22-7068

No.

in the

Supreme Court

of the

United States

Term,

JOSHUA ANDERSON,
Petitioner,

vs.

MARK BOLSTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION(S) PRESENTED

Does the indistinct standard of review promulgated in Burns v. Wilson, 346 U.S. 137 (1953); with the confusion and diverse approaches taken in the lower courts thereto, violate the Fifth Amendment's Due Process Clause and result in an unconstitutional suspension of the writ of habeas corpus pursuant to United States Constitution Article 1, Section 9, Clause 2?

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The Petitioner, Joshua Anderson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on October 4, 2022.

OPINIONS BELOW

1. The original conviction of Petitioner was appealed to the United States Navy-Marine Corps Court of Criminal Appeals, which modified the findings and approved his sentence to confinement for 30 years reported at 2013 CCA LEXIS 517 (Jun. 27, 2013) (unpub. op.) is attached hereto in Appendix A.

2. The decision of the Navy-Marine Corps Court of Criminal Appeals on Petitioner's military

habeas petition was not reported, but is set forth in Appendix B.

3. The decision of the United States Court of Appeals for the Armed Forces on Petitioner's writ-appeal petition reported at 2018 CAAF LEXIS 696 (Nov. 2, 2018) (unpub. op.) is attached hereto in Appendix C.

4. The interlocutory Order of the Eastern District Court of Virginia summarily dismissing three (3) of Petitioner's five (5) claims and requesting additional briefing reported at 2020 U.S. Dist. LEXIS 38322 (Mar. 4, 2020) (unpub. op.) is attached hereto in Appendix D.

5. The decision of the United States District Court for the Eastern District of Virginia on Petitioner's Section 2241 motion reported at 2020 U.S. Dist. LEXIS 156859 (Aug. 27, 2020) (unpub. op.) is attached hereto in Appendix E.

6. The opinion of the Court of Appeals below is reported at 2022 U.S. App. LEXIS 27874 (Oct. 4, 2022) (unpub. op.) and attached hereto in Appendix F.

7. The decision of the United States Fourth Circuit Court of Appeals denying motion for rehearing in this matter reported at 2022 U.S. App. LEXIS 35425 (Dec. 20, 2022) (unpub. op.) is attached hereto in Appendix G.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 4, 2022. A timely petition for rehearing was denied by the United States Court of Appeals on December 20, 2022, and a copy of the order denying rehearing appears at Appendix G. The mandate was filed on December 28, 2022. This petition is timely filed. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States Constitution Article 1, Section 9, Clause 2 states:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

Title 28 U.S.C. Section 2241 states:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions to a prisoner who is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The facts necessary to place in their setting the question now raised are stated as follows:

A. COURSE OF PROCEEDINGS IN THE MILITARY COURTS NOW BEFORE THIS COURT.

Petitioner, Joshua G. Anderson, a Navy Hospital Corpsman Apprentice (E-2) serving on active duty in the United States Navy was convicted in 2012, in accordance with his pleas, of conspiracy to rape a child, rape of a child, indecent liberties with a child, possession of child pornography (2 counts), distribution of child pornography, using indecent language (2 counts), fraudulent enlistment, communicating a threat, and wearing unauthorized medals or badges, in violation of Articles 81, 83, 120, and 134, UCMJ.

The military trial judge sentenced Petitioner to thirty (30) years of confinement, reduction in rank to E-1, forfeiture of all pay and allowances, and a dishonorable discharge from the Navy. The Convening Authority approved the sentence as adjudged and ordered it executed.

On direct review, the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") modified the findings, reassessed the sentence, and affirmed the modified findings and original sentence. United States v. Anderson, No. 201200499, 2013 CCA LEXIS 517, at *11 (N-M. Ct. Crim. App. June 27, 2013) (Appendix A).

On July 9, 2018, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus with the NMCCA seeking to both set aside the findings of guilt and sentence in his court-martial and order a new trial.

The issues Petitioner presented in his habeas petition to the NMCCA (all of which revolve around the inclusion of an Article 13, UCMJ, waiver provision in his pretrial agreement) are identical to those he included in his writ petition to the federal district court.

On July 24, 2018, the NMCCA dismissed Petitioner's habeas petition for lack of jurisdiction

(Appendix B). Petitioner appealed the NMCCA's dismissal of his writ of habeas corpus petition to the Court of Appeals for the Armed Forces on October 18, 2018. On November 2, 2018, the CAAF dismissed Petitioner's habeas writ-appeal petition for lack of jurisdiction (Appendix C).

Both courts dismissed Petitioner's filings for a lack of jurisdiction. However, it appears the military courts are just as confused about their scope of jurisdiction as the civil courts are on reviewing military prisoner's habeas petitions.

In 1998, the CAAF held that unlike "the practice in the United States Circuit Court of Appeal and District Courts, neither the UCMJ nor the Manual for Courts-Martial, United States, 1984, provides procedures for collateral, post-conviction attacks on guilty verdicts." United States v. Murphy, 50 M.J. 4, 5 (C.A.A.F. 1998); see also Witham v. United States, 355 F.3d 501, 505 (6th Cir. 2004) (recognizing Murphy); and Gilliam v. Bureau of Prisons, 2000 U.S. App. LEXIS 3684 (8th Cir. 2000) (quoting Murphy).

Just three (3) short years later, the N.M.C.C.A. found that "finality of a court-martial under art. 76, Unif. Code Mil. Justice, is not a bar to the court's consideration of a petition for extraordinary relief. A request for extraordinary relief in the nature of a writ of habeas corpus or error coram nobis may be filed with a military appellate court to collaterally attack a completed court-martial proceeding. The consideration of such a petition is properly a matter in aid of the court's jurisdiction under the All Writs Act." Fisher v. Commander, 56 M.J. 691 (N.M.C.C.A. 2001) (HN 3).

That precedent stood until August 2020, when the United States Navy-Marine Corps Court of Criminal Appeals overturned Fisher and held that "case finality under Unif. Code Mil. Justice art. 76, 10 U.S.C.S. 876, extinguishes jurisdiction to entertain petitions for writs of habeas corpus." United States v. Jordan, 80 M.J. 605 (N.M.C.C.A. 2020).

Accordingly, the Navy court had jurisdiction over Petitioner's habeas petition that was dismissed for lack of jurisdiction in 2018 and because "the NMCCA [had] jurisdiction, the CAAF

[had] jurisdiction to review the NMCCA's" dismissal of Petitioner's habeas filing. See United States v. Denedo, 556 U.S. 904 (2009).

As the NMCCA manifestly refused to consider Petitioner's claims in failing to exert its judicially crafted jurisdiction and CAAF refused to correct this error and exercise its responsibility to protect this servicemember from violations of his Constitutional rights, Petitioner was forced to seek relief outside the military court system.

B. COURSE OF PROCEEDINGS IN THE SECTION 2241 CASE NOW BEFORE THIS COURT.

On January 17, 2019, Petitioner filed a petition for a writ of habeas corpus at the United States District Court for the Eastern District of Virginia, seeking to raise five (5) assignments of error related to the inclusion of an Article 13 waiver provision in his pretrial agreement.

To obtain habeas relief under Section 2241, a petitioner must demonstrate that he is detained in federal custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.S. 2241(c)(3). Relief under this statute is available to military prisoners convicted by a court-martial, but a federal district court's authority to review military court proceedings is limited. See Burns v. Wilson, 346 U.S. 137 (1953). Indeed, pursuant to Burns, if a district court determines that the military court system gave "full and fair consideration" to the claims it is presented, the district court should deny the petition. See id. at 142. "Only when the military has not given a petitioner's claims full and fair consideration does the scope of review by the federal civil court expand." Lips v. Commandant, 997 F.2d 808, 810 (10th Cir. 1993); see also Burns, 346 U.S. at 142 (finding district courts are empowered to conduct de novo review only if military courts "manifestly refused" to consider the petitioner's claims).

After finding that Petitioner's claims were not procedurally defaulted and thus unreviewable

in the context of a 2241 proceeding pursuant to Brimeyer v. Nelson, 712 F. App'x 732, 737 (10th Cir. 2017) (quoting Harris v. Reed, 489 U.S. 255, 261-62 (1989); the District Court, in its March 4, 2020 Memorandum Opinion, recognized Burns and rejected the notion that Petitioner's claims had received "full and fair consideration" in the military courts. Specifically, it held "the Court cannot conclude that petitioner's claims received full and fair consideration by the military courts" and that "the military courts did not give petitioner's claims even [a bare] level of treatment." See Appendix D at 5. Consequently, the court proceeded to assess the merits of Petitioner's claims de novo.

The District Court summarily dismissed all but one of Petitioner's claims, finding they lacked merit. Discerning the remaining ground to be meritorious, the court concluded it couldn't hold that Petitioner "is not entitled to relief as to his arguments regarding the inadequacy of the McFadyen inquiry he received during his plea colloquy and the potential that failure had to negatively affect the sentence petitioner ultimately received." See United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999). The District Court then directed "the parties... to provide additional briefing on [the] question [and] brief the question of what remedy petitioner would be entitled to." Appendix D at 10. The court also permitted the Government to renew its motion to dismiss when filing the supplemental brief. Id.

The District Court then, on August 27, 2020, considered and dismissed the final claim, finding that the issue had been given full and fair consideration by the military courts. The court noted, however, "in a deviation from its original opinion," it was "constrained to dismiss the instant petition based on the sufficient level of review given to petitioner's claims by the military courts." See Appendix E at 4.

This decision was arrived at notwithstanding even the District Court recognizing the uncertain standard of review and the fact "Federal Circuit Courts of Appeal agree that whether

a petitioner's claims received "full and fair consideration" in military tribunals is the correct threshold question in a military-court-related 2241 action but do not agree as to what constitutes "full and fair consideration" to begin with." Id.

The court also noted "Merits review in a federal district court... is rare because [of] the standard of determining whether a claim received adequate consideration is highly deferential to the military courts." Appendix E at 5. That "significant deference" afforded to military court decisions rendered Petitioner's burden, in the District Court's opinion, "to show that his claims did not receive full and fair consideration" - an onerous one, and one that Petitioner failed to meet. Id.

Moreover, the district court failed to acknowledge the Fisher precedent and the fact NMCCA retained jurisdiction, while declaring that "several appellate military courts have found that, where court-martial proceedings are complete for the purposes of Article 76, UCMJ, those courts lack jurisdiction to consider a petition for writ of habeas corpus. See, e.g., Loving v. United States, 62 M.J. 235 (C.A.A.F. 2005) ("[F]inality under Article 76 is the terminal point for proceedings within the court-martial and military justice system... . [J]urisdiction continues until a case is final."); Chapman v. United States, 75 M.J. 598 (A.F. Ct. Crim. App. 2016) (finding it lacked jurisdiction over petition for writ of habeas corpus because the petitioner's court-martial had "completed direct review under Article 71, UCMJ, and [was] final under Article 76, UCMJ."); Gray v. Belcher, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012) (same)." Appendix E at 6. The district court likewise cited In re Best, 79 M.J. 594 (N-M. Ct. Crim. App. 2019), for the proposition that the Navy court also lacked habeas jurisdiction, but that decision specifically held "We find Chapman and Gray compelling, yet in direct conflict with established precedent of this court."

The court thereafter held even if it "were to have the authority to consider the instant

petition, it would deny the sole remaining claim on the merits." Appendix E at 7. However, this opinion is completely contradictory to the earlier meritorious finding utilizing identical facts and precedents and appears only to be an affront once the court regressed its "full and fair consideration" determination. Thus, it is apparent from the record that the muddled and confusing state on the proper standard of review for habeas petitions submitted by military prisoners announced in Burns v. Wilson, 346 U.S. 137 (1953) caused the district court to erroneously dismiss Petitioner's federal habeas petition as not being properly before the court.

Petitioner appealed the dismissal of his habeas petition with prejudice to the Fourth Circuit Court of Appeals on November 17, 2020. That court summarily affirmed the district court's decision on October 4, 2022 (Appendix F). A timely petition for rehearing/rehearing en banc was filed November 17, 2022 and denied December 20, 2022 (Appendix G).

C. HISTORICAL BACKGROUND OF BURNS V. WILSON.

Habeas corpus - the "Great Writ" - is the "most common form of collateral attack on a court-martial judgment." Donald T. Weckstein, Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities, Mil. L. Rev., Fall 1971, at 1, 15. Ergo, the historical backdrop of habeas review of courts-martial would be helpful to this Honorable Supreme Court in determining the question presented.

In Ex parte Reed, 100 U.S. 13 (1879), this Court heard its first case involving a habeas petition from a military court-martial. Although the Court noted that "[e]very act of a court beyond its jurisdiction is void," the Court found that the Navy court-martial in the case had jurisdiction over the defendant and the offense, and therefore, habeas review was improper. Ex parte Reed, 100 U.S. at 23. Thus, this Court limited the scope of habeas relief to where the

military lacked jurisdiction over the person or the offense. See id. (holding that "[i]f error was committed in the rightful exercise of [the court-martial's] authority, [the Court] cannot correct it"). Subsequent Court decisions emphasized that the scope of inquiry for federal courts was limited to whether the court-martial was properly constituted, whether it had jurisdiction over the person and the offense charged, and whether the sentence was authorized by law.

Then in 1938, a landmark case for federal petitioners arose in Johnson v. Zerbst, 304 U.S. 458 (1938). There, an individual convicted by a federal district court petitioned for a writ of habeas corpus alleging violation of his Sixth Amendment right to counsel. Id. at 459. This Court, in an opinion by Justice Black, stated that, "Since the Sixth Amendment constitutionally entitles one charged with [a] crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." Id. at 467. Accordingly, "[a] court's jurisdiction at the beginning of a trial may be lost 'in the course of the proceedings' due to failure to complete the court... by providing counsel." Id. at 468. The meaning of "jurisdiction" was thus explicitly expanded to include due process and other constitutional defects.

Four years later, in Waley v. Johnston, 316 U.S. 101 (1942), this Court finally dispensed with the strictly jurisdictional inquiry in federal habeas corpus cases. See id. at 104-05 ("[T]he use of the writ in the federal courts to test the constitutional validity of a conviction for [a] crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it."). The Court held that the writ of habeas corpus "extends... to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Id. at 105.

In the 1945 case, House v. Mayo, 324 U.S. 42 (1945), this Court applied the holding in Waley - that the writ shall extend to cases in which an accused's constitutional rights have

been violated - to habeas review of state court convictions. Id. at 46. Thus, in civil cases involving both state and federal petitioners, the permissible inquiry in habeas corpus was extended beyond the question of jurisdiction to include also a determination whether the conviction was in disregard of the constitutional rights of the accused.

With regard to the military sphere, "World War II - which saw harsh treatment of its citizen soldiers in courts-martial - provided an important catalyst for federal courts to expand habeas corpus review in this domain." See Weckstein at 36. As a result, "several circuit and district courts, as well as the Court of Claims, began collaterally reviewing alleged denials of constitutional rights in military courts-martial." Id. However, any prospect of wholesale invalidation of military convictions was scothed in 1950 when this Court firmly foreclosed examination of military rights in Hiatt v. Brown, 339 U.S. 103 (1950).

In Hiatt, the Fifth Circuit affirmed the granting of a writ of habeas corpus to a solider where the record evidenced that the petitioner was deprived of due process of law. Id. at 105; see also Servicemen in Civilian Courts, 76 YALE L.J. 380, 384-85 (noting that the court of appeals had found the record full of prejudicial errors which invalidated the conviction). This Court reversed, reaffirming its view that the sole inquiry is jurisdiction. See Hiatt, 339 U.S. at 111. The Court did not even touch on the civilian decisions that had transformed the habeas sphere but rather "reached all the way back to 1890 for military precedent, In re Grimley." Servicemen in Civilian Courts, supra at 385 (citing In re Grimley, 137 U.S. 147 (1890)).

Later in the term, in Whelchel v. McDonald, 340 U.S. 122 (1950), the Court seemed to slightly transgress from its strict view in Hiatt. See id. at 124 (expanding the jurisdictional inquiry by arguing that the denial of an opportunity to tender the issue of insanity goes to the issue of jurisdiction); Civilian Court Review of Court Martial Adjudications, 69 COLUM. L. REV. 1259 at 1261 (describing Whelchel as "a position midway between the traditional and expansive

jurisdictional tests"). Essentially, the Court concluded that a denial of the ability to present an insanity defense infringed upon the lower court's jurisdiction, and thus, the narrow definition of "jurisdiction" was ever so slightly expanded by this caveat. Id. at 124. But if that represented an innovation, it was a modest one.

The same cannot be said for Brown v. Allen, 344 U.S. 443 (1953). There, this Court discarded the remains of the jurisdictional inquiry and affirmed the convictions of four state prisoners by reaching the merits of the constitutional claims presented. See id. at 462-65, 487 (affirming the petitioner's convictions, but also concluding that a federal district court may hold a trial for an application for a writ of habeas corpus already considered by the highest state court). The Court "adopted the rule that federal courts are not barred by the principle of res judicata from reconsidering federal constitutional claims previously considered by state courts. Federal courts were essentially allowed to engage in de novo review of these claims." John K. Chapman, Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review, 57 VAND. L. REV. 1387, 1403; see also Brown, 344 U.S. at 462-65 (holding that "a trial may be had in the discretion of the federal court or judge hearing the new application" so that "[a] way is left open to redress violations of the Constitution"). Brown not only upended centuries of settled precedent and invited practical problems; it produced anomalies as well.

As previously stated, World War II provided an important impetus for federal courts to broaden habeas corpus review of military cases. When millions of persons suddenly became subject to military justice, greater concern seemed essential. As Chief Justice Warren said in this regard, "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." Warren, The Bill of

Rights and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962). Ergo, military law thus had a breadth and impact not previously possessed, requiring greater supervision over the actions of courts-martial. More importantly, there was public concern over the harsh justice and severe sanctions employed by the military during the war.

Therefore, federal courts, having expanded collateral attack in civilian habeas corpus cases, were confronted with new pleas by military defendants urging the courts to give cognizance to allegations that their convictions were invalid by virtue of constitutional, if not jurisdictional, deficiencies. The stage was thus set for a reevaluation by this Court of the proper response by federal courts to habeas corpus attacks on court-martial convictions; Burns v. Wilson, 346 U.S. 137 (1953), was that reevaluation.

D. THE BURNS DECISION.

In Burns v. Wilson, this Court directly confronted the scope of review a federal district court must apply when it analyzes a servicemember's habeas corpus petition contesting military court proceedings. The petitioners in Burns had been found guilty of murder and rape and were sentenced to death by an Air Force courts-martial. 346 U.S. at 138. After exhausting all military remedies, they petitioned for habeas corpus relief in federal district court. Id. The district court, rationally following this Court's strictly jurisdictional inquiry expressed in previous opinions, dismissed the petition, finding that the courts-martial had jurisdiction over the petitioners and the offenses, as well as jurisdiction to impose the sentences. Id. at 138-39. The court of appeals affirmed, but only after a full examination of the record; it gave "petitioners' allegations full consideration on their merits, reviewing in detail the mass of evidence to be found in the transcripts of the trial and other proceedings before the military court." Id. at 139.

This Court granted certiorari, stating, "Petitioners' allegations are serious, and, as

reflected by the divergent bases for decision in the two courts below, the case poses important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial in a habeas corpus proceeding." Id.; see also Rudolph G. Kraft, Jr., Collateral Review of Courts-Martial by Civilian Courts: Burns v. Wilson Revisited, U.S. A.F. JAG BULL., Mar.-Apr. 1963, at 14, 15-17 (discussing the procedural history of Burns in greater detail).

However, despite proclaiming the importance of determining the proper standard of review, the Court affirmed the dismissal without agreeing on the basis for such determination - importantly, neither an opinion nor a standard of review gathered a majority. See generally Burns, 346 U.S. at 137 (affirming the judgment without an opinion gathering the support of a majority of justices). Justice Minton, concurring in the affirmance of the judgment, expressed a desire to return to the very limited jurisdictional inquiry of In re Grimley and Hiatt v. Brown. Id. at 146-48 (Minton, J., concurring in the affirmance of the judgment). He emphasized, "if error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of courts provided by Congress." Id. at 147. Accordingly, the Court has "but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction." Id.

Chief Justice Vinson, joined by Justice Reed, Justice Burton, and Justice Clark, constituted a plurality and voted to affirm on the grounds that, "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." Id. at 142 (plurality opinion). Rather "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." Id. at 144. Vinson further stated that "[h]ad the military courts manifestly refused to consider those claims, the District Court was empowered to review

them de novo." Id. at 142. In attempting to explain why the law that governs civilian habeas petitions could not be assimilated to military petitions, Vinson merely stated that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases," and cited Hiatt v. Brown for that proposition. Id. at 139 (citing Hiatt v. Brown, 339 U.S. 103 (1950)). Thus, he drew from the special needs of the military to justify a distinctive standard from that of state habeas.

Chief Justice Vinson seemed to consider the enactment of the UCMJ as evidence of those special needs. He mentions in his analysis that Congress established the UCMJ in response to criticisms of court-martial proceedings after WWII. Id. at 140-41. Ergo, this emphasis on the UCMJ seems to implicitly argue that federal courts don't need a broad standard for habeas review because of the "rigorous provisions" in place that "guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense," as well as the new "special post-conviction remedy... whereby one convicted by a court-martial may attack collaterally the judgment under which he stands convicted." Id. The fear of encroachment into the special realm of military justice as well as the enactment of the UCMJ seem to have motivated Vinson to refrain from advocating for a broad standard of review or at least a standard of review in line with civilian habeas at that time.

In contrast, Justice Douglas and Black, dissenting, "saw no reason to narrow the scope of review because of military considerations, whatever effect they might have on the ultimate decision." Servicemen in Civilian Courts, supra, at 386. These justices argued that where "the military agency has fairly and conscientiously applied the standards of due process formulated by this Court" habeas would not be proper; however, where that is not the case, "a court should entertain the petition for habeas corpus." Burns, 346 U.S. at 154 (Douglas, J., dissenting).

The most interesting opinion, however, comes from Justice Frankfurter, who voted for re-argument of Burns. Id. at 844 (separate opinion by Frankfurter, J.). He first argued against the plurality's assertion that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." Id. at 844 (quoting Burns, 346 U.S. at 139 (plurality opinion)). He emphasized that until 1938, when the Court decided Johnson v. Zerbst, "the scope of habeas corpus in both military and civil cases was equally narrow: in both classes of cases it was limited solely to questions going to the 'jurisdiction' of the sentencing court." Id. at 846. He went on to argue that while the "Court has never considered the applicability of Johnson v. Zerbst to military habeas cases," it would not make sense to say that a denial of due process deprives a civil body of "jurisdiction" but not a military body of "jurisdiction." Id. at 848. Justice Frankfurter specifically expressed doubt "that a conviction by a constitutional court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an ad hoc military tribunal is invulnerable." 346 U.S. at 851.

Thereupon lies the anomaly of Brown v. Allen, 344 U.S. 443 (1953). The very same term it decided Brown, this Court rejected Brown's fix-any-error approach for final judgments issued by military courts in Burns. So only state prisoners - not United States servicemembers - are afforded an additional avenue for appellate relief in the garb of habeas corpus proceedings. And while Justice Frankfurter pushed back on the statement that the scope of civilian habeas has always been broader than military habeas, he did touch on the increase in scope of civilian habeas after Johnson v. Zerbst. Id. at 846-47.

This suggests that while Hiatt v. Brown is insufficient by itself to support the plurality's broad assertion, Johnson v. Zerbst could have been better suited to provide some support for a narrower standard of review. While expressing no opinion as to whether the allegations were

sufficient to sustain a collateral attack on the conviction, he further stressed that "[t]he issue here is whether the rationale of Johnson v. Zerbst is now to be quietly discarded or whether it will be appropriately applied, as it has been by the lower courts, in the military sphere." Id. at 851. Thus, Justice Frankfurter seems to have been advocating for, or at least leaning towards, the application of Zerbst to military habeas cases. But, more importantly, he recognized the problems associated with implementing an unclear standard with little justification to support it.

In sum, while it emphasized the importance of the standard of review for military habeas, the Burns decision resulted in a plurality opinion that gave a vague standard of review and no direction to the lower courts on how to apply it. Justice Frankfurter, while rejecting the historical argument made by Chief Justice Vinson, asked the right question: whether the standard of review for military habeas should be the same as federal civil and state habeas; however, he partook in no opinion as to whether it should or should not be. As anticipated, the resulting standard subsequently gave little guidance to lower courts.

E. CONFUSION AMONG CIRCUIT COURTS REGARDING THE BURNS DECISION.

While there was no majority opinion in Burns v. Wilson, the standard articulated by the plurality has largely been taken as the rule emanating from the Court. This Court has not revisited the Burns standard since its inception, meaning that it has been seventy years since the Court has addressed this issue. Lower courts "have... taken Vinson's opinion as that of the Court, and have been admittedly and unashamedly confused by it." See Servicemen in Civilian Courts, supra, at 387.

Furthermore, in addition to the considerable confusion that has surrounded the "full and fair consideration" standard enunciated in Burns; its validity has been questioned and criticized

by both courts and commentators since it was first announced. See Burns v. Wilson, 346 U.S. at 149 (Frankfurter, J., separate opinion) and 346 U.S. at 844 (Frankfurter, J., dissenting on denial of rehearing); Rushing v. Wilkinson, 272 F.2d 633, 641 (5th Cir. 1959); Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv.L.Rev. 266, 302-303 (1958); and most recently in Crenshaw, Habeas Review of Courts-Martial: Revisiting the Burns Standard, 99 Tex. L. Rev. 787 (2021) (the Supreme Court, having not clarified the standard in sixty-eight years, needs to address the issue.).

The First Circuit agrees that Burns' "fully and fairly" standard controls the scope of review in military habeas cases, but have frankly admitted a difficulty in understanding and applying the standard. See Allen v. Van Cant fort, 436 F.2d 625 (1st Cir. 1971), which initially states that the scope of review in military issues is "more limited than in comparable civilian cases," but then proceeds to note that "considerable confusion" surrounds Burns. Id. at 629.

The Third Circuit, in an opinion by then Circuit Judge Alito, held "The degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear." Brosius v. Warden, 278 F.3d 239 (3d Cir. 2002). He then went on to comment "the rule that emerges from Burns is far from clear" and the "court's treatment of Burns has been far from seamless." Id. at 243-244. Justice Alito essentially questioned the feasibility of the Burns standard. Id. at 245.

Moreover, a Third Circuit District Court case post-dating Brosius, affirmed on appeal, reviewed the confusion among the federal courts, left in the wake of Burns, as to the interpretation of the full and fair consideration test. See Armann v. Warden, No. 04-118, 2007 U.S. Dist. LEXIS 39660 (W.D. Pa. May 31, 2007). In the circuit opinion of the Armann appeal, the court acknowledged from the outset that "the Burns decision is far from clear" and the circuit's "approach to analyzing military habeas petitions is not free of ambiguity, nor has there been much coverage of the issue." Armann v. Warden, 549 F.3d 279, 289 (3d Cir. 2008); see

also Levy v. Parker, 478 F.2d 772, 781 n.9 (3d Cir. 1973) (noting that the Burns standard is "easy to state, but difficult to define and to apply").

Importantly, the Court of Appeals that affirmed the denial of Petitioner's habeas filing, the Fourth Circuit, has yet to interpret the "full and fair consideration" standard. See, e.g., Ward v. United States, 982 F.3d 906, 912-13 (4th Cir. 2020) (declining to delve into "complicated issues" concerning whether the military courts fully considered the petitioner's claim).

Soon after the decision in Burns, the Fifth Circuit noted the "uncertain state of the law" regarding the proper scope of review. Bisson v. Howard, 224 F.2d 586, 589-590 (5th Cir. 1955). More recently the court said that while Burns allowed collateral attack on courts-martial, "the scope of that review was left uncertain." Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). Applying Burns several years later, the Fifth Circuit stated that "[f]ederal courts have interpreted Burns with considerable disagreement" and that confusion existed regarding the proper scope of review in military habeas cases. Calley v. Callaway, 519 F.2d 184, 198 (5th Cir. 1975).

The Sixth Circuit has only one published opinion on this topic, and it does not provide much guidance in interpreting the "full and fair consideration" standard. See Witham v. United States, 355 F.3d 501, 505 (6th Cir. 2004). The Seventh, Eighth, Ninth, and Eleventh Circuits appear to unquestionably, with a few exceptions, accept Burns as meaning that the scope of review by federal courts in military habeas cases is narrower than in analogous civilian cases, and these circuits also generally accept that Burns focuses a habeas court's inquiry on whether the military courts fairly considered the petitioner's claims. See Youngberg v. Watson, No. 19-1140, 2021 U.S. App. LEXIS 20292 (7th Cir. 2021); Hurn v. Kallis, 762 Fed. Appx. 332 (7th Cir. 2019); Swisher v. United States, 354 F.2d 472, 475 (8th Cir. 1966); Harris v. Ciccone, 417 F.2d 479, 481 (8th Cir. 1969); Mitchell v. Swope, 224 F.2d 365, 367 (9th Cir. 1955); Sunday v. Madigan, 301 F.2d 871, 873 (9th Cir. 1962); Broussard v. Patton, 466 F.2d 816, 818 (9th Cir.

1972); Chapman v. Warden, No. 20-10427, 2021 U.S. App. LEXIS 36588 (11th Cir. 2021).

However, the Tenth Circuit has admitted the federal courts' interpretation -- particularly its court's interpretation -- of the language in Burns has been anything but clear. Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990). The court held that probably a majority of its cases have simply quoted the Burns language and held that no review of a petition for habeas corpus was possible when the defendant's claims were fully and fairly considered by the military courts. See Watson v. McCotter, 782 F.2d 143, 144 (10th Cir. 1986); King v. Moseley, 430 F.2d 732, 734 (10th Cir. 1970); Bennett v. Davis, 267 F.2d 15, 17 (10th Cir. 1959); Dickenson v. Davis, 245 F.2d 317, 320 (10th Cir. 1957); Easley v. Hunter, 209 F.2d 483, 486-87 (10th Cir. 1953).

A few Tenth Circuit cases were more specific and held that courts could not review factual disputes if they had been fully and fairly considered by the military courts. See Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967); Mendrano v. Smith, 797 F.2d 1538, 1542 n.6 (10th Cir. 1986). Still other cases have held that review of constitutional claims in habeas corpus petitions was proper without really saying when and why. See Wallis v. O'Kier, 491 F.2d 1323, 1325 (10th Cir. 1974); Day v. Davis, 235 F.2d 379, 384 (10th Cir. 1956). Another set of recent Tenth Circuit cases held that review was proper when the constitutional claim was both "substantial and largely free of factual questions." Monk v. Zelez, 901 F.2d 885, 888 (10th Cir. 1990) (quoting Mendrano, 797 F.2d at 1542 n.6). See also Lundy v. Zelez, 908 F.2d 593 (10th Cir. 1990).

Lastly, the D.C. Circuit has noted that the Burns "full and fair consideration" standard "has meant many things to many courts." Kauffman v. Sec'y of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969). The court later recognized its standard of review over a court-martial judgment was limited. However, the court also conceded the extent of that limitation was somewhat "muddled." See United States ex rel. New v. Rumsfeld, 448 F.3d 403, 406 (D.C. Cir. 2006)

("New II") (explaining standard of review of court-martial judgment is "tangled"). In any event, the D.C. Circuit has expressed "serious doubt [that] the judicial mind is really capable of applying the sort of fine gradations in deference" that the standard may indicate. Id. at 408. In sum, this Court has never clarified the standard announced in Burns, but the time has come to provide a satisfactory solution to the current confusion.

F. APPROACHES BY LOWER COURTS POST-BURNS.

In response to the lack of clarity in applying the "full and fair consideration" test, "federal courts have taken 'diverse approaches to constitutional challenges to military convictions, ranging from strict refusal to review issues considered by the military courts to de novo review of constitutional claims.'" Dwight H. Sullivan, The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases, Mil. L. Rev., Spring 1994, at 16 (quoting Richard D. Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, Mil. L. Rev., Spring 1985, at 5, 7).

The diversity of the approaches means that predicting the standard to be applied in habeas review of a particular court-martial is incredibly difficult. Id. Professor Bishop in 1961 stated that Burns "stands as the principal lighthouse in these trackless waters, however low its candlepower," and that statement remains an accurate description of the state of the law seventy years later. Joseph W. Bishop, Jr., Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 COLUM. L. REV. 40, 51 (1961).

1. Scope of Review Narrower Than Civil Cases.

The Third Circuit has abandoned attempting to apply the Burns full-and-fair-consideration standard after noting the difficulty in determining its application, and in Brosius v. Warden, 278 F.3d 239 (3d Cir. 2002) (Opinion by Alito, J.), the court applied the standard of review for state habeas articulated in the Antiterrorism and Effective Death Penalty Act (AEDPA) to the petitioner's

claims. Id. at 245 ("Thus, we will assume.... that we may review determinations made by the military courts in this case as if they were determinations made by state courts. Accordingly, we will assume that 28 U.S.C.S. 2254(e)(1) applies to findings of historical fact made by the military courts.").

Much earlier, the D.C. Circuit, in Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), had already determined that military cases should be treated like state cases. Id. at 997. The court stated that the plurality opinion in Burns did not apply a standard different from the one that was currently imposed in state habeas review. Id. at 996-97. The court held that "the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." Id. at 997. The court further reasoned:

> The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails... to protect the rights of servicemen, and... to articulate and defend the needs of the services as they affect those rights. Id.

The D.C. Circuit's analysis in this case essentially ignores much of the plurality's reasoning in Burns altogether, where Vinson expressly stated that the scope of review of military habeas was narrower than that of state habeas, and therefore, should be distinctive. Instead, the D.C. Circuit takes the approach that the Burns plurality systematized a test that was reflective of state habeas review, but with a caveat taking into account where conditions peculiar to military life might require a "different rule" (however, the court does not specify what that different rule would be). The D.C. Circuit seems to have fashioned a rule that it perceives as preferable, yet still related, to the full-and-fair-consideration test; but in reality, there seems to be but a strain of relation between the two.

2. Full and Fair Consideration.

While "full and fair consideration" is the universal standard for military habeas petitions, the Federal Circuits have not developed a uniform analysis to determine what constitutes "full and fair consideration" by the military courts. See Armann v. McKean, 549 F.3d 279, 289 n. 10 (3d Cir. 2008) (collecting cases from the different circuits which illustrate the different analytical approaches).

The Fourth Circuit, for example, has acknowledged the "full and fair consideration" test but has not analyzed it in detail. See United States v. Willenbring, 178 F. App'x 223, 224 (4th Cir. 2006) (unpublished). The circuit has therefore "yet to enunciate the exact standard governing collateral attacks of court-martial convictions," but many district courts within its jurisdiction have adopted the Tenth Circuit's test for determining when a claim has been fully and fairly reviewed by the military courts. Chinchilla v. Whitley, 2021 U.S. Dist. LEXIS 86505 (E.D. Va. May 5, 2021) (collecting cases including Petitioner's).

In attempting to apply Burns, the United States Court of Appeals for the Fifth Circuit noted that "[f]ederal courts have interpreted Burns with considerable disagreement" and that confusion existed regarding the proper scope of review in military habeas cases. Calley v. Callaway, 519 F.2d 184, 198 (5th Cir. 1975). After engaging in a thorough historical review of military habeas, the Fifth Circuit declared "military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice. Consideration by the military of such issues will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law." Id.

The court further expounded the "scope of review for violations of constitutional rights,

however, is more narrow than in civil cases. Thus federal courts should differentiate between questions of fact and law and review only questions of law which present substantial constitutional issues. Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues." The Fifth Circuit therefore, by contrast, interpreted Burns as establishing a narrower scope of review for military habeas than that for state habeas and crafted a four-factor test in determining whether review of a military conviction on habeas corpus is appropriate.

Likewise, the Eighth Circuit, while similarly appearing to hold that the scope of review of military habeas is narrower than the scope of review for state habeas, instead applies an ad hoc approach. Chapman, supra, at 1401. In Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), the court held that, "where the constitutional issue involves a factual determination, the court's inquiry is limited to determining whether the military court gave full and fair consideration to the constitutional issues." Id. at 481. The court seems to open up the inquiry to factual issues, but affords them a full-and-fair-consideration standard. Thus, it appears "to draw a law/fact distinction, like the Fifth Circuit, but it applies the Burns 'full and fair' consideration requirement only to military factual determinations." Chapman, supra, at 1401. However, the extent to which the court draws a distinction between factual and legal determinations and exactly how the full-and-fair-consideration test is applied is not exactly clear.

Also, the Ninth Circuit, in matters involving constitutional challenges, has held that the court must conduct an independent review of the matter. See Hatheway v. Secretary of the Army, 641 F.2d 1376, 1380 (9th Cir. 1981) ("The Burns plurality does not preclude civil court consideration of the constitutional [equal protection, due process, and First Amendment] defects."); see also Davis v. Marsh, 876 F.2d 1446, 1448 (9th Cir. 1989) (stating that

court-martial determinations are collaterally reviewable for constitutional or jurisdictional error").

The Tenth Circuit, which has the most experience with habeas petitions filed by service members due to the location of the Disciplinary Barracks at Ft. Leavenworth, Kansas, has as previously noted, "the federal courts' interpretation -- particularly this court's interpretation -- of the language in Burns has been anything but clear." Dodson v. Zelez, 917 F.2d 1250, 1252 (10th Cir. 1990). That ambiguity has led the court to hold that the "full and fair consideration" standard applies only to questions of fact. Kennedy v. Commandant, 377 F.2d 339, 342-343 (10th Cir. 1967). It has also held that review on the merits is appropriate where the alleged constitutional violation was so unfair as to shock the conscience. See Sweet v. Taylor, 178 F. Supp. 456, 458 (D. Kan. 1959). Moreover, in Application of Stapley, 246 F. Supp. 316 (D. Utah 1965), the "full and fair consideration" standard was simply ignored by the court.

The Court of Appeals for the Tenth Circuit has furthermore previously acknowledged that its review of military convictions is governed by the deferential standard established by this Court in Burns v. Wilson, but declared it "will consider and decide constitutional issues that were also considered by the military courts." Mendrano v. Smith, 797 F.2d 1538, 1541-42 & n.6 (10th Cir. 1986); Wallis v. O'Kier, 491 F.2d 1323, 1325 (10th Cir. 1974); Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967); see also Monk v. Zelez, 901 F.2d 885, 887-93 (10th Cir. 1990) (discussing exhaustion requirement, limited scope of review, and other constraints on habeas corpus review of court-martials, but concluding that review of claimed denial of basic constitutional right, which did not involve factual questions, was permitted, and that relief was warranted because of faulty reasonable doubt instruction). However, subsequent cases in which only constitutional claims were raised have led to broad statements to the effect that any claim that has received full and fair consideration by the military courts is beyond the scope of federal

review. See, e.g., Lips v. Commandant, 997 F.2d 808, 811 (10th Cir. 1993) (stating, in a case challenging evidentiary rulings and prosecutorial statements, that "if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied").

Shortly after Monk's petition was granted, the Tenth Circuit, "because of the confusing state of [its] cases, adopted the four-prong test first announced by the Fifth Circuit in Calley v. Callaway. See Dodson v. Zelez, 917 F.2d 1250, 1252-53 (10th Cir. 1990) (adopting the Fifth Circuit's four-prong test); Calley v. Callaway, 519 F.2d 184, 199-203 (5th Cir. 1975) (articulating its four-prong test). The "four principal inquires" are as follows:

1. "The asserted error must be of substantial constitutional dimension. The first inquiry is whether the claim or error is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice." Calley, 519 F.2d at 199 (emphasis in original).

2. "The issue must be one of law rather than of disputed fact already determined by the military tribunals. The second inquiry is whether the issue raised is basically a legal question, or whether resolution of the issue hinges on disputed issues of fact." Id. at 200 (emphasis in original).

3. "Military considerations may warrant different treatment of constitutional claims. The third inquiry is whether factors peculiar to the military or important military considerations require a different constitutional standard." Id. (emphasis in original).

4. "The military courts must give adequate consideration to the issues involved and apply proper legal standards. The fourth and final inquiry is whether the military courts have given adequate consideration to the issue raised in the habeas corpus proceeding, applying the proper legal standard to the issue." Id. at 203 (emphasis in original).

In 1990, the Tenth Circuit expressly adopted this standard in Dodson, and later, in 1991, restated the inquiry in Khan v. Hart, 943 F.2d 1261, 1262-63 (10th Cir. 1991). In Khan, the circuit court applied the four-prong inquiry as a sort of balancing test in order to determine whether federal review was appropriate. See id. at 1263 (weighing the different factors and

then determining whether they strike in favor of review). The court found that two of the "must" factors (the first and second inquires) had been met, but that "the potential for a different constitutional norm on this nondelegation issue would counsel against review," and that "the formulary order of the Court of Military Appeals denying relief [did] not indicate the consideration given to petitioner's claims or admit of review." Id. Despite finding that factors peculiar to the military were present, and despite lacking information regarding the level of consideration given to petitioner's claims, the court ended up striking in favor of review. Id.

However, in Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808 (10th Cir. 1993), the Tenth Circuit cited the Calley/Dodson test, but put a twist on it, stating that "review by a federal district court of a military conviction is appropriate only if the... four conditions are met." Id. at 811; see also Sullivan, supra, at 21 (contrasting the approach in Lips to that in Khan). Lips appears then, to hold that, unlike the balancing approach employed in Khan, an issue is reviewable only if all of the factors support review.

Lips essentially turns the inquiry into one of all "musts." This means that if the fourth prong - asking whether the military court has given adequate consideration to the issue - has been met (as when the military court has given adequate consideration), review is precluded. This drastically changed the four-prong test and in actuality, could mean that a petitioner meets the other prongs, but proper review would be forestalled utilizing the watered-down "full and fair consideration" test.

Lastly, the Tenth Circuit holds an issue is deemed to have been given "full and fair consideration" when it has been briefed and argued, even if the military court summarily disposed of the matter. Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986); Lips, 997 F.2d at 812, n.2. "The fact that the military court did not specifically address the issue in a written opinion is not controlling." Watson, 782 F.2d at 145. See also Faison v. Belcher, 496 F. App'x 890 (10th Cir. 2012)

(finding military court's summary dismissal of petitioner's double jeopardy claim, which petitioner raised for the first time in military habeas proceedings, had received full and fair consideration).

The court also declared that it "decline[s] to presume a military appellate court has failed to consider all the issues presented to it before making a decision." Thomas v. United States Disciplinary Barracks, 625 F.3d 667, 672 (10th Cir. 2010). Other courts have also concluded that where an argument has been briefed before a military court, full and fair review exists even if the military court summarily disposes of the issue. See, e.g., United States ex rel Thompson v. Parker, 399 F.2d 774, 775-76 (3d Cir. 1968); Sanford v. United States, 567 F. Supp. 2d 114, 118 (D.D.C. 2008); Matias v. United States, 19 Cl. Ct. 635, 646 (1990). However, the New I decision indicates that "briefing by parties does not necessarily establish "full and fair consideration," and that it is important that the relevant issues be "fully litigated at trial and considered carefully by the military courts of appeals." United States ex rel. New v. Rumsfeld ("New I"), 350 F. Supp. 2d 80, 89 (D.D.C. 2004), aff'd, 448 F.3d 403 (D.C. Cir. 2006).

In fact, one commentator has observed that in following Burns, "a court may simply and summarily dismiss a petition upon the ground that the military did not refuse to consider its allegations or it may, with equal ease or upon the same authority, stress the requirement that military consideration shall have been full and fair." Bishop, Civilian Judges and Military Justice, 61 Col. L. Rev. 40, 47 (1961). However, none of the aforementioned cases provide direct guidance for the situation presented here; namely, whether a military court gave full and fair review when it dismissed a properly presented habeas petition for lack of jurisdiction? See Johnson v. Rodriguez, 2022 U.S. Dist. LEXIS 106815 (C.D. Cal. Apr. 27, 2022) (Petitioner's habeas petition with the military court was not considered on the merits but was dismissed for lack of jurisdiction.). Likewise, the record in the present case makes clear that Petitioner's arguments were properly presented to and not considered under proper legal standards by the military courts.

This does not constitute full and fair consideration of his claims.

3. Only Substantial Constitutional Issues May be Raised in a Federal Habeas Petition.

Most courts which have interpreted Burns to allow review of non-jurisdictional claims have historically given cognizance only to assertions that fundamental constitutional rights were violated. E.g., Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) ("constitutional rights of the accused were violated"); Fischer v. Ruffner, 277 F.2d 756 (5th Cir. 1960) (lack of "essential due process"); Owings v. Secretary of the Air Force, 447 F.2d 1245 (D.C. Cir. 1971) ("constitutional defect"); Levy v. Parker, 478 F.2d 772, 783 (3d Cir. 1973) ("infirmity of constitutional dimension"); Shaw v. United States, 357 F.2d 949, 174 Ct. Cl. 899 (1966) ("issues of constitutional law").

However, in Allen v. Van Cant fort, 436 F.2d 625 (1st Cir. 1971), the United States Court of Appeals for the First Circuit declined to read Burns to foreclose consideration of all errors of federal statutory law committed by the military courts. Based on the language of the habeas corpus statute, the court in Cant fort held that a reviewing court "cannot refuse to consider all alleged errors of law committed by the military without explicit authority for doing so. We cannot read Burns v. Wilson as such authority; in mentioning only errors of constitutional magnitude, Burns was facing the only question before it." Allen v. Cant fort, 436 F.2d at 629 (citations omitted). See 28 U.S.C.S. 2241(c)(3) (writ shall not extend to a prisoner unless he or she is in custody "in violation of the Constitution or laws or treaties of the United States.").

Likewise, the Fifth Circuit in Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1975), which relied on and quoted this Court's opinion in Davis v. United States, 417 U.S. 333 (1974), found that "Most habeas corpus cases have provided relief only where it has been established that errors of constitutional dimension have occurred. But the Supreme Court held in a recent decision that non-constitutional errors of law can be raised in habeas corpus proceedings where

"the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,'" and when the alleged error of law "presented exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Davis v. United States, 417 U.S. 333, 346 (1972), quoting Hill v. United States, 368 U.S. 424, 428 (1962).

The court therefore declared "an essential prerequisite of any court-martial error we are asked to review is that it present a substantial claim of constitutional dimension, or that the error be so fundamental as to have resulted in a gross miscarriage of justice." Calley v. Callaway, 519 F.2d at 199 (emphasis added).

Finally, in Cothran v. Dalton, 83 F. Supp. 2d 58 (D.D.C. 1999), the D.C. District Judge effectively held that non-constitutional claims can be reviewed on collateral attack of military convictions and provided the standard for review of such claims. He expressly held in the disjunctive that "collateral relief is available where the plaintiff alleges either a constitutional error, a lack of jurisdiction or an error 'so fundamental as to have resulted in a miscarriage of justice.'" Id. at 66 (emphasis added) (quoting Calley v. Callaway, 519 F.2d 184, 199 (5th Cir. 1975)).

Accordingly, in yet another deep circuit split and intra-circuit split, the First, Fifth, and D.C. Circuits have all either explicitly recognized, or suggested they would recognize, that non-constitutional legal claims - that is, claims arising under federal statutes or regulations - may be considered on collateral review of a military conviction if the application of the statutes or regulations resulted in an error "so fundamental as to have resulted in a miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974).

G. SUSPENSION OF THE WRIT OF HABEAS CORPUS.

Military courts have the same responsibility as the federal courts to protect a person from violation of his constitutional rights. Burns v. Wilson, 346 U.S. 137 (1953) (HN 6). As such, the enactment of the Uniform Code of Military Justice ("UCMJ") and the establishment of the Court

of Appeals for the Armed Forces ("CAAF") made up of civilian judges to enforce its procedural guarantees are proof of Congress' concern that the system of military justice afford the maximum protection to the rights of servicemen. See Kauffman v. Secretary, 415 F.2d 991 (D.C. Cir. 1969).

The UCMJ provides only one avenue for reconsideration of a final court-martial conviction: a petition for a new trial under Article 73. See 10 U.S.C.S. 873. An Article 73 petition may be brought "within two years after approval by the convening authority of a court-martial sentence," meaning it may be brought before or after a conviction becomes final. If direct review is still pending before a CCA or the CAAF when the petition is filed, the judge advocate general (to whom the petition must be directed) will refer the petition to that court. But once the conviction is final, only the judge advocate general may act on an Article 73 petition.

However, the only relief available under this "special post-conviction remedy" is a new trial, Burns, 346 U.S., at 141 (plurality opinion), and even that may be granted only in an expressly circumscribed timeframe (two years) and set of circumstances (newly discovered evidence or fraud on the court). To be sure, the limited nature of relief available under Article 73 might lead one to question whether it is truly an adequate form of post-conviction relief at all. Whatever the merits of this procedure, it is an insufficient replacement for the comprehensive review servicemembers are entitled to receive through habeas corpus.

Still, the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") in 2001 held that "finality of a court-martial under art. 76, Unif. Code Mil. Justice, is not a bar to the court's consideration of a petition for extraordinary relief." Fisher v. Commander, 56 M.J. 691 (N.M.C.C.A.) (HN 3). The Navy Court stated a request for extraordinary relief in the nature of a writ of habeas corpus or error coram nobis may be filed at any time with a military appellate court to collaterally attack a completed court-martial proceeding. Id.

This holding was in direct contravention to high military court precedent which declared

"Unlike the practice in the United States Circuit Courts of Appeal and District Courts, neither the UCMJ... nor the Manual for Courts-Martial... provides procedures for collateral post-conviction attacks on guilty verdicts." United States v. Murphy, 50 M.J. 4, 5 (C.A.A.F. 1998); see also Gilliam v. Bureau of Prisons, 2000 U.S. App. LEXIS 3684 (8th Cir. 2000) (HN 2) (practice in the military courts confirms the lack of a formal method by which collateral challenges may be prosecuted).

In a decision reached in August 2020, the Navy Court overturned Fisher and held that case finality under Unif. Code Mil. Justice art. 76, 10 U.S.C.S. 876, extinguishes its jurisdiction to entertain petitions for writs of habeas corpus. See United States v. Jordan, 80 M.J. 605, 612 (N.M.C.C.A. 2020). After Jordan, the court now follows it sister courts in recognizing that when a case is final under Article 76, a petition for writ of habeas corpus is only appropriate for consideration by Article III courts, not military courts of criminal appeals. See also In Re Anderson, 2021 CCA LEXIS 225 (N.M.C.C.A. 2021) (HN 2).

Title 28 U.S.C.S. 2241 "vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts." Burns v. Wilson, 346 U.S. 137, 139 (1953). Servicemen who were convicted and sentenced by courts-martial may file habeas petitions in the district in which they are in custody. Hubbard v. United States, 7 F.4th 1228, 1231 (9th Cir. 2021). Court-martials "are thus collaterally reviewable for constitutional or jurisdictional error." Davis v. Marsh, 876 F.2d 1446, 1448 (9th Cir. 1989) (citing Schlesinger v. Councilman, 420 U.S. 738, 746-48 (1975)).

However, federal court review of court-martial proceedings is limited. See Burns v. Wilson, 346 U.S. 137 (1953). "Under Burns, if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied." Lips v. Commandant, 997 F.2d 808, 811 (10th Cir. 1993). While "full and fair consideration" is the universal standard for military habeas petitions, the Federal Circuits have not developed a uniform analysis to

determine what constitutes "full and fair consideration" by the military courts. Armann v. McKean, 549 F.3d 279, 289 n.10 (3d Cir. 2008).

The Fourth Circuit, as aforementioned, has acknowledged the "full and fair consideration" test but has not analyzed it in detail. See Willenbring supra. Moreover, district courts within the Fourth Circuit have adopted the Tenth Circuit's approach to analyzing "full and fair consideration." Miller v. Air Force Clemency and Parole Bd., 2011 U.S. Dist. LEXIS 106340 (D. Md. 2011); Mitchell v. Garcia, 2020 U.S. Dist. LEXIS 124064 (D.S.C. 2020); Romey v. Vanyur, 9 F. Supp. 2d 565 (E.D.N.C. 1998). As these courts have noted, the Tenth Circuit has the most developed and "advanced analysis in this specialized area of the law." Romey, 9 F. Supp. 2d at 569.

The Tenth Circuit, however, has even conceded that its interpretation of the language in Burns has been anything but clear. Historically, a few Tenth Circuit cases held that they could not review factual disputes if they had been fully and fairly considered by the military courts. See Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967); Mendrano v. Smith, 797 F.2d 1538, 1542 n.6 (10th Cir. 1986). Still other cases held that review of constitutional claims in habeas corpus petitions was proper without really saying when and why. See Wallis v. O'Kier, 491 F.2d 1323, 1325 (10th Cir. 1974); Day v. Davis, 235 F.2d 379, 384 (10th Cir. 1956). Another set of more recent cases held that review was proper when the constitutional claim was both "substantial and largely free of factual questions." Lundy v. Zelez, 908 F.2d 593 (10th Cir. 1990). See also Monk v. Zelez, 901 F.2d 885, 888 (10th Cir. 1990) (quoting Mendrano, 797 F.2d at 1542 n.6).

In Monk, the record indicated that the Military Court of Appeals considered his claim that the military judge's reasonable doubt instruction deprived him of his right to due process. See United States v. Martin, 13 M.J. 66 (C.M.A. 1982). The court nonetheless held that the constitutional claim was subject to further review because it was both "substantial and largely

free of factual questions." Mendrano, 797 F.2d at 1542 n.6; see Calley v. Callaway, 519 F.2d 184, 199-203 (5th Cir. 1975). "Consideration by the military of such [an issue] will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law." Calley, 519 F.2d at 203; see Burns, 346 U.S. at 142 (plurality opinion); Wallis, 491 F.2d at 1325 (where a military prisoner is in custody by reason of an alleged constitutional violation, "the constitutional courts of the United States have the power and are under the duty to make inquiry.").

Ultimately, the court found "the reasonable doubt instruction given at Monk's court-martial violated his constitutional right to trial under the standard of proof beyond a reasonable doubt and requires that his petition for writ of habeas corpus be granted." 901 F.2d at 893. By contrast, six months later, according to the Tenth Circuit in Dodson v. Zelez, the aforementioned four factors must be considered before federal habeas courts may review a military conviction. 917 F.2d 1250, 1252-53 (10th Cir. 1990). A year later, the court balanced the four factors and decided in favor of review. Khan v. Hart, 943 F.2d 1261, 1263 (10th Cir. 1991). However, later cases which reviewed court-martial convictions led to expansive holdings to the effect that any claim that has received full and fair consideration by the military courts is beyond the scope of federal review. See Lips v. Commandant, 997 F.2d 808, 811 (10th Cir. 1993).

The negative implications which have resulted from the confusion in the Tenth Circuit are reflected in the fact that, "[i]n the Tenth Circuit, an issue that is raised before a military court is deemed 'fully and fairly' considered even if the military court rejects the claim without explanation." Sullivan, supra, at 21. This, paired with the fact that "a claim not raised before the military courts will not be reviewed," creates a "Catch-22" where the only escape is "if the military courts expressly refused to consider an issue." Id. at 21-22 (citations omitted). This "Catch-22" problem is illustrated in Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667 (10th

Cir. 2010), where the Tenth Circuit held that full and fair consideration does not require a detailed opinion by the military court, but rather simply that the issue was briefed and argued. See id. at 671-72 (determining that "full and fair consideration does not require a detailed opinion or certain other indications that a military court diligently reviewed the parties' arguments"). Importantly, no federal habeas court has ever found that a military court "manifestly refused" to consider a petitioner's submitted claims.

Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure." Frank v. Mangum, 237 U.S. 309, 346 (1915) (dissenting opinion). That the Framers considered the writ such a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. 1, Sect. 9, cl. 2; see Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1509, n. 329 (1987) ("[T]he non-suspension clause is the original Constitution's most explicit reference to remedies").

A plurality of the Court in Burns (Chief Justice Vinson, Justices Burton, Clark, and Reed) agreed that the constitutional guarantee of due process was meaningful enough to protect both soldiers and civilians "from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness..." Id. at 142. Therefore, Burns could not be clearer that the privilege of habeas corpus extends to servicemembers, but for all its eloquence about the right to the writ, the Court made no effort to elaborate how exactly the remedy could properly function when applied to military cases.

Moreover, the Justices in Burns sought to attain the proper balance between individual rights and deference to military court determinations. See Burns, 346 U.S. at 148 (Frankfurter, J.) ("On the one hand is proper regard for habeas corpus, 'the great writ of liberty'; on the other

hand the duty of civil courts to abstain from intervening in matters constitutionally committed to military justice."). However, deference to the peculiar needs of the military does not require denying servicemen the contemporary reach of the writ. See Sullivan, "The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases," 144 Mil. L. Rev. 1 (1994) (Noting that under current law, review of courts-martial by habeas corpus does not provide a meaningful analysis of whether constitutional error occurred at the court-martial due to the narrow scope of review provided by federal courts).

The legislative history of Article 76, UCMJ, shows that Article III court collateral review was expected to be "the sole exception to the finality of actions within the military court system." Schlesinger v. Councilman, 420 U.S. 738 (1975). In doing so, it is said, Congress was acknowledging the special constitutional status of the writ under the Suspension Clause, a status shared by no other form of collateral relief. Section 2241, therefore, is the only avenue provided by the habeas statutes for a military prisoner to collaterally attack a court-martial conviction.

The confusion of Burns and resulting restricted scope of review effectively deprives civilian courts of all authority to entertain suits collaterally attacking military court judgments. Even the high military court has noted "that the scope of federal habeas review is not certain, thereby raising questions as to the capability of federal habeas proceedings to safeguard servicemembers' constitutional rights." Loving v. United States, 62 M.J. 235 (C.A.A.F. 2005); see also Rodriguez v. Artuz, 990 F. Supp. 275, 283 (S.D.N.Y.) ("as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits, the limits do not render habeas inadequate or ineffective to test the legality of detention and, therefore, do not constitute a suspension of the writ in violation of Article I of the United States Constitution."), aff'd, 161 F.3d 763 (2d Cir. 1998) (per curiam).

There has been no effort to preserve habeas corpus review as an avenue of last resort for

military prisoners since implementation of the narrower Lips test in 1993. Thus, the vague standard of review as it sits, with its serious capacity for arbitrary and discriminatory enforcement acts as an unconstitutional suspension of the writ of habeas corpus because it renders the collateral relief ineffective and inadequate to test the legality of detention. To deprive military members of their only effective remedy would not only be contrary to the rudimentary demands of justice, but destructive of a constitutional guaranty specifically designed to prevent injustice. This cannot be permitted to stand.

REASONS FOR GRANTING THE PETITION

1. THERE IS A PRONOUNCED CONFLICT AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF THE STANDARD OF REVIEW ARTICULATED IN BURNS V. WILSON, 346 U.S. 137 (1953), THAT CAN ONLY BE EFFECTIVELY RESOLVED BY THIS COURT TO GAIN A UNIFORM INTERPRETATION OF FEDERAL LAW.

Petitioner submits certiorari should issue because the standard of review for military habeas corpus petitions has not been revisited by this Court since it issued its opinion in Burns v. Wilson in 1953. The history leading up to that decision shows that while state and military habeas were always roughly similar, state habeas began to develop a little faster than its military counterpart around 1915. Chief Justice Vinson, writing for the plurality, provided a very vague full-and-fair-consideration standard with little explanation as to how it should be applied. Justice Frankfurter, in a separate opinion, argued that the Court should consider the issue on a rehearing, seemingly recognizing the undesirable implications that would result from such a broad and confusing standard of review articulated by the majority (with very little reasoning behind it).

Since Burns, lower courts have struggled with what full and fair consideration means, with some courts, specifically in the Tenth Circuit and the other circuits that follow its reasoning, outright refusing to entertain petitions where the issue has been briefed and argued in front of

a military court. Other courts have attempted to develop frameworks based on the full-and-fair-consideration test, with those frameworks varying drastically from one jurisdiction to another (e.g., the Fifth Circuit's Calley test compared to the D.C. Circuit's approach in Kauffman).

The confusion among the various jurisdictions as well as the confusion within jurisdictions further emphasizes the need for this Court to provide clarity on the issue. Because standards significantly vary between and within jurisdictions, the chance that a military prisoner will be afforded habeas relief is largely dependent upon the circuit where the prisoner is incarcerated (or where the prisoner's "immediate" custodian is located).

Military prisoners should not be given different access to federal courts based upon their location. Regardless of what standard of review is applied, it should be the same across jurisdictions, otherwise courts will continue to treat people differently, with some military prisoners receiving more justice than others. Why should a serviceman raising a habeas petition in the D.C. Circuit have a better chance at challenging his conviction than a military prisoner raising a petition in the Fourth Circuit? For this reason and the fact that it is solely the prerogative of this Court to depart from its precedents, the instant petition for certiorari should be granted.

2. THIS CASE RAISES A GENUINE AND SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW THAT HAS MATURED BUT THAT HAS NOT YET BEEN CONSIDERED BY THIS COURT AND IS NECESSARY AND PROPER FOR THE REASON THAT NO VIABLE COLLATERAL JUDICIAL FORUM IS AVAILABLE FOR MILITARY PRISONERS TO PRESENT THEIR LEGAL CHALLENGES AS TO THE LAWFULNESS OF THEIR CONVICTION OR SENTENCE.

The writ of habeas corpus occupies a position unique in American jurisprudence. Moreover, the Suspension Clause, U.S. Const. art. I, sect. 9, cl. 2, protects the rights of the detained by a means consistent with the essential design of the United States Constitution. It ensures that, except during periods of formal suspension, the judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to

call the jailer to account.

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the military exclusively to the military courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. However, habeas privilege entitles a military prisoner to a meaningful opportunity to demonstrate to a federal court that he is being held pursuant to the erroneous application or interpretation of relevant law. By way of remedy, the general federal habeas statute provides that the court, having heard and determined the facts, shall "dispose of the matter as law and justice require. This includes the power to order release." See Wilkinson v. Dotson, 544 U.S. 74, 79 (2005).

Nevertheless, based upon the foregoing, it necessarily follows that no legal procedural remedy is currently available in most circuits to grant relief for a violation of a constitutional right to a military prisoner. As such, Petitioner's claims are subject to habeas jurisdiction, but without any actual habeas scrutiny and the opportunity to be granted relief by a federal habeas court is likely to be more theoretical than real. There is no way to construe the current standard of review as allowing what is constitutionally required in this context and can in the end only hamper the ends of justice.

Additionally, military justice today is incredibly different than it was seventy years ago when this Court decided Burns. Some of the same considerations are still relevant, but the landscape is vastly distinctive. For example, in 1987, this Court decided Solorio v. United States, 483 U.S. 435 (1987). In Solorio, the Court overruled O'Callahan v. Parker, 395 U.S. 258 (1969) and the service-connection test for determining the jurisdiction of courts-martial, and implemented a new status test. Solorio, 483 U.S. at 441. Importantly, the Court held that the jurisdiction of a court-martial depends solely on the accused's status and not on whether the offense charged has some service connection. Id. at 450-51. This means that the scope of courts-martial jurisdiction

expanded significantly in 1987. Service members could now be tried by military courts for offenses completely unrelated to their military duties.

This drastic expansion of jurisdiction meant that many more people, after this decision, became subject to courts-martial jurisdiction where they previously had not been. That legal development inevitably raised concerns about the adequacy of the military justice system for the vast amount of people who are now subject to it. Therefore, the implementation of the status test is likely one justification that leads scholars to argue in favor of this Court implementing a broader standard of review for military habeas corpus petitions, perhaps a standard in line with its civilian counterparts. When the authority of the military has such a sweeping capacity for affecting the lives of the citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts and denying its members access to habeas corpus is almost certainly drawn into question. That question must be answered by this Court and is reason alone to grant certiorari in this case.

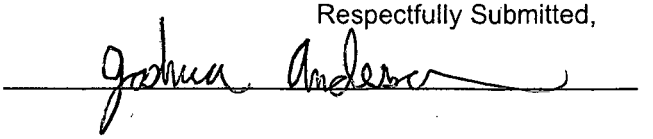
CONCLUSION

The confusion in the circuit courts leading to this unconstitutional suspension of the writ of habeas corpus in violation of Article I calls for this Court to intervene and provide clarity on the proper standard of review in military habeas cases. Allowing military claims to survive habeas standard of review scrutiny would ease anxieties related to the perceived lack of sufficient protections afforded to servicemembers, especially since every person in uniform is subject to the U.C.M.J. and courts-martial jurisdiction.

This petition for a writ of certiorari should, therefore, be granted.

Dated: March 16, 2023.

Respectfully Submitted,



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