No. _____

In The

Supreme Court of the United States

JAMES W. RICHARDS IV,
Petitioner,

v.

BARBARA M. BARRETT,
SECRETARY OF THE
AIR FORCE,

AARON GUILL,
COLONEL, COMMANDER,
AIR FORCE SECURITY FORCES CENTER,

CAROLINE K. HORTON,
COLONEL, COMMANDANT,
UNITED STATES DISCIPLINARY BARRACKS,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Should military-specific collateral claims raised by military prisoners still subject to military law be adjudicated in the specialized, experienced Article I military courts, or in the Article III federal courts, which are ill-equipped to determine the impact of their decisions on the military and are less likely to establish uniformity on technical provisions of military law?

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PETITION FOR A WRIT OF CERTIORARI

Lieutenant Colonel James W. Richards IV, an inmate at the Fort Leavenworth Disciplinary Barracks (FLDB), 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 grant of review on direct appeal is reported at *United States v. Richards,* 76 M.J. 365 (C.A.A.F. 2017) and reproduced in the Appendix at Pet. App. 3a. The CAAF's dismissal of the writ of habeas corpus and denial of the writ of error coram nobis is reported at *Richards v. Barrett*, No. 20-0212/AF, 2020 CAAF LEXIS 262 (C.A.A.F. May 6, 2020) and reproduced in the Appendix at Pet. App. 13a.

JURISDICTION

The CAAF granted review of Petitioner's direct appeal and affirmed the Air Force Court of Criminal Appeals' (AFCCA) decision on July 13, 2017. Pet. App. 3a. The CAAF considered a petition for extraordinary relief in the nature of a writ of habeas corpus, or, in the alternative, a writ of error coram nobis, and dismissed the writ of habeas corpus and denied the writ of error coram nobis on May 6, 2020. Pet. App. 13a. This Court's general order dated March 19, 2020, extended the due date for this petition to October 3, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

Article 2(a)(7), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(7) (2019) provides that "persons in custody of the armed forces while serving a sentence imposed by a court-martial" are subject to the UCMJ.

Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2016), *Courts of Criminals Appeals*, stated:[1]

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as 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)(3), UCMJ, 10 U.S.C. § 867(a) (2016), *Review by the Court of Appeals for the Armed Forces,* stated:

> The Court of Appeals for the Armed Forces shall review the record in…all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted review.

Article 70, UCMJ, 10 U.S.C. § 870 (2016), *Appellate Counsel* (hereinafter Article 70), stated:

> (a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title [10 USCS § 827(b)(1)] (article 27(b)(1)).

[1] The Military Justice Act (MJA) of 2016 slightly modified the language of this provision, and moved it under Article 66(d)(1), 10 U.S.C. § 866 (2020). *See* National Defense Authorization Act of Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328, div. E, title LIX, § 5330, 130 Stat. 2932

Article 71, UCMJ, 10 U.S.C. § 871 (2016), *Execution of sentence; suspension of sentence* (hereinafter Article 71), stated in relevant parts:[2]

> (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 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.

[2] 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).

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

> 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.

The All Writs Act, 28 U.S.C. § 1651(a) (hereinafter All Writs Act) 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.

STATEMENT OF THE CASE

On February 21, 2013, a general court-martial convicted Petitioner of various offenses. The court-martial sentenced Petitioner to a dismissal, confinement for 17 years, and forfeiture of all pay and allowances. Petitioner timely appealed under Articles 66 and 67. 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 rendered a decision on July 13, 2017, affirming the AFCCA's decision. Pet. App. 3a. 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). Dr. Heather Wilson, the then-Secretary of the Air Force and Respondent's

predecessor, approved Petitioner's sentence and executed his dismissal on August 27, 2018. Pet. App. 49a.

In May 2018, while his petition for a writ of certiorari with this Court was pending, Petitioner sent the Air Force Appellate Defense Division (ADD) a petition for a writ of habeas corpus. Pet. App. 50a.[3] This petition focused on the appearance of unlawful command influence (UCI) during various phases of Petitioner's court-martial, resulting in a denial of his Fifth Amendment right to due process. The ADD agreed to file the petition with the AFCCA on Petitioner's behalf and on June 20, 2018, the ADD informed Petitioner that the filing had occurred. Pet. App. 128a. Despite the ADD's assurance that it filed the petition, the ADD did not actually file the petition until September 13, 2018—17 days after Dr. Wilson approved Petitioner's sentence and executed his dismissal.

On October 22, 2018, the AFCCA dismissed the petition for the writ of habeas corpus, concluding it lacked jurisdiction because Petitioner filed it after his direct appeal was completed under Article 76 and final action taken under Article 71. *Richards v. Wilson*, No. 2018-07, 2018 CCA LEXIS 509 (A.F. Ct. Crim. App. Oct. 22, 2018). The AFCCA subsequently declined reconsideration.

On December 26, 2018, Petitioner's newly assigned ADD counsel filed for an enlargement of time with the CAAF, seeking an additional 20 days to file a writ-appeal petition of the AFCCA's jurisdictional dismissal. With the motion for an enlargement of time still pending, Petitioner filed his writ-appeal petition on January

[3] The appendices to this petition have been removed from this filing with one exception: Petitioner's sworn affidavit and accompanying documents addressing the ADD's failure to timely file his petition. Pet. App. 128a.

14, 2019. On February 6, 2019, the CAAF summarily denied Petitioner's motion for an enlargement of time and subsequently dismissed the writ-appeal petition as moot.

Petitioner's original petition for a writ of habeas corpus was filed prior to him obtaining supplemental, supporting materials through the Freedom of Information Act (FOIA). On April 21, 2020, Petitioner filed a petition for a writ of habeas corpus or, in the alternative, a writ of error coram nobis to the CAAF using the additional FOIA-obtained evidence to support his UCI claim. On May 6, 2020, the CAAF denied the writ of error coram nobis and dismissed the writ of habeas corpus for lack of jurisdiction. *Richards v. Barrett*, No. 20-0212/AF, 2020 CAAF LEXIS 258 (C.A.A.F. May 6, 2020).

REASONS TO GRANT THE PETITION

In *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975), this Court stated, "[i]t must be assumed that the military court system will vindicate a serviceman's constitutional rights." However, this assumption is no longer applicable given a recent spate of decisions by military appellate courts declining to consider military-specific collateral claims.[4] Petitioner's case is just the latest example, with the CAAF declining his writ of error coram nobis and dismissing his writ of habeas corpus due to a purported lack of jurisdiction. Although the CAAF declined to fully articulate its rationale, its judgement was assuredly rooted in its belief that coram nobis is unavailable because Petitioner remained confined, that habeas relief is available in

[4] *See, e.g.*, *Chapman v. United States*, 75 M.J. 598 (A.F. Ct. Crim. App. 2016); *Gray v. United States* (*Gray I*), 76 M.J. 579 (A. Ct. Crim. App. 2017); *Sutton v. United States*, 78 M.J. 537 (A.F. Ct. Crim. App. 2018); *United States v. Gray* (*Gray III*), 77 M.J. 5 (C.A.A.F. 2017); *Robert v. United States*, 77 M.J. 615 (A. Ct. Crim. App. 2018); *Jeter v. United States*, 77 M.J. 106, (C.A.A.F. 2017); *Lewis v. United States*, 77 M.J. 106 (C.A.A.F. 2007); *Ward v. United States*, 77 M.J. 106 (C.A.A.F. 2017).

the federal civilian courts, and that finality under Article 76 precluded its review of the habeas petition. *See*, *e.g.*, *Denedo v. United States* (*Denedo I*) 66 M.J. 114, 125-26 (C.A.A.F. 2008) (citing *United States v. Morgan*, 346 U.S. 502, 512-13 (1954) (other citations omitted), *aff'd and remanded*, 556 U.S. 904 (2009); *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005); *Gray III*, 77 M.J. at 6.

Irrespective of whether the CAAF's interpretations align with the federal circuits, or even this Court's precedent as applied to these other jurisdictions, the military's treatment of post-finality writs filed by prisoners like Petitioner ensures military-specific claims will either never be addressed by specialized military courts or that these claims will be acted upon only *after* a prisoner is ultimately released from jail. This will shunt uniquely military claims of error—like the UCI issue in this case—into a civilian court system which has traditionally, and justifiably, deferred to the military courts on the "extremely technical provisions" of military law. *Noyd v. Bond*, 395 U.S. 683, 696 (1969). This is not the scenario Congress envisioned when it took "great care both to define the rights subject to military law, and provide a complete system of review within the military system to secure those rights." *Burns v. Wilson*, 346 U.S. 137, 140 (1953); *cf. Chappell v. Wallace*, 462 U.S. 296, 300 (1983) ("The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion. . ."). Moreover, it serves to undermine congressional intent to establish the CAAF as the final arbiter of military claims, providing uniformity in military justice—an essential component to

maintaining fairness and discipline in the Armed Services. *See* 95 Cong Rec. H5719-22 (daily ed. May 5, 1949).

To ensure that the well-suited and specialized military courts once again exercise their "primary responsibility" for supervising military justice, including addressing post-finality claims of military error raised by military prisoners still subject to military law, this Court must intervene. *Noyd*, 395 U.S. at 693-94.

I. The Unique Nature of the Military and the Complexity of Military Law Justifies the Deference Long Afforded to Military Courts, and Correspondingly Warrants Distinctive Treatment of Extraordinary Writs to Ensure Military Courts Adjudicate Military Claims.

"[T]he 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*, 346 U.S. at 140. Instead, Congress has this task. *Id.* Accordingly, Congress established what it intended to be a self-sufficient, self-correcting uniform military justice system to handle the complexity of military law. The bedrock of this military justice 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. Congress thus "codified primary responsibility for the supervision of military justice" in the CAAF. *Noyd*, 395 U.S. at 695; *See also* 95 Cong Rec. H5719-22 (daily ed. May 5, 1949).

In recognition of this congressional intent, as well as the need to maintain good order and discipline in the Armed Forces, avoid needless friction between the civilian and military judicial systems, and afford due respect to the military courts' "expertise in interpreting the technical provisions of the UCMJ," the federal judiciary has long afforded a "substantial degree of deference" to military tribunals. *Loving*, 62 M.J. at 250 (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."). So, too, has this Court acknowledged the necessity of civilian courts deferring to their military counterparts on military claims of error. *Gusik v. Schilder*, 340 U.S. 128 (1950) (establishing the general rule that habeas petitions from military prisoners should not be entertained by federal courts until all remedies have been exhausted in the military justice system); *cf. Chappell*, 462 U.S. at 305 (noting that while military personnel are not barred from seeking relief from civilian courts for military wrongs, these courts "are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.") (citation omitted). This Court has further deemed the CAAF "a critical element" in balancing unique "military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses."[5] *Schlesinger*, 420 U.S. at 757-58.

[5] In *Schlesinger*, this Court referred to the Court of Military Appeals. 420 U.S. at 758. Congress later renamed the Court of Military Appeals as the Court of Appeals for the Armed Forces. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a), 108 Stat. 2663, 2831 (1994).

Yet, despite the distinctive exigencies of the military, the justifiable deference afforded to military courts by their civilian counterparts, and the clear congressional mandate establishing the "primacy" of military courts on military justice matters, the CAAF has adopted a series of rules that wrest from it the authority to act as the ultimate arbiter over military claims. *Loving*, 62 M.J. at 251 n.100. With respect to writs of error coram nobis, for example, the CAAF only entertains such petitions under following circumstances:

> (1) the alleged error is of the most fundamental character;
>
> (2) no remedy other than coram nobis is available to rectify the consequences of the error;
>
> (3) valid reasons exist for not seeking relief earlier;
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> (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment;
>
> (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and
>
> (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo I, 66 M.J. at 126. Pursuant to this final condition, the CAAF has held that coram nobis relief is unavailable if the petitioner remains in custody, following the overwhelming precedent in the federal circuits. *Gray III*, 77 M.J. at 6 (citing *Loving*, 62 M.J. at 254). The problem with this rule, however, is the paradox it creates with respect to the CAAF's jurisdiction. If the CAAF, pursuant to its authorities under the All Writs Act and Article 67, can entertain coram nobis petitions from former servicemembers who have been released from confinement—as this Court explicitly sanctioned in *United States v. Denedo* (*Denedo II*), 556 U.S. 904 (2009)—then it should have similar authority to review such claims by military prisoners. Although this

does not align with the federal circuits, the CAAF and its inferior military courts are the congressionally-empowered and universally-preferred entities to handle military-specific claims. Accordingly, atypical treatment is justified. A rule to the contrary would force a military prisoner to wait years and perhaps decades to have a specialized military court employ its "thorough familiarity with military problems" to adjudicate an issue that arose in the very court-martial which subjected the servicemember to confinement.[6] *Schlesinger*, 420 U.S. at 758. This cannot be what Congress envisioned when it created the military courts.

II. The Interplay Between Article I and Article III Courts Effectively Precludes Any Consideration of Petitions for Extraordinary Relief from Military Prisoners.

A second problem with the military's coram nobis prerequisites relates to the availability of other remedies. *Denedo I*, 66 M.J. at 126. Specifically, the CAAF has determined that coram nobis relief is unavailable if a petitioner can seek habeas relief from Article III courts. *Gray III*, 77 M.J. at 6. As a starting point, if "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect," *Denedo II*, 556 U.S. at 917 (emphasis in original), that jurisdiction should not be hobbled by a requirement that service members first pursue challenges to their courts-martial in Article III courts before availing themselves of the military justice system established by Congress. But even if this process is appropriate, the availability of relief in the

[6] In this case, Petitioner will be confined for approximately eight more years.

federal courts is illusory—a point aptly illustrated by the efforts of Specialist Ronald Gray, one of just four men on the military's death row.

In 2016, Specialist Gray sought corum nobis relief in the military justice system only to be turned away due to his purported ability to seek habeas relief from other jurisdictions. *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 a habeas petition to the federal court, who ultimately declined review until he exhausted his available remedies within 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 and dismissed his case with prejudice. *Gray III*, 77 M.J. at 6 ("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."). The CAAF's decision in this regard was in direct conflict with this Court's precedent. *Denedo II*, 556 U.S. at 917. Nevertheless, it left Specialist Gray in limbo, with no availability of relief from either the Article I courts or the Article III courts. And unfortunately, Specialist Gray is not alone in this jurisdictional doldrums.

As acknowledged by the CAAF itself, "a number of federal district courts have continued to rely upon the availability of collateral review in the military justice system to dispose of petitions seeking collateral relief." *Denedo I*, 66 M.J. at 123 (citing *Tatum v. United States,* Action No. RDB-06-2307, 2007 U.S. Dist. LEXIS 61947 at *12-*13 (D. Md. Aug. 7, 2007) (dismissing a request for post-Article 76 collateral relief on the grounds that the petitioner had not sought a writ of error coram nobis

before this Court); *Fricke v. Sec'y of the Navy*, No. 03-3412-RDR, 2006 U.S. Dist. LEXIS 36548, at *9-11 (D. Kan. June 5, 2006) (relying on this Court's summary disposition of petitioner's post-Article 76 request for coram nobis relief); *MacLean v. United States*, No. 02-CV-2250-K (AJB), 2003 U.S. Dist. LEXIS 27219, at *13-*15 (S.D. Cal. June 5, 2003) (dismissing a petition for coram nobis relief for lack of jurisdiction and noting the availability of such relief before the Court of Criminal Appeals); *Parker v. Tillery*, 1998 U.S. Dist. LEXIS 8399, at *3-*5 (D. Kan. May 22, 1998) (post-Article 76 coram nobis review in the military justice system demonstrated full and fair review of claim). Consequently, if the military courts continue to narrowly interpret their authority over petitions for extraordinary relief, as the CAAF appears to have done here, then military prisoners will be foreclosed from *any* court considering claims that strike at the heart of their convictions and sentence.

III. Finality Under Article 76 Does Not Preclude Post-Finality Claims When the Alleged Error Relates to the Original Proceeding.

The CAAF dismissed Petitioner's habeas request for lack of jurisdiction—presumably because finality occurred under Article 76. *Cf. Gray III*, 77 M.J. at 6. This was error, as Article 76 finality was never intended to be a jurisdictional bar or as a preclusion to collateral attacks. Indeed, as the CAAF's predecessor reasoned:

> Finalization of proceedings under Article 76, UCMJ, not only terminates the appellate processes of courts-martial, it also terminates this Court's jurisdiction of the case, *except in circumstances contemplated by [The All Writs Act].*

Hendrix v. Warden, 49 C.M.R. 146 (U.S. C.M.A. 1974)) (emphasis added) (footnotes omitted). The CAAF has also held that regardless of whether coram nobis was

available to a military prisoner, a writ of habeas corpus certainly was "since [the petitioner] remains in confinement *pursuant to the proceedings which he now challenges*." *Garrett v. Lowe,* 39 M.J. 293, 295 (C.A.A.F. 1994) (emphasis added) (citation omitted). These determinations are consistent with this Court's later holding in *Denedo II*, wherein it concluded that extraordinary writs were still available to the petitioner—even though his case was final under Article 76—because he was challenging the validity of his conviction and the military court had jurisdiction to entertain the petition pursuant to its authority to act on the findings and sentence under Article 66. 556 U.S. 904. Thus, this Court reaffirmed its long-standing view that Article 76 serves merely as "a prudential constraint on collateral review, not a jurisdictional limitation." *Schlesinger*, 420 U.S. at 745.

As applied here, Petitioner's underlying claim is that his court-martial was tainted by the appearance of unlawful command influence. Pet. App. 15a[7], 43a. This relates to the legality and validity of his conviction; consequently, Article 76 does not preclude review in the military courts.

IV. Allowing Article III Courts to Adjudicate Military Claims Subverts Congressional Intent, Deprives Military Petitioners from Having Their Military Claims Considered by Military Courts While Being Assisted by Military Attorneys, and Will Result in a Lack of Uniformity.

Assuming *arguendo* that the shift of military claims from Article I courts to their Article III brethren is well-founded with respect to current precedent, and that a federal court is even willing to entertain such petitions, there are a host of reasons

[7] The appendices to this petition have been removed from this filing, with the exception of Petitioner's Petition for a Writ of Extraordinary Relief Due to Unlawful Command Influence (UCI), dated September 13, 2018, and one of its subappendices (QQ).

why civilian courts should not be the final arbiters of military-specific claims. First, these courts are "ill-equipped" to determine the impact of their decisions on the military and its inherent need for discipline. *Chappell*, 462 U.S. at 305. Likewise, these courts would be "obligated to interpret extremely technical provisions of the [UCMJ] which have no analogs in civilian jurisprudence." *Noyd*, 395 U.S. at 696. Indeed, as Congress has acknowledged, "military law in itself embodies hundreds of complicated problems of status arising out of customs of the service as well as statute and regulation." 95 Cong Rec. H5719-22 (daily ed. May 5, 1949). A layman court should not have to "blaze a trail on unfamiliar ground," *id*., particularly where it involves intimate military matters like command authority—the underlying issue in the present case.

Deficits in experience and familiarity with military issues will not just be limited to the Article III courts, however. If a military prisoner seeks collateral relief in the federal system, he or she will likely do so without the assistance of specialized military counsel. Although Congress provides this counsel to servicemembers pursuant to Article 70, this authority only extends to representation before the military courts and this Court. Consequently, not only will a military prisoner have his or her military-specific issue decided by a layman civilian court, he or she will have to present their case utilizing an attorney who may have an equally infirm grasp on military law.

Finally, if military prisoners 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 Petitioner's

incarceration at the FLDB. 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 that impact servicemembers. *See*, *e.g.*, 95 Congr. Rec. H5719-22 (daily ed. May 5, 1949).

V. An Exception Should Apply Where Government Misconduct is a Material Factor in the Application of the Finality Rule.

Pursuant to Article 70, Congress requires the Government to provide

Petitioner with counsel who is able to provide representation in "both a competent and timely manner." *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003); *see also United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). This duty derives from the Government's "statutory responsibility to establish a system of appellate review . . . that preserves rather than diminishes the rights of convicted servicemembers." *Moreno*, 63 M.J. at 137 (quoting *Diaz*, 59 M.J. at 38).

In this case, the Government tasked the ADD to assist Petitioner. The ADD subsequently failed to file Petitioner's habeas petition with the AFCCA prior to case finality under Article 76. This failure ultimately led the AFCCA and, later, the CAAF, to dismiss Petitioner's habeas claim for lack of jurisdiction. Assuming *arguendo* that Article 76 finality generally precludes the consideration of habeas petitions in military courts, then there should be an exception to this rule where, as here, the Government—through the ADD—is at fault for failing to file prior to finality. This is especially true where the Government did not merely fail to provide "timely and competent" representation. Rather, its agents materially misrepresented to Petitioner that they would file his petition immediately and then subsequently told him the petition had, in fact, been filed. This assurance, whether an intentional falsehood or not, effectively impeded Petitioner from personally filing the brief to the AFCCA, as he reasonably and justifiably relied on the assertions of the ADD.

Had Petitioner's writ been filed in June 2018, as the ADD claimed it had, then there would be no question regarding the AFCCA's jurisdiction to consider it. Indeed, the AFCCA has previously held that Article 76 did not divest it of its jurisdiction to review an extraordinary writ filed prior to finality. *Richards v. James*, 2018 CCA

LEXIS 507 (A.F. Ct. Crim. App. Oct. 19, 2018) (unpub. op.). Likewise, the CAAF would have been able to review it through a writ-appeal petition, if the AFCCA declined to provide relief.

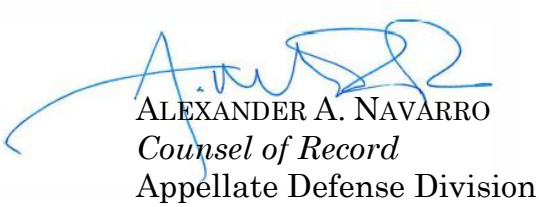
Where a government or state-appointed entity fails in a particular duty to an accused, the government or state is typically held responsible. *Cf. Barker v. Wingo*, 407 U.S. 514, 531 (1972) (noting that the ultimate responsibility for speedy trial delay caused by negligence or overcrowded courts rests with the Government); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (failure of court-appointed counsel and delays by the court are attributable to the state); *Simmons v. Breyer*, 44 F.3d 1160, 1169 (3d Cir. 1995) ("Responsibility for this [post-trial] delay cannot be charged against Simmons, the victim of ineffective [appointed] lawyers.") (citing *Harris v. Champion*, 15 F.3d 1538, 1562 (10th Cir. 1994) (delay caused by Public Defender's inability to timely perfect an appeal should not be attributed to petitioner.)). The same should ring true here, where Petitioner's habeas claim would have been timely filed and considered but for the misconduct of the ADD—Petitioner's Government-appointed representative.

The integrity of a criminal justice system is undermined when the Government obstructs an appellant from appealing a conviction. Therefore, assuming Article 76 finality precludes military prisoners from having their extraordinary writ claims heard in a military court, this Court should recognize an exception for those cases in which Government misconduct is a material factor in the application of the finality rule.

Conclusion

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

Respectfully Submitted,



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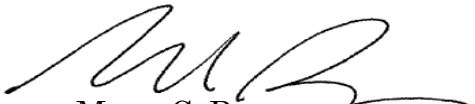

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