

part of the extraordinary relief requested. That filing was rejected, and Petitioner files again today requesting the same relief, noting that the jurisdiction for this Court to issue any stay in this case arises under the All Writs Act.

The factors governing issuance of a stay are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). These four factors may be balanced against each other and a stronger showing on one may reduce the need to rely on another. *American Civil Liberties Union v. National Security Agency*, 467 F.3d 590, 590-91 (6th Cir. 2006). The party seeking the stay has the burden of showing that it meets these standards. *Humane Soc'y of the United States v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009).

First, Respondent has given no legal reasoning in denying Petitioner's requests to ameliorate the *ex parte* communications issue via a more regular resolution, and has not explained how Petitioner's concerns about Respondent's resolution of that issue do not endanger the integrity of the three-year *DuBay* proceedings. Petitioner, on the other hand, has filed multiple pleadings with Respondent enunciating Petitioner's concerns

about legal irregularity in the process, and Appellant has enunciated similar concerns. Respondent summarily denied Petitioner's motions, did so only after four and three-weeks' delay in each case, and did so the day after Petitioner filed a motion to expedite in each case. These facts favor the Government's strong likelihood of prevailing on the merits in this Court.

Second, the Government stands to be irreparably harmed absent a stay in any further trial proceedings. First, parties to the proceedings have already begun acting despite the lack of any mandate from the Judge Advocate General in this case. United States' Motion to Expedite, *En Banc*, Sep. 28, 2010 (Appendix B). This signals the critical need for an immediate stay ordering all parties to halt compliance with Respondent's order until these issues are resolved. Second, if no stay is issued immediately, the possibility that *ex parte* communications revealed in a new *DuBay* proceeding, to be held within approximately the next week, will void the validity of the original three-year *DuBay* proceedings, will cause irreparable harm and delay in the case, potentially requiring an entirely new *DuBay* proceeding. The original judge, made witness in the second *DuBay* proceedings, will be unable to amend his original Findings. This would prolong definitive resolution of the case.

Third and Fourth, the potential harm to Appellant in a stay in this capital case, and the public interest, both definitively lie in proper and regular resolution of any ex parte communications issues that arose during the *DuBay* proceedings, and is surely outweighed by the potential harm to Respondent. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (balancing of interests and harms includes public at large). The Government's ability to ensure the just, and also expeditious and least onerous, resolution of the mental health issues involving Appellant and similarly situated accuseds is at question, and requires immediate resolution.

Conclusion

The Government respectfully moves this Court to issue an Order holding any further trial proceedings, and appellate proceedings in the lower court, in abeyance pending resolution of this appeal.

/s/

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Appendix

- A. *United States v. Parker*, No. 9501500 (N-M. Ct. Crim. App. Sep. 29, 2010) (order).
- B. United States' Motion to Expedite, *En Banc*, Sep. 28, 2010.

Certificate of Filing and Service

I certify that the foregoing original was electronically delivered to the Court, with copies served on:

- 1) CAPT Christian L. Reismeier, JAGC, USN
Chief Judge
Navy-Marine Corps Court of Criminal Appeals
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Counsel to LCpl Kenneth G. PARKER, USMC
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on this 1st day of October, 2010.

/s/

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UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

Kenneth G. PARKER
Lance Corporal (E-3)
U. S. Marine Corps

Appellant

NMCCA No. 9501500

GENERAL COURT-MARTIAL

O R D E R

By Order dated 31 August 2010, this Court returned the record of DuBay Hearing in this case to the Judge Advocate General for remand to an appropriate convening authority to order a new DuBay hearing for the limited purpose of establishing the nature and extent of the personal contact between Judge Dunn and the Government expert in this case, Dr. Roger Moore, outside the presence of the parties during the period April 2010 to August 2010. In addition to providing guidance on the goals of the hearing, the Court requested that the Chief Judge, Navy-Marine Corps Trial Judiciary make an experienced military judge available to the convening authority so that the hearing may be conducted within 30 days of the date of this Order, and the record, to include the military judge's findings of fact and conclusions of law, can be delivered to the Court on or before 15 October 2010.

On 10 September 2010, the Government filed a joint Motion for En Banc Reconsideration and Motion to Stay. The appellant filed a joint opposition to the Motion for En Banc Reconsideration and Consent to Motion to Stay. On 28 September the Government a Motion for Expedited Review En Banc.

After considering the pleadings of the parties and the record of trial, it is, by the Court, this 29th day of September 2010,

ORDERED:

1. That the Government's Motion for En Banc Reconsideration is denied.
2. That the Government's Motion to Stay is denied.

3. That the Government's Motion for Expedited Review En Banc is denied as moot.

4. That the Chief Judge, Navy-Marine Corps Trial Judiciary is requested to make an experienced military judge available to the convening authority so that the hearing may be conducted within 14 days of the date of this Order, and the record, to include the military judge's findings of fact and conclusions of law, can be delivered to the Court on or before 29 October 2010.

For the Court

R.H. TROIDL
Clerk of Court
29 September 2010



Copy to:
NMCCA (51.2)
Code 45 (Maj Sripinyo)
Code 46 (Mr. Keller)
Code 02
Code 05
~~Code 52~~

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES,)	GOVERNMENT MOTION FOR
Appellee)	EXPEDITED REVIEW, <i>EN BANC</i>
)	
v.)	
)	Case No. 9501500
Kenneth G. PARKER)	
Lance Corporal (E-3))	
U.S. Marine Corps,)	
Appellant)	
)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Navy-Marine Corps Court of Criminal Appeals Rules of Practice and Procedure, Rules 17 and 23, the Government respectfully petitions this Honorable Court, *en banc*, to expedite its consideration of the Government's Motion for *En Banc* Reconsideration and Motion to Stay, filed with this Court on September 10, 2010. Per Rule 17(a), the Government notes that this is a capital case, and garners high-visibility in the eye of the public.

On September 10, 2010, the Government moved this Court, *en banc*, to reconsider its order directing that the JAG remand for a *DuBay* hearing, and moved this Court, *en banc*, to toll all dates for compliance, including the October 15, 2010, date assigned to the Convening Authority, given the complex legal issues raised in this case and the motion for reconsideration. On September 16, 2010, Appellee filed an opposition to the Government's motion for reconsideration, but Appellee consented

to and joined the Government's request that the dates for compliance be tolled.

Nearly three weeks have passed since the Government's motion. The Government has been informed that the Chief Judge of the Trial Judiciary has taken it upon himself to coordinate compliance with this Court's Order, despite that the JAG has, issued no mandate under Article 66(e), has not returned the Record of Trial to the Convening Authority, the time for reconsideration had not expired, and no other court has gained jurisdiction over this case.

In order to ensure correct processing of this high-visibility death penalty case, the Government urges this Court immediately to stay the times for compliance contained in this Court's original order, as requested both by the Government and Appellant, and to expedite the consideration of the remaining issues in the Government's motion of September 10, 2010.

/s/

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Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court on September 28, 2010. I also certify that a copy of the foregoing was delivered on September 28, 2010, to Major Kirk SRIPINYO, USMC.

/s/

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