No. 22-7068

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA ANDERSON, PETITIONER

v.

MARK BOLSTER

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the standard governing the scope of a federal court's review in a habeas corpus case for collateral review of a court-martial conviction, as articulated by the plurality in Burns v. Wilson, 346 U.S. 137 (1953), violates the Fifth Amendment's Due Process Clause and results in an unconstitutional suspension of the writ of habeas corpus.

ADDITIONAL RELATED PROCEEDINGS

General Court-Martial (Camp Lejeune, North Carolina):

United States v. Anderson (July 27, 2012, approved, Nov. 20, 2012) (no docket number assigned)

United States Navy-Marine Corps Court of Criminal Appeals:

United States v. Anderson, No. 201200499 (June 27, 2013) (direct appeal)

Anderson v. United States, No. 201200499 (Apr. 23, 2018) (habeas corpus petition)

Anderson v. United States, No. 201200499 (July 24, 2018) (habeas corpus petition)

Anderson v. United States, No. 201200499 (May 11, 2021) (habeas corpus and coram nobis petition)

United States Court of Appeals for the Armed Forces:

Anderson v. United States, No. 18-243/NA (June 6, 2018) (writ-appeal petition)

Anderson v. United States, No. 19-21/NA (Nov. 2, 2018) (writ-appeal petition)

Anderson v. United States, No. 22-125/NA (Mar. 22, 2022) (writ-appeal petition)

United States District Court (E.D. Va.):

Anderson v. Bolster, No. 1:19-cv-75 (Aug. 28, 2020) (habeas corpus petition)

United States Court of Appeals (4th Cir.):

In re Anderson, No. 20-1247 (Apr. 17, 2020) (mandamus petition)

In re Anderson, No. 20-1946 (Feb. 8, 2021) (mandamus petition)

Anderson v. Bolster, No. 20-7707 (Oct. 4, 2022) (habeas appeal)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F) is not published in the Federal Reporter but is available at 2022 WL 4998074. The opinions of the district court (Pet. App. D, E) are not published in the Federal Supplement but are available at 2020 WL 1056504 and 2020 WL 5097516.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2022. A petition for rehearing was denied on December 20, 2022 (Pet. App. G). The petition for a writ of certiorari was filed on March 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea before a general court-martial, petitioner was convicted on one specification of conspiring to rape a child under the age of 12, in violation of 10 U.S.C. 881 and 920(b) (2006 & Supp. IV 2010); one specification of raping a child under the age of 12, in violation of 10 U.S.C. 920(b) (Supp. IV 2010); one specification of taking indecent liberties with a child, in violation of 10 U.S.C. 920(j) (Supp. IV 2010); two specifications of possessing child pornography, in violation of 10 U.S.C. 934 (2006); one specification of distributing child pornography, in violation of 10 U.S.C. 934 (2006); two specifications of using indecent language, in violation of 10 U.S.C. 934 (2006); one specification of communicating a threat, in violation of 10 U.S.C. 915 (2006); one specification of fraudulent enlistment, in violation of 10 U.S.C. 904a (2006); and one specification of wearing unauthorized medals or badges, in violation of 10 U.S.C. 906a (2006). Pet. App. A5. The military judge sentenced petitioner to 30 years of confinement, a reduction in pay grade, and a dishonorable discharge. Ibid. The convening authority approved the adjudged sentence. Ibid. In 2013, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed in part, setting aside the indecent-liberties conviction but affirmed the guilty finding on the lesser-included offense of commission of an indecent act, and affirmed the sentence. Id. at A; see id. at A9-A10. Petitioner did not petition the Court of Appeals for the Armed Forces (CAAF) for review.

In 2018, petitioner filed a petition for extraordinary relief, in the nature of habeas corpus, in the NMCCA. Pet. App. B; see id. at D2. The NMCCA dismissed the petition for lack of jurisdiction. Id. at B. Petitioner filed a writ-appeal petition in the CAAF, which dismissed the petition for lack of jurisdiction. Id. at C.

In 2019, petitioner filed a petition in federal district court for a writ of habeas corpus under 28 U.S.C. 2241. D. Ct. Doc. 1 (Jan. 17, 2019). The district court dismissed the petition. Pet. App. D and E. The court of appeals affirmed. Id. at F.

1. In 2002, petitioner was convicted on four counts of misdemeanor sexual battery in Chatham County, Georgia. D. Ct. Doc. 7-4, at 6 (May 21, 2019). In December 2008, when petitioner enlisted in the Navy, petitioner falsely stated on a form that he had never been arrested for, charged with, or convicted of any offense. Id. at 5-6; see D. Ct. Doc. 7-2, at 6.

After his enlistment, between 2009 and 2011, petitioner downloaded 580 images of child pornography from the Internet to his personal computer. Pet. App. A5. Petitioner subsequently copied a number of those images from his computer to the flash drive on his cellular phone. Id. at A5-A6.

In September 2010, petitioner had video conversations over the Internet with E.R., a child who was between 12 and 16 years old. D. Ct. Doc. 7-2, at 6; D. Ct. Doc. 7-4, at 5. During those conversations, petitioner used indecent sexual language with E.R. D. Ct. Doc. 7-2, at 5; D. Ct. Doc. 7-4, at 5. E.R. later learned

that petitioner was 21 and attempted to end all communications with him. D. Ct. Doc. 7-4, at 5. In response, petitioner threatened E.R., telling her that he would post a naked picture of her to the Internet if she ended communications. Ibid.

Shortly thereafter, on December 5, 2010, petitioner was married. D. Ct. Doc. 7-4, at 5. At his wedding, petitioner wore various military medals and badges without authorization. Ibid. The following month, petitioner planned to leave his wife. Pet. App. A5. Petitioner's wife, who was aware of petitioner's "sexual interest in minors," made a misguided attempt "to save their marriage" by proposing a plan to sexually assault her five-year-old niece. Ibid.

To implement their plan, petitioner and his wife arranged to babysit her five-year-old niece overnight at their home. Pet. App. A5. At bedtime, they gave the child hot chocolate laced with sleeping medication. Ibid. Once the child was asleep, petitioner and his wife raped the unconscious five-year-old by penetrating her genital opening with their tongues. Ibid. After raping the child, petitioner and his wife engaged in sexual intercourse in the same bed in which the child remained unconscious. Ibid.

2. a. In 2012, petitioner -- then a hospitalman apprentice (E-2) in the United States Navy -- pleaded guilty to the charges previously described. Pet. App. A5; see D. Ct. Doc. 7-3 (plea agreement); p. 2, supra. Petitioner's written plea agreement included a provision addressing Article 13 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 et seq., which provides

that pretrial confinement may not be "any more rigorous than the circumstances require to insure [the accused's] presence." 10 U.S.C. 813. In that provision, petitioner stated that, "[a]s consideration for this agreement" and "after having fully discussed the issue with my defense counsel," he "agree[d] not to raise a motion * * * to seek administrative or judicial credit for violations of * * * Article 13, UCMJ." D. Ct. Doc. 7-3, at 4-6 ¶ 16l.

At petitioner's plea colloquy, the military judge asked petitioner about, inter alia, the Article 13 provision of the plea agreement. D. Ct. Doc. 7-7 (excerpt of plea transcript). The judge observed that, under that provision, "you are not going to raise any motion * * * to seek any administrative or judicial credit for violations of * * * Article 13," adding that such a motion "would normally deal with unlawful pretrial punishment or confinement." Id. at 1. Petitioner confirmed that to be "[his] understanding." Ibid.

The military judge confirmed that petitioner had "discuss[ed] this fully with your defense counsel" and "understood that this is one of those things that you can waive and you can give up." D. Ct. Doc. 7-7, at 1. The judge then explained that other types of legal issues could not be waived before again asking, "So you understand that you are only waiving that one narrow issue that would probably deal with unlawful pretrial punishment or that you were confined improperly?" Ibid. Petitioner stated, "Yes, sir." Id. at 2.

The military judge also asked petitioner if he had "any questions at all about any of the specially negotiated provisions in [the] pretrial agreement" and petitioner stated that he did not. D. Ct. Doc. 7-7, at 2. And the judge additionally asked "are you sure you understand each and every provision of your pretrial agreement." Ibid. Petitioner responded, "Yes, sir." Ibid.

The military judge accepted petitioner's guilty plea, Pet. App. A6, and, on July 27, 2012, sentenced petitioner to 30 years of imprisonment, a reduction in grade, and a dishonorable discharge, D. Ct. Doc. 7-2, at 7. On November 20, 2012, the convening authority approved that sentence and ordered that petitioner be "credited with having served 456 days of [pretrial] confinement." Id. at 7, 9.

b. Petitioner appealed to the NMCCA, raising four issues, but not raising any challenge to the Article 13 provision of his plea agreement or the sufficiency of the associated plea colloquy. Pet. App. A5. In June 2013, the NMCCA affirmed in part, setting aside petitioner's indecent-liberties conviction but affirmed the guilty finding on the lesser-included offense of commission of an indecent act, and affirmed petitioner's sentence. Id. at A9-A10; see 10 U.S.C. 859(b).

The UCMJ provides a 60-day period within which to petition the CAAF for review. 10 U.S.C. 867(b). Petitioner did not petition for review. Pet. App. D2.

c. Article 76 of the UCMJ, 10 U.S.C. 876, "defines the point at which military court judgments become final." Schlesinger v.

Councilman, 420 U.S. 738, 749 (1975). Article 76 provides, inter alia, that "[t]he appellate review" provided by the UCMJ and "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by [the UCMJ]" are "final and conclusive." 10 U.S.C. 876. "[A]ll action taken pursuant to those proceedings are binding," subject only to action on a petition of a type that petitioner has never filed, certain action by the Secretary of Defense, and the "authority of the President." Ibid.

At the time of petitioner's proceedings in the military system, Article 71 of the UCMJ additionally provided that that, "[i]f a sentence extends to * * * a dishonorable or bad conduct discharge" and the accused has not waived his right to appeal, "that part of the sentence * * * may not be executed until there is a final judgment as to the legality of the proceedings." 10 U.S.C. 871(c)(1) (2012) (repealed 2016; repeal effective Jan. 1, 2019); see 10 U.S.C. 857(a)(5) (current provision in Article 57). Under that version of Article 71, a "judgment as to legality of [court-martial] proceedings is final in such cases when," inter alia, "review is completed by a Court of Criminal Appeals and * * * the accused has not filed a timely petition for * * * review" by the CAAF and "the case is not otherwise under review by [the CAAF]." 10 U.S.C. 871(c)(1)(A) (2012); see 10 U.S.C. 857(c)(1)(B) and (2).

By December 2013, petitioner's court-martial case had become final under Articles 71 and 76. Pet. App. D2. On December 16, 2013, petitioner's sentence of a dishonorable discharge from the United States Navy was executed. D. Ct. Doc. 7-5.

3. a. In July 2018, more than four and a half years after his court-martial judgment became final under Articles 71 and 76, petitioner filed a petition in the NMCCA for extraordinary relief in the nature of a writ of habeas corpus. Pet. App. D2; see D. Ct. Doc. 1-1, at 1-16 (NMCCA habeas petition). Petitioner asserted, among other things, that he had been "arbitrarily held in maximum custody and in unnecessary segregation during his entire 456 days of pretrial confinement." Id. at 4. And he argued that habeas relief was warranted on the theory that the military judge's examination of his waiver of his right to seek relief for an Article 13 violation "fell short of what is required by [Rule for Courts-Martial (R.C.M.)] 910(f)," id. at 3 -- which provides that "[t]he military judge shall inquire to ensure" that "the accused understands the [plea] agreement" and that "the parties agree to the terms of the agreement," R.C.M. 910(f)(4)(A) (2012) -- by failing to "inquire into the circumstances of [petitioner's] pre-trial confinement." D. Ct. Doc. 1-1, at 3, 8 (issue 3); see id. at 8-12.

The All Writs Act, 28 U.S.C. 1651(a), authorizes this Court and "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions." Ibid. That authorization, however, is "not a source of subject-matter jurisdiction." United States v. Denedo, 556 U.S. 904, 913 (2009) (citing Clinton v. Goldsmith, 526 U.S. 529, 534-535 (1999)). A military court's power to issue an extraordinary writ "in aid of" its jurisdiction, 28 U.S.C. 1651(a), is therefore limited to

"issuing process 'in aid of' its existing statutory jurisdiction." Goldsmith, 526 U.S. at 534-535; see Denedo, 556 U.S. at 911. Article 66(b), in turn, vests military courts of criminal appeals like the NMCCA with statutory subject-matter jurisdiction over appeals from court-martial judgments on direct review. 10 U.S.C. 866(b). And the military courts of criminal appeals have determined that "when a court-martial has completed direct review under Article 71" and "is final under Article 76," they cease to have statutory jurisdiction over a case and therefore cease to "have jurisdiction over habeas corpus petitions" under the All Writs Act that may arise from that case. Chapman v. United States, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016) (following Gray v. Belcher, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012)); see In re Jordan, 80 M.J. 605, 608-614 (N-M Ct. Crim. App. 2020) (en banc); id. at 609 n.26 (noting that all military courts of criminal appeals share this view).[1]

On July 24, 2018, the NMCCA, "[o]n consideration of [petitioner's] writ petition," "dismissed [the petition] for lack of jurisdiction." Pet. App. B.

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[1] The scope of a military court's habeas jurisdiction is different from the scope of its coram nobis jurisdiction. In 2009, the Court in Denedo determined that "an application for the writ [of coram nobis]" -- unlike one seeking "'habeas corpus'" relief -- "is properly viewed as a belated extension of the original proceeding." Denedo, 556 U.S. at 912-913 (citation omitted). A military court that "had statutory subject-matter jurisdiction over [the accused's] original judgment of conviction" therefore has jurisdiction to consider coram nobis relief even after the court-martial proceedings otherwise are final. Id. at 913-914, 916.

b. In October 2018, petitioner filed a writ-appeal petition in the CAAF. 78 M.J. 171; see D. Ct. Doc. 1-1, at 19-33 (writ-appeal petition).[2] Petitioner again argued, inter alia, that the military judge "committed plain error by failing to properly inquire into [petitioner's] waiver of [his right to file a] motion for relief under Article 13." D. Ct. Doc. 1-1, at 22 (issue 3); see id. at 27-30. But in his jurisdictional statement, petitioner recognized that "[h]abeas is a separate matter and [is] not an extension of the direct appeal" in a court-martial. Id. at 21. Petitioner accordingly acknowledged that the "C.A.A.F. is without jurisdiction to grant extraordinary relief in cases such as this that have reached finality under Articles 71 and 76." Ibid.

On November 2, 2018, the CAAF, "[o]n consideration of [petitioner's] writ-appeal petition," "dismissed [the petition] for lack of jurisdiction." Pet. App. C.

4. a. In January 2019, petitioner sought collateral review of his court-martial convictions by petitioning the district court

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[2] The CAAF's rules distinguish between a "writ-appeal petition," which must be filed "no later than 20 days" after service of the decision of a court of criminal appeals "acting on a petition for extraordinary relief," C.A.A.F. R. 19(e), and a statutory petition for review, which the accused must file within 60 days of the earlier of the mailing of a decision of a court of criminal appeals or notice of that decision, 10 U.S.C. 867(b). Compare C.A.A.F. R. 4(b)(2), 18(a)(4), 19(e), 27(b), 28(a) (governing writ-appeal petition) with C.A.A.F. R. 4(a)(3), 18(a)(1), 19(a)(1), (5) and (7), 20(a) and (b) (governing accused's petition for review under Article 67(a)(3), 10 U.S.C. 867(a)(3)). The record in this case indicates that petitioner's writ-appeal petition (mailed on October 10, 2018) was not filed within the requisite 20-day period. Compare D. Ct. Doc. 1-1, at 19 (stating that petitioner received the NMCCA's July 24, 2018 decision on September 10, 2018) with 78 M.J. 171 (October 18 notice of filing).

for a writ of habeas corpus under 28 U.S.C. 2241 on the same grounds on which he previously sought habeas relief in the NMCCA and CAAF. See D. Ct. Doc. 1 (Jan. 17, 2019).

"[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." Schlesinger, 420 U.S. at 758 & n.32. In addition, a plurality of the Court in Burns v. Wilson, 346 U.S. 137 (1953), reasoned that -- even "after all military remedies have been exhausted" -- Congress's instruction (now in Article 76) that determinations of military courts "are 'final' and 'binding' upon all courts" means that "when a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." Id. at 142. The Burns plurality accordingly stated that "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of the[] claims." Id. at 144.

The government moved to dismiss petitioner's habeas petition on the ground that petitioner had forfeited his habeas claims through procedural default because he had failed to exhaust those claims in the military courts on direct review; had not shown cause and prejudice for that failure; and could not "circumvent" his forfeiture by filing a belated military-court habeas petition after the jurisdiction of the military courts to entertain such a petition had expired. D. Ct. Doc. 7, at 2-3 (May 21, 2019); see id. at 13-19. The government also argued, in the alternative,

that petitioner's habeas claims lacked merit. Id. at 19-28; see D. Ct. Doc. 21, at 18-30 (Apr. 16, 2020).

b. The district court dismissed petitioner's habeas petition in two opinions. Pet. App. D and E.

In its first opinion (Pet. App. D), the district court stated that it "cannot dismiss this case on procedural bar grounds" because "the military courts did not hold that petitioner had waived his claims." Id. at D5. The court also stated that it "cannot conclude that petitioner's [habeas] claims received full and fair consideration by the military courts" under Burns. Ibid. The court therefore "assess[ed] the merits of petitioner's claims de novo," ibid., and found that four of petitioner's five habeas claims lacked merit, id. at D1; see id. at D5-D10. The court therefore dismissed those four claims. Id. at D10; see id. at E3.

In its second opinion (Pet. App. E), the district court addressed petitioner's "single remaining" habeas claim -- his claim that the military judge had erroneously failed to "inquire as to the specific conditions of petitioner's pretrial confinement" when considering petitioner's agreement to waive any motion for relief premised on an alleged Article 13 violation. Id. at E2-E3. The court rejected that "sole remaining claim" on two "alternative" grounds. Id. at E4, E10.

First, the district court reconsidered the sufficiency of the military courts' consideration of petitioner's claim. Pet. App. E4-E7. The court declined to reconsider its rejection of the government's "procedural default" argument, id. at E4, but empha-

sized that it had not itself determined that petitioner had timely presented his claims in the military courts, id. at E11 n.3. The court instead stated that it did not find a procedural default because it was "hesita[nt] to find that it is prohibited from considering [petitioner's] claims on waiver-related procedural bar grounds" where "the military courts themselves did not explicitly find that petitioner had waived [the] claims." Ibid.

The district court did, however, reconsider whether petitioner's Article 13-waiver claim should be "dismissed" because, under the standard articulated by the plurality in Burns, petitioner had not shown that the military courts "failed to give [his] arguments adequate consideration," and found that dismissal was in fact warranted on that basis. Pet. App. E6-E7. The court noted 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 [a] writ of habeas corpus." Id. at E6. And the court observed that in this case, petitioner's court-martial "conviction had already become final for purposes of Article 76" before he petitioned the military courts for habeas relief. Id. at E7.

The district court therefore "reject[ed] petitioner's argument that the military courts 'failed to apply the proper legal standards' in rejecting his [habeas] petition for want of jurisdiction." Pet. App. E7. The court instead found that "the military courts afforded petitioner 'full and fair' consideration' of his [habeas] claims." Ibid. The court -- which had observed

earlier in the opinion that the NMCCA and CAAF had both found that they "lacked jurisdiction" following "'consideration'" of petitioner's submissions and that "[t]he record * * * makes clear that the military courts were presented with thorough, two-party briefing with respect to petitioner's military habeas filings," id. at E5-E6 (citations and emphasis omitted) -- emphasized that the military courts had been "furnished with and [had] considered" those submissions. Id. at E7. The court added that "[i]t is immaterial that the military courts disposed of petitioner's claims summarily." Ibid.

Second, in the alternative, the district court rejected petitioner's Article 13-waiver claim because "it is clear that th[e] * * * claim is without merit." Pet. App. E10; see id. at E7-E10. The court stated that there "appears to be little real debate that the military judge technically erred in failing to elicit details with respect to petitioner's pretrial confinement," given that the CAAF stated in United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999), that "a military judge 'should inquire into the circumstances of [an accused's] pretrial confinement' whenever an Article 13 waiver is included in a plea agreement." Pet. App. E7 (quoting McFadyen, 51 M.J. at 291) (brackets in original). The court found, however, that "petitioner's substantial rights were [not] prejudiced by that error" for two independent reasons. Ibid.

As an initial matter, the district court found an absence of prejudice because "the military judge's colloquy was not offensive to R.C.M. 910(f)." Pet. App. E8. The court explained that "R.C.M.

910(f) only requires a military judge to ensure (1) that the accused understands his plea agreement and (2) that the parties agree to the terms of the agreement." Ibid. And the court found that, in this case, "the record makes abundantly clear that petitioner entered into his plea agreement with a full understanding of its terms and implications." Ibid.; see id. at E9 (discussing plea colloquy). The court observed that McFadyen required an inquiry into the circumstances of an accused's pretrial confinement only because the CAAF was "'concerned that any Article 13 waiver be executed with full knowledge of the implications of the waiver'" and "did not impose * * * freestanding requirements the violation of which would automatically entitle an accused to relief." Id. at E8 (quoting McFadyen, 51 M.J. at 291).

In addition, the district court found, based on "the record before it," that even if "the [military] judge's error impinged on some freestanding right created by McFadyen," "petitioner has not proffered a 'colorable showing' that he suffered prejudice to his substantial rights as a result of the military judge's plea inquiry." Pet. App. E9-E10 (citation omitted). The court observed that "petitioner engages in no more than unbridled speculation that, had the military judge been better informed of the conditions of petitioner's pretrial confinement, petitioner would have been afforded a less severe sentence." Id. at E10. And it also observed that the record in this case "demonstrat[ed]" that "many of petitioner's pretrial confinement conditions were dictated by petitioner's routine misconduct." Ibid. The court explained that one

could "speculate just as easily that, had the judge been informed of [the reasons for the conditions of confinement], his opinion of petitioner's sentence would not have been changed for the better." Ibid.

c. The court of appeals affirmed in an unpublished summary opinion. Pet. App. F. The court stated that it "affirm[ed] the [district] court's orders" because it "ha[d] reviewed the record and f[ound] no reversible error." Ibid.

ARGUMENT

Petitioner contends (Pet. 1) that this Court should grant review to consider whether the full-and-fair-consideration standard articulated by the plurality in Burns v. Wilson, 346 U.S. 137 (1953), violates the Fifth Amendment's Due Process Clause and results in an unconstitutional suspension of the writ of habeas corpus. The court of appeals correctly affirmed the orders dismissing petitioner's habeas petition, and its unpublished and nonprecedential decision does not conflict with any decision of this Court or any other court of appeals. The relevant portion of that decision is a single sentence reflecting that the court of appeals found "no reversible error" in the district court's orders, Pet. App. F; it does not specify agreement with the district court's application of Burns as opposed to its alternative resolution of the merits. And for that same reason, even if the Burns question on which petitioner seeks review might warrant this Court's review in some case, this case would be a poor vehicle for such review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly affirmed the district court's judgment. The district court in its first opinion conducted "de novo" review of the merits of petitioner's habeas claims, Pet. App. D5, because the court rejected the government's contention that de novo review by a civil court in this court-martial context was inappropriate under Burns, id. at D4-D5. And based on that review, the court "dismissed all but one of petitioner's claims" because the court found that those claims "lacked merit." Id. at E3; see id. at D5-D10; see also D. Ct. Doc. 19 (Mar. 4, 2020) (order dismissing petitioner's habeas petition in part "[f]or the reasons stated in [that opinion]"). The court of appeals' affirmance of the district court's dismissal of those four claims thus presumably reflects the court's determination that the district court correctly rejected those claims on the merits, and petitioner does not argue otherwise. Nor does the certiorari petition challenge the district court's resolution of the merits of any of his claims -- a challenge that would, in any event, be factbound.

The district court in its second opinion addressed petitioner's "single remaining" habeas claim based on "R.C.M. 910(f)" and "the military judge's failure to inquire as to the specific conditions of petitioner's pretrial confinement" when the judge approved petitioner's plea agreement waiving of any Article 13 claim. Pet. App. E2-E3. The district court, however, dismissed that "sole remaining claim" on two "alternative" grounds: (1) de novo habeas review was unwarranted under Burns because the military courts

gave that claim "'full and fair consideration,'" and (2) in any event, the claim was "without merit." Id. at E4.

Given those alternative bases for the district court's disposition of petitioner's final habeas claim, and the court of appeals' brief statement that it found "no reversible error," Pet. App. F, it is unclear whether the court agreed with the district court's Burns analysis in its second opinion. If the court of appeals affirmed only because it concluded that the district court properly dismissed petitioner's Article 13-waiver claim on the merits after de novo review, this case would not present the Burns question on which petitioner seeks review. And if the court agreed with the district court's conclusion under Burns that de novo review by a civil court of petitioner's claim was unwarranted, this case would be a poor vehicle to consider the Burns issue because the court of appeals decision is unpublished and non-precedential, and the district court did in fact conduct the de novo review that petitioner sought and rejected petitioner's habeas claim on the merits. Either way, no further review is warranted.

2. Even assuming that the court of appeals' decision were solely premised on a determination the military courts gave "full[] and fair[]" consideration to his Article 13-waiver claim, Burns, 346 U.S. at 142 (plurality opinion), that determination was correct and does not warrant review.

a. Assuming arguendo that petitioner's belated request for habeas-type relief in the military courts properly exhausted petitioner's claim, the military courts fully and fairly consi-

dered that submission when they dismissed the petition on jurisdictional grounds. Pet. App. B and C. No military court could have properly gone further to resolve the merits of such a habeas claim where the court had lost jurisdiction to grant habeas relief because of petitioner's years-long delay in filing the claim.

A military court's power to issue an extraordinary writ under the All Writs Act "in aid of" its jurisdiction, 28 U.S.C. 1651(a), is limited to "issuing process 'in aid of' its existing statutory jurisdiction." Clinton v. Goldsmith, 526 U.S. 529, 534-535 (1999) (emphasis added); see United States v. Denedo, 556 U.S. 904, 911 (2009). And the jurisdiction of the military appellate courts ends with when statutory finality attaches under Articles 71 and 76 of the UCMJ. In re Jordan, 80 M.J. 605, 608-614 & n.26 (N-M Ct. Crim. App. 2020) (en banc); Chapman v. United States, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016); Gray v. Belcher, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012); cf. pp. 6-7, supra (reproducing Articles 71 and 76). Cf. also Goldsmith, 526 U.S. at 536 (explaining that, under the UCMJ, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review"). Petitioner's court-martial case had become final under Articles 71 and 76 long before petitioner sought habeas relief in the military courts. Pet. App. D2. Particularly given petitioner's own concession that "finality" under Articles 71 and 76 of the UCMJ deprived the CAAF of jurisdiction to consider habeas relief, D. Ct. Doc. 1-1, at 21, it is unclear what more petitioner would require the military

courts to have done to have fully and fairly considered his Article 13-waiver claim.

The NMCCA's and CAAF's summarily dismissal on jurisdictional grounds, Pet. App. B and C, does not suggest that they failed to "give[] fair consideration" to petitioner's habeas claim or "manifestly refused to consider [it]." Burns, 346 U.S. at 142, 144. The military courts here, like other appellate courts, have "wide latitude in their decisions of whether or how to write opinions," Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) (per curiam), and in deciding when to render, as here, a summary disposition. See Harrington v. Richter, 562 U.S. 86, 99 (2011) ("The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed.").

The courts of appeals have thus consistently found that a military court has given "full and fair consideration" to a servicemember's claim even where the military court has not explicitly addressed that claim in a written opinion.[3] And petitioner's own concession to the CAAF that it was "without jurisdiction to grant

[3] See, e.g., Thomas v. United States Disciplinary Barracks, 625 F.3d 667, 671-672 & n.5 (10th Cir. 2010) (finding that "summary denial" of petition for writ of coram nobis fully and fairly considered ineffective-assistance claims; noting that "other circuits" likewise do not demand "explicit detail" for dismissal of such claims), cert. denied, 562 U.S. 1300 (2011); Fletcher v. Outlaw, 578 F.3d 274, 277-278 (5th Cir. 2009) (same for "military court's opinions [that] summarily dispose of [relevant] claims"); Armann v. McKean, 549 F.3d 279, 292-294 (3d Cir. 2008) (same where "CAAF issued a summary order disposing of [the] case"), cert. denied, 558 U.S. 835 (2009).

extraordinary relief in cases such as this that have reached finality under Articles 71 and 76" of the UCMJ, D. Ct. Doc. 1-1, at 21, underscores the point. See p. 10, supra.

c. To the extent that the precise scope of Burns' full-and-fair-consideration standard has been subject to some uncertainty in the court, see Pet. 17-40, petitioner fails to identify any uncertainty that would be relevant here. Specifically, petitioner does not even assert that any court of appeals has deemed a similarly untimely claim to have been denied full and fair consideration under Burns. See ibid.

3. In any event, even if the Burns issue were to warrant this Court's review in some case, this case would be a poor vehicle to consider it because that issue did not affect the ultimate disposition of petitioner's case. Notwithstanding its Burns analysis, the district court proceeded to conduct plenary review of petitioner's Article 13-waiver claim. Pet. App. E7-E10. As a result, a decision by this Court that effectively reverses or vacates the district court's application of the Burns standard would not entitle petitioner to any additional habeas review in district court.

The district court also correctly rejected petitioner's Article 13-waiver claim on its merits. Rule 910(f) provides, as relevant here, that "[t]he military judge shall inquire to ensure" that "the accused understands the [plea] agreement." R.C.M. 910(f)(4)(A) (2012). And the CAAF has taken the view that military judges "should inquire into the circumstances of the pretrial confine-

ment" when "a pretrial agreement * * * contains an Article 13 waiver." United States v. McFadyen, 51 M.J. 289, 291 (C.A.A.F. 1999). But as the district court recognized, the CAAF did so simply as a prophylactic measure to ensure that such a plea-agreement waiver was "executed with full knowledge of [its] implications," ibid. See Pet. App. E8. And in this case, as the district court determined, "petitioner has not proffered a 'colorable showing' that he suffered prejudice to his substantial rights as a result of the military judge's plea inquiry." Pet. App. E10 (citation omitted).

The district court correctly determined that "the record" in this case -- including the plea colloquy transcript -- "makes abundantly clear that petitioner entered into his plea agreement with a full understanding of its terms and implications." Pet. App. E8; see pp. 5-6, supra. And because the conditions of petitioner's pretrial confinement largely resulted from disciplinary action for petitioner's own misconduct while in pretrial detention, the district court correctly determined that petitioner failed to plausibly show that the military judge's failure to inquire into those conditions prejudiced him. Pet. App. E10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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