Capt Labergoll

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Joshua W. SIMS Corporal (E-4) U.S. Marine Corps, Petitioner	)	RESPONDENT'S SHOW CAUSE BRIEF TO OPPOSE EXTRAORDINARY RELIEF IN THE NATURE OF MANDAMUS AND SUPPORTING RELIEF
v.	)	Case No. 201000485
Major Robert G. PALMER, USMC Military Judge	)	
and	)	
UNITED STATES, Respondents	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS:

COMES NOW the United States pursuant to this Court's order of August 30, 2010, and prays that Petitioner's request for extraordinary relief be denied.

Procedural History of the Case

Corporal Sims, Petitioner, is presently being tried at a General Court-Martial for violations of Article 80 and Article 120, Uniform Code of Military Justice (UCMJ). Petitioner filed a petition for extraordinary relief with this Court. Petitioner requested that this Court issue two writs of mandamus ordering: (1) an immediate stay of proceedings; and, (2) the Military Judge to recuse himself.

This Court granted Petitioner's request, in part, ordering the court-martial stayed until further order of this Court.

This Court ordered Respondent to show cause why this Court should not issue a writ of mandamus ordering the Military Judge to recuse himself.

The Government filed a motion to re-title the litigation and requested that this Court name the United States as the sole Respondent. (Government Mot. to Re-title of September 3, 2010.) As of this date, this Court has not acted on the Government's motion. The Government's show cause brief is filed on behalf of the United States and is not made in the scope of any representation of the Military Judge.

Jurisdictional Statement

This Court has jurisdiction to determine whether it has jurisdiction to act on petitioner's writ for extraordinary relief and to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a).

Issue Raised in Petition

SHOULD THE MILITARY JUDGE BE DISQUALIFIED AFTER HAVING EX PARTE COMMUNICATIONS WITH THE STAFF JUDGE ADVOCATE FOR THE CONVENING AUTHORITY, WHEREIN HE COMMUNICATED HIS INTENT TO RULE IN THE GOVERNMENT'S FAVOR ON A [MIL. R. EVID.] 413 ISSUE SO THAT THE GOVERNMENT COULD BE PREPARED FOR TRIAL?

Statement of Facts

On August 19, 2010, the Military Judge was attending a training conference in Reno, Nevada. (R. at 3, 9, 26-27.) Because his attendance at the conference was arranged on late

notice, a motions hearing in Petitioner's case was re-scheduled until August 22, 2010. (R. at 26.) The Military Judge was completing his analysis of the Government's motion to admit evidence pursuant to Military Rule of Evidence (Mil. R. Evid.) 413 when he came across a note in his file which indicated that the Government may withdraw their motion. (R. at 3.) The Military Judge was working from his hotel room and did not have access to his military e-mail account or telephone directory. (R. at 3, 26.) He did not know the phone number for defense counsel, but he did recall the Staff Judge Advocate ("SJA") and Trial Counsel's phone numbers from memory as a result of prior communications in unrelated matters. (R. at 3, 8, 26.) The SJA and Trial Counsel offices are co-located at the Headquarters building at Marine Corps Air Station Beaufort, South Carolina. (R. at 26.)

The Military Judge called the Trial Counsel to inquire whether the motion had been withdrawn, but Trial Counsel did not answer his phone. (R. at 26.) The Military Judge then called the SJA, identified himself, and asked the SJA to inquire into the status of the Government's 413 motion. (R. at 9, 26.) The SJA returned after speaking with Trial Counsel and advised the Military Judge that the Government was not withdrawing its motion. (R. at 3, 9, 27.) The Military Judge advised the SJA that he anticipated granting the Government's motion, and told

the SJA to continue attempts to secure the presence of Ms. S, the witness through whom the Government proffered the evidence pursuant to Mil. R. Evid. 413. (R. at 10.)

The Military Judge was concerned because Petitioner was in pretrial confinement and he was hesitant to grant a continuance to allow Government time to produce Ms. S. (R. at 10, 27.) Moreover, Ms. S. implied at an earlier motions hearing that she was reluctant to appear at trial because she did not want to miss her college classes. (R. at 3, 9-10, 25.) The Military Judge believed it was possible that Ms. S's presence in court would only be accomplished through a subpoena and potentially, a warrant of attachment. (R. at 3, 10.)

The Military Judge and the SJA never discussed the pending defense motion to disqualify the SJA. (R. at 3.) The Military Judge and the SJA were not closely acquainted and had never worked together or even been stationed at the same installation prior to the Military Judge reporting to his current position. (R. at 27.) The conversation between the Military Judge and the SJA lasted approximately two minutes or less. (R. at 3, 9, 25, 27.)

The Military Judge never called Defense Counsel to inform them of his anticipated ruling. (R. at 11.) The Military Judge was unsure, but acknowledged that he may have asked the SJA to locate and inform Defense Counsel of the anticipated ruling.

(R. at 10, 27.) At an R.C.M. 802 conference on August 22, 2010, with all parties present, the Military Judge *sua sponte* recounted the facts of the 2-minute phone conversation with the SJA. (R. at 27.) The Military Judge stated on the record that it was a mistake that Defense Counsel was not notified until three days later. (R. at 27.) The Military Judge invited Defense Counsel to *voir dire* the Military Judge regarding the *ex parte* communication. (R. at 8.) Trial Defense Counsel conducted *voir dire* of the Military Judge. (R. at 8-11.)

Trial Defense Counsel made an oral motion pursuant to R.C.M. 902(a) and moved the Military Judge to disqualify himself from the case. (R. at 11-14.) Trial Defense Counsel stated that the Military Judge's *ex parte* communication was improper and resulted in the appearance of bias because the Government was afforded a "three day head start." (R. at 13.) Trial Defense Counsel argued that if the *ex parte* communication had been "45 days out" then "this would be different." (R. at 14.) Trial Defense Counsel did not allege that the Military Judge had an actual bias. (R. at 14.) The Government opposed Petitioner's motion to disqualify the Military Judge and argued that if the court believed prejudice occurred, the appropriate remedy would be a continuance. (R. at 15.) The parties and the Military Judge addressed other substantive matters before the court recessed for the day. (R. at 16-25.) Two days later, on

August 24, 2010 the court-martial was called to order. (R. at 25.) The Military Judge orally denied Defense motion to disqualify himself and stated his reasons on the record. (R. at 25-31.) The Miltary Judge explained why he made the phone call to the SJA, the nature and length of the discussion, and why he informed the SJA of his anticipated ruling. (R. at 25-27.) The Military Judge acknowledged that while the communication was appropriate for its intended purpose, it should have been followed with a phone call to Defense. (R. at 31.)

Reasons for Denying the Writ

A WRIT OF MANDAMUS IS A DRASTIC REMEDY AND SHOULD ONLY BE ISSUED IN TRULY EXTRAORDINARY SITUATIONS. THE MILITARY JUDGE SHOULD NOT BE DISQUALIFIED AFTER HAVING ONE BRIEF EX PARTE COMMUNICATION WITH THE CONVENING AUTHORITY'S STAFF JUDGE ADVOCATE, WHERE HE COMMUNICATED HIS INTENT TO RULE IN THE GOVERNMENT'S FAVOR ON A MIL. R. EVID. 413 ISSUE SO THAT THE TRIAL WOULD PROCEED AS SCHEDULED.

Writs of mandamus are a "drastic remedy . . . [which] should be invoked only in truly extraordinary situations." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (citing *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)); *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991). The burden is on Petitioner to show "[his] right to issuance of the writ is clear and indisputable." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172

U.S. 576, 582 (1899)). "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978)); *see Ponder v. Stone*, 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000). "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[1] *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted). In the context of writs of mandamus, military courts have read this rule to require Petitioner to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger,* 7 M.J. at 224; *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

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[1] "Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations,' *Ex parte Peru*, 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland v. Soper*, 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States v. United States District Court*, 334 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by [the Supreme] Court, *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *see McCullough v. Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706, 707 (1927) (dictum)." *Will*, 389 U.S. at 95-96.

The intensely restrictive use of extraordinary writs has as its basis a strong and longstanding congressional policy squarely against piecemeal appellate litigation. *See Kerr v. United States District Court*, 426 U.S. 394, 403 (stating that it has been "Congress' determination since the Judiciary Act of 1789 that 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'"). Congressional intent against piecemeal appellate litigation is at its apogee in criminal jurisprudence. *Flanagan v. United States*, 465 U.S. 259, 264 (1984); *see Will*, 389 U.S. at 96 (holding that the strong policy against piecemeal appellate litigation encourages a speedy resolution of any criminal charges); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (stating that the need for a final judgment is "especially compelling in the administration of criminal justice"). Accordingly, any "judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would 'run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.'" *Allied Chemical Corp.*, 449 U.S. at 35 (quoting *Kerr*, 426 U.S. at 403).

A. <u>The Military Judge did not usurp his power in denying Petitioner's motion.</u>

"The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to

a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will*, 389 U.S. at 95 (citing *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)). Mandamus is not to be used to control the decision of the trial court, but only to confine the trial court to the sphere of its discretionary power. *Bankers Life & Cas. Co.*, 346 U.S. at 382-83. Mandamus cannot be used "to correct a mere error in the exercise of conceded judicial power;" rather, it can only be used "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power." *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *see also Helstoski v. Meanor*, 442 U.S. 500, 505-08 (mandamus not appropriate vehicle to challenge indictment for alleged violation of Speech and Debate Clause where direct appellate review was available).

1. <u>The Military Judge did not usurp his power when he denied Defense Counsel's motion to disqualify himself</u>.

On direct appeal—as opposed to on a petition for extraordinary relief—a Military Judge's decision to *sua sponte* recuse, or not recuse, himself would be reviewed for abuse of discretion. *United States v. Rivers*, 49 M.J. 434, 444 (C.A.A.F. 1998)(citations omitted). A military judge is required to disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

Rules for Courts-Martial (R.C.M.) 902(a), Manual for Courts-Martial, United States (2008 ed.).

Actions by a military judge that "would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for disqualification." *United States v. Quintanilla,* 56 M.J. 37, 78 (C.A.A.F. 2001)(citations omitted). "There is a strong presumption that a military judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings. *Id.* at 44.

When challenging the military judge's impartiality on appeal, the objective test to be applied is "whether, 'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt" by the military judge's actions. *United States v. Burton,* 52 M.J. 223, 226 (C.A.A.F. 2000)(citations omitted).

Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge's denial of the motion to recuse himself, the concerns of R.C.M. 902(a) are fully met. *United States v.*

Campos, 42 M.J. 253, 262 (C.A.A.F. 1995)(citations omitted).

While military judges are obliged to disqualify themselves when they lack impartiality, they are equally obliged not to disqualify themselves when there is no reasonable basis for doing so. *Burton*, 52 M.J. at 226 (citations omitted).

2. The Military Judge's *ex parte* communication was not contrary to existing case law or R.C.M. 902.

The Military Judge conducted one limited *ex parte* communication with the Convening Authority's SJA. (R. at 3, 9.) The Military Judge called the SJA while on temporary orders, attending a training course in Reno, Nevada, to ask if the Government had withdrawn its motion pursuant to Military Rule of Evidence (Mil. R. Evid.) 413. (R. at 9.) The phone call lasted less than 2 minutes. (R. at 27.) The Military Judge learned that the Government was not withdrawing its Mil. R. Evid. 413 motion, and he advised the SJA that that the presence of the witness relevant to the motion would be required. (R. at 3, 9, 10.)

Based on Ms. S's prior telephonic testimony at the Mil. R. Evid. 413 motions hearing, the Military Judge reasonably believed she would not voluntarily appear to testify and a validly issued subpoena would be needed. (R. at 3, 27.) As of August 19, 2010, the Petitioner had been in pretrial confinement for 175 days. (R. at 25, 27.) The Military Judge stated on the

record that he told the SJA to take steps necessary to procure Ms. S. because he was cognizant of the Petitioner's lengthy pretrial confinement and Ms. S.'s reluctance to appear in court. (R. at 27.) There exists no evidence to suggest that the Military Judge's ruling on the Mil. R. Evid. 413 motion was improper or resulted from a bias or prejudice against Petitioner.

In fact, there is substantial evidence to suggest that the Military Judge only informed the SJA of the prospective ruling because the witness indicated that she was unwilling to attend trial. (R. at 3, 8, 25, 27.) The Military Judge advised the SJA to "make whatever efforts are necessary [to secure Ms. S's presence] to make sure that she is ready to go to trial the following week." (R. at 8.) Again, the Military Judge did so only to ensure that the trial would begin as scheduled and because he was unwilling to continue the trial based on the unavailability or unwillingness of Ms. S. to attend trial on its scheduled date.

While the Military Judge's course of action is not recommended, it demonstrates no prejudice or bias. The Military Judge's actions fall short of facts that require this Court to issue an extraordinary writ.

3. <u>The Military Judge did not abuse his discretion when he denied the defense motion to recuse himself</u>.

Ex parte communications, while generally discouraged, are not always prohibited and do not necessarily require disqualification of the military judge. *Quintanilla,* 56 M.J. at 44. The *ex parte* communication at bar concerned a witness production issue a mere 11 days from the start of trial, made in the context of the Petitioner's extended time in pretrial confinement. Both Trial Defense Counsel and Petitioner were aware for over a month that Ms. S. may testify at trial. (R. at 29.) The Military Judge disclosed this conversation and the surrounding circumstances three days later in an R.C.M. 802 conference. (R. at 3.) This communication was far from "extraordinary" and did not amount to "judicial usurpation of power." *Labella,* 15 M.J. at 228. The brief length and administrative nature of the conversation between the Military Judge and the SJA does not indicate bias or favoritism. The conversation did not include in depth discussion on issues of fact or law. The Military Judge did not express an opinion as to the guilt of the Petitioner and he did not comment on sentence appropriateness. Considering all known facts and circumstances, no reasonable person could find that the court-martial's "legality, fairness, and impartiality" were put into

doubt by the Military Judge's phone call to the SJA. *Burton*, 52 M.J. at 226.

4. A writ is neither necessary nor appropriate because Petitioner has other remedies available at law.

Extraordinary writs may not be employed as a substitute for relief obtainable during the ordinary course of appellate review, "even though hardship may ensue from delay and perhaps [an] unnecessary trial." *Bankers Life & Cas. Co.*, 346 U.S. at 383 (internal citations omitted). "Whatever may be done without the writ, may not be done with it." *Id.* (citing *Ex parte Rowland*, 104 U.S. 604, 617 (1882)); *Helstoski*, 442 U.S. at 505 (citing *Rowland*); *see Goldsmith*, 526 U.S. at 537 (1999) (extraordinary writ may not be used when alternative remedies available). The errors alleged by Petitioner, assuming any error at all, may be addressed in the normal course of appellate review. The present Petition is nothing more than a substitute for appeal.

Even applying the test urged upon this Court by Petitioner, Petitioner's arguments fail. The guidelines for analyzing a mandamus writ as set forth by the Ninth Circuit are:

> 1. The party seeking redress has no other adequate means, such as direct appeal, to attain the relief he or she desires;
>
> 2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;

3. The lower court's order is clearly erroneous as a matter of law;

4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of the rules;

5. The lower court's order raises new and important problems, or issue of law of first impression.

United States v. Harper, 729 F.2d 1216, 1221-22 (9th Cir. 1984) (citing *Bauman v. United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977)).

Only one military court has expressly applied the *Bauman* factors in an extraordinary writ case. *Dew v. United States*, 48 M.J. 639, 653 (A. Ct. Crim. App. 1998).[2] Besides the Ninth Circuit, several other circuits have cited to the test. *In re United States*, 565 F.2d 173, 178 (1st Cir. 1977); *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997); *In re Kansas City Star Co.*, 73 F.3d 191, 194 (8th Cir. 1996); *United States v. McVeigh*, 119 F.3d 806, 810 (10th Cir. 1997); *In re Temple*, 851 F.2d 1269, 1271 (11th Cir. Ga. 1988); *Nat'l Ass'n of Crim. Def. Lawyers v. United States DOJ*, 182 F.3d 981, 986-87 (D.C. Cir. 1999). The Third Circuit stated that the *Bauman* test articulated by the Ninth Circuit is a "less stringent standard." *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 379 n.6 (3d Cir. 2002); *see*

[2] This Court cited to the *Bauman* factors when making reference to a petitioner's arguments in another case, but did not adopt or make any further citation to the *Bauman* factors when making its decision. *See Chessani v. Folsum*, 2008 CCA LEXIS 216, *6-7 (N-M. Ct. Crim. App. June 10, 2008).

also Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175, 200 & n.96 (2001) (noting criticism of *Bauman* and stating that "other circuits generally articulate far more stringent standards").

Respondent does not agree that the *Bauman* factors represent the appropriate test, being less stringent than the standard set by the United States Supreme Court. Our superior court has never cited *Bauman*, and only the Army Court of Criminal Appeals has ever expressly applied the *Bauman* factors. Nonetheless, even under this less stringent standard Petitioner fails to meet his burden of showing entitlement to extraordinary relief.

First, Petitioner has other adequate means via direct appeal to attain the relief he desires.

Second, as for prejudice, as of the filing date of this brief, Appellant has had 15 additional days to prepare for trial. The merits phase was scheduled to begin on August 30, 2010. Over these two weeks, Petitioner has been afforded the chance to prepare his case in anticipation of Ms. S's testimony. Petitioner alleged that the Government gained a 72-hour advantage. (Petitioner's Br. at 10.) Any perceived "head-start" has been remedied and the facts are insufficient to justify extraordinary relief. Additionally, the burden of proof is on Petitioner, and he has submitted no evidence of additional

prejudice, such as actual bias of the Military Judge or evidence that the findings of fact in the trial court's ruling on Defense motion to disqualify the Military Judge were inaccurate, let alone sufficient prejudice to trigger mandamus relief.

Third, Appellant has failed to show that the Military Judge's rulings are clearly erroneous as a matter of law. The Military Judge's full disclosure in the R.C.M. 802 session and in two motions hearings support the Military Judge's denial of Petitioner's motion. The Military Judge's duty to recuse himself *sua sponte* or upon timely motion by counsel was not triggered. The Military Judge's rulings are in fact correct as a matter of law.

Fourth, Appellant has not shown that the Military Judge's rulings are either an oft-repeated error or made in disregard of applicable rules.

Fifth, the issues raised are neither new nor of first impression.

Thus, even under the less stringent test suggested by Petitioner, all of the factors militate against Petitioner. Petitioner has failed to meet his burden in showing that he is entitled to extraordinary relief.

Conclusion

The Government respectfully requests this Court deny the petition for extraordinary relief.

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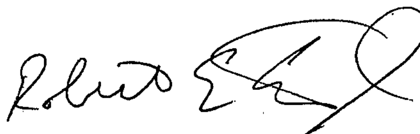
Certificate and Filing of Service

I certify that the original and required number of copies of the foregoing were delivered on to the Court on (September 15, 2010. I also certify that a copy of the foregoing was delivered to Captain Jeff Liebenguth, USMC, counsel of record, on 15 September 2010.



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