

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSTON, SQUIRES, and ECKER
Appellate Military Judges

Private DAVID M. MELANSON
United States Army,
Petitioner

v.

Lieutenant Colonel DONNA M. WRIGHT, U.S. ARMY,
and the UNITED STATES ARMY,
Respondents

ARMY MISC 9801349
(ARMY 9801266)

For the Petitioner: Captain John C. Einstman, JA (argued); Captain Mary M. Foreman, JA (on brief); Colonel John T. Phelps II, JA; Lieutenant Colonel Adele H. Odegard, JA; Major Leslie A. Nepper, JA (on related pleadings).

For the Respondents: Captain John W. O'Brien, JA (argued); Colonel Russell S. Estey, JA; Major Michael J. Klausner, JA (on brief and supplemental citations).

6 November 1998

MEMORANDUM OPINION AND ACTION ON
PETITION FOR EXTRAORDINARY RELIEF IN THE
NATURE OF A WRIT OF HABEAS CORPUS

SQUIRES, Judge:

This case is before us pursuant to petitioner's request for extraordinary relief. *See* All Writs Act, 28 U.S.C. § 1651; *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *Dew v. United States*, 48 M.J. 639 (Army Ct. Crim. App. 1998). Petitioner requests: (1) that this court order dismissal, with prejudice, of all charges and specifications against him; (2) that he be released immediately from post-trial confinement; and, (3) that he receive appropriate compensation for each day spent in confinement as a result of the charges against him.

Petitioner has failed to meet his burden of showing that he is a "civilian" who was improperly tried by court-martial and who is now clearly and indisputably deserving of extraordinary relief.

CASE HISTORY

Petitioner was tried by general court-martial at Vilseck, Germany on 3 and 10 September 1998. He moved at trial to dismiss the charges and specifications for lack of in personam jurisdiction. In essence, Private Melanson contended that he was discharged from the Army pursuant to Army Regulation 635-200 prior to his apprehension at the Frankfurt, Germany airport on 20 May 1998. After fully litigating the issue at an Article 39(a) session, the military judge denied the motion to dismiss for lack of jurisdiction. Immediately thereafter, petitioner entered pleas of guilty to various crimes. Petitioner remains incarcerated pursuant to his adjudged sentence to a bad-conduct discharge, confinement for thirty months, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority has yet to take final action on the findings of guilty and the sentence.

On 22 September 1998, petitioner filed this petition. We ordered respondents to show cause why the requested relief should not be granted on 25 September 1998. The respondents filed their response on 1 October 1998. Included therewith was an unauthenticated transcript of a portion of the trial proceedings, a copy of the motion litigated, other documentation considered at trial, and a copy of the findings of fact and conclusions of law entered by the military judge in denying the motion. Petitioner filed his reply brief on 5 October 1998.

On 13 October 1998, this court notified the parties that oral argument would be heard on the following specified issue:

WHETHER, UNDER THE CURRENT FACTUAL
POSTURE OF THIS CASE, THE QUESTION OF IN
PERSONAM JURISDICTION SHOULD BE DISPOSED
OF VIA WRIT OF HABEAS CORPUS RATHER THAN
IN THE NORMAL COURSE OF APPEAL.

Oral argument on the specified issue and the substance of petitioner's request for extraordinary relief was conducted on 16 October 1998. For the reasons set forth below this court denied petitioner's writ, by separate order, dated 28 October 1998 (Appendix) with leave to raise the issue in the normal course of appeal.

THE WRIT

At the outset, we were called upon to determine whether petitioner was so clearly entitled to relief that he should not be required to await the review of his case upon appeal. As our superior court has noted, "not every case is suitable for consideration upon a petition for extraordinary relief." *See Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983). Indeed, in a writ proceeding, the Court declined to

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review an in personam jurisdiction ruling by a trial court. *Keys v. Cole*, 31 M.J. 228, 230 (C.M.A. 1990).

Petitioner has denominated his petition as a request for a writ in the nature of habeas corpus. The military judge is not the proper respondent in such an action. In a habeas corpus proceeding, the writ is to be directed to the person having actual physical custody of the detainee-petitioner. See *Yi v. Mangens*, 24 F.3d 500 (3d Cir. 1994)(citing *Ex Parte Endo*, 323 U.S. 283 (1944)); *Billiteri v. U.S. Board of Parole*, 541 F.2d 938 (2d Cir. 1976)(citing 28 U.S.C. § 2243); see generally *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973)(citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)); *Chatman-Bey v. Thornburgh*, 864 F.2d 804 (D.C. Cir. 1988)(en banc)(citing *Strait v. Laird*, 406 U.S. 341 (1972)). “The Great Writ is never directed to the Court which has made the alleged offending order.” *Superior Court of the State of California in and for the County of Los Angeles v. United States District Court, Northern District of California*, 256 F.2d 844, 847 (9th Cir. 1958).

Similarly, petitioner’s second respondent, the United States Army, is not a proper party to this action. Cf. *DeMaris v. United States*, 187 F.Supp. 273 (S.D.Ind. 1960). While dismissal of the writ would be appropriate under these circumstances, the government has lodged no objection to a habeas corpus action against the named respondents. See *Chatman-Bey*, 864 F.2d 804.

Petitioner’s request that this court order dismissal of all charges and specifications is, in essence, a petition for a writ of mandamus directed to the trial judge and/or convening authority. This writ has traditionally been used in the courts only “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.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 31 (1943) (citing *Ex parte Peru*, 318 U.S. 578 (1943)). Ordinarily, only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy. See *Murray*, 16 M.J. at 76 (citing *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972)).

Nonetheless, in order to ensure that the issue underlying this writ was properly addressed, regardless of the approach employed by petitioner, we entertained this petition on its merits, as a request for both a writ of habeas corpus and a writ of mandamus.

Invocation of this court’s extraordinary writ powers should not be made a substitute for the ordinary appellate process. See *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 41 (1985)(citing *United States Alkali Export Ass’n v. United States*, 325 U.S. 196 (1945)); *Will v. United*

States, 389 U.S. 90 (1967)(citing *Fong Foo v. United States*, 369 U.S. 141 (1962)); *United States Alkali*, 325 U.S. 196 (citing *Roche*, 319 U.S. at 31). Extraordinary writs are reserved for extraordinary circumstances. *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)(citing *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980)); *Coyle v. Commander, 21st Theater Army Area Command*, 47 M.J. 626, 629 (Army Ct. Crim. App. 1997)(citations omitted). While the relief obtainable in an extraordinary proceeding may lead to the same result as on appeal, the bases and standards for initiation under each proceeding are different, as are the standards governing the award of relief. *See Dettinger*, 7 M.J. at 218.¹

ANALYSIS

The jurisdictional question raised in this writ has been carefully considered by a military judge to ensure that petitioner has not been improperly subjected to a court-martial. Thus, this is not a case where a soldier, who may be a civilian, is languishing in pretrial confinement without judicial review of his claim of lack of jurisdiction. While we need not wait until the court-martial process is complete to intervene and grant relief, we should do so only in those cases where a petitioner has demonstrated a clear entitlement to the relief sought. *See Gale v. United States*, 37 C.M.R. 304, 306 (1967).

Petitioner has failed to demonstrate that the military judge's factual findings were clearly erroneous,² her legal conclusions (which we have reviewed de novo) are wrong,³ or that any other exceptional circumstances are present on the facts of this case justifying relief. He has adequate means, such as direct appeal, to attain the relief requested.

Court-martial jurisdiction generally is lost when a soldier receives **proper** notice that his military status has terminated. *See* 10 U.S.C. §§ 1168, 1169; UCMJ art. 2(a)(1); *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955); *United States*

¹ Action by the convening authority or other appellate authority may result in the relief sought by petitioner. We do not express our opinion whether such relief would be appropriate under normal appellate review standards. *See Woodrick v. Divich*, 24 M.J. 147 (C.M.A. 1987).

² STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 13.11, at 13-66 (2d ed. 1992)(citing *Doganier v. United States*, 914 F.2d 165 (9th Cir. 1990)).

³ *Id.* § 2.13, at 2-92, § 2.14, at 2-101 (citing *In re Mclinn*, 739 F.2d 1395, 1398 (9th Cir. 1984)(en banc)).

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v. Batchelder, 41 M.J. 337 (1994); *United States v. Garvin*, 26 M.J. 194, 195-96 (C.M.A. 1988)(citing *United States v. Griffin*, 13 U.S.C.M.A. 213, 215-16, 32 C.M.R. 213, 215-16 (1962)); *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985); *United States v. Scott*, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (1960); THE JUDGE ADVOCATE GENERAL, ANNOTATION, *DISCHARGE*, DIGEST OF OPINIONS ¶¶ VIII A-XXB, at 443-61 (1912)(citations omitted); see also FRANCIS. A. GILLIGAN AND FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-22.10(b)(1), at 53 (1991)(citing *Howard*, 20 M.J. 353).

Both statute⁴ and case law give us the components of this required notice: “(1) ‘delivery of a valid discharge certificate’; (2) ‘a final accounting of pay’; and (3) undergoing ‘the “clearing” process required under appropriate service regulations to separate’ a servicemember ‘from military service.’” *United States v. King*, 42 M.J. 79, 80 (1995)(quoting *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)).

On the record before us, Petitioner Melanson has, at best, demonstrated “receipt” of a final accounting of pay. See *Smith v. Vanderbush*, 47 M.J. 56, 57 (1997). He has not shown that the military judge was clearly erroneous in finding that his valid discharge certificate, whether that be a DD Form 214 or DA Form 257A, had not been “delivered.” See *Howard*, 20 M.J. at 354 (citing *Scott*, 29 C.M.R. 462). In conducting our de novo review we concluded on the facts before us that full rights associated with delivery were not transferred prior to his departure from Germany.

⁴ 10 U.S.C. § 1168. Discharge or release from active duty: limitations

(a) A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.

10 U.S.C. § 1169. Regular enlisted members: limitations on discharge

No regular enlisted member of an armed force may be discharged before his term of service expires, except—

- (1) as prescribed by the Secretary concerned;
- (2) by sentence of a general or special court-martial; or
- (3) as otherwise provided by law

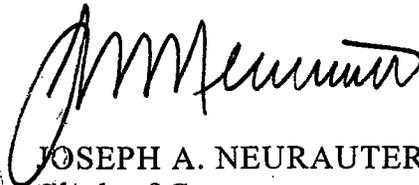
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Additionally, we have reservations, notwithstanding the military judge's findings, that this petitioner completed the "clearing process" under appropriate service regulations.⁵ As an example, we find nothing in the petitioner's submission to explain the relationship of petitioner's "clearing" his unit and the United States government's obligations under the North Atlantic Treaty Organization's Status of Forces Agreement to remove service members from Germany who are no longer accompanying the force. Such matters can be raised again in the normal course of appellate review after completion and authentication of a record of trial that encompasses all proceedings and testimony, to include any post-trial sessions necessary to resolve the issue.

For the reasons stated in this opinion, this writ has been denied.

Senior Judge JOHNSTON and Judge ECKER concur.

FOR THE COURT:



JOSEPH A. NEURAUTER
Clerk of Court

⁵ Our high Court's rejection of a government suggestion to let the service secretaries define the moment of discharge certainly was not intended to strip the Secretary of the Army of his statutory responsibility to promulgate regulations that promote the orderly transition of soldiers back to civilian status. *See Howard*, 20 M.J. at 354; *see generally Scott*, 29 C.M.R. at 465 (Latimer, J. dissenting).

APPENDIX

**CORRECTED COPY
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Appellate Military Judges

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ORDER

On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus, the petition is DENIED, without prejudice to petitioner's right to assert the same error during the course of regular appellate review. An opinion will follow.

DATE: 28 October 1998

FOR THE COURT:



JOSEPH A. NEURAUTER
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CRZ
JALS-CCZ
JALS-CC
Petitioner

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