing of child pornography, such that these sources did not provide fair notice to appellant that viewing child pornography was a criminal offense.

The Department of Defense has published several regulations which address child pornography. Department of Defense (DoD) Instruction 8550.01, DoD Internet Services and Internet-Based Capabilities, dated September 11, 2012, lists accessing pornography as a prohibited activity. (J.A. at 177-225). DoD Instruction 5505.11, Fingerprint Card and Final Disposition Report Submission Requirements, dated May 3, 2011, states,

albeit incorrectly, that viewing child pornography is an Article 134 offense.[11] (J.A. at 226-38). DoD Instruction 1304.32, Military Services Recruiting Related Reports, dated March 26, 2013, lists child pornography as a major misconduct offense but does not define or describe which act(s) constitute child pornography. (J.A. at 239-76). DoD Instruction 1035.01, Telework Policy, dated April 4, 2012, states that employees who have viewed child pornography may be considered for telework on a situational basis. (J.A. at 277-301).

Neither Air Force Instruction 1-1, Air Force Standards, or Air Force Policy Directive 1, Air Force Culture, both dated August 7, 2012, address viewing child pornography. (J.A. at 302-31).

Appellant does not argue that either the Air Force or the Department of Defense supports, promotes, encourages, or protects the viewing of child pornography; instead, appellant notes that these institutions have not addressed the viewing of child pornography as a cognizable offense. Accordingly, military regulations did not provide fair notice to appellant that viewing child pornography was a criminal offense.

E. The Air Force Court's Alternate Theory of Criminal Liability

[11] *See* footnote 6, *supra*.

Finally, appellant notes that the Air Force Court went to great lengths to affirm appellant's conviction for viewing child pornography where appellant did not have fair notice that the alleged conduct was criminal. The Air Force Court found "a sufficient basis exists to find the appellant knew, *or should have known*, that his conduct was service discrediting" because he wrote in his sworn statement to OSI that he felt deeply ashamed at looking at the images. *Merritt*, 71 M.J. at 704 (emphasis added.) The Air Force Court stated, "Such an admission is powerful evidence that the appellant was fully aware that viewing child pornography could call the Air Force into disrepute and thereby violate the UCMJ." *Id*. The Air Force Court apparently misread Specification 2, which did not allege that appellant "should have known" that his conduct was service discrediting. Thus, the Air Force Court affirmed an uncharged theory of liability. "[A]n appellate court may not affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt." *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008). Because appellant did not have fair notice that viewing child pornography was a punishable offense in May 2006, then he certainly did not have fair notice that, according to the Air Force Court, he should have known that the alleged conduct was service discrediting. If the alleged conduct was not punishable at the time of the

offense, then appellant cannot be punished for negligently failing to know that the conduct was service discrediting, yet this is exactly what the Air Force Court did in affirming the conviction.

Due process requires that a person have fair notice that an act is criminal before being prosecuted for it. Here, neither the MCM, federal law, state law, military case law, military customs and usage, or military regulations provided fair notice to appellant that viewing child pornography was a crime under Article 134, UCMJ. The Air Force Court went to great lengths to affirm appellant's conviction but misapplied or misconstrued federal and military case law in doing so.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside and dismiss the finding of guilty for Specification 2 of The Charge and reassess the sentence.

II.

APPELLANT'S DUE PROCESS RIGHT TO TIMELY APPELLATE REVIEW WAS VIOLATED WHERE THE AIR FORCE COURT DECIDED APPELLANT'S CASE ONE THOUSAND AND TWENTY-FOUR DAYS AFTER IT WAS DOCKETED.

Standard of Review

This Court reviews whether an appellant has been denied his due process right to a speedy appellate review de novo. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011).

Law and Argument

"[C]onvicted 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) (citing *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004) (*Toohey* I); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37-38 (C.A.A.F. 2003)). There is a "presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." *Id*. at 142. Here, appellant's case was docketed with the Air Force Court on December 24, 2010 and that court rendered its decision on December 14, 2012, just shy of twenty-four months later. Thus, a presumption of unreasonable appellate delay exists.

Where a presumption of unreasonable appellate delay exists, this Court examines the four factors set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Luke*, 69 M.J. 309, 321 (C.A.A.F. 2011) (citing *United States v. Young*, 64 M.J. 404, 408-09 (C.A.A.F. 2007)). The four 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.*

"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.'" *United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011) (quoting *United States v. Toohey,* 63 M.J. 353, 362 (C.A.A.F. 2006) (*Toohey* II)). This Court will grant relief in such cases unless the post-trial delay was harmless beyond a reasonable doubt. *Id*. (citing *United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006)). "Issues of due process and whether constitutional error is harmless beyond a reasonable doubt are reviewed de novo." *Young*, 64 M.J. at 409 (citing *Allison*, 63 M.J. at 370). This Court may also assume a due process violation and proceed straight to the harmless beyond a reasonable doubt analysis. *Id*. Finally, even in cases where post-trial delay was not harmless beyond a reasonable doubt, this Court cannot provide relief where "there is no reasonable, meaningful relief available." *Id*. (quoting *United States v. Rodriguez-Rivera,* 63 M.J. 372, 386 (C.A.A.F. 2006)).

1. Length of the delay

From docketing to decision, 1024 days, or two years, nine months, and twenty days, elapsed; therefore, the delay is facially unreasonable under *Moreno* and weighs heavily in favor of appellant.

2. Reasons for the delay

Both parties filed numerous motions for enlargement of time. The Air Force Court granted appellant's six motions to file the original assignments of error and one motion to file the reply to the government's answer brief. The Air Force Court also granted the government's four motions to file the answer to the original assignments of error and one motion to file the answer to the supplemental assignment of error.

Though the parties' motions for enlargement of time explain some of the appellate delay, there is no explanation whatsoever for the 351-day delay between the submission of appellant's reply brief and his motion to file a supplemental assignment of error. The Air Force Court's inaction gave appellant no choice but to submit the supplemental assignment of error which concerned the Air Force Court's violation of the eighteen-month post-trial processing standard under *Moreno* and a request for relief pursuant to *Tardif*. Thus, for all intents and purposes, the briefing was complete upon the August 25, 2012, submission of appellant's reply brief, yet the Air Force Court sat idle while appellant's case languished. This Court applies "a more flexible review" of the period following the submission of the final briefs to the lower court's decision because "it involves the exercise of the [lower court's] judicial decision-making authority" but "a period of slightly over six months is not an

unreasonable time for review. . . ." *Moreno*, 63 M.J. at 137-38. The virtually year-long delay, nearly twice this Court's allowance, is unexplained and unreasonable and is the responsibility of the government. *See id*. at 138.

The 477-day delay between appellant's reply brief and the Air Force Court's decision is not the only unexplained delay in appellant's case. There is also no explanation whatsoever for the 87-day delay between this Court's show cause order and the Air Force Court's decision. On September 18, 2012, this Court ordered both the government and the Air Force Court to show cause why the requested relief should not be granted, but only the government filed a response. The Air Force Court did not respond to this Court's order and did not provide any explanation for its unreasonable delay in deciding appellant's case. The periods of unexplained and unreasonable delay weigh heavily in favor of appellant.

3. Appellant's assertion of the right to timely review and appeal

Appellant asserted his right to a speedy post-trial review with his August 10, 2012 motion for expedited review and supplemental assignment of error. (J.A. at 170-76). As previously discussed, the supplemental assignment of error concerned the unreasonable appellate delay. Appellant also asserted his right by filing the petition for extraordinary

relief in the nature of a writ of mandamus with this Court on September 5, 2012. In *Barker*, the Supreme Court noted that where the defendant has asserted his speedy trial rights, the assertion is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Moreno*, 63 M.J. at 138 (quoting *Barker*, 407 U.S. at 531-32.). Appellant's multiple assertions of his right to timely review and appeal weigh heavily in his favor.

Appellant notes that the Air Force Court ignored his request for *Tardif* relief in its December 14, 2012 opinion. (J.A. at 1-10). In the section titled "Appellate Delay," the Air Force Court conducted a boilerplate analysis of appellant's supplemental assignment of error rather than evaluate the issue as framed.

4. Prejudice

In *Moreno*, this Court adopted the *Barker* framework for analyzing prejudice in a speedy trial context:

> 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. We identify three similar interests for prompt appeals: (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.

63 M.J. at 138-39 (quoting *Barker*, 407 U.S. at 532) (citations omitted).

Regarding oppressive incarceration pending appeal, "[i]f 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." *Id*. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)). "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." *Id*. (citing *Coe v. Thurman*, 922 F.2d 528, 532 (9th Cir. 1990)). Here, appellant served his twenty-four month sentence to confinement during the appeal period. Appellant was sentenced on September 2, 2009, but the Air Force Court did not issue its decision until December 14, 2012, well after appellant had been released from confinement. In his August 10, 2012 motion for expedited review, appellant informed the Air force Court that he had been on appellate leave for sixteen months and was nearing his retirement date and its attendant income. (J.A. at 174). Appellant is now retirement eligible. Because of the Air Force Court's unexplained and unreasonable delay, appellant has lost a significant amount of retirement income. Furthermore, appellant's substantive appeal is meritorious because he did not have fair notice that viewing child pornography was an offense.

See Certified Issue I, *supra*. Accordingly, the Air Force Court's delay prejudiced appellant because it resulted in oppressive incarceration pending appeal.

Turning to the "constitutionally cognizable anxiety that results from excessive delay," in *Moreno* this Court announced:

> We believe that the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. This particularized anxiety or concern is thus related to the timeliness of the appeal, requires an appellant to demonstrate a nexus to the processing of his appellate review, and ultimately assists this court to fashion relief in such a way as to compensate [an appellant] for the particular harm. We do not believe that the anxiety that an appellant may experience is dependent upon whether his substantive appeal is ultimately successful. An appellant may suffer constitutionally cognizable anxiety regardless of the outcome of his appeal.

Id. (internal quotation marks and citation omitted.)

Here, appellant suffered prejudice because he was required to register as a sex offender upon his release from incarceration without the opportunity of having his appeal heard and decided from the Air Force Court. *See id*. (citing 42 U.S.C. § 14071(a)(1)(A), (b)(6)(A) (2000)). Had appellant's appeal been processed in a timely manner, it would have been resolved before his release from confinement, regardless of whether the substantive appeal was successful. The loss of a significant

amount of retirement income coupled with the requirement to register as a sex offender constitutes a specific prejudice to appellant. Accordingly, the Air Force Court's delay prejudiced appellant because it resulted in particularized anxiety or concern that is distinguishable from the normal anxiety or concern experienced by prisoners awaiting an appellate decision.

Finally, if this Court decides in appellant's favor regarding Certified Issue I, and sets asides the conviction in Specification 2 of The Charge and authorizes a rehearing, the Air Force Court's unexplained and unreasonable delay will have a negative impact on his ability to prepare and present a defense at the rehearing. *See id*. at 140. Due to the passage of time, the German witnesses, specifically the police officers who participated in Operation Kimmel and the police officers who collected evidence, may not be available to testify or it may be unduly cost prohibitive to produce those crucial witnesses for trial. Because of the potential impairment to appellant's ability to prepare and present a defense at the rehearing, the Air Force Court's delay prejudiced appellant.

Because of the Air Force Court's unexplained and unreasonable delay, notably between the date appellant submitted his reply to the government's answer and the date the Air Force Court rendered its decision, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by

appellant from the oppressive incarceration pending appeal, his particularized anxiety, and the potential impairment to his ability to defend himself at a rehearing, this Court should find that analysis of the *Barker* factors leads to one conclusion: appellant was denied his due process right to speedy review and appeal.

Appellant has demonstrated prejudice from the denial of his due process right to speedy review and trial. If, however, this Court concludes that appellant has not suffered a specific prejudice, a constitutional due process violation still occurs because in balancing the remaining *Barker* factors, tolerating the Air Force Court's egregious delay would adversely affect the public's perception of the fairness and integrity of the military justice system.

The Air Force Court's system is utterly broken. Appellant's case is but one in a legion of cases in which the Air Force Court has essentially abdicated its responsibility to ensure that appellants are afforded their due process right to speedy review and appeal. From January 1, 2013 through May 8, 2013, the Air Force Court issued 129 new decisions.[12] Of those

[12] United States v. Carter, ACM 37715 (A.F. Ct. Crim. App. 04 January 2013)(unpub. op.), United States v. Dupree, ACM S31828 (A.F. Ct. Crim. App. 04 January 2013)(unpub. op.), United States v. Hall, ACM 37700 (A.F. Ct. Crim. App. 04 January 2013)(unpub. op.), United States v. Walker, ACM 37865 (A.F. Ct. Crim. App. 04 January 2013)(unpub. op.), United States v. Helms, ACM S31963 (A.F. Ct. Crim. App. 09 January 2013)(unpub. op.), United States v. Hooe, ACM S32065 (A.F. Ct. Crim. App. 09 January 2013)(unpub. op.), United

States v. Chin, ACM S32046 (A.F. Ct. Crim. App. 10 January 2013)(unpub. op.), United States v. Smith, ACM 37879 (A.F. Ct. Crim. App. 10 January 2013)(unpub. op.), United States v. Bolieau, ACM 37836 (A.F. Ct. Crim. App. 16 January 2013)(unpub. op.), United States v. Cooper, ACM 37761 (A.F. Ct. Crim. App. 16 January 2013)(unpub. op.), United States v. Duong, ACM 37892 (A.F. Ct. Crim. App. 16 January 2013)(unpub. op.), United States v. Johnson, ACM 37970 (A.F. Ct. Crim. App. 16 January 2013)(unpub. op.), United States v. Pickrel, ACM 38148 (A.F. Ct. Crim. App. 16 January 2013)(unpub. op.), United States v. Bruns, ACM S32030 (A.F. Ct. Crim. App. 17 January 2013)(unpub. op.), United States v. High, ACM 37777 (A.F. Ct. Crim. App. 17 January 2013)(unpub. op.), United States v. Moore, ACM 37968 (A.F. Ct. Crim. App. 17 January 2013)(unpub. op.), United States v. Payne, ACM 37594 (A.F. Ct. Crim. App. 17 January 2013)(unpub. op.), United States v. Kane, ACM 37800 (A.F. Ct. Crim. App. 18 January 2013)(unpub. op.), United States v. Klein, ACM 37833 (A.F. Ct. Crim. App. 18 January 2013)(unpub. op.), United States v. Boyd, ACM 37924 (A.F. Ct. Crim. App. 18 January 2013)(unpub. op.), United States v. Hernandez, ACM 37741 (A.F. Ct. Crim. App. 18 January 2013)(unpub. op.), United States v. Carrillo, ACM S31973 (A.F. Ct. Crim. App. 18 January 2013)(unpub. op.), United States v. Cordero, ACM 37828 (A.F. Ct. Crim. App. 18 January 2013)(unpub. op.), United States v. Finch, ACM 38081 (A.F. Ct. Crim. App. 25 January 2013)(unpub. op.), United States v. Haynes, ACM S31927 (A.F. Ct. Crim. App. 25 January 2013)(unpub. op.), United States v. Martin, ACM S31935 (A.F. Ct. Crim. App. 25 January 2013)(unpub. op.), United States v. Slemp, ACM 37947 (A.F. Ct. Crim. App. 25 January 2013)(unpub. op.), United States v. Jones, ACM 37528 (A.F. Ct. Crim. App. 29 January 2013)(unpub. op.), United States v. Pradella, ACM S31921 (A.F. Ct. Crim. App. 29 January 2013)(unpub. op.), United States v. Baxter, ACM 37973 (A.F. Ct. Crim. App. 29 January 2013)(unpub. op.), United States v. Williamson, ACM S31947 (A.F. Ct. Crim. App. 29 January 2013)(unpub. op.), United States v. Reindl, ACM S31993 (A.F. Ct. Crim. App. 30 January 2013)(unpub. op.), United States v. Horton, ACM 38151 (A.F. Ct. Crim. App. 31 January 2013)(unpub. op.), United States v. Lutes, 72 M.J. 530 (A.F. Ct. Crim. App. 2013), United States v. Winters, ACM 37915 (A.F. Ct. Crim. App. 31 January 2013)(unpub. op.), United States v. Fausey, ACM 37862 (A.F. Ct. Crim. App. 01 February 2013)(unpub. op.), United States v. Johnson, ACM 37980 (A.F. Ct. Crim. App. 05 February 2013)(unpub. op.), United States v. Bourne, ACM 37866 (A.F. Ct. Crim. App. 05 February 2013)(unpub. op.), United States v. Books, ACM 37938 (A.F. Ct. Crim. App. 05 February 2013)(unpub. op.), United States v. Grant, ACM 37898 (A.F. Ct. Crim. App. 05 February 2013)(unpub. op.), United States v. Hall, ACM S31889 (A.F. Ct. Crim. App. 05 February 2013)(unpub. op.), United States v. Kim, ACM 37613 (A.F. Ct. Crim. App. 07 February 2013)(unpub. op.), United States v. Rogers, ACM S31971 (A.F. Ct. Crim. App. 07 February 2013)(unpub. op.), United States v. Grocki, ACM 37982 (A.F. Ct. Crim. App. 12 February 2013)(unpub. op.), United States v. Powdrill, ACM 37983 (A.F. Ct. Crim. App. 13 February 2013)(unpub. op.), United States v. Davis, ACM S31902 (A.F. Ct. Crim. App. 13 February 2013)(unpub. op.), United States v. Northern, ACM 37984 (A.F. Ct. Crim. App. 13 February 2013)(unpub. op.), United States v. Gnash, ACM S32067 (A.F. Ct. Crim. App. 13 February 2013)(unpub. op.), United States v. Labella, ACM 37679 (A.F. Ct. Crim. App. 15 February 2013)(unpub. op.), United States v. Hollenbaugh, ACM S31978 (A.F. Ct. Crim. App. 19 February 2013)(unpub. op.), United States v. Payton, ACM 37699 (A.F. Ct. Crim. App. 19 February 2013)(unpub. op.), United States v. Schmidt, ACM 38220 (A.F. Ct. Crim. App. 19 February 2013)(unpub. op.), United States v. Clawson, ACM 37723 (A.F. Ct. Crim. App. 20 February 2013)(unpub. op.), United States v. Hawes, ACM S31962 (A.F. Ct. Crim. App. 22 February 2013)(unpub. op.), United States v.

Shockley, ACM 37884 (A.F. Ct. Crim. App. 22 February 2013)(unpub. op.), United States v. Gastelum, ACM 37887 (A.F. Ct. Crim. App. 25 February 2013)(unpub. op.), United States v. Hill, ACM 38178 (A.F. Ct. Crim. App. 01 March 2013)(unpub. op.), United States v. Vazquez, ACM 37647 (A.F. Ct. Crim. App. 01 March 2013)(unpub. op.), United States v. Knight, ACM 38083 (A.F. Ct. Crim. App. 05 March 2013)(unpub. op.), United States v. Flester, ACM S31965 (A.F. Ct. Crim. App. 05 March 2013)(unpub. op.), United States v. Melcher, ACM S31891 (A.F. Ct. Crim. App. 07 March 2013)(unpub. op.), United States v. Jordan, ACM S31939 (A.F. Ct. Crim. App. 07 March 2013)(unpub. op.), United States v. Johnston, ACM S32080 (A.F. Ct. Crim. App. 08 March 2013)(unpub. op.), United States v. McKeever, ACM 38026 (A.F. Ct. Crim. App. 14 March 2013)(unpub. op.), United States v. Sprader, ACM S32086 (A.F. Ct. Crim. App. 14 March 2013)(unpub. op.), United States v. Sizemore, ACM 38120 (A.F. Ct. Crim. App. 14 March 2013)(unpub. op.), United States v. Gussman, ACM 38048 (A.F. Ct. Crim. App. 14 March 2013)(unpub. op.), United States v. Lee, ACM S32009 (A.F. Ct. Crim. App. 14 March 2013)(unpub. op.), United States v. Brockington, ACM S32089 (A.F. Ct. Crim. App. 14 March 2013)(unpub. op.), United States v. Perrine, ACM S31972 (A.F. Ct. Crim. App. 18 March 2013)(unpub. op.), United States v. Hetman, ACM 37853 (A.F. Ct. Crim. App. 18 March 2013)(unpub. op.), United States v. Bailey, ACM 37746 (A.F. Ct. Crim. App. 19 March 2013)(unpub. op.), United States v. Hearn, ACM 37867 (A.F. Ct. Crim. App. 19 March 2013)(unpub. op.), United States v. Ferris, 72 M.J. 537 (A.F. Ct. Crim. App. 2013), United States v. Knapp, ACM 37718 (A.F. Ct. Crim. App. 20 March 2013)(unpub. op.), United States v. Carpenter, ACM S32069 (A.F. Ct. Crim. App. 21 March 2013)(unpub. op.), United States v. Guedry, ACM 37998 (A.F. Ct. Crim. App. 21 March 2013)(unpub. op.), United States v. Negron, ACM 37754 (A.F. Ct. Crim. App. 21 March 2013)(unpub. op.), United States v. Walker, ACM 37886 (A.F. Ct. Crim. App. 22 March 2013)(unpub. op.), United States v. Arrington, ACM 37698 (A.F. Ct. Crim. App. 25 March 2013)(unpub. op.), United States v. Roy, ACM 38089 (A.F. Ct. Crim. App. 25 March 2013)(unpub. op.), United States v. Zurita, ACM 37717 (A.F. Ct. Crim. App. 25 March 2013)(unpub. op.), United States v. Cook, ACM S32102 (A.F. Ct. Crim. App. 25 March 2013)(unpub. op.), United States v. Openshaw, ACM 38049 (A.F. Ct. Crim. App. 28 March 2013)(unpub. op.), United States v. Scott, ACM S32092 (A.F. Ct. Crim. App. 28 March 2013)(unpub. op.), United States v. Grawey, ACM S32029 (A.F. Ct. Crim. App. 28 March 2013)(unpub. op.), United States v. Albright, ACM 37961 (A.F. Ct. Crim. App. 28 March 2013)(unpub. op.), United States v. Garrison, ACM 38093 (A.F. Ct. Crim. App. 28 March 2013)(unpub. op.), United States v. Helpap, ACM S32017 (A.F. Ct. Crim. App. 01 April 2013)(unpub. op.), United States v. Lapointe, ACM S32081 (A.F. Ct. Crim. App. 04 April 2013)(unpub. op.), United States v. Geist, ACM S32125 (A.F. Ct. Crim. App. 04 April 2013)(unpub. op.), United States v. Dias, ACM S32017 (A.F. Ct. Crim. App. 05 April 2013)(unpub. op.), United States v. Newhouse, ACM 38019 (A.F. Ct. Crim. App. 05 April 2013)(unpub. op.), United States v. Stickney, ACM S32106 (A.F. Ct. Crim. App. 05 April 2013)(unpub. op.), United States v. Burkhart, __ M.J. __ (A.F. Ct. Crim. App. 2013), United States v. Mangan, ACM 38223 (A.F. Ct. Crim. App. 09 April 2013)(unpub. op.), United States v. McMillan, ACM 38189 (A.F. Ct. Crim. App. 09 April 2013)(unpub. op.), United States v. Yohe, ACM 37950 (A.F. Ct. Crim. App. 09 April 2013)(unpub. op.), United States v. Wright, ACM S32095 (A.F. Ct. Crim. App. 12 April 2013)(unpub. op.), United States v. Bogdonas, ACM 37725 (A.F. Ct. Crim. App. 15 April 2013)(unpub. op.), United States v. Rowell, ACM S31991 (A.F. Ct. Crim. App. 15 April 2013)(unpub. op.), United States v. Mann, ACM 38124 (A.F. Ct. Crim. App. 15 April 2013)(unpub. op.), United States v. Jones, ACM 38028 (A.F. Ct. Crim. App. 15 April 2013)(unpub. op.), United

129 decisions, the appellate delay exceeded the *Moreno* eighteen-month standard in sixty-seven cases, or 51.94% of the time[13]. Thus, an appellant has essentially a fifty-fifty chance whether the Air Force Court will complete its review within the *Moreno* standard. No convicted servicemember should be forced to undergo a judicial flip of the coin regarding the timeliness of appellate review. Additionally, as of May 8, 2013, there are forty-six cases docketed with the Air Force Court which exceed the *Moreno* eighteen-month standard. As in *Moreno*, this "is not an isolated case that involves excessive post-trial delay issues." 63 M.J. at 142. Instead, the Air Force Court has systematically deprived airmen of their due process rights.

United States v. Lindgren, ACM 37928 (A.F. Ct. Crim. App. 16 April 2013)(unpub. op.), United States v. Seliskar, ACM 38039 (A.F. Ct. Crim. App. 16 April 2013)(unpub. op.), United States v. Passut, __ M.J. __ (A.F. Ct. Crim. App. 2013), United States v. Rosenberg, ACM 38197 (A.F. Ct. Crim. App. 16 April 2013)(unpub. op.), United States v. Danylo, ACM 37916 (A.F. Ct. Crim. App. 17 April 2013)(unpub. op.), United States v. Tomkins, ACM 37627 (A.F. Ct. Crim. App. 18 April 2013)(unpub. op.), United States v. Illing, ACM S31808 (A.F. Ct. Crim. App. 18 April 2013)(unpub. op.), United States v. Chamerlain ACM 38098 (A.F. Ct. Crim. App. 23 April 2013)(unpub. op.), United States v. Webb, ACM 38071 (A.F. Ct. Crim. App. 24 April 2013)(unpub. op.), United States v. Branch, ACM S32064 (A.F. Ct. Crim. App. 25 April 2013)(unpub. op.), United States v. Talkington, ACM 37785 (A.F. Ct. Crim. App. 26 April 2013)(unpub. op.), United States v. Torrance, __ M.J. __ (A.F. Ct. Crim. App. 2013), United States v. Peacock, ACM 38043 (A.F. Ct. Crim. App. 26 April 2013)(unpub. op.), United States v. Burleigh, ACM 37652 (A.F. Ct. Crim. App. 29 April 2013)(unpub. op.), United States v. Martin, ACM S32035 (A.F. Ct. Crim. App. 02 May 2013)(unpub. op.), United States v. Rodriquez, ACM 37927 (A.F. Ct. Crim. App. 02 May 2013)(unpub. op.), United States v. Santana-Pena, ACM 37931 (A.F. Ct. Crim. App. 02 May 2013)(unpub. op.), United States v. Boore, ACM 38058 (A.F. Ct. Crim. App. 07 May 2013)(unpub. op.), United States v. McCrary, ACM 38016 (A.F. Ct. Crim. App. 07 May 2013)(unpub. op.), United States v. Latham, ACM 38107 (A.F. Ct. Crim. App. 07 May 2013)(unpub. op.), United States v. Snell, ACM 37792 (A.F. Ct. Crim. App. 07 May 2013)(unpub. op.), United States v. Norman, ACM 37945 (A.F. Ct. Crim. App. 07 May 2013)(unpub. op.), United States v. Bischoff, ACM 37731 (A.F. Ct. Crim. App. 08 May 2013)(unpub. op.)

The Air Force Court's abysmal appellate delay is demonstrably harmful to the reputation of the military justice system, just as the Department of the Navy's delay was several years ago. In 2009, the Senate Armed Services Committee sharply criticized the Department of the Navy for "longstanding problems with the processes for preparation of records of courts-martial and for appellate review of court-martial convictions." S. Rep. No. 111-35, at 131 (2009). The Committee stated that "cognizant legal authorities in the Department of the Navy have not taken necessary and appropriate steps to ensure that the resources, command attention, and necessary supervision have been devoted to the task of ensuring that the Navy and Marine Corps post-trial military justice system functions properly in all cases." *Id*. at 132. Pursuant to the Committee's directive, the Department of the Defense Inspector General analyzed the problem and issued a report which was highly critical of post-trial processing in the Department of the Navy. *Id*.; *See* Inspector General, Department of Defense, Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (Report No. IPO2010E003) (Dec. 10, 2010), *available at* http://www.dodig.mil/IGInformation/NavyAppellateFinalREport_V1.pdf. Furthermore, the National Defense Authorization Act for Fiscal Year 2010 subsequently created an independent panel to study, among other issues, "the performance of the Navy and

Marine Corps in providing legally sufficient post-trial processing of cases in general and special courts-martial." National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278 (2009).

Appellant's case and the current forty-six cases which have exceeded the *Moreno* standard demonstrate that the Air Force system now is as broken as the Navy and Marine Corps' system was just a few years ago. Accordingly, any further tolerance of the Air Force Court's egregious delay would adversely affect the public's perception of the fairness and integrity of the military justice system. Therefore, this Court can find a constitutional due process violation.

WHEREFORE, for the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss with prejudice the findings and sentence and restore all rights and privileges to appellant.

Conclusion

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

Respectfully Submitted,

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1. This brief complies with the type-volume limitation of Rule 24(c) because:

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on May 30, 2013.

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