

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

**FRANK D. WUTERICH
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

v.

**LIEUTENANT COLONEL D.M. JONES, U.S. MARINE CORPS
MILITARY JUDGE**

and

UNITED STATES OF AMERICA

**NMCCA 200800183
Review of Petition for Extraordinary Relief
in the Nature of a Writ of Mandamus**

For Appellant: Col Dwight H. Sullivan, USMCR; Maj Kirk Sripinyo, USMC; Neal Puckett, Esq.; Haytham Faraj, Esq.
For Appellee: Capt Samuel C. Moore, USMC.

7 January 2011

OPINION OF THE COURT

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

REISMEIER, Chief Judge:

Background

On 28 October 2010, the petitioner filed for extraordinary relief in the nature of a writ of mandamus, seeking: 1) a determination from this court that his right to continuation of an established attorney-client relationship was improperly severed; 2) abatement of the court-martial proceeding until the counsel at issue, Lieutenant Colonel (LtCol) V, USMC (Ret.) is restored as the petitioner's defense counsel, or, alternatively,

remand to the military judge to provide other appropriate relief in light of the declaration that the attorney-client relationship was improperly severed; and 3) a stay in the court-martial proceedings pending this court's consideration of the petition.

By Order dated 28 October 2010, this court denied the petitioner's request for a writ, having considered his petition and supporting brief, which included an unsigned copy of the military judge's findings of fact and conclusions of law, noting that it appeared that the military judge severed the attorney-client relationship after having found good cause on the record (an irreconcilable conflict of interest). The court did not reach the merits of the petition, and stated that the matter could be reviewed in the normal course of review under Article 66, UCMJ, if necessary.

On 20 December 2010, the Court of Appeals for the Armed Forces, acting on application for extraordinary relief, vacated this court's Order of 28 October 2010, and remanded the case with direction to 1) obtain the transcripts of the Article 39(a) sessions held on 13 and 14 September 2010, both sealed and unsealed; 2) determine whether the sealed portion should remain sealed; and 3) determine whether the military judge abused his discretion in determining that good cause existed to sever the attorney-client relationship. This case is to be returned to the Court of Appeals for the Armed Forces by 10 January 2011.

In response to Orders issued by this court, the respondents produced the required transcripts, relevant exhibits, and a sealed memorandum prepared by the military judge recounting an ex parte hearing he conducted with defense counsel on the severance issue. Having reviewed the record and pleadings of the parties, we find that the military judge's detailed, complete findings of fact are well-supported and not clearly erroneous. Having completed our review, we conclude that the sealed memorandum should remain sealed, and that the military judge did not abuse his discretion in severing the attorney-client relationship.

Facts

Charges were preferred against the petitioner in December 2006 for actions related to his conduct on 19 November 2005 in Haditha, Iraq. Then-LtCol V detailed himself to the case on 11 January 2007. Then-Major (Maj) F was detailed on 17 January 2007. Within weeks of detailing to the case, both detailed defense counsel submitted retirement requests. At various times, both counsel sought and received modifications of their retirement dates, but pending appellate litigation surrounding production of CBS outtakes was not resolved until after both counsel retired. Although the defense did not request it, the military judge insisted on the assignment of military defense counsel. In July 2010, Maj M was detailed as military defense counsel.

Mr. F and Mr. V both left active duty at their own request, but each maintained an attorney-client relationship with the petitioner until Mr. V's conflict became apparent. Mr. F joined a firm with Mr. P, one of the civilian attorneys representing the petitioner, and continues to represent the petitioner. Mr. V joined a firm that represented Mr. Salinas, a former sergeant and alleged conspirator in the petitioner's case. Mr. V was told orally upon his hiring that there was no conflict with the petitioner's case. The fact that they were alleged conspirators did not prompt Mr. V or the firm he joined to seek waivers of conflict from the clients. Neither counsel was released by the petitioner or the court until Mr. V requested to withdraw on 13 September 2010. Thus, in addition to his representation by a properly detailed military defense counsel, and recognizing that his originally detailed counsels' status changed from military to civilian, the fact is that the petitioner retained his attorney-client relationship with Mr. F, and, until his application for withdrawal was approved by the military judge, Mr. V.

On 13 and 14 September 2010, the military judge held a series of Article 39(a) sessions to consider issues surrounding the potential withdrawal of Mr. V. Based on an *ex parte* conference held by the judge with the defense team, he concluded that an irreconcilable conflict of interest necessitated the withdrawal of Mr. V as counsel.

Applicability of Writ of Mandamus

There are three conditions for issuance of a writ of mandamus. First, the party seeking the writ must have no other adequate means to attain the relief he desires, a condition designed to ensure that the writ is not used as a substitute for regular appellate review. Second, the petitioner must show that his right to issuance of the writ is clear and indisputable. Finally, the issuing court must be satisfied that even if the first two requirements for the writ are satisfied, the writ is appropriate in the case. *Cheney v. United States District Court*, 542 U.S. 367, 380-81 (2004).

Petitions for extraordinary relief predicated on disqualification of defense counsel in criminal cases are not generally reviewable as an interlocutory matter. "[A]n order denying a motion to disqualify does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment. In the exceptional case, where irreparable harm would indeed result, the movant may petition this court for a writ of mandamus under 28 U.S.C. § 1651 (1970), the All Writs Act. This approach [affords] the court the flexibility necessary to prevent serious injustice while advising litigants of the court's extreme reluctance to depart from the final judgment rule." *Community Broadcasting of Boston, Inc. v. FCC* 546 F.2d 1022, 1028 (D.C. Cir. 1976) (footnotes omitted). *Accord Flanagan et. al. v. United States*, 465 U.S. 259 (1984) ("We decide today that a District Court's pretrial disqualification of defense

counsel in a criminal prosecution is not immediately appealable under 28 U.S.C. § 1291."). This has been the practice in the military as well. *West v. Samuel*, 45 C.M.R. 64 (C.M.A. 1972) (order by military judge that defense counsel withdraw from the case because counsel refused to represent the petitioner on all pending charges demonstrated no extraordinary reason for direct appeal from an interlocutory ruling). This court determined that the petitioner's claim failed in two critical respects: he failed to meet the *Cheney* standard, and he failed to establish the threshold requirement of extraordinary circumstances implicating a claim of right that would be irreparably lost on appeal from final judgment.¹ Having concluded that the petitioner did not meet the jurisdictional requirements warranting an interlocutory review of the merits of his claim, this court denied the petition.

Analysis

The Court of Appeals for the Armed Forces has stated that:

An abuse of discretion means that "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (citation omitted). . . . [T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. *United States v. Wallace*, 296 U.S. App. D.C. 93, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992).

United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004). Without revealing the facts or analysis remaining under seal, we conclude that the military judge did not abuse his discretion by granting Mr. V's request to withdraw, per Judge Advocate General Instruction 5803.1C, Rule 1.7 (Ch-1, 10 May 2010). Where it appears that an attorney cannot represent a client, he should seek to withdraw, which is exactly what Mr. V did once the conflict became apparent. The military judge considered a range of options before arriving at release, including abatement (which he concluded would do nothing to resolve the irreconcilable conflict present) and additional time to prepare for trial (noting that the parties "have had plenty of time to get ready for trial and the trial has been delayed long enough"). The

¹ See *Flanagan*, 465 U.S. 259 (1984) and *West*, 45 C.M.R. 64 (C.M.A. 1972), suggesting that suffering the trial itself in order to obtain review of a pretrial disqualification of counsel issue is not reason to alleviate an accused from the requirement of a final judgment. "Bearing the discomfiture and cost of prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Flanagan*, 465 U.S. at 267 (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

military judge considered that the petitioner remained represented by Mr. F and Mr. P, as well as detailed counsel. The judge's findings of fact were supported by the evidence, and his decision to release Mr. V was within the range of remedies available.

Conclusion

We conclude that the military judge did not abuse his discretion in granting Mr. V's motion to withdraw and that the sealed memorandum shall remain sealed, subject to further court order. The case is returned to the Court of Appeals for the Armed Forces.

Senior Judge Mitchell and Judge Beal concur.

For the Court

R.H. TROIDL
Clerk of Court