No. _____

In The
Supreme Court of the United States

LUKE T. WEST,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1) As a matter of statutory construction and application, is petitioner entitled to the exercise of the authority of the United States Federal Court of Claims under 28 U.S.C. §1491(a)(2) to a remand of the review of petitioner's general court martial conviction to OJAG USN with further order to OJAG USN to exercise its authority under 28 U.S.C. §869(d)(1) to refer petitioner's general court martial conviction to the NMCCA for further judicial appellate review?

2) Under the Due Process Clause of the Fifth Amendment of the United States Constitution, is petitioner entitled to have his general court martial conviction vacated in the case of *United States v. West*?

3) Can the Court of Federal Claims issue a protective order placing the record under a partial seal preventing the disclosure of the names of petitioner's sexual assault/sexual harassment accusers in his general court martial, whereby the validity of the conviction in said general court martial is the subject of the dispute in the proceedings before the Court of Federal Claims?

4) Does the Privacy Act, 5 U.S.C. § 552a, impose upon the petitioner (and by extension his counsel) the duty to protect information regarding the identity of petitioner's sexual assault/sexual harassment accusers at petitioner's public court martial?

5) If the Privacy Act, 5 U.S.C. § 552a, can be interpreted to impose such a duty upon the petitioner (and by extension his counsel), does the imposition of that duty violate petitioner's rights under the First Amendment of the United States Constitution?

6) Does the doctrine of Issue Preclusion (Collateral Estoppel) apply to bar petitioner from litigating in the proceedings below the issue of whether the sexual assault/sexual harassment accusations against him were false where: a) a court in an earlier proceeding found that plaintiff failed to prove by preponderance of evidence that the allegations were false; b) the prior proceeding was a Westfall Act certification challenge and the findings on the merits regarding the falsity of the sexual assault/sexual harassment allegations was made pursuant to *Osborn v. Haley*, 549 U.S. 225 (2007); c) the finding of the court in the prior proceeding was that the court did not have subject matter jurisdiction over petitioner's claims; and d) the opposing parties did not explicitly deny defendant's allegations that the sexual assault/sexual harassment allegations were false (either by affidavit, answer, or other responsive pleading)?

PARTIES TO THE PROCEEDINGS

The petitioner is Luke T. West, the plaintiff and plaintiff-appellant in the courts below. The respondent is the United States of America, the defendant and defendant-appellee in the courts below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Luke T. West, respectfully petitions for a writ of certiorari to the United States Court of Appeal for the Federal Circuit in *West v. United States*, 2019-2415 (Fed. Cir. 5/10/21). Petitioner has been deprived of a constitutionally fair trial resulting in his conviction at a general court martial. However, because petitioner's sentence did not reach a certain threshold, the statutory scheme for military justice appellate review does not provide, as a matter of jurisdiction, for judicial appellate review by military tribunals, but is limited to administrative review by the service Judge Advocate General's Office ("OJAG"), which in this case is the OJAG of the United States Navy ("USN"). Complicating this problem is that petitioner's case involves accusations of sexual assault in the military, an area that was and is highly politically charged and pervades the military and civilian leadership at the highest levels, including the OJAG USN, whose potential misconduct is specifically challenged herein. Hence petitioner has sustained considerable constitutional violations that have essentially escaped any objectively disinterested judicial review.

Petitioner herein also seeks review pertaining to the Federal Circuit's application of the equitable doctrine of issue preclusion and the Privacy Act, 5 U.S.C. § 552a, which issues not only pertain to the potential of petitioner to fully prosecute his claims, but also pertain more broadly to the petitioner's ultimate ability to clear his name in the public sphere and to engage in much needed public discussion about the fairness of the military justice system as it pertains to the potential politicization of

military sexual assault cases. Most significantly, the holdings regarding these issues constitute a perversion of the aforementioned legal principles and statutory authority and potentially will have a dangerously chilling effect of stifling petitioner's ability to fully vindicate the aforementioned interests. As such, this Court should grant this writ application and reverse the decision of the court below.

OPINIONS BELOW

The judgment of the United States Court of Appeal for the Federal Circuit is a non-precedential decision of *West v. United States*, 2019-2415 (Fed. Cir. 5/10/21), which summarily affirmed the decision of the United States Court of Federal Claims in the matter of *West v. United States*, No. 17-2052C (Fed. Cl. 7/26/19).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeal for the Federal Circuit was entered on May 10, 2021. This Court's jurisdiction is pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional and statutory provisions under consideration are as follows:

> United States Constitution: First Amendment. Appx. at 225.

United States Constitution: Fifth Amendment. Appx. at 225.

United States Constitution: Sixth Amendment. Appx. at 225-26.

5 U.S.C. § 552a. Appx. at 226-55.

10 U.S.C. § 869. Appx. at 255-57.

10 U.S.C. § 876. Appx. at 257.

28 U.S.C. § 1491. Appx. at 258-60.

STATEMENT OF THE CASE

A) Background: the General Court Martial:

On June 20 and June 21, 2013, petitioner, Luke T. West, who was at the time a gunnery sergeant in the United States Marine Corps, was accused by four individuals of sexual assault and sexual harassment, allegedly occurring from November of 2011 through June of 2013, while petitioner was stationed at Marine Forces Reserves ("MFR") in New Orleans, Louisiana. Appx. at 81-85. The allegations were made within the context of a highly charged political climate surrounding the handling of such allegations in the military and were made under the auspices of the Department of Defense ("DoD") and Marine Corps ("USMC") Sexual Assault Prevention and Response ("SAPR") Program (collectively referred to as "DoD/USMC SAPR Program") and the Marine Corps Equal Opportunity ("EO") Program. Appx. at 79-85. Shortly after the initial allegations were made, some of the accusers obtained significant benefits under the DoD/USMC SAPR Program and EO Program. Appx. at 85-86.

Despite substantial evidence calling into question the veracity of the accusations, motives and opportunities to make such false allegations; accusers' allegations received virtually no scrutiny and resulted in a general court martial being convened against petitioner, due in large part to the continued pervasive and wrongful influence exerted by MFR SAPR Office personnel over the investigation of Naval Criminal Investigative Services ("NCIS") and over military prosecutors. Appx at 85-93.

This notwithstanding, petitioner was ultimately exonerated of any and all violations of U.C.M.J. Article 120, Sexual Assault, and U.C.M.J. Article 92 (violation of Paragraph 1166, U.S. Navy Regulations pertaining to sexual harassment). Appx. at 15-16, 23, 76-77, 92-94.

However, on November 21, 2014, petitioner was convicted of the charges of violation of Article 81, Conspiracy to Obstruct Justice; Article 93, Maltreatment; Article 134 (Obstructing Justice); and Article 134 (Indecent language). Appx. at 23, 77. These charges pertained to only to a single accuser, Ms. Rachel Allen ("Ms. Allen"), and pertained to purportedly inappropriate comments made in a January 16, 2013 text message and during the attendance at a March 27, 2013 professional basketball game (attended by petitioner, Ms. Allen and several other individuals from petitioner's unit). Appx. at 81-83. The particular charge of obstructing justice was based upon the action of then Master Gunnery Sergeant Larry Thomas ("Mr. Thomas"), a supervisor of both petitioner and Ms. Allen, to confront Ms. Allen with an accurate copy of 140 pages

of text message conversations, showing daily conversations between petitioner and Ms. Allen from March of 2012 through the date of the accusations on June 20, 2013. *Id.* These text message conversations showed that petitioner and Ms. Allen were actually close personal friends and colleagues and otherwise flatly refuted Ms. Allen's allegations that she was "offended" or "intimidated" by petitioner. *See* Appx. at 82. The evidence in this matter was uncontroverted that Mr. Thomas's action was done in an effort to discourage Ms. Allen from committing perjury by testifying consistent with her false harassment allegations. Appx. at 82-83.

In any event, as a result of this wrongful prosecution, petitioner was reduced in rank to Lance Corporal, incarcerated for 30 days and was prevented from re-enlisting in the Marine Corps. Appx. at 23, 77.

B) Motion to Dismiss for Unlawful Command Influence:

In the pre-trial procedure, petitioner filed a motion to dismiss the charges for what is termed in military justice jurisprudence as the exercise of "unlawful command influence" ("UCI"). Appx. at 17. Though considerably broad in scope, the motion did focus specifically upon the conduct of the investigation into the charges. Appx. at 89-95, 128, 134-35. Among the circumstances raised in petitioner's UCI motion were that NCIS had been specifically directed by the military prosecutor, in violation of MCO SAPR Program procedure, not to follow up upon exculpatory evidence showing the

falsity of the sexual assault allegations of one of the accusers, Appx. at 88-91, 94-95, 134-35; and that the NCIS agent had felt general "pressure" to credit the veracity of the accuser's statements, Appx. at 91, 94-95, 113-15. More significantly, the UCI motion raised several instances of potential witness intimidation against key witnesses, particularly with respect to a witness named Gunnery Sergeant Cesar Villegas ("Mr. Villegas"), who himself was suspiciously investigated by NCIS for obstructing justice under U.C.M.J. Article 134 relating to his alleged interaction with one of petitioner's accusers, and who ultimately testified against petitioner as to several matters, including providing testimony as to the charges for which petitioner was convicted. Appx. at 91, 139-40.

On September 26, 2014, a hearing on petitioner's UCI motion was held. Appx. at 18, 127, 128. During that hearing, the military judge articulated the following standard for evaluating the presence of UCI in petitioner's case:

> [W]henever I or any court these days consider UCI motions, we are really focused on three factors: Was the CA [the convening authority, the commanding general of MFR] acting in response to some type of pressures from superiors and acting with something other than a completely pure heart? *Of course, that's my language. That's certainly not case law language.* Secondly, is there any evidence at all that access to witnesses has been inhibited or that witness are, because of

> command influence, unwilling to testify or cooperate with the defense? And, thirdly, are the members [jury] free from bias?
>
> But I asked the defense counsel both last Friday and again before becoming [sic] on the record to focus his presentation evidence to meet his initial burden here on – within the bounds of established UCI case law and that would be typically on those three factors; *convening authority, access to witnesses, and potential taint of members pool.*

Appx. at 129 (emphasis added). This purported standard, hereinafter referred to by undersigned counsel as "the West Standard", was unduly restrictive and narrow as it explicitly and categorically excluded the conduct of a biased investigation by NCIS and wrongful interference with same by a uniformed military prosecutor. This categorical exclusion as articulated and applied by the military judge appears *nowhere* in military jurisprudence, which uniformly provides the following standard in evaluating actionable "apparent" UCI.

> We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public. Thus, the appearance of unlawful command influence will exist where *an objective, disinterested observer, fully informed of*

> *all the facts and circumstances,* would harbor a significant doubt about the fairness of the proceeding.

U.S. v. Lewis, 63 M.J. 405, 414-15 (C.A.A.F. 2006) (emphasis added); *see also U.S. v. Salyer*, 72 M.J. 415, 424 (C.A.A.F. 2013). This standard, referred to by undersigned counsel as "the disinterested observer standard", has been the well-established standard for evaluating UCI since its introduction in 2006.

Throughout the hearing, the military judge further applied the "West Standard" as previously articulated, when she decreed that the biased NCIS investigation was not "within the purview" of a UCI motion unless petitioner could establish that NCIS was specifically "pressured" by the convening authority (in this case, the Commander of MFR). Appx. at 137. More specifically, the military judge demanded petitioner's defense counsel ask the NCIS agents directly whether they were specifically pressured to conduct the investigation in a particular manner (and even asked the direct question herself to one of the agents). Appx. at 137-38, 141, 143-44, 148-50. When the NCIS agents predictably responded in the negative, the military judge expressly refused to permit defense counsel to conduct any meaningful examination into NCIS's conduct of that investigation to impeach NCIS's statements and to establish apparent UCI under the "disinterested observer" standard. *Id.* As such, the military judge, specifically using the artificially created "West Standard" as the framework, found that petitioner failed to meet his burden of

establishing a prima facie case of UCI and denied the petitioner's UCI motion. Appx. at 156-57.

C) U.C.M.J. Article 69 Review:

Because petitioner was not sentenced to six months or more of confinement and not awarded a punitive discharge, his appellate rights were limited to those rights as provided under Article 69 of the UCMJ. 10 U.S.C. § 869 (U.C.M.J. Article 69). Pursuant to Article 69 of the UCMJ, a military service judge advocate general, in this case, the Judge Advocate General of the United States Navy ("OJAG USN"), was required to review the record of trial in a general court martial conviction for legal sufficiency. *Id.* Of considerable significance is that, again due to the nature of the sentence awarded, petitioner had no appellate rights of judicial review of his case by the military tribunals under Articles 66 and 67 of the UCMJ. 10 U.S.C. §§ 866, 867. The only potential for any such judicial review rested with the discretion of the OJAG USN, who under Article 69(d) could refer a general court martial conviction to the Navy Marine Corps Court of Criminal Appeals ("NMCCA") for judicial appellate review. *Id.*

While not required under Article 69, the OJAG USN would accept and consider applications to review specific issues from defendants whose court martial convictions were before the OJAG USN for review under Article 69. Petitioner submitted such an application for review, which included the issue of the creation and application of the "West Standard". Petitioner also noted his objection to the

"summarized" transcript of his court martial proceedings, which did not include any information pertaining to several of petitioner's legal claims, most notably the articulation and application of the "West Standard". Appx. at 25-26; *compare* Appx. 127, *with* Appx. 129, 137-38, 141, 143-44, 149-51.

On December 1, 2016, the Office of the JAG USN responded to petitioner's application for appellate review. Within that response, OJAG USN advised that "a verbatim transcript is necessary for a thorough evaluation of the legal sufficiency of this case" and further advised that it was requesting a verbatim transcript and would continue its Article 69 review upon receipt. Appx. at 26, 165-66.

After preparing a verbatim transcript of petitioner's court martial proceedings, OJAG USN attempted to secure an agreement by petitioner that he (and his counsel) would be bound by the provisions of the Privacy Act, 5 U.S.C. §552a pertaining to its use. Appx. at 173-74. When petitioner refused, OJAG USN issued an ominous threat regarding its interpretation that undersigned counsel was subject to the provisions of the Privacy Act regarding the use of the verbatim transcript and conspicuously referenced OJAG USN's authority to impose disciplinary measures against counsel under its cognizance (of which undersigned counsel is included). *Id.*

Although petitioner's assertions regarding the creation and application of the "West Standard" were unambiguously confirmed by the verbatim transcript; on June 9, 2017, OJAG USN affirmed, without explanation, the findings and sentence in

petitioner's case. Appx. at 27, 177-78. Additionally, OJAG USN otherwise declined to exercise its discretion under Article 69(d) to direct petitioner's court martial to the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") for appellate review under U.C.M.J. Article 69(d), which effectively terminated any further jurisdiction of the military justice system over petitioner's court martial conviction, or the correctness of OJAG USN's U.C.M.J. Article 69 review of same. Appx. at 177-78; *see United States v. Arness*, 73 M.J. 454 (C.A.A.F. 2014). As such, no military tribunal has considered, nor has had the jurisdiction to even exercise discretion to consider, any of the assignments of error put forward by the petitioner in this case.

D) Related Proceedings: *West v. Rieth, et al.*, 15-cv-2512 (E.D. La. Jul. 12, 2016):

In conjunction with the collateral review of his court martial conviction, on July 9, 2015, petitioner filed suit against several of his accusers in the matter of *West v. Rieth, et al.*, 15-cv-2512 (E.D. La. Jul. 12, 2016), alleging state law claims of defamation and malicious prosecution arising out of the false allegations of sexual assault and sexual harassment against him. Appx. at 24-25, 188-90.

On August 27, 2015, the United States Government ("Government") through the Office of the United States Attorney for the Eastern District of Louisiana ("USAO EDLa"), pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2679 ("the Westfall Act"), certified that the alleged actions of the accuser defendants were all performed while

acting within the scope of their federal employment, which would defeat subject matter jurisdiction over the defendant accusers under the Westfall Act. Appx. at 190. As such, the USAO EDLa, appearing "on behalf of" the accuser defendants, filed a Motion to Dismiss Party for Lack of Subject Matter Jurisdiction and Motion to Substitute the United States of America as Sole Federal Defendant ("Motion to Dismiss/Substitute"). *Id.*

On December 22, 2015; the District Court granted the USAO EDLa's Motion to Dismiss/Substitute. Appx. at 204-05. The District Court, in upholding the Westfall Act certification, examined the merits of petitioner's claims as per this Court's decision in *Osborn v. Haley*, 549 U.S. 225 (2007), and found that petitioner, based on the evidence submitted (which the District Court specifically noted did not include a sworn statement by petitioner), failed to meet his burden of proof to establish, by preponderance of evidence sufficient to establish jurisdiction under the Westfall Act, that the allegations against him were false. Appx. at 196-97. Of significance was that the District Court acknowledged that the accusers never explicitly denied petitioner's assertions that the sexual assault and sexual harassment allegations against him were false, further noting that the purported contesting of petitioner's assertions was "an implicit premise" of the Government's argument. Appx. at 194. Additionally, despite its findings pertaining to the Westfall Act certification, the District Court specifically permitted petitioner to amend his complaint to allege a "*Bivens*" civil rights action against two of the accusers, which was done on

January 4, 2016 and which action was also based upon his assertion that the allegations of sexual harassment and sexual assault against him were false. Appx. at 203-04. Thirdly, as to its factual determination, the District Court imposed the burden of proof upon the petitioner, while specifically denying petitioner an evidentiary hearing, which explicitly had been requested. Appx. at 203.

Pursuant to its rulings on December 22, 2015 and June 24, 2016, the District Court issued final judgment on July 12, 2016. Appx. at 186-87. In its final judgment, the District Court dismissed the *Bivens* claims with prejudice. Appx. at 187. However, regarding the disposition of the state law claims pursuant to the December 22, 2015 Order and Reasons, the District Court explicitly dismissed those claims "without prejudice for lack of subject matter jurisdiction". Appx. at 186.

E) Procedural History of this Case:

On May 5, 2017, petitioner initially filed this suit for collateral review of his court martial conviction in the Eastern District of Louisiana. *West v. Mattis*, E.D. La. No. 2:17-cv-04746, R. Doc. No. 1. After declining to grant outright the Government's motions to dismiss, and after soliciting exhaustive briefing on the issues raised, the District Court requested whether petitioner would consent to a transfer of the case to the Court of Federal Claims. *See* E.D. La. No. 2:17-cv-04746, R. Doc. Nos. 27, 32, 33. After granting petitioner leave to amend his Complaint to aver a Tucker Act Claim under 28 U.S.C. § 1491, the District Court then transferred

the case the United States Court of Claims. E.D. La. No. 2:17-cv-04746, R. Doc. Nos.36, 37, 38.[1] Despite filing a detailed complaint fully identifying the accusers and their statements, the Government did not, in any way, object to the public identification of petitioner's accusers, nor did the Government file any motion to seal same.

Subsequent to the transfer of the case to the Court of Claims, the Government filed a motion for protective order seeking to "protect the confidentiality and privacy of the service-members that alleged sexual assault by [petitioner]", basing the motion on the application of the Privacy Act and upon the DoD SAPR Program procedures. *See* Appx. at 27, 65. The Trial Court granted the Government's motion and issued a protective order on April 24, 2018. Appx. at 27.

Pursuant to the Trial Court's scheduling order, the Government filed a Motion for Judgment on the Administrative Record seeking dismissal of petitioner's claims on the grounds that the administrative record did not establish any basis for vacating petitioner's general court martial conviction under the principles of collateral review as provided by the cases of *Matias v. United States*, 923 F.2d 821 (Fed. Cir. 1990) and *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983). Appx. at 27, 43-44.

Petitioner filed a Cross Motion for Judgment on the Administrative Record, arguing that the

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[1] As the case was transferred and postured in the Court of Claims, the substantive predicate for petitioner's attack upon his court martial conviction was the Military Pay Act, 37 U.S.C. § 204. Appx. at 29.

administrative record did, in fact, support a finding that petitioner's general court martial conviction should be vacated under *Matias* and *Bowling*. Appx. at 28, 43. Within wide ranging assertions of multiple circumstances of what was characterized as fundamental errors that pervaded the pre-trial, trial, post-trial, and appellate procedures; petitioner specifically asserted the military judge's erroneous creation and application of the "West Standard" in evaluating UCI cases. Appx. at 43. In addition to invoking the Trial Court's jurisdiction to vacate his court martial conviction outright, petitioner invoked, in the alternative, the Trial Court's jurisdiction under 28 U.S.C. § 1491(a)(2) to remand the case to the OJAG USN with further instruction to refer the case to the military courts for review, per the OJAG USN's authority under U.C.M.J. Article 69. Appx. at 43.

In addition, as a supplement to its Motion for Judgment on the Administrative Record, the Government also filed a Motion for Summary Judgment asserting that, as a result of the December 22, 2015 holding in the case of *West v. Rieth*, the petitioner was barred from asserting that the accusations of sexual assault and sexual harassment were false, and thus was barred from asserting conspiracy pertaining thereto under the application of the doctrine of issue preclusion. Appx. at 28, 37.

Furthermore, pursuant to the procedures provided under the Trial Court's Protective Order, petitioner filed a Motion for Relief from the Protective Order, arguing that the identities of his accusers and their accusations were not subject to any protection under the Privacy Act; nor did any

DoD procedures under the SAPR Program apply to afford any requirement that the accusers' identities by sealed. Appx. at 28, 64-65.

On July 26, 2019, in its Memorandum Order and Opinion, the Trial Court granted the Government's Motion for Summary Judgment on the application of issue preclusion, finding that petitioner was barred from asserting in these proceedings that the allegations of sexual assault and sexual harassment were false. Appx. at 36-37. Based at least in part upon its holding on the Government's Motion for Summary Judgment, the Trial Court granted the Government Motion for Judgment on the Administrative Record and denied petitioner's Cross Motion for Judgment on the Administrative Record, noting that the proceedings were neither fundamentally unfair, nor did petitioner establish that the military did not fully and fairly consider his claims. Appx. at 31, 37. Based upon its Memorandum Order and Opinion, the Trial Court dismissed petitioner's claims. Appx. at 13, 36, 68.

Finally, the Trial Court denied petitioner's Motion for Relief from Protective Order, finding that, despite the fact that they identified themselves and levied their accusations at petitioner's public trial, the identities of petitioner's accusers were subject to protection from publication under the Privacy and DoD SAPR Program procedures. Appx. at 67. Notwithstanding its analysis, the Trial Court directed the parties to identify the material in the Memorandum Opinion and Order to be redacted. Appx. at 68. Though of particular significance, with the notable exception of petitioner's accusers, the

Government did not seek, and the Trial Court did not redact, the names of the any other individuals involved in the case. *See* Appx. at 15, 18, 19, 21, 45-48, 55, 69.

Petitioner appealed the Trial Court decision to the United States Court of Appeals for the Federal Circuit. Appx. at 1-11. In that appeal, petitioner specifically asserted the Trial Court's error in applying the stringent *Mattias/Bowling* standard in collaterally reviewing the validity of petitioner's general court martial conviction. Appx. at 3-4. Additionally, petitioner asserted, as both a general matter of constitutional fairness as well as statutory construction, that the Trial Court erred in not exercising its remand authority under 28 U.S.C. §1491(a)(2) and refusing to order the OJAG USN to refer petitioner's court martial conviction to the NMCCA for further judicial appellate review. Appx. at 5-6, 8-10. Finally, petitioner specifically asserted the Trial Court's error both as to the application of the doctrine of issue preclusion pertaining to the issue on the merits of whether the sexual assault/sexual harassment accusations against petitioner were, in fact, false; as well as the imposition of a protective order effectively preventing "release" and "disclosure" of the identities of petitioner's accusers. Appx. at 3-5.

On May 10, 2021, the Federal Circuit summarily affirmed the decision of the Trial Court. Appx. at 1-2. This Petition follows.

ARGUMENT

I. As a Matter of Statutory Construction, Petitioner's Court Martial Conviction Should Be Remanded to OJAG USN with an Order to Refer to NMCCA to Establish Jurisdiction for Judicial Appellate Review.

A) The Finality Provision of U.C.M.J. Article 76 and Court Martial Collateral Review Jurisprudence:

As an initial matter, the Supreme Court cases of *Burns v. Wilson*, 346 U.S. 1045 (1953); *United States v. Augenblick*, 393 U.S. 348 (1969); and *Schlesinger v. Councilman*, 420 U.S. 738 (1975), have provided the jurisprudential basis for collaterally reviewing an otherwise final judgment of conviction at a court martial, as per 10 U.S.C. § 876 (U.C.M.J. Article 76). Based upon this Court's holdings in *Burns*, *Augenblick*, and *Schlesinger*, the subsequent circuit level jurisprudence has recognized, in a fairly uniform manner, a civilian federal court's jurisdiction to review and to declare "void" a court martial conviction, upon the finding of errors considered to be "fundamental", notwithstanding the principle of finality. More specifically, the Federal Circuit has held that the jurisdiction of the Court of Claims in Tucker Act cases includes the authority to collaterally review and vacate a court martial conviction where the following conditions are established: 1) the petitioner demonstrates convincingly that in the court-martial proceedings there has been such a deprivation of fundamental

fairness as to impair due process; and 2) the military tribunal failed to give full and fair consideration to each of petitioner's claims. *Matias v. United States*, 923 F.2d 821, 826 (Fed. Cir. 1990); *Bowling v. United States*, 713 F.2d 1558, 1561 (Fed. Cir. 1983).

B) The U.C.M.J. Article 69 Distinction:

However, while it is generally accepted that *Matias* and *Bowling* provide the basis and the general framework for review and potential vacating of courts martial convictions in Tucker Act cases, the analysis of *Matias/Bowling* does not squarely fit the circumstances of this case. *Matias/Bowling* have addressed situations in which the accused's court martial was subject to direct appellate review by military tribunals (the courts of appeals of the particular services and the Court of Appeals for the Armed Forces ("CAAF")) under U.C.M.J. Articles 66 and 67. *See generally, Matias*, 923 F.2d at 821; *Bowling*, 713 F.2d at 1559. However, due to the nature of the sentence imposed, absent a discretionary referral by OJAG USN; military tribunals were jurisdictionally precluded from providing any direct judicial appellate review of petitioner's general court martial under Article 66 and 67; and review was limited to agency review under Article 69. *See*, U.C.M.J. Article 66, 69; *United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015). Therefore, full and fair appellate review has simply not occurred in this case as contemplated by *Matias* and *Bowling*.

C) The Statutory Relationship of U.C.M.J. Article 76, U.C.M.J. Article 69, and 28 U.S.C. § 1491:

As a matter of statutory construction, the finality provision of U.C.M.J. Article 76 does not apply to the review of the OJAG USN's exercise (or refusal to exercise) its power to refer the case to the NMCCA under Article 69(d)(1). Article 69 provides for the review of courts martial by the service JAG, which review includes the requirement to review a general court martial conviction and to either affirm same or to modify or set aside the findings or sentence or both. *Id.* More importantly, Article 69(d) provides, as follows:

> A Court of Criminal Appeals may review, under section 866 of this title (article 66) –
>
> (1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General; and
>
> (2) any action taken by the Judge Advocate General under this section in such case.

10 U.S.C. § 869 (U.C.M.J. Article 69).[2]

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[2] 10 U.S.C. §869 (U.C.M.J. Article 869), along with 10 U.S.C. §§ 866 & 867 (U.C.M.J. Articles 66 & 67) were recently and substantively amended, with an effective date of January 1, 2019, which amendments are therefore inapplicable in this case.

The operative language of Article 69(d)(2) is critically important here. As written, the service JAG has the power to refer a case to a court of criminal appeal is broad and unrestricted. Specifically, there is no prohibition to the service JAG affirming the conviction, then subsequently referring the affirmed conviction to the service court of criminal appeals, with said court of appeal explicitly having the power to review that decision to affirm said conviction. As such, a service JAG's power to refer a case to its corresponding service court of criminal appeal under Article 69(d) constitutes a necessary and operative exception to the finality provision of Article 76, because the service JAG's "affirmation" of the conviction in that instance cannot be final if Article 69(d)(2) is to have any effect. Because Article 76 is the basis for the *Matias/Bowling* standard as per the case of *Augenblick*, the *Matias/Bowling* standard does not apply to provide the standard of analysis of whether a service JAG (or more specifically, the OJAG USN) properly exercised or declined to exercise its referral power under Article 69(d).

Another significant element of this statutory relationship is the jurisdiction afforded to the Court of Federal Claims by 28 U.S.C. § 1491(a)(2). Section 1491(a)(2) affords the Court of Claims in Tucker Act cases "the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." *Id.* Given the power of the service JAG to refer, under U.C.M.J. Article 69(d), a court martial conviction to the service courts of criminal appeal for judicial appellate review; such an instruction by the Court of Claims accompanying the Section 1491(a)(2) remand

would be "consistent with the statutory scheme" and would be a permissible exercise of Section 1491(a)(2) jurisdiction. *See Richey v. United States*, 322 F.3d 1317, 1323 (Fed. Cir. 2003).

The provision of Section 1491(a)(2) provides clear jurisdiction to the Federal Court of Claims remand petitioner's court martial conviction to OJAG USN with a limited order to refer petitioner's court martial conviction to the NMCCA. The Court of Claims would not be reviewing the correctness of the court martial conviction, nor would it be reviewing OJAG USN's review of same: it would merely be ordering further review, as explicitly provided for by Article 69(d), by the NMCCA. For this action, as a matter of statutory interpretation, the restrictive standard of *Matias/Bowling* is out of place.

Therefore, as a matter of the statutory interrelationship between U.C.M.J. Article 69 and 28 U.S.C. § 1491, petitioner herein submits that, where no judicial appellate review (or even discretionary consideration of appellate review) has occurred due to the jurisdictional limitations of U.C.M.J. Articles 66 and 67, and appellate review is limited to administrative appellate review under Article 69; any collateral review of a court martial conviction under *Matias/Bowling* by the Court of Federal Claims must include a preliminary determination as to whether the service JAG office properly declined to exercise its discretion under Article 69(d) to refer said conviction to the service courts of criminal appeals for judicial appellate review. Second, if a determination is made that the service JAG erroneously failed to exercise that authority, the Court of Claims must exercise its jurisdiction under

28 U.S.C. §1491(a)(2) to remand the conviction back to the service JAG with an order to refer said case to the service courts of criminal appeal for further judicial appellate review pursuant to Article 69(d). Finally, the Court of Claims must conduct this preliminary determination applying the same legal standards as it would in reviewing any other contested agency action. On this point, the Federal Circuit's decision in *Richey v. United States*, 322 F.3d 1317 (Fed. Cir. 2003), which involved review of an agency materially similar to the OJAG USN, provides that "a court may set aside the action only if the court finds that the action was — (A) arbitrary or capricious; (B) not based on substantial evidence; (C) a result of material error of fact or material administrative error; or (D) otherwise contrary to law." *Id.* at 1325.

D) Articulation and Application of Erroneous Legal Standard for Evaluating UCI:

The military judge's articulation and application of a previously non-existent legal standard in applying the UCI analysis, as well as her refusal to apply an accepted analysis for evaluating apparent UCI, was, at a minimum, patent legal error that should have been referred by OJAG USN's to the NMCCA under Article 69(d). To begin with, a full appreciation of the military judge's erroneous "West Standard" does require a fuller discussion of UCI jurisprudence. The prohibition against UCI is based upon U.C.M.J. Article 37 (10 U.S.C. § 837), which provides, in pertinent part, that "[n]o person

subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court martial . . ., in reaching the findings or sentence in any case." *Id.* The jurisprudence has provided the court with broad authority to provide an appropriate remedy where it is found, which remedy has also included dismissal of the case against an accused.

At the time of the military judge's ruling on petitioner's UCI motion in September of 2014, the jurisprudence clearly recognized the concepts of actual UCI and apparent UCI, either of which could be an independent basis for remedy. *See U.S. v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006); *U.S. v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). The principle of actual UCI was set forth in the case of *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). In that case, the Court of Appeals for the Armed Forces ("CAAF") established a burden of proof structure for establishing and rebutting the presence of actual UCI. Specifically, *Biagase* provided that an accused has the initial burden of establishing elements in order to raise actual UCI: 1) facts, which if true, constitute unlawful command influence; 2) the court martial proceedings were unfair (i.e., the accused was prejudiced); and 3) the unlawful command influence was the cause of that unfairness. 50 M.J. at 150. The quantum of proof for the accused's initial burden is "low, but more than mere allegation or speculation . . . i.e., some evidence". *Id.* Once the issue of unlawful command influence is raised, the Government must prove, beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or

(3) that the unlawful command influence will not prejudice the proceedings. *Id.*

This formulaic standard and burden/quantum of proof structure for actual UCI notwithstanding, CAAF issued a significant development in the application of apparent UCI in the case of *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). In that case, the prosecutor, perceiving the detailed military judge to be defense friendly, conducted an inappropriate and unprofessional voir dire of the military judge, which ultimately resulted in that judge's recusal. 63 M.J. at 407-11. While CAAF acknowledged the presence of actual UCI in the case, the analysis turned on whether the prejudicial effect of the UCI had been sufficiently removed by the detailing of an otherwise qualified and neutral military judge to the case. *Id.* at 414-15. In dismissing the case against the defendant, CAAF avoided the analysis of whether prejudicial effect had been disproven under actual UCI and decided the case on the application of apparent UCI. *Id.* at 415. In so doing, the *Lewis* court defined the "disinterested observer" standard by which a claim of apparent unlawful command influence is evaluated: "the appearance of unlawful command influence will exist where an objective, disinterested observer, *fully informed of all the facts and circumstances*, would harbor a significant doubt about the fairness of the proceedings." *Id.* (emphasis added).

CAAF further developed the "disinterested observer" standard in the case of *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). In that case, like *Lewis*, the court dismissed charges against an accused where the prosecutor had been involved in the

attempted improper disqualification of a perceived defense friendly military judge. *Id.* at 420-21. In *Salyer*, the court applied a particularly detailed and thorough circumstantial analysis, noting the presence of "six facts of record" that "considered together raise[d] some evidence of the appearance of unlawful influence in the case." *Id.* at 425-27. Having found that apparent UCI had been sufficiently raised, the *Salyer* court then asserted that it was next testing for "prejudice", further asserting that "the ultimate question is whether the Government has convinced us beyond a reasonable doubt that 'the disinterested public would now believe that [Petitioner] received a trial free from the effects of unlawful command influence.'" *Id.* at 427. This was the state of the UCI jurisprudence in September of 2014 when the military judge articulated the "West Standard" and made her decree regarding the absence of "facts" constituting unlawful command influence.

In the case of *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017), CAAF continued to apply the "disinterested observer" standard by employing the detailed circumstantial analysis developed in *Salyer*. In *Boyce*, CAAF had examined whether UCI infected the proceedings of a sexual assault case that was referred to a general court martial on the same day that the convening authority had been advised by the newly appointed secretary of the Air Force that he would be relieved from command unless he opted to retire. *Boyce*, 76 M.J. at 245-46. This news had been preceded by several politically unpopular decisions that the convening authority had made in sexual assault cases (involving his refusal to refer certain such cases to court martial and, in other such cases,

his exercise of his clemency authority pursuant to RCM 1107) that had garnered unwanted congressional and media attention. *Id.* at 244-45. Notwithstanding this pressure, the convening authority had directly asserted that such pressure had no impact on his decision to refer the particular appellant's case to court martial. *Id.* at 246. The military judge had held that appellant had met his initial burden of proving UCI, but found that the government had established beyond a reasonable doubt that there was no actual or apparent UCI based upon the convening authority's decision to retire at the time the case was referred to court martial. *Id.* CAAF reversed, holding that although there was no actual UCI, there was apparent UCI. In so holding, the court applied the "disinterested observer" standard using the same thorough and detailed circumstantial analysis of *Salyer*. *Id.* at 251-52. The particularly detailed circumstantial analysis included: 1) the date that the convening authority received a telephone call advising of the appointment of the new Secretary of the Air Force and the ultimatum to retire or be relieved, December 27, 2013; 2) the timing of the decision to retire, three hours after receiving the December 27, 2013 telephone call; 3) the loss of benefits resulting from his decision to retire at that time; 4) the date in which he received the referral package on appellant's case, which was the very same day of the December 27, 2013 telephone call; and 5) the fact that the convening authority was still vulnerable to additional adverse personnel action until his retirement on April 1, 2014. *Id.* at 251-52. As a result of its findings, the court dismissed the charges against the appellant without prejudice. *Id.* at 253.

In addition, CAAF has contemporaneously and explicitly broadened what constitutes UCI "facts" to coincide with the breadth of the "disinterested observer" standard. In the case of *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018) (which specifically involved conduct of the OJAG USN at the highest level and was within the context of the politically charged issue of sexual assault in the military) the court specifically examined the question as to whether the actions of a deputy service JAG (in this case, the deputy OJAG USN) in providing errant advice regarding a commander's RCM 1107 clemency authority to disapprove a court martial's finding of guilty could constitute "facts constituting unlawful influence". *Id.* at 74-76. In setting aside the conviction and sentence, the *Barry* court explicitly held (in direct contravention of the military judge's assertion of the "West Standard") that U.C.M.J. Article 37 did not require that the perpetrator be a convening authority or even be acting with the "mantle of command authority" and that the advice of the deputy JAG USN could constitute unlawful influence. *Id.* at 76. More significantly, the *Barry* court specifically held that unlawful influence of the deputy JAG USN did not need to be intentional to constitute such UCI facts. *Id.* at 78.

CAAF has also addressed the pervasive instances of UCI occurred within the specific context of a highly charged political environment surrounding the recent handling of sexual assault allegations in the military justice system. More significantly, while specifically recognizing the political pressures brought to bear by Congress and the Executive Branch with respect to sexual assault

cases; the court in *Boyce* "pointedly emphasize[d]" the duties of all judges within the military justice system in "appropriately address[ing]" such pressure "whenever they encounter it in specific cases". *Boyce*, 76 M.J. at 253 & n.9. Thus, CAAF has clearly signaled its intent to be active in reviewing and rooting out such influence on a case by case basis and its expectation that its subordinate military judges must do so as well.

This brings us back to the military judge's articulation and application of the "West Standard" in petitioner's general court martial. First and foremost, there is no jurisprudential support, whatsoever, for the proposition that such facts are, in any way, limited as articulated by the military judge's "West Standard". The military judge made no acknowledgement regarding the "disinterested observer" standard prevalent in the *Lewis* and *Salyer* cases. *See* Appx. at 128-29, 137-38, 141, 143-44, 148-50. There is also no recognition of the rather obvious ability of a biased NCIS investigator, with broad compulsory federal authority, acting under the admitted direction of the military prosecutor, to manipulate witness testimony and evidence. *See id.* The military judge's statement that petitioner's defense counsel was required to specifically prove that NCIS that had been pressured by the convening authority or someone up the chain of command not to pursue exculpatory evidence in the investigation, was a blatant violation of the well-established principle for an accused to establish a prima facie case of apparent UCI.

Additionally, in applying the "West Standard", the military judge expressly required petitioner to

obtain direct evidence testimony from the NCIS agents themselves that they were pressured to conduct their investigation to obtain a result prejudicial to petitioner, then prevented petitioner from conducting any meaningful examination of the circumstances of their investigation. This requirement imposed by the military judge stands in direct contravention to the broad and detailed circumstantial analysis accompanying the "disinterested observer" standard as applied in *Salyer* and *Boyce*, and is directly contradictory to the holding in *Boyce*, wherein the court expressly rejected the dispositive nature of the type of direct evidence testimony required by the military judge in petitioner's case. *See* 76 M.J. at 246.

Furthermore, given the context of this case being squarely within the highly charged political climate of sexual assault cases, the inexplicable and arbitrary creation and application of the erroneous and prejudicial "West Standard", along with the jurisdictional restrictions of U.C.M.J. Articles 66 and 67; the actions of the military judge cannot be seen as anything other than a clear frustration and violation of CAAF's mandate as articulated in the *Boyce* case.

At this point, petitioner acknowledges that military judge's September 26, 2014 creation of the "West Standard" predates the *Boyce* and *Barry* decisions; and OJAG USN's June 9, 2017 decision predates the *Barry* decision. This chronology is far from extenuating. At the outset, *Boyce* and *Barry* are not restrictive changes in UCI jurisprudence, but are clarifications (and, arguably, reinforcements) of the broad "disinterested observer" standard applied

by the *Lewis* and *Salyer* cases that should have been readily apparent to the military judge in this case. The timeline is much more damning for OJAG USN. The June 9, 2017 decision came *less than three weeks* after the issuance of CAAF's UCI mandate in *Boyce* (May 22, 2017), and while the *Barry* case (reviewing the very conduct of the JAG USN Actual) was pending. *See Barry*, 78 M.J. at 73-76. OJAG USN's refusal to exercise its Article 69(d) referral authority in this case under those circumstances is simply inexcusable.

Thus, at the very minimum, this violation required the exercise of the Court of Claim's power of remand under 28 U.S.C. §1491(a)(2).

II. In the Alternative, Petitioner's Court Martial Conviction Should Be Vacated Outright under the Jurisprudence Providing for Collateral Review of Courts Martial.

While petitioner contends that he is entitled, as a matter of statutory construction, to have his court martial remanded under 28 U.S.C. § 1491(a)(2) to the OJAG USN with instruction to refer same to the NMCCA in order to establish jurisdiction for judicial appellate review by the military tribunals; petitioner further contends that he is nevertheless entitled to have his court martial conviction vacated outright under the standard as set forth in *Matias/Bowling*. First and foremost, as mentioned above, it is without question that petitioner's case has not received *any* consideration, let alone *full and fair* consideration, by any military tribunal, which

means that petitioner need only establish that his case has been tainted by fundamental constitutional error to warrant the outright vacating of his court martial conviction.

Furthermore, the aforementioned wrongful acts rise to the level of fundamental constitutional due process violations because they are arbitrary deprivations of "substantial and legitimate interests" of petitioner in established jurisprudence relating to UCI, as provided in this Court's decision in the case of *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In the case of *Hicks*, this Court reviewed a judgment of the Oklahoma Supreme Court affirming a sentence that was imposed pursuant to statutory sentencing requirements determined to be unconstitutional. Specifically, the Oklahoma State Supreme Court, in reviewing the constitutionality of the defendant's sentence, held that the mandatory sentence provision was an unconstitutional infringement upon the defendant's statutory right to have his sentence decided by the jury. *Id.* at 343. However, the state court had further found that the sentence would not be disturbed because the it was within the range of what the jury could have assessed, the defendant in that case therefore was not prejudiced. *Id.* at 343. In reversing, this Court explained that arbitrarily depriving a criminal defendant, whose liberty interests are at stake, of a statutory procedural right rises to the level of a constitutional due process violation. *Id.* at 346.

Just as with the defendant in *Hicks*, petitioner in this case clearly had a "substantial and legitimate expectation" that deprivation of his liberty interests

would not occur on the arbitrary actions of either the military judge or the OJAG USN in applying UCI jurisprudence. Specifically, the military judge's arbitrary creation and application of a much more stringent standard of proof for establishing UCI not only constitutes legal error, but rises to the level of a fundamental violation of petitioner's right of Due Process. As such, even if this Court were to find that remand under 28 U.S.C. § 1491(a)(2) not to be warranted, petitioner is nevertheless entitled to have his conviction vacated outright under the standards of *Matias/Bowling*.

III. The Doctrine of Issue Preclusion Does not Apply Bar Litigation of the Issue of Falsity of the Sexual Assault Allegations against Petitioner:

The Trial Court found that the December 22, 2015 ruling in the case of *West v. Rieth*, which upheld the Westfall Act certification of the scope of employment of petitioner's accusers in that case, and denied the Federal District Court of subject matter jurisdiction; was preclusive as to the issue of whether petitioner was falsely accused of sexual assault and sexual harassment. The Trial Court's ruling was erroneous and the Government was not entitled to summary judgment on that issue.

This Court has applied defined the doctrine of issue preclusion (collateral estoppel), in the case of *Montana v. United States*, 440 U.S. 147 (1979). In that case, this Court provided that "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that

determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Id.* at 153. As applied in the Federal Circuit, a judgment on the merits in a prior suit precludes re-litigation in a second suit of issues actually litigated and determined in the first suit. *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). Issue preclusion is appropriate only if: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the first action. *Shell Petroleum, Inc. v. U.S.*, 319 F.3d 1334, 1338 (Fed. Cir. 2003); *Freeman*, 30 F.3d at 1465.

As an initial matter, the December 22, 2015 ruling does not carry preclusive effect upon the issue of falsity of accusations against petitioner because, in deciding to uphold the Westfall Act certification, the court had necessarily decided that it was not a court of competent jurisdiction. In fact, the July 12, 2016 Judgment in the case of *West v. Rieth*, incorporating the December 22, 2015 ruling, explicitly stated that petitioner's state law claims were "[d]ismissed without prejudice for lack of subject matter jurisdiction." Appx. at 186-87. Although seemingly addressing the merits, because the court in the case of *West v. Rieth* was making such a determination for the limited purpose of deciding its own jurisdiction under the Westfall Act, and because it answered that question in the negative; it was not a "court of competent jurisdiction" as to the actual merits of plaintiff's claims. As such, the December 22, 2015

ruling cannot have any preclusive effect upon the claims in the matter below as per this Court's pronouncement in *Montana v. United States*.

Additionally, petitioner clearly was not given a full and fair opportunity, within the December 22, 2015 ruling, to litigate the factual issues surrounding the weight of evidence of whether his accusers conspired to falsely accuse him of sexual assault and sexual harassment. Specifically, in dismissing petitioner's state law claims under the Westfall Act, the District Court 1) assigned the burden of proof, by preponderance of evidence, upon the petitioner; 2) did not afford the petitioner the right to an evidentiary hearing and 3) did not require, prior to adjudication of validity of the Westfall Act certification, that the defendants specifically deny the allegations of the petitioner on the merits. *See* Appx. at 194-98, 203. These factors clearly constitute "significant procedural limitations" preventing the December 22, 2015 ruling from having any preclusive effects on the issues pertaining to the weight of evidence as to the accusers' conspiracy to make false sexual assault and sexual harassment claims against petitioner.

IV. The Privacy Act, 5 U.S.C. § 552a, and DoD Policy Do Not Apply to Prohibit a Petitioner from Publicly Asserting the Identities of his Accusers:

As a final matter, the Trial Court abused its discretion when it denied petitioner's Motion for Relief from Protective Order based upon the application of the Privacy Act, 5 U.S.C. § 552a, which

purportedly applies to prevent the public release of the names of petitioner's accusers.

The Privacy Act safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records. *Bertel v. F.A.A.*, 725 F.2d 1403, 1407 (D.C. Cir. 1984). Specifically, the Privacy Act imposes responsibilities on federal agencies to maintain their records accurately and to prevent improper disclosure of same. *Id.* However, it is well settled law that the Privacy Act does not prohibit disclosure of information or knowledge obtained from sources other than records. *Pippinger v. Rubin*, 129 F.3d 519, 530-31 (10th Cir. 1997); *Wilborn v. Dept of Health & Human Servs.*, 49 F.3d 597, 600 (9th Cir. 1995); *Olberding v. United States Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983).

The Privacy Act does not apply to protect the disclosure of the identities of the accusers in this case, as that information was obtained in the normal course of the public proceedings of petitioner's general court martial independently of any so called "protected record" under the Privacy Act. In addition to the general presumption that "all trial proceedings should be subject to scrutiny by the public", the access to all information contained in the record of these proceedings was afforded through the open court martial process; and, as such, petitioner enjoys an unquestioned right under the Sixth Amendment of the United States Constitution to have that information made public. Petitioner's unquestioned right to a public trial, within the context of the military justice process, is encapsulated by RCM 806, which specifically provides that courts martial "shall

be open to the public" and permits "closure" under very narrow circumstances, which are inapplicable here. R.C.M. Rule 806(b)(2). Further, there is no provision within the DoD Instruction 6495.02 or Marine Corps Order 1752.5B, pertaining to the DoD/USMC SAPR Program, that of its own force requires confidentiality of any information or testimony elicited at a public trial.

Unfortunately, the Trial Court's holding went well beyond the confines of the record before it and has led to the unavoidable premise that because information may be contained within a purported government record, it must be protected from general dissemination by anyone (public official or private citizen) who would come by that information through independently public means. This is simply a gross distortion of the Privacy Act, which distortion unavoidably leads to unconstitutional prior restraint in violation of the First Amendment of the United States Constitution. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

CONCLUSION

Based on the above, petitioner herein submits that the Petition for Writ of Certiorari should be granted in this case.

September 15, 2021 Respectfully Submitted,

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