No. 19-55

IN THE

Supreme Court of the United States

JAMES W. RICHARDS IV,

Petitioner,

v.

BARBARA M. BARRETT,
SECRETARY OF THE AIR FORCE, ET AL.

Respondents.

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

REPLY BRIEF FOR PETITIONER

JEFFREY T. GREEN
SCOTT M. BORDER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

MARK C. BRUEGGER*
AIR FORCE LEGAL OPERATIONS AGENCY
1500 West Perimeter Rd.
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil

Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF FOR PETITIONER

The brief in opposition fails to address whether the Secretary of the Air Force's action to finalize the case under Article 76 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 876 (hereinafter Article 76), divested the military appellate courts of their jurisdiction over Petitioner's extraordinary writ. Unlike *United States* v. *Denedo*, 556 U.S. 904 (2009), where this Court held that Article 76 did not prohibit military appellate courts from entertaining a writ filed *several years after* the case became final, Petitioner sought relief *prior to* finality under Article 76. Pet. App. 16a. Petitioner thus has a stronger claim regarding the authority of the Court of Appeals for the Armed Forces (CAAF) to review his writ than did his counterpart in *Denedo*, making the CAAF's erroneous jurisdictional analysis in this case all the more apparent.

Rather than address this obvious error, the Government opposes certiorari on jurisdictional grounds and a purported lack of merit regarding Petitioner's underlying claims. Br. in Opp. 6–18. For this latter contention, the Government relies on the lower court's rationale for denying relief; rationale which fails in light of the plain text and legislative history for the statutes at issue. Br. in Opp. 18. The Government likewise bases its jurisdictional argument on flawed statutory interpretations. Br. in Opp. 7–16.

Moreover, by questioning this Court's jurisdiction, the Government ironically provides an incentive to grant certiorari, as doubt regarding this Court's review authority justifies resolving the matter rather than leaving it unsettled. See, *e.g.*, *Montgomery* v. *Louisiana*, 575 U.S. 911 (2015) (mem.). This is particularly true given that this Court has never directly

answered whether, once the CAAF "grants a petition for review on some issues, [this] Court has the power to consider other issues in the case that were not granted review." Stephen M. Shapiro et al., *Supreme Court Practice* § 2.14, at 130 n.120 (10th ed. 2013). This question has been raised before,[1] is now before the Court in *United States* v. *Briggs*, No. 19-108, and will certainly be raised in the future without clear guidance.

I. THIS COURT HAS JURSIDICTION TO REVIEW THE CASE

The Government argues that because the CAAF dismissed Petitioner's writ-appeal for lack of jurisdiction, this Court lacks jurisdiction to review the case. Br. in Opp. 7. However, as the Government acknowledges, 28 U.S.C. § 1259(3) empowers this Court to review "*cases* in which the [CAAF] granted a petition for review." *Id.* (emphasis added). That is what occurred here: The CAAF granted review of Petitioner's *case* when it considered his 2016 claims on direct appeal. *United States* v. *Richards*, 76 M.J. 365 (C.A.A.F. 2017), *cert. denied*, 138 S. Ct. 2707 (2018). The Government suggests that Congress limited this Court's jurisdiction to *issues* the CAAF agreed to review (Br. in Opp. 7–8), but "issues" is textually distinct and, indeed, a subset of "cases."

The legislative history demonstrates that Congress's use of "cases" was deliberate. Congress intended only to limit the *number* of cases heard by this

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[1] See, *e.g.*, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (mem.); *Wiechmann* v. *United States*, 559 U.S. 904 (2010) (mem.); *Stevenson* v. *United States*, 555 U.S. 816 (2008) (mem.); *McKeel* v. *United States*, 549 U.S. 1019 (2006) (mem.); *Andrews* v. *United States*, 513 U.S. 1057 (1994) (mem.); *Colon* v. *United States*, 502 U.S. 821 (1991) (mem.).

Court, not the scope of its review. See S. Rep. No. 98-53, at 33 (1983) ("[T]he Committee has taken steps to ensure that the bill will not result in an undue increase in the volume of cases presented to the Supreme Court."); *id.* at 34 ("[R]estricting direct access to the Supreme Court to cases [the CAAF] has agreed to hear is necessary as a practical matter."). In fact, Congress actually considered authorizing this Court to review "*issues* upon which [the CAAF] granted review and other *issues* upon which [it] took action in cases in which a petition for review was granted under section 867(a)(3) of title 10." H.R. 6298, § 4(a), 96th Cong. (2d Sess. 1980) (emphases added). That Congress ultimately chose the word "*cases*" vice "*issues*" definitively confirms that Congress meant to authorize this Court's review over the entirety of a case in which the CAAF issues a decision.

Even if the CAAF had not previously granted review of Petitioner's case, this Court could still intervene because the CAAF never refused to consider Petitioner's writ-appeal; rather, it conducted a jurisdictional analysis. Jurisdiction is a question of law the CAAF reviews *de novo*. *Randolph* v. *HV*, 76 M.J. 27, 29 (C.A.A.F. 2017). And the CAAF cannot conduct a *de novo* review of its jurisdiction over a case without actually reviewing that case. Accordingly, the Government's reliance on Article 67a(a), 10 U.S.C. § 867a(a), is misplaced. Br. in Opp. 7–8. The CAAF's legal conclusion that it lacks jurisdiction and its discretionary refusal to grant review are conceptually distinct events—the former endows this Court with jurisdiction, the latter does not. The CAAF's use of

very specific language in denying review further demonstrates that they are distinct events.[2]

It is also immaterial that Petitioner "never invoked" Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (hereinafter Article 67(a)(3)), and "opted to follow a different procedural path" called a "writ-appeal petition." Br. in Opp. 9. This argument is based on a legal fiction that "writ-appeal petitions" differ from appeals under Article 67(a)(3). Regardless of what the CAAF's rules state, there is no statutory authority for the court to decide "writ-appeals" other than what is conferred to it through the All Writs Act, 28 U.S.C. § 1651(a). This statute, in turn, empowers the CAAF to grant relief only if it possesses "subject-matter jurisdiction over the case or controversy." *Denedo*, 556 U.S. at 911–12. As the CAAF's subject-matter jurisdiction is rooted in Article 67(a)(3), so too is its authority to entertain "writ-appeal petitions." Even the CAAF has acknowledged this fact, concluding that a "case" under Article 67(a)(3) "includes a final action by an intermediate appellate court on a petition for extraordinary relief." *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)). Separately, the Government's argument here fails because, as discussed above, the CAAF granted review of this case in 2016 and conducted its subsequent jurisdictional analysis of the writ-appeal.

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[2] See, *e.g.*, *United States* v. *Gonzales,* No. 19-0322/AF, 2019 WL 5106977, at *1 (C.A.A.F. Sept. 19, 2019) ("Petitions for Grant of Review Denied"); *United States* v. *Smith*, No. 19-0395/MC, 2019 WL 5107035 (C.A.A.F. Sept. 25, 2019) ("Petitions for Grant of Review Denied"). Conversely, the CAAF in this case stated, "the writ-appeal petition is hereby *dismissed* for lack of jurisdiction." Pet. App. 7a (emphasis added).

The Government also misinterprets the CAAF's authority to review good conduct time (GCT) determinations. Br. in Opp. 15–16. As this Court has held, post-sentencing modifications to formulas for calculating confinement credit impermissibly change the "quantum of punishment" when applied retroactively and to the disadvantage of the prisoner. *Weaver* v. *Graham*, 450 U.S. 24, 31–33 (1981). Although the Government did not reference this holding in its brief, the CAAF has itself acknowledged that military appellate courts may review whether post-trial conditions unlawfully increase an appellant's punishment. See, *e.g.*, *United States* v. *Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007).

Next, the Government suggests that Petitioner can seek habeas relief in an Article III court. Br. in Opp. 16. But such a prospect is illusory in this case, as an Article III court may not adjudicate habeas petitions by military prisoners "when a military decision has dealt fully and fairly with an allegation raised in that application." *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953). The Tenth Circuit, where Petitioner's claim would fall, applies this doctrine in the extreme, such that "if an issue is brought before the military tribunal and disposed of, even summarily, the federal habeas court will find that the military courts have given full and fair consideration to the issue." *Davis* v. *Lansing*, 202 F. Supp. 2d 1245, 1251 (D. Kan. 2002), *aff'd*, 65 F. App'x 197 (10th Cir. 2003); see also *Roberts* v. *Callahan*, 321 F.3d 994, 997 (10th Cir. 2003). Here, Petitioner briefed his allegation before the Air Force Court of Criminal Appeals (AFCCA), which addressed his claim on the merits. Pet. App. 8a–29a; cf. *Roberts*, 321 F. 3d at 995–97 (finding that petitioner's non-waived claims were fully and fairly considered

when reviewed by the Army Court of Criminal Appeals but denied further review by the CAAF).

The Government further contends that Petitioner's decision to file a writ of mandamus differentiates his case from *Denedo*, which involved a writ of *coram nobis*. Br. in Opp. 17. As a starting point, how a writ is styled is of little consequence in Air Force practice. See *Nkosi* v. *Lowe*, 38 M.J. 552, 553 (A.F.C.M.R. 1993). Instead, the substance of the petition and the requested remedy are what matter. *Id*. As applied here, Petitioner sought relief from a post-sentencing modification to GCT credits; a modification which effectively increased his sentence. See Pet. App. 21a; cf. *Weaver*, 450 U.S. at 31–33; *Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999); *Pena,* 64 M.J. at 264. Petitioner was thus challenging the validity of his underlying sentence and his petition, like that in *Denedo*, represented "a further 'step in [Petitioner's] criminal' appeal." 556 U.S. at 913–14. Consequently, the CAAF's decision to dismiss Petitioner's writ-appeal—regardless of its styling—represented an impermissible conflict with this Court's controlling precedent, and warrants correction.

II. PETITIONER'S UNDERLYING CLAIM HAS MERIT AND THIS COURT SHOULD NOT WAIT FOR A BETTER "CANDIDATE" TO RESOLVE THE QUESTION PRESENTED

The Government argues this case is a "poor candidate" for review because the underlying claim lacks merit. Br. in Opp. 18. This contention hinges on the AFCCA's conclusions that the Secretary of Defense has "plenary authority" over all Department of Defense (DoD) matters and, therefore, the DoD's 2004 policy change regarding GCT applied to Airmen without further Air Force action. Pet. App. 28a–29a. As noted in the petition, however, the Secretary of De-

fense's authority is subject to both the direction of the President and to Title 10 of the United States Code. Pet. 19 & n.12 (citing 10 U.S.C. § 113(b)). Under this title, Congress empowered only the Service Secretaries to implement regulations regarding confinement and parole. 10 U.S.C. §§ 951–52; see also 10 U.S.C. § 101(a)(9) (defining the term "Secretary concerned" as pertaining to the Secretaries of the respective military departments vice the Secretary of Defense). Therefore, while the Air Force falls under the DoD in terms of Title 10's hierarchal structure, it must nevertheless *implement* a DoD policy in a regulation for that policy to become effective. This interpretation is consistent with both the plain language of 10 U.S.C. §§ 951–52 and the legislative history, the latter of which was never considered by the AFCCA.[3] See Pet. App. 8a–29a.

In 1968, Congress considered amending Title 10 to establish a parole system in the Navy similar to what existed in the Army and Air Force. See *Subcommittee No. 1 Consideration of H.R. 5783, to Amend Titles 10, 14, and 37, United States Code, to Provide Confinement and Treatment of Offenders Against the Uniform Code of Military Justice*, 90th Cong. 8371–74 (1968). As explained by Major General Carl C. Turner, who testified on behalf of the DoD in this matter, the purpose of the change was "to attain uniformity among the Armed Forces in the administration of military correctional facilities and the treatment of persons sentenced to confinement under the

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[3] The AFCCA's decision relied heavily on a federal district court case addressing GCT modifications in the military. Pet. App. 24a–25a (citing *Valois* v. *Commandant, USDB—Fort Leavenworth*, No. 13-3029-KHV, 2015 U.S. Dist. LEXIS 137046 (D. Kan. 2015)). In that case, the court likewise did not consider the legislative history of 10 U.S.C. §§ 951–52.

Uniform Code of Military Justice." *Id*. at 8373. However, Congressman Evans questioned whether the proposed language would actually result in uniformity when it seemingly allowed "each [Service] Secretary to develop independent and very different systems of parole, of administering correction facilities, [and] developing the treatment of people who have been confined." *Id*. at 8374. Maj. Gen. Turner responded that similarity in the systems "will be done at the Department of Defense, which *makes the overall policy* and *designates the Secretary* to do these." *Id*. at 8375 (emphasis added). When pressed further, Maj. Gen. Turner confirmed "[e]ach service will establish these systems" and concurred that it was possible for the different Secretaries to institute "their own rules and regulations for treating" prisoners. *Id*.

The Subcommittee later considered adding language that mandated action by the Secretary of Defense. *Id*. at 8376. However, it abandoned this idea and instead chose to "write into the report, something that would tell the Secretary of Defense that it is the intention in passing this legislation that the Secretary of Defense *shall seek* that the parole systems of the services shall be brought into uniformity." *Id*. (emphasis added). Congress ultimately amended Title 10 as proposed, reserving authority to implement confinement and parole regulations to the Service Secretaries, without explicitly requiring uniformity among the military departments.[4] See 10 U.S.C. §§ 951–52.

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[4] As support for its position, the Government highlighted the AFCCA's observation that there is no statutory authority specifically addressing GCT. Br. in Opp. 18 (citing Pet. App. 28a). However, 10 U.S.C. § 951(c) provides that "[u]nder regulations to be prescribed by the Secretary concerned, the officer in command shall have custody and control of offenders confined with-

Congress accordingly intended that it was the Secretary of Defense's role to establish *policies* concerning the confinement and parole of military prisoners, but that it was the Service Secretaries who would put legal effect to those policies by *implementing* them through service-specific regulations. Had Congress actually empowered the Secretary of Defense to implement the DoD's confinement policies, it would have been unnecessary to add the "shall seek" language about Service uniformity; the Secretary could have simply established these rules across the military, without coordination or action from the military departments. Consequently, the DoD's 2004 policy change—decreasing GCT from 10 days a month to 5—only took effect when the Air Force implemented it in 2015. Pet. App. 13a–14a. Prior to that, and as applicable to Petitioner, the Air Force awarded GCT in the amount of 10 days per month. *Id*. at 12a–14a.

Even assuming *arguendo* that Petitioner's underlying claim were somehow deficient, the jurisdictional limitations imposed by 28 U.S.C. § 1259 may prevent this Court from ever having a perfect vehicle by which to consider the question presented. Under the current statutory construct, the CAAF must have reviewed a case—through a grant of review or otherwise—for a petitioner to seek a writ of certiorari. 28

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in the facility which he commands." Such "custody and control" necessarily covers GCT. Moreover, the AFCCA previously acknowledged the link between a Service Secretary's authorization to administer parole and other forms of release: "We read 10 U.S.C. § 951-52 to grant *Service Secretaries* the authority and discretion to fashion program for the release of inmates." *United States* v. *Pena*, 61 M.J. 776, 782 (A.F. Ct. Crim. App. 2005) (emphasis added), *aff'd*, 64 M.J. 259 (C.A.A.F. 2007). The AFCCA further noted that "Congress declined to define what could constitute 'parole' by authorizing Service Secretaries to devise a 'system of parole.'" *Id*. (citing 10 U.S.C. § 952).

U.S.C. § 1259. But as evidenced by its dispositions of the present case and a recent spate of others, the CAAF appears to firmly believe that finality under Article 76 divests it of jurisdiction to entertain extraordinary writs.[5] Thus, it is highly unlikely the CAAF will grant review of similarly timed writs in the future. And if the CAAF has not earlier reviewed a particular case in some fashion, the affected service member will have no method by which to seek this Court's intervention, even in the face of the CAAF's blatant disregard of *Denedo*'s controlling precedent.

When viewed in conjunction with the federal judiciary's deference to a military court's full and fair consideration of an issue, a service member may have but one avenue for relief: a Service Court of Criminal Appeals. These Article I courts—comprised of judges on three-year tours who can be reassigned as their respective Service Secretaries prescribe, see Rules for Courts-Martial 1203(a) (2019)—will therefore be deciding important constitutional questions without further recourse to independent Article III courts, thereby violating the principles of due process and access to the courts.

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[5] See *United States* v. *Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017) (per curiam) (refusing to "entertain a request for coram nobis in a case that is final in all respects under the UCMJ"), *cert. denied*, 138 S. Ct. 2709 (2018). Following its decision in *Gray*, 77 M.J. 5, the CAAF summarily denied review in three other cases involving post-finality extraordinary writs. *See Ward* v. *United States*, 77 M.J. 106 (C.A.A.F. 2017) (mem.); *Lewis* v. *United States*, 77 M.J. 106 (C.A.A.F. 2017) (mem.); *Jeter* v. *United States*, 77 M.J. 106 (C.A.A.F. 2017) (mem.).

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

JEFFREY T. GREEN
SCOTT M. BORDER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

MARK C. BRUEGGER*
AIR FORCE LEGAL OPERATIONS AGENCY
1500 West Perimeter Rd.
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
mark.c.bruegger.civ@mail.mil

Counsel for Petitioner

* Counsel of Record

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