United States Navy–Marine Corps Court of Criminal Appeals

Before
DEERWESTER, HACKEL, and KIRKBY
Appellate Military Judges

In Re Noe MURILLO
Staff Sergeant (E-6)
Petitioner

v.

Michael D. ZIMMERMAN
Military Judge

And

UNITED STATES
Respondents

No. 202200132

Decided: 3 February 2023

Review of Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and a Writ of Prohibition.

Military Judge:
Michael D. Zimmerman

Arraignment 3 June 2022 before a special court-martial convened at Naval District Washington. Petitioner reserved notice of pleas and forum selection.

For Petitioner:
Philip D. Cave

For Appellee:
Lieutenant R. Blake Royall, JAGC, USN
Lieutenant Gregory A. Rustico, JAGC, USN

Senior Judge DEERWESTER delivered the opinion of the Court, in which Judge HACKEL and Judge KIRKBY joined.

[This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.]

DEERWESTER, Senior Judge:

The case before us is a petition for a writ of mandamus and writ of prohibition arising from Petitioner's second court-martial on the same charges. At his second-court martial, the case presently before us, Petitioner was charged with and pleaded not guilty to one specification of assault consummated by a battery and one specification of communicating a threat in violation of Articles 128 and134, Uniform Code of Military Justice [UCMJ],[1] for allegedly striking a Gunnery Sergeant [GySgt] and later threatening a taxi driver. Petitioner moved to dismiss the charges against him at his second court-martial pursuant to Rule for Court-Martial [R.C.M.] 915(c)(2)(B), and the military judge denied Petitioner's motion.

Petitioner then filed a Petition for a Writ of Mandamus, Prohibition, and Stay of Proceedings, arguing: in *United States v. Murillo I*, the military judge ordered a mistrial over defense objection caused by prosecution action. In *United States v. Murillo II* (this case), the military judge denied a defense motion to dismiss that was based on R.C.M. 915 and the "Double Jeopardy" Clause of the Fifth Amendment, U.S. Constitution. On 28 June 2022, this Court ordered a stay of proceedings and directed the United States to show cause, specifying the following issues:

[1] 10 U.S.C. §§ 928, 934.

> I. ***Did the military judge err when he determined that petitioner failed to raise an objection to ordering a mistrial?***
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> II. ***If so, was the military judge's decision to order a mistrial over Defense objection the result of manifest necessity in Petitioner's first court-martial?***
>
> III. ***If there was no manifest necessity to order a mistrial, what is the appropriate remedy?***

We find prejudicial error and take action in our decretal paragraph.

I. BACKGROUND

A. Petitioner's First Court-Martial

On 26 August 2021, the Government referred charges against Petitioner to a special court-martial alleging two specifications in violation of Article 128, UCMJ, and one specification in violation of Article 134, UCMJ. The specifications concerned two separate victims: the Article 128 allegations concerned Gunnery Sergeant [GySgt] Papa, with whom Petitioner was in a domestic relationship; and the Article 134 allegations concerned a taxi cab driver who Petitioner was alleged to have threatened.[2]

In September 2021, the military judge issued a trial management order which prescribed that the Government provide notice of its witness list by 11 February 2022. Prior to the trial, the Victims' Legal Counsel [VLC] representing GySgt Papa informed the Government that the victim did not wish to participate in the court-martial and would fight any attempts to compel her testimony. Because of the "sensitive nature" of the offense, trial counsel elected not to order the victim to testify.[3] Ultimately, the Government complied with the trial management order and submitted a list of anticipated Government witnesses that omitted GySgt Papa.

Trial commenced in Petitioner's first court-martial on 23 February 2022 before a panel of officer and enlisted members. On the first day of trial, counsel

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[2] All names used in this opinion, other than Appellant, appellate counsel, and the judges, are pseudonyms.

[3] Gov't Pet. Resp. Attachment G at 323.

from both parties gave their opening statements, and the Government presented five of its six witnesses. The Government's first witness was the taxi driver that Petitioner was accused of having threatened. He provided testimony of his memory of relevant events. On cross-examination he was asked if he could point out the person in the courtroom who threatened him. The witness was unable to identify Petitioner as the person who threatened him. The witness testified that the person who threatened him "was wearing a t-shirt and he also had tattoos in [sic] his body."[4] Petitioner does not have any tattoos. No other testimony had been presented that identified Petitioner as the individual who threatened the driver.

The following day, trial counsel was informed by VLC that his client had changed her mind and now wished to testify. Trial counsel immediately notified the Defense and the military judge that the prosecution intended to call GySgt Papa to testify at Petitioner's first court-martial. At this point, as the military judge recognized and as the Government concedes, the Defense had made several tactical decisions in reliance on the Government's representation that it would not be calling GySgt Papa to testify.[5] Specifically, the military judge queried whether he would "be obligated to declare a mistrial" if the Government called GySgt Papa to testify given the "detrimental reliance" with which the Defense had structured its case.[6] The Defense had represented to the members, and made it a major theme of Petitioner's defense case, that the members would not be hearing from GySgt Papa. The Government notes that, "Petitioner also made tactical trial decisions to forgo objections and not make certain motions, relying on the representation that [GySgt Papa] would not testify."[7]

Petitioner moved to exclude the testimony of GySgt Papa. During an Article 39(a), UCMJ, session, the Defense articulated its position on its preferred remedy for the Government's violation of the trial management order. First, civilian defense counsel argued that exclusion was the appropriate remedy when there was a surprise witness from the Government during the merits phase of the trial. Civilian defense counsel asserted that, during the merits phase of a

[4] R. at 181-188.

[5] Gov't Pet. Resp. at 5-6.

[6] Gov't Pet. Resp. Attachment G at 302.

[7] Gov't Pet. Resp. at 6.

trial, "the constitutional rights of the accused are at their zenith."[8] Comparatively, civilian defense counsel argued, "there really [aren't] any specific rights for a complaining witness" at the merits stage of the trial, pointing to the fact that Article 6b, UCMJ, does not apply to the merits phase of courts-martial.[9] Civilian defense counsel concluded that excluding GySgt Papa's testimony would be a "less severe remedy than a mistrial."[10]

Additionally, the Defense articulated its position with regard to a potential mistrial ruling. Civilian Defense Counsel pointed out several reasons that a mistrial would be prejudicial to Petitioner, including: (1) the delay caused by a mistrial; (2) the potential exposure to "greater punitive risk" if the Government chose to refer charges instead to a general court-martial;[11] (3) that the Government had already seen the Defense's cross-examination of all but two of its witnesses, and (4) that the Defense was satisfied with the cross-examination of the taxi cab driver and the progression of the trial thus far. Specifically, civilian defense counsel stated that:

> …[N]ormally the defense is asking for a mistrial because we're in a situation where… new trial[]… is the only thing that might help the accused. In this case, Your Honor, the defense firmly believes…that a mistrial will only put the accused in a worse situation. Besides the fact that—that he will now be a year and a half past his EAS or something by the time this matter reaches its ultimate conclusion.[12]

Ultimately, the military judge declined to exclude the testimony from the surprise witness, relying in part upon *United States v. Preuss* for the proposition that "any ruling that excludes otherwise admissible evidence in a process that is supposed to find the truth and provide justice should be reserved for only the most egregious circumstances."[13] The military judge found that the Government's move to call GySgt Papa contrary to prior representations, was not a form of gamesmanship, but rather an effort to honor the wishes of a named victim in the case to participate. Having, therefore, found no evidence of bad faith conduct on the part of the Government, and balancing that finding with

[8] Gov't Pet. Resp. Attachment G at 313.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 314.

[12] *Id.* at 315.

[13] *Id.* at 326; *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991).

the truth-seeking nature of the proceeding, the military judge did not find that the circumstances warranted exclusion of GySgt Papa's testimony.

The court-martial resumed and the Government called GySgt Papa to testify. The Defense immediately moved for a dismissal with prejudice. The Defense argued that the Government "ended up with a massive tactical advantage" because the Defense had made tactical decisions not to raise certain motions due to the Government's representations. Further, the Government had seen the results of the Defense's cross-examinations of nearly all of the Government's witnesses. When asked why a mistrial would not suffice over dismissal with prejudice, civilian defense counsel explained that Petitioner would be prejudiced by a mistrial because the Government's witnesses now knew the "weak points" of their stories.[14] Moreover, the Defense was happy about the taxi driver's unprompted misidentification, which would not be as impactful when admitted as a prior statement in a second court-martial. Civilian defense counsel argued:

> …[T]he other set of problem[s] with the mistrial or a dismissal without prejudice, because that's, I think, … effectually the same thing….the government then will have a number of options that can even put the accused in a worse place. They presumably could refer this to a [general court-martial], an Article 32 was completed. They could put the accused in a worse place, expose him to higher risk. They could … ask the convening authority to adopt members from a different unit, put him in a worse place panel wise. The – they've now had -- had the benefit of seeing the defense strategy, seeing defense cross, adjusting their preparation for that. They – they've had a dry run with all their witnesses. And about the best possible dry run possible… And ultimately, again, Your Honor, the -- and prejudice to the accused only continues in terms of being held past his EAS. …Your Honor, again, nothing changes that the government has now seen. Because, ultimately, a defense case is always about cross-examination and the government has now seen a preview of defense case. And, yes -- and we've actually not seen what will now be the majority part of their case, which is the testimony of [GySgt Papa]…[15]

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[14] Gov't Pet. Resp. Attachment G at 330.

[15] *Id*. at 331-33.

The Government represented that it thought a curative instruction would be sufficient. Civilian defense counsel disagreed, arguing that a curative instruction would also be prejudicial due to the impact on the defense counsel's credibility before of the members resulting from a witness testifying who civilian defense counsel promised would be absent.

In the end, the military judge ordered a mistrial on 24 February 2022. Finding that a curative instruction would be an insufficient remedy because it would "cause the defense to have to fundamentally shift everything that it has done…and to completely change the way it defends this case,"[16] the military judge issued an oral ruling ordering a mistrial in accordance with Rule for Court-Martial [R.C.M.] 915:

> So taking just the standard under 915, whether or not it's manifestly necessary under the circumstances of this case, having listened to the parties, seen the opening statements of counsel, the…tactical decisions that were made, I don't think a curative instruction at this point would solve the issue, vis-a-vis, as it applies to Gunnery Sergeant [Papa's] testimony. … [T]he defense made very direct representations in opening that she wasn't going to testify and that that would result in them having significant questions….I think the—the damage done in that regard is significant. And I think looking at [it] on balance, simply giving a curative instruction would not allow us to have a fair trial with these members based on what has transpired here and the abrupt change from the alleged victim not testifying to now the alleged victim testifying.
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> I'm keeping [in] mind that it is an extraordinary remedy and while I do not find there to be any evidence of malice or gamesmanship or prosecutorial misconduct in my mind at this stage, I do think that this is an extraordinary case and an extraordinary issue; and that the only way for me to rebalance the scales and to ensure the accused has a fair trial is to declare a mistrial. So the Court has ruled that this case as currently postured, has resulted in a mistrial.[17]

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[16] *Id*. at 334.

[17] *Id*. at 335-36.

B. Petitioner's Second Court-Martial

On 3 March 2022, the exact charges were again referred to special court-martial and Petitioner was re-arraigned on 3 June 2022. Petitioner moved to dismiss the charges for violating the Double Jeopardy Clause of the Fifth Amendment, which the military judge denied in a written ruling. It is this ruling that constitutes the basis of the proceedings before this Court.

In this written ruling, the military judge made several findings. He was adamant that there was no gamesmanship or malice on the part of the Government – noting that GySgt Papa's decision was "not procured by the government."[18] "Though the government could have sought an order…requiring her to testify, it chose not to in order to scrupulously honor her preference as a named victim in an assault case."[19] While the military judge acknowledged that the Government's decision not to seek such an order could be questioned on its merits, the trial court could not find that the Government's actions mandated "barring otherwise admissible evidence in a process that is supposed to find the truth and provide justice."[20] Therefore, the military judge explained, "barring the testimony of the alleged victim was not a proper remedy."[21]

The military judge next determined that the Defense did not object to a mistrial. The military judge reasoned that the right contemplated by the Double Jeopardy Clause of the Fifth Amendment is the right "to have a particular fact finder hear one's case" and proceed to a verdict, despite "any error apparent in the record."[22] The military judge found that after the trial court denied the motion to exclude GySgt Papa's testimony, the Defense argued that dismissal with prejudice was necessary because "the panel could not be fair to the accused" due to the tactical decisions made in reliance on the representations made by the Government.[23] The military judge found that the Defense "argued [the trial] should cease but only differed on the mechanism of that ending being dismissal with prejudice instead of a mistrial," and ultimately determined, therefore, that the Defense did not object to a mistrial.[24] The trial court further

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[18] Gov't Pet. Resp. Attachment F at 7.

[19] *Id*.

[20] *Id*. at 7-8.

[21] *Id*. at 8.

[22] *Id*.

[23] *Id*.

[24] *Id*.

determined that the Defense not only did not object to a mistrial, but requested one:

> In this case, while the accused did not ask for a mistrial, as noted above, the defense did move for dismissal with prejudice after the court denied the motion to exclude the testimony of Gunnery Sergeant [Papa]. Thus, the accused did ask to forgo the enlisted members panel as a result of the government's decision to call Gunnery Sergeant [Papa] after not listing her on the pre-trial matters witness list. The court finds that at least in spirit, if not in letter, the accused sufficiently requested the mistrial in light of an action by the government.[25]

We note that the military judge later acknowledged in his written ruling that neither party "*expressly* asked" for a mistrial.[26] The military judge found no prosecutorial misconduct designed to necessitate a mistrial took place, and instead attributed the Government's actions to a "tactical decision … made in an effort to scrupulously honor the desires of the named victim and not done maliciously or in an effort to gain a tactical advantage."[27] Finally, the military judge stated that, even if the Defense was found to have objected, double-jeopardy did not bar a second court-martial because the mistrial was declared due to manifest necessity:

> In addition, even if the accused can be said to have objected in order to retain that particular fact finder, the court's declaration of the mistrial was for manifest necessity. That standard does not require that it be the only possible remedy, but the court was mindful that a mistrial should be declared with great caution and only in urgent circumstances. The court discussed the issue with the parties and received their views. In addition to the possible remedy of excluding the witness, which the court considered and rejected, the court considered a curative instruction, a continuance, and a dismissal as possible remedies. The court looked at the timing of the incident; which was midtrial and the reason for the issue; the government's attempt to honor the desires of the alleged victim and her unsolicited change of heart.

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[25] *Id*. at 10.

[26] *Id*. at 11.

[27] *Id*. at 11-12.

> Given the prejudicial effect it would have on the defense, apparent in the opening statement and the representations made by the defense counsel during argument the court found that the mistrial was manifestly necessary to protect the accused.[28]

II. DISCUSSION

A. Jurisdiction

The instant case presents the question of whether this Court may entertain a petition for extraordinary relief in the nature of a writ of mandamus when it appears that this Court would obtain mandatory appellate review under Article 66, UCMJ, should Petitioner meet the criteria for Article 66 review. The type of harm alleged by Petitioner – a violation of the Double Jeopardy Clause of the Constitution – is key to answering that question.

Ours is a court of limited jurisdiction that is "defined entirely by statute."[29] The All Writs Act empowers this Court to "issue all writs necessary or appropriate in aid of [our] jurisdiction[] and agreeable to the usages and principles of law."[30] The All Writs Act does not serve as "an independent grant of jurisdiction," nor does it expand our already existing limited statutory jurisdiction.[31] Therefore, there are two distinct analyses: "(1) whether the writ is 'in aid of the [C]ourt's existing jurisdiction'; and (2) whether the writ is 'necessary or appropriate,' which relates to the merits of the issue and the propriety of a court granting relief outside of the normal appellate process."[32]

With respect to whether the fact we may obtain future jurisdiction over Petitioner's completed case precludes the instant review, we have previously recognized that the doctrine of potential jurisdiction "allows appellate courts to issue opinions in matters that *may reach* the actual jurisdiction of the court."[33] As a preliminary matter, we find the facts of Petitioner's case indicate

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[28] *Id*. at 9.

[29] *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015).

[30] 28 U.S.C. § 1651(a).

[31] *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013)

[32] *Brown v. United States* 79 M.J. 833, 837 (N-M Ct. Crim. App. 2020) (en banc) (quoting *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008)) (cleaned up).

[33] *Id*. (emphasis in original) (citing *United States v. Howell*, 75 M.J. 386, 397 n.4 (C.A.A.F. 2016)).

that the doctrine of potential jurisdiction applies. Our potential jurisdiction stems from Articles 66 and 69, UCMJ, which provide discrete pathways for appellate review. "Such potential jurisdiction exists even though there may still be several conditions precedent to ultimate review by the CCA at the time the writ petition is filed, and it exists even if there is a chance the case will never receive CCA review, as long as some pathway to our actual jurisdiction yet remains."[34]

Still, when exercising such authority, "we are … not broadly empowered to 'oversee all matters arguably related to military justice.'"[35] Under the All Writs Act, even when in aid of our jurisdiction, a writ may only issue when "necessary or appropriate."[36] That is an insular question requiring separate analysis.

A writ of mandamus is a "drastic instrument"[37] only to be used in "extraordinary situations"[38] amounting to a "clear abuse of discretion or usurpation of judicial power."[39] Our superior court has held that to prevail on an extraordinary writ, the Petitioner must show that: "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances."[40]

We find those circumstances are satisfied here. First, the normal appellate review process is not an adequate means to attain relief in Petitioner's case. The harm at issue stems from an alleged violation of the Double Jeopardy Clause. The right effectuated by the Double Jeopardy Clause is "a guarantee against being twice put to *trial* for the same offense."[41] The Supreme Court has explicitly recognized that the Double Jeopardy clause would be "significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence."[42] This Court recognized as much in the context of an appeal under Article 62, UCMJ, in *United States v. Dossey*:

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[34] *Id.*, at 839.

[35] *Id.*, 837 (quoting *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)).

[36] *Denedo*, 66 M.J. at 121.

[37] *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983)

[38] *Id.*

[39] *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

[40] *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F 2012)

[41] *Abney v. United States*, 431 U.S. 651, 661 (1977) (emphasis in original).

[42] *Id.,* at 660.

> To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice tried for the same offense.
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> . . .
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> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.[43]

Based on the precedent from the Supreme Court and this Court, we think it clear that protection from being twice *tried* for the same offense is squarely within the margins of the Double Jeopardy Clause. In addition, the Court of Appeals for the Armed Forces has previously issued writs in response to a showing of a double jeopardy bar to prosecution.[44] We think it is clear that a writ is proper where, as here, there is no other adequate means to obtain relief against being twice tried for the same offense. We now turn to the substance of the writ petition: whether "the right to issuance of the writ is clear and indisputable" and whether "the issuance of the writ is appropriate under the circumstances."[45]

B. Standard of Review for a Double Jeopardy Violation

"Whether a prosecution violates the Double Jeopardy Clause is an issue of law. We review this issue of law de novo."[46] In the course of our de novo review, we step into the position of the military judge and review anew the motions

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[43] *United States v. Dossey*, 66 M.J. 619, 624 (N-M Ct. Crim App. 2008).

[44] *See, e.g.*, *Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986).

[45] *Hasan*, 71 M.J. at 418.

[46] *United States v. Cabrera*, __ M.J. __, __ (N-M. Ct. Crim. App. 2023), 2023 CCA LEXIS 37 at *20 (citing *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019)) (cleaned up).

and record that were before him at the time. In this case, we assume the position of the military judge and review the initial mistrial declaration through the lens of Appellant's double jeopardy motion.[47] "A military judge's determination on a request for mistrial, or his own *sua sponte* consideration of a mistrial, will not be reversed 'absent clear evidence of an abuse of discretion.'"[48]

The Double Jeopardy Clause ensures that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[49] Article 44, UCMJ, provides that "no person may, without his consent, be tried a second time for the same offense."[50] In the military justice system, jeopardy attaches in a trial after the members are impaneled.[51] One function of the Double Jeopardy Clause is to prevent the Government from gaining knowledge and advantage over the course of a series of prosecutions against an accused for the same offenses.[52]

However, the prohibition against successive prosecutions is not an absolute guarantee. R.C.M. 915(a) provides that a military judge may declare a mistrial when such action is "manifestly necessary in the interest of justice because circumstances arose which cast substantial doubt upon the fairness of the proceedings."[53] R.C.M. 915(c)(2)(A) provides that a mistrial declaration shall *not* "prevent another court-martial on the affected charges" *except* when the mistrial was declared after jeopardy attached, before findings, and the declaration was an "abuse of discretion and without the consent of the defense."[54]

The abuse of discretion standard recognizes that a military judge "has a range of choices and will not be reversed so long as the decision remains within that range."[55] However, a military judge abuses his discretion "when his find-

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[47] *Id*.

[48] *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999) (citing *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990); *United States v. Jeanbaptiste*, 5 M.J. 374, 376 (C.M.A. 1978)).

[49] U.S. Const. amend. V.

[50] Article 44, UCMJ.

[51] Article 44(c)(2)(A)-(B), UCMJ.

[52] *See, e.g., Green v. United States*, 355 U.S. 184, 218-19 (1957).

[53] R.C.M. 915(a).

[54] R.C.M. 915(c)(2)(A).

[55] *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

ings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[56]

C. Double Jeopardy Analysis

We turn first to inquire whether manifest necessity existed. If a mistrial was required by manifest necessity, then the question of consent becomes irrelevant. If the military judge did abuse his discretion by ordering a mistrial without manifest necessity, then the double-jeopardy bar prevents subsequent prosecution for the offense, unless Petitioner is found by this Court to have consented to the mistrial declaration.[57]

1. Manifest Necessity

While not a clearly defined concept in military jurisprudence, the Supreme Court enunciated this standard of manifest necessity nearly two centuries ago:

> In all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes....[58]

No bright-line test exists to determine when there is manifest necessity to order a mistrial in a given prosecution. The federal circuit courts have identified a non-exhaustive list of factors to consider, including: (1) whether counsel were afforded an opportunity to be heard on the issue; (2) whether alternatives to a mistrial were explored; and, (3) whether the judge's decision was made after a sufficient reflection.[59] These factors are similar to the guidance from the Court of Appeals for the Armed Forces, which has also identified a non-exhaustive list of factors, including: "the timing of the incident leading to the question of mistrial, the identity of the factfinder, the reasons for a mistrial, and potential

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[56] *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

[57] *Burtt v. Schick*, 23 M.J. 140, 142 (C.M.A. 1986); R.C.M. 915(a), (c)(1)(A).

[58] *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

[59] *United States v. Simonetti*, 998 F.2d 39, 41 (1st Cir. 1993) (citations omitted).

alternative remedies; but, most importantly, the desires of and the impact on the defendant."[60]

We conduct our analysis with the guidance from our superior court that a mistrial is a tool of last resort.[61] Indeed, a mistrial is "an unusual and disfavored remedy"[62] only to be used when the effect of the underlying error is such that "the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair."[63]

We find that the military judge afforded both parties an opportunity to be heard on the issue and gave consideration to a few alternatives to declaring a mistrial. He also considered the timing of GySgt Papa's mid-trial decision to provide testimony, and the Government's too-late decision to call her as a witness – the incident triggering the mistrial analysis, as well as the fact that the case was before members. He did not appear to rush his decision.

Nonetheless, we conclude that the declaration of a mistrial was an abuse of discretion. The military judge failed to give proper consideration to "potential alternatives remedies" to a mistrial, as well as failed to appreciate the "desires of the defendant."[64] After accounting for the military judge's "considerable latitude in determining when to grant a mistrial,"[65] we conclude the military judge's mistrial declaration was a decision outside of "the range of choices reasonably arising from the applicable facts and the law."[66]

a. Alternative Remedies

We begin our analysis by examining potential alternative remedies to a mistrial. As a starting point, we turn to exclusion of the alleged victim's testimony as a less-drastic remedy to a mistrial. During the initial litigation over whether to exclude the testimony of GySgt Papa, the military judge examined this Court's prior decision in *United States v. Preuss* and concluded that the

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[60] *Harris*, 51 M.J. at 196 .

[61] *United States v. Diaz*, 59 M.J. 79, 91 (C.A.A.F. 2003).

[62] *Id.,* at 90.

[63] *Id.*, at 91 (citing *United States v. Freeman*, 208 F.3d 332, 339 (1st Cir. 2000) (internal quotation omitted)).

[64] *Harris*, 51 M.J. at 196.

[65] *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998).

[66] *Frost*, 79 M.J. at 109; *see Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953) (A writ of mandamus is only to be used in extraordinary circumstances which amount to a "clear *abuse of discretion* or usurpation of judicial power.") (emphasis added).

holding there created a strong presumption in favor of including the victim's testimony in the present case – going as far as to find that the facts of Petitioner's case *precluded* him from excluding GySgt Papa's testimony. If such a preclusion exists, then the military judge obviously could not have considered exclusion as an alternative. We turn to a brief analysis of *Preuss* and the proposition relied upon by the military judge in Petitioner's case.

(1) Application of *United States v. Preuss*

In *Preuss*, the appellant was found guilty of stealing a military identification card, altering the identification card, and forging a signature to cash a stolen check in violation of Articles 121, 123, and 134, UCMJ (1984). After the prosecution rested its case, defense counsel gave notice of an alibi witness, despite being required by R.C.M. 701(b)(1) to provide notice of any alibi defense prior to trial. When the court-martial reconvened, defense counsel stated that the testimony on alibi would be more expansive than what was represented in the notice to the Government. After a motion from the Government, the military judge excluded the testimony under R.C.M. 701(b)(1) – noting that the late notice prevented the Government from being able "to investigate and rebut that particular alibi."[67] The Defense then presented only two more witnesses: an alternative hand writing expert, who offered little of substance to aid the defense, and the appellant himself.

We noted in our review that the military judge considered that R.C.M. 701(g)(3) allows the military judge to take several actions, including ordering discovery, granting a continuance, excluding the evidence, or taking other orders as is just under the circumstances.[68] This Court then articulated the proposition relied upon by the military judge in Petitioner's case: "[w]hile we are reluctant to second-guess a trial judge's rulings, we are also faced with a countervailing consideration that any ruling that excludes otherwise admissible evidence in a process that is supposed to find the truth and provide justice should be reserved for only the most egregious circumstances."[69]

This statement does not create a presumption of admissibility—for *either* alibi witnesses under R.C.M. 701 or in situations where discovery is violated generally. Rather, it is *simply an acknowledgement* that, in the context of the choices permitted by R.C.M. 701(g)(3), exclusion was the most severe remedy of the options available.

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[67] *Preuss*, 34 M.J. at 690.

[68] *Id*.

[69] *Id*., at 691.

It is clear from both *Preuss* itself and the cases cited within that decision that the role of the military judge is not to outright preclude exclusion as a remedy, but rather to take a holistic examination of facts and evaluate the prejudicial effect to either party before choosing an appropriate remedy. In *Preuss*, this Court did just as much. As an initial matter, when this Court offered that proposition, we noted: "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. . . . Indeed, this right is an essential attribute of the adversary system itself."[70] Examining all of the facts of that particular case, as well as the rights at issue, we determined that the military judge erred because he failed to consider why a lesser remedy, a continuance, could not have cured the prejudice at issue.[71]

We find the military judge's reliance on *Preuss* to disregard exclusion of evidence as a remedy in Petitioner's case to be error. In fact, it would seem that from our review of the record that once the parties were informed that GySgt Papa wished to testify the military judge treated the testimony as a foregone conclusion. This is not the case.

(2) The Government's Late Decision to Call GySgt Papa

In his written ruling, presumably relying upon *Preuss*, the military judge stated that "while the wisdom of the tack the government took – aggressively honoring the desires of [GySgt Papa] could be subject to some debate, the basic facts *preclude the court* from finding the government's actions mandate barring otherwise admissible evidence in a process that is supposed to find the truth and provide justice."[72] There is no such preclusion in effect under the law applicable to Petitioner's case.

The wisdom of accounting for the preferences of victims in the courts-martial process is not lost on this Court. However, the *rights* of a crime victim un-

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[70] *Preuss*, 34 M.J. at 691 n.2 (quoting *Taylor v. Illinois*, 484 U.S. 400, 408 (1988)).

[71] *Id.*, at 691-92. We note as well that nearly all of the cases cited by this Court to support the above proposition in *Preuss* involve overturning a military judge's decision to exclude evidence presented by the defense simply due to technical violations of the Rules for Courts-Martial or Military Rules of Evidence that did not arise from maleficence on the part of, or otherwise out of control of, counsel. *See, e.g.*, *United States v. Coffin*, 25 M.J. 32 (C.M.A. 1987) (overturning a military judge's decision to deny appellant's suppression motion where the appellant's counsel became aware of the basis for suppression after the submission of guilty pleas).

[72] Gov't Pet. Resp. Attachment F at 7-8 (emphasis added).

der the UCMJ, important as they are, are *specifically enumerated* by Congress.[73] For example, crime victims have the right to be given timely notice of preliminary hearings or court-martial proceedings related to the offense; the right to be reasonably heard at public hearings concerning the continuation of confinement of the accused prior to trial; and the right to confer with trial counsel at nearly any criminal proceeding related to the offense.[74]

Of importance, Article 6b(a)(4)(B), UCMJ, addresses the rights of crime victims to be heard at a "sentencing hearing relating to the offense," such as the presentencing phase of a court-martial.[75] Unlike other subparagraphs of Article 6b, there is no mention of an enumerated right for a crime-victim to be heard during the *merits* portion of a court-martial. When Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[76]

The Government controlled its own witness list and bore responsibility for making the decision to call GySgt Papa well after the decision had become deeply problematic. While we do not admonish trial counsel's efforts to accommodate the preferences of the alleged victim, including her initial preference *not* to testify, the fact remains that the Government is not bound by the shifting decisions of witnesses in its cases. Prior to the trial, GySgt Papa's VLC informed the Government that she elected not to participate in the court-martial and would fight any attempts to make her testify. Trial counsel elected not to order the victim to testify. A trial management order was issued, complied with by both parties, and trial commenced. During the trial, defense counsel made several tactical decisions based upon these elections. When VLC expressed that GySgt Papa's desires had changed, the Government made the *decision* to call her as a witness. As civilian defense counsel stated during oral argument: "[GySgt Papa] has not elected to participate in this preceding. The government [— the] prosecution has affirmatively chosen to call her as a witness. [T]his massive tactical advantage didn't just fall into their lap. It's an affirmative choice by the prosecution."[77]

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[73] *See* Article 6b, UCMJ.

[74] Article 6b(a)(2), 6b(a)(4)(A), & 6b(a)(5), UCMJ.

[75] Article 6b(a)(4)(B), UCMJ; *see also* R.C.M. 1001(c).

[76] *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations and internal quotation marks omitted).

[77] Gov't Pet. Resp. Attachment G at 325.

This Court is in no way suggesting that Government counsel, as a matter of policy, should liberally wield the power of commanders to issue orders to force victims to testify against their will. However, it is clear that nothing precludes exclusion of a victim's testimony where otherwise appropriate, such as where the trial management order is violated, simply because it is the victim who is testifying. We do not need to find the exact moment when exclusion of such testimony becomes appropriate. Here, though, after the trial management order was complied with, after trial counsel made multiple affirmative representations that GySgt Papa would not be testifying, after defense counsel made several tactical decisions on the basis of those representations, after defense counsel made several representations to the members based on the victim's absence, after nearly all testimony and cross-examination of Government witnesses had taken place, and after the Government only then decided to call GySgt Papa as a witness—we think that the remedy of exclusion was ripe for consideration.

(3) Lack of Consideration of Other Lesser Remedies

We find the military judge failed to consider remedies less drastic than mistrial, which could have been employed to "prevent a manifest injustice against the accused" and mitigate any prejudice resulting from GySgt Papa's offered testimony.[78] First, excluding (or limiting) GySgt Papa's testimony could have accomplished this end. The members panel in Appellant's first court-martial never heard any inadmissible testimony, and at all times was unaware that trial counsel desired to call GySgt Papa to testify. Though certainly more extreme a remedy than others, exclusion of her testimony was a viable option in Petitioner's case that was improperly set aside by the military judge based on his misunderstanding of the law. Exclusion of the testimony is a less extreme remedy than the declaration of a mistrial.

The military judge did discuss whether including the evidence would have tainted the members' ability to fairly and impartially try Petitioner's case after the representations made by civilian defense counsel and the trial defense strategy. The military judge determined that a curative instruction and continuance alone would have been insufficient to cure the prejudice to Petitioner. However, we note that the military judge did not consider several other alternative remedies. First, as discussed, the military judge improperly removed exclusion of the evidence as a less-drastic remedy to mistrial. Second, the military judge failed to consider allowing defense counsel to make a new opening

[78] *Rushatz*, 31 M.J. at 456 .

statement or to recall certain witnesses. "This Court will not speculate on the exact combination or sequence of remedies that would have created the curative formula in Appellant's first court-martial."[79] The military judge "is best suited to fashion appropriate remedies for violations that occur."[80]

The military judge here misapplied the law as it related to his authority to exclude testimony, and, on the record before this Court, failed to consider the full range of other options available to him. It is true that civilian defense counsel argued that a continuance would also be prejudicial and that Petitioner desired dismissal with prejudice or exclusion of the testimony only. However, while it is true that military judges should take into account whether the Defense consents to a *mistrial*, military judges are not precluded from selecting less-extreme remedies from amongst those undesirable to the defense.

Because less drastic remedies were available, the military judge abused his discretion by ordering a mistrial where there was not a manifest necessity for this extreme remedy.[81] Several alternative remedies would have allowed the merits of the charges against the accused to be "resolved by the panel of members already sitting, given the government one, and only one, opportunity to present its case, and lessened 'the risk that an innocent defendant may be convicted.'"[82]

2. Petitioner Did Not Consent to a Mistrial

Having determined that the mistrial in Petitioner's court-martial was declared without manifest necessity, we now examine whether double jeopardy precludes subsequent prosecution.

Military accused retain "primary control over the course to be followed" after an error is identified in the court-martial process.[83] In his written ruling, the military judge in Petitioner's case concluded that Petitioner requested a mistrial because, following the court's determination to allow GySgt Papa to

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[79] *Cabrera*, __ M.J. at __, 2023 CCA LEXIS at *26.

[80] *Id.*

[81] R.C.M. 915(a).

[82] *Burtt*, 23 M.J. at 142-3 (quoting *Arizona v. Washington*, 434 U.S. 497, 504 (1978)).

[83] *Harris*, 51 M.J. at 196 (quotation omitted).

testify, the Defense moved for dismissal with prejudice.[84] The military judge reasoned that, because the double jeopardy bar is meant to protect the right of an accused to proceed to a verdict, the accused implicitly consented to a mistrial when he moved for dismissal with prejudice—electing to forego his right to proceed to verdict.[85]

Reviewing the double jeopardy motion de novo, we find that the military judge abused his discretion in finding that Petitioner consented to a mistrial. Not only did Petitioner not consent, but he clearly objected to the mistrial declaration. Civilian defense counsel, when first advocating for exclusion of testimony, stated that excluding the testimony would be a "less severe remedy than a mistrial."[86] Once the military judge declined to exclude the testimony, civilian defense counsel then articulated several reasons that a mistrial would be prejudicial to Petitioner: undue delay; future punitive exposure; tactical disadvantages; and the loss of the Defense's very successful cross-examination of the taxi driver who failed to identify Appellant as the person who threatened him. Indeed, civilian defense counsel did not mince words when he stated: "In this case, Your Honor, the defense firmly believes…that a mistrial will only put the accused in a worse situation."[87]

It is only at this point, after articulating why mistrial was not desired, the Defense then instead advocated for a dismissal with prejudice. The military judge again brought up the possibility of mistrial and civilian defense counsel stated that a dismissal with prejudice would be preferable to a mistrial and repeated many of the same reasons for the Defense's preference, including the Government benefitting from the vetting of its witnesses during cross-examination and the testimony of the taxi cab driver. When asked why a mistrial would not suffice over dismissal with prejudice, civilian defense counsel explained that Petitioner would be prejudiced by a mistrial because the Government's witnesses now know the "weak points" of their stories.[88] Further, the

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[84] "In this case, while the accused did not ask for a mistrial, as noted above, the defense did move for dismissal with prejudice after the court denied the motion to exclude the testimony of [GySgt Papa] … Thus, the accused did ask to forgo the enlisted members panel as a result of the government's decision to call Gunnery Sergeant [Papa] after not listing her on the pre- trial matters witness list. The court finds that at least in spirit, if not in letter the accused sufficiently requested the mistrial in light of an action by the government." Gov't Pet. Resp. Attachment F at 10.

[85] *See* Gov't Pet. Resp. Attachment F at 8.

[86] Gov't Pet. Resp. Attachment G at 313.

[87] *Id*. at 315.

[88] *Id*. at 330.

Defense was satisfied with the taxi driver's unprompted misidentification, which would not be as impactful when admitted as a prior statement in a second court-martial.

Here, after the military judge refused to exclude the testimony at issue, the Petitioner put forth a clear argument. He emphasized all the ways in which the first trial had been tainted – from his trial strategy to his attorney's credibility – and argued that the only remedy capable of curing the prejudice was a dismissal with prejudice. When asked why a mistrial would not be sufficient, he articulated several reasons why the Defense objected to the mistrial. We find this constitutes clear opposition to a mistrial declaration.

Nonetheless, the military judge's ruling demonstrates his error. He reasoned that by asking for the remedy of dismissal with prejudice – the ultimate effect of which would be to stop the proceedings—Petitioner assented to a mistrial. The Government agrees that this constituted implicit consent to a mistrial, arguing that if "Petitioner truly did not want a mistrial, he would have requested to continue the trial."[89] In view of the clear record, we disagree with this logic.

Where a military judge, in compliance with R.C.M. 915, inquires into the views of the parties regarding mistrial and develops a record that clearly communicates those views, we see no need to bend and reach for secondary meanings and inferences.[90] Petitioner affirmatively stated he did not want a mistrial, and put forth an argument for an alternative remedy. We cannot find a way, either in law or logic, to lock an accused into consenting to a mistrial when he or she articulates a good faith belief that a mistrial is insufficient to cure the prejudice at issue and instead advocate for an alternative, albeit more extreme, remedy—dismissal with prejudice. The military judge abused his discretion when he determined that Petitioner consented to a mistrial.

Jeopardy attached in Petitioner's first court-martial. We find that Petitioner did not consent to a mistrial and that the mistrial in Petitioner's first court-martial was declared over Defense objection without manifest necessity.

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[89] Gov't Brief at 20.

[90] *See Cabrera*, __ M.J. at __, 2023 CCA LEXIS at *19 ("Where, as here, the military judge creates a record in which each party articulates their view on the potential mistrial declaration, we simply cannot view the issue of consent as a legal, vice factual, determination.").

Therefore, the Double Jeopardy Clause prohibits subsequent prosecution. Accordingly, we find that with respect to a portion of the requested relief "the right to issuance of the writ is clear and indisputable; and . . . the issuance of the writ is appropriate under the circumstances."[91]

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the military judge abused his discretion by declaring a mistrial absent manifest necessity and that the declaration was done over the objection of Petitioner. Article 44, UCMJ, provides that "no person may, without his consent, be tried a second time for the same offense."[92] Because Petitioner did not consent to the mistrial, nor was the mistrial manifestly necessary, his second court-martial was, and remains, prohibited by the Double Jeopardy Clause of the Fifth Amendment.[93]

Accordingly, the petition for extraordinary relief in the nature of a writ of mandamus is **GRANTED**. The Charges and their Specifications are **DISMISSED WITH PREJUDICE**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[91] *Hasan*, 71 M.J. at 418.

[92] Article 44, UCMJ.

[93] U.S. Const. amend. V.