

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

C.A. PRICE

M.J. SUSZAN

R.C. HARRIS

**Jahmal R. CLARK
Corporal (E-4), U.S. Marine Corps**

Petitioner

v.

**Colonel COLLEEN C. MCGUIRE, U.S. Army
Commandant, USDB
and**

UNITED STATES

Respondents

NMCCA 200300254

Decided 12 January 2004

LT MICHAEL J. NAVARRE, JAGC, USN, Appellate Defense Counsel
Maj RAYMOND E. BEAL II, USMC, Appellate Government Counsel

Decision on Petition for Extraordinary Relief in the Nature of a
Writ of *Habeas Corpus* or alternatively a Writ of *Mandamus*.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

The petitioner has requested that this court issue a writ of *habeas corpus* or, in the alternative, order additional day-for-day credit for a period of nearly two and one-half years. The basis for the petition is: (1) unreasonable post-trial delay in the convening authority's action; (2) unreasonable delay in transmitting the record of trial to this court and the associated delay in the appointment of appellate defense counsel; (3) oppressive conditions of confinement suffered by the petitioner during the delays; and (4) illegible portions of the record.

The issuance of a writ is "a drastic remedy that should be used only on truly extraordinary situations." *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). The petitioner bears the heavy burden to show "that he is clearly and indisputably entitled to the relief as a matter of right." *Ross v. United States*, 43 M.J. 770, 771 (N.M.Ct.Crim.App. 1995).

We have carefully considered the petition and supporting brief, the Respondent's answer, and the petitioner's reply, as well as all associated pleadings and the record of trial. We conclude that the petitioner has not borne his heavy burden to demonstrate why extraordinary relief should be accorded to him. Accordingly, the petition is denied.

Judge SUSZAN concurs.

HARRIS, Judge (dissenting):

This case comes before this court as a petition for extraordinary relief in the nature of a writ of *habeas corpus* or, alternatively, a writ of *mandamus*. As to the majority's denial of the petition for extraordinary relief, I respectfully dissent.

The petitioner specifically requests that this court order the respondent Commandant of the United States Military Disciplinary Barracks to release him from confinement pending resolution of his appeal, and to further order the deferment of his remaining sentence to confinement until appellate review of his case is complete. In the alternative, the petitioner requests that this court issue a writ of *mandamus*, ordering additional day-for-day sentence credit from the date the petitioner first brought the delay to the Government's attention, 6 September 2000, until the date his case was docketed with this court for appellate review, 13 February 2003.

This court has jurisdiction to determine whether it has jurisdiction to entertain a petition for extraordinary relief. See RULE FOR COURTS-MARTIAL 1203(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. Further, this court has jurisdiction over the petitioner's case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. Finally, this court has authority under the "All Writs Act" to issue all writs necessary or appropriate "in aid of" its "respective" statutory jurisdiction. 28 U.S.C. § 1651(a); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); see *Dettinger v. United States*,

7 M.J. 216, 218-19 (C.M.A. 1979); see also *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993).

The issuance of a writ is "a drastic remedy that should be used only on truly extraordinary situations." *Aviz*, 36 M.J. at 1028 (quoting *United States v. Labella*, 15 M.J. 228, (N.M.C.M.R. 1983)). The writ of *habeas corpus* is the "traditional remedy for unlawful imprisonment." *Waller v. Swift*, 30 M.J. 139, 142 (C.M.A. 1990). The petitioner bears a heavy burden to show "he is clearly and indisputably entitled to the relief as a matter of right." *Ross v. United States*, 43 M.J. 770, 771 (N.M.Ct.Crim.App. 1995). Further, this court has authority under the "All Writs Act" to "enter an order deferring service to confinement pending completion of appellate review." *Moore v. Akins*, 30 M.J. 249, 253 (C.M.A. 1990).

Military courts of criminal appeals, in deciding whether a petition for extraordinary relief for a delay in an appeal that violates due process warrants the extraordinary remedy of release from custody, must further determine whether the delay so tainted the appellate process as to "affect the constitutional integrity of the appeal itself." *Cody v. Henderson*, 936 F.2d 715, 722(2d Cir. 1991)(quoting *Simmons v. Reynolds*, 898 F.2d 865, 869 (2d Cir. 1990). In *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 37-38 (C.A.A.F. 2003), the Court of Appeals for the Armed Forces instructed this court to exercise its supervisory powers under Article 66, UCMJ, to ensure timely and fair appellate review of a court-martial. Further, our superior court held that "an accused has a right to a timely review of his or her findings and sentence." *Id.* at 37; see also *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001).

Finally, in determining whether extraordinary relief should be granted, military courts of criminal appeals ought to consider those factors that are designed to protect the post-trial phase, which are: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, as his or her defenses in case of reversal and retrial, might be impaired." See *United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996)(quoting *Harris v. Champion*, 15 F.3d 1538, 1559 (10th Cir. 1994)).

In the instant case, in light of alleged trial errors, the staff judge advocate's failure to address matters presented by

the petitioner pursuant to R.C.M. 1106, the convening authority's failure to address clemency matters presented by the petitioner when he acted, the Government's loss of the original record of trial and transmission of an arguably incomplete and illegible copy of the record of trial, the length of post-trial delay, both before and after the convening authority acted in the petitioner's case, with associated delay in the appointment of appellate defense counsel, and the alleged oppressive conditions of confinement suffered by the petitioner during the delays, the petitioner asserts that meaningful confinement relief will be denied if normal appellate review occurs. Petition for Extraordinary Relief of 8 Dec 2003 at 5. The petitioner further asserts that this court can tailor a remedy to address the delay and the harm caused by the delay. *Id.* at 7; see *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). I would agree.

Fully realizing that the petitioner is, in effect, asking this court to plow virgin ground in the context of extraordinary relief, a very daunting task indeed, and one that is not to be taken lightly, we must not now or, for that matter, ever shy away from our solemn responsibility of cleansing the military justice field of those occasional unsightly stones that crop up from time to time--how else will we reap the benefit of a fertile military justice field worthy of adulation.

I would grant the Petition for Extraordinary Relief and issue a Writ of *Habeas Corpus* in this case. I would further order that the respondent immediately release the petitioner from confinement and that the remainder of the petitioner's sentence to confinement be deferred until appellate review by this court is complete.

For the Court

R.H. TROIDL
Clerk of Court