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

PETITIONER'S REPLY BRIEF

JOSHUA GARY ANDERSON

Pro Se Petitioner

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PETITIONER'S REPLY TO UNITED STATES'
BRIEF IN OPPOSITION

ARGUMENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

In response to the argument asserted in the Opposition to Petition of Certiorari, Petitioner declares:

I. PETITIONER'S CASE IS A COMPELLING VEHICLE FOR RESOLVING THE IMPORTANT CONSTITUTIONAL ISSUE PRESENTED

If a rule has been persuasively criticized by judges and commentators and practical experience suggests that the goals of the rule are being undermined and can be better served by a new rule, the precedent should be overruled. Burns fits this mold perfectly, however Respondent bases its opposition to certiorari

not on the unworkable nature of Burns or the deep circuit split caused by Burns, but on Petitioner's case being a "poor vehicle" to consider the Burns issue because "a decision by this Court would not entitle petitioner to any additional habeas review in district court." See Resp. Br. at 21.

Respondent is incorrect the Burns "issue did not affect the ultimate disposition of petitioner's case." Resp. Br. at 21. In the district court's first opinion, it was stated it could not "conclude that petitioner's [habeas] claims received full and fair consideration by the military courts" under Burns." Resp. Br. at 12. The court then found, after de novo review, that "petitioner is not entitled to relief as to four of the five grounds he raises but cannot conclusively determine whether or to what extent petitioner is entitled to relief as to the fifth."

Respondent then goes on to concede the "district court dismissed that sole remaining claim" after it found "de novo habeas review was unwarranted under Burns because the military courts gave that claim full and fair consideration." Resp. Br. at 17-18. The district court would have created quite the conundrum and a "perfect vehicle" for this Court if it continued to hold Petitioner's claim as meritorious while also declaring it did not process "de novo review" jurisdiction under Burns. The rejection of Petitioner's "sole remaining claim" on the merits was substantially manufactured after the district court withdrew its Burns jurisdiction.

In any event, this Court just three (3) years ago "granted certiorari to resolve a circuit split" about two (2) procedural rules to a petitioner whom Texas State courts upheld a conviction of aggravated assault with a deadly weapon on direct appeal and in collateral state proceedings. See Banister v. Davis, 140 S. Ct. 1698 (2020). Banister also was denied habeas relief in the district court, but was granted certiorari. Therefore, the instant case potentially presents a particularly compelling vehicle for overturning Burns because Petitioner, unlike Banister, could win on the merits as demonstrated below, if the district court conducts its de novo review under the proper standard.

In denying the government's first motion to dismiss, the court held the CAAF decision of United States v. Felder, 59 M.J. 444 (2004) "deemed the military judge's failure to conduct a full inquiry improper and upheld the conviction only because Felder's defense counsel informed the military judge on the record that [Felder] had not been punished in any way cognizable under Article 13;" "Felder therefore had not been prejudiced by the military judge's improper inquiry. See Felder at 445-46."

The district court then declared the "military judge's failure to conduct a full McFadyen inquiry prejudiced [Petitioner's] opportunity to receive a sentence predicated on all the relevant facts." The McFadyen court made clear "so long as the military judge can take into account the nature of the pretrial confinement in determining the amount of confinement appropriate as a punishment, there is no reason a servicemember

should be prevented from waiving his Article 13 rights." See United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999) (emphasis added).

The district court could not "conclude that petitioner was not prejudiced by the military judge's failure to inquire as to the circumstances of petitioner's pretrial confinement while citing United States v. Nye, 2018 WL 458948 (N.M.C.C.A. 2018) for the proposition that "in considering "the duration of pretrial restraint and the conditions of that restraint in determining an appropriate sentence," the judge "eliminat[ed] any potential prejudice to the appellant." The notion that 456 days of illegal pretrial punishment could have had no effect on Petitioner's sentence is simply absurd.

Unfortunately, the military judge fell short in Petitioner's case. Far from scrupulously adhering to the McFadyen standard, "the military judge technically erred in failing to elicit details with respect to petitioner's pretrial confinement." Resp. Br. at 14. Had the military judge made a forthright inquiry, Petitioner would have had the opportunity to decide afresh whether to proceed with the waiver or the judge could have declined to accept Petitioner's Article 13 waiver. See United States v. Barmeyer, 2022 CCA LEXIS 2 (N.M.C.C.A. 2022) (no abuse of discretion in the military judge's declining to accept Appellant's waiver of his Article 13 rights and awarding 30 days' confinement credit under Article 13).

If Petitioner's military judge rejected the Article 13 waiver and granted the defense motion, he would have been

awarded 1,368 days (3 years 9 months) towards his sentence, effectively reducing it by almost four (4) years. See Glover v. United States, 531 U.S. 198, 203-04 (2001) (holding any increase in actual jail time due to sentencing error is prejudicial). Without complete information, a judge cannot assess all the factors which must be considered in making a necessary determination regarding the appropriate sentence in a given case.

As further evidence of the prejudicial effect of this error, the NMCCA took the extraordinary step of awarding a Marine placed in pretrial confinement in the very same Camp Lejuene Brig as Petitioner three-for-one day credit due to the pretrial confinement conditions not being rationally related to security concerns or warranted to ensure his presence at trial. See United States v. White, 2006 CCA LEXIS 228 (N.M.C.C.A. 2006). Petitioner's pretrial confinement conditions were materially indistinguishable from those in White and required a similar result.

Moreover, the legal right to be free from unlawful pretrial punishment has long been clearly established by the Fifth Amendment of the United States Constitution as well as the Uniform Code of Military Justice Article 13 and 10 U.S.C. § 813. See Bell v. Wolfish, 441 U.S. 520 (1979); United States v. Destefano, 20 M.J. 347, 349 (C.M.A. 1985); and United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005). Considering the strong military and public interest in protecting individuals from being subjected to illegal pretrial punishment, it was prejudicial that the military judge failed to explain the Article 13 waiver

provision and its ramification despite the requirement of R.C.M. 910(f) that a military judge ensure an accused's understanding of a pretrial agreement.

Lastly, wherever one stands on the merits of this case, it presents an important question of federal law that has divided lower courts for decades. Respondent seeks to sidestep the Constitutional question presented with the disingenuous assertion that this case is a "poor vehicle." To the contrary, Petitioner's case squarely implicates the viability and application of the Burns test and is as ripe a suit for certiorari as any. Accordingly, Respondent cannot escape the pressing need for this Court to review the Constitutionality of Burns and given the conflict between the circuits on this matter, the present case presents an excellent vehicle in which the Court should consider this problem. The petition for a writ of certiorari should be granted.

II. THE MILITARY COURTS RETAINED JURISDICTION AND DID NOT AFFORD PETITIONER'S CLAIMS FULL AND FAIR CONSIDERATION WHILE MANIFESTLY REFUSING TO CONSIDER THEM

"A federal district court has power, on a military prisoner's application for habeas corpus, to review claims of fundamental unfairness in the process by which the applicants' guilt was determined and their sentences imposed where the military courts have manifestly refused to consider such claims." Burns v. Wilson, 346 U.S. 137 (1953) (HN 9). Respondent arbitrarily declares the "NMCCA's and CAAF's summ[ary] dismissal

on jurisdictional grounds does not suggest that they failed to "give fair consideration" to petitioner's habeas claim or "manifestly refused to consider" [it]." Resp. Br. at 20.

Respondent further contends "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" and "petitioner's court-martial "conviction had already become final for purposes of Article 76" before he petitioned the military courts for habeas relief." Resp. Br. at 13.

In making such an aspirational claim, Respondent ignores facts of law and omits entirely the NMCCA's precedent of Fisher v. Commander, 56 M.J. 691 (N.M.C.C.A. 2001); in which that court held "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 a writ of habeas corpus 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" (emphasis added).

As Respondent's opposition brief candidly concedes, the NMCCA in 2020 "determined that "when a court-martial has completed direct review under Article 71" and "is final under Article 76," [it] cease[s] to have statutory jurisdiction over a case and therefore cease[s] to "have jurisdiction over habeas corpus petitions" under the All Writs Act that may arise from that case." See In re Jordan, 80 M.J. 605, 608-614 (N.M.C.C.A. 2020) (en banc) (overruling Fisher). Resp. Br. at 9.

Accordingly, the NMCCA 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." United States v. Denedo, 556 U.S. 904 (2009). Petitioner admits he mistakenly held out to the CAAF "it was "without jurisdiction to grant extraordinary relief in cases such as this that have reached finality under Articles 71 and 76" of the UCMJ. Resp. Br. at 20-21. That was incorrect as military precedent plainly declares to the contrary.

Likewise, the military courts may be specialized courts, but they remain courts just the same and for both the NMCCA and CAAF to dismiss Petitioner's habeas filings without reviewing the merits for lack of jurisdiction which both courts possessed is unheard of - and speaks volumes. This amounts to the situation of which this Court spoke in Burns, when it wrote: "[h]ad the military courts manifestly refused to consider [the petitioner's] claims, the district court was empowered to review them de novo." Burns, 346 U.S. at 142. An explicit refusal to exercise its rightful jurisdiction to adjudicate a collateral petition is as "manifest" as it gets.

The military courts' decisions were not full because they expressly declined to rule on the merits. In Johnson v. Rodriguez, 2022 U.S. Dist. LEXIS 106815 (C.D. Cal. 2022) (Mag. R&R), adopted by Johnson v. Rodriguez, 2022 U.S. Dist. LEXIS 129935 (C.D. Cal. 2022); the court found "[p]etitioner's habeas petition with the military court was not considered on the merits but was dismissed for lack of jurisdiction." That finding would

likely be undisturbed on appeal and refutes Respondent's assertion that no "court of appeals has deemed a similarly untimely claim to have been denied full and fair consideration under Burns." Resp. Br. at 21.

Moreover, the district court, in its second opinion, found "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." Resp. Br. at 13. The failure of both CAAF and NMCCA to address the merits of Petitioner's military habeas petition, standing alone, shows that those courts' consideration was neither full nor fair.

Lastly, "[m]ilitary courts have the same responsibility as the federal courts to protect a person from violation of his constitutional rights." Burns (HN 6). This Court also stated, "it must be assumed that the military court system will vindicate servicemember's constitutional rights." See Schlesinger, 420 U.S. at 758. That assumption has been overcome in the instant case and the military courts have proven they will not protect their servicemembers constitutional rights. That context also explains why, in this unusual case, no deference to the military courts is warranted.

Simply put, Petitioner did not receive the type of review by the military appellate courts that precludes collateral attack in the federal system and the court of appeals' decision was solely premised on the district court's incorrect determination the military courts gave "full and fair" consideration to

Petitioner's Article 13-waiver claim. The decision of the court of appeals was an error of law and fact and in conflict with the Burns decision of this Court and when combined with the unworkable Burns standard of review, warrants this Court's further consideration.

III. THE UNCONSTITUTIONALITY OF THE COURSE PURSUED BY LOWER COURTS UNDER BURNS HAS NOW BEEN MADE CLEAR AND COMPELS THIS COURT TO RECONSIDER THE BURNS DECISION

This Court has long acknowledged a difference in its attitude toward precedent where it is presented with a constitutional question rather than one of statutory interpretation. Justice Brandeis, in his dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting), surmised that "in most matters it is more important that the applicable rule of law be settled than that it be settled right" but that "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its prior decisions."

Later, in his celebrated opinion in Erie Railroad Co. v. Tompkins, 304 U.S. 54, 77-78 (1938), Justice Brandeis remarked "if only a question of statutory construction were involved, we would not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."

Adherence to precedent is a "foundation stone of the rule of law." Michigan v. Bay Mills Indian Community, 572 U.S. 782, 798 (2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

At the same time, stare decisis is neither an "inexorable command," Lawrence v. Texas, 539 U.S. 550, 577 (2003), nor "a mechanical formula of adherence to the latest decision," Helvering v. Hallock, 309 U.S. 106, 119 (1940), especially in constitutional cases, see United States v. Scott, 437 U.S. 82, 101 (1978). When one of this Court's constitutional decisions goes astray, the country is usually stuck with the bad decision unless it corrects its own mistake. See Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989)("[o]nly the Supreme Court may overrule its decisions."). It will also only do so when a rule has proven "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." Vasquez v. Hillery, 474 U.S. 254, 266 (1986).

In this case, Burns is unworkable and was on a collision course with the Constitution from the day it was decided. Workability is the traditional basis for overruling a case. Patterson v. Mclean Credit Union, 491 U.S. 164, 173 (1989). That principle stands for the proposition of whether a rule can be understood and applied in a consistent and predictable manner.

See Montejo v. Louisiana, 556 U.S. 778, 792 (2009) and Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283-84 (1988). Burns' "full and fair consideration" test has scored poorly on the workability scale.

In fact, the lower court's experience applying Burns has confirmed Justice Frankfurter's prescient diagnosis that problems will arise associated with implementing an unclear standard with little justification to support it. Burns 346 U.S. at 844 (separate opinion by Frankfurter, J.). Likewise, Burns has generated a long list of circuit conflicts. See Brosius v. Warden, 2788 F.3d 239 (3d Cir. 2002)(court noted split in federal circuits over meaning and application of majority's view in Burns v. Wilson) and Kauffman v. Sec. of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969)(the test "has meant many things to many courts").

The Eight and Ninth Circuits appear to 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 Swisher v. United States, 354 F.2d 472, 475 (8th Cir. 1966) and Broussard v. Patton, 466 F.2d 816, 818 (9th Cir. 1972).

The First and Third Circuits agree that Burns' "fully and fairly" standard controls the scope of review, but have frankly admitted a difficulty in understanding and applying the standard. See Allen v. Van Cantfort, 436 F.2d 625 (1st Cir. 1971), which

initially states 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 and that Burns' "validity has been questioned and criticized by both courts and commentators since it was first announced," Id. at 679; Levy v. Parker, 478 F.2d 772, 779-783 (3d Cir. 1973).

The District of Columbia Circuit has gone beyond Burns, and has held that the scope of review of military judgements should be the same as in habeas review of state or federal convictions, unless it is shown that conditions peculiar to military life require a different rule. Kauffman v. Secretary of the Air Force, 415 F.2d 991, 992, 997 (D.C. Cir. 1969). The Fifth Circuit, by contrast, interprets Burns as establishing a narrower scope of review for military habeas than that for state habeas. Calley v. Callaway, 519 F.2d 184, 199-203 (5th Cir. 1975).

Most troubling, however, are the negative implications that have resulted from the confusion in the Tenth Circuit that "an issue raised before a military court is deemed 'fully and fairly' considered even if the military court rejects the claim without explanation." Lips v. Commandant, 997 F.2d 808 (10th Cir. 1993). This, paired with the fact that "a claim not raised before the military courts will not be reviewed," creates nothing more than a judicial "gotcha" and is an indefensible barrier to prompt adjudication of constitutional claims in the federal courts by service members.

This "Catch-22" problem is illustrated by the fact the last military member to be granted a habeas release by a federal court

would still be incarcerated today under the current standard. In Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990), the constitutional "reasonable doubt" issue was addressed on direct appeal in the military courts, but the Tenth Circuit held "[c]onsideration by the military of a constitutional 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." Monk (HN3).

More recently, had Robert Bergdahl been given the government requested fourteen (14) years imprisonment instead of only a dishonorable discharge and attempted to raise his due process claim in a Tenth Circuit district court after challenging it within the military system, he would still be at Leavenworth with a conviction because the Tenth Circuit holds "full and fair consideration does not require a detailed opinion by the military court, but rather simply that the issue was briefed and argued." Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 671-72 (10th Cir. 2010). Instead, his conviction has been voided. See Bergdahl v. United States, 2023 U.S. Dist. LEXIS 127510 (D.D.C. 2023).

"[T]he writ of habeas corpus occupies a position unique in our jurisprudence, the consequence of its historical importance as the ultimate safeguard against unjustifiable deprivations of liberty." Schlesinger v. Councilman, 470 U.S. 738, 7521 (1975). Currently, however, habeas does not provide a military prisoner with a "meaningful opportunity" to test the legality of his detention - despite the fact that common-law

habeas rules demand such a meaningful opportunity. The injustice and confusion incident to the Burns doctrine means while Section 2241(c) might provide an opportunity, it is not a meaningful one under Burns. A procedure that systematically deprives all military prisoners of habeas review is a system that provides no meaningful habeas review. Unquestionably, the lack of a meaningful habeas review system pursuant to Burns violates the Suspension Clause. For that reason, continued adherence to Burns' unworkable "full and fair consideration" test would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." Payne, 501 U.S. at 827. Burns must be overruled.

CONCLUSION

Burns is in practice unworkable. Not only has it been uniformly criticized by commentators, but circuit courts of appeal have struggled ever since this decision to configure exactly what "full and fair consideration" means, resulting in many different approaches. Respondent has not meaningfully rebutted the pressing need of this Court to reconsider Burns and even concedes "Burns' full-and-fair-consideration standard has been subject to some uncertainty." Resp. Br. at 21. Finally, Respondent does not dispute the questions presented are important and recurring. For the foregoing reasons, and those in the Petition, this Court should grant the writ and finally decide this question of great importance.

Dated: October 27, 2023.

Respectfully Submitted,

Joshua Gary Anderson
Pro Se Petitioner