No. _____

In the Supreme Court of the United States

JARED THOMAS CARDWELL,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

_____

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

_____

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves the dilemma of armed services members who are simultaneously caught in dual webs of the military and civilian justice systems. The following are the specific questions presented by this petition:

Issue 1: In order to protect their Fifth Amendment right against self-incrimination, should active duty service members interrogated during a joint military/civilian investigation be given the comprehensive military protections under UCMJ Art. 31(b) when facing a civilian prosecution since its application and the warnings are not identical to those required by *Miranda v. Arizona*.

A. Should any statements made by an active duty marine to civilian detectives be suppressed in a civilian prosecution if the suspect was not "in custody" for *Miranda* if his statements were previously suppressed in a court martial because they were "involuntary" since the civilian detectives were acting as agents of the NCIS at the time, and;

B. During a joint military/civilian investigation is the UCMJ Art. 31(b) advisement that an armed services member, while absolutely entitled to a military attorney, is only entitled to a civilian attorney at his own expense in the military justice system, the equivalent of the *Miranda*

warning that he is entitled to an attorney even if he is indigent, which is required for civilian criminal trials.

Issue 2: Did the civilian trial court err by finding the petitioner's statements were voluntary by not adequately assessing military service into the totality of the circumstances, and further erred by precluding testimony to the jury regarding the unique pressures of military service against long-standing Supreme Court precedents?

Issue 3: Once the military assumes the prosecution of one of its members under the terms of a Memorandum of Understanding (MOU) with the local prosecutorial agencies for a crime occurring on a military base, if the military dismisses its court martial after an adverse pretrial ruling did the civilian authorities waive its prosecutorial authority or cede its subject matter jurisdiction by entering into the MOU?

LIST OF PARTIES

Petitioner is Jared Thomas Cardwell. Respondent is the State of Arizona. No party is a corporation.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Military court martial. (Dismissal by Judge Advocate General)

State v. Cardwell, (Yuma County Superior Court, No. S1400CR201600404. Judgment entered April 30, 2021).

State v. Cardwell, No. 1 CA-CR 21-0181 (Ariz. Ct. App. September 6, 2022) (affirming trial court judgement); and

State v. Cardwell, No CR-22-0235-PR (April 4, 2023) (denying discretionary review).

There are no other proceedings in state or federal or military trial or appellate courts or in this Court that are directly related to this case.

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The opinion of the Arizona Court of Appeals affirming the petitioner's conviction (App. A) is unreported but is available at 2022 WL 4075333. The decision of the Arizona Supreme Court denying discretionary review (App. B) is unreported. The Superior Court's rulings rejecting petitioner's arguments to suppress his statements and granting of the state's motion to preclude testimony (App. G)), are unreported.

JURISDICTION

The Arizona Court of Appeals issued a final judgment affirming petitioner's conviction on September 6, 2022. (App. A). The Arizona Supreme Court denied discretionary review on April 4, 2023. (App. B). The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Constitutional Provisions and Statutes:

United States Constitution Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution Fourteenth Amendment:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 U.S.C. § 801, et. seq. (Uniform Code of Military Justice)

10 U.S.C. § 831

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

40 U.S.C. § 3112

(a)EXCLUSIVE JURISDICTION NOT REQUIRED.—

It is not required that the Federal Government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires.

(b)ACQUISITION AND ACCEPTANCE OF JURISDICTION.—

When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.

(c)PRESUMPTION.—

It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section.

Military Rules of Evidence, Rule 304.

(a) General rule. If the accused makes a timely motion or objection under this rule, an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial except as provided in subdivision (e).

(1) Definitions. As used in this rule:

(A) "Involuntary statement" means a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

Military Rules of Evidence, Rule 305.

(a) General rule. A statement obtained in violation of this rule is involuntary and will be treated under Mil. R. Evid. 304.

(b) Definitions. As used in this rule:

(1) "Person subject to the code" means a person subject to the Uniform Code of Military Justice as contained in Chapter 47 of Title 10, United States Code. This term includes, for purposes of subdivision (c) of this rule, a knowing agent of any such person or of a military unit.

(2) "Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(3) "Custodial interrogation" means questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.

(c) Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements.

(1) Article 31 Rights Warnings. A statement obtained from the accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused except as provided in subdivision (d). Pursuant to Article 31, a person subject to the code may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(A) informing the accused or suspect of the nature of the accusation;

(B) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(C) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(2) Fifth Amendment Right to Counsel. If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible against the accused unless counsel was present for the interrogation.

(3) Sixth Amendment Right to Counsel. If an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges by anyone acting in a law enforcement capacity, or the agent of such a person, and the accused requests counsel, or if the accused has appointed or retained counsel, any statement made in the interrogation, or evidence derived from the interrogation, is inadmissible unless counsel was present for the interrogation.

Arizona Statutes:

A.R.S. § 26-251

> The consent of the state may be given pursuant to section 37-620.02 in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States to the acquisition by the United States by purchase, lease, condemnation or otherwise of any land in the state required for the erection of forts, magazines, arsenals, dockyards and other needful buildings, or for any other military installations of the government of the United States.

A.R.S. § 26-252

> Exclusive jurisdiction over any land in the state acquired for any of the purposes set forth in section 26-251, and over any public domain in the state reserved or used for military purposes is ceded to the United States, but such jurisdiction shall continue no longer than the United States owns or leases the land or continues to reserve or use such public domain for military purposes.

A.R.S. § 26-253

> The state retains concurrent jurisdiction with the United States for serving process, civil or criminal, issuing under the authority of the state, or any courts, or judicial officers thereof, upon any person amenable thereto within the limits of any land over which exclusive

jurisdiction has been ceded by the state to the United States for military purposes in like manner as if no cession had taken place.

A.R.S. § 11-952

A. If authorized by their legislative or other governing bodies, two or more public agencies or public procurement units by direct contract or agreement may contract for services or jointly exercise any powers common to the contracting parties and may enter into agreements with one another for joint or cooperative action or may form a separate legal entity, including a nonprofit corporation, to contract for or perform some or all of the services specified in the contract or agreement or exercise those powers jointly held by the contracting parties.

B. Any such contract or agreement shall specify the following:

1. Its duration.

2. Its purpose or purposes.

3. The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget for the undertaking.

4. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property on such partial or complete termination.

5. If a separate legal entity is formed pursuant to subsection A, the precise organization, composition, title and nature of the entity.

6. Any other necessary and proper matters.

C. No agreement made pursuant to this article shall relieve any public agency of any obligation or responsibility imposed on it by law.

D. Except as provided in subsection E, every agreement or contract involving any public agency or public procurement unit of this state made pursuant to this article, before its execution, shall be submitted to the attorney for each such public agency or public procurement unit, who shall determine whether the agreement is in proper form and is within the powers and authority granted under the laws of this state to such public agency or public procurement unit.

E. A federal department or agency or public agency of another state that is a party to an agreement or contract made pursuant to this article is not required to submit the agreement or contract to the attorney for the department or agency unless required under federal law or the law of the other state.

F. Appropriate action by ordinance or resolution or otherwise pursuant to the laws applicable to the governing bodies of the participating agencies approving or extending the duration of the agreement or contract shall be necessary before any such agreement, contract or extension may be filed or become effective.

G. An agreement or contract may be extended as many times as is desirable, but each extension may not exceed the duration of the previous agreement.

H. Payment for services under this section shall not be made unless pursuant to a fully approved written contract.

I. A person who authorizes payment of any monies in violation of this section is liable for the monies paid plus twenty percent of such amount and legal interest from the date of payment.

J. Notwithstanding any other provision of law, public agencies may enter into a contract or agreement pursuant to this section with the superior court, justice courts and municipal courts for related services and facilities of such courts for a term not to exceed ten years, with the approval of such contract or agreement by the presiding judge of the superior court in the county in which the court or courts that provide the facilities or services are located.

STATEMENT OF THE CASE

The petitioner, an active duty service member, was charged with the murder of his twenty-month-old step-daughter on the base of the Marine Corp Air Station in Yuma, Arizona, in May of 2015. The child had been found unresponsive the morning after the petitioner had been responsible for babysitting her while his wife worked. On the day the death was discovered by his wife the petitioner was interrogated by civilian police detectives. Two more interrogations by military investigative agents occurred during the ensuing week, and he was arrested for causing the death after the final one. He did not receive any warnings at the first interrogation under either *Miranda v. Arizona*, 384 U.S. 436 (1966) or UCMJ Art. 31(b). He received only the military advisements at the second and third interrogations. The military advisement do not advise him that he is entitled to a free lawyer at non-military proceedings. At no time did he ever receive the warnings required for non-military charges from *Miranda*.

Pursuant to the 1985 Memorandum of Understanding between MCAS-Yuma and the local civilian prosecutors' offices (App. C), the Marine Corps commenced prosecuting the petitioner for the infant's death; no contemporaneous charges were filed by the local civilian prosecutors. The subject of that particular MOU involved here regarded the investigation and prosecution of crimes that occur on MCAS-Yuma.

Before the court martial trial began, the military court conducted a two-day suppression hearing. After the hearing, the court martial judge issued a thorough order discussing the law and the evidence in which he suppressed all of the

statements that the petitioner made at all three interrogations. (App. D). He found that Art. 31(b) warnings were required in the first interrogation because the civilian detectives conducting it were the "agents" for the military investigators who were contemporaneously monitoring it. Further, he held that despite the Art. 31(b) warnings that were given at the second and third interrogations, the petitioner's statements were "involuntary" given the totality of the circumstances. After this ruling the military dropped its court martial so the death could be prosecuted by the local civilian authorities.

After that local county attorney filed murder charges for the exact incident that the military had just dismissed, the petitioner challenged the statements that he made at the three interrogations in the new court. The first judge who heard the evidence found no *Miranda* violations at the first interrogation because the petitioner was not "in custody", although earlier an agent from NCIS told the petitioner to go to the station to answer questions. (App. M, p. 22-23). In fact, that agent followed the petitioner to the police station to ensure that he met with the detectives. Once at the station, the civilian police detectives took the petitioner's military identification (App. M, p. 27) whereby he could not return to the military base where he resided without it. The first civilian judge did not find that the statements from the first interrogation were involuntary.

Further, for the second and third interrogations, contrary to the military finding, the first civilian judge ruled that the statements that the petitioner made were legally voluntary, but suppressed some of them for other reasons. (App. F).

Also, that court held that the military warnings under Art. 31(b) satisfied the *Miranda* advisements that are required for civilian prosecutions.

After the case was reassigned to a new judge the petitioner again challenged that pretrial ruling that allowed admitting his statements. This time he called a retired Marine Corps JAG Colonel who testified to the subtle coercive atmosphere that was present in the three interviews given the nature of the petitioner's Marine Corps training and experience. Not only did the trial court reaffirm the original ruling, but it then precluded that same witness' testimony at trial to explain those unique military factors to the jury.

After there was a declared mistrial, the second jury convicted the petitioner of second degree murder. The petitioner was given a life sentence with no possibility of parole for 35 years. (App. H).

The petitioner appealed the conviction to the Arizona Court of Appeals, challenging several aspects and rulings, among them the admissibility of interrogation statements to the jury, the preclusion of testimony by the retired JAG Colonel regarding the coercive nature of military service pertaining to him, and whether the MOU was an enforceable agreement between the signatories. In his reply to the State's Answering Brief, the petitioner raised the issue of whether the State, in addition to waiving its right to prosecute him in a civilian court trial, had

officially ceded its subject matter jurisdiction to the military by entering into the MOU, itself.

REASONS TO GRANT THE WRIT

A. This Court can decide important questions that affect all active duty armed service members who potentially face criminal charges by both the military and civilian authorities.

The situation presented by this petition affects all of the combined members of the armed services of the United States. By serving in the armed forces these active duty members necessarily expose themselves to an additional criminal justice system, the Uniform Code of Military Justice (UCMJ). 10 U.S.C. 801, *et. seq*. This petition raises important questions involving the interplay between the military and civilian authorities if these members are suspected of committing a crime that is punishable by both military and state prosecutors. This Court may answer in this petition to what extent civilian courts must factor the unique circumstances of military service to adequately protect armed service members' fundamental rights under the Fifth, Sixth and Fourteenth Amendments.

Service in the military gives its active duty members a unique experience from that of ordinary civilians. Chappell v. Wallace, 462 U.S. 296, 300 (1983). The UCMJ has a different focus than the civilian justice system. A military court martial ". . . emphasize(s) the iron hand of discipline more that it does the even scales of justice." Reid v. Covert, 354 U.S. 1, 38 (1957). The UCMJ recognizes the inherent pressures exacted by military service and it offers greater protections than *Miranda* when it comes to admitting armed service members' statements in a military trial. It applies not just to law enforcement but to "anyone subject to the code;" it applies not only to interrogation but to "any request for a statement;" it does not apply to only "custodial" situations but any time a superior or someone in position of authority questions an armed services member. UCMJ, Art. 31(b).

1. The Court can provide certainty of the required warnings to law enforcement when a service member is potentially facing prosecution in both military and civilian courts

The need for clarity and certainty has always been a central objective of *Miranda*. This petition will clarify the when and to what extent that military members must be informed of their rights under the fifth and sixth amendments. "One of the principal advantages of the (*Miranda*) doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule." Berkemer v. McCarty, 468 U.S. 420, 430 (1984). That Court further explained the purposes behind the *Miranda* advisements.

> The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, (fn omitted) to relieve the "'inherently compelling pressures'" generated by the custodial setting itself, 'which work to undermine the individual's will to resist,'" (fn omitted) and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. (fn omitted).

Id., at 433. (emphasis added).

Miranda gave clear guidelines that minimum advisements were required to non-military subjects. This case presents the opportunity for the Court to ensure that the unique military pressures are likewise incorporated into the required warnings since there is a second potential prosecution involved when military members are questioned. In Maryland v. Shatzer, 559 U.S. 98 (2010), this Court announced a new strict 14-day break-in-custody rule. It acknowledged that clarity and certainty of application to law enforcement were its primary justifications to apply *Miranda*. *Id.*, at 109-110.

This court can determine whether this dilemma of dual prosecutions for armed services members requires that they be afforded all of the protections that exist in both the military and civilian criminal justice systems.

> Just as talismanic incantation [is] required to satisfy [*Miranda*] strictures; (citation omitted) it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'"

Missouri v. Siebert, 542 U.S. 600, 611 (2004).

This Court has recognized that additional warnings beyond the minimums from *Miranda* might be necessarily required given the totality of the circumstances of a case.

This Court should decide whether active military service imposes unique circumstances that require the additional advisements and application that are currently in place for military prosecutions.

2. This Court may clarify whether the protections given military members are constitutionally required or are granted merely by statute and presidential authority?

This Court has not formally ruled that the Constitution's Fifth Amendment protections apply to the military. "We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here." Davis v. United States, 512 U.S. 452, 457 fn[*] (1994). In *Davis*, military investigators were faced with an ambiguous request for counsel by a military suspect. This Court recognized the importance of warnings and the right to have an attorney for questioning in the military court system, but only did so because the military was (and still is) commanded to do so under the President's directive as commander-in-chief. *Id*. This case presents the opportunity to clarify whether and to what extent the Fifth Amendment self-incrimination and right to counsel are constitutionally required by the military investigating a service member for a potential court martial.

3. This Court may decide whether the military advisement regarding a subject's right to counsel is the functional equivalent to that required by *Miranda* if the service member is charged in a civilian prosecution?

In granting this petition, the Court can clarify whether suppression is required for failing to advise an active duty marine of his right to an attorney if he is indigent if the case is prosecuted by civilian authorities.

In the second and third interrogations, the state court did not enforce the *Miranda* required advisement that the suspect be told that he was entitled to a civilian attorney if he was indigent; the petitioner was only told that he had the right to a free attorney for the military case. The testimony by the NCIS agents at the first suppression hearing indicated that the military advisements were the "equivalent" of the *Miranda* warnings. (App. I, p. 13-14). This case squarely presents this issue for the Court's review.

Further, the civilian court appeared to follow the rule of Oregon v. Elstad, 470 U.S. 298, 311-314 (1985) which did not apply the "cat out of the bag" theory to an innocent *Miranda* mistake. A substantial factor in the military's suppression of statements in the second two interrogations as "involuntary" was the lack of a "cleansing warning" instructing the petitioner that any earlier statements were inadmissible, which is consistent with the requirements of *Siebert*. *Id.*, fn. 7.

B. This Court may determine if the differences between *Miranda* and Art. 31(b) advisements should be combined to protect the service member against the potential abuse of the "two step" interrogation and forum shopping.

This case presents the issue of the potential for the military and civilian authorities to violate the petitioner's right to fundamental fairness under the Fourteenth Amendment because the exact circumstances and language between the military and civilian justice systems could lead to different decisions regarding the admissibility of an accused's statements.

This Court has recognized that police have attempted to avoid the Fifth, Sixth and Fourteenth Amendments' rights in the constitution. In Edwards v. Arizona (451 U.S. 477 (1981)) this Court ". . . established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) . In *Maryland v. Shatzer*, supra, where the defendant refused to speak without an attorney, the Court recognized that its enunciated break-in-custody rule would eliminate any ". . . gain (by simply releasing a suspect from custody early in order to reset the coercion clock) by such gamesmanship." *Id.*, at 98. In Taylor v. Alabama, 457 U.S. 687 (1982), a "virtual replica" of two other Supreme Court cases, the defendant was intentionally improperly arrested without probable cause in the hope that something would turn up. *Id.*, at 691 (see also, Culombe v. Connecticut, 367 U.S. 568, 571-575 (1961) for a recitation of police abuses prior to *Miranda*).

This case presents a similar situation to Missouri v. Siebert. supra. In *Siebert,* Missouri police who were taught this practice in official police manuals, routinely engaged in a two-step interrogation where a suspect who made unwarned confessions was then subsequently given *Miranda* advisements in order to obtain the now

admissible statements. *Id.*, at 609. This Court prevented that police strategy, noting that ". . . the intent of the officer will rarely be as candidly admitted as it was here. . ." *Id*. at 616, and fn. 6.

Here, the military judge ruled that the Art. 31(b) warnings were required because the civilian investigators were military agents subject to the UCMJ warning requirements. But because the interrogators were civilians, they did not think that the petitioner was in *Miranda* "custody" because he was told that he was free to leave. Either through intentional ploy, mistake or "oversight" by the military investigative agents monitoring the interrogation, or by the civilian detectives' negligent ignorance, those interrogators did not know of an NCIS agent's directive to the petitioner telling him to go to the interrogation, which was then accompanied by an act making return to home on the base difficult should he be the one to end the questioning. By subsequently dismissing its court martial, the military engaged in similar gamesmanship where it circumvented the adverse military decision by allowing the state to evade any warnings by exploiting the "custody" requirement against the petitioner. This case presents a similar dilemma.

Further, as mentioned above, the failure to advise the petitioner of his right to an attorney in a civilian prosecution is guaranteed regardless of his ability to pay. This resulted in the two prosecutions exploiting the differences in the two systems to the petitioner's prejudice. This Court can determine whether the federal and state prosecutions that result in two bites at the apple can coordinate their efforts to forum

shop whether the statements are admitted after the initial decision regarding prosecution is made.

C. This Court can establish the extent to which military service factors into the calculus of the "totality of the circumstances" for involuntariness at the initial legal determination and whether these unique circumstances of military service can ever be kept from the jury's consideration as to the weight to attribute to those statements.

The Court can provide guidance to applying UCJM Article 31(b) for civilian prosecutions where a finding of involuntariness by the military courts is not properly considered and, second, whether testimony regarding the facts and circumstances of the unique nature of military service must be presented to the jury for it to assess the worth of the accused's statements.

1. Did the initial legal decision regarding the voluntariness of the statements properly weigh into its calculation the circumstances of the petitioner's current status as an active duty marine?

The petitioner presents the opportunity for the Court to clarify the weight that civilian courts should give to the unique traditions of active military service in assessing the "surrounding circumstances" in making the legal voluntariness decision. This Court is not bound by the trial court's finding of voluntariness of the statements. Mincey v. Arizona, 437 U.S. 385 (1978). This necessarily involves deciding how much deference civilian courts should give to a court with special expertise in assessing the effect of military service on an important and often dispositive issue.

Any statement can be "involuntary" under the "totality of all the surrounding circumstances" Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), despite the

presence of the advisement of rights. This "totality" assessment requires courts to assess ". . . both the characteristics of the accused and the details of the interrogation." *Id.*, at 226. *Schneckloth* provided a non-comprehensive list of factors. *Id.*, at 226. Is military service itself and, if so, to what degree, entitled to be a consideration into the totality of the circumstances as a characteristic of the accused?

This Court has placed great emphasis on relying on the expertise of other agencies of government to make factual assessments (e.g., McGee v. United States, 402 U.S. 479 (1971) which applied the expertise of administrative bodies to resolve underlying issues of fact; Department of Navy v. Eagan, 484 U.S. 518 which held that the predictive judgment of denying a security clearance must be made by those with the necessary expertise in protecting classified information)).

This petition presents the opportunity to assess if weight should be given to any prior court martial rulings that assess these same voluntariness factors as civilian courts, but incorporates its expertise in applying it to the unique military circumstances.

2. The factual decision regarding the weight to be given the statements is for the jury and is it ever appropriate to deny the jury relevant material information to that inquiry?

The Court can determine if there are any considerations surrounding circumstances of military service that would ever make competent testimony inadmissible which explains military culture to assist the jury to ascertain the weight

to be given those statements. Here, this Court can correct the trial court suppression decision that improperly applied established Supreme Court precedent.

In Crane v. Kentucky, 476 U.S. 683 (1986), this Court held that despite the finding that statements are "legally" voluntary, the trial court must allow the jury to hear relevant evidence regarding all of the circumstances surrounding them so that it can ascribe the appropriate weight. *Id*., at 691 (1986). A legally voluntary statement can still be of questionable reliability. *Id*., at 688. Here, the trial court justified its decision based on evidence prohibiting relevant evidence because it would confuse the issues to the jury and for an alleged discovery violation. (App. G, p. 33-35). This Court can clarify whether the facts and circumstances of the petitioner's statements would ever "confuse the issue" when the State intends to introduce them in its case-in-chief. This implicates the rights to due process of the Fourteenth Amendment and right to present a complete defense under the Sixth Amendment to the United States Constitution. *Id*, at 690-691.

The military rules of evidence define violations of Art. 31(b) as involuntary, thus the equivalent to violations of the Fifth Amendment, coercion, unlawful interference and unlawful inducement. Mil. R. Evid. 304 and 305. The military trial court suppressed the statements as involuntary. Upon the subsequent charging in state court, the petitioner twice challenged whether his statements were voluntarily made. At the second hearing the petitioner presented testimony from a retired Marine Corp. JAG Colonel who testified in support of those statement's involuntariness. The trial court granted the prosecutor's motion to preclude this testimony.

In so doing, the trial court misapplied long-established constitutional case law from this Court. (e.g.; Lego v. Twomey, 404 U.S. 477 (1972), Jackson v. Denno, 378 U.S. 368 (1964); Sims v. Georgia, 385 U.S. 538 (1967); Haynes v. Washington, 373 U.S. 503 (1963); accord Vega v. Tekoh, 597 U.S. , ___ (2022)).

Additionally, this petition presents the question whether the military court's finding that the statements were "involuntary" is an absolute bar to admitting them against the petitioner in any criminal proceeding, or are they akin to the *Miranda* violation's balancing considerations that statement are admissible as long as they are actually voluntary, not just deemed to be involuntary. *Id.,* (Alito, at 7).

D. This petition challenges whether the state in a concurrent jurisdiction case may subsequently charge an armed services member for an identical crime once the military assumes the original prosecution under the terms of a Memorandum of Understanding.

When the Marine Corp assumes to prosecute an active duty military member pursuant to a formal agreement with civilian prosecutors, does that civilian authority waive its ability to indict and try that member for the same crime under its agreed terms? Alternatively, did the civilian authorities cede any concurrent jurisdiction to the federal government by entering into the Memorandum under a law authorizing intergovernmental agreements?

Memorandums of Understanding (hereafter MOU) are important to the operations of the military. The Department of Defense entered into such agreements with both the Department of Justice and the Department of Transportation regarding the investigation and prosecution of military and Coast Guard members. (App. C). It expects its bases to enter into those agreements with local civilian prosecutorial agencies.

> In the case of an act or omission which violates the UCMJ and a criminal law of a State, the United States, or both, the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials (ordinarily the staff judge advocate) and appropriate civilian authorities (United States Attorney, or equivalent).

Rules for Courts-Martial, (R.C.M. 201(d), II-12) (Discussion) (emphasis added).

That same Discussion addresses a similar situation in international law that is governed by treaties. It recognizes that foreign nations may punish armed service members committed within its borders ". . . unless it expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign." *Id*. (emphasis added).

Military appellate courts have addressed a similar situation in the past. In United States v. Duncan, 34 M.J. 1232 (1992) the U.S. Army Court of Military Review held that an MOU does not divest the Department of Justice of jurisdiction that it validly held. This issue has not been decided by this Court, and this petition presents this opportunity.

1. Binding Nature of the Memorandum of Understanding.

MOUs between federal governmental agencies, among federal and state agencies and between private parties (Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002); South Carolina v. Cat Denver & RGWR Co. v. U.S., 387 U.S. 485 (1967)awba Tribe, Inc., 476 U.S. 498 (1986), ; Garment Workers v. NLRB, 366 U.S. 731 (1961)) have been part of the Supreme Court jurisprudence for over 50 years. The Court has treated these as binding agreements between the signatories and enforced their terms.

a. Did the State waive its authority to prosecute the petitioner by entering into a binding agreement with a specific military base?

This petition asks whether, once the initial decision is made regarding which authority (military or civilian) will prosecute a crime that is subject to both jurisdictions, does it violate due process of the fourteenth amendment if that original prosecutorial decision changes to the prejudice of that service member? Additionally, although not argued in the appellate courts, this specific treatment of the petitioner further implicates his rights under the Fourteenth Amendment's equal protection clause in that similarly situated marines face different potential evidentiary rulings depending on the base where they are ordered to serve. This Court can define the scope of the Due Process and, if it chooses, the Equal Protection clauses for situations outside of the Art. III constitutional context and the extent it applies to military courts created by the executive under the authority of Art. I of the Constitution.

b. Did the State cede its subject matter jurisdiction to prosecute crimes on a specific military base when it ceded its authority over military bases state-wide and then established a mechanism of

intergovernmental agreements under which MCAS-Yuma and the prosecutors entered into an MOU pursuant to those statutes?

Arizona ceded all of its criminal jurisdiction to the military. A.R.S. §§ 26-251 through 26-253. This MOU was authorized under an Arizona statute that allows state and local Arizona agencies to enter into inter-governmental agreements. A.R.S. § 11-952. The federal government, since 1940, has required that that it formally accept the cessation of jurisdiction by specifying a written process between the state governor and agency head. 40 U.S.C. § 3112. However, the federal acceptance of exclusive jurisdiction statute also included an alternative manner, allowing it to be accepted by other means as allowed by state law. This Court has never ruled on the alternative methods of federal acceptance of jurisdiction and whether an official MOU can serve as that alternative acceptance of a state's cessation statute for military bases.

2. If the MOU is binding between the military and the local prosecutors, was the petitioner entitled to enforce its terms?

Against petitioner's trial motion to dismiss the state prosecution, the prosecutors argued that the petitioner lacked standing to enforce the agreement. (App. L, p. 14). This particular MOU did not contain language that ostensibly limited the petitioner's right to enforce its terms; language contained in other Department of Defense MOU's that appear to limit these individual enforcement rights. (App. K; see,the Department of Justice and Department of Defense).

Last month the Court reaffirmed the precedent that individuals possess standing to sue if they are prosecuted or threatened with prosecution regarding the executive

branch's decision to not exercise its prosecutorial discretion.. *United States v. Texas*, 599 U.S. ___ (2023) (Kavanaugh, p. 5); citing Linda R.S. v. Richard D., 410 U.S. 614 (1973). This Court specifically recognized that an individual possesses standing when he ". . . is himself an object of the action (or forgone action) at issue. . . ." *Id.*, fn 2; citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-562).

This Court can clarify whether individual service members who are facing actual prosecution by state authorities after the federal government previously exercised its prosecutorial discretion under a binding agreement may enforce the terms of that agreement. The government exercised its decision to not prosecute the petitioner only after an adverse ruling. This Court has discouraged such apparent forum shopping. Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted this 3rd day of July, 2023.

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