UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**Misc. Dkt. No. 2009-14**
Respondent	**)**	
	)	
v.	**)**	
	)	**ORDER**
First Lieutenant (O-2)	**)**	
JAMES L. MILLER,	**)**	
USAF,	**)**	
Petitioner – *Pro se*	**)**	**Panel No. 1**

On 16 November 2009, the petitioner filed a *pro se* petition for extraordinary relief in the nature of a Writ of Habeas Corpus. The petitioner, who has been entered into the Department of Defense's Mandatory Supervised Release program (MSR) by the Air Force Clemency and Parole Board,[1] asks this Court to issue an order to be removed from the MSR or, in the alternative, issue an order for the removal or modification of certain specified conditions of the MSR.

The petitioner asserts four grounds in support of his position: (1) The imposition of the MSR resulted in custody outside his approved sentence in violation of federal law; (2) His placement on the MSR resulted in an unlawful abridgment of his liberty interest in good conduct time credits; (3) The Air Force Clemency and Parole Board procedures for determining if the petitioner should be placed in the MSR violated his due process rights under the Fifth Amendment;[2] and (4) Certain conditions of the MSR are arbitrary, vague, and overly restrictive.

Contrary to the petitioner's pleas, he was found guilty of one specification of attempted rape, two specifications of forcible sodomy, two specifications of assault, and two specifications of kidnapping, in violation of Articles 80, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 925, 928, 934. Consistent with his pleas, he was found guilty of one specification of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933. The approved sentence consisted of a dismissal, confinement for 12 years, and forfeiture of all pay and allowances. On appeal, this Court affirmed the approved findings but reduced his period of confinement to 11 years 6 months for delay in the post-trial processing of his case. *United States v. Miller*, 64 M.J. 666 (A.F. Ct. Crim. App. 2007). The petitioner's appeal to our superior court was denied

[1] On 23 February 2010, the petitioner was placed on Mandatory Supervised Release which will continue until his maximum release date, 23 April 2015.
[2] U.S. CONST. amend. V.

on 4 February 2008.[3] On 3 April 2008, the Secretary of the Air Force approved the sentence and ordered the dismissal to be executed. The petitioner ceased to be a member of the Air Force on 20 April 2008.[4]

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(a). 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).

This Court's authority is limited to reviewing proceedings with respect to the findings and sentence approved by the convening authority. *See Huschak v. Gray*, 642 F. Supp. 2d 1268, 1275 (D. Kan. 2009) (citing 10 U.S.C. §§ 866(c), 867(c)); *see also United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007). We are without authority to review the general administration of the Air Force Clemency and Parole Board and its proceedings. *Pena*, 64 M.J. at 264 (citing *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 361 (C.A.A.F. 2001)); *see also United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F. 2007). Stated differently, we only have authority to review the Air Force Clemency and Parole Board and its proceedings as they impact the petitioner's findings and sentence. *Pena*, 64 M.J. at 264; *see also Tate*, 64 M.J. at 272. Accordingly, our review is limited to determining if the post-trial conditions constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ, unlawfully increased the petitioner's punishment, or rendered his guilty plea improvident. *Pena*, 64 M.J. at 264. The burden is on the party challenging the conditions to demonstrate that there has been an increase above the punishment of confinement imposed at trial. *Id*. at 266.

The Air Force Clemency and Parole Board has the authority to place the petitioner on the MSR. The MSR is not separate punishment but rather is a parole system administered by the Air Force Clemency and Parole Board in which the petitioner is "required to serve the balance of his sentence outside of confinement on the condition that he abides by certain rules." *Huschak*, 642 F. Supp. 2d at 1276. The petitioner was sentenced to 12 years of confinement, and with the exception of the six months of credit awarded by this Court, he has no reasonable right to expect that he will serve less than the approved sentence. There is no evidence presented by the petitioner establishing his sentence has been increased. The MSR does not increase the petitioner's sentence but instead is a parole system. The administration of the MSR credits is not part of an adjudged sentence and is simply a collateral consequence of the petitioner's sentence.

[3] *United States v. Miller*, 66 M.J. 182 (C.A.A.F. 2008).
[4] General Court-Martial Order No. 13.

The procedures used to determine placement in the MSR likewise do not affect the appellant's sentence. Thus, the issues raised concerning the general administration of the Air Force Clemency and Parole Board and its proceedings are beyond our review authority.

Concerning the alleged conditions of the petitioner's MSR,[5] the petitioner claims that the following conditions are improper: (1) the requirement to take either the penile plethysmograph or a screen assessment every six months; (2) the prohibition from residing in a household with minor family members; (3) allowing his probation officer to monitor and search all computer equipment to which the petitioner has access; (4) the prohibition against possessing legal pornography and sexually stimulating material; (5) the prohibition against use or possession of alcohol or any illegal substances; and (6) the prohibition against associating with people of bad or questionable character or frequenting places where controlled substances are used, sold, or distributed. Although these conditions arguably are burdensome, none of the conditions constitute cruel or unusual punishment under the Eighth Amendment.[6] Additionally, the petitioner has failed to show how the conditions have increased his approved sentence.

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

Accordingly, it is by the Court on this 27th day of May, 2010,

ORDERED:

That Petitioner's request is hereby **DENIED**.

FOR THE COURT

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[5] We note that the petitioner only submitted an unsigned draft copy of the conditions of his supervised release.
[6] U.S. CONST. amend. VIII.