NO. 08-267

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JACOB DENEDO,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Under 28 U.S.C. § 1259(4)—the jurisdictional statute which the government invokes, Pet. 2—the Court may review "[c]ases . . . in which the Court of Appeals for the Armed Forces has granted relief." Does this Court have jurisdiction under that provision where the Court of Appeals remands to a lower court for further proceedings to "determine whether the requested relief should be granted"?

2. May the military appellate courts issue a writ of error coram nobis where the claim arises after a conviction has become final and no other remedy is available?

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BRIEF IN OPPOSITION

JURISDICTION

The Court lacks jurisdiction. *See* pp. 4-6 *infra*.

STATEMENT

Jacob Denedo, a Nigerian who came to the United States as a student and eventually became a permanent resident, enlisted in the United States Navy in 1989. After two reenlistments, he was convicted in 1998 by a special court-martial for larceny and conspiracy to commit larceny. He was sentenced to three months' confinement, reduction to the lowest enlisted pay grade, and a bad-conduct discharge. He had pleaded guilty in reliance on the explicit (and flatly incorrect) assurance of his civilian defense counsel, Michael A. Ceballos, that conviction by a special court-martial would not expose him to any risk of deportation because conviction by such a court—unlike conviction by a general court-martial—is a federal misdemeanor. The Navy-Marine Corps Court of Criminal Appeals ("the Navy Court") affirmed on February 24, 2000, and on May 30, 2000, Mr. Denedo was discharged.

Mr. Denedo applied for naturalization in 2002. The Immigration and Naturalization Service ("INS") denied his application, without prejudice, on the ground that his conviction reflected a lack of good moral character during the statutorily-prescribed period. The INS again denied his application without prejudice when he reapplied the following year.

On October 30, 2006, after expiration of the latest possible date for seeking collateral review of his conviction in federal district court or the Court of Federal Claims, 28 U.S.C. §§ 2401(a), 2501, the INS's successor agency (U.S. Citizenship and Immigration Services) did precisely what Mr. Ceballos assured him the government could not do—it initiated removal proceedings based on the court-martial. The notice to appear treated it as an "aggravated felony" under the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

In addition to having advised Mr. Denedo that his conviction would constitute a misdemeanor (and hence could not be used to deport him), Mr. Ceballos never informed him that the 1996 INA amendments had expanded the definition of "aggravated felony." Those amendments reduced the minimum term of imprisonment for theft offenses under § 1101(a)(43)(G) from "at least five years" to "at least one year" and reduced the minimum amount of loss in fraud cases under § 1101(a)(43)(M) from "$200,000" to "$10,000."[1] *See* Pub. L. No 104-208, 110 Stat. 3009 (1996), amending 8 U.S.C. §§ 1101(a)(43)(G), (M). Having no independent knowledge of the term "aggravated felony" or the INA and its amendments, Mr. Denedo relied on Mr. Ceballos to inform him as to the state of the law and the consequences of his plea.

Upon receiving notice of the removal proceedings, Mr. Denedo secured other counsel and petitioned for a writ of error coram nobis from the Navy Court. The

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[1] The larceny to which Mr. Denedo pleaded guilty involved a loss in excess of $10,000.

relief he sought was an order setting aside his guilty plea. The Navy Court denied a government motion to dismiss for lack of jurisdiction, but denied relief on the merits without explanation. Pet. 63a.

Mr. Denedo filed a timely writ appeal with the Court of Appeals for the Armed Forces, which held that it had jurisdiction to grant the requested relief but rather than doing so, remanded for further proceedings. Pet. 32a. "If prejudice is found," the majority wrote, "the [Navy C]ourt shall determine whether the requested relief should be granted." *Id.* Two judges dissented. Pet. 32a, 40a.

Mr. Denedo has long since served his sentence.

In light of the extended period of time this case may remain before the other courts involved, the Immigration Court, without objection from the Department of Homeland Security, administratively closed the removal proceedings on October 17, 2008. Mr. Denedo remains subject to deportation.

Unbeknownst to Mr. Denedo, Mr. Ceballos had begun to suffer from the effects of alcohol abuse, including occupational impairment, and entered into an agreement in August 1997 with Florida Lawyers Assistance, Inc. to participate in an alcohol rehabilitation program. Even though he failed to stay sober, he continued to practice until May 2000, when he entered a conditional guilty plea in response to bar complaints. He admitted violating the Florida Rules of Professional Conduct by, among other things, failing to adequately advise clients. Later that year, the state supreme court suspended him from practice for 30 days and placed him on probation for two years with alcohol rehabilitation treatment. His parents

had him involuntarily committed in November 2000 because his "extreme consumption of alcohol made him a danger to himself and others." In 2001, he was suspended on an interim basis, *Florida Bar v. Ceballos*, 786 So. 2d 1190 (Fla. 2001), and placed on inactive status. *Florida Bar v. Ceballos*, 791 So.2d 1102 (Fla. 2001). In 2002, he was indefinitely suspended. *Florida Bar v. Ceballos*, 832 So. 2d 106 (Fla. 2002). He received reciprocal discipline in other jurisdictions. *E.g., In re Ceballos*, 797 A.2d 1258 (D.C. 2002). Florida reinstated him on three years' probation shortly after the government sought certiorari. *Florida Bar v. Ceballos*, No. SC07-548 (Fla. Sept. 10, 2008). Mr. Denedo was unaware of Mr. Ceballos's impairment or unprofessional conduct until after the INS initiated removal proceedings.

The gravamen of Mr. Denedo's claim for a writ of error coram nobis is that incorrect legal advice rendered his plea involuntary. He has no other remedy.

REASONS FOR DENYING THE PETITION

A. The Court Lacks Jurisdiction

This Court lacks jurisdiction.

The petition invokes 28 U.S.C. § 1259(4), under which the Court may review "[c]ases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces has granted relief."

A jurisdictional statute must be construed with precision and fidelity to its terms, particularly when it authorizes appeal to this Court. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S.

577, 581 (1982). Using this principle, § 1259(4) does not apply here for the simple reason that the Court of Appeals did not "grant[] relief." It merely remanded, and plainly indicated that the merits of Mr. Denedo's claim remained unadjudicated:

> [W]e 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 U.S.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.*

Pet. 32a (emphasis added).

A remand, without relief, is not "relief." It is merely a procedural step that may lead to adjudication of the merits. "Relief" is the substance of what the moving party seeks and what the court finds he or she is entitled to. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 706 (7th Cir. 1999) (Posner, C.J.).

Mr. Denedo's petition sought quintessential coram nobis relief—an order setting aside his plea.[2] The Court of Appeals neither issued such an order nor found him entitled to one. While the "further proceedings" on remand could yield the relief he seeks, that is far from preordained. Because, as the Court of Appeals recognized, relief may yet be denied, Pet. 32a, it cannot be said that that court "has granted relief," as § 1259(4) requires.[3]

B. The Case Does Not Satisfy The Standards Governing The Grant Of Certiorari

The petition should be denied because it meets none of the criteria for certiorari and in any event the decision below is correct. *United States v. Morgan*, 346 U.S. 502, 511 (1954), holds that in extraordinary cases "where circumstances compel such ac-

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[2] *See, e.g.*, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (erroneous advice on immigration consequences of guilty plea); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002) (same); *see generally* 39 Am. Jur. 2d *Habeas Corpus* § 271 at 423 (1999) ("If the triumphant coram nobis petitioner has served the sentence and is no longer incarcerated, the conviction is vacated and the petitioner's record of conviction expunged"). In the rare coram nobis case in which the Court of Appeals does grant relief, its order is unambiguous. *E.g.*, *Del Prado*, 23 U.S.C.M.A. 132, 48 C.M.R. 748 at 750 (declaring conviction null and void, directing expungement and restoration of rights and privileges).

[3] It is of no moment from the standpoint of this Court's jurisdiction that—if relief is ultimately denied—examination of the correctness of the Court of Appeals' ruling as to *its* jurisdiction would have to await some future case. Whether the "relief" clause, which (notwithstanding this case) operates overwhelmingly to the accused's detriment and the government's benefit, is wise or unwise is not for this Court to determine.

tion to achieve justice," litigation may continue despite finality. Coram nobis is allowed without limitation of time for "facts that affect the 'validity and regularity' of the judgment." *Id.* at 507. This is such a case.

1. Contrary to the government's position, Pet. 8-12, and Judge Ryan's dissent, Pet. 54a-56a, there is no conflict with *Clinton v. Goldsmith*, 526 U.S. 529 (1999). Major Goldsmith did not challenge the findings or sentence of his court-martial. Rather, he sought extraordinary relief with respect to an order dropping him from the rolls. That was an administrative action, not a punishment "that was (or could have been) imposed in a court-martial proceeding." *Id.* at 530. As a result, this Court was right to find that the Court of Appeals exceeded its authority. In stark contrast, Mr. Denedo challenged his guilty plea and conviction, the very core of the court-martial process, rather than a peripheral matter, as in *Goldsmith*.

2. Nor is there a conflict among the circuits. While Article III courts of appeals have occasionally noted that there is no express provision for collateral review within the military justice system, *see* Pet. 41a, the fact is that the All Writs Act, 28 U.S.C. § 1651(a), plainly applies to the Article I appellate military courts, and since the 1960s it has been settled law that those courts may grant extraordinary writs. *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969).

3. Contrary to the government's position and the views of the dissenting judges, Article 76, 10 U.S.C. § 876, does not stand in the way of Mr. Denedo's petition.

a. *Schlesinger v. Councilman*, 420 U.S. 738, 749 (1975), stands for the proposition that Article 76 is a prudential restraint and not a jurisdictional one. The provision "does not expressly effect any change in the subject matter jurisdiction of Article III courts," but "only defines the point at which military court judgments become final and requires that they be given res judicata effect." *Id.* Faced with this, the government improbably seeks to impose a different meaning on Article 76 depending on whether collateral relief is sought in the Article III courts or in the appellate military courts. Pet. 14-15. Nothing in the text supports such a distinction. Moreover, as Chief Judge Effron pointed out, Pet. 9a-10a, both *Schlesinger*, 420 U.S. at 753 n.26, and *Noyd,* 395 U.S. at 695 n.7, referred with approval to the Court of Military Appeals' decision in *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), a landmark case in which the court, tellingly, concluded that it has jurisdiction to issue coram nobis relief post-finality. That court, like its successor, was created under Article I. Art. 141, UCMJ, 10 U.S.C. § 941. The government's proposed Article I/Article III distinction is also inconsistent with its clear implication, Pet. 18, that Mr. Denedo could seek relief in the Court of Federal Claims. Congress created that court under Article I. 28 U.S.C. § 171(a). If, notwithstanding Article 76, *it* could grant Tucker Act relief in a final case, *see* p. 10 *infra,* it is difficult to see why the Article I Navy Court and the Article I Court of Appeals for the Armed Forces could not do so as well.

b. In *Goldsmith* the Court of Appeals acted after the case was final. Given that that case concerned the Court of Appeals' own jurisdiction, it is unlikely

that this Court would, as Judge Ryan suggested, Pet. 55a n.9, pass over in silence an Article 76 infirmity had there been one. Indeed, the Court expressly noted that "the approved findings and sentence in Goldsmith's case had become final," while providing an illustration that contradicts the position the government espouses here. *Goldsmith,* 526 U.S. at 536 & n.9.[4] Moreover, if Article 76 has the effect attributed to it by the government, then once a case becomes final, no military court could take action either to compel adherence to the judgment or to void a conviction for lack of jurisdiction. Judge Ryan's dissent acknowledges that both of these powers may be exercised notwithstanding Article 76, and does so without reference to any authority in the UCMJ. Pet. 46a-47a. Likewise, *Goldsmith* cites nothing in the UCMJ for the proposition that a military appellate court may grant extraordinary relief in a final case. 526 U.S. at 536. Since the military appellate courts are entirely creatures of statute, the only other basis for these powers can be the All Writs Act. The government's construction of Article 76 is at odds with *Goldsmith*.

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[4] In particular, *Goldsmith* indicated that if, rather than simply dropping an officer from the rolls, "a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ," an appellate military court would have post-finality power under the All Writs Act to compel adherence to its own judgment. 526 U.S. at 536 (also noting government had conceded as much and citing *United States v. United States District Court*, 334 U.S. 258, 263-264 (1948)).

4. The government claims, Pet. 17-21, that a writ of error coram nobis is not "necessary or appropriate," as required by the All Writs Act because Mr. Denedo can invoke the district courts' federal question jurisdiction or the Court of Federal Claims' Tucker Act jurisdiction. Pet. 9, 17-19. This is incorrect. The six-year statutes of limitation for those forms of collateral review, 28 U.S.C. §§ 2401(a), 2501, expired before the removal proceedings were initiated and he became aware of the gross error in Mr. Ceballos's advice. *See Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983) (limitation period begins to run when discharge is final), *reh'g denied*, 737 F.2d 1038 (1984) (en banc) (per curiam); *Goldstein v. United States*, 131 Ct. Cl. 228, 130 F. Supp. 330, 332 (1955) (cause of action accrues on date of discharge).[5] Even if there were a doctrine of equitable tolling, *Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2366 (2007), Mr. Ceballos was not a government official and his error cannot be imputed to the government. Mr. Denedo thus never had a remedy in any other court.[6]

5. The government points out, Pet. 19, that coram nobis is only available in the jurisdiction and court in which the conviction is adjudged. The former is

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[5] Mr. Denedo's discharge became final on May 30, 2000. By the time the INS initiated removal proceedings, on October 30, 2006, it was too late.

[6] The government is correct that Mr. Denedo could seek review of his discharge in the Board for Correction of Naval Records, Pet. 18 n.2, but that agency's function is limited, in court-martial cases, to implementing decisions of UCMJ reviewing authorities and sentence clemency. 10 U.S.C. § 1552(f). It is powerless to vacate a plea or set aside a conviction.

true but of no assistance to the government because Mr. Denedo applied for relief within the proper jurisdiction: the military courts. The latter is untrue. There being no standing trial court, he applied to the lowest appellate court within the same jurisdiction. The worst that can be said is that his petition should therefore have been labeled a petition for a writ of error coram *vobis*. Accepting this part of the government's argument would improperly "exalt nomenclature over substance," *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 164 (1984) (quoting *Browder v. Director, Ill. Dept. of Corr'ns*, 434 U.S. 257, 272 (1978) (Blackmun, J., joined by Rehnquist, J., concurring); and citing *Schlesinger v. Councilman*, 420 U.S. at 742 n.5), since coram *vobis* is among the recognized writs, *Loving v. United States*, 62 M.J. 235, 252 (C.A.A.F. 2005) (writ petition submitted to superior court is writ of error coram vobis); *see, e.g., Thornton v. Bruton*, 18 M.J. 412 (1984) (mem.), and a proper vehicle for seeking post-conviction relief from an appellate court such as the Navy Court or the Court of Appeals. The substance of the writ governs, not the label. *E.g., Loving,* 62 M.J. at 252 & n.108, citing 2 STEVEN CHILDRESS & MARTHA DAVIS, FEDERAL STANDARDS OF REVIEW § 13.01, at 13-8 (3d ed. 1999).[7]

[7] Judge Ryan's suggestion that Mr. Denedo's claim is "nothing more than a petition for a new trial, dressed up as a writ of coram nobis," Pet. 53a & n.8, is equally wide of the mark. Under Article 73, a new trial petition must be based on newly discovered evidence or fraud on the court. 10 U.S.C. § 873. Mr. Ceballos's misadvice does not fall within either category.

6. The government's claim, Pet. 21, that the decision below will divert military resources is unfounded (as well as irrelevant to the question of jurisdiction). Even though coram nobis has been available from the military courts for decades, *see Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306; *Del Prado v. United States*, 23 U.S.C.M.A. 132, 48 C.M.R. 748 (1974), such cases remain an infinitesimal part of the workload of the courts of criminal appeals and the Court of Appeals. In the last 10 years for which data are available, the Court of Appeals received only 10 coram nobis petitions.[8] During the same decade, there were also 176 "writ appeals." Even if a substantial portion of those cases sought coram nobis relief, they would still not unduly burden the military justice system.

7. Invoking *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), the government argues, Pet. 15-16, that Mr. Denedo cannot be heard because, having been discharged, he is no longer subject to trial by court-martial. This misuse of *Toth* conflates personal jurisdiction and appellate subject-matter jurisdiction. The latter is not contingent on the former.[9] The government's contrary claim proves too

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[8] The Court of Appeals' annual reports are available at http://www.armfor.uscourts.gov/Annual.htm (last visited Oct. 21, 2008).

[9] For example, execution of a punitive discharge "does not deprive the Court [of Appeals] of jurisdiction to grant a petition for review." *United States v. Engle*, 28 M.J. 299 (C.M.A. 1989) (per curiam). The court's jurisdiction is also unimpaired by the fact that the accused has been released from active duty, *e.g.*, *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988); *United States v. Jackson*, 3 M.J. 153 (C.M.A. 1977); *United States v. Entner*, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *United States*

much because, if valid, it would mean that the Article III courts and the Court of Federal Claims, *neither of which can try courts-martial*, also could not grant relief in respect of a final court-martial, even though the government agrees that they can.

8. The government's suggestion, Pet. 23-24, that the military justice system lacks power to compel testimony by discharged coram nobis petitioners is without merit. Civilians are subject to subpoena under the UCMJ. Arts. 46-47, UCMJ, 10 U.S.C. §§ 846-47; R.C.M. 703(e)(2)(G)(i); *United States v. Ortiz*, 35 M.J. 391, 393 (C.M.A. 1992); *United States v. Hinton*, 21 M.J. 267, 270-71 (C.M.A. 1986). In any event, there is no reason to believe a coram nobis petitioner would not appear voluntarily, since absence would doom his or her petition, whether for failure to prosecute, abandonment, or failure of proof.

The government's related suggestion, Pet. 24, that even allowing punitively discharged personnel to enter a military installation for the purpose of appearing at a coram nobis hearing would harm the government is also unfounded. The military justice system has long conducted post-trial hearings that involve accused, civilian witnesses, and spectators whose interests may be adverse to the government. The government also has ample tools for dealing

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v. Green, 10 U.S.C.M.A. 561, 28 C.M.R. 127 (1959); *United States v. Speller*, 8 U.S.C.M.A. 363, 368, 24 C.M.R. 173, 178 (1957); *see also Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F. 1999) (administrative discharge during pendency of appellate review did not affect power of convening authority or appellate courts to act on findings and sentence); *United States v. Sippel*, 4 U.S.C.M.A. 50, 52-54, 15 C.M.R. 50, 52-54 (1954) (appellate jurisdiction unaffected by expiration of officer's commission).

with misconduct by a coram nobis petitioner, including civilian prosecution, as well as expulsion and debarment from the installation.

9. Finally, the government cites, Pet. 25, five other decisions of the Court of Appeals that it believes reflect the court's profligate view of its own jurisdiction and support a call to "once again" clip its wings. That criticism is unjustified. For example, the government took completely inconsistent positions on the jurisdictional issue in *Lopez de Victoria*—the Army had argued (on behalf of the United States as appellee) against the Court of Appeals as having jurisdiction while the Air Force argued (on behalf of the same sovereign as amicus) for it. *United States v. Lopez de Victoria*, 66 M.J. 67, 69 n.3 (C.A.A.F 2008). Passing over that and the fact that the government elected not to seek certiorari in *Lopez de Victoria* or *Kreutzer*, and sought it and prevailed in *Goldsmith*, this slender catalog of cases hardly paints a picture of a court that is out of control and institutionally needs to be taught a lesson.

The irony is that in its effort to call into question the jurisdiction of the Court of Appeals the government has overlooked this Court's lack of jurisdiction over the petition. In any event the decision below is correct and does not warrant further review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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