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

**Before**
**J.A. MAKSYM, R.E. BEAL, R.Q. WARD**
**Appellate Military Judges**

**DANIEL PACK, JR.**
**GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**v.**

**UNITED STATES OF AMERICA**

**NMCCA 200400772**
**Review of Petitions for Extraordinary Relief in the Nature of Writs of Habeas Corpus and Coram Nobis**

**31 October 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:

This matter is brought before the court through petitioner's *pro se* petitions for Extraordinary Relief in the Nature of Writ of *Habeas Corpus* and a Writ of Error *Coram Nobis* under the All Writs Act, 28 U.S.C. §1651(a).[1] In the former, the petitioner alleges that the offenses for which he stands convicted are multiplicious and unreasonably multiplied and, in the latter, he alleges that all specifications fail to state an offense under *United States v. Fosler*.[2]

After considering the petitions and all documents submitted in support thereof, we conclude that the petitioner has failed

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[1] The petitions were received at this court on 19 September 2011.

[2] 70 M.J. 225 (C.A.A.F. 2011).

to demonstrate a clear and indisputable right to the extraordinary relief he has requested. Therefore, we deny his petitions.[3]

**Background**

A general court-martial composed of officer and enlisted members convicted the petitioner, contrary to his pleas, of six specifications of indecent acts with a child, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. On 10 October 2002, he was sentenced to confinement for 23 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged. On 26 October 2006, this court dismissed one specification, affirmed the remaining findings, reassessed the sentence, and affirmed a sentence of confinement to 22 years, reduction to pay grade E-1, and a dishonorable discharge.[4]

**Jurisdiction**

The All Writs Act, 28 U.S.C. § 1651(a), authorizes this court to grant extraordinary relief in appropriate cases. This Act does not enlarge the court's jurisdiction; rather, relief is appropriate only when "in aid of [this court's] existing statutory jurisdiction." *Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citation and internal quotation marks omitted), *aff'd* and *remanded, United States v. Denedo*, 119 S. Ct. 2213 (2009). This requires us to address two issues: first, whether the writ is "in aid of" this court's jurisdiction; and second, whether the writ is "necessary or appropriate", *id*. at 120, keeping in mind that the issuance of a writ is "a drastic remedy that should be used only on truly extraordinary situations." *Aziz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993) (citation omitted). The petitioner must show that he has "a clear and indisputable right" to the extraordinary relief requested. *Denedo*, 66 M.J. at 126 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004)). Once a conviction is final upon direct review under Articles 71 and 76, UCMJ, this court may issue a writ if a petitioner seeks to collaterally attack an action that was taken within the subject-

[3] As explained *infra*, we find a petition for a writ of error *coram nobis* to be erroneously filed whenever the petitioner remains in custody. Therefore we deny the petitioner's *coram nobis* petition without prejudice to his right to refile as *habeas corpus*.

[4] *United States v. Pack*, No. 200400772, 2006 CCA LEXIS 286, unpublished op. (N.M.Ct.Crim.App. 26 Oct 2006), *aff'd*, 65 M.J. 381 (C.A.A.F. 2007), *cert. denied*, *Pack v. United States*, 552 U.S. 1313 (2008).

matter jurisdiction of the military justice system, such as the finding or sentence of a court-martial. *Id*. at 125. An extraordinary writ can lie for factual, constitutional, and fundamental errors, to include "the impact of new law on a decision." *Loving v. United States*, 62 M.J. 235, 252 (C.A.A.F. 2005) (citing 2 CHILDRESS & DAVIS, FEDERAL STANDARDS OF REVIEW §13.01 (2d ed. 1999)); *see also Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994). It is not a substitute for appeal and should only be used to correct "errors of the most fundamental character." *Loving*, 62 M.J. at 253 (citation omitted).

Because both petitions raise a claim concerning the validity of the findings and/or sentence of the petitioner's court-martial, we possess jurisdiction to entertain these petitions for extraordinary relief. *Denedo*, 66 M.J. at 120.

**Writ of *Habeas Corpus***

A writ of *habeas corpus* orders a prisoner released because his confinement in some aspect is improper or illegal. *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691, 693 (N.M.Ct.Crim.App. 2001). It is the proper avenue whenever the petitioner is in custody and complains of constitutional and other fundamental errors. *Denedo*, 129 S. Ct. at 2220; *see also Loving*, 62 M.J. at 256 (rejecting contrary holding in *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994) that *coram nobis* petitions can be entertained when the petitioner is in custody).

In raising allegations of error on collateral review, a *habeas* petitioner must show that "he has a clear and indisputable right to the extraordinary relief that he has requested." *Fisher*, 56 M.J. at 692 (internal quotation marks and citation omitted). Because this petitioner's claim is constitutionally grounded,[5] we apply both the scope and standard of review adopted by the Court of Appeals for the Armed Forces (CAAF) in *Loving v. United States*.[6]

[5] The petitioner raises both multiplicity and unreasonable multiplication of charges (UMC) in his petition for *habeas* relief. Multiplicity, by its nature, implicates the Double Jeopardy clause of the Fifth Amendment. *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001); *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993). In contrast, UMC is based on a traditional concept in military law to guard against prosecutorial abuses. *Quiroz*, 55 M.J. at 337-38.

[6] 64 M.J 132 (C.A.A.F. 2006).

In *Loving*, the CAAF adopted the standard of review legislated by Congress in 28 U.S.C. § 2254(d)[7] for a *habeas* petition alleging constitutional error. *Id*. at 145. Therefore, we must determine whether the petitioner's trial:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [prior] proceeding.[8]

In the present case, the petitioner argues that the offenses for which he stands convicted are both multiplicious and unreasonably multiplied.[9] He acknowledges that his trial defense counsel raised these issues at trial, but contends that his appellate defense counsel refused to raise them on appeal despite his specific request to do so.[10] As we articulated in our previous decision in this case, trial defense counsel raised these same issues both pretrial[11] and at the conclusion of the Government's case in chief. The military judge at trial agreed with the trial defense counsel, but only as to Specifications 1 of the Charge and 3 of the Additional Charge, and then only as to sentencing.[12] In our review of the record, we re-examined this same issue of multiplicity and found that these specifications were also multiplicious for findings. We then disapproved the guilty finding under Specification 3 of the Additional Charge, dismissed the specification and reassessed the sentence.

Applying now the standard for review articulated by *Loving*, we do not find the decision by the trial court, as modified by this court, to be "contrary to" or "an unreasonable application

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[7] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2244-2254 (2000).

[8] *Id*.

[9] *Habeas* Petition at 3.

[10] *Habeas* Petition at 5.

[11] Appellate Exhibit VII at 2-3, attached to *Habeas* Petition. The basis for the trial defense counsel's motion was both multiplicity and unreasonable multiplication of charges.

[12] *Pack*, 2006 CCA LEXIS 286 at 24-25.

of" clearly established Federal law. Nor do we find that the trial court's decision, as modified by this court, was "based on an unreasonable determination of the facts in light of the evidence presented" at trial. The military judge determined that the six specifications (with the one exception described earlier) were each based on distinct and separate acts. Although not raised on appeal, we reviewed the military judge's decision pursuant to our statutory responsibility under Articles 59 and 66, UCMJ. We note that the petitioner raises no new evidence or legal basis not previously advanced before the trial court.[13] In essence, his petition amounts to a request for a "third look" at the same argument. Consequently, we do not find that he has a clear and indisputable right to the extraordinary relief requested. We, therefore, deny his petition.

**Writ of Error *Coram Nobis***

A writ of c*oram nobis* is appropriate whenever exceptional circumstances, not apparent to the court in its original consideration, reveal an error "'of such a fundamental nature as to render the proceeding itself irregular and invalid.'" *Fisher*, 56 M.J. at 695 (quoting *Chapel v. United States*, 21 M.J. 687, 689 (A.C.M.R. 1985)).

However, such a petition for a writ of error *coram nobis* is limited when "alternative remedies, such as *habeas corpus*, are available." *Denedo*, 129 S. Ct. at 2220 (citing *United States v. Morgan*, 346 U.S. 502, 510-11 (1954)). In the past, our courts have viewed this as simply "form over substance" and treated the *coram nobis* petition as one of *habeas corpus*. *See Garrett*, 39 M.J. at 293. More recently though, the CAAF has eschewed such practice, instead refusing to re-characterize erroneously filed *coram nobis* petitions as *habeas corpus* petitions. *Loving*, 62 M.J. at 259-60. This avoids potential adverse consequences if the petitioner ultimately seeks relief in an Article III court. *Id*. Accordingly, we will follow this more recent approach adopted by the CAAF.

**Conclusion**

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

[13] We note that one criterion for seeking extraordinary relief is that ". . . the writ does not seek to reevaluate previously considered evidence or legal issues." *Denedo*, 66 M.J. at 126. That is exactly what this habeas petition invites us to do.

without prejudice to the petitioner's right to re-file a petition for a writ of *habeas corpus* with this court.

For the Court

R.H. TROIDL
Clerk of Court