

No. 22-540

In The

Supreme Court of the United States

PAUL ANTHONY RIOJAS

Petitioner

v.

DEPARTMENT OF THE ARMY, ET AL.

Respondents

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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Questions Presented for Review

1. Of the varying Circuit Courts' developed standards for determining if review of a military proceeding is appropriate, which scope and standard of review is proper and in accordance with the *Burns*' full and fair consideration standard?
2. Does the holding in *Fletcher v. Outlaw*, 578 F.3d 274 (5th Cir. 2009), as applied in Riojas' case, adequately determine whether a military court fully and fairly considered a claim when it does not account for an abuse of discretion or whether proper legal standards were applied?

Introduction

The respondents' brief in opposition reframes the question. presented in a manner that attempts to detract from the critical issues raised by the petitioner. Specifically, whether *Fletcher* affords the military courts complete deference over its judicial determination, and whether military courts have discretion to disregard proper legal standards.

Fletcher v. Outlaw, 578 F.3d 274 (5th Cir. 2009). Despite the attempt, the respondents concede that the "precise scope of *Burns* has been subject to some uncertainty in the courts of appeals" and imply that clarification on the contours of *Burns*' "full and fair consideration" test is necessary. (Brief in Opposition at 6); (*Burns v. Wilson*, 346 U.S. 137 (1953). This case best exemplifies many of the problems raised by the circuit courts and would prove to be an excellent vehicle for resolving the *Burns* scope issue.

Argument

The respondents' assertion that the court of appeals correctly determined that the petitioner is not entitled to review according to the *Burns* standard is misleading. To begin, the assertion contradicts the respondents' belief that the *Burns* standard is incomplete. What can be said of the court of appeals decision is that it was correct in adhering to its own precedent. However, the court of appeals precedent is flawed in its reasoning and workability.

1. The decision in *Burns* did not have full support among the justices. Justice Frankfurter, dissenting, stated that the case should be set for re-

argument as “issues of far-reaching import are at stake which call for further consideration [as] they were not explored in all their significance in the submission made to the Court.” *Burns*, 346 at 149-150. Those far-reaching implications are now present in the relations of the federal and military courts as demonstrated by the petitioner’s case and questions presented.

Justice Douglas and Justice Black, also dissenting, took issue with the fact that at no time had there been any considered appraisal of the facts. This is specifically the argument made by the petitioner in the instant case. Appraisal of the military proceeding by the federal courts is, as these justices cautioned, vital to determining whether full and fair consideration had been met. To reduce that examination to simply whether the military courts were briefed and had considered a claim, as per *Fletcher*, severely narrows the scope and standard of review of *Burns*. The subsidiary question raised by the petitioner asks what defines “manifestly refused.” *Burns*, 346 U.S. at 142. Whether it is possible for a military court, after a briefing and consideration, to improperly refuse to consider a servicemember’s claim.

2. The respondents make unsubstantiated claims that the petitioner’s case would fail any plausible application of the “full and fair consideration” test, thereby making this case an improper vehicle. The petitioner disagrees with this assessment as he specifically identified the Courts of Appeals for the District of Columbia and the Federal Circuit standards which remedied the inadequate record issue, making it possible for a grant of review

and subsequent relief. This case is a proper vehicle as it easily demonstrates the different outcomes of the varying *Burns* interpretations.

A recent case that validates the petitioner's alternate test claim is that of *Bergdahl v. United States*, 1:21-cv-00418-RBW. On March 31, 2023, the District Court for the District of Columbia having weighed the derived *Burns* standard against the motion to dismiss on the grounds that the claim had been fully and fairly considered ruled in favor for Robert Bergdahl. Bergdahl claimed that the military court had manifestly refused to consider his claim involving an impartial judge. This is another case where the Army Court of Criminal Appeals (Army CCA) abused its discretion, did not apply proper legal standards and failed to consider a claim fully and fairly. In the civil courts the military court, again, utilized the narrowest interpretation of *Burns* as a defense to justify all military determinations and prevent substantive review of any petitioner's claims. In this instance, Bergdahl, who resides in the same city as the petitioner at the time of his civil suit filing, was fortunate enough to benefit from experience legal counsel who advised that he raise the proceeding through the District of Columbia.

3. The respondents' claim that the petitioner's ineffective-assistance claim was legally and factually insubstantial, and did not merit discussion according to the Army CCA is unfounded. Both the Army CCA and CAAF did not explicitly refer to the merit of the claim, only that the claim was considered and denied. As the petitioner has previously contended, the military courts did not reach the merits of the claim before denying review. Given the single

sentence decision by the Army CCA, neither the petitioner's nor the respondents' claim regarding full and fair consideration can be proven. In the brief in opposition the respondents attempt to insert their own grounds for the *coram nobis* determination and present them as that of the military court's rationale. This Court should not accept such substitution.

Furthermore, the respondents' argument that if there is no evidence to the contrary then the military court properly considered a servicemember's claim is a logical fallacy. Evidence would prove either proper or improper consideration. The absence of evidence would prove neither. Evidence is independent of consideration and it is possible to have proper or improper consideration without evidence. Under this framework a petitioner would never meet this burden if the military courts, as demonstrated by the petitioner's case, simply did not offer any information in which they could utilize or address.

While appellate courts have wide discretion on whether or how to write their decision it does not detract from the rule, as the petitioner understands, that decisions are immune from collateral attack. A decision absent any grounds is susceptible to abuse of discretion review. It is especially warranted when a petitioner can demonstrate that the court misapplied legal standards or ignored evidence presented before it. Applying an unchecked latitude as sought by the respondents would only reinforce a military court's immunity against collateral attack.

4. For the purpose of correcting the brief in opposition where statements that the ages of the

victims were 12-14 years of age; the age group of which the petitioner was charged and convicted was that of 13-16. A witness statement taken by the German police was that of a 12-year-old. However, that individual was not listed as a victim in the offense. This statement by the respondents is either a mistake or an intentional misrepresentation of the record used to create disfavor for the petitioner and distract this Court from the raised issue.

More significant here is the fact that the respondents use information from the record of trial and the opinion of the Army CCA on direct appeal to support its argument. Where previously the district court and court of appeals were barred from reviewing such records and limited to a single sentence *coram nobis* decision when making their own evaluations. The respondents capitalized on the limitations imposed by *Fletcher* in the prior proceedings, but now attempt to incorporate such information in order to demonstrate legitimacy in the military court proceedings. Legitimacy that is unvalidated, and should be, as Justice Douglas and Justice Black declared, examined.

Insofar as to address the *Strickland* requirements raised by the respondents, the petitioner did not include pertinent information as he believed it was not relevant to the questions presented. *Strickland v. Washington*, 466 U.S. 668 (1984). Should this Court find it necessary to apply the *Strickland* test, petitioner requests that the full record concerning the ineffective-assistance claim be reviewed so that an accurate assessment be made. There the Court will find that evidence exists pointing to deficient performance and prejudice.

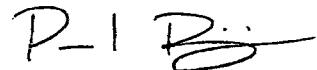
5. This case is a proper vehicle to clarify the *Burns* “full and fair consideration” test as it clearly demonstrates the exploits used by the military courts. Where a military court does not have to provide any grounds for its decision and that decision is insulated from collateral attack simply due to decision being made is a serious flaw. The Court’s intervention is necessary to protect servicemember’s rights, and to correct any and all miscarriages of justice.

Conclusion

The petition for writ of certiorari should be granted.

April 2023

Respectfully submitted,



Paul Anthony Riojas