

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Technical Sergeant (E-6))	Misc. Dkt No. 2003-01
CHRISTOPHER A. FLEMING)	
Petitioner)	
)	
v.)	Petition for Extraordinary Relief
)	
Lieutenant Colonel (O-5))	
THOMAS G. CROSSAN JR.)	
Military Judge)	
USAF Trial Judiciary, Eastern Circuit)	Panel No. 1
Respondent)	

Petitioner has asked this Court for extraordinary relief in the nature of a writ of prohibition.

On 7 April 2003, the petitioner submitted a request for extraordinary relief in the nature of a writ of prohibition and a request to stay the proceedings below. He petitions this Court to stay his general court-martial currently set for 29 April 2003 and to prohibit the military judge from setting a trial date before 11 August 2003. Specifically, he challenges the military judge's denial of his request for a lengthy continuance on the basis it improperly infringes upon his right to counsel of choice. Having completed our review of the appellant's petition and the law applying to the matters raised therein, we find that the petitioner has failed to establish a clear and indisputable right to a continuance. Further, we find he has failed to pursue more appropriate means to secure the relief he requests. Accordingly, the petition is denied.

Background

The petitioner faces charges alleging he assaulted, raped, and forcibly sodomized his wife and gave a false official statement, in violation of Articles 107, 120, and 128, UCMJ, 10 U.S.C. §§ 907, 920, 928. Very soon after these allegations surfaced in March of 2002, he hired Mr. Neal Connors to represent him and to serve as lead counsel. The appellant's military defense counsel was detailed in September 2002 and continues to represent him before this Court.

Charges were referred to trial by general court-martial on 7 January 2003. Both sides agreed to a trial date of 10 February 2003. On 28 January 2003, Mr. Connors, a Lieutenant Colonel (Lt Col) in the Marine Corps Reserves, received notice of an involuntary recall to active duty for an assignment at Marine Corps Headquarters in Washington, D.C. This initial notification indicated his mobilization would begin on the scheduled trial date of 10 February 2003 and end approximately six months later. Based upon this information, Mr. Connors immediately notified the military judge and trial counsel. The parties and the military judge discussed the matter in a conference pursuant to Rule for Courts-Martial (R.C.M.) 802.

As a result of this pre-trial conference, the military judge requested a written motion. On 4 February 2003, the petitioner submitted his motion for a continuance until 10 May 2003. The petitioner explained that he needed this time to “allow the facts and circumstances and extent of his [civilian defense counsel’s] mobilization to active duty to be more fully revealed prior to making any decisions on the likelihood of [his] extended non-availability.”

The government objected to the three-month delay, but conceded that a reasonable delay was appropriate to allow the petitioner time to secure substitute counsel or to make alternate arrangements for representation. On 13 February 2003, the military judge concluded that the petitioner was unable to specify a reasonably certain date his civilian counsel would be available and thus denied the request for a 10 May 2003 trial date. He set a new trial date of 11 March 2003.

On 3 March 2003, the petitioner asked the military judge to reconsider his prior ruling, this time asking for a trial date of 11 August 2003. In this motion, the petitioner advised the military judge that Lt Col Connors’ mobilization to active duty would expire on 9 July 2003. He further stated that Lt Col Connors would need an additional 33 day period after his demobilization to reopen his civilian law practice and prepare for the petitioner’s court-martial. The petitioner also informed the military judge that he intended to make a formal request for Lt Col Connors to be appointed his individual military counsel (IMC), pursuant to the provisions of R.C.M. 506(b). He asked the military judge not to “proceed without first allowing the defense the opportunity to process the IMC request. This is just another reason, in the long list of reasons, provided by the defense for the Military Judge to set the trial date for 11 August 2003 as requested and allow the IMC request to be processed.”

The government opposed such a lengthy delay, but agreed to a trial date of 22 April 2003 in order to “afford the Defense the time to allay their concerns and prepare competently for trial.” It also appears a delay was needed by the government in order to accommodate the schedule of the government’s expert witness. On 17 March 2003, the military judge granted a delay until 29 April 2003. The petitioner timely filed for extraordinary relief on 7 April 2003 pursuant to United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, Rule 20.1.

Military defense counsel’s declaration to this Court states the convening authority approved a request for a forensic psychiatrist on 3 March and that this expert will not be available to testify before 9 June 2003. Thus, the petitioner advises this Court, although the case is currently set for 29 April 2003, “the trial date will be changed to a later date because of witness availability issues (likely on or about 9 June 2003).” We note the petition is silent as to the status of the petitioner’s IMC request for Lt Col Connors or the nature or extent of his current military duties.

Law

This Court’s jurisdiction to consider petitions for extraordinary relief is provided by the All Writs Act, 28 U.S.C. § 1651. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). To invoke the extraordinary jurisdiction of this Court, a petitioner must show there are no other adequate means to attain the relief he desires and that the right to the requested relief is clear and indisputable. *Kerr v. United States District Court for the Northern District of Cal.*, 426 U.S. 394 (1976).

It is well recognized that an extraordinary writ is a drastic remedy invoked only in the absence of any other adequate remedy and when there is a clear legal right. *See generally* 2 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* §§ 25-91.00 et seq. (2d ed. 1999). Our superior courts have held that the party seeking a writ of prohibition or mandamus has “the burden of showing that its right to issuance of the writ is ‘clear and indisputable’” and that petitioners must show they lack adequate alternative means to obtain the relief they seek. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). Writs of prohibition or mandamus are traditionally invoked in response to abuses of judicial power and to preclude a subordinate court from exceeding its jurisdictional limits. To justify the reversal of a discretionary decision of a military judge through an extraordinary writ, “the judicial decision must amount to more than even gross error, it must amount to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur.” *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (internal citations and punctuation omitted).

When we review a case submitted to us for extraordinary relief, we are not at liberty to substitute our judgment for that of the trial judge. *United States v. Bowlden*, 16 M.J. 878 (A.F.C.M.R. 1983). Our task is to determine if the trial judge exceeded his or her authority and ruled contrary to statute, settled case law, or valid regulation. *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983); *Bowlden*, 16 M.J. at 878; *Porter v. Eggers*, 32 M.J. 583, 584 (A.C.M.R. 1990).

Discussion

Applying these standards of review to the facts as averred by the petitioner, we find the petition fails on two grounds. First, we conclude there are insufficient grounds to warrant a writ of prohibition. The military judge’s order of 17 March 2003 adequately addresses the legal principles governing continuances and the severance of an existing attorney-client relationship. *See United States v. Blaney*, 50 M.J. 533 (A.F.C.C.A. 1999); *United States v. Grant*, 38 M.J. 684 (A.F.C.M.R. 1993), *aff’d*, 42 M.J. 340 (1995). From the record before us we cannot say that the military judge clearly ignored and disregarded applicable rules and precedents in ruling on petitioner’s motions for a continuance.

Additionally, the petitioner has failed to seek relief through more appropriate means. In this regard, we note the absence of any indication the petitioner has formally made an IMC request pursuant to R.C.M. 506(b) since first learning of his civilian attorney’s mobilization in late January 2003. He has had sufficient time to make such a request and resolve any attendant procedural, logistical, or ethical issues prior to the 29 April 2003 trial date. Indeed, if it is true that the petitioner’s expert witness is a necessary witness and will not be available until 9 June 2003, he will have even more time to process an IMC request through Marine Corps command channels in the event he has not already initiated such a request.

Although an IMC request in this case will be somewhat unusual, R.C.M. 506 clearly applies and favors the petitioner. The petitioner’s pre-existing attorney-client relationship with Lt Col Connors must be given considerable weight by Lt Col Connors’ commanding officers in determining whether he will be made available, especially in view of the serious charges the petitioner faces, which carry a maximum punishment of life imprisonment. R.C.M. 506 affords broad rights, to include the right to request a review of an adverse decision about Lt Col Connors’ availability. Judicial review is also available. *See United States v. Redding*, 11 M.J. 100 (C.M.A. 1981). We will not grant

extraordinary relief when the petitioner has failed to pursue the reasonably available alternative found in R.C.M. 506(b).

Accordingly, it is by the Court this 11th day of April 2003 hereby ORDERED:

The petitioner's request for extraordinary relief in the nature of a writ of prohibition is denied without prejudice to the petitioner's right to raise the issue before this Court in the normal course of appellate review. Further, the petitioner's request for a stay of the 29 April 2003 trial date is hereby denied.

FOR THE COURT

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner