OCTOBER TERM 2017

No. 17-7769

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

-- CAPITAL CASE --

JONATHAN JEFFRESS
KaiserDillon PLLC
1401 K Street, NW #600
Washington, DC 20005
jjeffress@kaiserdillon.com
(202) 640-4430

TIMOTHY KANE*
SHAWN NOLAN
Federal Community Defender for the
Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Timothy_Kane@fd.org
Shawn_Nolan@fd.org
(215) 928-0520

*Counsel of Record & Member of the
Bar of the United States Supreme Court

Dated: May 31, 2018

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Petitioner Ronald Gray respectfully files this reply in support of his Petition for Writ of Certiorari or Mandamus and prays that this Court review the decision of the Court of Appeals for the Armed Forces (CAAF), which held that it lacked jurisdiction over Petitioner's post-finality claims for relief and indicated that it would decline to review such claims in all cases.

ARGUMENT

The government does not dispute that the Court's resolution of this petition will determine whether Article I military or Article III civil courts will be principally responsible for adjudicating military prisoners' post-finality claims of constitutional error. Instead, the government simply argues that Article III courts should decide all such claims, and that the Court should sanction this scheme without merits review.

To support its argument, the government advocates an unprecedented extension of the alternative-remedy rule—a prudential limit to coram nobis relief that has previously been applied only when choosing among modes of post-conviction review within one court system—into a blanket fiat that overrides, and disregards the bedrock purposes of, the exhaustion rule. This approach, as discussed below, would undercut longstanding precedent, tradition, and legislation establishing the scope and purpose of exhaustion. The government articulates no persuasive rationale for a scheme in which military courts alone among criminal court systems would cease policing their own errors at the conclusion of direct appeal. And the government offers only the tersest of counter-arguments to the petition's evidence from Congressional history and traditional military court practice that weighs strongly in favor of fidelity to exhaustion and thus to the prevailing scheme in which courts police their own errors arising during or after direct appeal.

The government advocates a unique scheme for military prisoners despite conceding CAAF's error in holding that it lacks coram nobis jurisdiction in final capital cases—a holding

that will become settled military law if this Court declines review. Further, while acknowledging that CAAF has jurisdiction over "a capital case that is final for all purposes under the UCMJ," Br. for the U.S. in Opp'n (BIO) 19, the government nonetheless asks the Court to disregard Congress's unambiguous command that CAAF's jurisdiction in capital cases is mandatory, not discretionary.

This Court should grant review both to enforce Congress's assignment of mandatory jurisdiction to CAAF in capital cases, and to resolve that military courts appropriately exercise their jurisdiction to conduct coram nobis review of military prisoners' post-appeal claims of constitutional error.

I. The Government's Arguments Favoring Article III Court Review of Military Prisoners' Post-Finality Claims Are Unpersuasive and, in Any Event, Underscore the Need for Merits Review.

The government primarily contends that the rule that coram nobis "may not issue when alternative remedies such as habeas corpus are available . . . resolves this case." BIO 12-13 (internal quotation marks and citation omitted). The government thus defends CAAF's emergent view that, because Article III habeas review is always technically available to military prisoners, military courts will no longer consider their post-finality claims. *See* BIO 14-18, 19-22, 24-27. The government further claims that CAAF's alternative-remedy rule "does not conflict with any decision of another court of appeals." BIO 14.

The fatal flaw in CAAF's and the government's reasoning is their failure to acknowledge that the alternative-remedy rule applies only within a court system—not across separate court systems. *See* Pet. for Writ. of Cert. or Mandamus (Cert. Pet.) 16. The government thus provides citation after citation for the proposition that, "in a federal criminal case," coram nobis is not available to federal prisoners in light of 28 U.S.C. § 2241 and § 2255. *See* BIO 15, 24, 25. The

government does not cite a single case, however, applying the alternative-remedy rule across separate court systems, or weighing the alternative-remedy rule against the exhaustion rule under the "necessary or appropriate" standard of the All Writs Act, 28 U.S.C. § 1651, as this case requires.

Under federal statute, this Court's decisions, and decisions of the courts of appeals, the exhaustion rule trumps the alternative-remedy rule every time. No court system has previously avoided adjudicating coram nobis challenges to its own judgments by pointing to a potential remedy in a separate court system. Quite the opposite, this Court has held that exhaustion of a state court coram nobis remedy is a prerequisite to habeas review in an Article III court. *Ex parte Hawk*, 321 U.S. 114, 118 (1944) (per curiam). The Court explained:

> [The] petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge. . . . Nebraska recognizes and employs the common law writ of error coram nobis which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial. Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted.

Id. at 116 (citation omitted).[1]

The *Hawk* Court thus recognized both the vitality of the alternative-remedy rule—"the common law writ of error coram nobis [may be issued] in circumstances in which habeas corpus will not lie"—and the preeminence of the exhaustion rule over it. *Ibid*. And since *Hawk*, this Court has adopted for military cases the same exhaustion rule it developed in state court cases.

[1] Before this Court's intervention, Hawk's case endured a convoluted procedural history similar to Petitioner's. *See* Curtis R. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 466 n.30 (1960) ("For over twelve years Hawk tried without success to get a hearing in state and federal courts. The former refused habeas corpus and coram nobis relief while the latter relied upon failure to exhaust state remedies.").

Boumediene v. Bush, 553 U.S. 723, 793 (2008) ("[W]e have extended this rule to require defendants in courts-martial to exhaust their military appeals before proceeding with a federal habeas corpus action.") (citing *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) ("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.").

Hawk remains bedrock law. By granting review and relief in cases that originated in state court coram nobis proceedings, despite the availability of federal habeas review, this Court has implicitly reaffirmed the supremacy of the exhaustion rule over the alternative-remedy rule. *See Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961) (granting relief in state coram nobis proceeding before initiation of federal habeas review); *Woods v. Nierstheimer*, 328 U.S. 211, 216-17 (1946) (ruling that federal review would be available "only after a denial of the statutory substitute for the writ of error coram nobis . . . had been affirmed by the Supreme Court of the state."). The courts of appeals recognize the same hierarchy. *See, e.g.*, *Eakes v. Sexton*, 592 F. App'x 422, 430-31 (6th Cir. 2014) (remanding to district court with instructions to vacate denial of and stay federal habeas proceedings to permit petitioner to pursue coram nobis remedy in state court); *Bailey v. Van Cleve*, 488 F.2d 137, 138 (5th Cir. 1973) (per curiam) ("[T]he collateral remedy of coram nobis is presently available to Bailey in state court. . . . Therefore, under 28 U.S.C. § 2254(b) we must reverse the district court's decision [granting habeas relief] and remand this case for Bailey to present his de hors the record claim to the state courts of Alabama without prejudice to his right to return to federal court if his exhaustion of existing state remedies does not afford the relief he seeks."); *Sweet v. Howard*, 155 F.2d 715, 719 (7th Cir. 1946) ("Such a wrong, if committed, can be remedied by the petition for a writ of error coram nobis which the

petitioner has pending in the courts of Indiana. It is therefore apparent that the petitioner has not exhausted his remedies provided by the law of Indiana. This he must do before we can consider him entitled to relief on a petition of habeas corpus in a federal court."). The government's assertion that CAAF's ruling "is consistent with the uniform holdings" of the federal courts, BIO 24-25, overlooks the long line of cases pertinent here.

Further, Congress expressly incorporated *Hawk* into the federal exhaustion rule of 28 U.S.C. § 2254(b). *Felker v. Turpin*, 518 U.S. 651, 662 n.4 (1996) (explaining that § 2254's "reviser's notes, citing *Ex parte Hawk*, 321 U.S. 114, . . . indicated that 'this new section is declaratory of existing law as affirmed by the Supreme Court'" (brackets omitted)). And this Court has recognized that statutory restrictions on Article III court habeas review—like the common law exhaustion rule, *see supra*—apply regardless of the specific type of collateral review that other court systems employ. *See Duncan v. Walker*, 533 U.S. 167, 177 (2001) (recognizing "the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction," and suggesting that Congress intended federal habeas restrictions to apply "to all types of state collateral review available after a conviction and not just to those denominated 'post-conviction' in the parlance of a particular jurisdiction").[2] For example, state coram nobis proceedings toll the federal habeas statute under § 2244(d)(2). *See, e.g.*, *Ramirez v. Yates*, 571 F.3d 993, 999 (9th Cir. 2009); *Clark v. Stinson*,

[2] *See generally Darr v. Burford*, 339 U.S. 200, 230 (1950) (Frankfurter, J., dissenting) ("[A]ccording to the procedure of one State a constitutional issue . . . must be raised by habeas corpus, not coram nobis, while in another State only coram nobis is available, not habeas corpus"); Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 6.1 (7th ed. 2016) ("A wide variety of statutory and common law postconviction remedies is available in the States, including the common law writs of habeas corpus and of error coram nobis, various writs of error, motions to recall the remittitur, motions for new trial and for review or reduction of sentence, and modern 'post-conviction hearing' statutes.").

214 F.3d 315, 319 (2d Cir. 2000). This practice obviously presumes that federal habeas review, despite providing an "alternative remedy," properly follows state coram nobis proceedings.

In short, where the only alternative to coram nobis review exists in a separate court system, the alternative-remedy rule must give way to the exhaustion rule. None of the cases cited by the government, *see* BIO 15, 24-25, contradict this conclusion; none of the cases even involve exhaustion. Rather, the government cites only federal criminal cases in which coram nobis was considered in light of other "more usual" remedies within the Article III court system. *Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002) (recognizing that coram nobis is unavailable where 28 U.S.C. § 2255 applies).[3] And while it is true that, in federal criminal cases, "coram nobis may provide a remedy [only] for a person 'who is no longer "in custody" and therefore cannot seek habeas relief,'" BIO 15 (quoting *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013)), the military courts, unlike Article III civil courts, lack jurisdiction to conduct habeas review in final cases, regardless of whether a petitioner is in custody. *See Loving v. United S*tates, 62 M.J. 235, 246 (CAAF 2005); *Chapman v. United States*, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016); *Gray v. Belcher*, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012). Coram nobis review is therefore the "remedy of last resort," *Williams v. United States*, 858 F.3d 708, 714 (1st Cir. 2017), in final cases in the military court system.

[3] *See also Carlisle v. United States*, 517 U.S. 416, 429 (1996) (coram nobis not available where Federal Rule of Criminal Procedure 29 governs); *Williams v. United States*, 858 F.3d 708, 714 (1st Cir. 2017) (coram nobis review appropriate where it was "remedy of last resort"); *United States v. Kovacs*, 744 F.3d 44, 49, 54 (2d Cir. 2014) (similar); *Mendoza v. United States*, 690 F.3d 157, 159 (3d Cir. 2012) (coram nobis not available where 28 U.S.C. § 2255 applies), *cert. denied*, 568 U.S. 1193 (2013); *United States v. Swaby*, 855 F.3d 233, 238-39 (4th Cir. 2017) (same); *United States v. Hatten*, 167 F.3d 884, 887 n.6 (5th Cir. 1999) (same); *United States v. Sandles*, 469 F.3d 508, 517-18 (6th Cir. 2006) (same), *cert. denied*, 552 U.S. 983 (2007); *Clarke v. United States*, 703 F.3d 1098, 1101-02 (7th Cir. 2013) (same); *Baranski v. United States*, 880 F.3d 951, 956 (8th Cir. 2018) (same); *United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002) (same); *United States v. Garcia*, 181 F.3d 1274, 1274-75 (11th Cir. 1999) (similar).

Even within court systems, the alternative-remedy limit to coram nobis is not universally embraced. Before being largely replaced by modern statutory post-conviction schemes, coram nobis was the predominant, not residual, mode of collateral review in numerous jurisdictions other than the military. *See* n.2, *supra*. And although the government asserts that CAAF "specifically rejected" this approach "more than a decade ago," BIO 27 n.7 (quoting *Loving*, 62 M.J. at 256), the assertion does not withstand scrutiny. In *Loving*, CAAF ruled that coram nobis is not the appropriate remedy "where the petitioner is 'in custody' *and a writ of habeas corpus is available to Petitioner to present issues to this Court*." 62 M.J. at 256 (emphasis added). But the government quotes only the un-emphasized portion of this ruling, *see* BIO 27 n.7, thus leaving the impression that the *Loving* court adopted the blanket rule at issue here, when in fact it merely applied the alternative-remedy rule in the traditional (intra-court) manner. The government likewise does not address CAAF's acknowledgment that its "coram nobis decisions have involved petitioners both in and out of custody," and that a petitioner's custody had never been "treated as dispositive" in determining the availability of relief. *Loving*, 62 M.J. at 254. In any event, even if the government's characterization were accurate, CAAF's embrace of a blanket, inter-court application of the alternative-remedy rule has still coincided with, and at times engendered, the convoluted progression of this case.[4]

[4] The government also disputes the suggestion of the Army Court of Criminal Appeals that government counsel has taken inconsistent positions during the pendency of this case. BIO 22-23; *see* Cert. Pet. 16 n.8 (quoting A-24). But, by way of example, the government argued previously in the District Court of Kansas that "federal courts are not to entertain habeas petitions by military prisoners until all available military remedies have been exhausted," and "Petitioner could have raised his unexhausted claims in a[n] error coram nobis petition in the military courts prior to his filing a habeas petition with this court in April 2009." Resp't's Resp. in Opp'n to Pet'r's 'Mot. to Stay Proceedings' at 12-13, 16, *Gray v. Belcher*, No. 08-cv-03289 (D. Kan. Feb. 25, 2011). During the first coram nobis proceeding, the government then successfully urged that "military coram nobis review [is] unavailable . . . because . . . Article III

While quoting the alternative-remedy rule seriatim, the government fails to acknowledge the values underlying the exhaustion rule—namely, judicial economy and respect for the independence, uniformity, and uniqueness of military law, *see* Cert. Pet. 14-17—and addresses the rule itself only in a single paragraph where it contends that exhaustion is required only through "an ordinary remedy" or "avenues provided under the UCMJ." BIO 22 (internal quotation marks and emphasis omitted). This contention lacks merit.[5] This Court's precedent does not limit exhaustion to "ordinary" remedies but instead makes clear that "federal courts normally will not entertain habeas petitions by military prisoners unless *all* available military remedies have been exhausted." *Schlesinger*, 420 U.S. at 758 (emphasis added); *accord Noyd v. Bond*, 395 U.S. 683, 693 (1969) ("[H]abeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain."); *Gusik*, 340 U.S. at 131-32 ("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.").

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habeas review provides a sufficient remedy at law for military prisoners." Appellee's Answer to Appellant's Writ-Appeal Pet. at 5, *Gray v. Belcher*, No. 12-8017/AR (CAAF Mar. 12, 2012). Upon return to the district court, the government argued: "The military court may have been mistaken when it thought that the alternative of a federal habeas was available for these unexhausted claims. Since the claims were unexhausted they could not be the subject of a federal habeas petition." Resp't's Resp. to the Ct.'s Mem. and Order at 17, *Gray v. Belcher*, No. 08-cv-03289 (D. Kan. Feb. 17, 2015). Such arguments are at least in tension with each other, and with some of the government's current positions.

[5] The government also suggests that military court review should be foreclosed because the unexhausted claims are "forfeited," BIO at 5, 9, 24, and Petitioner "failed to raise the claims on direct review." BIO 8. Petitioner does not doubt the military courts' authority to enforce rules of forfeiture and default but is aware of no such rule that applies here, and the government identifies none. An appellant cannot on direct appeal "fail" to raise claims based on ineffective assistance of appellate counsel, or on precedent and evidence that arise after the appeal.

Moreover, this Court has specifically held that the UCMJ confers coram nobis jurisdiction to the military courts where, as here, those courts had jurisdiction over the petitioner's direct appeal. *United States v. Denedo*, 556 U.S. 904, 914-15 (2009). CAAF's Rules of Practice and Procedure provide for both appellate and original review of coram nobis petitions. *See* CAAF R. 4(b), 18(b), 27(a), 28. Coram nobis review is thus an available "avenue[] provided under the UCMJ," BIO 22 (emphasis omitted), and the military courts are obligated to undertake such review, as this Court explained in *Denedo*:

> The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments. Under the premises and statutes we have relied upon here, the jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed.

556 U.S. at 917.

Finally, in the face of Petitioner's evidence of Congressional history and intent, *see* Cert. Pet. 14-15, 19-22, the government argues that Congress omitted from the UCMJ a specific "statutory mechanism for the military courts to entertain collateral attacks, presumably because . . . in 1950, writs of habeas corpus in the Article III courts were already the well-established mechanism for collateral review of court-martial convictions." BIO 20 (footnote omitted). This interpretation, in support of which the government cites no legislative history, proves too much; it would undermine even the military courts' routinely-exercised authority to consider extraordinary writs in non-final cases. The interpretation also ignores the legislative history *after* 1950 during which "Congress legislated against a judicial backdrop that already provided for a broad reading of jurisdiction over 'cases' in the extraordinary writ context." *United States v. Lopez de Victoria*, 66 M.J. 67, 70 (CAAF 2008) (citing S. 2521, 97th Cong. § 3(v)(2) (1982));

accord United States v. Caprio, 12 M.J. 30, 31 (C.M.A. 1981). The better interpretation is that Congress, while obviously aware of the potential for habeas review in Article III courts, nonetheless intentionally created a uniform system in which the military courts would police their own errors, including through petitions for collateral relief. *See* Cert. Pet. 20-21.

The weight of precedent and practice strongly favors exhaustion in military court of military prisoners' post-appeal claims. At minimum, the Court should grant review to consider the question on the merits because the systemic effects of CAAF's ruling would be substantial, and an opportunity for the Court to address the issue may not recur for many years to come.

II. The Government's Arguments That CAAF Has Discretionary Jurisdiction over Capital Cases Lack Merit.

CAAF mischaracterized this appeal as discretionary despite 10 U.S.C. § 867(a)(1), which requires CAAF to exercise jurisdiction over affirmed death penalty cases. Under the plain language of § 867, its legislative history, and precedent of this Court and the military courts, CAAF's invocation of discretionary review was error, but that error does not deprive this Court of jurisdiction. Cert. Pet. 17-28.

In response, the government relies on 10 U.S.C. § 867a(a), which precludes certiorari jurisdiction over "any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." *See* BIO 2, 13, 29. This prohibition, however, plainly applies only to requested, not mandatory, appeals.[6] The phrase "petition for review" derives directly from 10 U.S.C. § 867(a)(3), which gives CAAF discretion, "upon petition of the accused," to "grant[] a

[6] In *United States v. Dalmazzi*, No. 16-961 (argued Jan. 16, 2018), the government aptly observed that this prohibition applies only to discretionary CAAF appeals: "When DOD proposed what is now Section 1259, it explained that the statute would 'preclude direct Supreme Court review in cases where the CAAF declined to exercise its discretionary jurisdiction.' 1982 Hearing 39 (William H. Taft, IV, Gen. Counsel, DOD)." Br. for the U.S. at 43 (Dec. 7, 2017) (brackets omitted).

review." But for the reasons already set forth in the petition, this was not a discretionary appeal under § 867(a)(3); CAAF's jurisdiction was mandatory under § 867(a)(1) because Petitioner's "sentence, as affirmed by a Court of Criminal Appeals, extends to death." 10 U.S.C. § 867(a)(1).

Stuck with this language, the government reads illusory limits into § 867. Without grappling with Petitioner's evidence that Congress intended § 867(a) to apply to death penalty "cases" as a class and to encompass matters outside the scope of direct appeal, *see* Cert. Pet. 19-22, the government asserts that the term "all cases" applies only "to the specific 'case' that was before the Court of Criminal Appeals and that the CAAF is being asked to review." BIO 31 (brackets omitted). Yet even this construction does not help the government's cause. The Army Court of Criminal Appeals (ACCA) correctly treated Petitioner's coram nobis petition as "'a step in the criminal case,'" A10 n.2 (quoting *Denedo*, 556 U.S. at 912), and thus reviewed his claims in light of "events from the case's pretrial, trial, and direct appellate history," A12. Such review cannot be distinguished from Petitioner's underlying criminal case, and neither ACCA nor CAAF have suggested it can be.

The government also seizes on the phrase "as affirmed by a Court of Criminal Appeals," 10 U.S.C. § 867(a)(1), to argue that the "decision under review here did not affirm petitioner's convictions and sentence -- instead, it denied a [coram nobis] petition." BIO 30. But read naturally, § 867(a)(1)'s "as affirmed" phrase modifies the "sentence" and at most restricts CAAF's mandatory review to cases, like Petitioner's, where a current death sentence has been affirmed on appeal. This construction acknowledges the established hierarchy of military appeals and exempts from mandatory review those cases where a death sentence was initially

imposed but then vacated or reduced prior to an appeal to CAAF.[7] The government's strained construction, on the other hand, recrafts § 867(a)(1) to cover only "direct appeals from affirmances by a Court of Criminal Appeals in cases in which the sentence extends to death." Congress could have adopted such a limited provision but did not.

In any event, *Denedo* precludes the government's strained constructions of § 867. *Denedo* recognized that a coram nobis proceeding is part of the underlying criminal case and held that the military courts' coram nobis jurisdiction under 10 U.S.C. § 866 and § 867 flows directly from their jurisdiction over the petitioner's direct appeal:

> Because respondent's request for *coram nobis* is simply a further step in his criminal appeal, the NMCCA'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. . . . That jurisdiction is sufficient to permit the NMCCA to entertain respondent's petition for *coram nobis*. . . . Because the NMCCA had jurisdiction over respondent's petition for *coram nobis*, the CAAF had jurisdiction to entertain respondent's appeal from the NMCCA's judgment.

556 U.S. at 914-15 (internal quotation marks, citation, and brackets omitted). As the government acknowledges, *see* BIO 30, CAAF reviewed Petitioner's direct appeal under the mandatory provision of § 867(a)(1). Under *Denedo*, CAAF's jurisdiction over the instant coram nobis petition derived from, and was governed by, the same provision.

The government additionally argues that CAAF's refusal to conduct mandatory review "was consistent with the CAAF's rules," which provide for discretionary review of denials of petitions for extraordinary relief. BIO 28-29 (citing CAAF R. 4(b)(2)); *see also* BIO 32 (same).

[7] This construction and § 867(a)(1)'s requirement that the *present-tense* "sentence . . . extends to death" avoid the "anomalous results" the government posits in which any case that CAAF once reviews would automatically be entitled to serial CAAF review of future decisions by a Court of Criminal Appeals. *See* BIO 32. Similarly, § 867(a)(3)'s provision for discretionary review only "upon petition of the accused and upon good cause shown" plainly requires a separate petition and distinct good cause for each CAAF appeal that arises in the course of a single case.

Rule 4, however, provides multiple bases for CAAF review, the first of which is mandatory review of death penalty cases. CAAF R. 4(a)(1). Rule 4(b)(2) need not be, and has never been, applied as conflicting with and overriding CAAF's duty to exercise mandatory jurisdiction—Rule 4(c) in fact disclaims any such interpretation. *See* CAAF R. 4(c) ("These Rules shall not be construed to extend or to limit the jurisdiction of [CAAF] as established by law."). Indeed, were the government's interpretation of Rule 4(b)(2) correct, it would preclude the Judge Advocate General from initiating mandatory review under § 867(a)(2) in extraordinary writ matters, but CAAF has squarely rejected that view. *See LRM v. Kastenberg*, 72 M.J. 364, 367 (CAAF 2013) (where "the CCA took a final action on a petition for extraordinary relief when it denied LRM's writ-appeal petition . . . , this Court has jurisdiction over the certificate submitted by the JAG pursuant to Article 67(a)(2)"), *superseded by statute on unrelated grounds*, 10 U.S.C. § 806b (2017); *United States v. Curtin*, 44 M.J. 439, 440 (CAAF 1996) ("The definition of 'case' as used within [§ 867(a)(2)] includes a 'final action' by an intermediate appellate court on a petition for extraordinary relief."); *United States v. Redding*, 11 M.J. 100, 104 (C.M.A. 1981) (holding that extraordinary writ proceedings are subject to mandatory review when certified under § 867(a)(2)). CAAF has likewise ruled that the mandatory review provisions of § 867(a)(1) extend to extraordinary writ proceedings in final capital cases. *Loving*, 62 M.J. at 246 n.75 ("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."). Thus, to the extent this Court should defer to CAAF's understanding of its own Rules, as the government urges, *see* BIO 33, CAAF's

decisions in *Loving*, *Curtin*, and related cases warrant such deference whereas its present, unexplained refusal to exercise mandatory review does not.

CAAF's refusal to acknowledge its mandatory jurisdiction finds no support in statute, precedent, or established practice. Because Congress granted this Court certiorari jurisdiction in all cases where CAAF's jurisdiction is mandatory, 28 U.S.C. § 1259(1) and (2), CAAF's erroneous failure to follow this mandate does not undermine this Court's certiorari jurisdiction. Cert. Pet. 24-26. Even if it did, however, mandamus is available and appropriate to correct CAAF's clear error. *Id.* at 26-28.

CONCLUSION

This Court should issue a writ of certiorari or mandamus to decide whether the Article I military courts appropriately review military prisoners' post-finality claims of constitutional error.

Respectfully submitted,

/s/ Timothy Kane
TIMOTHY KANE*
SHAWN NOLAN
Federal Community Defender for the
Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Timothy_Kane@fd.org
Shawn_Nolan@fd.org
Katherine_Ensler@fd.org
(215) 928-0520

JONATHAN JEFFRESS
KaiserDillon PLLC
1401 K St NW #600
Washington, DC 20005
jjeffress@kaiserdillon.com
(202) 640-4430

Counsel for Petitioner

*Counsel of Record & Member of the
Bar of the United States Supreme Court

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PROOF OF SERVICE

I, Timothy Kane, certify that on this 31st day of May, 2018, I caused a copy of the foregoing *Reply in Support of Petition for Writ of Certiorari or Mandamus* to be served by FEDEX overnight delivery, with fees prepaid, upon all parties required to be served under SUP. CT. R. 29, listed below:

Noel Francisco, Solicitor General
John Cronan, Acting Assistant Attorney General
Thomas Booth, Attorney
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

CPT Sam Landes
Branch Chief, Branch IV
Government Appellate Division
9275 Gunston Road
Ft. Belvoir, VA 22060

/s/ Timothy Kane
Timothy Kane