

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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|----------------------------|---|-------------------------------|
| UNITED STATES, |) | Misc. Dkt. No. 2012-02 |
| Respondent |) | |
| |) | |
| v. |) | |
| |) | ORDER |
| Senior Airman (E-4) |) | |
| STEVEN J. HOLSEY, |) | |
| USAF, |) | |
| Petitioner |) | Panel No. 1 |

On 23 March 2012, the Petitioner filed with this Court a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus or, in the alternative, a Writ of Prohibition, ordering the abatement of all military justice proceedings against the Petitioner until the special court-martial convening authority (SPCMCA) grants the Petitioner’s requests for appointment and funding of expert assistance at the Article 32, UCMJ, investigation stage of the proceedings. In a response filed on 29 March 2012, the Government opposes the requested relief. We find that extraordinary relief is neither necessary nor appropriate, and we deny the petition.

Background

On 16 December 2011, charges were preferred against the Petitioner alleging premeditated murder and impeding an investigation in violation of Articles 118 and 134, UCMJ, 10 U.S.C. §§ 918, 934. After several defense-requested delays, the Article 32, UCMJ, investigation is now scheduled for 4 April 2012. The Petitioner requested that the SPCMCA appoint certain experts to assist at the Article 32, UCMJ, investigation, including a forensic psychologist and a mitigation specialist, as well as a defense criminal investigator and “learned” counsel who is experienced in the defense of capital cases.

On 25 January 2012, the SPCMCA denied the requests for the forensic psychologist and mitigation specialist on the grounds that “the Defense is not entitled to such broad expert assistance at the Article 32 hearing, nor will the denial of such assistance result in a fundamentally unfair trial to SrA Holsey.” On the same date, the Petitioner’s request for appointment of qualified and learned counsel was denied as being premature “as this case has not been referred as capital.” And, on 14 February 2012, although the SPCMCA found that the Petitioner had justified the need for appointment of a criminal investigator, insufficient resources within the command caused the SPCMCA to forward the Petitioner’s request to the Air Force Office of Special Investigations (AFOSI) for determination as to whether AFOSI could provide a criminal

investigator. Apparently, at this time the Petitioner does not have a criminal investigator appointed to his case.

The Petitioner argues that because his case has the potential to be referred as capital, he is irreparably harmed and prejudiced without the requested expert assistance. Without these experts, the Petitioner claims, he is prevented from presenting a proper extenuation and mitigation case at the Article 32, UCMJ, investigation. This, in turn, denies the convening authority a “meaningful” Article 32, UCMJ, investigation on which to base the disposition of charges, and thus denies the Petitioner a “significant opportunity” to influence the investigating officer and convening authority and prevent his case from being referred as capital.

Discussion

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(a). The Act requires two separate determinations by the Court: (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, 119 (C.A.A.F. 2008) (citations omitted), *aff’d*, 556 U.S. 904 (2009). We find that our consideration of this petition is properly a matter in aid of our jurisdiction; however, “[t]he issuance of a writ is a ‘drastic remedy that should be used only in truly extraordinary situations.’” *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691, 692 (N.M. Ct. Crim. App. 2001) (citations omitted). “[A] writ is not ‘necessary or appropriate’ under the statute if another adequate legal remedy is available.” *Denedo*, 66 M.J. at 121 (citations omitted).

The Petitioner seeks extraordinary relief primarily in the nature of a writ of mandamus to compel appointment of various experts for assistance at the Article 32, UCMJ, investigation in which one of the charges to be investigated, premeditated murder, is an offense for which death is an authorized punishment. *Manual for Courts-Martial, United States*, Part IV, ¶ 43e(1) (2008 ed.). However, a case is not considered capital and eligible for the death penalty until and if the general court-martial convening authority refers the charge with an instruction that the case be treated as capital. Rules for Courts-Martial (R.C.M.) 103 (2) and (3); R.C.M. 1004.

The Petitioner’s request for relief is based upon the speculation that because he has been charged with a capital offense, and because the Government requested the investigating officer to review possible capital aggravating factors, that his case will be referred as capital. However, at this point the posture of the case is only that charges are preferred and an Article 32, UCMJ, investigation is pending. The convening authority has not referred charges, capital or otherwise, and no court-martial has been convened. Moreover, no military judge has had the opportunity to rule on any motions related to the

pretrial investigation or the appointment of experts. The Petitioner has not shown that he is prevented from presenting evidence in extenuation and mitigation at the upcoming Article 32, UCMJ, investigation as is his right under R.C.M. 405(f), but only that he may not do so with the assistance of government-appointed and -funded experts. The Petitioner may, however, make note of his objections at the Article 32, UCMJ, hearing and make objections to the report of investigation to the commander who directed the investigation. R.C.M. 405(h)(2) and (j)(3), (4).

In the event the convening authority refers the case to court-martial, the Petitioner will have the opportunity to pursue timely and appropriate remedies. For example, under R.C.M. 703(d), after referral, the Petitioner may again request expert assistance from the convening authority, and if denied, he may renew his request before the military judge for decision. Also, pursuant to R.C.M. 905(b)(1), the Petitioner may challenge the validity of the Article 32, UCMJ, investigation by motion at trial. In short, extraordinary relief at this point is neither necessary nor appropriate.

Having considered the matters submitted, we find the Petitioner fails to demonstrate that extraordinary relief is warranted.

Accordingly, it is by the Court on this 3rd day of April 2012,

ORDERED:

That the Petition for Extraordinary Relief is hereby **DENIED**.

Judges ORR, GREGORY, and WEISS concur.

FOR THE COURT

OFFICIAL



Angela E. Dixon

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court