

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**Charles Wm. DORMAN**

**C.J. VILLEMEZ**

**R.C. HARRIS**

**Christopher M. HAYES  
Engineman Second Class (E-5), U.S. Navy**

**v.**

**John A. MAKSYM  
Commander, JAGC, USN  
Military Judge**

NMCCA 200301982

Decided 11 February 2004

Decision on Petition for Extraordinary Relief in the Nature of a Writ of Mandamus.

LT STEVEN M. MYERS, JAGC, USNR, Trial Defense Counsel  
LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel  
Capt GLEN R. HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The petitioner submitted a Petition for Extraordinary Relief under the All Writs Act, 28 U.S.C. § 1651(a), in the Nature of a Writ of Mandamus on 16 December 2003. In the Petition, he asks this court to either: (1) order the respondent military judge to grant the petitioner's motion to dismiss under RULE FOR COURTS-MARTIAL 604(b)(2) or 907, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); or, (2) direct specific performance of the terms of a pretrial agreement accepted by the Government on 17 September 2003. On the same day the petitioner requested that this court issue a writ of mandamus, he also submitted a Motion to Stay Proceedings.

On 17 December 2003, we granted the petitioner's Motion to Stay the proceedings. We also ordered the respondent to show cause why the requested writ should not be issued and to produce a transcript of the proceedings. To assist the respondent, we

also requested that the Judge Advocate General appoint counsel for the respondent.<sup>1</sup>

We have now completed our review of the proceedings below. We have also considered all the pleadings submitted by the petitioner and the respondent. Oral argument was not requested or conducted in this case. Based upon our review of the proceedings and the pleadings, we find that the petitioner has failed to establish that he has a clear and indisputable right to issuance of the requested writ. Accordingly, the petition is denied.

## I. Facts

A charge and two specifications alleging the petitioner violated Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, by violating a Florida statute concerning criminal child neglect were referred to a special court-martial on 29 July 2003. Commander (CDR) D.E. Davis, USN, the Commanding Officer, Naval Diving and Salvage Training Center, referred the charge and specifications. The petitioner was arraigned on that charge on 20 August 2003 at Naval Air Station, Pensacola, FL. After arraignment, the petitioner submitted an Offer of Pretrial Agreement to CDR Davis on 15 September 2003. Appellate Exhibit IV. In that Offer, the petitioner requested that CDR Davis withdraw the case from trial by special court-martial and refer the case to a summary court-martial. Additionally, the petitioner agreed to plead guilty at the summary court-martial, to proceed without benefit of counsel, and to waive his right to an administrative discharge board, with the likely result of receiving an "other than honorable discharge." *Id.* CDR Davis accepted that offer on 17 September 2003.

While the petitioner and his counsel were negotiating a deal with CDR Davis, the Commanding Officer of the Trial Service Office Southeast, Captain (CAPT) Stevens, was contacting CAPT Windhorst, the Commanding Officer, Center for Explosive Ordnance and Diving. CAPT Windhorst is the immediate superior in the chain of command (ISIC) of CDR Davis. The thrust of CAPT Stevens' comments to CAPT Windhorst was that the charges against the petitioner were serious enough to warrant trial by at least a special court-martial. He also informed CAPT Windhorst that if he did not assume control over the case, that he, CAPT Stevens, would discuss the matter with CAPT Windhorst's ISIC. Subsequent to that conversation, CAPT Windhorst discussed the case with the staff judge advocate for his ISIC and he was told that the ISIC did not intend to interfere in the case. Appellate Exhibit VI. Then, on 14 October 2003, CAPT Windhorst informed CDR Davis that he was withholding CDR Davis' authority to dispose of the charges against the petitioner. This withholding of authority was based

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<sup>1</sup> Contrary to the suggestion of respondent's counsel, our Order did not direct the Appellate Government Division to provide representation. See Respondent's Answer of 24 Dec 2003 at 1, n.1.

upon R.C.M. 401(a). Appellate Exhibit I. Thereafter, CAPT Windhorst referred the same charge and specifications, upon which the petitioner had previously been arraigned, to a special court-martial.

On 23 October 2003, the petitioner was arraigned on the current charge and specifications.<sup>2</sup> When asked to enter pleas, the petitioner "reserve[d] all pleas and motions...." Record at 14. A second session of petitioner's court-martial was held on 13 November 2003, at which time the petitioner moved to dismiss for the same reasons he has raised before this court. At trial, neither the Government nor the petitioner offered any evidence on the motion other than Appellate Exhibits I-VII. Following extensive argument and discussion, the military judge denied the motion. *Id.* at 99. The written ruling on the motion to dismiss, containing the military judge's essential findings, is Appellate Exhibit XXII.

## II. Discussion

The writ of mandamus is normally issued by a superior court to compel a lower court "to perform mandatory or purely ministerial duties correctly." BLACK'S LAW DICTIONARY 973 (7th ed. 1999). In other words, its purpose is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Dew v. United States*, 48 M.J. 639, 648 (Army Ct.Crim.App. 1998)(quoting *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943)).

The issuance of such 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)). It should not be invoked in cases where other authorized means of appeal or administrative review exist, and it is generally disfavored because it disrupts the normal process of orderly appellate review. *Id.*; *McKinney v. Jarvis*, 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997). For this reason, "[t]o justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even 'gross error;' it must amount 'to a judicial usurpation of power.'" *LaBella*, 15 M.J. at 229 (citing *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972)). To justify extraordinary relief, the petitioner bears the burden of demonstrating that he is entitled to it as a clear and indisputable right. *Aviz*, 36 M.J. at 1028.

In this case the petitioner essentially argues that the military judge erred in failing to grant his motion to dismiss

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<sup>2</sup> While the record before us does not contain the normal mention of "arraignment," the petitioner waived the reading of the charges and was asked to enter pleas. Record at 13-14.

because of a jurisdictional defect in the referral of the charge and specifications by CAPT Windhorst. Even if the referral were improper in this case, the court would not be deprived of jurisdiction. See *United States v. Blaylock*, 15 M.J. 190, 192 (C.M.A. 1983). Concerning the issue of whether the referral was improper, however, the petitioner can point to no provision in the Uniform Code of Military Justice, the Manual for Courts-Martial, or case precedent that prohibits what happened in this case. Rather, R.C.M. 401 (a) provides that "[a] superior competent authority [such as CAPT Windhorst] may withhold the authority of a subordinate [such as CDR Davis] to dispose of charges in individual cases. . . ." Absent the attachment of jeopardy in a case, there appears to be no jurisdictional limitation on that authority. Finally, we do not find the facts of this case, or issues they present, to be of the nature to merit the drastic relief the petitioner seeks.

### **III. Disposition**

The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is denied without prejudice to the petitioner's right to raise the issues contained herein in the normal course of appellate review if he is convicted. Our Order of 17 December 2003 staying the court-martial proceedings below is hereby dissolved.

Judge VILLEMEZ and Judge HARRIS concur.

For the Court

R.H. TROIDL  
Clerk of Court