

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.S. WHITE, R.E. VINCENT, J.E. STOLASZ
Appellate Military Judges**

**KEVIN J. FLYNN
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

v.

UNITED STATES OF AMERICA

NMCCA 9601519

**Review of a Petition for Extraordinary Relief in the Nature of a Writ of Error Coram
Nobis, Habeas Corpus, and Mandamus**

For Petitioner: William Cassara; CDR Kelvin Stroble, JAGC,
USN.

For Respondent: Capt Roger Mattioli, USMC.

22 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Senior Judge:

This petition for extraordinary relief in the nature of writs of habeas corpus, mandamus, and error coram nobis is again before the court on remand from our superior court. After considering the petition, the petitioner's brief, and the respondent's answer, we conclude the petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief requested. We, therefore, deny the petition.¹

¹ As the petitioner is no longer in custody pursuant to the sentence of his court-martial, his request for a writ of habeas corpus is moot. The petitioner also requests a "writ of mandamus for production," but never identifies what he wants produced or to whom the writ should be directed, and it is not otherwise clear from the record. Accordingly, the petitioner has failed to carry his burden to demonstrate entitlement to a writ of mandamus.

I. Procedural History

A military judge sitting as a general court-martial convicted the petitioner in November 1995 of maiming and assault in which grievous bodily harm was intentionally inflicted, in violation of Articles 124 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 924 and 928. He was sentenced to 10 years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

The victim of the petitioner's crimes was his minor child, who suffered severe brain damage. Whether the child's injuries resulted from the petitioner's misconduct, subsequent medical malpractice by Navy doctors, or some combination of the two was litigated at trial. In June 1996, the child, by and through his legal guardian and next friend, filed a claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672, alleging medical malpractice by the Navy doctors who treated him.

On direct appeal, the petitioner contended, *inter alia*, that the evidence was legally and factually insufficient. In May 1998, this court affirmed the findings and sentence in the petitioner's court-martial. *United States v. Flynn*, No. 9601519, 1998 CCA LEXIS 249, unpublished op. (N.M.Ct.Crim. App. 21 May 1998). In October 1998, our superior court denied a petition for grant of review, *United States v. Flynn*, 51 M.J. 117 (C.A.A.F. 1998)(daily journal), and the case became final pursuant to Article 71, UCMJ. On 5 March 1999, the petitioner's dishonorable discharge was executed. Petitioner's Brief in Support of Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis at 5.

On 15 August 2000, the guardian/next friend of the petitioner's child reached an agreement with the United States to settle the child's FTCA claim. The United States agreed to pay \$3,400,000.00 "in full settlement and satisfaction" of the claim, but did not admit liability. Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Administrative Claims Pursuant to 28 U.S.C. § 2672 at 1.

In March 2003, the petitioner applied to this court for extraordinary relief. He contended his conviction was null and void as a result the FTCA claim settlement, and asked the court to order his release from confinement, to issue a writ of mandamus for production, and to issue a writ of error coram nobis dismissing the charges against him. The court denied the

petition for lack of jurisdiction, noting the petitioner's case was final under Article 76, UCMJ. *United States v. Flynn*, No. 9601519, unpublished op. (N.M.Ct.Crim.App. 30 June 2003).

The petitioner appealed that decision to the Court of Appeals for the Armed Forces (CAAF), which, in view of its earlier decision in *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004), set aside this court's decision and remanded "for a new review before a panel comprised of judges who [had] not previously participated in the case." *United States v. Flynn*, 60 M.J. 389 (C.A.A.F. 2004).

Instead of being re-docketed with this court, the record was mistakenly sent to the Federal Records Center as a closed case by the Navy-Marine Corps Appellate Review Activity. Not until the petitioner's counsel inquired about the status of the petition, in September 2007, was it discovered the record had never been returned to the court. On 29 October 2007, the court ordered the Government to produce the record, and on 30 January 2008, the Government notified the court it had been unable to locate the record. The Government avers the entire box in which the Flynn record should be located is missing from the Federal Records Center, and there is no record of anyone signing for the box. Government Response to Court Order dated 29 Oct 2007 at 1-2.

Consequently, the court does not now have before it the record of the petitioner's court-martial. The court has, however, been able to assemble and consider: (1) its 21 May 1998 decision affirming the findings and sentence; (2) CAAF's 21 October 1998 denial of review; (3) the Petition for Writ of Habeas Corpus, Writ of Error Coram Nobis, and Writ of Mandamus; (4) the Brief in Support of the Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis, (5) this court's 7 April 2003 show cause order; (6) the respondent's Answer to the Show Cause order; (7) the respondent's 13 May 2003 Motion to Attach (granted 21 May 2003), and the attached copy of the FTCA claim of the petitioner's minor child; (8) the 30 June 2003 decision of this court on the Petition for Extraordinary Relief; (9) the petitioner's Brief in Support of his writ-appeal petition to CAAF; (10) the respondent's general opposition to the writ-appeal petition; (11) CAAF's 5 November 2004 order; and (12) the Stipulation for Compromise Settlement and Release of the petitioner's son's FTCA claim. While we lack the record of the petitioner's original court-martial, we are satisfied we can

fairly and properly decide the Petition for Extraordinary Relief on the record currently before us.²

II. Jurisdiction

The All Writs Act, 28 U.S.C. § 1651, authorizes this court to grant extraordinary relief in appropriate cases. *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). That Act, however, does not enlarge the court's jurisdiction, and the court may only grant extraordinary relief "in aid of 'its existing statutory jurisdiction.'" *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. Mar. 11, 2008)(quoting *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)).

The first question, therefore, is whether the requested writ would be "in aid of" the court's jurisdiction given that the petitioner's court-martial is final under both Articles 71 and 76, UCMJ. Our superior court recently held a writ of error coram nobis is "in aid of" the court's existing jurisdiction where a petitioner (a) seeks the writ to examine the findings or sentence of a final court-martial that a Court of Criminal Appeals previously reviewed and (b) raises a claim that goes to the validity of the judgment rendered and affirmed. *Denedo*, 66 M.J. at 120. As the facts of the instant petition are identical in all material respects to those in *Denedo*, we conclude, on the basis of our superior court's decision in *Denedo*, that we have jurisdiction to entertain the petition for extraordinary relief in this case.

III. Merits of the Petition

A. Principles of Law

An extraordinary writ is a drastic remedy that should be used only in extraordinary circumstances. *Aviz v. Carver*, 36

² Additionally, we note that, by order dated 9 January 2008, the court explicitly afforded the petitioner the opportunity to attach any documents related to the petition that were not then available to the court, and that the petitioner did not provide any additional documents at that time. (He did later provide a copy of his original Petition for Extraordinary Relief in response to a court order of 24 March 2008.). Given that the petitioner's court-martial had been final for four years prior to the filing of his petition for extraordinary relief, that the burden of demonstrating entitlement to a writ of error coram nobis is on the petitioner, and that the petitioner did not provide the court with a copy of the record of his trial, we conclude that the absence of the record of the court-martial does not prevent us from deciding the instant Petition.

M.J. 1026, 1028 (N.M.C.M.R. 1993). The petitioner has the burden to show a clear and indisputable right to the extraordinary relief requested. *United States v. Morgan*, 346 U.S. 502, 512-13 (1954); *Denedo*, 66 M.J. at 126 (citing *Cheney v. United States District Court*, 542 U.S. 367, 381 (2004)); *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000); *Aviz*, 36 M.J. at 1028.

A writ of error coram nobis is extraordinary relief available only under "exceptional circumstances" based upon facts that were not apparent to the court during the original consideration of the case and that may change the result. *United States v. Frischholz*, 36 C.M.R. 306, 309 (C.M.A. 1966)(citing *United States v. Tavares*, 27 C.M.R. 356, 358 (C.M.A. 1959)). The standard for obtaining a writ of error coram nobis is more stringent than the standard applicable on direct appeal. *United States v. Dew*, 48 M.J. 639, 649 (Army Ct.Crim.App. 1998)(quoting *United States v. Chapel*, 21 M.J. 687, 689 (A.C.M.R. 1985)). The error the petitioner alleges must be "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid". *Morgan*, 346 U.S. at 509 (quoting *United States v. Mayor*, 235 U.S. 55, 69(1914)).

After a court-martial is reviewed by the appellate courts, it is presumed to be correct. *Id.* at 512. A petitioner seeking a writ of error coram nobis bears the burden of showing otherwise. But, even before addressing the merits of the petition, the petitioner must first meet six stringent threshold requirements:

(1) the alleged error must be of the most fundamental character;

(2) no remedy other than coram nobis can be available to rectify the consequences of the error;

(3) valid reasons must exist for not seeking relief earlier;

(4) the new information could not have been discovered through the exercise of reasonable diligence prior to the original judgment;

(5) the petition does not seek to reevaluate previously considered evidence or legal issues; and

(6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo, 66 M.J. at 126 (citing *Morgan*, 346 U.S. at 512-13; *Loving v. United States*, 62 M.J. 235, 252-53 (C.A.A.F. 2005); 28 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 672.02[2][c], at 672-43-46 (3d ed. 2007); 3 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 592 (3d ed. 2004); 6 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 28.9(a), at 121-22 (2d ed. 2004)).

B. Analysis

The petitioner argues his conviction is null and void because the United States admitted, by settling his son's malpractice claim, that it was the negligence of its doctors rather than the petitioner's actions that caused the child's injuries. We disagree. For the reasons set out below, we conclude the petition fails to meet the threshold criteria for *coram nobis* relief.

First, the error alleged by the petitioner is not fundamental. In this case, had the FTCA claim been settled prior to trial, the petitioner would, nevertheless, have been barred from introducing evidence of the settlement at his court-martial by MILITARY RULE OF EVIDENCE 408, *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1995 ed).³ The petitioner, however, now seeks to use the settlement agreement for precisely the purpose the rule would have prohibited at trial.

Further, the settlement agreement would also have been inadmissible under MIL. R. EVID. 403, as irrelevant. Despite the petitioner's repeated claims to the contrary, the agreement does not admit Government liability. Nor does it explain the Government's reasons for settling. Even if the settlement agreement impliedly admitted that the Navy doctors who treated the petitioner's son committed malpractice (which it does not), their malpractice would not necessarily absolve the petitioner of criminal culpability. To absolve the petitioner of criminal

³ MIL. R. EVID. 408 states that "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

culpability, the doctors' negligence must have "loomed so large" in comparison with the petitioner's acts that his conduct would be disregarded "'as a *substantial factor* in the final result'". *United States v. Taylor*, 44 M.J. 254, 257 (C.A.A.F. 1996) (citing *United States v. Cooke*, 18 M.J. 152, 154 (1984)(quoting R. PERKINS, CRIMINAL LAW 698-701 (2d. ed. 1969))).

Because the settlement of the malpractice claim is both inadmissible and irrelevant, and because even the possible negligence of Navy doctors does not necessarily absolve the appellant of criminal culpability, it can hardly be said that the malpractice settlement fundamentally undermines the findings and sentence of the petitioner's court-martial and renders the proceedings irregular and invalid.

Finally, the petitioner may not, by a petition for a writ of error coram nobis, relitigate legal issues previously considered and extensively litigated, at trial and on appeal, concerning the negligence of the Navy doctors who treated his son and the cause of his son's injuries. The petitioner presents no new facts relevant to those issues.

All of the facts supporting the malpractice claim were known during the original consideration of the case. Petitioner had the opportunity to offer, and according to his petition did offer, ample evidence and argument, both at trial and on appeal, regarding the cause of the injuries to his son. Obviously, the trial judge, and this court on direct review, concluded that, whatever role Navy medical personnel played in producing the injuries suffered by the victim, the petitioner was nonetheless guilty as charged. The only new fact he offers now is that the Government settled his son's FTCA claim. As noted above, the settlement is not an admission of negligence by the Government, and the fact of the settlement is irrelevant to the determination of causation.

IV. Conclusion

For the foregoing reasons, the petition is denied.

Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court