No. 08-267

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB DENEDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

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The divided Court of Appeals for the Armed Forces (CAAF) held that Article I military appellate courts possess perpetual jurisdiction under the All Writs Act, 28 U.S.C. 1651, to review court-martial judgments that have long since become final. That decision warrants review and reversal because it cannot be reconciled with *Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999), which makes clear that the All Writs Act does not give the CAAF "continuing jurisdiction * * * over all actions administering sentences that the CAAF at one time had the power to review"; it disregards key provisions of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, which expressly provide only for *direct* review of court-martial convictions; and it expands the jurisdiction of the military courts beyond the limits set by Congress. The result will be to place on the military justice system administrative burdens that it was not designed to bear

and to degrade its ability to function as an arbiter of discipline for the armed forces.

In response, respondent argues that this Court lacks jurisdiction to review the CAAF's decision under 28 U.S.C. 1259(4) because that court did not grant "relief." That is incorrect. The CAAF of course granted relief when it reversed the order of the Navy-Marine Corps Court of Criminal Appeals (N-MCCA)—which had denied respondent's petition—and remanded for further proceedings. Respondent's efforts to distinguish *Goldsmith* and defend the CAAF's decision on the merits are similarly unpersuasive. Certiorari is therefore appropriate to review the CAAF's decision on the fundamental jurisdictional question presented.

A. This Court Has Jurisdiction

This Court has jurisdiction to consider the petition under 28 U.S.C. 1259(4), which allows for review of "[c]ases, other than those described in" the preceding paragraphs of 28 U.S.C. 1259, "in which the Court of Appeals for the Armed Forces granted relief." Respondent maintains (Br. in Opp. 4-6) that the CAAF did not grant relief because—while it reversed the N-MCCA decision denying his petition—it simply remanded his case to the N-MCCA and did not itself set aside his conviction. That argument is contrary to the ordinary meaning of the term "relief," and it is inconsistent with the structure and purpose of Section 1259.

1. According to respondent (Br. in Opp. 6), he did not obtain "relief" from the CAAF because he sought "an order setting aside his plea" and instead received a remand to the N-MCCA. But Section 1259(4) requires only "relief," not "complete relief," and simply because respondent did not receive all the relief he sought, it

does not follow that he did not receive any relief at all. Indeed, in his petition to the CAAF, respondent sought an order "setting aside his guilty plea and grant[ing] such *other and further relief* as in the circumstances justice may require." C.A. Pet. 21 (emphasis added). Thus, respondent himself recognized the common-sense notion that the term "relief" can embrace a variety of remedies. See *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) (recognizing that "effectual relief" can consist of a "partial remedy" in a party's favor).

Respondent's contrary argument ignores the CAAF's role as an appellate tribunal. A remand for further proceedings is a traditional and important form of relief for a party that lost in a lower court. Cf. *Lonchar* v. *Thomas*, 517 U.S. 314, 332 (1996) (discussing "the traditional habeas relief of a new trial"). In this case, a remand was the *only* relief the CAAF could have granted. Since the CAAF does not have fact-finding authority, it has no way to resolve a factual dispute arising in the context of a claim of ineffective assistance of counsel such as that raised by petitioner. See UCMJ Art. 67(c) (10 U.S.C. 867(c)) ("The Court of Appeals for the Armed Forces shall take action only with respect to matters of law."). Thus, a remand for a factual hearing—like the one ordered here, Pet. App. 32a—is the only remedy that the court can provide in such a case, and the CAAF itself properly views such a remedy as constituting "appellate relief." *United States* v. *Ginn*, 47 M.J. 236, 238 (C.A.A.F. 1997) (noting that "appellant has not averred or shown sufficient prejudice to now warrant a factfinding hearing or any other appellate relief").

2. The structure of 28 U.S.C. 1259 demonstrates that paragraph (4) (28 U.S.C. 1259(4)) permits certiorari review in cases where the CAAF remands a case to one of

the courts of criminal appeals. Each of the three preceding paragraphs in Section 1259 corresponds to one of the three provisions of Article 67(a) of the UCMJ that extends appellate jurisdiction to the CAAF. Thus, Section 1259(1) provides certiorari jurisdiction in capital cases, in which review by the CAAF is mandatory under Article 67(a)(1); Section 1259(2) provides certiorari jurisdiction in cases reviewed by the CAAF under Article 67(a)(2) at the direction of the Judge Advocate General of one of the armed forces; and Section 1259(3) provides certiorari jurisdiction in cases reviewed by the CAAF under Article 67(a)(3) upon the petition of the accused. Those three classes of cases exhaust the CAAF's appellate jurisdiction under Article 67, and therefore the only possible role for Section 1259(4) is to provide an avenue for certiorari review of decisions in which the CAAF has exercised its jurisdiction under the All Writs Act.

Significantly, in each of the preceding three categories of cases that are subject to certiorari jurisdiction, the remedy afforded the prevailing party may include a remand for further proceedings. See, *e.g.*, *United States* v. *Murphy*, 50 M.J. 4 (C.A.A.F. 1998) (remand in Article 67(a)(1) case); *United States* v. *Quintanilla*, 63 M.J. 29 (C.A.A.F. 2006) (remand in Article 67(a)(2) case); *United States* v. *Gilley*, 56 M.J. 113 (C.A.A.F. 2001) (remand in Article 67(a)(3) case). Yet nothing in Section 1259 suggests that a remand or other partial relief in the disposition of such cases forecloses certiorari review. There is no reason to suppose that Congress contemplated the more restrictive rule suggested by respondent with respect to decisions that are covered by Section 1259(4).[1]

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[1] Respondent's construction of the term "relief" is also at odds with the purpose of Section 1259. When that provision was enacted in 1983,

B. The CAAF's Decision Conflicts With *Goldsmith* And Contravenes Key Provisions Of the UCMJ

1. As explained in the petition (at 10-16), the judgment of the CAAF cannot be reconciled with this Court's decision in *Goldsmith*. Respondent maintains (Br. in Opp. 7) that in *Goldsmith*, the Court reversed the decision of the CAAF granting extraordinary relief under the All Writs Act simply because that court had exceeded its authority by reviewing an "administrative action" of military authorities that had no relationship to the judgment of a court-martial. That is incorrect. In *Goldsmith*, the Court rejected the broader proposition underlying the decision below in that case—*i.e.*, that the All Writs Act allows the CAAF to "oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." 526 U.S. at 536. And in language that is equally applicable to this case, it observed that "there is no source of continuing jurisdiction for the CAAF over

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the House committee report explained that, under prior law, "there [was] no authority for either party to seek Supreme Court review of decisions of the Court of Military Appeals," the predecessor to the CAAF. H.R. Rep. No. 549, 98th Cong., 1st Sess. 16. The Committee found that situation unacceptable because the Court of Military Appeals had "demonstrated a willingness to strike down provisions of the Manual for Courts-Martial and departmental regulations, and to interpret provisions of the Uniform Code of Military Justice in a manner that adds or detracts from procedural requirements or regulations," yet "the government [had] no judicial recourse from adverse decisions." *Ibid.* Respondent's construction of Section 1259(4) would continue to deny the government "judicial recourse from adverse decisions"—and would provide a means for the CAAF to insulate its own decisions from further review—in almost any case where the CAAF's adverse decision includes a remand for fact-finding, even where, as here, the decision involves an important question of law that warrants this Court's review.

all actions administering sentences that the CAAF at one time had the power to review." *Ibid.* The CAAF's exercise of jurisdiction in this case was not authorized by Article 67—the provision of the UCMJ that defines the CAAF's authority—and it is directly at odds with *Goldsmith*.

2. a. The CAAF's exercise of jurisdiction in this case was not only unauthorized by any statute; it was affirmatively prohibited by the finality rule of Article 76. Respondent repeats the CAAF's error when he observes (Br. in Opp. 8) that in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975) this Court construed Article 76 as a prudential rather than a jurisdictional restraint. As explained in the petition (at 14), *Councilman* so held only with respect to the subject-matter jurisdiction of *Article III* courts, and it emphasized that Article 76 "describ[ed] the terminal point for proceedings *within the court-martial system*," of which the CAAF is a part. 420 U.S. at 750 (emphasis added) (quoting *Gusik* v. *Schilder*, 340 U.S. 128, 132 (1950)).

Indeed, it has long been understood that, upon review and final approval of the judgment of a court-martial, a defendant has no further recourse within the military justice system, save a pardon by the President. See William Winthrop, *Military Law and Precedents* 54 (2d ed. 1920) ("[T]he judgment of a court-martial * * * is, within its scope, absolutely final and conclusive. Its sentence, if per se legal, cannot, after it has received the necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can * * * be rendered in whole or in part inoperative.") (footnote omitted). And the legislative history of Article 76 makes clear that Congress intended to continue that practice when it enacted the UCMJ, leaving

the federal courts as the sole recourse for post-finality relief from a court-martial conviction. See S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949) ("Subject only to a petition for a writ of habeas corpus in Federal court, [Article 76] provides for the finality of court-martial proceedings and judgments."). Nothing in *Councilman* casts doubt on the continuing vitality of that principle.

Respondent contends (Br. in Opp. 8) that if the Court of Federal Claims, an Article I court, can review a conviction notwithstanding Article 76, then "it is difficult to see why" the N-MCCA and the CAAF cannot do so as well. But unlike the CAAF, the Court of Federal Claims is not part of the military justice system, and therefore the finality provision of Article 76—as its terms make clear—is not a jurisdictional bar to that court's ability to review court-martial proceedings. Furthermore, the actions that have been allowed in the Court of Federal Claims are for backpay, and not the writ of error coram nobis proceeding at issue here. See Pet. 18.

b. Respondent observes (Br. in Opp. 8-9) that in *Goldsmith* the CAAF acted after the case was final, but that this Court did not challenge the propriety of its action on that basis. But that is beside the point because it was fully sufficient to the disposition of that case to hold that, given that nothing in the UCMJ afforded the CAAF continuing jurisdiction over cases that it once had the power to review, issuance of an extraordinary writ could not have been in aid of its existing jurisdiction. See *Goldsmith*, 526 U.S. at 534-535.

Nor is respondent correct when he suggests (Br. in Opp. 9) that the CAAF's action in this case is somehow analogous to "action * * * to compel adherence to the judgment," which *Goldsmith* indicated would be permissible. As the CAAF recognized, the purpose of the writ

of error coram nobis is to *alter or overturn* a judgment. Pet. App. 21a. There is a clear distinction, recognized in *Goldsmith*, between enforcing a judgment, which is permissible, and overturning a judgment or otherwise "act[ing] as a plenary administrator * * * of criminal judgments," which is not. 526 U.S. at 536.

c. The CAAF lacked jurisdiction for the additional reason that respondent has been lawfully discharged from military service and has no current relationship with the military. Respondent maintains (Br. in Opp. 12-13) that that argument "conflates personal and appellate subject-matter jurisdiction" and that, if it is correct, it would mean that the Article III courts and the Court of Federal Claims would lack jurisdiction to adjudicate claims arising from courts-martial convictions because they lacked personal jurisdiction over the accused at the time of his court-martial. But because the CAAF is part of the court-martial system, its appellate jurisdiction cannot extend to persons who are not subject to the UCMJ. In contrast, neither the Article III courts nor the Court of Federal Claims are so confined; instead, they possess jurisdiction to entertain the claims of anyone, including former members of the armed forces, as long as such claims fall within their statutory authority.

3. Even if there were some statutory jurisdictional basis for collaterally reviewing final court-martial judgments, the issuance of a writ of error coram nobis was improper under *Goldmith* because it was neither "necessary" nor "appropriate." 526 U.S. at 537.

a. Relief under the All Writs Act is not "necessary" to review a final court-martial conviction because alternative remedies exist in Article III courts and in the Court of Federal Claims. Respondent maintains (Br. in Opp. 10) that the statutes of limitations that govern

claims in those courts would preclude him from seeking such relief. But even assuming respondent could not have pursued relief earlier, particular factual circumstances in any given case are not a basis for the CAAF to expand its jurisdiction to classes of cases that have become final and that, as a general rule, are subject to adequate alternative remedies. In addition, in cases where the petitioner remains in custody, the remedy of habeas corpus will be available.

b. The issuance of a writ of error coram nobis was also not "appropriate" because that writ permits a court to correct its own errors, not those of an inferior court. Here, the judgment that respondent sought to attack was not issued by the CAAF or the N-MCCA; it was issued by a court-martial. Thus, neither the CAAF nor the N-MCCA could properly review that judgment by means of a writ of error coram nobis. Respondent asserts (Br. in Opp. 10-11) that "[t]he worst that can be said is that his petition should therefore have been labeled a petition for a writ of error coram *vobis*." But such a writ would have been equally inappropriate here. A writ of error coram vobis is "directed by a reviewing court to the court which tried the cause." *Nicks* v. *United States*, 955 F.2d 161, 166 (2d Cir. 1992). In this case, there is no tribunal to which a writ could be directed, since courts-martial are not standing bodies but are "ad hoc proceedings which dissolve after the purpose for which they were convened has been resolved." *Witham* v. *United States*, 355 F.3d 501, 505 (6th Cir. 2004). Whether labeled a writ of error coram nobis or a writ of error coram vobis, the relief granted by the CAAF was inconsistent with the common-law scope of the writ.

C. This Court's Review Is Warranted

The decision below incorrectly resolves a fundamental jurisdictional question and threatens to divert the limited resources of the military justice system from adjudicating courts-martial and direct appeals to addressing collateral challenges to convictions that have long since become final. Respondent observes (Br. in Opp. 12) that in the past ten years the CAAF received only ten petitions for coram nobis relief. But in just the months since the CAAF issued its decision in this case, the N-MCCA and the Army Court of Criminal Appeals—which bear the primary burden of adjudicating those petitions—have both experienced many post-finality petitions for extraordiary relief, including coram nobis, which now require adjudication on the merits when they should be dismissed for lack of jurisdiction.[2] Without this Court's intervention, the decision below will lead to a further diversion of resources that will degrade the ability of the military justice system to perform its intended function as the arbiter of discipline within the armed forces. And, in any event, even beyond those practical considerations, the basic jurisdictional question presented warrants resolution by this Court.

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[2] See, *e.g.*, *Tatum* v. *United States*, No. 9202530, 2008 WL 4367497 (N-M.C. Ct. Crim. App. Sept. 23, 2008); *Echols* v. *United States*, No. 9801059 (N-M. Ct. Crim. App. July 31, 2008); *Hollis* v. *United States*, No. 9900297 (N-M. Ct. Crim. App. July 30, 2008); *Soto* v. *United States*, No. 20080698 (A. Ct. Crim. App. July 29, 2008); *Moultrie* v. *United States*, No. 20080652 (A. Ct. Crim. App. July 29, 2008); *Tillery* v. *ACCA*, Nos. 20080672, 20080673 (A. Ct. Crim. App. July 22, 2008); *Christian* v. *United States*, No. 20011021 (A. Ct. Crim. App. July 15, 2008); *Hobson* v. *United States*, No. 20080498 (A. Ct. Crim. App. June 25, 2008); *Reeder* v. *United States*, No. 20080907 (A. Ct. Crim. App. 2008).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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