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No. 08-267

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JACOB DENEDO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Armed Forces

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The significant issues raised by this case include (1) the ability of courts with criminal jurisdiction to provide remedies for constitutional errors at trial; (2) the role played by Article III courts in providing collateral relief for convictions obtained in state courts, and in Article III and non-Article III federal courts; (3) the specific interaction between Article I military courts and Article III courts; and (4) the applicability of the canon of statutory interpretation disfavoring repeals of jurisdiction by implication.

Amici curiae, listed in Appendix A, are professors teaching the law of federal jurisdiction, criminal procedure, and post-conviction remedies. *Amici* join together to provide the Court with their understanding of the application of different strands of the relevant jurisprudence to the lawfulness of the potential relief—the writ of *coram nobis*—that the Court of Appeals of the Armed Forces (CAAF) has ordered to be considered for Respondent. *Amici* share the view that the probable existence of a post-conviction remedy in Article III courts does not divest the military courts of their authority to resolve

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1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party nor a party itself made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

post-conviction claims of ineffective assistance of counsel that would—if left unredressed—result in the Respondent's deportation.

SUMMARY OF ARGUMENT

At issue in this case is whether the courts of appeals in the military justice system—including the Court of Appeals for the Armed Forces (CAAF) and the Navy-Marine Corps Court of Criminal Appeals (N-MCCA)—have the power to issue writs of *coram nobis*[2] to respond to unlawful convictions. The CAAF answered this question in the affirmative. *See Denedo v. United States*, 66 M.J. 114 (C.A.A.F.), *cert. granted*, 129 S. Ct. 622 (2008). Nonetheless, the Government argues that because Article III courts have authority under certain circumstances to hear ineffective assistance of counsel claims such as those presented by the Respondent, the military courts of appeals do not.

In the Uniform Code of Military Justice (UCMJ), Congress conferred upon the military courts jurisdiction to conduct criminal proceedings via courts-martial. As "courts established by Act of

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2. As an appellate court, the N-MCCA would fashion relief in the form of a writ of *coram vobis*, rather than *coram nobis*. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 196 (1873). Like the traditional distinction between common-law writs of mandamus and prohibition, that semantic clarification is "virtually meaningless" today. *See United States v. Sawyer*, 239 F.3d 31, 37 n.4 (1st Cir. 2001). *See generally* Note, *The Need for Coram Nobis in the Federal Courts*, 59 YALE L.J. 786 (1950) (discussing the background and purpose of the writ).

Congress," courts-martial and the military courts of appeals are thereby authorized by the All Writs Act, 28 U.S.C. § 1651, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Under this Court's decision in *United States v. Morgan*, 346 U.S. 502, 512 (1954), that authority includes the power to issue writs of *coram nobis* in appropriate cases.

No Act of Congress provides to the contrary. Article 76 of the UCMJ, 10 U.S.C. § 876, states only that, upon the conclusion of direct appellate review, "the proceedings, findings, and sentences of courts-martial . . . are final and conclusive." This provision does not speak to the power of the military courts to fashion collateral relief, and this Court disfavors repeals of jurisdiction by implication. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 660 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869)).

As Justice Powell explained in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Id.* at 752. *Councilman* thus held that Article 76 did not preclude collateral review of courts-martial in the Article III courts, whether through habeas corpus or *other* available remedies. *See id.* at 749-51. Given that Congress and this Court's jurisprudence generally require exhaustion of remedies in the courts (both Article III and non-Article III) from which the convictions issued as a

predicate to Article III review, the *Councilman* precept applies to the military justice system as well.

To require litigants to resort first to collateral review in the Article III courts, rather than to post-conviction remedies available in the court system in which they were convicted, would be inconsistent with the fabric of post-conviction remedies, as developed under both state and federal case law and statutes. The exhaustion doctrine is based on considerations of comity and pragmatism, as it posits that the judicial system responsible for the conviction is generally able and well-suited to conduct the requisite post-conviction review. Such collateral proceedings are especially critical in cases raising ineffective assistance claims, which often require fact-finding outside the record about a lawyer's alleged constitutionally inadequate representation. *See Massaro v. United States*, 538 U.S. 500 (2003).

The jurisprudence of exhaustion recognizes the authority and utility of this sequencing in protecting Article III courts from having to act when they need not, thereby avoiding unnecessary decisions about the administration of criminal justice by non-Article III tribunals. Article III review remains available in most cases as a necessary stopgap, but generally as the last—rather than the first or only—resort. Congress has not directed to the contrary, and, absent a clear statement of congressional intent, neither should this Court.

ARGUMENT

I. THE POSSIBLE AVAILABILITY OF ARTICLE III REVIEW IS NOT A BASIS FOR INFERRING THAT POST-CONVICTION RELIEF IS UNAVAILABLE IN THE MILITARY COURTS.

A. Article III Courts Have Jurisdiction to Entertain Collateral Challenges to Convictions Obtained in Their Own Courts, in State Courts, and in Non-Article III Federal Courts, Including Courts-Martial.

Decisions by both this Court and the lower federal courts consistently recognize the authority of the Article III courts to entertain collateral attacks on convictions rendered by courts-martial under the UCMJ. The basis for such jurisdiction has varied depending on the nature of the relief sought and includes 28 U.S.C. §§ 1331, 1361, 2201, and 2241. *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999) (recognizing authority under § 2241); *Davis v. Marsh*, 876 F.2d 1446, 1448 & n.4 (9th Cir. 1989) (recognizing authority under § 2201); *Baker* v. *Schlesinger*, 523 F.2d 1031, 1034-35 (6th Cir. 1975) (recognizing authority under § 1361); *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006) (recognizing authority under § 1331), *cert. denied*, 127 S. Ct. 2096 (2007). *See generally Councilman*, 420 U.S. at 746-48.[3]

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[3] The Government states that remedies in the Article III courts remain available to individuals in Respondent's position. *See* U.S. Br. at 34.

More generally, Article III courts have jurisdiction to entertain collateral challenges to convictions rendered in their own courts, as well as in state courts and non-Article III courts providing criminal processes—including territorial courts, the D.C. Superior Court, and the military justice system. The prototype for such review is the Habeas Corpus Act of 1867, the relevant provisions of which are codified as amended at 28 U.S.C. § 2254, which, together with the jurisdictional grant in 28 U.S.C. § 2241, provides the federal courts with jurisdiction to hear challenges to state-court convictions.

Congress has authorized comparable review of federal-court convictions through 28 U.S.C. § 2255; prisoners "in custody under sentence of a court established by Act of Congress" are authorized to file motions for post-conviction relief in the sentencing court that are functionally equivalent to habeas corpus. *See* 28 U.S.C. § 2255(a); *Hill v. United States*, 368 U.S. 424, 427-28 & n.5 (1962).[4] Further, in a statute modeled on § 2255, Congress has provided for such review when a defendant is convicted in the D.C. Superior Court. *See* D.C. CODE § 23-110; *see also Swain* v. *Pressley*, 430 U.S. 372, 379-81 (1977).

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4. The text of § 2255 suggests that it may be invoked by any "prisoner in custody under sentence of a court established by Act of Congress," hence potentially including courts-martial. Section 2255 has been interpreted as not being available to court-martial defendants. *See, e.g.*, *Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004).

B. Under the All Writs Act, Article III Courts Have Jurisdiction to Issue Writs of *Coram Nobis* to Set Aside Convictions Rendered in Their Own Trial Courts.

Article III courts have the power under the All Writs Act, 28 U.S.C. § 1651, to issue writs of *coram nobis* to set aside federal convictions, as this Court held in *United States v. Morgan*, 346 U.S. 502 (1954). *See also United States v. Mayer*, 235 U.S. 55 (1914); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).[5] Although *coram nobis* is an unusual remedy, it continues to have significance in a specific class of cases:

> The writ of *coram nobis* is an extraordinary remedy available to a petitioner no longer in custody who seeks to vacate a criminal conviction in circumstances where the petitioner can demonstrate civil disabilities as a consequence of the conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief.

United States v. Esogbue, 357 F.3d 532, 534 (5th Cir. 2004) (internal quotation marks omitted); *see also* Ira P. Robbins, *The Revitalization of the Common-Law Writ of Audita Querela as a Postconviction Remedy in Criminal Cases: The Immigration Context and Beyond*, 6 GEO. IMMIGR. L.J. 643, 665-68

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5. The lower federal courts have not recognized the availability of *coram nobis* in cases involving state-court judgments. *See, e.g.*, *Finkelstein v. Spitzer*, 455 F.3d 131, 133-34 (2d Cir. 2006) (per curiam).

(1992) (summarizing circumstances in which post-*Morgan* courts have found *coram nobis* relief appropriate). *See generally* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 41.2b, at 1919-21 (5th ed. 2005). As Judge Edwards has explained, "[t]he teaching of *Morgan* is that federal courts may properly fill the interstices of the federal post-conviction remedial framework through remedies available at common law." *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990).

In *Morgan*, the Court rejected the Government's argument that the power to fashion *coram nobis* relief was superseded by Congress's 1948 provision of collateral review in § 2255.[6] Instead, Justice Reed invoked the Court's ruling in *United States v. Hayman*, 342 U.S. 205 (1952), for the proposition that § 2255 was intended to streamline habeas corpus proceedings, while not precluding other forms of collateral review. *See* 346 U.S. at 510-11 (citing *Hayman*, 342 U.S. at 219).

Morgan is also thus part of a line of decisions rejecting arguments that Congress has implicitly divested the federal courts of their jurisdiction. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 533-34 (2003) (O'Connor, J., concurring in part and concurring in the judgment); *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001); *see also* Gerald L. Neuman, *The Habeas*

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6. *Morgan* has particular relevance to this case in that it recognized the appropriateness of *coram nobis* as a remedy for violation of the defendant's Sixth Amendment right to counsel. *See* 346 U.S. at 507-08, 511-12.

Corpus Suspension Clause After INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555 (2002). *See generally* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1553-56 (2000) (noting the relationship between the presumption against implied repeals and the constitutional avoidance canon).

C. Congress and this Court Require Defendants to Exhaust Available Post-Conviction Remedies in the Courts in Which Their Conviction Originated Before Seeking Collateral Article III Review.

The availability of collateral Article III review does not constrain the scope of post-conviction remedies in the judicial system in which the conviction was obtained. State courts routinely provide their own forms of collateral post-conviction relief, including, in many jurisdictions, *coram nobis*. *See, e.g.*, 1 Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook* § 2:4, at 35 (2008-2009 ed.). Moreover, Congress and this Court have not only recognized the availability of such remedies but have generally required their exhaustion before defendants may invoke the collateral powers of the Article III courts. *See, e.g.*, 28 U.S.C. § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, *by any available procedure*, the question presented." (emphasis added)); *see also Coleman v.*

Thompson, 501 U.S. 722 (1991). *See generally Ex parte Royall*, 117 U.S. 241 (1886).

Post-conviction fact-finding stands in a special relationship to a small set of collateral claims, of which ineffective assistance of counsel is a leading example. In *Massaro v. United States*, 538 U.S. 500 (2003), which held that a defendant does not default an ineffective-assistance claim by failing to raise it on direct appeal, Justice Kennedy emphasized how, "[u]nder the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505; *see also Murray v. Giarratano*, 492 U.S. 1, 24-26 (1989) (Stevens, J., dissenting); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 325 (1988).

As Justice Kennedy acknowledged in *Massaro*, many ineffective assistance cases turn on evidence that is outside the trial record. *See* 538 U.S. at 504-06; *see also, e.g.*, *Rompilla v. Beard*, 545 U.S. 374 (2005) (granting habeas relief based upon the record created in state post-conviction proceedings); *Wiggins v. Smith*, 539 U.S. 510 (2003) (same). To that end, even where defendants *are* able to raise such claims in a direct appeal, the lower federal courts have suggested that an ineffective assistance claim "is more appropriately raised through a post-conviction motion brought pursuant to 28 U.S.C. § 2255." *United States v. Campbell*, 549 F.3d 364, 377 (6th Cir. 2008).

Post-conviction review in the courts in which the conviction originated thus serves dual purposes: it provides an opportunity for the defendant to introduce evidence not in the trial record, and it places initial adjudicatory responsibility in the same courts in which the conviction was obtained. This sequencing reflects the principle that collateral remedies in the Article III courts come as the last resort, rather than the first. In the most common context, the purpose of this rule is to "protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

The background to 28 U.S.C. § 2255 reveals another reason for such sequencing, predicated on efficiency rather than federalism. The enactment of § 2255 was a response to the logistical problems attendant to collateral review of federal convictions in the 1940s. Then, federal prisoners were required to seek habeas corpus relief in their district of confinement. *See, e.g.*, *Ahrens v. Clark*, 335 U.S. 188 (1948), *overruled in part by Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973). Because the overwhelming majority of federal prisoners were housed in five prisons, the rule placed the greatest burden on five district courts. *See Hayman*, 342 U.S. at 214 & n.18; *see also* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 904-07 (1984) (summarizing the background); Robbins, 6 GEO. IMMIGR. L.J., at 663-64 (same).

In addition to the volume of cases, those courts' distance from the courts in which the defendants

were sentenced created a separate set of difficulties—in obtaining trial records or relevant witnesses to testify at evidentiary hearings. *See Hayman*, 342 U.S. at 212-14. Thus, as Chief Justice Vinson explained,

> the few District Courts in whose territorial jurisdiction major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court solely because of the fortuitous concentration of federal prisoners within the district.

Id. at 213-14.

To reduce these problems, Congress provided an alternative to habeas corpus under 28 U.S.C. § 2241, requiring that defendants file motions for post-conviction relief in the court in which they were convicted. Congress thus provided that review under § 2255 would be in lieu of review under § 2241 "unless . . . the remedy by motion is inadequate or ineffective to test the legality of [the defendant's] detention." 28 U.S.C. § 2255(e). As this Court observed last Term, "[t]he purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient. It directed claims not to the court that had territorial jurisdiction over the place of the petitioner's confinement but to the sentencing court, a court already familiar with the facts of the case." *Boumediene v. Bush*, 128 S. Ct. 2229, 2264 (2008).

D. This Court Has Applied an Exhaustion Requirement for Challenges to Court-Martial Convictions Parallel to That Which Congress Has Required for Challenges to Convictions in State and Federal Civilian Courts.

Pragmatism and comity have produced comparable requirements for the military system. In *Councilman* and *Gusik v. Schilder*, 340 U.S. 128 (1950), this Court applied the exhaustion principle to the military justice system created by Congress. As Justice Douglas explained in *Gusik*, requiring the exhaustion of remedies in the military justice system before resorting to the Article III courts serves similar purposes as the exhaustion requirement for state-court defendants. *See* 340 U.S. at 131-32; *see also id.* at 132 ("If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless.").

Moreover, in *Councilman*, Justice Powell rejected the general power of the Article III courts to conduct *ex ante* habeas review of a court-martial.[7] As he explained,

> [J]udgments of the military court system remain subject in proper cases to collateral

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7. *Councilman* reaffirmed an important exception to the exhaustion requirement—where defendants seek to challenge their amenability to military jurisdiction in the first place. *See* 420 U.S. at 758-59; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 585 n.16 (2006); *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

> impeachment. But 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. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted.

420 U.S. at 758; *see also Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality) ("In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted."); *cf. Khadr v. Bush*, 587 F. Supp. 2d 225, 230 (D.D.C. 2008) (noting the significance of "*Councilman* abstention" in declining to entertain a pre-trial habeas petition challenging a military commission).

As noted by the CAAF, *see Denedo*, 66 M.J. at 123 (citing cases), these precepts are the basis for decisions of several district courts holding that the court-martial defendants failed to exhaust their available military remedies by failing to pursue

coram nobis relief. *See also Parker v. Tillery*, No. 95-3342-RDR, 1998 WL 295574, at *2 (D. Kan. May 22, 1998) (holding that *coram nobis* review in the military justice system demonstrated full and fair review of claim). In short, the pattern that emerges is one in which, despite the different sources of law, criminal defendants are first to seek post-conviction relief in the courts responsible for the conviction.

II. THE UNIFORM CODE OF MILITARY JUSTICE DOES NOT PRECLUDE COLLATERAL POST-CONVICTION REVIEW IN THE MILITARY COURTS.

A. Congress Authorized the Military Court System to Enter Convictions and to Review Them Collaterally.

Congress has empowered the military courts to provide post-conviction remedies, both on appeal and as a collateral matter. *See Burns*, 346 U.S. at 141 (plurality); *see also Gusik*, 340 U.S. at 131-32. In *Councilman*, 420 U.S. at 753 & n.26, this Court quoted with approval the decision of the CAAF's predecessor—the United States Court of Military Appeals—in *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A 1966), which upheld the power of the military courts under the All Writs Act to issue writs of *coram nobis*, even while denying the petitioner's claim on the merits. *Id.* at 308-09.

To similar effect is *Noyd*, which noted that *Frischholz* "properly rejected the Government's argument" that the military courts of appeals are powerless to provide collateral post-conviction relief. 395 U.S. at 695 n.7. Like state courts and non-

Article III federal courts such as the territorial courts and the D.C. Superior Court—if not more so—the military's judicial system is designed to function as a complete whole, able both to provide all of the procedural protections at trial required by the Constitution and to provide remedies when those protections go unobserved.

B. The All Writs Act Supports the Jurisdiction of the Military Courts of Appeals to Issue Writs of *Coram Nobis* in Appropriate Cases.

Relying upon *Noyd* and *Councilman*, the CAAF has sustained its own jurisdiction to entertain various applications for collateral relief, including *coram nobis* and relief in the form of habeas corpus under the All Writs Act. *See Loving v. United States*, 62 M.J. 235, 246-47 (C.A.A.F. 2005). Such analysis is consistent with the recognition of the power of other non-Article III courts to exercise All Writs Act authority. *See, e.g.*, *United States v. Hamid*, 531 A.2d 628 (D.C. 1987); *see also United States v. Cogdell*, 585 F.2d 1130, 1133-34 (D.C. Cir. 1978) (upholding the D.C. Superior Court's power under the All Writs Act), *rev'd on other grounds sub nom. United States v. Bailey*, 444 U.S. 394 (1980).

This Court's decision in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), does not counsel to the contrary. That decision held that the CAAF exceeded the scope of its jurisdiction under the All Writs Act in affording relief to an Air Force officer who claimed he had been unlawfully dropped from the rolls. The power the CAAF claimed there was not a power to correct a

constitutional error in a defendant's court-martial, but to correct executive action. As Justice Souter explained, "the Air Force's action to drop respondent from the rolls was an executive action, not a 'findin[g]' or 'sentence' that was (or could have been) imposed in a court-martial proceeding." *Id.* at 535 (alterations in original; citation omitted); *see also id.* at 536 (rejecting Goldsmith's alternative argument on the ground that he did not challenge his conviction, but rather the "independent action" of "another military agency").

By contrast, the central feature of *coram nobis* is to provide a means for an individual no longer in custody to revisit a conviction in light of fundamental claims that could not have been before the trial court. Thus, ineffective assistance of counsel claims present the paradigmatic case for *coram nobis* relief because: (1) they depend on evidence not available at trial; (2) they may not be properly cognizable in a direct appeal, or the direct appeal may be time-barred by the time the relevant evidence is uncovered; and (3) they go to the fundamental fairness of the underlying proceeding—perhaps even to the trial court's jurisdiction.[8]

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8. As this Court has explained,

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.

Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

Respondent here is no longer in the military and does not request relief that would involve a court—military or civilian—directing the military about how to assign its personnel. Rather, the application for a writ of *coram nobis* necessarily seeks to revise the judgment of conviction—here, the "findings" or "sentence" of a court-martial, a proceeding of the military system that can now be reconsidered by the military system. This review *is* otherwise within the jurisdiction of the intermediate military courts of appeals, including the N-MCCA, pursuant to Article 66 of the UCMJ, 10 U.S.C. § 866(c). As such, and in marked contrast to the relief sought in *Goldsmith*, *coram nobis* is "in aid of" the N-MCCA's jurisdiction over the "findings" and "sentence" of Denedo's court-martial.

C. No Act of Congress Divests the Military Courts from Exercising Their Authority Under the All Writs Act, Nor Should Such Divestment Be Inferred by Implication.

Article 76 of the UCMJ provides that "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." 10 U.S.C. § 876. This Court in *Councilman* emphasized, however, that finality under Article 76 is a prudential—rather than jurisdictional—constraint. *See* 420 U.S. at 749 (rejecting the argument that "Art. 76 was intended to

bar subject-matter jurisdiction in suits for collateral relief other than by way of habeas"). As Justice Powell explained, "there is no necessary inconsistency between [the finality of a judgment under Article 76] and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction." *Id.*

Councilman rejected the argument that Article 76 preserved habeas corpus in the Article III courts while eliminating other forms of collateral relief. Instead, the Court concluded that "nothing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack. If Congress intended such a distinction, it selected singularly inapt language to express it." *Id.* at 751.

The text of Article 76 does not speak expressly to the power of the military courts to fashion collateral relief. It should not be read inferentially to divest such jurisdiction. As this Court has made plain, statutes are not to be presumed to repeal jurisdiction by implication. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 660 (1996) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869)). This "canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Councilman*, 420 U.S. at 752. Thus, while Congress *could* constitutionally limit the jurisdiction of military courts to issue appropriate post-conviction writs—at least as long as some other

remedy remained available[9]—it did not do so in Article 76.

D. By Taking Responsibility for Correcting Fundamental Errors in Courts-Martial, the Military Courts Are Properly Discharging Their Obligations in Relation to Article III Courts.

Throughout the nearly six decades since the UCMJ was enacted, this Court has accorded deference "to the judgments of the carefully designed military justice system established by Congress." *Councilman*, 420 U.S. at 753. Indeed, the limitations on the substantive scope of Article III habeas review of court-martial convictions articulated in *Burns* and its progeny are explained by the "great care" Congress has taken "both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." *Burns*, 346 U.S. at 140 (plurality). As Justice Harlan described in *Noyd*,

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9. If eliminating *coram nobis* review in the military courts would deprive litigants such as Respondent of any judicial forum for resolution of their constitutional claims, it would raise "serious constitutional questions." *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988); *cf. Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (invalidating part of an Act of Congress that effectively precluded habeas corpus review for non-citizens held as "enemy combatants"). *See generally* Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777-807 (1991).

> When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

395 U.S. at 694; *see also id.* at 695 (rejecting the possibility that "civilian courts intervene precipitately into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad"). The proposition that Article III review strips CAAF and the N-MCCA of their jurisdiction to provide collateral relief thus gets the relationship between the Article I military judicial system and the Article III courts backwards.

Neither this Court nor Congress has used the availability of Article III redress as a predicate to an absolute bar on a non-Article III court from fashioning appropriate post-conviction relief, and for good reason. To adopt a position of implied jurisdiction stripping based upon the availability of Article III courts would put the onus on the Article III courts to serve as courts of first impression for claims like those brought by the Respondent. *See generally* Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-89 (1953) (highlighting the difficulties inherent in

requiring habeas courts to resolve factual issues as a matter of first impression). Given the military courts' familiarity with the specific case, the background issues, and the nature of court-martial proceedings more generally, such a rule would be as impracticable as it would be unwise. Thus, "[t]here seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider [Respondent's] arguments." *Noyd*, 395 U.S. at 696.

CONCLUSION

For the aforementioned reasons, *amici* respectfully submit that the decision of the CAAF be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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