

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

**Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

**JESSIE A. QUINTANILLA
SERGEANT (E-5), USMC**

v.

UNITED STATES OF AMERICA

**NMCCA 200900037
Review of Petition for Extraordinary Relief in the Nature of a
Writ of Mandamus**

Military Judge: CAPT Keith J. Allred, JAGC, USN.
Convening Authority: Commanding General, 3d Marine Aircraft
Wing, Camp Pendleton, CA.
For Appellant: CAPT Henry Lazzaro, JAGC, USN; Maj J.E.
Galvin, USMC; LCDR Stephen C. Reyes, JAGC, USN; Capt S.M.
Dempsey, USMC.
For Appellee: Mr. Brian Keller, Esq.

30 March 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES
NOT SERVE AS PRECEDENT.**

MITCHELL, Senior Judge:

On 29 December 2009, the petitioner applied to this court for extraordinary relief in the nature of a writ of mandamus, contending that he is being deprived of his rights under the Fifth, Sixth, and Eight Amendments to the United States Constitution. The petitioner asks this court to direct the military judge to grant his motion to, in effect, retroactively apply the Life Without Parole (LWOP) statute to the petitioner's case, thereby making this an authorized punishment at his sentence rehearing. Alternatively, the petitioner requests that this court direct the military judge to grant the petitioner's motion allowing him to waive his right to clemency and parole

following sentencing, so that he can more easily reach a pretrial agreement with the convening authority.

On 5 January 2010, this court ordered the respondent to show cause why the petition for extraordinary relief should not be granted. The respondent filed an answer on 15 January 2010.

After carefully considering the petition for extraordinary relief and the respondent's answer, we conclude that the petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief he has requested. We, therefore, deny his petition.

Factual Background

The petitioner, a sergeant in the U.S. Marine Corps, stands convicted of premeditated murder, attempted unpremeditated murder (two specifications), aggravated assault by pointing a dangerous weapon (two specifications), and other offenses stemming from his actions of 5 March 1996. *United States v. Quintanilla*, 60 M.J. 852, 854 (N.M.Ct.Crim.App. 2005), *rev'd in part and remanded*, 63 M.J. 29 (C.A.A.F. 2006).¹ On that day, the petitioner, who was stationed at Marine Aviation Logistics Squadron 39, Camp Pendleton, California, entered his squadron's command suite with a .45-caliber pistol concealed in his clothing. *Id.* at 855. He confronted his Executive Officer, Lieutenant Colonel (LtCol) Daniel W. Kidd, USMC, in his office, pointed the weapon at him and - as LtCol Kidd attempted to flee into an adjoining changing room - shot him in the back. *Id.* The petitioner followed LtCol Kidd into the changing room, where he encountered his Commanding Officer, LtCol Thomas A. Heffner, USMC. *Id.* He shot LtCol Heffner in the chest. *Id.* Although badly wounded, LtCol Heffner managed to escape. *Id.* The petitioner then turned his attentions back to LtCol Kidd, shooting him a second time in the back and killing him. *Id.* Shortly thereafter, he fired two shots at Gunnery Sergeant W.E. Tiller, USMC, missing with both, before he was disarmed and apprehended by authorities. *Id.*

A general court-martial, comprised of 12 members with enlisted representation, unanimously sentenced the petitioner to death, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the adjudged sentence. The petitioner appealed to this Court, which set aside the findings and sentence. *Id.* at 868. That ruling was partially reversed by the Court of Appeals for the Armed Forces (C.A.A.F.), which reinstated the guilty findings and remanded the case for a new sentencing hearing. *Quintanilla*, 63 M.J. at 39.

At his new sentencing hearing, the petitioner made the two motions that form the basis for his current petition. The military judge denied both. The petitioner filed a petition for

¹ This court's earlier opinion in this case provides a full accounting of the factual background.

extraordinary relief with this court on 26 January 2009 which was denied as moot on 27 April 2009 because the military judge had declared the petitioner unfit to stand trial. On 18 November 2009, the petitioner was declared competent to stand trial and, as a result, he filed the current motion, reasserting his previous arguments.

Authority to Issue Extraordinary Writs

The All Writs Act, 28 U.S.C. § 1651, grants all courts established by Act of Congress the power to issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. As a court created by Act of Congress, this court has the authority to issue the writ requested in this case. *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979).

Principles of Law

The petitioner has the burden of showing that he has a clear and indisputable right to the requested extraordinary relief. *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000); *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). See also *Will v. United States*, 389 U.S. 90, 96 (1967).

A writ of mandamus is considered a "drastic instrument" to be used only in "truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (citing *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980)). Extraordinary writs are used to confine inferior courts to the exercise of their authority when it is their duty to do so. *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985); *Dettinger*, 7 M.J. at 220; *Ponder*, 54 M.J. at 616. In order to reverse the military judge's decision and grant relief to the petitioner, the lower court's "decision must amount to more than even gross error; it must amount to a judicial usurpation . . . of power, or be characteristic of an erroneous practice which is likely to recur". *Labella*, 15 M.J. at 229 (internal quotations and citations omitted). We therefore analyze the trial court's rulings on the petitioner's two motions to determine whether error occurred, and if so, whether it reaches the magnitude required for granting the extraordinary relief sought.

Application of the Life Without Parole Statute

The petitioner first argues that the military judge erred by denying his motion to instruct members on his impending resentencing hearing that LWOP is an authorized punishment they could consider imposing on the petitioner.

On 6 November 1997, Congress passed the National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581, 111 Stat. 1629, 1759 (1997) (codified at 10 U.S.C. § 856a), which

amended Article 56a(a), Uniform Code of Military Justice, 10 U.S.C. § 856a(a), by making LWOP an authorized punishment at general courts-martial for any offense for which a life sentence could be adjudged. The statute explicitly stated that LWOP "shall be applicable only with respect to an offense committed after the date of the enactment of this Act." *Id.* at 1760. The President signed the bill into law on 18 November 1997, the date of its enactment. Signing Statement, 33 Weekly Comp. Pres. Doc. 1861 (Nov. 18, 1997), reprinted in 1997 U.S.C.C.A.N. 2707.

In 2002, the President issued an Executive Order that, *inter alia*, incorporated LWOP into the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Exec. Order No. 13,262, 67 Fed. Reg. 18,733 (April 17, 2002). Section 3, paragraph f, of that Executive Order amended RULE FOR COURTS-MARTIAL 1003(b)(7), MANUAL FOR COURTS-MARTIAL (2000 ed.) to incorporate LWOP when a life sentence was authorized. Section 3, paragraph g, amended R.C.M. 1004(e) to incorporate LWOP into sentences where death was an authorized punishment, noting that "confinement for life, with or without eligibility for parole . . . may be adjudged in lieu of the death penalty"

Section 6 noted that the amendments would take effect on 15 May 2002. Section 6, paragraph b, reads:

The amendments made to Rules for Courts-Martial 1003(b)(7), 1004(e), 1006(d)(4)(B), and 1009(e)(3)(B)(ii) shall only apply to offenses committed after November 18, 1997. In cases not involving these amendments, the maximum punishment for an offense committed prior to May 15, 2002, shall not exceed the applicable maximum punishment in effect at the time of the commission of such offense. Provided further, that for offenses committed prior to May 15, 2002, for which a sentence is adjudged on or after May 15, 2002, if the maximum punishment authorized in this Manual is less than that previously authorized, the lesser maximum punishment shall apply.

(Emphasis added).

The petitioner bases his argument entirely on the last sentence quoted above, claiming that the President intended "to bestow upon any service member sentenced after the effective date of the amendments the benefits of any lesser punishment he might be subject to under the amended Manual." Petitioner's Brief of 29 Dec 2009 at 8-9.

A plain reading of the italicized portion of Section 6, paragraph b, however, indicates quite the opposite. LWOP was incorporated into the MCM through amendments to R.C.M. 1003(b)(7) and R.C.M. 1004(e). Section 6, paragraph b, of the executive order explicitly states that the amendments involving R.C.M. 1003(b)(7) and 1004(e) apply only to offenses committed after

Congress amended Article 56a(a), UCMJ (i.e., after 18 November 1997). The sentence the petitioner relies on applies to "cases not involving these amendments." Exec. Order No. 13,262, 67 Fed. Reg. at 18,779, §6, ¶b. This language is unambiguous and we find the petitioner's argument unpersuasive.

In *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004), a case very similar to the one at bar, C.A.A.F. noted: "'It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.'" *Id.* at 84 (quoting *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000)). An examination of the applicable statute, in fact, reveals that Congress explicitly authorized LWOP as a sentence only for crimes committed from the day after its enactment forward. *Id.*

The petitioner's crimes occurred on 5 March 1996. Both Congress and the President clearly indicated their intent to make LWOP available only to those whose crimes which occurred after 18 November 1997 and that this statute was not to be retroactively applied. Accordingly, we conclude that the military judge was correct in finding that he is proscribed from instructing on the possibility of LWOP as an authorized punishment for members to consider at his resentencing trial.

Waiver of Parole and Clemency

The petitioner additionally argues that the military judge erred in denying his motion to waive his rights to clemency and parole following sentencing, alleging that this violates his rights under the Fifth and Eighth Amendments of the U.S. Constitution.

The petitioner readily admits that his desire to waive his rights to clemency and parole is part of a negotiation strategy with the convening authority, wherein he hopes that in exchange for a sentencing limitation agreement, which would impose a *de facto* LWOP-like condition upon himself by waiving clemency and parole, the convening authority will be persuaded to shield him from exposure to the death penalty. Petitioner's Brief at 15. He states that he believes the convening authority will agree to this arrangement "only if there has been a presentencing legal determination that Petitioner's agreement to waive his right to request clemency or parole now or at any time in the future is legally permissible." *Id.* at 17.

It is not the practice of this court to issue declaratory judgments solely for the benefit of fostering negotiations between convening authorities and those accused or convicted of crimes. We note, however, that there is a distinction between the petitioner's right to waive clemency and parole, which he may do at any time without judicial approval, and the enforceability of an agreement he might make to waive such rights in the future.

In reaching our holding, we look to R.C.M. 705 for guidance on the enforceability of pretrial agreements.² It states that any term or condition precluding "the complete and effective exercise of post-trial and appellate rights is unenforceable." R.C.M. 705(c)(1)(B). In *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007), C.A.A.F. specifically interpreted R.C.M. 705(c)(1)(B) to include parole and clemency within the meaning of "post-trial rights." Therefore, the military judge correctly ruled that the petitioner's offer to waive these rights per a pretrial agreement would be unenforceable.

Conclusion

The petitioner has failed to demonstrate that the military judge's ruling on either issue constitutes a usurpation of power or abdication of duty. To the contrary, we are convinced that the trial judge interpreted both issues correctly. Accordingly, the petitioner cannot meet his burden, and his petition is denied.

Senior Judge MAKSYM and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court

² Although the petitioner is well past the "pretrial" stage of his trial, and R.C.M. 705 applies to "pretrial" matters, we still think that the principles of that rule apply here as well.