No. 23-371

In the Supreme Court of the United States

D'ANDRE M. JOHNSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF U.S. COAST GUARD DEFENSE SERVICES AND U.S. NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The U.S. Coast Guard and Navy-Marine Corps Appellate Defense Divisions were established by the Judge Advocates General of their respective services pursuant to Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870. These defense service units are statutorily tasked with representing servicemembers before the service Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and this Court.[1]

STATEMENT OF THE CASE

Following his appeal to the Air Force Court of Criminal Appeals (AFCCA), Petitioner petitioned the Court of Appeals for the Armed Forces (CAAF) to review five issues, including whether the evidence is legally sufficient to support his conviction for sexually assaulting M.P. Pet. App. E at 071-72a. The CAAF granted the petition for review on two issues other than the legal sufficiency issue. *United States v. Johnson*, 81 M.J. 229 (C.A.A.F. 2021). After a remand to the AFCCA, and a subsequent petition to the CAAF that was granted on a separate issue, the CAAF

[1] In accordance with Supreme Court Rule 37.6, *amici curiae* are authorized legal representatives of their respective Appellate Defense units, and are authorized by law to appear before this Court under 10 U.S.C. § 870(c); neither Petitioner nor Respondent authored this brief in whole or in part; and no monetary contributions were made to *amici* in its preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties were notified of *amici*'s intent to file this brief at least ten days prior to the filing deadline.

issued its decision disposing of the case on May 8, 2023. *United States v. Johnson*, __ M.J. __, 2023 CAAF LEXIS 303, 2023 WL 4032521 (C.A.A.F. 2023).

Petitioner now petitions for a writ of certiorari asking this Court to review: (1) whether it has jurisdiction under 28 U.S.C. § 1259(3) to review the legal sufficiency issue that the CAAF did not address in its review of the case; and (2) whether the evidence is legally sufficient to support his conviction.

SUMMARY OF ARGUMENT

The CAAF was established under Article I as the highest appellate court within the military justice system. *See Ortiz v. United States,* 138 S. Ct. 2165, 2178 (2018). Pursuant to 28 U.S.C. § 1259(3), the Supreme Court may review by writ of certiorari "[d]ecisions of the [CAAF]" in "[c]ases in which the [CAAF has] granted a petition for review." Created in 1983, this direct-appeal pathway to this Court for cases reviewed by the CAAF is similar to the direct-appeal pathways by which this Court reviews the final adjudications of the high courts of States, U.S. territories, and the District of Columbia. *See* 28 U.S.C. §§ 1257-1260. Thus, this Court's certiorari jurisdiction over CAAF cases is on par with its jurisdiction over other non-Article III high-court judgments.

Under the plain language of 28 U.S.C. § 1259(3), this Court may review any issue presented to (even if not reviewed by) the CAAF, provided the CAAF "granted a petition for review" in "the case." This is the same certiorari jurisdiction the Court applies to the high-court judgments of States, territories, and the District of Columbia, and has exercised in a similarly situated CAAF case. *See United States v. Briggs*, 141 S. Ct. 467 (2020).

Petitioner's second, substantive question—the legal sufficiency of his sexual assault conviction—highlights the inequity of construing 28 U.S.C. § 1259(3) to grant any less access to this Court by servicemembers convicted at courts-martial than by persons convicted in other non-Article III courts. Since *all* criminal cases are subject to the same due process guarantee of a rational criminal verdict, the proper constitutional standard for legal sufficiency impacts the fairness of not only the military justice system, but also civilian criminal justice systems. Here, the trier of fact rendered an obviously unfounded, spill-over verdict, which the AFCCA then upheld by employing an incorrect constitutional standard to support an irrational view of the evidence. Addressing this issue will clarify the contours of this important constitutional protection for all of the Nation's appellate courts, military and civilian.

ARGUMENT

I. This Court has certiorari jurisdiction to review any issue in a case in which the CAAF granted a petition for review.

Amici agree with Petitioner that this Court's power to review CAAF decisions in "[c]ases in which the [CAAF has] granted a petition for review," 28 U.S.C. § 1259(3), applies even with respect to issues the CAAF did not specifically grant for review or address in a written opinion.

A. A plain reading of 28 U.S.C. §1259(3) leads to jurisdiction.

As Petitioner correctly argues, the plain language of 28 U.S.C. § 1259(3) supports this Court's certiorari jurisdiction in this case. *See United States v. Apfelbaum*, 445 U.S. 115, 122 (1980) (discussing the "well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language"). The statute provides that "*[d]ecisions* of the [CAAF] may be reviewed by the Supreme Court by writ of certiorari in . . . *cases* in which the [CAAF] granted a petition for review under § 867(a)(3) of title 10 [Article 67(a)(3), UCMJ]." 28 U.S.C. § 1259(3) (emphasis added).

The statute's distinction between "decisions" and "cases"—terms with different legal meanings—is critical. A "decision" is "[a] *judicial . . . determination* after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or *disposing of a case*." *Decision, Black's Law Dictionary* (11th ed. 2019) (emphasis added). A "case," in turn, is "[a] civil or *criminal proceeding*, action, suit, or controversy at law or in equity." *Case, Black's Law Dictionary* (11th ed. 2019) (emphasis added). Read together, these terms support that once the CAAF grants a petition for review of any issue in a case, this Court may review any aspect of its disposition of that case. As Petitioner aptly describes, Congress chose this language very carefully—changing "issues" to "cases" in the final version of the statute—to remove any suggestion that this Court would be limited to reviewing CAAF decisions only as to the *issues*, as opposed to the *cases*, that the CAAF granted for review. Pet. Br. at 17-18.

Here, the CAAF granted a petition for review in Petitioner's case, but decided to address issues other than his legal sufficiency claim, effectively deciding that issue summarily against him. But because the CAAF granted review of some issues in the case, this Court may, under 28 U.S.C. § 1259(3), review any aspect of the CAAF's case disposition, including those issues it has summarily denied.

B. The language of 28 U.S.C. § 1259(3) places this Court's review of CAAF decisions on par with its review of the high-court judgments of States, U.S. territories, and the District of Columbia.

This interpretation of 28 U.S.C. § 1259(3) is consistent with the similar jurisdictional framework Congress has created for the Court's review of other non-Article III high-court judgments. "[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 315-16 (2006) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); *United States v. Freeman*, 44 U.S. 556, 564 (1845)). Thus, 28 U.S.C. § 1259(3) should be read together with the similar jurisdictional provisions immediately surrounding it as if they were one law.

The three statutes surrounding 28 U.S.C. § 1259(3) provide that this Court may review the "final judgments or decrees" of the highest courts of the States, territories, and the District of Columbia. 28 U.S.C. §§ 1257, 1258, 1260. Like a "decision" under 28 U.S.C. § 1259(3), a "final judgment" under these other statutes is "[a] court's last action that settles the rights of the parties and *disposes of all issues* in the controversy . . . ." *Final Judgment, Black's Law Dictionary* (11th ed. 2019) (emphasis added). Thus, all four statutes create similar pathways to this Court's certiorari review of high-court actions that dispose of a case. Accordingly, this Court's procedural precedents regarding 28 U.S.C. §§ 1257, 1258, and 1260 apply *in pari materia* to 28 U.S.C. § 1259, since they are all part of the same statutory framework to make this Court the final (discretionary) arbiter of direct criminal appeals from non-Article III high courts, military and civilian.

1. For purposes of certiorari jurisdiction, the CAAF is analogous to the highest court of a State, U.S. territory, or the District of Columbia.

The CAAF, the Supreme Courts of Puerto Rico and the U.S. Virgin Islands, and the District of Columbia Court of Appeals (DCCA) are the only federal courts with specialized subject matter jurisdiction from which a case can be directly appealed to this Court without first being appealed to the Court of Appeals for either the Federal Circuit or the District of Columbia (D.C.) Circuit. *See* 10 U.S.C. § 950g; 38

U.S.C. § 7292; 28 U.S.C. §§ 1295, 1257-1260.[2] This is not a coincidence. Rather, as this Court has found, "the military, territories, and District [are] a triad of 'specialized areas having particularized needs' in which Article III 'gives way to accommodate plenary grants of power to Congress.'" *Ortiz*, 138 S. Ct. at 2178 (quoting *Palmore v. United States*, 411 U.S. 389, 408 (1973)) (alteration omitted).

Because of its specialized jurisdiction, the CAAF, like the DCCA, is an Article I appellate court that functions like the highest court of a State. *See* 10 U.S.C. § 941; *Ortiz*, 138 S. Ct. at 2178, 2180.[3] Unlike cases arising from the U.S. Circuit Courts of Appeals, for example, CAAF cases are not subject to certiorari jurisdiction until the CAAF disposes of the case. *Compare* 28 U.S.C. § 1254(1) ("Cases in the courts of appeals may be reviewed . . . *before or after* rendition of judgment or decree") (emphasis added) *with* 28 U.S.C. § 1259(3) ("*Decisions* of the [CAAF] may be reviewed . . . in . . . cases in which the [CAAF] granted a petition for review. . . .") (emphasis added). This requirement is the same for the States' highest appellate courts, the Supreme Courts of Puerto Rico and the U.S. Virgin Islands, and the DCCA. *See* 28 U.S.C. §§ 1260 ("Final judgments or decrees rendered

[2] The final judgments of the only other military appellate court, the Court of Military Commission Review, are reviewed by the D.C. Circuit. 10 U.S.C. § 950g.

[3] The DCCA is treated like the highest court of a State in all practical effect by both statute and this Court's custom. *See* 28 U.S.C. § 1257(b); *Ortiz*, 138 S. Ct. at 2177; *Pernell v. Southall Realty*, 416 U.S. 363, 368-69 (1974).

. . . may be reviewed by the Supreme Court by writ of certiorari . . . ."), 1258 (same), 1257(a) (same).

In fact, since the enactment of 28 U.S.C. § 1259 in 1983, the military appellate structure has become similar to that of its civilian counterparts in virtually every respect. *See Ortiz*, 138 S. Ct. at 2170 ("[C]ourts-martial are now subject to several tiers of appellate review, thus forming part of an integrated court-martial system that closely resembles civilian structures of justice.") (citation and internal quotation marks omitted); *Weiss v. United States*, 510 U.S. 163, 174 (1994) ("Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system."). These similarities are "more than sufficient" to align the CAAF's "judicial character . . . with territorial and D.C. (and also state and federal) courts of appeals." *Ortiz*, 138 S. Ct. at 2180. Thus, "the decisions of [courts-martial] are subject to an appellate process—what [this Court has] called an integrated system of military courts and review procedures—that replicates the judicial apparatus found in most States." *Id.* at 2175.

2. CAAF decisions are subject to the same not-pressed-or-passed-upon rule this Court applies to state high-court judgments.

This Court has for many decades determined the contours of its certiorari jurisdiction over decisions from state high courts. *See Illinois v. Gates*, 462 U.S. 213, 218 (1983). Early on, the Court held it had no jurisdiction to hear such a case "unless a federal question had been *both* raised *and* decided in the state court below." *Id.* (citing *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 392 (1836)) (applying predecessor statute § 25 of the Judiciary Act of 1789) (emphasis added). However, as the Court has noted, this rule evolved and changed under the current statute, 28 U.S.C. § 1257:

> The apparent rule of *Crowell v. Randell* that a federal claim have been *both* raised *and* addressed in state court was generally not understood in the literal fashion in which it was phrased. Instead, the Court developed the rule that a claim would not be considered here unless it had been *either* raised *or* squarely considered and resolved in state court.

Gates, 462 U.S. at 218 n.1 (emphasis added).

The Court has never decided whether this "not-pressed-or-passed-upon" rule is jurisdictional or merely prudential. *See Howell v. Mississippi*, 543 U.S. 440, 445 (2005) (*per curiam*) (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988)); *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (*per curiam*) ("We need not decide in this case whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential."). However, the latter appears to be the case. The Court has, for example, exercised jurisdiction to decide an issue on its merits that was never raised to or addressed by the state supreme court, but only presented for the first time to this Court. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 883 (1986). The Court has also exercised jurisdiction to decide specific issues on their merits that were never raised in either the petitioner's state court appeals *or* the petition for certiorari. *Vachon v. New Hampshire*, 414 U.S. 478, 479 (1974); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949). The Court has even gone so far as to specifically note it has discretionary authority to decide a case on an issue not raised in state court. *Vachon*, 414 U.S. at 479 n.3.

Most recently, in *Hemphill v. New York*, the Court reaffirmed that "'no particular form of words or phrases is essential' for satisfying the presentation requirement, so long as the claim is 'brought to the attention of the state court with fair precision and in due time.'" 142 S. Ct. 681, 689 (2022) (quoting *Street v. New York*, 394 U.S. 576, 584 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). *Hemphill* involved a claimed Confrontation Clause violation, which the Court of Appeals of New York never mentioned in its published opinion. *People v. Hemphill*, 35 N.Y.3d 1035 (N.Y. 2020). In response to the State's assertion of the not-pressed-or-passed-upon rule, this Court found the petitioner had satisfied the presentation requirement by raising the claim to both the New York Appellate Division and the Court of Appeals of New York, such that the Court had jurisdiction to "consider any argument Hemphill raises in support of his claim . . . ." *Hemphill*, 142 S. Ct. at 689.

This military case presents exactly the same procedural scenario as *Hemphill*, in that Petitioner brought his claim of legal sufficiency to the attention of both the AFCCA and the CAAF with fair precision and in due time; the AFCCA denied it; and the CAAF granted his petition for review, yet chose to address other issues in deciding the case. Because the not-pressed-or-passed-upon rule announced in *Hemphill* only requires proper presentation of the claim to the appellate court in question, irrespective of whether the court actually considers or addresses the claim, Petitioner satisfied this rule before the CAAF in the same manner Hemphill did before the Courts of Appeals of New York.

As members of Appellate Defense units charged with representing servicemembers' rights throughout the military appellate process, Amici respectfully submit that there is no reason why this servicemember's claim of error should be viewed any differently than that of a similarly situated person in some other non-Article III criminal court system. As this Court has previously stated, it "would need a powerful reason to divorce military courts from territorial and D.C. courts when it comes to defining [its] appellate jurisdiction." *Ortiz*, 138 S. Ct. at 2178. In this respect (as in many others), there is no appreciable difference between a petition for certiorari from a CAAF decision in a case and one from a high-court judgment in a State, territory, or the District of Columbia. *See id.* at 2174 ("*The procedural protections* afforded to a service member *are virtually the same* as those given in a civilian criminal proceeding, whether state or federal.") (emphasis added); *id.* at 2174-75 ("The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review.").

C. This Court has granted a petition for certiorari under 28 U.S.C. § 1259(3) in a prior CAAF case with the same procedural posture.

This Court has held that "limitations on [its] jurisdiction to review" must be read "narrowly." *Castro v. United States*, 540 U.S. 375, 381 (2003) (quoting *Utah v. Evans*, 536 U.S. 452, 463 (2002)). And it "do[es] not normally read into a statute an unexpressed congressional intent to bar jurisdiction that [it] ha[s] previously exercised." *Evans*, 536 U.S. at 463 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Department of Commerce v. Montana*, 503 U.S. 442, 459 (1992)).

As several scholars have discussed, the Court has previously exercised jurisdiction in a case similar to Petitioner's.[4] In *Abdirahman v. United States,* 139 S. Ct. 38 (2018), a petition for certiorari was filed on behalf of 165 petitioners raising an Appointments Clause challenge that was eventually resolved in *Ortiz v. United States*. 138 S. Ct. at 2184. While the issue was still pending resolution, however, certiorari was denied in *Abdirahman*. One of the *Abdirahman* petitioners, Briggs, then petitioned this Court for a

[4] This analysis is drawn from Eugene R. Fidell et al., *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces,* §19.03[19] (22d ed. 2023).

rehearing, requesting that a writ of certiorari be granted in his case, followed by remand to the CAAF for further consideration in light of that court's construction of a statute of limitations issue decided in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018).

Although the CAAF had not granted review of this issue, the Court granted the request for rehearing and certiorari, vacated the CAAF's decision, and remanded for further consideration in light of *Mangahas*. *United States v. Briggs*, 141 S. Ct. 467 (2020). While questioning himself whether the Court had jurisdiction over the issue, Justice Gorsuch in his concurring opinion conceded that "a majority of the Court believe[d] [it] ha[d] jurisdiction . . . ." *Id.* at 474 (Gorsuch, J., concurring).

This previous exercise of jurisdiction over the issue presented in *Briggs* would only have been permissible under the reading of 28 U.S.C. § 1259(3) offered by Petitioner and Amici in this case. Hence, the Court should construe 28 U.S.C. § 1259(3) the same way here.

II. Petitioner's legal sufficiency question raises important constitutional and statutory issues that this Court should address.

Finally, Petitioner's substantive question of legal sufficiency presents two important issues that merit this Court's consideration. First, the AFCCA misinterpreted the legal sufficiency standard, which protects against unjust and unfounded criminal convictions and is "necessary to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This constitutional issue is not unique to military justice, but is equally important to criminal convictions obtained in civilian courts.

Second, the legal sufficiency issue involves the federal question of what quantum of evidence is necessary to find non-consent for the offense of sexual assault under a federal statute, 10 U.S.C. § 920. This Court is and always has been the final and paramount interpreter of federal law. *See, e.g.*, *Axon Enter. v. FTC*, 143 S. Ct. 890, 914 (2023) (Gorsuch, J., concurring) ("Our job is to interpret the laws Congress has adopted."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). It should exercise its appellate jurisdiction to address the question of federal law presented here.

In determining whether a criminal conviction is legally sufficient under due process, a court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any *rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis added). Hence, the light most favorable to the prosecution cannot be used to create an *irrational* or *unreasonable* view of the evidence. *Id.* at 318 ("the critical inquiry on review of the sufficiency of the evidence . . . must be . . . to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt.") (emphasis added). And this "constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Id.* at 323.

Here, the AFCCA misinterpreted these important constitutional safeguards to justify an unfounded conviction. The court first found that even in the light most favorable to the prosecution, the evidence absolved Petitioner of any sexual assault against M.P. during their consensual sexual activity *before* he left the room and was later discovered with her roommate. Pet. App. A at 016a. So the court simply concluded that the assault of M.P. must have occurred *after* the incident with her roommate. *Id.* at 016a-017a.

The trouble is, this factual conclusion is refuted by the "stubborn facts" of the case.[5] Specifically, M.P. herself testified Petitioner was clothed when the charged act on the couch occurred; however, he was later seen naked with the roommate and only wearing his underwear on the couch next to M.P. Pet. App. A at 016a-017a. Therefore, the AFCCA's conclusion that Petitioner sexually assaulted M.P. *after* the incident with the roommate—without articulating any basis for determining or inferring when he *put his clothes back on*—is not a reasonable one. In fact, no *rational* trier of fact could find Petitioner sexually assaulted M.P. beyond a reasonable doubt on this evidence, even

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[5] John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (December 1770) ("Facts are stubborn things; and whatever may be our wishes, our inclinations or the dictates of our passion, they cannot alter the state of facts and evidence."), http://www.quotationspage.com/quote/3235.html (last visited October 13, 2023).

when viewed in the light most favorable to the prosecution. To the contrary, the only rational conclusion is that, in the midst of her ongoing, contentious divorce and child custody battle, M.P. only reported her consensual encounter with Petitioner as an assault after her husband's friend came to the house the following morning. Pet. App. A at 017-18a, 027-28a; Pet. Br. at 27.

CONCLUSION

The petition for writ of certiorari should be granted so that the Court can address these important questions of jurisdictional, constitutional, and substantive federal law for this servicemember.

Respectfully submitted.

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October 2023