

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>Staff Sergeant (E-5)</b>	)	
<b>JUSTIN G. PORTER,</b>	)	
<b>United States Air Force</b>	)	<b>Misc. Dkt. No. 2013-10</b>
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>ORDER</b>
	)	
<b>Brigadier General (O-7)</b>	)	
<b>STEVEN D. GARLAND</b>	)	
<b>Commander, 36th Wing</b>	)	
<b>United States Air Force</b>	)	
<b>Respondent .</b>	)	<b>Panel No. 2</b>

This is a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition. Petitioner asks us to prohibit a general court-martial convening authority from proceeding with an Article 32, UCMJ, 10 U.S.C. § 832, hearing in Petitioner’s court-martial and from referring the case to a general court-martial. We decline to grant such relief at this time.

*Procedural Background*

On 10 October 2012, Petitioner was charged with one specification of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Respondent (a general court-martial convening authority) referred the charge and specification to a special court-martial on 15 October 2012. After the Government learned that Petitioner had tested positive during a 12 November 2012 random urinalysis, a second specification alleging an additional use of methamphetamine was preferred and referred to the special court-martial, based in part on the already docketed trial date of 16 January 2013. This additional specification was not served on Petitioner until 13 January 2013.

Several sessions under Rule for Courts-Martial (R.C.M.) 802 were held with the military judge on 16 and 17 January 2013. Petitioner elected to exercise his right under Article 35, UCMJ, 10 U.S.C. § 835, and R.C.M. 602 to not have his trial proceed until 17 January 2013, three days after the additional Charge and specification were served on him.

Trial did not proceed on that date.<sup>1</sup> According to declarations submitted to this Court by Petitioner's trial defense counsel, on 16 January 2013, the defense was first provided with some potentially exculpatory information relating to the testing of Petitioner's hair sample in 2012. These declarations also state the Government had improperly failed to make a deployed defense witness available in person for the trial. Both of these situations appeared to preclude the trial from proceeding as scheduled.

The trial defense counsel's declarations also describe a meeting between the defense counsel and Respondent's staff judge advocate (SJA) on 17 January 2013. These declarations claim the SJA indicated that production of the defense witness would delay the case and the trial would not get beyond arraignment if it started the following day. The SJA mentioned the expense the Government had already incurred by traveling witnesses for the current trial date and that a delay in the trial would likely not be in the Petitioner's interest as he was fairly likely to engage in additional misconduct. In his opinion, the only way the trial could go forward as originally scheduled was if the defense would enter into a pretrial agreement, with terms that could include a ten or twelve month cap and an agreement to keep the case at a special court-martial. The SJA indicated if the Petitioner would not enter into a pretrial agreement, the convening authority was likely to withdraw the charges and specifications from the special court-martial and re-refer the case to a general court-martial.

Later that day, the Petitioner declined to enter into the pretrial agreement. That same day, the charges and specifications were withdrawn and dismissed without prejudice.

On 26 March 2013, the same two specifications were then re-preferred by Petitioner's commander, along with his indorsement recommending trial by general court-martial. The trial defense counsel's declarations claim the commander (who had first previously recommended a special court-martial based on the same language, namely "the seriousness of the offense") acknowledged there had been no additional misconduct by Petitioner or any issues with his duty performance, and indicated the defense counsel would have to speak to the SJA for an explanation of the change in forum.

On 5 April 2013, Respondent appointed an investigating officer pursuant to Article 32, UCMJ, to investigate the Charge and its specifications. The Article 32, UCMJ, hearing was scheduled for 12 April 2013.

#### *Extraordinary Writ Litigation*

On 10 April 2013, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition and an Emergency Motion for a Stay of the Article 32, UCMJ,

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<sup>1</sup> In its filing, the Government expressly did not stipulate to the following facts alleged by Petitioner.

proceedings. We granted the latter request on 11 April 2013 and directed the Government to show cause why the Petition should not be granted.

Petitioner claims the Government withdrew the Charge and specifications from a special court-martial for an improper purpose, which therefore precludes the Government from proceeding with the same charge in a general court-martial. Specifically, he contends the case was improperly withdrawn from a special court-martial because he chose to exercise his rights under the Constitution, the UCMJ, and the *Manual for Courts-Martial, United States* (2012 ed.), by electing not to waive his right to a three-day waiting period between service of referred charges and trial, by demanding discovery of information favorable to the defense and by insisting on the production of a necessary and relevant witness. He cites our superior court's decisions in *Petty v. Moriarty*, 43 C.M.R. 278 (C.M.A. 1971), and *Vanover v. Clark*, 27 M.J. 345 (C.M.A. 1988), as requiring us to issue the requested writ of prohibition under these facts and at this time.

The Government chose not to provide this Court with factual information about the pretrial events and reasons why this case was withdrawn from a special court-martial and placed on a path that could lead to a general court-martial. Instead, the Government argues we should deny Petitioner's request for extraordinary relief as premature since a charge against Petitioner has not yet been referred to a general court-martial and, even if that occurs, Petitioner should be required to seek relief first from the military judge and then, if he is convicted, from this Court during the regular course of appellate review under Article 66, UCMJ, 10 U.S.C. § 866. The Government also contends that our superior court in *Petty* applied what today would be a legally erroneous standard, and thus we should not follow it. Notably, the Government does not argue that Petitioner would not be entitled to his requested relief if the events occurred as he alleges.

### *Jurisdiction*

Pursuant to the All Writs Act, military Courts of Criminal Appeals are empowered to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). *See United States v. Denedo*, 556 U.S. 904, 911 (2009), *aff'd sub nom.*, *Denedo v. United States*, 66 M.J. 114, 124 (C.A.A.F. 2008). A writ of prohibition is "[a]n extraordinary writ issued by an appellate court to . . . prevent a nonjudicial officer or entity from exercising a power." *Black's Law Dictionary* (9th ed. 2009). For purposes of this Court's exercise of review in aid of its jurisdiction under the All Writs Act, an Article 32, UCMJ, a pretrial investigation is a "judicial proceeding." *San-Antonio Express-News v. Morrow*, 44 M.J. 706, 708-09 (A.F. Ct. Crim. App. 1996). On this basis, we conclude that we have jurisdiction to entertain the Petition for Extraordinary Relief in this case. The parties do not allege otherwise.

## *Discussion*

Having found we have jurisdiction, we must now decide whether to exercise that jurisdiction. We elect not to do so at this time.

A convening authority may for any reason cause charges or specifications to be withdrawn from a court-martial at any point before findings are announced. R.C.M. 604(a). However, charges “should not be withdrawn . . . arbitrarily or unfairly to an accused.” R.C.M. 604(a), Discussion. If charges are withdrawn for an “improper reason,” the convening authority may not re-refer the withdrawn charges to a different court-martial. R.C.M. 604(b); *United States v. Williams*, 55 M.J. 302, 304 (C.A.A.F. 2001).

Improper reasons for withdrawal include “an intent to interfere with the rights of the accused, an intent to interfere with the impartiality of a court-martial, or an action that does not represent the personal and independent judgment of the authority ordering withdrawal.” *United States v. Haagenson*, 52 M.J. 34, 35 (C.A.A.F. 2009); R.C.M. 604(b), Discussion. Permissible reasons for withdrawal include “receipt of additional charges, absence of the accused, reconsideration by the convening authority, issues concerning the mental capacity of the accused, and routine duty rotation of court-martial personnel.” *Id.* In this context, our superior court has interpreted “proper” to mean “a legitimate command reason which does not ‘unfairly’ prejudice an accused in light of the particular facts of a case.” *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999) (citations omitted). If charges are withdrawn and referred to a later court-martial that is more onerous to the accused, “the reasons for the withdrawal and later referral should be included in the record of the later court-martial.” *Haagenson*, 52 M.J. 35, (quotation marks omitted) (citing R.C.M. 604(b), Discussion).

A convening authority’s discretion “becomes more and more restricted the closer the original forum gets to accepting evidence on the issue of guilt or innocence [and t]he scope of what constitutes a proper reason for withdrawal permitting rereferral narrows as that charge progresses along the judicial process in the original forum before the convening authority exercises his prerogative to withdraw.” *United States v. Mann*, 32 M.J. 883, 889 (N.M.C.M.R. 1991). This “avoid[s] the possibility or the appearance that the convening authority has manipulated the judicial process to obtain some preconceived result.” *Id.*

Here, the defense has alleged facts which, if substantiated, indicate the withdrawal of the Charge and its specifications may have been for the “improper purpose” of interfering with Petitioner’s exercise of his rights by retaliating against him for exercising them. *See Moriarty*, 43 C.M.R. at 283 (holding improper a convening authority’s decision to withdraw a case from a special court-martial and order an Article 32, UCMJ, investigation in response to a defense request for witnesses). Unlike in *Petty* and

*Vanover*, however, in this case, the underlying facts as to why the convening authority withdrew the initial charges have not been developed.

In *Petty*, the convening authority's affidavit stated he withdrew charges from a pending special court-martial and ordered an Article 32, UCMJ, investigation for the purpose of looking into the veracity of the accused's allegations he had been abused by the confinement personnel he was charged with threatening, disobeying and assaulting. *Petty*, 43 C.M.R. at 281. Under those facts, and noting "[t]he appropriate basis for directing an investigation under Article 32[, UCMJ,] is the seriousness of the offenses," our superior court found improper the convening authority's decision to order such an investigation as a response to the defense's request that the confinement personnel appear at his trial, and enjoined him from proceeding with that investigation. *Id.* Similarly, in *Vanover*, extraordinary relief was not granted by our superior court until after the military judge heard evidence on and then denied a defense motion to dismiss charges based on improper withdrawal and referral. *Vanover*, 27 M.J. at 347.

We are cognizant of our ability to direct that the convening authority and SJA supply us with declarations explaining the events and decisions made in Petitioner's case regarding the withdrawal and re-preferral of charges. *See United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002) (a court of criminal appeals has the "discretion ... to determine how additional evidence, when required, will be obtained, e.g., by affidavits, interrogatories, or a factfinding hearing"). However, we elect not to do so at this time.

The putative improper conduct by the convening authority does not become ripe until he refers the withdrawn charges to a new court-martial. Until that occurs, Petitioner has not been harmed by the actions of the convening authority and the SJA. It is possible that, following the Article 32, UCMJ, investigation, the case will again be referred to a special court-martial. If the case is instead referred to a general court-martial, Petitioner has the opportunity to move the military judge to dismiss the charge and its specification based on improper withdrawal and re-referral. We believe the trial judge is best postured to engage in fact-finding on this matter through witnesses subject to cross-examination. *See Lis v. United States*, 66 M.J. 292 (C.A.A.F. 2008) (mem.) (dismissing writ-appeal filed prior to an Article 32, UCMJ, investigation by an individual claiming not to be a member of the armed forces). In the event the military judge finds the facts to be as Petitioner alleges them in this Extraordinary Writ Petition, yet then refuses to dismiss the case, Petitioner is not precluded from again asking this Court to prevent him from facing a general court-martial.

### *Conclusion*

The petitioner's Petition is denied without prejudice to raising this issue through another extraordinary writ petition in the event his case is referred to a general court-martial.

Accordingly, it is by the Court on this 30th day of April, 2013,

**ORDERED:**

That the Petition for Extraordinary Relief in the Nature of a Writ of Prohibition is hereby **DENIED**.

**IT IS FURTHER ORDERED:**

That the stay of the Article 32, UCMJ, proceedings in *United States v. Porter* is hereby **VACATED**.



FOR THE COURT

STEVEN LUCAS  
Clerk of the Court