IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

MICHAEL G. NEW,	)	
Petitioner-Appellant,	)	PETITION FOR RECONSIDERATION
v.	)	
UNITED STATES,	)	Crim. App. Dkt. No. Misc. 20120479
Respondent-Appellee.	)	USCA Misc. Dkt. No. 12-8025/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to Rule 31 of Rules of Practice and Procedure of this Court, the Court is respectfully requested to reconsider its order denying Petitioner-Appellant's writ-appeal petition in this case for the following reasons:

STATEMENT OF FACTS

On 16 May 2012, Petitioner Michael G. New ("Mr. New") filed in the Army Court of Criminal Appeals ("ACCA") his Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis challenging the legality of his court-martial conviction for disobedience of a lawful order. Attached to his 35-page petition, in support thereof, were a 48-page brief and two appendices of several hundred pages of transcript excerpts and appellate exhibits from Mr. New's court-martial, as well as an appendix containing two previously classified documents obtained by Mr. New, after diligent efforts, several years after imposition of his court-martial conviction and bad conduct

discharge on a charge of disobeying a lawful order.

On 30 May 2012, without requiring Respondent, the United States, to show cause or otherwise answer, ACCA issued without any opinion a one-sentence order: "On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Coram Nobis, the petition is DENIED."

On 22 June 2012, Mr. New timely filed in this Court his Writ-Appeal Petition for Review of the 30 May 2012 ACCA decision. Mr. New attached to his 31-page writ-appeal petition copies of the original petition, brief and appendices that he previously filed with ACCA.

On 2 July 2012, the United States filed its 16-page Answer in which it contended that Mr. New's writ-appeal petition should be dismissed on the sole ground that Mr. New's claim that the President's deployment order violated a federal statute was a nonjusticiable "political question," unreviewable by any military court and, therefore, withholding of exculpatory evidence constituted "harmless error."

On 16 July 2012, Mr. New filed a 16-page Reply primarily rebutting the Government's misuse of the political question doctrine to cover prosecutorial misconduct at Mr. New's court-martial.

On 10 September 2012 , this Court denied Mr. New's writ-appeal petition and, like the ACCA, issued without any opinion

its own one-sentence order: "On consideration of the writ-appeal petition, it is, by the Court ... ORDERED: That said writ-appeal petition is hereby denied."

By this petition, Mr. New seeks this Court's reconsideration of his writ-appeal petition on the ground that both the ACCA and CAAF orders violate: (i) the two-tiered legal standard governing the exercise of discretion respecting Mr. New's petition for a writ of error coram nobis established by this Court in Denedo v. United States, 66 M.J. 114, 124-27 (C.A.A.F. 2008) (hereinafter Denedo I), and (ii) the Fifth Amendment Due Process guarantee of "full and fair consideration," as established in Burns v. Wilson, 346 U.S. 137 (1953). *See* Denedo I, 66 M.J. at 122.

ARGUMENT

THE PERFUNCTORY ORDERS ISSUED BY ACCA AND CAAF WITHOUT OPINION DENYING MR. NEW'S ORIGINAL PETITION AND HIS WRIT-APPEAL PETITION CONTRAVENE BOTH THIS COURT'S DECISION IN DENEDO V. UNITED STATES AND THE FIFTH AMENDMENT DUE PROCESS GUARANTEE OF FULL AND FAIR CONSIDERATION.

A. Perfunctory Orders Do Not Comply with Denedo I.

1. The Orders Are Impermissibly Perfunctory.

Both the ACCA order denying Mr. New's original petition and this Court's order denying Mr. New's writ-appeal petition, both issued without opinion, are perfunctory. It is impossible to tell from either order the ground upon which either court relied to deny Mr. New relief. *See* Al Sayar v. Mukasey, 305 Fed. Appx. 719, 2009 U.S. App. LEXIS 67 (2d Cir. 2009). Had Mr. New made a

perfunctory argument, he may have invited such "perfunctory rul[ings]." *See* United States v. Morales, 994 F.2d 386, 389 (7th Cir. 1993). But he did not. Rather, in his petitions and briefs filed with ACCA and CAAF, Mr. New carefully and painstakingly set forth comprehensive allegations and well-reasoned arguments, supporting those allegations and arguments with relevant court-martial testimony and appellate exhibits and other relevant documents, addressed to all six threshold criteria, as required by this Court to support a coram nobis petition. *See* Denedo I, 66 M.J. at 126-27. Mr. New specifically identified his legal claim for relief and marshaled facts and law in support of the propriety of his requested relief, again following Denedo I. *See id.*, 66 M.J. at 127-30. But he did not receive a Danedo I response from either ACCA or this Court. Rather, both ACCA and CAAF issued perfunctory orders summarily denying Mr. New's petition, without even a "passing reference to any legal standard [and] no reference at all to ... the merits" of Mr. New's claims either in his original or writ-appeal petition, or, in the writ-appeal petition, to the Government's "claims in rebuttal." *See* Nero Trading, LLC v. U.S. Department of Treasury, 570 F.3d 1244, 1250 (11th Cir. 2009).

To be sure, the rules of practice and procedure of both ACCA and CAAF describe the writ of coram nobis as an "extraordinary" one, issued not as a matter of right, but of discretion. *See*

Rule 4(b), CAAF Rules of Practice and Procedure. Indeed, Rule 20.1 of the ACCA Internal Rules of Practice and Procedure states further that the issuance of "an extraordinary writ ... is ... a matter of discretion sparingly exercised." Although infrequently exercised — only in "exceptional circumstances" — this Court and ACCA are called upon to exercise great care to review a well-presented coram nobis petition for it seeks relief from an unlawful court-martial conviction that allegedly "cannot be obtained in any other form or from any other court." *See* ACCA Rule 20.1. Indeed, as this Court stated in Denedo I, the Article 76, UCMJ rule of "finality of direct review **enhances** rather than diminishes consideration of a request for collateral relief." Denedo I, 66 M.J. at 121 (emphasis added). To that end, the Denedo I Court laid down specific "standards applicable to review final judgments" in collateral relief proceedings within the military justice system. *Id.* Those standards do not permit the issuance of perfunctory orders which hide the courts' analyses, if any, in a coram nobis proceeding, such as that filed by Mr. New.

2. Denedo I Requires Transparent Compliance with Its Threshold Criteria.

Denedo I established that "a writ of error coram nobis should be brought before the court that rendered the judgment." *Id.*, 66 M.J. at 124. With respect to courts-martial, the Denedo I Court designated "the Court of Criminal Appeals, the first-

level standing courts in the military justice system [as] an appropriate forum for consideration of coram nobis petitions regarding courts-martial." *Id.* "They are," Denedo I ruled, "well-positioned to determine whether corrective action on the findings and sentence is warranted, including ordering any factfinding proceedings that may be necessary." *Id.* Thus, Rule 4(b)(1) of the Rules of this Court posits that, "[a]bsent good cause," petitions for extraordinary relief in the form of a writ of error coram nobis "shall be filed ... in the appropriate Court of Criminal Appeals." Mr. New complied fully with this rule.

Denedo I also fixed the legal rule by which a petition for a writ of error coram nobis is to be measured. After acknowledging that it had not previously laid down any such standard, this Court adopted the two-tier formula governing civilian coram nobis petitions filed in Article III courts, as laid down by the Supreme Court in United States v. Morgan, 346 U.S. 502, 511 (1954): "In the first tier, the petition must satisfy the [six] threshold requirements for a writ of coram nobis [and], [i]f the petitioner does so, then the court analyzes, in the second tier," the petitioner's claim of error. Denedo I, 66 M.J. at 126.

While the petitioner's claim of error in Denedo I concerned "ineffective assistance of counsel," the two-tier test prescribed and applied by this Court in Denedo I was not limited to such claims. Rather, the two-tier standard was designed to "implement

th[e] admonition" that "relief is limited to circumstances in which the requested writ is 'necessary or appropriate' within the meaning of the All Writs Act." *Id.* This Court found support for such a fixed standard in a previous case setting a legal standard to govern habeas corpus collateral attacks in the military justice system. In Loving v. United States, 64 M.J 132 (CAAF 2006), this Court concluded that a fixed standard was "necessary and appropriate" for habeas collateral attacks within the military justice system (*id.*, 64 M.J. at 145), especially in light of the absence of "a consistent standard for collateral review of courts-martial" in Article III courts. *Id.*, 64 M.J. at 144.

Ironically, in Denedo I, this Court was persuaded to adopt such a fixed standard based on the United States Court of Appeals for the District of Columbia's previous consideration of Mr. New's own habeas collateral attack on his court-martial, as reported in United States *ex rel.* New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006), which "described the case law as so 'tangled' and marked by 'uncertainty' that it left the court with 'serious doubt whether the judicial mind is really capable of applying that sort of fine gradations in deference that the varying formulae may indicate.'" Loving, 64 M.J. at 144. In response, the Loving Court laid down a rule designed to make more consistent the court's exercise of discretion in habeas corpus

cases. *Id.*, 64 M.J. at 144-53. In short, the Denedo I two-tiered rule was not fashioned by this Court for Denedo only, or for ineffectiveness of counsel claimants alone, but for all future extraordinary petitions in the form of a writ of error coram nobis, including Mr. New's.

This Court adopted Denedo's "two-tiered evaluation" system, then, to avoid uncertainty, and to ensure greater consistency, fixing a detailed legal standard by which to measure the exercise of discretion by the military Courts of Criminal Appeals deciding coram nobis collateral attacks. Additionally, by imposing such a fixed and detailed standard, CAAF believed it would be better situated to "exercise ... its supervisory powers over the administration of the UCMJ" (Rule 5, CAAF Rules of Practice and Procedure), including the exercise of discretion in extraordinary matters such as coram nobis, just as it regularly reviews decisions involving the acceptance of guilty pleas or the imposition of sentences for "abuse of discretion" which is without an adequate factual basis or based on an erroneous view of the law. *See, e.g.*, United States v. Weeks, 71 M.J. 44 (CAAF 2012) (guilty plea); United States v. Beaty, 70 M.J. 39 (CAAF 2011) (sentence). *See also* http://www.armfor.iscourts.gov/newcaaf/digest/IIC5.htm.

When ACCA acted perfunctorily in denying Mr. New's coram nobis petition, in violation of this Court's directive in Denedo

I, this Court was left to speculate whether ACCA properly exercised its discretion based upon an adequate basis in fact or on a correct view of the law, or whether it acted arbitrarily and capriciously, shielding the Army prosecutor from the consequences of misrepresentations about a document containing exculpatory evidence supporting Mr. New's claim that the order that he disobeyed was based upon a deployment order that violated a federal statute.[1] CAAF's equally perfunctory order denying Mr. New's petition compounds the error below and leaves open to speculation why Mr. New's petition was denied, and provides absolutely no guidance to courts in future coram nobis matters, particularly since the Government filed an Answer joining issue related to both Denedo I tiers. Indeed, in response to Mr. New's second-tier argument that the order was unlawful because it was issued in violation of the United Nations Participation Act, the Government countered, urging this Court to disregard the Act's provisions as unreviewable under the political question doctrine. If there is a lesson to be gleaned from CAAF's September 10, 2012 order, this Court's refusal to explain its decision may very well be perceived by members of the American armed forces that orders from the Commander-in-Chief are

[1] Recent press accounts of prosecutorial misconduct securing convictions by withholding evidence favorable to the defense give credence to this interpretation. *See* http://www.mainjustice.com/tag/brady-violations/.

irrebuttably lawful.

Both perfunctory orders, then, leave one in the dark as to whether the denial was based upon Mr. New's failure to meet one or more of the six threshold criteria, or upon his failure to prevail on the merits of his claim that he had been unconstitutionally and illegally denied access to exculpatory evidence. That uncertainty alone is sufficient to justify reversing and remanding Mr. New's petition to ACCA for review and action consistent with the two-tier Denedo standard. *See* Al Sayar, 2009 U.S. App. LEXIS 67 at **6-**7.

Furthermore, the Denedo I two-tier rule was specifically established to avoid the uncertainties that would otherwise prevail in the exercise of judicial discretion in coram nobis collateral attacks. By its perfunctory order denying Mr. New's writ-appeal petition, this Court has affirmed ACCA's equally perfunctory denial of Mr. New's original petition, indicating that the Denedo I rule can be discarded without explanation, and that military courts of criminal appeals may summarily dispose of coram nobis petitions on factors other than those spelled out in Denedo I without explanation, transparency, justification, or accountability. CAAF's refusal to exercise its supervisory role in full view ensures that neither the litigants nor the American people will know how or why either court decided that Mr. New did not meet the legal standards governing coram nobis review.

B. The Perfunctory Orders Deny Mr. New Due Process of Law.

Previously, this Court has faulted perfunctory judicial treatment of important court-martial matters. In United States v. Rosser, 6 M.J. 267 (C.M.A. 1979), this Court found that a military judge had abused his discretion to deny a defense motion for mistrial on the grounds that (i) he "applied incorrect legal standards in reaching his decision [and] (ii) his inquiry into the particular facts and circumstances of this case was so **perfunctory** as to provide an inadequate factual basis for his decision." *Id.*, 6 M.J. at 273 (emphasis added). As a predicate for its decision, this Court said:

> It is clear that the mantle of judicial **discretion** will not protect a decision based on the judge's arbitrary opinions as to what constitutes a fair court-martial. Likewise, the military judge must engage in a **sufficient inquiry** as a matter of law to uncover sufficient facts to decide the issue before him. Since [a motion for mistrial] may raise issues of crucial importance to the **integrity** of the military justice system, the military judge may **not** be satisfied with mere **perfunctory** conclusions in determining whether a military accused is receiving a fair trial. In addition, the application of law to the facts, by the military judge must be **reasonable in some objective** sense to be upheld by this Court. Finally, a mistrial is a drastic remedy, but equally important in our mind is the **affirmative responsibility** of the military judge to insure the military accused a **fair** trial decided by **impartial** triers of fact and free from command influence." [*Id.*, 6 M.J. at 271 (emphasis added).]

What this Court so eloquently observed about the duty of a military judge in the exercise of his discretion to ensure a fair and impartial trial — including freedom from partiality created

by unlawful command influence — is certainly no less applicable to the duty of the ACCA and CAAF in the exercise of their discretion respecting a petition for a writ of error coram nobis. Indeed, the first issue of the first tier of Denedo I's two-tier standard is whether the alleged error is "of the most fundamental character,"[2] constituting a "fundamental flaw[] in the proceedings" impugning the "neutrality," and threatening the "integrity," of the "final judgment." *See* United States v. Denedo, 556 U.S. 504, 916, 917 (2009) (Denedo II). In such cases, it is "of central importance for military courts [to] take all appropriate means ... to ensure the neutrality and integrity of their judgments." *Id.*, 556 U.S. at 917. Indeed, the very purpose of a coram nobis writ is "to redress a fundamental error," such as the violation of the Sixth Amendment, "'to achieve justice.'" *Id.*, 556 U.S. at 911.

Mr. New's underlying constitutional and legal claim of having been denied by the proscutor access to exculpatory evidence at his court-martial is certainly no less important than the ineffectiveness of counsel claim in Denedo I, and arguably of greater moment in the administration of the UCMJ. In his original coram nobis petition, and again in his writ-appeal filed in this Court, Mr. New presented court-martial record evidence, *inter alia*, that the prosecutor misrepresented to the military

[2] *Id.*, 66 M.J. at 126.

judge that a particular relevant, exculpatory, classified document was, in fact, the document that the military judge had ordered produced for examination by defense counsel, when, in fact, trial counsel must have known that the document was not the document that had been ordered to be produced. *See* Writ-Appeal Petition, pp. 14-20. This potential fraud upon the court-martial could not have been discovered by Mr. New at the time, and would have never been discovered in the absence of Mr. New's extraordinary diligence pursuing the declassification of documents by the Clinton Presidential Lbrary. Even the Government conceded in its Answer filed with this Court that "it is unclear on the face of the record whether trial counsel's reference to the document being "8-10 pages" was a statement made in full knowledge of its truth, or merely uninformed conjecture." Answer, p. 15, n. 67. As this Court observed in Rosser, "[n]o premium will be paid in the military justice system for lack of candor on the part of its members,"[3] especially that of trial counsel.

Yet in their refusal to demonstrate that they seriously addressed the misbehavior of trial counsel, both ACCA and CAAF have sent the message that such behavior would be ignored. This is not a small matter. Rather, as Peter A. Joy, Professor of Law and Director of the Criminal Justice Clinic, Washington

[3] Rosser, 6 M.J. at 273.

University School of Law, has reported, prosecutorial misconduct has led to many a wrongful conviction, and there is need for more "transparency," and more "accountability," not less. P. Joy, "The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 *Wisc. L. Rev.* 399 and 340.

The need for transparency and accountability in the disposition of Mr. New's petition is compounded by the nature of the charge against him — disobedience of a presumably lawful order — and the source from which that order came: the office of the President. Further, the exculpatory documents withheld from the military judge and defense counsel had been classified by the White House. If there is a special class of coram nobis petitions above all in which the military courts have a duty to demonstrate openly the integrity of a final court-martial judgment, it is in a court-martial where the legality of a military order has been called into question. This is especially so where the order emanates from the Commander-in-Chief, whose inherent command influence looms over every such court-martial requiring every effort be made to uphold the judicial principle of impartiality.

In Weiss v. United States, 510 U.S. 163, 178 (1994), the Supreme Court stated that "[i]t is elementary that a fair trial in a fair tribunal is a basic requirement of due process and that

[a] necessary component of a fair trial is an impartial judge." Neither ACCA nor this Court demonstrated that they gave "full and fair consideration" of Mr. New's claim that he met the first tier of the six-tier Denedo I test, as contemplated by the Denedo I decision. *See id.*, 66 M.J. at 122. Rather, by their issuance of two one-sentence perfunctory orders, both courts could be viewed as having "manifestly refused to consider [his] claims." *See* Burns v. Wilson, 346 U.S. at 142-43.

CONCLUSION

For the reasons stated, this Court should reconsider its perfunctory order of September 10, 2012, vacate that order, and take such steps as are appropriate and necessary to apply transparently the Denedo I two-tier standard to Mr. New's petition, demonstrating that the Denedo I rule applies not just to those cases which pose no threat to the established military order.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on September 20, 2012, and that a copy of the foregoing was transmitted electronically via Amber.j.roach3.mil@mail.mil, to Government Appellate Division, Acting Chief Lt. Col. Amber J. Roach on September 20, 2012.

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