NO. _____

In The

Supreme Court for the United States

ROBERT A. CONDON, Technical Sergeant (E-6)
U.S. Air Force

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES ARMED FORCES COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the Court of Criminal Appeals of the Armed Forces, which is without findings of fact or law, susceptible to review by this Court which should require a remand to obtain that information to permit meaningful review.

2. Whether the failure of the prosecution to ensure that the same transcript of proceedings was provided to counsel for Petitioner as was provided to the prosecution and, if not, whether that warrants relief.

3. Whether Petitioner's counsel was ineffective in failing to detect that there was a difference in the transcript provided to the prosecution and to him and whether that difference warrants relief.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- United States Air Force Court of Criminal Appeals
  In Re: Robert A. Condon
  Miscellaneous Docket No. 2022-07
  Date: 08/04/2022

- United States Court of Appels for the Armed Forces
  Robert A. Condon v. United States
  USCA Docket No. 22-0287/AF
  Date: 11/18/2022

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TABLE OF AUTHORITIES CITED

Cases

Statutes

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 11/18/2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including____ (date) on____(date) in Application No._A___.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was_____

A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date:_, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____date) on (date) in Application No._A__.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of United States Constitution
Sixth Amendment of United States Constitution

28 U. S. C. §1254(1)
28 U. S. C. §1257(a)

STATEMENT OF THE CASE

While the circumstance here is unique, it is verging on the obscene to suggest that this Court will enter a decision holding that the failure of prosecution to provide accurate transcripts does not deprive Petitioner of his rights to due process of law as guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

REASONS FOR GRANTING THE WRIT

QUESTION NO. 1:

> Does the decision of the Court of Criminal Appeals of the Armed Forces, which is without findings of fact or law susceptible to review by this Court, require a remand to obtain that information to permit meaningful review

The entire decision from the Court of Criminal Appeals of the Armed Forces is but one sentence. To be sure, it is clear as to what the relief was: it was denied. But it contains not a hint of analysis of the facts or the law. It is immune from review because of that shortcoming.

If this form of opinion if this form of opinion is permitted, why should not all courts draft their decisions in this manner? It is no doubt easier for the various writers but it avoids any potential analysis by this or other courts. That would debase the entire history of Supreme Court jurisprudence.

It is not that the United States Court of Criminal Appeals for the Armed Forces is unique and able to write whatever it wishes. In Ortiz v. United States, 138 S. Ct. 2165 (2018), this Court held that it had appellate jurisdiction over

decisions of the United States Court of Appeals for the Armed Forces. No special provisos were mentioned. In Ortiz it would appear that the decision being reviewed was one that indeed contained assessment of the facts under the law and therefore could be reviewed pursuant to a grant of the Petition for Certiorari.

As this Court is aware there are several different standards for review to be applied in the cases which come before it depending on the issues. If they are factual, the standards include whether they are arbitrary, capricious, not supported by substantial evidence or clearly erroneous. Questions of law are reviewed *de novo*. Questions of judicial oversight are reviewed under the standard of abuse of discretion while questions of constitutionality apply the test of rational basis, intermediate scrutiny and strict scrutiny, depending on the circumstances.

Review in this Court of decisions of other courts, indeed of the legislature and the executive branch, was established in 1803 and remains the law today. Marbury v.

Madison, 5 U.S. 137 (1803). Nothing has happened that suggests that standard of review is different for military courts.

This decision presented for review here makes the Court whose work is to be reviewed here the final arbiter of the correctness of its own decision. As the Supreme Court of Ohio said recently in a different proceeding but with a similar issue, "To the extent that a trial court's policy allows the trial court to review the correctness of its own decisions, that policy is unreasonable." State v. Hill, 2022-Ohio-4544 (2022). Dealing with a similar issue, this Court condemned the practice of courts announcing their decision and leaving it to the parties to write the findings in fact and conclusions of law. Anderson v. City of Bessemer, 470 U.S. 564 (1995). But while those decisions might not be favored, at least the Court would have had something to look at and evaluate.

This may be the practice in the Court of Criminal Appeals for the Armed Forces which was developed at a time when it felt its word was final but since Ortiz, that is not the case. Some sort of reasoned decision should be provided to facilitate this

Court's review. It is essential if Petitioner is to be treated in a manner consistent with the requirements of the Fifth and Sixth Amendments of the Constitution of the United States.

QUESTION NO. 2:

> Whether the failure of the prosecution to ensure that the same transcript of proceedings was provided to counsel for Petitioner as was provided to the prosecution and, if not, whether that warrants relief.

The circumstances of Petitioner's appeal were that he was confined in the Leavenworth Disciplinary Barracks in Kansas. His appellant counsels were located in Florida and Virginia. There were thousands of miles between them all. They were also aware that their conversations were being recorded by the Government. That made execution of this appeal difficult. But throw in the fact that there were two different transcripts and it was a practical impossibility. That this is correct was established by Colonel Todd Fanniff, the Air Force Officer asked to look into these circumstances. He confirmed that there were indeed two different transcripts but never provided an explanation as to why.

The confusion on the part of counsel for Petitioner was driven in no small measure by the fact that there were no page breaks. Consecutive pagination in both transcripts created the

appearance that all portions of the transcripts were before them. There were three lawyers representing Petitioner on his appeal and they all missed this circumstance.

Yet the prosecution was aware of it, noted it, and corrected its copies and those of the court but said not a word to counsel for Petitioner.

These circumstances do not arise regularly, and one supposes that the careful conduct of other lawyers may have prevented that but it did happen here. As a result, Petitioner is now one-third of the way through a 30 year sentence, having been discharged dishonorably from the Air Force despite having had a decorated career as an Air Force non-commissioned officer serving in several foreign combat zones.

This Court should not let stand this decision which permits such conduct by the prosecution. The protections guaranteed by the Fifth and Sixth Amendments must be assured. In the Air Force the burden is on the prosecution to prepare the transcripts according to the military code and it failed to do that. It would be troubling enough if this were a case where the airman

had been simply discharged but add in the substantial prison sentence and it just ought not be allowed to occur.

QUESTION NO. 3:

> Whether Petitioner's counsel was ineffective in failing to detect that there was a difference in the transcript provided to the prosecution and to him and whether that difference warrants relief.

This Court is no doubt familiar with the standards of review of the claims of ineffective assistance of counsel so time will not be taken setting them forth since they are well-established. Often such claims are dismissed as being attributable to trial tactics. There is no such possibility here. Nothing can be gained by having briefs submitted containing pagination citations to a transcript record the judges do not have. It is impossible to assess the deleterious impact that had on the judges attempting to review his appeals. But there had to be a disparaging eye cast on the Petitioner's briefs whose cites did not match the record. His counsel should have detected the issue and did not. That is by definition ineffective assistance of counsel which deprived Petitioner of his rights under the Sixth Amendment and warrants a new appeal.

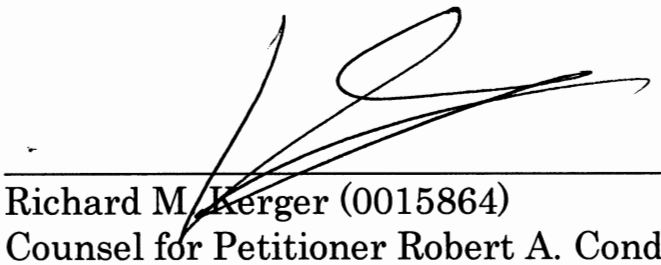
STANDARD OF REVIEW

The scope of review if *de novo*. In military courts, whether it is ineffective assistance of counsel or an error in post-trial proceedings does not matter. The scope of review to be exercised is *de novo*. United States v. Miller, 82 M.J. 204 (2022); United States v. Beauge, 82 M.J. 157 (2022); and United States v. Schmidt, 82 M.J. 68 (2022).

CONCLUSION

For the reasons set forth in the questions presented for review, a favorable decision should be made regarding Petitioner's contentions and certiorari should be granted to allow full development of the issues here and a review of the merits of this appeal.

Respectfully submitted,



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NO. _____

IN THE SUPREME COURT FOR THE UNITED STATES

ROBERT A. CONDON, Technical Sergeant (E-6), U.S. Air Force,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, RICHARD M. KERGER, do swear or declare that on this date as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States of America
5614 Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Olivia B. Hoff, Capt., USAF Appellate Government Counsel
Mary Ellen Payne, Associate Chief
Government Trial and Appellate-Operations Division
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews, MD 20762

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 10th day of February, 2023.

Richard M. Kerger (0015864)

APPENDIX A

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Robert A. Condon,

Appellant

v.

United States,

Appellee

USCA Dkt. No. 22-0298/AF
Crim.App. No. 38765

ORDER

On consideration of the writ-appeal petition, it is, by the Court, this 18th day of November, 2022,

ORDERED:

That the writ-appeal petition is denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Kerger)
Appellate Government Counsel (Hoff)

APPENDIX A

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Robert A. CONDON **Technical Sergeant (E-6)** **U.S. Air Force** ***Petitioner***	)	**Misc. Dkt. No. 2022-07**
	)	**ORDER**
	)	**Special Panel**

This order resolves Petitioner's 19 July 2022 request for extraordinary relief in the nature of a writ of *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a).

Petitioner is a former active duty member of the United States Air Force, and was tried by a general court-martial at Hurlburt Field, Florida. On 25 September 2014, contrary to his pleas, Petitioner was found guilty of dereliction of duty, rape by fear of grievous bodily harm, sexual assault of a second victim based upon her inability to consent due to alcohol consumption, stalking, forcible sodomy, assault consummated by a battery, false imprisonment, and obstruction of justice, in violation of Articles 92, 120, 120a, 125, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 920, 920a, 925, 928, 934.[1] Petitioner was sentenced to, and the convening authority approved, a dishonorable discharge, 30 years of confinement, total forfeiture of pay and allowances, and reduction to the grade of E-1. This court affirmed the findings and sentence. *United States v. Condon,* No. ACM 38754, 2017 CCA LEXIS 187, at *82 (A.F. Ct. Crim. App. 10 Mar. 2017) (unpub. op.), *aff'd*, 77 M.J. 244 (C.A.A.F. 2018). Petitioner remains in confinement pursuant to his sentence.

Petitioner's case completed direct review on 1 October 2018 when the Supreme Court of the United States denied his petition for certiorari. *Condon v. United States*, 139 S. Ct. 110 (2018); *see* Article 71(c)(1)(C)(ii), UCMJ, 10 U.S.C. § 871(c)(1)(C)(ii). On 26 April 2019, Petitioner's case became final when the

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[1] References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2002 ed.).

convening authority ordered the dishonorable discharge executed, having already ordered the other portions of Petitioner's sentence executed. *See* Article 76, UCMJ, 10 U.S.C. § 876.[2]

Petitioner, through civilian counsel, asks this court to issue a writ of *coram nobis*, overturning his conviction and, at a minimum, granting Petitioner a new appeal. Petitioner cites inadequate direct review of his case on appeal, and requests we review the following: (1) whether prosecutorial misconduct occurred in the handling of the court-martial transcript on appeal; and (2) whether Petitioner's appellate defense counsel were ineffective. Specifically, Petitioner contends that the Government prepared two different versions of the trial transcript, a "correct" version that was served on Petitioner, and a different "incorrect" version that was served on his counsel.[3] Additionally, Petitioner argues that he received ineffective assistance of counsel during his appeal, due to his appellate counsel's failure to discover the alleged issues with the record of trial.

The All Writs Act, 28 U.S.C. § 1651(a), grants this court authority to issue extraordinary writs. *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005) (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)). "However, the Act does not enlarge our jurisdiction, and the writ must be in aid of our existing statutory jurisdiction." *United States v. Chapman,* 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016) (citing *Clinton,* 526 U.S. at 529, 534–35). "The writ of *coram nobis* is an ancient common-law remedy designed 'to correct errors of fact.'" *United States v. Denedo*, 556 U.S. 904, 910 (2009) (quoting *United States v. Morgan*, 346 U.S. 502, 507 (1954)). Appellate military courts have jurisdiction over "*coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." *Id.* at 917. The writ of *coram nobis* is an extraordinary writ and an extraordinary remedy. *Id.* It should not be

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[2] The substantive law on finality regarding Appellant's case did not change during the course of his appeal. *See* Articles 71(c)(1)(C)(ii) and 76, UCMJ (*Manual for Courts-Martial, United States* (2012 ed.)), and Articles 71(c)(1)(C)(ii) and 76, UCMJ (*Manual for Court-Martial, United States* (2016 ed.)).

[3] In support of this petition, Petitioner's counsel submitted two exhibits which we considered. Exhibit A is a copy of an email sent from Air Force Appellate Defense Division to Petitioner's counsel. This email informed Petitioner's counsel that the actual record of trial in Petitioner's case was delivered to both appellate government counsel and Petitioner's military and civilian appellate counsel. While the email does acknowledge errors in the electronic transcript, it states that the errors only "led to discrepancies in page numbers" between the actual record of trial and the electronic transcript. Exhibit B is a letter from the Air Force Inspector General's Office to Petitioner's mother. This letter states that their investigation disclosed "both the government and defense had access to the complete record of trial, and there is no evidence of ethical violations by government counsel."

granted in the ordinary case; rather, it should be granted only under circumstances compelling such action to achieve justice. *Id.*; *Morgan*, 346 U.S. at 511; *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973).

Although a Petitioner may file a writ of *coram nobis* at any time, to be entitled to the writ he must meet the following threshold requirements:

> (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; (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 v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009).

"This court uses a two-tier approach to evaluate claims raised via a writ of *coram nobis*. First, [P]etitioner must meet the aforementioned threshold requirements for a writ of *coram nobis*. If [P]etitioner meets the threshold requirements his claims are then evaluated under the standards applicable to his issues." *Chapman*, 75 M.J. at 601 (citing *Denedo*, 66 M.J. at 126).

Evaluating Petitioner's case under the *coram nobis* threshold requirements, we find that Petitioner has failed to satisfy several threshold requirements, and that "the failure to meet any one alone warrants a denial of Petitioner's writ." *Id.* We will address three of the six *Denedo* factors.

As to the first factor, we find that Petitioner has not demonstrated that a fundamental error exists. Petitioner's court-martial was reviewed by this court on 10 March 2017, at which time this court determined that the findings and sentence were correct in law and fact and that no error materially prejudicial to a substantial right of Petitioner occurred. *Condon*, unpub. op. at *82. Petitioner's court-martial conviction was subsequently reviewed by our superior court, the United States Court of Appeals for the Armed Forces, which affirmed the decision of this court. *Condon,* 77 M.J. at 247. Finally, as noted above, on 1 October 2018, the Supreme Court denied Petitioner's request for certiorari. There is no indication that any of these courts did not have a complete record of trial, or that their review of Petitioner's conviction was prejudiced in any way. Petitioner has also not demonstrated what, if anything, would have changed regarding his appeal as a result of discrepancies in page numbers between the official record of trial and the electronic transcript. At most, any

alleged error was clerical in nature, and therefore was manifestly not of "the most fundamental character." *See Chapman*, 75 M.J. at 601.

As to the second factor, Petitioner has also failed to demonstrate that no remedy other than *coram nobis* is available to rectify the consequences of the alleged error. Here, because Petitioner is still in confinement, he still has the option to seek relief via a writ of habeas corpus in the appropriate federal district and appellate courts.[4]

Likewise, in addressing the sixth factor, Petitioner has not demonstrated that his sentence has been served, or that the consequences of the erroneous conviction persist. On this point, we note that Petitioner is still in confinement, and where Petitioner "is still in confinement, *coram nobis* relief is not available. *United States v. Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017) (citing *Loving*, 62 M.J. at 254).

Finally, assuming *arguendo* that Petitioner could satisfy the threshold requirements, we find he has failed to demonstrate that his substantive claims would warrant setting aside the findings and sentence imposed pursuant to his court-martial conviction.

Accordingly, it is by the court on this 4th day of August, 2022,

ORDERED:

The Petition for Extraordinary Relief in the Nature of a Writ of *Coram Nobis* is **DENIED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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[4] Petitioner filed a petition for extraordinary relief in the nature of a writ of habeas corpus with this court which we denied because we do "not have jurisdiction over habeas corpus petitions when there is a final judgment as to the legality of the proceedings, all portions of the sentence have been ordered executed, and the case is final under Articles 71(c)(1)(C)(ii) and 76, UCMJ." *In re Condon*, Misc. Dkt. No. 2022-04, 2022 CCA LEXIS 372, at *2 (A.F. Ct. Crim. App. 21 Jun. 2022) (order). However, this does not preclude Petitioner from seeking relief from an appropriate Article III court.