

## “I’ve Got to Admit It’s Getting Better”\*: New Developments in Post-Trial

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“You’re holding me down, turning me round, filling me up with your rules.”<sup>1</sup>

appellant to resubmit matters under Rule for Courts-Martial (RCM) 1105.<sup>8</sup>

### I. Introduction

During the 2008 term of court, the Court of Appeals for the Armed Forces (CAAF) and the service courts of criminal appeal (CCAs) decided several cases that have an impact on post-trial procedures. The opinions addressed numerous post-trial topics, and it is difficult to discern any unifying trend among them. However, the strongest trend is in the arena of post-trial processing delay. Since the landmark opinion of *United States v. Moreno*,<sup>2</sup> the CAAF has gradually backed away from the seemingly inflexible rules they established in that case.<sup>3</sup> This year, the CAAF continued the trend of denying post-trial processing delay relief in almost all cases, except where the appellant has clearly established prejudice. Depending on one’s point of view, this trend in post-trial delay cases might be “getting better” or “it can’t get no [sic] worse.”<sup>4</sup>

This article will discuss three CAAF post-trial decisions from the 2008 term. The first decision is the case that continued the trend away from the strict application of *Moreno*. *United States v. Bush*<sup>5</sup> clarified the requirement to establish prejudice in a post-trial delay case in order to receive relief. The other two decisions dealt with convening authority actions. In *United States v. Burch*,<sup>6</sup> the CAAF reiterated that a facially unambiguous action that erroneously suspends a previously vacated suspended sentence must be honored. The third decision, *United States v. Mendoza*,<sup>7</sup> reinforced the idea that a case remanded for a new action requires a new Staff Judge Advocate’s Recommendation (SJAR) and an opportunity for the

From the service courts, this article will cover four published opinions that fall into two areas. First, there were two cases that discussed the appropriate contents of the SJAR addendum. In *United States v. Taylor*,<sup>9</sup> the Air Force Court of Criminal Appeals (AFCCA) held that the SJAR addendum does not have to address requests from the appellant to participate in administrative rehabilitation programs. In *United States v. Tuscan*,<sup>10</sup> the Coast Guard Court of Criminal Appeals (CGCCA) held that the SJA should not comment on the circumstances surrounding pretrial negotiations in the addendum. Second, there were two cases that discussed discrepancies in the record of trial (ROT). The Navy-Marine Corps Court of Criminal Appeals (NMCCA) held in *United States v. Godbee*<sup>11</sup> that a facially complete and accurate copy of the original ROT can be used when the original ROT is lost, even when the copy has not been properly authenticated as required by RCM 1104(c).<sup>12</sup> Finally, the CGCCA held in *United States v. Usry*<sup>13</sup> that a fifty-second gap in the trial recording that is re-created for a verbatim ROT is not necessarily a prejudicial omission.

### II. Post-Trial Delay and Prejudice—*United States v. Bush*<sup>14</sup>

#### A. Facts and Procedural History

The facts from *Bush* are relatively straight-forward. Before a military judge sitting alone as a general court-martial, Private First Class Bush pled guilty to attempting to escape from custody, failing to obey a lawful order, fleeing apprehension, resisting apprehension, two specifications of reckless driving, two specifications of assault with a dangerous weapon, and striking a superior commissioned officer.<sup>15</sup> On 5 January 2000, he was sentenced to a dishonorable discharge, confinement for six years, total

\* THE BEATLES, *Getting Better*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (EMI 2009) (1967).

<sup>1</sup> *Id.*

<sup>2</sup> 63 M.J. 129 (C.A.A.F. 2006).

<sup>3</sup> For further examples of this backing away, see Lieutenant Colonel James L. Varley, *The Lion Who Squeaked: How the Moreno Decision Hasn’t Changed the World and Other Post-Trial News*, ARMY LAW., June 2008, at 80.

<sup>4</sup> THE BEATLES, *supra* note \*.

<sup>5</sup> 68 M.J. 96 (C.A.A.F. 2009).

<sup>6</sup> 67 M.J. 32 (C.A.A.F. 2008).

<sup>7</sup> 67 M.J. 53 (C.A.A.F. 2008).

<sup>8</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105(a) (2008) [hereinafter MCM].

<sup>9</sup> 67 M.J. 578 (A.F. Ct. Crim. App. 2008).

<sup>10</sup> 67 M.J. 592 (C.G. Ct. Crim. App. 2008).

<sup>11</sup> 67 M.J. 532 (N-M. Ct. Crim. App. 2008).

<sup>12</sup> See MCM, *supra* note 8, R.C.M. 1104(c).

<sup>13</sup> 68 M.J. 501 (C.G. Ct. Crim. App. 2009).

<sup>14</sup> 68 M.J. 96 (C.A.A.F. 2009).

<sup>15</sup> *United States v. Bush (Bush CCA I)*, 66 M.J. 541, 542 (N-M. Ct. Crim. App. 2008).

forfeiture of all pay and allowances, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority suspended all confinement in excess of twenty-four months for a period of six months from the action.<sup>16</sup>

The convening authority took action on 16 November 2000. Even though the ROT was only 143 pages long, the case was not docketed with the NMCCA until 13 February 2007. According to an affidavit from the legal office in charge of mailing it, this delay was caused by the ROT being lost in the mail for over six years.<sup>17</sup> After returning the case for proper post-trial processing, the NMCCA re-docketed the case on 10 January 2008.<sup>18</sup>

## B. First NMCCA Review

In the first review of the case, the NMCCA applied the standard from the landmark case of *United States v. Moreno*<sup>19</sup> and found that “a delay of over seven years to review a 143-page guilty plea record of trial [was] facially unreasonable.”<sup>20</sup> The NMCCA then applied the four-factor test from *Barker v. Wingo*<sup>21</sup> to determine if the post-trial delay rose to the level of a due process violation.<sup>22</sup> The first prong, the length of the delay, was established by the facially unreasonable delay in the case. The second prong, the reasons for the delay, also weighed in the appellant’s favor because “[m]ailing delay is the least defensible of all post-trial delays.”<sup>23</sup> The third factor, the appellant’s

assertion of the right to a timely appeal, also weighed in favor of Bush because he submitted an un-rebutted affidavit claiming “that approximately two years after being released from confinement, he repeatedly contacted both his command and the Navy-Marine Corps Appellate Leave Activity (NAMALA)” because “he needed his DD Form 214 to maintain his employment.”<sup>24</sup> The fourth factor, prejudice, also weighed in favor of the appellant because his affidavit claimed that “he was denied employment by the Costco store in Huntsville, Alabama, three to four years after his trial, specifically because he lacked his final discharge papers (DD Form 214).”<sup>25</sup> The NMCCA held that the appellant’s affidavit was “factually adequate on its face to state a claim of legal harm” and that the “Government [did] not offer any evidence to the contrary.”<sup>26</sup> The NMCCA balanced the four *Barker* factors, and found that the post-trial delay violated the appellant’s due process rights.<sup>27</sup>

The reliance of the NMCCA on this affidavit is crucial to understanding the later CAAF opinion. The NMCCA used the appellant’s affidavit alone to establish prejudice. The NMCCA held that even though the appellant did not submit additional “supporting proof” beyond his own words, the affidavit was enough to establish prejudice.<sup>28</sup> The NMCCA concluded that even if “the appellant’s declaration is insufficient to support a finding of prejudice, we may, even without specific prejudice, find a due process violation if 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.’”<sup>29</sup> As a result, even if the *Barker* factors balancing test was inadequate to establish a due process violation, the NMCCA still found a due process violation due to the egregious delay in the case.<sup>30</sup>

In determining whether or not the due process violation was harmless beyond a reasonable doubt, the NMCCA held that “the integrity and fairness of the military justice system has been brought into question by the excessive and unreasonable post-trial processing delay . . . and by the Government’s failure . . . to undertake any efforts to verify or refute the appellant’s assertions.”<sup>31</sup> The NMCCA held that the due process violation was not harmless beyond a reasonable doubt and granted relief.<sup>32</sup> The NMCCA

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The legal office alleged in a post-trial affidavit that they had mailed the ROT on 12 February 2001, but they did not track or confirm whether the ROT made it to the appellate court. *Id.*

<sup>18</sup> *Id.* The NMCCA returned the ROT to the convening authority because they found unspecified “errors in the post-trial processing of the case.” *United States v. Bush (Bush CCA II)*, 67 M.J. 508, 509 (N-M. Ct. Crim. App. 2008) (en banc).

<sup>19</sup> 63 M.J. 129 (C.A.A.F. 2006). While this case predated the *Moreno* decision by several years, the court specifically applies the standards from *Moreno* in conducting their review. See *Bush CCA II*, 67 M.J. at 509. This comment was unnecessary by the NMCCA because the CAAF imposed the standards in *Moreno* “for those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision.” *Moreno*, 63 M.J. at 142. *Moreno* was decided on 11 May 2006. *Id.* at 129. Bush’s file arrived at the NMCCA on 13 February 2007. *Bush CCA I*, 66 M.J. at 542. *Moreno* clearly applied.

<sup>20</sup> *Bush CCA I*, 66 M.J. at 542.

<sup>21</sup> 407 U.S. 514 (1972). The four-factor test includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s “responsibility to assert his right”; and, (4) prejudice. *Id.* at 531. Prejudice includes three interests: 1) preventing oppressive incarceration; 2) minimizing anxiety and concern to the accused; and 3) limiting the possibility that re-trial will be impaired. *Id.* *Barker* was a pre-trial delay case, but these rules have been applied to post-trial delay cases by numerous appellate courts, including the CAAF. See *Moreno*, 63 M.J. at 135 n.6.

<sup>22</sup> *Bush CCA I*, 66 M.J. at 542.

<sup>23</sup> *Id.* at 543 (quoting *Moreno*, 63 M.J. at 137 (internal quotation omitted) (citation omitted)).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (quoting *United States v. Toohey (Toohey II)*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 544.

<sup>32</sup> *Id.*

affirmed the findings, but limited the sentence to a bad-conduct discharge.<sup>33</sup> The dishonorable discharge, confinement for six years, reduction to the grade of E-1, and forfeiture of all pay and allowances were disapproved.<sup>34</sup>

### C. *United States v. Allende*<sup>35</sup> Intervenes

Only one day after the NMCCA issued its first opinion in *Bush*, the CAAF rendered its opinion in *Allende*.<sup>36</sup> The facts in *Allende* were very similar to *Bush*: a seven-year post-trial delay, where the appellant submitted an affidavit, without supporting documentation, claiming prejudice based upon lost employment opportunities because he lacked a DD Form 214.<sup>37</sup> The CAAF assumed that there was a due process violation and proceeded directly to the issue of whether the violation was harmless beyond a reasonable doubt.<sup>38</sup> Unlike the NMCCA opinion in *Bush*, the CAAF held that an unsupported affidavit does not establish prejudice, particularly where the appellant did not demonstrate a valid reason for not providing documentation from potential employers.<sup>39</sup>

The CAAF also cited, with favor, their prior decision in *United States v. Jones*.<sup>40</sup> In *Jones*, the appellant was able to establish prejudice through his affidavit and “three affidavits from officials of a potential employer.”<sup>41</sup> In *Jones*, the CAAF set aside the appellant’s bad-conduct discharge, even though the delay was “only” 363 days.<sup>42</sup> In *Allende*, the lack of these supporting affidavits was fatal. The CAAF held that the due process violation in *Allende* was harmless beyond a reasonable doubt “and note[d] that [the a]ppellant . . . failed to present any substantiated evidence to the contrary.”<sup>43</sup>

### D. Second NMCCA Review

The NMCCA reconsidered the first *Bush* opinion en banc after the *Allende* opinion was issued.<sup>44</sup> This second *Bush* (*Bush CCA II*) decision did not change much from the first opinion, but the ultimate conclusion changed. The

NMCCA still found the seven-year delay to be facially unreasonable, which triggered the full due process inquiry, and led to a balancing test of the four *Barker v. Wingo* factors.<sup>45</sup> The NMCCA still found that the reasons for the delay weighed heavily in favor of the appellant because the “mailing delay is the least defensible of all post-trial delays.”<sup>46</sup> The court noted that Bush submitted an unsupported affidavit in support of the third prong—the assertion of the right to a timely appeal.<sup>47</sup> However, despite the unsupported nature of this affidavit, the Government made no effort to contact the offices claimed to have been contacted by the appellant to confirm or deny the facts therein.<sup>48</sup> As a result, this prong weighed “on balance” in favor of the appellant.<sup>49</sup>

As for prejudice, the NMCCA held that “in light of [*Allende*], this court now concludes that the appellant failed to meet his burden to show employment prejudice.”<sup>50</sup> The court rejected the Government position that “an appellant’s declaration or affidavit of prejudice, standing alone, will never be sufficient to meet his burden of proof no matter how detailed and specific it might be.”<sup>51</sup> Instead, the NMCCA held that the “burden is on the appellant to provide legally competent evidence demonstrating the prejudice asserted,”<sup>52</sup> but that the appellant does not have to provide “independent third-party substantiation of the facts underlying his claim of employment prejudice upon a showing that he reasonably attempted to obtain such independent corroboration but was unable to do so.”<sup>53</sup> In this case, the appellant did provide legally competent evidence with sufficient detail for the Government to confirm or deny the prejudice claimed.<sup>54</sup> The affidavit “identified a specific store, in a specific town, during a specific timeframe.”<sup>55</sup> However, the appellant did not submit any supporting documentation or “an explanation of why such evidence could not be obtained.”<sup>56</sup> Therefore, the fourth factor, prejudice, weighed in favor of the Government.<sup>57</sup>

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<sup>33</sup> *Id.*

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

<sup>35</sup> 66 M.J. 142 (C.A.A.F. 2008).

<sup>36</sup> *Bush CCA I* was issued on 11 March 2008; *Allende* was issued on 12 March 2008. *Allende* was a 5-0 decision. See *Allende*, 66 M.J. at 142.

<sup>37</sup> *Allende*, 66 M.J. at 145.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 61 M.J. 80 (C.A.A.F. 2005).

<sup>41</sup> *Id.* at 82.

<sup>42</sup> *Id.* at 86.

<sup>43</sup> *Allende*, 66 M.J. at 145.

<sup>44</sup> *United States v. Bush (Bush CCA II)*, 67 M.J. 508, 509 (N-M. Ct. Crim. App. 2008) (en banc).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 510 (quoting *United States v. Moreno*, 63 M.J. 129, 137 (internal quotation omitted) (citation omitted)).

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 511 (citing *United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005)).

<sup>52</sup> *Id.* (citing *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 512.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing *Allende*, 66 M.J. at 145).

<sup>57</sup> *Id.*

In the absence of prejudice, the court held that they “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.”<sup>58</sup> In this case, the NMCCA did find that the delay was egregious and would affect the public perception of the military justice system; therefore they found that the appellant’s due process rights were violated.<sup>59</sup> However, the court also found that the due process violation was harmless beyond a reasonable doubt.<sup>60</sup> The fact that the appellant could not corroborate his claim of employment prejudice “weigh[ed] heavily in [the court’s] decision.”<sup>61</sup> The appellant’s original conviction and sentence were affirmed.<sup>62</sup>

#### E. Review by the CAAF

The CAAF granted review of *Bush CCA II* to resolve whether *Allende* conflicted with *United States v. Ginn*,<sup>63</sup> and whether the NMCCA improperly shifted the burden to the appellant to establish that the post-trial delay due process violation was harmful.<sup>64</sup> *Ginn* established a six-factor test to determine when a post-trial evidentiary hearing is required to resolve issues raised by an appellant in a post-trial affidavit.<sup>65</sup> At the CAAF, Bush claimed that *Ginn* allowed

the CCA to resolve his claims without further proof if his affidavit presented undisputed “legally competent evidence.”<sup>66</sup> In rejecting this claim, the CAAF reiterated that “an appellant must do something more than provide his own affidavit asserting that a specific employer declined to hire him because he lacked a DD Form 214.”<sup>67</sup> The court also noted that this was a requirement long before *Allende*.<sup>68</sup> The CAAF again cited *Jones* with favor, holding that “in most cases, the appropriate source of information pertaining to hiring decisions will be a representative of the potential employer itself.”<sup>69</sup> The CAAF did not see a conflict between the requirement that the appellant provide independent evidence and the requirements of *Ginn*.<sup>70</sup> The CAAF held that *Ginn* did not relieve or alter the burden of proof or persuasion,<sup>71</sup> nor did it relieve the appellant of the requirement to testify based on personal knowledge;<sup>72</sup> it merely established when a service court may resolve a factual matter without resorting to a *DuBay* hearing.<sup>73</sup> In fact, because the appellant “failed to provide independent evidence to support his claim” of employment prejudice “and did not demonstrate a valid reason for not doing so[,] . . . the fourth *Barker* factor is resolved against [the appellant] before the question even arises as to whether” *Ginn* required a *DuBay* hearing in his case.<sup>74</sup>

<sup>58</sup> *Id.* (quoting *United States v. Toohey (Toohey II)*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

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

<sup>60</sup> *Id.* at 513.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 47 M.J. 236 (C.A.A.F. 1997).

<sup>64</sup> *United States v. Bush*, 68 M.J. 96, 98 (C.A.A.F. 2009).

<sup>65</sup> *Ginn*, 47 M.J. at 248. The CAAF established six factors to decide when a CCA does not need to order a post-trial evidentiary hearing to resolve allegations raised in an affidavit submitted by the appellant. Those factors are as follows:

First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant’s favor, the claim may be rejected on that basis.

Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole “compellingly demonstrate” the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant’s expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *DuBay* proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66 factfinding power and decide the legal issue.

*Id.*

<sup>66</sup> *Bush*, 68 M.J. at 100.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing to *United States v. Jenkins*, 38 M.J. 287, 289 (C.M.A. 1993) (rejecting a prejudice claim because it was unsupported by any independent evidence) and *United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006) (rejecting a prejudice claim because it was unsupported by any “persons with direct knowledge of the pertinent facts”)).

<sup>69</sup> *Bush*, 68 M.J. at 101 (citing *United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (citing *United States v. Pena*, 64 M.J. 259, 266–67 (C.A.A.F. 2007)).

<sup>72</sup> *Id.* (citing MCM, *supra* note 8, MIL. R. EVID. 602).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

The CAAF then moved on to the issue of whether *Allende* effectively shifted the burden to the appellant to establish that the due process violation was not harmless beyond a reasonable doubt.<sup>75</sup> The court quickly dismissed the claim that *Allende* shifted the burden to the appellant: the burden solely rests on the Government to establish that any constitutional error is harmless beyond a reasonable doubt.<sup>76</sup> The test for post-trial delay harm is “prejudicial impact” from the delay.<sup>77</sup> “Unless [the court] conclude[s] beyond a reasonable doubt that the delay generated no prejudicial impact, the Government will have failed to attain its burden.”<sup>78</sup>

This second prejudice test, according to the court, is different from prejudice under *Barker*.<sup>79</sup> The *Barker* prejudice prong is focused on “oppressive incarceration, undue anxiety, and ‘limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.’”<sup>80</sup> However, the scope and burden of the harmless beyond a reasonable doubt prejudice test are different.<sup>81</sup> The CAAF held that

[i]n 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. . . . 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.<sup>82</sup>

Applying this standard, the CAAF found the due process violation harmless beyond a reasonable doubt in this case.<sup>83</sup> The CAAF refused to find otherwise, because the net result would have been to “adopt a presumption of prejudice . . . in the absence of *Barker* prejudice.”<sup>84</sup> The court held that they had not adopted such a standard previously, and there was

no need to adopt that position at this point.<sup>85</sup> Accordingly, the second NMCCA decision was affirmed.<sup>86</sup>

The concurrence in the judgment criticized the majority’s reliance on *United States v. Toohey (Toohey II)*,<sup>87</sup> which “permits [the court] to find due process violations without any showing of specific prejudice to the appellant.”<sup>88</sup> The majority had, in a footnote, agreed with the second NMCCA holding that applied the *Toohey II* public perception test to find a due process violation in the absence of *Barker* prejudice.<sup>89</sup> Judge Ryan, joined by Judge Stucky, disagreed with this holding,

as it necessarily leads to bizarre scenarios like the one presented today. First, the CCA decided that [the a]ppellant had failed to establish any constitutionally cognizable prejudice. Then, despite this failure, the CCA concluded that there was a due process violation based on public perception. Finally, the CCA awarded no relief because it was convinced, as this Court agrees, that the constitutional violation was harmless beyond a reasonable doubt—the Government met its burden because [the a]ppellant did not provide independent evidence of his lost employment opportunity.

This reasoning comes dangerously close to shifting onto [the a]ppellant the burden of proving harmlessness.<sup>90</sup>

The two concurring judges would require, like seven federal circuits and the District of Columbia, “a showing of prejudice before finding a due process violation.”<sup>91</sup> This requirement “would not only be cleaner and simpler, but it also would follow the ordinary model of constitutional inquiry into an alleged due process violation.”<sup>92</sup> However, the concurrence ultimately agrees with the outcome of the

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> 63 M.J. 353 (C.A.A.F. 2006). Specifically, the concurrence criticized the portion of *Toohey II* that allows due process violations “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.” *Bush*, 68 M.J. at 104 (quoting *Toohey II*, 63 M.J. at 362).

<sup>88</sup> *Bush*, 68 M.J. at 106.

<sup>89</sup> *Id.* at 103 n.8. See also *supra* note 58 and accompanying text. However, the majority minimizes their reliance on this because the public perception analysis from *Toohey II* “is not ultimately determinative in the present case and is therefore not addressed in the majority opinion.” *Bush*, 68 M.J. at 103 n.8.

<sup>90</sup> *Id.* at 106 (emphasis in original).

<sup>91</sup> *Id.* at 107.

<sup>92</sup> *Id.*

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<sup>75</sup> *Id.* at 102.

<sup>76</sup> *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

<sup>77</sup> *Id.* (citing *United States v. Szymczyk*, 64 M.J. 179 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006); and *United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 103.

<sup>80</sup> *Id.* (quoting *United States v. Moreno*, 63 M.J. 123, 138–39 (C.A.A.F. 2006)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 104.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

case because they also would find no prejudice and grant no relief.<sup>93</sup> What distinguishes the concurrence from the majority opinion is that the concurrence would find no due process violation.<sup>94</sup>

#### F. Decisions Following *Bush*

Even though the decision in *Bush* was not rendered until 17 August 2009, a mere forty-five days before the end of the term, there were two additional decisions from the CAAF before the end of the term that cited *Bush* to resolve their post-trial delay issues. The two cases were the companion cases of *United States v. Ashby*<sup>95</sup> and *United States v. Schweitzer*.<sup>96</sup> Both cases resulted from the infamous cable-car-severing flight that killed twenty Italian nationals in early February 1998.<sup>97</sup>

Post-trial delay was one of eight issues raised in *Ashby*.<sup>98</sup> Despite the extremely long post-trial processing time in this case, the appellant did not initially complain about the delay.<sup>99</sup> The NMCCA had raised the post-trial delay issue, *sua sponte*.<sup>100</sup> The CAAF agreed with the NMCCA that the four-factor *Barker* test established a due process violation.<sup>101</sup> However, the CAAF held that *Ashby* did not “sustain his burden of showing particularized prejudice.”<sup>102</sup> The only claim *Ashby* could establish in an affidavit was that “he lost job opportunities as a result of his inability to travel due to his appellate leave status.”<sup>103</sup> Despite this lack of prejudice, the CAAF held, after balancing the four *Barker* factors, that there was a due process violation.<sup>104</sup> Applying *Bush*, the CAAF held that the

Government met its burden of establishing that this violation was harmless beyond a reasonable doubt.<sup>105</sup> The CAAF found “no convincing evidence of prejudice in the record,” and stated that the court “will not presume prejudice from the length of the delay alone.”<sup>106</sup>

Post-trial delay was also one of three issues raised in *Schweitzer*.<sup>107</sup> Like in *Ashby*, the NMCCA raised the post-trial delay issue, *sua sponte*.<sup>108</sup> In this case, the appellant claimed in an affidavit, with no substantiation, that he “averaged less than \$35,000 a year in annual income” when the average income for a person with college degrees similar to his earned “\$79,000 to \$95,000 per year.”<sup>109</sup> The appellant also alleged that *Allende* improperly shifted the burden to him to establish harm from any post-trial delay.<sup>110</sup> The CAAF cited *Bush* for the settled proposition that *Allende* did not improperly shift the burden to the appellant to establish harm from the delay.<sup>111</sup> Even though the CAAF agreed with the NMCCA that there was a post-trial delay due process violation, the CAAF held that “[t]here [was] no evidence [the appellant] suffered any prejudice as defined in prong four” of the *Barker* test.<sup>112</sup> As a result, the due process violation was harmless beyond a reasonable doubt.<sup>113</sup>

#### G. Practice Pointers

The CAAF continues to back away from the strict position they established in *United States v. Moreno*. Numerous cases have come before the court in the last three years, but only a fraction of them actually receive any form of relief, no matter how long or egregious the delay.<sup>114</sup> The

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<sup>93</sup> *Id.* at 104–05.

<sup>94</sup> *Id.* at 105.

<sup>95</sup> 68 M.J. 108 (C.A.A.F. 2009).

<sup>96</sup> 68 M.J. 133 (C.A.A.F. 2009).

<sup>97</sup> *Ashby*, 68 M.J. at 112.

<sup>98</sup> *Id.* at 123.

<sup>99</sup> The sentencing occurred on 10 May 1999. The initial NMCCA decision in this case was not issued until 27 June 2007 (2970 days later). *Id.*

<sup>100</sup> *Id.* The NMCCA rejected the claim after they raised it. The court found a due process violation, but also held that it was harmless beyond a reasonable doubt. *Id.*

<sup>101</sup> *Id.* at 124.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 125.

<sup>104</sup> *Id.* However, the CAAF again relied on *United States v. Toohey (Toohey II)*, 63 M.J. 353, 362 (C.A.A.F. 2006), for the principle that a due process violation can exist despite the lack 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.” *Id.* at 125 n.12. Judge Stucky again wrote a separate concurring opinion to express reservation about this public perception analysis. *Id.* at 132. This time he was not joined by Judge Ryan because she had recused herself from the case. *Id.* at 112 n.1.

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (citing *Toohey II*, 63 M.J. at 363).

<sup>107</sup> *United States v. Schweitzer*, 68 M.J. 133, 138 (C.A.A.F. 2009).

<sup>108</sup> *Id.* As in *Ashby*, the NMCCA rejected the claim after they raised it. The court found a due process violation, but also held that it was harmless beyond a reasonable doubt. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 138–39.

<sup>113</sup> *Id.* at 139. Judge Stucky did not write a separate concurring opinion in *Schweitzer* because he wrote the majority opinion. *Id.* at 133. He does not reference *Toohey II* at all in his opinion, and his opinion glosses over why the NMCCA found a due process violation. *See id.* at 139. Ironically, the NMCCA did use the public perception analysis in determining that there was a due process violation in this case. *See United States v. Schweitzer*, No. 200000755, 2007 WL 1704165, at \*32 (N-M. Ct. Crim. App. May 10, 2007) (unpublished). Judge Ryan recused herself from *Schweitzer*, as she did from *Ashby*, so she did not join in Judge Stucky’s opinion. *Schweitzer*, 68 M.J. at 134 n.1.

<sup>114</sup> For example, *Ashby* and *Schweitzer* were more than eight-year-delay cases, but no relief was granted. *See United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) and *Schweitzer*, 68 M.J. at 139.

key point to take away from *Bush* is that unless the appellant can establish prejudice with independent evidence, the CAAF will find the error harmless beyond a reasonable doubt.<sup>115</sup> Both *Ashby* and *Schweitzer* confirmed that the length of the delay alone is insufficient to establish prejudice, even in light of “gross negligence and lack of institutional vigilance.”<sup>116</sup> Appellate defense counsel seeking relief for post-trial delay should follow the actions taken by the defense in *Jones* and request affidavits from potential employers who would have hired the appellant if he or she had had a DD Form 214.<sup>117</sup> While not every case will require three independent affidavits from potential employers to establish prejudice, it is clear that an “appellant must do something more than provide his own affidavit” to establish prejudice.<sup>118</sup> If the potential employers refuse to provide the affidavits, then the appellant can possibly “demonstrate a valid reason for” not providing the independent evidence, and he or she may still be able to establish *Barker* prejudice.<sup>119</sup>

The second key point from *Bush* is that the current state of post-trial delay analysis leaves practitioners with a complicated multi-step process. The starting point for analyzing post-trial delay is the application of the “post-trial processing standards” from *United States v. Moreno* to determine whether the case triggers a “presumption of unreasonable delay.”<sup>120</sup> If the case does not evince facially unreasonable delay, there is no due process violation, and the appellant will receive no relief.<sup>121</sup> On the other hand, if the case exhibits facially unreasonable delay, then the four-factor *Barker* test should be applied.<sup>122</sup> There are three possible outcomes of the *Barker* balancing test. First, if the balancing test does not weigh in the appellant’s favor, there is no due process violation, and the appellant receives no relief.<sup>123</sup> Second, if the balancing test weighs in favor of the

appellant, and the appellant is able to show *Barker* prejudice through independent evidence (or demonstrate a valid reason for not doing so), then there is a due process violation.<sup>124</sup> Third, if the balancing test weighs in favor of the appellant, but there is no *Barker* prejudice, there may still be a due process violation if after “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.”<sup>125</sup>

If there is a due process violation, the next step is to determine whether or not the due process violation is harmless beyond a reasonable doubt. The test to determine whether the violation was harmless beyond a reasonable doubt is prejudice. This prejudice test is not the same as the *Barker* four-factor prejudice test.<sup>126</sup> To add to the confusion, this secondary prejudice test diverges depending on whether or not there was *Barker* prejudice when conducting the four-factor balancing test. In the absence of *Barker* prejudice, the Government’s burden of proving that a post-trial delay due process violation is harmless beyond a reasonable doubt is “more easily attained by the Government,” while in cases with *Barker* prejudice, the Government’s burden “may be difficult to attain.”<sup>127</sup> If there is *Barker* prejudice, then the case will likely follow the result from *United States v. Jones*, and the appellant will likely receive relief.<sup>128</sup> If there is not *Barker* prejudice, then the case will likely follow the result from *United States v. Allende*, and the appellant will likely not receive relief.<sup>129</sup>

The last resort for post-trial delay relief is to convince the service CCAs to apply their Article 66(c) authority to “grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ . . . if it deems relief appropriate under the circumstances.”<sup>130</sup> Article 66(c) authority has been cited on several occasions by the CAAF as a remedy for post-trial delay relief, including such cases as *United States v. Tardif*<sup>131</sup> and *United States v. Toohey*.<sup>132</sup>

<sup>115</sup> See *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009).

<sup>116</sup> *Schweitzer*, 68 M.J. at 138.

<sup>117</sup> See *United States v. Jones*, 63 M.J. 80 (C.A.A.F. 2005).

<sup>118</sup> *Bush*, 68 M.J. at 100.

<sup>119</sup> *Id.* at 101.

<sup>120</sup> 63 M.J. 129, 142 (C.A.A.F. 2006). The standards are 120 days from sentencing to convening authority action, 30 days from convening authority action to docketing at the service court, and 18 months from docketing to decision by the service court. *Id.*

<sup>121</sup> *United States v. Toohey (Toohey I)*, 60 M.J. 100 (C.A.A.F. 2004). The relevant portion of this case gives us a two-part test for the length of the delay. First, if the delay is reasonable, “there is no necessity for inquiry into the other factors that go into the balance.” *Id.* at 102 (quotation omitted). Second, the length of the delay may, “in extreme circumstances, give rise to a strong presumption of evidentiary prejudice affecting the fourth *Barker* factor.” *Id.* at 102 (quotation omitted).

<sup>122</sup> See *supra* note 21.

<sup>123</sup> This is an uncommon result. Frequently, the courts will not even apply a balancing test if the case is clear cut. They will presume a due process violation and move directly into the analysis of whether the violation was harmless beyond a reasonable doubt. See, e.g., *United States v. Allison*, 63 M.J. 365, 370–71 (C.A.A.F. 2006).

<sup>124</sup> See *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008). The relevant portion of this case established that an appellant must provide independent “documentation from potential employers,” or “demonstrate[] a valid reason for failing to do so,” in order to establish employment prejudice under the fourth *Barker* factor. *Id.* at 145.

<sup>125</sup> *United States v. Toohey (Toohey II)*, 63 M.J. 353 (C.A.A.F. 2006).

<sup>126</sup> See *supra* note 82 and accompanying text.

<sup>127</sup> *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009).

<sup>128</sup> 63 M.J. 80 (C.A.A.F. 2005).

<sup>129</sup> *Allende*, 66 M.J. at 142.

<sup>130</sup> *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (A. Ct. Crim. App. 2000)).

<sup>131</sup> See *id.* at 224.

<sup>132</sup> See *United States v. Toohey (Toohey I)*, 60 M.J. 100, 103 (C.A.A.F. 2004).

Post-trial delay continues to be a complicated area. Wise practitioners will carefully apply the relevant case law in order to determine the potential outcomes for their case. For the time being, the CAAF continues to back away from the seemingly inflexible rules they established in the landmark case of *United States v. Moreno*. This trend will likely continue for the foreseeable future.

### III. Action by the Convening Authority

#### A. *United States v. Burch*<sup>133</sup>

In the past, figuring out what constitutes an unambiguous action has been a source of dispute and has resulted in numerous appellate opinions.<sup>134</sup> *Burch* is another in that long line of cases.

##### 1. Facts

Corporal Burch pled guilty at a special court-martial, military judge alone, of willfully damaging military property of the United States, assault consummated by a battery, and assault consummated by a battery upon a child under the age of sixteen years. He was sentenced to a bad-conduct discharge, confinement for one year, and reduction to the grade of E-1. Pursuant to a pretrial agreement, “the convening authority suspended all confinement in excess of forty-five days on the condition that the [a]ppellant commit no misconduct in violation of the UCMJ during [the one year] suspension.”<sup>135</sup> Burch served forty-five days of confinement and was released. After his release, but prior to the convening authority action and prior to the suspension period running out, he committed additional misconduct.<sup>136</sup>

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<sup>133</sup> 67 M.J. 32 (C.A.A.F. 2008).

<sup>134</sup> See, e.g., *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994); *United States v. Schiaffo*, 43 M.J. 835 (A. Ct. Crim. App. 1996); *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001); *United States v. Koljbornsen*, 56 M.J. 805 (C.G. Ct. Crim. App. 2002); and, *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007).

<sup>135</sup> *Burch*, 67 M.J. at 33.

<sup>136</sup> The lower court described the additional misconduct:

On 3 August 2005, the appellant was observed by a Marine lieutenant colonel to be driving an automobile significantly above the posted speed limit. The appellant was in uniform at the time. The officer followed the appellant into a military parking lot and confronted him. The appellant was disrespectful in tone and body language to the officer. After being ordered to accompany the officer to his staff noncommissioned officer, the appellant made an unsuccessful attempt to hide by blending in with other similarly attired Marines in a formation. The officer located the appellant and delivered him to the staff sergeant in charge of the formation.

*United States v. Burch (Burch I)*, No. 200700047, 2007 WL 2745706, at \*4 (N-M. Ct. Crim. App. Sept. 13, 2007) (unpublished).

The sentence suspension was properly vacated in accordance with RCM 1109.<sup>137</sup> Approximately six weeks later, the convening authority took action.<sup>138</sup> The action stated, in relevant part, “Execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months . . . .”<sup>139</sup> Despite this convening authority action that reinstated the sentence suspension, the appellant was not released from confinement, and no efforts were made to vacate this second suspension.<sup>140</sup> Burch served a total of 223 days of confinement beyond what the convening authority had approved in the action.<sup>141</sup>

##### 2. NMCCA Review

The NMCCA affirmed in an unpublished opinion.<sup>142</sup> The NMCCA held that the action was unambiguous, “without reference to other post-trial documents in the record of trial.”<sup>143</sup> The CAAF had recently held in *United States v. Wilson*<sup>144</sup> that “when the plain language of the convening authority’s action is facially complete and unambiguous, its meaning must be given effect.”<sup>145</sup> The NMCCA interpreted this decision to “constrain[] us from considering anything outside the 4-corners of the unambiguous and complete 11 March 2006 convening authority’s action” to interpret that action.<sup>146</sup> Therefore, the NMCCA had no choice but to find that the appellant’s due process rights under the Fifth Amendment were violated by being held in confinement for a period beyond that approved in the action.<sup>147</sup> However, because *Wilson* only constrained the court from looking outside the four corners of the action to interpret the action itself, the NMCCA looked outside the four corners of the action in the course of determining whether the constitutional error was harmless beyond a reasonable doubt.<sup>148</sup> Considering the record as a whole, the NMCCA held that the convening authority had no intention of releasing the appellant prior to completion of his adjudged sentence.<sup>149</sup> The NMCCA held that despite the due process

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<sup>137</sup> *Burch*, 67 M.J. at 33.

<sup>138</sup> The appellant was returned to confinement on 24 January 2006, and the convening authority took action on 11 March 2006. *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> The appellant was released from confinement on 20 October 2006. *Id.*

<sup>142</sup> See *United States v. Burch (Burch I)*, No. 200700047, 2007 WL 2745706 (N-M. Ct. Crim. App. Sept. 13, 2007) (unpublished).

<sup>143</sup> *Id.* at \*5.

<sup>144</sup> 65 M.J. 140 (C.A.A.F. 2007).

<sup>145</sup> *Id.* at 141.

<sup>146</sup> *Burch I*, at \*5.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at \*6.

violation, the appellant suffered no prejudice, and that the error was harmless beyond a reasonable doubt.<sup>150</sup>

### 3. CAAF Review

The CAAF held that the NMCCA erred.<sup>151</sup> The CAAF concluded that the prejudice from being held 223 days over the approved confinement “is both obvious and apparent and may not be attenuated by facts predating the final action of the convening authority.”<sup>152</sup> The CAAF placed weight on the fact that the NMCCA opinion essentially authorized extended punishment for the appellant because the convening authority, at some point preceding the action, intended something other than what the action stated.<sup>153</sup> The CAAF also noted that under RCM 1113(a) punishment suspended by a convening authority may not be executed.<sup>154</sup> Finally, the CAAF reiterated the holding from *Wilson*: Where an action “is facially complete and unambiguous, its meaning must be given effect.”<sup>155</sup> To allow the NMCCA to find otherwise, based upon facts predating the final action, would render an unambiguous action meaningless.<sup>156</sup>

### B. *United States v. Mendoza*<sup>157</sup>

While *Burch* was about giving effect to an unambiguous action, *Mendoza* was about a convening authority purporting to take a new action to replace an ambiguous action.

#### 1. Facts

Aviation Electronics Technician Third Class Mendoza pled guilty at a special court-martial, military judge alone, to wrongfully uttering thirty-nine checks without sufficient funds.<sup>158</sup> He was sentenced to a bad-conduct discharge, confinement for ninety days, and reduction to the grade of E-1.<sup>159</sup> The action taken by the convening authority stated, in relevant part, “only such of the sentence as provides for reduction to the pay grade E-1, confinement for 90 days, is

approved and except for the part of the sentence extending to a bad conduct discharge [sic], will be executed.”<sup>160</sup> This action raised questions about whether or not the convening authority approved the bad-conduct discharge.<sup>161</sup>

### 2. NMCCA Review

On appeal, the NMCCA held that the language was ambiguous and set aside the action and returned the case for proper post-trial processing.<sup>162</sup> A successor in command took a new action that stated, in relevant part, “the sentence is approved and, except for that part of the sentence extending to a bad-conduct discharge, will be executed.”<sup>163</sup> The new convening authority did not consult with his predecessor to divine the intent behind the original action.<sup>164</sup> A new SJAR was not prepared, and an opportunity to submit additional RCM 1105 matters was not offered.<sup>165</sup>

On rehearing, the appellant did not file any specific assignments of error dealing with this process.<sup>166</sup> Thereafter, the NMCCA specified the issue: “Whether, under the circumstances of the case, a new [SJAR], with service in compliance with [RCM 1106(f)], was required prior to issuance of the new convening authority’s action DTD 29 May 2007.”<sup>167</sup> The NMCCA held that there was no *per se* rule requiring a new SJAR and opportunity to submit clemency matters whenever there is a new action.<sup>168</sup> However, they held that the passage of time and some evidence of changed circumstances may create a presumption of staleness requiring a new SJAR and opportunity to submit clemency matters.<sup>169</sup> In this case, they held that there were no changed circumstances, only the passage of time, so there was no presumption of staleness in the SJAR.<sup>170</sup> The NMCCA also held that even if the SJAR was stale, the error was harmless beyond a reasonable doubt, because the appellant had “failed to indicate what, if any,

<sup>150</sup> *Id.*

<sup>151</sup> *United States v. Burch*, 67 M.J. 32, 34 (C.A.A.F. 2008).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 33.

<sup>154</sup> *Id.* at 34. “No sentence of a court-martial may be executed unless it has been approved by the convening authority.” MCM, *supra* note 8, R.C.M. 1113(a).

<sup>155</sup> *Burch*, 67 M.J. at 33 (quoting *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007)).

<sup>156</sup> *Id.* at 34.

<sup>157</sup> 67 M.J. 53 (C.A.A.F. 2008).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 54.

<sup>161</sup> This action did not follow the model actions in the MCM either. See MCM, *supra* note 8, app. 16. Also of note, the CAAF highlighted that Mendoza had asked the convening authority to disapprove his bad-conduct discharge. See *Mendoza*, 67 M.J. at 54.

<sup>162</sup> *United States v. Mendoza (Mendoza CCA I)*, No. 200602353, 2007 CCA LEXIS 622 (N-M. Ct. Crim. App. Mar. 20, 2007) (unpublished).

<sup>163</sup> *Mendoza*, 67 M.J. at 54.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *United States v. Mendoza (Mendoza CCA II)*, 65 M.J. 824, 825 (N-M. Ct. Crim. App. 2007).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 825–26.

<sup>170</sup> *Id.* at 826.

additional information he would have provided to the convening authority if given the opportunity.”<sup>171</sup>

### 3. CAAF Review

The CAAF held that in cases involving an ambiguous action returned by a CCA for a corrected action with a successor convening authority, there are two possible outcomes.<sup>172</sup> First, in cases remanded for a corrected action,<sup>173</sup> the successor convening authority can communicate with his predecessor to ensure that the corrected action reflects the original convening authority’s intent.<sup>174</sup> Alternatively, the successor convening authority may take a new action after receiving a new SJAR that has been served on the defense and after the defense has been provided the opportunity to submit clemency matters.<sup>175</sup> The CAAF also disagreed with the NMCCA holding that passage of time combined with some evidence of changed circumstances may create a staleness that requires a new SJAR and opportunity to submit clemency matters.<sup>176</sup> The court held that staleness is irrelevant in cases involving a new action.<sup>177</sup> Those cases involving a new action require a new SJAR and an opportunity to submit clemency matters under RCM 1105.<sup>178</sup>

The CAAF held that because the NMCCA remanded the case for new post-trial processing (as opposed to remanding the case for a corrected action), the second action in this case was a new action, not a corrected action.<sup>179</sup> A new SJAR and an opportunity to submit clemency matters under RCM 1105 were required in this case.<sup>180</sup> The court also disagreed with the NMCCA that Mendoza had nothing further to submit.<sup>181</sup> Because of post-trial review errors, the CAAF held that Mendoza did not try to allege prejudice during the

review by the NMCCA.<sup>182</sup> As a result, the CAAF remanded the case for a determination by the NMCCA on whether or not Mendoza was prejudiced by the lack of a new SJAR and the opportunity to submit additional matters under RCM 1105.<sup>183</sup>

### C. Practice Pointers for Convening Authority Actions

Practitioners should exercise caution when drafting actions for the convening authority. These two CAAF opinions make clear that attention to detail is crucial when preparing post-trial documents. In *Burch*, the action appeared to unintentionally resurrect the sentence suspension, which is an error in attention to detail. In *Mendoza*, the original error was a failure to follow the model “Forms for Action” in Appendix 16 of the MCM.<sup>184</sup> In both cases, these oversights caused months of appellate litigation and countless man-hours to resolve errors that should not have happened in the first place.

In both *Burch* and *Mendoza*, the CAAF showed little patience for the mistakes that occurred along the way. Both of the CAAF opinions reversed the actions taken by the NMCCA and remanded the cases for further processing. The main takeaway from these two opinions is that the CAAF will critically review convening authority actions for errors. Any mistakes will likely result in a remand. This critical review by the CAAF is consistent with their overall theme that “[i]t is at the level of the convening authority that an accused has his best opportunity for relief.”<sup>185</sup> Mistakes in the action, particularly involving attention to detail, will not be tolerated by the CAAF in order to ensure that the accused has the full opportunity to petition the convening authority for clemency.

<sup>171</sup> *Id.* at 825.

<sup>172</sup> *United States v. Mendoza*, 67 M.J. 53, 54 (C.A.A.F. 2008). In cases returned for action to the same convening authority, the first option is irrelevant. The second option is still a possibility. *Cf. id.* (discussing the options for a successor convening authority as opposed to the same convening authority).

<sup>173</sup> *See generally* MCM, *supra* note 8, R.C.M. 1107(g) (discussing the ability of a CCA or other authority to direct withdrawal and substitution of a corrected action).

<sup>174</sup> *See Mendoza*, 67 M.J. at 54 (citing *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981)).

<sup>175</sup> *See id.* (citing *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006)).

<sup>176</sup> *Id.* at 55.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* Note that this is true whether the new action is from the same or a successor convening authority. *See supra* note 172.

<sup>179</sup> *Id.* at 54–55.

<sup>180</sup> *Id.* at 55.

<sup>181</sup> *Id.* at 55 n.2.

## IV. Contents of the Addendum to the SJAR

### A. *United States v. Taylor*<sup>186</sup>

*Taylor* helps clarify what the SJA must comment on in the addendum to the SJAR. Airman First Class Taylor pled guilty at a general court-martial, military judge alone, to two specifications of willfully disobeying the lawful order of a non-commissioned officer, two specifications of making a false official statement, one specification of divers presentations of false claims (false travel vouchers), and one

<sup>182</sup> *Id.* In fact, Mendoza “filed a motion to attach documents with [the CAAF], alleging such prejudice. Such claims must be raised before the CCA.” *Id.* (citing *United States v. Wheelus*, 49 M.J. 283, 288–89 (C.A.A.F. 1998)).

<sup>183</sup> *Mendoza*, 67 M.J. at 55.

<sup>184</sup> *See* MCM, *supra* note 8, app. 16.

<sup>185</sup> *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

<sup>186</sup> 67 M.J. 578 (A.F. Ct. Crim. App. 2008).

specification of making and uttering worthless checks by dishonorably failing to maintain sufficient funds.<sup>187</sup> She was sentenced to a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1.<sup>188</sup> In her clemency submissions to the convening authority, she asked to enter the Return-To-Duty Program (RTDP).<sup>189</sup> The SJAR addendum made no mention of her request, nor did it advise the convening authority that he could approve her entry into the RTDP.<sup>190</sup> The addendum did, however, specifically list the appellant's submissions and advised the convening authority that he had to consider them prior to taking action.<sup>191</sup>

The AFCCA held that the SJA did not err by not advising the convening authority about the RTDP in the addendum to the SJAR.<sup>192</sup> The AFCCA held that the addendum should: (1) inform the convening authority that matters were submitted and that they are attached; (2) inform the convening authority that he must consider those matters; and, (3) list as attachments the matters submitted.<sup>193</sup> If there are no allegations of legal error, no further comments are required in the addendum.<sup>194</sup> The AFCCA held that a request to participate in the RTDP is not an allegation of legal error, so the SJA is not required to address it in the addendum.<sup>195</sup> Under RCM 1106, the SJA could have advised the convening authority about the RTDP, but there was no obligation to do so.<sup>196</sup>

#### B. *United States v. Tuscan*<sup>197</sup>

While *Taylor* resolved an issue about whether an SJA needs to respond to a request in the addendum, *Tuscan* deals

with comments made by the SJA that probably should not have been made. Fireman Machinery Technician Tuscan was convicted at a contested general court-martial, consisting of members, of one specification each of assault with an unloaded firearm and assault consummated by a battery.<sup>198</sup> He was sentenced to a bad-conduct discharge, confinement for twelve months, and reduction to the grade of E-1.<sup>199</sup> The appellant's RCM 1105 submissions included a paragraph asking for a reduction in confinement because Tuscan was "remorseful" and he had "even offered to plead guilty to one of the specifications he was eventually found guilty of during his trial. This indicated a desire to take responsibility for his actions and to move on with his life."<sup>200</sup> The SJAR addendum addressed Tuscan's contentions by stating that the SJA disagreed that the appellant was remorseful. The SJA explained, "As you may recall, the pretrial offers, taken as a whole were unreasonable and on their face did not reflect a willingness on the part of the [appellant] to fully accept responsibility."<sup>201</sup> No objection was raised to the addendum, but the appellant did personally respond to it.<sup>202</sup>

The CGCCA first addressed the proper role of the SJA with respect to post-trial matters. The CGCCA held that "[a]n SJA cannot perform trial counsel functions because it limits the SJA's ability to provide a critical independent legal review for the convening authority."<sup>203</sup> In fact, RCM 1106(b) prohibits a trial counsel from acting as an SJA to any convening authority in the same case.<sup>204</sup> In this case, the SJA did not act as an actual trial counsel during the court-martial, but the comments made in the addendum may have caused the SJA to become a *de facto* trial counsel because of the apparent loss of objectivity. "An SJA should not only be objective . . . but also should maintain the appearance of objectivity."<sup>205</sup> The comments made "did not restate the full scope of the pretrial negotiations. . . . Pretrial negotiations are not really indicative of the appellant's state of mind. They are more likely a reflection of counsel tactics."<sup>206</sup>

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<sup>187</sup> *Id.* at 578–79.

<sup>188</sup> *Id.* at 579.

<sup>189</sup> *Id.* The RTDP is an Air Force program. "The program offers selected court-martialed enlisted personnel with exceptional potential the opportunity to be returned to active duty and have their punitive discharge, if adjudged, remitted." See U.S. DEP'T OF AIR FORCE, INSTR. 31-205, CORRECTIONS PROGRAM para. 11.6 (7 Apr. 2004) (C1, 6 July 2007) [hereinafter AFI 31-205].

<sup>190</sup> *Taylor*, 67 M.J. at 579. There are three authorities that can approve entry into the RTDP: (1) the convening authority; (2) the Air Force TJAG; and, (3) the Air Force Clemency & Parole Board (AFC&PB). See AFI 31-205, *supra* note 189, para. 11.6.6.

<sup>191</sup> *Taylor*, 67 M.J. at 579.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (citing *United States v. Foy*, 30 M.J. 664, 665 (A.F.C.M.R. 1990)).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* MCM, *supra* note 8, R.C.M. 1106(f)(7) states that "[t]he staff judge advocate or legal officer may supplement the recommendation." (emphasis added). That permissive language allows the SJA to comment on matters not qualifying as legal error but does not require comments to be made.

<sup>197</sup> 67 M.J. 592 (C.G. Ct. Crim. App. 2008).

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<sup>198</sup> *Id.* at 593.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 596.

<sup>201</sup> *Id.* at 597.

<sup>202</sup> *Id.* The addendum was served on the accused as new matter under RCM 1106(f)(7). Tuscan's personal response was submitted by his counsel and consisted of a 1 1/4 page typed, single-spaced letter to the convening authority. See Memorandum from Defense Counsel to Convening Authority, subject: Supplemental Request for Clemency ICO *United States v. FNMK Gary M. Tuscan*, USCG (27 Apr. 2007) (enclosure 1). The letter says that it "is not at all true" that he was not remorseful. *Id.* It also ended with a plea that "this request for clemency" be granted. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See MCM, *supra* note 8, R.C.M. 1106(b).

<sup>205</sup> *Tuscan*, 67 M.J. at 597.

<sup>206</sup> *Id.*

Commenting on the state of pretrial negotiations could be viewed as “unsympathetic to the right of the accused and counsel to engage in a dialogue during negotiations, or as dismissive of the right of the accused not to negotiate at all.”<sup>207</sup> Despite all of this, the CGCCA found no prejudice because there was no evidence that the convening authority would have acted differently if the addendum did not contain the SJA’s comments.<sup>208</sup> However, the CGCCA did “not consider the addendum a model to be followed.”<sup>209</sup>

### C. Practice Pointers

Practitioners should be wary of unnecessary comments in the SJAR addendum. In *Tuscan*, even though the CGCCA found no prejudice, it is clear that the court was not pleased with the language used in the addendum. The comments made by the SJA were unnecessary and made the SJA look like a trial counsel, which is prohibited by the rules. Meanwhile, in *Taylor*, the AFCCA had no difficulty upholding the absence of comments from the SJA about the RTDP.

Reading the results of both of these cases together, the main takeaway is that the only time an SJA should make comments in the addendum is when allegations of legal error are made (or are ostensibly made). Even then, comments should be limited to the language provided by Chief Judge Cox in *United States v. McKinley*: “I have considered the defense allegation of legal error regarding \_\_\_\_\_. I disagree that this was legal error. In my opinion, no corrective action is necessary.”<sup>210</sup> Any language or comments that step outside of this suggested language are unnecessary, as shown by the results in *Taylor* and *Tuscan*.

The second takeaway concerning the addendum is that the AFCCA’s advice on what the addendum should contain applies even outside of the Air Force. Every addendum should include as attachments all of the submissions from the accused and should advise the convening authority that he is required to consider them before taking action.<sup>211</sup> Practitioners that follow this advice will ensure that every addendum is adequate and complies fully with the rules.

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<sup>207</sup> *Id.* at 597–98.

<sup>208</sup> *Id.* at 597.

<sup>209</sup> *Id.*

<sup>210</sup> *United States v. McKinley*, 48 M.J. 280, 281 (C.A.A.F. 1998)

<sup>211</sup> *See supra* note 193 and accompanying text.

## V. Issues with the Record of Trial

### A. *United States v. Godbee*<sup>212</sup>

In *Godbee*, the original ROT was lost.<sup>213</sup> Private Godbee pled guilty at a special court-martial, military judge alone, to multiple offenses.<sup>214</sup> He was sentenced to a bad-conduct discharge, confinement for ninety days, and forfeiture of \$823 pay per month for three months.<sup>215</sup> There was a delay of nearly 1100 days from sentencing to docketing at the NMCCA.<sup>216</sup> The case is unclear, but the delay may have occurred because the original ROT was lost.<sup>217</sup> A duplicate copy was eventually submitted for appellate review.<sup>218</sup> The copy of the ROT submitted for appellate review was “internally consistent, . . . contain[ed] all numbered pages, and all prosecution, defense, and appellate exhibits.”<sup>219</sup> The original ROT had been authenticated, and this duplicate copy contained a copy of the authentication page signed by the military judge.<sup>220</sup> However, the duplicate copy had not been authenticated.<sup>221</sup>

Rule for Court-Martial 1104(c) requires the authentication of a duplicate ROT if the original ROT is lost.<sup>222</sup> In this case, because the ROT came from an “undisputed source” and based upon the “completeness of the duplicate,” the NMCCA applied “a presumption of regularity to [the ROT’s] creation, authentication, and distribution.”<sup>223</sup> The appellant could not point to any discrepancies, and gave no reason to “doubt the completeness, the accuracy, or the authenticity of the duplicate copy of the [ROT] submitted for appellate review.”<sup>224</sup> In fact, Godbee’s “detailed defense counsel reviewed the original record three days before the military judge authenticated it, and he was served with the appellant’s copy of the authenticated record.”<sup>225</sup> The defense counsel did not note any discrepancies in the original or the appellant’s copy of the authenticated record

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<sup>212</sup> 67 M.J. 532 (N-M. Ct. Crim. App. 2008).

<sup>213</sup> *Id.* at 533.

<sup>214</sup> *Id.* at 532.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *See generally id.* at 533 (noting that a duplicate copy was prepared and submitted for appellate review, but not stating why a duplicate copy was prepared).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See MCM, supra* note 8, R.C.M. 1104(c).

<sup>223</sup> *Id.* (citing *United States v. Weaver*, 1 M.J. 111, 115 (C.M.A. 1975)).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

(or any discrepancies between the two of them).<sup>226</sup> Because of this lack of discrepancies, the NMCCA found that the appellant could not establish any prejudice.<sup>227</sup> The NMCCA also found that the lack of prejudice and any discrepancies made the use of the un-authenticated, duplicate ROT a harmless error.<sup>228</sup>

### B. *United States v. Usry*<sup>229</sup>

*Usry* was a case mostly about competence to stand trial. However, there was a fifty-second gap in the recording of the trial. Seaman Usry pled guilty at a general court-martial, military judge alone, to one specification of wrongful appropriation and five specifications involving child pornography. He was sentenced to a bad-conduct discharge, confinement for thirty-six months, reduction to the grade of E-1, and forfeiture of all pay and allowances. The day before trial was originally scheduled to commence, Usry attempted suicide. An inquiry into his mental health was ordered under RCM 706. The inquiry showed that he was competent to stand trial.<sup>230</sup>

Before arraignment, the military judge recited the reasons for the trial delay on the record. The military judge also noted that Usry had taken two medications shortly before trial, including Seroquel and Celexa. The appellant told the military judge that these drugs helped him with the voices in his head, that they calm him down, that they affect his memory, and that they make him mellow. During this colloquy with the military judge, there was a fifty-second gap in the trial recording. The ROT reflected that the military judge held a telephonic, post-trial RCM 802 conference and “proposed text to fill the gap.” Counsel for both sides concurred on the text proposed by the military judge. The proposed text was captured in an appellate exhibit, and was inserted in the appropriate place in the ROT itself, with a note that the “substance” of the conversation followed.<sup>231</sup>

The CGCCA first noted that RCM 1103(b)(2)(B) requires a “verbatim transcript be included in the [ROT].”<sup>232</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* (citing to *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998) (explaining threshold showing of colorable prejudice is low but, nevertheless, must be demonstrated in regard to alleged post-trial errors)).

<sup>228</sup> *Godbee*, 67 M.J. at 533.

<sup>229</sup> 68 M.J. 501 (C.G. Ct. Crim. App. 2009).

<sup>230</sup> *Id.* at 502–03.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (citing MCM, *supra* note 8, R.C.M. 1103(b)(2)(B)). A verbatim record of trial is required for any court-martial where the sentence includes a discharge or any part of the sentence exceeds: (1) six months confinement; (2) forfeitures of pay greater than two-thirds pay per month; (3) forfeitures of pay for more than six months; or, (4) other punishments that may be adjudged by a special court-martial. See MCM, *supra* note 8, R.C.M. 1103(b)(2)(B).

The court also referred to several other cases in a footnote to show that reconstructed testimony or a summary of testimony normally makes a ROT non-verbatim.<sup>233</sup> Then the CGCCA cited to *United States v. Lashley*<sup>234</sup> for the principle that “insubstantial omissions from a [ROT] do not affect its characterization as a verbatim transcript, but substantial omissions give rise to a presumption of prejudice.”<sup>235</sup> In this case, the appellant claimed that he was prejudiced because the missing material was substantial and “critical to the military judge’s determination of whether [he] was competent to stand trial.”<sup>236</sup>

The CGCCA found that the fifty-second gap was not a substantial omission.<sup>237</sup> Even though that fifty-second gap occurred when the military judge was inquiring into the appellant’s competence to stand trial, which is an important issue, the court held that a decision on competence is “unlikely to turn on the precise words being spoken during a fifty-second period.”<sup>238</sup> The military judge had an opportunity to observe the appellant’s behavior during the entire trial, which was more probative of the appellant’s competence than his answers to a few questions. Even if there had been actual words in that fifty-second gap that would have demonstrated a lack of competence to stand trial, the behavior of the appellant during the course of the trial would have reflected this lack of competence. Usry’s answers during the providence inquiry, and the contents of his unsworn statement reflected that he was competent. The CGCCA found no issue with the fifty-second gap in the trial recording.<sup>239</sup>

### C. Practice Pointers

Practitioners should exercise caution when dealing with issues involving the ROT. There are two main takeaways from *Godbee* and *Usry*. The first takeaway is that when the original ROT is lost, the Government should ensure that the duplicate copy is authenticated as required by RCM 1104(c). Even though the NMCCA found no prejudice in *Godbee* from using a non-authenticated copy, this should be the exception rather than the rule. Meanwhile, properly authenticating the duplicate copy would avoid litigating the issue of prejudice altogether. If the military judge is unavailable to conduct authentication, there are procedures for substitute authentication that would have solved any concerns from *Godbee*.<sup>240</sup>

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<sup>233</sup> *Usry*, 68 M.J. at 503 n.3.

<sup>234</sup> 14 M.J. 7, 8–9 (C.M.A. 1982).

<sup>235</sup> *Usry*, 68 M.J. at 503.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 504.

<sup>238</sup> *Id.* at 503.

<sup>239</sup> *Id.* at 504.

<sup>240</sup> See MCM, *supra* note 8, R.C.M. 1104(a)(2)(B).

The second takeaway is that not all omissions from a verbatim ROT are substantial or result in relief on appeal. If practitioners have an issue with gaps in the trial recordings, the best course of action is to follow the trial court's approach in *Usry*. A post-trial RCM 802 session with the military judge where counsel agree to proposed text will ensure that any possible prejudice is minimized. If the gap is so large that proposed text cannot reasonably be re-created, then having the convening authority approve non-verbatim ROT punishment is the prudent course of action.<sup>241</sup>

play—notice and an opportunity to respond.”<sup>242</sup> Any post-trial matters that fall short of this mantra will likely result in appellate decisions, whether the matter involves post-trial delay, ambiguous actions, or any number of other issues. Wise practitioners realize that once court is adjourned, the post-trial process is just beginning. Addressing post-trial matters requires the same effort and professionalism with which the trial was conducted.

## VI. Conclusion

The post-trial process continues to be a fruitful area for the appellate courts to examine. Practitioners should always exercise due diligence when following the rules to avoid unnecessary appellate litigation. As the CAAF has stated in the past, “[t]he essence of post-trial practice is basic fair

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<sup>241</sup> A verbatim record is only required when the sentence exceeds a certain threshold. If the record cannot be re-created as a verbatim ROT due to gaps in the recording, the convening authority can approve a sentence below those thresholds to avoid any issues on appeal (e.g., no sentence in excess of six months confinement, forfeitures of two-thirds pay per month, forfeitures for more than six months, or a punitive discharge). *See supra* note 232 for a more detailed discussion of the verbatim ROT threshold.

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<sup>242</sup> *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).