

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

**MOTION TO RECONSIDER
RULING ON REQUEST FOR A
STAY OF PROCEEDINGS**

v.

Colonel (O-6)
PRITCHARD, CHARLES L.
Military Judge
United States Army,
Respondent

Docket No. ARMY MISC 20220001

Lieutenant Colonel (O-5)
DIAL, ANDREW J.
United States Army,
Real Party in Interest

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

COMES NOW, LTC Andrew J. Dial, by and through undersigned appellate defense counsel, and respectfully requests this court reconsider its decision to grant the government's request to stay the proceedings in *United States v. Lieutenant Colonel Andrew J. Dial*.

Statement of the Case

Lieutenant Colonel Dial is charged with one specification of indecent conduct and three specifications of sexual assault, and one specification of attempted sexual assault, in violation of Articles 134, 120 and 80. On 15 November 2021, the trial defense counsel filed a Motion for Appropriate Relief: Unanimous Verdict. The government filed a response on 18 November 2021. On 17 December 2021, the

military judge issued an order for the parties to “brief specified issues re: defense motion for appropriate relief (unanimous verdict). Both parties filed their response on 31 December 2021. The military judge issued his findings and conclusions granting the defense’s motion for appropriate relief on 3 January 2022. Government appellate counsel then filed a request for stay of proceedings on 4 January 2022 in this court. Trial was set to begin on 10 January 2022 in Germany.

On 5 January 2022, this court granted the government’s request for a stay.

Statement of Facts

In the Defense Motion for Appropriate Relief: Unanimous Verdict, the defense requested that the military judge “require a unanimous verdict for any finding of guilty or modify the instructions accordingly.” In the alternative, the defense requested that the military judge “provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names.” The request was made pursuant to the Fifth and Sixth Amendments to the United States Constitution; Rules for Courts-Martial (RCM) 906, 920 and 921.

The government opposed the motion stating “the Sixth Amendment Right to a trial by jury does not apply at courts-martial. Congress has provided rules borne out by case law on how a court-martial panel determines a verdict.” (Govt. Response to Defense Mtn.).

In his ruling on 3 January 2022, the military judge granted the defense's motion for appropriate relief and stated "the Court will instruct the panel that any findings of guilty must be by unanimous vote, and the Court will ask the panel president before announcement of findings if each guilty findings was the result of a unanimous vote." (Findings and Conclusions Re: Defense Motion for Appropriate Relief)

The government did not file a motion to reconsider the military judge's ruling. The government did not request a stay of proceedings from the military judge.

In a perfunctory request filed on 4 January, 2022, the government moved to stay the proceedings, merely stating "without the stay of proceedings, the trial will proceed before the United States is able to file a complete and thorough petition." (Govt. Request for Stay). In a footnote, the government noted: "The United States received the military judge's ruling on the date of this pleading, and therefore it has twenty (20) days to file the petition for extraordinary relief. *See* Rule 19(b)(1)." (Govt. Request for Stay).

Law and Argument

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). The government has failed to meet the standard required for a stay to be granted. The Supreme Court has

distilled the traditional standard for a stay down to four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* at 434. “The first two factors of the traditional standard are the most critical.” *Id.* The party requesting a stay bears the burden of showing that the circumstances justify it. *Id.*

The government fails to offer any reason why a stay is necessary or appropriate in this case. The government does not argue that it is likely to succeed on the merits or alleged it will suffer irreparable harm, or in any other way attempt to justify that a stay is warranted. For those reasons alone this court should deny the request.

The government merely states that they “have twenty (20) days to file the petition for extraordinary relief.” (Govt. Request for Stay). They ignore the preceding part of Rule 19(b)(1) which states that the writ should be filed as soon as possible.

The government has not shown, much less made a strong showing, that they are likely to succeed on the merits of the writ. The government has not even established that they have jurisdiction to file a writ in the current case. “The burden to establish jurisdiction rests with the party invoking the court’s jurisdiction.”

United States v. LaBella, 75 M.J. 52, 53 (C.A.A.F. 2015); *see McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997) (“The ‘extraordinary’ nature of relief under the All Writs Acts places an ‘extremely heavy burden’ upon the party seeking relief.”).

The government faces a high hurdle. The issuance of writs is generally disfavored. *Id.* In order to establish subject matter jurisdiction, the harm contemplated by the extraordinary writ must “have had the potential to directly affect the findings and sentence.” *United States v. Brown*, 81 M.J. 1, 4 (C.A.A.F. 2021) (citation omitted). The power of this court to act “is conferred and strictly confined by statute.” *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017). This factor weighs heavily against the government.

Second, the government has not shown why they would be irreparably injured absent a stay. To the contrary, its request establishes that the only government injury should the stay be denied is an expenditure of travel funds for witnesses. According to the motion, some witnesses will have to travel from “OCONUS to testify, and some are already en route.” (Govt. Request for Stay). But that is at most a minimal harm, and with some witnesses already en route actually militates toward proceeding to trial.

The government argues that without a stay they will be unable to file a complete and thorough petition. That is not the type of irreparable injury

contemplated under the traditional stay criteria. And the issue of unanimous verdicts is not new. The government was on notice of the issue since 15 November 2021 (in fact, since 20 April 2020, when the Supreme Court decided *Ramos v. Louisiana*) and the Government Appellate Division has drafted multiple responses to defense assignments of error on the issue. The military judge was able to draft a thorough and complete ruling three days after receiving briefing from the parties. Surely the robustly staffed U.S. Army's government appellate division can do the same. Accordingly, this factor too weighs against the government.

And granting a stay will substantially injure LTC Dial. The allegations against LTC Dial are from 2019. Since that time, LTC Dial has been under investigation, flagged, and carrying the heavy burden of an impending court-martial. Furthermore, he has been geographically separated from his spouse. LTC Dial's wife is medically retired from the Army and unable to receive the medical care that she needs in Germany. Unfortunately, she must reside in the Netherlands to get her required healthcare. This separation has created a significant hardship on the family. In addition, LTC Dial has retained the representation of a civilian defense counsel, Mr. [REDACTED], to represent him at trial. Granting a stay of the proceedings will result in Mr. [REDACTED] having to travel to Germany again at a later time. LTC Dial will bear the financial burden of that travel. This factor favors LTC Dial.

The public interest lies in a speedy resolution of this case, a case that has already been pending for two years. Both the complaining witness and the accused have a right to a trial that is free from unreasonable delay. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions “the accused shall enjoy the right to a speedy and public trial . . .” and is triggered by preferral or confinement. *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014). The government has not met its burden to show why a stay would be in the public’s best interest.

Conclusion

Because the government has not met its burden in establishing that a stay is appropriate, LTC Dial requests that this honorable court reconsider its previous ruling and deny the government's request for a stay.

MOTION TO RECONSIDER RULING ON REQUEST FOR A STAY OF PROCEEDINGS

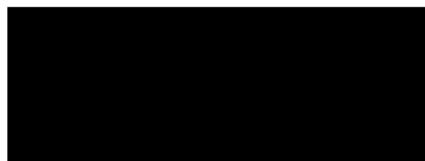
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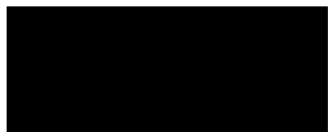
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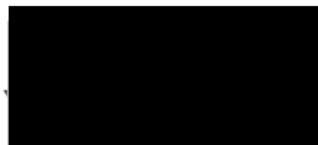
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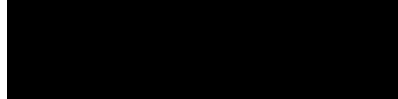
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 5 January 2022.



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