NO. 12-802

IN THE
Supreme Court of the United States

MICHAEL C. BEHENNA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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February 27, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National Association of Criminal Defense Lawyers (NACDL), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before the U.S. Supreme Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving the ability of criminal defendants in both the civilian and military justice systems to vindicate their rights on direct appeal and through collateral

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[1] The parties have consented to the filing of this brief. Counsel of record for both 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 *amicus* or its counsel made a monetary contribution to its preparation or submission.

post-conviction review. As relates to the issue before the Court in this case, NACDL has an interest in ensuring that an Article III court has the final say on such an important question of substantive criminal law, even where that question's significance may be limited to cases arising out of the military.

SUMMARY OF ARGUMENT

Over the last 70 years, two developments have dramatically reduced the Court's focus on direct appeals from civilian criminal convictions: the expansion of collateral review via habeas corpus and Congress's transformation of the Court's docket from one featuring a high number of mandatory appeals to one in which almost all of the Court's jurisdiction is discretionary. As a result, it is now the rare case where this Court grants certiorari in a direct criminal appeal merely to exercise a routine error-correcting function.

These trends militate in the other direction, however, with respect to the Court's review of criminal convictions in military courts. In the military context, collateral review of criminal convictions is severely limited to whether the military court gave "full and fair consideration" to the defendant's constitutional claims. And unlike civilian criminal convictions, Congress has explicitly indicated its desire for the Court to exercise a *more* aggressive supervisory role over military convictions.

Accordingly, while the Court is certainly not bound to exercise certiorari jurisdiction over military appeals in any or even most cases, the Court is meant to—and should—play a different and more

active role in reviewing direct appeals from the military justice system. *Amicus* believes that the question presented in this case is sufficiently significant to merit this Court's resolution.

ARGUMENT

I. CONGRESS AND THIS COURT HAVE INCREASINGLY PREFERRED COLLATERAL REVIEW, RATHER THAN DIRECT APPEALS, FOR SUPERVISING CIVILIAN CRIMINAL CONVICTIONS.

A. Post-Conviction Habeas Corpus Came To Serve Similar Functions as Those Served by Direct Appellate Review.

Ever since the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, cemented the ability of federal courts to entertain habeas petitions from criminal defendants convicted in state courts, a dual track has existed pursuant to which those convicted in state and federal civilian courts can mount challenges to their trials: direct appeals culminating in this Court, and petitions for writs of habeas corpus in the appropriate Article III district court. Even as the functions served by these tracks of review have varied, case law arising from the 1867 Act reflected a series of interrelated propositions usefully summarized by Professors Hertz and Liebman:

> All prisoners deserve one federal-court appeal as of right of their federal constitutional claims, if not on direct review in the Supreme Court, then on habeas corpus in the lower federal courts. As in other appeals, the scope

> of review was to be *de novo* on the law, deferential on the facts. In the federal prisoner context, the appeal generally would be a direct appeal to a United States Court of Appeals, unless the prisoner could not reasonably be expected to raise his claims in the immediate wake of trial. In the state-prisoner context, with direct Supreme Court review on the merits as of right having been limited to but a few cases each year, the bulk of the review responsibility would fall to the lower federal courts (and, at times, the Supreme Court) on habeas corpus.

Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at 71 (5th ed. 2005).

Two important jurisprudential developments helped to accelerate this trend: *First*, in *Waley v. Johnston*, 316 U.S. 101 (1942) (per curiam), the Court expanded the scope of post-conviction habeas corpus from challenges to the "jurisdiction" of the trial court to *all* constitutional challenges to the conviction. *See id.* at 104–05; *see also Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) ("[I]n *Waley v. Johnston*, the Court openly discarded the concept of jurisdiction . . . as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of disregard of the constitutional rights of the accused." (citations omitted) (internal quotation mark omitted)). *See generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi.

L. Rev. 142, 151–54 (1970) (describing the evolution of the scope of post-conviction habeas review).

Eleven years later, in *Brown v. Allen*, 344 U.S. 443 (1953), the Court held that such expansive post-conviction review extended even to those claims that had been fully litigated at trial, opening the door to sweeping federal *re*litigation of alleged trial-court errors. Between them, *Waley* and *Brown* necessarily presupposed that the principal federal post-conviction review of state trial court errors would not take place on direct appeal, but rather collaterally via habeas corpus. And although federal post-conviction review of *federal* convictions was already available on direct appeal, this Court soon made clear that similar considerations applied to collateral review of federal convictions via 28 U.S.C. § 2255 as well. *See generally Hill v. United States*, 368 U.S. 424, 427–28 & n.5 (1962).

To be sure, both this Court and Congress have since narrowed the scope of federal post-conviction habeas review for state prisoners, especially in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. But even as AEDPA eliminated *de novo* habeas review for "any claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362 (2000), it preserved such review for claims that were *not* so adjudicated, and it continues to allow federal courts to set aside state-court merits adjudications if they are "contrary to, or involved an unreasonable application of, clearly established Federal law," as

determined by this Court. 28 U.S.C. § 2254(d)(1). And for *federal* court convictions, the post-conviction review provided for by § 2255 continues to be *de novo*. *See id.* § 2255(a).

B. Congress Has Consistently Expanded this Court's Discretion Over its Appellate Jurisdiction, Especially in Criminal Cases.

At the same time, Congress has consistently expanded this Court's discretion over its appellate jurisdiction, beginning in the Evarts Act, *see* Act of March 3, 1891, ch. 517, 26 Stat. 826, and the "Judges' Bill," *see* Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936, and culminating in the near-abolition of mandatory appellate review in 1988, *see* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662. Indeed, this general story has been well- and often-told. *See, e.g.*, Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1448–50 (6th ed. 2009) [hereinafter "Hart & Wechsler"]; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

Nevertheless, it bears emphasizing that one of the areas where the expansion of appellate discretion has been the most pronounced has been in direct *criminal* appeals. For example, although the Judges' Bill had already heavily circumscribed the Court's mandatory appellate jurisdiction over federal convictions, the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1880, went further, eliminating direct appeals from district courts in

specific criminal cases in which such authority had been provided by the Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246. *See* Hart & Wechsler, *supra*, at 1449 & n.19. With regard to state court convictions, the Judiciary Act of 1914 had already made such appeals discretionary with regard to state-court decisions *upholding* federal rights. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In 1988, certiorari was extended to encompass all remaining state-court decisions subject to the Court's appellate jurisdiction. *See* Hart & Wechsler, *supra*, at 432–33. Thus, while the Court's discretion to set its docket has expanded as a general matter, such expansions have, at least in some cases, been specifically focused on increasing the Court's discretion to not hear direct criminal appeals.

C. This Court Has Increasingly Declined to Exercise Direct Supervisory Powers Over Civilian Criminal Appeals.

Not surprisingly, these jurisdictional trends have produced a corresponding decline in this Court's docket, from a peak of well-over 300 cases per Term in the early part of the twentieth century, *see* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 295 tbl.I (1928), to the roughly 75 cases per Term the Court currently hears. The actual decline has been particularly sharp, however, with regard to direct criminal appeals—especially from state courts. Indeed, even in 1989 (the year after the 1988 Act virtually abolished the Court's mandatory appellate jurisdiction), the Court still heard 41 appeals from

state courts. During the October 2010 Term, in contrast, the Court heard nine such cases, *see The Supreme Court, 2010 Term—The Statistics*, 125 Harv. L. Rev. 362, 371 tbl.2(E) (2011), only three of which were criminal appeals, *see Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Kentucky v. King*, 131 S. Ct. 1849 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). *See generally* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211 (2008) (studying the shift in the composition of the Court's criminal docket).

The natural consequence of both the expansion of post-conviction habeas and the contraction of the Court's mandatory appellate jurisdiction has been to sharpen the Court's focus on those cases of national importance and/or cases raising divisions of authority among the lower courts, at the expense of ordinary appellate supervision of ordinary lower-court errors. Thus, although it is now accepted as axiomatic that "[e]rror correction . . . is outside the mainstream of the Court's functions," Eugene Gressman et al., *Supreme Court Practice* § 5.12(c), at 351 (9th ed. 2007); *see also* S. Ct. R. 10, it has been described as especially inappropriate in circumstances in which the errors petitioners seek to correct may be resolved in subsequent or collateral proceedings in the lower courts, *see, e.g.*, *Tory v. Cochran*, 544 U.S. 734, 739–40 (2005) (Thomas, J., dissenting), or in cases in which the likely impact of the lower court's error is limited to the specific

controversy at bar, *see, e.g.*, *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting). In other words, the gradual but near-complete evaporation of this Court's error-correcting function in criminal cases can be traced at least in some respects to a combination of its increasingly discretionary jurisdiction and the greater opportunities for meaningful post-conviction review via habeas corpus in the lower courts.

II. POST-CONVICTION REVIEW OF MILITARY CONVICTIONS HAS FOLLOWED THE OPPOSITE PATTERN.

A. This Court Has Carefully Circumscribed the Scope of Collateral Post-Conviction Review of Military Convictions.

Even as this Court was expanding the scope of post-conviction habeas review of *civilian* criminal convictions as documented above, it took a far more modest approach to post-conviction habeas review of military convictions. Prior to 1942, habeas review of military courts, like that of civilian courts, only extended to claims that the trial court lacked "jurisdiction." *See, e.g.*, *United States v. Grimley*, 137 U.S. 147, 150 (1890) ("[T]he civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . . The single inquiry, the test, is jurisdiction."). But whereas *Waley v. Johnston*, 316 U.S. 101 (1942) (per curiam), dramatically expanded the scope of *civilian* post-conviction habeas, *see ante* at 4, no comparable expansion immediately followed for collateral review

of courts-martial, *see, e.g.*, *Hiatt v. Brown*, 339 U.S. 103, 110–11 (1950) (reaffirming *Grimley*).

Instead, four months after *Brown v. Allen*, 344 U.S. 443 (1953), opened the door to *de novo* relitigation in civilian post-conviction habeas, the Court in *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion), took a far-more-modest step in that direction for military convictions. Specifically, *Burns* held that collateral review of courts-martial would extend only to whether the trial court gave "full and fair consideration" to the defendant's claims. *See* 346 U.S. at 142 ("[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ . . . .").

Burns was heavily criticized when it was decided, *see, e.g.*, *id.* at 153–54 (Douglas, J., dissenting); *see also Burns v. Wilson*, 346 U.S. 844, 844–51 (1953) (Frankfurter, J., dissenting from the denial of rehearing). In particular, as Justice Frankfurter explained, it was difficult to understand why the justifications for more expansive collateral post-conviction review of civilian criminal courts did not apply *a fortiori* to military courts. *See* 346 U.S. at 848–49 (Frankfurter, J., dissenting from the denial of rehearing). If anything, there may be even stronger arguments for *de novo* collateral review of military convictions, because, as Justice Kennedy explained in *Boumediene v. Bush*, 553 U.S. 723 (2008), "where relief is sought from a sentence that resulted from the judgment of a court of record, . . . considerable deference is owed to the

court that ordered confinement," *id.* at 782, but "[m]ilitary courts are not courts of record," *id.* at 786.

Burns nevertheless remains good law. *See, e.g.*, *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 671 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 1711 (2011); *Sanford v. United States*, 586 F.3d 28, 31-33 (D.C. Cir. 2009); *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 408 (D.C. Cir. 2006); *see also Schlesinger v. Councilman*, 420 U.S. 738, 748–53 (1975). Moreover, as the Tenth Circuit's decision in *Thomas* indicates, courts have understood "full and fair consideration" to encompass even those claims that receive *no* formal adjudication by the military justice system. Instead,

> [w]hen an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion.

625 F.3d at 671 (quoting *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986)) (alteration in original); *see also id.* (noting that the Tenth Circuit "give[s] greater deference to the military than we do to state courts in relation to determining ineffective assistance of counsel claims"). Although there is some variation at the margins in how other circuits apply *Burns*, *see, e.g.*, *Armann v. McKean*, 549 F.3d 279, 289 n.10 (3d Cir. 2008) ("The case law interpreting the full and fair consideration test lacks uniformity."), every circuit's approach reflects the

basic proposition that the only military court errors that will typically be reviewable via post-conviction habeas in the civilian courts are those that reflect *gross* constitutional error or that implicate the trial court's jurisdiction.[2]

B. Congress Has Expanded This Court's Direct Appellate Jurisdiction Over the Military Justice System—and Thereby Underscored the Need for More Direct Supervision.

Whether as a cause or an effect of this narrow scope of collateral review, Congress has only expanded civilian appellate supervision of the military justice system. Thus, as part of the Uniform Code of Military Justice (UCMJ) in 1950, Congress created the Court of Military Appeals (the forerunner to the present-day Court of Appeals for the Armed Forces, or "CAAF"), a single civilian appellate court to supervise direct appeals from each of the service departments. Congress went one critical step further in the Military Justice Act of 1983, Pub. L. No. 98–209, 97 Stat. 1393, investing this Court with certiorari jurisdiction in four classes of appeals from CAAF, *see* 28 U.S.C. § 1259, and for the first time

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[2] One of the strongest indications of the difficulty military defendants face in seeking collateral review in the civilian courts is their increasing resort to collateral post-conviction review *within* the military justice system, as endorsed by this Court in *United States* v. *Denedo*, 556 U.S. 904 (2009). *See, e.g.*, *Loving* v. *United States*, 68 M.J. 1 (C.A.A.F. 2009). Just as collateral post-conviction review within state courts does not obviate the importance of independent Article III oversight of state court convictions, however, the same can be said for military convictions, as well.

giving the Supreme Court direct supervisory responsibility over the military justice system.[3] *See generally* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329 (1984).

Although part of the impulse behind the 1983 Act was to empower the *military departments* to appeal adverse decisions by CAAF, the relevant legislative history is replete with concerns over the extent to which pursuing collateral review had become "a difficult and costly endeavor" for servicemembers as well, especially given that (1) many of them could not afford to retain counsel in such cases; and (2) in any event, there were "limited grounds for collateral review." *See, e.g.*, S. Rep. No. 98-53, at 8–9 (1983); *see also* H.R. Rep. No. 98-549, at 16 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2177, 2182. *See generally The Military Justice Act of 1982: Hearings on S. 2521*

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[3] To similar effect, the Military Commissions Acts of 2006 and 2009 also invest the Supreme Court for the first time with certiorari jurisdiction to review direct appeals of final judgments by military commissions (after they have been heard by the intermediate Court of Military Commission Review and the D.C. Circuit). *See* 10 U.S.C. § 950g(e). And although it has since been repealed, one provision of the 2006 MCA would have made such a direct appeal the *exclusive* post-conviction remedy available under the Act. *See* 10 U.S.C. § 950j(b) (2006). *See generally* Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, *in Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective* (Fionnuala D. Ní Aoláin & Oren Gross eds., Cambridge Univ. Press forthcoming 2013) (summarizing the evolution of appellate and collateral review of military courts).

Before the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services, 97th Cong., 2d Sess. 136 (1982) (testimony of Hon. Robinson O. Everett, Chief Judge, U.S. Court of Military Appeals).

To be sure, the expansion of the Court's certiorari jurisdiction over the military has not escaped criticism—especially to the extent that § 1259 does *not* confer certiorari jurisdiction over court-martial appeals that CAAF itself declines to hear. *See, e.g.*, Eugene R. Fidell, *Review of Decisions of the United States Courts of Appeals for the Armed Forces by the Supreme Court of the United States*, *in Evolving Military Justice* 149, 155–60 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). But the perceived underinclusiveness of the 1983 Act in no way undermines the point that one of its central goals was to expand this Court's supervisory authority over the military justice system. Indeed, it is particularly telling that Congress so intended, given that decisions by the military courts are often of limited importance or precedential value *outside* the military justice system. The natural conclusion to draw from this development is that, contra the civilian criminal conviction example, Congress specifically *intended* for this Court to take a more active role in supervising military convictions on direct appeal.

C. This Case is an Appropriate Candidate for Such Supervision.

To be clear, *amicus* does not suggest that, by dint of *Burns* and the Military Justice Act, this Court is

bound to exercise certiorari jurisdiction over CAAF in any case (or even in most cases) in which it is validly sought. Quite to the contrary. But the lesson to be divined from this Court's jurisprudence and the Military Justice Act is the different (and more active) role that this Court is meant to—and should—play in reviewing direct appeals from the military justice system as compared to that which it plays on direct appeal of civilian criminal convictions.

We therefore agree with Petitioner that the question presented addresses a significant point of substantive criminal law and thus merits this Court's resolution. As Petitioner notes, "The CAAF's ruling," *i.e.*, that "a servicemember in a combat zone categorically forfeits the right to self-defense by pointing a firearm without authorization at a suspected enemy outside the traditional 'active battlefield situation,'" "has central and growing significance as our servicemembers confront enemies in increasingly unconventional combat settings." Pet. at 15; *see also United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012).

Indeed, the sole question presented in this case is a quintessential example of the kind of issue that is normally beyond the purview of this Court's direct appellate review (since, *inter alia*, it is neither constitutionally grounded nor applicable outside the military justice system), but merits the Court's intervention here. After all, whether or not CAAF reached the right result, the fact that its decision on such a significant and far-reaching question of substantive military law provoked a 3-2 split among

its judges only underscores the significance of giving an Article III tribunal the final say—as Congress intended. And because of the deferential standard this Court laid down in *Burns* for collateral Article III review of military convictions, the only realistic opportunity for such oversight is on direct appeal to this Court under 28 U.S.C. § 1259.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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