

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

**Before  
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD  
Appellate Military Judges**

**CALVIN A. PRINCE II  
GUNNER'S MATE SEAMAN RECRUIT (E-1), U.S. NAVY**

**v.**

**UNITED STATES OF AMERICA**

**NMCCA 201100161  
Review of Petition for Extraordinary Relief in the Nature of a  
Writ of Habeas Corpus**

**Sentence Adjudged:** 2 December 2010.

**Military Judge:** CAPT David Berger, JAGC, USN.

**Convening Authority:** Commander, Navy Region Hawaii, Pearl Harbor, HI.

**Staff Judge Advocate's Recommendation:** LCDR K.A. Elkins, JAGC, USN.

**For Petitioner:** LT Toren Mushovic, JAGC, USN

**13 March 2012**

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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:

This matter comes before us on a petition for Extraordinary Relief in the nature of a writ of Habeas Corpus brought forth subsequent to the petitioner's convictions at a general and special court martial respectively. As a result of the initial general court-martial, the petitioner stands convicted, pursuant to his pleas, of three specifications of conspiracy, two specifications of failing to obey a lawful general regulation, one specification of willful damage to military property, two specifications of willful damage to the property of another, one

specification of being drunk onboard ship, and one specification of wrongful receipt of property knowing it had been stolen, respective violations of Articles 81, 92, 108, 109, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 908, 909, and 934. The petitioner was sentenced to confinement for five years, forfeiture of all pay and allowances, reduction to pay grade E-1, a fine of \$20,000.00 with an additional twelve months of confinement if not paid by the time of the convening authority's action, and a dishonorable discharge. On March 9, 2011, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of 20 months in accordance with the pretrial agreement (PTA) and disapproved the additional twelve months of confinement for failure to pay the \$20,000.00 dollar fine by the date of the convening authority's action.

In December 2011, this court affirmed the findings and sentence. *United States v. Prince II*, No. 201100161, unpublished op. (N.M.Ct.Crim.App. 27 Dec 2011). The petitioner filed an appeal with the Court of Appeals for the Armed Forces on 22 February 2012.

In September 2011, the petitioner was allegedly disrespectful toward a senior petty officer and knowingly and wrongfully used marijuana, as discerned from a positive urinalysis. On 31 January 2012, at his special court-martial the petitioner pled guilty to the September 2011 misconduct. A military judge, sitting as special court-martial, convicted the petitioner, pursuant to his pleas, of violating Articles 92 and 112(a), UCMJ, 10 U.S.C. §§ 892 and 912(a). The military judge sentenced the petitioner to time served. On that same day, based upon the misconduct plead to at the special court-martial, the convening authority vacated the previously suspended portion of the petitioner's five-year sentence from his general court-martial conviction, an approximately three-year time-period.

The petitioner now seeks extraordinary relief from this court in the form of a writ of *habeas corpus* claiming that his immediate release from confinement is required because his current confinement is based on the previously suspended sentence, which he argues the convening authority improperly vacated. After carefully considering the petition, and its supporting documents, we conclude that the petitioner has failed to demonstrate that he is entitled to any relief.

## **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 seeks *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(a).

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, 693 (N.M.Ct.Crim.App. 2001). 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 (C.M.A. 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.*

The petitioner claims that the PTA at his general court-martial does not specifically set forth misconduct after the date of the convening authority's action as a condition upon which suspended confinement can later be subjected to a vacation hearing. Specifically, he argues that: (1) paragraph 12 of the PTA, entitled, "Further Misconduct," specifically omits any reference to the time period after the convening authority's action and that this omission is an express admission that the period is not to be included; (2) the other conditions of suspension contained within the PTA are evidence that this period of time was not overlooked; and (3) because the parties agreed in the PTA that there are no other agreements other than those in the PTA, a term not included in the PTA cannot be held against the petitioner. We disagree.

RULE FOR COURTS-MARTIAL 1108(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), states:

(c) *Conditions of suspension.* The authority who suspends the execution of the sentence of a court-martial shall:

- (1) Specify in writing the conditions of suspension;
- (2) Cause a copy of the conditions of the suspension to be served on the probationer; and
- (3) Cause a receipt to be secured from the probationer for service of the conditions of the suspension.

*Unless otherwise stated*, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code.

R.C.M. 1108(c) (emphasis added in final paragraph).

The condition to not violate any punitive article of the code during the period of suspension is "implied by law, [and] it is not necessary for the convening authority to notify the probationer of that condition. Only conditions that are not implied by the MCM are subject to the requirements of notice and service otherwise imposed by R.C.M. 1108(c)." *United States v. Mayville*, 32 M.J. 838, 839 (N.M.C.M.R. 1991) (citation omitted).

The PTA contains no language which states that the implied condition of suspension of R.C.M. 1108 does not apply. The rule is plain: the implied condition exists unless otherwise stated. The standardized PTA is not mandated, so (contrary to the petitioner's argument) failure to use the standard PTA's boilerplate language does not necessitate a different result. Further, there is no authority to support the petitioner's suggestion that the inclusion of an explicit condition of suspension negates the implicit condition of R.C.M. 1108(c).

The petitioner also argues that no other term can be read into the PTA because paragraph 2 states that "[t]his Agreement (Parts I and II) constitutes all the conditions and understandings of both me and the government regarding the pleas in this case. There are no other agreements." This argument cuts both ways. The petitioner argues that paragraph 2 must be read to mean that because the implicit condition of R.C.M. 1108 is not stated, then it cannot be held against him; however, this language can also be read to mean that there was no outside agreement to remove that condition. Therefore, the language of paragraph 2 of the PTA is not persuasive proof that the parties were making an explicit statement that the petitioner was to be exempt of the R.C.M. 1108(c) condition to not commit misconduct during the period of suspension.

Finally, the petitioner cites *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009) and *United States v. Cox*, 46 C.M.R. 69 (C.M.A. 1972) for the proposition that there cannot be any implied conditions of good behavior which are not explicitly stated in a PTA. These cases are inapplicable. Neither of these cases address the period of time after the convening authority's action to suspend the sentence, which is the only time period in which the MCM spells out an implicit condition.

In sum, we conclude that the petitioner has not carried the heavy burden required to merit issuance of the extraordinary writ of *habeas corpus*. The petition is denied.

For the Court

R.H. TROIDL  
Clerk of Court