

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

RONALD A. GRAY,

Petitioner,

vs.

Case No. 08-3289-RDR

**ERIC BELCHER, COLONEL, U.S. ARMY,
Commandant, USDB - Fort Leavenworth,**

Respondent.

STATUS REPORT CONCERNING MILITARY POST-CONVICTION PROCEEDINGS

Respondent Eric Belcher, Colonel, U.S. Army, Commandant, USDB-Fort Leavenworth, by and through Barry R. Grissom, United States Attorney for the District of Kansas, and T.G. Luedke, Assistant United States Attorney for said District, respectfully submits the following status report regarding Petitioner's related post-conviction proceedings in the military courts:

1. On April 1, 2009, Petitioner submitted his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 alleging eighteen (18) grounds of Constitutional error in his court-martial trial and appellate proceedings. (Doc. 17.)

2. On May 1, 2009, Respondent filed an Answer and Return asserting that the petition should be denied because Petitioner either received full and fair consideration of his claims or failed to exhaust his available remedies with the military courts. (Doc. 20.)

3. Petitioner then filed a Traverse/Amended Petition on December 18, 2009, in which he requested to amend his original petition and add an additional three claims to the original eighteen claims. (Docs. 42 and 43.)

4. On September 30, 2010, the Court granted Petitioner's request to amend his original petition and granted the Respondent thirty (30) days to file a response to the Traverse/Amended Petition. (Doc. 47.)

5. On November 1, 2010, Respondent filed a Response to Petitioner's Traverse replying only to Petitioner's additional three (3) claims and incorporating the Answer and Return (Doc. 20) which responded to the original eighteen (18) claims. (Doc. 48.)

6. On November 10, 2010, Petitioner filed a Motion for Extension of Time to File a Reply, requesting ninety (90) additional days. (Doc. 49.) Respondent opposed Petitioner's request for such a lengthy delay. (Doc. 50.)

7. On February 11, 2011, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis in the Army Court of Criminal Appeals ["ACCA"]. (Docs. 51-1 and 51-2.)

8. On February 14, 2011, Petitioner provided notice to this Court that he filed a petition for a Writ of Error Coram Nobis with the ACCA (Doc. 51) and moved this Court to stay the habeas proceedings pending action on the writ. (Doc. 51, ¶¶ 10, 11.)

9. On February 25, 2011, Respondent filed an opposition to Petitioner's Motion to Stay Proceedings and requested that the Court deny Petitioner's request to stay these habeas proceedings. (Doc. 52.)

10. On September 29, 2011, this Court issued an Order directing Petitioner to file a status report regarding his pending Petition for Writ of Error Coram Nobis filed with ACCA. (Doc. 55.) Petitioner complied with the Court's order and filed a status report on October 27, 2011, informing the Court that the ACCA had not yet taken action on his writ. (Doc. 58.)

11. On January 26, 2012, the ACCA issued its decision denying Petitioner's writ. (See Exhibit A.)

12. In light of the time limitations outlined in 28 U.S.C. § 2266 for making a final determination on an application for writ of habeas corpus in a capital case, Respondent respectfully requests that the Court deny Petitioner's motion to stay proceedings and direct Petitioner to file his Reply to Respondent's Response to Petitioner's Traverse within thirty (30) days. (Doc. 48.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a copy to the following CM/ECF participants:

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UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, COOK, and BURTON
Appellate Military Judges

Private E1 RONALD GRAY
United States Army, Petitioner

v.

Colonel ERIC BELCHER,
Commandant, United States Disciplinary Barracks
and
THE UNITED STATES, Respondents

ARMY MISC 20110093¹

For Petitioner: Colonel Mark Tellitocci, JA; Captain Stephen J. Rueter, JA;
Timothy P. Kane, Esq.; Shawn Nolan, Esq.; Billy H. Nolas, Esq. (on brief).

For Respondents: Colonel Michael E. Mulligan, JA; Major Amber J. Williams, JA;
Major Adam S. Kazin, JA (on brief).

26 January 2012

OPINION OF THE COURT AND ACTION
ON PETITION FOR EXTRAORDINARY RELIEF
IN THE NATURE OF A WRIT OF CORAM NOBIS

JOHNSON, Senior Judge:

This is a petition for extraordinary relief in the nature of a writ of *coram nobis* based on several alleged errors discovered after petitioner's court-martial and appellate proceedings. We hold that petitioner cannot meet the threshold criteria for *coram nobis* review. Petitioner has other remedies available to him as a matter of law, but not within the military justice system.

I

In 1988, petitioner was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, petitioner was convicted of the premeditated murder of Ms. KAR and Private LLV, as well as the attempted murder of Private MALN, in violation of Articles 118, and 80, Uniform Code of Military Justice, 10 U.S.C. §§ 918, and 880 (1982) [hereinafter UCMJ, 1982]. Petitioner was also convicted of rape (3 specifications), robbery (2 specifications), and sodomy

¹ The docket number for petitioner's direct appeal is ACMR 8800807.

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(2 specifications) with respect to the above victims, as well as burglary and larceny of another person, in violation of Articles 120, 122, 125, 129, and 121, UCMJ, 1982, respectively. The convening authority approved his sentence to death, a dishonorable discharge, total forfeitures and reduction to E1.

The petitioner's conviction and sentence were affirmed by both the Army Court of Military Review, which is this court's predecessor, and the United States Court of Appeals for the Armed Forces. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999), *aff'g* 37 M.J. 751 (A.C.M.R. 1993), *cert. denied*, 532 U.S. 919 (2001). On 28 July 2008, the President of the United States approved petitioner's sentence to death and ordered it executed. The Secretary of the Army scheduled petitioner's execution for 10 December 2008; however, before it could be carried out, the United States District Court for the District of Kansas granted a stay of execution in anticipation of petitioner filing a petition for extraordinary relief in the nature of a writ of habeas corpus. Thereafter, petitioner filed a writ of habeas corpus, which is still pending before that court.

On 11 February 2011, petitioner filed with this court the instant petition for extraordinary relief in the nature of a writ of *coram nobis*. We then ordered the government to show cause why the writ should not issue, and it filed an answer brief on 14 March 2011. Petitioner filed a reply brief on 13 June 2011. Petitioner is currently in confinement at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

II

In this case, there is a final judgment as to the legality of the proceedings under Article 71(c)(1), UCMJ, and the case is final under Article 76, UCMJ. *See Loving v. United States (Loving I)*, 62 M.J. 235, 244 (C.A.A.F. 2005). Therefore, this court is without jurisdiction to entertain collateral review under a writ of habeas corpus. *Loving v. United States (Loving II)*, 64 M.J. 132, 135 (C.A.A.F. 2006) (quoting *Loving I*, 62 M.J. at 236).² *See* H.R. Rep. No. 81-491, at 35 (1949) ("Subject only to a petition for a writ of habeas corpus in Federal court, [Article 76] provides for the finality of court-martial proceedings and judgments"). Although a case is final pursuant to Article 76, UCMJ, a service court may nonetheless entertain a writ of *coram nobis* "in aid of" its jurisdiction. *Denedo II*, 556 U.S. at ____, 129 S. Ct. at 2223-24; *Denedo I*, 66 M.J. at 120-21, 125; 28 U.S.C. § 1651(a) (2010).

² Although the reasoning in *Denedo v. United States (Denedo I)*, 66 M.J. 114 (C.A.A.F. 2008), and *United States v. Denedo (Denedo II)*, 556 U.S. 904, 129 S. Ct. 2213 (2009), could be construed to reach all forms of collateral review, their mutual holding is much more limited. Those cases extended collateral review beyond Article 76 only for writs of *coram nobis*.

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In the military justice system, a petitioner must satisfy several, stringent threshold requirements in order to obtain *coram nobis* relief:

(1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons 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 writ 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 I, 66 M.J. at 126 (citing *United States v. Morgan*, 346 U.S. 502, 512–13 (1954), and *Loving I*, 62 M.J. at 252–53). Here, petitioner cannot traverse these threshold requirements because there is, as a matter of law, a remedy other than *coram nobis* available to him.³ Although in our view petitioner's right to habeas corpus in the military justice system has ended, this is not so for Article III courts. In fact, petitioner has filed a writ of habeas corpus in federal district court and the government does not dispute the jurisdictional basis for doing so. The merits of petitioner's claims are now for the federal district court, rather than this court, to decide.

We are cognizant of the preference for military courts to hear issues potentially of first impression,⁴ but we are also mindful of clear constraints imposed on this court by statute and our superior court.

III

The Petition for Extraordinary Relief in the Nature of a Writ of Error *Coram Nobis* is DENIED.

³ Where a petitioner is in custody, he or she can obtain relief through a writ of habeas corpus and, therefore, cannot establish that no remedy other than *coram nobis* is available. See *Denedo I*, 66 M.J. at 126 (noting that the petitioner in that case did not have habeas corpus available to him because he was not in custody).

⁴ See generally *Denedo I*, 66 M.J. at 121–122 (stating that “courts within the military justice system should have an opportunity to consider challenges to court-martial proceedings prior to review by courts outside the military justice system”).

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Judges COOK and BURTON concur.

FOR THE COURT:

A handwritten signature in cursive script, reading "Malcolm H. Squires, Jr.", written in black ink.

MALCOLM H. SQUIRES, JR.
Clerk of Court