

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

**Before  
C.L. REISMEIER, J.R. PERLAK, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**EDWIN A. EHLERS II  
SERGEANT (E-5), U.S. MARINE CORPS**

**v.**

**UNITED STATES OF AMERICA**

**NMCCA 200800190  
Review of Petition for Extraordinary Relief in the Nature of a  
Writ of Habeas Corpus**

**Sentence Adjudged:** 21 August 2007.

**Military Judge:** Maj Brian Kasprzyk, USMC.

**Convening Authority:** Commanding General, 1st Marine  
Division (REIN), Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** LtCol R.M. Miller,  
USMC.

**For Appellant:** *Pro se.*

**27 December 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the petitioner, contrary to his pleas, of sodomy with a child under the age of 12 years, assault consummated by a battery on a child under the age of 16 years, and indecent liberties with a child under the age of 16 years, violations, respectively, of Articles 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928, and 934. The petitioner was sentenced to confinement for 25 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a

dishonorable discharge from the United States Marine Corps. The convening authority approved the sentence, but disapproved all confinement in excess of 19 years in an act of clemency.

In June 2009, this court affirmed the findings and sentence. *United States v. Ehlers*, No. 200800190, 2009 CCA LEXIS 229, unpublished op. (N.M.Ct.Crim.App. 30 Jun 2009). In April 2010, the Court of Appeals for the Armed Forces denied the petitioner's petition for grant of review. *United States v. Ehlers*, 69 M.J. 89 (C.A.A.F. 2010). The Supreme Court denied a writ of certiorari. *Ehlers v. United States*, 131 S. Ct. 536 (2010). Direct appellate review is complete.

The petitioner now seeks extraordinary relief from this court in the form of a writ of *habeas corpus* claiming: (1) the charges and specifications under Article 134 failed to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); (2) the petitioner's Sixth Amendment speedy trial rights were violated by the delay between the first allegations of misconduct and the trial; (3) the military judge abused his authority by failing to dismiss the charges because the petitioner's right against self-incrimination was violated by a special agent interrogating the petitioner; (4) the prosecution withheld exculpatory evidence at trial; (5) the military judge's findings were ambiguous; (6) the Naval Criminal Investigative Service (NCIS) failed to follow established directives by failing to report the allegations at issue to the Family Advocacy Program (FAP); and (7) an NCIS special agent tampered with evidence.

After carefully considering the petition, the accompanying documents, and this court's prior decision, we conclude that the petitioner has failed to demonstrate that an extraordinary writ is appropriate. We deny his petition.

### **Discussion**

This court has the authority to issue emergency writs pursuant to the All Writs Act, 28 U.S.C. § 1651. *Noyd v. Bond*, 395 U.S. 683 (1969). The writ at issue in this case is a writ of *habeas corpus*. The All Writs Act authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." 28 U.S.C. § 1651. The Act requires two separate determinations: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate." See *Denedo v. United*

*States*, 66 M.J. 114, 120 (C.A.A.F. 2008), *aff'd and remanded*, *United States v. Denedo*, 556 U.S. 904 (2009). Issuance of a writ is "a drastic remedy that should be used only in truly extraordinary situations." *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993) (citing *United States v. LaBella*, 15 M.J. 228 (N.M.C.M.R. 1983)). The petitioner has the heavy burden of showing that he has "a clear and indisputable right" to the extraordinary relief that he has requested. *Id.* A writ of *habeas corpus* orders the release of a petitioner because his confinement is either improper or illegal. *Fisher v. Commander*, 56 M.J. 691 (N.M.Ct.Crim.App. 2001).

The petitioner makes the following arguments in support of his request for a writ. He claims, in essence: (1) that the rule announced in *Fosler* is retroactive; (2) that the passage of time from the date of offense to date of trial was Constitutionally unacceptable; (3) that in stating that he was not going to consider the petitioner's election to terminate his interrogation and request counsel, the military judge ignored the petitioner's "civil right," necessitating dismissal of charges; (4) that the Government prevented an exculpatory witness from testifying at trial, and failed to disclose exculpatory evidence in its possession; (5) that the military judge should have specified the particular occasion on which the findings were predicated, despite the fact that the specifications did not allege on "divers" occasions; (6) that an alleged administrative failure in involving FAP in the petitioner's investigation requires the remedy of dismissal of the charges; and (7) that an NCIS special agent violated the petitioner's rights, having admitted to the military judge that he (the agent) did in fact mark upon the drawing offered as evidence. We are not persuaded that this set of circumstances merits an extraordinary writ.

We briefly address each of the petitioner's claims. As to his first claim, *Fosler* has no retroactive application. The Supreme Court has held that a "'habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.'" *Teague v. Lane*. 489 U.S. 288, 306 (1989) (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969)). The Supreme Court has identified two exceptions where a new rule may have retroactive application during habeas review: (1) where the new rule places private individual conduct beyond the power of criminal law-making authority; and (2) a rule articulates fundamental procedures without which the chances for accurate conviction are severely diminished. *Loving v. United States*, 64 M.J. 132, 156 (C.A.A.F. 2006) (Effron, J.,

concurring in part and in the result) (citing *Teague*, 489 U.S. at 311-13). We do not believe that *Fosler* falls into either category. Even if it did, a petitioner's failure to raise a claim during prior proceedings constitutes a procedural default unless a petitioner "can show cause for the default and prejudice resulting therefrom." *Id.* (quoting *Teague*, 489 U.S. at 298). Petitioner did not raise this claim on direct appeal, and he has not articulated any reason in his petition for the omission.

As to his second, accepting the dates the petitioner alleges at face value, the offenses occurred between 2002 and 2003. They were reported in June of 2004. In April 2005, the petitioner was interrogated, and in May 2005, he was polygraphed and interrogated again. The Article 32, UCMJ, hearing was held in February 2007, and the petitioner was sentenced in August 2007. Recognizing that pre-indictment or pre-charging delay may be prejudicial, there is nothing in the petitioner's submissions to suggest that the delay at any stage in any way prejudiced him. *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (holding that prejudice is one of the factors a court should consider when examining whether a defendant has been deprived his constitutional right to a speedy trial). We also note that the appellant failed to raise a speedy trial claim on direct appeal.

Likewise, accepting the petitioner's claim that the military judge acknowledged that the petitioner invoked his right to terminate and to counsel during his NCIS interrogation, in this military judge-alone trial, we can discern no basis for relief of any sort based on the petitioner's complaint. "A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000).

The petitioner's allegation regarding an exculpatory witness and exculpatory evidence is also unpersuasive. In his submission, the petitioner claims that the Government never called RH, a witness to accusatory statements made by the victim, claiming both that she was available at trial and flown to the situs to testify. It appears, however, that the Government did not call her, leading to the petitioner's complaint that he was denied the chance to confront her. He further alleges that he was denied the chance to call RH as a witness himself, because he was not aware that RH would address the truthfulness of the allegations. We can discern neither a

confrontation clause nor a discovery violation within his allegations. As to his complaint that the Government failed to disclose that the victim's father himself was suspected of abusing the victim, we do not concur with the petitioner's interpretation of the medical entry. Rather, the document notes that the victim was screened for domestic violence and sexual assault or abuse, not that anyone was suspected of such.

Regarding the petitioner's complaint regarding the sufficiency of the findings, he was charged with and convicted of sodomy, battery, and indecent liberties with an underage child. He was neither charged with nor convicted of misconduct "on divers" occasions. He was not acquitted of some allegations found within the specifications as he suggests. His reliance on *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), is accordingly misplaced (*Walters* held that a military judge should ensure that findings by exceptions and substitutions do not result in ambiguity that precludes factual sufficiency review.)

The petitioner's final two allegations are likewise unpersuasive. A putative failure to inform the FAP of the crimes at issue in no way relates to the disposition of this criminal case. *United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994) (disciplinary action not precluded by administrative recommendation. Likewise, the issues the petitioner raises regarding the full scope of the investigation support no conclusion relative to the writ the petitioner seeks.

In sum, we conclude that the petitioner has not carried the heavy burden required by the extraordinary writ of *habeas corpus*. We deny his petition.

For the Court

R.H. TROIDL  
Clerk of Court