

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

**Before  
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI  
Appellate Military Judges**

**JUSTIN H. MCMURRIN  
GAS TURBINE SYSTEMS TECHNICIAN (E-3), U.S. NAVY**

**v.**

**UNITED STATES OF AMERICA**

**NMCCA 200900475  
Review of Petition for Extraordinary Relief in the Nature of a  
Writ of Mandamus**

**Convening Authority:** Commander, Navy Region Midwest, Great Lakes, IL.

**For Petitioner:** CAPT P.C. LeBlanc, JAGC, USN; Capt M.D. Berry, USMC.

**For Respondent:** Maj Paul Ervasti, USMC.

**30 November 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:

A military judge, sitting alone as a general court-martial, convicted the petitioner, on mixed pleas, of conspiracy to possess cocaine, violation of an order, wrongful use of cocaine, obstruction of justice, and negligent homicide (violations, respectively, of Articles 81, 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 912a, and 934). The petitioner was sentenced to 66 months confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge from the United States Navy. The convening authority (CA) approved the adjudged sentence.

In September 2010, this court set aside the convictions of negligent homicide and violating a lawful order, affirmed the remaining findings of guilty, set aside the sentence and authorized a rehearing on sentence. The Judge Advocate General certified the case to the Court of Appeals for the Armed Forces, which affirmed our decision and then denied the Government's petition for reconsideration. Captain (CAPT) Paul C. LeBlanc, JAGC, USN, and Captain (Capt) Michael D. Berry, USMC, represented the petitioner before both appellate courts and formed an attorney-client relationship with the petitioner. In May 2011, this case was remanded for disposition by the CA.

### **Recent Procedural History**

In June 2011, CAPT LeBlanc and Capt Berry requested that the CA fund their representation of the petitioner at his court-martial proceedings. The CA declined. In July 2011, charges of negligent homicide and failure to obey a lawful order were preferred and the CA directed an Article 32 investigation into those charges. The Article 32 investigation was held in August 2011. CAPT LeBlanc and Capt Berry were not present. The newly preferred and investigated charges were then referred to a general court-martial. The charges which were affirmed by this court and returned to the convening authority with a rehearing on sentence authorized are not before the current court-martial. In September 2011, during pretrial motions, the military judge denied a defense motion to recognize CAPT LeBlanc and Capt Berry as detailed trial defense counsel. The record does not reflect that the petitioner has submitted a request that CAPT LeBlanc and/or Capt Berry be assigned to represent him as individual military counsel. See Rule for Courts-Martial 506, Manual for Courts-Martial, United States (2008 ed.). The case is currently stayed pending resolution of the petition for extraordinary relief.

On 26 September 2011, the petitioner applied to this court for extraordinary relief in the nature of a writ of *mandamus*. The petitioner asks this court to order : (1) the military judge to recognize the petitioner's appellate defense counsel, CAPT LeBlanc and Capt Berry as trial defense counsel at the petitioner's court-martial, and (2) the CA to provide funding for CAPT LeBlanc and Capt Berry to appear at the petitioner's trial. The petitioner argues that the military judge's refusal to recognize his appellate defense counsel and the CA's refusal to fund their travel are tantamount to violations of the petitioner's Sixth Amendment right to counsel. The petitioner also argues that the military judge's decision contravenes this court's holding in *United States v. Morgan*, 62 M.J. 631 (N.M.Ct.Crim.App. 2006).

On 29 September 2011, this court responded to the petitioner's request for a writ by ordering the pending court-martial proceedings stayed until further order from this court. This court also ordered that the respondent produce an authenticated copy of the court-martial proceedings and a detailed chronology of the significant events leading to the court-martial proceedings. Finally, this court ordered that the respondent show cause as to why the petitioner's request for a writ should not be granted. On 21 October 2011, the respondent answered this court's order and the petitioner filed a reply on 28 October 2011.

After carefully considering the petition and the parties' arguments, we conclude that the petitioner has failed to demonstrate that an extraordinary writ is appropriate. We deny his petition.

### Discussion

The Supreme Court held in *Noyd v. Bond*, 395 U.S. 683 (1969), that this court has the authority to issue emergency writs pursuant to the All Writs Act, 28 U.S.C. 1651. The writ at issue in this case is a writ of *mandamus*; that is, an order issued by a superior court compelling an inferior court to "perform mandatory or purely ministerial duties correctly." *Ponder v. Stone*, 54 M.J. 613, 616 (N.M.Ct.Crim.App. 2000) (citation and internal quotation marks omitted). The purpose of a writ of *mandamus* is 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." *Dew v. United States*, 48 M.J. 639, 648 (Army Ct.Crim.App. 1998) (citation and internal quotation marks omitted). It is a "drastic remedy that should be used only in truly extraordinary situations." *Ponder*, 54 M.J. at 616 (citation and internal quotation marks omitted). We do not favor its use because it is a disruption of the normal appellate process. See *McKinney v. Jarvis*, 46 M.J. 870, 873-874 (Army Ct.Crim.App. 1997) (citation and internal quotation marks omitted). Intervening to reverse a military judge's exercise of discretion is proper only when it is apparent that the judge's decision amounts to a "judicial usurpation of power." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (citation and internal quotation marks omitted). Gross negligence alone is not enough. *Id.* The petitioner must demonstrate that usurpation occurred and that he has a "clear and indisputable right" to the requested relief. *Ponder*, 54 M.J. at 616 (citations and internal quotation marks omitted). If alternative remedies exist, including those within the normal course of appellate review, a writ is inappropriate. See *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999).

The petitioner makes the following arguments in support of his request for a writ of *mandamus*: CAPT LeBlanc and Capt Berry were properly assigned to represent him during his appellate proceedings and their representation continues as it was never severed by counsel or the petitioner; the military judge erred by not recognizing CAPT LeBlanc and Capt Berry as part of the petitioner's growing defense team; the CA's refusal to provide funding for CAPT LeBlanc and Capt Berry constitutes unfair "cherry picking" of more inexperienced defense counsel; the petitioner has exhausted all available remedies by seeking (and being denied) funding and recognition of CAPT LeBlanc and Capt Berry; the ordinary course of appellate review is inadequate because the petitioner would be subjected to the entire trial process without the benefit of his full defense team.

We are not persuaded that this set of circumstances merits an extraordinary writ. First, although CAPT LeBlanc and Capt Berry have an attorney-client relationship with the petitioner and are properly assigned to represent him before this court and the Court of Appeals for the Armed Forces, there is no evidence presented in support of this writ that they were ever detailed to represent him before a trial court. The petitioner relies principally on *Morgan* for the proposition that appellate defense counsel join trial defense counsel as part of an appellant's "growing defense team." 62 M.J. at 635. The petitioner argues that the military judge's erroneous consideration of *Morgan's* applicability to this case is an abuse of discretion. However, an abuse of discretion is not a "usurpation of power." The petitioner continues to retain his original detailed trial defense counsel and does not demonstrate that representation by only these two attorneys, without the assistance of CAPT LeBlanc and Capt Berry, would deprive him of a "clear and indisputable right." Second, we note that the petitioner has not exhausted his remedies short of extraordinary relief. In particular, he has not requested the assignment of CAPT LeBlanc and/or Capt Berry as individual military counsel. Lastly, we are not convinced that the normal course of appellate review would be insufficient to resolve this case. If the petitioner is convicted at this trial, he will have the benefit of subsequent review and will have the opportunity then to argue why he believes that the principles of *United States v. Morgan* were violated, or why the absence of CAPT LeBlanc and Capt Berry resulted in undue prejudice to his court-martial.

In sum, we conclude that the petitioner has not carried the heavy burden required by the extraordinary writ of *mandamus*. We

deny his petition and hereby lift the stay of the court-martial proceedings issued on 29 September 2011.

For the Court

R.H. TROIDL  
Clerk of Court