

No. _____

IN THE
Supreme Court of the United States

DANIEL A. BENCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**Application for Extension of Time to File
a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces**

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States:

Pursuant to Supreme Court Rules 13.5, 22, and 30.2, the Petitioner, Daniel A. Bench respectfully requests a 30-day enlargement of time, to and including December 7, 2022, to file a Petition for a Writ of Certiorari. The final filing date for the petition for writ of certiorari in this case is currently November 7, 2022.

Extraordinary circumstances exist that warrant granting this request, which undersigned counsel respectfully submits less than the required 10 days before the final filing date. Petitions for Writs of Certiorari from military servicemembers represented by military counsel require a special process to obtain funding. Specifically, to print a Petition for a Writ of Certiorari in accordance with this Honorable Court's rules, the Air Force Appellate Defense Division (AFADD) may not contract directly with a printing service; rather, it must first submit an approval request through a local funding source and then have that request processed through a Department of

Defense logistics agency pursuant to government regulations. In turn, the logistics agency will contract with outside vendors on behalf of AFADD, with little to no input from the Division. The overall process differs from past practice and is both complex and time consuming. As of the current date, undersigned counsel has yet to receive approved funding for the present case. Accordingly, undersigned counsel respectfully requests a 30-day enlargement of time—filed out-of-time—to account for this unanticipated complication and to afford Petitioner his statutory right to military counsel before this Honorable Court. Should funding be approved prior to the requested 30 days, undersigned counsel will endeavor to file the petition at an earlier date.

Petitioner's case presents important questions of federal law. Petitioner was a member of the United States Air Force, tried and convicted by court-martial for *inter alia*, sexual abuse of his nine-year old son, who was diagnosed with autism. This allegation arose amidst Petitioner's contentious divorce from his then-wife. During the court-martial, Petitioner's son was allowed to testify remotely, with a screen blocking his view of the courtroom and only a prosecutor, a defense counsel, and his victim counsel present. At the outset of this testimony, Petitioner's son asked the prosecutor persistent questions about whether the court could "hear us" and watch him, whether there were "some people in there" (referring to the blocked video screen), and ultimately, whether Petitioner was present at the court-martial convened to try him. Several times in response, the prosecutor falsely told the son "it's just us in this room," "all you've got is the three people right here," and finally that Petitioner "[was] not in there," falsely affirming to the son that his father was not present at the trial. The son's substantive testimony about the allegations only followed the prosecutor's false assurances, which were never corrected.

The Court of Appeals for the Armed Forces (CAAF) reviewed whether lying to a witness about Petitioner's presence in the courtroom to secure testimony materially prejudiced Petitioner's

Sixth Amendment right to confrontation. Attachment A. Throughout briefing and oral argument, Petitioner made clear that his right to confrontation was prejudiced not based on the fact that his son testified remotely, but rather that the prosecutor committed misconduct by lying to his son about Petitioner's presence in the courtroom. The CAAF "recognize[d] that trial counsel's misleading statements might have lessened the pressure [Petitioner's] son felt to tell the truth[.]" Attachment B, *2. However, the Court concluded "[w]hether the Sixth Amendment is violated when a counsel misleads a witness who is testifying remotely about the accused's presence is an open question with no clear or obvious answer in the military justice system[.]" and denied relief based on plain error review. *Id.* at *11. The CAAF, however, failed to address the plain and obvious prosecutorial misconduct—to include certain ethical violations—that resulted from lying to a key witness in this manner.

Attached to this application is a copy of the CAAF's decision on direct appeal in Petitioner's case, for which Petitioner seeks review in this Honorable Court. *See* Attachment B. The CAAF issued judgment in this case on August 8, 2022. *See Id.* The time for filing a petition would therefore expire on November 7, 2022,¹ absent an extension. Though this application has not been filed at least 10 days before that date as required by Rule 13.5, extraordinary circumstances exist which warrant granting the instant request, as discussed *supra*. Because the CAAF granted review of this case, Petitioner respectfully submits that this Honorable Court has jurisdiction under 28 U.S.C. § 1259(3).

This case presents an important question of federal law concerning whether service courts are enabling conduct that so far departs from the accepted and usual course of judicial proceedings

¹ November 6, 2022 is 90 days from August 8, 2022 (*see* Rule 13.1); however, November 6, 2022 is a Sunday, extending the period until the end of the next day that is not a Sunday (November 7, 2022) in accordance with Rule 30.1.

as to call for an exercise of this Court’s supervisory power. The CAAF erred in denying Appellant relief for prosecutorial misconduct that materially prejudiced his Constitutional Confrontation right, thus also denying him the due process of a trial that was fundamentally fair. *See Darden v. Wainwright*, 477 U.S. 158, 181 (1986) (“The relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’”) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)); *Napue v. Illinois*, 360 U.S. 264, 269-80 (1959) (“A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.”); *United States v. Berger*, 295 U.S. 78 (1935); *see also Strickler v. Greene*, 527 U.S. 263, 281 (1999) (highlighting “the special role played by the American prosecutor in the search for truth in criminal trials.”).

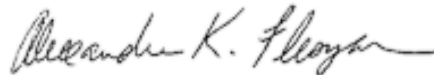
Further, in failing to address the plain and obvious prosecutorial misconduct of material misrepresentation, the CAAF tacitly permitted such conduct in military courts. This precedent conflicts with, at a minimum, federal civilian court practice. *See United States v. Butler*, 955 F.3d 1052 (D.C. Cir. 2020) (finding defendant was denied a fair trial where the state knowingly presented false testimony regarding hair microscopy, noting the strict standard the state is held to “not just because [the cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.”) (quoting *United States v. Agurs*, 427 U.S. 97, 104-108 (1976)) (alteration original); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (granting a petition for writ of *habeas corpus* where the State failed to correct false representations to a judge regarding a witness’ pending prosecution and enabled the witness’ false testimony); *Shih Wei Su v. Fillion*, 335 F.3d. 119 (2d Cir. 2003) (reversing the district court and remanding with instructions to grant a petition for writ of *habeas corpus* where the prosecutor

falsely established on direct examination no promises had been made to a state witness).

Moreover, the CAAF's tacit permission sanctioned conduct in military courts that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* A.B.A. 2020 Model Rules of Professional Conduct Rules 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person"), 3.3 ("(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

WHEREFORE, Petitioner respectfully requests 30 additional days for the reasons outlined above, thus making the Petition for a Writ of Certiorari due on December 7, 2022.

Respectfully Submitted,



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