UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2010-10**
Respondent	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
JOSE A. COSSIO, JR.,	)	
USAF,	)	
Petitioner – *Pro se*	)	**Panel No. 1**

On 16 December 2004, a military judge sitting as a general court-martial convicted the petitioner, contrary to his pleas, of stealing United States currency, two violations of federal laws prohibiting improperly obtaining another person's social security number and using that person's social security number with intent to commit larceny, and communicating a threat, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for ten months, reduction to E-1, and a fine of $750 with an additional three months of confinement if the fine was not paid.

To say that the appellate processing of this case is a model of clarity would be a gross overstatement. On 30 January 2006, prior to appellate review, the petitioner was arraigned on additional charges, which the military judge dismissed based on an Article 10, UCMJ, 10 U.S.C. § 810, speedy trial violation. The United States filed an appeal under Article 62, UCMJ, 10 U.S.C. § 862, and on 10 May 2006, this Court granted the Article 62, UCMJ, appeal and set aside the dismissal of charges. *United States v. Cossio*, Misc. Dkt. 2006-02 (A.F. Ct. Crim. App. 10 May 2006). On 24 August 2006, this Court approved the findings and the sentence. *United States v. Cossio*, ACM 36206 (A.F. Ct. Crim. App. 24 Aug 2006) (unpub. op.).

On 10 January 2007, our superior court affirmed this Court's granting of the Article 62, UCMJ, appeal. *United States v. Cossio*, 64 M.J. 254 (C.A.A.F. 2007). On 30 January 2007, our superior court denied the petitioner's petition for review. *United States v. Cossio*, 64 M.J. 401 (C.A.A.F. 2007). On 14 November 2007, the petitioner, claiming a *Brady*[1] violation by the trial counsel at his initial court-martial, asked this

[1] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). Here, the gist of the petitioner's coram vobis claim was that the trial counsel was aware of and failed to disclose to the defense that Senior Airman (SrA) MHT, a key witness who testified against the petitioner, had pled nolo contendere to four separate misdemeanor worthless check charges. The petitioner asserted that he was deprived of this impeachment evidence and prejudiced.

Court to issue a writ of coram vobis. On 21 November 2007, this Court issued an order prohibiting the execution of the approved bad-conduct discharge pending resolution of the petition.

On 15 February 2008, this Court, addressing the petition for a writ of coram vobis on its merits, rescinded the writ of prohibition regarding the execution of the petitioner's bad-conduct discharge and denied the petitioner's writ of coram vobis. *United States v. Cossio*, ACM 36206 (A.F. Ct. Crim. App. 15 Feb 2008) (unpub. op.). In doing so, this Court found that the petitioner was not prejudiced by not being advised of the nolo contendere pleas as there was no probability that the outcome of the petitioner's court-martial would have been different if the petitioner's trial defense counsel had been aware of the nolo contendere pleas.[2]

This case is once again before this Court, as the petitioner filed a petition for extraordinary relief in the nature of a writ of error coram vobis on 21 June 2010. The petitioner, alleging that Senior Airman (SrA) MHT "may have committed perjury, further acts of larceny, and conspired with another witness to hide such conduct from the court," asks this Court to order a *Dubay*[3] hearing to: (1) "[r]elease the criminal report on SrA MHT's perjury and larceny;" (2) "make a finding of fact considering [the] petitioner's allegations that the government suppressed evidence to include SrA MHT's Nolo Contendere pleas;" and (3) determine "whether the government asserted unlawful command influence to quash any investigation into witnesses who may have committed crimes relevant to petitioner's court-martial despite a reasonable probability that crimes had been committed which would have affected the outcome of [the] petitioner's court-martial." We deny the petition.

Discussion

The All Writs Act, 28 U.S.C. § 1651(a), grants this Court authority to issue extraordinary writs. *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005) (quoting *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)). "The writ of coram nobis[[4]] is an ancient common-law remedy designed 'to correct errors of fact.'" *United States v. Denedo*, 129 S. Ct. 2213, 2220 (2009) (quoting *United States v. Morgan*, 346 U.S. 502, 507 (1954)). Appellate military courts have jurisdiction over "*coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental

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[2] In making this finding, this Court specifically found that: (1) the petitioner's guilt was overwhelming; (2) even assuming that SrA MHT's credibility was relevant, the petitioner's trial strategy focused more on minimizing his culpability rather than attacking SrA MHT's credibility and SrA MHT's credibility was already undermined by his admission to repeated larcenies by fraud; and (3) it was highly unlikely that the trier-of-fact, the military judge, would have found SrA MHT's nolo contendere pleas significant in evaluating the evidence. *United States v. Cossio*, ACM 36206, unpub. op. at 2 (A.F. Ct. Crim. App. 15 Feb 2008).

[3] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

[4] This petition is styled as a "Petition for Extraordinary Relief in the Nature 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 petition[], it is a distinction without a difference," and we will use the terms interchangeably. *Cossio*, unpub. op. at 1 n.2.

respect." *Id*. at 2224; *see also Denedo v. United States*, 66 M.J. 114, 124-25 (C.A.A.F. 2008). The writ of coram nobis is an extraordinary writ and an extraordinary remedy. *Denedo*, 129 S. Ct. at 2224 (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1762 (2009)). It should not be granted in the ordinary case; rather, it should be granted only under circumstances compelling such action to achieve justice. *Id.* at 2223-24; *Morgan*, 346 U.S. at 511; *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973).

Although a petitioner may file a writ of coram nobis at any time, to be entitled to the writ he must meet the following threshold requirements:

> (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, 66 M.J. at 126.

This Court uses a two-tier approach to evaluate claims raised via a writ of coram nobis. First, the petitioner must meet the aforementioned threshold requirements for a writ of coram nobis. *Id.* If the petitioner meets the threshold requirements, his claims are then evaluated under the standards applicable to his issues. *Id.* Evaluating the petitioner's case under the coram nobis threshold requirements, we find that the petitioner has failed to satisfy several threshold requirements, and the failure to meet any one alone warrants a denial of the petitioner's writ.

First, the petitioner's allegations of perjury and unlawful command influence could have been made when the petitioner filed his 14 November 2007 writ of coram vobis with this Court.[5] Rather than including these allegations in his earlier writ, he takes a piecemeal approach and fails to articulate a valid reason for not raising these allegations in his earlier coram vobis petition. *See, e.g.*, *United States v. Bejacmar*, 217 Fed. Appx. 919, 922-23 (11th Cir. 2007) (noting that the petitioner did not satisfy the coram nobis threshold requirements because he did not establish "sound reasons" for failing to raise his ineffective assistance of counsel claim in his prior request for habeas relief). Additionally, this Court previously addressed the merits of the petitioner's *Brady*

[5] We note that the petitioner made similar unsubstantiated perjury allegations to 16 SOW/SFOI on 14 February 2005, as indicated in a 27 May 2005 memorandum that was attached to this petition. Moreover, the petitioner uses the aforementioned memorandum to support his allegation of unlawful command influence. In short, the petitioner was aware of these issues well before filing his 14 November 2007 writ and, thus, should have included them in his earlier writ.

violation allegation, and we decline his invitation to reevaluate the issue. Lastly, assuming, arguendo, that the petitioner was erroneously convicted, he fails to explain how the consequences of his conviction persist. Put simply, the petitioner has failed to show any lingering civil disabilities or any ongoing legal disabilities resulting from his conviction. *See Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990); *United States v. Sepulveda*, 763 F. Supp. 352, 354 (N.D. Ill. 1991). In short, the petitioner has failed to meet all of the coram nobis threshold requirements.

Assuming, arguendo, that the petitioner has met all of the coram nobis threshold requirements, he is still not entitled to relief. A *Dubay* hearing would not be warranted because the petitioner's claims of perjury and unlawful command influence are speculative, conclusory, and unsubstantiated. Additionally, even if the petitioner's claim of perjury were substantiated (that is, SrA MHT committed perjury by denying that he stole money from his own girlfriend), evidence of the petitioner's guilt was overwhelming without SrA MHT's testimony and evidence of SrA MHT's perjury would not have provided the petitioner with a defense to his crimes. Finally, SrA MHT's nolo contendere pleas to four unrelated bad check cases were of marginal relevancy, if any, and the admission of his pleas at trial would not have resulted in a favorable result for the petitioner.

Accordingly, it is by the Court on this 1st day of July, 2010,

ORDERED:

That the petition for extraordinary relief in the nature of a writ of coram vobis is hereby **DENIED**.

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court