No. 17-7769

IN THE

Supreme Court of the United States

RONALD GRAY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari or Mandamus to the United States Court of Appeals for the Armed Forces

BRIEF OF THE APPELLATE DEFENSE DIVISION OF THE UNITED STATES AIR FORCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LT COL NICHOLAS MCCUE
CAPT DUSTIN WEISMAN
AIR FORCE LEGAL OPERATIONS AGENCY
1500 West Perimeter Rd.
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

BRIAN L. MIZER *
AIR FORCE LEGAL OPERATIONS AGENCY
1500 West Perimeter Rd.
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
brian.l.mizer.civ@mail.mil

Counsel for Amicus Curiae

March 19, 2018

* Counsel of Record

QUESTION PRESENTED

Amicus will address the first question presented in Petitioner's brief:

Which court system, Article I military or Article III civil, appropriately exercises jurisdiction in final military cases to conduct initial review of constitutional claims that arise after or in conjunction with direct appeal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES.. ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The CAAF has Summarily Overruled Decades of Precedent Holding that Article 76, UCMJ, is not a Jurisdictional Bar to Collateral Review and Abdicated its Assigned Task of Vindicating the Constitutional Rights of Service Members ... 3

II. Assuming the CAAF Cannot Overrule this Court's decision in *Denedo*, this Court Should Reject the CAAF's Alternative Holding that Service Members Must Exhaust their Claims in Article III Courts Before Seeking Collateral Review of their Courts-Martial in Article I Courts 6

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Burleson v. United States,
No. 200700143, 2018 CCA LEXIS 87 (N-M. Ct. Crim. App. Feb. 26, 2018) 6

Burns v. Wilson,
346 U.S. 137 (1953) 8

Del Prado v. United States,
48 C.M.R. 748 (C.M.A. 1974) 5

Denedo v. United States,
66 M.J. 114 (C.A.A.F. 2008) 2, 4, 5, 8

Garrett v. Lowe,
39 M.J. 293 (C.M.A. 1994)............................. 5

Gray v. Gray,
2015 U.S. Dist. LEXIS 131345 (D. Kan. 2015)... 5

Gray v. Gray,
645 Fed. Appx. 624 (10th Cir. 2016)............ 5

Jeter v. United States,
No. 18-0012/AF, 2017 CAAF LEXIS 1103 (C.A.A.F. Nov. 13, 2017)........................ 1, 6, 7

Lewis v. United States,
No. 18-0004/AF, 2017 CAAF LEXIS 1106 (C.A.A.F. Nov. 13, 2017)........................ 1, 6, 7

Loving v. United States,
62 M.J. 235 (C.A.A.F. 2005) 5

TABLE OF AUTHORITIES (CONTINUED)

Noyd v. Bond,
395 U.S. 683 (1969) 4

Parisi v. Davidson,
405 U.S. 34 (1972) 9

Pierre v. United States,
No. 201300257 (N-M. Ct. Crim. App. Mar. 8, 2018).. 6, 7, 8

Schlesinger v. Councilman,
420 U.S. 738 (1975) 4, 5

Thompson v. United States,
60 M.J. 880 (N-M. Ct. Crim. App. 2005)....... 5

United States v. Burleson,
68 M.J. 163 (C.A.A.F. 2008) 7, 8

United States v. Denedo,
556 U.S. 904 (2009) ....*passim*

United States v. Frischholz,
16 U.S.C.M.A. 150 (C.M.A. 1966) 3, 4, 8

United States v. Gray,
77 M.J. 5 (C.A.A.F. 2017).....................*passim*

United States v. Guardado,
77 M.J. 90 (C.A.A.F. 2017)............................ 7

United States v. Hills,
75 M.J. 350 (C.A.A.F. 2016).................. 6, 7, 8

TABLE OF AUTHORITIES (CONTINUED)

United States v. Hukill,
76 M.J. 219 (C.A.A.F. 2017) 7

Ward v. United States,
No. 18-0006/AF, 2017 CAAF LEXIS 1105 (C.A.A.F. Nov. 13, 2017)........................ 1, 6, 7

STATUTES

10 U.S.C.
§ 867.. 4, 7
§ 870.. 8
§ 876... 2, 3, 4, 5

28 U.S.C.
§ 1651(a) 4
§ 2241.. 2

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are appellate defense attorneys assigned to the United States Air Force's Appellate Defense Division, and represent military members seeking initial review of constitutional claims that have arisen after or in conjunction with their direct appeals. Air Force members who were recently denied review of their constitutional claims by the Court of Appeals for the Armed Forces (CAAF) have their denials reported at *Jeter v. United States*, No. 18-0012/AF, 2017 CAAF LEXIS 1103 (C.A.A.F. Nov. 13, 2017); *Lewis v. United States*, No. 18-0004/AF, 2017 CAAF LEXIS 1106 (C.A.A.F. Nov. 13, 2017); and *Ward v. United States*, No. 18-0006/AF, 2017 CAAF LEXIS 1105 (C.A.A.F. Nov. 13, 2017). *Amici* respectfully request this Honorable Court grant petitioner Gray's writ of certiorari or mandamus to ensure the resolution of this important question.

SUMMARY OF ARGUMENT

Nine years ago, this Honorable Court reaffirmed longstanding precedent of the CAAF permitting current and former military members to seek *coram nobis* relief, holding "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." *United States v. Denedo*, 556 U.S. 904, 917 (2009). This

[1] The Petitioner has lodged a blanket consent to the filing of *amicus* briefs, and Respondent has consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Court reasoned, "[t]he result we reach today is of central importance for military courts. The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments." *Id.* at 917.

Central to the CAAF's decision in *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F. 2008), was the Court's conclusion that Article 76, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 876 (2018), provides only a prudential constraint on collateral review, and the petitioner met the threshold requirements for *coram nobis*, in part, because the abstention and exhaustion doctrines made Article III courts unavailable.

However, four months ago, in a *per curiam* decision, the CAAF reversed itself and held Article 76, UCMJ, provides a jurisdictional bar to collateral review by the CAAF. *United States v. Gray*, 77 M.J. 5, 6 (C.A.A.F. 2017). The CAAF further held that Petitioner Gray could not meet the requirements for *coram nobis* due to the availability of collateral review in Article III courts. That decision cited *Denedo* only for the proposition that *coram nobis* may not issue when *habeas corpus* review is available in Article III courts. *Id.*

Unfortunately for Petitioner Gray, and also for the Air Force appellants who had their writs denied on the same day, *habeas corpus* is not available in Article III courts because those courts have already held that prisoners challenging court-martial convictions through 28 U.S.C. § 2241 must first exhaust *coram nobis* claims with the CAAF pursuant to this Court's decision in *Denedo*. *A-99-100.*

These military members, and those that will inevitably follow, are now suspended in judicial limbo between Article I military courts and Article III courts with each court insisting the other has primary jurisdiction to hear their constitutional claims. (*see* Petitioner's Brief at 7). The Article III court has pledged to rule on Petitioner Gray's writ of *habeas corpus*, just as soon as the Article I court rules on *coram nobis*. And the Article I court has now declared, for the first time, it lacks the jurisdiction to do so.

While this isn't the first time America's airmen find themselves in a "Catch-22," the CAAF has effectively closed the courthouse doors to military members seeking review of constitutional claims that arise after or in conjunction with their direct appeals.

This Court should grant Petitioner's writ of *certiorari* or *mandamus*, reaffirm its holding in *Denedo*, and leave the Article I military courts to police their own errors prior to courts-martial being reviewed by Article III courts. We therefore ask this Court to grant Petitioner's writ of certiorari or mandamus and once again open the CAAF's doors to military members seeking review of their constitutional claims.

ARGUMENT

I. The CAAF has Summarily Overruled Decades of Precedent Holding that Article 76, UCMJ, is not a Jurisdictional Bar to Collateral Review and Abdicated its Assigned Task of Vindicating the Constitutional Rights of Service Members.

For more than fifty years, the CAAF, and its predecessor the Court of Military Appeals (CMA), held Article 76, UCMJ, did not provide a jurisdictional bar to collateral review by Article I military courts. *United*

States v. Frischholz, 16 U.S.C.M.A. 150 (C.M.A. 1966).

In *Denedo*, the CAAF presciently described the "Catch-22" that confronted Captain Frischholz before affirming its long-standing precedent that "Article 76 provides a prudential constraint on collateral review, not a jurisdictional limitation." *Denedo*, 66 M.J. at 120.

Captain Frischholz initially sought collateral review in the United States District Court for the District of Columbia. *Denedo*, 66 M.J. at 123. "The district court dismissed the petition, indicating that he should first seek review on the merits from this Court, a suggestion apparently initiated by the government." *Id.* (citing *Frischholz*, 16 U.S.C.M.A. at 151). "When Frischholz followed the district court's suggestion and filed a petition for a writ of error coram nobis with this Court, the government changed its position, contending the case was outside this Court's statutory jurisdiction under Article 67, and that we could not review a case after it became final under Article 76, UCMJ." *Id.*

In *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969), this Court noted the CMA "properly rejected" the government's argument as to the CMA's jurisdiction to issue extraordinary writs pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

Six years later, in *Schlesinger v. Councilman*, 420 U.S. 738, 753 n.26 (1975), this Court cited the CMA's decision in *Frischholz* and reiterated Article 76, UCMJ, "does not stand as a jurisdictional bar to Captain Councilman's suit." *Id.* However, this Court required Captain Councilman to exhaust all available military remedies in light of the congressional expec-

tation "that the military court system generally is adequate to and responsibly will perform its assigned task." *Councilman*, 420 U.S. at 758. "We think this congressional judgment must be respected and that it must be assumed that the military court will vindicate servicemen's constitutional rights." *Id.*

In the years since *Frischholz*, Article I military courts have exercised their jurisdiction to consider petitions for extraordinary relief after direct appeal was final pursuant to Article 76, UCMJ. *See Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005); *Garrett v. Lowe*, 39 M.J. 293, 294-95 (C.M.A. 1994); *Del Prado v. United States*, 48 C.M.R. 748, 749 (C.M.A. 1974); *Thompson v. United States*, 60 M.J. 880 (N-M. Ct. Crim. App. 2005).

As noted by the CAAF in *Denedo*, "a number of federal district courts have continued to rely upon the availability of collateral review in the military justice system to dispose of petitions seeking collateral relief." *Denedo*, 66 M.J. at 123. These include the United States District Court for the District of Kansas, which, now armed with this Court's decision in *Denedo* as to the availability of *coram nobis* in Article I military courts, did the same in Petitioner Gray's case. *Gray v. Gray*, 2015 U.S. Dist. LEXIS 131345 (D. Kan. 2015) *rev'd by Gray v. Gray*, 645 Fed. Appx. 624 (10th Cir. 2016).

In light of this history, the CAAF's decision in *Gray* is a bolt out of the blue. The CAAF held that "[t]he threshold question is whether this Court has jurisdiction to entertain a request for *coram nobis* in a case that is final in all respects under the UCMJ. We hold that we do not." *Gray*, 77 M.J. at 6. But, as this Court succinctly stated in *Denedo*, "That is incorrect." 556 U.S. at 915.

II. Assuming the CAAF Cannot Overrule this Court's decision in *Denedo*, this Court Should Reject the CAAF's Alternative Holding that Service Members Must Exhaust their Claims in Article III Courts Before Seeking Collateral Review of their Courts-Martial in Article I Courts.

The CAAF's decision in *Gray* presents an important federal question that broadly impacts the appellate rights of service members under both the UCMJ and in Article III courts.

On the same day the CAAF decided *Gray*, the Court also denied three *coram nobis* petitions in non-capital cases where the petitioners, who were confined, raised claims based on jury instructions that CAAF had recently found to be constitutionally infirm. *Jeter v. United States*, No. 18-0012/AF, 2017 CAAF LEXIS 1103 (C.A.A.F. Nov. 13, 2017); *Lewis v. United States*, No. 18-0004/AF, 2017 CAAF LEXIS 1106 (C.A.A.F. Nov. 13, 2017); and *Ward v. United States*, No. 18-0006/AF, 2017 CAAF LEXIS 1105 (C.A.A.F. Nov. 13, 2017); *see generally United States v. Hills*, 75 M.J. 350, 356-57 (C.A.A.F. 2016).

The Navy-Marine Corps Court of Criminal Appeals has subsequently done the same in two other cases. *Burleson v. United States*, No. 200700143, 2018 CCA LEXIS 87 (N-M. Ct. Crim. App. Feb. 26, 2018); *Pierre v. United States*, No. 201300257 (N-M. Ct. Crim. App. Mar. 8, 2018).

Each of these petitions for extraordinary relief involve the CAAF's decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), which held that a pattern instruction given in sexual assault cases violated the "presumption of innocence and right to have all

findings made clearly beyond a reasonable doubt, resulting in constitutional error." The CAAF has since invoked *Hills* to set aside dozens of sexual assault convictions. *See, e.g. United States v. Guardado*, 77 M.J. 90 (C.A.A.F. 2017); *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017).

Unfortunately for other service members, the CAAF denied review of the issue presented in *Hills* on a number of occasions in the period from when the pattern instruction was adopted in 2006 to the Court's decision in *Hills* in 2016, including in *United States v. Burleson*, 68 M.J. 163 (C.A.A.F. 2008).

Even though they objected to the use of the pattern instruction at their courts-martial, the petitioners in *Jeter, Lewis, Ward,* and *Pierre* did not raise the error on direct appeal in light of the CAAF's prior decisions denying review pursuant to Article 67, UCMJ. 10 U.S.C. § 867 (2018). Nevertheless, each of their cases presents "obvious" constitutional error. *Hills*, 75 M.J. at 353 ("[I]t seems obvious that it is impermissible to utilize [Military Rule of Evidence 413] to show that charged conduct demonstrates an accused's propensity to commit…the charge conduct.").

If "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect," *Denedo*, 556 U.S. at 917, that jurisdiction should not be hobbled by a requirement that service members first pursue challenges to their courts-martial in Article III courts before availing themselves of the military justice system established by Congress.

The three military petitioners who had their claims denied the same day as *Gray*, and who will

likely soon be joined by *Pierre* and *Burleson*, are now left with no other recourse than to restyle their claims as writs of *habeas corpus* and refile in an Article III court. They will likely do so without the assistance of specialized military counsel provided by Congress to service members regardless of indigence. 10 U.S.C. 870 (2018). And they will seek enforcement of CAAF's precedent in at least four different federal judicial districts, making it likely—in the event their cases are even reviewed—that the application of *Hills* will be anything but uniform.

More likely, however, given recent federal district court rulings, these military petitioners will inevitably have Article III courts decline to review their *habeas corpus* petitions on grounds that their Article I remedies have not been exhausted. *See A-99-100.* And if *Frischholz* is any guide, the Article III courts will do so at the urging of the Department of Justice. *Denedo*, 66 M.J. at 123. In essence, these petitioners no longer have a court available to them to hear their constitutional claim that they have been convicted in violation of the presumption of innocence.

But worse, not only does the CAAF's holding in *Gray* impact these military petitioners, but it impacts all future military petitioners, including petitioners like Jacob Denedo, who wish to present fundamental claims like a violation of the Sixth Amendment.

"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." *Burns v. Wilson*, 346 U.S. 137, 142 (1953). This Court should grant Petitioner's writ of *certiorari* or *mandamus* and reaffirm its precedent holding the primary responsibility to protect the rights of service members rests within the "system of specialized mili-

tary courts," *Parisi v. Davidson*, 405 U.S. 34, 53 (1972), established by Congress.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or mandamus.

Respectfully submitted,

BRIAN L. MIZER *
AIR FORCE LEGAL
OPERATIONS AGENCY
1500 West Perimeter Rd.
Suite 1100
Joint Base Andrews, MD
20762
(240) 612-4770
brian.l.mizer.civ@mail.mil

LT COL NICHOLAS MCCUE
CAPT DUSTIN WEISMAN
AIR FORCE LEGAL
OPERATIONS AGENCY
1500 West Perimeter Rd.
Suite 1100
Joint Base Andrews, MD
20762
(240) 612-4770

Counsel for Amicus Curiae

March 19, 2018

*Counsel of Record