IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In *re*	)	
	)	
Firecontrolman Chief	)	**NMCM No. 200200375**
SALVADOR DIAZ,	)	
U.S. Navy,	)	
	)	**USCA Dkt. No. 03-8014/NA**
Petitioner.	)	
	)	
	)	

PLEADINGS INDEX

Tab		Document		Date
5		**Order:** attaching response from US Navy-Marine Corps Court of Criminal Appeals		October 30, 2003
4		**Order:** NIMJ's Motion for Leave to File Memorandum as *Amicus Curiae* is GRANTED		October 30, 2003
3		Memorandum of National Institute of Military Justice as *Amicus Curiae*		July 8, 2003
2		Petitioner's Reply Brief		
1		U.S. Court of Appeals for the Armed Forces Daily Journal		June 16, 2003

NMJ

United States Court of Appeals for the Armed Forces

Washington, D.C. 20442-0001

Salvador DIAZ (098-48-7391), Petitioner	)	USCA Misc. Dkt. No. 03-8014/NA
	)	Crim. App. Dkt. No. 200200374
v.	)	O R D E R
THE JUDGE ADVOCATE GENERAL OF THE NAVY, Respondent	)	

In reply to this Court's order in the above-entitled case, 59 M.J. 34 (C.A.A.F. 2003), the United States Navy-Marine Corps Court of Criminal Appeals has submitted a "Response to Court Order." This response indicates that the lower court has reviewed the processing and status of the Petitioner's case and issued orders for a fixed briefing scheduled before the lower court in this case. Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2000).

Additionally, the Clerk of Court of the Navy-Marine Corps Court of Criminal Appeals has submitted a letter to the Clerk of this Court indicating steps the Court of Criminal Appeals has taken to ensure timely appellate review of Navy-Marine Corps cases. Attached to this letter is a memorandum signed by the Assistant Judge Advocate General of the Navy outlining steps that the Judge Advocate General of the Navy has taken or will take with respect to appellate processing of courts-martial pursuant to Article 66.

The aforementioned responses are attached to this order as Appendix "A" (Response to Court Order with attachments) and Appendix "B" (Clerk of Court's letter with attachments).

For the Court,

/s/ William A. DeCicco
Clerk of the Court
October 30, 2003

cc: The Judge Advocate General of the Navy
Counsel for Petitioner (KISOR)
Counsel for Respondent (GATTO)
Amicus Curiae (FIDELL, Esq.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Salvador DIAZ, Petitioner v. The Judge Advocate General of the Navy Respondent	RESPONSE TO COURT ORDER Crim.App. No. 200200374 USCA Dkt. No 03-8014/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

On August 5, 2003, the United States Court of Appeals for the Armed Forces (CAAF), acting upon a Petition for Extraordinary Relief filed personally by the petitioner, granted the petitioner's petition by remanding the case to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). In that decision, the NMCCA was ordered to "expeditiously review the processing and status of Petitioner's Article 66 appeal." The NMCCA was also ordered to "take appropriate action to ensure that Petitioner receives the rights he is entitled to under Article 66 and Article 70, and issue orders as are necessary to ensure timely filing of an Assignment of Errors (sic) and Brief on behalf of Petitioner and the timely filing of an Answer . . . on behalf of the Government." Additionally, the NMCCA was ordered to report back to the CAAF within 60 days detailing the "steps taken to comply" with CAAF's opinion in this case.

In compliance with the Order of the CAAF to the NMCCA to report the steps taken in this case, the following information is provided. The NMCCA issued an Order on August 14, 2003, to the currently assigned appellate defense counsel of record in this case and his supervisor, along with the assigned appellate Government counsel and the Director of the Appellate Government Division, Navy-Marine Corps Appellate Review Activity, to attend a Chamber's Conference with the Chief Judge, NMCCA, on August 20, 2003. Attachment A. On August 22, 2003, following that Chamber's Conference, the NMCCA issued an Order to the petitioner's appellate defense counsel and to the Government establishing a briefing schedule before the

NMCCA in this case. Attachment B. Under this schedule, the appellant's brief is to be filed with the NMCCA by October 21, 2003 and the Government's response is due no later than November 21, 2003.

For the Court.

R.H. TROIDL
Clerk of Court
Navy-Marine Corps Court of
Criminal Appeals

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S Appellee v. Salvador Diaz 098 48 7391 Chief Fire Controlman (E-7) U.S. Navy Appellant	)	NMCM No. 200200374 GENERAL COURT-MARTIAL O R D E R

On 5 August 2003, the United States Court of Appeals for the Armed Forces, acting upon a Petition for Extraordinary Relief filed personally by the appellant, granted the appellant's petition as follows:

> 1. This case is remanded to the Navy-Marine Corps Court of Criminal Appeals. That court shall expeditiously review the processing and status of Petitioner's Article 66 appeal.
>
> 2. The Court of Criminal Appeals shall take appropriate action to ensure that Petitioner receives the rights he is entitled to under Article 66 and Article 70, and issue such orders as are necessary to ensure timely filing of an Assignment of Errors and Brief on behalf of Petitioner and the timely filing of an Answer to the Assignment of Errors on behalf of the Government.

A review of the record of trial reveals the following chronology of events in this case:

> 01 Dec 2000 - the appellant was sentenced to 9 years confinement, total forfeitures, reduction to E-1, and a dishonorable discharge
>
> 26 Sep 2001 - 976 page record of trial authenticated
>
> 24 Oct 2001 - copy of record of trial mailed to the appellant
>
> 01 Nov 2001 - copy of record of trial received by the appellant

Attachment A

14 Nov 2001 - staff judge advocate's recommendation issued and served upon trial defense counsel

14 Dec 2001 - R.C.M. 1105 and 1106 matters submitted by trial defense counsel

21 Dec 2001 - Convening Authority's Action approves the adjudged sentence

25 Feb 2002 - record of trial received by Navy-Marine Corps Appellate Review Activity

28 Feb 2002 - case docketed by Navy-Marine Corps Court of Criminal Appeals

12 Mar 2002 - LT Snyder assigned as appellate defense counsel (as per Nautilus I)

25 Jun 2002 - First defense enlargement of time request

31 Jul 2002 - Second defense enlargement of time request

18 Oct 2002 - Third defense enlargement of time request

06 Nov 2002 - LT Snyder filed Motion for Appropriate Relief seeking appellant's release from confinement until appellate review is complete in his case or until a Petition for Extraordinary Relief being drafted by the appellant is resolved. "Appellant requests this relief on the grounds his appellate counsel has a conflict of interest because Appellant believes it is in his best interest for his case to be reviewed now, however, due to his appellate counsel's case load, she has not yet completed appellate review of his case and does not believe that she will do so anytime in the near future."

14 Nov 2002 - the appellant's Motion for Appropriate Relief denied

20 Nov 2002 - Fourth defense enlargement of time request

03 Dec 2002 - LT Snyder files a Petition for Extraordinary Relief drafted personally by the appellant

04 Dec 2002 - the appellant's Petition for Extraordinary Relief denied without prejudice to raise the same issues during the course of normal appellate review. "The Court notes petitioner's expressed concern with post-trial and appellate delay in his case, which is currently awaiting his brief and assignments of error as the next step in the appellate review process."

13 Dec 2002 - the appellant personally filed a Motion for Appropriate Relief seeking "deferment of his sentence and . . . release from confinement until completion of his appeal."

16 Dec 2002 - the Motion for Appropriate Relief denied without prejudice to raise the same issues during the course of normal appellate review. "The Court notes petitioner's expressed concern with post-trial and appellate delay in his case, which is currently awaiting his brief and assignments of error as the next step in the appellate review process."

14 Jan 2003 - Fifth defense enlargement of time request

03 Feb 2003 - LT Snyder filed a Motion Out of Time to Reconsider Appellant's Motion for Appropriate Relief

06 Feb 2003 - Sixth defense enlargement of time request

11 Feb 2003 - the Motion to Reconsider denied

24 Feb 2003 - Seventh defense enlargement of time request

19 Mar 2003 - Eigth defense enlargement of time request

23 Apr 2003 - Ninth defense enlargement of time request

21 May 2003 - Tenth defense enlargement of time request

20 Jun 2003 - Eleventh defense enlargement of time request

25 Jul 2003 - Twelfth defense enlargement of time request

24 Aug 2003 - Current due date for defense assignment of errors and brief

Accordingly, it is, by the Court, this 14th day of August 2003,

ORDERED:

That the appellant's current appellate defense counsel (LT Kisor) and his supervisor in this case, along with appellate Government counsel and the Division Director, Appellate Government Division, or her representative, will appear in the chambers of the Chief Judge of this Court at 1000, 20 August 2003, to discuss the status of this case and establish a firm briefing schedule.

For the Court

R.H. TROIDL
Clerk of Court
14 August 2003

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Salvador DIAZ 098 48 7391 Chief Fire Controlman (E-7) U.S. Navy Appellant	NMCCA No. 200200374 GENERAL COURT-MARTIAL O R D E R

Following a chambers conference with counsel and their supervisors to discuss the status of this case and establish a firm briefing schedule, it is, by the Court, this 22nd day of August 2003,

ORDERED:

1. That appellate defense counsel will file a brief and assignment of errors in this case with the Court on or before 21 October 2003.

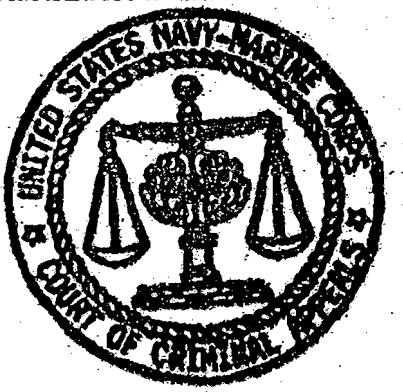
2. That appellate defense counsel will personally contact the appellant and inform him of this filing deadline and further inform the appellant that he should inform counsel of any issues he wishes raised before this Court not later than 21 September 2003.

3. That the Government will file its answer on or before 21 November 2003.

4. That absent extraordinary circumstances and good cause shown, enlargements of time beyond the newly established due dates will not be granted.

For the Court

R.H. TROIDL
Clerk of Court
22 August 2003



Attachment B

DEPARTMENT OF THE NAVY
U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON, DC 20374-5047

IN REPLY REFER TO

5800
Ser 07/072
3 Oct 2003

Mr. William A. DeCicco
Clerk of Court
United States Court of Appeals for the Armed Forces
450 E Street, N.W.
Washington, D.C. 20442-0001

Ref: USCA Dkt. No. 03-8014/NA

Dear Mr. DeCicco:

On August 5, 2003, the United States Court of Appeals for the Armed Forces (CAAF), acting upon a Petition for Extraordinary Relief filed personally by Chief Fire Controlman Salvador Diaz, U.S. Navy, granted the petition by remanding the case to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). In that decision the NMCCA was ordered to "expeditiously review the processing and status of Petitioner's Article 66 appeal." The NMCCA was also ordered to "take appropriate action to ensure that Petitioner receives the rights he is entitled to under Article 66 and Article 70, and issue orders as are necessary to ensure timely filing of an Assignment of Errors (sic) and Brief on behalf of Petitioner and the timely filing of an Answer . . . on behalf of the Government." In compliance with that order the NMCCA has filed a Response to Court Order concerning the referenced case.

In addition to ordering the NMCCA to report to the CAAF concerning issues related to the referenced case, the CAAF Order of August 5th also ordered the NMCCA to report to CAAF concerning "other appellants awaiting appellate review." The Order directed the NMCCA to report back to the CAAF within 60 days, detailing the "steps taken to comply with the provisions" of CAAF's decision in the *Diaz* case concerning totally unrelated cases pending Article 66, UCMJ, review before the NMCCA.

In compliance with the Order of the CAAF to the NMCCA to report the steps taken to ensure timely appellate review in these totally unrelated cases, the following information is provided:

1. The judges of the NMCCA met in Chambers to discuss NMCCA policies concerning Motions for Enlargement of Time to file pleadings before the NMCCA. The focus of this discussion was whether the NMCCA should require more information from counsel before deciding to grant such a motion. The resulting decision was to consider each motion on a case-by-case basis, requesting additional information when deemed warranted.

2. The Chief Judge, NMCCA, met with the Directors of the Appellate Government and Defense Divisions, Navy-Marine Corps Appellate Review Activity, and the Assistant Judge Advocate General of the Navy for Military Justice (AJAG), to consider the procedures utilized by the Appellate Divisions to review cases awaiting action within their respective appellate divisions. After noting that their counsel carry heavy caseloads and work extremely hard to meet their obligations to clients, both the Division Directors represented that their counsel consider whether an appellant is still serving confinement when prioritizing cases. The Director, Appellate Defense Division, also asserted that his counsel seek to establish direct communication with each client concerning the status of their case shortly after the case is docketed, despite the fact that Navy and Marine Corps appellants routinely execute a power of attorney to their appellate defense counsel.

3. The Chief Judge invited the Judge Advocate General to address steps the Navy was taking in light of the *Diaz* decision. Enclosure 1. In response, on September 19, 2003, the AJAG, forwarded Enclosure 2 to the NMCCA. By separate correspondence, the AJAG provided a list of all appellants awaiting Article 66, UCMJ, review, who are currently confined, detailing their release dates.

4. Appellate defense counsel are now regularly indicating in their Motions for Enlargement of Time information concerning their client's confinement status and whether the client concurs in the request for more time.

5. The court has been informed that the Marine Corps has agreed to assign two Reserve judges and two Reserve commissioners to support the court.

The court will continue to closely monitor the progress of all cases awaiting appellate review, providing direction when necessary and relief when warranted.

Sincerely yours,

R.H. TROIDL
Clerk of Court

Enclosures

DEPARTMENT OF THE NAVY
U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON, DC 20374-5047

IN REPLY REFER TO
5800
Ser 07/065
27 Aug 2003

From: Chief Judge, Navy-Marine Corps Court of Criminal Appeals
To: Judge Advocate General

Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO ARTICLE 66, UCMJ

Ref: (a) *Diaz v. Judge Advocate General*, __ M.J. __, No. 03-8014 (C.A.A.F. Aug. 5, 2003)
(b) *United States v. Brunson*, __ M.J. __, No. 03-0297 (C.A.A.F. Aug. 14, 2003)

Encl: (1) Chart of Cases Decided by Service for Fiscal Years 1997 through 2002
(2) Chart of Cases Pending Appellate Review, Calendar 1999 through 2002 and 2003 Year to Date
(3) Chart of Cases Pending Appellate Review for Calendar Years 2000 through 2003
(4) Charts of Cases Pending In-Panel Over 6 and 12 Months for Calendar Years 2000 through 2003

1. By reference (a), on 5 August 2003, the United States Court of Appeals for the Armed Forces (CAAF), acted upon a Petition for Extraordinary Relief filed personally by an appellant whose case is pending before this court for review pursuant to Article 66(c), UCMJ. In addition to granting the petitioner certain specific relief, our superior court provided the following:

> It is further directed that within 60 days of the date of this opinion, the Navy-Marine Corps Court of Criminal Appeals shall submit a report to this Court which specifies the steps taken to comply with the provisions of this opinion in regard to Petitioner **and other appellants awaiting appellate review under Article 66 before the Navy-Marine Corps Court of Criminal Appeals.** (emphasis added).

2. Although this court is tasked with responding to CAAF, we are only one part of the Navy-Marine Corps appellate review process. The court does not control the number of military and civilian billets assigned to the court or to the four divisions within the Navy-Marine Corps Appellate Review Activity (NAMARA). Additionally, this court does not control the number of personnel (military and civilian) actually assigned to fill those billets. Although there is

a screening process in place for selecting judges to this court, the court has no control over the experience level and qualifications of judge advocates assigned as appellate counsel, or the length of their tours of duty.

3. The Navy and Marine Corps have a longstanding tradition of doing more with less. The personnel assigned to this court and NAMARA have lived up to that tradition to the best of their ability. As evidenced by enclosure (1), there has not been a year in recent memory when this court did not decide more cases than all of the other service courts combined, despite having fewer judges, fewer appellate counsel, and smaller support staffs than both the Army and Air Force courts. For a variety of reasons, doing more with less is simply not getting the job done for too many appellants and for the Government. Enclosure (2) reflects the dramatic increase in the number of cases pending appellate review since the end of CY-1999. Enclosure (3) reflects the distribution of the pending cases between the court and the Appellate Defense and Appellate Government Divisions. Additionally, the court expects to be faced with deciding three capital cases and the two Italian aircraft mishap cases over the next 12-18 months. Each of those cases will require a significant amount of judicial time that cannot be devoted to reducing the ever-growing backlog.

4. The court does not have statistics reflecting how many cases currently pending appellate pleadings were docketed over 6 months or 12 months ago. As reflected in enclosure (4), there are currently 53 cases which are fully briefed and have been awaiting judicial review for over 6 months and another 35 cases that have been awaiting judicial review for over one year. These figures do not compare favorably with ABA Appellate Standard 3.52, which calls for 75% of all appeals to intermediate appellate courts to be decided within 290 days of the notice of appeal, 95% of all such appeals to be decided within one year of the notice of appeal, and the remaining 5% to be decided as soon after one year as is possible. The Tenth Circuit[1] held that a delay of two years from notice of appeal to decision by the intermediate court is a presumptive denial of due process.

5. In light of the delays associated with this backlog, individual appellants may be found to have suffered violations of their due process rights. Navy-Marine Corps appellate counsel may, therefore, find themselves in ethical jeopardy due to circumstances largely beyond their control.

[1] *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994).

Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO ARTICLE 66, UCMJ

CAAF's recent decision in *Brunson*, reference (b), clearly indicates that CAAF will hold appellate counsel and their supervisors accountable for the processing of their cases. Of particular note, CAAF referenced a comment to Rule 1.3 of the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT, which states "[a] lawyer's work load must be controlled so that each matter can be handled competently." Since the Government is tasked with operating the military justice system by statute and controls the appellate process in terms of manning and resources, delays in the process are attributable to the Government. *See United States ex rel. Green v. Washington,* 917 F.Supp. 1238, 1273 (N.D. Il. 1996). A change in the process is urgently needed.

6. For this court's part, we are examining each step of our internal process for reviewing cases, along with the policies that we follow in granting counsel enlargements of time. In this regard, by separate correspondence, I am requesting that the Assistant Judge Advocate General for Military Justice provide this court with a list of all those appellants whose cases have been docketed with this court and who remain in confinement due to their court-martial sentence as of 1 September 2003, along with projected release dates.

7. While the court can become marginally more efficient in how we process cases, we cannot become significantly more productive without the assignment of additional personnel to decide cases (judges) and provide research support (commissioners). Assuming that the caseload will remain about the same, I am confident that the court can, over time, make significant inroads in shortening the length of time required to issue opinions by continually manning the court with 12 active duty appellate judges and four full-time commissioners. The number of selected Reserve officers supporting the court should include eight judges and four commissioners. This would allow the court to maintain four full-time panels, each with a dedicated active duty commissioner, two dedicated Reserve judges, and one dedicated Reserve commissioner. I would gauge the need for any additional civilian support after the four panels begin to produce a steady volume of work. I recognize that increasing the court's manning will go against the recent personnel trend which has seen the number of judicial billets assigned to the court reduced from nine to eight and significant gaps in the assignment of replacement judges and commissioners. Without more judges and commissioners, however, based upon the number of cases requiring Article 66 review, the backlog of cases pending before the court will continue to grow.

Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO ARTICLE 66, UCMJ

8. With respect to those parts of the appellate review process outside of the court, I respectfully request that your staff review that process with a view toward identifying and resolving any inefficiency that may plague the system. Additionally, and I believe more importantly, I respectfully request that your staff review the process to determine the number of counsel that should be assigned for their caseload and collateral duties, so as to ensure that all cases are fully briefed to the court in an appropriate and timely manner. A comparison of the staffing and workload of the Navy-Marine Corps appellate divisions to the manning and relative workloads (vice productivity) of the Army and Air Force appellate divisions would be most instructive. I personally believe that a study, such as the one conducted by Whitley, Bradberry, Brown, would be helpful.

9. Finally, with respect to those parts of the appellate review process under your control, I respectfully request that your staff convey to this court information concerning "the steps taken to comply with the provisions of [the *Diaz*] opinion in regard to . . . **appellants awaiting appellate review under Article 66 before the Navy-Marine Corps Court of Criminal Appeals,"** so that we may include that information in the report we are required to submit to CAAF. Given the established due date and in order to allow sufficient time to incorporate the data into the report, a response is respectfully requested on or before 19 September 2003.

Very respectfully,

C.W. Dorman

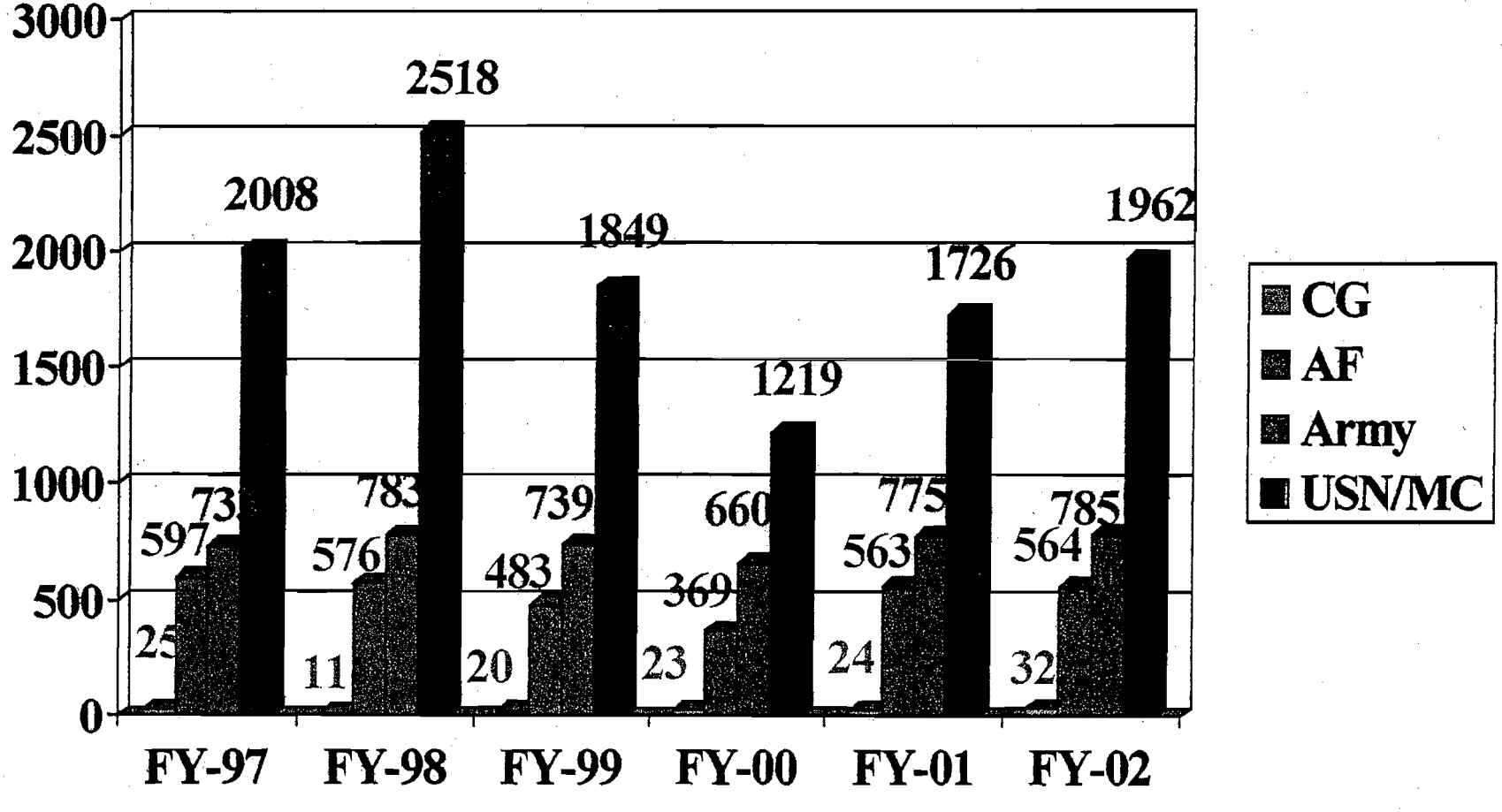
CCA Cases Decided

As Reported by CAAF

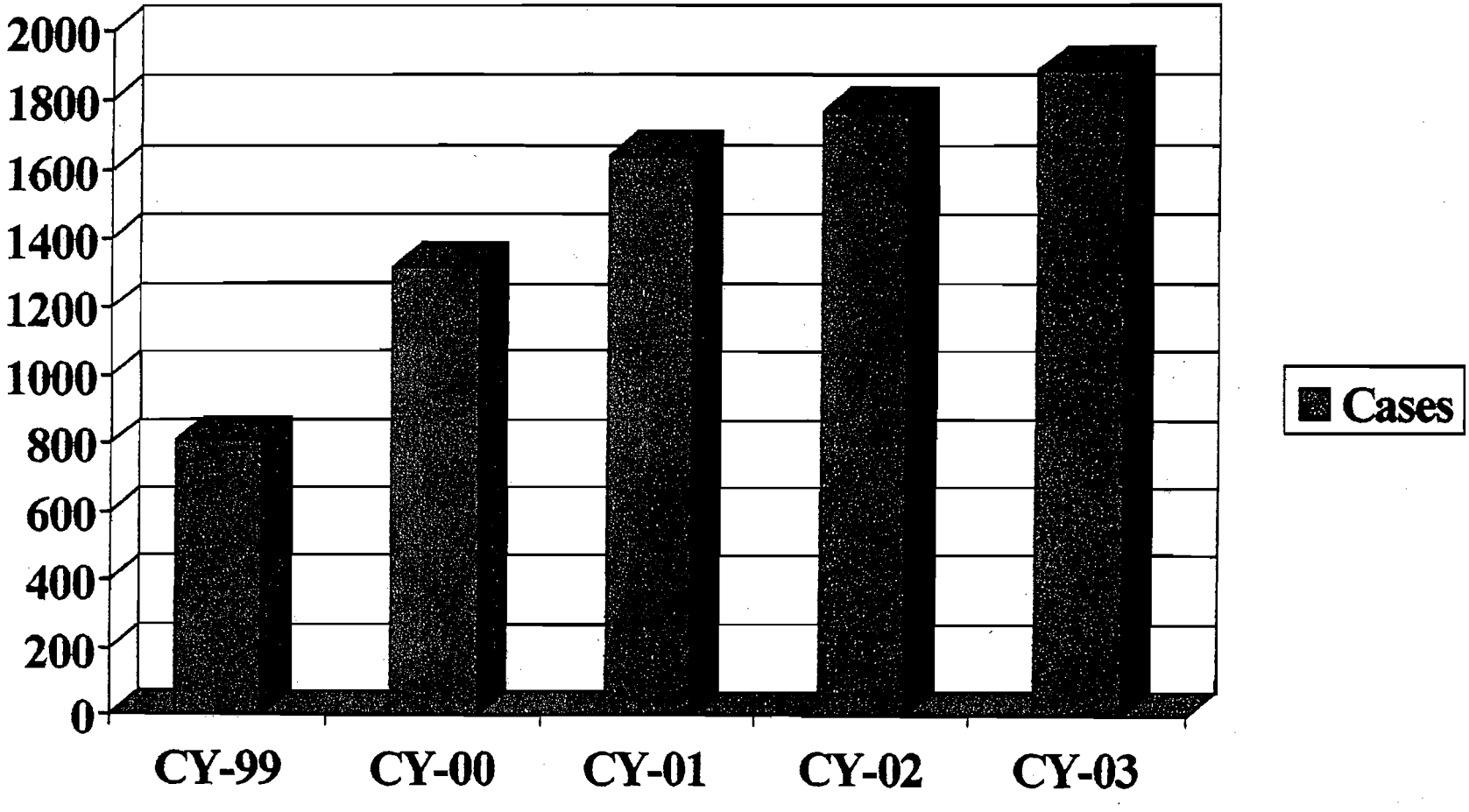
Total Cases for All Service Courts

FY-97- 3363 FY-98- 3888 FY-99- 3136

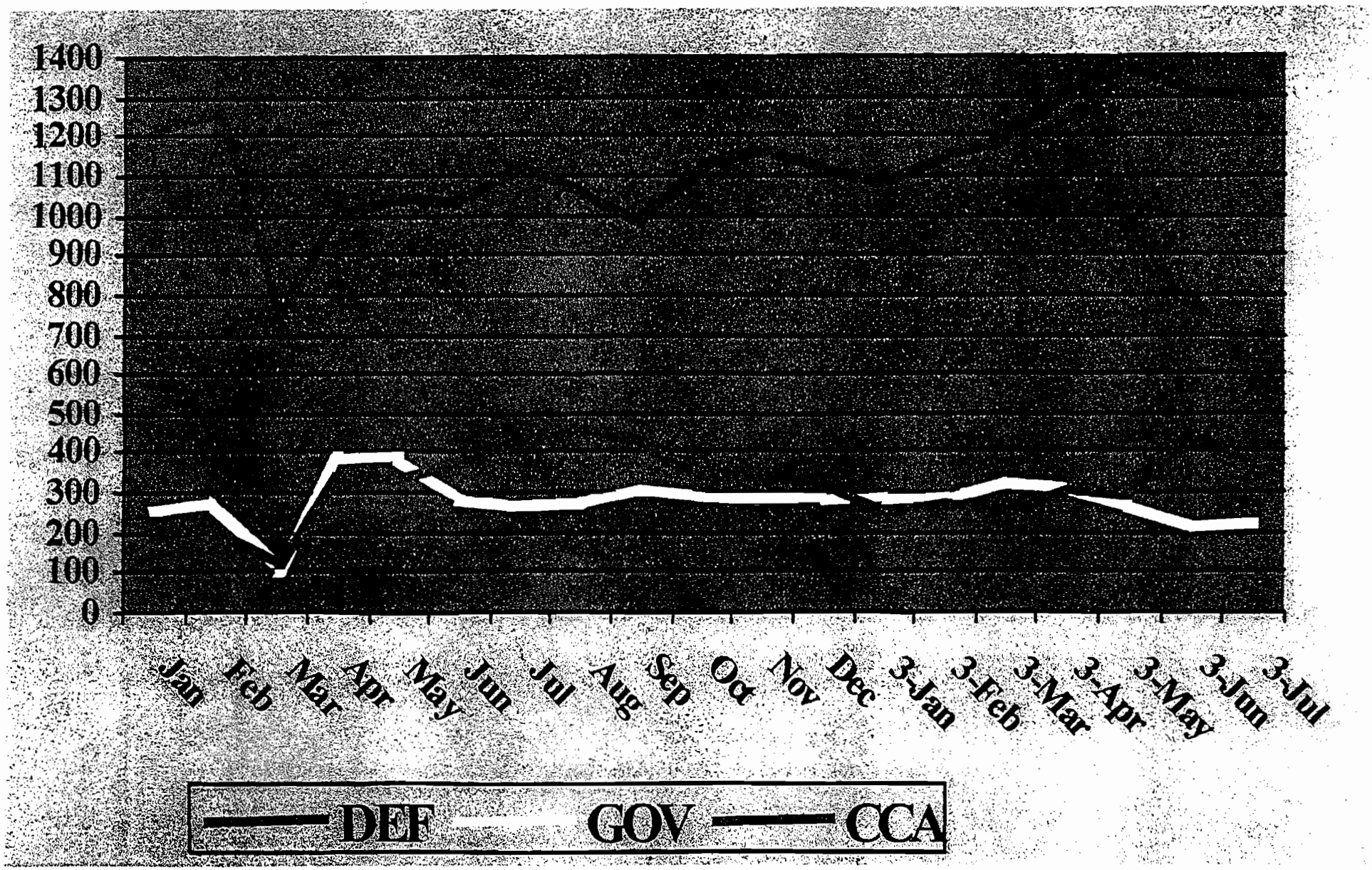
FY-00- 2271 FY-01- 3088 FY-02- 3307



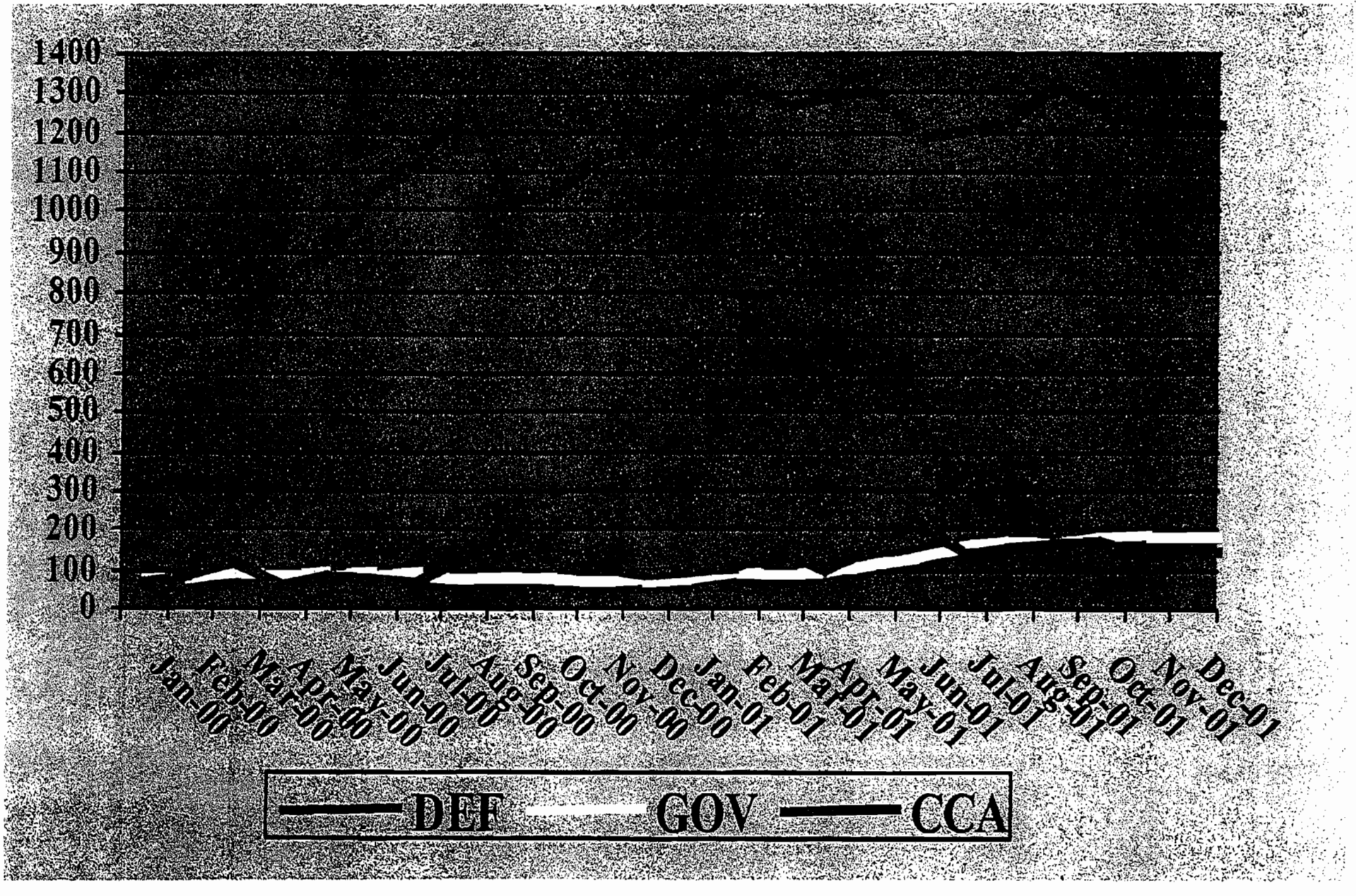
Cases Pending at the End of CY-1999-2002 and CY-2003 to 31 July



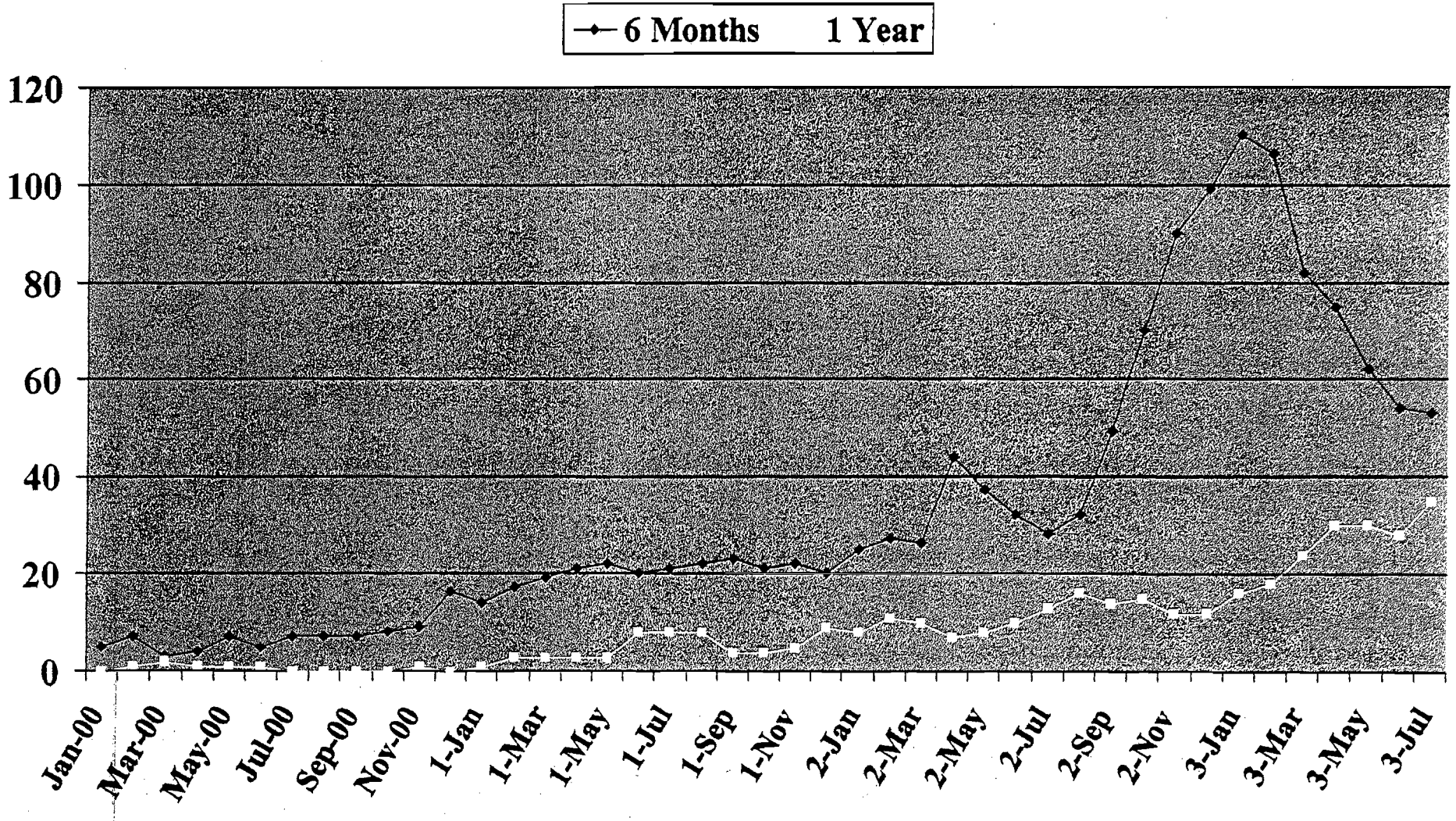
Monthly Cases Pending List
CY 02/03



Monthly Cases Pending List
CY 00/01



[redacted]


6 Months
1 Year
120
100
80
60
40
20
0
Jan-00
Mar-00
May-00
Jul-00
Sep-00
Nov-00
1-Jan
1-Mar
1-May
1-Jul
1-Sep
1-Nov
2-Jan
2-Mar
2-May
2-Jul
2-Sep
2-Nov
3-Jan
3-Mar
3-May
3-Jul

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON DC 20374-5047

IN REPLY REFER TO

5800
Ser 02/719
26 Sep 03

From: Judge Advocate General
To: Chief Judge, Navy-Marine Corps Court of Criminal Appeals

Subj: APPELLATE PROCESSING OF COURTS-MARTIAL PURSUANT TO ARTICLE 66, UNIFORM CODE OF MILITARY JUSTICE (UCMJ)

Ref: (a) Your ltr 5800 Ser 07/065 of 27 Aug 03
(b) *Diaz v. Judge Advocate General of the Navy*, __ M.J. __, No. 03-8014 (C.A.A.F. Aug. 5, 2003)

Encl: (1) Navy JAG input to NMCCA

1. Reference (a) requested input for your report to the U.S. Court of Appeals for the Armed Forces (CAAF), per its decision at reference (b). Specifically, CAAF requested our "steps taken to comply with the provisions of [the *Diaz*] opinion in regard to . . . appellants awaiting appellate review under Article 66 before the Navy-Marine Corps Court of Criminal Appeals."

2. Enclosure (1) reflects our input to your request.

K. H. WINTERS
By Direction

Enclosure (2)

Navy JAG Input to Navy Marine Court of Criminal Appeals

1. **Institutional Commitment.** As background, it is important to note that the Department of the Navy remains committed to ensuring appellants receive quality and timely appellate review pursuant to Article 66, UCMJ. Indeed, the Department commits substantial resources to this requirement -- to include first-rate centralized appellate review facilities at the Washington Navy Yard (though recently damaged by Hurricane Isabel).

2. **Framing the Challenge.** We continually review our processes, procedures, and staffing to fulfilling our appellate review requirements. We organize our assets in anticipation or response to the following two variables: total cases per year requiring appellate review and the complexity of those cases. While it is difficult to predict the *complexity* of cases per year, the total *numbers* of cases requiring review per year is typically about 2000. Numbers of complex cases – generally defined as contested cases with large records of trial - fluctuate and we have to "surge" our staffing accordingly (as we are now doing).

3. **Staffing**. Staffing our appellate divisions with qualified counsel is fundamental in meeting our appellate review requirement. Our most recent staffing review indicated that we should increase the number of judge advocates in the Appellate Defense Division, as they are the Division tasked with examining all records of trial and filing initial pleadings in all cases that require Article 66, UCMJ, review. As of September 19, 2003, they had a backlog of 1099 cases, down from 1365 cases in May (the FY03 high), when they were staffed with 14 attorneys. There are now 18 judge advocates in Appellate Defense.

a. **Active Duty Judge Advocates**. We intend to increase our staffing at Appellate Defense Division to approximately 20 active duty judge advocates. Coupled with our Reserve support detailed below, we believe this number, coupled with an actual decrease in FY03 cases tried, will further reduce our backlog - specifically our high enlargement cases. Finally, we staff our Appellate Divisions with judge advocates who have at least one tour at a field command before performing appellate duties; this "experience factor" also contributes to our timeliness and quality goals.

b. **Reserve Judge Advocates**. The work of our Reserve judge advocates is essential in accomplishing our appellate review mission. Currently, we have four Reserve units with almost 40 members who work on appellate defense cases. To further reduce our backlog this summer, we arranged for three Reserve judge advocates to serve on extended Active Duty Special Work (ADSW) time periods to support the division. Eleven Naval Reserve counsel also volunteered to drill extra periods of annual training (AT) and active duty for training in order to assist Appellate Defense with lessening its caseload through the end of the fiscal year.

c. **Mobilization of a Capital Litigation Specialist**. Three capital cases are pending within NAMARA. Recognizing that capital cases involve specialized appellate issues, we activated a recognized expert (USMCR Lieutenant Colonel) in capital litigation. His training, oversight, and advice have paid enormous dividends in both substance and efficiency.

d. **Experienced Leadership**. In October 2003, a U.S. Navy Captain (select) with a strong

background in military justice and case management will assume duties as the Division Director, thereby increasing the experience level within the Division.

4. **Internal Efficiencies**. Other efforts to improve the timeliness of appellate review include the following:

a. **Training**. We continue our comprehensive effort to emphasize the importance of a timely review pursuant to Article 66, UCMJ. These include formalized training sessions at the highest levels of judge advocate leadership – to include the JAG training symposium in September 2003, a planned presentation at the Marine Corps SJA conference in October 2003, and re-emphasis at Marine Corps bi-annual commander's courses. In addition, every prospective commanding officer and executive officer of our Trial Service Office and Navy Legal Service Command is taken to the Navy Marine Corps Appellate Review Activity to observe the operational tempo, learn the processes and procedures, so that they can understand the importance of timely and accurate record of trial preparation. In August 2003, we conducted a record of trial preparation training symposium at NAMARA for selected commands in need of remediation. Lastly, although judge advocates are qualified and certified to practice before appellate courts, we also conduct internal appellate training and attend off-site appellate practice workshops as schedules permit.

b. **Case Tracking**. Identifying cases that have been tried, but where the command has not sent the record of trial to NAMARA, is an area where we have also been focusing our attention. NAMARA now coordinates with the trial judiciary to identify commands in this category, and takes action to ensure the record of trial is located and moving through the process.

c. **Early Check for Missing Documents**. We are also taking steps to ensure the court and counsel have complete records of trial that are ready for appellate review. Records are checked twice for completeness. First, the Administrative Division (Code 40) uses a detailed checklist to check the records of trial for missing documents and seeks to obtain them from the command. Next, when appellate defense counsel receive the records, they check again for missing documents so that these documents may be obtained right away and will not delay the substantive review of the case. The combined efforts of Codes 40 and 45 have paid enormous dividends in case processing.

d. **Prioritization of Cases**. Appellate Defense has also focused on the way they prioritize cases – with confinement, pleas, and length of time from the date sentence was adjudged being the key variables.

NMJ

United States Court of Appeals for the Armed Forces

Washington, D.C. 20442-0001

Salvador DIAZ (098-48-7391), Petitioner	)	USCA Dkt. No. 03-8014/NA
	)	Crim.App. No. 200200374
v.	)	O R D E R
THE JUDGE ADVOCATE GENERAL OF THE NAVY, Respondent	)	

On consideration of the motion filed by the National Institute of Military Justice for leave to file memorandum as amicus curiae and Petitioner's motions to attach, it is, by the Court, this 30th day of October, 2003,

ORDERED:

That said motions are hereby granted.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Petitioner (KISOR)
Counsel for Respondent (GATTO)
Amicus Curiae (FIDELL, Esq.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re Firecontrolman Chief SALVADOR DIAZ, U.S. Navy, *Petitioner.*	MEMORANDUM OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* NMCM No. 200200374 USCA Dkt. No. 03-8014/NA

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July 8, 2003

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

In accordance with Rules 26 and 30, the National Institute of Military Justice ("NIMJ") respectfully submits this Memorandum as *Amicus Curiae*. For the reasons explained below, the petition for extraordinary relief should be granted. Unless the case is briefed by appellate defense counsel by a date certain, the Court should appoint a willing member of its bar to represent Chief Diaz before the Court of Criminal Appeals and in any proceedings here under Article 67.

Interest of the Amicus

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ participates actively in the military justice process, through such means as the filing of *amicus* briefs, rulemaking comments, its popular website (www.nimj.org), and its publications program, which includes the unofficial *Guide to the Rules of Practice and*

Procedure.

Jurisdiction, Statement of the Case and Facts

NIMJ believes there is no colorable argument that the Court lacks jurisdiction, and that the cases relied on by respondent for the contrary proposition are transparently inapposite. NIMJ is not in possession of any facts beyond what is set forth in the parties' submissions, but we do believe the response to the order to show cause is deficient in that it fails to furnish details regarding the caseload borne by the Appellate Defense Division and thereby deprives the Court of the factual predicate needed for an intelligent exercise of its authority under the All Writs Act, 28 U.S.C. § 1651.

Argument

NIMJ is submitting this memorandum for three limited purposes.

First, as a matter of principle, we applaud the Court's entry of an order to show cause. The problem of appellate delay is one with which the Court has wrestled for many years, with limited success. Particularly because the prompt administration of justice is one of the traditional raisons d'êtres for a separate system of military justice, delay is—if not a "mortal enemy" of military justice, as has been aptly said of unlawful command influence, *e.g.*, *United States v. Thomas*, 22 M.J. 388, 393 (1986)—certainly a serious and persistent concern. In offering this observation, we in no way wish to call into question the possible effect of the tempo

of military operations on staffing needs in the Judge Advocate Generals' Corps. However, nothing in the response to the order to show cause demonstrates such an effect, and we know of nothing in recent military operations of which the Court can take judicial notice that would, in fact, have impacted on the staffing required to furnish appellate defense services in the kind of timely, professional fashion the Court and the Nation have every reason to require.

Second, we offer for the Court's consideration an April 2003 ethics opinion issued by the American Council of Chief Defenders of the National Legal Aid and Defender Association. While of course there are differences between the provision of defense services in the civilian community and in the military appellate context, we believe there is much of value in the ACCD/NLADA opinion.

Third, it is certainly to be assumed that, prompted by the order to show cause, Chief Diaz will now receive the timely representation to which he is entitled. For this reason, and with prejudice to the fact that dismissal may indeed be warranted in some circumstances, NIMJ is reluctant to embrace such a sanction unless every reasonable means of addressing the delay has been tried in vain. Nor are we comfortable with setting step-by-step deadlines for the Courts of Criminal Appeals, whose importance in the military justice system was underscored only recently in *United States v. Rorie*, 58 M.J. ___ (2003). Rather than conditionally

direct a dismissal of the charges, as respondent proposes as an alternative to his main contention that the petition should be denied, the wiser approach is to prescribe only a date certain for submission of a brief and assignment of errors on Chief Diaz's behalf. If that deadline is not met, this Court should then appoint a willing member of its bar—either civilian or from another branch of the service—to represent him for the appellate phase of his case. Doing so will have the twin advantages of respecting the independence of the Court of Criminal Appeals and drawing on the broad pool of talent represented by this Court's bar.

According to the Court's report for the year ending September 30, 2002, 32,589 attorneys have been admitted to practice before the Court. Ann. Rep. Code Comm. on Mil. J. 1 (2002). More have been admitted in the intervening months. It is an unfortunate fact that the Court's bar is and always has been a seriously underutilized institutional resource.

Appointment of counsel from the Court's bar is appropriate in the circumstances of this case, *see generally* Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* 88 (190th ed. 2001), discussing *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 27 M.J. 11, 12 (1988) (mem.), but we believe it would be premature to do so until other means of expediting Article 66 review have proven unsuccessful.

An alternative to appointing a member of the Court's bar would be to direct the Court of Criminal Appeals to appoint counsel from its own bar. But doing so would unduly invade the province of that court. Moreover, the far larger size of this Court's bar and the need to underscore the institutional dimension of the problem militate in favor of an appointment—if one proves to be needed—from this Court's bar.

Conclusion

For the foregoing reasons, the Court should fix a deadline for submission of a brief and assignment of errors for Chief Diaz in the Court of Criminal Appeals. If that deadline is not met, the Court should appoint a willing member of its bar to represent him in that court and in any proceedings here under Article 67.

Respectfully submitted,

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July 8, 2003

American Council of Chief Defenders
National Legal Aid and Defender Association

Ethics Opinion 03-01
April 2003

Situation presented:

Due to budgetary pressures within a jurisdiction, a public defense agency is under pressure to accept a substantial budget cut, even though the agency's caseload is not projected to decrease. Alternatively, the agency faces a flat budget but substantially increasing caseloads. In either event, the agency's chief executive officer has determined that some portion of the caseload will be beyond the capacity of the staff to competently handle. What are the ethical obligations of the agency's chief executive officer in such a situation?

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards.

When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

Principle sources: American Bar Association Model Code of Professional Responsibility ("Model Code"); American Bar Association Model Rules of Professional Conduct ("Model Rules"); *Ten Principles of a Public Defense Delivery System* (American Bar Association, 2002) ("ABA Ten Principles"); American Bar Association *Standards for Criminal Justice, Defense Function* (3rd ed. 1993) ("ABA Defense Function"); National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representation* (1995) ("Performance Guidelines"); Monahan and Clark, "Coping with Excessive Workload," Ch. 23 of *Ethical Problems Facing the Criminal Defense Lawyer*, American Bar Association, 1995 ("Ethical Problems").

1. General duty of lawyer to act competently, diligently and promptly

The ABA Model Code requires that a lawyer "should represent a client competently." The ABA Model Rules further require that a lawyer "act with reasonable diligence and promptness" (Rule 1.3), including "zeal in advocacy upon the client's behalf" (*id.*, comment), and communicate promptly and effectively with clients. (Rule 1.4). "Competence" is discussed in terms of the training and experience of the lawyer to handle any particular type of case (comment to ABA Model Rule 1.1).

Inexperience is not a defense to incompetence (*Ethical Problems*, citing *In re Deardorff*, 426 P.2d 689, 692 (Col. 1981)). Being too busy with cases is not an acceptable excuse to avoid discipline for lack of knowledge of the law. (*Id., citing Nebraska State Bar Association v. Holscher*, 230 N.W. 2d 75, 80 (Neb. 1975)).

The question of what constitutes competent representation is addressed in the two national sets of performance standards for criminal defense representation: ABA *Defense Function* Standard 4-1.2 (obligation to provide "effective, quality representation"), and NLADA *Performance Guideline* 1 (duty to provide "zealous, quality representation"). These and various state and locally adopted standards derived therefrom are published as Volume 2 of the U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems* (Office of Justice Programs, 2000 www.ojp.usdoj.gov/indigentdefense/compendium/).

Among the basic components of competent representation under the ABA and NLADA standards, and as discussed in *Ethical Problems, supra,* are:

- Timeliness of representation, encompassing prompt action to protect the rights of the accused;
- Thoroughness and preparation, including research to discover readily ascertainable law, at risk of discipline and disbarment;
- Independent investigation of the facts of the case (use of a professional investigator is more cost-effective than a higher-compensated attorney performing this function)
- Client relationship and interviewing, including not just timely fact gathering, but building a relationship of trust and honesty that is necessary to an effective working relationship;
- Regular client communications, to support informed decision-making; prompt and thorough investigation;
- Discovery (failure to request exculpatory evidence from prosecution is violation of constitutional right to counsel, *Kimmelman v. Morrison,* 477 U.S. 365, 368-69, 385 (1986));
- Retention of experts (including mitigation specialists in capital cases) and forensic services, where appropriate in any case;
- Exploring and advocating alternative dispositions;
- Competent discharge of duties at all the various stages of trial court representation, including from voir dire and opening statement to closing argument;
- Sentencing advocacy, including familiarity with all sentencing alternatives and consequences, and presence at all presentence investigation interviews;
- Appellate representation, including explaining the right, the consequences, the grounds, and taking all steps to preserve issues for appeal (there are additional duties of appellate counsel, under ABA Defense Function Standard 4-8.3, including reviewing the entire appellate record, considering all potential guilt or penalty issues, doing research, and presenting all pleadings in the interest of the client); and
- Maintaining competence through continuing legal education: mandatory CLE was mandated for the first time by the ABA – but only for public defense providers – in

Principle 9 of its *Ten Principles*[1] ("**Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors"). Training, it should be noted, takes away from the time an attorney has available to provide direct representation (ABA Principle 5, infra: numerical caseload limitations should be adjusted to reflect an attorney's nonrepresentational duties).

Failure to perform such basic duties as researching the law, investigation, advising the client on available defenses, or other preparation, may constitute a constitutional violation, *State* v. *Felton,* 329 N.W.2d 161 (Wis. 1983), or warrant disciplinary sanctions, *Office of Disciplinary Counsel v. Henry,* 664 S. W. 2d 62 (Tenn. 1983); *Florida Bar v. Morales,* 366 So. 2d 431 (Fla. 1978); *Matter of Lewis,* 445 N.E.2d 987 (Ind. 1983). Under national standards, indigent defense counsel's incurring of expenses such as for experts or investigators may not be subject to judicial disapproval or diminution. The first of the ABA Ten Principles (recapitulating other ABA standards) provides that indigent defense counsel should be "subject to judicial supervision only in the same manner and to the same extent as retained counsel," and the courts have no role with regard to matters such as utilization of experts or investigators by retained counsel. By extension, prosecutors have no role in moving for any such judicial action.

Effective assistance of counsel means "that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients." *State v. Peart,* 621 So. 2d 780, 789 (La. 1993). It is no excuse that an attorney is so overloaded as to become disabled or diminished by personal strain or depression; when too much work results in lawyer burnout, discipline for neglect of a client is still the consequence. *In re Conduct of Loew,* 642 P.2d 1174 (Or. 1982).

2. Indigent defender's duty to limit workload so as to ensure quality, and to decline excess cases

The ABA has very recently placed these ethical commands in the context of workload limits on providers of public defense services. Principle 5 of the ABA's *Ten Principles* states:

> **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.

This principle is not expressed as new policy, but as a restatement and summary of long-standing ethical standards and legal requirements relating to indigent defense systems, which are in turn derived from the basic commands of the ABA Model Code and Model Rules. The standards cited are:

[1] The ABA Ten Principles are substantially identical to a document published by the U.S. Department of Justice in December 2000 to guide local jurisdictions in the development and adoption of indigent defense standards: the "Ten Commandments of Public Defense Delivery Systems," written by James Neuhard, State Appellate Defender of Michigan and former NLADA President, and Scott Wallace, NLADA Director of Defender Legal Services, published as an introduction to the five-volume *Compendium of Standards for Indigent Defense Systems*. See www.ojp.usdoj.gov/indigentdefense/compendium/standardsv1/v1intro.htm#Ten.

- National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "National Study Commission"], Guideline 5.1, 5.3;
- American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA Defense Services"], Standard 5-5.3;
- ABA Defense Function, Standard 4-1.3(e);
- National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standard 13.12;
- *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (National Legal Aid and Defender Association, 1984) [hereinafter "Contracting"], Guidelines III-6, III-12;
- *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989) [hereinafter "Assigned Counsel," Standards 4.1,4.1.2;
- Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties," Standard 2.2 (B) (iv).

The duty to decline excess cases is based both on the prohibition against accepting cases which cannot be handled "competently, promptly and to completion" (Model Rule 1.16(a)(1) and accompanying commentary), and the conflict-of-interest based requirement that a lawyer is prohibited from representing a client "if the representation of that client may be materially limited by the lawyer's responsibility to another client." (See *Keeping Defender Workloads Manageable*, U.S. Department of Justice, Bureau of Justice Assistance monograph, NCJ 185632, January 2001, at 4-6).

"As licensed professionals, attorneys are expected to develop procedures which are adequate to assume that they will handle their cases in a proficient fashion and that they will not accept more cases than they can manage effectively. When an attorney fails to do this, he or she may be disciplined even where there is no showing of malicious intent or dishonesty. The purpose of attorney discipline is not to punish the attorney but to ensure that members of the public can safely assume that the attorney to whom they entrust their cases is worthy of that trust." *In re Martinez, 717* P.2d 1121, 1122 (1986). The fact that the unethical conduct was a prevalent or customary practice among other lawyers is not sufficient to excuse unprofessional conduct. *KBA v. Hammond,* 619 S.W.2d 696, 699 (Ky. 1981). In *People v. Johnson,* 606 P. 2d 738, 744 (Cal. 1980), the court found that a public defender's waiver of one client's speedy trial rights because of the demands of other cases "is not a matter of defense strategy at all; it is an attempt to resolve a conflict of interest by preferring one client over another." Counsel's abdication, if made "solely to resolve a calendar conflict and not to promote the best interests of his client," the court held, "cannot stand unless supported by the express or implied consent of the client himself." In any event, the client's consent must be both fully informed and voluntary.

The duty to decline excess cases has been recognized and enforced through both constitutional caselaw and attorney disciplinary proceedings, as reviewed in *Ethical Problems*. "[T]he duty of loyalty [is] perhaps the most basic of counsel's duties." *Strickland v. Washington,* 466 U.S. 668, 692 (1984). "When faced with a workload that makes it impossible for a lawyer to prepare adequately for cases, and to represent clients competently, the staff lawyer should, except in extreme or urgent cases, decline new legal matters and should continue representation in pending matters only to the extent that the duty of competent, nonneglectful representation can be ful-

filled." Wisconsin Formal Opinion E-84-.11, reaffirmed in Wisconsin Formal Opinion E-91-3. "There can be no question that taking on more work than an attorney can handle adequately is a violation of a lawyer's ethical obligations.... No one seriously questions that a lawyer's staggering caseloads can result in a breach of the lawyer's duty of competence." Arizona Opinion 90-10. *See State v. Alvey,* 524 P.2d 747 (1974); *State v. Gasen,* 356 N.E.2d 505 (1976).

A chief public defender may not countenance excessive caseloads even if it saves the county money (*Young v. County of Marin*, 195 Cal.All.3d §63, 241 Cal.Rptr. 3d 863). Nor is a chief public defender permitted to allow his or her financial interests, personal or professional, to oppose the interests of any client represented by any attorney in the office (*People v. Barboza*, 29 Cal.3d, 173 Cal.Rptr. 458). Nor can the lawyer's ethical or constitutional obligations be contracted away by a public defender agency's contract with the municipality or other government body.[2]

Though the duty to decline excess cases is the same for both the individual attorney and the chief executive of a public defense agency, the individual attorney may not always have the *ability* to withdraw from a case once appointed. If a court denies the attorney's motion to withdraw from a case due to issues such as excessive workload, the attorney may, under ABA Model Rule 1.16(a) (Declining or Terminating Representation), have no choice but to continue representing the client, while retaining a duty to object and seek appropriate judicial review, as noted in *Ethical Problems.* A chief defender, on the other hand, has the ability not only to decline cases prospectively (as does the individual lawyer), but to redress an individual staff attorney's case-overload crisis by reallocating cases among staff attorneys or declaring the whole office unavailable for further appointments.

3. Determining whether workload is excessive

The question of how to determine whether the workload of an attorney has become excessive and unmanageable is addressed in the remainder of ABA Principle 5. It provides that:

> National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

The national caseload standards referenced as unconditional numerical maxima per attorney per year, are those promulgated in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, a body established by Administrator of the U.S. Law Enforcement Assistance Administration to write standards for all components of the criminal justice system, pursuant to the recommendation of the President's Commission on Law Enforcement and Administration of Justice in its 1967 report, *The Challenge of Crime in a Free Society.*[3] Courts

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[2] Model Rule 1.8(f)(2) allows a lawyer to accept compensation for representing a person from a third party, but only if, first, there is no interference with the lawyer's independence of professional judgment, and, second, no interference with the client-lawyer relationship. This would include all of the lawyer's ethical & fiduciary obligations (including conflict of interest, zealous advocacy, competence), and legal obligations (including constitutional) to the client.

[3] As noted in a footnote to ABA Principle 5, these annual caseload limits per attorney are:

- 150 felonies
- 400 misdemeanors

have relied on numerical national caseload standards in determining the competence of the lawyer's performance for all of his or her clients. *See, e.g., State v. Smith,* 681 P.2d "1374 (Ariz. 1984). "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads." *Id.* at 1381 (cited in *Ethical Problems*).

The concept of workload referenced in ABA Principle 5 is explained in a manual prepared for the National Institute of Justice by NLADA, *Case Weighting Systems: A Handbook for Budget Preparation.* Essentially, the National Advisory Commission's numerical caseload limits are subject to local adjustment based on the "weights," or units of work, associated with different types of cases and different types of dispositions, the attorney's level of support services, and nonrepresentational duties.

The concept of workload allows appropriate adjustment to reflect jurisdiction-specific policies and practices. The determination of workload limits might start with the NAC caseload limits, and then be adjusted by factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, extent and quality of supervision, and availability of investigative, social worker and support staff.[4] It is the responsibility of each chief public defender to set appropriate workload limits for attorney staff, reflecting national standards adjusted by local factors. Some jurisdictions may end up significantly below the numerical caseload standards (e.g., if the prosecution follows a no-plea policy, or pursues statutory mandatory minimums for any class of cases), and others significantly above (e.g., if court policies favor diversion of nonviolent offenders, and judicial personnel are responsible for matching the client with appropriate community-based service providers). Workload must always subsume completion of the ethical requirements of competent representation (see section 1, *supra*) for every indigent client.

4. Special duties of the chief executive officer of a public defense agency

In a structured public defender office environment, a subordinate lawyer is ethically required to refuse to accept additional casework beyond what he or she can ethically handle, even though ordered to by a supervisor (ABA Model Rule 5.2; Attorney Grievance Committee v. Kahn, 431 A.2d 1336 (Md. 1981) (lawyer's conduct not excused by employer's order on pain of dismissal)). And conversely, a supervisor is ethically prohibited from ordering a subordinate lawyer to do

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- 200 juvenile
- 200 mental health, or
- 25 appeals

Capital cases, the note observes, are in a category by themselves: "the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea," citing *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). (Note: these are averages, not minima, and assume that, as required under federal law and national death penalty standards of the ABA and NLADA, at least two attorneys are appointed to each capital case, and that these hour-totals are spread among all attorneys on the case.)

[4] For maximum efficiency and quality, national standards call for particular ratios of staff attorneys to other staff, e.g., one investigator for every three staff attorneys (every public defender office should employ at least one investigator), one full-time supervisor for every ten staff attorneys, as well as professional business management staff, social workers, paralegal and paraprofessional staff, and secretarial/clerical staff for tasks not requiring attorney credentials or experience. National Study Commission, Guideline 4.1.

something that would cause a violation of the ethical rules (ABA Model Rule 5.1). Thus, "supervisors in a state public defender office may not ethically increase the workloads of subordinate lawyers to the point where the lawyer cannot, even at personal sacrifice, handle each of his or her clients' matters competently and in a non-neglectful manner." Wisconsin Formal Opinion E-84-11, *reaffirmed,* Wisconsin Formal Opinion E-91-3. A supervisor who does so, or a chief defender who permits it, acts unethically.

Thus, the chief executive of a public defense agency is required to decline excessive cases. *See, e.g., In re Prosecution of Criminal Appeals by the Tenth judicial Public Defender*, 561 So. 2d 1130, 1138 (Fla. 1990) (where "woefully inadequate funding of the public defender's office despite repeated appeals to the legislature for assistance" causes a "backlog of cases in the public defender's office ... so excessive that there is no possible way he can timely handle these cases, it is his responsibility to move the court to withdraw"); *Hattern v State*, 561 So. 2d 562 (Fla. 1990); *State v. Pitner*, 582 A.2d 163 (Vt.1990); *Schwarz v Cianca*, 495 So. 2d 1208 (Fla. App. 1986).

The rule is the same if the excessive caseloads are caused not by an increase in case assignments, but by decrease in funded positions. The Model Code "creates a primary duty to existing clients of the lawyer. Acceptance of new clients, with a concomitant greater overload of work, is ethically improper. Once it is apparent that staffing reductions caused by loss of funding will make it impossible to serve even the existing clientele of a legal services office, no new matters should be accepted, absent extraordinary circumstances." ABA Formal Opinion 347, *Ethical Obligations of Lawyer to Clients of Legal Services Offices When Those Offices Lose Funding* (1981). DR 6-101(A)(2) and (3) are violated by the lawyer who represents more clients than can be handled competently. *Id.*

Chief public defenders also have various duties to effectively manage the agency's staff and resources, to ensure the most cost-effective and least wasteful use of public funding. ABA Principle 10 requires that in every defender office, staff be supervised and periodically evaluated for efficiency and quality according to national standards. Principle 9 requires that systematic and comprehensive continuing legal education be provided to attorneys, to assure their competence and efficiency. Principle 3 requires that defendants be screened for financial eligibility as soon as feasible, which allows weeding out of ineligible cases and triggering of cost-recovery mechanisms (such as application fees and partial reimbursement) for clients found to be partially eligible. And Principle 1 requires that in the performance of all such duties, the chief public defender should be accountable to an independent oversight board, whose job is "to promote efficiency and quality of services."

5. Civil liability of chief public defender and unit of government

In addition to ethical problems, both the chief public defender and the jurisdiction may have civil liability for money damages as a result of the violation of a client's constitutional right to counsel caused directly by underfunding of the public defense agency. In *Miranda v. Clark County, Nevada*, 319 F.3d 465, 2003 WL 291987, (9th Cir., February 3, 2003), the *en banc* Ninth Circuit ruled that a §1983 federal civil action may stand against both the county and the chief public defender (even though the individual assistant public defender who provided the inadequate representation does

not qualify as a state actor for purposes of such a suit, under *Polk Co. v. Dodson*, 454 U.S. 312 (1981)). The chief public defender had taken various administrative steps to cut costs in response to underfunding by the county – steps other than increasing the caseloads of assistant public defenders. He adopted a policy of allocating resources for an adequate defense only to those cases where he felt that the defendant might be innocent, based upon polygraph tests administered to the office's clients. Even clients who "claimed innocence, but appeared to be guilty" through the polygraph testing, as the court put it, "were provided inadequate resources to mount an effective defense" (slip op. at 1507-08). He also adopted a policy of saving money on training, and assigning inexperienced lawyers to handle cases they were not qualified for – in this case, involving capital charges.

The court held that both policies were sufficient to create a claim of a pattern or practice of "deliberate indifference to constitutional rights," redressable under §1983. On the triage-by-polygraph policy specifically, the court wrote:

> The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt. *City of Canton*, 489 U.S. at 389. This is a core guarantee of the Sixth Amendment and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin our civil rights. *Gideon*, 372 U.S. at 340-41, 344; *Powell v. Alabama*, 287 U.S. 45, 67-69 (1932); *see also Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 1767 (2002).

Conclusion

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case, encompassing the elements of such representation prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards.

When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

CERTIFICATE OF FILING AND SERVICE

I certify that on July 8, 2003 an original and seven copies of the foregoing Memorandum as *Amicus Curiae* were delivered to the Court and copies thereof mailed to Lieutenant Frank L. Gatto, JAGC, USNR, Appellate Government Division, NAMARA, and Lieutenant Colin A. Kisor, JAGC, USNR, Appellate Defense Division, NAMARA.

Eugene R. Fidell

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re Firecontrolman Chief SALVADOR DIAZ, U.S. Navy, *Petitioner.*	MOTION OF NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE MEMORANDUM AS *AMICUS CURIAE* NMCM No. 200200374 USCA Dkt. No. 03-8014/NA

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

The National Institute of Military Justice ("NIMJ") respectfully moves for leave to file the *amicus curiae* memorandum tendered herewith.

NIMJ is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ has participated in the Court's proceedings in the past, most recently in *United States v. Rorie*, 58 M.J. ___ (2003), and believes this is another important case in which it can contribute to the search for a proper disposition.

Receipt of the brief submitted herewith will not delay the hearing or disposition of the case, C.A.A.F.R. 26(c), or prejudice either of the parties.

Respectfully submitted,

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July 8, 2003

CERTIFICATE OF FILING AND SERVICE

I certify that on July 8, 2003 an original and seven copies of the foregoing motion were delivered to the Court and copies thereof mailed to Lieutenant Frank L. Gatto, JAGC, USNR, Appellate Government Division, and Lieutenant Colin A. Kisor, JAGC, USNR, Appellate Defense Division, NAMARA.

Eugene R. Fidell

NMCCA
Diaz

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re:

Salvador DIAZ
Firecontrolman Chief (E-7)
United States Navy

Petitioner,

v.

RADM Michael F. LOHR, JAGC, USN
Navy Judge Advocate General

Respondent.

PETITIONER'S REPLY BRIEF

NMCCA NO. 200200374

USCAAF Misc. Dkt. No. 03-8014/NA

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Preamble

COMES NOW the petitioner, by and through Appellate Defense Counsel, and prays for an order by this Court granting Petitioner's request for extraordinary relief in the nature of a writ of habeas corpus.[1]

I

Jurisdiction

Jurisdiction is invoked under the All Writs Act, 28 U.S.C. § 1651(a) (2000). *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979).

II

History of the Case

A general court-martial composed of members with enlisted representation tried Petitioner on June 14, October 30, and November 27 through December 1, 2000. Contrary to Petitioner's pleas, the members convicted him of three specifications of rape of his then twelve year old daughter and two specifications of indecent acts with his then twelve year old daughter, in violation of Articles 120 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920 and 934 (2000).

The members sentenced Petitioner to confinement for nine years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. On December 21, 2001, the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed. There was no pretrial agreement in this case.

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[1] Although originally filed as a Motion for Appropriate Relief, in its order of June 16, 2003, this Court construed that motion as a petition for extraordinary relief and named the Judge Advocate General of the Navy as the Respondent.

III

Relief Was Sought Below

The requested relief was sought below. CAAF Rule 27(a)(2)(B)(i). The lower court repeatedly denied Petitions for Extraordinary Relief. *See* Orders Denying Petition for Extraordinary Relief of 4 December 2002, 13 December 2002 and 11 February 2003. In the first two denials, the Navy-Marine Corps Court of Criminal Appeals stated, "[t]he Court notes petitioner's expressed concern with post-trial and appellate delay in his case, which is currently awaiting his brief and assignments of error as the next step in the appellate review process." *Id.*

IV

Relief Sought

The Petitioner respectfully requests this Court grant Petitioner's request for a Writ of Habeas Corpus ordering his release from confinement pending resolution of his appeal.

V

Issue Presented

WHETHER PETITIONER IS ENTITLED TO EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF HABEAS CORPUS PENDING APPELLATE REVIEW OF HIS CASE IN LIGHT OF THE IMPORTANCE OF TIMELY APPELLATE REVIEW OF CASES PURSUANT TO ARTICLE 66, UCMJ, AND THE UNITED STATES CONSTITUTION, WHERE HIS DETAILED APPELLATE DEFENSE COUNSEL HAS STATED SHE IS UNABLE TO DETERMINE WHEN SHE WILL COMMENCE REVIEW OF PETITIONER'S CASE DUE TO AN EXCESSIVE CASE LOAD.

VI

Statement of Facts

Members convicted Petitioner of three specifications of raping his minor daughter, and two specifications of indecent acts. Petitioner was sentenced on December 1, 2000. Following

the convening authority's action more than a year later, the Navy-Marine Corps Appellate Review Activity received Petitioner's case on February 25, 2002. The case was docketed with the lower Court of Criminal Appeals on February 28, 2002.

After his detailed military appellate defense counsel filed her tenth request for an enlargement of time to perfect Petitioner's appeal citing, among other reasons, her excessive case load, Petitioner filed a Writ of Habeas Corpus with the lower Court requesting his release from confinement pending appeal. Petitioner based his request on the fact that his detailed appellate counsel was unable to begin reviewing his case due to excessive case load. Arguing that his rights to timely appellate review are being violated, Petitioner requested the lower Court order his release from confinement pending the eventual appellate review of his case. The lower Court denied the writ on December 4, 2002 and Petitioner filed for reconsideration of that decision on February 3, 2003. The lower Court again denied the writ on February 11, 2003. After requesting an extension of time, Petitioner filed a motion for appropriate relief with this Court on June 16, 2003. This Court issued a show cause order to Respondent as to why Petitioner's request for extraordinary relief should not be granted on June 16, 2003.

VII

Reasons Why Writ Should Issue

This case presents two fundamental questions about the very nature of the military appellate system. Is a continuing delay of greater than thirty months between trial and the filing of the first substantive appellate brief inordinate and excessive? If so, what is the appropriate remedy? Each of these questions will be addressed in turn.

A. *Petitioner's appeal has been inordinately and excessively delayed.*

Petitioner's case currently is in the ELEVENTH enlargement at the Navy-Marine Corps Court of Criminal Appeals. Appellant has been in confinement for more than two years, and has

been persistently asking appellate defense counsel to file an appeal in his case and, subsequently, petitioning military courts to release him pending appeal. In a *pro se* pleading received at the Navy-Marine Corps Court of Criminal Appeals on December 17, 2002, Petitioner wrote, "More significant is the assertion by appellate defense counsel that she will not be able to address his case in the near future due to extremely heavy case load." (Motion for Appropriate Relief of 2 December 2002.) Petitioner further stated:

> Appellant believes his appellate defense counsel faces a government-induced conflict of interest which prevents her from providing timely assistance of counsel. This is not to be construed as an attack on appellate counsel's ability as an attorney, indeed appellant is in no position to judge her qualifications, nor is appellant requesting new appellate counsel, who will most likely be similarly burdened. This is, however, a formal objection to the government's assignment of appellate counsels unable to provide effective assistance because of egregious caseload. Appellant feels that assignment of counsel under such conditions violates appellant's right to effective assistance of counsel as guaranteed by the Sixth Amendment.

Id. In fact, in the tenth motion for an enlargement of time filed on May 21, 2003, LT Rebecca Snyder, JAGC, USNR, Appellant's then-detailed appellate defense counsel, represented to the court that "due to other caseload commitments, counsel has not yet completed review of this case." (Tenth Motion For Enlargement of Time.) In that pleading, LT Snyder noted, "Counsel currently has sixty-six cases on her docket totaling more than 16,000 pages [of trial transcript, not including exhibits] eleven [cases] of which are in thirteenth enlargement or higher and comprise 8,992 pages." *Id.*

On June 25, 2003, Petitioner's case was re-assigned to LT C.A. Kisor, JAGC, USNR, who, as of June 6, 2003, is assigned as appellate defense counsel in eighty-two cases totaling 19,853 pages of trial transcript, (not including Petitioner's). LT Kisor is currently reviewing a contested murder case where that particular appellant was sentenced to life without the possibility of parole, and which is currently in twentieth enlargement. That case alone will

probably take several months to carefully read and to identify, research, and brief the assignments of error.

The Respondent correctly states in his answer brief that "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." (Respondent's Answer, at 5-6 *citing Evitts v. Lucey,* 469 U.S. 387 (1985).) The Respondent's counsel subsequently asserts that "though petitioner has served a little more than two years in confinement, he fails to establish that 18 months of appellate delay, in and of itself, is sufficient to characterize the delay as inordinate and excessive giving rise to a due process claim." (Respondent's Answer, at 8.) However, it should be noted by this Court that the "appellate delay" has been eighteen months *so far* -- with very little hope of Appellant's case being exhaustively read and the appellate issues briefed anytime soon given the present workload of the current Appellate Defense Counsel. Interestingly, CDR R. P. Taishoff, JAGC, USN, Respondent's counsel and the deputy director, Appellate Government Division, recently signed an opposition to a defense motion for enlargement in a different case, arguing that "[w]hile the Government is sympathetic to issues involving manpower and heavy caseloads, it cannot stand idle while appellant's case has been pending review for over one and one-half years." *See* Opposition to Appellant's sixteenth motion for enlargement of time in United States v. White, No 01-1242, April 29, 2003.[2]

Moreover, there is currently a "backlog" of 1463 cases awaiting an initial filing with the Court of Criminal Appeals in the Navy-Marine Corps Appellate Defense Division, with the average caseload, per counsel, being 70 cases comprising a average total of 18,100 pages of trial

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[2] Submitted contemporaneously via a separate motion to attach.

transcript. (Declaration of CDR G. F. Reilly, JAGC, USN, Director, Appellate Defense Division of 30 June 2003.)[3] In contrast, the average caseload for the Air Force Appellate Defense Division is at 45 cases, with an average of 8,825 pages of records of trial per active duty attorney. (Declaration of Colonel Beverly B. Knott, USAF, Division Chief of the Appellate Defense Division.)[4] The Air Force has a "backlog" of 317 cases. *See Id.*

Further, Respondent cites numerous cases discussing appellate delay, one of which holds that a 16-18 month delay "is within the period of time considered by the courts to be indicative of a violation of due process." (Respondent's Brief at 8 *citing Einaugler v. Dowling*, 862 F. Supp 39, 41 (E.D.N.Y. 1994.) This Court should hold that eighteen months of continuing "appellate delay" where a petitioner is in confinement and actively seeking to have his case appealed, is grounds for extraordinary relief in the form of a writ of habeas corpus.

The Respondent's argues that "this Court should take notice that Petitioner has failed to allege he is without sufficient resources to hire his own attorney who can presumably perfect his appeal in a shorter amount of time than a 'public defender, who, by the very nature of his job, will always have a higher caseload.'" (Respondent's Answer, at 10.) Firstly, Petitioner is indigent. He was awarded total forfeitures of pay and allowances and sentenced to nine years in confinement. (Record at 972.) His Chapter 7 Bankruptcy was discharged on August 8, 1999 by the United States Bankruptcy Court for the District of New Jersey. *See* Arch Docketing Report, petition 99-55552, U.S. District Court, District of New Jersey[5]; Declaration of Salvador Diaz.[6]

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[3] Submitted contemporaneously via a separate motion to attach.

[4] Submitted contemporaneously via a separate motion to attach.

[5] Submitted contemporaneously via a separate motion to attach.

Appellant does not own a home, any real estate, a car, and his assets consist of approximately $200 in his inmate account and perhaps $3000 combined in bank accounts. *Id.* Secondly, this argument is entirely spurious insofar as it amounts to an assertion that a timely appeal under Article 66, UCMJ, is available only to those who can pay for it.

Respondent next argues that "Petitioner lists a number of issues he intends to raise in the appeal of his case, he fails to give any indication of the merits of those appeals thus failing to make a colorable claim of any possibility or probability of relief on Appeal." (Respondent's Answer at 14.) Petitioner listed fourteen issues which he intended to Appeal in his *pro se* pleading to the Navy-Marine Court of Criminal Appeals of 3 December 2002, including ineffective assistance of counsel, unlawful command influence, and other procedural and evidentiary errors. Respondent posits that "Petitioner would have no reason to be anxious over an appeal which lacks any merit . . . Thus, Petitioner fails to establish he has suffered any additional anxiety since he has failed to make a colorable claim that would warrant reversal of his case or reduction of his sentence." (Respondent's Answer, at 15) Firstly, no appellate court has yet ruled on the merits of any of the issues identified by Petitioner in his succession of *pro se* pleadings. In fact, the Navy-Marine Corps Court of Criminal Appeals denied the Petition, "without prejudice to the right of petitioner to raise the same issues in the course of normal appellate review." (Order Denying Petition of 4 December 2002.) Secondly, Respondent's reasoning is entirely circular in this regard – the Respondent's stated position is that Petitioner is not entitled to extraordinary relief because he has suffered no anxiety because he has not filed an appeal with any merit, but Petitioner has not yet had the assistance of an appellate defense

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[6] Submitted contemporaneously via a separate motion to attach.

attorney in identifying, researching, and briefing the legal issues which he has identified. Thirdly, the fact that Petitioner is languishing in the USDB without having an appeal filed is obviously generating its own anxiety or Petitioner would not be filing detailed *pro se* pleadings requesting relief in the absence of assignment of an appellate defense counsel who will be able to tell him that he or she will be able to work on his case this year.

B. The Writ of Habeas Corpus is the proper remedy for this Constitutional violation.

Respondent asserts that "this court is without authority to either release petitioner and defer his sentence to confinement pending his appellate review or to order his release from confinement." (Respondent's Answer at 16.) Simply put, this is an incorrect statement of the law. The Supreme Court of the United States has unambiguously stated:

> The Government does not renew the arguments it has on occasion advanced before the Court of Military Appeals, see Brief in Support of Motion to Strike and Dismiss Petition, *United States* v. *Frischholz*, Docket No. 14,270 (1965), to the effect that the Court of Military Appeals lacks the power to grant emergency writs. In its decision in the *Frischholz* case, 16 U. S. C. M. A. 150, 36 C. M. R. 306 (1966), the Court of Military Appeals properly rejected the Government's argument, holding that the All Writs Act, 28 U. S. C. § 1651(a), permitted it to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction." Since the All Writs Act applies by its terms to any "courts established by Act of Congress," and since the Revisers of 1948 expressly noted that "the revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts," we do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. *United States v. Bevilacqua*, 18 U. S. C. M. A. 10, 39 C. M. R. 10 (1968).

Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969). More recently, in *United States v. White*, this Court considered whether the language of Article 67(c), UCMJ, "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals" precluded, on jurisdictional grounds, an

evaluation of the conditions of post-trial confinement. *See United States v. White*, 54 M.J. 469 (2001). This Court held that it did have jurisdiction and stated in dicta, "Because this case is before us on direct appeal, we need not determine our authority to review a collateral attack on the conditions of confinement. We are not persuaded, however, by the Government's suggestion that jurisdiction is precluded by *Clinton v. Goldsmith,* 526 U.S. 529 (1999.)" *Id.* at 472. Thus, the power of this Court to grant the requested relief cannot reasonably be questioned.

In determining the appropriate remedy, it is appropriate to consider the reasons for the inordinate delay. As Petitioner notes, the delay is not the fault of Petitioner's appellate defense counsel, who is simply overburdened with cases. The delay is not Petitioner's own fault either. Rather, it is the fault of the Department of the Navy which has understaffed the Appellate Defense Division relative to the number of cases to be appealed. Thus, the question of what constitutes a proper remedy should be answered with a remedy sufficient to motivate the Department of the Navy to ensure that a servicemember's right to appellate counsel under Article 70, UCMJ, to represent him or her within the appellate structure established by Articles 66 and 67, UCMJ, is respected. Releasing Petitioner from confinement pending his eventual appeal would both remedy the violation of Petitioner's right, and also would motivate the Respondent to staff the Appellate Defense Division with enough attorneys to ensure that each appellant in confinement has a timely appeal filed on his or her behalf at the Navy-Marine Corps Court of Criminal Appeals.

However, should this Court decide to grant relief short of release from confinement pending the eventual appeal, the Respondent proposes two different remedies, both of which are woefully inadequate to provide any relief for Petitioner's situation. The Respondent proposes first, that this court "order the lower court to hear the appeal within a set amount of time."

(Respondent's answer at 22.) In the conclusion section, the Respondent "requests this Court dismiss the case unless it is heard or submitted for decision within 150 days of the date of this court's order, and decide the case within 60 days of the date the case is either heard or submitted...." Such a remedy is the judicial equivalent of Marie Antionette's alleged response upon being informed that the peasants had no bread, "let them eat cake." Merely ordering the lower court to "hear" a case not yet read and briefed by appellate defense counsel impacts appellate defense counsel's ethical duty to provide effective representation if the time period to read and brief the case is unreasonably short given the counsel's workload, the complexity of the case and the number of legal issues to be analyzed. Certainly the lower Court, and this Court, may utilize their supervisory powers over cases before them. However, in this case, the lower Court will not be able to "hear" Petitioner's case within the next several months without ordering appellate defense counsel to submit a brief within a specified time period. As appellate defense counsel has had this case for only one week, appellate defense counsel makes no representation to the Court regarding how long it will take him to read and brief Petitioner's lengthy record of trial. Further, in order to fulfill his duty to petitioner to effectively represent Petitioner before the lower court if this case is to be prioritized in time above appellate defense counsel's other cases to be heard in the next several months, appellate defense counsel will have to withdraw from other cases in higher enlargement forcing reassignment of those cases to other similarly burdened appellate counsel. This will, in turn, generate more petitions similar to this one before the lower Court and this Court. Consequently, should this Court order the lower Court to "hear" appellant's case within the next several months, this Court should also order the Respondent to order the Appellate Government Division not to oppose, and the lower Court to grant, any and all

motions for withdrawal from any other cases, or any and all motions for multiple enlargements in any other cases as requested by appellate defense counsel.

Secondly, the Respondent proposes that this Court "set aside the convening authority's order executing the sentence and direct the convening authority to consider that request [for deferred confinement pending appeal.]" (Respondent's answer brief at 22.) The Respondent does not couch his answer in ripeness terms, or argue that Petitioner has not exhausted some administrative procedure, because that would acknowledge the eventual availability of Petitioner's petition for judicial review. Thus, Respondent posits that Petitioner's due process complaint is akin to a request for clemency -- reviewable *only* by the convening authority -- as opposed to a constitutional due process violation redressable in this Court. *See generally United States v. White*, 54 M. J. 469 (2001). This flies in the face of Respondent's concession that "[i]nordinate and excessive delay in the processing of an appeal can amount to a violation of due process." (Respondent's Answer at 6.) Furthermore, setting aside the convening authority's order executing the sentence will only cause Petitioner to languish in confinement until the convening authority has the opportunity to review his submission, obtain a legal opinion on it, and issue a decision, before the lower Court and this Court would then be able to review the constitutional violation and determine a remedy.

Accordingly, Petitioner submits that release from confinement pending appeal is the most appropriate remedy for the violation of Petitioner's due process right to the timely appeal of his case. However, if this Court is unwilling to remedy the due process violation by releasing Petitioner pending appeal, another remedy could be fashioned ordering the Judge Advocate General of the Navy to immediately provide a competent counsel with military appellate experience who has the time to work on Appellant's case immediately. There are a number of

ways to accomplish this: (1) the Judge Advocate General could activate a reservist with appellate litigation experience to represent Petitioner before the lower court and this court; (2) the Judge Advocate General could negotiate the temporary assignment of a Judge Advocate from the Army or Air Force or Coast Guard Appellate defense divisions to represent Appellant before the Navy-Marine Corps Court of Criminal Appeals; or (3) in the absence of either of the above by a certain date, this Court could order the Judge Advocate General to pay for a competent civilian appellate defense counsel to represent Petitioner, and include time limits for reading and briefing the case as part of the contract.

If this Court determines that selecting an appropriate remedy involves a factual examination of the staffing level of the Appellate Defense Division in relation to the backlog of the 1463 courts-martial pending an initial pleading not yet filed with the lower Court, this Court could appoint a special master under Rule 30A(e) of this Courts' Rules of Practice and Procedure to hold a hearing to take the testimony of the Judge Advocate General of the Navy and other persons in order to develop relevant facts with respect to staffing levels in the Navy-Marine Corps Appellate Defense Division, the caseload of the active duty attorneys assigned there, and the future prospects for a timely review of Petitioner's case, and thereafter to make recommendations to this Honorable Court with respect to Petitioner's request for a writ of habeas corpus.

Conclusion

As the Respondent has not shown cause why the Petition should not be granted, and for the above stated reasons, this Court should issue the extraordinary writ of habeas corpus.

VIII

Respondent's Address, Telephone and Facsimile Number

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DATED: July 3 , 2003

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Certificate of Filing and Service

I HEREBY CERTIFY that the foregoing Reply brief was served, this 3rd day of July, 2003, by delivering copies thereof to the Clerk of the Court and to:

LT FRANK L. GATTO, JAGC, USNR
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Dated: July 3, 2003

By:_____
Colin A. Kisor
Lieutenant, JAGC, USNR

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

DAILY JOURNAL

No. 03-167

Monday, June 16, 2003

PETITIONS FOR GRANT OF REVIEW FILED

No. 02-0554/AF. U.S. v. Michael L. MCMILLION. CCA 34518.*/

No. 03-0504/AR. U.S. v. Casey L. WILLIAMSON. CCA 20010992.

No. 03-0505/AR. U.S. v. Logan A. JACOBS. CCA 20010988.

No. 03-0506/AR. U.S. v. Michael A. ARVISO. CCA 20020534.

No. 03-0507/AR. U.S. v. Alejandro AMITRANO. CCA 20011107.

No. 03-0508/AR. U.S. v. Ray D. PENCE. CCA 20020712.

No. 03-0509/NA. U.S. v. Carole L. CAMACHO. CCA 9900893.

No. 03-0510/AF. U.S. v. Anthony C. CLEMO. CCA S30267.

No. 03-0511/AF. U.S. v. Monitrese L. CHAMPAIGNE. CCA S30212.

MISCELLANEOUS DOCKET - FILINGS

Misc. No. 03-8014/NA. Salvador DIAZ, Petitioner, v. The Judge Advocate General of the Navy, Respondent. CCA 200200374. On consideration of Petitioner's "Motion for Appropriate Relief", which we construe as a Petition for Extraordinary Relief, and upon consideration of Petitioner's allegation that he has been confined for more than two years, that his appellate defense counsel has yet to review his record of trial, and that appellate defense counsel is unable to determine when she will commence to review Petitioner's case because of an excessive number of cases, and in light of the importance of timely appellate review of cases under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2000), and the Constitution of the United States, it is ordered that the foregoing petition shall be docketed; that counsel be appointed to represent the parties herein; and that Respondent show cause on or before June 26, 2003, by filing an answer under Rule 28(b) why Petitioner should not be entitled to such relief as may be deemed appropriate.

Petitioner may file a reply under Rule 28(c) within five days thereafter. [See also INTERLOCUTORY ORDERS this date.]

INTERLOCUTORY ORDERS

Misc. No. 03-8014/NA. Salvador DIAZ, Petitioner, v. The Judge Advocate General of the Navy, Respondent. CCA 200200374. [See also MISCELLANEOUS DOCKET - FILINGS this date.]

*/ Second petition filed in this case.

Salvador DIAZ, Petitioner,

v.

The JUDGE ADVOCATE GENERAL OF THE NAVY, Respondent.

No. 03–8014.
Crim.App. No. 200200374.

U.S. Court of Appeals for the Armed Forces.

Decided Aug. 5, 2003.

Accused convicted by general court-martial filed petition for extraordinary relief concerning timeliness of the appellate process being afforded him as well as potential issues of ineffective assistance of appellate defense counsel. The United States Court of Appeals for the Armed Forces held that accused was not afforded timely appellate review of his findings and sentence that comported with the requirements of Article 66 and Article 70, where accused's case had yet to receive substantive review by his appellate counsel more than two and one-half years after sentencing.

Petition granted.

1. Military Justice ⇐1384

An accused has the right to a timely review of his or her findings and sentence.

2. Military Justice ⇐1244, 1412

An accused has the right to effective representation by counsel through the entire period of review following trial, including representation before the Court of Criminal Appeals and the Court of Appeals for the Armed Forces by appellate counsel. UCMJ, Art. 70, 10 U.S.C.A. § 870.

3. Constitutional Law ⇐278.6(2)
Military Justice ⇐1384

Convicted accused's right to a full and fair review of his findings and sentence under Article 66 embodies a concomitant right to have that review conducted in a timely fashion; additionally, accused has a constitutional right to a timely review guaranteed him under the Due Process Clause. U.S.C.A. Const.Amend. 5; UCMJ, Art. 66, 10 U.S.C.A. § 866.

4. Military Justice ⇐1384

The Court of Appeals for the Armed Forces will not take the caseload of a detailed appellate defense counsel into account when determining whether an appellate delay is excessive.

5. Military Justice ⇐1412

Standards for representation of servicemembers by military or civilian counsel in military appellate proceedings are identical.

6. Military Justice ⇐1384

Accused was not afforded timely appellate review of his findings and sentence that comported with the requirements of Article 66 and Article 70, where accused's case had yet to receive substantive review by his appellate counsel more than two and one-half years after sentencing. UCMJ, Arts. 66, 70, 10 U.S.C.A. §§ 866, 870.

For Petitioner: *Lieutenant Colin A. Kisor*, JAGC, USNR.

For Respondent: *Lieutenant Frank L. Gatto*, JAGC, USNR, and *Commander R.P. Taishoff*, JAGC, USN.

Amicus Curiae: *Kevin J. Barry, Eugene R. Fidell*, and *Stephen A. Saltzburg*, for the National Institute of Military Justice.

PER CURIAM:

The Petitioner, Navy Firecontrolman Chief Salvador Diaz, initiated this proceeding by filing a Motion for Appropriate Relief which raised issues concerning the timeliness of the appellate process being afforded him as well as potential issues of ineffective assistance of appellate defense counsel. In response, this Court ordered the Respondent Judge Advo-

cate General of the Navy (Government) to show cause why appropriate relief should not be granted. The Government's Answer in response to these serious issues is not persuasive. We conclude that the Navy–Marine Corps Court of Criminal Appeals should have taken action to ensure the protection of Petitioner's rights when he sought relief from that court. We therefore remand this matter to the Court of Criminal Appeals to take appropriate action and issue such orders as are necessary to ensure the timely filing of an Assignment of Errors and Brief on behalf of Petitioner, and we order such further action as directed in this opinion.

Background

Petitioner was tried by a general court-martial on June 14, October 30, and November 27—December 1, 2000. Contrary to his pleas of not guilty, he was convicted of multiple charges of rape and indecent acts with his 12–year–old daughter. On December 1, 2000 (day zero),[1] Petitioner was sentenced to a dishonorable discharge, confinement for nine years, total forfeiture of all pay and allowances, and reduction to E–1. The convening authority approved the sentence without modification on December 21, 2001 (day 385).[2]

The Navy–Marine Corps Appellate Review Activity received Petitioner's case on February 25, 2002 (day 451), and it was docketed with the Navy–Marine Corps Court of Criminal Appeals on February 28, 2002 (day 454). Petitioner's first appellate defense counsel filed ten requests for enlargement of time to file an assignment of errors. On December 3, 2002 (day 732), Petitioner filed a pro se petition for a Writ of Habeas Corpus with the Court of Criminal Appeals requesting release from confinement pending appeal. This request was based on an assertion that Petitioner's appellate defense counsel had not even commenced an initial review of the record of trial because of an excessive caseload. The court denied the writ petition on December 4, 2002 (day 733), though it did note that Petitioner "expressed concern with post-trial and appellate delay in his case." Petitioner filed for reconsideration, which was denied on February 11, 2003 (day 802).

Petitioner then filed a Motion for Appropriate Relief with this Court. We construed his motion as a Petition for Extraordinary Relief, and on June 16, 2003 (day 927), we ordered the Government to show cause why relief should not be granted. The Government filed an Answer to the Show Cause Order on June 26, 2003 (day 937). Represented by a new appellate defense counsel, Petitioner filed his Reply to Respondent's Answer on July 3, 2003 (day 944).

The Government's Answer

Although the Government acknowledges that the Due Process and Equal Protection Clauses of the Constitution apply to review of a case before the service Courts of Criminal Appeals, and that "[d]elays caused by Government or State paid attorneys representing an accused on appeal have been held attributable to the Government[,]" the Government broadly asserts that "[t]he appellate delay in this case was neither excessive nor has it amounted to a prejudicial violation of Petitioner's due process rights."

Despite the fact that Petitioner's appellate defense counsel have had this case since late February 2002, the Government argues that Petitioner has failed to show that this delay, "in and of itself, is sufficient to characterize the delay as inordinate and excessive giving rise to a due process claim." The Government also notes that Petitioner "has not even served one-third of his nine year sentence," although this fact would seem to underscore rather than excuse the failure to initiate a legal and factual review that could conceiv-

1. As Petitioner's primary allegation is that his appellate review has not been processed in a timely manner, we will note the number of days from sentencing upon which each significant event in the post-trial process occurred.

2. The Government notes in a footnote that the post-trial delay from sentencing to action "was not unreasonable under the circumstances." Because the reasonableness of any delay between sentencing and the convening authority's action is a matter for consideration initially by the Court of Criminal Appeals, *see United States v. Tardif*, 57 M.J. 219 (C.A.A.F.2002), that issue is not before us at this time.

ably alter Petitioner's conviction, sentence, or both.

The Government makes several specific arguments why the delay should not be considered excessive:

- Due to the unique rights accorded servicemembers in our court-martial system, this Court should acknowledge that a detailed appellate counsel's caseload can be an appropriate factor in deciding when the length of appellate delay becomes inordinate and excessive;
- This Court should not judge the length of time it takes a detailed military counsel to perfect an appeal in relation to the time it takes to perfect such an appeal when an appellant decides to hire his own private civilian counsel;
- This Court should not judge the length of time it takes a detailed military counsel to perfect an appeal in relation to civilian "public defenders" who are required to represent only indigent defendants, not all defendants, before the court;
- The military justice system requires the mandatory review of a vast number of court-martial cases regardless of whether the servicemember files a notice of appeal, and it is therefore reasonable and not a violation of due process when an appeal takes longer to perfect and decide in the military justice system than in the civilian justice system;
- This delay is not inordinate or excessive because of the size of the record of trial, the seriousness of the charges, the number of issues identified by Petitioner, and the "high volume of cases submitted to the lower Court."

The Government summarizes that "the advocacy of the parties, the institutional vigilance of both the lower Court and the Government, as well as the reasons for the delay all justify the delay in this case."

Even if this Court were to find a violation of due process, the Government argues that Petitioner is not entitled to relief, because he has not established substantial prejudice. The Government urges that the factors to be used in determining substantial prejudice in a case of speedy appellate review are similar to those used to determine prejudice for lack of a speedy trial [3] and that Petitioner has not met his burden.

Petitioner's Reply

Petitioner argues in his Reply that the delay has been inordinate and excessive. Petitioner focuses primarily on the root problem that caused the delay but also addresses the various rationalizations offered by the Government for the delay.

Petitioner notes that his case is currently on its eleventh period of enlargement. He points out that his case has yet to receive any substantive review by his appellate counsel, even though counsel has had his case since February 28, 2002. He has been confined post-trial for more than two and one-half years; he has asserted his right to speedy appellate review; and his case is now in the hands of a second detailed appellate defense counsel. In her tenth request for enlargement, Petitioner's first appellate defense counsel cited her "caseload commitments" as cause for the requested relief. That "commitment" included "sixty-six cases on her docket totaling more than 16,000 pages [of trial transcript,] eleven [cases] in thirteenth enlargement or higher."

Now on an eleventh enlargement, Petitioner's case is in the hands of a new appellate defense counsel. That new counsel notes that there is "little hope of [Petitioner's] case being exhaustively read and the appellate issues briefed anytime soon given the present workload of the current Appellate Defense Counsel."

Petitioner's counsel also informs us that there are 1,463 cases pending initial review and filing by Navy–Marine Corps appellate defense counsel, and the average caseload,

3. "1) preventing oppressive incarceration pending appeal; 2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeal; and 3) limiting of the possibility that Petitioner's grounds for appeal or, in the event of reversal, his defense in the case on retrial might be impaired."

per counsel, in the Navy-Marine Corps Appellate Defense Division is "70 cases comprising [an] average total of 18,100 pages of trial transcript." Petitioner asserts that the increasingly long period of "continuing" appellate delay, during which he has actively pursued his appeal, is grounds for extraordinary relief.

In contending that he is being denied speedy appellate review, Petitioner takes specific issue with several of the Government's arguments. Petitioner disputes the suggestion that he should seek civilian counsel. Petitioner asserts that he is indigent, was sentenced to total forfeitures, has gone through bankruptcy, has no property, and has only about $3,200 in various accounts. Additionally, Petitioner notes that the suggestion that he should protect his right to a speedy appellate review by hiring civilian counsel "is entirely spurious insofar as it amounts to an assertion that a timely appeal under Article 66, UCMJ, is available only to those who can pay for it."

Petitioner next disputes the Government's claim that the issues Petitioner identified for review do not make a "colorable claim of any possibility or probability of relief on Appeal." Petitioner notes that he has identified 14 issues in pro se pleadings filed at the Court of Criminal Appeals. These issues include "ineffective assistance of counsel, unlawful command influence, and other procedural and evidentiary errors" which have yet to be reviewed or ruled upon by any appellate court. Petitioner questions the soundness of the Government's claim that, in order to be entitled to relief from this delay, he must show that his direct appeal has merit, when he "has not had the assistance of an appellate defense attorney in identifying, researching, and briefing the legal issues which he has identified."

Petitioner further asserts that he is anxiously languishing in prison, a fact evidenced by his detailed pro se pleadings and his efforts to prosecute his appeal even though his appellate defense counsel have been unable to provide him professional assistance.

Discussion

[1, 2] This Court has long recognized that an accused has the right to a timely review of his or her findings and sentence. *See United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F.2001). That review spans a continuum of process from review by the convening authority under Article 60, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 860 (2000), to review by a Court of Criminal Appeals under Article 66, UCMJ, 10 U.S.C. § 866 (2000), to review, in appropriate cases, by this Court under Article 67, UCMJ, 10 U.S.C. § 867 (2000). An accused has the right to effective representation by counsel through the entire period of review following trial, including representation before the Court of Criminal Appeals and our Court by appellate counsel appointed under Article 70, UCMJ, 10 U.S.C. § 870 (2000). *See United States v. Palenius*, 2 M.J. 86 (C.M.A.1977).

We have had repeated opportunities to address issues of delay in the various stages of that review process. *See, e.g., United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002)(13–month delay between sentencing and referral to Court of Criminal Appeals); *United States v. Hock, et al.*, 31 M.J. 334 (C.M.A.1990)(delay of several years between service of lower court decisions and petitions for review at this Court); *United States v. Dunbar*, 31 M.J. 70 (C.M.A.1990)(three-year delay between trial date and docketing at the service court); *United States v. Clevidence*, 14 M.J. 17 (C.M.A.1982)(313–day delay between sentence and final action by supervisory authority); *United States v. Green*, 4 M.J. 203 (C.M.A.1978)(nine-month delay in transmission of appeal from service court to this Court); *United States v. Timmons*, 22 C.M.A. 226, 46 C.M.R. 226 (1973)(six-month delay between sentencing and action by convening authority). We are, for present purposes, concerned with the delay in the processing of Petitioner's case under Article 66. *See* 59 M.J. at 35 n.2.

[3] Petitioner's right to a full and fair review of his findings and sentence under Article 66 embodies a concomitant right to have that review conducted in a timely fash-

ion. Additionally, Petitioner has a constitutional right to a timely review guaranteed him under the Due Process Clause. *Harris et al. v. Champion et al.*, 15 F.3d 1538 (10th Cir.1994)(quoting *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)(where state has created appellate process as integral part of criminal justice system, procedures used in deciding appeal must comport with demands of due process and equal protection)); *United States v. Antoine*, 906 F.2d 1379 (9th Cir.1990); *United States ex rel. Green v. Washington*, 917 F.Supp. 1238 (N.D.Ill.1996).

[4, 5] The Government has advanced several arguments as to why the period of delay should not be considered as excessive or inordinate and should, in fact, be condoned by this Court as a part of the normal appellate process. We will address the Government's major arguments:

1. The Government argues that due to the unique rights afforded servicemembers by Congress, this Court should take the caseload of a detailed appellate defense counsel into account when determining whether an appellate delay is excessive. The Government, however, has not identified support in the applicable legislation or legislative history for the proposition that Congress intended that the rights afforded servicemembers under the UCMJ should be used as a basis to diminish their right to timely appellate review.[4] Appellate counsel caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government. To allow caseloads to become a factor in determining whether appellate delay is excessive would allow administrative factors to trump the Article 66 and due process rights of appellants. To the contrary, the Government has a statutory responsibility to establish a system of appellate review under Article 66 that preserves rather than diminishes the rights of convicted servicemembers.[5] In connection with that responsibility, the Government has a statutory duty under Article 70 to provide Petitioner with appellate defense counsel who is able to represent him in both a competent and timely manner before the Court of Criminal Appeals.
2. The Government suggests that Petitioner should retain private counsel, but also argues that this Court should not compare the length of time it takes a detailed military counsel to perfect an appeal to the length of time that it takes a privately retained civilian counsel. This argument first assumes that Petitioner has the resources to retain a civilian counsel, which he has asserted that he does not. It further assumes that there are two standards in military justice—a standard for detailed military counsel and a standard for privately retained civilian counsel—and that the standards for the military counsel are lower than what is expected of a civilian counsel. In fact, the

4. The American Bar Association's *Model Rules of Professional Conduct* (2003 ed.) require that counsel "shall act with reasonable diligence and promptness in representing a client." Model Rules of Prof'l Conduct R. 1.3. "A lawyer's work load must be controlled so that each matter can be handled competently." *Id.* at cmt. 2. Article 70(a), Uniform Code of Military Justice, 10 U.S.C. 870(a) (2000), places the responsibility for detailing appellate counsel on the Government. If an onerous caseload hinders the timely processing of appeals or infringes on the effective assistance of counsel, then it is the Government, not an appellant, who bears the responsibility to take corrective action. *See, e.g., Green*, 917 F.Supp. 1238, 1250 (N.D.Il.1996)(finding, based on expert testimony, that assignment of significantly more than 25 cases of average complexity to one appellate attorney in a single calendar year would create unacceptably high risk that the attorney would be unable to brief the cases competently within a reasonable period of time).

5. This Court has recognized that Congress, when defining the rights of servicemembers, was not limited to the minimum requirements established by the Constitution, and in many instances provided safeguards unparalleled in the civilian sector. *United States v. McGraner*, 13 M.J. 408, 414 (C.M.A.1982). The appellate rights afforded to servicemembers is but one example where Congress has provided greater rights than found in the civilian sector.

standards for representation of servicemembers by military or civilian counsel in military appellate proceedings are identical.

3. The Government argues that the length of time it takes detailed military appellate defense counsel to perfect an appeal should not be compared to public defenders in the public sector. The duty of diligent representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians. Courts have not hesitated to take action when public defender programs fail to represent their clients in a timely manner. *See, e.g., Harris,* 15 F.3d at 1538; *Green,* 917 F.Supp. at 1238; *In re Order On Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So.2d 1130 (Fla.1990)(per curiam). The military appellate courts should be no less diligent in protecting the rights of convicted servicemembers.

4. The Government argues that the military justice system requires that a "vast number" of court-martial cases be reviewed regardless of whether the servicemember files a notice of appeal, and that as a result the appellate process in the military necessarily takes longer than in the civilian justice system. In making this argument, the Government does not give appropriate consideration to the "awesome, plenary, de novo" nature of the review by the Courts of Criminal Appeals under Article 66. *United States v. Cole,* 31 M.J. 270, 272 (C.M.A.1990). Unlike the civilian criminal justice system, the Courts of Criminal Appeals have unique fact finding authority, and that aspect of a servicemember's case is not concluded until that review is completed. The nature of this review calls for, if anything, even greater diligence and timeliness than is found in the civilian system.

5. The Government argues that the "institutional vigilance" present in this and other cases ensures that there can be no due process violations. In making this argument, the Government asserts that Petitioner's first appellate defense counsel worked diligently, prioritized her cases, was available to Petitioner and guaranteed his access to appellate courts. The fact remains, however, that after February 28, 2002, through ten enlargements of time, Petitioner's first appellate defense counsel did not look at the substance of Petitioner's case and did not know when she would be able to do so. The appointment of a new appellate defense counsel did not rectify this problem, because that attorney concedes that he will not be able to look at the case in the foreseeable future. We reject any suggestion that "institutional vigilance" is evident in this case or that vigilance has been applied to ensure that Petitioner receives the rights he is entitled to under Article 66 and Article 70.

6. The Government argues that Petitioner cannot establish "prejudice" from the delays, but its argument is circular. It is disingenuous for the Government to argue that Petitioner has not made a "colorable claim of any possibility of relief," when the system that the Government controls has to date deprived Petitioner of the timely assistance of counsel that would enable him to perfect and refine the legal issues he has asserted.

[6] Given the current posture of Petitioner's case as outlined above, Petitioner is not being afforded an appellate review of his findings and sentence that comports with the requirements of Article 66 and Article 70. These rights must be recognized, enforced and protected by the Government, by the appellate attorneys, by the Court of Criminal Appeals, and by this Court.

We reject any suggestion that continued delay or less diligence in completing appellate review of a criminal conviction should be tolerated under the UCMJ. We are confident that the right to a timely appellate review in the military justice system is no

less important and no less a protection than its counterpart in the civilian criminal justice system. As noted, we reject any suggestion that institutional vigilance is evident in Petitioner's case. The Government's general proposition that "so far" there is no showing of excessive or inordinate delay warranting remedial action by this Court is not accurate. Instead, Petitioner's case illustrates that nothing has been done "so far" to respect or ensure Petitioner's right to timely review of his findings and sentence.

We are therefore returning this case to the Navy–Marine Corps Court of Criminal Appeals, as it is that court which is directly responsible for exercising "institutional vigilance" over this and all other cases pending Article 66 review within the Navy–Marine Corps Appellate Review Activity. ..

Decision and Order

The Petition for Extraordinary Relief is granted as follows:

1. This case is remanded to the Navy–Marine Corps Court of Criminal Appeals. That court shall expeditiously review the processing and sta Petitioner's Article 66 appeal.
2. The Court of Criminal Appeal take appropriate action to ensu Petitioner receives the rights he titled to under Article 66 and 70, and issue such orders as are sary to ensure timely filing of signment of Errors and Brief on of Petitioner and the timely filin Answer to the Assignment of on behalf of the Government.
3. It is further directed that wit days of the date of this opini Navy–Marine Corps Court of C Appeals shall submit a report Court which specifies the steps to comply with the provisions opinion in regard to Petitioner a er appellants awaiting appellate under Article 66 before the Na rine Corps Court of Criminal A
4. This order is entered without pr to Petitioner's right to assert a tion of his statutory and constit rights to speedy appellate rev the ordinary course of appeal.