OCTOBER TERM 2017

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD GRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari or Mandamus to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

-- CAPITAL CASE --

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Dated: February 9, 2018

QUESTIONS PRESENTED

CAPITAL CASE

Petitioner has substantial, unexhausted constitutional challenges to his death sentence. Congress assigned to the Court of Appeals for the Armed Forces (CAAF) mandatory appellate jurisdiction in capital cases, 10 U.S.C. § 867(a)(1), and the authority to issue extraordinary relief, including coram nobis, in furtherance thereof. *United States v. Denedo*, 556 U.S. 904, 917 (2009). Accordingly, the Article III district court, consistent with traditional practice, has repeatedly declined to conduct habeas review of Petitioner's claims until the Article I military courts address them. CAAF nevertheless refused to conduct mandatory review and held that it lacked jurisdiction to consider a petition for coram nobis in a case that is final under the Uniform Code of Military Justice. *Gray v. United States*, 77 M.J. 5, 6 (CAAF 2017).

The Questions Presented are:

1. Which court system, Article I military or Article III civil, appropriately exercises jurisdiction in final military cases to conduct initial review of constitutional claims that arise after or in conjunction with direct appeal?

2. Does 28 U.S.C. § 1259(1) confer certiorari jurisdiction over a decision of the Court of Appeals for the Armed Forces dismissing a coram nobis petition in a military death penalty case?

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INTRODUCTION

Petitioner Ronald Gray is the first and only military prisoner since 1961 to be under a "final" sentence of death. For nearly a decade since his death sentence became final in 2008, Petitioner has sought review of unexhausted claims of constitutional error in his military proceedings—including claims of ineffective assistance of appellate counsel, claims alleging constitutional violations in the Presidential approval process, and claims based on new evidence. The Article I military courts and the Article III civil courts have repeatedly declined to review the claims in the vain hope that the *other* court system would do so. In the latest salvo in this dispute, the United States Court of Appeals for the Armed Forces (CAAF) refused to exercise mandatory appellate review over this case pursuant to 10 U.S.C. § 867(a)(1), and then held, in direct conflict with *United States v. Denedo*, 556 U.S. 904 (2009), that it lacks jurisdiction to issue coram nobis relief in cases that are final under the Uniform Code of Military Justice (UCMJ). CAAF also indicated that it will refuse military court review of post-finality claims by all military prisoners.

To resolve the conflict between the Article I military and Article III civil courts, to enable review of Petitioner's claims, and to avert in future cases the litigation ping pong that has defined this one, this Court should decide which court system properly conducts initial review of post-finality claims of constitutional error in military cases.

OPINIONS BELOW

The opinion of the CAAF (A-1) is reported at 77 M.J. 5 (2017). The opinion of the Army Court of Criminal Appeals (A-10) is reported at 76 M.J. 579 (2017).

JURISDICTION

CAAF entered final judgment on November 13, 2017. A-4. This Court has jurisdiction over this affirmed death penalty case under 10 U.S.C. § 867a(a) and 28 U.S.C. § 1259(1).

CAAF held that it lacked substantive jurisdiction over Petitioner's coram nobis petition. A-2. Petitioner addresses that jurisdictional holding in Part I of the Reasons section, *infra*.

CAAF refused to conduct mandatory review under 10 U.S.C. § 867(a)(1), as stated in its Docketing Notice of July 25, 2017. A-8. Petitioner addresses the jurisdictional implications of the court's refusal to conduct mandatory review in Part II of the Reasons section, *infra*.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this case and included in the Appendix: 10 U.S.C. §§ 866, 867, 867a; 28 U.S.C. §§ 1259, 1651. A-109.

STATEMENT OF THE CASE

On April 11, 1988, after general court-martial in Fort Bragg, North Carolina, Petitioner Ronald Gray was convicted of two counts of murder, one count of attempted murder, three counts of rape, two counts of robbery, and two counts of forcible sodomy. A-1. On April 12, 1988, Petitioner was sentenced to death, dishonorable discharge, forfeitures of pay, and reduction to Private E-1. A-1.[1]

On direct appeal, the Army Court of Military Review, the predecessor court to the Army Court of Criminal Appeals (ACCA), affirmed. *United States v. Gray*, 37 M.J. 751 (A.C.M.R. 1993). CAAF affirmed on May 28, 1999. *United States v. Gray*, 51 M.J. 1 (CAAF 1999). On March 19, 2001, this Court denied certiorari. *Gray v. United States*, 532 U.S. 919 (2001). On July 28, 2008, President Bush approved the death sentence. A-2; *see* 10 U.S.C. § 871(a).

[1] Petitioner earlier pled guilty and received life imprisonment sentences in North Carolina state court for two additional murders.

The United States District Court for the District of Kansas stayed Petitioner's execution and appointed federal habeas counsel on November 26, 2008. *Gray v. Belcher*, No. 5:08-cv-3289 (D. Kan. Nov. 26, 2008), ECF No. 7. Petitioner filed a habeas corpus petition on April 1, 2009, asserting the claims that were litigated in the military direct appeal (the "direct appeal claims"). *Id*., ECF No. 17. On December 18, 2009, Petitioner moved to amend the habeas petition with new claims alleging errors that arose after or in conjunction with the military direct appeal (the "coram nobis claims").[2] *Id*., ECF Nos. 42-43. On September 30, 2010, the district court granted Petitioner's motion to amend, and on November 1, 2010, the government submitted its response to the amended petition. *Id*., ECF Nos. 47-48. The response asserted the affirmative defense of non-exhaustion to the new claims. *Id*., ECF No. 48.

As to those claims, on February 11, 2011, Petitioner filed a coram nobis petition in ACCA. ACCA denied the petition on January 26, 2012, "because there is, as a matter of law, a remedy other than coram nobis available," i.e., federal habeas review. A-106. The court concluded that "[t]he merits of petitioner's claims are now for the federal district court, rather than this court, to decide." *Id.*

[2] As set forth in the instant coram nobis proceedings, the new claims of constitutional error allege: (1) ineffective assistance of appellate counsel for failing to adequately investigate and litigate Petitioner's mental incompetency at trial and on appeal; (2) ineffective assistance of appellate counsel and trial counsel for failing to adequately investigate and present available evidence of Petitioner's traumatic upbringing and lifelong history of mental illness; (3) violations of the Due Process Clause and the Sixth and Eighth Amendments where the President, acting in a judicial role, approved Petitioner's death sentence in reliance upon confidential reports that were not disclosed to Petitioner and to which Petitioner had no opportunity to respond; and (4) systemic violations of the Fifth, Sixth, and Eighth Amendments in the military death sentencing system based on, inter alia, new evidence of racial discrimination in the military justice system. *See* A-262-310. The record below includes Petitioner's extensive factual proffer of sworn declarations, expert reports, documentary evidence, and other materials in support of the claims.

The Judge Advocate General failed to initiate mandatory review under Rule 18(a)(3) of CAAF's Rules of Practice and Procedure ("CAAF Rules"), which directs that "[c]ases under Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1), will be forwarded by a Judge Advocate General by the filing of the record with the Court, together with the form prescribed by Rule 23(a)." On February 15, 2012, Petitioner filed a writ-appeal petition in CAAF. On April 17, 2012, CAAF ordered: "[t]hat said writ-appeal petition is hereby denied without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rules on the pending habeas petition." A-103.

On September 29, 2015, the federal district court denied the direct appeal claims, but dismissed the coram nobis claims without prejudice. A-102. As to the latter claims, the court recognized that, pursuant to this Court's decision in *United States v. Denedo*, 556 U.S. 904 (2009), the military courts could review a coram nobis petition, and further explained that "CAAF, the highest military appellate court, left open the door for Petitioner to present these claims to the military courts again upon learning what *this* court would do by denying the [first] petition for coram nobis *without* prejudice." A-99-100. Regarding ACCA's prior ruling that federal habeas review precluded military coram nobis review, the district court found that, "[w]ith the dismissal of the present case, that procedural defect is removed and the ACCA may address the merits of Petitioner's coram nobis claims." A-100. The court explained that it was "obliged to pursue the strong preference expressed in *Burns* [*v. Wilson*, 346 U.S. 137 (1953),] that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments." A-100.

Petitioner appealed the denial of the direct appeal claims to the Tenth Circuit and filed a second coram nobis petition in ACCA. The Tenth Circuit summarily reversed due to the district

court's improper "hybrid" disposition of the petition. A-45. After stating the familiar rule that "[a] prisoner challenging a court martial conviction through 28 U.S.C. § 2241 must exhaust *all available military remedies*," the appeals court remanded to the district court. A-43, 45 (emphasis added).

On May 10, 2016, ACCA dismissed the second coram nobis petition without prejudice. A-41. The Judge Advocate General again failed to initiate mandatory review under CAAF Rules 18(a)(3) and 23(a). Petitioner therefore filed in CAAF a notice of mandatory review under 10 U.S.C. § 867(a)(1), which CAAF construed as a discretionary writ-appeal petition. A-38. On June 8, 2016, CAAF again denied review "without prejudice to re-filing" after the district court ruled on the federal habeas petition. A-38-39.

On remand from the Tenth Circuit, the federal district court reiterated "the strong preference that the military courts first be given every reasonable opportunity to address" the coram nobis claims and dismissed the entire habeas petition without prejudice. A-36-37. The court anticipated that its dismissal would "allow petitioner to fully exhaust the unexhausted claims" in military court. A-37.

On December 9, 2016, Petitioner filed a third coram nobis petition in ACCA. The government filed its response on March 1, 2017. Petitioner filed a reply on March 27, 2017. On May 9, 2017, ACCA denied relief. A-10. ACCA denied reconsideration on June 20, 2017. A-108.

The Judge Advocate General failed to initiate mandatory review under CAAF Rules 18(a)(3) and 23(a). On July 7, 2017, as docketed on July 12, 2017, Petitioner filed in CAAF a Notice of Mandatory Review pursuant to 10 U.S.C. § 867(a)(1) (A-113), and an original coram nobis petition. A-165. By Order of July 25, 2017, CAAF construed the Notice of Mandatory

Review as a writ-appeal petition for discretionary review. A-8. By Order of September 6, 2017, CAAF denied permission to file the coram nobis petition and directed Petitioner to file a writ-appeal petition for discretionary review of ACCA's decision. A-6. While renewing his objections to the court's failure to conduct mandatory review, Petitioner filed the writ-appeal petition in CAAF on September 18, 2017. A-244, 249.

On November 13, 2017, CAAF dismissed the petition with prejudice, holding that it lacked "jurisdiction to entertain a request for coram nobis in a case that is final in all respects under the UCMJ." A-1-3. This petition follows.

REASONS FOR GRANTING THE PETITION

Contrary to 10 U.S.C. § 867(a)(1) and without explanation, the United States Court of Appeals for the Armed Forces (CAAF) refused to exercise mandatory jurisdiction in this death-penalty case and instead treated it as a discretionary, non-capital appeal.[3] A-8. While purporting to decline review, CAAF issued a published, reasoned decision that *sub silentio* overrules *United States v. Denedo*, 556 U.S. 904 (2009), by holding that CAAF lacks "jurisdiction to entertain a request for coram nobis in a case that is final in all respects under the UCMJ." A-2.

CAAF's decision is the latest in a nearly decade-long contest of hot potato between the Article I military courts and the Article III civil courts over which court system properly reviews Petitioner's post-finality claims of constitutional error—including claims of ineffective assistance of appellate counsel and claims based on new evidence. CAAF's sweeping holding will impact all final military cases by shifting initial litigation of such claims from their traditional forum in the military courts to the incongruous venue of the civil courts.

This Court should resolve the persistent conflict between the Article I military and Article III civil courts as to which court system properly reviews military prisoners' post-finality claims of constitutional error. At bottom, this dispute pits two competing interpretations of the "necessary or appropriate" standard of the All Writs Act, 28 U.S.C. § 1651, against each other. Relying on the principle of abstention and the strong preference for military courts to police their own errors, the civil courts deem habeas review not "necessary or appropriate" until the military courts have addressed military prisoners' post-finality claims. Conversely, the military courts invoke prudential limits to the writ of coram nobis to conclude that coram nobis review is not

[3] A similar issue is currently pending in this Court in *Dalmazzi v. United States*, No. 16-961, and *Cox v. United States*, No. 16-1017, concerning whether CAAF mischaracterized its review under 10 U.S.C. § 867, and if so, whether the mischaracterization removed those cases from the purview of this Court's certiorari jurisdiction under 28 U.S.C. § 1259.

"necessary or appropriate" in the military courts where habeas review is available in an Article III court (by virtue of the prisoner's incarceration).

This disagreement recurs, and complicates the litigation, in numerous non-capital military cases, which typically are not subject to this Court's review under 28 U.S.C. § 1259. Thus, although the first question presented arises frequently, this Court's opportunity to answer it does not. The Court should settle this conflict and decide whether the military courts properly exercise their Article I independence and fulfill the intended purpose of the Uniform Code of Military Justice ("UCMJ") by policing their own errors and considering post-finality constitutional claims raised by military prisoners.

I. The Military Courts Are the Appropriate Forum to Adjudicate Post-Finality Claims of Constitutional Error in Military Cases.

A. The Conflict between the Article I and Article III Courts

Since 2011, the Article I military courts and the Article III civil courts have repeatedly declined to review Petitioner's claims in the vain hope that the other court system would do so. The resulting litigation quagmire stems in large part from the two court systems' disagreement over the "necessary or appropriate" standard of the All Writs Act as applied to post-finality claims of constitutional error.

The District of Kansas twice dismissed Petitioner's coram nobis claims by reasoning that it was "obliged to pursue the strong preference . . . that the military courts first be given every reasonable opportunity to address the merits of a military prisoner's post-conviction arguments." A-100; *see also* A-36 (similar). In remanding the case, the Tenth Circuit echoed this fundamental principle. A-43 ("A prisoner challenging a court martial conviction through 28 U.S.C. § 2241 must exhaust all available military remedies."). The district court specifically relied on this

Court's holding in *Denedo*, 556 U.S. 904, as providing an avenue for the military courts to adjudicate Petitioner's claims. A-81-82, 99.

The district court's rulings here are consistent with the predominant Article III court practice. *See, e.g.*, *Piotrowski v. Commandant*, No. 08-3143-RDR, 2009 WL 5171780, at *13-14 (D. Kan. Dec. 22, 2009) (relying on *Denedo* and dismissing habeas claims without prejudice to enable military coram nobis review); *MacLean v. United States*, No. 02-CV-2250-K, 2003 U.S. Dist. LEXIS 27219, at *13-15 (S.D. Cal. June 6, 2003) (dismissing coram nobis petition and noting availability of such relief in military court); *cf. Tatum v. United States*, No. RDB–06–2307, 2007 WL 2316275, at *6–*7 (D. Md. Aug. 7, 2007) (dismissing petition for post-finality relief on the ground that petitioner failed to seek coram nobis relief in military court). As the *Piotrowski* court explained:

> It has long been the established and effective practice of the military appellate courts, like state and federal courts, to exert their authority not only to hear direct appeals but to collaterally review constitutional challenges to their decisions regarding convictions and sentences as well. This court has reviewed numerous § 2241 petitions by military prisoners over 3 decades, and many with claims that were exhausted in the military courts in post-appeal proceedings. Under *Burns* all available military remedies must be exhausted prior to, not after, § 2241 review. As a matter of comity and judicial efficiency, if nothing else, the military courts should continue to decide collateral challenges in the first instance and have the opportunity to correct their own errors, while applying their expertise in military law.

2009 WL 5171780, at *13.

The military courts, meanwhile, traditionally addressed such post-finality claims. *See id*.; *see also Denedo v. United States*, 66 M.J. 114 (CAAF 2008); *Thompson v. United States*, 60 M.J. 880, 883 (N-M. Ct. Crim. App. 2005); *Fisher v. Commander*, 56 M.J. 691, 695 (N-M. Ct. Crim. App. 2001); *Nkosi v. Lowe*, No. 94-03, 1994 WL 175766, *1 (A.F.C.M.R. 1994).

Recently, however, the military courts have increasingly adopted blanket post-finality rules that close their courthouse doors to all military prisoners. CAAF's jurisdictional holding here is the starkest example of that trend. *See* Part I.B, *infra*. But even if that jurisdictional holding is corrected, CAAF's decision included dicta[4] that, where a petitioner "is still in confinement, coram nobis relief is unavailable" as a matter of law. A-3 (quoting *Denedo*, 556 U.S. at 911). And on the same date that CAAF issued this decision, it also denied three petitions for review in non-capital cases in which the lower military courts had relied on the same blanket rule as precluding post-finality relief for military prisoners. *Jeter v. United States*, 77 M.J. 106 (CAAF 2017); *Lewis v. United States*, 77 M.J. 106 (CAAF 2017); *Ward v. United States*, 77 M.J. 106 (CAAF 2017); *see Lewis v. United States*, 76 M.J. 829, 834 (A.F. Ct. Crim. App. 2017) (denying coram nobis petition and reasoning: "Petitioner remains in confinement; therefore, coram nobis is not the sole remedy available to him because he is eligible to seek a writ of habeas corpus from a federal district court"). Notably, the petitioners in those cases raised claims based on pattern military jury instructions that CAAF had recently found to be constitutionally infirm.[5] *See Lewis*, 76 M.J. at 832; *see generally United States v. Hills*, 75 M.J. 350, 356-57 (CAAF 2016).

As a result of the military courts' blanket rulings denying or declining to exercise jurisdiction in post-finality cases, the Article III courts are—unwillingly—becoming the

[4] The court's discussion on this point was dicta because, once a court determines that it lacks jurisdiction, any further pronouncements are without force of law. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

[5] Similar post-finality claims are currently pending in non-capital cases in the Navy-Marine Corp Court of Criminal Appeals. *See United States v. Burleson*, No. 200700143 (N-M. Ct. Crim. App. 2017); *United States v. Pierre*, No. 201300257 (N-M. Ct. Crim. App. 2017).

exclusive venue for military prisoners to raise claims that arise after or in conjunction with direct appeal. This represents a marked shift in traditional practice and, troublingly, lacks any articulated rationale. Ultimately, it falls to this Court to decide the "necessary or appropriate" forum for these claims, and for the reasons set forth below, the military courts should continue to review such claims consistent with their traditional practice and consistent with their jurisdiction under the UCMJ.

B. The Military Courts Have Jurisdiction to Review Collateral Claims for Relief That Arise after or in Conjunction with Direct Appeal.

In dismissing the coram nobis proceeding below, CAAF stated the issue and held as follows:

> The threshold question is whether this Court has jurisdiction to entertain a request for coram nobis in a case that is final in all respects under the UCMJ. We hold that we do not.

A-2. In *Denedo*, this Court addressed the identical issue:

> The case before us presents a single issue: whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis to challenge its earlier, and final, decision affirming a criminal conviction.

556 U.S. at 906. But this Court reached the opposite conclusion as CAAF did here:

> We hold that Article I military courts have jurisdiction to entertain coram nobis petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect.

Id. at 917. CAAF's holding directly contradicts, and *sub silentio* purports to overrule, this Court's holding in *Denedo*.

In *Denedo*, the petitioner was convicted of non-capital offenses, his convictions were affirmed on appeal, and, after serving his sentence, he was discharged from the Navy. *Id*. at 907. In 2006, "though at this point [his case] had been final for eight years," Denedo petitioned the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") for a writ of coram nobis based on

his defense counsel's ineffective assistance. *Id*. at 907-08. The NMCCA overruled the government's jurisdictional objections but summarily denied the petition. *Id*. at 908. On appeal, "CAAF agreed with the NMCCA that standing military courts have jurisdiction to conduct 'collateral review under the All Writs Act.'" *Id*. (quoting *Denedo*, 66 M.J. at 119). CAAF then remanded to NMCCA for further consideration, holding that "a nondefaulted, ineffective-assistance claim that was yet to receive a full and fair review 'within the military justice system' could justify issuance of the writ." *Id*. (quoting *Denedo*, 66 M.J. at 125). In dissent, Judge Ryan "concluded that the UCMJ does not confer jurisdiction upon military tribunals to conduct 'post-finality collateral review.'" *Id*. at 909 (quoting *Denedo*, 66 M.J. at 136).

This Court affirmed. The Court expressly rejected the government's argument—and the rationale of Judge Ryan's dissent—that "finality" under 10 U.S.C. § 876 undermines the military courts' jurisdiction over a coram nobis petition. *Id.* at 915-16. The Court instead recognized that a "request for coram nobis is simply a further step in his criminal appeal," and that the military courts therefore have coram nobis jurisdiction wherever they had jurisdiction to review the case on direct appeal. *Id*. at 914 (internal quotations and brackets omitted). The Court emphasized that "the long-recognized authority of a court to protect the integrity of its earlier judgments impels the conclusion that the finality rule is not so inflexible that it trumps each and every competing consideration." *Id*. at 916. And those considerations necessarily included the bedrock principle that military courts "must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments." *Id*. at 917. *Denedo* thus established that military courts have jurisdiction to review, and significant interests in adjudicating, coram nobis petitions that allege constitutional error in final cases. *Id*.

CAAF's decision below resurrects the arguments rejected in *Denedo*. In a single paragraph explaining its holding, CAAF observed that Petitioner's case is final under 10 U.S.C. §§ 871 and 876. A-2-3. But the court did not acknowledge that *Denedo*'s holding expressly applied to final cases, nor did it acknowledge that coram nobis proceedings are simply a further step in the criminal appeal. *See Denedo*, 556 U.S. at 914. CAAF also asserted an "absence of any statutory authority to provide extraordinary relief" in this case, A-3, but the court did not address *Denedo*'s ruling that such authority is "conferred by the All Writs Act . . . to issue 'all writs necessary or appropriate in aid of'" the military courts' pre-existing jurisdiction under 10 U.S.C. §§ 866 and 867. *Denedo*, 556 U.S. at 911 (quoting 28 U.S.C. § 1651(a)); *see id.* at 911-15. CAAF likewise failed to acknowledge or weigh the principle that military courts "must take all appropriate means" to police their own errors and adjudicate their own cases. *Id*. at 917.

CAAF's judges apparently disagree with, and are unwilling to abide by, this Court's holding in *Denedo*.[6] This Court should not permit its holding to be *sub silentio* overruled by CAAF. Not only do the military courts have jurisdiction to consider post-finality claims of error, but, as discussed below, it is entirely appropriate that they continue to exercise such jurisdiction consistent with their longstanding practice.

C. The Military Courts Remain the Appropriate Forum to Adjudicate Post-Finality Claims.

The All Writs Act gives both the Article I military courts and the Article III civil courts the duty to issue extraordinary writs when "necessary or appropriate." 28 U.S.C. § 1651(a); *Denedo*, 556 U.S. at 911. This "necessary or appropriate" standard is flexible and equitable. *See*

[6] Because of a vacancy on the court and the recusal of Judge Ohlson, CAAF's decision here was made by three judges, two of whom dissented from CAAF's decision in *Denedo*. *See* 66 M.J. at 130 (Stucky, J., dissenting); *id*. at 133 (Ryan, J., dissenting).

United States v. George, 676 F.3d 249, 253 (1st Cir. 2012) ("There is a generally accepted understanding that the All Writs Act imbues courts with flexible, inherently equitable powers.") (citations omitted). This Court's precedent requires courts to apply the standard by considering the circumstances of each case. *See United States v. Morgan*, 346 U.S. 502, 512-13 (1954).

Despite this case-specific and equitable standard, the present conflicting views of the Article I military and Article III civil courts derive from two very general, and heretofore unyielding, principles: on the one hand, the rule that the civil courts "will not entertain habeas petitions by military prisoners until all available military remedies have been exhausted," *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975), and on the other hand, the emerging military court rule that coram nobis relief is unavailable "when alternative remedies, such as habeas corpus [in an Article III court], are available." A-3 (quotation omitted). For several reasons, the Article III courts have the better view.

First, Congress intended the UCMJ to establish a self-sufficient, self-correcting, uniform military justice system. As this Court has observed, in the UCMJ, "Congress has taken great care both to define the rights of those subject to military law, and provide *a complete system* of review within the military system to secure those rights." *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (emphasis added). Further, whereas Congress specifically created CAAF to ensure uniformity in military court decisions, *see, e.g.*, 95 Cong. Rec. H5719-22 (daily ed. May 5, 1949), the detention of military prisoners in at least three different federal districts[7] will

[7] Male Army prisoners are incarcerated at Fort Leavenworth and typically file any federal post-conviction challenges in the District of Kansas. Male Navy prisoners and all female military prisoners are incarcerated at the Naval Consolidated Brig in Miramar and typically file federal post-conviction challenges in the Southern District of California. Male prisoners from all military branches are incarcerated at the Naval Consolidated Brig in Charleston and typically file federal post-conviction challenges in the District of South Carolina. *See* Rod Powers, *Inside a*

inevitably lead to divergent district court habeas decisions on matters of post-conviction military justice. The military courts' recent blanket refusals to consider post-finality claims of constitutional error will therefore undermine the "complete" and "uniform" system that Congress intended.

Second, and relatedly, under our tripartite system of government, the power of Article III courts over the military is limited by design. Military law is "a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Parker v. Levy*, 417 U.S. 733, 744 (1974). Because military law is "separate and apart" from federal law, Article III courts traditionally defer to military court decisions. In *Noyd v. Bond*, 395 U.S. 683, 694-95 (1969), this Court thus recognized the necessity for "a substantial degree of civilian deference to the military tribunals" and for the military courts to exercise "primary responsibility" for the supervision of military justice. The Court explained:

> "The policy underlying [the exhaustion] rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved."

Id. at 693-94 (quoting *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950)). But Article III courts obviously cannot defer to the military courts on matters that those courts refuse to decide. It will be particularly odd for Article III courts to decide the scope and impact of sweeping new CAAF

Military Prison, Balance (Oct. 13, 2016), https://www.thebalance.com/inside-a-military-prison-3354204; *see generally* Major Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5, 7-8 & n.26 (1985) (discussing the divergent approaches to collateral review of court-martial convictions developing among federal courts).

decisions like *Hills*, 75 M.J. 350, when military prisoners assert their rights thereunder. *See Jeter*, 77 M.J. 106; *Lewis*, 77 M.J. 106; *Ward*, 77 M.J. 106; *Lewis*, 76 M.J. 829.

Third, although it is true that courts frequently refuse to grant coram nobis relief where habeas relief is available, *see* A-3, this doctrinal limit lacks the talismanic power that the military courts have recently begun to accord it.[8] Indeed, courts do not rely upon the availability of habeas review in a *separate* court system to justify withholding coram nobis review in *their own cases*. *See Loving v. United States*, 62 M.J. 235, 248 (CAAF 2005) ("[O]ur concluding that Article III courts have the power to entertain a writ of habeas corpus or other petitions does not necessarily mean that this eventual review is an adequate remedy at law" that would justify withholding military court review). Such an approach is particularly inapt where, as here, the separate, Article III court system lacks expertise and authority in questions of military justice. *See Noyd*, *supra*. The military courts have thus traditionally considered and granted coram nobis petitions to *incarcerated* servicemembers, i.e., to servicemembers for whom habeas relief in an Article III court was technically available. *See, e.g.*, *Garrett v. Lowe*, 39 M.J. 293 (CAAF 1994); *Fisher*, 56 M.J. at 695; *Nkosi*, 1994 WL 175766, at *1. The military courts' recent bright-line rule against such relief is especially incongruous in capital cases, wherein federal habeas will

[8] The government's reliance below on this prudential limit to preclude military coram nobis review was also disingenuous, because these three rounds of coram nobis proceedings were prompted by the government's assertion in district court that a military remedy *was* available and that the district court should therefore deny the claims as unexhausted. *See* A-24 (ACCA observing that "Department of Justice counsel argued with persuasive effect in the United States District Court for the District of Kansas that petitioner should have litigated the instant claims in the military justice system before raising them in a habeas corpus action in an Article III court. In an interesting turn of advocacy within the executive branch, the Army's government appellate counsel now insist we should 'dismiss the petition with prejudice' because 'whether or not any Article III litigation is currently pending, it is available to petitioner.' The United States cannot have it both ways, at least not in the context of this petition, and create a 'Catch-22' that avoids matters properly before us.") (internal brackets omitted).

always be technically available, because it will sharply limit military court oversight of those cases; yet Congress plainly designed the UCMJ to accord greater military court oversight, and greater protections, in military capital cases. *See* Part II.B, *infra*.

Finally, shifting the adjudication of post-finality claims from military court to civil court will likely have far-reaching, unintended consequences. Military appellants—especially when under death, life, or other severe sentences—may now withhold collateral claims from the permissive review stage of their military direct appeals in order to present them, post-finality, to the Article III courts in the first instance. Such strategy decisions may be dictated by considerations regarding the preferred forum, the likely availability of discovery, appointed counsel, or investigative resources, or the substantive or procedural law of the federal district in question. One long term consequence of such strategy decisions will be to redouble the transfer of litigation from military to civil court. For the reasons already discussed, that shift is neither necessary nor appropriate.

This Court should grant certiorari to resolve the present conflict between the Article I military courts and Article III civil courts.

II. Because This Is a Death Penalty Case, CAAF Had Mandatory Jurisdiction under 10 U.S.C. § 867(a)(1), and This Court Has Jurisdiction under 28 U.S.C. § 1259(1).

As described in the Statement of the Case, despite the government's failure to initiate mandatory review under CAAF Rules 18(a)(3) and 23(a), Petitioner notified CAAF on July 7, 2017, as docketed on July 12, 2017, of the mandatory nature of this appeal. *See* A-113, 118-125. Petitioner's notice included discussion of the principle statutory provisions and case law that established the applicability of 10 U.S.C. § 867(a)(1). *Id.* CAAF nonetheless ordered, without explanation, that the "Notice of Mandatory Review . . . [would be] construe[d] as a [discretionary] writ-appeal petition of the decision of the United States Army Court of Criminal

Appeals." A-8. For the reasons discussed below, CAAF's characterization of the appeal was error,[9] but the error does not undermine this Court's jurisdiction.

A. Section 867(a)(1) Establishes CAAF's Mandatory Appellate Jurisdiction in "All" Affirmed Death Penalty "Cases."

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In drafting 10 U.S.C. § 867, Congress began with the following unambiguous command:

> (a) The Court of Appeals for the Armed Forces shall review the record in--
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death[.]

10 U.S.C. § 867. Section 867(a) uses compulsory language—CAAF "shall review"—and applies broadly to "all cases" with an affirmed death sentence. The provision carves out neither exceptions nor limits to Congress's requirement that CAAF review appeals in all capital cases.

Petitioner's case fits squarely within § 867(a)(1). He is under sentence of death, and his sentence has been affirmed by ACCA. A-1-2; A-10-11; *see United States v. Gray*, 37 M.J. 751, 761 (A.C.M.R. 1993). CAAF previously conducted mandatory review of Petitioner's direct appeal under § 867(a)(1). *United States v. Gray*, 51 M.J. 1, 10 (CAAF 1999) ("This case is before our Court for mandatory review pursuant to Article 67(a)(1), UCMJ, 10 USC § 867(a)(1) (1989)."); *United States v. Gray*, 40 M.J. 25, 25 (C.M.A. 1994) ("Appellant is before the United

[9] Although it is common practice for courts to re-construe pleadings to facilitate review or to protect a litigant's rights, *see, e.g.*, *Castro v. United States*, 540 U.S. 375, 381 (2003), it is noteworthy that CAAF here re-characterized Petitioner's pleading to limit review.

States Court of Military Appeals for mandatory review of his sentence to death. Art. 67(a)(1), Uniform Code of Military Justice, 10 USC § 867(a)(1) (1989).").

Further, the instant coram nobis proceeding is, as a matter of law, "a step in the criminal case." *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954); *see Wall v. Kholi*, 562 U.S. 545, 559 (2011); *Denedo*, 556 U.S. at 912-13. Thus, "[b]ecause [Petitioner's] request for coram nobis is simply a further step in his criminal appeal, the [military court's] jurisdiction to issue the writ derives from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review." *Denedo*, 556 U.S. at 914 (internal quotations, citations, and brackets omitted). As CAAF's jurisdiction on Petitioner's direct appeal was governed by the mandatory review provision of § 867(a)(1), that same provision governs this further step in the case.

Despite § 867(a)(1) and its plain applicability to this case, CAAF failed to acknowledge its mandatory review here. That was error because, where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quotation and citation omitted).

B. Congress Intended That CAAF Would Review All Military Capital Appeals Regardless of Their Procedural Posture.

Even if the terms of § 867(a)(1) were not clear, Congress intended that CAAF would review all appeals in military capital cases, regardless of their procedural posture. The legislative history of the UCMJ reveals Congress's overriding concern with ensuring reliability and providing unique procedural protections in military capital cases as a class. The legislative history is devoid, however, of any suggestion that Congress intended piecemeal application of these protections or anticipated that the mandatory review requirement of § 867(a)(1) could depend on the particular type of appeal or the point in the proceedings at which the appeal arose.

Adoption of the UCMJ in 1950 grew out of widespread concern that military court proceedings lacked fairness and uniformity. *See, e.g.*, S. Rep. No. 90-806, at 2 (1967); 95 Cong. Rec. H5719-30 (daily ed. May 5, 1949); *see also* Daniel Walker and C. George Niebank, *The Court of Military Appeals – Its History, Organization and Operation*, 6 Vand. L. Rev. 228, 229-30 (1953). These concerns were particularly significant in death penalty cases, and Congress provided a variety of unique protections for capital cases as a class. In addition to mandatory appellate review, these protections included heightened thresholds for capital sentencing verdicts, 10 U.S.C. § 852(a)(1) and (b)(1); relaxed procedures for capital defendants to present evidence, 10 U.S.C. §§ 849(e) and 850(b); and a prohibition against guilty pleas to capital offenses, 10 U.S.C. § 845(b). Neither the statutory language nor legislative history suggested that these protections would apply only to certain capital cases; rather, Congress repeatedly made a bright-line distinction between "capital cases" and cases "not capital." *See id*.; *see also* 95 Cong. Rec. H5720, 5732, 5735, 5740 (daily ed. May 5, 1949).

Given this bright-line distinction, Congress understood the mandatory review provision of § 867(a)(1) to govern capital cases writ large. *See* 95 Cong. Rec. H5720 (daily ed. May 5, 1945) ("[T]he review of the record for errors of law by the court of military appeals . . . is automatic in cases where the sentence is death."). This Court has long recognized the same distinction. *See Burns*, 346 U.S. at 141 n.7 ("[The C.M.A.] automatically reviews all capital cases and has discretionary jurisdiction over other cases.") (citation omitted). Commentators shared this understanding. *See* Walker and Niebank, *supra* at 231-32 ("cases with sentences involving the death penalty . . . must be reviewed [by the C.M.A.]").

Subsequent legislative history confirms that Congress understood § 867(a) to encompass proceedings, like this one, arising outside the context of the direct appeal. Congress revised the

UCMJ in the Military Justice Act of 1983. As initially proposed, the Act limited the C.M.A.'s appellate review to post-trial proceedings. *United States v. Lopez de Victoria*, 66 M.J. 67, 70 (CAAF 2008) (citing S. 2521, 97th Cong. § 3(v)(2) (1982)). The Department of Defense, among others, opposed this limitation as contrary to military court practice, and Congress omitted the limitation in the final, adopted version of the Military Justice Act. S. Rep. No. 98-53, at 23 (1983). This history has been aptly described as demonstrating Congress's understanding that the term "all cases" in § 867(a) includes, as here, petitions for issuance of an extraordinary writ:

> [T]he state of the law at the time the Military Justice Act of 1983 was enacted explicitly comprehended jurisdiction in the Court of Military Appeals under Article 67, UCMJ, to review interlocutory decisions by the courts of military review. In other words, Congress legislated against a judicial backdrop that already provided for a broad reading of jurisdiction over "cases" in the extraordinary writ context . . . .

Lopez de Victoria, 66 M.J. at 70 (citations omitted); *see also United States v. Caprio*, 12 M.J. 30, 31 (C.M.A. 1981) ("[A]lthough Article 67 does not explicitly authorize access to our Court by any party by means of a petition for extraordinary relief, we have long held the view that the All Writs Act permits such petitions.").

Although *Lopez de Victoria* arose in the pre-trial context, CAAF has likewise interpreted § 867(a) to provide jurisdiction in final cases. *See Loving*, 62 M.J. at 244 (discussing "the rich history of this Court's exercise of jurisdiction after completion of direct review"). In the context of the mandatory review provision of capital cases under § 867(a)(1), CAAF has explained:

> Simply stated, whether this case is "final" under Article 71(c) or not, this Court has subject matter jurisdiction under Article 67(a)(1), over this capital case. On this point, we state that there is nothing in the legislative history of Article 71(c) that indicates the congressional purpose to terminate this Court's jurisdiction over a capital case. Also it is important to note that Congress made no changes to Article 76 when it amended Article 71(c). Had Congress intended to deprive this Court of all jurisdiction after complete review by the Supreme Court, we believe in light of this Court's mandatory jurisdiction over every capital case in Article 67(a)(1), Congress would have made its purpose clear and unequivocal. In

> summary, even after "a final judgment as to the legality of the proceedings," Petitioner may collaterally attack his conviction and sentence, and this Court has judicial power to entertain Petitioner's later challenges.

Id. at 246 n.75. Without analyzing Congress's intent, or its own prior decisions addressing it, CAAF erroneously reached the opposite conclusion here.

CAAF's failure to conduct mandatory review of this capital post-conviction appeal is inconsistent with Congress's intent in adopting, and in subsequently declining to limit the scope of § 867(a).

C. CAAF's Failure to Exercise Mandatory Review Conflicts with This Court's Decision in *Denedo* and with Prior Military Court Precedent.

As mentioned above, CAAF previously exercised mandatory jurisdiction under § 867(a)(1) on direct appeal in this case. *Gray*, 51 M.J. at 10; *Gray*, 40 M.J. at 25. Although the court did not explain its failure to conduct mandatory review here, it presumably declined to do so because this case is now final and the direct appeal concluded years ago.[10] That distinction, however, is not consistent with this Court's precedent or with the military courts' prior practice.

CAAF has not previously interpreted its jurisdiction under § 867 as limited to direct appeals. In *Denedo*, 66 M.J. 114, CAAF specifically recognized its jurisdiction to consider appeals from denials of coram nobis petitions well after the conclusion of direct appeal. *Id*. at 120. This Court affirmed. *Denedo*, 556 U.S. at 917.

[10] Under CAAF's Rules, the government is required to notify the court and file the record for review in order to initiate the appeal in all mandatory review cases. *See* CAAF Rule 18(a); CAAF Rule 19(c); CAAF Rule 23(a). The compulsory language of these rules grants the government no prerogative to treat a mandatory appeal as a discretionary one. *See id*. And just as § 867(a)(1) uses the broad term "cases" to define the scope of mandatory review, so too do CAAF's Rules. *See id*. Thus, to the extent that CAAF failed to conduct mandatory review here because the government failed to initiate it, the government's failure is as groundless under the CAAF Rules as the court's failure is unsupported under the UCMJ.

Even before *Denedo*, CAAF recognized its jurisdiction to consider petitions for extraordinary relief after the case became "final." *See, e.g.*, *Loving*, 62 M.J. at 239 (finding jurisdiction to consider habeas corpus petition and rejecting "the position of the Government that this Court has no jurisdiction to address Petitioner's attack on his conviction and sentence because they became final after the Supreme Court's decision on review of his direct appeal"); *Garrett v. Lowe*, 39 M.J. 293, 294-95 (C.M.A. 1994) (exercising jurisdiction to consider coram nobis petition after case became final and after conclusion of direct appeal); *Del Prado v. United States*, 48 C.M.R. 748, 749 (C.M.A. 1974) (finding jurisdiction to consider coram nobis petition based on new, retroactive rule and stating: "[n]or is the possibility for relief terminated by the exhaustion of all appellate rights and procedures established by the Uniform Code of Military Justice"); *United States v. Frischholz*, 36 C.M.R. 306, 307-09 (C.M.A. 1966) (finding jurisdiction to consider coram nobis petition in final case after conclusion of direct appeal) (quoted approvingly in *Schlesinger v. Councilman*, 420 U.S. 738, 753 n.26 (1975)).

Conversely, this Court and CAAF have exercised appellate jurisdiction *before* initiation of a military direct appeal. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435, 437-38 (1987) (granting certiorari in pre-trial military appeal); *Lopez de Victoria*, 66 M.J. at 70 (rejecting the government's argument that "'all cases' in Article 67(a), UCMJ, does not include interlocutory appeals of adverse trial court rulings").

The lower military appellate courts have followed CAAF's lead, and abided by this Court's holding in *Denedo*, in exercising jurisdiction outside the context of direct appeal. *See, e.g.*, *Chapman v. United States*, 75 M.J. 598, 601 (A.F. Ct. Crim. App. 2016) ("Appellate military courts have jurisdiction over coram nobis petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect.") (internal quotation omitted);

Gray v. United States, 70 M.J. 646, 647 (ACCA 2012) ("Although a case is final pursuant to Article 76, UCMJ, a service court may nonetheless entertain a writ of coram nobis 'in aid of' its jurisdiction.") (citations omitted); *Denedo*, 66 M.J. at 118-19 (recounting that the Navy-Marine Corps Court of Criminal Appeals denied the Government's motion to dismiss the coram nobis petition on jurisdictional grounds).

Accordingly, just as adopting an exception to § 867(a)(1) based on the procedural posture of this capital post-conviction appeal is inconsistent with the statutory language and with Congressional intent, *see* Parts II.A and II.B *supra*, so too it conflicts with this Court's holding in *Denedo* and with the military courts' longstanding practice. Mandatory appellate review under § 867(a)(1) encompasses post-appeal coram nobis proceedings in final cases like this one.

D. This Court Has Jurisdiction over This Appeal.

1. Certiorari

This Court has certiorari jurisdiction under 28 U.S.C. § 1259, which provides:

> Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:
>
> (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

28 U.S.C. § 1259. As established above, CAAF was required to review this case under § 867(a)(1); CAAF previously did review Petitioner's case under § 867(a)(1) on direct appeal; and CAAF issued a reasoned decision in this coram nobis proceeding. Accordingly, § 1259(1) applies.

Although CAAF failed to characterize its latest review as mandatory under § 867(a)(1), A-8, permitting CAAF to thereby circumvent certiorari jurisdiction would be inconsistent with the plain terms of § 1259(1). If the term "under section 867(a)(1) of title 10" modifies only the word "[c]ases" in § 1259(1), then this Court's certiorari jurisdiction is plain, because this is a

§ 867(a)(1) case. *See* Part II.A, *supra*. Further, if the term "under section 867(a)(1) of title 10" modifies the full phrase "cases reviewed by [CAAF]," then CAAF's prior review of this case on direct appeal under § 867(a)(1), *see Gray*, 51 M.J. at 10, *Gray*, 40 M.J. at 25, likewise triggers this Court's jurisdiction, particularly given that this coram nobis proceeding is part of the same case as the direct appeal. *See Denedo*, 556 U.S. at 912-13.

On the other hand, it would be misguided and unnatural to read § 1259(1) as conditioning this Court's jurisdiction on CAAF's invocation of "§ 867(a)(1) review" as requisite magic words in each and every decision issued in a capital case. Such a strained reading would also undermine Congress's intent in passing § 1259(1).

In adopting § 1259(1) in the Military Justice Act of 1983, Congress intended that this Court would have certiorari jurisdiction over *all* military capital appeals. Congress understood that the UCMJ already provided that "the Court of Military Appeals . . . reviews all death penalty cases," and its 1983 amendments "retain[ed] automatic review of all death penalty cases." S. Rep. No. 98-53, at 8, 28 (1983); *see also* H. Rep. 98-549, at 15 (1983). Congress likewise understood that the Court of Military Appeals reviewed extraordinary writ proceedings, not just direct appeals, under § 867(a). *Lopez de Victoria*, 66 M.J. at 70; *see Loving*, 62 M.J. at 246 n.75.

Congress was concerned that "[t]here is no other major federal judicial body whose decisions are similarly insulated from direct Supreme Court review," and it took note of the widespread support for its legislation to authorize certiorari jurisdiction to "review decisions" of the Court of Military Appeals. S. Rep. No. 98-53, at 8-9; *see also* H. Rep. 98-549, at 16. It accordingly added "a new provision, § 1259, to authorize discretionary review by the Supreme Court through writs of certiorari in[, *inter alia*,] . . . cases reviewed by the Court of Military Appeals under its mandatory review jurisdiction in which the sentence, as affirmed by a Court of

Military Review, extends to death (Article 67(b)(l))." S. Rep. No. 98-53, at 34. Congress thus intended that § 1259 would grant "discretionary review" to this Court, but not that § 1259 would add a layer of discretion to CAAF's "mandatory review jurisdiction" in death penalty cases. *See id*. Nothing in the legislative history of § 1259 suggests that Congress intended for CAAF to be able to circumvent this Court's supervisory certiorari jurisdiction by mischaracterizing as discretionary a decision in a mandatory review case like this one.

This Court should find that it has certiorari jurisdiction and grant a writ of certiorari.

2. Mandamus

If this Court determines that it lacks certiorari jurisdiction in light of CAAF's erroneous failure to characterize its review here as mandatory, then the Court should nonetheless issue a writ of mandamus to compel CAAF's mandatory jurisdiction under § 867(a)(1).

> The traditional use of the [mandamus] writ in aid of appellate jurisdiction both [at] common law and in the federal courts has been 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, 26 (1943) (emphasis added); *see also McClellan v. Carland*, 217 U.S. 268, 281 (1910) (upholding grant of mandamus where the lower court "had practically abandoned its jurisdiction over a case of which it had cognizance"). Here, the Court should grant the writ to compel the "jurisdiction which [CAAF] unlawfully repudiated." *Roche*, 319 U.S. at 32.

This Court issues the writ where three prerequisites are met. First, to ensure that a petitioner does not utilize the writ "as a substitute for the regular appeals process," the petitioner "must have no other adequate means to attain the relief he desires." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). Second, the petitioner's entitlement to the writ must be

clear and indisputable. *Id*. at 381. Third, issuance of the writ must be appropriate under the circumstances. *Id*. These prerequisites are met here.

First, if this Court finds that it lacks certiorari jurisdiction, then Petitioner will have no other means to appeal and no other forum in which to challenge CAAF's novel holding that the military courts lack jurisdiction to hear post-finality claims of constitutional error. Although Petitioner can seek habeas corpus relief in the Article III courts, doing so would mean that CAAF had succeeded in its apparent effort to shift the litigation of military prisoners' post-appeal claims from their traditional forum in the military courts to the anomalous forum of Article III courts. *See* Part I, *supra*. Such a sweeping decision should not evade this Court's review and become settled law as a result of a procedural sleight of hand.

Second, Petitioner's entitlement to the writ is clear and indisputable. For the reasons set forth above in parts II.A-C, CAAF's refusal to conduct mandatory review violated the plain terms of § 867(a)(1), undermined Congress's intent in adopting § 867(a)(1), conflicted with this Court's decision in *Denedo*, 556 U.S. 904, and reversed longstanding military court practice, including in this very case. Mandamus is necessary to correct CAAF's clear abdication of judicial duty.

Third, issuance of the writ is appropriate. This petition stems from a dispute between the federal and military courts concerning which court system should review claims of constitutional error that arise after or in conjunction with a military direct appeal. As the first military capital case to be deemed "final" in more than a half-century, the resolution of this conflict will likely dictate the litigation of untold future cases raising claims of ineffective assistance of counsel, claims based on new or previously undisclosed evidence, and claims seeking to enforce new constitutional rules announced by this Court or by CAAF. As things stand now, CAAF's

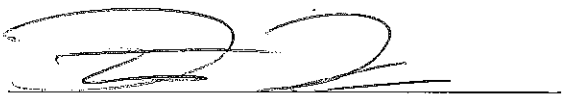
decision will relegate the litigation of such claims to the Article III courts despite, and indeed without mention of, the bedrock principle that the military court system should police its own errors. *See Schlesinger*, 420 U.S. at 758; *Noyd*, 395 U.S. at 693-95; *Gusik*, 340 U.S. at 131-32. CAAF will have prevailed in its dispute with the Article III courts, not by force of reason or law, but by distorting § 867(a)(1) to preclude this Court's oversight. Absent certiorari jurisdiction, this Court should issue a writ of mandamus to ensure that the resolution of such an important question is decided, and subject to appeal, on its merits.

CONCLUSION

This Court is well-versed in the procedures that state and federal prisoners follow to litigate claims of constitutional error that arise during or after direct appeal. *See* 28 U.S.C. §§ 2254, 2255. Even convicted enemy combatants have the clarity of knowing which courts will address such claims. *See* 10 U.S.C. § 950g; *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016). But military prisoners like Petitioner enjoy no clear procedure to litigate claims of ineffective assistance of appellate counsel, claims based on new or previously undisclosed evidence, or claims based on new, constitutional holdings of this Court or the military courts. The Court should take this opportunity to resolve the conflict between the Article I and Article III courts and decide which court system provides the proper forum for adjudicating such claims in the first instance.

For the foregoing reasons, the Court should grant certiorari or, in the alternative, issue a writ of mandamus to address the important questions raised here.

Respectfully submitted,



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Dated: February 9, 2018

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD GRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, Timothy Kane, certify that on this 9th day of February, 2018, I caused a copy of the foregoing *Petition for Writ of Certiorari or Mandamus*, its *Appendix*, and *Motion for Leave to Proceed In Forma Pauperis* to be served by FIRST CLASS MAIL, postage prepaid, upon all parties required to be served under SUP. CT. R. 29, listed below:

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