IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

Lieutenant Colonel (O-5)
JONES, PAMELA L.,
Military Judge,
Respondent

and

Sergeant First Class (E-7)
STARR, BRYAN D.,
U.S. Army,
Real Party in Interest

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR EXTRAORDINARY RELIEF

Docket No. ARMY MISC 20250182

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

Summary of Argument

Petitioner again asks this court for extraordinary relief even though its true quarrel is internal, a disagreement between two entities of the United States Army: the chain of command and the Office of Special Trial Counsel (OSTC). These two entities of the United States, a convening authority and a referral authority, have divergent interests. On one hand, the Special Court-Martial Convening Authority (SPCMCA) who directed the Article 32 determined that the latest Article 32 was flawed and directed that it be reopened. On the other hand, the OSTC believes the

Article 32 was done in substantial compliance with the rules and is fighting the reopening.

Unable to resolve the dispute, the United States turned to the military judge to resolve its spat. The military judge, considering the relevant authorities, took the position that the SPCMCA who directed the Article 32 possessed the authority to reopen it, and she returned the case to the SPCMCA for action.

It is from that reasonable ruling petitioner now seeks extraordinary relief. In other words, petitioner now asks this court to settle its internal dispute even though the United States itself has yet to decide what is in its best interest: Is it the position adopted by the OSTC or the command?

Petitioner is correct that "the facts of this case are unique." (Pet. 20). After all, OSTC only became operational in December 2023. And the command and the prosecution do not ordinarily share internal grievances in court. But "unique" does not mean extraordinary relief is necessary or appropriate. Petitioner continues to overlook the obvious solution to its internal debate: The United States Army should settle its internal dispute without involving military judges.

Relevant Facts and History of the Case

The procedural history challenges description. But to sum it up, despite SFC Starr pleading guilty in civilian court, petitioner insists on court-martialing him for the same thing. Petitioner has struggled to complete an Article 32, having held

four across two courts-martial. It is the fifth Article 32 that now has the government engaged in internal bickering.

A. Prosecution by Civilian Authority

In November 2020, SFC Starr was involved in a traffic accident that led to the death of his girlfriend's (now wife) five-year-old son. (App. Ex. III, p. 4; App. Ex. XIV, p. 1). In July 2023, he pled guilty to manslaughter in an Alabama court. (App. Ex. III, pp. 4-6). He was sentenced to a five-year reverse split sentence, whereby he serves three years of probation, after which the judge may extend the probation or impose two years of confinement. (App. Ex. III, pp. 6-7).

B. The First Court-Martial: *Starr I*

The day after he was sentenced, SFC Starr's command preferred charges against him for the same offense. (*Starr I* Charge Sheet, 14 Sep. 2023). An Article 32 was held, and the defense submitted objections to the preliminary hearing officer's [PHO] report. The general court-martial convening authority (GCMCA) referred the charges to a general court-martial. (App. Ex. III-A, pp. 39-41). SFC Starr was arraigned over defense objection. (App. Ex. III-A, p. 67). On 16 January 2024, the GCMCA withdrew and dismissed the charges without prejudice. (App. Ex. III-A, p. 67).

C. The Second Court-Martial: *Starr II*

On 22 January 2024, the OSTC preferred charges against SFC Starr. (App. Ex. III-A, p. 68). An Article 32 was held, and the defense submitted objections to the PHO's report. (App. Ex. V, pp. 11-12). On 9 May 2024, the Deputy Lead Special Trial Counsel (DLSTC) referred the charges to a general court-martial. (App. Ex. III, pp. 11-12; *Starr II* Charge Sheet). On 31 May 2024, the military judge arraigned SFC Starr over defense objection and heard a defense motion for a defective Article 32. (App. Ex III; App. Ex. XLVIII, p. 16; App. Ex. LVIII, p. 7). Since then, the military judge has ordered the Article 32 reopened three times.

First, on 7 June 2024, the military judge ordered the Article 32 be reopened, finding it was defective because the PHO failed to consider an updated version of the OSTC SOP. (App. Ex. XI; App. Ex. LVIII, p. 8; App. Ex. LXIX, p. 2). The same PHO conducted the reopened Article 32 via email. (App. Ex. LXIX-a, pp. 1-2). The defense filed a motion for a defective Article 32. (App. Ex. XXXVII).

Second, on 4 October 2024, the military judge ordered the Article 32 be reopened again, finding it was defective because it was held without SFC Starr being present. (App. Ex. LII, p. 7). The same PHO reopened the Article 32 in person. (App. Ex. LXIX, p. 3). The defense conducted voir dire of the PHO and objected to him continuing to serve as the PHO. (App. Ex. LXIX, p. 3, para. 6.)

The defense submitted objections to the PHO's report based on the PHO's apparent bias. (App. Ex. LXIX, p. 4).

On 1 November 2024, in response to the defense objections, the SPCMCA who directed the Article 32 directed that it be reopened and stated he would appoint a new PHO. (App. LXX-a, p. 2). The same day, the defense filed a motion to dismiss based on a defective Article 32. (App. Ex. LXIX). The next day, the DLSTC signed a memorandum concurring with her previous referral decision—she believed the SPCMCA did not have the authority to reopen the Article 32 without her request. (App. Ex. LXX, pp. 8-10; App. Ex. LXX-a, p.1). The SPCMCA testified at an Article 39(a) motions hearing on 8 November 2024. (R. at 967).

Third, on 12 December 2024, the military judge returned the case to the SPCMA, finding the SPCMCA had authority to reopen the Article 32 per the plain language of R.C.M. 405(m)(5), which states, in part, "The convening authority may direct that the preliminary hearing be reopened or take other action, as appropriate." (App. Ex. LXXXVIII, p. 11). The government moved for reconsideration. (App. Ex. LXXXI). On 24 February 2025, the military judge issued a ruling denying the government's motion. (App. Ex. XC). The military judge did not find that the latest Article 32 was defective. (App. Ex. XC, pp. 7-8). Instead, she concluded that the SPCMCA possessed the authority to reopen the

Article 32. (App. Ex. XC, pp. 7-8). The military judge directed the SPCMA to reopen the Article 32 no later than 10 March 2025. (App. Ex. XC, p. 8).

3. The First Petition for Extraordinary Relief, ARMY MISC 20250096

On 7 March 2025, petitioner filed a writ petition with this court signed by the OSTC. Other filings related to the petition were signed by the Government Appellate Division (GAD).

The OSTC's authority to file on behalf of and represent the United States before this court on a writ petition was the subject of litigation. On 9 April 2025, this court ruled en banc that the petition did not comport with Article 70, UCMJ's requirement that appellate government counsel represent the United States in front of this court, and this court dismissed the petition.

4. The Second Petition for Extraordinary Relief, ARMY MISC 20250182

Within hours of this court's 9 April order, petitioner filed the current writ petition signed by the GAD.[1] It is largely a cut-and-paste job of the original 7 March petition signed by the OSTC.

[1] *See* Real Party in Interest's Motion to Dismiss, filed 21 April 2025.

Issue

WHETHER THE RESPONDENT ERRED WHEN SHE DETERMINED THE CONVENING AUTHORITY HAD THE AUTHORITY TO REOPEN THE ARTICLE 32 PRELIMINARY HEARING AFTER THE GOVERNMENT SUBSTANTIALLY COMPLIED WITH RULE FOR COURTS-MARTIAL 405 AND THE SPECIAL TRIAL COUNSEL, AS THE REFERRAL AUTHORITY, EXERCISED STATUTORY AUTHORITY AND MADE A BINDING REFERRAL DECISION UNDER 10 UNITED STATES CODE § 824a.

Law and Argument

A writ "is a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotations and citations omitted); *see also United States v. Howell*, 75 M.J. 386, 390 (C.A.A.F. 2016) ("A writ of prohibition . . . is a drastic instrument which should be invoked only in truly extraordinary situations.") (internal quotations and citations omitted). While the facts of this case may be unique, petitioner's cause does not warrant extraordinary relief. Petitioner fails to explain why there are no other adequate means of relief, and it fails to articulate a "clear and indisputable right" to relief.

A. Extraordinary Relief Is Not Appropriate For Its Internal Dispute

Petitioner must demonstrate that a writ is "appropriate under the circumstances." *United States v. Pritchard*, 82 M.J. 686, 690 (Army Ct. Crim. App. 2022) (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-381

(2004)). Even now, when asking this court for another bite at the apple, petitioner avoids the heart of the issue: that despite naming the military judge as respondent, the United States' true quarrel is internal. The United States has yet to decide what is in its best interest. Is it the position adopted by the OSTC or the command? Both entities undoubtedly believe they are acting in good faith.

The current petition still reads as if written by the OSTC, and advocates what the OSTC wants, and not a product that actually advocates the interests of the United States. The petition still does not recognize that petitioner is the United States, to which both the OSTC and the SPCMCA belong.[2]

Instead of grappling with the core conflict, petitioner creates a bogeyman, the SPCMCA, a creature that somehow exists outside the umbrella of the "United States." The "United States" describes this villain as someone "attempting to subvert [the OSTC's] referral decision," who "can prevent charges from going to trial . . . by continuously directing a case back to a preliminary hearing as [he] deems appropriate," and who can "force the referral authority to refer to a special court martial." (Pet. 7-8, 11, 18). Petitioner even implies the military judge has somehow unwittingly allowed the SPCMCA such vast power because "she has

[2] Perhaps this is because the Lead Special Trial Counsel has exclusive authority to decide whether to pursue extraordinary relief for covered offenses, and not the Chief, GAD, who can employ a broader perspective in a case like this. Army Reg. 27-10, Legal Services: Military Justice, para. 12-1 (8 Jan. 2025).

inappropriately ceded her own authority and subverted statutory authority of the [OSTC's] referral authority by substituting it with that of the [SPCMCA]." (Pet. 11). But in the end, petitioner gives the game away. Extraordinary relief is necessary not because the "United States" interests are at stake, but OSTC's: "A commander and military judge are preventing a lawful exercise of the OSTC's authority." (Pet. 20).

But that is not what happened here. There is no evidence the SPCMCA sought to frustrate any authority. He complied with his duty to direct the Article 32, forwarded his recommendation, and expected to be done with this case. It is only because of litigation and court rulings that the case ended up back at his level—he did not reach up to the court-martial to claw it back.

Petitioner misreads the SPCMCA's full testimony. While he does not support the prosecution of SFC Starr, he also understands he does not have disposition authority, and he knows he only gets to make a recommendation, which he previously made and forwarded months before the current internal debate arose. (R. at 978-79). In short, he testified to the following: he is concerned about due process and an accused's ability to mount a defense; he knows he cannot indefinitely hold up the processing of a case; and he believes he has authority to address a defect in the Article 32 he directed and then move the case to the next step in the process, which he previously did. (R. at 550, 973-77, 986-87).

The SPCMCA testified he does think his role was not to be a "rubber stamp":

> Otherwise, why am I there to—what am I concurring to? If there's a—there's a problem with the proceeding or there's something we should consider, let's consider it and then we can move on with the process. That's not the same thing as dismissing charges or any of that. I acknowledge that I have no authority to do such a thing.
>
> . . .
>
> I mean, why am I looking at this at all if I have no authority to [correct it]?

(R. at 986-87). No fair reading of his testimony leads one to conclude he is using the Article 32 as a tool of "delay in perpetuity." (Pet. 11).

Petitioner avoids the full context of the SPCMCA's testimony, just as it avoids the bigger issue that this case is a result of its own internal dispute. Instead, petitioner conjures up a nightmare scenario, its own "Groundhog Day," where it is forced to conduct Article 32 after Article 32 in what it believes is an "indefinite abatement of proceedings." (Pet. 11, 17 n.5).

But aside from its imaginings, petitioner devotes little to explain why it believes extraordinary relief is appropriate under the circumstances. (Pet. 20). Petitioner does not address why this court must settle an intra-Army leadership dispute. Instead, petitioner simply asserts that "nothing short of a writ of prohibition" will suffice.

B. There Is Other Adequate Means of Relief to Solve Its Internal Dispute

Petitioner must also demonstrate there is "no other adequate means of relief." *Pritchard*, 82 M.J at 690. Petitioner ignores two obvious alternatives.

First, petitioner could solve resolve its internal dispute doing what is ordinarily done—requesting intervention from a higher authority within the chain of command. If, as petitioner argues, the SPCMCA is undermining congressional intent in direct contravention of clear and indisputable statutes and rules, it only makes sense for petitioner to ask a higher Army authority for redress, but not this court. Here, the logical authority is the GCMCA, who, after all, convened this general court-martial.[3] Petitioner has not demonstrated why a superior authority could not withhold the SPCMCA's authority to direct an Article 32 or to take any future action on the case.

Second, and simpler, petitioner could conduct another Article 32. Although a logistical inconvenience, Article 32s are a routine prosecution function that can be completed with a short suspense, just like the military judge directed in this case.

Petitioner is concerned with "substantial delay" that could "seriously jeopardize the government's case." (Pet. 11). But if petitioner had complied with the miliary judge's 24 February order, petitioner could have conducted the Article

[3] A prior GCMCA referred this case to a general court-martial in *Starr I*.

32 by 10 March and started trial on 7 April. (Pet. 4-5). This is regardless of the PHO's report, as long as the LSTC believed referral to a general court-martial was still appropriate. The fact that petitioner has caused more delay through its failure to comport its original petition with Article 70 further undercuts its argument.

C. Petitioner Fails to Show a Clear and Indisputable Right

Lastly, petitioner must show a "clear and indisputable" right to the issuance of the writ. *Pritchard*, 82 M.J. at 690. This is "an extremely heavy burden." *Dew v. United States*, 48 M.J. 639, 648 (A.C.N.R. 1998); *United States v. Rechnitz*, 75 F.4th 131, 140 (2nd Cir. 2023) (noting the burden to show a "clear and indisputable right" is "exceptionally high"). Courts "require more than a showing that the court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015); *see also In re McGraw-Hill Global Educ. Hodings, LLC*, 909 F.3d 48, 57 (3rd Cir. 2018) ("reversible error by itself is not enough to obtain [a writ]"). The military judge's decision "must amount to a judicial usurpation of power," where the decision was directly "contrary to statute, settled case law, or valid regulation." *Dew*, 48 M.J. at 648; *see also In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) ("we will deny [relief] even if a petitioner's argument, though pack[ing] substantial force, is not clearly mandated by statutory authority or case law.") (internal quotations and citations omitted) (second alteration in original).

Petitioner has not proven error by the military judge, let alone a "judicial usurpation of power." As the military judge noted, Article 24a, UCMJ, which outlines the OSTC's exclusive authority, does not mention Article 32s, much less the notion that the OSTC has exclusive authority to reopen one.

In part, R.C.M. 405(m)(5) states a "convening authority may direct that the preliminary hearing be reopened." Despite this plain language, petitioner spends the bulk of its petition engaged in an exercise of statutory interpretation, arguing the statutes and rules are so plain and unambiguous as to mandate an opposite conclusion. (Pet. 11-20). Petitioner invokes "congressional intent," but does not cite to any statement of Congress's intent or legislative history. Petitioner also does not explain why the same statutes and rules maintain the convening authorities' involvement in the court-martial process even though the OSTC, in its view, exercises authority over the charges.

Petitioner also argues the last sentence of R.C.M. 405(c)(2) contemplates the OSTC having exclusive authority to reopen an Article 32. (Pet. 15). But petitioner selectively reads the Rule, ignoring the preceding sentence, that upon request, "the convening authority shall provide a preliminary hearing officer and *direct a preliminary hearing in accordance with this rule*." (emphasis added). It is reasonable to believe that a convening authority can do more than simply "provide" the PHO and "direct" an Article 32—the convening authority indeed has

an interest in ensuring compliance with R.C.M. 405. It follows that a convening authority who has concerns about the impartiality of a PHO he appointed also has the authority to re-open the Article 32 with a new, impartial PHO. *See* R.C.M. 405(e)(1)(A) (requiring the detailing of an impartial PHO); *United States v. Badders*, 82 M.J. 299, 303 (C.A.A.F 2022) (language is ambiguous when "reasonably subject to two opposing interpretations").

The folly of the internal dispute came to a head at the motions hearing. On cross-examination, the Special Trial Counsel (STC) quizzed the SPCMCA about his understanding of authorities under R.C.M. 405(c)(2), which resulted in the STC reading the entirety of the rule to the SPCMCA in court. (R. at 979-84). The SPCMCA, presumably the reasonable person the rules are meant to guide, summed it up best: "And so if you mean the practical application of the rule that you cited, *it is not clear for me from your reading, even though you read it perfectly*, that I don't have the authority to open the Article 32 hearing." (R. at 983-84) (emphasis added).

Petitioner concludes by arguing that the military judge's ruling is "without precedent" and "wholly inconsistent with Congressional intent." But petitioner does not acknowledge that the OSTC and the statutes and rules that guide it are brand new, and the more salient point: Internal prosecutorial disputes are not ordinarily aired in courts-martial, let alone the subject of extraordinary writs. (Pet.

19-20). Petitioner has not demonstrated a "clear and indisputable" right such that the military judge's decision was a "judicial usurpation of power."

Conclusion

The United States Army should settle its internal dispute. Extraordinary relief is not appropriate. This court should deny the petition.

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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 21 April 2025.

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