

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

**BEFORE**

**C.L. CARVER**

**D.A. WAGNER**

**J.F. FELTHAM**

**Elva Y. GRAVES  
Boatswain's Mate Third Class (E-4), U.S. Navy**

**v.**

**UNITED STATES**

**and**

**Commanding Officer, Naval Station, San Diego, CA**

NMCCA 200501108

Decided 26 August 2005

Decision on Petition for Extraordinary Relief in the Nature of a Writ of Mandamus.

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel  
LCDR TRAVIS J. OWENS, JAGC, USN, Detailed Defense Counsel  
LT TEREKA L. FAN, JAGC, USNR, Detailed Defense Counsel  
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

Charges were preferred against the petitioner alleging false official statement, use of methamphetamine, murder of her infant son, and assault on her infant daughter, in violation of Articles 107, 112a, 118, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, 918, and 928. The charges are currently pending a hearing before an investigating officer appointed on 24 June 2005, pursuant to Article 32, UCMJ. The petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus with this court on 19 July 2005. We issued an Order staying the proceedings and directing the Government to show cause why the requested relief should not be granted on 20 July 2005.

We have considered all the filings by the parties. We grant all motions to attach and deny the petitioner's motion for oral argument.

In the Petition for Extraordinary Relief, the petitioner presents two issues:

I. WHETHER ARTICLE 32, UCMJ, REQUIRES A CONVENING AUTHORITY TO PROVIDE EXPERT ASSISTANCE TO THE PETITIONER WHEN THE GOVERNMENT IS TO PRESENT EXPERT TESTIMONY AT THE HEARING.

II. WHETHER THE CONVENING AUTHORITY VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION WHEN HE DENIED PETITIONER'S REQUEST FOR EXPERT ASSISTANCE.

A writ of mandamus is normally issued by a superior court to compel a lower court or tribunal possessing judicial or quasi-judicial powers to perform its mandatory or ministerial duties correctly. BLACK'S LAW DICTIONARY 973 (7<sup>th</sup> ed., 1999). The superior court may use it either to confine the inferior court or tribunal to the lawful exercise of its jurisdiction or to compel it to exercise a required duty. *Dew v. United States*, 48 M.J. 639, 648 (Army Ct.Crim. App. 1998)(quoting *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943)).

Under the All Writs Act, 28 U.S.C. § 1651(a), "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." We are a court that Congress, acting through the Judge Advocate General, has created. *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979); see also *United States v. Frischholz*, 36 C.M.R. 306, 307 (C.M.A. 1966)(holding that the All Writs Act is applicable not only to Article III courts, but to all courts established by Congress). Accordingly, this court is empowered under the All Writs Act to grant extraordinary relief where appropriate. *Dettinger*, 7 M.J. at 219; *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). As the highest judicial tribunal within the Department of the Navy, it follows then that our review of this petition under the All Writs Act is properly a matter in aid of our jurisdiction.

The issuance of an extraordinary writ, however, is, "a drastic remedy" that is reserved for "truly extraordinary situations."

*Aviz*, 36 M.J. at 1028 (citing *United States v. Labella*, 15 M.J. 228 (N.M.C.M.R. 1993)). Writs are "generally disfavored" because they disrupt the "normal process of orderly appellate review." *Shadwell v. Davenport*, 57 M.J. 774, 778 (N.M.Ct.Crim.App. 2002)(citing *McKinney v. Jarvis*, 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997)). To prevail, the petitioner must demonstrate that the decision by the lower court, or in this case the convening authority, amounted "to more than even gross error; it must amount to a . . . usurpation of power." *Labella*, 15 M.J. at 229 (quoting *United States v. DiStephano*, 464 F.2d. 845, 850 (2d Cir. 1972)). Also, the petitioner must show that he has "a clear and indisputable right" to the extraordinary relief that he has requested. *Shadwell*, 57 M.J. at 778(quoting *Aviz*, 36 M.J. at 1028). See also *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-62 (1978)(holding settled limitations on power of appellate courts to review interlocutory orders requires more than simple showing of error; petitioner must prove he had a clear and indisputable right to a particular result or decision that he was not able to obtain from lower court).

Since the issuance of such a writ is a drastic remedy and because it disrupts the normal course of appellate review, it should not be invoked in cases where other authorized means of appeal or administrative review exist. *Aviz*, 36 M.J. at 1028; *McKinney*, 46 M.J. 870. Accordingly, to justify extraordinary relief, the petitioner bears a heavy burden of demonstrating that he is entitled to issuance of a writ as a clear and indisputable right. *Aviz*, 36 M.J. at 1028.

Having considered the petitioner's request that we issue a writ of mandamus, we conclude that the petitioner has failed to demonstrate an entitlement to this drastic remedy as a matter of right. Accordingly, the petition is denied. We also dissolve our stay of the proceedings. We note that the petitioner has not yet appeared before the Article 32, UCMJ, investigating officer, who may note the appellant's concerns for the record. Additionally, if the charges are referred to a court-martial, the petitioner can move to reopen the Article 32 investigation, if she feels she has not been afforded a full and fair

investigation or has been denied the effective assistance of counsel.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL  
Clerk of Court