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In The  
**SUPREME COURT OF THE UNITED STATES**

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RICHARD J. ASHBY, CAPTAIN,  
UNITED STATES MARINE CORPS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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*On Petition For Writ Of Certiorari To The  
United States Court of Appeals for the Armed Forces*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

A right to speedy appellate processing, via the Due Process clause, has been recognized by nearly every federal circuit, without this Court's comment. The test established by this Court regarding Speedy Trial violations has uniformly been adopted as the test to determine whether a Due Process violation has occurred for dilatory appellate processing. However, a number of federal circuits, in this adoption, have substantially veered from this Court's Speedy Trial precedents, by either making particularized prejudice indispensable or deeming presumptive prejudice harmless. The Court of Appeals for the Armed Forces—the court that reviewed Captain Ashby's case—is one such court.

Whether the Court of Appeals for the Armed Forces erred by deviating from this Court's Speedy Trial jurisprudence, and whether this departure from precedent precluded Captain Ashby from receiving relief for a founded Due Process violation?

Regardless of the misapplication of this Court's Speedy Trial jurisprudence, whether the Court of Appeals for the Armed Forces still erred by disregarding Appellant's employment prejudice in determining whether the Government established that the Due Process violation was harmless beyond a reasonable doubt?

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## PETITION FOR A WRIT OF CERTIORARI

Captain Richard J. Ashby, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (CAAF) (App., *infra*, 1a-55a) is reported at 68 M.J. 108. The second opinion of the Navy and Marine Corps Court of Criminal Appeals (NMCCA) is *United States v. Ashby*, No. 200000250, unpublished op. (N.M.Ct.Crim.App. 17 June 2008). App. B, *infra* at 56a-62a. The case had previously been remanded by the NMCCA to the Convening Authority for a new Staff Judge Advocate's Recommendation from a non-disqualified Staff Judge Advocate. The principal appellate opinion by the NMCCA is *United States v. Ashby*, No. 200000250, 2007 CCA LEXIS 235, unpublished op. (N.M.Ct.Crim.App. 27 June 2007). App. C, *infra*, at 63a-165a.

### JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on August 31, 2009. A timely petition for reconsideration was denied on September 29, 2009. App. D, *infra*, 166a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution is reproduced in App. E, *infra* at 167a.

### STATEMENT

Captain Richard J. Ashby, United States Marine Corps, was convicted at a general court-martial of two specifications of conduct unbecoming an officer, in violation of 10 USC § 933. He was sentenced on May 10, 1999. The NMCCA docketed Captain Ashby's case on March 13, 2000. The NMCCA did not issue its opinion until June 27, 2007—over eight years after sentencing.

In its initial review of the case, the NMCCA, *sua sponte*, commented on the dilatory appellate processing of this case.<sup>1</sup> The NMCCA then conducted a *Barker v. Wingo* analysis, and found that a Due Process violation had occurred, despite finding no particularized prejudice under the fourth *Barker* factor.<sup>2</sup> The NMCCA then conducted a harmlessness review, and found that this constitutional error was harmless beyond a reasonable doubt.<sup>3</sup> However, due to a remand for another reason, the NMCCA stated “We will reconsider the issue of harm to the appellant anew upon return and subsequent review of the appellant's record to this court....”<sup>4</sup> The NMCCA

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<sup>1</sup> Appendix C at 159a.

<sup>2</sup> *Id.* at 161a-163a.

<sup>3</sup> *Id.* at 163a.

<sup>4</sup> *Id.*

also commented that it would “also, at that time, consider whether it is appropriate in this case to grant the appellant discretionary relief under our Article 66(c), UCMJ, authority.”<sup>5</sup>

The NMCCA then returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority, due to an issue regarding the disqualification of the original Staff Judge Advocate (SJA). The NMCCA gave the option to the Convening Authority to either order a fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), or order a new Staff Judge Advocate’s Recommendation from a different, non-disqualified SJA, and then prepare a new Convening Authority’s action.<sup>6</sup>

The Convening Authority chose the latter option, which entitled Captain Ashby to submit clemency materials to the Convening Authority, pursuant to 10 USC § 860, before the Convening Authority acted.<sup>7</sup> Captain Ashby submitted a substantial

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<sup>5</sup> *Id.*; The Court was referring to its power under 10 USC § 866, as interpreted by *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), where the CAAF found that, under the broad authority of 10 USC § 866, the Service Courts of Criminal Appeals are “required to determine what findings and sentence ‘should be approved,’ based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay.”

<sup>6</sup> Appendix C at 164a.

<sup>7</sup> *See* 10 USC § 860(b)(1) (“The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence.”); 10 USC § 860(b)(1) (“[S]uch action may be taken only after consideration of any matters submitted by the accused under subsection (b)...”) ; *See also* RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

clemency package, outlining the prejudice he felt as a result of the dilatory appellate processing of his case.<sup>8</sup> Captain Ashby detailed his psychological toll, as well as personal and employment prejudice as a result of his inability to travel outside the United States.<sup>9</sup> This inability to travel is a result of Marine Corps Order (MCO) 1050.16A, which precludes any Marine, during the midst of his or her appeal, from traveling outside of the United States.<sup>10</sup>

Of particular note within those clemency enclosures was a letter from a potential employer, “DownRange G2 Solutions, Inc.,” which stated that Captain Ashby’s background puts him in “demand around the world,” that the only drawback the employer could see is the inability to travel and the difficulty obtaining a clearance, that “there are many flying jobs once [his] current situation is resolved,” and that the employer “will help [Captain Ashby] move on as soon as [he is] free to travel” and “hope[s] [the employer] will have [him] onboard soon.”<sup>11</sup>

Upon the second review by the NMCCA, Captain Ashby argued that he should be afforded relief as a result of the Due Process violation, as well as under 10 USC § 866.<sup>12</sup> Under the section of his brief requesting relief under 10 USC § 866, Captain Ashby, through counsel, specifically referenced his

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<sup>8</sup> Clemency Request of February 15, 2008.

<sup>9</sup> Clemency Request of February 15, 2008; enclosures 1-7.

<sup>10</sup> MCO 1050.16A(16) “Space Available Travel/Foreign Travel” (“Marines on appellate leave are...not authorized to travel or reside outside the United States or its territories and possessions while on appellate leave.”)

<sup>11</sup> Clemency Request of February 15, 2008; enclosure 6.

<sup>12</sup> *See* Appellant’s Brief and Assignment of Errors of April 28, 2009.

clemency petition and the enclosures therein: “The clemency materials submitted on his behalf testify to all of the missed opportunities, sleepless nights, and other obstacles resulting from this Court’s negligence. Clemency Petition of 15 Feb 2008, Enclosures 1-7.”<sup>13</sup> The NMCAA, in looking to the Due Process violation, stated that, “having carefully re-reviewed the record of trial and the appellant’s pleadings, we find no such prejudice,” and therefore ruled that the Due Process violation was, again, harmless beyond a reasonable doubt.<sup>14</sup>

Captain Ashby’s case was then reviewed by the CAAF, including an assignment of error regarding his Due Process right to speedy appellate processing. The CAAF agreed with the NMCCA that Captain Ashby’s Due Process rights were violated, but also agreed that the violation was harmless beyond a reasonable doubt.<sup>15</sup> In assessing the employment prejudice, while conceding the inability to travel may have been remedied by a speedy appeal, the CAAF noted that, given the affirmation of the convictions, a speedy appeal, “may or may not address” the difficulty in obtaining a security clearance.<sup>16</sup>

As a result of the CAAF’s decision that the error was harmless beyond a reasonable doubt, Captain Ashby received no remedy for this founded Due Process violation for dilatory appellate processing.

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<sup>13</sup> Appellant’s Brief and Assignment of Errors of April 28, 2009 at 15-16.

<sup>14</sup> Appendix B at 61a.

<sup>15</sup> Appendix A at 35a-38a.

<sup>16</sup> Appendix A at 37a, n. 11.

By the time of the CAAF's decision of August 31, 2009, more than ten years had elapsed in Captain Ashby's direct appeal since he was sentenced.

### REASONS FOR GRANTING THE PETITION

A right to speedy appellate processing, via the Due Process clause, has been recognized by nearly every federal circuit, without this Court's comment. The test established by this Court regarding Speedy Trial violations has uniformly been adopted as the test to determine whether a Due Process violation has occurred for dilatory appellate processing. However, a number of federal circuits, in this adoption, have substantially veered from this Court's Speedy Trial precedents, by either making particularized prejudice indispensable or deeming presumptive prejudice harmless. Because this jurisprudential deviance is not supported by this Court's analogous Speedy Trial precedents, and because this deviance has prevented Captain Ashby from receiving relief for this Due Process violation, review by this Court is necessary.

While this Court has never addressed the constitutional right to speedy appellate process, nearly every federal court has recognized that such a right exists under the Due Process clause of the Fifth Amendment to the United States Constitution.<sup>17</sup> In determining whether a violation

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<sup>17</sup> *United States v. Pratt*, 645 F.2d 89, 91 (1st Cir. 1991); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *Burkett v. Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1987); *United States v. Johnson*, 732 F.2d 379, 381-82 (4th Cir.), cert. denied,

has occurred, the federal courts have logically extended this Court's Speedy Trial framework to post-trial delay.

#### A. This Court's Speedy Trial Jurisprudence

In *Barker v. Wingo*, this Court set forth a four-part balancing test in order to determine whether a delay in proceeding to trial has resulted in a Due Process violation.<sup>18</sup> That test looks to (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted this right; and (4) the prejudice to the defendant in performing this fact-specific balancing test.<sup>19</sup> Furthermore, "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."<sup>20</sup> Therefore, every analysis under *Barker* presumes some prejudice by virtue of the delay, even

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469 U.S. 1033 (1984); *Rheark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); *United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996); *United States v. Kimmons*, 917 F.2d 1011, 1014-15 (7th Cir. 1990); *United States v. Hawkins*, 78 F.3d 348, 350-51 (8th Cir.), cert. denied, 519 U.S. 844 (1996); *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993) (en banc), cert. denied, 510 U.S. 1182 (1994); *Harris v. Champion (Harris II)*, 15 F.3d 1538, 1559 (10th Cir. 1994); *United States v. Rodriguez*, 259 Fed. Appx. 270, 277 (11th Cir. 2007); *Montgomery v. Sheffield*, 821 F.2d 821, 821 (D.C. Cir. 1987) (recognizing such a theory has been upheld elsewhere); *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

<sup>18</sup> 407 U.S. 514, 530 (1972).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

without considering particularized trial prejudice.

This Court has consistently highlighted the “balancing” nature of the test, one in which all the factors are weighed: “We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.”<sup>21</sup> And again, in *Moore v. Arizona*, where this Court specifically announced that the fourth factor—prejudice—was not a *sine qua non* for a constitutional violation, this Court stated: “*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial.”<sup>22</sup> And yet again, in *United States v. Doggett*, this Court explained that particularized prejudice under the fourth *Barker* factor is not a requisite under this Speedy Trial test because “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”<sup>23</sup> Therefore, “[w]hile such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.”<sup>24</sup>

In sum, this Court’s Speedy Trial analysis requires a balanced, case-by-case approach, triggered by a presumptively prejudicial delay. Notably, it specifically does not require

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<sup>21</sup> *Id.* at 533.

<sup>22</sup> 414 U.S. 25, 26 (1973) (per curiam).

<sup>23</sup> 505 U.S. 647, 655 (1992).

<sup>24</sup> *Id.* (citation omitted).

particularized prejudice if the other factors, including the presumptively prejudicial delay, weigh in favor of the accused.

B. Deviation from the Speedy Trial Jurisprudence within federal courts

As noted above, federal courts have uniformly adopted this Court's Speedy Trial jurisprudence to analyze Due Process violations for dilatory appellate processing.<sup>25</sup> However, in this adoption, some courts have impermissibly abandoned two substantive principles marked by this Court's Speedy Trial jurisprudence: (1) particularized prejudice is not a requisite to establish a constitutional violation; and (2) delay, in and of itself, is a triggering mechanism that establishes "presumptive prejudice." Because this Court has stated that these two principles are essential facets of Speedy Trial jurisprudence, federal courts are bound by this precedent, and therefore may not deviate from this precedent without sharp reproach from this Court. Similarly, when incorporating this Court's jurisprudence into an analogous situation, such as speedy appellate processing, deviation from the analogous precedent is equally worthy of this Court's review.

Federal courts are split as to whether an accused is required to make a showing of particularized prejudice to establish a Due Process violation for dilatory appellate processing.<sup>26</sup> And despite citing

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<sup>25</sup> See footnote 1.

<sup>26</sup> Compare *United States v. Garcia*, 444 F.3d 41, 57 (1st Cir. 2006) ("defendant must show prejudice, and we will not presume prejudice from the length of the delay"); *Kimmons*,

*Barker*, those courts that have found that such a requirement exists have clearly retreated from the holding of *Barker* that “none of the four factors [are] a necessary or sufficient condition.”<sup>27</sup> Thus, the fact-specific, balancing test enunciated in *Barker* has been discarded by those federal courts in favor of a “prejudice plus” test—requiring particularized prejudice to satisfy a Due Process violation, rather than it serving as one of several factors to consider. Coupled with these courts’ requirement of particularized prejudice is a dismissal of presumptive prejudice as affecting the *Barker* analysis. These changes are substantial, as they

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917 F.2d 1015 (7th Cir. 1990) (requiring particularized prejudice under fourth *Barker* factor); *Hawkins*, 78 F.3d at 350-51 (8th Cir. 1996) (stating *Hawkins* “must also show prejudice from the delay to establish a due process violation.”); *Tucker*, 8 F.3d at 676 (9th Cir. 1993) (requiring finding of particularized prejudice); *Rodriguez*, 259 Fed. Appx. 270, 278 (11th Cir. 2007) (requiring particularized prejudice for due process violation), *with Simmons*, 898 F.2d at 868 (2d Cir. 1990); (“In determining whether a delay of a prisoner’s appeal violated due process, we look to the *Barker* criteria, although no one factor is dispositive and all are to be considered together with the relevant circumstances.”); *Heiser v. Ryan*, 15 F.3d 299, 304 (3rd Cir. 1994) (recognizing that “a situation may arise where the court may presume prejudice in a post-conviction delay context”); *Smith*, 94 F.3d at 209 (6th Cir. 1996) (recognizing, in extreme circumstances, the length of the delay may give rise to a strong presumption of evidentiary prejudice); *Harris II*, 15 F.3d at 1559 (10th Cir. 1994) (recognizing that presumptive prejudice may come into play in extreme circumstances, yet still stating that, ordinarily, a petitioner must make some showing on the fourth factor of *Barker*); *Moreno*, 63 M.J. at 136 (C.A.A.F. 2006) (“No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding”).

<sup>27</sup> *Barker*, 407 U.S. at 533.

ignore the effect of the egregiousness of the other *Barker* factors, and discount the fact that “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”<sup>28</sup> Because the reliability of an appeal suffers in the same way as a trial would, due to delay, no distinction need be made that calls for a different standard or approach.<sup>29</sup> As such, the federal courts that have required particularized prejudice and ignored presumptive prejudice have overstepped their bounds, and flouted this Court’s analogous precedent.

While the pertinent cases used in determining Captain Ashby’s case may not be implicated by these federal courts’ deviation, a similar deviation has occurred in military jurisprudence. Therefore, an underlying concern is that this area of law is developing divergent paths, without guidance from this Court. Furthermore, these divergent paths seemingly conflict with the Speedy Trial framework established by this Court, which has been adopted as the sole model for determining a violation of dilatory appellate processing. Lest these paths become more divergent and less tied to this Court’s Speedy Trial framework, Captain Ashby respectfully requests review by this Court.

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<sup>28</sup> *Doggett*, 505 U.S. at 655.

<sup>29</sup> *Rheuark*, 628 F.2d at 303-04 (“[T]he reasons for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial.”)

C. Deviation from the Speedy Trial Jurisprudence within the military

The CAAF has similarly incorporated *Barker* as the appropriate analysis for a violation of dilatory appellate processing under the Due Process clause of the United States Constitution.<sup>30</sup> The military courts have continued to employ the *Barker* balancing test, and have seemingly cast aside the notion that particularized prejudice is a prerequisite to finding a Due Process violation.<sup>31</sup> However, though particularized prejudice is not required to establish a Due Process violation, it nevertheless is required to establish that this Due Process violation is not harmless beyond a reasonable doubt. Every constitutional violation is reviewed for harm.<sup>32</sup> And in order to find harm, the CAAF has continued to require particularized prejudice.<sup>33</sup> Therefore,

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<sup>30</sup> *Moreno*, 63 M.J. at 135.

<sup>31</sup> *Id.* at 136 (“No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.”)

<sup>32</sup> *United States v. Bush*, 68 M.J. 96, 102 (C.A.A.F. 2009).

<sup>33</sup> *Id.* at 104 (“Under the totality of circumstances in this record, we are confident that the due process violation was harmless beyond a reasonable doubt. To find otherwise would essentially adopt a presumption of prejudice in cases where the appellate court has found a due process violation as a result of unreasonable post-trial delay in the absence of *Barker* prejudice. We have declined to adopt such a standard in the past and see no need to alter that position.”); *But see United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006) (finding harm without *Barker* prejudice, yet stating “we do not presume prejudice based on the length of the delay alone.”) To whatever extent *Toohey* does not require particularized prejudice, the application of this precedent to other cases is difficult, without a more detailed discussion of how “harm” was established

particularized prejudice is still a *de facto* requirement to receive a remedy under this type of Due Process violation. Explicit within that notion is the CAAF's refusal to recognize presumptive prejudice, as harm, in conducting its harmlessness review.<sup>34</sup>

The CAAF's framework is flawed because it still requires particularized prejudice and ignores presumptive prejudice, despite this Court's Speedy Trial jurisprudence. As stated in *Moore*, "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial."<sup>35</sup> And as noted in *Doggett*, "[w]hile such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay."<sup>36</sup> Despite the clear precedent of *Barker* and its progeny that presumptive prejudice can and should be considered, the CAAF refuses to follow those precedents: "We believe that adopting the *Doggett* presumption of prejudice is unnecessary at this point."<sup>37</sup>

In dismissing this Court's analogous precedents, the CAAF fails to understand the rationale for not requiring particularized prejudice, as well as the rationale for accepting presumptive prejudice.

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without any particularized *Barker* prejudice.

<sup>34</sup> *Id.*

<sup>35</sup> 414 U.S. at 26.

<sup>36</sup> 505 U.S. at 655 (citation omitted).

<sup>37</sup> *Moreno*, 63 M.J. at 142; *see also* *Bush*, 63 M.J. at 104 ("We have declined to adopt [the *Doggett*] standard in the past and see no need to alter that position.")

“[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”<sup>38</sup> Therefore, particularized prejudice will not always be readily apparent. Furthermore,

[P]rejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings. Inordinate delay, ‘wholly aside from possible prejudice to a defense on the merits, may ‘seriously interfere with the defendant’s liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.’ *United States v. Marion*, 404 U.S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.’ *Barker v. Wingo*, *supra*, at 537 (WHITE, J., concurring).<sup>39</sup>

These intangibles, including the very access to a court for one’s right to appellate process, must be considered in determining prejudice, or harm.

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<sup>38</sup> *Doggett*, 505 U.S. at 655.

<sup>39</sup> *Moore*, 414 U.S. at 26.

Again, these same interests and factors are as applicable to persons awaiting appeals as they are for a persons awaiting trial. As such, it is error for the CAAF to discount presumptive prejudice as prejudicial harm within the harmlessness review. Because the CAAF has refused to apply *Doggett* to dilatory appellate processing cases, presumptive prejudice will always be ignored, and particularized prejudice will always be required.

#### D. Application to Captain Ashby's case

In Captain Ashby's case, the CAAF conducted a *Barker* analysis, and found, similar to the NMCCA, that a Due Process violation occurred:

Despite the fact that Ashby has not established prejudice under the *Barker* analysis, in balancing and weighing the four factors, we agree with the lower court that the delay violated Ashby's due process rights to a speedy post-trial review and appeal.<sup>40</sup>

The CAAF showed some fidelity toward *Barker*, and its balancing nature, by finding a violation without a finding of particularized prejudice. However, the CAAF then conducted a harmlessness review and found that, despite Captain Ashby's rights being violated by a ten-year delay in his appeal, this violation was harmless beyond a reasonable doubt.

The CAAF erred in discounting the theory of presumptive prejudice in conducting their

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<sup>40</sup> Appendix A at 37a-38a.

harmlessness review. As this Court has noted, “[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.”<sup>41</sup> This affirmatively recognizes that, even before the *Barker* balancing test is necessary, the delay must have some presumptive harm. And, “[w]hile such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.”<sup>42</sup> By failing to apply this presumptive prejudice in conducting the harmlessness analysis, the effect of which is increased by the ten-plus years of direct appeal, the CAAF has affirmatively abandoned this Court’s holding that harm can be found without a showing of particularized prejudice.<sup>43</sup>

Therefore, this case should be remanded to the lower court with direction that presumptive prejudice need be considered when conducting a harmlessness analysis.

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<sup>41</sup> *Barker*, 407 U.S. at 530.

<sup>42</sup> *Doggett*, 505 U.S. at 655 (citation omitted).

<sup>43</sup> *Moreno*, 63 M.J. at 142; *see also* *Bush*, 63 M.J. at 104 (“We have declined to adopt [the *Doggett*] standard in the past and see no need to alter that position.”)

Regardless of the misapplication of this Court's Speedy Trial framework, the Court of Appeals for the Armed Forces still erred by disregarding Appellant's employment prejudice in determining whether the Government established that the violation was harmless beyond a reasonable doubt.

As noted above, the CAAF found that Captain Ashby's rights were violated, but found that such a violation was harmless beyond a reasonable doubt. Captain Ashby argues that such a finding is impossible in his case, given the particularized prejudice that he presented to both the CAAF and the NMCCA.

Normally, when a Due Process violation has occurred for dilatory appellate processing, particularized prejudice will also be shown as part of the *Barker* analysis, thereby making harm in the harmlessness review apparent.<sup>44</sup> The standard *Barker* prejudice required for dilatory appellate processing cases is set forth in *United States v. Moreno*: (1) oppressive incarceration pending appeal; (2) anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might

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<sup>44</sup>*Bush*, 68 M.J. at 104 (“In circumstances where a record establishes that an appellant has suffered *Barker* prejudice, the Government's burden to establish that the constitutional violation was harmless beyond a reasonable doubt may be difficult to attain. The corollary seems apparent. In those cases where the record does not reflect *Barker* prejudice, as a practical matter, the burden to establish harmlessness may be more easily attained by the Government.”)

be impaired.<sup>45</sup> However, the CAAF has also recognized that “post-trial delays do not necessarily impact directly the findings or sentence.”<sup>46</sup> Therefore, the CAAF also “review[s] the record de novo to determine whether other prejudicial impact is present from the delay.”<sup>47</sup> As a result, the CAAF has expanded the scope of “harm,” having found prejudicial impact, due to appellate delay, in the nature of time spent having to be registered as sex offender,<sup>48</sup> and for employment prejudice.<sup>49</sup>

Captain Ashby demonstrated employment prejudice, yet the CAAF failed to recognize this prejudice, in either the *Barker* analysis (which does not matter because a violation was found even without this prejudice), or the harmlessness review. This was error, as Captain Ashby evidenced particularized employment prejudice that would have prevented the CAAF from concluding, beyond a reasonable doubt, that he was not harmed.

In ignoring this employment prejudice, the CAAF states: “Nor do we fault the Court of Criminal Appeals for failing to address Ashby’s employment prejudice argument, which was based upon clemency materials submitted to the convening authority but was not argued before that court.”<sup>50</sup> The disregarding of this prejudice is faulty for two reasons: (1) contrary to the CAAF’s statement, this prejudice was in front of the NMCCA, was

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<sup>45</sup> *Moreno*, 63 M.J. at 138-39.

<sup>46</sup> *Bush*, 68 M.J. at 102.

<sup>47</sup> *Id.*

<sup>48</sup> *United States v. Szymczyk*, 64 M.J. 179, 179 (C.A.A.F. 2006).

<sup>49</sup> *United States v. Jones*, 61 M.J. 80, 84-85 (C.A.A.F. 2005).

<sup>50</sup> Appendix A at 35a.

referenced by Captain Ashby's pleadings, and was required to be examined by NMCCA's own mandate; and (2) the CAAF has *de novo* review of the harmless beyond a reasonable doubt analysis, where it "consider[s] the totality of the circumstances in assessing whether the Due Process violation is harmless beyond a reasonable doubt."<sup>51</sup> Therefore, it does not matter what NMCCA did, because the CAAF reviews it anew, just as this Court can review the CAAF's decision anew on the same issue.

The CAAF's dismissal of these allegations of prejudice, based upon a failure to argue them to the NMCCA, was in error. The CAAF alleges that "Ashby did not claim prejudice arising from lost employment opportunities before the lower court."<sup>52</sup> This is simply not the case. First, these letters were part of the record,<sup>53</sup> and as part of the NMCCA's duty under 10 U.S.C. § 866, the NMCCA must review and analyze the "entire record."<sup>54</sup> Therefore, the allegations of prejudice should have been apparent from the reading of the entire record, without argument. Second, the CAAF has specifically instructed the NMCCA that, under 10 U.S.C. § 866, it has discretion to address and correct dilatory appellate processing violations as part of its statutory mandate, above and beyond the constitutional Due Process analysis.<sup>55</sup> In so doing,

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<sup>51</sup> Appendix A at 38a.

<sup>52</sup> *Id.* at 37a, n. 11.

<sup>53</sup> RULE FOR COURTS-MARTIAL 1103(b)(3)(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) (Clemency materials are matters attached to the record.)

<sup>54</sup> *See* 10 USC § 866(c).

<sup>55</sup> *See Tardif*, 57 M.J. at 224 (finding, under the broad authority of 10 USC § 866, that a court is "required to

the CAAF has made it incumbent upon NMCCA to assess the appropriateness of a sentence based upon appellate delay. Third, in the NMCCA's first decision in this case, it instructed itself that it should address this dilatory appellate processing issue upon return from remand: "We will reconsider the issue of harm to the appellant anew upon return and subsequent review of the appellant's record to this court."<sup>56</sup> Therefore, beyond the 10 USC § 866 mandate, the NMCCA's own internal mandate required them to assess the whole record for harm resulting from this Due Process violation. And lastly, and most contrary to the CAAF's statement, Captain Ashby even referenced that employment letter, and other clemency materials in asking for relief for dilatory appellate processing in this case.<sup>57</sup> So, the CAAF's excusal of the NMCCA failure to address this prejudicial allegation is inexcusable.

Even more inexcusable is the CAAF's own failure to address this prejudice as part of its *de novo* harmlessness review. The CAAF does concede that this allegation of prejudice was raised before them: "In his brief before this Court and during oral

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determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay.")

<sup>56</sup> Appendix C at 163a.

<sup>57</sup> Appellant's Brief and Assignments of Error, dated April 28, 2008, pages 15-16 (In a request for relief for dilatory appellate processing under 10 USC § 866, the Petitioner, through counsel, states "The clemency materials submitted on his behalf testify to all of the missed opportunities, sleepless nights, and other obstacles resulting from this Court's negligence. Clemency Petition of 15 Feb 2008, Enclosures 1-7.")

argument, Ashby called our attention to a letter from a potential employer, dated December 17, 2005, which he submitted with his clemency materials when the case was before the convening authority a second time.”<sup>58</sup> And the CAAF, in this footnote, provides its analysis of this prejudice:

The letter does not specifically state that the company would have hired Ashby if he had a DD 214. It does, however, note that Ashby was unable to travel and would “find it difficult to obtain a government security clearance.” Obtaining a DD 214 would alleviate Ashby’s inability to travel but, as we have affirmed the Article 133, UCMJ, convictions, may or may not address the difficulty he may have in obtaining a security clearance. Under the circumstances of this case, this letter does not establish specific prejudice under *United States v. Jones*, 61 M.J. 80, 85 (C.A.A.F. 2005).<sup>59</sup>

This analysis does no justice to the stated letter. Contrary to the CAAF’s rendering above, the letter from the potential employer certainly implies that he would be hired, but for his inability to travel and the question of a security clearance. The letter states (1) that Captain Ashby’s background puts him in

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<sup>58</sup> Appendix A at 37a, n. 11; The significance of the DD-214 is that signifies the end of an appeal, when a person is finally given their discharge.

<sup>59</sup> *Id.*

“demand around the world;” (2) that the only drawbacks for him are the travel and clearance issues; (3) that “there are many flying jobs once [his] current situation is resolved;” and (4) most importantly, the letter states “we will help you move on as soon as you are free to travel...I hope we will have you onboard soon.”<sup>60</sup> All these statements, in the context of the letter, indicate that he will be hired as soon as his case is finalized and his travel restriction lifted. In fact, the CAAF concedes that the travel issue would have been resolved by speedy appellate review. The lone issue, therefore, for the CAAF, is the security clearance, saying speedy appellate processing “may or may not address the difficulty he may have in obtaining a security clearance.”<sup>61</sup>

This statement is the undoing for the CAAF’s finding of harmlessness. Having already recognized that employment prejudice is a cognizable harm,<sup>62</sup> the CAAF, after finding a Due Process violation, must provide relief, “[u]nless [the CAAF] conclude[s] beyond a reasonable doubt that the delay generated no prejudicial impact....”<sup>63</sup> “Beyond a reasonable doubt” is a substantial burden. And the CAAF’s finding that the appellate delay, “may or may not” have affected his security clearance, and therefore the lone impediment to his employment, certainly is language that rebuts any governmental argument that the Due Process violation was harmless beyond

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<sup>60</sup> Clemency Request of February 15, 2008, enclosure 6, dated December 17, 2005.

<sup>61</sup> Appendix A at 37a, n. 11.

<sup>62</sup> *Jones*, 61 M.J. at 84-85.

<sup>63</sup> *Bush*, 68 M.J. at 102.

a reasonable doubt. If the clearance issue “may” (as opposed to “may not”) be resolved by issuance of a DD-214—meaning the end of one’s appeal—then the CAAF cannot be certain, beyond a reasonable doubt, that that there was no harm. By its own language, the CAAF states that it does have a reasonable doubt whether the violation was harmless.

Because actual, particularized prejudice was elicited and argued, the CAAF erred by finding that the Due Process violation was harmless beyond a reasonable doubt. Harm being present, Captain Ashby has been prejudiced by the CAAF’s failure to remedy his Due Process violation. Wherefore, Captain Ashby requests this Court remand his case to the CAAF for a determination of an appropriate remedy.

## CONCLUSION

Because the law regarding speedy appellate processing is evolving in different directions within the federal courts, and in a different direction from the only analogous precedent from this Court, review is necessary to establish a uniform framework to analyze Due Process violations resulting from dilatory appellate processing.

Furthermore, because the CAAF ignored palpable prejudice in conducting a harmless review, its decision must be overturned.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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