

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

**Before  
R.E. VINCENT, E.C. PRICE, J.E. STOLASZ  
Appellate Military Judges**

**WAYNE TATUM  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**v.**

**UNITED STATES OF AMERICA**

**NMCCA 9202530**

**Review of Petition for Extraordinary Relief in the Nature of a  
Writ of Error Coram Nobis**

**Sentence Adjudged:** 15 June 1992.

**Convening Authority:** Commanding General, 2d Marine  
Aircraft Wing, FMF, Atlantic, MCAS, Cherry Point, NC.

**For Petitioner:** *Pro se.*

**For Respondent:** Maj James Weirick, USMC.

**23 September 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

VINCENT, Senior Judge:

On 22 July 2008, the petitioner submitted a petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis, under the All Writs Act, 28 U.S.C. § 1651(a). In his petition, he alleges the military lacked jurisdiction to try him at a general court-martial held on 15 June 1992 because he was not placed on appellate leave after the convening authority acted on the sentence of a previous, but unrelated, July 1990 general court-martial.<sup>1</sup> The petitioner requests this court to

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<sup>1</sup> I. Did the respondents lack jurisdiction over the petitioner to conduct a general court-martial proceeding on or about July 17-21, 1990 and June 15,

set aside and dismiss the findings and sentence imposed by the 15 June 1992 court-martial, correct all of his military and civilian records, and grant any other relief the court deems appropriate.

After considering the petition and the petitioner's brief, we conclude he has failed to demonstrate a clear and indisputable right to the extraordinary relief requested. We, therefore, deny the petition.

### I. Procedural History

The petitioner was tried and convicted by a general court-martial on 17-21 July 1990. On 27 April 1992, the Navy-Marine Corps Court of Criminal Review (NMCMR) set aside and dismissed some of the findings and set aside the sentence.<sup>2</sup> On 15 June 1992, the petitioner was tried and convicted by a general court-martial on charges unrelated to his first court-martial. On 29 October 1993, NMCMR affirmed the findings and sentence of the petitioner's second court-martial and on 30 June 1994, the Court of Military Appeals affirmed NMCMR's decision.<sup>3</sup>

### II. Jurisdiction

The All Writs Act, 28 U.S.C. § 1651, authorizes this court to grant extraordinary relief in appropriate cases. The 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. 2008)(quoting *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)), *petition for cert. filed*, \_\_\_ U.S. \_\_\_ (U.S. Aug. 29, 2008)(No. 08-267). Once a case becomes final in

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1992, when they failed to properly extend the petitioner's enlistment contract by presenting the petitioner with a convenience of the government legal hold document for signature?

II. Did the respondents lack jurisdiction over the petitioner to conduct a general court-martial proceeding on or about June 15, 1992?

III. Did the Marine Corps abuse its discretion when they failed to place the petitioner on appellate leave, immediately following the June 1990 general court-martial, pending the outcome of the board of Naval Appeals return of its ruling as mandated by the Uniform Code of Military Justice Manual (UCMJ) § 876.a Art. 76a?

<sup>2</sup> *United States v. Tatum*, 34 M.J. 1115 (N.M.C.M.R. 1992).

<sup>3</sup> *United States v. Tatum*, No. 922530, unpublished op. (N.M.C.M.R. 29 October 1993), *aff'd*, 40 M.J. 320 (C.M.A. 1994)(summary disposition).

accordance with Articles 71 and 76, Uniform Code of Military Justice, a military appellate court may issue a writ if a petitioner seeks to collaterally attack an action that was taken within the subject matter jurisdiction of the military justice system, such as the finding or sentence of a court-martial. *Id.* at 125; *Loving v. United States*, 62 M.J. 235, 245-46 (C.A.A.F. 2005).

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. We note the petitioner seeks a writ to examine the findings and sentence of a final court-martial this court has previously reviewed and raises a claim that goes to the validity of the judgment rendered and affirmed. Accordingly, based on our superior court's decision in *Denedo*, we possess 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 only be used in extraordinary circumstances. *Aviz v. Carter*, 36 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 Dist. Court*, 542 U.S. 367, 381 (2004)).

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. *Dew v. United States*, 48 M.J. 639, 649 (Army Ct.Crim.App. 1998)(quoting *Chapel v. United States*, 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)).

Prior to addressing the merits of the petition, the petitioner must meet six stringent threshold requirements:

(1) the alleged error is of the most fundamental nature;

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

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

(4) the new information presented in the petition 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 126-27 (citations omitted).

## **B. Analysis**

Since the alleged error is jurisdictional, it is of a most fundamental nature, and, arguably, our consideration of coram nobis may be his only adequate remedy. However, the petitioner has not articulated any valid reason for failing to seek the requested relief earlier. He could have raised jurisdictional issues during his 1992 trial and 1993 appellate review processes. Additionally, the petitioner's alleged jurisdictional defect is based upon information that he and his counsel could and should have discovered through the exercise of reasonable diligence prior to the original judgment or on appeal. Accordingly, we conclude the petitioner has failed to meet the threshold requirements.

Furthermore, even if the petitioner was able to meet the coram nobis threshold requirements, he would not be entitled to relief. A servicemember remains subject to the UCMJ until he is formally discharged from military service. Art. 2, UCMJ. Even if the petitioner had been placed on appellate leave after his 1990 conviction, he would have remained subject to military jurisdiction. See 10 U.S.C. § 701(e); *Pena v. United States*, 64 M.J. 259, 267-68 (C.A.A.F. 2007). Finally, this court's 1992 decision to set aside part of the findings and the sentence of

the petitioner's 1990 court-martial did not affect the military's jurisdiction over him. Therefore, the petitioner was subject to the UCMJ and the military had jurisdiction to try him in 1992.

### **Conclusion**

For the foregoing reasons, the petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief he has requested. Accordingly, the petition is denied.

Judge STOLASZ and Judge PRICE concur.

For the Court

R.H. TROIDL  
Clerk of Court