No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LONZELL J. THREATS,

Petitioner,

v.

WARDEN, USP TUCSON

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Date Sent by Federal Express Overnight Delivery: December 5, 2023

QUESTION PRESENTED

Must a court reviewing a 28 U.S.C. § 2241 habeas corpus petition challenging a military-court conviction extend absolute deference to the military court's rulings on questions of law, and mixed questions of law and fact, that do not involve uniquely military matters?

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings: *Threats v. Shartle*, No. 17-cv-00542-JAS (D. Ariz.) (judgment entered June 28, 2021); *Threats v. Shartle*, No. 21-16302 (9th Cir.) (judgment entered June 9, 2023; petition for rehearing denied Sep. 6, 2023).

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Petitioner Lonzell J. Threats respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 9, 2023. App. A.

OPINIONS BELOW

The court of appeals' memorandum is designated Not for Publication, but is available at 2023 WL 3918235 and 2023 U.S. App. LEXIS 14372. The district court's order also is not officially published, but is available at 2021 WL 2646873 and 2021 U.S. Dist. LEXIS 120187.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over Mr. Threats' petition for a writ of habeas corpus under 28 U.S.C. § 2241. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 9, 2023. App. A at 1. The court of appeals denied Mr. Torres' timely petition for rehearing en banc on September 6, 2023. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

Lonzell J. Threats is a decorated former U.S. Army Medic who served tours of duty in Afghanistan and Iraq. On September 22, 2010, then-Sergeant Threats was stationed at Fort Campbell, Kentucky, when female fellow soldier Private K.P. reported having been raped, sodomized, and robbed by a masked man she could not identify. She said the attacker hid in the backseat of her car and assaulted her as she was leaving a morning physical training session, then secured her login code and used an ATM to steal money from her bank account. After extracting incriminating statements from Sgt. Threats in interrogations that spanned two days, the Fort Campbell Criminal Investigation Division charged him with attempted murder, rape, robbery, sodomy, assault, and conduct tending to bring discredit upon the armed forces. Sgt. Threats was tried for these charges in a court-martial bench trial at which he was represented by government-funded counsel Captain George Vargas.

Sgt. Threats was not satisfied with Cpt. Vargas' representation. Cpt. Vargas did not bother to interview a soldier who saw a man who was not Sgt. Threats—but who largely matched Pvt. P.'s description of her attacker—loitering near the physical training area in the two weeks preceding the incident. Nor did Cpt. Vargas bother to interview another soldier who was absent from physical training on the day of the incident, and who in some respects matched Pvt. P.'s description of the

attacker more closely than did Sgt. Threats. Cpt. Vargas failed to exploit the fact that Pvt. P.'s description of the attacker's ammunition did not match Sgt. Threats' ammunition. Cpt. Vargas also failed to exploit Pvt. P.'s testimony that the attacker appeared to believe that she had a son—which Sgt. Threats knew she did not. And Cpt. Vargas failed to obtain or introduce evidence showing that shortly before the incident, Sgt. Threats had received a $1,000 Army loan—which would have mitigated the incriminating appearance of cash found in his car the next day. Instead of pursuing these leads, Cpt. Vargas explained at a post-trial hearing that he adopted the non-strategy of treating the trial as an opportunity to re-litigate his unsuccessful pretrial motion to suppress Sgt. Threats' incriminating statements under interrogation.

Predictably, this strategy failed. Following a two-day trial, the military judge found Sgt. Threats guilty of rape, robbery, sodomy, assault, and conduct tending to bring discredit upon the armed forces, and sentenced him to 50 years of imprisonment and dishonorable discharge from the Army.

Assisted by new appointed counsel, Sgt. Threats filed a petition for clemency arguing that Cpt. Vargas rendered ineffective assistance. The military judge who had presided over Sgt. Threats' trial accepted briefing on the matter and convened an evidentiary hearing, then issued findings of fact and conclusions of law rejecting Sgt. Threats' ineffective-assistance claim.

Sgt. Threats appealed his convictions and sentence, together with the military judge's rejection of his ineffective-assistance claim, to the Army Court of

Criminal Appeals. That court denied Sgt. Threats' claims (except for a technical issue affecting one count) in a summary disposition. Sgt. Threats filed a motion for reconsideration, which the court summarily denied.

Sgt. Threats then filed a petition seeking discretionary review in the Court of Appeals for the Armed Forces. After that court denied the petition, the Army entered an order declaring that Sgt. Threats' conviction had been finally affirmed, and executed his dishonorable discharge.

Mr. Threats then filed a 28 U.S.C. § 2241 petition for habeas corpus in the United States District Court for the District of Arizona, where he was (and remains) incarcerated. Three years after briefing on his petition was completed, a magistrate judge issued a report and recommendation recommending that the district court deny the petition. App. C. The magistrate judge reasoned that, pursuant to *Burns v. Wilson*, 346 U.S. 137 (1953), a civilian habeas court's role in reviewing a military court conviction is limited to determining whether the military courts have "'dealt fully and fairly'" with the habeas petitioner's allegations. App. C at 21 (*quoting Burns*, 346 U.S. at 142). The magistrate judge noted that Mr. Threats had pressed in the military courts his claim that Cpt. Vargas rendered ineffective assistance, and reasoned that "[a]s such, the issue was fully and fairly presented to the military courts and [Mr. Threats] is not entitled to review here." *Id*. at 25, 26.

Mr. Threats filed objections to the magistrate judge's report and recommendation. On the same day that Mr. Threats filed his reply in support of his objections, the district court entered its order and judgment denying his petition.

App. B. The court stated that it had conducted a de novo review of the record, found Mr. Threats' claims to be without merit, and adopted the magistrate judge's report and recommendation "in its entirety." *Id.* at 3.

In his appeal to the Ninth Circuit, Mr. Threats argued that the district court had incorrectly applied a rubber-stamp form of deference to the military courts' rulings on his ineffective-assistance claim, and that those rulings could not survive scrutiny under the proper standard of review.

The court of appeals affirmed the district court's ruling in a three-page, unsigned memorandum. App. A. In essentially summary fashion, the court held that Mr. Threats had failed to show, pursuant to this Court's plurality opinion in *Burns*, that the military courts did not deal "fully and fairly" with his ineffective-assistance claim:

> The military courts dealt fully and fairly with the sole claim that Threats raises on appeal, that he was denied effective assistance of counsel. Threats alleges six specific instances of ineffective assistance to support his claim, each of which was aired in a post-conviction hearing in the military courts and discussed in a detailed opinion by a military judge. The military judge found any instances of ineffective assistance insufficient to show a violation of Threats's right to effective counsel, and the Army Court of Criminal Appeals twice affirmed. Threats has not shown that the military courts failed to fully and fairly consider his claim. He merely seeks "to prove de novo . . . precisely the case which [he] failed to make in the military courts." *Burns*, 346 U.S. at 146.

App. A at 2–3 (footnote omitted). Mr. Threats filed a timely petition for rehearing en banc, which the court of appeals denied by order entered on September 6, 2023. App. D.

REASONS FOR GRANTING THE WRIT

This case cleanly presents an important question regarding the type of deference that a federal district court reviewing a 28 U.S.C. § 2241 habeas corpus petition challenging a military-court conviction must extend to a military court adjudication. The court of appeals, like several other inferior federal courts, construed a passage from a plurality opinion in this Court's 70-year-old decision in *Burns v. Wilson*, 346 U.S. 137 (1953), as essentially requiring absolute deference in this context. In addition to denying this Nation's veterans the same constitutional protections that individuals collaterally challenging state- and federal-court convictions receive, this construction of *Burns* conflicts with other opinions of the Ninth Circuit, as well as opinions of other circuits. Our country's fighting forces deserve better than this rubber-stamp treatment, and only this Court can correct the lower courts' error and resolve their disagreement. The Court should grant certiorari and make plain that a civilian habeas court should extend extraordinary deference to military-court adjudications only with respect to questions of fact, and with respect to legal or mixed legal and factual questions that implicate uniquely military matters.

ARGUMENT

The question presented is the subject of inter- and intra-circuit disagreement with respect to an important issue, and this case supplies an ideal vehicle to resolve it.

1.a. In *Burns v. Wilson*, 346 U.S. 137 (1953), this Court reviewed the convictions by Army courts-martial of two soldiers charged with murder and rape.

Id. at 138 (plurality opinion). The soldiers were convicted and sentenced to death. *Id*. After exhausting their appeals in the military justice system, they filed petitions for habeas corpus in the District Court for the District of Columbia, alleging that their court-martial proceedings had deprived them of due process of law. *Id*. Following review in the district and circuit courts, this Court granted certiorari to address "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*. at 139.

The judgment of the Court was announced by Chief Justice Vinson, in an opinion joined by three other justices. *Id*. at 138–46. Chief Justice Vinson confirmed that the federal civil courts have jurisdiction over habeas corpus applications alleging the deprivation of "basic rights guaranteed by the Constitution" in court-martial proceedings. *Id*. at 139. But he asserted that habeas review of military proceedings was "sui generis" and "more narrow" than in civil cases, "because of the peculiar relationship between the civil and military law." *Id*. at 139–40. Chief Justice Vinson reasoned that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," and he stressed that Congress had sought to protect the rights of military members by providing, in the Uniform Code of Military Justice (UCMJ), a "complete system of review within the military system to secure those rights." *Id*. at 140.

In the most-cited portion of his opinion, Chief Justice Vinson posited that civilian habeas courts should not "simply re-evaluate the evidence" with respect to an "allegation" with which the military courts have "dealt fully and fairly":

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are 'final' and 'binding' upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. But these provisions do mean 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 (emphasis added; citations and footnote omitted).

Chief Justice Vinson then turned to the petitioners' ineffective-assistance claims. He observed that the respondents had presented extensive evidence in refutation of these claims, and that the military courts had "heard petitioners out on every significant allegation which they now urge." *Id.* at 144. He reiterated that it was not the duty of a civilian habeas court "to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." *Id.* In sum, Chief Justice Vinson concluded, the petitioners were effectively "demand[ing] an opportunity to make a new record, to prove de novo in the District Court precisely the case which they failed to prove in the military courts." *Id.* at 146.

The plurality's votes to affirm the dismissal of the petitioners' claims were joined by Justice Jackson, who concurred in the result without comment, and Justice Minton, who concurred on the ground that a civilian habeas court's sole function on review of a court-martial conviction is to "see that the military court has jurisdiction." *Id*. at 146–47 (Minton, J., concurring in the affirmance of the judgment). Justice Frankfurter wrote an opinion declining to concur or dissent, on the ground that the case involved "[i]ssues of far-reaching import" that "were not explored in all their significance in the submissions made to the Court." *Id*. at 148–50 (Op. of Frankfurter, J.). Justice Douglas, joined by Justice Black, dissented, concluding that the petitioners were entitled to a judicial hearing on the circumstances surrounding their confessions. *Id*. at 150–55 (Douglas, J., dissenting).

Pursuant to the "*Marks* rule," Chief Justice Vinson's opinion for the plurality in *Burns* may be viewed as precedential. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted). In fact, while not expressly referencing the *Marks* rule, lower courts have generally treated the *Burns* plurality's reference to a civilian court's obligation not to revisit matters dealt with "fully and fairly" by the military courts as the governing standard. *See generally* John E. Theuman, J.D., Annotation, *Review by federal civil courts of court-martial convictions—modern status*, 95 A.L.R. Fed. 472 (1989).

b. However, courts applying the *Burns* plurality's standard have wrestled with the fact that the phrase "fully and fairly" essentially frames—rather than answers—the standard-of-review question, because it does not identify the qualities the military court's rulings must manifest in order to be deemed "full and fair." *See Kauffman v. Sec'y of Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969) (noting that the standard of full and fair consideration "has meant many things to many courts"). Under an extreme reading—which the lower courts here adopted—all the military courts must do in order to be deemed to have given "full and fair" consideration to a legal (or mixed legal and factual) claim is to address and decide it. The Tenth Circuit has adopted a similarly absolute interpretation. *See, e.g., Roberts v. Callahan*, 321 F.3d 994, 997 (10th Cir. 2003) ("We have held that where an issue is adequately briefed and argued before the military courts the issue has been given fair consideration, even if the military court disposes of the issue summarily."); *Santucci v. Commandant, U.S. Disciplinary Barracks*, 66 F.4th 844, 876 (10th Cir.), *cert. denied*, No. 23-72, ___ S. Ct. ___, 2023 WL 6378544 (Oct. 2, 2023) (Army Court of Criminal Appeals' consideration of petitioner's claim was "sufficient to sound the death knell" for petitioner's request for full merits review on habeas). But this understanding of the "full and fair" standard conflicts with decisions of other circuits, and with other decisions of the Ninth Circuit itself.

2. Although there is substantial agreement that habeas courts should not apply de novo review to purely *factual* questions that were litigated and resolved in the military courts, *see, e.g., Lips v. Commandant, U.S. Disciplinary Barracks*, 997

F.2d 808, 811 (10th Cir. 1993); *Kauffman*, 415 F.2d at 997; *Calley v. Callaway*, 519 F.2d 184, 200 (5th Cir. 1975), the Fifth and D.C. Circuits have rejected the absolute reading of the *Burns* "full and fair" standard that the court of appeals adopted here.

In *Calley v. Callaway*, the Fifth Circuit rejected the government's bid for absolute deference, and instead declared that civilian habeas courts must apply robust review to "questions of law which present substantial constitutional issues," provided that "factors peculiar to the military" are not implicated:

> 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. 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. Moreover, military law is a jurisprudence which exists separate and apart from the law governing civilian society so that what is permissible within the military may be constitutionally impermissible outside it. Therefore, when the military courts have determined that factors peculiar to the military require a different application of constitutional standards, federal courts are reluctant to set aside such decisions.

Calley, 519 F.2d at 203.

The D.C. Circuit similarly rejected the government's bid for absolute deference to military-court adjudications in *Kauffman v. Secretary of the Air Force*,

disagreeing with the notion that a habeas court may "simply and summarily dismiss a petition upon the ground that the military did not refuse to consider its allegations." *Kauffman*, 415 F.2d at 997 (internal quotation marks omitted). The "better view," the court concluded, is that "the principal opinion in *Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions." *Id*. The "test of fairness," the court reasoned, required "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*. The court noted that the "wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claims urged by the government are limitations with no rational relation to the military circumstances which may qualify constitutional requirements." *Id*.

3. The court of appeals' absolute interpretation of the *Burns* "full and fair" standard here also conflicts with other opinions of the Ninth Circuit. Where habeas petitioners' claims have implicated legal questions, the Ninth Circuit has not hesitated to apply de novo review to claimed errors in military court adjudications. *See Welch v. Fritz*, 909 F.2d 1330, 1331 (9th Cir. 1990) (question of validity of petitioner's Army enlistment); *Davis v. Marsh*, 876 F.2d 1446, 1448–50 (9th Cir. 1989) (question of application of cause-and-prejudice exhaustion standard to military adjudication); *Daigle v. Warner*, 490 F.2d 358 (9th Cir. 1973) (question of right to counsel in "summary" court-martial); *Sunday v. Madigan*, 301 F.2d 871 (9th Cir. 1962) (question of time at which UCMJ went into effect in Korea); *Edwards v.*

Madigan, 281 F.2d 73 (9th Cir. 1960) (question of whether sentences under UCMJ must be concurrent). The court has recognized a limitation on such de novo review only with respect to legal issues that implicate a "uniquely military matter." *Broussard v. Patton*, 466 F.2d 816, 819 (9th Cir. 1972) (addressing whether petitioner's desertion occurred "in time of war"); *see also Mitchell v. Swope*, 224 F.2d 365, 366–67 (9th Cir. 1955) (finding that denial of continuance did not deprive petitioner of adequate representation where it was "required by military necessity"); *cf. Daigle*, 490 F.2d at 365 (noting that "exigencies of military discipline" may affect scope of right to counsel in "summary" court-martial).

The panel that decided Mr. Threats' appeal did not observe these principles. Mr. Threats expressly refrained from challenging the military courts' purely factual findings regarding Cpt. Vargas' actions and omissions in representing him. C.A. Op. Br. at 41. Unlike the petitioners in *Burns*, therefore, Mr. Threats did not seek to "make a new record" or relitigate purely factual matters underlying his ineffective-assistance claim. *Burns*, 346 U.S. at 146. Instead, he challenged only the military courts' conclusion that these facts did not show ineffective assistance of counsel—a mixed question of fact and law subject to de novo review. *Rogers v. Dzurenda*, 25 F.4th 1171, 1180 (9th Cir. 2022). And he noted that, because the military court's reasoning in rejecting his ineffective-assistance claim did not rely on any "uniquely military matter" (*Broussard*, 466 F.2d at 819) or claim of "military necessity" (*Mitchell*, 224 F.2d at 367), the court should apply de novo review to his claims. C.A. Op. Br. at 41. Moreover, as Mr. Threats observed in his reply brief, the government

did not argue that his ineffective-assistance claim implicated any "uniquely military matter" or "military necessity." C.A. Reply Br. at 4–5. The court of appeals' insistence on extending absolute deference to the military court's rejection of his claim accordingly cannot be reconciled with the Ninth Circuit opinions cited above. The question presented thus implicates both intra- and inter-circuit disagreements.

4. This question has been percolating for 70 years, since the Court issued its fractured decision in *Burns*. As shown above, the inferior federal courts have had great difficulty construing and applying the "full and fair" standard. *See Kauffman*, 415 F.2d at 997 ("The Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts."). There is a pressing and longstanding need for the Court to clarify the law on this important question, and this case presents an ideal vehicle for the Court to provide this clarification. Unlike some cases applying *Burns*, the court of appeals here did not accompany its application of an absolute version of the *Burns* "full and fair" standard with any additional or alternative holding on the merits of the habeas petitioner's claims. *See, e.g., Allen v. VanCantfort*, 436 F.2d 625, 629–30 (1st Cir. 1971) (noting that petitioner's ineffective-assistance claim had been "fully considered" by the military courts, but nevertheless determining to "review briefly petitioner's claims on the merits").

5. The circuit decisions, like the one challenged here, that adopt an absolute interpretation of the *Burns* "full and fair" standard are misguided. The *Burns* plurality did not articulate an across-the-board absolute-deference standard for

civilian habeas review of military-court convictions. To the contrary, it precluded only a "re-evaluat[ion of] the evidence" (*Burns*, 346 U.S. at 142) with respect to the military courts' purely *factual* findings. *See, e.g., Calley*, 519 F.2d at 200; *Kauffman*, 415 F.2d at 997; *Shaw v. United States*, 357 F.2d 949, 953–54 (Ct. Cl. 1966). The lower courts, including (in many cases) the Ninth Circuit, have also held that deference may be appropriate with respect to legal issues that implicate "uniquely military" matters, as to which the military courts have special expertise the civilian courts lack. *See supra at* 13. But nothing in *Burns* indicates that deference must be absolute with respect to *all* military court findings, whether purely factual, purely legal, or mixed. As the D.C. Circuit observed in *Kauffman*, *Burns* confirms that collateral review of military-court judgments is available in civilian courts, and "[t]he 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, on the one hand, to protect the rights of servicemen, and, on the other, to articulate and defend the needs of the services as they affect those rights." *Kauffman*, 415 F.2d at 997. The Court should grant certiorari and ensure that these benefits are fully retained and guaranteed to the members of our fighting forces.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted on December 5, 2023.

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