

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

**Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges**

**DARRYL S. PHILLIPS
MAJOR (O-4), U.S. MARINE CORPS**

v.

UNITED STATES OF AMERICA

**NMCCA 200400865
Review of Petition for Extraordinary Relief in the Nature of a
Writ of Habeas Corpus.**

For Appellant: *In propria persona.*
For Appellee: Capt Roger Mattioli, USMC.

9 December 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Chief Judge:

Before the Court is the petitioner's *pro se* Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus filed by mail on 1 February 2008. The petitioner asks the court to order his release from confinement at the U.S. Disciplinary Barracks on several grounds: 1) that he received ineffective assistance of counsel by all of his trial and appellate defense counsel concerning fine enforcement; 2) that he was denied his Sixth Amendment right to effective assistance of counsel by the Government's improper severing of his attorney-client relationship with his trial defense counsel, who subsequently did not represent him at a fine enforcement hearing; 3) that his due process rights were violated at the fine enforcement hearing, and that he was deprived of the effective assistance of counsel; and 4) that his counsel failed to timely challenge his sentence as illegal after the convening authority, in an act of clemency, reduced the amount of the adjudged fine, but did not

proportionately reduce the contingent confinement awarded by the members as an enforcement mechanism.

After considering the petition and all documents submitted in support of the petition, the Government's answer, and the petitioner's reply, we conclude that the petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief requested. We, therefore, deny the petition.

Procedural History

This case has a lengthy procedural history, involving, *inter alia*, 13 petitions for extraordinary relief to this Court, and the Court of Appeals for the Armed Forces (CAAF). A partial recitation of the procedural history follows.

On 22 August 2002, the petitioner was convicted, contrary to his pleas, at a general court-martial composed of officer members, of conspiracy to steal government property, willful dereliction of duty, destruction of nonmilitary government property, larceny of government property, wrongful appropriation of government property, conduct unbecoming an officer, obstructing justice (four specifications), obtaining services by false pretense (three specifications), obtaining personal services at government expense, and fraternization, in violation of Articles 81, 92, 109, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 909, 921, and 934. The offenses primarily involved the creation of shell companies and fraudulent charges of more than \$400,000.00 on government credit cards.

The petitioner was sentenced to a reprimand, confinement for five years, a \$400,000.00 fine, and a dismissal. The sentence also contained a contingent confinement provision under RULE FOR COURTS-MARTIAL 1003(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), providing that, if the fine was not paid, the petitioner would serve an additional five years of confinement. The convening authority (CA) approved the sentence but, in an act of clemency, disapproved the portion of the fine in excess of \$300,000.00, and suspended for twenty-four months the execution of that portion of the fine in excess of \$200,000.00. The CA then ordered the modified sentence executed, except the dismissal, which required appellate review prior to execution.

On direct appeal, the petitioner was represented by detailed appellate defense counsel, LT Y, who filed appellant's brief and assignment of 25 errors (AOEs) on 29 October 2004. The petitioner also filed three supplemental assignments of error, on 12 September 2005.¹ During the pendency of his direct appeal, the petitioner was the subject of a fine enforcement proceeding.

¹ All of the AOEs were summarized in this Court's unpublished opinion, *United States v. Phillips*, No. 200400865, 2006 CCA LEXIS 61 (N.M.Ct.Crim.App. 16 Mar 2006).

The Commanding General, Marine Corps Base, Camp Pendleton (Commanding General), ordered the fine enforcement hearing under R.C.M. 1113(d)(3) to determine whether petitioner's failure to pay the fine was willful or due to indigence. That hearing was held in June 2005. The petitioner was present and was represented by counsel appointed for that hearing. The hearing officer determined that the petitioner had willfully failed to pay the fine. The Commanding General then ordered executed the contingent confinement of an additional five years.

In disposing of the petitioner's direct appeal, this court set aside the findings of guilty as to the charges of conspiracy to steal government property, and destruction of nonmilitary government property, but affirmed the remaining findings. The court then reassessed the sentence, and affirmed it as approved by the CA.² *United States v. Phillips*, No. 200400865, 2006 CCA LEXIS 61, unpublished op. (N.M.Ct.Crim.App. 16 Mar 2006).

Thereafter, the petitioner filed a petition with the CAAF, which granted review of two issues. On 26 March 2007, the CAAF affirmed the decision of this court, holding: (1) that the officer who executed the contingent confinement provision was authorized to do so, and (2) that the officer, upon concluding that the petitioner was not indigent, was not required to consider alternatives to contingent confinement. *United States v. Phillips*, 64 M.J. 410 (C.A.A.F. 2007). Finally, the petitioner filed a petition for review with the Supreme Court of the United States. That petition was denied. *Phillips v. United States*, 128 S. Ct. 313 (2007).

Having exhausted his direct appeals, the petitioner filed for extraordinary relief with this court on 3 January 2008. In his petition for a writ of habeas corpus, he asked this court to review whether the reduction of his fine in an act of clemency likewise requires a commensurate reduction in the term of contingent confinement. This Court denied the petition because the petitioner had not raised the issue during his statutory appellate review, he had not shown just cause for his default, and his case was final under Article 76, UCMJ. See order of 8 Jan 2008 (citing *Loving v. United States*, 64 M.J. 132, 156 (C.A.A.F. 2006)).

The petitioner responded by filing the present petition for extraordinary relief, alleging, *inter alia*, the ineffective assistance of counsel for failing to timely raise the issue of whether a reduction in his fine through clemency requires a commensurate reduction in the term of confinement. As previously noted, he also complains of other alleged ineffective assistance

² During the time between the filing of petitioner's initial pleading and the entry of the unpublished opinion of this court on 16 March 2006, the petitioner also filed a number of extraordinary writs and motions for relief with this court and with the CAAF, all of which have been denied, some without prejudice.

of counsel, the unlawful severance of his relationship with one of his trial defense counsel, and a lack of due process at his fine enforcement hearing.³

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: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate." See *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citations omitted), *cert. granted*, 2008 U.S. LEXIS 8524 (Nov. 25, 2008). In *Denedo*, the CAAF held that the jurisdiction of a court of criminal appeals under the All Writs Act extends to a collateral challenge based on a claim of ineffective assistance of counsel, even after direct appeal is completed. *Id.* at 125. This is because the issues raised in such a petition question the "validity and integrity" of the petitioner's conviction and sentence, and the correctness of the disposition of his case on direct appeal. *Id.* While one might question our jurisdiction over a post-trial fine enforcement proceeding, in this case that hearing occurred during the pendency of direct appeal, and it was included in our initial review.⁴ *Id.* Under these circumstances, and on the basis of the foregoing authority, we conclude that we have jurisdiction to inquire into the merits of the present petition insofar as it raises issues of ineffective assistance of counsel. As we do so, we note that the issuance of a writ is "a drastic remedy that should be used only on truly extraordinary situations." *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993)(citing *United States v. LaBella*, 15 M.J. 228 (N.M.C.M.R. 1983)). The petitioner has the heavy burden of showing that he has "a clear and indisputable right" to the extraordinary relief that he has requested. *Id.*

³ The petitioner raises four principal assignments of error (Petition at 3):

- I. Ineffective assistance of counsel for failure to provide "Adequate Assistance";
- II. Violation of the 6th Amendment for the unlawful severance of his relationship with one trial defense counsel, LT S;
- III. Lack of due process at the fine enforcement hearing and ineffective assistance of counsel, LT B; and
- IV. Ineffective assistance of appellate counsel, LT Y, for failing to raise an issue that the sentence, as adjusted, was illegal.

The petition thereafter lists multiple "Acts and Omissions" under each of the assigned errors. The petition also includes inconsistently numbered additional allegations of error in the text, which reassert these four principal complaints in additional examples.

⁴ We limit our invocation of jurisdiction to the facts in this case, and we make no determination with respect to whether this court has jurisdiction over fine enforcement hearings under other circumstances.

III. Analysis of the Petitioner's Claims⁵

Standard of Review and Burden of Proof

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. 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).

Discussion

I. Ineffective Assistance of Counsel For Failure to Provide "Adequate Assistance"

In his first principal assignment of error, the petitioner generally alleges that all of his counsel (civilian trial defense counsel, and military trial and appellate defense counsel) failed to "render Adequate Assistance." His more specific "Acts and Omissions" include that his counsel: a) failed to inform him when his fine was due; b) failed to provide him with a copy of his record of trial; and c) advised him that if he made monthly payments, he would not have to serve contingent confinement.

a. Counsel failed to tell petitioner when his fine was due

The record submitted by the petitioner shows that, at a minimum, he was informed on 15 April 2005 that he was required to pay his fine in full by 15 May 2005, and if he failed to do so, a fine enforcement hearing would be ordered. (Petition, Appendix 18). Consistent with this notice, when the petitioner did not pay his fine, the enforcement hearing was ordered. The petitioner was provided notice of the hearing, and was detailed

⁵ In resolving the petitioner's claims of ineffective assistance of counsel, this court first determined the petitioner's claims can be resolved without recourse to a post-trial evidentiary hearing. *United States v. Ginn*, 47 M.J. 236, 248 (1997); see also *United States v. Clark*, 49 M.J. 98, 101 (C.A.A.F. 1998).

counsel to represent him at the hearing. (Petition, Appendix 4). The petitioner was personally present at the hearing, was provided the opportunity to challenge evidence presented by the Government, and was provided an opportunity to testify and present other evidence on the relevant issues.

Assuming, without deciding, that none of his trial defense counsel told the petitioner when his fine was due, then that circumstance was entirely remedied when he received the 15 April 2005 notice, which provided him the opportunity to pay the fine within the 30-day time limit expressly set forth in the notice. He also had the opportunity to arrange to pay his fine during the additional 26-day period between the notice's due date and the enforcement hearing on 27 June 2005. We conclude that the petitioner has failed to demonstrate that he suffered prejudice as a result of any alleged failure by his defense counsel to inform him of the requirement to pay the fine by a certain date. In the absence of a showing of prejudice, the petitioner does not have "a clear and indisputable right" to the extraordinary relief he has requested. *Aviz*, 36 M.J. at 1028. We, therefore, grant no relief.

b. Counsel failed to provide petitioner with a copy of his record of trial

Once again, assuming, without deciding, that this complaint is true, the procedural history of this case amply demonstrates that the petitioner has had a full and fair review of his trial and his numerous extraordinary writ applications. He has not been prejudiced by having no personal copy of his record of trial.⁶ The petitioner has, therefore, not sustained his burden of demonstrating that his not having a copy of his record of trial resulted in unfair post-trial review or other prejudice. *Strickland*, 466 U.S. at 687. In the absence of such a showing, he does not have "a clear and indisputable right" to the extraordinary relief he has requested. *Aviz*, 36 M.J. at 1028. We, therefore, grant no relief.

c. Counsel advised petitioner that if he made monthly payments, he would not have to serve contingent confinement

Petitioner concedes that his counsel told him that if he paid "whatever [he] could afford" in monthly payments, he would not have to serve additional contingent confinement. Even if this is all the advice counsel gave to the petitioner, the plain meaning is that the petitioner must maintain monthly payments in good faith. The fine enforcement hearing officer specifically considered whether the petitioner acted in good faith in making

⁶ In support of his first complaint, the petitioner notes that an advisement by the military judge that his fine would be due on a date certain is "no where in the record of trial." Petition at 4. This statement, based as it is on a review of the record of trial, indicates the petitioner has had meaningful access to his record of trial.

payments of approximately \$ 25.00 to \$ 100.00 per payment, beginning on 30 July 2003, and totaling \$ 790.00 toward the \$ 200,000.00 fine. He found that the petitioner had not acted in good faith, and that he had willfully failed to pay his fine. Because the petitioner did not act in good faith, he has not demonstrated any prejudice resulted from the advice of counsel. Rather, any prejudice resulted from his own contumacious conduct. This complaint merits no relief.

II. Denial of Sixth Amendment Right to Effective Assistance of Counsel by the Government's Unlawful Severance of his attorney-client relationship with LT S at his fine enforcement hearing

In his petition for extraordinary relief in the nature of a writ of habeas corpus of 26 May 2005, petitioner asserted that his Fifth and Sixth Amendment rights were violated by the denial of LT S as his defense counsel for the fine enforcement hearing. This court denied that petition on 21 June 2005. We again conclude that this claim merits no relief.

The petitioner's reliance on the Fifth and Sixth Amendments as the basis for his right to continuing representation by his trial defense counsel at a post-trial fine revocation hearing is misplaced. A fine revocation hearing is not a part of the original criminal prosecution. See *Morrissey v. Brewer*, 408 U.S. 471 (1972). His right to counsel at such a hearing is, therefore, neither grounded in the same principals of constitutional law and regulation as, nor directly equivalent to, his right to counsel at trial. Indeed, the U.S. Supreme Court has held that participation of counsel at a revocation hearing is probably constitutionally unnecessary in most cases. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). As a result, the Court has not established a *per se* rule requiring representation by counsel. The petitioner is correct only in so far as due process can require representation by counsel at a revocation hearing in a specific case. In this case, the issue is not whether he had counsel -- he did -- the complaint is that he did not have his trial defense counsel, and that amounted to *per se* error. We disagree.

The petitioner's fine enforcement hearing was a collateral, administrative hearing held three years after his trial, and a year after the CA's action. The issues raised during that hearing were not the same as those adjudicated at trial. Thus, there was no existing attorney-client relationship between the petitioner and his former trial defense counsel concerning the substance of the matters then at issue. *United States v. Spriggs*, 52 M.J. 235, 240 (C.A.A.F. 2000)(holding a "good cause" requirement for severance comes into play only if an ongoing attorney-client relationship regarding the substance of the charges at issue exists). The detailing of counsel other than the trial defense counsel, therefore, did not improperly sever an existing attorney-client relationship as to the matters at issue during the fine enforcement hearing. Additionally, while the

appointing authority may have appointed LT S, in view of her prior affiliation with the petitioner, it was not unreasonable or an abuse of discretion to decline to do so. Under the facts of this case, the petitioner has not demonstrated a clear and indisputable right to the services of LT S, merely because that counsel had previously represented him at trial. We decline to grant relief.

III. Ineffective Assistance of Counsel at the Fine Enforcement Hearing

In his third principal assignment of error, the petitioner alleges that LT B, the detailed counsel at the fine enforcement hearing, was ineffective. We disagree.⁷

At the outset, we have rejected the proposition that counsel detailed to represent the petitioner at the fine enforcement hearing was ineffective simply because he was not the trial defense counsel. The hearing was an inquiry limited to matters that arose post-trial, including the petitioner's indigent status, and his good faith in attempting to pay his fine. Neither of these matters was at issue during his trial. This is not to say that there was no information disclosed during trial germane to the fine enforcement hearing. But, that information was not as extensive or complex as the petitioner asserts. LT B's detailed discussion with the hearing officer of facts gleaned from the record of trial regarding the petitioner's assets shows that LT B had adequate time to familiarize himself with those facts, consult with this client, and we conclude that he effectively presented those facts during the fine enforcement hearing. Petition, Appendix 7.

We are likewise not persuaded that the petitioner's retrospective tactical disagreements with LT B demonstrate ineffective assistance. Acts or omissions by counsel that are strategic or tactical do not amount to ineffective assistance, unless they were unreasonable under prevailing professional norms. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001); *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996). We find nothing unreasonable in LT B's representation of the petitioner. Whether or not he presented brig regulations prohibiting prisoner debt, or certain receipts of the petitioner's prior legal fees, was not determinative of the hearing officer's finding that the petitioner had engaged in asset-shifting, and that he had willfully failed to pay his fine on time. LT B was prepared, organized, submitted 80 exhibits, answered all questions on behalf of the petitioner, inserted

⁷ We previously considered the fine enforcement hearing as a whole and determined that "[t]here is no dispute that the appellant was afforded the due process rights to which he was entitled." *Phillips*, 2006 CCA LEXIS 61 at *36. Though the petitioner again complains he was denied due process at his fine enforcement hearing, we decline to revisit this broader issue. We limit our review to the petitioner's current allegation of ineffective assistance of counsel.

multiple objections into the record for later consideration by the CA and the courts, and he faithfully asserted the position of the petitioner. Under these facts, we find neither prejudice, nor performance that fell below that of reasonably effective assistance. *Strickland*, 466 U.S. at 687.

IV. Ineffective Assistance of Appellate Defense Counsel

In his fourth principal assignment of error, the petitioner avers that appellate defense counsel (ADC), LT Y, rendered ineffective assistance by: (1) failing to address the Government's alleged unlawful severing of his attorney-client relationship with LT S; (2) failing to challenge the appropriateness of the sentence at this court; (3) failing to file an extraordinary writ challenging the computation of the petitioner's Good Conduct Time (GCT) and Earned Credit Time (ECT); and (4) that LT Y was too inexperienced. We find no merit in these claims.

a. Failing to address the government's alleged unlawful severing of his attorney-client relationship with LT S

We have twice considered the merit of the underlying issue, and concluded that the appellant is entitled to no relief. The petitioner has demonstrated no prejudice by the alleged failure of his appellate counsel to raise this issue on direct appeal. The claim merits no relief.

b. Failing to challenge the appropriateness of the sentence at this Court

The petitioner's complaint here is not that his counsel failed to challenge his sentence as inappropriate, but that counsel did not challenge his sentence as approved by the CA, after granting clemency by reducing the adjudged fine, but not proportionately reducing the contingent confinement.

"Clemency involves bestowing mercy - treating the accused with less rigor than he deserves." *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Whether to grant clemency is a matter of command prerogative, involving the sole discretion of the CA. Art. 60(c)(1), UCMJ. It is certainly true that R.C.M. 1003(b)(3) provides that contingent confinement may be *adjudged* for a fixed period considered *equivalent* to the fine. It is also true that there is little guidance in the Manual for Courts-Martial on contingent confinement procedures that may, or must, be followed in cases of nonindigent, delinquent servicemembers. *Phillips*, 64 M.J. at 414. However, neither the Rules for Courts-Martial, nor any case law of which this court is aware, has yet imposed any limitation on the sole discretion of the CA, such that a reduction in the amount of a fine, as an act of mercy, *requires* the convening authority to grant additional relief by a proportionate reduction in contingent confinement. It follows that a failure to challenge such a grant of clemency does not

fall below the level of professional competence expected of counsel, because such a challenge would have to be based on a limitation of the CA's discretion that is, thus far, not recognized in law. See *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995)(finding no ineffective assistance of counsel for failure to anticipate a new rule of law). As a result, we find the petitioner has failed to sustain his burden of establishing ineffective assistance of his appellate defense counsel, and we decline to grant relief.

c. Failing to file a petition for extraordinary relief challenging the computation of the petitioner's Good Conduct Time (GCT) and Earned Credit Time (ECT)

We conclude that any failure by appellate defense counsel to petition for an extraordinary writ challenging computation of GCT and ECT is not prejudicial. The petitioner has raised these issues, a prior panel of this court has affirmatively considered them, and found them lacking sufficient merit as to warrant relief. See Order of 15 Oct 2008. Recasting these complaints in the form of ineffective assistance of counsel does not increase the merit of the underlying complaints. As a result, the petitioner has failed to carry his burden of demonstrating prejudice, and he is entitled to no relief.

d. That LT Y was too inexperienced

We reject the petitioner's characterization of LT Y as "a rookie" and inexperienced. Such vague assertions are insufficient statements of prejudice, and they fail to sustain the petitioner's burden to establish both a lack of effective assistance and prejudice. Indeed, the record of this matter demonstrates to the contrary.

On the petitioner's behalf, LT Y filed a brief and assigned 25 AOE's to this court on 29 October 2004. LT Y also filed a reply to the Government's answer, assigned supplemental AOE's, and filed several petitions for extraordinary relief. On 12 May 2006, LT Y filed a petition at the CAAF on behalf of the petitioner, and he succeeded in obtaining a grant of review on two issues. LT Y thereafter presented the petitioner's oral argument before the CAAF. Once again, we decline to entertain the petitioner's tactical quarrels, or his retrospective general dissatisfaction with his counsel. On the face of this record, the petitioner has not met his burden to demonstrate that LT Y's performance fell below that of reasonably effective assistance by appellate defense counsel. He certainly has not demonstrated a clear and indisputable right to the relief he requests. We, therefore, decline to grant relief.

Conclusion

For the foregoing reasons, the Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus is denied.

Senior Judge COUCH and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court