UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, **Respondent** **v.** **Staff Sergeant (E-5)** **LINWOOD W. BURTON, JR.,** **USAF,** **Petitioner – *Pro se***	)))))))))	**Misc. Dkt. No. 2009-16** **ORDER** **Panel No. 1**

On 8 December 2009, the petitioner filed a *pro se* petition for extraordinary relief in the nature of a writ of habeas corpus on three asserted bases: (1) the evidence is legally and factually insufficient to support his conviction of rape, (2) his counsel was ineffective by failing to request that the victim testify at the Article 32, UCMJ, 10 U.S.C. § 832, hearing and by failing to object to improper argument, and (3) that he was denied his Sixth Amendment right to confront the victim at the second Article 32, UCMJ, hearing. Based on the petitioner's claim of ineffective assistance of counsel, we issued an order to counsel for the United States to show cause why the requested relief should not be granted on 24 November 2010. Counsel for the United States responded to the petition on 13 January 2011. The petitioner requests that this Court set aside the findings and sentence.

Procedural History

A general court-martial composed of officer and enlisted members convicted the petitioner contrary to his pleas of rape, indecent acts (as a lesser included offense of the charged indecent assault), and consensual sodomy (as a lesser included offense of the charged forcible sodomy) in violation of Articles 120, 134 and 125, UCMJ, 10 U.S.C. §§ 920, 934, 925. He was found not guilty of one specification of attempted rape. The court-martial sentenced the appellant to a dishonorable discharge, confinement for 8 years, and reduction to the grade of E-1. The convening authority disapproved the findings of guilty as to the offenses of indecent acts and consensual sodomy, and approved the sentence as adjudged, except for the term of confinement, which he reduced to 7 years.

We affirmed the findings and sentence on 16 July 2007. *United States v. Burton*, ACM 36296 (A.F. Ct. Crim. App. 16 July 2007) (unpub. op.), *aff'd*, 67 M.J. 150 (C.A.A.F. 2009), *cert. denied*, 129 S. Ct. 2416 (2009). In our consideration of the

petitioner's case, we addressed the substance of two issues now raised in the petition for extraordinary relief. First, we found the evidence legally and factually sufficient to support conviction. Second, we found error in the military judge's denial of a motion for a new Article 32, UCMJ, hearing, but found the error harmless beyond a reasonable doubt since the impeachment evidence that petitioner wanted to develop at the new Article 32, UCMJ, hearing was presented to the convening authority before he referred the charge. Third, we found no plain error in trial counsel's argument and that no material prejudice resulted from the argument.

On 15 January 2009, our superior court affirmed our decision. *Burton*, 67 M.J. 150. While disagreeing with our rationale, the court found no plain error in trial counsel's argument. *Id.* Chief Judge Effron concurred, finding no material prejudice from the error, plain or otherwise. *Id.* at 156. Finally, the petitioner sought review with the Supreme Court of the United States. That petition was denied. *Burton*, 129 S. Ct. 2416 (2009) (mem.). Against this procedural background, the petitioner seeks to reevaluate previously considered issues regarding factual sufficiency and confrontation of the victim at the Article 32, UCMJ, hearing.

Writ of Habeas Corpus Jurisdiction

The All Writs Act authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651. The Act requires two separate determinations: (1) whether the requested writ is "in aid of 'its existing statutory jurisdiction,'" and (2) whether the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citations omitted), *aff'd*, 129 S. Ct. 2213 (2009). A writ of habeas corpus is used to order the release of a person from confinement. *Moore v. Akins*, 30 M.J. 249, 254 (C.M.A. 1990). The standard of review for habeas corpus in military courts is whether the prior review: "'(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [prior] proceeding.'" *Loving v. United States*, 64 M.J. 132, 145 (C.A.A.F. 2006) (alteration in original) (quoting 28 U.S.C. § 2254(d)).

The Errors Alleged in the Petition

The petitioner again attacks the sufficiency of the evidence to support his conviction, but offers nothing new that causes us to change our original determination that the evidence is legally and factually sufficient to support his conviction. Likewise concerning confrontation at the Article 32, UCMJ, hearing, we find nothing new in the petition that causes us to depart from our original decision. As before, we have carefully

and fully reviewed the petitioner's case and we stand by our initial decision.[*] Furthermore, a writ of habeas corpus is not a proper substitute for an appeal. *Kaizo v. Henry*, 211 U.S. 146, 148 (1908); *Gragg v. United States*, 10 M.J. 732, 735 (N.C.M.R. 1980).

Moving to the new allegation regarding the effectiveness of his counsel, counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Scott*, 24 M.J. 186, 192 (C.M.A. 1987). In order to show ineffective assistance, the appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). That hurdle can only be overcome by meeting the two-pronged test that the Supreme Court established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the petitioner must show that counsel's performance fell below that of reasonably effective assistance. *Strickland*, 466 U.S. at 687. Second, the petitioner must show that the deficient performance prejudiced him. *Id.* This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair proceeding. *Id*; *Scott*, 24 M.J. at 188. If we first determine there is no prejudice, however, this court need not reach the question of deficient representation. *Quick*, 59 M.J. at 386; *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004) (quoting *Strickland*, 466 U.S. at 697).

Petitioner first alleges that his counsel was ineffective by failing to request the victim be present to testify at the Article 32, UCMJ, hearing. We have previously addressed on direct review the underlying issue concerning the denial of a second Article 32, UCMJ, hearing and found the error harmless beyond a reasonable doubt since the impeachment evidence that petitioner wanted to develop at the new Article 32, UCMJ, hearing was presented to the convening authority before he referred the charge. Therefore, the petitioner fails to meet the second prong of *Strickland* since any failure on the part of his counsel did not result in prejudice. Second, the petitioner alleges that his counsel was ineffective by failing to object to trial counsel's argument. Again, the underlying issue has already been addressed on direct review where no material prejudice was found from any error in trial counsel's argument. Therefore, the petitioner fails to meet the second prong of *Strickland* on this issue as well.

Conclusion

Having considered the matters submitted by the petitioner, we find that he has failed to demonstrate that extraordinary relief is warranted.

[*] We note that this Court has overruled the decisions of this trial judge while he has been assigned as an appellate judge to this Court.

Accordingly, it is by the Court on this 7th day of June, 2011,

ORDERED:

That the petition for extraordinary relief in the nature of a writ of habeas corpus is hereby **DENIED**.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court