

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

**JEFFREY R. CHESSANI
LIEUTENANT COLONEL (O-5), USMC**

v.

**COLONEL S.A FOLSUM, USMC
MILITARY JUDGE**

**NMCCA 200800299
Review of Petition for Extraordinary Relief in the Nature of a
Writ of Mandamus.**

Convening Authority: Commander, U.S. Marine Forces
Central Command, MacDill AFB, FL.
For Petitioner: Capt Kyle Kilian, USMC; Robert J. Muise.

10 June 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

On 30 April 2008, the petitioner submitted a petition for Extraordinary Relief in the Nature of a Writ of Mandamus under the All Writs Act, 28 U.S.C. § 1651(a). He asks the court to order the respondent, a military judge, to grant his Motion to Compel Production of Evidence which the petitioner asserts is relevant, material and essential to the preparation of his defense. On the same day, the petitioner submitted a Motion to Stay Proceedings.¹

¹ The Motion to Stay proceedings is rendered moot by our decision on the Petitioner's for Extraordinary Relief.

In completing our review, we have considered the petitioner's brief, as well as all the documents submitted by the petitioner supplementing his brief, including transcripts of the Article 39(a), UCMJ, sessions and pleadings. Based upon our review of the documents and the proceedings, we find that the petitioner has failed to establish that he has a clear and indisputable right to issuance of the requested writ. Accordingly, the petition is denied.

I. Procedural History

The petitioner was the commanding officer of Third Battalion, First Marines (3/1) during the time frame alleged in the charges (19 November 2005-12 February 2006). The 3/1 arrived in Iraq in early September 2005, and was attached to Regimental Combat Team-2 (RCT-2). On 19 November 2005, the 3/1 was involved in an incident in Haditha, Iraq, during which 24 people were killed, including 15 Iraqi civilians, some of whom were women and children. As a result of this incident, the petitioner was charged with two violations of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.²

Following an Article 32, UCMJ, pretrial investigation, the convening authority (CA) referred the charges to a general court-martial on 19 October 2007. The petitioner was arraigned on 16 November 2007.

The petitioner filed a detailed six-page discovery request on 14 December 2007. On 15 January 2008, the Government specifically responded to the petitioner's discovery request indicating that the information requested had been provided, or that the trial counsel was not in possession of the requested documents, and the requested documents were irrelevant and immaterial. On 5 February 2008, the petitioner moved to compel the Government to produce all requested discovery material.

² The Charge that alleges from about 19 November 2005 through 12 February 2006, the petitioner violated a lawful general order, Marine Corps Order 3300.4, by failing to accurately report and thoroughly investigate a possible, suspected or alleged violation of the law of war by Marines under his command, including the killing of women and children, on 19 November 2005 in Haditha, Iraq. Additional Charge II alleges that from 19 November 2005 through 12 February 2006, the petitioner was derelict in the performance of his duties by willfully failing to accurately report and investigate the facts and circumstances relating to the deaths of twenty-four persons on 19 November 2005 in Haditha, as well as allegations that the deaths were the result of violations of the law of war.

The respondent received evidence and heard argument on the defense motion during an Article 39(a), UCMJ, session held on 21 February 2008. The respondent subsequently denied the defense motion by an electronic mail message (e-mail) to the litigants on 5 March 2008.

On 1 April 2008, the petitioner moved for reconsideration of the denial of his Motion to Compel, narrowing his discovery request to eight items.³

At an Article 39(a), UCMJ, session on 15 April 2008, the respondent put his findings of fact on the initial motion to compel on the record. He specifically held the petitioner had failed to demonstrate, by a preponderance of the evidence, that the discovery items he sought were relevant and necessary to the issues.

The respondent also denied the petitioner's motion to reconsider, holding the petitioner had not provided additional information requiring reconsideration, and further finding there was no evidence to show his prior ruling denying the defense motion was erroneous.

II. Law

An extraordinary writ is a drastic remedy that should only be used in extraordinary circumstances. *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). Its purpose is "to confine an inferior court to a lawful exercise of its prescribed

³ The petitioner asserts a statutory as well as constitutional right to all discovery requested, but claims the eight items listed below are the minimum necessary to prepare an adequate defense and ensure a fair trial.

1. The Secured Internet Protocol Router (SIPR) used by Colonel (Col) Stephen Davis, USMC, during the relevant time period.
2. The SIPR hard drive used by Lieutenant Colonel (LtCol) James Christmas, USMC, during the relevant time period.
3. The SIPR hard drive used by LtCol Christopher Starling, USMC, during the relevant time period.
4. The SIPR hard drive used by Major (Maj) Sam Carrasco, USMC, during the relevant time period.
5. The SIPR hard drive used by Major General (MajGen) Richard Huck, USMC, during the relevant time period.
6. The SIPR hard drive used by Col Gary Sokoloski, USMC, during the relevant time period.
7. MIRC chat between 3/1 and RCT-2 and the 2d Marine Division.
8. Rebuttal letters to the Secretary of the Navy censure letters in the case of MajGen Huck, Col Davis and Col Sokoloski.

Petitioner's Brief of 30 Apr 2008 at 16, n.17.

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)).

It should not be invoked in cases where other authorized means of appeal or administrative review exist, and 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); *Aviz*, 36 M.J. at 1028. For this reason, "to justify a reversal of a discretionary decision by mandamus the judicial decision must amount to more than even 'gross error;' it must amount to a 'judicial usurpation of power.'" *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)(citing *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972)). The petitioner has the burden to show a clear and indisputable right to the extraordinary relief requested. *Aviz*, 36 M.J. 1028 (citing *Labella*, 15 M.J. at 228).

III. Discussion

The petitioner asserts that unless the court orders the production of the requested evidence, he will be denied his fundamental right to a fair trial, to effective assistance of counsel, and to meaningfully confront witnesses against him pursuant to the Fifth and Sixth Amendments to the United States Constitution. Petitioner's Brief at 22. The petitioner argues that mandamus is appropriate were four conditions are satisfied:

- (1) The petitioner has no adequate means to attain the relief requested;
- (2) The petitioner will be prejudiced in a way not correctable on appeal;
- (3) The respondent's denial of the specifically requested evidence was erroneous as a matter of law; and
- (4) The issue is likely to recur and presents the possibility that trial judges in other cases may render an erroneous opinion.

United States v. Harper, 729 F.2d 1216, 1221-22 (9th Cir 1984)(citing *Bauman v. United States District Court*, 557 F. 2d 650, 654-655 (9th Cir. 1977)).

Assuming, for the moment, that the military judge's decision was erroneous, the court is not convinced that the petitioner would be prejudiced in a way not correctable on appeal. If the petitioner is convicted, whatever the sentence imposed, his correction will be subject to review. If the sentence adjudged and approved does not meet the jurisdictional threshold of this court, the petitioner's record will nevertheless be reviewed by the Judge Advocate General (JAG) of the Navy pursuant to Article 69, UCMJ. Should his case be reviewed on appeal by JAG, under Article 69, the JAG would have authority to correct the errors here alleged.

Additionally, we note that generally discovery and other pretrial orders are not reviewable on mandamus, particularly in a criminal case. *In Re United States*, 878 F.2d 153, 158 (5th Cir. 1989). This court will not issue a writ of mandamus to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. *Will v. United States*, 389 U.S. 90, 104 (1967) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953)). We do not find that the respondent's discretionary decision amounts to a "judicial usurpation of power." *LaBella*, 15 M.J. at 229 (citing *Distefano*, 464 F.2d at 850).

Further, we do not agree the respondent's ruling on the motion to compel discovery was erroneous as a matter of law. The respondent repeatedly, and, we think, correctly, emphasized in his ruling that the petitioner did not establish the relevance or necessity of the discovery information he sought to have produced.

We find that the petitioner has not demonstrated a clear and indisputable right to the relief requested.

IV. Disposition

The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is denied without prejudice to the petitioner's right to raise the issues contained therein in the normal course of appellate review, if he is convicted.

Senior Judge WHITE and Senior Judge VINCENT concur.

For the Court

R.H. TROIDL

Clerk of Court