No 19 -

In the Supreme Court of the United States

Jared D. Herrmann,

Petitioner,

v.

Ryan D. McCarthy, Secretary of the Army,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JOHN N. MAHER*
KEVIN J. MIKOLASHEK
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
john@maherlegalservices.com
kevin@maherlegalservices.com
Tel: (708) 468-8155

Counsel for Petitioner
*Counsel of Record

June 22, 2020

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED FOR REVIEW

Whether the district court misinterpreted its subject matter jurisdiction when dismissing without adjudication petitioner's 28 U.S.C. § 2241 Federal habeas challenge to Article I military tribunals' constitutional rulings, where this Court and all U.S. Circuit Courts of Appeals have held that the statutory term "in custody" does not mean actual physical confinement as long as collateral consequences from the conviction remain affixed after release, and where a certificate of appealabilty is not required for Federal Section 2241 appeals.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Jared D. Herrmann (Herrmann), appellant below. Respondent is the United States by and through the Secretary of the Army, appellee below. Petitioner is not a corporation.

PROCEEDINGS BELOW

Herrmann v. McCarthy, 2020 U.S. App. LEXIS 2008 (9th Cir. January 22, 2020) (summary affirmance)

Herrmann v. Esper, 2019 U.S. Dist. LEXIS 63450 (D. Ariz. April 11, 2019) (dismissal without adjudication and declination of request to reconsider)

Herrmann v. United States, 138 S. Ct. 487 (2017) (cert. denied)

United States v. Herrmann, 76 M.J. 304 (C.A.A.F. 2017) (Article I findings and sentence affirmed)

United States v. Herrmann, 75 M.J. 672 (A. Ct. Crim. App. 2016) (Article I findings and sentence affirmed)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE AND THE FACTS 4

REASONS FOR GRANTING THE PETITION 10

I. This Court should summarily Dispose of this Matter by Granting the Petition, Vacating the Judgments Below, and Remanding to the District Court because "In Custody" does not Mean actual physical Custody for Purposes of Section 2241 Federal Habeas Corpus Subject Matter Jurisdiction for military Members .10

II. Congress and every U.S. Circuit Court of Appeals has Held that a Certificate of Appealability is not Required for a Federal Petitioner to Appeal a Section 2241 Habeas Claim 20

CONCLUSION 25

APPENDIX A - *Herrmann v. McCarthy*, 2020 U.S. App. LEXIS 2008 (9th Cir. January 22, 2020).........1a

APPENDIX B - *Herrmann v. Esper*, 2019 U.S. Dist. LEXIS 63450 (D. Ariz. April 11, 2019).....................2a

TABLE OF AUTHORITIES

Cases: **Page(s)**

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973) 18, 19

Brown v. Resor, 393 U.S. 10 (1968) 3

Brown v. Resor, 407 F.2d 281 (5th Cir. 1969) 3

Bryan v. Duckworth, 88 F.3d 431 (7th Cir. 1996) 16

Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968) 16

Capler v. City of Greenville, 422 F.2d 299 (5th Cir. 1970) 16

Carafas v. LaVallee, 391 U.S. 234 (1968) 2, 17

Carey v. Saffold, 536 U.S. 214 (2002) 24

Chaidez v. United States, 568 U.S. 342 (2013) 18

Dawson v. Scott, 50 F.3d 884 (11th Cir. 1995) 17

Fernos-Lopez v. Figarella-Lopez, 929 F.2d 20 (1st Cir.), *cert. denied*, 502 U.S. 886 (1991) 16

Fiswick v. United States, 329 U.S. 211 (1946) 17

Forde v. U.S. Parole Comm'n, 114 F.3d 878 (9th Cir. 1997) 22

Garlotte v. Fordice, 515 U.S. 39 (1995) 17

Gonzalez v. Justices of the Mun. Court, 382 F.3d 1 (1st Cir. 2004) 21

Gonzalez v. Thaler, 565 U.S. 134 (2012) 20

Hensley v. Mun. Court, 411 U.S. 345 (1973) 12

Hoffler v. Bezio, 726 F.3d 144 (2d Cir. 2013) 21

Jeffers v. Chandler, 253 F.3d 827 (5th Cir.) (*per curiam*), *cert. denied*, 534 U.S. 1001 (2001) 22

Jones v. Cunningham, 371 U.S. 236 (1963) 12, 17

Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969) 2, 3, 12, 13, 14, 15, 19

Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988) (*en banc*), *cert. denied* 489 U.S. 1083 (1989) 16

Langella v. Anderson, 612 F.3d 938 (8th Cir. 2010) .22

Lefkowitz v. Newsome, 95 S. Ct. 886 (1975) 12

Leonard v. Nix, 55 F.3d 370 (8th Cir. 1995) 16

Maleng v. Cook, 490 U.S. 488 (1989) 18

Marden v. Purdy, 409 F.2d 784 (5th Cir. 1969) 16

McAliley v. Birdsong, 451 F.2d 1244 (6th Cir. 1971) .3

McIntosh v. U.S. Parole Comm'n, 115 F.3d 809 (10th Cir. 1997) 22

McClain v. United States Bur. of Prisons, 9 F.3d 504 (6th Cir. 1993) 16

Melton v. Hemingway, 40 F. App'x 44 (6th Cir. 2002) 22

Nakell v. Attorney General, 15 F.3d 319 (4th Cir. 1994) 16

Nowakowski v. New York, 835 F.3d 210 (2d Cir. 2016) 16

Oyler v. Allenbrand, 23 F.3d 292 (10th Cir.), *cert. denied*, 513 U.S. 909 (1994) 17

Rumsfeld v. Padilla, 542 U.S. 426 (2004) 17

Sanchez-Rengifo v. Caraway, 798 F.3d 532 (7th Cir. 2015) 22

Sawyer v. Holder, 326 F.3d 1363 (11th Cir. 2003) ...23

Schlesinger v. Councilman, 420 U.S. 738 (1975) 10, 11, 14, 15, 19

Slack v. McDaniel, 529 U.S. 473 (2000) 24

Spencer v. Kemna, 523 U.S. 1 (1998) 2, 17

Strait v. Laird, 406 U.S. 341 (1972) 18, 19

Sugarman v. Pitzer, 170 F.3d 1145 (D.C. Cir. 1999).23

United States v. Augenblick, 393 U.S. 348 (1969) ...18

United States v. Cepero, 224 F.3d 256 (3d Cir. 2000) 21

United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970), *cert. denied*, 401 U.S. 941 (1971)..15

United States Ex. Rel. New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006) 14, 15, 19

United States v. Re, 372 F.2d 641 (2d Cir.), *cert. denied*, 388 U.S. 912 (1967) 15

United States v. Doe, 810 F.3d 132 (3d Cir. 2015) ...16

Walker v. North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966), *aff'd per curiam*, 372 F.2d 129 (4th Cir.), *cert. denied*, 388 U.S. 917 (1967) 15

Wilborn v. Mansukhani, 795 F. App'x 157 (4th Cir. 2019) 21

Statutory Provisions

10 U.S.C. § 866 (Article I direct review) 5
10 U.S.C. § 867 (Article I discretionary review) 6
10 U.S.C. § 892 (reckless endangerment statute) 4
10 U.S.C. § 934 (dereliction of duty statute) 4
28 U.S.C. § 1254 (jurisdiction) 1
28 U.S.C. § 1331 (Federal question jurisdiction) 11, 15, 20

28 U.S.C. § 2241 (Habeas for military statute) ....*passim*
28 U.S.C. § 2243 (Court orders for law and justice) 8, 15, 20
28 U.S.C. § 2253 (Certificate of appealability) 20, 21, 22, 23, 24
28 U.S.C. § 2254 (State civilian habeas statute) 20, 21
28 U.S.C. § 2255 (Federal civilian habeas statute) 20, 21, 22

Rules and Regulations

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts 21

Rule 11 of the Rules Governing Section 2255 Proceedings in the United States District Courts ...21

Federal Rule of Appellate Procedure 22(b) 21

JURISDICTION

This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1). On January 22, 2020, the United States Court of Appeals for the Ninth Circuit summarily affirmed the United States District Court for the District of Arizona's April 11, 2019 dismissal without adjudication of Herrmann's Federal 28 U.S.C. § 2241 collateral challenge to Article I military tribunals' unconstitutional rulings. Pursuant to this Court's March 19, 2020 COVID-19 order, Herrmann's Petition for a Writ of Certiorari is due on or before June 22, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, § 8
U.S. Const. art. III, §§ 1, 2

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331
28 U.S.C. § 2241
28 U.S.C. § 2243
28 U.S.C. § 2253
28 U.S.C. § 2254
28 U.S.C. § 2255

INTRODUCTION

Petitioner respectfully submits that this matter is appropriate for summary disposition by granting the petition, vacating the summary affirmance of the United States Court of Appeals for the Ninth Circuit, vacating the dismissal without adjudication of the United States District Court for the District of Arizona, and remanding the case to the United States District Court for the District of Arizona with an order directing Herrmann to re-file his 28 U.S.C. § 2241 petition and the United States thereafter file its Answer and Return.

This petition boils down to two fundamental, plain, and obvious errors that shuttered the Federal courthouse doors to Herrmann, who sought Article III review of Article I military tribunals' rulings on the Constitution that rendered his military court-martial conviction and sentence unlawful.

First, the district court declined to follow this Court's guidance, Ninth Circuit guidance, and the guidance of each of the Circuit Courts of Appeals, that the term "in custody" for purposes of Section 2241 Federal habeas jurisdiction does not mean "actual" physical confinement. The "in custody" requirement is satisfied as along as a petitioner remains affected by "serious collateral consequences of his incarceration exist—*i.e.*, that there is 'some concrete and continuing injury,'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), like a punitive discharge from the military. *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 994 (D.C. Cir. 1969) ("confinement is not a jurisdictional

requirement for collateral review of military judgments in civilian courts").

Petitioner Herrmann labors under consequences of his Article I trial, sentence, and appeal, to include reduction to the most junior enlisted rank, forfeiture of all pay and allowances, confinement for 10 months, the end of his military career, and the ineradicable stigma of a punitive discharge that one case describes as "infamy." *Kauffman,* 415 F.2d at 995. *See also Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) (holding that habeas petition is not moot as long as petitioner suffers "collateral consequence"); *Brown v. Resor*, 393 U.S. 10 (1968) (remanding court-martial case in light of *Carafas*); *Brown v. Resor*, 407 F.2d 281, 283 (5th Cir. 1969) (acknowledging on remand that collateral consequences could support consideration of habeas petition arising out of court-martial even after the petitioner was no longer in custody); *McAliley v. Birdsong*, 451 F.2d 1244, 1246 (6th Cir. 1971) (finding that undesirable discharge carries with it serious "collateral consequences" which, under *Carafas*, require holding that the case is not moot).

Second, the district court erred by directing the clerk of the district court not to issue a Certificate of Appealability (COA), despite well-settled jurisprudence establishing that the COA requirement does not even apply to appeals of denials of Section 2241 petitions brought by Federal petitioners.

For these reasons, this matter is altogether ripe for summary disposition of grant, vacate, and remand.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. Proceedings Before Article I Court-Martial

At Fort Carson, Colorado, a military judge sitting as an Article I military tribunal (general court-martial) convicted Herrmann, contrary to his pleas, of willful dereliction in the performance of his duties and reckless endangerment, in violation of Articles 92 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892 and 934 (2012).

Consistent with his pleas, the Article I judge acquitted Herrmann of solicitation to commit an offense, false official statement (two specifications), and obstruction of justice.

Herrmann, a non-commissioned officer and parachute rigger while on active duty in the Army, had supervisory oversight of junior soldiers whose duty was to physically inspect reserve parachutes (those held in the front of a paratrooper in the event the main chute, carried on a paratrooper's back, fails to properly deploy). Upon random inspection, it was discovered that three soldiers junior to Herrmann failed to physically inspect several reserve parachutes and instead marked them as airworthy. This practice is called "pencil-packing" because no actual physical inspection occurs, but personnel nevertheless certify that they had been physically inspected and ready for use. Although Herrmann did not "pencil-pack" any reserve parachutes, he was prosecuted, convicted, and sentenced based on his status as a supervisor.

Having been convicted of reckless endangerment and dereliction of duty, the commanding general who convened the Article I military tribunal approved the adjudged sentence of reduction to the most junior enlisted grade (E-1), forfeiture of all pay and allowances, confinement for 10 months, and a bad-conduct discharge from the Army.

Herrmann served his sentence to confinement and was released while his Article I direct military appeals were processing. Now a civilian, he continues to encounter adversity from his reduction in rank, forfeiture of all pay and allowances, and punitive discharge from the Army.

II. Proceedings before the Article I United States Army Court of Criminal Appeals

After trial and upon Article 66, UCMJ, 10 U.S.C. § 866 review before an Article I appellate tribunal (Army Court), Herrmann argued that the prosecution failed to prove that it was *likely* that the reserve parachutes would have been necessary during a jump and, if deployed, would have failed, and that failure would have led to death or grievous bodily harm.

Herrmann cited the government's failure to introduce any evidence regarding failure rates of main parachutes, the success rate of deploying a reserve chute when needed, or the rate at which instances involving the deployment of fully operational reserve parachutes result in death or grievous bodily harm, all of which degraded the prosecution's evidence that

the "pencil-packing" was "likely" to produce death or grievous bodily harm.

The Article I Army Court determined that the prosecution did not have to offer evidence concerning likelihood, an element of the offense, as Herrmann proffered. The court instead focused on what *likely* does not mean, and, by contrast, what *likely* does mean, to reach the following interpretation of "likely:"

A means, force, or conduct is likely to produce death or grievous bodily harm when that is the natural and probable result or consequence of that particular means, force, or conduct. This "likelihood" determination is made utilizing a common-sense approach and factoring in and balancing all relevant facts and circumstances.

The Army Court affirmed the court-martial findings and sentence in a published opinion, *United States v. Herrmann*, 75 M.J. 672, 678 (A. Ct. Crim. App. 2016).

III. Proceedings before the Article I United States Court of Appeals for the Armed Forces (CAAF)

Pursuant to Article 67, UCMJ, 10 U.S.C. § 867, the CAAF granted review of whether the evidence was legally sufficient to find Herrmann committed reckless endangerment, which requires proof the conduct was "likely" to produce death or grievous bodily harm.

In *Herrmann*, 76 M.J. at 308, the CAAF refused to apply its published decision in *United States v.*

Gutierrez, 74 M.J. 61, 66-68 (CAAF 2015), that a 1:500 chance of occurrence was legally insufficient to sustain a conviction. In *Gutierrez*, the Court held that a 1:500 chance, or 0.20% chance, of contracting HIV does not meet the statutory definition of likely to produce death or grievous bodily harm.74 M.J. at 67. The court reasoned that "in law, as in plain English, an event is not 'likely' to occur when there is a 1-in-500 chance of occurrence." *Id.* A risk of "almost zero does not clear any reasonable threshold of probability," nor does a risk of transmission that was only "remotely possible." *Id.* at 68.

Application of the *Gutierrez* 1:500 standard, or 0.20% as being "not likely" would have all but ensured reversal of Herrmann's reckless endangerment conviction and sentence, especially where the leading Army Field Manual on the subject of parachute failures uses substantial data derived over time and expert opinions to conclude as Army doctrine that a main parachute will deploy correctly 99.98% of the time. Thus, a reserve parachute will only have to be accessed .02% of the time. The legal significance is that the *Gutierrez* 1:500 finding converted to a percentage is 0.2%, or ten times greater likelihood of death or grievous bodily harm than the .02% derived from the Army's own data and doctrine for reserve parachutes. Put differently, the likelihood of death or grievous bodily harm in *Herrmann* was at least ten times less than that found legally insufficient in *Gutierrez*.

But, the CAAF declined to apply its precedent in *Gutierrez*, which would have all but ended the case in Herrmann's favor.

IV. Proceedings Before This Court

Because the CAAF granted review of Herrmann's case and denied any relief, he sought certiorari before this Court. In his petition, he characterized the issue as the problematic case where the CAAF changed the definition of the law and the standard by which criminality is measured, mid-stream and thereby implicated *ex post facto* and due process considerations, which led to the type of arbitrary Article I decision making this Court's vagueness doctrine seeks to prevent. The CAAF's decision could be rightly seen as the inevitable by-product of a vague criminal statute where the invitation to be applied *ad hoc* or *post hoc* was accepted.

But, on November 27, 2017, this Court denied Herrmann's timely Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces. *Herrmann v. United States*, 138 S. Ct. 487 (2017).

V. Title 28 U.S.C. § 2241 Petition For Habeas Corpus

On November 26, 2018, Herrmann, having completed his sentence to confinement and subsequently exhausted the Article I statutorily required direct review of his court-martial convictions and sentence, brought an Article III challenge pursuant to 28 U.S.C. §§ 2241 and 2243 (court may fashion orders to grant

relief as law and justice require) in his home state before the United States District Court for the District of Arizona.

Rather than direct the United States to file its Answer and Return, customary judicial responses to Section 2241 military habeas petitions, the district court *sua sponte* and erroneously dismissed the petition without adjudication noting that Herrmann was no longer in actual physical custody. He had served his confinement (characterized as "good behavior") while his case was processing through the Article I statutorily required appeal process. In the same action, the district court errantly directed the clerk not to issue a certificate of appealability.

On April 11, 2019, the district court dismissed the case without adjudication. *Herrmann v. Esper*, 2019 U.S. Dist. LEXIS 63450 (D. Ariz., Apr. 11, 2019), and on June 4, 2019, denied Herrmann's request for reconsideration.

VI. United States Court of Appeals for the Ninth Circuit

On January 22, 2020, the lower court summarily affirmed the district court's dismissal. *Herrmann v. McCarthy*, 2020 U.S. App. LEXIS 2008.

REASONS FOR GRANTING THE PETITION

I. This Court should summarily Dispose of this Matter by Granting the Petition, Vacating the Judgments Below, and Remanding to the District Court because "In Custody" does not Mean actual physical Custody for Purposes of Section 2241 Federal Habeas Corpus Subject Matter Jurisdiction for military Members.

A United States District Court has jurisdiction pursuant to 28 U.S.C. § 2241 to grant a writ of habeas corpus "to a prisoner . . . in custody in violation of the Constitution . . . of the United States," and to grant relief beyond mere release from custody by fashioning orders as "law and justice require." 28 U.S.C. § 2443.

Although Herrmann had completed his sentence to confinement by the time his Article I military appeals ended and he exhausted his military remedies, at the time of his petition he was nevertheless "in custody" as the courts have uniformly interpreted that statutory phrase. Herrmann's liberty and freedom remained negatively affected as collateral consequences given his reduction in rank, forfeiture of pay and promotion, and bad conduct (punitive) discharge from the Army, all of which last into civilian life.

It is well established by this Court that habeas petitions like Herrmann's are properly entertained in Article III courts, even if the petitioner is no longer in actual physical custody. For example, in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), this Court held

that Congress did not intend to confine collateral attacks on court-martial proceedings to one statute only, namely, 28 U.S.C. § 2241. The *Schlesinger* Court pointed to Federal Question jurisdiction (28 U.S.C. § 1331) as a basis for Article III subject matter jurisdiction when a military petitioner pressing a Section 2241 habeas claim was not in actual physical custody.

The *Schlesinger* Court reasoned that restraint on liberty, although perhaps the most immediately onerous, is not the only serious consequence of a court-martial conviction. After release from confinement, "[s]uch convictions may result, for example, in deprivation of pay and earned promotion, and even in discharge or dismissal from the service under conditions that can cause lasting, serious harm in civilian life. *Schlesinger*, 420 U.S. 752. Accordingly, this Court has confirmed Article III jurisdiction in the absence of actual physical custody under 28 U.S.C. § 1331 based on the serious consequences of a court-martial conviction that can cause lasting harm in civilian life.

Applied here, Herrmann has been deprived of rank, pay, promotion, a military career, and punitively discharged which has caused lasting and serious harm to his civilian life. As such, jurisdiction is appropriate under *Schlesinger*.

This Court has found that the term "in custody" encompasses more than physical in a wide variety of circumstances. For instance, the term "custody" for purposes of seeking a writ of habeas corpus now

includes a petitioner who is on parole. *Jones v. Cunningham*, 371 U.S. 236 (1963) (the use of habeas corpus is not restricted to situations in which the applicant is in actual, physical custody). The term also includes a person who is at large on his own recognizance but subject to several conditions pending execution of his sentence. *Hensley v. Municipal Court*, 411 U.S. 345 (1973). And it also includes someone who has been released on bail after conviction pending final disposition of his case. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975).

The U.S. Circuit Courts of Appeals have concluded that habeas jurisdiction exists in circumstances similar to those presented here. For instance, *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), is instructive. In *Kauffman*, the District of Columbia Circuit held that "confinement is not a jurisdictional requirement for collateral review of military judgments in civilian courts." 415 F.2d at 994. That is, confinement or custody is not a jurisdictional requirement for collateral review of military judgments in civilian courts, where the military petitioner was released from confinement before his direct military appeal process was completed. The court reasoned that "[a] serviceman need not be in prison, for the continuing disabilities attending a dishonorable discharge provided a case or controversy, and 'the right to due process would be lost if one deprived of it could not obtain redress because not in confinement.'" *Kauffman*, 415 F.2d at 995 (internal citation omitted).

Turning to the ineradicable stigma of a punitive discharge from the military forming a basis for jurisdiction after a military petitioner is released from custody, the *Kauffman* court noted, "the deprivation of liberty under an invalid conviction is a grievous injury, but a military discharge under other than honorable conditions imposes a lifelong disability of greater consequence for persons unlawfully convicted by courts martial." *Id.* Further, the court observed that "[i]n terms of its effects on reputation, the stigma experienced by the recipient of a discharge under other than honorable conditions is very akin to the concept of infamy." *Id.* (internal citation omitted).

The *Kauffman* court also recognized the situation where a military court does not sentence an accused to confinement, but instead, discharges them from the military with a punitive discharge. Without confinement, a traditional predicate for military habeas review, a military petitioner would not be able to seek redress from Article III jurists and experts. *Id.* at 996.

> To hold that collateral review is contingent on confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violations of the serviceman's rights.

Id.

The Court in *Kauffman* further explained the result of requiring confinement as a condition of a military member's access to collateral remedies would be arbitrary where, through no fault of their own, the opportunity to secure Article III review expired because he was released while continuing to exhaust his Article I military remedies. *Id.*

The circumstances described in *Kauffman* are present here. Herrmann was released from incarceration while his Article I appeals were underway but not yet exhausted. After release, and after exhaustion of the military appellate process, Herrmann filed his Section 2241 petition and continues to experience the disabilities of his bad conduct discharge from confinement and return to civilian life such that an actual case or controversy exists for purposes of Article III of the Constitution. The merits of his Section 2241 petition challenge the constitutionality of his conviction and sentence.

The D.C. Circuit found jurisdiction where the petitioner was never sentenced to confinement as part of his court-martial sentence. In *United States Ex. Rel. New v. Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006), the court applied § 2241 to the undisputed fact that petitioner's court-martial sentence did not include a term to confinement, rather, only a punitive discharge from the Army. Basing his claim on Section 2241, even though he was not, nor ever was incarcerated, the court relied on *Schlesinger, supra*, and held that subject matter jurisdiction was proper. The Court in *New* reasoned:

> Section 2241(c) precludes granting the writ unless the petitioner is in custody. Upon conviction by court-martial [military petitioner] received a bad-conduct discharge; as he is not in custody, § 2241 can't supply subject matter jurisdiction. This is not fatal, however, because the Supreme Court has held that Congress didn't intend to confine collateral attacks on court-martial proceedings to § 2241 [citing *Schlesinger, supra*]. Thus the district court had subject matter jurisdiction to hear New's collateral attack under § 1331 (which New's second amended complaint invoked).

New, 448 F.3d at 406.

Herrmann not only invoked Sections 2241 and 2243, but also, like the petitioner in *New* who was not in actual physical custody but afflicted by a bad conduct discharge in civilian life, Section 1331 for jurisdiction.

In addition to *Kauffman* and *New*, which arose from the District of Columbia Circuit, courts in other Federal Circuits that have addressed the issue have found that habeas petitions like Herrmann's are properly entertained, even though the petitioner is not in actual physical custody. *See United States v. Re*, 372 F.2d 641 (2d Cir. 1967) (probation sufficient custody); *United States ex rel. Meadows v. New York*, 426 F.2d 1176 (2d Cir. 1970) (subject to parole detainer warrant sufficient custody); *Walker v. North*

Carolina, 262 F. Supp. 102 (W.D. N.C. 1966), *aff'd per curiam*, 372 F.2d 129 (4th Cir. 1967) (recipient of a conditionally suspended sentence sufficient custody); *Marden v. Purdy*, 409 F.2d 784 (5th Cir. 1969) (free on bail sufficient custody); *Burris v. Ryan*, 397 F.2d 553 (7th Cir. 1968); *Capler v. City of Greenville*, 422 F.2d 299 (5th Cir. 1970) (released on appeal bond sufficient custody).

Indeed, following this Court's guidance, the various Federal Circuit Courts of Appeals have also not required actual physical confinement as long as a habeas petitioner labors under some consequence of her conviction. *Fernos-Lopez v. Figarella-Lopez*, 929 F.2d 20, 21 – 23 (1st Cir.), *cert. denied*, 502 U.S. 886 (1991) (contempt for failure to pay alimony sufficient custody for habeas); *Nowakowski v. New York*, 835 F.3d 210, 217 – 217 (2d Cir. 2016) (potential for future adverse consequences from conviction sufficient "custody"); *United States v. Doe*, 810 F.3d 132, 142 (3d Cir. 2015) (supervised release from prison sufficient custody); *Nakell v. Attorney General*, 15 F.3d 319, 322 – 23 (4th Cir. 1994) (release from jail petitioner sought return of $500 fine sufficient custody); *Landry v. Hoepfner*, 840 F.2d 1201, 1204 n.8 (5th Cir. 1988) (*en banc*), *cert. denied* 489 U.S. 1083 (1989) (release pending appeal sufficient custody); *McClain v. United States Bur. of Prisons*, 9 F.3d 504, 504 (6th Cir. 1993) (supervised release sufficient custody); *Bryan v. Duckworth*, 88 F.3d 431, 432 – 33 (7th Cir. 1996) (custody satisfied for released petitioner unless there is no possibility that the conviction will have collateral consequences); *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995)

("Collateral consequences are presumed to stem from a criminal conviction even after release."); *Oyler v. Allenbrand*, 23 F.3d 292, 294 (10th Cir.), *cert. denied*, 513 U.S. 909 (1994) (custody satisfied even though petitioner completed probation because conviction could be used in later case for impeachment or to enhance sentence); and *Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995) (supervised release sufficient custody).

The principle underlying the conclusion that actual custody is not necessary for purposes of obtaining habeas relief is that petitioners who have completed sentences for criminal convictions retain "a substantial stake in [overturning] the judgment of conviction which survives the satisfaction of the sentence." *Carafas*, 391 at 237 (citing *Fiswick v. United States*, 329 U.S. 211, 222 (1946) (disabilities of a criminal conviction kept the case from being moot and that collateral relief should not be denied because of exhaustion requirements and delays in court processes). *See also Cunningham*, 371 U.S. at 236 (petitioner released on parole sufficient custody); *Garlotte v. Fordice*, 515 U.S. 39 (1995) (same); *Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004) ("we no longer require physical detention as a prerequisite to habeas relief": "our understanding of custody has broadened to include restraints short of physical confinement"); *Spencer,* 523 U.S. at 7 – 12 (liberal construction "in custody" requirement finding "custody" whenever petitioner suffers [some] present restraint from a conviction").

The district judge failed to consider or apply these authorities. Instead, in wrongly concluding that the requirement to be "in custody" was not met by Herrmann, the district court relied on five inapposite cases: *Maleng v. Cook*, 490 U.S. 488 (1989); *United States v. Augenblick*, 393 U.S. 348 (1969); *Chaidez v. United States*, 568 U.S. 342 (2013); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973); and *Strait v. Laird*, 406 U.S. 341 (1972).

Maleng involved a civilian petitioner convicted under Washington state law in 1958, whose sentence expired by its own terms in 1978. Maleng was in actual physical custody in 1985 for separate offenses when he filed his habeas petition. *Maleng*, 490 U.S. at 489. The court's inquiry in *Maleng* did not involve a military petitioner convicted under Federal law whose sentence continues to present negative consequences in civilian life, *e.g.* his punitive discharge.

Augenblick was based on military claims before the U.S. Court of Federal Claims seeking back pay based on 28 U.S.C. § 1491. *Augenblick*, 393 U.S. at 350 n.2. (noting that habeas corpus is available to military members in spite of 10 U.S.C. § 876's guidance that military trials and appeals are final). *Id.* at 350 – 51.

Chaidez concerned a civilian alien convicted of mail fraud who challenged deportation proceedings by *writ of coram nobis*. *Chaidez,* 568 U.S. at 354 – 56. The discussion in *Chaidez* was unrelated to a military Federal habeas challenge under Section 2241, where

the sentence continues to affect the petitioner in civilian life. *Id.*

Braden centered on an Alabama state prisoner who challenged a Kentucky interstate detainer placed with Alabama officials. The case turned on the Federal venue statute, and the Court noted that jurisdiction for Section 2241 is proper where the custodian of the petitioner is located. *Braden*, 410 U.S 494 – 95. The Court in *Braden* discussed liberal and expansive interpretations of habeas to achieve the purposes of the statute. *Id.*

Strait addressed Federal habeas jurisdiction in the context of a military reserve officer and conscientious objector who resided in California, but whose commanding officer was located in Indiana. *Strait,* 406 U.S. 342. The Court concluded that the concepts of custody and custodian are sufficiently broad to properly exercise habeas jurisdiction in California based on the concept of decentralized command structure. The case is not relevant to the inquiry present here, *i.e.*, whether the petitioner continued to labor under collateral consequences resulting from his conviction.

Consequently, none of the cases the district court cited is instructive or controlling. By contrast, cases like *Schlesinger, Kauffman, New,* and those spanning the Federal Circuit Courts of Appeals discussed *supra*, confirm that even where a military petitioner is not in actual physical custody, or has completed a sentence to confinement without restrictions, he may still pursue habeas relief in the appropriate Federal district court so long as Federal question jurisdiction

exists pursuant to 28 U.S.C. § 1331, and his conviction presents significant collateral consequences into civilian life. Here, the district court possessed subject matter jurisdiction to entertain Herrmann's Article III challenges to Article I constitutional determinations pursuant to 28 U.S.C. §§ 1331, 2241, and 2243 as interpreted by the Federal judiciary. In rejecting Herrmann's petition without adjudication, the district court impermissibly shuttered the Federal courthouse doors and left this American citizen and soldier out in the cold without his day in civil court.

For these reasons, this case is suitable for summary disposition by granting Herrmann's petition, vacating the lower courts' judgments, and remanding the case to the district court with an instruction directing Herrmann to re-file his Section 2241 petition and the United States to file its Answer and Return.

II. Congress and every U.S. Circuit Court of Appeals has Held that a Certificate of Appealability is not Required for a Federal Petitioner to Appeal a Section 2241 Habeas Claim.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104 – 132, 110 Stat. 1214 (April 24, 2016), which requires a habeas petitioner proceeding pursuant to 28 U.S.C. §§ 2254 or 2255 to secure leave to appeal in the form of a "certificate of appealability" (COA). 28 U.S.C. §§ 2253(c)(1)(A), (B). *See also Gonzalez v. Thaler*, 565 U.S. 134, 142 & n.3 (2012) (section 2253(c)(1)'s COA requirement is jurisdictional, just as was pre-AEDPA requirement of a certificate of probable cause to

appeal; "until a COA has been issued Federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners."); Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts; Rule 11 of the Rules Governing Section 2255 Proceedings in the United States District Courts; Federal Rule of Appellate Procedure 22(b).

However, it is well-settled that the COA requirement does not apply to appeals from denials of Section 2241 petitions brought by Federal petitioners. Indeed, there is no disagreement among the Federal Circuit Courts of Appeal -- rather, they are unanimous on this point of law – that no COA is needed for a Federal petitioner proceeding pursuant to Section 2241. *See, e.g., Gonzalez v. Justices of the Mun. Court*, 382 F.3d 1, 12 (1st Cir. 2004) ("where, as here, a habeas petition is governed by Section 2241, a certificate of appealability is not essential"); *Hoffler v. Bezio*, 726 F.3d 144, 152 (2d Cir. 2013) ("We have also held that a federal prisoner seeking habeas relief under 28 U.S.C. § 2241 is not required to obtain a certificate of appealability to take an appeal, inasmuch as he is neither challenging detention arising out of process issued by a state court, nor proceeding under § 2255."); *United States v. Cepero*, 224 F.3d 256, 264-65 (3d Cir. 2000) ("Federal prisoner appeals from § 2241 proceedings, however, are not governed by 2253's certificate of appealability requirement."); *Wilborn v. Mansukhani*, 795 F. App'x 157, 162 n.6 (4th Cir. 2019) ("The district court's order indicates it did not issue a certificate of appealability. But as a federal prisoner proceeding under § 2241, Wilborn did

not have to obtain such a certificate before being able to appeal from the court's order.); *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir.) (*per curiam*), *cert. denied*, 534 U.S. 1001 (2001) ("Because he is proceeding under § 2241, Jeffers need not obtain a COA."); *Melton v. Hemingway*, 40 F. App'x 44, 45 (6th Cir. 2002) ("a federal prisoner seeking relief under § 2241 is not required to get a certificate of appealability as a condition to obtaining review of the denial of his petition."); *Sanchez-Rengifo v. Caraway*, 798 F.3d 532, 535 n.3 (7th Cir. 2015) ("Unlike federal prisoners proceeding under 28 U.S.C. § 2255, federal prisoners proceeding under § 2241 need not obtain a certificate of appealability, *see* 28 U.S.C. § 2253(c)(1)."); *Langella v. Anderson*, 612 F.3d 938 (8th Cir. 2010):

> Both Langella and the district court were under the impression that Langella was required to obtain a certificate of appealability in order to appeal the court's dismissal of his petition. We note, however, that Langella is a federal prisoner effectively filing his petition under § 2241, and that the Antiterrorism and Effective Death Penalty Act's certificate of appealability requirement therefore does not apply to him.

Langella, 612 F.3d at 939, n.2. *See also Forde v. United States Parole Comm'n*, 114 F.3d 878, 879 (9th Cir. 1997) (same); *McIntosh v. United States Parole Comm'n*, 115 F.3d 809 n.1 (10th Cir. 1997) (stating that Federal prisoners do not need to seek a COA

before appealing a final order in a proceeding under 28 U.S.C. § 2241); *Sawyer v. Holder*, 326 F.3d 1363, 1364 n.3 (11th Cir. 2003) ("By negative implication, a federal prisoner who proceeds under § 2241 does not need a COA to proceed."); *Sugarman v. Pitzer*, 170 F.3d 1145 (D.C. Cir. 1999) (*per curiam*):

> The circuits that have addressed the issue have held that § 2253's COA requirement does not apply to § 2241 claims brought by Federal prisoners . . . . In light of the plain language of the AEDPA, which omits Federal § 2241 petitions from the list of those requiring COAs, we now join the conclusion that Federal § 2241 petitions are excluded from the COA requirement.

Sugarman, 170 F.3d at 146.

Despite all this, the district judge erred by instructing the district court clerk not to issue a COA to Herrmann. The COA requirement simply did not and does not apply to Herrmann, a Federal Section 2241 petitioner challenging Article I military tribunals' constitutional rulings before Article III courts. The Ninth Circuit compounded the error by its summary affirmance of the plain, obvious, and unfairly prejudicial error boarding up the Federal courthouse against the congressional intent that Herrmann and those in his situation have access to the expertise of Federal jurists as part of separation of powers and checks and balances.

In its April 11, 2019 dismissal order, the Court cited *Porter v. Adams*, 224 F.3d 1006 (9th Cir. 2001), as support for directing the district clerk to deny issuance of a COA to Herrmann. However, the Ninth Circuit held in *Porter* that 28 U.S.C. § 2253(c)(1) does not require a certificate of appealability in an appeal from an order denying a 28 U.S.C. § 2241 petition where: (1) the detention complained of does not arise out of a process issued by a state court; or (2) it is not a 28 U.S.C. § 2255 proceeding. *Porter* does not support the district court's opinion that a COA is required for a military Section 2241 habeas petitioner to appeal.

Also in its April 11, 2019 order, the Court cited *Slack v. McDaniel*, 529 U.S. 473 (2000), in support of its instruction to the district clerk not to issue a certificate of appealability to Herrmann. In *Slack*, this Court noted that in setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal. *Slack*, 529 U.S. at 483. Slack did not involve a Section 2241 Federal petition. Even if a COA were required for Herrmann to appeal to the Ninth Circuit his § 2241 constitutional claims dismissed on procedural grounds, "jurists of reason would find it debatable" whether the district and appellate courts were correct in its application of the "custody" requirement for a military petitioner pressing a Section 2241 claim. *See Carey v. Saffold*, 536 U.S. 214 (2002) (construing statutory habeas terms expansively).

For these reasons, Herrmann respectfully suggests that this case is fitting for summary disposition by granting the Writ, vacating the judgments of the lower courts, and remanding the matter to the district judge with an instruction for Herrmann to re-file his Section 2241 petition and subsequently, the United States shall prepare and file its Answer and Return.

CONCLUSION

For the foregoing reasons, the Court should summarily grant the petition for a writ of certiorari, vacate the judgments of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Arizona, authorize Herrmann to re-file, and issue an instruction to the district judge to direct the United States to prepare and file its Answer and Return.

Respectfully submitted,

JOHN N. MAHER*
KEVIN J. MIKOLASHEK
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
john@maherlegalservices.com
Tel: (708) 468-8155

Counsel for Petitioner

June 22, 2020 *Counsel of Record