**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class JOSE A. COSSIO, JR.**
**United States Air Force**

**ACM 36206 (pet)**

**15 February 2008**

Sentence adjudged 16 December 2004 by GCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, fine of $750.00, an additional 3 months of confinement if the fine is not paid, and reduction to E-1.

Appellate Counsel for the Petitioner: Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Major Sloan M. Pye.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges



PER CURIAM:

*Background*

The petitioner, contrary to his pleas, was convicted in December of 2004 of stealing U.S. currency, two violations of federal laws prohibiting improperly obtaining another person's social security number and the use of that person's social security number with intent to commit larceny, and communicating a threat. A military judge sentenced the petitioner to a bad-conduct discharge, confinement for 10 months, reduction to E-1, and a fine of $750.00 with an additional 3 months of confinement if the fine was not paid. The convening authority approved the findings and sentence as adjudged.

This Court affirmed the petitioner's conviction on 24 August 2006 in an unpublished decision, and his petition for a grant of review was denied by the United States Court of Appeals for the Armed Forces on 30 January 2007. *United States v. Cossio*, ACM 36206 (A.F. Ct. Crim. App. 24 Aug 2006) (unpub. op.), *pet. denied*, 64 M.J. 401 (C.A.A.F. 2007). At that point, appellate review of the petitioner's conviction was complete. On 14 November 2007 the petitioner asked this Court to issue a writ of *error coram vobis*, claiming a *Brady* violation by trial counsel at his initial trial.[1]

The petitioner, represented by appellate defense counsel, asserts that "*Brady v. Maryland*, 373 U.S. 83 (1963), required the government to disclose two prior worthless check convictions for SrA MHT, a key prosecution witness at petitioner's court-martial." In documents admitted in support and in response to this petition, public records indicate that SrA MHT pled *nolo contendere* to four separate misdemeanor worthless check charges under Florida law on 23 September 2003. The petitioner only became aware of these pleas on 30 September 2007. The petitioner argues that SrA MHT's pleas are "material evidence," the prosecution was required to disclose the prior convictions, and the failure to do so was an error of "constitutional dimension" warranting relief.

In reply to the petitioner's request, the government contends that 1) the petition is not timely because this Court's rules require that writs for extraordinary relief be filed within 20 days of discovery (*see* A.F. CT. CRIM. APP. R. PRAC. AND PROC. 20.1(a) (2007)); 2) the prosecution did exercise due diligence in disclosing discoverable evidence within "trial counsel's control;" and 3) even if trial counsel had the information, the failure to disclose was harmless beyond a reasonable doubt because the pleas would not have been admissible at trial to impeach under Mil. R. Evid. 609(a) because they were not a *crimen falsi* conviction or felony conviction.

*Writ of Error Coram Vobis*[2]

The authority of this Court to issue an extraordinary writ under the All Writs Act, 28 U.S.C. § 1651(a), is accepted within military justice jurisprudence. *Loving v. United States*, 62 M.J. 235, 246-47 (C.A.A.F. 2005); *Nkosi v. Lowe*, 38 M.J. 552, 553 (A.F.C.M.R. 1993). "*Coram nobis* is not a substitute for an appeal. It is extraordinary relief predicated upon 'exceptional circumstances' not apparent to the court in its original consideration of the case. It may not be used to seek a reevaluation of the evidence or a

[1] On 21 November 2007, this Court issued an order prohibiting the execution of the approved bad-conduct discharge pending review of this petition. The General Court-Martial Convening Authority had apparently delayed execution of the approved punitive discharge pending completion of a second court-martial.

[2] The petitioner's petition is styled as a "*Writ of Error Coram Vobis*." The appellate courts have referred to *Writs of Coram Vobis* and *Writs of Coram Nobis* almost interchangeably. For purposes of this petitioner, it is a distinction without a difference.

reconsideration of alleged errors." *United States v. Frischholz*, 36 C.M.R. 306, 309 (C.M.A. 1966). When evaluating the petitioner's prayers for relief:

> The basis for granting a writ of *coram nobis* is a demonstration of *error of fact* unknown at time of trial, of fundamentally unjust character which probably would have altered the outcome of the challenged proceedings had it been known. It is in the nature of an attack on a conviction, valid on its face, defective *by reason of facts* outside the record which deprived petitioner, without fault on his part, of the constitutional right to a fair trial. The purpose of a writ of *coram nobis* is to correct *errors of fact*, not errors of law, and the writ is not intended to enable a petitioner to resubmit his case to the court on a different legal theory from that originally presented.

*United States v. Biondi*, 27 M.J. 830, 831 (A.F.C.M.R. 1988) (internal citations omitted) (underlined emphasis added).

*Brady Violation*

The Supreme Court, in *Brady v. Maryland*, held that withholding exculpatory information, unavailable to a defendant, violates a defendant's trial rights. 373 U.S. 83, (1963). The claimed exculpatory evidence must put the whole case in a different light thereby undermining "confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

To prevail on a claim that withholding of impeachment evidence constitutes a *Brady* violation, the petitioner must establish that "(1) the evidence at issue is favorable to him; (2) the [government], either willfully or inadvertently, suppressed that evidence; and (3) prejudice ensued." *Harbison v. Bell*, 408 F.3d 823, 830 (6th Cir. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Prejudice is shown when the suppressed evidence is "material," *Strickler*, 527 U.S. at 282, which is when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

*Analysis*

We address this petition on the merits and have considered the initial briefs, the admitted documents, and the reply brief. Having considered the facts and allegations of the petitioner's request, we need not address whether the prosecution was ever aware of the *nolo contendere* pleas prior to trial. In order for the petitioner to obtain relief under the *Writ of Coram Vobis* for a *Brady* violation we must find a "probability" the outcome of the challenged proceedings would have been different had trial defense counsel been aware of the pleas in question.

Having reviewed the testimony in this case we find the petitioner's guilt to the offenses is overwhelming. While trial defense counsel did attempt to attack the credibility of SrA MHT that was not the real defense strategy. Faced with a variety of admissions by the petitioner, the trial strategy centered more on minimization of the petitioner's conduct than on attacks of SrA MHT's credibility. Further, to the extent that the credibility of SrA MHT was relevant it was already significantly undermined by his admission to repeated larcenies by fraud from another party. As this was a judge-alone trial, it is highly unlikely that the military judge would have found evidence of unrelated *nolo contendere* pleas for SrA MHT to four bad checks significant in his evaluation of the evidence as a whole. Therefore, even accepting they could be used to attack the credibility of SrA MHT, we find this new evidence would not have "probably" altered the findings or the sentence.

Once again, we note that our first review of the petitioner's case determined the findings and sentence to be correct in law and fact, and, on the basis of the entire record, was approved. Any "proceeding which is challenged by the writ is presumed to be correct and the burden rests on its assailant to show otherwise." *United States v. Gross*, 614 F.2d 365, 368 (3d Cir. 1980) (quoting *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963)). The petitioner has not done so. The petitioner received the appellate review required by law. Articles 66 and 67, UCMJ, 10 U.S.C. §§ 866, 867. Nothing in this petition convinces us he is entitled to further relief.

Accordingly, it is hereby ordered that this Court's prior order of 21 November 2007, previously granting the petitioner's request for a Writ of Prohibition regarding the execution of the bad-conduct discharge is rescinded. Additionally, the petitioner's request for a Writ of *Error Coram Vobis* is

DENIED.

OFFICIAL


STEVEN LUCAS, GS-11, DAF
Clerk of the Court