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

BEFORE

Charles Wm. DORMAN **W.L. RITTER** **C.A. PRICE**

John DOE
Lieutenant (O-3), U.S. Navy

Petitioner

v.

Commander, Naval Special Warfare Command
San Diego, CA

Respondent

NMCCA 200401530 Decided 15 December 2004

Maj C.R. ZELNIS, USMC, Appellate Defense Counsel
MATTHEW FREEDUS, Civilian Defense Counsel
EUGENE R. FIDELL, Civilian Defense Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel
LT KATHLEEN A. HELMANN, JAGC, USNR, Appellate Government Counsel

Decision on Petition for Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition.

DORMAN, Chief Judge:

The petitioner is a Navy Seal. Charges were preferred against the petitioner alleging three specifications of dereliction of duties, maltreatment of an enemy prisoner of war, assaulting enemy prisoners of war on divers occasions, and conduct unbecoming an officer. These charges allege violations of Articles 92, 93, 128 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 928, and 933. The charges are currently pending a hearing before an investigating officer (IO) appointed on 22 October 2004, pursuant to Article 32, UCMJ. On 25 October 2004, the Commander, Naval Special Warfare Command, (hereinafter "respondent"), who appointed the IO, also issued a protective order applicable to the Article 32 investigation. This protective order was designed to protect classified

information during the Article 32 investigation and possible follow-on court-martial proceedings.

On 3 November 2004 the respondent issued "Special Instructions" regarding the petitioner's Article 32 investigation. These instructions provided, in part, that no classified material would be considered during the investigation, and that the investigation would be closed to the public during that portion of the investigation during which a witness who is an active duty Navy Seal states their name and unit, and that the written report would be marked "For Official Use Only / FOIA Exempt." Apparently in response to the petitioner's objections to the Protective Order of 25 October 2004, that order was superceded by a second protective order issued on 5 November 2004. The Article 32 investigation was scheduled to begin on 18 November 2004. Following receipt of the petitioner's Motion For Stay, this court granted that motion and issued an Order on 16 November 2004 staying further proceedings in this case until further order.

On 12 November 2004 the petitioner also filed a Petition For Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition. In issuing our Order of 16 November 2004, staying the proceedings, we also ordered the Government to show cause as to why the Petition should not be granted.

On 24 November 2004 the respondent issued new "Special Instructions" to the IO regarding the petitioner's Article 32 investigation. These instructions do not prevent the investigating officer from considering classified information during the course of the investigation. They do, however, require the IO to notify the respondent prior to the IO permitting either the Government or the petitioner from introducing classified information into the Article 32 hearing. These new instructions also require the IO to notify the respondent's legal advisor if the petitioner objects to the closure to the public of the Article 32 hearing during those portions of the investigation during which a witness who is an active duty Navy Seal states their name and unit so that the objection can be addressed under RULE FOR COURTS-MARTIAL 405, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) and "other applicable law." Commander, Naval Special Warfare Command letter of 23 Nov 2004 at 2.

We have now considered all the filings by the parties, and their numerous motions to attach. We hereby grant all motions to attach, filed by both the petitioner and the Government, except for Petitioner's Motion to Attach filed on 1 December 2004. That motion is denied.[1] We have also denied the Government's Motion

[1] We have denied this Motion to Attach because the materials the petitioner seeks to attach relate to a prior unpublished decision of this court. While petitioner relies extensively on that unpublished decision in his pleadings, we note that unpublished decisions do not serve as legal precedent.

to Reconsider Stay, filed on 17 November 2004, and Petition for Leave to File a Surreply to Petitioner's Reply to Respondent's Response to Court's Order to Show Cause, filed on 8 December 2004.

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

> I. WHETHER THE CONVENING AUTHORITY'S EXCLUSION OF ALL CLASSIFIED INFORMATION FROM THE ARTICLE 32 INVESTIGATION VIOLATES G*RUNDEN*[2] AND DEPRIVES PETITIONER OF A FULL AND IMPARTIAL INVESTIGATION?
>
> II. WHETHER THE CONVENING AUTHORIY'S CLOSURE OF THE ARTICLE 32 HEARING VIOLATES THE PETITIONER'S RIGHT TO AN OPEN HEARING?
>
> III. WHETHER THE CONVENING AUTHORITY'S PROTECTIVE ORDER IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, EXCEEDS THE SCOPE OF HIS AUTHORITY, AND IMPROPERLY INVADES THE ATTORNEY-CLIENT RELATIONSHIP?

Petition for Extraordinary Relief of 12 Nov 2004 at 15. Specifically, the petitioner seeks "a writ of mandamus ordering the convening authority to rescind his special instructions to the investigating officer, modify his protective order and comply with *Grunden* . . . and *Powell*[3], . . . and a writ of prohibition preventing the convening authority from excluding all classified materials from the pretrial investigation hearing and from arbitrarily and unilaterally closing that hearing to the public." *Id*. at 13-14.

Discussion

The writ of mandamus is normally issued by a superior court to compel a lower court "to perform mandatory or purely ministerial duties correctly." BLACK'S LAW DICTIONARY 973 (7th ed., 1999). In other words, its purpose is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *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))(internal quotation marks omitted).

The writ of prohibition is the:

> "process by which a superior court prevents an inferior court or *tribunal possessing judicial or quasi-judicial powers* from exceeding its

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[2] *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

[3] *ABC, INC. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

> jurisdiction. . . ." BLACK'S LAW DICTIONARY 1212 (6th ed. 1990). . . . For purposes of this court exercising supervisory review in aid of its jurisdiction under the All Writs Act, an Article 32, UCMJ, pretrial investigation is a "judicial proceeding." *San Antonio Express-News v. Morrow*, 44 M.J. 706, 708-09 (A.F.Ct.Crim.App. 1996). It is judicial in nature. *United States v. Samuels*, 10 U.S.C.M.A. 206, 216, 27 C.M.R. 280, 286 (1959). The Article 32, UCMJ, investigation is a judicial proceeding and plays a necessary role in military due process of law. . . . Discretionary decisions by officers who appoint Article 32, UCMJ, investigations are also subject to review under the All Writs Act. *McKinney v. Jarvis*, 47 M.J. 363 ([C.A.A.F.] 1997)(Order).

McKinney v. Jarvis, 46 M.J. 870, 873 (Army Ct.Crim.App. 1997).

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. *Frischholz*, 36 C.M.R. at 307; *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 should be used only in truly extraordinary situations." *Aviz*[, 36 M.J. at 1028](*citing United States v. Labella*, 15 M.J. 228 (C.M.A. 1983). It is generally disfavored because it disrupts the normal process of orderly appellate review. *McKinney v. Jarvis*, 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997). For that reason, "to justify reversal of a discretionary decision by mandamus [or prohibition], the . . . decision must amount to more than even gross error; it must amount to a . . . usurpation of power." *Labella*, 15 M.J. at 229 (internal quotation marks omitted). The petitioner has the burden of showing that he has "a clear and indisputable right" to the extraordinary relief

> that he has requested. *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).

Shadwell v. Davenport, 57 M.J. 774, 778 (N.M.Ct.Crim.App. 2002).

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. at 873-74. 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.

We have thoroughly considered the petitioner's request that we issue writs of mandamus and prohibition. We conclude that the petitioner has failed to demonstrate an entitlement to these drastic remedies as a matter of right. We need not address each and every concern raised by the petitioner, but comment briefly on each of the "ISSUES PRESENTED."

First, the petitioner has yet to come before the Article 32 investigation. Many of his concerns raised in the petition have now been addressed by the new instructions issued by the respondent to the IO on 24 November 2004. Specifically, the IO can now consider classified information in arriving at his recommendation to the officer who appointed him. Second, if the petitioner objects at the Article 32 hearing concerning the very limited closure of the hearing to protect the names and units of witnesses of the Navy Seal community, the matter is to be referred to the respondent's legal advisor for compliance with R.C.M. 405 and "applicable law." Our intervention at this premature stage of the proceedings would suggest a lack of confidence in the respondent's legal advisor's ability to read and understand the law. The modifications to the special instructions to the IO suggest just the opposite, that the respondent and his legal advisor are aware of the legal requirements for conducting an Article 32 investigation and are attempting to comply with them. Furthermore, this limited closure of the proceedings to the public, in our view, appears more reasoned than reflexive. *See ABC, INC. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997). It also more closely resembles the "constitutionally required scalpel," rather than an ax. *Id*. at 366 (quoting *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977). Third, as the Government correctly points out, if the petitioner is eventually referred to trial by general court-martial, he may move to reopen the Article 32 investigation if he

believes that he has not been afforded a full and fair Article 32 investigation. Many remedies are still open to the petitioner. Fourth, the petitioner's arguments as to how the protective order invades the attorney-client relationship are speculative at best. Under R.C.M. 405(g)(6) a convening authority can issue a protective order prior to referral of charges in those cases "where the Government agrees to disclose to the accused information to which the protections of Mil. R. Evid. 505 or 506 may apply. . . ." Finally, we note that the petitioner's counsel have been granted clearances to examine classified materials, and such materials have apparently been made available to those counsel.

Conclusion

Accordingly, the petition for extraordinary relief is DENIED. The stay issued by this court on 16 November 2004 is dissolved.

Senior Judge RITTER and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court