

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**J.D. HARTY**

**R.G. KELLY**

**W.M. FREDERICK**

**Trent D. THOMAS  
Corporal (E-4), U.S. Marine Corps  
Petitioner**

**v.**

**UNITED STATES  
Respondent**

NMCCA 200700261

Decided 27 April 2007

Decision on Petition for Extraordinary Relief in the Nature of a Writ of Prohibition.

LT BRIAN MIZER, JAGC, USN, Counsel for Petitioner  
Maj K.C. HARRIS, USMC, Counsel for Respondent

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

On 22 March 2007, the petitioner submitted a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition, along with a supporting brief (hereinafter "Petition") and a Motion to Stay Proceedings.<sup>1</sup> He requested that we take the following actions: (1) stay the proceedings of his pending general court-martial; and (2) bar the respondent from trying the petitioner until he is afforded his Article 32, UCMJ, rights. On 23 March 2007, we granted the petitioner's request for a stay until further order of this Court, and ordered the respondent to show cause as to why the petition should not be granted. On 29 March 2007, the respondent filed a Motion to Amend the Court's Order of 23 March 2007 asking this Court to modify our previous Order by lifting the stay so that motions could be litigated in accordance with the trial milestones previously set. On 3 April 2007, the petitioner filed his opposition to the respondent's Motion to Amend, and on 5 April 2007, the respondent's motion was

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<sup>1</sup> Although titled as a petition for a writ of prohibition, petitioner requests extraordinary relief in the form of a writ of mandamus and a writ of prohibition. Petition at 3 and 8.

denied. On 11 April 2007, the petitioner filed a Motion to Compel the United States to Abide by this Court's Stay of 23 March 2007. The respondent filed its Answer to the petitioner's motion on 19 April 2007, and the petitioner's motion was denied on 20 April 2007. The respondent filed its answer to the court's order to show cause on 12 April 2007. This matter is now ripe for decision.

### History Below

#### 1. Prefferal of Charges

Charges were preferred against the petitioner on 21 June 2006 alleging conspiracy, making a false official statement, premeditated murder, larceny of a shovel and AK-47 assault rifle, assault, housebreaking, kidnapping, and obstructing justice, in violation of Articles 81, 107, 118, 121, 128, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 918, 921, 928, 930, and 934. On 3 August 2006, an additional charge of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928, was preferred against the petitioner. On 3 October 2006, the convening authority withdrew and dismissed the charges of assault (Charge V, sole specification) and obstructing justice (Charge VI, Specification 2), both preferred among the original charges on 21 June 2006.

#### 2. Article 32, UCMJ, investigation waivers

On 16 August 2006, the petitioner submitted a written unconditional waiver of his right to an Article 32, UCMJ, investigation into the charges "preferred against me on 9 May 2002, [that] have been referred to an investigation . . . to convene on 1 July 2002."<sup>2</sup> Petition at Appendix A (emphasis added). On 22 August 2006, the convening authority (CA), Commander, U.S. Marine Corps Forces, Central Command,<sup>3</sup> denied the petitioner's 16 August 2006 request to waive the Article 32, UCMJ, investigation. *Id.* at Appendix B. On 12 October 2006, the petitioner again submitted a written waiver of his right to an Article 32, UCMJ, investigation, this time conditioned on charges being referred non-capital. See Respondent's Response to Court Order of 4 April 2007 filed on 11 Apr 2007. According to the respondent, that request was accepted on 17 October 2006, and charges were referred the same day. Respondent's Motion to Amend the Court's Order of 23 March 2007 filed on 29 Mar 2007 at 3.

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<sup>2</sup> The parties before this court, and below, claim the petitioner's 16 August 2006 waiver pertains to this case. There is, however, nothing within the written waiver itself that ties it to this case because the dates precede any action in this case (including the charged offenses) by almost four years.

<sup>3</sup> Commander, U.S. Marine Corps Forces, Central Command, also serves as Commanding General, I Marine Expeditionary Force.

### 3. Pleas

Pursuant to a pretrial agreement completed on 17 January 2007, the petitioner, on 18 January 2007, entered guilty pleas to all charges and specifications, excepting the words "with premeditation" from the sole specification under Charge III alleging a violation of Article 118, UCMJ, and the words "and an AK-47 assault rifle" from the sole specification under Charge IV alleging a violation of Article 121, UCMJ. The petitioner pled not guilty to the excepted language. Electronic Record, Appellate Exhibit V at 22.<sup>4</sup>

### 4. Withdrawal and dismissal of the excepted language

After reviewing the pretrial agreement terms and following acceptance of pleas, the military judge asked the trial counsel if he planned "to go forward on the language and greater offense under the specification of Charge III and the excepted language in the specification of Charge IV?" *Id.*, Appellate Exhibit V at 141.<sup>5</sup> In response, the trial counsel stated "No, sir. At this time, the government moves to withdraw that language." *Id.* Again, in response to the military judge's characterization of the trial counsel's request as a "motion to withdraw and dismiss the language in both of those specifications without prejudice . . . ," the trial counsel told the military judge that it was only a motion to withdraw the language. *Id.*, Appellate Exhibit V at 142.<sup>6</sup> The military judge nonetheless treated the trial counsel's oral motion as a request to withdraw *and dismiss* the language without prejudice in accordance with the pretrial agreement, and granted the motion. *Id.* The pretrial agreement, however, only required the Government to withdraw the language. See Memorandum of Pretrial Agreement, Part I, at ¶ 15b, Respondents Response to Court's Order of 4 April 2007 filed on 11 Apr 2007.

### 5. Rejection of guilty pleas

On 8 February 2007, during the sentencing hearing, the defense team notified the military judge and trial counsel that the petitioner would make comments inconsistent with his earlier pleas if the court-martial continued through the sentencing phase. Rather than request to withdraw the petitioner's guilty pleas,

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<sup>4</sup> See Adobe page 411. By consent motion the respondent attached a compact disk containing the record of trial for hearings held on 1-2 March 2007 and exhibits from those hearings in Adobe format. We will cite to that record in the body of this opinion as "Electronic Record" and the exhibit number or record page. By footnote, we will also provide the Adobe page location for pages as they appear in the left-side screen of the Adobe page that allows the reviewer to go directly to that page. We will refer to those pages as "Adobe page."

<sup>5</sup> See Adobe page 541.

<sup>6</sup> See Adobe page 542.

the defense team asked the military judge to reopen providence. Electronic Record, Appellate Exhibit V at 263-64, 269.<sup>7</sup> The military judge reopened providence, during which the petitioner stated that he believed he was acting pursuant to lawful orders when he committed each act to which he earlier plead guilty. *Id.* at 275-86.<sup>8</sup> The military judge determined that the petitioner's guilty pleas were improvident and entered not guilty pleas to all charges and specifications, as previously excepted. *Id.* at 288-89.<sup>9</sup> The Government then withdrew from the pretrial agreement. *Id.* at 289.<sup>10</sup>

6. Withdrawal of remaining charges and specifications as excepted

Once the military judge entered not guilty pleas on the petitioner's behalf, the Government moved to withdraw, but not dismiss, Charges I - VI, Additional Charge I, and all supporting specifications, as previously excepted.<sup>11</sup> *Id.* at 290.<sup>12</sup> The trial counsel observed, and the military judge agreed, that the court's earlier dismissal of the language excepted from the sole specifications under Charges III and IV was an effective dismissal of the language even though the Government never requested that the language be dismissed. *Id.* at 289-90.<sup>13</sup>

7. Subsequent prefferal and referral of excepted language

After the Government withdrew from the pretrial agreement and withdrew the remaining Charges and Specifications as excepted, the CA preferred a sole specification of premeditated murder in violation of Article 118, UCMJ, under Additional Charge II, and a sole specification of larceny in violation of Article 121, UCMJ, under Additional Charge III, on 8 February 2007. These two charges include the previously excepted, withdrawn, and dismissed language to create a mirror image of what was originally preferred as the sole specifications under Charges III and IV on 21 June 2006. On 12 February 2007, the CA referred these two

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<sup>7</sup> See Adobe page 651-52, 657.

<sup>8</sup> See Adobe pages 663-74.

<sup>9</sup> See Adobe pages 676-77.

<sup>10</sup> See Adobe page 677.

<sup>11</sup> The petitioner mistakenly asserts that the Government withdrew and dismissed all charges. Petition at 2-3, 6. The petitioner also mistakenly asserts that the military judge withdrew and dismissed charges at the Government's request, and that the Government dismissed charges. *Id.* at 5, 6, 8. The record does not support these claims. The Government never moved to dismiss any Charge or Specification, nor did it ever dismiss a Charge or Specification.

<sup>12</sup> See Adobe page 678.

<sup>13</sup> See Adobe pages 677-78.

additional charges to be tried in conjunction with all previously preferred charges.

8. Subsequent rereferral of withdrawn charges as previously excepted

Also on 12 February 2007, the CA rereferred all charges and specifications that were preferred on 21 June 2006 and 3 August 2006, without the language that was withdrawn by the trial counsel and dismissed by the military judge.

9. Current charges

After the above procedural gymnastics, we are left with the following referred charges: conspiracy (Charge I), making a false official statement (Charge II), murder without premeditation (Charge III), larceny of a shovel (Charge IV), housebreaking (Charge V), kidnapping (Charge VI), aggravated assault (Additional Charge I), premeditated murder (Additional Charge II), and larceny of a shovel and an AK-47 assault rifle (Additional Charge III), in violation of Articles 81, 107, 118, 121, 130, and 134, UCMJ.

#### **Extraordinary Relief**

A writ of mandamus is normally issued by a superior court to compel a lower court or tribunal possessing judicial or quasi-judicial powers to perform its mandatory or ministerial duties correctly. BLACK'S LAW DICTIONARY 973 (7th ed., 1999). The superior court may use it either to confine the inferior court or tribunal to the lawful exercise of its jurisdiction or to compel it to exercise a required duty. *Dew v. United States*, 48 M.J. 639, 648 (Army Ct.Crim. App. 1998)(quoting *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943)).

Under the All Writs Act, 28 U.S.C. § 1651(a), "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." We are a court that Congress, acting through the Judge Advocate General, has created. *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979); see also *United States v. Frischholz*, 36 C.M.R. 306, 307 (C.M.A. 1966)(holding that the All Writs Act is applicable not only to Article III courts, but to all courts established by Congress). Accordingly, this court is empowered under the All Writs Act to grant extraordinary relief where appropriate. *Dettinger*, 7 M.J. at 219; *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993). As the highest judicial tribunal within the Department of the Navy, it follows then that our review of this petition under the All Writs Act is properly a matter in aid of our jurisdiction.

The issuance of an extraordinary writ, however, is, "a drastic remedy" that is reserved for "truly extraordinary

situations." *Aviz*, 36 M.J. at 1028 (citing *United States v. Labella*, 15 M.J. 228 (N.M.C.M.R. 1993). Writs are "generally disfavored" because they disrupt the "normal process of orderly appellate review." *Shadwell v. Davenport*, 57 M.J. 774, 778 (N.M.Ct.Crim.App. 2002)(citing *McKinney v. Jarvis*, 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997)).

To prevail, the petitioner must demonstrate that the decision by the lower court amounted "to more than even gross error; it must amount to a . . . usurpation of power." *Labella*, 15 M.J. at 229 (quoting *United States v. DiStephano*, 464 F.2d 845, 850 (2d Cir. 1972)(internal quotation marks omitted). Also, the petitioner must show that he has "'a clear and indisputable right'" to the extraordinary relief that he has requested. *Shadwell*, 57 M.J. at 778 (quoting *Aviz*, 36 M.J. at 1028). Extraordinary relief in the form of a writ should not be invoked in cases where other authorized means of appeal or administrative review exist. *Aviz*, 36 M.J. at 1028.

### **Article 32, UCMJ, Investigations**

Article 32, UCMJ, requires a thorough investigation before any charges or specifications may be referred to a general court-martial. "The Article 32 investigation 'operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.'" *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004)(quoting *United States v. Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959)).

An accused may, however, waive his or her right to an Article 32, UCMJ, investigation. RULE FOR COURTS-MARTIAL 405(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). "The precise form or procedure for a waiver is not specified," but any waiver made, regardless of form, must be an informed and voluntary waiver personally made by the accused. *Garcia*, 59 M.J. at 451. Once waived, an accused may request to withdraw the waiver. "Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown." R.C.M. 405(k).

### **Issue of First Impression**

On 12 October 2006, the petitioner personally waived his right to an Article 32, UCMJ, investigation into the charges that were preferred on 21 June 2006 and 3 August 2006 as those Charges and supporting Specifications existed on the date of the waiver.<sup>14</sup> That waiver was not part of a pretrial agreement. Subsequent to that waiver, the parties entered into a pretrial

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<sup>14</sup> Those Charges and Specifications included the "with premeditation" language later excepted from the sole specification under Charge III, and the "and an AK 47 assault rifle" language later excepted from the sole specification under Charge IV.

agreement in which the respondent agreed, in part, to except and withdraw certain language from two specifications, and the petitioner agreed, in part, to enter certain pleas to the specifications as excepted and to the charges. Pursuant to the pretrial agreement, the respondent moved to withdraw the agreed upon language from the sole specifications under Charges III and IV, but did not ask that the language be dismissed. The military judge granted the motion to withdraw the language but mistakenly dismissed the withdrawn language without prejudice.

Due to the petitioner's subsequent improvident pleas, the respondent withdrew from the pretrial agreement and withdrew the remaining charges and specifications as authorized by R.C.M. 604(a). But for the military judge's dismissal of the language withdrawn from the specifications under Charges III<sup>15</sup> and IV, that language could have been part of the charges and specifications rereferred without a rereferral. See R.C.M. 604(b).

Whether a prior valid, and never withdrawn, Article 32, UCMJ, investigation waiver continues to be effective as to the same conduct, after a military judge mistakenly dismisses language from a specification, is an issue of first impression that can be resolved during the normal course of appellate review. The related issue of whether the CA has substantially complied with Article 32, UCMJ, when he relies on the prior Article 32, UCMJ, waiver in referring the excepted language following a new referral can also be reviewed in the normal course of appellate review.

We conclude, therefore, that the petitioner has failed to demonstrate that there has been a "usurpation of power," *Labella*, 15 M.J. at 229, or that he has "a clear and indisputable right" to the extraordinary relief that he has requested. *Shadwell*, 57 M.J. at 778 (quoting *Aviz*, 36 M.J. at 1028). The petition for extraordinary relief in the nature of a writ of prohibition and mandamus is, therefore, denied. This denial is without prejudice to the petitioner's right to raise the same issues during the course of normal appellate review.

### **Conclusion**

Having considered the petitioner's request that we issue a writ of prohibition or mandamus, we conclude that the petitioner has failed to demonstrate an entitlement to extraordinary relief as a matter of right. This court's Order staying the proceedings

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<sup>15</sup> The petitioner mistakenly asserts that the military judge dismissed "Charge III in its entirety." Petition at 5. The language "with premeditation" was withdrawn from that specification and dismissed; the remaining specification and charge were never dismissed.

as to all charges and specifications is hereby dissolved.  
Counsel for the respondent will convey the decision of this Court  
to the parties and the military judge.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court