No. 17-7769

IN THE SUPREME COURT OF THE UNITED STATES

RONALD GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI OR MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Armed Forces (CAAF) erred in rejecting petitioner's request for an extraordinary writ of error coram nobis, where it is undisputed that petitioner may seek relief by filing a petition for a writ of habeas corpus in an Article III district court.

2. Whether this Court has jurisdiction under 28 U.S.C. 1259(1) to review the CAAF's order dismissing petitioner's writ-appeal petition, where Congress has directed that the Court may not review by writ of certiorari "any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. A1-A3) is reported at 77 M.J. 5. The opinion of the United States Army Court of Criminal Appeals (Pet. App. A10-A34) is reported at 76 M.J. 579. A related order of the United States Court of Appeals for the Tenth Circuit (Pet. App. A42-A45) is not published in the Federal Reporter but is reprinted at 645 Fed. Appx. 624. A related order of the United States District Court for the District of Kansas (Pet. App. A46-A102) is

not published in the Federal Supplement but is available at 2015 WL 5714260.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2017. The petition for a writ of certiorari was filed on February 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1). As explained below, however, the Court lacks jurisdiction because it may not review by writ of certiorari "any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." 10 U.S.C. 867a(a); see pp. 27-33, infra.

STATEMENT

In 1988, petitioner, a member of the United States Army, was convicted by a general court-martial of premeditated murder (two specifications), attempted murder, rape (three specifications), robbery (two specifications), forcible sodomy (two specifications), burglary, and larceny, in violation of Articles 118, 80, 120, 122, 125, 121, and 129 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, 920, 922, 925, 921, and 929, respectively. He was sentenced to death, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved the sentence. The United States Army Court of Military Review (ACMR), which is now called the United States Army Court of Criminal Appeals (Army CCA), affirmed the findings and

sentence. 37 M.J. 730. After granting petitioner leave to file supplemental assertions of error, the ACMR again affirmed the findings and sentence. 37 M.J. 751. The United States Court of Appeals for the Armed Forces (CAAF) affirmed. 51 M.J. 1. This Court denied a petition for a writ of certiorari. 532 U.S. 919.

In 2016, after several previous efforts to collaterally attack his convictions and sentence in both the Article III and military courts, petitioner filed a petition for an extraordinary writ of error coram nobis with the Army CCA. The Army CCA denied the petition in part and dismissed it for lack of jurisdiction in part. Pet. App. A10-A34. The CAAF dismissed petitioner's writ-appeal petition with prejudice. Id. at A1-A3.

1. Petitioner was an Army Specialist stationed at Fort Bragg, North Carolina. In December 1986, he abducted, raped, sodomized, and murdered Private Laura Lee Vickery-Clay. In January 1987, he raped Private Mary Ann Long Nameth and attempted to murder her by stabbing her repeatedly. A few days later, he raped, sodomized, robbed, and murdered Kimberly Ann Ruggles, a civilian. In 1988, a general court martial convicted petitioner of murder (two specifications), attempted murder, rape (three specifications), robbery (two specifications), forcible sodomy

(two specifications), burglary, and larceny. Petitioner was sentenced to death. 51 M.J. at 10-11; 37 M.J. at 735-736.[1]

Petitioner appealed his convictions and sentence within the military justice system. In addition to reviewing his legal challenges, the Army CCA granted his requests for additional testing and evaluations of his mental capacity. Pet. App. A18-A21. The CAAF ultimately affirmed petitioner's convictions and sentence, rejecting his 101 assignments of error. 51 M.J. 1; see Pet. App. A62-A69. In 2001, this Court denied a petition for a writ of certiorari. 532 U.S. 919 (No. 00-607). That denial ended the direct-review process and rendered petitioner's convictions "final" under the UCMJ. 10 U.S.C. 871(c)(1)(C)(ii); see 10 U.S.C. 876.

"Between 2001 and 2008, there was no appellate litigation in this case," and petitioner did not seek collateral review of his convictions or sentence in any court. Pet. App. A2. In July 2008, the President approved petitioner's death sentence under Article 71(a) of the UCMJ, which authorizes the President to commute or remit a death sentence and specifies that the portion of a court-martial sentence extending to death "may not be

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[1] In 1987, petitioner pleaded guilty in North Carolina state court to offenses involving other victims, including two counts of murder and five counts of rape. Pet. App. A50 n.3. He was sentenced to multiple terms of life in prison. Ibid.

executed until approved by the President." 10 U.S.C. 871(a); see Pet. App. A2. The Secretary of the Army scheduled petitioner's execution for December 2008. Pet. App. A2.

2. Since November 2008, petitioner has sought to collaterally attack his convictions and sentence. His primary avenue for doing so has been a petition for a writ of habeas corpus in the Article III courts. He has also, however, attempted to overcome procedural obstacles to the Article III courts' consideration of claims that he forfeited in the military courts by postponing his district-court litigation to request that the military courts consider those claims for the first time in the context of a petition for an extraordinary writ of error coram nobis. The military courts have declined to issue such a writ.

a. Servicemembers convicted by military courts-martial have long obtained collateral review of their convictions by filing petitions for writs of habeas corpus in the Article III courts. See Schlesinger v. Councilman, 420 U.S. 738, 747 (1975). Petitioner initially pursued that traditional avenue for review: In November 2008, he sought and received a stay of execution from the United States District Court for the District of Kansas in anticipation of filing a habeas petition under 28 U.S.C. 2241, the general federal habeas statute. Pet. App. A73. In April 2009, petitioner filed a petition asserting 18 constitutional

challenges to his convictions and sentence (to which he later added three more). Id. at A73-A76.

In opposing petitioner's habeas petition, the government argued that some of his challenges were barred because they had not been raised in the military courts on direct appeal and because petitioner could not establish cause and prejudice to excuse that procedural default. Pet. App. A81; see, e.g., D. Ct. Doc. 20, at 25, 126, 163-164 (May 1, 2009).[2] In November 2011, petitioner responded by returning to the Army CCA and attempting to raise the defaulted claims in a petition for an extraordinary writ of error coram nobis. Pet. App. A76-A77, A81. He then asked the district court to "await the action of the military courts" before acting on his habeas petition. Ibid. The court granted the requested stay over the government's opposition. Id. at A77; see D. Ct. Doc. 52, at 10-11 (Feb. 25, 2011).

b. In January 2012, the Army CCA denied petitioner's coram nobis petition. Pet. App. A104-A107. The court explained that petitioner could not satisfy the "threshold requirements" for that extraordinary relief because a "remedy other than coram nobis [wa]s available to [him]" in the form of a habeas petition in

[2] References to the district court docket refer to petitioner's habeas case, Gray v. Belcher, No. 08-cv-3289 (D. Kan. filed Nov. 25, 2008).

district court. Id. at A106. In April 2012, the CAAF denied discretionary review of the Army CCA's decision. Id. at A103. It stated that its denial was "without prejudice to raising the issue asserted after the U.S. District Court for the District of Kansas rule[d] on the pending habeas petition." Ibid.

c. After the CAAF denied review, the district court lifted its stay and resumed proceedings on petitioner's habeas petition. Pet. App. A77-A78. In September 2015, the court dismissed the petition. Id. at A46-A102.

The district court denied most of petitioner's claims with prejudice because it concluded that they had been fully and fairly considered by the military courts. Pet. App. A88-A95; see Burns v. Wilson, 346 U.S. 137, 142 (1953) (plurality opinion) ("[W]hen a military decision has dealt fully and fairly with an allegation raised in [a petition for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.").

The district court dismissed without prejudice the claims that petitioner had not attempted to raise in the military courts until his 2011 coram nobis petition. Pet. App. A95-A100. The court interpreted the military courts' orders denying coram nobis relief to indicate that those courts would have considered petitioner's claims in the absence of a "pending civilian habeas action." Id. at A100. The court believed that challenges to a

court-martial conviction should be presented first to the military courts "and only afterwards presented by habeas corpus to civilian courts" -- even where, as here, the servicemember failed to raise the claims on direct review and thus seeks to raise them in the military courts for the first time through a petition for an extraordinary writ of error coram nobis. Ibid.

d. The Tenth Circuit reversed in an unpublished per curiam order. Pet. App. A42-A45. The court explained that where, as here, a district court is presented with a "mixed" habeas petition that includes both exhausted and unexhausted claims, it has four options:

> (1) dismiss the entire petition without prejudice to re-filing after the petitioner either exhausts all claims or resubmits the petition to proceed solely on the exhausted claims;
>
> (2) deny the entire petition with prejudice if the unexhausted claims are clearly meritless;
>
> (3) apply an "anticipatory procedural bar" to the unexhausted claims and deny them with prejudice if the petitioner would now be procedurally barred from exhausting them in state (or, as here, military) court and cannot demonstrate cause and prejudice to excuse the procedural default; or
>
> (4) retain jurisdiction but abate the habeas proceeding to allow the petitioner to exhaust all unexhausted claims.

Id. at A44 (citations omitted); see, e.g., Rhines v. Weber, 544 U.S. 269, 273-274 (2005). "The one thing the district court may not do," the court continued, "is effect a hybrid disposition of the petition, dismissing with prejudice all exhausted claims and dismissing without prejudice the unexhausted claims." Pet. App.

A44. Because that is what the district court did here, the court remanded with instructions to vacate the "hybrid dismissal" and "adopt one of the alternative dispositions set forth" in its opinion. Id. at A45. The court did not address or endorse the district court's suggestion that servicemembers seeking federal habeas relief may belatedly present their previously forfeited claims to the military courts in coram nobis petitions.

e. On remand, the government urged the district court to deny petitioner's entire habeas petition with prejudice because the claims he sought to present to the military courts were both "clearly meritless" and "procedurally barred" in the military system. D. Ct. Doc. 111, at 2 (Oct. 26, 2016). Petitioner, in contrast, argued that the court should dismiss his petition without prejudice to allow him to seek coram nobis relief from the military courts. Id. at 1-2. The district court, while stating that "the additional delay occasioned by a dismissal without prejudice [wa]s regrettable," granted petitioner's request to dismiss his entire petition without prejudice. Id. at 2; see id. at 2-3.

f. In December 2016, petitioner returned to the Army CCA and filed his third coram nobis petition. Pet. App. A10-A11.[3]

[3] In February 2016, while his habeas petition was still pending, petitioner had filed a second coram nobis petition in the Army CCA. Pet. App. A40. The military courts dismissed that petition without prejudice. Id. at A38-A41.

The Army CCA considered the petition en banc and unanimously denied relief. Id. at A10-A34.

The Army CCA first concluded that, under this Court's decision in United States v. Denedo, 556 U.S. 904 (2009), it had jurisdiction to entertain petitioner's request for coram nobis relief as to all but one of his claims. Pet. App. A13-A14 (citing Denedo, 556 U.S. at 917).[4] The court noted, however, that coram nobis is an extraordinary remedy that is not appropriate unless the petitioner establishes, among other things, that his conviction was infected by an error "of the most fundamental character"; that "no remedy other than coram nobis is available"; that "valid reasons exist for not seeking relief earlier"; and that "the sentence has been served, but the consequences of the erroneous conviction persist." Id. at A23 (quoting Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008), aff'd, 556 U.S. 904 (2009)).

Applying those requirements here, the Army CCA denied relief on three independent grounds. First, the court observed that petitioner's claims were "ripe * * * as soon as the Supreme Court denied his petition for certiorari sixteen years ago" and found "no valid reason for his failure to seek relief earlier."

[4] The Army CCA concluded that it lacked jurisdiction to consider petitioner's challenge to the procedure by which the President approved his death sentence. Pet. App. A30-A31.

Pet. App. A24. Second, the court explained that petitioner was not entitled to coram nobis relief because he was still in custody. Id. at A25. Third, after "specifically address[ing]" the merits of each claim over which it had jurisdiction, the court determined that petitioner had "failed to establish the existence of error." Ibid.; see id. at A25-A33. For example, the court rejected petitioner's contention that his counsel had failed adequately to litigate his mental capacity, finding that counsel had "competently, diligently, and zealously" pursued the issue. Id. at A26.

g. Petitioner sought review of the Army CCA's denial of his coram nobis petition in the CAAF, which construed his filing as a writ-appeal petition and denied it with prejudice. Pet. App. A1-A3; see CAAF R. 4(b)(2), 27(b) (describing the CAAF's writ-appeal procedure for review of decisions on petitions for extraordinary relief). The CAAF first concluded that it lacked jurisdiction. Pet. App. A2-A3. The CAAF observed that petitioner had "exhausted all of his remedies in the military justice system," and it stated that, "[i]n the absence of any statutory authority to provide extraordinary relief for a capital case that is final for all purposes under the UCMJ," it "lack[ed] jurisdiction" to grant a writ of error coram nobis. Id. at A3.

The CAAF also concluded, in the alternative, that "[e]ven assuming that [it] ha[d] jurisdiction," petitioner had "fail[ed]

to show that he [wa]s entitled to extraordinary relief." Pet. App. A3. The court observed that petitioner "has a remedy other than coram nobis to rectify the consequences of the alleged errors, namely a writ of habeas corpus in the Article III courts." Ibid. The court emphasized this Court's instruction that a writ of error coram nobis "may not issue when alternative remedies, such as habeas corpus, are available." Ibid. (quoting Denedo, 556 U.S. at 911). Relatedly, the court noted that its precedent precludes coram nobis relief where, as here, the petitioner "is still in confinement." Ibid. (citing Loving v. United States, 62 M.J. 235, 254 (C.A.A.F. 2005)).

ARGUMENT

Petitioner principally contends (Pet. 8-17) that a military appellate court may grant an extraordinary writ of error coram nobis even where, as here, the servicemember remains in custody and could thus seek habeas relief in an Article III court. That contention lacks merit. The government agrees with petitioner that, under this Court's decision in United States v. Denedo, 556 U.S. 904 (2009), the military courts have subject-matter jurisdiction to entertain such requests for coram nobis relief and that the CAAF erred in concluding othewise. But Denedo reiterated the settled rule that an extraordinary writ of error coram nobis "may not issue when alternative remedies, such as habeas corpus, are available." Id. at 911. That rule resolves

this case, because it is undisputed that petitioner may file a renewed habeas petition in federal district court, thereby allowing his properly preserved claims to be adjudicated. The CAAF's reaffirmation that the appropriate mechanism for collateral review of a court-martial conviction is the ordinary habeas process -- not the extraordinary writ of error coram nobis -- neither conflicts with any decision of another court of appeals nor otherwise warrants this Court's review.

Petitioner separately contends (Pet. i, 17-28), as a subsidiary matter, that this Court has jurisdiction to review the CAAF's decision under 28 U.S.C. 1259(1). In fact, this Court lacks jurisdiction because the CAAF dismissed his petition for review and this Court may not review by writ of certiorari "any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a). Petitioner does not contend that the application of Sections 867a(a) and 1259(1) to the unusual circumstances of this case is a question that independently warrants this Court's review. Instead, the presence of that threshold jurisdictional obstacle further counsels against granting review on the first question presented. The Court should deny the petition for a writ of certiorari, at which point petitioner may return to federal district court and have his habeas petition adjudicated without further procedural delay.

1. Even if this Court had jurisdiction to consider it, petitioner's contention that the CAAF should have addressed the merits of the claims in his coram nobis petition would not warrant further review. Although CAAF erred to the extent it framed one of its alternative holdings in jurisdictional terms, it correctly concluded that a threshold obstacle bars coram nobis relief where, as here, the servicemember has the ability to file a habeas petition in Article III court. That conclusion follows directly from this Court's decision in Denedo and does not conflict with any decision of another court of appeals.

a. The All Writs Act provides that "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). The writs authorized include the writ of error coram nobis, "an ancient common-law remedy" that was originally "designed 'to correct errors of fact.'" Denedo, 556 U.S. at 910 (quoting United States v. Morgan, 346 U.S. 502, 507 (1954)). Although "the precise contours of coram nobis have not been 'well defined,'" this Court has concluded that the "modern iteration" of the writ is "broader than its common-law predecessor" and that it may in some circumstances be used to correct a "fundamental error" in an otherwise-final conviction. Id. at 911 (citation omitted).

This Court has instructed, however, that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through th[e] extraordinary remedy" of coram nobis "only under circumstances compelling such action to achieve justice." Morgan, 346 U.S. at 511; see Denedo, 556 U.S. at 911. The Court has also emphasized that coram nobis is potentially appropriate only where "no other remedy [is] available." Morgan, 346 U.S. at 512; see Denedo, 556 U.S. at 911, 917.

In light of that limitation, this Court has long cautioned that the availability of habeas relief and other statutory mechanisms for post-conviction review makes it "difficult to conceive of a situation in a federal criminal case * * * where a writ of coram nobis would be necessary or appropriate." Carlisle v. United States, 517 U.S. 416, 429 (1996) (quoting United States v. Smith, 331 U.S. 469, 475 n.4 (1947)) (brackets omitted). The one exception the Court has identified is that coram nobis may provide a remedy for a person "who is no longer 'in custody' and therefore cannot seek habeas relief." Chaidez v. United States, 568 U.S. 342, 345 n.1 (2013); see 28 U.S.C. 2241(c) (limiting habeas relief to persons who are "in custody"); 28 U.S.C. 2255(a) (same). In Morgan, for example, the Court allowed a federal criminal defendant who had already served his sentence to

challenge his uncounseled conviction by seeking a writ of coram nobis. 346 U.S. at 503-504, 512.

b. As courts "established by Act of Congress," 28 U.S.C. 1651(a), "military courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act," Denedo, 556 U.S. at 911. But "[t]he authority to issue a writ under the All Writs Act is not a font of jurisdiction," which must instead derive from some other source. Id. at 914. In Denedo, this Court resolved what had previously been an open question and held for the first time that a military appellate court like the Army CCA "has jurisdiction to entertain a petition for a writ of error coram nobis to challenge its earlier, and final, decision affirming a criminal conviction." Id. at 906.

Like Morgan, Denedo involved a coram nobis petition filed by a previously convicted defendant who had already served his sentence, but who was continuing to suffer collateral consequences -- there, the prospect of removal from the United States. Denedo, 556 U.S. at 907-908. This Court concluded that "an application for the writ [of coram nobis] is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." Id. at 913. Based on that understanding, the Court held that the military court's "jurisdiction to hear an appeal of [the original] judgment of conviction" under 10 U.S.C. 866 was "sufficient to permit [it] to entertain [a] petition for

coram nobis" challenging the conviction even after it had become final. Denedo, 556 U.S. at 914.

In holding that the military appellate courts have subject-matter jurisdiction to consider coram nobis petitions, however, this Court took care to reiterate the established limits on coram nobis relief. The Court emphasized that "judgment finality is not to be lightly cast aside" and that military courts therefore "must be cautious so that the extraordinary remedy of coram nobis issues only in extreme cases." Denedo, 556 U.S. at 916. And the Court twice directed that coram nobis relief "may not issue when alternative remedies, such as habeas corpus, are available." Id. at 911; see id. at 917 (coram nobis is potentially appropriate only if, as in Denedo, "other judicial processes for correction are unavailable").

c. Petitioner does not and could not dispute that "[h]e has a remedy other than coram nobis" by which to challenge his court-martial convictions and sentence -- "namely, a writ of habeas corpus in the Article III courts." Pet. App. A3. And as the CAAF held, in language drawn directly from this Court's decision in Denedo, petitioner's acknowledged ability to file a habeas petition disqualifies him from coram nobis relief because "an extraordinary remedy such as coram nobis may not issue when alternative remedies, such as habeas corpus, are available." Ibid. (quoting Denedo, 556 U.S. at 911) (brackets omitted). That

merits holding is correct, and it fully supported -- indeed, compelled -- the CAAF's denial of relief.

d. Petitioner identifies no sound reason to question the CAAF's conclusion that he is not entitled to coram nobis relief.

i. Petitioner first contends (Pet. 11-13) that the CAAF erred to the extent that it held that it lacked subject-matter jurisdiction. Pet. App. A2-A3. The government agrees. Although this Court did not squarely address the issue in Denedo, the logic of the Court's decision suggests that the bar on coram nobis relief when other remedies are available is a "merits question" that "speaks to the scope of the writ, not the [military courts'] jurisdiction to issue it." 556 U.S. at 916-917. The government has thus never argued in this case that the Army CCA and the CAAF lacked jurisdiction to entertain petitioner's coram nobis petition.

The CAAF's erroneous framing of its initial holding in jurisdictional terms does not, however, warrant this Court's review. It did not affect the outcome in this case, because the CAAF held, in the alternative, that "[e]ven assuming that [it] ha[d] jurisdiction," the availability of habeas means that petitioner "fail[ed] to show that he is entitled to extraordinary relief." Pet. App. A3. And, contrary to petitioner's assertion (Pet. 13), the CAAF's conclusion about its jurisdiction in this case does not indicate that the CAAF is "unwilling to abide by[]

this Court's holding in Denedo." The CAAF did not purport to hold that the military courts lack jurisdiction to entertain a coram nobis petition where, as in Denedo, the servicemember has been released from custody and thus cannot seek habeas relief. To the contrary, the CAAF limited its jurisdictional holding to "a capital case that is final for all purposes under the UCMJ," Pet. App. A3 (emphasis added) -- a circumstance in which, by definition, the servicemember remains in custody. And although the government believes that the rule barring coram nobis relief in such circumstances is properly characterized as a merits issue rather than a matter of jurisdiction, petitioner has not shown that the CAAF's framing of the rule in jurisdictional terms will have any practical effect.

ii. Petitioner also asserts (Pet. 13-17) that the CAAF erred in holding, on the merits, that his ability to file a habeas petition in federal district court forecloses his request for coram nobis relief. But petitioner provides no sound reason to depart from this Court's unambiguous instruction that in the military courts, as in their civilian counterparts, an extraordinary writ of error coram nobis "may not issue when alternative remedies, such as habeas corpus, are available." Denedo, 556 U.S. at 911; see Morgan, 346 U.S. at 512.

First, petitioner contends (Pet. 14) that the military courts rather than the Article III courts should hear collateral

challenges to court-martial convictions because "Congress intended the UCMJ to establish a self-sufficient, self-correcting, uniform military justice system." But the statutory scheme and this Court's decisions indicate that Congress in fact intended for Article III courts to provide the primary forum for postconviction challenges to the final judgments of military courts-martial. Congress did not provide any statutory mechanism for the military courts to entertain collateral attacks,[5] presumably because when Congress enacted the UCMJ and created military appellate courts in 1950, writs of habeas corpus in the Article III courts were already the well-established mechanism for collateral review of court-martial convictions. See, e.g., Wales v. Whitney, 114 U.S. 564, 575 (1885); Ex parte Reed, 100 U.S. 13, 23 (1879); see also William Winthrop, Military Law and Precedents 52 (2d ed. 1920) ("[I]n our U.S. Courts, similarly as in the English tribunals, the writ of habeas corpus may be availed of by a prisoner claiming to be illegally detained under trial or sentence of court-martial."). And shortly after the UCMJ was enacted, this Court specifically concluded that Congress had not

[5] The UCMJ allows a convicted servicemember to file a petition for a new trial within two years after his conviction "on the grounds of newly discovered evidence or fraud on the court." 10 U.S.C. 873. If the servicemember's appeal is still pending in a military appellate court, the petition goes to that court. Ibid. Otherwise, the petition goes to the relevant Judge Advocate General. Ibid.

intended to displace the traditional mechanism of Article III habeas review, "which has been exercised from the beginning." Gusik v. Schilder, 340 U.S. 128, 132-133 (1950). The Article III courts have thus continued to entertain collateral challenges to court-martial convictions in the decades since the UCMJ was enacted, and this Court has recognized that "[h]abeas corpus proceedings" in the Article III courts "have been and remain by far the most common form of collateral attack on court-martial judgments." Schlesinger v. Councilman, 420 U.S. 738, 747 (1975).[6]

It is one thing to conclude, as this Court did in Denedo, that despite the absence of express authorization in the UCMJ, military courts may invoke the All Writs Act to grant coram nobis relief in "rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable." 556 U.S. at 917 (emphasis added). But it is an altogether different matter to assert, as petitioner does, that extra-statutory petitions for extraordinary writs of error coram nobis should be the principal mechanism for collateral challenges to court-martial convictions even where, as here, the ordinary mechanism of Article III habeas review is available under 28 U.S.C. 2241. Petitioner

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[6] See, e.g., Brimeyer v. Nelson, 712 Fed. Appx. 732, 734-735 (10th Cir. 2017); Burke v. Nelson, 684 Fed. Appx. 676, 677-678 (10th Cir. 2017); Ehlers v. Wilson, 667 Fed. Appx. 572, 572 (8th Cir. 2016); Narula v. Yakubisin, 650 Fed. Appx. 337, 338 (9th Cir. 2016).

identifies nothing in the UCMJ suggesting that Congress intended such a "marked" "break with history." Gusik, 340 U.S. at 133.

Second, petitioner observes (Pet. 15-17) that this Court has instructed that servicemembers generally must exhaust available military remedies before seeking habeas relief. But the decisions on which he relies (Pet. 15) did not require resort to extraordinary remedies like coram nobis. Instead, they held that the federal courts should not intervene where a servicemember has an ordinary remedy available in the military system, such as a "petition for a new trial" under the UCMJ, Gusik, 340 U.S. at 131, or the ability to seek an order requiring his release during the pendency of his direct appeal, Noyd v. Bond, 395 U.S. 683, 695 & n.7 (1969). The Court has thus explained that the exhaustion rule requires only that a servicemember exhaust the "avenues provided under the UCMJ to seek relief from his conviction." Clinton v. Goldsmith, 526 U.S. 529, 537 n.11 (1999) (emphasis added). Once he does so, he "is entitled to bring a habeas corpus petition." Ibid.

Relatedly, petitioner is wrong to assert (Pet. 16 n.8) that the government previously urged the district court to dismiss his habeas petition so that he could pursue coram nobis relief. The government did observe that petitioner had failed to raise some of his claims in the military courts on direct appeal. See, e.g., D. Ct. Doc. 20, at 23-25, 163-164. But the government did not

argue that petitioner should therefore be permitted to return to the military courts to raise the defaulted claims in a coram nobis petition. Instead, the government argued, consistent with established habeas law, that the defaulted claims were "waived" because petitioner could not establish "cause and actual prejudice excusing the[] procedural default." Id. at 23 (citing Roberts v. Callahan, 321 F.3d 994, 995 (10th Cir.), cert. denied, 540 U.S. 973 (2003)) (emphasis omitted); see generally Coleman v. Thompson, 501 U.S. 722, 746-751 (1991).

Indeed, when petitioner asked the district court to dismiss his habeas petition without prejudice to allow him to pursue coram nobis relief, the government opposed that disposition. Consistent with its current position (and with the CAAF's ultimate holding), the government argued that "[w]here other remedies, such as habeas corpus, are available, coram nobis is not appropriate." D. Ct. Doc. 107, at 4 (June 24, 2016). The government thus argued that petitioner's ability to request habeas relief in the Article III courts meant that his anticipated coram nobis petition would "seek a form of relief the military court is legally unable to provide." Ibid.; see id. at 5 (arguing that the availability of habeas relief meant that petitioner could not "meet the threshold requirements of a coram nobis petition"). Petitioner identifies no authority suggesting that an extraordinary writ of error coram nobis may be sought as a special method of obviating any procedural

bars that would otherwise apply to the assertion of forfeited claims in a habeas petition. See Matus-Leva v. United States, 287 F.3d 758, 761 (9th Cir.) ("A petitioner may not resort to coram nobis merely because he has failed to meet the * * * gatekeeping requirements [for habeas relief]."), cert. denied, 537 U.S. 1022 (2002).

Finally, petitioner asserts (Pet. 17) that the unavailability of coram nobis relief in military courts will encourage court-martial defendants to strategically "withhold" claims during their direct appeals and then "present them, post-finality, to the Article III courts." But petitioner does not explain why that is so. In fact, the established rules governing habeas review deter such sandbagging by providing that "if a ground for relief was not raised in the military courts, then the district court must deem that ground waived" unless the petitioner can demonstrate "cause and actual prejudice" excusing the default. Roberts, 321 F.3d at 995. Petitioner's preferred approach, on the other hand, would limit the incentive of servicemembers to properly present claims on direct review by providing another bite at the apple in the military courts after a conviction is already final, and a way to circumvent the preservation principles that normally apply to requests for habeas relief.

e. The CAAF's conclusion that petitioner's custodial status precludes coram nobis relief is consistent with the uniform

holdings of the courts of appeals in the civilian context. Like the CAAF, those courts "have consistently barred individuals in custody from seeking a writ of error coram nobis." Matus-Leva, 287 F.3d at 761 (9th Cir.); accord Williams v. United States, 858 F.3d 708, 714 (1st Cir. 2017); United States v. Kovacs, 744 F.3d 44, 49 (2d Cir. 2014); Mendoza v. United States, 690 F.3d 157, 159 (3d Cir. 2012), cert. denied, 568 U.S. 1193 (2013); United States v. Swaby, 855 F.3d 233, 238-239 (4th Cir. 2017); United States v. Hatten, 167 F.3d 884, 887 n.6 (5th Cir. 1999); United States v. Sandles, 469 F.3d 508, 517 (6th Cir. 2006), cert. denied, 552 U.S. 983 (2007); Clarke v. United States, 703 F.3d 1098, 1101-1102 (7th Cir. 2013); Baranski v. United States, 880 F.3d 951, 956 (8th Cir. 2018); United States v. Torres, 282 F.3d 1241, 1245 (10th Cir. 2002); United States v. Garcia, 181 F.3d 1274, 1274-1275 (11th Cir. 1999).

Petitioner asserts (Pet. 9) that the CAAF's decision conflicts with he calls a "predominant Article III court practice" of requiring servicemembers to seek coram nobis relief in the military system before pursuing habeas relief in federal district court. But as evidence of that "predominant" practice, petitioner cites (ibid.) just three unpublished district court decisions. Even if his characterization of those decisions were accurate, a conflict between the CAAF and those nonprecedential decisions would not warrant this Court's review. See Sup. Ct. R. 10.

In any event, the decisions on which petitioner relies do not support his characterization. In two of them, the former servicemember was no longer in custody and thus could not have sought habeas relief. See Tatum v. United States, No. 06-cv-2307, 2007 WL 2315275, at *1-*2 (D. Md. Aug. 7, 2007) (former servicemember finished serving his sentence in 1992 but did not file his challenge until 2005); MacLean v. United States, No. 02-cv-2250, 2003 U.S. Dist. LEXIS 27219, at *1-*4 (S.D. Cal. June 5, 2003) (former servicemember challenged his 1992 conviction in 2002, long after the completion of his 40-month sentence). Those decisions thus did not address the question presented here. And although the third decision cited by petitioner did involve a servicemember who was still in custody, the court emphasized that it was "express[ing] no opinion" on whether the military courts should entertain a petition for coram nobis under those circumstances. Piotrowski v. Commandant, No. 08-cv-3143, 2009 WL 5171780, at *13 (D. Kan. Dec. 22, 2009). Instead, the court dismissed the habeas petition without prejudice because the court was uncertain whether the military courts would entertain a request for coram nobis relief. Ibid. That disposition does not conflict with the CAAF's decision in this case, which simply

eliminated the uncertainty that the district court in that case perceived.[7]

2. Petitioner separately contends (Pet. i, 17-28) that this Court has jurisdiction to review the CAAF's order under 28 U.S.C. 1259(1). In fact, the Court lacks jurisdiction. And because the application of Section 1259(1) to the unusual circumstances of this case is not a question that independently warrants this Court's review, the presence of that threshold jurisdictional obstacle provides further reason to deny the petition for a writ of certiorari. The Court should also reject petitioner's

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[7] That uncertainty did not, in fact, exist. Even before the CAAF's decision in this case, it had unambiguously held that coram nobis relief is permitted only if "no remedy other than coram nobis is available" -- and thus that coram nobis relief is not appropriate unless "the sentence has been served" and the petitioner has been released from custody. Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008), aff'd, 556 U.S. 904 (2009). Petitioner therefore errs in asserting (Pet. 16) that the decision below departs from a "traditional[]" military-court practice of entertaining coram nobis petitions filed by servicemembers who remain in custody. Petitioner cites a few cases in which military courts considered coram nobis petitions without expressly addressing the effect of the servicemember's custodial status. See Garrett v. Lowe, 39 M.J. 293 (C.M.A. 1994); Fisher v. Commander, 56 M.J. 691, 695 (N.M. Ct. Crim. App. 2001); Nkosi v. Lowe, No. 94-03, 1994 WL 175766, at *1 (A.F.C.M.R. 1994). But the CAAF specifically rejected that approach more than a decade ago, "declin[ing] to follow Garrett and perpetuate the life of a writ of coram nobis where the petitioner is 'in custody.'" Loving v. United States, 62 M.J. 235, 256 (2005).

alternative request for a writ of mandamus because this case does not satisfy the requirements for such relief.[8]

a. Section 1259(1) provides that this Court has jurisdiction to review the CAAF's decisions in "[c]ases reviewed by the [CAAF] under [10 U.S.C.] 867(a)(1)." Section 867(a)(1), in turn, provides that the CAAF "shall review the record in * * * all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." This Court lacks jurisdiction under Section 1259(1) because this not a case "reviewed by the [CAAF] under [S]ection 867(a)(1)." 28 U.S.C. 1259(1).

After the Army CCA denied his petition for a writ of error coram nobis, petitioner purported to invoke the CAAF's mandatory jurisdiction under Section 867(a)(1). Pet. App. A8. But the CAAF did not accept that characterization, and instead construed petitioner's filing "as a writ-appeal petition" seeking discretionary review of the Army CCA's decision under 10 U.S.C. 867(a)(3). Pet. App. A8. That construction was consistent with

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[8] In United States v. Dalmazzi, No. 16-691 (argued Jan. 16, 2018), this Court is considering whether it has jurisdiction under 28 U.S.C. 1259(3) in a case in which the CAAF initially granted a petition for review, but then vacated the grant and denied the petition. The Court's resolution of that question is unlikely to affect the distinct jurisdictional question presented here. And in any event, because that question relates only to this Court's jurisdiction, and not to any issued decided by the CAAF, this Court's forthcoming decision in Dalmazzi would not provide any basis for a remand to the CAAF in this case. The Court thus has no reason to hold the petition for a writ of certiorari in this case pending its decision in Dalmazzi.

the CAAF's rules, which provide that a request for review of "the decision of a Court of Criminal Appeals on a petition for extraordinary relief" should take the form of a discretionary "writ-appeal petition." CAAF R. 4(b)(2). The CAAF then declined to grant discretionary review and instead "dismissed" petitioner's writ-appeal petition. Pet. App. A3.

The CAAF's denial of a petition for discretionary review under Section 867(a)(3) is not within this Court's jurisdiction under Section 1259(1). It is also not within the jurisdiction conferred by the rest of Section 1259, which reaches only cases certified to the CAAF by a Judge Advocate General, cases in which the CAAF "granted a petition for [discretionary] review," and other cases in which the CAAF "granted relief." 28 U.S.C. 1259(2)-(4). Congress has, moreover, expressly directed that this Court "may not review by a writ of certiorari * * * any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a). The plain language of that statute unambiguously bars review here, because petitioner asks this Court to review an order of the CAAF in which that court "dismissed" -- that is, "refus[ed] to grant" -- a writ-appeal petition for review. Pet. App. A3.

b. Petitioner contends (Pet. 17-26) that this Court has jurisdiction under Section 1259(1) because the CAAF should have treated this case as falling within its mandatory jurisdiction

under Section 867(a). But the natural reading of Section 1259(1) is that this Court's jurisdiction turns on what the CAAF did, not on what the servicemember contends that it should have done. The statute grants this Court jurisdiction to review the CAAF's decisions in "[c]ases reviewed by the [CAAF] under [S]ection 867(a)(1)." 28 U.S.C. 1259(1) (emphasis added). Petitioner does not and could not contend that the decision below "reviewed" his case under Section 867(a)(1) -- to the contrary, the CAAF expressly declined to do so. Pet. App. A8.

In any event, this is not a case that the CAAF was required to review under Section 867(a)(1). Section 867(a)(1) provides that the CAAF "shall review the record in * * * all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." Consistent with that direction, the CAAF conducted a "mandatory review pursuant to [Section] 867(a)(1)" nearly two decades ago, after the ACMR affirmed petitioner's convictions and death sentence on direct appeal. 51 M.J. at 10. But the Army CCA decision under review here did not affirm petitioner's convictions and sentence -- instead, it denied a petition for an extraordinary writ of error coram nobis. Pet. App. A33.

Petitioner contends (Pet. 18-19) that because this Court has described a request for coram nobis relief as "a belated extension of the original proceeding during which the error allegedly

transpired," Denedo, 556 U.S. at 913, the present litigation on his petition for a writ of error coram nobis is still part of a "case[] in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." Although the word "case" can sometimes be used to refer to all proceedings related to a criminal prosecution, including every appeal and post-conviction filing, that is not how Congress used the word in Section 867(a). Congress provided that the CAAF "shall review the record" in three categories of "cases":

> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the [CAAF] for review; and
>
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and upon good cause shown, the [CAAF] has granted a review.

10 U.S.C. 867(a). In each of those paragraphs, the context makes clear that the term "case[]" refers not to the entire criminal proceeding, including previous appeals, but instead to the specific "case[]" that was before the Court of Criminal Appeals and that the CAAF is being asked to review. Cf. Hohn v. United States, 524 U.S. 236, 241 (1998) (finding "little doubt that [an] application for a certificate of appealability" qualifies as a "case in [a] court[] of appeals" under 28 U.S.C. 1254(1) even though it is only one part of a larger proceeding).

Any other reading would produce anomalous results. It would mean, for example, that once the CAAF granted a petition for discretionary review at one stage of a court-martial proceeding, it would be compelled to review any future decision by the Court of Criminal Appeals following a remand -- as well as any subsequent decision on a petition for extraordinary relief -- because the entire proceeding would forever after be a "case[] * * * in which * * * the [CAAF] has granted a review" under Section 867(a)(3). The same would be true in any proceeding in which a Judge Advocate General at any point sought the CAAF's review under Section 867(a)(2).

Petitioner provides no sound reason to read Section 867(a) to mandate such an odd regime. The legislative history on which he relies (Pet. 19-20) confirms that Section 867(a)(1) requires the CAAF to review the record in every capital case on direct appeal -- that is, in every case in which "the sentence, as affirmed by a Court of Criminal Appeals, extends to death." 10 U.S.C. 867(a)(1). But those sources do not support petitioner's assertion that Congress intended Section 867(a)(1) to mandate CAAF review of a potentially unlimited number of subsequent petitions for extraordinary relief. And the CAAF's rules reject that understanding, classifying all review of decisions on petitions for extraordinary relief as "discretion[ary]." CAAF R. 4(b)(2). To the extent that the proper interpretation of Section 867(a)(1)

might be in doubt, the CAAF's judgment on that military-specific question is entitled to "great deference." Middendorf v. Henry, 425 U.S. 25, 43 (1976).[9]

c. Petitioner also contends (Pet. 26), in the alternative, that if this Court lacks jurisdiction under Section 1259(1), it should "issue a writ of mandamus to compel" the CAAF to exercise its purported "mandatory jurisdiction under [Section] 867(a)(1)." This Court has authority under the All Writs Act to issue a writ of mandamus when such relief is "necessary or appropriate in aid of" its jurisdiction. 28 U.S.C. 1651(a). That authority extends to the issuance of writs of mandamus to the CAAF when "necessary or appropriate" in aid of this Court's jurisdiction under Section

[9] Petitioner errs in asserting (Pet. 20-22) that three of the CAAF's prior decisions support his assertion that Section 867(a)(1) mandates CAAF review of all court of criminal appeals decisions on petitions for extraordinary relief in capital cases. In fact, the decision on which petitioner principally relies took the opposite view, expressly recognizing that the question whether to entertain a request for coram nobis relief in a capital case "is a matter within [the CAAF's] discretion." Loving, 62 M.J. at 257. The other two decisions on which petitioner relies were non-capital cases that did not cite Section 867(a)(1) and instead simply recognized that the CAAF has discretionary jurisdiction to review decisions on petitions for extraordinary writs. See United States v. Lopez de Victoria, 66 M.J. 67, 70 (C.A.A.F. 2008); United States v. Caprio, 12 M.J. 30, 31 (C.M.A. 1981). Petitioner's reliance (Pet. 22-24) on Denedo and other decisions in which the military courts have entertained petitions for extraordinary writs is misplaced for the same reasons: None of those decisions support his assertion that this case fell within the CAAF's mandatory jurisdiction under Section 867(a)(1) rather than its discretionary jurisdiction under Section 867(a)(3).

1259. The availability of such relief refutes petitioner's suggestion (Pet. 25-26) that the CAAF could "circumvent" this Court's supervision by manipulating its characterization of matters before it to evade review under Section 1259. Here, however, petitioner cannot satisfy the threshold requirements for mandamus relief.

A writ of mandamus is warranted only if, among other things, "the writ is appropriate under the circumstances." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (quoting Cheney v. United States Dist. Court, 542 U.S. 367, 380-381 (2004)). A writ of mandamus to compel the CAAF to review this case under Section 867(a)(1) would not be appropriate here because the CAAF has already made clear, in its order denying discretionary review, that petitioner's undisputed ability to file a habeas petition disqualifies him from coram nobis relief. That conclusion was correct and would not warrant this Court's review even if this case were within the Court's jurisdiction under Section 1259. See pp. 14-27, supra. In addition, the CAAF's conclusion that petitioner's coram nobis petition fell outside its mandatory jurisdiction under Section 867(a)(1) was not error at all, see pp. 28-33, supra -- much less a "clear and indisputable" error warranting mandamus relief. Cheney, 542 U.S. at 381 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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