

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

In Re

Roberto RODRIGUEZ-RIVERA  
Personnelman Second Class  
(E-5)  
U.S. Navy,  
Petitioner

v.

The Navy-Marine Corps Court of  
Criminal Appeals,

The Judge Advocate General of  
the Navy

and

United States,

Respondents

RESPONDENT'S ANSWER TO SHOW  
CAUSE ORDER OF DECEMBER 22,  
2004

NMCM No. 9900859

USCA Dkt. No. 05-8007/NA

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

**Preamble**

Comes now the Respondent, the Judge Advocate General of the  
Navy, in answer to this Court's order of December 22nd, 2004.

**History of the Case**

Petitioner was tried December 3, 7-12, and 14, 1998 by a  
general court-martial composed of members with enlisted  
representation. Contrary to his pleas, Petitioner was convicted  
of making false official statements, forcible sodomy on a child

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under the age of 12, taking indecent liberties with a female under the age of 16, and committing indecent acts with a female under the age of 16, in violation of Articles 107, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 925, and 934. He was sentenced to confinement for 12 years, forfeiture of all pay and allowances, reduction to pay-grade E-1, and a dishonorable discharge. On November 9, 1999, the convening authority approved the sentence as adjudged, and, except for the dishonorable discharge, ordered it executed.

The Navy-Marine Corps Court of Criminal Appeals docketed the case for review pursuant to Article 66, UCMJ on December 2, 1999. Petitioner requested 23 enlargements of time, and filed his brief 1026 days later, on September 23, 2002. The Government filed its response 234 days later, on May 15, 2003, after requesting five enlargements. The case was submitted to Panel Two of the Navy-Marine Corps of Criminal Appeals on May 30, 2003, and was pending a decision when the writ presently in question was filed.

On June 23, 2004, Petitioner filed an extraordinary writ with this Court. This Court returned the petition, indicating Petitioner had failed to first request relief from the court below. On July 6, 2004, Petitioner filed a motion to expedite review. On July 22, 2004, the Navy-Marine Corps Court of Criminal Appeals granted the motion in part, stating it would "conduct expedited review of the appellant's case, moving the review of his case ahead of other appellants whose cases are

awaiting review." Order of N.M.Ct.Crim.App. of July 22, 2004.

On September 24, 2004, Petitioner again filed with this Court a petition for extraordinary relief in the nature of a writ of mandamus or, alternatively, a writ of habeas corpus. Petitioner requested that this Court require the Navy-Marine Corps Court of Criminal Appeals decide his case within 30 days or, alternatively, release him from confinement pending resolution of his appeal.

On consideration thereof, this Court ordered that the United States and the Judge Advocate General of the Navy, each show cause as to why the petition should not be granted.<sup>1</sup> The Court subsequently clarified the precise question to which the Judge Advocate General of the Navy was to respond. This answer is in response to the Court's specified question.

On January 10, 2005, the Navy-Marine Corps Court of Criminal Appeals decided Petitioner's appeal, affirming the findings and sentence. On that same day, Petitioner filed a Motion to Reconsider the decision *en banc*. The motion was denied by the Navy-Marine Corps Court of Criminal Appeals on January 18, 2005. On January 13, 2005, Respondent filed a Motion to Dismiss the petition on the basis that it was moot, and this Court has not yet ruled on that motion.

#### **Statement of Facts**

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<sup>1</sup> Petitioner also named the Navy-Marine Corps Court of Criminal Appeals as a respondent, but that court was not ordered to show cause as to why the petition should not be granted by this Court.

From August 1997 through December 1997, Petitioner baby-sat the four-year old daughter of his neighbor, Petty Officer Second Class Lavinder. Petitioner and the Lavinder family lived on base housing located aboard Royal Air Force Station West Ruislip, England. In March 1998, the then five-year old girl disclosed to her parents that Petitioner had sexually abused her. At trial, the girl testified that Petitioner had forcibly sodomized her, forced her to perform oral sex on him, masturbated in front of her, ejaculated on her, touched her vagina, and showed her pornographic movies - all on numerous occasions.

On December 14, 1998, a general court-martial composed of members found Petitioner guilty of all charges and specifications. Petitioner was sentenced to 12 years confinement, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. On November 9, 1999, the convening authority approved the findings and sentence.

#### **Issue Presented**

IN LIGHT OF THE JUDGE ADVOCATE GENERAL'S STATUTORY RESPONSIBILITIES TO ESTABLISH THE SERVICE COURT OF CRIMINAL APPEALS PURSUANT TO ARTICLE 66(a), UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 866(a) (2000), AND TO DETAIL GOVERNMENT AND DEFENSE APPELLATE COUNSEL PURSUANT TO ARTICLE 70(a), UCMJ, 10 U.S.C. § 870(a) (2000), AND IN LIGHT OF THE JUDGE ADVOCATE GENERAL'S STATUTORY AUTHORITY WITH RESPECT TO THE ASSIGNMENT OF JUDGE ADVOCATE OFFICERS OF THE NAVY UNDER ARTICLE 6(a), UCMJ, 10 U.S.C. § 806(a) (2000), WHAT RESPONSIBILITY DOES RESPONDENT

JUDGE ADVOCATE GENERAL OF THE NAVY HAVE TO ASSIGN SUFFICIENT APPELLATE COUNSEL AND APPELLATE MILITARY JUDGES TO THE APPELLATE DIVISIONS AND THE COURT OF CRIMINAL APPEALS, RESPECTIVELY, TO ASSURE PETITIONER'S CASE IS BRIEFED, REVIEWED AND ADJUDICATED IN A TIMELY MANNER?

### **Response**

As an initial matter, Petitioner's request for extraordinary relief is moot because the court below has obviated the need for a mandate. See Respondent, the United States' Motion to Dismiss of January 13, 2005 and Reply to Petitioner's Opposition of January 21, 2005.

Additionally, the Court's question of the Judge Advocate General of the Navy appears to be inappropriate and its answer unnecessary for resolution of the petition.

When Congress created the Court of Appeals for the Armed Forces (CAAF), it confined the Court's jurisdiction to the review of specified courts-martial. See U.S. Const. Art. I, § 8, cl. 14; 10 U.S.C. § 941; Article 67, UCMJ, 10 U.S.C. §867 (2000). Congress "narrowly circumscribed" CAAF's jurisdiction to 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." *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999); Article 67, UCMJ.

The Court's authority to employ extraordinary writs is confined to the authority to the issuance of writs "in aid of"

its jurisdiction. All Writs Act, 28 U.S.C. § 1651(a) (2000). The Act does not enlarge the jurisdiction of courts created by Congress. *Pennsylvania Bureau of Corrections v. United States Marshalls Service*, 474 U.S. 34, 41 (1985). Accordingly, "the CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice." *Clinton*, 526 U.S. at 537.

Clearly, Petitioner's request correctly falls within the authority of the CAAF to grant or deny the petition. However, it is unclear how Petitioner's request that the court below be ordered to decide his case within 30 days properly implicates the assigned issue that the Respondent, Judge Advocate General of the Navy, has been ordered to answer.

The issue assigned appears to involve an exercise of supervisory authority by this Court. Supervisory authority is not a basis for jurisdiction. The Supreme Court has explained that "supervisory authority" permits a superior court in some circumstances to "formulate procedural rules not specifically required by the Constitution or the Congress \* \* \* to implement a remedy for violation of recognized rights, \* \* \* to preserve judicial integrity \* \* \*, and \* \* \* to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983). However, the superior courts described in *Hasting* are courts of original jurisdiction, not Federal courts created by Article I of the Constitution. As stated by the Supreme Court, the CAAF would be

"simply wrong [to] treat itself as a court of original jurisdiction." *Clinton*, 525 U.S. at 537.

The CAAF was given a supervisory role in that it reviews particular courts-martial for errors of law. Article 67, UCMJ. But the information this Court has requested of the Judge Advocate General does not, on its face, appear necessary for this Court to decide whether it should issue a mandate in Petitioner's case. As a practical matter, further assignments of counsel cannot possibly affect the timeliness of appellate review of Petitioner's case. Likewise, further assignment of military judges to the Navy-Marine Corps Court of Criminal Appeals, after a case has been with the lower court for 16 months, would have little or no affect on the timeliness of that case being reviewed and adjudicated.

Should the Court nevertheless continue to believe that a response to the specified issue is necessary to the resolution of the case before it, the Judge Advocate General of the Navy provides the following information.

The Judge Advocates General were given the responsibility to establish the service Courts of Criminal Appeals by Article 66(a), UCMJ, 10 U.S.C. § 866(a) (2000). Article 66(a), UCMJ, requires that the Court of Criminal Appeals shall be composed of one or more panels consisting of not less than three appellate military judges. The Judge Advocates General are also required to designate as chief judge one of the appellate military judges

of the service court they establish.

Article 66(f), UCMJ, 10 U.S.C. § 866(f) (2000), requires that the Judge Advocates General prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of courts-martial.

The Judge Advocates General are also responsible for detailing Government and Defense Appellate Counsel pursuant to Article 70(a), UCMJ, 10 U.S.C. § 870(a) (2000). The Judge Advocate General of the Navy has established the Navy-Marine Corps Appellate Review Activity in order to facilitate the detailing of Government and Defense Appellate Counsel.<sup>2</sup>

Article 6(a), UCMJ, 10 U.S.C. § 806(a) (2000) states that assignment for duty of judge advocates of the services shall be made upon the recommendation of the corresponding Judge Advocate General. It further states that the assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General of the Navy does not have absolute authority in the assignment of judge advocates within the Department of the Navy. He does, however, have the ability to substantially influence that assignment process.

Pursuant to these statutory requirements, the Judge Advocate

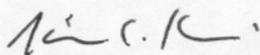
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<sup>2</sup> A detailed response regarding the staffing of the Navy-Marine Corps Appellate Review Activity was previously forwarded to this Court. See *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (2003).

General of the Navy periodically reviews the process, procedures and staffing of appellate counsel and the Navy-Marine Corps Court of Criminal Appeals. The appellate review activities are staffed consistent with the operational needs of the Navy and Marine Corps and authorized manpower limits. They are currently manned sufficiently to accomplish the mission identified in Article 66, UCMJ and Article 70, UCMJ.

### **Conclusion**

WHEREFORE, the Respondent respectfully submits the following answer in response to the Court's order of December 22, 2004.



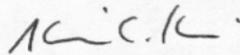
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**Certificate of Compliance**

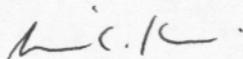
This brief complies with the type-volume limitation of Rule 24(d) because the brief contains 2,039 words, and this brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface using Microsoft Word 2000 with 10.5 characters per inch and courier font.



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**Certificate of Filing and Service**

I certify that the original and seven copies of the foregoing were mailed first class to the Court on January 21, 2005, and that a copy of the foregoing was delivered to Lt. Brian Mizer, JACG, USN on January 21, 2005.



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