

Maj. Surinzo

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

Frank D. WUTERICH,)	GOVERNMENT OPPOSITION TO
Staff Sergeant (E-6))	PETITIONER'S MOTION FOR
U.S. Marine Corps,)	INTERROGATORIES
)	
Petitioner)	Case No. 200800183
)	
v.)	
)	
UNITED STATES)	
)	
Respondent)	
)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Pursuant to Navy-Marine Corps Court of Criminal Appeals
Rules of Practice and Procedure, Rule 23(c), the Government
respectfully opposes Petitioner's Motion for Interrogatories.
(Pet'r's Motion, June 9, 2011.)

First, Petitioner's latest delaying tactic in support of
his Petition for Extraordinary Relief not only further delays
justice being had in this case—but regardless of what answers
might be given to interrogatories, Petitioner's search for
relief during the normal course of appellate review would itself
fail. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383
(1953); see also *United States v. Snyder*, 18 C.M.A. 480, 483
(C.M.A. 1969); *United States v. Frischholz*, 16 C.M.A. 150
(C.M.A. 1966) (petitions for extraordinary relief not
substitutes for normal appellate process). The All Writs Act

"is a residual source of authority to issue writs that are not otherwise covered by statute." *Pennsylvania Bureau of Correction v. U.S. Marshals*, 474 U.S. 34, 42-43 (1985). Statutory and direct review can, and has addressed the errors Petitioner now alleges. See *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). If Petitioner could not gain relief during regular appellate review regardless of the answers to such questions, no further delay is necessary in support of factfinding at the appellate level to bolster Petitioner's assertions made in pleadings without support on the Record.

Moreover, even more recently the Court of Appeals for the Armed Forces pointedly called such *Hutchins* errors merely "procedural error." *United States v. Hohman*, No. 11-6004, 2011 CAAF LEXIS 435 (C.A.A.F. May 31, 2011). Procedural error. Not constitutional; not statutory: but "procedural error." The Military Judge's ample Findings of Fact and Conclusions of Law demonstrate that the sort of resolution had in *Hutchins* and *Hohman* is the result that would obtain in this case, regardless of what any hypothetical interrogatories might reveal about who was on the trial team.

Second, further delay is not warranted because Petitioner himself has been given multiple opportunities to develop the Record in this case. Yet now, for the first time, he makes yet

further new but baseless allegations that Major Nicholas Gannon, USMC, current Trial Counsel in his case, visited the site of Petitioner's alleged crime. Petitioner approaches this court and requests interrogatories, claiming that, in response to the Government's rebuttal of Petitioner's baseless allegation, "[i]t is axiomatic that 'statements made in briefs are not evidence of the facts asserted.'" (Pet'r's Motion at 2) (citing *Bell v. United Princeton Properties*, 884 F.2d 713, 720 (3rd Cir. 1989).)

But to gain the benefit of a stay, the party seeking the stay bears the burden of showing that it meets the *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), standards. *Humane Soc'y of the United States v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009). Petitioner further opportunistically shifts his focus to LtCol Erickson, who has not been part of the Government's trial team for two years. It is Petitioner's burden alone to prove these facts. This Motion should be dismissed, Petitioner having failed, after being given multiple opportunities, to develop a Record in open and contested court-martial for the Military Judge to rule on, and this Court to review in Petitioner's numerous novel pleadings seeking extraordinary relief.

Third, Petitioner cannot now move for interrogatories in support of his Petition, and further delay trial unless—and in

any case, extraordinary relief is only proper if—the Military Judge's ruling was a clear abuse of discretion, or a usurpation of judicial power. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *Bankers Life & Casualty Co.*, 346 U.S. at 383. Given the fact that Petitioner now, and has always, had an ample Defense team, fully in satisfaction of his Sixth Amendment rights, any procedural error in the change of counsel fails in light of the absence of any prejudice in Petitioner's representation by an enviable team of defense counsel.

WHEREFORE, the Government respectfully requests denial of Petitioner's motion for interrogatories, and return of Petitioner's case to his court-martial so that he may face justice.

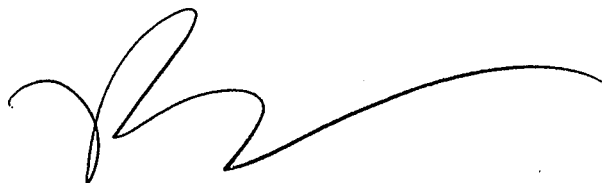


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Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court on June 16, 2011. I also

certify that a copy of the foregoing was delivered on June 16,
2011, to counsel for Petitioner.

A handwritten signature in black ink, appearing to read 'BK', with a long horizontal flourish extending to the right.

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