Lt. Watada retrial halted!

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Update 5 October 2007

> By Mike Barber, Seattle Post-Intelligencer. October 5, 2007
>
> A federal judge in Tacoma has delayed the court-martial of 1st Lt. Ehren Watada, a Fort Lewis Army officer to refuse to deploy to Iraq. In a rare intervention of a civilian court in the military justice system, U.S. District Court Judge Benjamin H. Settle granted the emergency stay shortly before close of business Friday. Watada's trial, slated to begin at 9 a.m. Tuesday, is now postponed until at least Oct. 26, the judge ruled.

In granting the stay at 4:48 p.m., Settle determined that he has jurisdiction under federal law to grant the stay and that Watada's claim that a second-trial amounts to double jeopardy is not frivolous and "has merit" for consideration.

"The irreparable harm suffered by being put to a trial a second time in violation of the double jeopardy clause of the Fifth Amendment stems not just from being subjected to double punishment but also from undergoing a second trial proceeding," Settle wrote in quoting case law.

Watada's lawyers, Jim Lobsenz and Ken Kagan of the Seattle firm Carney Badley Spellman, have argued that the circumstances of a mistrial declared in Watada's court-martial in February result in double jeopardy -- being tried twice for the same charge.

The mistrial was declared over Watada's objections and after a panel of military officers acting as a jury had heard evidence but not begun deliberatons.

Watada's appeals have been dismissed by the military trial judge and the U.S. Army Court of Appeals. An appeal was made Sept. 18 to the Court of Appeals for the Armed Forces, the highest court in the military justice system.

Lobsenz and Kagen said they were compelled to ask the federal court on Wednesday to stop the court-martial. Watada's trial approached, and nothing had been heard from the armed forces appeals court. With Monday a federal holiday to observe Columbus Day, time was even shorter, they

said.

Settle indicated at a hearing on Thursday that he might defer to the military appeals court if it made a decision by Friday, but at close of business Friday, it hadn't ruled.

Because the case being heard in federal court, the U.S. Attorney's Office now is arguing the government position.

Watada publicly refused to go to Iraq with the 3rd Stryker Brigade in June 2006, contending that the war there is illegal and exposed members of the military to war crimes. He has been charged with missing movement and conduct unbecoming an officer. He could be sentenced to up to six years in prison if convicted.

Settle has set up a briefing schedule to examine the merits of the double jeopardy argument and how long he will continue the stay. The government has until Oct. 12 to file its arguments, and Watada's lawyers must reply by Oct. 17.

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United States District Court
Western District of Washington at Tacoma

1 LT. EHREN K. WATADA, Petitioner, v. LT. COL. JOHN HEAD, Military Judge, Army Trial Judiciary, Fourth Judicial District; LT. GEN.
CHARLES JACOBY, Convening Authority, Ft. Lewis, Washington, Respondents.

CASE NO. C07-5549BHS

ORDER GRANTING IN PART PETITIONER'S EMERGENCY MOTION FOR A STAY OF COURT MARTIAL PROCEEDINGS

This matter comes before the Court on Petitioner's Emergency Motion for a Stay of Court Martial Proceedings (Dkt. 2). The Court has considered the pleadings filed in support of and in opposition to the motion and the oral arguments of counsel, and hereby grants the motion for the following reasons.

I. JURISDICTION

This court has jurisdiction over this habeas petition under 28 U.S.C.
§ 2241. The writ for habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose -- the protection of individuals agains erosion of their right to be free from wrongful restraints upon their liberty."

Peyton v. Rowe, 391 U.S. 54, 66 (1968). Habeas petitions are available to members of the armed services who are not seeking a discharge from the military as part of their claims. *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971); *Bratcher v. McNamara*, 448 F.2d 222 (9th Cir. 1971). Petitioner alleges that the restraint on liberty he is being subjected to is a court martial proceeding that would violate his Fifth Amendment right to be free from double jeopardy. Dkt. 1 at 9. The Supreme Court of the United States has held that being required to appear for trial is sufficient to show custody over an individual for habeas purposes. *Justices of Boston Municipal Court v. Lydon*,

466 U.S. 294, 300-301 (1984).

As a general rule, where members of the armed forces file habeas petitions seeking relief from the military's wrongful restraint of liberty, federal civilian courts should not entertain such petitions until all available remedies within the military court system have been exhausted. *Noyd v. Bond*, 395 U.S. 683, 693 (1969).
Petitioner's habeas petition asks this Court to determine issues that have also been placed before the military trial court, the Army Court of Criminal Appeals, and the United States Court for the Armed Forces.

Dkt. 2 at 2. Both the military trial court and the Army Court of Criminal Appeals have denied Petitioner's claims. Id. On October 5, 2007, the United States Court of Appeals for the Armed Forces issued an order denying Petitioner's claims. Dkt. 7 at 4-6. As of the date of this Order, Petitioner has exhausted his available military court remedies with respect to his double jeopardy claim that forms the basis of his habeas petition. This Court my therefore rightfully entertain the instant habeas petition.

II. REQUIREMENT OF STAY

Having decided that Petitioner has exhausted his military court remedies with repsect to the double jeopardy claim, thereby affording the Court jurisdiction over the habeas peitition, the Court must now determine whether a stay of the second military court martial proceeding is justified. The Double Jeopardy Clause "not only protects an individual against being subjected to double punishment but also is a guarantee against being twice put to trial for the same offense." *Abney v. U.S.*, 43 U.S. 651, 652 (1977). The Supreme Court held in *Abney* that for a criminal defendant to "enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before the subsequent exposure occurs."
Id. at 662.

The rule articulated in *Abney* applies to the instant matter if Petitioner's double jeopardy claim is meritorious or not frivolous.

United States v. Claiborne, 727 F. 2d 842, 850 (9th Cir. 1984). The Court has not been presented any evidence showing that Petitioner's double jeopardy claim lacks merit. On the contrary, the record indicates that Petitioner's double jeopardy claim is meritorious.

"[A] defendant raising a meritorious *Abney*-type claim -- asserting a valid, constitutional 'right not to be tried' -- would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal." Id. at 850. The Irreparable harm suffered by being put to tria a second time in violation of the Double Jeopardy Claus of the Fifth Amendment stems not just from being subjected to double punishment but also from the harm of undergoing a second trial proceeding. *Abney*, 431 U.S. 660 at 661. Having preliminarily decided that Petitioner's double jeopardy claim is not frivolous, a stay of the military court martial is justified.

III. CONCLUSION

The Court concludes, as a preliminary matter, that it has jurisdiction over the habeas petition and that Petitioner's double jeopardy claim is not frivolous. The pending court martial proceeding scehduled to begin on October 9, 2007 should be preliminarily stayed. The Court recognizes that these issues are raised on an emergency motion and that the parties have not yet had the opportunity to provide full briefing. The government should be afforded the right to respond and

Petitioner should be permitted to reply to that response.

The Court further notes that the issues raised by the petition for habeas corpus bear no relation to the charges or defenses in Petitioner's court martial proceedings. The habeas petition concerns only the alleged violation of Petitioner's Fifth Amendment right to be free from double jeopardy. This is an issue concerning Petitioner's individual constitutional right to be free from being subjected to two trial proceedings concerning the same offense and is completely unrelated to the underlying claims addressed by the military trial court.

IV. ORDER

Therefore, it is hereby

ORDERED that Petitioner's Emergency Motion for a Stay of Court Martial Proceedings (Dkt. 2) is GRANTED in part. Respondents are enjoined from holding the court martial proceeding referred to by Respondent Jacoby. This stay is preliminary and shall remain in place until October 26, 2007, or until further order of the Court.

It is further ORDERED that Respondents are to file a repsonse to Petitioner's Emergency Motion for a Stay of Court Martial Proceedings on or before October 12, 2007; Petitioner is to file a reply to Respondents' response by October 17, 2007; and the motoin is RENOTED for consideration on October 19, 2007.

DATED this 5th day of October, 2007.

[Signed]
BENJAMIN H. SETTLE
United States District Judge

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