

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)
U.S. Navy,

Appellant

REPLY ON BEHALF OF APPELLANT

USCA Dkt. No. 26-0179/NA

Crim. App. Dkt. No. 202400329

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES:

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Introduction

The reasoning underlying *Rodriguez* is now obsolete because the precedent it relies on does not apply to Article I courts. Also, the Supreme Court’s unanimous decision in *Harrow* is clear: statutory deadlines require a clear congressional statement to be jurisdictional.¹ Article 67(b), UCMJ, does not meet this “high” standard.

Moreover, the Government’s attempt to confine *Harrow* to administrative appeals fails. The Supreme Court explicitly limited rigid jurisdictional rules solely to Article III transfers. Treating Article 67(b), UCMJ, as similar to a claims-processing rule complies with binding Supreme Court precedent and preserves finality while properly affording this Court the authority to prevent manifest injustice. Therefore, this Court should overturn *Rodriguez*.

¹ *Harrow v. Dept. of Defense*, 604 U.S. 480, 489 (2024).

Argument

This Court should overturn its decision in *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009), in light of *Harrow v. Dept. of Defense*, 601 U.S. 480 (2024), and hold the sixty-day deadline to appeal a Court of Criminal Appeals decision is not jurisdictional.

A. The Government’s *stare decisis* argument fails because *Harrow* represents a major intervening change in the law, fundamentally undermining *Rodriguez*.

Both the Supreme Court and this Court recognize that *stare decisis* is at its weakest when a precedent’s jurisdictional underpinnings have been eroded by subsequent doctrinal shifts. When the Supreme Court changes the methodology or foundational principles of how courts must interpret statutes, prior statutory interpretations that did not use that methodology lose their *stare decisis* protection.² “[S]tare *decisis* is ‘not an exorable command[.]’”³

This Court will overrule precedent based on the following factors: (1) whether the prior decision is unworkable or badly reasoned; (2) whether there have been intervening events; (3) the reasonable expectation of service members; and (4) the risk of undermining public confidence in the law.⁴

² *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

³ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 262 (2022).

⁴ *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015).

1. Quick factor one: *Rodriguez* was badly reasoned.

Rodriguez's reliance on the Supreme Court's 5-4 decision in *Bowles* to overturn "more than fifty years of military justice precedent" was badly reasoned.⁵ First, *Bowles* is distinguishable from *Rodriguez*. The Supreme Court in *Bowles* analyzed a statute that authorized district courts to reopen the time for filing an appeal.⁶ Article 67(b) has no such provision. Second, *Bowles*' holding was limited to civil cases appealing to Article III courts, not Article I.⁷ "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."⁸ Third, *Rodriguez*'s 3-2 decision relied exclusively on *Bowles*. The *Rodriguez* Court concluded that the sixty-day deadline in Article 67(b), UCMJ, was jurisdictional "in light of" *Bowles*.⁹ Accordingly, by relying on *Bowles*, the entire legal foundation supporting *Rodriguez* has collapsed. Thus, *Rodriguez* was badly reasoned.

These reasons explain why, in the years since *Bowles*, the Supreme Court has been mindful to walk-back *Bowles* and highlight its "exceptional nature."¹⁰ Unanimously, the Supreme Court stated "[W]e have since taken care to delineate

⁵ *United States v. Rodriguez*, 67 M.J. 110, 120 (C.A.A.F. 2009) (J. Baker dissenting).

⁶ *Bowles v. Russell*, 551 U.S. 205, 208 (2007).

⁷ *Bowles*, 551 U.S. at 214.

⁸ *Id.*

⁹ *United States v. Rodriguez*, 67 M.J. 110, 111 (C.A.A.F. 2009).

¹⁰ *Harrow*, 601 U.S. at 488.

both where *Bowles* applies and where it does not. *Bowles* governs statutory deadlines to appeal ‘from one Article III court to another.’”¹¹ Article 67(b), UCMJ, governs deadlines to appeal from one Article I court to another. Therefore, due to its exclusive reliance on *Bowles*, *Rodriguez* is unworkable.

2. Quick factor two: *Harrow* is an intervening event.

The Supreme Court in *Kimble v. Marvel Entertainment, LLC*, carved out an exception to statutory *stare decisis*, noting that the Court overrules statutory interpretation decisions when there is a “growth of judicial doctrine.”¹² Similarly, in *Patterson v. McLean Credit Union*, the Supreme Court noted that *stare decisis* does not prevent overruling a statutory precedent where the intervening development of the law has “remov[ed] or weaken[ed] the conceptual underpinnings from the prior decision.”¹³

Here, the Government’s absolutist *stare decisis* argument is wrong. *Harrow* is precisely the type of “growth of judicial doctrine” *Kimble* contemplates. And *Harrow* removed the conceptual foundation of *Rodriguez*. Accordingly, *Rodriguez*’s determination that Article 67(b) provides a clear statement required of a jurisdictional procedural requirement is unsupported by the Supreme Court’s

¹¹ *Harrow*, 601 U.S. at 489.

¹² *Kimble*, 576 U.S. at 458.

¹³ *Patterson*, 491 U.S. at 173.

current “demand” for a clear jurisdictional statement.¹⁴ Therefore, *Rodriguez* has lost its *stare decisis* protection.

The Government’s argument that *Harrow* was not a significant intervening event is incorrect.¹⁵ *Harrow* did not merely create a rule for administrative appeal; it clarified and reinforced a jurisdictional principle, that Congress provide a “clear statement” for determining if a filing deadline is jurisdictional.¹⁶ *Rodriguez* was a direct application of *Bowles* to an Article I court. But in *Harrow* the Court “made plain [the] exceptional nature of the *Bowles* statutory deadline—a deadline that applies only “to appeal from one *Article III* court to another.”¹⁷ And the Supreme Court recognized that *Bowles* merely affirmed other cases that predated the Court’s “current approach to such matters.”¹⁸ In light of *Harrow*, *Rodriguez* is now barren of support. Thus, to adhere to *Rodriguez* would be to knowingly apply an inapplicable legal framework.

Moreover, the Government suggests that since Congress has not “fixed” *Rodriguez*, it must agree with it.¹⁹ But this argument is not persuasive. Congress does not re-legislate every time the Supreme Court changes how it reads statutory

¹⁴ *Harrow*, 601 U.S. at 489.

¹⁵ Appellee’s Br. at 20.

¹⁶ Appellant’s Br. at 5; *Harrow v. Dept. of Defense*, 601 U.S. 480, 489 (2024).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* at 488-89.

¹⁹ Appellee’s Br. at 15-19.

text. Congressional inaction is a weak indicator of intent, especially when the judiciary clarifies the very nature of statutory interpretation. In sum, *Harrow* constitutes an intervening event that supports overturning *Rodriguez*.

3. Quick factor three: the reasonable expectations of servicemembers supports overturning *Rodriguez*.

The Government argues “servicemembers can reasonably rely on a known filing deadline.”²⁰ This argument is weak. On the contrary, servicemembers should rely on “this Court [being] last, not first, to close the courtroom door to members of the armed forces.”²¹ Overruling *Rodriguez* does not result in a windfall—it means returning to the over fifty years of precedent where this Court accepted out-of-time petitions for good cause. Therefore, servicemembers can rely on, as they did before, a post-*Rodriguez* era.

4. Quick factor four: overruling *Rodriguez* poses zero risk in undermining public confidence in the law.

The Government argues “Public confidence in the law will be served by a filing deadline that follows congressional intent.”²² But, as discussed below, Congress never intended the deadline in Article 67(b) to be jurisdictional. If it had, Congress would have provided a “clear statement” that the Article 67(b) deadline is jurisdictional. Also, the Government argues public confidence is served because

²⁰ Appellee’s Br. at 29-30.

²¹ *Rodriguez*, 67 M.J. at 120 (J. Baker dissenting).

²² Appellee’s Br. at 30-31.

this Court applied *Rodriguez* “thousands” of times in the past nearly eighteen years.²³ But it forgets that *Rodriguez* overturned “more than fifty years” of this Court’s precedent.²⁴ Accordingly, the Government’s argument that *Rodriguez* should not be overturned because its precedent has lasted eighteen years has no merit. Therefore, overruling *Rodriguez* poses zero risk in undermining public confidence in the law.

B. The Government misinterprets *Harrow* by confining its “clear statement” rule to administrative appeals and ignoring its broader implications.

The Government’s central argument for distinguishing *Harrow* is that it involved an appeal from an administrative agency to an Article III court, whereas this case involves an appeal between two Article I adjudicatory courts.²⁵ But the key principle from *Harrow* is not about the source of the appeal but about the need for a “clear statement” from Congress to strip a court of its power. “As to all other time bars, [the Court] now demand[s] a clear statement.”²⁶

Furthermore, the Government’s attempt to align the military justice system with the Article III framework (where *Bowles* might still apply) is flawed.²⁷

Military tribunals are anchored in Article I. “The [Court of Appeals for the Armed

²³ Appellee’s Br. at 31.

²⁴ *Rodriguez*, 67 M.J. at 120 (J. Baker dissenting).

²⁵ Appellee’s Br. at 20-25.

²⁶ *Harrow*, 601 U.S. at 489.

²⁷ Appellee’s Br. at 22.

Forces] is established under [A]rticle I of the constitution. The court is located for administrative purposes only in the Department of Defense.”²⁸ Consequently, the Supreme Court’s limitation of *Bowles* to the “timebound transfer of adjudicatory authority” within Article III is on point and controlling.²⁹ Therefore, the military justice system falls squarely outside of *Bowles* jurisdictional rule.

C. Contrary to the Government’s assertions, neither the statutory text nor the legislative history provides a “clear statement” that the filing deadline is jurisdictional.

Article 67(b) states an accused “may petition” for review within sixty days.³⁰ This permissive language, as analyzed in *Harrow*, is classic claims-processing text. It instructs the litigant on the *process*; it does not speak to this Court’s power or jurisdiction.

The Government describes the military justice system’s appellate process as a “tunnel of power” to argue for strict jurisdictional cutoffs.³¹ But this argument fails. On the contrary, the military justice system is an intricate, congressionally-designed system, which includes provisions for finality in Article 57 and Article 76. This demonstrates that Congress knew exactly how to talk about finality and

²⁸ 10 U.S.C. § 941 (2024).

²⁹ Appellee’s Br. at 11.

³⁰ 10 U.S.C. § 867 (b) (2024).

³¹ Appellee’s Br. at 17-18.

jurisdiction when it wanted to. Thus, the absence of such clear jurisdictional language in Article 67(b) is a deliberate choice.

Moreover, the Government's reliance on *United States v. Denedo* is unpersuasive.³² *Denedo* addresses the extraordinary remedy of coram nobis for final judgments. This case involves a statutory deadline for a direct appeal. The *Denedo* Court held that military appellate courts have the authority to issue writs of coram nobis as a "belated extension" of their original jurisdiction.³³ But that holding does not apply to this case. The Government's attempt to draw a parallel misconstrues *Denedo*'s narrow holding because it conflates extraordinary collateral relief with established appellate jurisdiction. Thus, *Denedo* is distinguishable.

The Government on some legislative history to claim that Congress desired "finality."³⁴ But finality can be achieved through non-jurisdictional, claims-processing rules that are reliably enforced. The Government conflates the goal of finality with the method of jurisdiction. A rule can be mandatory and promote finality without being jurisdictional. The key is that a non-jurisdictional rule allows for a safety valve in rare cases, like this one, where an injustice would otherwise occur. Thus, the Article 67(b) deadline is not jurisdictional.

³² Appellee's Br. at 15.

³³ *United States v. Denedo*, 556 U.S. 904, 912 (2009).

³⁴ Appellee's Br. at 16, 19, 27-31.

Chief Judge Effron’s conclusion in his dissenting opinion is as valid today as it was in 2009, if not more so because of *Harrow*:

The opportunity to demonstrate good cause for a belated filing comports with the permissive wording of the statute, the statutory rules of construction for Title 10, the legislative history of Article 67, the purpose of the UCMJ, the consistent interpretation of the statute, and subsequent legal developments. As such, Article 67 does not constitute a congressional prohibition on appellate review under *Bowles*.³⁵

Conclusion

For these reasons, this Court should find the sixty-day deadline in Article 67(b) is not jurisdictional and overturn *Rodriguez*.

Respectfully submitted.

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³⁵ *Rodriguez*, 67 M.J. at 120; “*Rodriguez* closes the courthouse door to members of the armed forces” *Rittenhouse v. United States*, 70 M.J. 266 n.* (C.A.A.F. 2011).

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Certificate of Filing and Service

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