

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

**REPLY BRIEF ON BEHALF OF
REAL PARTY IN INTEREST
REGARDING AUTHORITY OR
STANDING**

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

Docket No. ARMY MISC 20250096

and

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

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

Question Presented

**DOES THE OFFICE OF THE SPECIAL TRIAL
COUNSEL HAVE AUTHORITY OR STANDING TO
FILE ON BEHALF OF AND REPRESENT THE
UNITED STATES BEFORE THE ARMY COURT
OF CRIMINAL APPEALS ON A PETITION FOR
AN EXTRAORDINARY WRIT?**

Summary of Argument

This petition for extraordinary relief stems not from a disagreement between the United States and the military judge, but rather a disagreement between two entities of the United States Army: the chain of command and the Office of Special Trial Counsel (OSTC). Further adding to this internecine confusion, both the

OSTC and the Government Appellate Division (GAD) have filed pleadings with this court purporting to represent the United States.

This case has a long and tortuous history. SFC Starr pled guilty in civilian court and was sentenced by a civilian authority. Despite this, both the chain of command and the OSTC pursued prosecution.

Because this case is really a dispute between a convening authority and a referral authority, the case also presents this question: Who is the United States in appellate proceedings? The UCMJ provides the answer. Per the plain language of Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870 (2019) [UCMJ], appellate government counsel represent the United States before this court. Therefore, this court should dismiss the petition and lift the stay of proceedings because the OSTC does not have authority or standing to file on behalf of and represent the United States.

Relevant Facts and History of the Case

A. Prosecution by Civilian Authority

On 29 November 2020, SFC Starr was involved in a traffic accident that led to the death of his then-girlfriend's (now wife) five-year-old son. (App. Ex. III, p. 4; App. Ex. XIV, p. 1). On 17 July 2023, SFC Starr 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 SFC Starr 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 chain of command preferred charges against him for the same offense. (Charge Sheet dated 14 September 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). On 5 January 2024, SFC Starr was arraigned over the defense's 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 be reopened three times.

First, on 7 June 2024, the military judge ordered the Article 32 be reopened. (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 arguing that the Article 32 was defective as it was conducted outside the presence of the accused and that neither the PHO nor the government forwarded the defense's objections to the Special Court-Martial Convening Authority (SPCMCA). (App. Ex. XXXVII).

Second, on 4 October 2024, the military judge ordered the Article 32 be reopened again. (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 actual and apparent bias. (App. Ex. LXIX, p. 4; App. Ex. LXIX).

The defense then filed a motion to dismiss based on a defective Article 32. (App. Ex. LXIX). On 1 November 2024, in response to the defense objections, the SPCMCA directed the Article 32 be reopened and stated that he would appoint a new PHO. (App. LXX-a, p. 2). The next day, the DLSTC signed a memorandum concurring with her previous decision to refer the case to a general court-martial—she explained that 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).

Third, on 12 December 2024, the military judge returned the case to the SPCMA for action. (App. Exs. LXXXI, LXXXVIII). The government filed a motion for reconsideration. (App. Ex. LXXXI). On 24 February 2025, the military judge issued her ruling, denying the government's motion to reconsider. (App. Ex. XC). This is the ruling that is the subject of the petition for extraordinary relief. The military judge did not conclude one way or the other 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 Petition for Extraordinary Relief

The petition pending before this court challenges the military judge's 24 February 2025 ruling that the SPCMCA has the authority to reopen the preliminary hearing. Both the OSTC and the GAD have filed pleadings with this court purporting to represent the United States on the petition.

(i) *Request for a Stay of Proceedings*, filed 3 March 2025, signed by the GAD.

On 4 March 2025, this court rejected the filing because of noncompliance with Rule 19(b)(2)(F) of the Joint Rules of Appellate Procedure for Courts of

Criminal Appeals [C.C.A. R.], which requires the request for a stay of proceedings to be part of the petition.

(ii) *Petition for Extraordinary Relief in the Nature of a Writ of Prohibition*, filed 7 March 2025, signed by the OSTC.

The petition opens with the following: “COMES NOW the United States, by and through undersigned appellate government counsel.” (Petition 1). The petition is signed by two counsel from the OSTC. (Petition 20). The petition does not appear to include the signature of an appellate government counsel.

The petition also includes a request for a stay of proceedings. (Petition 8). The petition omits the military judge’s order, appellate exhibits, any record citations, or any other reference essential for this court to address the petition as required by C.C.A. R. 19(b)(2)(C).

(iii) *Request for a Stay of Proceedings*, filed 7 March 2025, signed by the GAD.

On 7 March 2025, this court stayed the proceedings. This court ordered petitioner to provide the parts of the record essential to understanding the matters set forth in the petition no later than 10 March 2025. This court’s order was sent to both the OSTC and the GAD.

(iv) *Motion to Attach Relevant Portions of the Record of Trial (Out of Time)*, filed 11 March 2025, signed by the GAD.

In its out-of-time the motion, government appellate counsel explained that “[a]lthough [the court’s 10 March 2025] Order was properly sent to government

counsel, the government mistook the email. . . as this court’s acknowledgment of receipt and acceptance of the Petition.” Government appellate counsel further “anticipat[ed] providing the relevant portions of the record no later than 17 March 2025, in accordance with Rule 19(b)(1). The motion does not identify whether counsel from the OSTC or counsel from the GAD was responsible for the oversight, or which counsel prepared the relevant portions of the record for filing with the court.

On 12 March 2025, this court ordered petitioner to provide a brief responsive to the question of standing and responsibility no later than 12 March 2025.

(v) *Brief on Behalf of Petitioner Regarding Specified Issues*, filed 13 March 2025, signed by the GAD.

(vi) *Motion to Withdraw and Refile Petition for Writ of Prohibition*, filed 17 March 2025, signed by the GAD.

(vii) *Petition for Extraordinary Relief in the Nature of a Writ of Prohibition (CORRECTED)*, filed 17 March 2025, signed by the OSTC.

The motion to withdraw and refile the petition does not include a signatory from the OSTC. In the motion, appellate government counsel attempts to explain and correct errors from the original petition. The motion and corrected petition fail to indicate what corrections were made to the petition.

The corrected petition, like the original, begins with “COMES NOW the United States, by and through undersigned appellate government counsel.”

(Petition 1). The corrected petition, like the original, is signed by two counsel from the OSTC. (Petition 20). The corrected petition does not include a signatory from an appellate government counsel. The corrected petition still contains two glaring errors this court noted when accepting the original petition: SFC Starr's rank is incorrect and the petition includes a footnote that has nothing to do with the petition.

(viii) *Motion to Attach the Record of Trial*, filed 17 March 2025, signed by the GAD.

Law and Argument

In accordance with the plain language of Article 70, UCMJ, only appellate government counsel can represent the United States before the courts of criminal appeals. Therefore, the OSTC has no authority or standing to file on behalf of and represent the United States before this court on a petition for extraordinary relief. To the extent rules and regulations suggest otherwise, they run counter to Article 70's dictate. Furthermore, as evidenced by the confusion illustrated by this very case, policy dictates the United States speak with one voice before this court, and appellate government counsel must be doing the speaking.

A. Article 70, UCMJ, is Plain and Unambiguous: Appellate Government Counsel Represent the United States Before this Court

Petitioner has a section in its brief entitled "Statutory authority." (Pet'r Br. 3). But absent from that subsection is any citation to, or discussion of, Article 70.

(Pet'r Br. 3-4). Article 70, UCMJ, concerns "Appellate counsel," and states in part:

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel

(b) *Appellate Government counsel shall represent the United States before the Court of Criminal Appeals or the Court of Appeals for the Armed Forces when directed to do so by the Judge Advocate General.*

(emphasis added).

The plain language of Article 70(b) states "Appellate Government counsel" are the counsel who "shall represent the United States" before military appellate courts. "Unless the text of a statute is ambiguous, the plain language will control unless it leads to an absurd result." (*United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (internal quotation marks omitted)).

Petitioner has not addressed Article 70, the statutory provision which assigns exclusive authority to appellate government counsel to represent the United States before this court. Instead, petitioner cites ambiguous rules and regulations that must yield to the UCMJ. *United States v. Seay*, 1 M.J. 201, 202 (C.M.A. 1975) (it is "a fallacious premise in assuming that the regulation should be accorded precedence over the statute"); *United States v. Bartlett*, 66 M.J. 426, 429 (C.A.A.F.

2008) (“As such, the Army regulations must yield to the clear language of [the UCMJ].”)

B. The R.C.M.s Track Article 70, UCMJ

Petitioner’s “Statutory authority” subsection is not devoted to a statute but instead to the Rules for Courts-Martial [R.C.M.], specifically R.C.M. 1203(c) and R.C.M. 103. However, the government ignores R.C.M. 1202, the rule regarding “Appellate counsel.” The language of R.C.M. 1202 tracks the language of Article 70, which describes the duties of “Appellate Government counsel,” tracks with the language of Article 70(b), and plainly and unambiguously states that “Appellate Government counsel shall represent the United States” before military appellate courts.

Instead, petitioner looks to the discussion to R.C.M. 1203(c), which states “any party may petition a Court of Criminal Appeals for extraordinary relief,” and R.C.M. 103(20)(B), which defines “party” to include any “trial or assistant trial counsel representing the United States . . . when acting on behalf of the United States with respect to the court-martial or proceedings in question,” to cobble together its argument. (Pet’r Br. 7). That argument boils down to: (1) OSTC is a

“party”;¹ and (2) “any party may petition [this court] for extraordinary relief”; therefore (3) OSTC may file a petition for extraordinary relief.

But that doesn’t answer the question. No one disputes the United States may be a party to the court-martial. Nor does anyone dispute the United States may file a petition for extraordinary relief. But who represents the United States? In light of Article 70, does the OSTC have the authority or standing to file on behalf of and represent the United States before this court?

C. AR 27-10 Must Yield to Article 70, UCMJ

Petitioner also relies on Army Regulation 27-10, Legal Services: Military Justice, paragraph 12-1 (8 Jan. 2025) [AR-27-10], which addresses petitions for extraordinary relief. (Pet’r Br. 4-5). Per the regulation, the Lead Special Trial Counsel [LSTC] has exclusive authority to determine whether to seek extraordinary relief. AR 27-10, paragraph 12-1(a). Beyond that, coordination is required between the OSTC and the GAD:

Prior to seeking extraordinary relief . . . with the USACCA . . . on behalf of the United States or government officials Special trial counsel will coordinate with the [Lead Special Trial Counsel (LSTC)] and the Chief, GAD.

Id. para 12-1(a).

As to who files on behalf of and represents the United States:

¹ “‘Trial counsel,’ unless otherwise specified in these rules, includes special trial counsel.” R.C.M. 103(27).

The Chief, GAD will notify trial counsel or special trial counsel, as applicable, prior to filing a petition for extraordinary relief.

Id. This provision contemplates GAD filing the petition.

As with petitions for extraordinary relief, the LSTC has exclusive authority to determine whether to file an Article 62 appeal. *Id.* para. 12-3(a)(2). Again, coordination between the OSTC and the GAD is required before the OSTC files its R.C.M 908 notice. *Id.* But the regulation is explicit: “the Chief, GAD will . . . file an appeal.” *Id.* para. 12-3(b). And “[i]n all cases, the Chief, GAD will be responsible for the substance and content of submissions to the USACCA.” *Id.* Considering paragraphs 12-1 and 12-3 together, the regulatory aim is apparent: (1) the OSTC decides whether to seek extraordinary relief on behalf of the United States (or whether to file an Article 62 appeal); (2) coordination is required between the OSTC and the GAD; and (3) the GAD files the petition or Article 62 appeal on behalf of the United States.

D. The Rules of Appellate Procedure Must Yield to Article 70, UCMJ

Petitioner also relies on this court’s rules regarding petitions for extraordinary relief. Army Court of Criminal Appeals Rules of Practice and Procedure Rule [A.C.C.A. R.] 19.2(c) states:

Unless filed by the Chief, Government Appellate Division, a petition and brief filed on behalf of the United States or any officer or agent thereof shall be coordinated with the Chief, Government Appellate Division.

Like with AR 27-10, petitioner argues the OSTC may file a petition on behalf of the United States as long as the OSTC coordinates with the GAD. (Pet'r Br. 6). To the extent the rule allows counsel other than appellate government counsel to file on behalf of and represent the United States before this court, it must yield to Article 70.

Petitioner acknowledges A.C.C.A. R. 19.3(b) requires “[a]ppellate government counsel” to represent the United States. (Pet'r Br. 6 n.3). Petitioner argues this requirement is only triggered once this court orders the respondent to show cause, i.e., the OSTC can file the petition on behalf of the United States, then the GAD will assume representation of the United States if the court orders the respondent to show cause. (Pet'r Br. 6 n.3). Petitioner implies that Rule 19.3(b) applies to the instant petition. It does not. Instead, the rule contemplates scenarios in which the petitioner is a party other than the United States. If so, this court would order the respondent, which might be the United States, to show cause. Then government appellate counsel steps in to represent the United States.

Petitioner's interpretation of Rules 19.2(c) and 19.3(b) indeed leads to confusion: two offices of the United States Army (indeed as here a convening authority and a referral authority) could put forth conflicting positions on behalf of the United States in the same matter.

E. Petitioner's Authority on Standing is Inapposite

As to standing, petitioner cites to *LRM v. Kastenber*, 72 M.J. 364, 367-68 (C.A.A.F. 2013), and other cases that have held that under certain circumstances a non-party to a court-martial can have standing, e.g., a victim, the press, a third-party subject to a subpoena. (Pet'r Br. 8-9). Petitioner wants to extend that proposition to argue that it is logical that the OSTC, as a party to the court-martial, can file a petition. (Pet'r Br. 8). But here no one has questioned whether a nonparty to a court-martial has standing, or whether the United States is a party to the court-martial, or whether the OSTC, as a "party" as defined by the MCM, can prosecute courts-martial on behalf of the United States. The question is whether OSTC has authority or standing *to file on behalf of and represent the United States* before this court. Petitioner does not squarely address that question.

F. Article 70, UCMJ, Reflects Valid Policy Concerns

Article 70 makes sense. The United States must speak with one voice before this court. To allow multiple entities within the United States Army to represent the United States leads to confusion and needless litigation. This is not an illusory concern. It is happening in this case.

1. There is Confusion Between the OSTC and the GAD at the Appellate Level

One office, the GAD, moved to stay the proceedings. After this court rejected that filing, another office, the OSTC, filed the petition. The petition

included a request for a stay. Nearly simultaneously, the GAD again filed a separate stay of proceedings, which appeared to be the same stay of proceedings it previously filed.

The OSTC's petition failed to include the military judge's order or anything else required by this court's rules. When this court ordered the portions of the record omitted from the OSTC's petition be provided, the GAD submitted an out of time filing because of confusion caused by the multiple filings by the OSTC and the GAD.

Several days later, the GAD filed a motion to withdraw the OSTC's petition and replace it with a corrected copy. Nothing in that motion indicated that the OSTC was consulted. Nothing indicated what corrections were made to the petition. The corrected petition, still signed by the OSTC, also fails to indicate what corrections were made. This left the burden on this court and the real party in interest to figure out what corrections were made to the petition.

This illustrates why Article 70 requires appellate government counsel to represent the United States before this court. Coordination with other offices notwithstanding, appellate government counsel are the subject matter experts in appellate law and are familiar with this court's rules of procedure. *See United States v. Patterson*, 22 U.S.C.M.A. 157, 161 (C.M.A. 1973) ("since enactment of the Uniform Code the military appellate counsel have been qualified attorneys

assigned to the office of the Judge Advocate General who were detailed to specialize in appellate work”).²

2. The Dispute at the Trial Level is Internal to the United States

Perhaps not coincidentally, this lack of intra-Army coordination is also playing out at the trial level. Despite petitioner naming the military judge as the respondent, the United States’ true quarrel is internal: disagreement between the chain of command and the OSTC.

These two entities of the Army have divergent interests. On one hand, the SPCMCA determined that the latest Article 32 was flawed and directed that it be reopened. But the OSTC believes the Article 32 was done in substantial compliance with the rules and is fighting the reopening. Both entities undoubtedly believe they are acting in good faith.

Unable to resolve the dispute, the OSTC and the command turned to the military judge to resolve their spat. And now government appellate counsel have been dragged into this dispute. But petitioner, the United States, has yet to decide

² Petitioner demonstrates its own confusion in its papers. Although the petition says “by and through undersigned appellate government counsel,” the signature blocks list the signatories as “special trial counsel.” (Petition 1, 20).

what is in its best interest. Is it the position adopted by the OSTC or the command?

Conclusion

Article 70 requires appellate government counsel, not the OSTC, to represent the United States before this court. The OSTC does not have authority or standing to file a petition on behalf of and represent the United States before this court. Therefore, this court should dismiss the petition and vacate the stay of proceedings.



Emily R. Ittner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Robert W. Rodriguez
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Jonathan F. Potter
Senior Appellate Counsel
Defense Appellate Division



Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

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 26 March 2025.

A black rectangular redaction box covering the signature of Robert W. Rodriguez.

Robert W. Rodriguez
Major, Judge Advocate
Branch Chief
Defense Appellate Division