

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	Misc. Dkt. No. 2013-11
Respondent)	
)	
v.)	
)	ORDER
Airman First Class (E-3))	
JAKE A. SOERGEL)	
USAF,)	
Petitioner)	Panel No. 1

Petitioner has been charged with offenses under the Uniform Code of Military Justice (UCMJ) that are scheduled to be investigated under Article 32, UCMJ, on 23 April 2013. Petitioner has filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. He also seeks an Emergency Order to Stay the Article 32, UCMJ, proceedings pending action by this Court. In the Petition for Writ of Mandamus, Petitioner asks this Court to order the respondents to audio record the testimony of the complaining witnesses at the Article 32, UCMJ investigation or, in the alternative, that the defense be “authorized to make such recording as is possible under the circumstances.”

Petitioner initially filed a request to the Staff Judge Advocate for the Convening Authority on 18 March 2013 asking that the testimony of the complaining witnesses be recorded at the Article 32, UCMJ, hearing. Petitioner asserted that it was critically important to record the witnesses’s testimony in order to properly evaluate their testimony; that he had a substantial discovery interest in the recording; that the recording would benefit the government; and audio recordings of witness testimony at Article 32, UCMJ, hearings is common among our sister services.

The Staff Judge Advocate denied the request in accordance with Air Force Instruction 51-201, para. 4.1.8. The Staff Judge Advocate concluded that the three victims “are likely to be available for the actual trial, should the case proceed,” and their statements at the Article 32 hearing are “best evaluated by careful attention to the actual in-person testimony.” The Staff Judge Advocate also stated that the request did not “articulate any unique discovery interest in an audio recording,” noting that Petitioner cited reasons supporting his request that are common to “many, if not most, courts-martial of this sort, the norm for which is summarized testimony without audio recording or verbatim transcription.”

This court is empowered to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a) (2006) (authorizing “all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”). See *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have “no other adequate means to attain the relief”; (2) the party seeking the relief must show that the “right to issuance of the relief is clear and indisputable”; and (3) “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004) (internal quotation marks omitted).

Petitioner argues before this Court that the reasons cited by the Staff Judge Advocate in denying his request are “neither practical, reasonable, or conducive to a fair hearing.” He asserts that once unrecorded testimony is given, it cannot be recreated even if a military judge were to order a reopened and recorded hearing. Petitioner concedes that there are no current impediments to witnesses appearing for trial, but states that “careful attention to the witnesses at the hearing is not practical as a means to examine [the witnesses] and to record their testimony for later use.” He also faults the use of summarized statements and provides statistics indicating that Army, Navy, and Marine Corps hearings are more often recorded than not.

We have considered the Petitioner’s arguments and find them unpersuasive. In our opinion, the Staff Judge Advocate properly exercised his discretion when he reviewed and denied the Petitioner’s initial request to record the testimony of the complaining witnesses. Petitioner has not cited any new or compelling reasons to convince us that this case is one where the right to relief is “clear and indisputable.” As such, we conclude the matter is not appropriate for issuance of a writ of mandamus pursuant to The All Writs Act, 28 U.S.C. Section 1651.

Accordingly, it is by the Court on this 18th day of April, 2013,

ORDERED:

That the application for an Emergency Stay of the Article 32, UCMJ, proceeding is hereby **DENIED**.

IT IS FURTHER ORDERED that the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is **DENIED** without prejudice to Petitioner's right to raise the issue in the normal course of review under the UCMJ.



FOR THE COURT

STEVEN LUCAS
Clerk of the Court