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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis filed by a former service member to review a court-martial conviction that has become final under the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*

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The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-60a) is reported at 66 M.J. 114. The order of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 62a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2008. A petition for reconsideration was denied on April 4, 2008. App., *infra*, 61a. On June 23, 2008, the Chief Justice extended the time within which

to file a petition for a writ of certiorari to and including August 1, 2008, and on July 21, 2008, the Chief Justice further extended the time to August 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(4).

STATUTES INVOLVED

Pertinent provisions are set out in an appendix to this petition. App., *infra*, 68a-81a.

STATEMENT

This case concerns the statutory jurisdiction of the military courts—created by Congress pursuant to Article I of the Constitution—to entertain collateral challenges by former service members to court-martial convictions that have long since become final. Following a guilty plea before a special court-martial, respondent was convicted of conspiracy to commit larceny, in violation of 10 U.S.C. 881, and 15 specifications of larceny, in violation of 10 U.S.C. 921. He was sentenced to three months of confinement, a bad-conduct discharge from the Navy, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) affirmed the findings and sentence. Respondent did not seek further review, and he was discharged from the Navy. Seven years later, respondent petitioned the N-MCCA for a writ of error coram nobis, alleging that he had received ineffective assistance of counsel. The N-MCCA denied the petition, but—by a 3-2 decision—the United States Court of Appeals for the Armed Forces (CAAF) reversed and remanded for an evidentiary hearing.

1. The Constitution empowers Congress "[t]o make rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. Congress

has exercised that authority in the Uniform Code of Military Justice (UCMJ), which governs the conduct of, among others, "[m]embers of a regular component of the armed forces." 10 U.S.C. 802(a)(1).

Exercising that Article I authority, Congress has also established a military justice system that embraces three tiers of tribunals. See *Weiss* v. *United States*, 510 U.S. 163, 166-169 (1994). First, persons charged with violations of the punitive articles of the UCMJ are tried by courts-martial. See 10 U.S.C. 816-821. Unlike a federal district court, a court-martial is not a standing trial court but is convened to hear a particular case. See 10 U.S.C. 822-824. Its jurisdiction terminates when the officer who has convened the court-martial has acted on the findings and sentence in the case. See Rule for Courts-Martial (R.C.M.) 1102(d).

Second, each of the armed forces possesses a court of criminal appeals. See 10 U.S.C. 866. The courts of criminal appeals have jurisdiction to review the judgment of a court-martial when the sentence, as approved by the officer who convened the court-martial, extends to death, a punitive discharge, or confinement for one year or more. See 10 U.S.C. 866(b).

Third, the CAAF, an Article I court composed of five civilian judges, has jurisdiction to review all cases reviewed by the courts of criminal appeals. See 10 U.S.C. 867; 10 U.S.C. 941 *et seq.* Under UCMJ Article 71, 10 U.S.C. 871(c), "[a] judgment as to legality of the proceedings is final" when review is completed by a court of criminal appeals and by the CAAF, and when the time for filing a petition for a writ of certiorari has expired. Under UCMJ Article 76, 10 U.S.C. 876, following the completion of authorized review provided by the UCMJ, a court-martial sentence imposed and executed on an

appellant by military order is "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States, subject only to" three specified exceptions: a petition for a new trial under UCMJ Article 73, 10 U.S.C. 873; action by the relevant service Secretary under UCMJ Article 74, 10 U.S.C. 874; and the President's authority.

In addition, the results of courts-martial within that military justice system are subject to collateral review by Article III courts. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 750-753 (1975); App., *infra*, 6a-7a.

2. Respondent, a native and citizen of Nigeria, came to the United States in 1984 and enlisted in the Navy in 1989. In 1998, military authorities charged him with conspiracy, larceny, and forgery based on his participation in a scheme to defraud a community college. Represented by both a military and a civilian attorney, respondent entered into a pretrial agreement with the convening authority. In exchange for respondent's plea of guilty, the convening authority agreed to reduce the charges and to refer the case to a special court-martial, which at the time could not impose a sentence of confinement exceeding six months. App., *infra*, 3a.

After conducting an inquiry to determine that respondent's plea was knowing and voluntary, the military judge accepted the plea and convicted respondent of conspiracy and larceny. Respondent was sentenced to three months of confinement, a bad-conduct discharge, and reduction to the lowest enlisted pay grade. App., *infra*, 3a-4a. The convening authority approved the sentence, and the N-MCCA affirmed. *Id.* at 64a-67a. Respondent did not seek further review, and he was discharged from the Navy on May 30, 2000. *Id.* at 4a.

In 2006, the Department of Homeland Security initiated removal proceedings against respondent based upon his court-martial conviction. After removal proceedings began, respondent petitioned the N-MCCA for a writ of error coram nobis to review his conviction. He alleged that he had received ineffective assistance of counsel because, he said, his civilian attorney had assured him that pleading guilty would eliminate any risk of deportation. App., *infra*, 4a-5a. The N-MCCA determined that it had jurisdiction to consider respondent's petition, but it denied relief on the merits. *Id.* at 62a-63a.

3. The CAAF reversed by a 3-2 vote. App., *infra*, 1a-60a.

a. The CAAF held that the issuance of a writ of error coram nobis was authorized by the All Writs Act, 28 U.S.C. 1651(a), which allows courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Ibid.*; App., *infra*, 7a-21a. In reaching that conclusion, the court first considered whether the requested writ was "in aid of" the N-MCCA's jurisdiction. It determined that because the petition concerned "the validity and integrity of the judgment rendered and affirmed" by the N-MCCA, it was "in aid of" that court's jurisdiction. *Id.* at 8a-9a. The court acknowledged that in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), this Court held that the CAAF "is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." App, *infra*, 7a (quoting 526 U.S. at 536). But the court believed that *Goldsmith* was inapplicable here, and it reasoned that where a petition seeks "collateral relief to

modify * * * the findings or sentence of a court martial, a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." *Id.* at 8a. The court acknowledged that UCMJ Article 76, 10 U.S.C. 876, provides that the decision on direct review of a court-martial decision is "final and conclusive," but it held that Article 76 "provides a prudential constraint on collateral review, not a jurisdictional limitation." App., *infra*, 9a.

The CAAF next considered whether relief under the All Writs Act was "necessary or appropriate." App., *infra*, 11a-21a. It stated that "[a]n Article III court, when asked to consider a court-martial conviction on an issue that has not been fully and fairly reviewed within the military justice system and has not been defaulted procedurally, is likely to defer action pending review by the court that approved the conviction." *Id.* at 20a. That is because, the court reasoned, "the primary responsibility for addressing challenges to courts-martial resides with the courts in the military justice system established by Congress." *Ibid.* Accordingly, the court concluded that "the Court of Criminal Appeals provides an appropriate forum for coram nobis review." *Ibid.*

Turning to the facts of this case, the CAAF determined that respondent's claim of ineffective assistance of counsel met "the threshold criteria for coram nobis review." App., *infra*, 24a. It therefore remanded the case to the N-MCCA to "determine whether the merits of [respondent's] petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required." *Id.* at 32a.

b. Judge Stucky dissented. App., *infra*, 32a-39a. He believed that the court's "authority to grant the requested relief" was "questionable," but he found it un-

necessary to reach that issue because, in his view, respondent's claim of ineffective assistance failed on the merits. *Id.* at 35a.

c. Judge Ryan dissented. App., *infra*, 40a-60a. She started with the understanding that the CAAF, "as a legislatively created Article I court, is a court of limited jurisdiction" whose "limited powers are defined entirely by statute." *Id.* at 43a. In addition, drawing from this Court's decision in *Goldsmith*, she observed that "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id.* at 43a (quoting *Goldsmith*, 526 U.S. at 534-535).

In Judge Ryan's view, the military courts lacked statutory jurisdiction to consider respondent's petition because respondent is a civilian who no longer has any relationship with the military. Under UCMJ Articles 2 and 3, 10 U.S.C. 802, 803, she explained, "the military justice system does not have jurisdiction over civilians." App., *infra*, 44a. Judge Ryan concluded that respondent, as "a *former* servicemember lawfully discharged from military service," has "no legally cognizable relationship with the military justice system." *Id.* at 45a. And, she explained, "[i]t is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute." *Ibid.*

In addition, Judge Ryan argued that the UCMJ precludes post-finality collateral review. App., *infra*, 46a-48a. Articles 66 and 67, 10 U.S.C. 866, 867, which provide for direct review of court-martial decisions, make "no mention of, and thus no provision for, post-finality collateral review." App., *infra*, 48a. To the contrary,

she explained, under Article 76, 10 U.S.C. 876, "once appellate review is complete, the findings and sentence are 'final and conclusive'" with "[n]o exception * * * for writs of coram nobis or other collateral review." App., *infra*, 50a. Although Article 76 "describe[s] the terminal point for proceedings within the court-martial system," *id.* at 51a (quoting *Schlesinger*, 420 U.S. at 750), Judge Ryan observed that it does not deprive Article III courts of authority to review court-martial convictions. *Ibid.* Thus, she concluded that the appropriate forum for any collateral review in a case such as this is an Article III court. *Ibid.*

REASONS FOR GRANTING THE PETITION

By a 3-2 vote, the CAAF has held that the military courts of criminal appeals possess continuing jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to grant collateral relief to former service members whose court-martial convictions have become final and whose sentences have been ordered executed. That decision contravenes this Court's decision in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), key provisions of the UCMJ governing the jurisdiction of the military appellate courts, and established principles governing the limited jurisdiction of Article I courts. And it follows in a line of decisions —including *Goldsmith*—in which the CAAF has overstepped its statutory bounds.

As a statutory court, the CAAF's jurisdiction is limited to the authority conferred by Congress. In *Goldsmith*, this Court held that Congress has "confined the [CAAF's] jurisdiction to the review of specified sentences imposed by court-martial" and that the All Writs Act does not expand that jurisdiction. 526 U.S. at 534. Here, however, the CAAF asserted jurisdiction to con-

sider collateral attacks on final court-martial convictions, even though no provision of the UCMJ authorizes the exercise of such jurisdiction. Indeed, as Judge Ryan explained, collateral review is affirmatively prohibited by the provisions of the UCMJ governing the finality of convictions and generally limiting the jurisdiction of military courts to current—not former—service members. Although this case involves a judgment that once could have been reviewed by the CAAF, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.* at 536.

Moreover, even if there were some jurisdictional basis for collateral review of final court-martial judgments after a conviction has become final and a service member has been discharged, the particular procedural vehicle for collateral review that the CAAF adopted—a writ of error coram nobis—is not "necessary or appropriate" under the All Writs Act. It is not necessary because, as this Court has recognized, there are several available remedies by which former service members may collaterally attack their court-martial convictions in Article III courts. And it is not appropriate because a writ of error coram nobis permits a court to correct only its own errors, not those of an inferior tribunal. Further, while courts have adopted certain limits on the reach of that writ, it is particularly problematic in a military justice system that emphasizes "final[ity]," 10 U.S.C. 876, because of the writ's temporal range and unsettled legal standards.

The decision below warrants this Court's review because its reasoning not only departs from this Court's decisions and Congress's enactments on a fundamental question of jurisdiction, but also affords the armed services' appellate courts essentially unlimited discretion to

undertake collateral review of any court-martial conviction over which they once possessed jurisdiction. The result of that broad and unfounded assertion of authority is to impose upon the military justice system administrative and judicial burdens that it was not designed by Congress to bear and to degrade its ability to perform its intended function as the arbiter of discipline within the armed forces. Certiorari is therefore appropriate.

A. Collateral Review Of A Final Court-Martial Judgment Is Not "In Aid Of" The Jurisdiction Of A Military Appellate Court

1. In *Goldsmith*, this Court reaffirmed that the All Writs Act is not an independent jurisdictional grant: it confers authority to issue "process 'in aid of' the issuing court's jurisdiction," but it "does not enlarge that jurisdiction." 526 U.S. at 534-535 (quoting 28 U.S.C. 1651(a)). The Court also held that Congress has "confined the [CAAF's] jurisdiction to the review of specified sentences imposed by courts-martial," and therefore that court "has the power to act 'only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.'" *Id.* at 534 (quoting 10 U.S.C. 867(c)) (brackets in original). Applying those principles, the Court concluded that the CAAF lacked jurisdiction under the All Writs Act to enjoin the President from dropping from the rolls an Air Force officer who had been sentenced by a court-martial to a term of confinement but not to dismissal from the service. *Id.* at 531. Even though the officer had received a court-martial sentence that did not include a dismissal, the Court explained that "the CAAF is not given authority, by the All Writs Act or otherwise,

to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id.* at 536.

2. The CAAF's decision in this case cannot be reconciled with this Court's decision in *Goldsmith*, which makes clear that "the CAAF's independent statutory jurisdiction is narrowly circumscribed." 526 U.S. at 535. Indeed, as Judge Ryan observed, the CAAF's decision in this case "is troubling not so much because it is misplaced, but because it is highly reminiscent of the position of this Court prior to the Supreme Court's decision in [*Goldsmith*]." App., *infra*, 54a. "Inexplicably," she continued, "this Court appears determined not to heed the Supreme Court's unequivocal directive that it stay squarely within the express limits of statutory jurisdiction." *Id.* at 56a.

Specifically, Article 67 of the UCMJ authorizes the CAAF to "review the record in [certain] cases reviewed by" the courts of criminal appeals, while Article 66 authorizes the courts of criminal appeals to "review[] court-martial cases." 10 U.S.C. 867, 866. Nothing in Articles 66 or 67 confers jurisdiction on those courts to entertain collateral attacks on final judgments and discharges ordered into execution that have reached finality under Article 76. Instead, as Judge Ryan explained, the statutes provide only for direct review of court-martial convictions. App., *infra*, 46a; see *Witham* v. *United States*, 355 F.3d 501, 505 (6th Cir. 2004) ("[N]either the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts.").

The CAAF did not purport to find collateral-review authority in Articles 66 and 67, but it reasoned that "when a petitioner seeks collateral relief to modify an

action that was taken within the subject matter jurisdiction of the military justice system, * * * a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." App., *infra*, 8a. But *Goldsmith* makes clear that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." 526 U.S. at 536. The same is true of the military courts of appeals. That the CAAF and the N-MCCA were at one time vested with jurisdiction to review the findings and sentence in respondent's case provides no basis for asserting continuing jurisdiction over the case—seven years after respondent's conviction and sentence became final.

Indeed, the CAAF's exercise of jurisdiction in this case not only had no statutory support; it was affirmatively prohibited by the finality provisions of the UCMJ. Under Article 71, a "judgment as to legality of the [court-martial] proceedings is final * * * when review is completed by a Court of Criminal Appeals" and by the CAAF and when the time for seeking certiorari has expired. 10 U.S.C. 871(c)(1). Article 76 provides an additional kind of finality once military orders have been issued to carry out the court-martial sentence. It states that "[t]he appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive," "subject only" to three exceptions: (1) "action upon a petition for a new trial" under Article 73, (2) "action by the Secretary concerned" to remit or suspend the sentence

under Article 74, and (3) "the authority of the President." 10 U.S.C. 876. Unless a case is still pending, a petition for a new trial must be directed to the Judge Advocate General, not to a court. See 10 U.S.C. 873; App., *infra*, 53a (Ryan, J., dissenting).

None of the three statutory exceptions to finality provides any role for the CAAF or the N-MCCA, and the fact that Congress expressed specific exceptions in the UCMJ underscores that it did not intend for the courts to create additional exceptions of their own. Once respondent's conviction was "final" under Article 76, neither court possessed statutory jurisdiction "in aid of" which an extraordinary writ could issue. As Judge Ryan explained, the contrary conclusion reached by the CAAF "eviscerates" the statutory scheme established by Congress and "renders Article 76, UCMJ's * * * finality provision meaningless." App., *infra*, 54a.

Under the decision below, the All Writs Act effectively provides a fourth exception to the final-judgment rule of Article 71 and the finality rule of Article 76. That result is inconsistent with the principle that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985)); see *Trenkler* v. *United States*, 2008 WL 2941573, at *9 (1st Cir. Aug. 1, 2008) ("[C]ommon-law writs, including the writ of error coram nobis, [are] available only to fill whatever interstices exist in the post-conviction remedial scheme."); cf. *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007) ("[A] precisely drawn, detailed statute pre-empts more general remedies.") (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)).

3. The CAAF relied upon *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), for the proposition that Article 76 is merely a "prudential constraint," not "a jurisdictional limitation," but its reliance on that decision was misplaced. App., *infra*, 9a. In *Councilman*, the Court rejected an argument that Article 76 barred Article III courts from issuing writs of habeas corpus to review court-martial convictions. The Court noted that Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Art. III courts." 420 U.S. at 749. But that observation about the statutory jurisdiction of *Article III* courts has no bearing on the jurisdiction of *military* (*i.e.*, Article I) courts. To the contrary, *Councilman* recognized that "the finality clause" of Article 76 "describ[es] the terminal point for proceedings within the court-martial system." 420 U.S. at 750 (quoting *Gusik* v. *Shilder*, 340 U.S. 128, 132 (1950)). As the CAAF is part of the "court-martial system," Article 76 is not merely a "prudential constraint," App., *infra*, 9a, but "a statutory directive" that forecloses the continued exercise of jurisdiction, *id.* at 51a (Ryan, J. dissenting).

The CAAF emphasized that *Councilman* cited *United States* v. *Frischholz*, 36 C.M.R. 306 (C.M.A. 1966), a case in which the former Court of Military Appeals—the predecessor of the CAAF—held that it had authority under the All Writs Act to grant extraordinary writs. App., *infra*, 10a. But *Councilman* cited *Frischholz* only for the proposition that Article 76 "does not insulate a conviction from subsequent attack in an appropriate forum." 420 U.S. at 753 n.26 (quoting *Frischholz*, 36 C.M.R. at 307). This Court had no occasion to consider *Frischholz*'s broader holding that the Court of Military Appeals was "an appropriate forum" for the issuance of writs of error coram nobis. See also App., *infra*, 33a

(Stucky, J., dissenting) ("[I]t is one thing to state that this Court has authority to issue writs under the All Writs Act and quite another to conclude that that authority includes a general mandate to correct errors in cases that are final by means of coram nobis."). Likewise, when this Court again cited *Frischholz* in *Noyd* v. *Bond*, 395 U.S. 683 (1969), it did so only for the limited proposition that the Court of Military Appeals could "issue an emergency writ of habeas corpus in cases * * * which may ultimately be reviewed by that court." *Id.* at 695 n.7. That principle does not apply here: because this is not a case that "ultimately may be reviewed" by any military court, there is no ongoing or future jurisdiction that a writ of error coram nobis could "aid."

4. The CAAF lacked jurisdiction for the additional reason that, as Judge Ryan observed, respondent is "a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction [who] has no current relationship with the military." App., *infra*, 45a. Indeed, as Judge Ryan observed, that dimension of the CAAF's decision "flies in the face of Supreme Court precedent, the decisions of at least two federal circuit courts of appeal, and the position, for the past fifty-seven years, of the solicitors general of the United States as agents of the President, commander in chief of the armed forces." *Id.* at 40a; see *id.* at 40a-41a (citing authorities).

Congress's power to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, allows it "to subject persons actually in the armed service to trial by court-martial for military and naval offenses." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955). But "[i]t has never

been intimated by this Court * * * that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions." *Ibid.*; see William Winthrop, *Military Law and Precedents* 89 (2d ed. 1920) ("It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier," and that jurisdiction "ends with * * * discharge or mustering out.").

Consistent with that constitutional limitation, the UCMJ does not apply to persons who have been punitively discharged from the armed forces under a military order, except for persons who are in custody of the armed forces serving a sentence imposed by a court-martial, see 10 U.S.C. 802(a)(7), and, in certain cases, deserters and persons who procured their discharge by fraud, see 10 U.S.C. 803(b) and (c).[1] Because the CAAF and the military courts of appeals form part of the military justice system, their jurisdiction cannot extend to discharged service members whose convictions are final and who have no remaining connection to the military. And the CAAF's jurisdiction therefore does not extend to respondent, who, on the day he was discharged from the Navy in 2000, became "a civilian, completely detached from the military and the military justice system." App., *infra*, 45a (Ryan, J., dissenting).

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[1] A discharge issued during ongoing appellate proceedings does not terminate the jurisdiction of the military appellate courts pending completion of the UCMJ's appellate procedures. See *United States* v. *Davis*, 63 M.J. 171, 176 (C.A.A.F. 2006) ("Once jurisdiction attaches, it continues until the appellate processes are complete.") (quoting *United States* v. *Entner*, 36 C.M.R. 62, 62 (C.M.A. 1965)).

B. Coram Nobis Review Is Neither Necessary Nor Appropriate In Light Of The Alternative Remedies Available To Former Members Of The Armed Forces

Even if the N-MCCA had some jurisdictional basis for collaterally reviewing final court-martial judgments, the issuance of a writ of error coram nobis in this case is not permissible under the All Writs Act because it is neither "necessary" nor "appropriate." The All Writs Act, this Court has held, "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Goldsmith*, 526 U.S. at 537. In this context, the availability of alternative remedies for former service members seeking to challenge their court-martial convictions makes coram nobis unnecessary. Additionally, issuance of the writ by an appellate court to review a trial court's judgment long after a conviction became final is inappropriate because it is inconsistent with the traditional scope of the writ and incompatible with the demands of a system of military justice.

1. This Court has observed that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Carlisle*, 517 U.S. at 429 (quoting *United States* v. *Smith*, 331 U.S. 469, 476 n.4 (1947)) (brackets in original). That point applies with even greater force in the military context, for even without resort to coram nobis, a former service member has several avenues for challenging a court-martial conviction. The most common avenue for review is a habeas petition in an Article III court under 28 U.S.C. 2241 (2000 & Supp. V 2005). As the Court noted in *Goldsmith*, "once a criminal conviction has been finally reviewed within the military system, and a servicemember in custody has exhausted

other avenues provided under the UCMJ to seek relief from his conviction * * * he is entitled to bring a habeas corpus petition." 526 U.S. at 537 n.11; see *Councilman*, 420 U.S. at 750; *Gusik*, 340 U.S. at 132-133.

Even in cases where the former service member is no longer in custody, there are sufficient alternative remedies to foreclose recourse to coram nobis relief. For example, federal courts have entertained collateral challenges to court-martial convictions under their general federal-question jurisdiction and under their authority to grant declaratory judgments or mandamus relief. See, *e.g.*, *United States ex rel. New* v. *Rumsfeld*, 448 F.3d 403, 406-407 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 2096 (2007); *Davis* v. *Marsh*, 876 F.2d 1446, 1448 & n.4 (9th Cir. 1989); *Baker* v. *Schlesinger*, 523 F.2d 1031, 1034-1035 (6th Cir.), cert. denied, 424 U.S. 972 (1975). In addition, former service members who allege that their discharge was unlawful may bring actions for backpay in the Court of Federal Claims. See 28 U.S.C. 1491; *Goldsmith*, 526 U.S. at 539; *Councilman*, 420 U.S. at 751; *Matias* v. *United States*, 923 F.2d 821, 823 (Fed. Cir. 1990) ("We have long honored the rule that 'judgments by courts-martial, although not subject to direct review by federal civil courts, may nevertheless be subject to narrow collateral attack [in the Court of Federal Claims] on constitutional grounds' when traditional Tucker Act jurisdiction is present.") (quoting *Bowling* v. *United States*, 713 F.2d 1558, 1560 (Fed. Cir. 1983)).[2]

The court below justified its assertion of coram nobis jurisdiction on the theory that, even after a court-martial conviction has become final, Article III courts will

[2] In certain cases, former service members may also seek review of their discharge from the Board for Correction of Military Records. See 10 U.S.C. 1551 *et seq.*; *Goldsmith*, 526 U.S. at 538-539.

abstain from entertaining claims for collateral review pending exhaustion of available remedies within the military justice system. App., *infra*, 16a-17a. But as Judge Ryan explained, *id.* at 58a-59a, an exhaustion rule cannot invest the military courts with collateral jurisdiction that they otherwise would lack. If the CAAF has no continuing jurisdiction in a case that is final under Article 76, then a failure to exhaust military remedies would not be an obstacle to review by an Article III court. Thus, coram nobis review in the military courts cannot be said to be necessary.

2. The N-MCCA's exercise of coram nobis jurisdiction is inappropriate for the additional reason that the writ permits a court to correct *its own* errors, not to correct those of an inferior court. As the Second Circuit has explained, "[t]he term '*coram nobis*' * * * comes from the phrase 'error *quae coram nobis resident*,' which means, literally, an error 'which remains in our presence.'" *Finkelstein* v. *Spitzer*, 455 F.3d 131, 133 (2006) (citations omitted), cert. denied, 127 S. Ct. 1125 (2007). Thus, the common-law writ "was used by a court in cases within its own jurisdiction, not to correct errors in other jurisdictions." *Ibid.* (holding that federal court cannot issue coram nobis to set aside a state-court judgment); see *United States* v. *Morgan*, 346 U.S. 502, 507 n.9 (1954) ("[I]f there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same court, by writ of error *coram nobis*.") (quoting 2 *Tidd's Practice* 1136 (4th Amer. ed. 1856)); *Lowery* v. *McCaughtry*, 954 F.2d 422, 423 (7th Cir.) ("Coram nobis is an established writ, but the 'usages and principles of law' send an applicant to the court that issued the judgment.") (citations omitted), cert. denied, 506 U.S. 834 (1992); *Booker* v. *Arkansas*, 380 F.2d 240, 244 (8th Cir.

1967) ("Relief by the writ * * * is available, if at all, only in the court which rendered the judgment.").

Neither the CAAF nor the N-MCCA was the court that rendered the judgment in this case: the judgment was entered by a court-martial. As Judge Ryan noted, however, courts-martial are not standing bodies like Article III courts, but are convened to hear particular cases. App., *infra*, 53a n.9. Because they are "ad hoc proceedings which dissolve after the purpose for which they were convened has been resolved," they are incapable of considering petitions for collateral relief. *Witham*, 355 F.3d at 505; see *United States* v. *DuBay*, 37 C.M.R. 411, 413 n.2 (C.M.A. 1967); R.C.M. 1102(d). The CAAF recognized the inability of courts-martial to issue writs of error coram nobis, App., *infra*, 17a-18a, and it concluded that "the Courts of Criminal Appeals * * * provide an appropriate forum for consideration of coram nobis petitions," *id.* at 19a. That conclusion is inconsistent with the common-law scope of the writ, and it is therefore not an "appropriate" exercise of the authority granted by the All Writs Act.

The writ of error coram nobis is also fundamentally incompatible with a military justice system that emphasizes "finality" in order to instill discipline critical to the maintenance of a well-trained armed force. See 10 U.S.C. 871(c)(1), 876. While the courts have adopted certain common law limits on the scope of the writ, the availability of relief remains subject to unsettled legal standards. Indeed, as this Court has recognized, petitions for extraordinary relief such as a writ of error coram nobis "are not subject to any time limitations and, theoretically, could be filed at any time without limitation." *In re Sindram*, 498 U.S. 177, 180 (1991); see App., *infra*, 54a (Ryan, J., dissenting). That uncertainty—

which distinguishes the writ of coram nobis even from other forms of collateral review, such as habeas—is particularly problematic in a system of military justice.

C. The Question Presented Is Important And Warrants This Court's Review

1. This case concerns a matter of fundamental importance with respect to the authority of the military courts created by Congress. Moreover, the decision below contravenes *Goldsmith* and the statutory provisions governing the CAAF's jurisdiction, and also imposes on the military justice system a burden of considering petitions for collateral relief that the system was not designed by Congress to bear. The result not only will undermine the finality and discipline that Congress intended to instill when it established that system, but also will divert the resources of the armed forces from their primary duty of protecting the nation to the adjudication of claims that are properly the province of the Article III courts.

"This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society," and that military law, correspondingly, "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Parker* v. *Levy*, 417 U.S. 733, 743-744 (1974) (quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). Whereas the sole function of Article III courts is to adjudicate cases, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth*, 350 U.S. at 17. The "trial of soldiers to maintain discipline," although necessary, "is merely incidental to an army's primary fighting function," and when "those responsible for performance

of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.*

Recognizing the danger of diverting the armed forces from their principal function, Congress made no provision in the UCMJ for collateral review of court-martial convictions. Although it provided for direct review in military courts, it confined post-finality challenges within the military system to motions for a new trial, and it imposed strict time limits on such motions. See 10 U.S.C. 873. At the same time, Congress left it to the Article III courts to adjudicate motions for collateral review. See *Councilman*, 420 U.S. at 749-751. Particularly when the conviction is final and the defendant has been discharged from the armed forces, such proceedings are not even remotely "incidental to an army's primary fighting function." *Toth*, 350 U.S. at 17.

The CAAF's decision disrupts that sensible division of responsibility between the military and civilian courts, and it will have the effect of diverting the limited resources of the military justice system from its role of fostering discipline and readiness to an unwieldy proceeding wholly unanticipated by its statutory charter. As reflected by the CAAF's disposition of this case, collateral challenges to court-martial convictions often require fact-finding. App., *infra*, 32a. Here, for example, resolution of the merits of respondent's ineffective-assistance claim will require factual findings concerning what advice respondent's civilian attorney provided him, and whether respondent's decision to enter pleas of guilty was predicated on such advice. But no provision of the UCMJ prescribes procedures for litigating such factual issues long after convictions become final. As a result, the CAAF was required to improvise "an unwieldy and

imperfect system" for post-conviction fact-finding by the assignment of the case to a court-martial convening authority with instructions to convene an evidentiary hearing. App., *infra*, 47a (Ryan, J. dissenting); see *DuBay*, 37 C.M.R. at 412 (establishing procedures, within the military justice system, for fact-finding with respect to post-conviction claims based on disputed facts not contained in the trial record). That procedure will require a senior commander, members of his staff, a military judge, a trial counsel, and a military defense counsel to divert their attention from the fulfillment of their primary responsibilities to the resolution of factual claims made by a petitioner who long ago severed all ties with the military.

Even in cases where post-conviction claims can be addressed without recourse to an evidentiary hearing, the government will be required to appoint defense counsel at its expense to represent a now-civilian petitioner. See 10 U.S.C. 870(c)(2). As this Court has noted, when petitioners "are not subject to the financial considerations," such as attorney's fees, "that deter other litigants from filing frivolous petitions," they have a "greater capacity than most to disrupt the fair allocation of judicial resources." *In Re Sindram*, 498 U.S. at 180. Moreover, "[t]he risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation." *Ibid.*

In cases, like this one, where the petitioner has been discharged, the military justice system is particularly ill-suited to fulfil the role envisioned by the CAAF. Although the former service member will likely be an essential witness in a fact-finding proceeding, he is not

subject to military jurisdiction or to the orders of the commander convening the court-martial. App., *infra*, 49a (Ryan, J., dissenting). Here, for example, respondent is a civilian over whom neither the convening authority nor the military courts would appear to have personal jurisdiction. In view of that status, it is uncertain whether he could be compelled to participate in any fact-finding proceeding.

In addition, to the extent that they did participate in such proceedings, former service members who already had been discharged for unlawful conduct would have to be permitted to re-enter the military base where the proceedings were conducted. Exposing current service members to such individuals may itself create disciplinary problems. Moreover, while present for the proceedings they would be immune from the demands of military discipline and requirements of conduct that otherwise govern members of the military community who are present on the military installations where the proceedings would likely be conducted. In the tightly controlled environment of a military installation, such a disruption of discipline and order could prove problematic even in individual cases.

2. The role of the CAAF and the military courts of appeals in the military justice system is important, but it is also limited, and *Goldsmith* makes clear that the CAAF does not have a general power to superintend all matters relating to military justice. The decision below represents the latest iteration of that court's efforts to expand its role beyond its congressionally prescribed jurisdiction to "review * * * specified sentences imposed by courts-martial." *Goldsmith*, 526 U.S. at 534; see, *e.g.*, *United States* v. *Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (permitting appeals to the CAAF from

the decisions of the Courts of Criminal Appeals in interlocutory appeals by the government); *United States* v. *Tamez*, 63 M.J. 201 (C.A.A.F. 2006) (permitting extension, for "good cause," of the statutory deadline for filing appeals to the CAAF); *Loving* v. *United States*, 62 M.J. 235 (C.A.A.F. 2005) (asserting jurisdiction under the All Writs Act to entertain petitions for habeas corpus after there is a final judgment); *Kreutzer* v. *United States*, 60 M.J. 453 (C.A.A.F. 2005) (employing All Writs Act to regulate defendant's place of confinement); *Goldsmith* v. *Clinton*, 48 M.J. 84 (C.A.A.F. 1998) (employing All Writs Act to enjoin the government from administratively discharging Air Force Officer), rev'd, 526 U.S. 529 (1999). This Court's intervention is warranted, once again, in order to confine the CAAF to its statutory jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Misc. No. 07-8012
Crim. App. No. 99-00680

JACOB DENEDO, MESS MANAGEMENT SPECIALIST
SECOND CLASS U.S. NAVY, APPELLANT

v.

UNITED STATES, APPELLEE

Argued: Oct. 1, 2007
Decided: Mar. 11, 2008

EFFRON, C.J., delivered the opinion of the Court, in which Baker and Erdmann, JJ., joined. Stucky and Ryan, JJ., each filed a dissenting opinion.

Military Judge: GERALD E. CHAMPAGNE.

Chief Judge EFFRON delivered the opinion of the Court.

Appellant filed a petition for extraordinary relief with the United States Navy-Marine Corps Court of Criminal Appeals. The court considered his petition and denied relief. *Denedo v. United States*, No. NMCCA 9900680 (N-M. Ct. Crim. App. Mar. 26, 2007). Appellant then filed the present appeal.

For a writ appeal, we consider the record developed at trial and on direct appeal. We also consider the materials filed by the parties in the course of the writ proceedings at the Court of Criminal Appeals and the appeal to our Court. Based on the foregoing, we consider whether a decision on the writ appeal can be reached on the record before us, or whether a more fully developed factual record is required prior to reaching a decision on the merits. *See* Section III.C.2., *infra*.

The Government contends that the Court of Criminal Appeals erred by not dismissing the petition on jurisdictional grounds, while Appellant contends that the court erred by not granting relief. Appellant challenges his court-martial conviction, asserting that his plea was not knowing or voluntary. Appellant contends that he expressly requested guidance of counsel on the immigration impact of his plea, that the advice provided by his attorney was defective, and that he relied upon ineffective assistance of counsel to his detriment in pleading guilty. He further asserts that the defect in counsel's advice was not known to him and could not have been known to him until eight years after conviction when the United States Citizenship and Immigration Services (USCIS) first sought to deport him based on his court-martial conviction. Although judicial review of immigration proceedings, including any use therein of a court-martial conviction, is outside the jurisdiction of this Court, the providence of a guilty plea at a court-martial is subject to our review. *See* Section III.B., *infra*.

For the reasons set forth below, we conclude that the Court of Criminal Appeals properly rejected the Government's motion to dismiss. We further conclude that a more fully developed record is required prior to reach-

ing a decision on the merits, and we remand the case for further consideration by the Court of Criminal Appeals.

Section I of this opinion outlines the procedural history of the present case. Section II discusses collateral review under the All Writs Act. Section III addresses Appellant's request for relief.

I. PROCEDURAL HISTORY

Appellant, who was born in Nigeria, came to the United States in 1984. He enlisted in the Navy in 1989 and became a lawful permanent resident in 1990.

In 1998, the Government charged Appellant with conspiracy, larceny, and forgery, alleging that he assisted a civilian acquaintance in defrauding a community college. *See* Articles 81, 121, 123, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 921, 923 (2000). Appellant, who was represented by civilian counsel and detailed military counsel, entered into a pretrial agreement with the convening authority. In exchange for Appellant's agreement to enter a guilty plea, the convening authority agreed to reduce the charges. The convening authority also agreed to refer the case to a special court-martial, which, at that time, could not impose a sentence of confinement in excess of six months. *See* Article 19, UCMJ, 10 U.S.C. § 819 (1994), *amended by* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 577, 113 Stat. 512, 625 (1999) (prospectively providing a twelve-month maximum for periods of confinement adjudged by special courts-martial).

Pursuant to the pretrial agreement, Appellant entered a plea of guilty at a special court-martial composed of a military judge sitting alone. In accordance with applicable law, the military judge conducted an inquiry

into the providence of the plea. *See* Article 45, UCMJ, 10 U.S.C. § 845 (2000); Rule for Courts-Martial (R.C.M.) 910; *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969). After conducting the inquiry, the military judge concluded that the plea was provident. The military judge entered findings of guilty for the charges of conspiracy and larceny, as limited by the pretrial agreement. The record contains no reference to the subject of the deportation consequences of the pleas. Following the entry of findings, the military judge conducted a sentencing proceeding. On July 15, 1998, the military judge imposed a sentence that included three months confinement, reduction to grade E-1, and a bad-conduct discharge. The convening authority approved the sentence on March 7, 1999. The Navy-Marine Corps Court of Criminal Appeals affirmed on February 24, 2000. *United States v. Denedo*, No. NMCA 99-00680 (N-M. Ct. Crim. App. Feb. 24, 2000). Appellant did not seek further review in our Court. The Navy discharged Appellant on May 30, 2000.

On October 30, 2006, the Government, through USCIS, initiated proceedings to deport Appellant, citing his 1998 special court-martial conviction.[1] Subsequently, Appellant filed a petition for extraordinary relief with the Navy-Marine Corps Court of Criminal Appeals, requesting collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a) (2000). Appellant's petition alleged that he specifically told his counsel during plea negotiations

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[1] During the present writ appeal, USCIS filed an additional deportation charge, also based upon Appellant's special court-martial conviction.

that "his primary concern and objective" was "to avoid the risk of deportation," and that he was "far more concerned about deportation and being separated from his family, than the risk of going to jail." According to Appellant's petition, his counsel had assured him that "if he agreed to plead guilty at a special-court-martial he would avoid any risk of deportation."

At the Court of Criminal Appeals, the Government filed a motion to dismiss on the grounds that the court lacked jurisdiction to consider the writ. The Court of Criminal Appeals denied the Government's motion to dismiss. *Denedo*, No. NMCCA 9900680. The court also considered and denied Appellant's petition for extraordinary relief in a summary decision. *Id.*

Appellant filed a writ appeal with this Court. The Government, in response, reiterated its jurisdictional objection. In addition, the Government contended that Appellant had been provided with the effective assistance of counsel at his court-martial.

II. COLLATERAL REVIEW

A. BACKGROUND

In a court-martial of the type at issue in the present case, the findings and sentence approved by the convening authority are subject to direct review by the Court of Criminal Appeals of the military department concerned. Article 66(b), UCMJ, 10 U.S.C. § 866(b) (2000); *cf.* Article 69, UCMJ, 10 U.S.C. § 869 (2000) (providing for review of other courts-martial in the Office of the Judge Advocate General). In addition to issues of law, the scope of review at the Court of Criminal Appeals extends to factual sufficiency and sentence appropriateness. *See* Article 66(c), UCMJ. The decisions of the

Court of Criminal Appeals are subject to direct review in this Court on issues of law. Article 67(a), (c), UCMJ, 10 U.S.C. § 867(a), (c) (2000). Cases in which we have granted review or have otherwise provided relief are subject to direct review in the Supreme Court by writ of certiorari. Article 67a, UCMJ, 10 U.S.C. § 867a (2000); 28 U.S.C. § 1259 (2000).

A judgment as to the legality of the proceedings becomes final upon the completion of direct review by the Court of Criminal Appeals and (1) expiration of the time for filing a petition for review with this Court without such a filing (and without the case otherwise being under review at this Court); (2) rejection of a petition for review by this Court; or (3) completion of review by this Court, subject to requirements regarding potential review by the Supreme Court. Article 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1) (2000). In addition, various forms of executive action are required before the results of a court-martial become final. *See* Article 71(a), (b), (c)(2), UCMJ. Once such action is taken, Article 76, UCMJ, 10 U.S.C. § 876 (2000), provides, in pertinent part, that "[o]rders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States," subject to certain explicit exceptions.

The results of courts-martial are subject to collateral review by courts outside the military justice system. *See*, *e.g.*, *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion) (habeas corpus in Article III courts); *Schlesinger v. Councilman*, 420 U.S. 738, 751 (1975) (noting that various forms of collateral review historically have been available for courts-martial convictions); *United*

States ex rel. New v. Rumsfeld, 448 F.3d 403, 406 (D.C. Cir. 2006 (federal question under 28 U.S.C. § 1331); *Matias v. United States*, 923 F.2d 821, 823, 825 (Fed. Cir. 1990) (back pay litigation under the Tucker Act, 28 U.S.C. § 1491). Courts-martial also are subject to collateral review within the military justice system. *See*, *e.g.*, *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005); cf. *Schlesinger*, 420 U.S. at 753 n.26 (describing collateral review by extraordinary writs in the military justice system).

Appellant has requested collateral review under the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act requires two separate determinations: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate."

B. COLLATERAL REVIEW IN AID OF THE JURISDICTION OF THE COURTS OF CRIMINAL APPEALS

As the Supreme Court observed in *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999), "although military appellate courts are among those empowered to issue extraordinary writs under the Act," the Act confines a court to issuance of process in aid of "its existing statutory jurisdiction" and "does not enlarge that jurisdiction." The Supreme Court noted that this Court "is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id*. at 536. The Court

added that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Id.*

When courts within the military justice system lack subject matter jurisdiction over an action, such as an administrative separation, they cannot invoke the All Writs Act to enlarge their jurisdiction to review the administrative action, even if it is based upon the results of a court-martial. *Id*. (noting that "Goldsmith's court-martial sentence has not been changed; another military agency has simply taken independent action"). However, when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act "in aid of" the court's existing jurisdiction. *Loving*, 62 M.J. at 245-46 (citing 28 U.S.C. § 1651(a), and *Goldsmith*, 526 U.S. at 534).

The existing statutory jurisdiction of the Navy-Marine Corps Court of Criminal Appeals includes cases such as Appellant's, in which the sentence extends to a punitive discharge. Article 66(b), UCMJ. On direct appeal, the Court of Criminal Appeals conducts a de novo review of the findings and sentence approved by the convening authority. Article 66(c), UCMJ (providing for review of matters of fact and law, as well as sentence appropriateness). Appellant's request for coram nobis relief is limited to the findings and sentence of the court-martial reviewed by the Court of Criminal Appeals. He has raised a claim—ineffective assistance of counsel—that goes directly to the validity and integrity of the

judgment rendered and affirmed. As such, the petition was "in aid of" the existing jurisdiction of the Court of Criminal Appeals.

C. ARTICLE 76 AND COLLATERAL REVIEW

As noted in Section II.A., *supra*, Article 76 addresses the completion of direct review, including executive action. Article 76 provides in pertinent part:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

In *Schlesinger*, 420 U.S. at 745, the Supreme Court emphasized that Article 76 provides a prudential constraint on collateral review, not a jurisdictional limitation. Article 76 "does not expressly effect any change in the subject-matter jurisdiction of Article III courts." *Id*. at 749. The Article "only defines the point at which military court judgments become final and requires that they be given res judicata effect." *Id*.

Similar considerations apply to the application of Article 76 within the military justice system. Although *Schlesinger* involved a collateral challenge to a pending court-martial in an Article III court, the Supreme Court's analysis of the relationship between Article 76 and collateral review specifically cited a post-Article 76 coram nobis case reviewed by this Court. *See Schlesinger*, 420 U.S. at 753 n.26 (quoting *United States v. Frischholz*, 16 C.M.A. 150, 151, 36 C.M.R. 306, 307 (1966)); *see also Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969) (observing that this Court in *Frischholz* "properly rejected" the government's argument that this Court lacked power to grant writs under the All Writs Act); *cf. Goldsmith*, 526 U.S. at 537 n.11 (referring to the discussion in *Noyd*, 395 U.S. at 693-99, of the various avenues of relief available within the military justice system). In terms of timing, Article 76 serves as a prudential restraint on collateral review of courts-martial pending completion of direct review. When a coram nobis petition is considered after completion of direct review, finality of direct review enhances rather than diminishes consideration of a request for collateral relief. *See, e.g., United States v. Morgan*, 346 U.S. 502, 511-12 (1954); *see* Section III, *infra*. In terms of the scope of collateral review, the res judicata effect of Article 76 means that the decision on direct review will stand as final unless it fails to pass muster under the highly constrained standards applicable to review of final judgments, as discussed in the following sections.

D. THE AVAILABILITY OF OTHER REMEDIES AS A LIMITATION ON RELIEF UNDER THE ALL WRITS ACT

Because the All Writs Act serves as a residual authority, a writ is not "necessary or appropriate" under the statute if another adequate legal remedy is available. *See Loving*, 62 M.J at 247, 253-54 (discussing *Carlisle v. United States*, 517 U.S. 416 (1996)). The determination of whether another remedy is adequate requires a contextual analysis. The possibility of executive clemency, for example, does not provide an adequate remedy because the exercise of clemency powers does not ensure judicial review of legal issues. *See id.* at 247. Likewise, a motion for a new trial is not a remedy if the request for extraordinary relief is based on developments occurring after the two-year deadline in Article 74, UCMJ, 10 U.S.C. § 874 (2000).

In view of the potential for collateral review by courts outside the military justice system, *see* Section II.A., *supra*, the question arises as to whether the availability of such review renders review of a coram nobis petition by the Court of Criminal Appeals unnecessary or inappropriate. In *Loving*, we observed that Article III courts would be unlikely to exercise jurisdiction over petitions for extraordinary relief during the period between completion of final legal review under Article 71(c) and finality of proceedings on direct review under Article 76 because of doctrines such as exhaustion and abstention, reflecting the primary role of courts within the military justice system in reviewing challenges to courts-martial. 62 M.J. at 248-51. In that context, we concluded that review was available under the All Writs Act to consider a court-martial conviction and sentence

that was challenged during the period between completion of final legal review under Article 71(c) and the completion of final review, including executive actions, under Article 76. *Id*. at 256. In the present case, we consider the relationship between extraordinary writ proceedings within the military justice system and the possibility of Article III collateral review in a post-Article 76 setting, a matter that we did not address in *Loving*. *See id*. at 245 n.61.

1. *Constraints on collateral review by courts outside the military justice system*

The power of courts outside the military justice system to engage in post-Article 76 collateral review is subject to constraints on the exercise of that power. *See Loving*, 62 M.J. at 248-49. A prominent theme running through the Supreme Court's consideration of military justice cases on collateral review is that the system of courts established by Congress for the military justice system should serve as the primary mechanism for review of court-martial cases, and that the courts within the military justice system should have an opportunity to consider challenges to court-martial proceedings prior to review by courts outside the military system. This theme is reflected in the Supreme Court's emphasis on exhaustion of military remedies, as well as the Court's focus on full and fair consideration by the courts within the military justice system.

a. Exhaustion of remedies

Under the exhaustion of remedies doctrine, courts outside the military justice system normally refrain from collateral review of courts-martial until all available military remedies are exhausted. The doctrine re-

flects the Supreme Court's view of the pivotal role assigned by Congress to the courts in the military justice system. As the Court stated in *Schlesinger*, Congress enacted the UCMJ under its power to regulate the armed forces in an effort "to balance . . . military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted." 420 U.S. at 757-58. To address those competing interests, "Congress created an integrated system of military courts and review procedures." *Id.* at 758.

The Supreme Court further observed that "implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task." *Id.* Underscoring the need for other courts to refrain from review until all military remedies have been exhausted, the Court stated "[w]e think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Id.*

As a general matter, courts outside the military justice system "will not entertain habeas petitions by military prisoners until all available military remedies have been exhausted." *Id.* The exhaustion requirement is prudential rather than jurisdictional, and the Supreme Court did not preclude the possibility that the circumstances of a particular case might warrant consideration of a habeas petition by an Article III court prior to exhaustion. *Id.* at 761.

b. Full and fair consideration

Even when remedies have been exhausted, the scope of collateral review outside the military justice system is constrained by the requirement to consider whether the military justice system has given full and fair consideration to the claims at issue. *Burns*, 346 U.S. at 142-46. De novo review is appropriate only if the military justice system "manifestly refused to consider those claims." *Id.* at 142. As recently noted by the United States Court of Appeals for the District of Columbia Circuit in *New*, 448 F.3d at 407-08, Article III courts have utilized various standards in applying *Burns*. *Compare*, *e.g.*, *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990) (applying the deference test articulated by the United States Court of Appeals for the Fifth Circuit in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975)), with *Brosius v. Warden*, 278 F.3d 239, 245 (3d Cir. 2002) (applying the deference standard that the court would have used in habeas review of a state court conviction under 28 U.S.C. § 2254(d)). Irrespective of the different approaches used by the Article III courts, they are obligated to apply the exhaustion and review standards of *Schlesinger* and *Burns* when considering claims raised by a petitioner on collateral review.

2. *The relationship between courts within and outside the military justice system with respect to collateral review*

As previously described, courts within the military justice system conduct extraordinary writ review of courts-martial at a variety of stages, including after completion of direct review under Article 76. Although not prohibited from undertaking collateral review at the post-Article 76 stage without considering the availability

of relief within the military justice system, a number of Article III courts have deferred action because of, or otherwise have taken into account, the availability of post-Article 76 collateral review within the military justice system.

In *Frischholz*, 16 C.M.A. at 151, 36 C.M.R. at 307, the petitioner's conviction became final under Article 76 after we denied his petition for direct review and he was dismissed from the Air Force. Five years later, he sought collateral relief from the United States District Court for the District of Columbia. *Id.* at 151, 36 C.M.R. at 307. 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. *See id.* at 151, 36 C.M.R. at 307.

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 that 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. *See id.* at 151, 36 C.M.R. at 307. We rejected the government's position, concluding that we had jurisdiction to review the case under the All Writs Act, and we denied the application for relief on its merits. *Id.* at 152-53, 36 C.M.R. at 308-09.

The Supreme Court subsequently cited with approval the conclusion in *Frischholz* that Article 76 does not bar "subsequent attack in an appropriate forum" and that "[a]t best it provides finality only as to interpretations of military law" by this Court. *See Schlesinger*, 420 U.S. at 753 n.26 (quoting *Frischholz*, 16 C.M.A. at 151, 36 C.M.R. at 307); *see also Noyd*, 395 U.S. at 695 n.7 (citing

Frischholz as an example of the availability of review by this Court under the All Writs Act).

In *Del Prado v. United States*, 23 C.M.A. 132, 133-34, 48 C.M.R. 748, 749-50 (1974) (collateral review where petitioner was not in confinement), and *Garrett v. Lowe*, 39 M.J. 293, 294 (C.M.A. 1994) (collateral review where petitioner was in confinement), petitioners first sought relief in federal district court after their cases had become final under Article 76. In each case, the district courts withheld action pending collateral review in this Court, and in both cases we undertook review and granted relief. *Del Prado*, 23 C.M.A. at 134, 48 C.M.R. at 750; *Garrett*, 39 M.J. at 297.

More recently, 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. *See*, *e.g.*, *Tatum v. United States*, No. RDB-06-2307, 2007 U.S. Dist. LEXIS 61947, at *12-*13, 2007 WL 2316275, at *6-*7 (D. Md. Aug. 7, 2007) (dismissing a request for post-Article 76 collateral relief on the grounds that the petitioner had not sought a writ of error coram nobis before this Court); *Fricke v. Sec'y of the Navy*, No. 03-3412-RDR, 2006 U.S. Dist. LEXIS 36548, at *9-*11, 2006 WL 1580979, at *3-*5 (D. Kan. June 5, 2006) (relying on this Court's summary disposition of petitioner's post-Article 76 request for coram nobis relief); *MacLean v. United States*, No 02-CV-2250-K (AJB), 2003 U.S. Dist. LEXIS 27219, at *13-*15 (S.D. Cal. June 6, 2003) (dismissing a petition for coram nobis relief for lack of jurisdiction and noting the availability of such relief before the Court of Criminal Appeals); *Parker v. Tillery*, 1998 U.S. Dist. LEXIS 8399, at *3-*5, 1998 WL 295574, at *2 (D. Kan. May 22,

1998) (post-Article 76 coram nobis review in the military justice system demonstrated full and fair review of claim).

The foregoing cases illustrate the care taken by Article III courts to ensure that an issue has been considered by the courts within the military justice system established by Congress prior to outside collateral review. These cases reflect the Supreme Court's recognition that the military is an institution with distinct traditions and disciplinary concerns, and that Congress has given the military justice system a particular role to play in the maintenance of the traditions and discipline essential to the national defense, as balanced against the individual rights of servicemembers. *See* Section II.D.1., *supra*. Particularly where a collateral challenge requires interpretation of the UCMJ, the *Manual for Courts-Martial*, or military law precedents, courts outside the military justice system have endeavored to ensure that an issue has received full and fair consideration by courts within the military justice system before undertaking their own review.

3. *Requirement to bring a coram nobis petition before the court that rendered the judgment*

The likelihood that outside courts will defer taking action on a coram nobis petition pending consideration within the military justice system is increased by the well-recognized principle that a writ of error coram nobis should be brought before the court that rendered the judgment. *See Loving*, 62 M.J. at 251 (citing Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 Va. J. Soc. Pol'y & L. 1, 9 (2003); 2 Steven Childress & Martha Davis, *Federal Standards of Review*, § 13.01, at 13-4 (3d ed.

1999)). This requirement reflects the importance of providing the court that made the decision with the opportunity to consider any subsequent developments and to correct any resulting error in its original judgment. *See, e.g.*, *Lowery v. McCaughtry*, 954 F.2d 422, 422-23 (7th Cir. 1992) (discussing the rationale underlying the principle and noting that "[c]oram nobis arose as a device to extend the period . . . in which the judge who rendered a decision could reexamine his handiwork"). Many courts have disposed of writs of error coram nobis on this basis. *See id.* (noting that counsel in that case "conceded that she had not found even one decision in the history of the United States using coram nobis to set aside a judgment rendered by another court"); *see also United States v. Sawyer*, 239 F.3d 31, 37 (1st Cir. 2001); *Sinclair v. Louisiana*, 679 F.2d 513, 514-15 (5th Cir. 1982); *Mustain v. Pearson*, 592 F.2d 1018, 1021 (8th Cir. 1979); *MacLean*, 2003 U.S. Dist. LEXIS 27219, at *15; *Carter v. Attorney General of the United States*, 782 F.2d 138, 141 (10th Cir. 1986).

In the military justice system, the trial court—the court-martial—does not have independent jurisdiction over a case after the military judge authenticates the record and the convening authority forwards the record after taking action. *See* R.C.M. 1102(d); R.C.M. 1107(f)(2); *United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 412 (1967). Because the trial court is not available for collateral review under the UCMJ or the *Manual for Courts-Martial*, collateral review within the military justice system does not occur at the trial court

level. *See United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F. 1998).[2]

In that context, the Courts of Criminal Appeals, the first-level standing courts in the military justice system, provide an appropriate forum for consideration of coram nobis petitions regarding courts-martial. During the initial consideration of a case, such as the case now before us, they engage in de novo consideration of the record and expressly act on the findings and sentence. Article 66(c), UCMJ. With respect to collateral review of the present case, they are well-positioned to determine whether corrective action on the findings and sentence is warranted, including ordering any factfinding proceedings that may be necessary.

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[2] Several Article III courts, citing *Murphy*, have noted the unavailability of collateral review at the trial court as a reason for concluding that court-martial convictions may not be reviewed under 28 U.S.C. § 2255 (providing for collateral review by "the court which imposed the sentence"). *Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004); *Gilliam v. Bureau of Prisons*, No. 99-1222, 2000 U.S. App. LEXIS 3684, at *3, 2000 WL268491, at *1 (8th Cir. Mar. 3, 2000) (unpublished); *see Loving*, 62 M.J. at 254-55. In *Witham*, the court considered the case under the general habeas statute, 28 U.S.C. § 2241, and denied relief on the grounds that three of the petitioner's claims had been considered fully and fairly in the military justice system and the remaining two claims were procedurally defaulted. 355 F.3d at 506. In that context, the court did not address exhaustion of other remedies, such as review under the All Writs Act, 28 U.S.C. § 1651(a). In *Gilliam*, the court concluded that the district court had erred in treating a petition under § 2241 as a claim for relief under § 2255. 2000 U.S. App. LEXIS 3684, at *5-*6, 2000 WL 268491, at *2-*3. The court remanded the case to the district court for further proceedings, including consideration of whether the petitioner had exhausted his remedies in the military justice system. 2000 U.S. App. LEXIS 3684, at *7, 2000 WL 268491, at *3.

4. *The sequence of review in the present case*

The Courts of Criminal Appeals have the authority, expertise, and case-specific knowledge appropriate to conduct the initial review of coram nobis petitions, particularly in view of the principle that coram nobis petitions should be brought before the court that rendered the judgment. An Article III court, when asked to consider a court-martial conviction on an issue that has not been fully and fairly reviewed within the military justice system and has not been defaulted procedurally, is likely to defer action pending review by the court that approved the conviction. The sequence of review—collateral review in the military justice system prior to review by the Article III courts—reflects adherence to the concept that the primary responsibility for addressing challenges to courts-martial resides with the courts in the military justice system established by Congress.

Our conclusion—that the Court of Criminal Appeals provides an appropriate forum for coram nobis review—takes into account that the present case does not involve the propriety of jurisdiction to convene a court-martial. The present case involves the jurisdiction to review a case properly referred to a court-martial, unlike, for example, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), which addressed the question of jurisdiction to try a person by court-martial. In *Toth*, the Supreme Court held that a court-martial may not be convened to try a former servicemember who had no relationship with the military at the time of trial. *Id*. at 23. The present case involves a different question: whether a court-martial conviction, imposed on a servicemember while in military status, is subject to collateral review under the All Writs Act by the court that

approved the conviction. When court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review. *See United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006) (citing cases). In the present case, the court-martial that convicted Appellant had jurisdiction over both the person and the offense. The Court of Criminal Appeals had jurisdiction to review and approve the findings and sentence on direct review. As such, the Court of Criminal Appeals is an appropriate forum to receive and consider a writ of coram nobis that involves a collateral challenge to the court's approval of the findings and sentence.

The Court of Criminal Appeals did not err by reviewing Appellant's petition under the All Writs Act. We consider next whether Appellant's petition meets the criteria for issuance of a writ of error coram nobis.

III. CORAM NOBIS

A writ of error coram nobis requests the court that imposed the judgment to consider exceptional circumstances, such as new facts or legal developments, that may change the result. *See Loving*, 62 M.J. at 252. Appellant's coram nobis petition asked the Court of Criminal Appeals to take corrective action with respect to the findings and sentence that had been approved by the court on direct review. The decision of the Court of Criminal Appeals on a writ petition is subject to appellate review. *See*, *e.g.*, *Dettinger v. United States*, 7 M.J. 216, 222-24 (C.M.A. 1979); C.A.A.F. R. 4.(b)(2); R.C.M. 1204(a) Discussion.

Subsection A discusses the limitations on issuance of a coram nobis writ. Subsection B addresses the application of the threshold limitations to the circumstances of the present appeal. Subsection C considers whether a writ of error coram nobis is necessary or appropriate with respect to Appellant's claim that he was denied his constitutional right to the effective assistance of counsel.

A. LIMITATIONS ON THE AVAILABILITY OF CORAM NOBIS

The Supreme Court, in *Morgan*, 346 U.S. at 511, observed that coram nobis permits "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review," but only under very limited circumstances. Although a petition may be filed at any time without limitation, a petitioner must meet stringent threshold requirements: (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. *See id.* at 512-13; *Loving*, 62 M.J. at 252-53; 28 James Wm. Moore et al., *Moore's Federal Practice* § 672.02[2][c], at 672-43-46 (3d ed. 2007); 3 Charles Alan Wright et al., *Federal Practice and Procedure: Criminal* § 592 (3d ed. 2004); 6 Wayne R. LaFave et al., *Criminal Procedure* § 28.9(a), at 121-22 (2d ed. 2004).

This Court has not previously identified the standards applicable to review of an ineffective assistance of counsel claim raised via a coram nobis petition. At a minimum, such standards must ensure that relief is limited to circumstances in which the requested writ is "necessary or appropriate" within the meaning of the All Writs Act." *Loving v. United States*, 64 M.J. 132, 145 (C.A.A.F. 2006). To implement that admonition, we adopt the two-tiered evaluation used by Article III courts for coram nobis review of ineffective assistance of counsel claims. In the first tier, the petitioner must satisfy the threshold requirements for a writ of coram nobis, as described above. If the petitioner does so, the court then analyzes, in the second tier, the ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). *See*, *e.g.*, *United States v. Bejacmar*, 217 F. App'x 919, 922-23 (11th Cir. 2007) (petitioner did not satisfy coram nobis threshold requirements because he failed to explain why he did not include his ineffective of counsel claim in his prior request for habeas relief); *Evola v. Attorney General of the United States*, 190 F. App'x 171, 174-76 (3d Cir. 2006) (assuming petitioner met coram nobis threshold requirements, the claim failed to demonstrate prejudice under *Strickland*); *United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005) (petitioner satisfied coram nobis threshold requirements and demonstrated that counsel's erroneous advice on immigration consequences of guilty plea was both deficient and prejudicial); *United States v. Castro*, 26 F.3d 557, 559-63 (5th Cir. 1994) (petitioner satisfied coram nobis threshold requirements and his claim that counsel failed to inform him, prior to guilty plea, of opportunity to request a judicial recommendation against deportation remanded to district court for

determination of whether it constituted ineffective assistance of counsel). Because the claim arises under the All Writs Act, the petitioner must establish a clear and indisputable right to the requested relief. *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004).

B. APPLICATION OF THE CORAM NOBIS THRESHOLD CRITERIA

Appellant's writ petition meets the threshold criteria for coram nobis review. First, the alleged error, denial of the Sixth Amendment right to the effective assistance of counsel, is of the most fundamental character. *See*, *e.g.*, *Kwan*, 407 F.3d at 1018; *Castro*, 26 F.3d at 559; *cf. Morgan*, 346 U.S. at 512-13 (coram nobis appropriate to remedy denial of Sixth Amendment right to the assistance of counsel).

Second, there is no other adequate remedy, other than consideration of coram nobis by the Navy-Marine Corps Court of Criminal Appeals, to rectify the consequences of the alleged error. Appellant is not in custody, so he cannot obtain relief through a writ of habeas corpus. *Morgan*, 346 U.S. at 510 (rejecting the contention that the federal habeas corpus statute should be construed "to cover the entire field of remedies in the nature of *coram nobis*").

The pending deportation hearings do not provide Appellant with an adequate remedy. The proper forum for post-conviction review of a court-martial proceeding is a collateral review proceeding, *see* Section II.A., *supra*, not an administrative proceeding in which the proposed agency action is a collateral consequence of the conviction. In an administrative forum addressing the collateral consequences of a conviction, such as deporta-

tion, the hearing officer and any subsequent reviewing court would be obligated to give res judicata effect to the court-martial conviction. *See* Section II.C., *supra*. Because Appellant's claim did not receive full and fair consideration within the military justice system on direct review, an outside court is unlikely to review his writ petition prior to such consideration by the Court of Criminal Appeals, the first-level standing court that approved the findings and sentence at issue, as discussed *supra* in Section II.D.

Third, valid reasons exist for not seeking relief earlier. Appellant's claim is that his counsel misinformed him as to the immigration consequences of his guilty plea and that avoiding deportation was the primary motivation for his guilty plea. His conviction became final when it was affirmed by the Court of Criminal Appeals on February 24, 2000, because Appellant did not seek further review. However, the immigration consequences did not become known to him until the Government initiated deportation proceedings in 2006 and Appellant sought coram nobis relief at the lower court within a few months of being notified of those proceedings.

Fourth, the new information (the immigration consequences) could not have been discovered through the exercise of reasonable diligence prior to the original judgment. Appellant retained civilian counsel to represent his interests in the court-martial proceedings. Assuming, for purposes of the threshold inquiry that his unrebutted allegations are true, he exercised reasonable diligence by retaining counsel, calling counsel's attention to his concern about immigration consequences, and relying on counsel's advice assuring him that he would

not be deported on the basis of a special court-martial conviction.

Fifth, the writ does not seek to reevaluate previously considered evidence or legal issues. The appellate proceedings on direct review did not consider whether Appellant's plea was compromised by misleading advice from counsel.

Sixth, the sentence has been served, but serious consequences persist. The Government, through USCIS, has initiated deportation proceedings that rely primarily on Appellant's court-martial conviction as the basis for deportation.

The threshold criteria establish eligibility for review, not the propriety of the requested writ. We consider next whether the court below erred in denying relief with respect to Appellant's ineffective assistance of counsel claim

C. INEFFECTIVE ASSISTANCE OF COUNSEL

1. *Applicable standards*

A military accused is entitled under the Constitution and Article 27(b), UCMJ, 10 U.S.C. § 827(b) (2000), to the effective assistance of counsel. *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987) (citing *Strickland*, 466 U.S. 668). An accused making a claim of ineffective assistance "must surmount a very high hurdle." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (citation and quotation marks omitted). Courts reviewing such a claim "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The presumption of competence will not be overcome unless the accused demonstrates: first, a defi-

ciency that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment"; and second, that the accused was prejudiced by errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 687) (quotation marks omitted). When challenging the effectiveness of counsel in a guilty plea case, the accused must also "show specifically that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The burden of establishing the truth of factual matters relevant to the claim of ineffective assistance rests with the accused. *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). If there is a factual dispute on a matter pertinent to the claim, the determination as to whether further factfinding will be ordered is resolved under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

2. *Appellant's Claim of Ineffective Assistance of Counsel*

Appellant's Sixth Amendment claim focuses on the advice he received from counsel prior to trial regarding the deportation consequences of a guilty plea. The declaration accompanying Appellant's coram nobis petition states that: (1) he retained Mr. C as civilian counsel to represent him at his court-martial in 1998; (2) he told Mr. C that he was a permanent resident alien who had been living in the United States for fourteen years, that he intended to remain indefinitely, that his primary con-

cern was to avoid the risk of deportation, and that he was more concerned about deportation and separation from his family than the risk of going to jail; (3) Mr. C advised Appellant that if he contested the charges, he would likely face a general court-martial, and that an acquittal would avoid deportation consequences; but a conviction at a general court-martial would constitute a felony that could be used as a basis for deportation; (4) Mr. C further advised him that a special court-martial would constitute a misdemeanor and could not be used as a basis for deportation; (5) Appellant entered into a pretrial agreement that provided for referral of charges to a special court-martial; and (6) Mr. C advised him of the specific words that he would have to use in the plea colloquy to ensure that the military judge did not reject the plea.

With respect to Appellant's plea, we note that there are specialized requirements for a guilty plea in the military justice system. *See* Article 45, UCMJ. The military judge must engage in a specific dialogue with the accused, in which the accused addresses the voluntariness of the plea, describes the factual basis for guilt, and demonstrates an understanding of any pretrial agreement. R.C.M. 910(d)-(f). The record reflects that Appellant had considerable difficulty in acknowledging guilt during the military judge's plea inquiry. The inquiry in Appellant's case extended over a two-day period before the military judge finally accepted the plea.

Appellant was convicted, served his time in confinement, and returned to civilian life. On two occasions, he applied to the Immigration and Naturalization Service for naturalization. On both occasions, his application was rejected, citing his court-martial conviction. Each

time, however, he was informed that the rejection was based on conduct within the five-year period prior to his application and was "without prejudice" to a future application. In neither instance did the Government suggest that he would face deportation.

In late 2006, however, six years after his conviction was affirmed on direct appeal, the Government initiated deportation proceedings against him. The deportation charges filed on October 30, 2006 and April 12, 2007 are based on his 1998 conviction by special court-martial.

Appellant's declaration states that Mr. C's advice regarding deportation consequences was the "decisive factor" in his decision to plead guilty, and that he would have insisted on going to trial had he been advised that a guilty plea could have resulted in deportation. Appellant contends that the deportation proceedings demonstrate that his counsel was ineffective because the very consequence that counsel assured him could be avoided by a guilty plea at a special court-martial is now being pursued by the Government.

An attorney's failure to advise an accused of potential deportation consequences of a guilty plea does not constitute deficient performance under *Strickland*. See, *e.g.*, *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). An affirmative misrepresentation about such consequences, however, can constitute deficient performance, particularly when the client requests the information and identifies the issue as a significant factor in deciding how to plead. *See*, *e.g.*, *Kwan*, 407 F.3d at 1015-16; *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002); *Qiao v. United States*, No. 07 Civ. 3727 (SHS), 98 Cr. 1484 (SHS), 2007 U.S. Dist. LEXIS 87934, at *8, 2007 WL 4105813, at *3 (S.D.N.Y. Nov. 15, 2007); *United*

States v. Khalaf, 116 F. Supp. 2d 210, 217 (D. Mass. 1999); *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995). *But see Commonwealth v. Padilla*, No. 2006-SC-000321-DG, 2008 Ky LEXIS 3, at *7, 2008 WL 199818, at *3 (Ky. Jan. 24, 2008). Although occurring in a different context, the Supreme Court has noted the importance of immigration consequences to a defendant who is considering whether to plead guilty. *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001), *superseded by statute on other grounds*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

To show prejudice from ineffective assistance of counsel in a guilty plea case, an accused must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *Alves*, 53 M.J. at 289. The focus is not on the outcome of a potential trial, but on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59; *cf. id.* at 60 (finding no prejudice where petitioner neither alleged that he would not have pleaded guilty absent counsel's erroneous advice, nor any special circumstances "that might support the conclusion that he placed particular emphasis" on the subject of the erroneous advice).

Appellant, noting that the Government has not rebutted his declaration, asserts that we should treat the matters stated therein as accurate and decide the legal issue of whether his counsel was ineffective. *See Ginn*, 47 M.J. 236. In the current posture of the case, we decline to do so. The case before us is a writ appeal of a decision from the Court of Criminal Appeals, not an original writ petition. At the Court of Criminal Appeals, the Govern-

ment filed a motion to dismiss and reserved the right to file an answer addressing the substance of the petition if ordered to do so by the court. The court below denied the Government's motion to dismiss, but also summarily denied Appellant's petition on the merits without ordering a Government response. As a result, the Government did not have the opportunity before the Court of Criminal Appeals to obtain affidavits from the counsel who represented Appellant at trial and to submit such other matter as might have a bearing on the merits of Appellant's claim.

The court below should not have dismissed Appellant's petition without obtaining and assessing such information. The matter set forth in Appellant's declaration, if true, warranted consideration under *Strickland*, particularly in light of other aspects of the trial and appellate record, including the nature of the providence inquiry, Appellant's apparent belief that he could apply for naturalization without facing deportation consequences, and the subsequent deportation proceedings. Until the Government is required to respond on the merits, however, it would be inappropriate to render a judgment on the merits of his petition. At this stage, Appellant's petition facially establishes a sufficient basis for coram nobis review, but a ruling on his petition would be premature without a Government response, consideration by the Court of Criminal Appeals as to whether counsel's performance was deficient and, if so, whether Appellant was prejudiced thereby. *See United States v. Castro*, 26 F.3d at 563; *Downs-Morgan v. United States*, 765 F.2d 1534, 1541-42 (11th Cir. 1985). In that regard, we note that the high hurdles established in *Strickland* and *Hill*, both of which involved collateral review, establish the appropriate standards for assess-

ing the Sixth Amendment claim in the present case, both in terms of allegations of deficiency and prejudice. *See Khalaf*, 116 F. Supp. 2d at 216 and cases cited therein.

IV. DECISION

Accordingly, we remand Appellant's petition to the United States Navy-Marine Corps Court of Criminal Appeals for further proceedings, where the Government will have the opportunity to obtain affidavits from defense counsel and submit such other matter as the court deems pertinent. The Court of Criminal Appeals will then determine whether the merits of Appellant's petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). The court will determine whether Appellant's counsel rendered deficient performance and, if so, whether such deficiency prejudiced Appellant under *Strickland v. Washington*, 466 U.S. 668 (1984). If prejudice is found, the court shall determine whether the requested relief should be granted.

STUCKY, Judge (dissenting):

I find myself in agreement with many of the points made by Judge Ryan in her able and scholarly dissenting opinion. I consider it established that we have coram nobis jurisdiction in cases in which the jurisdiction of the court-martial is at issue. The extent of our jurisdiction beyond this very limited area is questionable. However, even assuming that we have such jurisdiction, this is not a proper case for coram nobis relief. I would, therefore, deny the petition and do not find it necessary now to determine the extent, if any, of our jurisdiction beyond the circumscribed area set out above. *See*, *e.g.*,

United States v. Tavares, 10 C.M.A. 282, 283, 27 C.M.R. 356, 357 (1959) (assuming without deciding that Court had jurisdiction, "this case presents no grounds for invoking such extraordinary relief").

The majority opinion cites *United States v. Frischholz,* 16 C.M.A. 150, 36 C.M.R. 306 (1966), as authority for exercising jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (2000) after Appellant's conviction became final under Article 76, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 876. *Denedo v. United States*, __ M.J. __ (18) (C.A.A.F. 2008). In *Frischholz*, the government argued that the All Writs Act was intended to apply only to Article III courts and at least implied that our location "for administrative purposes" in the Department of Defense made us something other than a "court" for the purposes of the Act. *Id*. at 308 n.1. This Court properly rejected those arguments, holding that the Act's application to "courts established by Act of Congress" was not limited to courts established by Act of Congress pursuant to Article III of the Constitution. *Id*. at 307-08. However, it is one thing to state that this Court has authority to issue writs under the All Writs Act and quite another to conclude that that authority includes a general mandate to correct errors in cases that are final by means of coram nobis. It is established that a writ issued under the Act must be in aid of this Court's existing jurisdiction and may not be a vehicle for expanding it. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Font v. Seaman*, 20 C.M.A. 387, 390, 43 C.M.R. 227, 230 (1971); *United States v. Snyder*, 18 C.M.A. 480, 482-83, 40 C.M.R. 192, 194-95 (1969).

In *Del Prado v. United States*, 23 C.M.A. 133, 48 C.M.R. 749 (1974), and *Gallagher v. United States*, 22

C.M.A. 191, 46 C.M.R. 191, (1973), we granted relief in cases in which direct review was no longer available or had been completed. However, both of these cases involved fundamental and inherent problems of jurisdiction. In *Del Prado*, the accused was tried by a military judge alone although he had not requested in writing that he be so tried, *Del Prado*, 23 C.M.A. at 133, 48 C.M.R. at 749, while in *Gallagher*, enlisted members sat on the accused's court-martial although he had not personally submitted a written request for enlisted representation.[1] *Gallagher*, 22 C.M.A. at 192, 46 C.M.R. at 192. Of course, a federal court always has jurisdiction to determine its own jurisdiction. *United States v. United Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947); *Mansfield, Coldwater & Lake Michigan Railway Company v. Swan*, 111 U.S. 379, 382 (1884). The expansive statements as to jurisdiction in *Del Prado* and *Gallagher*, particularly the assertion in Gallagher that the filing of a petition alone vests jurisdiction in this Court, 22 C.M.A. at 193, 46 C.M.R. at 193, must be read in that context. Neither *Del Prado* nor *Gallagher* is authority for a general superintendency over cases in which Article 67, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867 (2000), jurisdiction is otherwise absent. *Goldsmith*, 526 U.S. at 536.[2]

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[1] See *United States v. Dean*, 20 C.M.A. 212, 215, 43 C.M.R. 52, 55(1970), and *United States v. White*, 21 C.M.A. 583, 584, 588-89,45 C.M.R. 357, 358, 362-63 (1972), for the jurisdictional nature of those errors.

[2] In *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994), we granted relief in a case in which fundamental jurisdiction was not at issue, based upon an instructional error. However, this case is distinguishable because, although Appellant styled his request for relief as one for coram nobis, he was still in confinement at the time and therefore habeas corpus was

While I consider our authority to grant the requested relief questionable, I need not reach that issue here, because Appellant has not made out a case for relief on the merits. This is not a case in which there existed any fundamental jurisdictional impediment to Appellant's original trial by court-martial, and indeed none is alleged. Rather, what we have here is a case, like many others, in which the complaint is ineffective assistance of counsel. Moreover, the claim of ineffective assistance relates not to the conduct, findings, or sentence of the court-martial, but purely to a collateral consequence thereof.

Appellant asserts that his primary concern in his court-martial was avoiding deportation; that he was erroneously advised by his civilian counsel that a conviction by a special court-martial would not subject him to deportation, but a conviction by a general court-martial would; that he was advised that the Government would take the case to a general court-martial unless he pled guilty; that, in reliance upon this advice, he pled guilty before a special court-martial; that eight years later, the Department of Homeland Security initiated deportation proceedings against him on the basis of the conviction; and that, had he known of the possibility of deportation, he would have pled not guilty and taken his chances with the general court-martial.

Assuming, without deciding, that Appellant's counsel incorrectly advised him as to the state of the law, this alone does not entitle him to coram nobis relief. Deportation is not only a collateral consequence of a court-

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available. *Id.* at 295. We granted sentence relief without stating which prerogative writ was the basis of the action. *Id.* at 297.

martial conviction, but a consequence entirely outside the purview of the armed forces and the system of military justice. As a general rule, this Court has concerned itself with the collateral consequences of court-martial convictions only in very limited circumstances. *United States v. Miller*, 63 M.J. 452, 457 (C.M.A. 2006) (sex offender registration); *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (retirement benefits); *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997) (dependent benefits); *United States v. McElroy*, 40 M.J. 368, 371-72 (C.M.A. 1994) (veterans' benefits); *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (retirement benefits); *United States v. Bedania*, 12 M.J. 373, 374-75 (C.M.A. 1982) (administrative separation resulting from guilty plea). In *Miller*, we established a prospective prophylactive rule that, while not per se ineffective assistance, defense counsel's failure to advise the accused of possible sex offender requirements for offenses to which he is pleading guilty will be "one circumstance this Court will carefully consider in evaluating allegations of ineffective assistance of counsel." *Miller*, 63 M.J. at 459. In *Boyd,* we established a prospective rule requiring military judges to instruct on the effect of a punitive discharge on retirement benefits, if requested by the defense and supported by the evidence. *Boyd*, 55 M.J. at 221.

Coram nobis is an "extraordinary remedy" limited to "errors of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Morgan*, 346 U.S. 502, 509 n.15 (1954) (quotation marks and citation omitted); *United States v. Mayer*, 235 U.S. 55, 69 (1914). In *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit set out four crite-

ria for the issuance of the writ: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) sufficient adverse consequences exist to satisfy the case or controversy requirement; and (4) the error is of the most fundamental character.

The third criterion applies to the Article III courts, not to a court of purely statutory jurisdiction like this one. The second criterion admittedly favors Appellant, since the deportation proceedings were instituted years after the court-martial. However, neither the first nor the last supports the requested relief.

With regard to the first criterion, the lack of a more usual remedy, Appellant has not yet been deported. As a lawful permanent resident, he has a statutory right to notice and a hearing before an immigration judge, as well as appellate rights both within the executive branch and to the Article III courts. Indeed, it appears that Appellant's counsel intends to argue that his special court-martial conviction does not constitute an "aggravated felony" within the meaning of the immigration laws—the very question that is the gravamen of this ineffective assistance of counsel claim. Writ-Appeal Petition at 18, n.11, *Denedo v. United States*, No. 07-8012 (C.A.A.F. Mar. 30, 2007).[3] In any event, the availability of meaningful *direct* review of his immigration proceeding, in the venue and according to the procedures set out by Congress for such matters, significantly undercuts any argument for extraordinary relief in the military justice system.

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[3] If Appellant's conviction is not an "aggravated felony," then it would appear that the advice given by his counsel at the court-martial was legally correct.

The fourth *Hirabayashi* criterion, that the error be of "the most fundamental character," is not met either. There was no jurisdictional defect in Appellant's court-martial; his sole complaint is the alleged ineffective assistance of counsel which admittedly did not manifest itself until years after the court-martial, when the deportation proceeding was instituted. Generally, failure to advise a client in a criminal trial of the potential adverse immigration effects, including deportation, of a guilty plea or conviction has not been held to constitute ineffective assistance of counsel. This is because deportation, or other immigration consequences, are collateral to the criminal conviction and are thus not covered by the Sixth Amendment in the criminal context. *See*, *e.g.*, *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7th Cir. 1989), *superseded by statute on other grounds*, Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 5050 (1990), *as recognized in Rodriguez v. United States*, No. 92-3163, 1995 U.S. App. LEXIS 7920, at *3, 1995 WL 156669, at *1 (7th Cir. Apr. 6, 1995); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Gavilan*, 761 F.2d 226, 228-29 (5th Cir. 1985). The 1996 amendments to the Immigration and Nationality Act relating to "aggravated felonies" did not change the collateral nature of immigration proceedings. *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002); *United States v. Armador-Leal*, 276 F.3d 511, 513 (9th Cir. 2002); *United States v. Gonzalez*, 202 F.3d 20, 26-27 (1st Cir. 2000).

Appellant, relying on *United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005) and *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002), attempts to draw

a distinction between *failure* to advise as to the potential immigration consequences of a conviction and *incorrect* advice on the subject. But a defendant in a criminal trial who alleges ineffective assistance of counsel must show more than incorrect advice; he must show prejudice. To meet this standard, he must show that, absent the errors, the outcome of the trial would have been different, and that the result of the trial was fundamentally unfair or unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). Here, all we are presented with is the bald assertion that, had the advice been correct, Appellant would not have pled guilty, but would have taken his chances before a general court-martial, where a conviction would have exposed him to a considerably harsher sentence and, in any event, still would have subjected him to deportation. This is insufficient. *Parry v. Rosemeyer*, 64 F.3d 110, 118 (3d Cir. 1995); *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994); *Key v. United States*, 806 F.2d 133, 139 (7th Cir. 1986); *see also State v. Sabillon*, 622 S.E.2d 846, 848-49 (2005). It is questionable whether Appellant has even made out a case for prejudice under applicable ineffective assistance of counsel law; in any event, he has not met the far higher standard—error "of the most fundamental character"—necessary for coram nobis relief.[4]

I respectfully dissent.

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[4] Whether any nonjurisdictional error can meet the "fundamental character" standard is a question that need not be reached in this case. I am satisfied that on these facts, Appellant has not met that standard.

RYAN, Judge (dissenting):

"Courts created by statute can have no jurisdiction but such as the statute confers." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (quoting *Sheldon v. Sill*, 49 U.S. 441, 449 (1850)). There is no statutory basis for jurisdiction in this Court in this case: The petitioner is a civilian, lawfully discharged from military service pursuant to a court-martial conviction. And the case has been final, for purposes of both Articles 71 and 76, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 871, 876 (2005), for seven years. Indeed, the statutory limits of this Court's jurisdiction are precisely to the contrary. *See* Articles 2, 3, 66, 67, 73, and 76, UCMJ, 10 U.S.C. §§ 802, 803, 866, 867, 873, 876 (2005).

Although we have no jurisdiction over Denedo and final cases fall outside our statutory mandate, the majority nonetheless concludes today that this Court has jurisdiction. This is perplexing. In addition to being contrary to the statutory scheme, this Court's assertion of jurisdiction flies in the face of Supreme Court precedent, the decisions of at least two federal circuit courts of appeal, and the position, for the past fifty-seven years, of the solicitors general of the United States as agents of the President, commander in chief of the armed forces. *See Solorio v. United States*, 483 U.S. 435, 439-40 (1987) (recognizing that military jurisdiction is tied to military status, i.e., U.S. Const. art. I, § 8, cl. 14—a person within the "land and naval Forces"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14-15 (1955) (holding that Article I military jurisdiction could not be "extended to civilian ex-soldiers who had severed all relationship with the military and its institutions");

Gusik v. Schilder, 340 U.S. 128, 132 (1950) (interpreting the predecessor to Article 76—Article 53 of the Articles of War, 62 Stat. 639, 10 U.S.C. § 1525 (1950)—and concluding that finality "describe[es] the terminal point for proceedings within the court-martial system"); *see also Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004) (stating that "neither the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts"); *Gilliam v. Bureau of Prisons*, No. 99-1222, 2000 U.S. App. LEXIS 3684, at *4, 2000 WL 2684919, at *2, (8th Cir. Mar. 10, 2000) ("Unlike the practice in the United States Circuit Courts of Appeal and District Courts, neither the UCMJ . . . nor the Manual for Courts-Martial . . . provides procedures for collateral, post-conviction attacks on guilty verdicts.") (quoting *United States v. Murphy*, 50 M.J. 4, 5 (C.A.A.F. 1998) (quotation marks omitted)); Brief for Petitioners on the Jurisdictional Issues at 7, *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (No. 73-662) (stating that the legislative history of Article 76, UCMJ shows that Article III court collateral review was expected to be "the sole exception to the finality of actions within the military court system"); Brief for Respondent at 3-4, *Gusik*, 340 U.S. 128 (No. 110) (stating that the exception to finality for a motion for new trial in the Articles of War provided the sole collateral remedy within the courts-martial system). I agree with the Supreme Court, the Sixth and Eighth Circuits, the solicitors general, and the Government's position in this case: we have no jurisdiction over a discharged civilian's case that is final under Article 76, UCMJ.

The majority conclusorily asserts that it has jurisdiction, grounded in the fact that Denedo was once in the

military, and his case once fell within the statutory jurisdiction of the military justice system. *See Denedo v. United States*, __ M.J. __ (10) (C.A.A.F. 2008) ("The existing statutory jurisdiction of the Navy-Marine Corps Court of Criminal Appeals includes cases such as Appellant's, in which the sentence extends to a punitive discharge."). It does not explain how jurisdiction follows in this case. As the Supreme Court reminded this Court not so very long ago, we are "not given authority, by the All Writs Act [28 U.S.C. § 1651(a) (2000)] or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments [we have] affirmed." *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999).

It is unclear to me why the Court charts this course today. Denedo's claim—ineffective assistance of counsel, based on newly discovered evidence, after his case is final under Article 76, UCMJ—would be cognizable immediately in federal court but for this Court's refusal to state that it lacks jurisdiction. *Massaro v. United States*, 538 U.S. 500, 504 (2003) (stating that ineffective assistance may be raised on collateral review irrespective of whether petition could have raised it on direct appeal); *Dobbs v. Zant*, 506 U.S. 357, 358-60 (1993) (holding that courts should consider newly discovered evidence regarding ineffective assistance of counsel on collateral review). I do not question that the military justice system can fairly assess Denedo's claim. But the majority's suggestion that the military system is somehow better able to assess his claim in this case, a fact-bound question involving a civilian and a civilian attorney and grounded in part in assessment of immigration law, is unfounded.

I. *Absent Jurisdiction No Writ May Issue*

The Court provides relief today by remanding the case for additional action by the Court of Criminal Appeals (CCA), in reliance on the All Writs Act. But in the absence of jurisdiction, a writ may not issue. *Marbury v. Madison*, 5 U.S. 137, 173 (1803). Most recently the Supreme Court reaffirmed this longstanding principle as it relates to the jurisdiction of this Court, stating that, "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Goldsmith*, 526 U.S. at 534-35. The All Writs Act is a mechanism for exercising power a court already has. The starting point of the analysis must always be whether a court has jurisdiction before proceeding to the question whether a writ should issue. *See* 28 U.S.C. § 1651(a) (2000).

This Court, as a legislatively created Article I court, is a court of limited jurisdiction. Our limited powers are defined entirely by statute. *See generally* Articles 2-3, 66-76, UCMJ, 10 U.S.C. §§ 802-03, 866-76 (2005). Despite the majority's holding to the contrary, under those Articles no jurisdiction exists in this case.

A. This Court Does Not Have Jurisdiction Over Discharged Civilians Who Have Severed Their Connection With the Military

Article I, § 8, cl. 14 of the U.S. Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." Articles 2 and 3, UCMJ, reflect the considered judgment of Congress as to those classes of persons who fall within that constitutional grant. Article 2, UCMJ, delineates jurisdiction

over "[p]ersons subject to this chapter." Persons discharged from the armed forces, other than retired members under Article 2(a)(4) and (5), UCMJ, or persons in custody of the armed forces serving a sentence imposed by court-martial under Article 2(a)(7), UCMJ, are not included within Article 2, UCMJ. Article 3, UCMJ, entitled "[j]urisdiction to try certain personnel," sets forth, *inter alia*, the limited circumstance in which a discharged servicemember is not relieved from military jurisdiction: a person charged with fraudulently obtaining his discharge or who has deserted.[1] Article 3(b) and (c), UCMJ. Articles 2 and 3, UCMJ, are consonant with the considered view that the military justice system does not have jurisdiction over civilians, and that there is a military community, a civilian community, and "no third class which is part civil and part military." William Winthrop, *Military Law and Precedents* 106 (2d. ed. 1920).

The Supreme Court has not hesitated to invalidate any efforts by Congress or the military to sweep civilians unattached to a military unit within the jurisdiction of the military justice system. *See*, *e.g.*, *McElroy v. United States ex rel Guagliardo*, 361 U.S. 281, 284-87 (1960) (holding that a provision of the UCMJ extending jurisdiction to persons accompanying the armed forces outside the continental limits of the United States could not be constitutionally applied to civilian employees in time of peace); *Reid v. Covert*, 354 U.S. 1, 30-35 (1957) (invalidating the same provision as applied to civilian dependents of members of the armed forces in time of peace); *Toth*, 350 U.S. at 14 (recognizing that Article I military jurisdiction could not be "extended to civilian

[1] Article 3(a), UCMJ, relates to persons currently in a status covered by Article 2, UCMJ.

ex-soldiers who had severed all relationship with the military and its institutions"). I fear that today the majority invites the Supreme Court to issue another decision reaffirming the holdings of this line of cases.

B. Denedo is a Civilian Who Has Severed All Relationship With the Military

Denedo is a *former* servicemember lawfully discharged from military service pursuant to a court-martial conviction. He has no current relationship with the military—at least no more of a relationship than any other civilian who was formerly in the military might have if he had filed a writ of coram nobis here—which is to say, no legally cognizable relationship with the military justice system under the UCMJ.

The majority acknowledges that Denedo was discharged from the Navy on May 30, 2000. On that day, the bad-conduct discharge adjudged at his court martial and approved by the convening authority was effective, and Denedo was a civilian, completely detached from the military and the military justice system. And, as stated above, Article 2, UCMJ does not provide jurisdiction over military personnel who have been discharged from the military service and have no remaining connection to the military. *Toth*, 350 U.S. at 14 ("[i]t has never been intimated by [the Supreme] Court . . . that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions"). It is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute. The majority opinion fails to explain how we have jurisdiction over Denedo, given his discharge.

C. Collateral Review is Outside Article 67, UCMJ

Article 67, UCMJ, provides jurisdiction for this Court to "review the record" in specified cases reviewed by the CCA. The fact that Denedo's case was such a case is a truism that provides no legal authority or logical support for collateral review now that his case is final. The majority's reasoning from true premises to unrelated conclusions without statutory or other authority is unsound.

Moreover, it is not at all clear how Article 66 or 67, UCMJ, supports an assertion of jurisdiction to conduct collateral review. The CCAs have jurisdiction to act on "the findings and sentence as approved by the convening authority." Article 66(c), UCMJ. In undertaking this review, a CCA may only affirm such parts of the findings and sentence "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Id*. While reasonable minds may differ as to what is included in "the record," matters that have not been reviewed by the convening authority are not part of the record of trial, and therefore are unreviewable by the CCA or this Court. *See United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (discussing what constitutes the "entire record" for purposes of Article 66(c), UCMJ, review).

Articles 66 and 67, UCMJ are statutes governing direct review of courts-martial[2] because the jurisdic-

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[2] This does not rule out jurisdiction in the limited exception recognized by the Supreme Court in *Goldsmith*, 526 U.S. at 536 to "compel adherence to its own judgment." *See also United States v. United States District Court*, 334 U.S. 258, 263-64 (1948) (discussing the power of federal courts of appeals to issue mandamus). And, as always, a court may question whether its initial judgment was void in the first

tional grants under Articles 66 and 67, UCMJ are tied to "the record." *See Beatty*, 64 M.J. at 458. It is not surprising that collateral review is not provided for within those statutes. Collateral review most often requires, by its terms, development and consideration of something outside "the record." *See Parke v. Raley*, 506 U.S. 20, 30 (1992) (citing *Black's Law Dictionary* 261 (6th ed. 1990)); *see also* John McKee VanFleet, *The Law of Collateral Attack on Judicial Proceedings* 5-6 (1892) (defining a collateral attack).

In those instances where cases on direct review require additional fact finding, we have an unwieldy and imperfect system in place to facilitate inclusion of those facts in the record: new factual matters must be developed at a court-martial, revisited by the convening authority, and "included" in the record for review.[3] *United States v. DuBay*, 17 C.M.A. 147, 149; 37 C.M.R. 411, 413 (1967). Additional awkward constructs were created to determine the threshold question whether additional facts were needed. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). But the fact that these procedures may apply on direct review is not relevant to whether this Court has the power to employ them on collateral review. Moreover, it is untenable to suggest that jurisdiction for collateral review of final cases is *clear* under Articles 66 and 67, UCMJ, in instances where collateral

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instance for want of jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers*, 330 U.S. 258, 291(1947)).

[3] The permutations and legal gymnastics necessary to bring cases on direct review within our statutory grant in the limited circumstances where new facts must be brought within "the record" are challenging enough for any justice system.

review of the issue necessarily requires the development of facts outside the statutory grant. And this Court has no mechanism for doing so. *See United States v. Walters*, 45 M.J. 165, 167 (C.A.A.F. 1996) (Cox, C.J., and Sentelle, J., United States Court of Appeals for the District of Columbia, sitting by designation, concurring in the result) (urging "the Joint-Service Committee on Military Justice to consider and recommend to the President a procedure by which collateral attacks on courts-martial might be litigated").[4] There is no mention of, and thus no provision for, post-finality collateral review anywhere within Article 66 or 67, UCMJ.

D. Denedo Seeks Collateral Review

In this case Denedo filed a writ coram nobis at the CCA seeking to challenge his court-martial conviction on the grounds that his Sixth Amendment right to counsel was violated because his counsel was ineffective. Denedo alleges that his civilian counsel told him that if he pled guilty he would not be deported. He alleges that he recently discovered that this was not true. Obviously, this privileged conversation was not included in the record of trial. For Denedo to have any hope of prevailing, evidence extrinsic to the record must be developed. *See Massaro*, 538 U.S. at 505 (stating the advantages of collateral review in developing the factual predicate for an ineffective assistance of counsel claim); *see also DuBay*,

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[4] Chief Judge Cox's observation is relevant to this case. I note that military counsel has entered an appearance before this Court on behalf of Denedo. I question whether, under the reasoning of the majority opinion, Article 70(a) and (c), UCMJ, would require that Denedo, and all other similarly situated litigants whose cases are final, be afforded military counsel as their cases proceed.

17 C.M.A. at 149, 37 C.M.R. at 413. As the case is final, and no convening authority or court-martial has jurisdiction over a discharged servicemember, we have no mechanism for developing these extrinsic facts.[5]

II. *The Effect of Finality Under Article 76, UCMJ*

In addition to lacking statutory jurisdiction over a civilian's writ seeking collateral review of a court-martial, today the Court acts on a case that has been "final" for seven years.

Denedo's bad-conduct discharge was capable of execution on May 30, 2000, because appellate review was completed and the findings and sentence were approved, reviewed, and affirmed as required by the UCMJ. Execution of the bad-conduct discharge returned Denedo to civilian status. Completion of appellate review also meant his case was "final" for purposes of Article 76, UCMJ. *See* Rule for Courts-Martial (R.C.M.) 1209. As expressed in Article 76, UCMJ, this means the same proceedings, findings, and sentence Denedo complains of here are "final and conclusive" within the court-martial system, subject to specific exceptions.

Article 76, UCMJ, states that:

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or

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[5] Even if the CCA or this Court acts on Denedo's claims of ineffective assistance of counsel, it is unclear how that necessarily grants the relief he truly requests. He wishes to stop the deportation proceedings that stem from his conviction. But neither this Court nor the CCA has the power to prevent the Department of Homeland Security, Immigration and Customs Enforcement division, from exercising its deportation powers.

> affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are *final and conclusive*. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, *subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74)*, and the authority of the President.

(emphases added).

The language of the statute suggests that once appellate review is complete, the findings and sentence are "final and conclusive," subject only to action upon a petition for a new trial pursuant to Article 73, UCMJ, remission and suspension actions by the service secretaries, pursuant to Article 74, UCMJ, or presidential action.[6] No exception is listed for writs of coram nobis or other collateral review.

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[6] Despite this clear statutory limitation the majority cites *United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006), for the proposition that "[w]hen court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review." *Denedo*, ___ M.J. ___ (25). In *Davis*, unlike the current case, direct review had not been completed; therefore the case was not yet final. 63 M.J. at 176. Nothing in *Davis* or the cases cited therein serves as precedent for the concept that there is "continuing jurisdiction" over cases that are final under Article 76, UCMJ.

A. Finality Does Not Preclude Collateral Review by Article III Courts

It was soon recognized that applying the literal language of Article 76, UCMJ, raised constitutional concerns because it would, implicitly, conflict with the Suspension Clause. *See* U.S. Const. art. I, § 9, cl. 2; *Schlesinger v. Councilman*, 420 U.S. at 751. Consequently the Supreme Court interpreted the finality provision to not deprive Article III courts of collateral review authority. But the Supreme Court did note that Article 76, UCMJ, "describe[s] the terminal point for proceedings within the court-martial system." *Schlesinger*, 420 U.S. at 750 (quoting *Gusik*, 340 U.S. at 132). And no one suggests that the Court of Appeals of the Armed Forces is not part of the "court-martial system." *See* Article 67, UCMJ (describing this Court's subject-matter jurisdiction over courts-martial).

Instead of taking the Supreme Court's opinion in *Schlesinger* at face value, the majority claims it supports the proposition that Article 76, UCMJ, is merely a "prudential bar" to review of final decisions. This is clearly so for an Article III court. But the majority does not recognize that there is a difference between what is "prudential" for an Article III court, and what is a statutory directive for an Article I, legislatively created court. While an Article III court may, if it wishes, step into the breach whenever constitutional justiciability requirements are satisfied, this Court is limited to acting only when our statutory grant so allows. *Goldsmith*, 526 U.S. at 535.

Schlesinger is not to the contrary. The statutory framework, as drafted by Congress, signed into law by the President, and interpreted by the Supreme Court,

counsels that we yield to the Article III courts once we have reached the "terminal point," as described by the finality provision in Article 76, UCMJ. That collateral review is so circumscribed is neither surprising nor unjust given the reality that, where a case is final for purposes of Article 76, UCMJ, the individual will almost certainly no longer be a servicemember.[7]

B. Ignoring the Effect of Article 76, UCMJ, Eviscerates the Statutory Scheme

The majority cites the text of Article 76, UCMJ, but avoids discussing the specific exceptions to finality listed therein. Having avoided the listed exceptions, it suggests that Article 76, UCMJ, is wholly "prudential" for both Article I and Article III courts. Given the holdings of the Supreme Court and the language of the statute, this interpretation is perplexing. The only exception to Article 76, UCMJ, finality recognized by the Supreme Court is Article III collateral review—i.e., review outside the military justice system. *Schlesinger*, 420 U.S. at 749. And the only exceptions to finality contained within Article 76, UCMJ, itself are petitions for a new trial under Article 73, UCMJ, remission or suspension under Article 74, UCMJ, or presidential action.

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[7] That Article 76, UCMJ, is bypassed by the majority as irrelevant to jurisdiction is surprising. Two years ago this Court, in response to the Government's argument that the Court did not have jurisdiction because a case was final, did not say that finality was irrelevant to its review. *Loving v. United States*, 62 M.J. 235, 240-45 (C.A.A.F. 2006). Instead, it went through a lengthy analysis to explain why the case was not, in fact, final under Article 76, UCMJ, although it ultimately concluded that it need not address whether this Court has jurisdiction after a case is final. *Id*.

Article 73, UCMJ, allows for collateral review within two years of convening authority action. Tellingly, this "special post-conviction remedy," *Burns v. Wilson*, 346 U.S. 137, 141 (1953), is vested not in this Court, but in the judge advocates general of each branch unless the case is pending before this Court or the CCA at the time the petition is made. An Article 73, UCMJ, petition for new trial, is the sole statutory provision for collateral review of final judgments by a court within our system. *See* Article 76, UCMJ. The decisions of at least two federal courts of appeal confirm this point, and today's decision creates a circuit split. *See Witham*, 355 F.3d at 505; *Gilliam*, 2000 U.S. App. LEXIS 3684, at *5, 2000 WL 268491, at *2. The position of these courts is consistent with the position of the solicitors general of the United States in *Gusik* and *Schlesinger*. Brief for Petitioners on the Jurisdictional Issues at 7, *Schlesinger*, 420 U.S. 738 (No. 73662); Brief for Respondent at 3-4, *Gusik*, 340 U.S. 128 (No. 110).

The majority opinion's contrary interpretation ignores both the language of the statute and the statutory limitations placed on claims for a new trial. Denedo's claim is nothing more than a petition for a new trial, dressed up as a writ of coram nobis.[8] For this Court to

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[8] A writ coram nobis must be directed at the court that issued the decision. *Lowery v. McCaughtry*, 954 F.2d 422, 423 (7th Cir. 1992); *see generally* Abraham L. Freedman, The Writ of Error Coram Nobis, 3 Temple L.Q. 365 (1929); Note, 37 Harv. L. Rev. 744 (1924). Because we do not have standing courts, the military justice system appears ill-suited to this form of relief, as this Court recently acknowledged. *See Loving*, 62 M.J. at 251-55. The majority's attempt to transmogrify the CCA into a trial court for the purpose of the analysis in this case is unfounded. The CCA is in no better position to rule on a writ coram nobis than the federal courts or we are. None were the original trial court.

permit a petition for a new trial to escape the statutory limitations placed upon it by Congress and allow this petition to proceed as a writ of coram nobis eviscerates Article 73, UCMJ, and renders Article 76, UCMJ's, finality provision meaningless. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

Today's decision is disturbing. By asserting it can act on a final case involving a person who is not within Article 2, UCMJ, and ignoring the clear language of the statutory scheme, the Court effectively asserts that it can review any case, at any time. There is now no terminal point for this Court's jurisdiction.

III. *Clinton v. Goldsmith Redux?*

The justification for today's opinion rests on tautologies, such as "Congress enacted the UCMJ under its power to regulate the armed forces," and "the military is an institution with distinct traditions and disciplinary concerns." These are truisms, and thus no doubt true. Of course, it is also true that Denedo is lawfully discharged from the military and that the Constitution only grants Congress the power, vis-à-vis this Court, to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14.

But the majority's justification is troubling not so much because it is misplaced, but because it is highly reminiscent of the position of this Court prior to the Supreme Court's decision in *Clinton v. Goldsmith*. At that time this Court, without statutory authority, asserted it

had collateral review power over cases that were final.[9] *Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994); *Del Prado v. United States*, 23 C.M.A. 132, 13334, 48 C.M.R. 748, 749-50 (1974); *United States v. Frischholz*, 16 C.M.A. 150, 151-53, 36 C.M.R. 306, 307-09 (1966).

It was upon those decisions, and the analysis that underlay them, that this Court's decision in *Goldsmith* rested. *See*, *e.g.*, *Goldsmith v. Clinton*, 48 M.J. 84, 86 n.3 (C.A.A.F. 1998) (citing *Frischholz*, 16 C.M.A. at 151-52, 36 C.M.R. at 308 (stating that Article 67, UCMJ, does not describe the full powers of this Court; rather, the Court also possesses incidental powers as part of its responsibility under the UCMJ to protect the constitutional rights of members of the armed forces), and *Gale v. United States*, 17 C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967) (stating that Congress intended to grant this Court "supervisory power over the administration of military justice")). Those decisions, contrary to the well-established principle of expressly limited jurisdiction of Article I courts, were based on the notion that this Court had plenary power over the administration of military justice and all things over which it once had jurisdiction. *See Goldsmith*, 48 M.J. at 86-87 (stating

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[9] *Goldsmith* was a final case heard on collateral review. 526 U.S. at 532-33. While the Supreme Court could have decided *Goldsmith* based on finality, that issue was not raised, and it decided the case based on an arguably more important jurisdictional theory—that this Court does not have plenary power over everyone and everything that has, at some point, touched the military justice system. *Id*. at 536. Applying the logic of the Court's opinion in *Goldsmith*— a strict interpretation of this Court's legislative grant of authority—to Articles 2, 67, and 76, UCMJ, yields a result opposite to the conclusion reached by the majority in this case.

that "Congress intended for this Court to have broad responsibility with respect to the administration of military justice"). Given that this analytic framework was expressly rejected by the Supreme Court when it reversed our decision in *Goldsmith*, it is both significant and surprising that the majority relies upon these cases today.

When the Supreme Court overturned this Court's *Goldsmith* opinion, it made it clear that this Court occupied only a small plot of the judicial landscape, and that that plot was circumscribed by statute. *Goldsmith*, 526 U.S. at 533-35. Inexplicably, this Court appears determined not to heed the Supreme Court's unequivocal directive that it stay squarely within the express limits of statutory jurisdiction.[10]

IV. *Denedo's Claims Are Not Uniquely Military in Nature, and Collateral Review is Not Foreclosed in an Article III Court*

Today's decision is particularly odd given the facts of this case. The majority appears to argue that this Court must review Denedo's case because it involves unique aspects of military justice. If we do not review, the argument goes, no one can or will. This logic is flawed, as both premises are unsound.

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[10] The majority's reliance on footnote eleven of *Goldsmith* is misplaced. There, the Supreme Court cited, *inter alia*, *Noyd v. Bond*, 395 U.S. 683, 693-99 (1969), and *Burns v. Wilson*, 346 U.S. at 142, for the proposition that once a servicemember had exhausted his military remedies, final decisions of the military justice system could be collaterally reviewed under 28 U.S.C. §2241(c) (2000), by Article III courts. In *Goldsmith*, the Supreme Court said nothing about collateral review of final judgments by this Court after a petitioner had exhausted the remedies outlined in Article 76, UCMJ.

First, there is nothing uniquely military about this case. While this case, or any case for that matter, can be cloaked in military justice rhetoric, this is essentially a garden variety claim of ineffective assistance of counsel, coupled with an argument regarding an immigration problem.

Denedo, who is a civilian, claims he could not have raised his Sixth Amendment claim before now. This constitutional claim is grounded in conversations that transpired between Denedo and his civilian defense counsel and the intricacies of federal immigration law. Neither this Court nor the CCA has a record of Denedo's conversation with his civilian lawyer, special knowledge beyond that of an Article III court of the myriad ways to prove ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), or any expertise with respect to immigration law. There is no colorable argument that this Court is in a better position to review this claim than an Article III court.

Nor is it correct that this Court is the sole option on collateral review if the correct standard is applied. The fact that this Court had not weighed in on Denedo's claim would not have been dispositive of whether an Article III court would address the merits of his claim, because he claims that he only recently learned of violation of his constitutional rights, *i.e.*, after direct review was completed. *Roberts v. Callahan*, 321 F.3d 994, 995 (10th Cir. 2003) (citing *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1993)) (stating that there is an exception to exhaustion and waiver requirements on collateral review when the petitioner can show actual prejudice and good cause why the petition had not been previously brought);

Hatheway v. Sec'y of Army, 641 F.2d 1376, 1380 (9th Cir. 1981), *abrogated on other grounds by High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (Article III courts will collaterally review a final court martial when the military courts have not given "full and fair consideration" to the petitioner's claim); *Calley v. Callaway*, 519 F.2d 184, 203 (5th Cir. 1975) ("Military court-martial convictions are subject to collateral review by federal civil courts . . . where . . . exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice."). A federal court may or may not determine that Denedo's claim constitutes a serious constitutional claim warranting collateral review of a final judgment. *See Matias v. United States*, 923 F.2d. 821, 825 (Fed. Cir. 1990). But if it determines review is warranted, there is nothing to prevent its review or development of facts *not* resolved by military courts because they arose after the case was final and the military justice system had no jurisdiction under the UCMJ.

The majority's discussion of the collateral review exhaustion requirement ignores the point that the exhaustion problem is one that it creates today. The majority opinion relies on four federal district court cases for the proposition that an Article III Court will not entertain Denedo's writ. *Tatum v. United States*, No. RDB-06-2307, 2007 U.S. Dist. LEXIS 61947, at *12-*13, 2007 WL 2316275 at *7 (D. Md. Aug. 7, 2007); *Fricke v. Sec'y of the Navy*, No. 03-3412-RDR, 2006 U.S. Dist. LEXIS 36548, at *9-*14, 2006 WL 1580979 at *2-*5 (D. Kan. June 5, 2006); *MacLean v. United States*, No. 02-CV-2250-K, 2003 U.S. Dist. LEXIS 27219, at *13-*15 (S.D. Cal. June 6, 2003); *Parker v. Tillery*, No. 95-3342-RDR, 1998 U.S. Dist. LEXIS 8399, at *3*5, 1998

WL 295574 at *1-*2 (D. Kan. May 22, 1998). But none of those cases addresses evidence discovered after the petitioner's case was final, and each assumes that the petitioner could have brought an extraordinary writ in the military justice system. If this Court had held that no jurisdiction exists over either a civilian with no relationship to the military or a case once it is final under Article 76, UCMJ, Denedo would have been able to file his claim in an Article III court without fear of a dismissal based on exhaustion.

V. *Conclusion*

There is no question that Congress intended this Court to be the final court of review within the military justice system and to review those cases and matters it placed within our limited grant of jurisdiction. Those judgments are entitled to deference by the Article III Courts, which generally will not conduct de novo review of claims we have considered or permit collateral review of questions of fact we resolved. *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 409 (D.C. Cir. 2006); *Witham*, 355 F.3d at 505; *McElhaney v. Erker*, 98 Fed. Appx. 417, 418 (6th Cir. 2004); *Roberts*, 321 F.3d at 995; *Brosius v. Warden*, 278 F.3d 239, 245 (3d Cir. 2002); *Matias*, 923 F.2d. at 826; *Hatheway*, 641 F.2d at 1379; *Allen v. VanCantfort*, 436 F.2d 625, 629 (1st Cir. 1971); *Harris v. Ciccone*, 417 F.2d 479, 481 (8th Cir. 1969); *see also* 129 Cong. Rec. 24, 34,312-13 (1983).

But the statutory scheme does not permit this Court to exercise jurisdiction over a civilian's case that is final, in derogation of Articles 2, 67, 69, 73, and 76, UCMJ, and in the absence of a specific legislative grant of authority. On the contrary, the scheme suggests that in the absence of a military remedy, a petitioner may seek

relief from an Article III court. As the statutory scheme does not confer jurisdiction over a civilian who has severed all connection to the military or allow for review once a decision is final under Article 76, UCMJ, I believe the Court should dismiss Denedo's petition, thereby allowing him to pursue his claim in an Article III court.[11] "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts." *Reid*, 354 U.S. at 21. Today we encroach on Article III jurisdiction without reason.

I respectfully dissent.

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[11] Because I conclude that the Court does not have jurisdiction, I would not reach the substantive issue in this case. I do note, however, that the majority appears to ignore the most recent precedent on the intersection of ineffective assistance of counsel and the collateral consequences of a court-martial, *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006), as well as precedents that are contrary to *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005). *See Jiminez v. United States*, 154 Fed. Appx. 540, 541 (7th Cir. 2005); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004); *United States v. Gonzalez*, 202 F.3d 20, 25-28 (1st Cir. 2000).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Misc. Dkt. No. 07-8012/NA
Crim. App. Dkt. No. 99-00680

JACOB DENEDO, APPELLANT

v.

UNITED STATES, APPELLEE

ORDER

On consideration of Appellee's petition for reconsideration of this Court's decision, 66 M.J. 114 (C.A.A.F. 2008), it is, by the Court, this 4th day of April, 2008,

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (FREEDUS, Esq.)
Appellate Government Counsel (KELLER)

APPENDIX C

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

NMCCA No. 9900680

JACOB DENEDO 7347 MESS MANAGEMENT SPECIALIST SECOND CLASS (E5) U.S. NAVY, PETITIONER

v.

UNITED STATES, RESPONDENT

Apr. 15, 2002

PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF ERROR CORAM NOBIS

ORDER

On 12 March 2007 the appellant filed a Petition for Writ of Error *Coram Nobis*, the supporting brief, and a Motion to Attach. The Government filed a combined Motion for Leave and Motion to Dismiss Petition for Writ of Error *Coram Nobis* on 15 March 2007. The petitioner filed an Opposition to Motion to Dismiss Petition for Writ of Error *Coram Nobis* on 19 March 2007. Having considered the pleadings of the parties, it is, by the Court, this 26th day of March 2007,

ORDERED:

1. That the petitioner's Motion to Attach is granted.

2. That the Government's Motion for Leave is granted.

3. That the Government's Motion to Dismiss is denied.

4. That the Petition for Extraordinary Relief is denied.

For the Court

R.H. TROIDL
Clerk of Court
15 April 2002

Copy to:
NMCCA (72)
Matthew Freedus (Fax 202-293-8103)
45 (LT Mizer)
46 (LCDR Bunge)
02

[Seal Omitted]

APPENDIX D

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

NMCM 99 00680

UNITED STATES

v.

JACOB DENEDO, MESS MANAGEMENT SPECIALIST
SECOND CLASS (E-5), U.S. NAVY

Decided: Feb. 24, 2000

BEFORE: R.B. LEO, D.A. ANDERSON, K.J. NAUGLE

Sentence adjudged 15 July 1998. Military Judge: G.E. Champagne. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS John F. Kennedy (CV 67).

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a miliary judge sitting as a special court-martial of conspiracy and larceny, in violation of Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921 (1994). He was awarded a bad-conduct

discharge, confinement for three months, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the single assignment of error[1] raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and the Government's response. After careful consideration, we conclude the findings and sentence to be correct in law and fact and find no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. Specially, we find the sentence is not inappropriately severe.

Background

The appellant conspired to steal money from Bethune-Cookman College (BCC) in Florida with a co-conspirator who apparently worked in the accounting department of that educational facility. The larceny was accomplished by the co-conspirator stealing checks from that facility, having forged endorsements inscribed, and negotiating the stolen forged checks through the appellant's credit union account. In this manner, 15 checks totaling $28,068.50 drawn on BCC's account were deposited into the appellant's account during December 1997. Thereafter, he withdrew the funds and disbursed the ill-gotten proceeds to his co-conspirator, keeping some portion for himself. There is some evidence that the appellant may have made restitution of some portion of the $28,068.50 to BCC. Prior to this criminal behavior, the appellant had a superior military record and remained well thought of by his supervisors even after the crime

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[1] THE SENTENCE IS INAPPROPRIATELY SEVERE FOR APPELLANT'S RELATIVE MINOR OFFENSES.

came to light. The co-conspirator is not a miliary member and apparently had not been prosecuted by civil authorities at the time of the appellant's court-martial.

Inappropriately Servere Sentence

A court-martial is free to impose any legal sentence that it determines is appropriate. *United States v. Turner*, 14 C.M.A. 435, 437, 34 C.M.R. 215, 217 (1964). We may not affirm a sentence, however, that we are not convinced is appropriate. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c) (1994). Sentence appropriateness involves the judicial function of ensuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1998).

We are fully mindful of appellant's prior honorable service, deployments, and his expressed contrition during his unsworn statement to the court below. However, these matters were considered by the military judge who imposed the sentence. They were also considered by the convening authority who acted on that sentence following his own review, consideration of the record, and contemplation of the sentence limitation portion of the pretrial agreement provisions negotiated by appellant, which in this case extended only to referral to a special court-martial.

We believe that this assignment of error is nothing more than a request for clemency. We determine sentence appropriateness, and not matters of clemency. Clemency, which involves bestowing mercy, is the prerogative of the convening authority. *Healy*, 26 M.J. at 395-96 (C.M.A. 1988); RULE FOR COURTS-MARTIAL 1107(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). The convening authority, who was

the appellant's best chance for clemency, apparently believed that the appellant expended all the currency his prior service earned him, as he granted no further clemency beyond the referral to a special court-martial.

We believe the appellant misperceives the gravamen of his crimes when he refers to them as "relatively minor offenses." Considering this appellant, his prior honorable service, and the crimes he admitted committing, we do not find that the sentence is inappropriately severe.

Accordingly, we affirm the findings and the sentence as approved below.

For the Court

/s/ CHRISTINE E. SHEEHY
CHRISTINE E. SHEEHY
Clerk of Court (Acting)

[Seal Omitted]

APPENDIX E

1. 10 U.S.C. 802 provides:

Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(e) The provisions of this section are subject to section 876b(d)(2) of this title (article 76b(d)(2)).

2. 10 U.S.C. 803 provides:

Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

3. 10 U.S.C. 866 provides:

Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

4. 10 U.S.C. 867 provides:

Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed

Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

5. 10 U.S.C. 871 provides:

Art. 71. Execution of sentence; suspension of sentence

(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and—

(A) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(ii) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.

6. 10 U.S.C. 873 provides:

Art. 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

7. 10 U.S.C. 876 provides:

Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

8. 28 U.S.C. 1651 provides:

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.