

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

PETITION FOR REHEARING

-- CAPITAL CASE --

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Dated: July 20, 2018

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Pursuant to this Court's Rule 44.2, Petitioner Ronald Gray respectfully petitions for rehearing of the Court's June 28, 2018, order denying certiorari in this case. This petition is filed within 25 days of the Court's order.

The Court's order denying certiorari did not address Petitioner's alternative request for a writ of mandamus. The Court should grant mandamus for the reasons already stated, but in any event should expressly rule on that request to avoid further complicating the posture of this post-conviction capital case. In addition, the Court's decision in *Ortiz v. United States*, 138 S. Ct. 2165 (June 22, 2018), issued after the parties' submissions in this case, supports Petitioner's requests for certiorari and mandamus, as discussed below.

GROUND FOR REHEARING

On July 25, 2017, the Court of Appeals for the Armed Forces (CAAF) refused to exercise mandatory jurisdiction under 10 U.S.C. § 867(a)(1) in this capital coram nobis proceeding. A-8. On November 13, 2017, CAAF held that it lacks "jurisdiction to entertain a request for coram nobis in a case that is final in all respects under the [Uniform Code of Military Justice]." A-2. The court further indicated that it would refuse military court review of post-finality claims by all military prisoners. A-3.

On February 9, 2018, Petitioner filed a Petition for Writ of Certiorari or Mandamus to review CAAF's decision. The petition identified a possible jurisdictional impediment to this Court's certiorari review but argued that, even if the jurisdictional impediment were credited, the Court should issue a writ of mandamus. Pet. for Writ of Cert. or Mandamus 24-28.

This Court's rules do not prohibit a petitioner from requesting such alternative forms of relief; Rule 20.3(a) in fact contemplates that mandamus relief can be sought in conjunction with

other relief. S. Ct. R. 20.3(a) (“A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall . . .”).

In its brief, the government raised objections to this Court’s exercise of certiorari jurisdiction based on arguments that do not apply to the propriety of mandamus relief. *See* Br. for the U.S. in Opp’n (BIO) 27-33. The government separately argued that the prerequisites for mandamus relief are not met in this case. *Id.* at 33-34.

On June 28, 2018, the Court ordered as follows: “The petitions for writs of certiorari are denied.” *Gray v. United States*, No. 17-7769, 585 U.S. _____. The order did not address Petitioner’s request for mandamus relief.

As the parties’ submissions recount in detail, this case has a convoluted procedural history in which the Article III federal courts and Article I military courts have each endeavored to persuade the other court system to review Petitioner’s present claims. *See* Pet. for Writ of Cert. or Mandamus 2-9; BIO 2-12. Future litigation in this case will only be further complicated by a lack of clarity regarding the scope of this Court’s June 28, 2018, order. Accordingly, and for the reasons set forth previously, the Court should issue a writ of mandamus. *See* Pet. for Writ of Cert. or Mandamus 24-28. And if the Court denies mandamus relief, it should do so expressly.

Petitioner further requests rehearing based on this Court’s recent decision in *Ortiz*, 138 S. Ct. 2165, which supports several of Petitioner’s arguments in favor of certiorari or mandamus review. In a nutshell, Petitioner has contended that the rule of exhaustion should apply to military prisoners’ post-finality claims just as it does to state prisoners’ post-finality claims, and that adopting this rule would end in this case—and prevent in future cases—the litigation ping pong between the Article I military and Article III civil courts that has been ongoing for nearly a

decade. Pet. for Writ of Cert. or Mandamus 7-8; Reply Br. 1, 3-6. In support of this contention, Petitioner cited, *inter alia*, authorities indicating Congress's intent to establish a complete, self-correcting military court system similar to state court systems. See Pet. for Writ of Cert. or Mandamus 9-10, 14-15.

Ortiz provides significant support for Petitioner's arguments. This Court recognized that the military court system "closely resembles civilian structures of justice." 138 S. Ct. at 2170 (citations omitted). The Court reaffirmed the symmetry of state court and military court processes, variously characterizing military court proceedings as "replicat[ing] the judicial apparatus found in most States" and as the "functional equivalents of state courts." *Id.* at 2175, 2178 (quotation marks omitted). These characterizations strongly support Petitioner's request to extend the exhaustion rule for state prisoners' post-finality claims to the present military court context.

Ortiz also supports Petitioner's arguments that this Court has certiorari jurisdiction. Relying on *United States v. Denedo*, 556 U.S. 904 (2009), Petitioner has argued that, under 10 U.S.C. § 867, CAAF had mandatory jurisdiction over this coram nobis proceeding because Petitioner is under a sentence of death and because this proceeding is part of the same "case" over which CAAF previously exercised mandatory jurisdiction. Pet. for Writ of Cert. or Mandamus 24-26; Reply Br. 10-12. In *Ortiz*, this Court recognized that "CAAF must review certain weighty cases (*including those in which capital punishment was imposed*), and may grant petitions for review in any others. See § 867." 138 S. Ct. at 2171 (emphasis added). Consistent with Petitioner's arguments here, the Court also employed a broad understanding of the term "cases" for the purpose of determining appellate jurisdiction. See *id.* at 2174 ("Each level of military court decides criminal 'cases' as that term is generally understood . . ."); see also *id.* at

2173 (using the term “case” interchangeably with the term “cause”). And the Court twice cited *Denedo* approvingly. *See id.* at 2171, 2173 n.3. Thus, to the extent that this Court denied certiorari based on doubts about its certiorari jurisdiction, *Ortiz* largely removes such doubt.

CONCLUSION

This Court should grant rehearing and 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,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.



Timothy Kane

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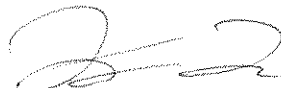
Respondent.

PROOF OF SERVICE

I, Timothy Kane, certify that on this 20th day of July, 2018, I caused a copy of the foregoing *Petition for Rehearing* to be served by FedEx overnight delivery, with fees prepaid, upon all parties required to be served under Sup. Ct. R. 29, listed below:

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