

**IN THE SECOND JUDICIAL CIRCUIT
FORT BRAGG, NORTH CAROLINA**

UNITED STATES)

v.)

HURST, Jeffery T.)

SGT, U.S. Army)

HHC, 3rd Battalion, 21st Infantry Regt.)

1st Stryker BCT, 25th ID)

Fort Bragg, NC 28310)

**RULING and ORDER
(Motion to Dismiss for Violation of
Right to Counsel At Article 32
Hearing)**

Before the Court is the Defense Motion to Dismiss the Charges for a Violation of the Right to Counsel at the Article 32 Hearing (AE IV), and the Government Response in Opposition (AE V.) At the request of the parties, the Court has considered the documents attached to those pleadings, as well as the evidence introduced at the 10 July 2012 Article 39(a) hearing on this matter, and arguments of counsel.

At the Article 39(a) hearing, defense modified its prayer for relief to no longer request dismissal of charges, but to instead request the reopening of the Article 32 investigation or a new Article 32 investigation.

FINDINGS OF FACT

Charges were preferred against the accused on 21 December 2011. The same day, the Special Court-Martial Convening Authority, COL Wood, appointed LTC Matos as the Article 32 officer for this case and five other co-accuseds.

On 27 December 2011, LTC Matos notified the accused via memorandum that he would conduct the Article 32 investigation on 6 January 2012 at Kandahar Airfield, Afghanistan. In that memorandum, LTC Matos informed the accused he would have the right to be represented at all times during the investigation by legally qualified counsel, either a civilian attorney of the accused's choice, a qualified military defense counsel of the accused's own selection, or a qualified military defense counsel detailed by Trial Defense Service.

On 28 December 2011, CPT Gurtov and CPT Williams were detailed to represent the accused. CPT Gurtov was located at Fort Bliss, TX. CPT Williams was located at a different CONUS installation.

On 29 and 30 December 2011, the government began electronically sending the defense counsel approximately 750 pages of documentary evidence which accompanied the charges.

On 2 January 2012, the detailed defense counsel requested LTC Matos delay the Article 32 investigation until 27 February 2012. In that request, the detailed defense counsel informed LTC Matos that the accused was considering retaining civilian counsel and that the delay request may be further amended.

LTC Matos recommended the defense delay request be partially granted, and that the Article 32 be held on 20 February 2012. COL Wood approved that recommendation on 4 January 2012, and granted a continuance of the Article 32 until 20 February 2012.

On 3 January 2012, the accused retained civilian defense counsel, Mr. Faraj. Trial Defense Service withdrew CPT Williams' detailing when Mr. Faraj was retained. At that point, the accused was represented by both CPT Gurtov and Mr. Faraj.

Mr. Faraj's law offices are in Michigan and Washington, DC. Mr. Faraj was in trial in California from 4-25 January 2012.

On 30 January 2012, civilian defense counsel requested additional delay of the Article 32 from 20 February 2012 to 6 March 2012. The government opposed additional delay.

On 6 February 2012, LTC Matos denied the defense request for additional delay. Defense requested reconsideration of that decision, which was denied by COL Wood on 16 February 2012.

The Article 32 hearing was held on 20 February 2012. The accused was present. CPT Gurtov was present to represent the accused. Mr. Faraj was not.

Twelve witnesses testified at the Article 32 hearing, 9 of whom were Soldiers from the accused's unit flown in from an outlying FOB to Kandahar Airfield. Afghanistan is an active combat zone.

The accused objected to the Article 32 proceedings unless his civilian counsel could be available and present. He did not authorize CPT Gurtov to speak on his behalf except to inform LTC Matos of his objections. LTC Matos noted the accused's objections in his investigation report.

PRINCIPLES OF LAW

The accused may be represented at an Article 32 investigation by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present at the investigation. However, the investigation shall not be unduly delayed for this purpose. RCM 405(d)(2)(C).

ANALYSIS and CONCLUSIONS

As an initial matter, both parties agree that the accused noted his objections at the Article 32 hearing and has preserved his objections under RCM 405(j)(4).

The issue here is whether the delay of the Article 32 investigation requested by the accused in order to have his civilian counsel present was reasonable. The Court believes it was.

On 2 January 2012, the detailed defense counsel requested delay from 6 January 2012 until 27 February 2012. At that time, Mr. Faraj had not been retained. The delay request was based instead on the availability of detailed defense counsel due to other courts-martial, the significant amount of documentary evidence accompanying the charges to be reviewed, time needed to speak with the accused who was located in Afghanistan, time to identify witnesses to appear at the investigation, and travel by detailed defense counsel from CONUS to Afghanistan for the Article 32 investigation. While the detailed defense counsel alerted the investigating officer to the possibility that the accused might retain civilian counsel, that was not the basis for this initial delay. The Article 32 officer and Special Court-Martial Convening Authority approved all but one week of the requested delay, and set the investigation for 20 February 2012.

On 3 January 2012, the accused retained Mr. Faraj. This was a prompt exercise of SGT Hurst's right to counsel, coming only 14 days after prefferal of charges.

Likewise, Mr. Faraj filed his request for additional delay in a timely and prompt manner, three weeks before the scheduled investigation. In that request, he outlined the reasons for two weeks of additional delay until 6 March 2012. The Court has considered those reasons—civilian counsel's appearance in another court-martial until 25 January 2012 which affected his ability to prepare, the logistical challenges created by his location in CONUS and the accused's location in Afghanistan, and his prior commitment to sit for the California bar examination--and find them to be reasonable and valid bases for a two-week delay.

The government is unable to articulate any prejudice in terms of lost witnesses or evidence that would have incurred had the investigation been delayed until 6 March 2012. The Court is very cognizant of the harsh and austere combat conditions in theatre and the dangers and difficulty involved in transporting witnesses from remote areas to the Article 32 investigation site. The Court also recognizes that by delaying the investigation, the Article 32 investigation in this case may not occur at the same time as the investigation in the co-accused cases, causing many of these witnesses to be transported twice. But the rights an accused has to counsel and to an Article 32 investigation are individual rights, independent of a co-accused. The rights to counsel and to an Article 32 investigation are not suspended because the government chooses to proceed with its case in a combat theater of operations. In any event, defense counsel in its request for delay, agreed to waive the personal appearance of witnesses who became unavailable because of the delay and not object to alternative forms of testimony.

Considering the timeliness, length, and basis for the requested delay, and the lack of prejudice to the government, the accused's request for an additional two weeks of delay to have

civilian counsel present at the Article 32 investigation was not unreasonable and the investigation would not have been unduly delayed had it been granted. The accused is entitled to a new Article 32(b) investigation.

RULING and ORDER

The defense motion for a new Article 32(b) investigation is GRANTED.

So ordered in chambers this 9th day of August 2012:



TARA A. OSBORN
Colonel, U.S. Army
Chief Circuit Judge