The Lion Who Squeaked: How the *Moreno* Decision Hasn't Changed the World and Other Post-Trial News

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Introduction

The 2007 term for the Court of Appeals for the Armed Forces (CAAF) and the service courts was of great interest to post-trial practitioners. The first part of this article addresses the continuing development of post-trial delay jurisprudence in light of CAAF's 2006 *United States v. Moreno*[1] decision. When CAAF expressed its frustration with the military's long history of dilatory post-trial processing by announcing that it would apply "a presumption of unreasonable delay . . . where the action of the convening authority is not taken within 120 days of the completion of trial,"[2] many post-trial practitioners feared the worst. Knowing that most cases, particularly contested cases, required significantly longer than 120 days to process,[3] there was great concern that appellate courts would apply the 120-day rule strictly and bludgeon the government into timeline compliance by granting widespread and significant relief to otherwise undeserving appellants.[4]

Fortunately (or unfortunately—depending on your perspective), neither the service courts nor the CAAF are granting wholesale relief to appellants whose cases have violated the *Moreno* timelines. This article reviews four cases which shed light on how CAAF is applying the *Moreno* decision to determine questions of unreasonable post-trial and appellate delay. Each of these cases adds new insight into how CAAF intends to proceed with this new and powerful tool to remedy meritorious claims of excessive post-trial delay. These cases, taken collectively, demonstrate that the CAAF is not applying as strict a standard to the government as would appear to be permitted under the *Moreno* opinion.

The second part of this article reviews those 2007 term of court cases involving the technical aspects of the post-trial process. It begins with a discussion of several cases involving the advice the staff judge advocate (SJA) gives the convening authority under Rule for Court-Martial (RCM) 1106.[5] It also examines actions taken by the convening authority pursuant to RCM 1107.[6] In the case of *United States v. Bonner*,[7] the Army Court of Criminal Appeals (ACCA) distinguished between the requirement for sentence reassessment in light of a legal error versus the absence of such a requirement where the convening authority grants "pure" clemency under his RCM 1107(d)(2)[8] authority.

In *United States v. Wilson*,[9] the CAAF analyzed a convening authority's action under RCM 1107(d)(1)[10] and ruled that when an action is unambiguous on its face, the meaning will be given effect regardless of what surrounding documents might indicate the convening authority's true intent may have been. The last case discussed in part two of this article addresses the SJA's duty to advise his convening authority on defense deferment and waiver of forfeiture requests as illustrated by the ACCA opinion in *United States v. Moralez*.[11]

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[1] 63 M.J. 129 (2006).

[2] *Id.* at 142.

[3] Major John Rothwell, *Annual Developments in Sentencing and Post-Trial—2006,* ARMY LAW., June 2007, at 42, 54.

[4] *Moreno* provided that relief for denial of speedy post-trial or appeal could include, but was not limited to:

> (a) day-to-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside portions of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice.

Moreno, 63 M.J. at 143.

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106 (2008) [hereinafter MCM].

[6] *Id.* R.C.M. 1107.

[7] 64 M.J. 638 (Army Ct. Crim. App. 2007).

[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1) (2005) [hereinafter 2005 MCM].

[9] 65 M.J. 140 (2007).

[10] 2005 MCM, *supra* note 8, R.C.M. 1107(d)(1).

[11] 65 M.J. 665 (Army Ct. Crim. App. 2007).

Post-Trial Processing in a Post-*Moreno* World

United States v. Moreno[12]

"Time keeps on slippin, slippin, slippin . . . . Into the future"[13]

On 11 May 2006, the CAAF released its opinion in the post-trial delay case of *United States v. Moreno*.[14] The *Moreno* case represents the most recent manifestation of CAAF's frustration with post-trial delay in the military justice system. When confronted with a 746-page court-martial record that required almost five years (1688 days) to process from announcement of sentence to service court review,[15] the CAAF expressed its disappointment in the "institutional vigilance"[16] of the Government by providing appellants a means to obtain meaningful relief for what appellate courts determine is unreasonable post-trial delay.[17]

In *Moreno*, the court declined to resurrect a bright-line *Dunlap*-like rule requiring initial action by the convening authority within ninety days,[18] but did announce that it would apply a presumption of unreasonable delay in any case, completed after 11 June 2006, which did not have initial action taken within 120 days of the completion of the trial.[19] The court warned that in such cases, the court "will apply a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor analysis where the action of the convening authority is not taken within 120 days of the completion of trial."[20] In *Barker v. Wingo*,[21] the Supreme Court set out four factors to review speedy trial issues in a pretrial, Sixth Amendment context: (1) the length of delay; (2) the reason for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice.[22]

Under the *Moreno* precedent, once the post-trial delay in a case is determined to be unreasonable, the court must balance the length of delay against the three other factors, with no single factor being required to find that the post-trial delay constitutes a due process violation.[23] With respect to the fourth factor involving prejudice, the appellate court must evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern over those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal or retrial, might be impaired.[24] In *United States v. Toohey*, a case decided three months after the *Moreno* decision was released, the CAAF elaborated on the prejudice factor by announcing that when an appellant had not shown prejudice under the fourth factor, the appellate courts "will find a due process violation only when, 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.[25]

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[12] 63 M.J. 129 (2006).

[13] LyricsFreak.com, Steve Miller, Lyrics to Fly Like an Eagle, http://www.lyricsfreak.com/s/steve+miller/fly+like+an+eagle_20130994.html (last visited June 18, 2008).

[14] *Moreno*, 63 M.J. 129.

[15] *Id.* at 132.

[16] *Id.* at 137.

[17] *Id.* at 142–43.

[18] Dunlap v. Convening Authority, 23 C.M.A. 135 (1974). In *Dunlap*, the Court of Military Review (the predecessor to the present Court of Appeals for the Armed Forces) announced that there would be a presumption of a denial of speedy disposition where the convening authority failed to take action within ninety days of trial. *Id.* at 138. This presumption placed a "heavy burden on the Government to show diligence, and in the absence of such a showing the charges would be dismissed." *Id.* at 138 (quoting United States v. Burton, 44 C.M.R. 166, 172 (C.M.A. 1971)).

[19] *Moreno,* 63 M.J. at 142. The court further announced a similar "presumption of unreasonable delay for courts-martial completed thirty days after the date of this opinion where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action." *Id.*

[20] *Id.*

[21] 407 U.S. 514 (1972).

[22] *Id.* at 530.

[23] *Moreno*, 63 M.J. 136.

[24] *Id.* at 138–39.

[25] 63 M.J. 353, 362 (2006).

If, after completing a *Barker* four factor analysis, a reviewing authority finds a post-trial denial of due process rights, that authority may grant relief as it finds appropriate.[26] In *Moreno*, the CAAF suggested a non-exclusive list of relief that could include, but was not, limited to: (1) day-for-day reduction in confinement or confinement credit; (2) reduction of forfeitures; (3) set aside of portions of the approved sentence including punitive discharge; (4) set aside of the entire sentence, leaving a sentence of no punishment; (5) limitation upon the sentence that may be approved by the convening authority following a rehearing; and (6) dismissal of the charges and specifications with or without prejudice.[27]

As a result of prior case law and *Moreno*, service courts have two distinct responsibilities when reviewing allegations of post-trial and appellate delay. First, service courts may grant relief to appellants for excessive post-trial delay under their broad authority to determine sentence appropriateness under Article 66(c), UCMJ.[28] Second, as a matter of law, both the service courts and the CAAF may review claims of untimely review and appeal under the Due Process Clause of the Constitution using the principles announced in *Moreno*.[29]

The 2006–2007 Court Term

During the past court term, the CAAF published eight opinions analyzing post-trial delay in cases tried after the implementation of the *Moreno* timelines.[30] Of those eight decisions, three resulted in the CAAF granting relief directly to the appellant[31] and two resulted in the CAAF returning the case to the service court for favorable action.[32] Part one of this article will examine four of those cases for clues as to how the *Moreno* decision is being interpreted by CAAF and what that interpretation means to military justice practitioners. As will be seen, the worst fears imagined by government post-trial practitioners in the summer of 2006 do not appear to be coming to fruition. *Moreno* is not being interpreted in a way that grants wholesale relief to appellants whose cases have taken longer to process than the timelines set out in the *Moreno* decision. Instead, the CAAF decisions in the last court term appear to begin to provide a nuanced and descriptive methodology for understanding how the CAAF will decide post-trial delay cases in the future.

United States v. Dearing[33]

An Example of Unreasonable Post-Trial Delay Analysis

A military panel convicted Operations Specialist Seaman (OSS) Brian Dearing, contrary to his pleas, of one specification of unpremeditated murder, two specifications of aggravated assault, and one specification of obstruction of justice.[34] The panel adjudged, and the convening authority approved, a sentence of twenty-five years confinement, reduction to E-1, total forfeiture of all pay and allowances, and a dishonorable discharge.[35] The CAAF reviewed OSS Dearing's case after a 1794

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[26] *Moreno*, 63 M.J. at 143.

[27] *Id.*

[28] UCMJ Article 66 deals with review by the Service Courts of Criminal Appeals. Specifically, Article 66(c) states:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ art. 66 (2008); *see* United States v. Tardif, 57 M.J. 219, 225 (2002).

[29] U.S. CONST. amend. V; *see* Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 38 (2003).

[30] United States v. Dearing, 63 M.J. 478 (2006); United States v. Harvey, 64 M.J. 13 (2006); United States v. Simon, 64 M.J. 205 (2006); United States v. Canchola (*Canchola II*), 64 M.J. 245 (2007); United States v. Young, 64 M.J. 404 (2007); United State v. Roberson, 65 M.J. 43 (2007); United States v. Pflueger, 65 M.J. 127 (2007); United States v. Harrow, 65 M.J. 190 (2007).

[31] *Dearing*, 64 M.J. at 489; *Harvey*, 64 M.J. at 25; *Pflueger*, 65 M.J. at 131.

[32] *Canchola II*, 64 M.J at 247; *Simon*, 64 M.J. at 208.

[33] *Dearing*, 63 M.J. 478.

[34] *Id.* at 480.

[35] *Id.* at 482–83.

day delay between OSS Dearing's murder trial and his first-level appellate review.[36] Three hundred and forty days elapsed between the announcement of the sentence in his case and the action by the convening authority.[37] Four more years passed before the Navy-Marine Corps Court of Appeals (NMCCA) affirmed OSS Dearing's case.[38] The CAAF granted review on an instructional issue at trial and on whether OSS Dearing was provided timely post-trial and appellate review.[39]

Length of Delay

In the first part of the opinion, the CAAF reviewed the military judge's instruction to the military panel with regard to an aggressor's right to exercise self-defense in an escalation of force situation and determined that he erred and that the error was not harmless beyond a reasonable doubt.[40] After setting aside OSS Dearing's convictions for murder and aggravated assault, the court took up the post-trial delay issue.[41] Finding the first *Barker* factor "heavily" in favor of OSS Dearing, the court quickly determined that a delay of "almost five years for a first-level appellate review by a service court of criminal appeals is facially unreasonable and clearly excessive and inordinate."[42]

Reason for Delay

Examining the reasons for delay in the record of trial, the court noted that the record was "neither unusually long or complex, and there is no reasonable explanation for why it took the convening authority over ten months to take action."[43] While the CAAF acknowledged that the twenty-one defense motions for enlargement (constituting two years of delay) that the service court granted were a "significant" reason for delay, the CAAF still held that "the Government has the ultimate responsibility for the staffing and administrative management of the appellate review process for cases pending before lower court."[44] Finally, the court concluded that the government had not presented legitimate reasons or exceptional circumstances for the excessive post-trial delay and that the second *Barker* factor weighed heavily in favor of OSS Dearing.[45]

Assertion of the Right to Timely Review and Appeal

While initially saying that they would normally weigh OSS Dearing's failure to raise any complaint about his post-trial delay to the service court against him, the CAAF went on to say that the facts of OSS Dearing's case required further analysis.[46] Noting that in a communication with his defense counsel, OSS Dearing complained that his case had sat "idle for almost (1) one year" and that he had filed a congressional complaint alleging that his appellate defense counsel had "neglected to show any interest at all in helping me" the court concluded that the third *Barker* factor also weighed heavily in his favor.[47]

Prejudice

Examining prejudice in OSS Dearing's case, the CAAF first turned its attention to the lack of "institutional vigilance" that led the defense to request twenty-one defense enlargements. After granting the twenty-first enlargement, the CAAF

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[36] *Id*. at 485.

[37] *Id.* at 486.

[38] *Id.*

[39] *Id.* at 479.

[40] *Id.* at 484–85.

[41] *Id.* at 485.

[42] *Id.* at 486.

[43] *Id.*

[44] *Id.* The court concluded by saying, "we decline to hold Appellant responsible for the lack of 'institutional vigilance' that should have been exercised in this case. *Id.* (quoting Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 39–40).

[45] *Id.*

[46] *Id.* at 487.

[47] *Id.*

noted that the service court notified OSS Dearing that it would decide the case without a brief if one was not filed by a deadline set by the court.[48] In response, "the detailed military appellate counsel merely submitted a *Grosetefon* submission."[49] Finally, apparently out of desperation, OSS Dearing hired a civilian appellate counsel who managed to file a substantive brief in OSS Dearing's case.[50] Reviewing these facts, the CAAF concluded that the lack of institutional vigilance "effectively denied Appellant his statutory right to the free and timely professional assistance of detailed military appellate defense counsel."[51]

Conclusion

In the end, the CAAF held that all of the *Barker* factors weighed heavily in favor of the accused and that prejudice, in particular, required a finding that the error arising from the post-trial delay was not harmless beyond a reasonable doubt.[52] In deciding in favor of OSS Dearing, the court pointed to two forms of actual prejudice. First, OSS Dearing "endured oppressive incarceration because he has been denied a timely review of his meritorious claim of legal error for over six years while he was incarcerated."[53] Second, lack of institutional vigilance by the government resulted in OSS Dearing being denied his statutory right to free and timely professional assistance of his appeals by a military appellate defense counsel.[54]

Relief

Reviewing the broad relief contemplated in the *Moreno* decision, the CAAF declined to order dismissal of the murder and aggravated assault charges with prejudice because OSS Dearing had not made any showing of prejudice to his ability to defend against those at a rehearing.[55] The CAAF then reflected upon the fact that since a rehearing had been authorized, there was no sentence relief the court could immediately provide OSS Dearing.[56] Crafting a flexible form of relief to apply to the authorized rehearing, the court ordered that: (1) should a rehearing result in confinement, the convening authority must direct that OSS Dearing be credited with 365 days of confinement served; or (2) if the adjudged sentence at the rehearing does not include confinement, the convening authority will not approve a punitive discharge.[57]

United States v. Harvey[58]

Relief Without Prejudice

The CAAF case of *United States v. Harvey*, like *Dearing*, is another case where the appellant received relief for both a substantive error in the trial as well as additional relief for unreasonable post-trial delay.[59] A military panel convicted Lance Corporal (LCpl) Jemima Harvey on charges of conspiracy, false official statement, communication of a threat, and a variety of wrongful possession and use of controlled substances.[60] Lance Corporal Harvey was subsequently sentenced to

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 488.

[53] *Id.*

[54] *Id.*

[55] *Id.* Earlier in the opinion, however, the court that "[c]onsistent with *Moreno*, Appellant may in any later proceeding demonstrate prejudice arising from post-trial delay." *Id.*

[56] *Id.* at 489.

[57] *Id*

[58] 64 M.J. 13 (2006).

[59] *Id.*

[60] *Id.* at 17.

confinement for sixty-days, reduction to E-1, partial forfeitures, and a bad-conduct discharge.[61] On appeal, CAAF focused on two issues: (1) unlawful command influence, and (2) denial of speedy review.[62]

Deciding the unlawful command influence issue first, the CAAF found in favor of LCpl Harvey and set aside the findings and sentence.[63] The court then examined the 2031-day delay between announcement of sentence and the completion LCpl Harvey's first-level appellate review.[64] The court wasted little time finding that the first three *Barker* factors weighed in favor of the appellant.[65] Turning to the fourth factor of prejudice, the court looked immediately to the success of LCpl Harvey's underlying appeal on the substantive issue of unlawful command influence.[66] The court acknowledged that when an appellant's appeal is meritorious, "she may have served oppressive incarceration during the appeal period."[67] When looking at the facts of the case, however, the CAAF concluded that since LCpl Harvey was only sentenced to sixty days of confinement and had been released even before the convening authority's action, the post-trial delay did not result in any prolonged incarceration.[68]

The CAAF then examined the other sub-factors of prejudice and determined that none of these factors weighed in favor of any prejudice to LCpl Harvey as a result of post-trial delay.[69] Despite not finding any prejudice in the case, the CAAF recalled that the *Barker* decision permits relief even in the absence of prejudice when "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."[70] Ultimately, the CAAF found that the unexplained and unreasonably lengthy delay weighed in favor of finding that LCpl Harvey's due process right to a speedy review and appeal was denied notwithstanding her inability to establish specific prejudice under the fourth factor.[71] Turning to the issue of relief, the CAAF decreed that in the case of a rehearing resulting in a conviction and sentence, the convening authority could not approve any sentence other than a punitive discharge.[72]

United States v. Simon[73]

Never Forget to Mail the Record of Trial

In the case of *United States v. Simon*, CAAF reviewed a case in which there was an 847-day delay between the announcement of the appellant's sentence and the docketing at the service court.[74] Of the 847 days, 275 days elapsed between the court-martial and the initial action by the convening authority and another 572 days passed before the service court received the record of trial and docketed the case for review.[75] Not surprisingly, the CAAF opinion took direct aim at the 572-day delay in mailing the record of trial to service court as "the most glaring deficiency in the post-trial processing of this case."[76] The court had little sympathy for the delay, noting that "[t]ransmission of the record of trial from the field to the court is a ministerial act, routinely accomplished in a brief period of time in the absence of special circumstances."[77]

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[61] *Id.* at 16 n.4.

[62] *Id.* at 14.

[63] *Id.* at 22.

[64] *Id.* at 24. In this case, 370 days passed from announcement of sentence to convening authority action. *Id.* at 23 n.46. Docketing at the service court required an additional 195 days and the service court required 555 days to decide the case once the government filed its response to the appellant's brief. *Id*.

[65] *Id.* at 23–24.

[66] *Id.* at 24.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 24–25.

[70] *Id.* (quoting United States v. Toohey, 63 M.J. 353, 362 (2006)).

[71] *Id.*

[72] *Id.* at 25.

[73] 64 M.J. 205 (2006).

[74] *Id.* at 206.

[75] *Id.*

[76] *Id.* at 207.

[77] *Id.*

Finding no special circumstances in the appellant's case, the CAAF returned the record of trial to the NMCCA to conduct a new review under Article 66(c), UCMJ.[78] The court directed that the NMCCA review consider and expressly address whether the appellant should be entitled to relief for post-trial delays as a matter of sentence appropriateness under the Due Process Clause of the Constitution or as a matter of sentence appropriateness under Article 66(c), UCMJ.[79]

United States v. Canchola[80]

Excludable Delay for Good Cause Shown? Absolutely Not!

Unlike the last three cases, the case of *United States v. Canchola* is not notable for the relief granted the appellant. In fact, the CAAF agreed with the NMCCA's determination that the appellant was not entitled to relief for the 783 days that elapsed before the convening authority acted upon his fifty-nine-page record of trial or the total 1263 days that passed between announcement of sentence and the decision of the NMCCA.[81] What is notable about the *Canchola* is CAAF's assessment, and rejection, of the analysis that led to the NMCCA's decision.

In the NMCCA's decision, the court attempted to carve out a doctrine of excusable delay similar to the provisions of RCM 707(c).[82] Reviewing the appellant's allegation of unreasonable post-trial delay using the *Barker* factors, the NMCCA attempted to graft the concept of excusable delay onto the second *Barker* factor of reasons for delay.[83] In response to the SJA's assertion in his post-trial recommendation that the delays were caused by manpower shortages caused by his office's support of ongoing operations in Iraq and Afghanistan, the NMCCA noted that:

> We believe that such consideration is demanded by the very nature of deployable fighting forces, especially when those forces are expected to answer the call to arms under austere budget and manpower constraints that are a reality in our nation today. *There must be recognition in the post-trial arena of the concept of "excludable delay" for good cause shown, just as it is recognizable in the pretrial arena*.[84]

While agreeing that the "high demands placed upon military personnel in supporting the national interests of the United States, particularly in combat or hostile environments" should be considered in assessing post-trial delays under the *Barker* analysis, the CAAF refused to permit an "exclusion" of delay and only recommended that such delays be thoroughly documented in the record of trial.[85] The court cautioned that "general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government."[86] Looking at the case at hand, the CAAF concluded that the SJA's proffered explanation was "too general to demonstrate that the 'unforeseeable events' had a reasonably direct impact on the timeliness of post-trial processing."[87] Despite their rejection of the NMCCA's "excludable delay" construct, the court agreed that after balancing the *Barker* factors in a case where the accused had demonstrated no prejudice, the appellant was not denied his due process right to timely post-trial review and speedy appeal.[88]

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[78] *Id.*; UCMJ art. 66(c) (2008).

[79] *Simon*, 64 M.J. at 208.

[80] *Canchola II*, 64 M.J. 245 (2007).

[81] *Id.* at 246–47.

[82] 2005 MCM, *supra* note 8, R.C.M. 707(c).

[83] *Canchola II*, 64 M.J. at 247.

[84] United States v. Canchola (*Canchola I*), 63 M.J. 649, 651 (N-M. Ct. Crim. App. 2006) (emphasis added).

[85] *Canchola II*, 64 M.J. at 247.

[86] *Id.*

[87] *Id.*

[88] *Id.*

Trends in Post-Trial and Appellate Delay Litigation

While the meaning of the *Moreno* decision continues to reveal itself through the CAAF decisions of the last term, a few trends are apparent. First, the biggest key for an appellant to obtain meaningful relief for post-trial delay is by prevailing on another substantive issue during his appeal. Not surprisingly, if the CAAF finds that the appellant's rights were substantially impaired at trial and also find that he was forced to wait an unreasonable period to obtain appellate review, the appellant is very likely to receive some form of sentence relief. This is particularly true if the appellant has been continuously confined during the review period.

Second, while the third *Barker* factor looks to the appellant's assertion of the right to timely review and appeal, the CAAF really doesn't hold it against an appellant if he fails to make such an assertion. In a footnote to the *Harvey* opinion, the CAAF referred back to an earlier opinion in which they had found that the "weight against [the appellant] [for failing to assert his right to timely appeal] is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay."[89] Despite the slight weight given to this factor by the CAAF, trial and appellate defense counsel would still be prudent to object early and often if the government violates the *Moreno* timelines.

The third trend that can be detected is that delays, particularly prior to action by the convening authority, must be thoroughly documented and explained in the record of trial if the government appellate division is going to defend against claims of unreasonable post-trial delay. In *Canchola*, the CAAF not only rejected the NMCCA's attempt to create an RCM 707-like "excludable delay" construct to excuse post-trial delays, but also dismissed the SJAs generalized explanation for the delay.[90] While the court indicated that it will give due consideration to the demanding job of executing military justice in a wartime environment, it appears clear that the only explanation that will withstand CAAF's scrutiny will explicitly explain the delay in a detailed fashion.[91] Generalized explanations or talismanic incantations of such keywords as "manpower shortages," the "Global War on Terror," or "Operation Iraq/Enduring Freedom" in the SJAs post-trial recommendation or addendum will not satisfactorily explain the delay.

The SJA Recommendation and Action by the Convening Authority

United States v. Bonner[92]

To Reassess or Not to Reassess, that Is the Question

Sergeant (SGT) Bonner was convicted, contrary to his pleas, of rape, sodomy, and adultery.[93] The panel sentenced SGT Bonner to a bad-conduct discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to E-1.[94] In his recommendation to the convening authority under RCM 1106, the SJA recommended the convening authority set aside and dismiss with prejudice the findings of guilty for sodomy.[95] The convening authority, in accord with the SJA's recommendation, disapproved the findings of guilty to the sodomy charge and dismissed the charge and its specification with

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[89] United States v. Harvey, 64 M.J. 13, 23 n.53 (2006) (quoting, United States v. Moreno, 63 M.J. 129, 138 (2006)).

[90] *Canchola II*, 64 M.J. at 247. In the addendum to his post-trial recommendation, the staff judge advocate explained the 783-day delay to action by saying that:

> Due to a number of unforeseen events the post-trial review process in this case has been unusually lengthy. Multiple deployments by the SJA and support judge advocates, as well as many of the Convening Authorities, in support of Operation Enduring Freedom and Operation Iraqi Freedom, and its many follow-on missions, have caused severe manpower issues that have affected the review process.

Id. at 246.

[91] *Id.*

[92] United States v. Bonner, 64 M.J. 638 (Army Ct. Crim. App. 2007).

[93] *Id.*

[94] *Id.*

[95] *Id.* at 639.

prejudice.[96] The convening authority then approved the remaining findings of guilty, reduced the adjudged confinement by two months, and approved the remainder of the adjudged sentence.[97]

On appeal, SGT Bonner argued that the SJA failed to advise the convening authority properly on sentence reassessment after dismissal of a portion of the findings of guilty.[98] Denying SGT Bonner the relief he sought, ACCA described how sentence reassessment "in light of a legal error and a grant of clemency are distinctly different acts; therefore, the advice required for sentence reassessment in light of legal error is not required in conjunction with an act of clemency."[99]

Reviewing the requirements of RCM 1107(d)(2) in light of the applicable case law, ACCA reminded SJAs that "[w]hen a convening authority disapproves a finding[of guilty] based on *legal* error, the SJA must provide advice on the responsibilities to reassess the sentence in light of the error and make a determination of sentence appropriateness."[100] This advice should include instruction to the convening authority that he has two separate and distinct responsibilities: "first, to 'cur[e] any effect that the error may have had on the sentencing authority,' and second, to 'determin[e] anew the appropriateness of the adjudged sentence.'"[101] Having said that, the court went on to say that "[w]here there is no error, however, there is no obligation on the SJA to advise the convening authority on corrective action as to sentence."[102]

Applying the law to the facts in SGT Bonner's case, the court refused to read any legal error into the case based upon the SJA's recommendation to the convening authority to set aside the findings of guilty to sodomy.[103] The court noted that the "SJA gave no reason for his recommendation, and we will not speculate as to the basis."[104] The court also observed that the defense did not complain of any legal error in their post-trial submissions.[105] Finally, the court concluded that since the convening authority's disapproval of SGT Bonner's sodomy conviction was an act of clemency in itself, no further advice was required of the SJA and no further sentence reassessment was required by the convening authority.[106]

United States v. Wilson[107]

Action Language: Say What You Mean, and Mean What You Say

A panel of members at a general court-martial convicted Hospitalman Wilson, contrary to his pleas, of rape, assault, adultery, and unlawful entry into a dwelling.[108] The panel sentenced Hospitalman Wilson to confinement for eight years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.[109] When the convening authority took action, his action stated, in relevant part, as follows:

> In the case of Hospitalman Sean A. Wilson, U.S. Navy, . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.[110]

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[96] *Id.* at 638.

[97] *Id.* In his action, the convening authority also waived automatic forfeitures for six months.

[98] *Id.*

[99] *Id.* at 639.

[100] *Id.*

[101] *Id.* at 640 (citations omitted). *See generally* United States v. Sales, 22 M.J. 305, 307–08 (C.M.A. 1988) ("[W]hen prejudicial error has occurred at trial, not only must the [sentence assessment authority] assure that the sentence is appropriate in relation to the affirmed findings of guilty, but it must also assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed.").

[102] *Id.*

[103] *Id.* at 639.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 641.

[107] United States v. Wilson, 65 M.J. 140 (2007).

[108] *Id.*

[109] *Id.*

[110] *Id.* at 140–41.

In an unpublished opinion, the NMCCA recognized that the sentence to confinement had been reduced to three years and three months and affirmed the findings and sentence "as approved by the convening authority."[111] The service court did not address the language concerning the dishonorable discharge.[112] On appeal to CAAF, Hospitalman Wilson challenged the NMCCA's finding that the convening authority had approved the adjudged dishonorable discharge.[113]

The court's started its analysis of Wilson's challenge by pointing out the fact that "the convening authority must exercise care in drafting the action."[114] Evaluating the convening authority's action in light of RCM 1107(f)(4),[115] the CAAF determined that the first sentence of the convening authority's action explicitly approved three years and three months of confinement.[116] The court then stated that the second sentence approved the "remainder of the sentence, *with the exception of the Dishonorable Discharge*."[117] The CAAF then stated that, "[u]nder the plain meaning of this language, the dishonorable discharge was not approved."[118]

In the 2006 case of *United States v. Politte*,[119] the CAAF reviewed another action whose language was questioned by the appellant. In *Politte*, the convening authority took the following action:

> In the case of Hospital Corpsman Second Class Michael J. Politte, U.S. Navy, . . . *the sentence is approved except for that part of the sentence extending to a bad conduct discharge.*[120]

In *Politte*'s action, the convening authority approved the sentence, but failed to order any portion of the sentence executed. Based upon this ambiguity, the CAAF determined that the convening authority's action was ambiguous, looked at the surrounding documentation (i.e., the pretrial agreement, the SJA's recommendation, the defense submission, and the fact that the case was forwarded to the service court for review pursuant to Article 66), and concluded that the convening authority had meant to approve a punitive discharge.[121] The case was then returned to the Judge Advocate General of the Navy for submission to the convening authority for clarification.[122]

In contrast to *Politte*, the CAAF found no ambiguity in the action the convening authority took in *Wilson*.[123] When the convening authority in *Wilson* stated that, "[t]he remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed,"[124] the language was plain and complete on its face. A sentence was approved and ordered executed. Because there was no ambiguity, the court apparently found no need to look for an ambiguity by looking at the surrounding documentation in the *Wilson* record of trial.

The *Wilson* case represents a cautionary tale for military justice managers. While the CAAF can caution convening authorities about "drafting" their actions, the court doubtlessly knew it was really directing its caution toward post-trial paralegal noncommissioned officers and Judge Advocates. The error in this case arose because the drafter of the appellant's action did not follow the form language provided in Appendix 16 of the *Manual for Courts-Martial* (*MCM*).[125] Specifically, the individual who prepared the action put the word "approved" after, rather than before, the phrase "with the exception of

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[111] United States v. Wilson, No. NCMMA 20010205, slip op. at 7 (N-M. Ct. Crim. App. Feb. 7, 2006).

[112] *Id.*

[113] *Wilson*, 65 M.J. at 141.

[114] *Id.*

[115] 2005 MCM, *supra* note 8, R.C.M. 1107(f)(4). Rule for Courts-Martial 1107(f)(4) states: "(A) *In general*. The action shall state whether the sentence adjudged by the lower court is approved. If only part of the sentence is approved, the action shall state which parts are approved." *Id.*

[116] *Wilson*, 65 M.J. at 142 (emphasis added).

[117] *Id.*

[118] *Id.*

[119] 63 M.J. 24 (2006).

[120] *Id.* at 25 (emphasis in original).

[121] *Id.* at 26.

[122] *Id.* at 27.

[123] *Wilson*, 65 M.J. at 142.

[124] *Id.*

[125] MCM, *supra* note 5, App. 16.

the dishonorable discharge."[126] Unfortunately, this small error resulted in the convening authority disapproving a dishonorable discharge he probably intended to approve.[127] Had the individual who prepared Hospitalman Wilson's action accurately followed the sample language contained in Appendix 16 of the *MCM*, a convicted rapist would have received the dishonorable discharge he was adjudged and by all accounts, save the action itself, deserved.[128]

United States v. Moralez[129]

Process, Process, Process, You've Got to Have a Process

In *United States v. Moralez*, the ACCA reconsidered its earlier affirming of the findings and sentence to "highlight a common and recurring problem in the Army: misinterpretation of the rules governing deferment and waiver of forfeitures."[130] While the court again affirmed the findings and sentence, it also declared that "all parties in the court-martial process must understand the deferment and waiver concepts and how to apply them in different factual settings."[131] The ACCA went on to state that it wrote a new opinion "to reinforce the military justice practitioners' professional responsibility to recognize and *properly* apply congressionally-created deferment and waiver rules on a case-by-case basis."[132]

A military judge sitting as a general court-martial convicted First Lieutenant (1LT) Javier O. Moralez, in accordance with his pleas, of failing to obey a lawful general regulation, adultery on divers occasions, fraternization, and fraternization on divers occasions.[133] First Lieutenant Moralez was sentenced to a dismissal, confinement for six months, and forfeiture of all pay and allowances.[134] Pursuant to a pretrial agreement, the convening authority approved confinement for only 120 days, but otherwise approved the adjudged sentence.[135]

On 21 February 2006, appellant's trial defense counsel requested a deferment and waiver of forfeitures asking the convening authority to: "(1) defer adjudged and automatic forfeitures until initial action; and (2) at action, disapprove adjudged forfeitures and waive automatic forfeitures until appellant's release from confinement."[136] On 24 February 2006, the SJA advised the convening authority to only act on the first part of the defense's request and defer the appellant's adjudged and automatic forfeitures.[137] The SJA addressed the second part of the defense request by advising the convening authority that "[t]he request to disapprove [adjudged] and waive [automatic] forfeitures is more appropriately addressed at the time of [a]ction."[138]

On 3 March 2006, the convening authority responded to the appellant's 21 February request. Following his SJA's advice, the convening authority deferred the appellant's adjudged and automatic forfeitures until action, effective 23 February 2006, and further stated that "I will address the request to waive the adjudged [sic] and automatic forfeitures, for the period of

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[126] *Wilson*, 65 M.J. at 142.

[127] *Id.*

[128] To approve the desired reduction in confinement and dishonorable discharge, the convening authority's action should have read, in relevant part:

> In the case of Hospitalman Sean A. Wilson, . . . only so much of the sentence as provides for reduction to Private E1, forfeiture of all pay and allowances, confinement for 3 years and 3 months, and a Dishonorable Discharge **is approved** and, except for that part of the sentence extending to a Dishonorable Discharge, will be executed.

See generally 2005 MCM, *supra* note 8, Forms for Action, at A16-6 (emphasis added).

[129] 65 M.J. 665 (2007).

[130] *Id.* at 666 (citing UCMJ arts. 57(a)(2), 58(a), (b) (2008)).

[131] *Id.*

[132] *Id.*

[133] *Id.* at 665.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 666.

[137] *Id.*

[138] *Id.*

[appellant's] confinement, at the time of [a]ction."[139] Unfortunately, the SJA did not revisit the defense request for disapproval of adjudge forfeitures and waiver of automatic forfeitures in his post-trial SJA recommendation to the convening authority.[140] Complicating matters further, the appellant's defense counsel did not revisit the request in his clemency submission and the convening authority did not explicitly refer to the request when, in his 9 June 2006 initial action, he approved the appellant's adjudged sentence (including the forfeiture of all pay and allowances).[141]

In its discussion, the ACCA determined that the SJA rendered incomplete advice to the convening authority by advising him that the disapproval and waiver request was "more appropriately addressed at the time of [a]ction."[142] The court concluded that the SJA should have "further advised that although adjudged forfeitures can be disapproved only at action, automatic forfeitures can be waived as soon as they become effective."[143] The court pointed out that the convening authority, although never informed of this by the SJA, had a number of options available to him with regard to the appellant's 21 February request:

> (1) first deferring adjudged forfeitures—thus creating an entitlement to pay and allowances subject to automatic forfeiture; and then (2) waiving automatic forfeitures for the period of appellant's confinement, not to exceed six months, "when they bec[a]me effective by operation of *Article 57(a)*," i.e., fourteen days after the military judge imposed the sentence in this case.[144]

As stated earlier, after reviewing the rules governing deferral and waiver of forfeitures the ACCA again affirmed the findings and sentence in appellant's case.[145] In large part, the court's failure to grant any relief was a result of the convening authority's 3 March 2006 approval of a deferral of adjudged and automatic forfeitures until action and the likelihood that the accused was already out of confinement (and thus not in a pay status and unable to benefit from any further disapproval or waiver of adjudged or automatic forfeitures) by the time the convening authority took initial action on 9 June 2006. Despite the affirmation of findings and sentence, *Moralez* holds several lessons for both government and defense representatives.

The first lesson that can be drawn from *Moralez* is that the military justice office must have a process that ensures that the SJA provides complete and accurate advice to the convening authority covering all of the defense's deferment and waiver requests, whenever made. All the loose ends must be tied up prior to the convening authority taking initial action. If, as in the case at hand, the defense submits a request before action that the convening authority take certain steps before action (e.g., defer both adjudged and automatic forfeitures) and other steps at action (e.g., disapproval of adjudged and waiver of automatic for six months), there is nothing wrong with the SJA recommending that the convening authority wait until action to take the steps requested by the defense. The only catch to this advice is that the SJA must be able to prove that he has informed the convening authority of the defense's outstanding request, and his options in response to that request, in either his post-trial recommendation or his addendum.

The second lesson is that military justice practitioners themselves must understand the rules governing deferral and waiver of forfeitures and how those rules fit the particular case for which they are preparing the SJA's advice to the convening authority. Perhaps the most illuminating case ever published in the area of deferral and waiver of forfeitures is the 2002 case of *United States v. Emminizer*.[146] Every military justice practitioner should be familiar with *Emminizer* and have a copy available for reference when preparing the SJA advice to the convening authority on deferral and waiver of forfeiture requests.

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[139] *Id.* The convening authority's response incorrectly stated that the defense had requested waiver of the adjudged forfeiture at action. Pursuant to RCM 1107(d), adjudged forfeitures can only be disapproved at the time of action.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* (citations omitted).

[144] *Id.* at 666–67.

[145] *Id.* at 667.

[146] 56 M.J. 441 (2002).

Conclusion

As has been seen in prior court terms, post-trial processing continues to be an area of concern and activity for the appellate courts. Attention to detail and the tying up of all the loose ends in the post-trial process is the order of the day, as it always is in the post-trial world. With regard to post-trial delay, the full meaning of the 2006 *Moreno* decision continues to be defined as more post-*Moreno* trial cases make their way through appellate review. While the 2008 term of court may hold some surprises, it does not appear that the prevailing interpretation of the *Moreno* decision will result in arbitrary or unreasoned grants of relief to otherwise undeserving appellants.