UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In Re: Robert A. Condon Petitioner v. Col. Michael A. Johnston Warden United States Disciplinary Barricks 1301 N. Warehouse Rd. Ft. Leavenworth, KS 66027 Respondent	)	Case No: _____ Judge: _____ **PETITION FOR WRIT OF HABEAS CORPUS** Richard M. Kerger [redacted] *Counsel for Petitioner Robert A. Condon*

BASIS OF JURISDICTION AND WHY REGULAR REVIEW IS INADEQUATE

Jurisdiction exists here pursuant to 28 U.S.C. section 1651 and Rule 19, Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

Regular review is inadequate since the issues presented in this writ were unknown to petitioner or his counsel until after the original appeal was concluded.

ISSUES IN THIS WRIT

The issues presented in this Petition call for a review of:

1. Whether the prosecutorial misconduct occurred in the handling of the transcript on appeal.

2. Ineffective assistance of counsel by Petitioner's appellate counsel.

3. Errors of the trial judge including his self-selection and improper command influence.

4. Brady violation through the failure to disclose the key witnesses' prior criminal conviction.

HISTORY OF CASE

In 2014 following several overseas tours of duty, Tech. Sgt. Robert A. Condon was charged with a variety of sexually related offenses. He was tried at Hurlburt Field beginning on June 24, 2014 through September 25, 2014. He was convicted of violating several specifications and was sentenced to 30 years in the Disciplinary Barracks at Ft. Leavenworth, Kansas.

An appeal was taken from that conviction to the United States Air Force Court of Criminal Appeals, Case No. 38765. After relief was denied, an appeal was then taken to the United States Court of Appeals or the Armed Forces, Case No. 171392/AF. Relief was denied that court as well. He then appealed to the United States Supreme Court which denied certiorari in Case No. 17-9077. A Petition for Habeas Corpus relief was filed in the District Court of Kansas. Relief was denied in that case. Case No. 19-cv-3192-JWL. At the same time a similar petition for relief was filed in Florida where the case was tried and it was dismissed since the jurisdiction was found to be improper.

ISSUES PRESENTED FOR REVIEW

The record in the case is extensive but the issues presented in this Petition for Writ of Habeas Corpus are limited to four.

1. Was prosecutorial misconduct committed in the handling of the transcript on appeal? For reasons unknown to Petitioner, there were two versions of the transcript prepared. The one submitted to his appellate counsel by the prosecution omitted more than 60 pages of the trial transcript. The transcripts furnished to the prosecution, to the Defendant personally and to the Court contained the full record. Since Defendant was confined thousands of miles from his appellate counsel, reviewing the two transcripts was not possible nor did it seem necessary. The difference in the transcripts was significant in that many of the citations to the transcript submitted by Petitioner's appellate counsel in his briefs were incorrect due to the difference in pagination.

2. Petitioner alleges that his appellate counsel was ineffective for failing to detect the difference in the pagination his copy and in the other versions. Petitioner and his counsel talked regularly on issues and when Petitioner attempted to provide him citations to the record, the lawyer could not find them and just disregarded them.

3. The trial judge engaged in improper conduct in self-selecting himself to be the trial judge in this case. He also exerted improper command influence. The trial judge allowed Mr. Condon to be moved four times during the pretrial stages and kept him jailed many hundreds of miles from his defense counsel who was originally retained because of his proximity to the base where the matter would be tried. For a majority of the time Defendant was held in jail, he was in solitary confinement. Objections were made but no relief was granted. The handling of the case by the trial judge indicated his effort to make an example of Petitioner to help improve the military's image with regard to the handling of sexual assault charges.

4. Petitioner contends that his rights under Brady v. Maryland were dramatically affected when his

investigator learned after the trial that the primary witness against Petitioner, who testified in short form that he had raped her, was substantially undercut by the testimony of a nurse who ass an expert in sexual assault cases. The nurse's testimony based on a physical examination of the victim on the night of the alleged rape was dismissive of the witness's claims of sexual assault. What was not known to defense at the time was that the witness had a criminal conviction. Indeed it appears she should not have been in the Air Force because of her pre-enlistment conviction [redacted].

STATEMENT OF FACTS

The overwhelming majority of facts involved in this case are not relevant to the issues presented here. Those that are relevant are these:

1. Whether in fact there were two different versions of the transcript in the hands of counsel for Petitioner and the Air Force. It seems clear there were for reasons which have not been disclosed. Under the procedural rules, it was incumbent upon the prosecution to ensure the accuracy of the transcripts. Regardless of what happened, it was incumbent upon the prosecution to ensure that the lawyers, the Judges and the Petitioner had the same transcript.

2. Petitioner's appellate counsel was ineffective in failing to recognize the differences in the transcripts. He and the Petitioner talked routinely about the issues in the case, not in person since they were more than 1,000 miles apart, but it was clear that the citations were not matching. An effective lawyer should have recognized this deficiency.

3. Then-Colonel Spath self-selected himself to be the Judge in Petitioner's case. He then improperly used his command influence to shape the decision of the trial jurors. After his self-selection, he was actively involved at the same time in proceedings in Guantanamo Bay. He delayed proceedings in Petitioner's case so that he could handle both assignments. Then before deliberations began, the Judge's comments about consent would have confused the jurors. Moreover, his rulings were all negative to Petitioner including commencing the trial even though the time within which it should have occurred had expired. He allowed the prosecution to dismiss and refile the case. His willingness to put his personal interests ahead of the fairness to the Defendant was borne out in the proceedings in Guantanamo Bay. He was removed as the Judge there after having presided for several years and all of his interim rulings reversed. That same attitude was reflected in his handling of Petitioner's case.

4. The principal witness against Petitioner had a criminal conviction which was not disclosed to Petitioner's counsel before the trial. Indeed it was not until his family had hired a private investigator that this conviction was found. It is impossible to imagine that Prosecution's investigators would not have detected a criminal conviction in the career path of the star witness for the prosecution. This is a violation of his rights under Brady v. Maryland.

FACTUAL STATEMENT

In 2014 Robert A. Condon was convicted on charges of dereliction of duty, rape by fear of grievous bodily harm, sexual assault of a second victim based on her inability to consent due to alcohol consumption, stalking, forcible sodomy, assault consummated by a battery, false imprisonment and obstruction of justice.

His conviction was appealed and affirmed. He also sought relief through a Petition for Writ of Habeas Corpus which was denied. He now is before this Court raising issues which were unknown at the time of his appeal and which dramatically affected his ability to achieve a fair trial.

Before turning to the issues raised here, it is significant to note that prior to these charges, Petitioner was not only a successful Airman with several tours in combat zones, but one who had been the recipient of many awards and medals. He was carrying out his duties in an exemplary manner and yet according to the prosecution, he committed this market basket full of offenses.

There is a psychological doctrine known as the doctrine of antecedent probability. This seemingly esoteric doctrine is used by people betting on horses every day. Put simply, if you want to know what a horse or an individual is going to do in the future, look at what he has done in the past. Absent some substantial impact on a person's life (death of a loved one or diagnosis of a terminal disease) that person is likely to do what he has done in the past. Looking at the conduct of Petitioner, the conduct claimed to underlie his conviction is in marked contrast to his prior conduct and in no place in the record of any indication of a significant event that would change his history.

1. PROSECUTORIAL MISCONDUCT

For reasons known only to the prosecution, in preparing for the appeal of this case, two different versions of the trial transcript were prepared. Each had pages consecutively numbered so that the 66 page omission in the version given to counsel for Petitioner, to Petitioner and apparently to the prosecution was not easily noticed. Indeed this problem was not noticed by Petitioner or his counsel until long after his appeal and after post-conviction avenues had been explored. It came about in 2021 when Petitioner and his mother were discussing an issue during the drafting of a request for clemency. Petitioner kept insisting that a particular portion of the record appeared on a given page. His mother checked and resolutely responded that portion was not. They then continued checking and found the error – different versions. Petitioner had what was the correct version but his mother and his lawyer did not.

This error was investigated by Lt. Col. [redacted] when the matter was brought to the attention of the Air Force in June of 2021. He reported that:

> "Both sides had the same error filled electronic transcript. The government appellate division paid attention and appeared to cite the actual record vice the erroneous electronic transcript, but the defense appears to have mistakenly cited the electronic transcript, that again is not part of the official record of trial." (See Exhibit A.)

From the standpoint of defense counsel there was nothing that indicated that the record he had was anything other than the official transcript. His version was apparently prepared after the official record was prepared. Whoever removed the portions filed under seal had to intentionally remove those pages and intentionally not mark the transcript as containing redactions.

What is critical to this issue is the observation by Colonel [redacted] that the prosecutors detected the error. But they then did nothing to notify defense counsel. When the briefs were being exchanged, the prosecutors had to detect that the page citations by Appellant's counsel were incorrect. And again, they said nothing. They were content to have an unseen advantage which worked to the prejudice of Appellant and denied him a fair appeal.

But what is staggeringly obvious is the confusion here. Colonel [redacted] says that both the prosecution and defense had the same incorrect transcript but the prosecution caught the error. However there is a third party not mentioned in all of this – Petitioner. He had a transcript and the correct one. He got his about the time his lawyer, Phillip Cave, did. How could Mr. Cave get an incorrect transcript and the Petitioner receive the correct one?

It is also frightening to consider that had Petitioner been given the incorrect transcript, this problem would never have been noticed. These circumstances warrant vacation of the appellate court ruling and a remand for new appeal with everyone having the same correct copies of the transcript.

2. INEFFECTIVE ASSISTANCE OF COUNSEL

Under the guidance of Strickland v. Washington, 466 U.S. 668 (1984), if it is shown that defense counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on to produce a just result, the conviction should be reversed. The same has to be true for deficient performance on appeal. See also Martinez v. Ryan, 566 U.S. 1 (2012) and Hittson v. GDCP Warden, 759 F. 3d 1210 (11th Cir. 2014).

The proof of the ineffective performance of appellate counsel here comes from the report of Colonel [redacted]. In the section quoted previously, he noted that both the prosecution and Mr. Cave got the same transcript but the prosecutors were able to detect the problem and raise it. Mr. Cave did not.

No one could point to any tactical consideration or reason of trial judgment that that problem should not have been noted. Mr. Condon had numerous conversations with Mr. Cave and they stumbled over the citation issue but it apparently never occurred to Mr. Cave or Petitioner that there was a difference in the transcripts. It did occur to the prosecution and so it is apparent it could have been found, and as Petitioner suggests should have been. That would have avoided all of these problems.

This issue was raised with Air Force Inspector General and investigated by [redacted], USAF Complaints Resolution Specialist. She reported in an email dated May 25, 2021 directed to Petitioner's mother that having looked into this issue, it was simply a clerical issue that contained no evidence of ethical violations or in fact any problem. Exhibit B. The observation of Ms. [redacted] is very simply wrong.

It is not the case that challenges to the accuracy of transcripts are unheard of. But those challenges involve questions about a court reporter being unable to understand the testimony and putting in a statement "the remarks are unintelligible". Or the transcripts are of an audio tape played at trial where there is disagreement as to what the transcript should say. See 43.M.R. 918, 1970 W.L. 7517, United States Air Force Court of Military Review (1973); United States v. Zinn, U.S. Air Force Court of Military Review, decided April 16, 1992 (ACM 28930 F.Rev.) (1990); United States v. Ratajczak, 43 C.M.R. 1007, 1971 W.L. 12922 (United States Air Force Court of Military Review 1971).

Accordingly the performance of appellate counsel was ineffective and the judgment of the Court of Appeals should be set aside and the matter brought on for a new appeal.

3. ERRORS OF THE TRIAL JUDGE

Equally troubling was the performance of the trial judge, then-Colonel Vance Spath. His integrity was drawn into focus recently by a decision of the United States Court of Appeals for the District of Columbia. In ruling on a mandamus petition filed by Abd Al-Rahim Hussein Muhammed Al-Nashiri, that Court vacated years of oral and written rulings in that case issued by then-Colonel Spath. The Court granted the unusual relief sought in that case because of the improper and unethical actions of Judge Spath.

According to the appellate decision, shortly after accepting the role as the trial judge in Al-Nashiri's case, then-Colonel Spath sought post retirement employment as an immigration judge. He did this realizing that the Justice Department controlled such appointments, the same Justice Department that was prosecuting Al-Nashiri. But Judge Spath elected to remain silent about his career plans and carried out his work as Al-Nashiri's judge while at the same time currying favor with the Justice Department. In the course of its decision, the Court made this observation:

> "The fact of Spath's employment application alone would thus be enough to require his disqualification. But Spath did yet more to undermine his apparent neutrality.
>
> First, in his job application, Spath chose to emphasize his role as the presiding judge over Al-Nashiri's commission. He boasted that he had been "handpicked by the top lawyer of the Air Force to be the trial judge" on "the military commissions proceedings for the alleged 'Cole bombing' mastermind," Reply Attachments B-2 and he even supplied an order from Al-Nashiri's case as his writing sample, *see id* at B-11. Spath thus affirmatively called the Justice Department's attention to his handling of

> Al-Nashiri's case, making his performance as presiding judge a key point in his argument for employment.
>
> Second, while Spath made sure to tell the Justice Department about his assignment to the Al-Nashiri's commission, he was not so forthcoming with Al-Nashiri. At no point in the two-plus years after submitting his application did Spath disclose his efforts to secure employment with the Executive Office for Immigration Review. Indeed, perhaps most remarkably, less than twenty-four hours after receiving his July 2018 start date, Spath indefinitely abated commission proceedings, musing on the record that "over the next week or two" he would decide whether "it might be time...to retire." Commission Tr. 12374 (Feb. 16, 2018); *see also supra* at 11-12. Given this lack of candor, a reasonable observer might wonder whether the judge had done something worth concealing. *Cf.* Rule for Military Commissions 902(e) (permitting, in some circumstances, "the parties to [a] proceeding" to waive judicial disqualification but only if the waiver "is preceded by a full disclosure on the record of the basis for disqualification". See Exhibit C.

The Court went on to observe: "It is, of course, entirely possible that Spath's orders were the product of his considered and unbiased judgment, unmotivated by any improper considerations. But that is beside the point: 'Appearance may be all there is, but it is enough.'" United States v. Microsoft Corp, 253 F. 3d 34 at 115 (D.C. Cir. 2001). Exhibit C.

In this case, then-Colonel Spath "detailed himself as the trial judge for that case" (Exhibit D.) This Order was entered on May 13, 2014 which is the same day that the Defense filed its Motion to Dismiss for Unlawful Command Influence. The timing would be ironic if the issue were not so important.

The unwillingness to be candid in connection with his involvement in the Al Nashiri case suggests that then-Colonel Spath's decision to appoint himself to

handle Petitioner's case was motivated by a desire to be the Judge who helped reduce concerns about the handling of sexual assault cases by the military.

When Petitioner was charged, a furor was beginning in every political and military setting about the military's handling of sexual assault cases. Politician after politician and officer after officer fought to gain higher ground in their attacks on how soft the military had been on sexual predators in the past. There was a literal firestorm blazing and the person placed on the spit was Robert A. Condon. The Judge handling his case demonstrated in a very high profile case his willingness to bend the rules to his personal gain. That is simply not tolerable and the conviction of Robert A. Condon ought to be set aside or at the worst, his sentence suspended because of the role played by then-Colonel Spath.

There is no question that the then-Colonel Spath detailed himself to sit on the trial of then-Sergeant Condon. He was acutely sensitive to the issue of the handling of sexual assault by the military. One of the reasons he said he denied Mr. Condon's motion to dismiss for violation his speedy trial right was that the nature of those allegations in "today's environment warrants the delay". Trial Transcript pg. 136. Then in presenting the matter to the trial jurors, he commented that "consent to have sex" is not enough. See Trial Transcript pg. 470. Exhibit E.

Moreover, in addition to the Al-Nashiri case, then-Colonel Spath was found to have colluded to remove the Judge in the Vargas case because he felt that person would be too lenient on sexual assault cases. See Exhibit F excerpt from United States v. Vargas, No. ACM38991. That Court reversed the conviction of Vargas because it found that then-Colonel Spath serving as Vargas' trial judge had personal

knowledge of disputed facts in the case – in the course of the decision the Court made the following observation:

> "Based on our review of the lengthy and complex record, we conclude that the military judge abused his discretion by failing to recuse himself from presiding over the trial in this case. We reach this conclusion because he was a potential witness with personal knowledge of disputed evidentiary facts concerning the proceeding, specifically knowledge regarding the removal of Lieutenant Colonel (Lt Col) CL, who was originally detailed as the military judge in Appellant's case, which was the subject matter of the alleged UCI, and because military judge's impartiality could be reasonably questioned." Vargas, Pg. 2 attached as Exhibit F.

In regard to the ruling on denial of Mr. Condon's right to a speedy trial, then-Colonel Spath ignored the fact that Petitioner was moved four times during the year he was waiting and that Petitioner was held in solitary confinement for months before trial. After having hired a lawyer in the Jacksonville area near the base where he would be tried, he was moved 970 miles away obstructing his ability to communicate with his lawyer.

As the Court is no doubt aware, telephonic communications, even those between lawyer and client, are recorded. Keeping Petitioner nearly one thousand miles from his retained counsel made an effective defense strategy almost impossible to develop. It is certainly true that his lawyer is responsible for the legal architecture of his defense, but it is only the Petitioner who is in a position to tell the lawyer what in fact occurred in regard to these incidents. He is the source of the facts. By separating him from his lawyer, it made the preparation of that defense almost impossible.

The rulings made during Petitioner's trial were almost uniformly in favor of the position of the prosecution and against Petitioner. Clearly, the willingness of then-Colonel Spath to give sway to his own biases was demonstrated in other cases and prevailed here as well. His effort to present a "new face" for the military in regard to sexual assault cases should not have been made through Petitioner's wrongful conviction. Then-Colonel Spath put a huge thumb on the scales of justice to insure that Technical Sergeant Condon would be convicted and then subjected to a 30 year sentence. That improved the military's image in the eyes of the politicians who then-Colonel Spath was obviously trying to impress.

Then-Colonel Spath's comments concerning the effect of consent must have confused the jurors. He recognized that consent was an issue but then said the following: "Do you have to get consent for every single aspect of your sexual encounter? I mean is that where we're at that not only-not only, of course in the Air Force is concerned about sexual assault, as they should be. We can't figure out how to get consent these days and now it's not enough to get consent to have sex." See Page 470 of the Trial Transcript attached as Exhibit E.

4. BRADY VIOLATION IN THE FAILURE TO DISCLOSE THE KEY WITNESSES PRIOR CRIMINAL CONVICTION

Testimony of A1C [redacted] is one which seems to have involved intentional misconduct by one or more members of the Air Force. A1C [redacted] (identity restricted because of the circumstances of the case) was a primary witness if not the primary witness against Mr. Condon. In short form her testimony involved claims of rape by Petitioner. Those claims, however, were substantially undercut and was really destroyed by the testimony of Nurse [redacted] (Exhibit G). She had been carefully trained in recognizing evidence of sexual assault and testified to having given A1C [redacted] a thorough examination within hours after the claimed incident. Her testimony, which appears as Exhibit G indicates, that nothing happened, certainly nothing on the order testified to by A1C [redacted]. Note the attached Declaration of trial counsel, Captain Shalimar Addy, which makes clear the defense knew nothing about the witness's criminal conviction. (Exhibit H).

Indeed, it seems A1C [redacted] should never even been in the Air Force, at least without substantial accommodation made for her pre-enlistment conviction [redacted] This conviction was either not discovered at the time of her enlistment or it was found and ignored. It was also ignored when the Air Force Office of Special Investigations completed a report of investigated activity from September 12 through 25 in 2013. It was at a point in time that they knew that she was a claiming to be a victim of Mr. Condon's assault. Yet all their investigation disclosed nothing about her prior [redacted] conviction. Obviously this office has different standards from most in that it thinks committing [redacted] and then failing to disclose it are the moral equivalent of a parking ticket.

In her evaluation of the claims made by Defendant, General Vernon found that the issue of A1C [redacted] prior conviction was not pertinent since it had been known by defense counsel as early as 2015. In point of fact, as the Government later admitted in a brief filed on June 19, 2017 in the United States Court of Appeals for the Armed Forces that the documents were not obtained until May 31, 2017. This was after the initial Petition for Clemency was filed, and well after the trial and even after the appeal.

The failure to disclose this is a violation of Petitioner's right under Brady.

CONCLUSION

All of these violations, some of which certainly had to be intentional, show the lengths to which the prosecution was tilted by the then-Colonel Spath and others to ensure a conviction showing that the military would take complaints of sexual abuse seriously. Apparently sacrificing Mr. Condon's rights to due process of law was a small price to pay for that accomplishment.

The errors set out here should be recognized, and Andy Condon released from prison to go home to his family and reestablish himself so that he can accomplish the goals that are before him.

Respectfully submitted,

[redacted]

THE KERGER LAW FIRM, LLC

[redacted]

Richard M. Kerger [redacted]

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served this 6th day of May, 2022 upon the following:

Colonel Caroline Horton, Warden
United States Disciplinary Barracks
1301 N. Warehouse Rd.
Ft. Leavenworth, KS 66027

Col. John C. Johnson
Chief Appellate Military Judge
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In Re: Robert A. Condon Petitioner v. Colonel Michael A. Johnston United States Disciplinary Barricks 1301 N. Warehouse Rd. Ft. Leavenworth, KS 66027 Respondent	)	Case No: _____ Judge: _____ **NOTICE OF APPEARANCE** Richard M. Kerger [redacted] THE KERGER LAW FIRM, LLC [redacted] *Counsel for Petitioner Robert A. Condon*

Now comes Richard M. Kerger with The Kerger Law Firm, LLC and hereby enters his appearance as attorney for Petitioner Robert A. Condon in this case.

Respectfully submitted,

[redacted]

Richard M. Kerger [redacted]

THE KERGER LAW FIRM, LLC

[redacted]

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served this 6th day of May, 2022 upon the following:

Colonel Michael A. Johnston
United States Disciplinary Barricks
1301 N. Warehouse Rd.
Ft. Leavenworth, KS 66027

Col. John C. Johnson
Chief Appellate Military Judge
U.S. Air Force Court of Criminal Appeals
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In Re: Robert A. Condon Petitioner v. Colonel Michael A. Johnston United States Disciplinary Barricks 1301 N. Warehouse Rd. Ft. Leavenworth, KS 66027 Respondent	Case No: _____ Judge: _____ **MOTION TO APPEAR PRO HAC VICE** Richard M. Kerger [redacted] THE KERGER LAW FIRM, LLC [redacted] *Counsel for Petitioner Robert A. Condon*

Now comes Petitioner and prays that the Court grant his undersigned counsel the right to appear *pro hac vice*. Attached is the curriculum vitae for his lawyer and an Affidavit. Also attached is a Certificate of Good Standing from the Ohio Supreme Court. Counsel is admitted to practice in all the Courts of Ohio, federal and state, as well as the Court of Appeals for the Sixth Circuit and the Eleventh Circuit. Further he has been admitted to appear *pro hac vice* in many state courts. Indeed he has never been denied the right to proceed *pro hac vice*. It is unlikely that counsel will ever participate in any other proceeding involving the military courts which is why he has not sought to be admitted to the bar of this Court.

Respectfully submitted,

[redacted]

Richard M. Kerger [redacted]

THE KERGER LAW FIRM, LLC

[redacted]

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served this 9th day of May, 2022 upon the following:

Colonel Caroline Horton, Warden
United States Disciplinary Barracks
1301 N. Warehouse Rd.
Ft. Leavenworth, KS 66027
(Via U.S. Mail)

Col. John C. Johnson
Chief Appellate Military Judge
U.S. Air Force Court of Criminal Appeals

[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Robert A. CONDON, ***Petitioner***	)	**Misc. Dkt. No. 2022-04**
	)	**NOTICE OF DOCKETING**
	)	**Special Panel**

A petition entitled "Petition for Writ of Habeas Corpus" in the above-styled case was filed with this court on 9 May 2022.* The petition was accompanied by a Motion to Appear Pro Hac Vice by Mr. Richard M. Kerger, Esquire.

Accordingly, it is by the court on this 13th day of May, 2022,

ORDERED:

The Motion to Appear Pro Hac Vice for Mr. Richard M. Kerger, Esquire, is **GRANTED.**

This petition has been assigned Misc. Dkt. No. 2022-04 and has been referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge
MEGINLEY, CHARLTON J., Colonel, Appellate Military Judge

No briefs in response to this petition will be filed unless ordered by the court.

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

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* Filings in support of the petition were submitted on 6 May 2022 and on 9 May 2022.

18 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re Robert A. CONDON,	)	MOTION FOR LEAVE TO FILE
Petitioner	)	MOTION TO DISMISS
	)	
	)	Misc. Dkt. No. 2022-04
	)	
	)	Before Special Panel

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 23(d) of this Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file this motion to dismiss Petitioner's Petition for Writ of Habeas Corpus, filed on 9 May 2022, for a lack of jurisdiction. Since this Court has no jurisdiction to entertain Petitioner's writ, this petition should be dismissed.

Petitioner's case completed direct review on 1 October 2018 when the Supreme Court denied his petition for certiorari. *See* Condon v. United States, 139 S. Ct. 110 (2018); Article 71(c)(1)(C)(ii), UCMJ, Manual for Courts-Martial, United States A2-25 (2016 ed.); *see also* Article 57(c)(1)(B)(iii)(II), UCMJ (post-2019 version of the same Article). Petitioner's case became final when the convening authority approved the sentence and ordered the dishonorable discharge executed on 26 April 2019. *See* Article 76, UCMJ; Government's Mot. to Attach at 4.

This Court squarely held in Chapman v. United States, that "military courts do not have jurisdiction over habeas corpus petitions when a court-martial has completed direct review under Article 71, UCMJ [as in effect prior to 2019] and is final under Article 76." 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016). The Court reasoned that military courts are courts of limited, statutory jurisdiction, and habeas corpus petitions—separate civil proceedings—are not proper extensions of that jurisdiction. Id. at 601; *see also* In re Hyppolite, Misc. Dkt. no. 2021-02, 2021 CCA LEXIS 126, *2 (A.F. Ct. Crim. App. 29 March 2021) (order) ("This court does not have

jurisdiction over habeas corpus petitions when there is a final judgment as to the legality of the proceedings, all portions of the sentence have been ordered executed, and the case is final[.]"); Gray v. Belcher, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012) ("In this case, there is a final judgment as to the legality of the proceedings under Article 71(c)(1), UCMJ, and the case is final under Article 76, UCMJ. Therefore, this court is without jurisdiction to entertain collateral review under a writ of habeas corpus.") (citation omitted). Challengers may instead bring their habeas corpus petitions in federal district court. Chapman, 75 M.J. at 601. Indeed, Petitioner acknowledges he has brought such petitions in two separate courts. (Pet. Br. at 3.)

In the past, this Court has, on occasion, ignored the petition's title and considered it as a petition for a writ of error coram nobis. Chapman, 75 M.J. at 601 ("The label placed on a petition for extraordinary relief is of little significance.") (quoting Nkosi v. Lowe, 38 M.J. 552, 553 (A.F.C.M.R. 1993)). To be entitled to that writ, the petitioner must meet stringent threshold requirements:

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008), *aff'd and remanded*, 556 U.S. 904 (2009). Without addressing the remaining requirements, Petitioner cannot meet at least the second and sixth requirements, and that failure is dispositive. As noted above, Petitioner may seek relief through a writ of habeas corpus in an Article III court. Additionally, Petitioner is still serving his thirty-year sentence, as tacitly acknowledged in his petition. (Pet. Br. at 18 ("The errors set out here should be recognized, and Andy Condon released from prison[.]").)

These key failings mirror those at issue not only in Chapman, but also in Lewis v. United States, in which the petitioner explicitly requested a writ of coram nobis. 76 M.J. 829 (A.F. Ct. Crim. App. 2017). There, the Court reasoned:

> Like Chapman, Petitioner remains in confinement; therefore, coram nobis is not the sole remedy available to him because he is eligible to seek a writ of habeas corpus from a federal district court. Similarly, Petitioner has failed to demonstrate his sentence to nine years of confinement has been served. Accordingly, even if we were to assume arguendo Petitioner meets the remaining requirements, under Chapman no writ should issue on his petition.

Id. at 834. Since Petitioner has not filed his petition as a writ of error coram nobis and would not be entitled to such a writ anyway, this Court should decline to construe his petition as such. Instead, this Court should simply recognize the petition as a request for writ of habeas corpus, which this Court has no jurisdiction to grant.

WHEREFORE, the United States respectfully requests this Court dismiss Petitioner's petition for lack of jurisdiction.

[redacted]

BRIAN E. FLANAGAN, Maj, USAFR
Appellate Government Counsel
Military Justice and Discipline Directorate
United States Air Force

[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Counsel for the Petitioner on 18 May 2022 via electronic filing.

[redacted]

BRIAN E. FLANAGAN, Maj, USAFR
Appellate Government Counsel
Military Justice and Discipline Directorate
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In Re: Robert A. Condon	)	Misc. Dkt. No. 2022-04
	)	
Petitioner	)	**Before Special Panel**
	)	
	)	**BRIEF IN OPPOSITION TO MOTION TO DISMISS**
	)	
	)	Richard M. Kerger [redacted] THE KERGER LAW FIRM, LLC [redacted] *Counsel for Petitioner Robert A. Condon*

A Motion to Dismiss has been filed by counsel for the Government. It is predicated on the fact that this Court lacks jurisdiction since Petitioner's sentence has received a complete direct review under Article 71, UCMJ. Without disputing that that assertion is correct, the facts in this case make clear that there has not been the required "direct review under Article 71."

There is no dispute that there were two differing transcripts prepared in connection with the appeal of Petitioner's case. It is also undisputed that counsel for the Air Force discovered the error and corrected their copy. They also apparently corrected the copy sent to Petitioner. Attached as Exhibit A to the Petition in this case is correspondence from an Air Force officer confirming the existence of two differing

transcripts. He also suggests filing for a writ in the Air Force Court of Criminal Appeals.

What is also clear is that the copy sent to Petitioner's appellate counsel was incorrect. It was more than 60 pages short of the complete transcript. This created problems during the process of consultation between Petitioner and his counsel – suggested inclusions of issues were rejected because appellate counsel was unable to find the citation provided by his client.

Without knowing what transcript the officer conducting the review had, it cannot be said with any certainty that the review provided for under Rule 71 occurred. At a minimum, this Court must determine if the basis for the Motion to Dismiss is in fact correct. Only at that point can the Court decide the Motion.

Accordingly the Motion to Dismiss must be denied.

Respectfully submitted,

[redacted]

Richard M. Kerger [redacted]

THE KERGER LAW FIRM, LLC

[redacted]

CERTIFICATE OF FILING AND SERVICE

This is to certify that a copy of the foregoing was delivered on the 25th day of May, 2022 to the Court and to the following Counsel via Electronic Mail:

Brian E. Flanagan, Maj, USAFR
Appellate Government Counsel
Military Justice and Discipline Directorate
Email: [redacted]

Mary Ellen Payne
Associate Chief, Government Trial and
Appellate Operations Division
Email: [redacted]

[redacted]

18 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re Robert A. CONDON,	)	MOTION FOR LEAVE TO FILE
Petitioner	)	MOTION TO DISMISS
	)	
	)	Misc. Dkt. No. 2022-04
	)	
	)	Before Special Panel

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rule 23(d) of this Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file this motion to dismiss Petitioner's Petition for Writ of Habeas Corpus, filed on 9 May 2022, for a lack of jurisdiction. Since this Court has no jurisdiction to entertain Petitioner's writ, this petition should be dismissed.

Petitioner's case completed direct review on 1 October 2018 when the Supreme Court denied his petition for certiorari. *See* Condon v. United States, 139 S. Ct. 110 (2018); Article 71(c)(1)(C)(ii), UCMJ, Manual for Courts-Martial, United States A2-25 (2016 ed.); *see also* Article 57(c)(1)(B)(iii)(II), UCMJ (post-2019 version of the same Article). Petitioner's case became final when the convening authority approved the sentence and ordered the dishonorable discharge executed on 26 April 2019. *See* Article 76, UCMJ; Government's Mot. to Attach at 4.

This Court squarely held in Chapman v. United States, that "military courts do not have jurisdiction over habeas corpus petitions when a court-martial has completed direct review under Article 71, UCMJ [as in effect prior to 2019] and is final under Article 76." 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016). The Court reasoned that military courts are courts of limited, statutory jurisdiction, and habeas corpus petitions—separate civil proceedings—are not proper extensions of that jurisdiction. Id. at 601; *see also* In re Hyppolite, Misc. Dkt. no. 2021-02, 2021 CCA LEXIS 126, *2 (A.F. Ct. Crim. App. 29 March 2021) (order) ("This court does not have

jurisdiction over habeas corpus petitions when there is a final judgment as to the legality of the proceedings, all portions of the sentence have been ordered executed, and the case is final[.]"); Gray v. Belcher, 70 M.J. 646, 647 (Army Ct. Crim. App. 2012) ("In this case, there is a final judgment as to the legality of the proceedings under Article 71(c)(1), UCMJ, and the case is final under Article 76, UCMJ. Therefore, this court is without jurisdiction to entertain collateral review under a writ of habeas corpus.") (citation omitted). Challengers may instead bring their habeas corpus petitions in federal district court. Chapman, 75 M.J. at 601. Indeed, Petitioner acknowledges he has brought such petitions in two separate courts. (Pet. Br. at 3.)

In the past, this Court has, on occasion, ignored the petition's title and considered it as a petition for a writ of error coram nobis. Chapman, 75 M.J. at 601 ("The label placed on a petition for extraordinary relief is of little significance.") (quoting Nkosi v. Lowe, 38 M.J. 552, 553 (A.F.C.M.R. 1993)). To be entitled to that writ, the petitioner must meet stringent threshold requirements:

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008), *aff'd and remanded*, 556 U.S. 904 (2009). Without addressing the remaining requirements, Petitioner cannot meet at least the second and sixth requirements, and that failure is dispositive. As noted above, Petitioner may seek relief through a writ of habeas corpus in an Article III court. Additionally, Petitioner is still serving his thirty-year sentence, as tacitly acknowledged in his petition. (Pet. Br. at 18 ("The errors set out here should be recognized, and Andy Condon released from prison[.]").)

These key failings mirror those at issue not only in Chapman, but also in Lewis v. United States, in which the petitioner explicitly requested a writ of coram nobis. 76 M.J. 829 (A.F. Ct. Crim. App. 2017). There, the Court reasoned:

> Like Chapman, Petitioner remains in confinement; therefore, coram nobis is not the sole remedy available to him because he is eligible to seek a writ of habeas corpus from a federal district court. Similarly, Petitioner has failed to demonstrate his sentence to nine years of confinement has been served. Accordingly, even if we were to assume arguendo Petitioner meets the remaining requirements, under Chapman no writ should issue on his petition.

Id. at 834. Since Petitioner has not filed his petition as a writ of error coram nobis and would not be entitled to such a writ anyway, this Court should decline to construe his petition as such. Instead, this Court should simply recognize the petition as a request for writ of habeas corpus, which this Court has no jurisdiction to grant.

WHEREFORE, the United States respectfully requests this Court dismiss Petitioner's petition for lack of jurisdiction.

[redacted]

BRIAN E. FLANAGAN, Maj, USAFR
Appellate Government Counsel
Military Justice and Discipline Directorate
United States Air Force

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MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Counsel for the Petitioner on 18 May 2022 via electronic filing.

[redacted]

BRIAN E. FLANAGAN, Maj, USAFR
Appellate Government Counsel
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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Without knowing what transcript the officer conducting the review had, it cannot be said with any certainty that the review provided for under Rule 71 occurred. At a minimum, this Court must determine if the basis for the Motion to Dismiss is in fact correct. Only at that point can the Court decide the Motion.

Accordingly the Motion to Dismiss must be denied.

Respectfully submitted,

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Richard M. Kerger [redacted]

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