No. 11-1237

In the Supreme Court of the United States

OSBORN N. MIRANDA, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

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

BRIEF FOR NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EUGENE R. FIDELL
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 432-4852
eugene.fidell@yale.edu

STEPHEN A. SALTZBURG
2000 H Street, N.W.
Washington, DC 20052
(202) 994-7089

RONALD W. MEISTER
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036
(212) 790-9255

Attorneys for Amicus Curiae

May 2012

QUESTIONS PRESENTED

The petition for a writ of certiorari presents the following question:

> Congress enacted the Uniform Code of Military Justice, which directs that a voluntary guilty plea cannot be accepted by a military judge if the servicemember, after the plea, presents a matter that is inconsistent with that plea. The question presented is:
>
> Are post-traumatic stress disorder and bipolar disorder substantial questions that a military judge must consider before accepting a servicemember's guilty plea, when those disorders may have contributed to the charged misconduct?

Amicus National Institute of Military Justice believes the following threshold question is presented:

> Is review under 28 U.S.C. § 1259 restricted to the particular issue(s) as to which the Court of Appeals for the Armed Forces granted review, or does it extend to all issues in the case?

CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

Other Authorities:

INTEREST OF THE *AMICUS CURIAE*[*]

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. Its advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but most of whom have served as military lawyers. NIMJ directors and advisors have practiced before the United States Court of Appeals for the Armed Forces ("CAAF") and have served on its Rules Advisory Committee as well as on the statutory Code Committee on Military Justice.

NIMJ appears regularly as an *amicus curiae* before CAAF and other federal courts. It was an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004).

NIMJ's publications include the GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

---

[*] Counsel for all parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. Because of NIMJ's internal consultative process we were unable to afford the parties 10 days' notice. Counsel for NIMJ have authored this brief in whole, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief. NIMJ takes no position on the question presented in the petition.

(13th ed. 2010) and the forthcoming MILITARY COURT RULES OF THE UNITED STATES (LexisNexis 2012).

SUMMARY OF ARGUMENT

The petition is within the Court's certiorari jurisdiction based on the plain meaning of 28 U.S.C. § 1259. That jurisdiction is not confined to issues CAAF may single out when it grants review.

ARGUMENT

The petition is within the Court's jurisdiction

Article I, § 8, clause 14, of the Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces." Under this authority, in 1950 Congress passed the Uniform Code of Military Justice ("UCMJ") for military personnel in all branches of the armed forces.[1] Coupled with the Rules for Courts-Martial and Military Rules of Evidence promulgated by the President in the *Manual for Courts-Martial*,[2] the UCMJ provides a comprehensive framework for the administration of military justice. The UCMJ establishes several layers of appellate review,[3] including (following en-

---

[1] 10 U.S.C. §§ 801 *et seq*.

[2] *See* Art. 36, UCMJ, 10 U.S.C. § 836.

[3] Arts. 66-67, UCMJ, 10 U.S.C. § 866-67. *See generally Weiss v. United States*, 510 U.S. 163, 166-69 (1994).

actment of the Military Justice Act of 1983)[4] review here on writ of certiorari for some actions by CAAF.[5]

As is true of all Article I courts, the jurisdiction of the appellate military courts is confined to what Congress specifies by statute.[6] Cases with sentences that include confinement for one year or longer or a punitive discharge are automatically reviewed by the service branches' courts of criminal appeals. The Navy-Marine Corps Court of Criminal Appeals automatically reviewed Hospitalman Miranda's case because his sentence included a bad-conduct discharge.[7] Unlike the service courts' mandatory jurisdiction, in non-capital cases such as this, CAAF's review is discretionary.[8]

Miranda's petition is within this Court's jurisdiction. This Court has jurisdiction over court-martial cases in which CAAF has granted review.[9] CAAF's January 17, 2012 Order, Pet. App. 1a, *United States v. Miranda*, No. 12-0142/NA, 2012 CAAF LEXIS 138 (C.A.A.F. Jan. 17, 2012), qualifies: it expressly granted Miranda's petition.

The statute does not limit this Court's jurisdiction to the particular "issue(s)" as to which CAAF has granted review. As a result, the fact that CAAF's decision did not refer to the question Miranda has

---

[4] Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405.

[5] Art. 67a, UCMJ, 10 U.S.C. § 867a; 28 U.S.C. § 1259.

[6] *See Clinton v. Goldsmith*, 526 U.S. 529, 533-34 (1999).

[7] Art. 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

[8] Art. 67(a)(3), UCMJ, 10 U.S.C. § 67(a)(3).

[9] 28 U.S.C. § 1259(3).

raised here is of no statutory significance, and does not deprive this Court of jurisdiction.

The Solicitor General, after suggesting in earlier cases that the matter was unclear[10] (and perhaps influenced by CAAF's practice of issuing orders that purport to grant review on particular issues), has come to insist that review by petition for a writ of certiorari for court-martial cases is available only with respect to the issues on which CAAF has granted review.[11]

That view is mistaken. Plainly, CAAF can specify in the order granting review fewer than all of the issues raised by an appellant. This is clear from the third sentence of Article 67(c).[12] The same sentence provides that CAAF has a duty to act only with respect to those issues. However, under the initial clause of Article 67(a), the entire record in the case must be reviewed, and under the plain language of

---

[10] Brief for the United States in Opposition 5 n.3, *Jacobs v. United States*, 498 U.S. 1088 (1991) (denying cert.); Brief for the United States in Opposition 3 n.2, *Williams v. United States*, 506 U.S. 941 (1992) (denying cert.).

[11] Brief for the United States in Opposition, *Stevenson v. United States*, 555 U.S. 816 (2008) (denying cert.), at 7-8; Brief for the United States in Opposition, *McKeel v. United States*, 549 U.S. 1019 (2006) (denying cert.), at 5-6. The Solicitor General has waived response in this case (as he did in *Diamond v. United States*, 131 S. Ct. 1689 (2011) (denying cert.), and *Rivera v. United States*, 479 U.S. 1091 (1987) (denying cert.)). But if the Court were to invite him to file a response, experience teaches that he will make the same jurisdictional argument. Because an *amicus* cannot reply to an opposition to a certiorari petition, this brief is NIMJ's only opportunity to present its views.

[12] 10 U.S.C. § 867(c).

Article 67(a)(3), it is the "case[]" that is reviewed. CAAF orders that identify particular issues are properly understood as marking the metes and bounds of what the court *must* act on (not the larger universe of what it *may* act on), and, as a practical matter, merely as limiting the briefing to particular issues – a routine power that *any* appellate court enjoys, including this one. To view an order granting review in any other light would pit the issue-oriented third sentence of Article 67(c) against the case-oriented terms of Article 67(a).

In any event, this case does not involve a partial grant. While CAAF's order addressed a particular technical defect in the proceedings below (and suggested for a second time that the *Manual for Courts-Martial* be revised to prevent a recurrence), the decretal provision was unlimited. It simply ordered "[t]hat said petition is hereby granted" and affirmed the decision of the Court of Criminal Appeals. Pet. App. 2a. This is all that was needed to subject the entire case to review by writ of certiorari.

The statutory text is perfectly clear and, as it happens, is directly buttressed by the legislative history. When Congress expanded the certiorari jurisdiction to include cases arising under the UCMJ, it did so with respect to "cases" in which CAAF – then known as the Court of Military Appeals – had granted review. This is in contrast to the approach taken earlier in the legislative process of permitting certiorari review only of "issues" as to which that court had granted review.[13] Congress ultimately rejected

---

[13] The history is set out in detail in Capt. James P. Pottorff, *The Court of Military Appeals and the Military Justice Act of 1983:*

the "issues" approach that had been in the Defense Department's original legislative proposal, *see* Pottorff, *supra* note 13, at 14 & n.97 (H.R. 6298), opting instead (in accordance with the Department's witness's advice, *id.* at 14 & n.98) for the broader term "cases." Whether, as Capt. Pottorff suggests, *id.* at 14 & n.100, the choice was driven by concern that the "issues" approach might raise a question in light of Article III's case or controversy requirement, or by something else, that Congress abandoned that restrictive approach could not be clearer.

Whether certiorari may be granted with respect to an issue CAAF does not list when granting review is an "unresolved question."[14] This is a recurring matter. *See* notes 10-11 *supra.*[15] When CAAF grants review, its order typically lists fewer than all of the issues presented by the appellant in what is called, in CAAF practice, the "supplement" to the petition for a grant of review.[16] Indeed, correctly or

---

An Incremental Step Towards Article III Status?, 149 ARMY LAW., May 1985, at 1, 14. *See also* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in EVOLVING MILITARY JUSTICE 150-51 & nn.12-15 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

[14] *See* EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 128 n.103 (9th ed. 2007).

[15] *See also* Brief for the National Institute of Military Justice as *Amicus Curiae* in Support of Petitioner, *Diamond, supra* note 11; Fidell, *supra* note 12, at 151 & nn.14-15, *discussing Rivera*, *supra* note 11, and *Garwood v. United States*, 474 U.S. 1085) (denying cert.)).

[16] *See* C.A.A.F.R. 21.

not, CAAF occasionally grants review in a case in which the appellant has cited no issues at all.[17]

It is important to the proper and efficient administration of the military justice system that the Court make clear, in keeping with both the text and legislative history of Article 67a and section 1259, that a certiorari petition will lie as to any issue in a case in which CAAF has granted review, regardless of whether the order granting review mentions the particular issue(s) with respect to which certiorari is later sought. Because the Court ordinarily does not give reasons when denying certiorari, the "ungranted issue in a granted case" question will continue to haunt military appellate practice. *Cf. Southern Pac. Term. Co. v. ICC*, 219 U.S. 498 (1911) ("capable of repetition, yet evading review" exception to mootness). If nothing else, the judges of the Court of Appeals ought to be able to know what the consequences are if they identify particular issues in an order granting review – or if they fail to do so. Without that information, their ability to intelligently perform the gatekeeper function Congress has conferred on them is needlessly compromised.

The Court indicated in *United States v. Denedo,* 556 U.S. 904, 909 (2009), that the statute granting jurisdiction over court-martial cases should not be read parsimoniously. At issue there was a contention by another Navy enlisted man that the govern-

---

[17] *E.g., United States v. Dalrymple*, 14 C.M.A. 307, 308-09, 34 C.M.R. 87, 88-89 (1963); *see generally* GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, *supra*, at 156 (collecting cases).

ment's petition lay outside the Court's jurisdiction. Here the shoe is on the other foot, but the construction of the statute must remain constant. It is disturbing enough that Congress has given the military personnel who defend the Nation narrower access to this Court than the unrestricted access enjoyed by all other petitioners for certiorari, including those convicted by military commissions.[18] There is no reason to magnify that disparity by construing the grant of certiorari jurisdiction in court-martial cases more narrowly than warranted by either the statutory text or, if recourse to it is necessary or appropriate, the legislative history.

CONCLUSION

For the foregoing reasons, the petition is within the Court's jurisdiction. The Court may wish to invite the views of the Solicitor General and thereafter use the opportunity presented by this case to make clear that a certiorari petition may be filed on all issues presented in a case in which CAAF has granted review.

---

[18] *Compare* 28 U.S.C. § 1254 *with* 28 U.S.C. § 1259; *see* 10 U.S.C. § 867a(a); Military Commissions Act of 2009, 28 U.S.C. § 950g(d); *see also Equal Justice for Our Military Act of 2009: Hearing on H.R. 569 Before the H. Comm. on the Judiciary, Subcomm. on Courts and Competition Policy*, 111th Cong. 12 (2009) (testimony of Dwight H. Sullivan).

Respectfully submitted.

EUGENE R. FIDELL
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 432-4852
eugene.fidell@yale.edu

STEPHEN A. SALTZBURG
2000 H Street, N.W.
Washington, DC 20052
(202) 994-7089

RONALD W. MEISTER
Cowan, Liebowitz
& Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036
(212) 790-9255

Attorneys for Amicus Curiae

May 2012