

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,

Appellee,

v.

Brian J. Sumpter,

Aviation Structural Mechanic First

Class (E-6),

United States Navy,

Appellant.

**BRIEF OF *AMICUS CURIAE*, AIR
FORCE APPELLATE DEFENSE
DIVISION, IN SUPPORT OF
APPELLANT**

Crim. App. Dkt. No. 202400329

USCA Dkt. No. 26-0179/NA

May 28, 2026

Pursuant to Rule 26(b)(1) of this Court’s Rules of Practice and Procedure, the Air Force Appellate Defense Division (the Division) submits this brief in support of Appellant.

INTEREST OF AMICUS CURIAE

The Division represents Airmen and Guardians before the Supreme Court, this Court, and the Air Force Court of Criminal Appeals. During such representation, this Division’s counsel or counsel’s clients have, on rare occasions, missed the deadline for filing a petition for grant of review with this Court. *See, e.g., United States v. LaBella*, 75 M.J. 52, 53–54 (C.A.A.F. 2015); *United States v. Thomas*, 74 M.J. 272 (C.A.A.F. 2015) (mem.). Because of the possibility of such an incident’s recurrence, this Division and its clients have a strong interest in this Court’s resolution of Issue I raised by Petty Officer Sumpter’s supplement to the petition for grant of review.

SUMMARY OF ARGUMENT

Article 67(b), Uniform Code of Military Justice (UCMJ), provides that an accused “may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of” two triggering events. This Court held in *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009), that failure to meet Article 67(b)’s deadline results in a jurisdictional bar to this Court’s review of a petition. *Rodriguez* was based on the Supreme Court’s decision in *Bowles v. Russell*, 551 U.S. 205 (2007). *Rodriguez*, 67 M.J. at 111. The Supreme Court has since held that *Bowles* applies only to an appeal “from one Article III court to another.” *Harrow v. Dep’t of Defense*, 601 U.S. 480, 488–89 (2024) (quoting *Hamer v. Neighborhood Housing Servs. of Chicago*, 583 U. S. 17, 25 (2017)). In other contexts, a statutory court filing deadline will be treated as jurisdictional only upon a clear congressional statement. *Id.* at 484. Thus, “most filing deadlines” are “not jurisdictional.” *Id.* at 482. There is no clear statement of congressional intent to make Article 67(b)’s time limit jurisdictional. This Court should, therefore, overrule *Rodriguez*.

Once this Court overturns *Rodriguez*, it should return to its pre-*Bowles* approach to untimely petitions for grant of review. This Court’s practice was to accept an untimely petition upon a showing of good cause. *See generally United*

States v. Tamez, 63 M.J. 201 (C.A.A.F. 2006) (per curiam), *overruled by Rodriguez*, 67 M.J. at 116.

STANDARD OF REVIEW

Jurisdiction is a question of law that this Court reviews de novo. *United States v. Parino-Ramcharan*, 84 M.J. 445, 448 (C.A.A.F. 2024).

ARGUMENT

I. Due to intervening Supreme Court case law, this Court should overturn its decision in *United States v. Rodriguez*.

“Applying stare decisis is not an inexorable command, and [this Court is] not bound by precedent when there is a significant change in circumstances after the adoption of a legal rule” *United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021). There has been such a significant change in circumstances after this Court’s *Rodriguez* opinion that warrants overturning that precedent.

When considering whether to overturn precedent, this Court considers: (1) “whether the prior decision is unworkable or poorly reasoned”; (2) “any intervening events”; (3) “the reasonable expectations of servicemembers”; and (4) the risk of undermining public confidence in law.” *Id.* (quoting *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018)).

Subsequent Supreme Court case law makes clear that *Rodriguez* was wrongly decided. In *Rodriguez*, this Court concluded that “[i]n light of *Bowles v. Russell*, . . . the congressionally-created statutory period within which an accused

may file a petition for grant of review is jurisdictional.” 67 M.J. at 111. The Supreme Court has since clarified that *Bowles v. Russell* applies only to an appeal from one Article III court to another. *Harrow*, 601 U.S. at 488–89. Article 67(b)’s 60-day standard governs the appeal from one Article I court (a Court of Criminal Appeals) to another Article I court (this Court). *Bowles* is, therefore, inapplicable.

In contexts other than an appeal from one Article III court to another, a statutory court filing deadline will be treated as jurisdictional only upon a clear congressional statement. *Harrow*, 601 U.S. at 484. Thus, “most filing deadlines” are “not jurisdictional.” *Id.* at 482. There is no “clear statement” of congressional intent to make Article 67(b)’s time limit jurisdictional. *See id.* at 484. This Court should, therefore, overrule *Rodriguez*.

As Judge Baker explained in his *Rodriguez* dissent, the best interpretation of Article 67(b)’s plain text is that its 60-day filing deadline is not jurisdictional. Judge Baker observed, “Read in the context of the statute as a whole, the language in Article 67, UCMJ, 10 U.S.C. § 867 (2000), defines a permissive right to petition this Court—an ‘accused may petition’ the Court.” *Rodriguez*, 67 M.J. at 120 (Baker, J., dissenting). He continued, “Congress did not specifically limit the amount of time in which an accused must file a petition before this Court; it required that this Court review all petitions filed within sixty days. After sixty days, consideration of a petition is discretionary.” *Id.* (Baker, J., dissenting).

After arguing (correctly, as it turns out) that *Bowles* was inapposite to Article 67’s construction, Judge Baker identified the outcome determinative issue as whether Article 67 “incorporates a congressionally prescribed time limit for filing appeals or a permissive time limit.” *Id.* at 122 (Baker, J., dissenting). *Harrow* confirms that that is, indeed, the dispositive question. *Harrow*, 601 U.S. at 483–84. Notably, “whether or not [a] bar is ‘framed in mandatory terms’” is not dispositive. *Harrow*, 601 U.S. at 484 (quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015)). “‘What matters instead’ is whether a time bar speaks to a court’s authority to hear a case.” *Id.* at 485 (quoting *Kwai Fun Wong*, 575 U.S. at 411).

Judge Baker’s conclusion that “Article 67, UCMJ, contains a permissive time limit” reflects a proper analysis of Article 67’s text without reliance on legislative history. *Compare Rodriguez*, 67 M.J. at 122 (Baker, J., dissenting), with *id.* at 115–16 (the majority’s interpretation of Article 67’s plain language).¹ He explained that under Article 67(b), an appellant “must file ‘within 60 days’ to preserve his right to have this Court review his petition. Otherwise, this Court is not obliged to review his petition. But it does not preclude this Court from doing so if good cause is shown ‘upon petition of the accused.’ Article 67(a)(3), UCMJ.” *Id.*

¹ The *Rodriguez* majority’s reliance on committee reports to resolve any statutory ambiguity, 67 M.J. at 115–16 (quoting H.R. REP. NO. 97-306 (1981), and S. REP. NO. 97-146 (1981)), is “a relic from a bygone era of statutory construction.” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019) (internal quotation marks omitted).

at 123 (Baker, J., dissenting). He continued, “This reading of the statute is based on the plain language and, in particular, the modal verbs chosen and not chosen.” *Id.* (Baker, J., dissenting). It is “also based on the placement of the clause within Article 67, UCMJ. The Court’s jurisdiction is defined in section (a) and the appellant’s right to petition is defined in section (b).” *Id.* (Baker, J., dissenting). As the Supreme Court “has often explained[,] . . . Congress’s separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.” *Kwai Fun Wong*, 575 U.S. at 411 (citing, *inter alia*, *Henderson v. Shinseki*, 562 U.S. 428, 439–40 (2011)).

Although Judge Baker noted an alternative—albeit inferior—reading of the statute that would render the 60-day deadline jurisdictional, *contrast Rodriguez*, 67 M.J. at 122–23 (Baker, J., dissenting), *with id.* at 115 (the majority’s interpretation of Article 67’s plain language), Judge Baker’s compelling plain language interpretation of the statute demonstrates that there is no “clear statement” that the 60-day period is jurisdictional. *See Harrow*, 601 U.S. at 484.

“Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.” *Kwai Fun Wong*, 575 U.S. at 410. Article 67 contains no such special language.

II. This Court should revert to its pre-*Bowles* practice of allowing the filing of an untimely petition for good cause shown.

After overruling *Rodriguez*, this Court should revert to its pre-*Bowles* approach to untimely petitions for new trial. This Court discussed that approach in *Tamez*. *Tamez* noted, “Since the advent of this Court, this Court’s application of Article 67(b), UCMJ, as well as this Court’s rules, have permitted consideration of petitions out of time if good cause for the late filing is shown.” 63 M.J. at 202 n.1. This Court also observed that it had “consistently permitted appellants to file petitions for grant of review out of time for good cause shown” and that “[s]uch a practice is consistent with Congress’s intent that servicemembers have the opportunity to obtain appellate review in an independent civilian court.” *Id.* at 202.

This Court explained that an “[a]ppellant bears the burden of demonstrating good cause for considering a petition out of time.” *Id.* at 203. “‘Good cause’ in this context does not lend itself to precise definition. Rather good cause represents a discretionary judgment on the part of this Court that an appellant can ‘establish some reasonable basis justifying his relief from that default.’” *Id.* (quoting *United States v. Ponds*, 1 C.M.A. 385, 386, 3 C.M.R. 119, 120 (1952)). This Court added, “We have also said that as part of this showing of good cause counsel should assign some meritorious issue,” while cautioning that “the showing of good case for the untimely filing of a petition is distinct from the showing of good cause required to grant a petition for review.” *Id.*

Before *Rodriguez*, this Court was particularly forgiving of late filings for which counsel bore fault or to which lack of continuity of counsel contributed. For example, in *Tamez*, this Court found good cause for late filing where there was confusion as to whether the appellate defense counsel had been timely served with a copy of the Navy-Marine Court of Criminal Appeals' decision and where there was "no indication that this error is anything that should be attributed personally to Appellant." *Id.* This Court also observed that Petty Officer Tamez had "been represented by four different appellate counsel and [his] current counsel did not assume this position until after the sixty-day filing period had run." *Id.* This Court concluded that "the interests in timely review and judicial economy are better served by considering Appellant's petition without further debate over the reasons for, and the effect of, the eight-day filing delay." *Id.* at 203–04.

Other examples of this Court finding good cause for the late filing of a petition for grant of review are collected at Eugene R. Fidell, *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals, Second Edition*, 131 MIL. L. REV. 169, 238–39 (1991). *See also, e.g., United States v. McNeil*, 8 M.J. 28, 28 n.2 (C.M.A. 1979) (mem.) (finding good cause for the filing of an out-of-time petition where military authorities misadvised the appellant concerning the petition process); *United States v. Cunningham*, 8 M.J. 27, 27 n.1 (C.M.A. 1979) (mem.) (finding good cause for the filing of an out-of-time petition

where computer problems at the United States Disciplinary Barracks contributed to the late filing); *United States v. Harris*, 7 M.J. 167, 167 n.1 (C.M.A. 1979) (mem.) (finding good cause for the filing of an out-of-time petition where the appellate defense counsel's absence from his office performing temporary additional duty delayed the appellant's receipt of a form with which to petition this Court).

CONCLUSION

This Court should grant review of Issue I, overturn *Rodriguez*, and return to its previous regime in which the late filing of a petition for grant of review could be excused upon good cause shown. *See* C.A.A.F. R. 33. In doing so, this Court should not bar Appellant's untimely petition for grant of review for lack of jurisdiction but rather review whether to accept Appellant's petition under the good cause shown standard.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 26(f) because it contains 2,067 words excluding certificates of counsel. This brief complies with the typeface and style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that, on May 28, 2026, a copy of the foregoing was electronically sent to the Court and electronically served on the Navy-Marine Corps Appellate Government Division at code46-DAC@us.navy.mil, the Navy-Marine Corps Appellate Defense Division at meggie.c.kane-cruz.mil@us.navy.mil, Frank Spinner, Esq., at lawspin@aol.com, and the Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at code40@us.navy.mil and Joshua.D.Ricafrente.civ@us.navy.mil.

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