No. _____

IN THE

Supreme Court of the United States

JAMES W. RICHARDS, IV,
Petitioner,

v.

MATTHEW P. DONOVAN,
ACTING SECRETARY OF THE AIR FORCE,

COLONEL BRIAN S. GREENROAD,
COMMANDER, AIR FORCE SECURITY FORCES CENTER,

COLONEL CAROLINE K. HORTON,
COMMANDANT, U.S. DISCIPLINARY BARRACKS,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner submitted a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus to the Air Force Court of Criminal Appeals (AFCCA), seeking redress from the Government's *ex post facto* application of good conduct time confinement credits. The AFCCA determined it had jurisdiction to review the petition under the All Writs Act, 28 U.S.C. § 1651(a). In doing so, the AFCCA declined the Government's request to dismiss due to the Secretary of the Air Force's action to finalize the case, reasoning that the petition had been docketed and fully briefed prior to such finalization. The AFCCA subsequently denied the petition on its merits. Petitioner timely appealed the AFCCA's decision to the Court of Appeals for the Armed Forces (CAAF), which possessed jurisdiction over all cases reviewed by the AFCCA. The CAAF then dismissed the writ-appeal for lack of jurisdiction.

The Question Presented is:

Can the Executive Branch divest an Article I military court of appeals of jurisdiction over an extraordinary writ brought under the All Writs Act, 28 U.S.C. § 1651(a), once jurisdiction has vested under the Uniform Code of Military Justice?

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PETITION FOR A WRIT OF CERTIORARI

Lieutenant Colonel James W. Richards IV respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The CAAF's order denying reconsideration is not reported. It is reproduced in the Appendix at Pet. App. 4a. The CAAF's order dismissing Petitioner's writ-appeal petition is reported at 78 M.J. 323 (C.A.A.F. 2019) and reproduced in the Appendix at Pet. App. 6a. The opinion of the U.S. Air Force Court of Criminal Appeals (AFCCA) denying the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is not reported. It is reproduced in the Appendix at Pet. App. 8a. The CAAF's decision affirming the AFCCA is reported at 76 M.J. 365 (C.A.A.F. 2017) and reproduced in the Appendix at Pet. App. 30a.

JURISDICTION

The CAAF granted review of Petitioner's direct appeal and affirmed the AFCCA on July 13, 2017. Pet. App. 30a. The CAAF entered its judgment regarding the writ-appeal petition on January 31, 2019, Pet. App. 6a, and denied reconsideration on March 1, 2019. Pet. App. 4a. On May 22, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to July 9, 2019.[1] The jurisdiction of this Court rests on 28 U.S.C. § 1259(3).

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[1] Petitioner's request for an extension listed former Secretary of the Air Force Deborah Lee James and former Commandant of the United States Disciplinary Barracks, Colonel D.L. Hinton, as

STATUTORY PROVISIONS INVOLVED

Article 66(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(a) (2016), *Review by Court of Criminal Appeals*, stated in relevant parts:[2]

> Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purposes of reviewing court-martial cases, the court may sit in panels or as a whole . . .

Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016), *Review by Court of Criminal Appeals*, stated:[3]

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as

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Respondents. Both individuals have since ceased in their respective positions and were succeeded by the named Respondents in this petition.

[2] The Military Justice Act of 2016 (MJA 2016) subsequently modified Article 66, UCMJ. *See* National Defense Authorization Act of Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328, div. E, title LIX, § 5330, 130 Stat. 2932. However, the MJA 2016 did not alter the cited language above. *See* Article 66(a), UCMJ, 10 U.S.C. § 866(a) (2019).

[3] The MJA 2016 modified the above cited language; however, the Courts of Criminal Appeals remain limited to acting "only with respect to the findings and sentence," and "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines . . . should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019).

> approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part and amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 67(a), UCMJ, 10 U.S.C. § 867(a) (2016), *Review by the Court of Appeals for the Armed Forces*, stated:[4]

> 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;
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and
>
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon

[4] The MJA 2016 modified Article 67, UCMJ. *See* NDAA 2017, Pub. L. 114-328, div. E, title LIX, § 5331, 130 Stat. 2934. However, the MJA 2016 altered the cited language above only to the extent that certain notification is required prior to certifying a case. Article 67(a), UCMJ, 10 U.S.C. § 867(a) (2019).

> petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted review.

Article 71, UCMJ, 10 U.S.C. § 871 (2016), *Execution of sentence; suspension of sentence*, stated in relevant parts:[5]

> (b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned.
>
> (c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment

[5] The MJA 2016 repealed Article 71, UCMJ. *See* NDAA 2017, Pub. 114-328, div. E, title LXIII, § 5541, 130 Stat. 2967. Much of the above cited language, with some modifications, now appears in Article 57, UCMJ, 10 U.S.C. § 857 (2019). As applicable to this petition, the Secretary of the Air Force must still approve the dismissal of a commissioned officer. *See* Article 57(a)(4), UCMJ, 10 U.S.C. § 857(a)(4) (2019). The completion of appellate review remains largely the same. *See* Article 57(c), UCMJ, 10 U.S.C. § 857(c) (2019).

as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and --

(A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and --

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

Article 76, 10 U.S.C. § 876 (2019), *Finality of proceedings, findings, and sentences*, states:[6]

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

28 U.S.C. §1651(a) (2019), *Writs*, states:

> The Supreme Court and all 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.

[6] The MJA 2016 did not alter Article 76, UCMJ.

STATEMENT OF THE CASE

A. Legal Background

The All Writs Act, 28 U.S.C. § 1651(a), grants military appellate courts the authority to issue extraordinary writs "necessary or appropriate in aid of their respective jurisdictions." *See Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (citing *Noyd v. Bond*, 395 U.S. 683, 695, n.7 (1969)). The Act itself and "the extraordinary relief [it] authorizes are not a source of subject matter jurisdiction." *United States v. Denedo*, 556 U.S. 904, 913 (2009). Rather, a court's power to grant relief "is contingent on that court's subject-matter jurisdiction over the case or controversy." *Id.* at 911. To this end, Congress determines the subject-matter jurisdiction of military appellate courts. *Id.* at 912 (citing *Goldsmith*, 526 U.S. at 533-34).

Article 66(c), UCMJ (hereinafter Article 66(c)), authorized the Service Courts of Criminal Appeals (CCAs) to act only with respect to the findings and sentence of a court-martial.[7] Article 67(a)(3), UCMJ (hereinafter Article 67(a)(3)), granted the CAAF jurisdiction over all cases reviewed by the CCAs. Such cases "include[ ] a final action by an intermediate appellate court on a petition for extraordinary relief." *See Randolph v. HV*, 76 M.J. 27, 30 (C.A.A.F. 2017)

[7] This petition references UCMJ provisions in the past tense due to their application during the pendency of Petitioner's direct and writ appeals, and the MJA 2016's subsequent modifications to the UCMJ. Unless otherwise noted, the delineated authorities from the superceded Articles remain extant under the current UCMJ. *Compare*, *e.g.*, Article 66(c) (2016) *with* Article 66(d)(1) (2019).

(citing *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013) (quoting *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996))).

This Court considered the scope of the All Writs Act in relation to the CAAF's Article 67(a)(3) appellate authority in *Clinton v. Goldsmith*, 526 U.S. 529. In that case, Air Force Major James Goldsmith never challenged his court-martial conviction or sentence, which did not include dismissal. *Id.* at 531-32. Instead, he requested extraordinary relief when the Government sought to drop him from the rolls of the Air Force due to his conviction and sentence. *Id.* at 531-33. The CAAF subsequently "asserted jurisdiction and purported to justify reliance on the All Writs Act in [that] case on the view that 'Congress intended [it] to have broad responsibility with respect to administration of military justice.'" *Id.* at 534 (quoting *Goldsmith v. Clinton*, 48 M.J. 84, 86-87 (C.A.A.F. 1998)). This Court disagreed, however, concluding the CAAF's jurisdiction was statutorily limited to reviewing cases reviewed by the CCAs, "which in turn have jurisdiction to 'review court-martial cases.'" *Id.* at 535 (quoting 10 U.S.C. § 866(a)). This Court then reasoned:

> Since the Air Force's action to drop [Major Goldsmith] from the rolls was an executive action, not a "finding" or "sentence," that was (or could have been) imposed in a court-martial proceeding, the elimination of [Major] Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond

> the "aid" of the All Writs Act in reviewing it.

Id. (citations omitted).

This Court further declined to interpret the All Writs Act as conferring to the CAAF the authority to preserve the integrity of sentences imposed by courts-martial, stating: "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.* at 536. Nevertheless, this Court distinguished the facts in *Goldsmith*, which addressed an action independent from the sentence, with scenarios involving military authorities seeking "to alter a judgment by revising a court-martial finding and sentence to increase punishment." *Id*.

To determine whether a post-trial action qualifies as altering a sentence, this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), is instructive. In *Weaver*, this Court granted a petition for a writ of habeas corpus challenging post-sentencing changes to formulas rewarding prisoners for good conduct with sentence reductions. *Id*. Specifically, this Court found that a Florida statute that altered the availability of "gain time for good conduct" represented an unconstitutional *ex post facto* law when applied to the petitioner, who committed his crime prior to the statute's enactment but who was still subject to the statute's less generous formula for gain-time deductions. *Id*. at 25. In concluding the statute was impermissibly retroactive and disadvantageous to the petitioner, this Court declined to limit its review based on the State's argument that the gain-time provision's predecessor was not technically part of the petitioner's sentence. *Id*. at 31-32. This Court instead

found it sufficient, for *ex post facto* application, that the statute altered the petitioner's "effective sentence" and thus increased his punishment for the crime. *Id.* at 32.

The CAAF has yet to apply *Weaver* to cases involving the application of good conduct credit in military jurisprudence. *Cf. United States v. Orzechowski*, 65 M.J. 538 (N.M. Ct. Crim. App. 2006) (Navy-Marine Corps Court of Criminal Appeals' citing *Weaver* in granting petition for habeas corpus due to the Navy's *ex post facto* application of good conduct time credits). However, the CAAF has similarly found that its jurisdiction under Article 67(a)(3) is not limited to the technical parameters of a prisoner's sentence. For example, in *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007), the CAAF considered a challenge to the Department of Defense's authority to establish certain requirements associated with a Mandatory Supervised Release program. Although noting that the scope of its direct appeal review did "not extend to supervision of all aspects of the confinement and release process," the CAAF explained:

> Our review of post-trial confinement and release conditions on direct appeal is limited to the impact of such conditions on the findings and the sentence. Accordingly, our review in the present appeal focuses on whether the post-trial conditions at issue: (1) constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; (2) *unlawfully increased*

> *Appellant's punishment*; or (3) rendered his guilty plea improvident.

Id. at 264 (emphasis added) (citations omitted). The CAAF has further acknowledged that prisoners – like the petitioner in *Weaver* and Petitioner here – may seek judicial relief for good conduct time disputes through petitions for extraordinary relief. *United States v. Spaustat*, 57 M.J. 256, 263 (C.A.A.F. 2002). In terms of when to file such petitions, determining when a case is "final" has proved critical.

For military cases involving commissioned officers sentenced to dismissal, a case was final only after "there [was] a final judgment as to the legality of the proceedings." Article 71, UCMJ (hereinafter Article 71).[8] This final judgment occurred when the CCA's review was complete and an appellant exhausted (or declined to pursue) his or her direct appeal at the CAAF and this Court. *Id*. Thereupon, the Service Secretary was required to approve the dismissal for the case to become "final and conclusive" under Article 76, UCMJ (hereinafter Article 76).

The CAAF considered the interplay between Articles 71 and 76, and how it affected the court's collateral review jurisdiction, in *Loving v. United States (Loving I)*, 62 M.J. 235 (C.A.A.F. 2005). In that case, Army Private Dwight Loving filed two writs of error coram nobis after the completion of his direct

[8] Article 71 applied during the pendency of Petitioner's appellate proceedings. The Article's finality requirement is now codified in Article 57(c)(2), UCMJ, 10 U.S.C. § 857(c)(2) (2019).

appeal but prior to the approval of his sentence.[9] *Id.* at 236. Following an extensive analysis, the CAAF first concluded that it had collateral review jurisdiction during the period after final judgment under Article 71, but before the case was final pursuant to Article 76.[10] *Id.* at 239-46. However, the CAAF held that Private Loving's writs of coram nobis were improper vehicles for relief, as such writs were only available when a writ of habeas corpus – referred to as "the Great Writ" due to its tremendous scope and flexibility – was otherwise unavailable. *Id.* at 251-56. Finding that the All Writs Act authorized it to entertain a writ of habeas corpus, the CAAF declined to treat Private Loving's "erroneously filed coram nobis petitions simply as petitions for habeas corpus," and instead dismissed the petitions without prejudice to afford Private Loving an opportunity to refile utilizing writs of habeas corpus. *Id.* at 259-60.

Private Loving subsequently accepted the CAAF's invitation and used a single habeas corpus petition to present the exact issues he tried to raise through coram nobis – ineffective assistance of counsel allegations stemming from appellate decisions rendered during the pendency of his appeal. *Loving v. United States (Loving II)*, 64 M.J. 132 (C.A.A.F. 2006). In an opinion concurring with the majority's decision to remand the case for further fact finding, Judge

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[9] Private Loving received a death sentence, which required Presidential approval. *Loving I*, 62 M.J. at 240 (citing Article 71(a), UCMJ).

[10] The CAAF expressly declined to address whether it had "jurisdiction after a case is final under Article 76 [UCMJ]" because that issue was not raised. *Loving I*, 62 M.J. at 245 n. 61.

Effron reiterated a significant point addressed in *Loving I*:

> During the period between final legal review under Article 71(a), UCMJ, and final action under Article 76, UCMJ, a servicemember is required to exhaust his or her remedies under the UCMJ before seeking collateral review in the Article III courts. One of those remedies is a petition to this Court for a writ of habeas corpus under the All Writs Act.

Id. at 154 (Effron, J. concurring) (citations omitted).

The exhaustion requirement cited by Judge Effron is rooted, in part, in this Court's recognition that "the military court system will vindicate servicemen's constitutional rights." *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). This Court has further articulated "the need for 'a substantial degree of civilian deference to the military tribunals.'" *Loving I*, 62 M.J. at 250 (quoting *Noyd*, 395 U.S. at 693-94 (quoting *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950)). Such deference is justified due to "both judicial economy (avoiding needless civilian judicial intervention) and respect for [the CAAF's] expertise in interpreting the technical provisions of the UCMJ." *Id*. (citing *Noyd*, 395 U.S. at 696).

Following the CAAF's decisions in *Loving I* and *Loving II*, this Court considered the force and scope of Article 76 with respect to collateral review jurisdiction in *United States v. Denedo*, 556 U.S. 904. Jacob Denedo was a native Nigerian who served in the U.S. Navy for approximately nine years before he was court-martialed and punitively discharged for his role

in defrauding a community college. *Id*. at 907. Several years after his case was "final and conclusive" under Article 76, Mr. Denedo was notified of the Government's intent to deport him based on his court-martial conviction. *Id*. Mr. Denedo subsequently filed a coram nobis petition with the Navy-Marine Corps Court of Criminal Appeals (NMCCA), contending that his guilty plea was improvident due to his defense counsel's erroneous deportation advice. *Id*.

Finding that Mr. Denedo's allegations challenged the validity of his conviction, this Court held that the NMCCA had jurisdiction to entertain the petition under its authority to act on the "findings and sentence" pursuant to Article 66. *Id*. at 915-16. This Court correspondingly concluded that because the NMCCA had jurisdiction over the petition, the CAAF had jurisdiction "to entertain [Mr. Denedo's] appeal from the NMCCA's judgment." *Id*. at 915.

This Court then considered, and soundly rejected, the Government's contention that the finality provision of Article 76 affirmatively prohibited coram nobis review. *Id*. at 915-16. "Just as the rules of finality did not jurisdictionally bar the court in [*United States v. Morgan*, 346 U.S. 502 (1954)] from examining its earlier judgment, neither does the principle of finality bar the NMCCA from doing so here." 556 U.S. at 916. Thus, this Court reaffirmed its long-standing view that Article 76 served as a prudential constraint on collateral review rather than a jurisdictional limitation. *See Denedo v. United States*, 66 M.J. 114, 120 (C.A.A.F. 2008) (citing *Schlesinger*, 420 U.S. at 745).

In the years following *Denedo*, military appellate courts have increasingly concluded that finality under

Article 76 precludes the availability of extraordinary relief. For example, both the AFCCA and the Army Court of Criminal Appeals have held that habeas corpus petitions may not be reviewed in the military justice system after a case is "final and conclusive." *See*, *e.g.*, *Chapman v. United States*, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016); *Gray v. United States (Gray I)*, 76 M.J. 579, 582 (A. Ct. Crim. App. 2017). The AFCCA has likewise held that Article 76 finality extinguishes its jurisdiction over writs of mandamus and prohibition. *Sutton v. United States*, 78 M.J. 537 (A.F. Ct. Crim. App. 2018). Perhaps most significant, however, has been the CAAF's conclusions regarding corum nobis petitions.

Specialist Ronald Gray, one of just four men on the military's death row, sought corum nobis relief in the military justice system only to be spurned due to his purported ability to seek habeas relief from other jurisdictions.[11] *See*, *e.g.*, *Gray I*, 76 M.J. 579; *Gray v. Gray (Gray II)*, 645 Fed. Appx. 624, 625 (10th Cir. 2016). He then dutifully submitted habeas petitions to the federal courts, who ultimately declined review until he exhausted his available remedies with the military courts. *See Gray I*, 76 M.J. at 581-82. Yet, when Specialist Gray subsequently petitioned the CAAF for corum nobis relief, the court held that it did not have jurisdiction since the case was final under the UCMJ. *United States v. Gray (Gray III)*, 77 M.J. 5, 6 (C.A.A.F. 2017) ("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.").

[11] Specialist Gray was also the petitioner in *Gray I*, 76 M.J. 579.

This conclusion was in clear and direct conflict with *Denedo*:

> The Government counters that Article 76 of the UCMJ, 10 U.S.C. § 876, 'affirmatively prohibit[s] the type of collateral review sought by respondent.' That is incorrect.

556 U.S. at 915 (citations omitted). Notably, the CAAF appears to have since repeated its error by summarily denying review in at least three other cases seeking post-finality coram nobis relief. *See Ward v. United States*, 77 M.J. 106 (C.A.A.F 2017); *Lewis v. United States*, 77 M.J. 106 (C.A.A.F. 2017); *Jeter v. United States*, 77 M.J. 106 (C.A.A.F. 2017).

The CAAF's indisputable error in *Gray III* notwithstanding, none of the military's cases prohibiting post-finality extraordinary relief involved petitions filed *before* a case became "final and conclusive" under Article 76. However, prior to the present case, the CAAF's own precedent suggested that once jurisdiction vested in the CCAs, those courts retained the statutory authority (and responsibility) to review extraordinary writs to completion, irrespective of any actions by external parties:

> We hold simply that a [CCA] which has acquired jurisdiction over a case retains that governance until the decision is either final or has been appealed to the [CAAF] pursuant to Article 67(b), UCMJ, 10 U.S.C. § 867(b). This is true whether jurisdiction is acquired pursuant to Article 62, 66, or 69; the All Writs Act, 28 U.S.C. § 1651(a); or by remand from the

> [CAAF], to the extent of the terms of the remand.
>
> Once jurisdiction is acquired pursuant to Article 66, the [CCA] has a statutory duty to review the case to completion unless the accused has waived his right to appeal or withdrawn it.

Boudreaux v. United States Navy-Marine Corps Court of Military Review, 28 M.J. 181, 182 (C.M.A. 1989) (citations omitted).

B. Procedural History – Direct Appeal

On February 21, 2013, a general court-martial sentenced Petitioner to dismissal, confinement for 17 years, and forfeiture of all pay and allowances. The AFCCA affirmed the findings and sentence of Petitioner's court-martial on May 2, 2016. *United States v. Richards,* No. ACM 38346, 2016 CCA LEXIS 285 (A.F. Ct. Crim. App. May 2, 2016) (unpub. op.). The CAAF granted review and affirmed the AFCCA's decision on July 13, 2017. Pet. App. 30a. This Court denied Petitioner's petition for a writ of certiorari on June 28, 2018. *Richards v. United States,* 2018 U.S. LEXIS 4064, 138 S. Ct. 2707, 201 L. Ed. 2d 1099 (2018). The Secretary of the Air Force approved Petitioner's sentence and executed his dismissal on August 27, 2018. *See* Pet. App. 16a.

C. Procedural History – Writ

On June 4, 2017, while Petitioner's direct appeal was pending before the CAAF under Artic1e 67(a)(3), Petitioner filed a *pro se* Petition for Extraordinary Relief in the Nature of a Writ of Mandamus with the AFCCA, seeking relief from the Government's *ex post*

facto application of good conduct time credits (hereinafter writ-petition). Pet. App. 45a. On June 16, 2017, the AFCCA denied the writ-petition for lack of jurisdiction, opining that the CAAF's pending review had divested the AFCCA of authority over the case unless subsequently remanded. Pet. App. 51a (citing *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990)).

On July 14, 2017, the day after the CAAF's direct appeal decision, Petitioner moved for reconsideration of the AFCCA's denial of his writ-petition. Pet. App. 65a. On November 9, 2017, Petitioner filed a petition for a writ of certiorari with this Court regarding issues raised in his direct appeal. Pet. App. 57a.

On May 30, 2018, Petitioner filed a mandamus petition with the CAAF, asking the court to order the AFCCA to rule on his reconsideration motion regarding the writ-petition. Pet. App. 62a. On June 4, 2018, the AFCCA granted Petitioner's motion for reconsideration and ordered the Government to show cause why the court had no jurisdiction or why the writ should not issue. Pet. App. 57a. The parties then filed briefs supporting their respective positions. *See* Pet. App. 16a.

Approximately one month after the final filing relating to the show cause order, the Secretary of the Air Force approved Petitioner's sentence and executed his discharge. *See* Pet. App. 16a. Two days later, on August 29, 2018, the Government filed a motion to dismiss the writ-petition on the basis that direct review was final pursuant to Articles 71 and 76. Pet. App. 55a.

On October 19, 2018, the AFCCA issued its decision on the writ-petition. Pet. App. 8a. First, it

declined the Government's request to dismiss based on the case's finality under Article 76, reasoning that the writ-petition was docketed and briefed prior such finalization. Pet. App. 16a. The AFCCA then concluded it possessed jurisdiction to review the writ. Pet. App. 16a-21a. The AFCCA's rationale focused on its connected authorities under the All Writs Act and Article 66(c) to act "with respect to the findings and sentence as approved by the convening authority." Pet. App. 16a-17a. Citing to the "narrow framework of *Pena* [64 M.J. 259]," in which the CAAF sanctioned the direct appeal review of post-trial confinement conditions that unlawfully increased an appellant's punishment, the AFCCA held that it had "the authority to review whether Petitioner's approved sentence to confinement is being unlawfully increased" due to the government's alleged *ex post facto* application of good conduct time credits. Pet. App. 20a-21a. Ultimately, however, the AFCCA denied relief on the merits.[12] Pet. App. 29a.

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[12] Although unnecessary for the resolution of the presented question, the AFCCA erred in deciding against Petitioner on the merits due to fundamental misinterpretations of federal statutes. Specifically, the AFCCA concluded that, unless otherwise preempted by the President, the Secretary of Defense (SecDef) has "plenary authority over all [Department of Defense (DoD)] matters." Pet. App. 28a. However, the statute upon which the AFCCA based its decree, 10 U.S.C. § 113(b) (2018), further limited the SecDef's authority subject "*to this title* and section 2 of the National Security Act of 1947 . . ." (emphasis added). Applied in conjunction with 10 U.S.C. § 952 (2018), which solely authorized the Service Secretaries to provide a system of parole for offenders, the SecDef's modification of DoD policy regarding good conduct time required implementation by the Air Force to be effective. This reading is consistent with the legislative history of 10 U.S.C. § 852 (2018), which envisioned the

Petitioner appealed the AFCCA's decision on the writ-petition to the CAAF. On January 31, 2019, the CAAF dismissed the writ-appeal petition "for lack of jurisdiction." Pet. App. 51. On March 1, 2019, the CAAF denied Petitioner's motion for reconsideration. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

As this Court established in *Denedo*, finality under Article 76 does not act as a *per se* prohibition against post-finality extraordinary writs. This is because a court of appeals can and must "protect the integrity of its earlier judgments," regardless of timing. 556 U.S. at 916. Inexplicably, the CAAF refuses to abide by *Denedo*'s controlling precedent, as illustrated by the present case and *Gray III*. On this fact alone, intervention by this Court is necessary to correct and guide military jurisprudence. But there is additional justification for granting certiorari.

Service Secretaries implementing DoD policies through individual service regulations. *See Subcommittee No. 1 Consideration of H.R. 5783, to Amend Titles 10, 14, and 37, United States Code, to Provide for Confinement and Treatment of Offenders Against the Uniform Code of Military Justice*, 90th Cong. 8373-76 (1968). Taking this legislative history into consideration, in conjunction with *Pena*, 64 M.J. 259, Petitioner should have prevailed on the merits as the change to the rule governing good conduct time credit was retroactively applied to Petitioner in violation of the *Ex Post Facto* Clause and *Weaver*, 450 U.S. 24. Neither the AFCCA, nor the federal district court decision that influenced the AFCCA's decision, addressed these matters. Pet. App. 24a-29a (citing *Valois v. Commandant, USDB—Fort Leavenworth*, No. 13-3029-KHV, 2015 U.S. Dist. LEXIS 137046 (D. Kan. Oct. 7, 2015)).

Due to a fundamental misinterpretation of finality under Article 76 and its effect on the appellate process, the CAAF has created a rule of law that conflicts with the UCMJ. The CAAF's erroneous views have in turn sanctioned and encouraged inferior military appellate courts to adopt similarly restrictive positions on their post-finality responsibilities. This growing trend purporting the military courts' lack of jurisdiction over post-finality extraordinary writs has far-reaching consequences, as military members have been forced to seek relief in other judicial forums and will continue to do so in increasing numbers.

Without this Court's involvement, the federal court system may soon find itself mired in military-specific issues, with myriad civilian judges becoming the final arbiters over specialized military claims. This is not the fate envisioned by Congress, which justifiably sought to avoid the disparate treatment of servicemembers by charging the CAAF with the responsibility of maintaining uniformity in military cases. Civilian courts will instead be overseeing the military justice system, tasked even with determining the validity of courts-martial. Given the unique nature and disciplinary purpose of military justice, supervisory responsibility for its administration should and must remain in the CAAF and CCAs.

A. The CAAF's decision conflicts with this Court's controlling precedent.

The CAAF's conclusion that it lacked jurisdiction in this case aligns with its rationale from *Gray III*, where it found it was not statutorily authorized to review a coram nobis petition filed after Article 76 finality. 77 M.J. at 6. However, this Court expressly rejected this "incorrect" proposition in *Denedo*. 556

U.S. at 915 (citations omitted). This Court's rationale was that Mr. Denedo's petition – alleging ineffective assistance of counsel at trial – challenged the validity of his underlying conviction. *Id*. at 913. Accordingly, the petition represented "a further 'step in [Mr. Denedo's] criminal appeal,'" and "the NMCCA's jurisdiction to issue the writ derive[d] from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review." *Id*. at 914. (citation omitted). The same principles apply here.

Although styled as a writ of mandamus vice coram nobis, the writ in the present case related to the AFCCA's earlier judgment on Petitioner's sentence.[13] As identified in *Weaver*, post-sentencing modifications to formulas that calculate confinement credit, though not technically part of a sentence adjudged at trial, impermissibly change the "quantum of punishment" if applied retroactively to the disadvantage of a prisoner. 450 U.S. at 31-33. This is precisely what Petitioner complained about in his writ-petition, alleging the Air Force's alteration of its good conduct time credits increased his effective sentence. Pet. App. 45a; *cf. Weaver*, 450 U.S. at 32. Consequently, the AFCCA could exercise jurisdiction over Petitioner's later writ-petition because it possessed the earlier authority to review the validity and appropriateness of Petitioner's sentence under Article

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[13] Petitioner filed his writ *pro se*. Moreover, Petitioner was precluded from seeking coram nobis relief due to his continued confinement. *See*, *e.g.*, *Loving I*, 62 M.J. at 254; *cf. Nkosi v. Lowe*, 38 M.J. 552, 553 (A.F.C.M.R. 1993) ("The label placed on a petition for extraordinary relief is of little significance.") (citing *Ex parte Simons*, 247 U.S. 231, 240 (1918)) (other citations omitted).

66 and, in fact, affirmed his sentence. As in *Denedo*, the writ-petition represented just a further step in Petitioner's appeal and served to protect the integrity of the AFCCA's previous judgment.

This contention does not contravene *Goldsmith*, where this Court checked the CAAF's attempt to expand its authorities under the All Writs Act. 526 U.S. 529. Rather, *Goldsmith* is distinguishable in that the underlying allegations related to an executive action unconnected to the findings or sentence. *Id*. at 535. This case conversely involves facts explicitly identified in *Goldsmith* as warranting jurisdiction under the All Writs Act:

> It would presumably be an entirely different matter if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ, and it certainly would be a different matter when such a judgment had been affirmed by an appellate court. In such a case, as the Government concedes, [ ], the All Writs power would allow the appellate court to compel adherence to its own judgment.

Id. at 536 (citations omitted).

Notably, the CAAF itself has acknowledged the authority of military appellate courts to review allegations on direct appeal like those raised by Petitioner in his writ-petition:

> Our review of post-trial confinement and release conditions on direct appeal is

> limited to the impact of such conditions on the findings and the sentence. Accordingly, our review in the present appeal focuses on whether the post-trial conditions at issue . . . *unlawfully increased Appellant's punishment* . . .

Pena, 64 M.J. at 264 (emphasis added). When read in conjunction with *Denedo*, *Goldsmith*, and *Weaver*, the CAAF's framework compels the conclusion that the AFCCA was correct in finding it had jurisdiction "to review whether Petitioner's approved sentence to confinement [was] being unlawfully increased." Pet. App. 21a. The soundness of the AFCCA's jurisdictional analysis is even more pronounced given the particular facts of Petitioner's case.

Petitioner first submitted his request for extraordinary relief on June 4, 2017.[14] Pet. App. 45a. Following the AFCCA's initial denial, Petitioner timely sought reconsideration. Pet. App. 65a. The AFCCA then declined to act on the motion over the next 320 days, whereupon Petitioner sought to compel a decision by filing a writ of mandamus with the CAAF. Pet. App. 62a. On June 4, 2018, the AFCCA finally acted, granting Petitioner's reconsideration motion and ordering briefs. Pet. App. 16a, 57a. On August 27, 2018, approximately one month after the last brief was filed regarding the writ-petition, the Secretary of the Air Force approved Petitioner's sentence and executed his dismissal, thus rendering his case final under Article 76. Pet. App. 16a.

[14] The AFCCA received the request on June 6, 2017. Pet. App. 51a-52a.

Thereafter, on October 19, 2018, the AFCCA ruled on the writ-petition. Pet. App. 8a.

Given this tortuously protracted timeline, along with Petitioner's persistent attempts to seek relief pre-Article 76 finality, the AFCCA appropriately declined the Government's request to dismiss for lack of jurisdiction. *See* Pet. App. 16a, 60a. *Denedo* sanctioned a CCA's authority to entertain a coram nobis petition filed several years *after* the case's finalization under Article 76, and on an issue that similarly traced back to the CCA's earlier judgment. 556 U.S. 904. The AFCCA in this case was thus equally (if not more) justified in finding it had jurisdiction to entertain Petitioner's writ-petition, filed more than a year *prior to* Article 76 finality. *Cf. Denedo*, 556 U.S. at 916 ("Just as the rules of finality did not jurisdictionally bar the court in *Morgan* [346 U.S. 502] from examining its earlier judgment, neither does the principle of finality bar the NMCCA from doing so here.").

Unfortunately, the CAAF declined to articulate its rationale when it dismissed Petitioner's writ-appeal on jurisdictional grounds. Pet. App. 7a. However, the implication is clear. Either the CAAF concluded that the AFCCA erred by exercising jurisdiction over Petitioner's post-finality writ-petition, in which case the CAAF was similarly barred from entertaining the post-finality writ-appeal; or, the AFCCA was justified in reviewing the writ-petition given its pre-finality submission, but that the CAAF was barred from considering the post-finality writ-appeal. Since both scenarios conflict with *Denedo*, the CAAF's decision was erroneous and warrants correction.

B. The CAAF's decision conflicts with the UCMJ and contravenes Congressional intent to have military courts serve as the primary source for servicemembers seeking collateral relief.

Article 76 states only that, upon conclusion of direct appellate review, "the proceedings, findings, and sentences of courts-martial . . . are final and conclusive." This provision does not address the authority of military appellate courts to fashion collateral relief, and this Court disfavors repeals by implication, particularly where "the asserted repealer would remove a remedy otherwise available." *Schlesinger*, 420 U.S. at 752 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-36 (1974)).

As applied to the present case, the CAAF's jurisdictional dismissal did not merely represent a misinterpretation of Article 76 and its effect on collateral review. Rather, the decision served as an abdication of the CAAF's appellate authority under Article 67(a)(3), stripping Petitioner of a significant and Congressionally-favored remedy.

Congress created the military appellate courts pursuant to its authority to enact legislation under Article I, § 8 of the Constitution. As observed by this Court, the status of the CAAF and the CCAs as Article I courts should compel them to be more attuned to their jurisdictional limits and responsibilities than their federal judicial brethren. *See Denedo*, 556 U.S. at 912. These responsibilities include acting as the first and primary source for servicemembers seeking collateral relief. Indeed, the doctrines of abstention and exhaustion require servicemembers to seek remedies through military courts prior to turning to

Article III judicial bodies; a requirement designed to respect "congressional judgment . . . that the military court will vindicate a servicemen's constitutional rights." *Schlesinger*, 420 U.S. at 758.

In this case, however, after the AFCCA exercised jurisdiction and denied Petitioner relief on the merits, the CAAF decided it lacked the authority to entertain Petitioner's appeal. Pet. App. 7a. This decision ensured Petitioner would be forced to seek relief elsewhere – in contravention of Congressional intent to have military cases remain, to the extent practicable, within the military justice system – and conflicted with Article 67(a)(3).

Article 67(a)(3) provided the CAAF jurisdiction "over all cases reviewed by a [CCA] in which, upon petition of the accused and good cause shown, the [CAAF] has granted a review." Akin to this Court's reasoning in *Denedo*, because the AFCCA exercised its jurisdiction and rendered a decision in Petitioner's case, "the CAAF had jurisdiction to entertain" Petitioner's appeal from AFCCA's judgment upon a showing of good cause. 556 U.S. at 915; *see also Boudreaux*, 28 M.J. 181. Consequently, the CAAF had one of three statutory options:

> 1. Conclude that Petitioner failed to show good cause for review and decline to review the writ-appeal;
>
> 2. Review the writ-appeal and overturn the AFCCA's conclusion that jurisdiction existed over the writ of mandamus; or
>
> 3. Review the writ-appeal on the merits.

An option unavailable to the CAAF was the option it ultimately chose: rule that the CAAF did not have jurisdiction to adjudicate Petitioner's appeal of the lower court's decision on his writ of mandamus. This jurisdictional punt effectively authorized the Secretary of the Air Force to divest the court of jurisdiction over writ-appeals from lower courts; a scenario unsupported in law, in conflict with Congressional intent, and clearly contrary to the CAAF's statutory appellate authority.

C. The CAAF's decision will result in more servicemembers seeking extraordinary relief through the civilian court system. This will increase the likelihood of servicemembers being disparately treated, and will supplant the military courts as arbiters over military justice.

The CAAF's refusal to exercise jurisdiction over Petitioner's writ-appeal has far-reaching implications. As a starting point, the decision signals to the CCAs that they need not address post-trial extraordinary writs, whether filed before or after Article 76 finalization. As illustrated in this case, a CCA can decline to act on a pre-Article 76 writ pending direct appellate review, and then issue its ruling just prior to case finality or sometime thereafter. The former scenario leaves little (if any) time for a writ-appeal, whereas the latter – assuming the CCA, like the AFCCA here, found it still possessed jurisdiction – would purportedly preclude any further review by the CAAF. And in terms of writs filed post-Article 76 finality, the CCAs would apparently lack jurisdiction entirely for review. *See Chapman*, 75 M.J. 598; *Gray I*, 76 M.J. 579; *Sutton*, 78 M.J. 537. In any event, the result is the same: stripped of a remedy within the

military justice system, servicemembers will be forced to seek relief through the federal judiciary. This is significantly problematic for several reasons.

First, there is no authority or precedent promoting civilian courts as the primary arbiters over military-related claims. This is for good reason. As this Court has acknowledged, "the military constitutes a specialized community governed by a separate discipline from that of the civilian." *Parker v. Levy*, 417 U.S. 733, 744 (1974). Because "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." *Burns v. Wilson*, 346 U.S. 137, 140 (1953). Rather, Congress has this task. *Id*. To this end, Congress established what it intended to be a self-sufficient, self-correcting uniform military justice system. The bedrock of this system, the UCMJ, with its seemingly imprecise standards based on centuries of customs and general usages, simply "cannot be equated to a civilian code." *Parker*, 417 U.S. at 749. Accordingly, "Congress codified primary responsibility for the supervision of military justice" in the CAAF. *Noyd*, 395 U.S. at 695.

The civilian courts have correspondingly given a "substantial degree of deference" to military tribunals. *Loving I*, 62 M.J. at 250 (citing *Noyd*, 395 U.S. at 696). This deference is grounded in the doctrine of exhaustion, which generally requires litigants seeking post-conviction relief to first seek such relief from the judicial system actually responsible for the conviction. Included within the military-specific exhaustion requirement are concerns regarding judicial economy,

the separation of powers, the need to maintain good order and discipline in the armed forces, avoiding needless friction between the civilian and military judicial systems, and respect for the military courts' "expertise in interpreting the technical provisions of the UCMJ." *Id.* (citing *Noyd*, 395 U.S. at 696); *accord Parisi v. Davidson*, 405 U.S. 34 (1972); *Lawrence v. McCarthy*, 344 F.3d 467, 471 (5th Cir. 2003) ("Because the military constitutes a specialized community governed by a separate discipline from that of the civilian, orderly government requires that the judiciary scrupulously avoid interfering with legitimate Army matters.").

The authority of Article III courts over the military has thus been limited through a combination of Congressional design and judicial temperance. This pragmatic and long-standing arrangement is at risk, however, if the military courts continue to abdicate their appellate responsibilities like the CAAF in this case and the CCAs in a growing number of others. *See*, *e.g.*, *Chapman*, 75 M.J. 598 (prohibiting habeas corpus relief after Article 76 finality); *Sutton*, 78 M.J. 537 (prohibiting mandamus relief after Article 76 finality). Indeed, if servicemembers are forced to turn to civilian courts for post-finality relief, fewer cases will appear before courts with discernible and specialized competencies in military affairs, and the federal judiciary will ultimately supplant the CAAF as the overseer of military justice. Congress and the civilian courts clearly do not desire such a fate, and neither should this Court.

The danger here is not just that the civilian courts will become the first and primary resort for addressing military claims. Rather, it is that these

courts will consider post-finality allegations relating to the validity of convictions and sentences, as illustrated by this case and *Denedo*. The civilian courts will thus be determining the legitimacy of courts-martial, thereby wresting from the military courts the authority "to protect the integrity of [the military courts'] earlier judgments." *Denedo*, 556 U.S at 916. Given the specialized structure of the military, and the unique nature and disciplinary purpose of military justice, supervisory responsibility over courts-martial and the UCMJ should and must remain with the CAAF and CCAs.

Finally, if servicemembers are forced to seek post-finality redress outside the military courts, it will be extraordinarily difficult to ensure uniform results. For example, the present case would likely be heard in the 10th Circuit due to Petioner's incarceration at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. However, military prisoners situated at other locations may appear before different circuits. Indeed, virtually every federal circuit and district would be involved. *See*, *e.g.*, *Roukis v. United States Army*, 2014 U.S. Dist. LEXIS 160690 (S.D.N.Y. Nov. 14, 2014); *Lewis v. Oddo*, 2015 U.S. Dist. LEXIS 174302 (N. Dist. W.Va. Dec. 22, 2015); *Hollis v. Cruz*, 2012 U.S. Dist. LEXIS 135345 (N.D. Tex. Jul. 24, 2012); *Jenks v. Warden*, 2018 U.S. Dist. LEXIS 77123 (S.D. Ohio May 7, 2018); *Hurn v. Kallis*, 2018 US Dist. LEXIS 108024 (C.D. Ill. Jun. 28, 2018); *Brooks v. United States*, 2016 US Dist. LEXIS 183902 (N.D. Fla. Dec. 8, 2016).

The application of laws within these federal circuits is varied, particularly with regards to post-conviction petitions for extraordinary relief. *See*, *e.g.*,

Brosius v. Warden, 278 F.3d 239, 244 (3d Cir. 2002) (discussing the difficulties and varied interpretations of the circuits in applying the "full and fair" consideration test on habeas claims) (citing *Burns*, 346 U.S. at 144); *see also Kauffman v. Sec. of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969) (noting that the full and fair test "has meant many things to many courts."). Accordingly, an Airman incarcerated in Kansas may have his post-finality writ treated one way, while a Sailor housed in California has her similar writ treated another. Such disparate treatment cuts against the clear intent of Congress, which established the CAAF to ensure uniformity of military court decisions. *See*, *e.g.*, 95 Congr. Rec. H5719-22 (daily ed. May 5, 1949).

CONCLUSION

Petitioner's request for extraordinary relief was functionally equivalent to the presented issue in *Denedo*, as it challenged the underlying sentence from his court-martial and thus represented a further step in his criminal appeal. Consequently, the Secretary of the Air Force's finalization of the case under Article 76 should not have affected the military courts' jurisdiction to entertain Petitioner's writ-petition nor his subsequent writ-appeal. This is particularly true given that, unlike the petitioner in *Denedo*, Petitioner initially sought relief prior to Article 76 finality.

The CAAF's decision to the contrary conflicted with this Court's controlling precedent and the UCMJ, and represents an abdication of its authority and responsibilities under Article 67(a)(3). Without intervention by this Court, the CAAF's erroneous jurisdictional determination will reign over the military judicial system, encouraging and sanctioning

the lower courts from entertaining post-finality extraordinary writs. This will in turn burden the federal judiciary, whose civilian judges will soon become the final arbiters over the morass of military-specific issues raised by servicemembers stripped of their right to seek redress from the acutely specialized and suited military courts. Civilian judges will further determine the legitimacy of courts-martial, thereby precluding the military courts from protecting the integrity of their own judgments and ensuring uniformity in the Armed Forces. Neither Congress nor the federal courts desire such fates, and neither should this Court.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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