No. 23-____

IN THE

Supreme Court of the United States

NORBERT A. KING II,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented are:

1. The lower court endorsed the Government's supplementation of the "record" with new documents mid-appeal. Does the lower Court's decision, which demonstrates a misapplication of the canons of statutory construction—directly affecting Petitioner's Due Process rights—and highlights a difference in federal appellate practice regarding the addition of new materials to the "record" on appeal, necessitate this Court's intervention?

2. Can a federal prosecutor of child sex crimes cases also serve as a military judge in a child sex crime case without an appearance of partiality?

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case:

1. *United States v. King*, No. 39583, 2021 CCA LEXIS 415, 2021 WL 3619892 (A.F. Ct. Crim. App. Aug. 16, 2021) (unpub. op.).

2. *United States v. King*, No. 22-0008/AF, 83 M.J. 115 (C.A.A.F. 2023). Judgment entered on Feb. 23, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Lieutenant Colonel Norbert A. King II, United States Air Force, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF) in this case.

OPINIONS BELOW

The CAAF's published opinion appears at pages 1a through 26a of the appendix to this petition. It is reported at 83 M.J. 115. The unpublished opinion of the United States Air Force Court of Criminal Appeals (AFCCA) appears at 27a through 112a of the appendix. It is found at 2021 CCA LEXIS 415, 2021 WL 3619892.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).[1]

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"[2]

Article 1(14) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801(14), defines "record" as, "when used in connection with the proceedings of a court-martial," "an official written transcript, . . . relating to the proceedings," or "an official audiotape . . . depicting the proceedings . . . may be reproduced."

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[1] *Ortiz v. United States*, 138 S. Ct. 2165, 2172 (2018).

[2] U.S. CONST. amend. V.

Article 16(1), UCMJ, 10 U.S.C. § 816(1), designates the minimum number of members required for trial by general court-martial.

Article 29(a), UCMJ, 10 U.S.C. § 829(a), provides "[n]o member of a general . . . court-martial may be absent or excused after the court has been assembled for the trial of the accused unless . . . excused by order of the convening authority for good cause."

Article 36, UCMJ, 10 U.S.C. § 836, permits the President to prescribe regulations governing proper procedures for courts-martial, within limits set by Congress.[3]

Article 66(c), UCMJ, 10 U.S.C. § 866(c), limiting a CCA's ability to consider the "entire record" for purposes of factual and legal sufficiency of the evidence to support a conviction and sentence appropriateness.

28 U.S.C. § 455(a) requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Rule for Courts-Martial (R.C.M.) 505(c)(2)(A)(i) requires "good cause" to be "shown on the record" in order for a convening authority to properly excuse a panel member after assembly of the court-martial.

R.C.M. 505(c)(2)(B) states new members may be detailed after assembly only when, as a result of excusals, under subsection (c)(2)(A) of this rule, the number of members of the court-martial is reduced below a quorum.

R.C.M. 505(f) defines "good cause" as a "military exigency or extraordinary circumstance . . . which

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[3] *See Runkle v. United States*, 122 U.S. 543, 555-56 (1887).

render[s] the member . . . unable to proceed with the court-martial within a reasonable time."

R.C.M. 813(c) requires the military judge to ensure the "record" reflects changes to personnel, including panel members, and the reason for change.

As with 28 U.S.C. § 455(a), R.C.M. 902(a) requires a military judge to disqualify himself in any proceeding in which that military judge's impartiality might reasonably be questioned.

R.C.M. 1103(b)(2)(B) requires a verbatim transcript to be prepared, while R.C.M. 1103(b)(2)(D) and (b)(3) specify matters to be included with, or attached to, the record.

Federal Rule of Appellate Procedure (FRAP) 10(a) defines the record on appeal as the original papers and exhibits filed in the district court; the transcript (if any); and a certified copy of the docket entries. FRAP 10(e) provides for correction or modification of the record under certain circumstances.

STATEMENT OF THE CASE

Petitioner was convicted of sexually assaulting his 17-year-old daughter, in violation of Article 120, UCMJ, and sentenced to three years of confinement and a dismissal from the Air Force. He appealed to the AFCCA. *United States v. King*, 2021 CCA LEXIS 415, 2021 WL 3619892 (A.F. Ct. Crim. App. Aug. 16, 2021) (unpub. op.) (*King I*). Two of the assignments of error he raised in that appeal are relevant to this Petition.

I. JUDGE STEPHEN GROCKI DENIES PETITIONER'S MOTION TO RECUSE HIMSELF BASED UPON THE APPEARANCE OF BIAS DUE TO HIS EXTENSIVE CAREER IN THE DEPARTMENT OF JUSTICE'S CHILD

EXPLOITATION AND OBSCENITY SECTION, WHICH PROSECUTES CHILD SEX CRIMES.

One of the military judges who presided over Petitioner's court-martial, Judge Stephen Grocki, was an Air Force reservist. Judge Grocki disclosed that, in his civilian capacity, he served as the Chief of the Child Exploitation and Obscenity Section (CEOS) within the Department of Justice (DOJ). Judge Grocki described the CEOS as an office of Federal prosecutors and Digital Investigative Analyses and support staff who are subject matter experts in child exploitation matters and prosecute cases along with Assistant U.S. attorneys throughout the country.

Petitioner asked Judge Grocki several questions about his civilian employment as the Chief of the CEOS. He confirmed he had worked in the CEOS for thirteen years as a trial attorney, Deputy Chief, and Chief. He personally prosecuted 60 cases and supervised the prosecution of 60-100 cases per year. In his role as Chief of CEOS, Judge Grocki supported several projects designed to prevent child sex abuse and to support victims, including the DOJ's Project Safe Childhood, service as a board member for the internationally-based We Protect Global Alliance, and the Youth Technology and Virtual Communities Conference. This latter law enforcement conference was held at Bond University in Queensland, Australia; Judge Grocki was personally invited to present at that conference. He also participated in a conference in Brazil as a guest speaker that included discussion of online crimes against children. At one point during questioning, Judge Grocki engaged in a contentious debate about whether defense counsel "misled" him during an off-the-record conference regarding the Government's issuance of a subpoena to

Petitioner's female civilian defense counsel for a computer.

In support of his recusal motion, Petitioner submitted an ethics guide for part-time judges (Appendix 117a-125a). The guide questioned whether a person could simultaneously serve as a judge and prosecutor, as dual service "would inevitably lead to the erosion of public confidence;" the "ability to act as a neutral and detached judicial officer one day . . . after advocating for the people as an assistant prosecutor . . . is simply too much to expect from the human personality" (Appendix 119a).

Petitioner moved Judge Grocki to recuse himself, arguing that having Judge Grocki continue to preside over his case, which involved a charge of sexually assaulting his minor daughter, raised an appearance of partiality. Petitioner believed Judge Grocki could not maintain the appearance of impartiality due to his "very pro-government" background with thirteen years of experience in not just personally prosecuting child sex crime cases, but also supervising such prosecutions and presenting at national and global law enforcement conferences on child sex abuse crimes.

Judge Grocki declined to recuse himself. He did not explicitly address whether a member of the public might reasonably question his impartiality. Petitioner subsequently requested reconsideration, noting Judge Grocki did not address the appearance of bias; Judge Grocki disagreed.

Judge Grocki presided over a lengthy motions practice and the first stage of a contentious *voir dire* process of the panel members. During this *voir dire* session, Judge Grocki criticized Petitioner's female

civilian defense counsel in front of a member, leading her to be concerned he was undermining her. Additionally, Judge Grocki took over her *voir dire* of a member midstream, and later took over questioning of *all* members, despite his representation to the members that *voir dire* was counsels' task.

Petitioner argued to the AFCCA that Judge Grocki erred in refusing to recuse himself. He presented declarations from relatives and friends who observed Judge Grocki's performance and questioned his impartiality. The AFCCA held the military judge did not abuse his discretion in denying Petitioner's recusal motion. *King I*, 2021 CCA LEXIS 415 at *36-38.[4]

II. THE CONVENING AUTHORITY EXCUSES A PANEL MEMBER AFTER ASSEMBLY, AND DETAILS ADDITIONAL MEMBERS, WITHOUT "GOOD CAUSE" FOR THE MEMBER'S EXCUSAL BEING "SHOWN ON THE RECORD"

Five members, including Lieutenant Colonel (Lt Col) KW and Lt Col PBL, were selected for Petitioner's panel. After they were selected, his court-martial was continued for approximately three months from April 2018 until July 2018. When Judge Grocki asked the panel members if they had any conflicts with a start date in July, Lt Col KW indicated she was selected for a five-week fellowship in Washington, D.C., which started on July 1. Her fellowship would be followed by a permanent move to a different installation. Lt Col PBL indicated he was scheduled to transfer to another unit, but would remain at Joint Base McGuire-Dix-Lakehurst, New Jersey.

[4] Appendix 44a-46a.

After the members were excused, the parties and Judge Grocki discussed the possibility of the convening authority having to detail additional members. The trial counsel represented that an alternate panel member, Colonel (Col) DL, would replace Lt Col KW if she was excused.

At the next session in July, Judge Speranza replaced Judge Grocki. The trial counsel presented Judge Speranza with a court-martial convening order which excused Lt Col KW and Lt Col and detailed additional panel members to Petitioner's case.. The trial counsel incorrectly stated that Lt Cols KW and PBL were excused at a previous session. No mention was made in court, or in the convening order, of what happened with Col DL. The parties proceeded with *voir dire* of the newly-detailed panel members, and two of them were selected to sit on Petitioner's panel.

Petitioner argued to the AFCCA that Lt Col PBL was not properly excused after the panel was assembled, for the failure to establish "good cause" for his excusal "shown on the record." He argued that the only mention of Lt Col PBL's transfer to another unit at Joint Base McGuire-Dix-Lakehurst, New Jersey, was not "good cause." As "good cause" was not "shown on the record" for Lt Col PBL's excusal, his replacement was not properly detailed. Accordingly, Petitioner's panel did not meet the minimum threshold for a quorum, resulting in a lack of jurisdiction.

In response to this assignment of error, the Government moved the AFCCA to attach documents showing that the reason for Lt Col PBL's excusal was his attendance at the Air War College at Maxwell Air Force Base, Alabama. The AFCCA granted the

Government's motion over Petitioner's objection. The AFCCA held that, while it was error for Lt Col PBL's excusal to not be "shown on the record," the mid-appeal documents showed he was excused for "good cause," and Petitioner was not prejudiced by his excusal. *Id*. at *54-60.[5]

Petitioner subsequently sought, and was granted, review of his case by the CAAF. *United States v. King*, 83 M.J. 115 (C.A.A.F. 2023) (*King II*). The CAAF affirmed Petitioner's conviction, holding that the AFCCA did not abuse its discretion in attaching and considering the Government's mid-appeal documents. *Id*. at 121. In so holding, the CAAF cited *United States v. Jessie*, which held that a CCA cannot consider matters outside of the "entire record" except in limited circumstances. 79 M.J. 437, 441-44 (C.A.A.F. 2020). Despite *Jessie*'s narrow focus on the scope of a Court of Criminal Appeals (CCA)'s review of a sentence under Article 66(c), UCMJ the CAAF extended its application of *Jessie* to Petitioner's case, holding that such an extension was appropriate. According to the CAAF, "the phrase 'shown on the record,' encompasses 'the entire record[,]'" as opposed to only the portions of the court-martial proceedings that were transcribed and which reflected the in-court discussion of the reasons for Lt Cols KW and PBL's excusals. *King II*, 83 M.J. at 121 n.4.

REASONS FOR GRANTING THE PETITION

PETITIONER'S CASE PRESENTS ISSUES OF CENTRAL IMPORTANCE THROUGHOUT THE MILITARY

This Court has granted review of courts-martial cases which present issues of central importance to

[5] Appendix 47a-55a.

the military.[6] Petitioner's case presents four issues of central importance to the military that warrant this Court's review.

A. Petitioner's Case Necessitates a Comparison of Military Appellate Practice to Circuit Court Appellate Practice, Which this Court Should Harmonize to Fulfill Congressional Intent Outlined in Article 36(a), UCMJ

Congress enacted, through its authority to make rules for the government and regulation of the land and naval Forces pursuant to U.S. CONST. art. I, § 8, cl. 14, and the President implemented through the authority Congress granted to him via 10 U.S.C. § 836,

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[6] *See United States v. Briggs*, 141 S. Ct. 467 (2020) (applicable statute of limitations for rape); *Ortiz*, 138 S. Ct. 2165 (qualifications of a military judge to sit on both the Air Force Court of Criminal Appeals and the Court of Military Commission Review); *United States v. Denedo*, 556 U.S. 904 (2009) (jurisdiction of military appellate courts to consider writs of *coram nobis*); *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (jurisdiction of a military appellate court to issue an injunction to enjoin the President of the United States and other Air Force officials from dropping an Air Force officer from the rolls); *Edmond v. United States*, 520 U.S. 651 (1997) (whether Congress authorized the Secretary of Transportation to appoint civilians to the Coast Guard Court of Criminal Appeals and whether such authority was constitutional); *Loving v. United States*, 517 U.S. 748 (President's authority to prescribe aggravating factors allowing imposition of the death penalty on a Servicemember convicted of murder); *Weiss v. United States*, 510 U.S. 163 (1994) (method of appointing military judges); *Middendorf v. Henry*, 425 U.S. 25 (1976) (whether Servicemembers have a constitutional right to counsel for summary courts-martial proceedings); *Parker v. Levy*, 417 U.S. 733 (1974) (constitutionality of Article 133, UCMJ, proscribing conduct unbecoming of an officer and a gentleman).

Article 36, UCMJ, "an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts." *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000). However, Congress further specified to the President that his rules and regulations, to the extent he deems practicable, "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." Article 36(a), UCMJ.

Congress defined "record" broadly in Article 1(14), UCMJ to require court-martial proceedings to be recorded in written form (such as a transcript), or by audio or video recordings that depict the court-martial proceedings, such that the recordings can be reproduced. Both Congress and the President have modified the term "record" to require that certain events be reflected at certain times during court-martial proceedings, and to identify the contents of a "record," such that the record is legally sufficient for appellate review. *See*, *i.e.*, Article 16(1)(B), UCMJ (requiring an accused in a general court-martial to request military judge alone "orally on the record" or in writing before assembly); Article 45, UCMJ (in the case of an irregular plea, or failure or refusal to plead, a plea of not guilty shall be "entered in the record" and the court shall proceed as if the accused pleaded not guilty; Article 54(c)(1)(A), UCMJ (requiring a "complete record of the proceedings and testimony of witnesses" to be prepared in general courts-martial resulting in a dismissal). R.C.M. 1103(b)(2)-(3) implement the "complete record" requirement of Article 54(c)(1)(A), UCMJ by requiring a verbatim transcript in a general court-martial and itemizing matters to be included with, and attached to, the

"record." Everything between the blue cover sheets of a "record" is part of the "record of trial."

Once a "record" qualifying for Article 66, UCMJ review is authenticated, it is shipped to the service's CCA and docketed for appeal. Once it is shipped, the "record of trial" is "frozen" as the "entire record." CCAs are not free to consider documents outside of "the entire record" because Congress limited the CCAs to considering the "entire record" in Article 66(c), UCMJ. *Jessie*, 79 M.J. at 444-45. The CAAF subsequently held that documents submitted directly to a CCA which are not referenced or contained "in the record" do not become part of "the entire record" simply because the CCA accepted them as part of a party's brief, even when those documents relate to an issue a CCA has authority to consider under Article 66(c), UCMJ. *United States v. Willman*, 81 M.J. 355, 360-61 (C.A.A.F. 2021) (affirming AFCCA's declination to consider the Servicemember's declaration, which was attached to his appellate brief, regarding post-trial confinement conditions for purposes of sentence appropriateness as part of the "entire record" under Article 66(c), UCMJ).

Pertaining to the issue of post-assembly excusal of panel members, the President implemented Articles 1(14) and 29(a), UCMJ, through R.C.M. 505(c)(2)(A)(i), to require that the *reason* for a panel member's excusal be for "good cause *shown on the record*" and through R.C.M. 813(c) to require that the military judge ensure the "record" reflects the *reason* for a panel member's excusal and replacement (emphasis added to both). The President further implemented Article 29(a), UCMJ by defining "good cause" as a military exigency or extraordinary circumstance. R.C.M. 505(f). "Good cause does not

include temporary inconveniences that are incident to normal conditions of military life." *Id*.

When read in conjunction, these R.C.M.s require post-assembly member excusals be discussed in open court and resolved on the record before the court-martial proceeds with alternate members. *Cf. United States v. Hutchins*, 69 M.J. 282, 291 (C.A.A.F. 2011) (detailing the process for post-assembly excusals); *see King I*, 2021 CCA LEXIS 415 at *47, 50.[7] Furthermore, R.C.M. 505(c)(2)(B) requires that, *before* a convening authority can lawfully detail additional members to a court-martial, the excusal of previous members must have been in accordance with R.C.M. 505(c)(2)(A) *and* must reduce the panel below quorum, which is five members. Article 16(1)(A), UCMJ (emphasis added). In other words, when there are five members plus a detailed alternate member (for a total of six members), and one of the members is excused in accordance with R.C.M. 505(c)(2)(A)(i), then four panel members plus the alternate member remain, for a total of five members. Under these circumstances, the convening authority cannot lawfully detail additional panel members.

Similar to R.C.M. 1103(b)(2)(B), (D), and (b)(3), FRAP 10(a) defines the "record for appeal" as all of the original papers and exhibits filed in the district court; the transcript (if any); and a certified copy of the docket entries. FRAP 10(e) provides circumstances and procedures for correcting or modifying a record. Notably, FRAP 10(e)(2) states:

> If anything material to either party is omitted from or misstated in the record

[7] Appendix 51a-52a.

> by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
>
> (A) on stipulation of the parties;
>
> (B) by the district court before or after the record has been forwarded; or
>
> (C) by the court of appeals.

At first blush, FRAP 10(e)(2)(C) seems to suggest a party can submit the "material" documents directly to the Circuit Court of Appeals, thereby bypassing the district court, if that party "forgot" to include (or unintentionally misrepresented) them in the "record," and did not realize the omission or misstatement until the appeal was underway. However, at least four Circuit Court of Appeals (First, Sixth, Seventh, and Eighth) considering this very issue have firmly held that FRAP 10(e)(2)(C) does *not* permit a party to directly submit to the Circuit Courts of Appeals documents that were required to be included in the record, and which were omitted or misrepresented, even if such omission or misrepresentation was by accident or oversight. *United States v. Husein*, 478 F.3d 318, 335-36 (6th Cir. 2007); *United States v. Morales-Madera*, 352 F.3d 1, 11 (1st Cir. 2003) (citing *United States v. Rivera-Risario*, 300 F.3d 1, 9-10 (1st Cir. 2001) (citing *Belber v. Lipson*, 905 F.2d 549, 551 n.1 (1st Cir. 1990)); *Badami v. Flood*, 214 F.3d 994 (8th Cir. 2000); *United States v. Alcantar*, 83 F.3d 185 (7th Cir. 1996). "[A]s is clear from the rule's wording, the purpose of the rule is to allow the court to correct omissions from or misstatements in the record for appeal, *not to introduce new evidence in the court of appeals*." *Husein*, 478 F.3d at 335-36 (emphasis in the

original) (quotation omitted).

Rivera-Risario is directly on point in Petitioner's case, as *Rivera-Risario* involved the Government's attempt to "supplement" the record on appeal by submitting transcripts of English translations of 180 Spanish audiotapes, when neither the transcripts nor translations were created by the court or considered by the jurors. The First Circuit held:

> Though tantalizingly efficient, [the Government's] proposal is beset with procedural and substantive difficulties that ultimately make it unappealing. A 10(e) motion is designed to only supplement the record on appeal so that it accurately reflects what occurred before the district court. *It is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court.*

300 F.3d at 9 (emphasis added) (quotation omitted).

Other circuits have also used similar language to prohibit a party from "bypassing" a district court by using FRAP 10(e) to introduce new evidence directly on appeal. "A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal." *Husein*, 478 F.3d at 335 (quotation omitted); *Badami*, 214 F.3d at 998-99 (holding FRAP 10(e) may be used to modify the record so long as the district court was given the opportunity to resolve the difference); *Alcantur*, 83 F.3d at 191 (holding that materials related to ineffective assistance of counsel claims, which Alcantar moved to

add to the record, were never before the district court, and therefore could not be added to the record on appeal pursuant to FRAP 10(e)).

Here, the CAAF and the AFCCA succumbed to the temptation of efficiency through the procedurally and substantively "'unappeal'-ing" process of allowing the Government to add new information about the reason for Lt Col PBL's excusal to the "record" during direct appeal, creating a split between military justice practice and federal practice. This is contrary to Congressional intent in Article 36(a), UCMJ for the military justice system to mirror federal criminal court practice by applying federal court rules to the extent the President deems "practicable." This Court should grant review to resolve this split and harmonize military justice practice with federal court practice.

Additionally, the Sixth Circuit noted that some Circuit Courts have held they have "equitable power" to supplement a "record" by allowing a party to introduce new evidence during the appeal. *Husein*, 478 F.3d at 336; *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012-13 (6th Cir. 2003) (noting the Eighth, Tenth, and Eleventh Circuits have recognized, though not necessarily applied, an inherent "equitable" power to supplement a record with new evidence during an appeal (citing *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Ross v. Kemp*, 785 F.2d 1467, 1473-76 (11th Cir. 1986); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970)).[8] In light of the issues regarding an appellate court's "equitable power" to act beyond a

[8] This split in Circuit Courts could also form the basis for a grant of review.

statute's authority, this Court should also grant review to determined to what, if any, extent non-Article III courts, like military appellate courts, have "inherent equitable power" to exercise authority outside of a grant of authority by Congress and/or the President. Petitioner submits that military appellate courts do *not* have "equitable power" to act outside the scope of the authority granted by Congress and the President. Indeed, the CCAs, like AFCCA, are *not* courts of equity. *United States v. Johnson*, 76 M.J. 673, 685 (A.F. Ct. Crim. App. 2017); *United States v. Quiroz*, 55 M.J. 334, 340 (C.A.A.F. 2001) (Crawford, C.J. dissenting). And *this* Court previously recognized that the CAAF is also not a court with equitable powers to act outside of its scope of authority. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-38 (1999) (holding military appellate courts do not have jurisdiction to review executive actions not affecting the findings or sentence of a court-martial). Therefore, to the extent the CAAF and AFCCA acted in an equitable manner, as opposed to a legally authorized manner pursuant to statute, these courts acted contrary to *this* Court's precedent.

B. The Lower Court Failed to Follow Rules of Statutory Construction, Thereby Shifting Responsibility for Compliance with the R.C.M. from the Government and Military Judge to the Defense

"Ordinary rules of statutory construction apply in interpreting the R.C.M." *United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021) (citation omitted). Principal among the canons of statutory interpretation is an analysis of the plain meaning of the text. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a

court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Id.* at 254 ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal citation and quotations omitted). While the CAAF can interpret the meaning of a statute, it cannot decide that the words of the statute mean something they clearly do not. *Goldsmith*, 526 U.S. at 536-37 (holding that the CAAF interpreted the All Writs Act too broadly to give it jurisdiction to review an executive action that was outside of the CAAF's jurisdictional authority to review).

Additionally, military justice has a hierarchy of laws: the U.S. Constitution, statutes (including the UCMJ), and executive orders, by which the President enacts the Manual for Courts-Martial, which includes the R.C.M.s. *United States v. Davis*, 47 M.J. 484, 485 (C.A.A.F. 1998). "Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual." *Id.* at 485-86. Accordingly, if the President implemented a rule related to the "record" that affords more protection to the accused, and so long as the rule does not redefine "record," then the rule takes precedent over a comparable provision of the UCMJ.

Congress unambiguously defined "record" as a "court-martial proceeding" that is either reduced to writing in some manner, or recorded in a way that permits reproduction of the court-martial proceeding via sound (i.e. audiotape). Article 1(14), UCMJ. Congress also required that post-assembly excusals of

panel members be for "good cause." Article 29(a), UCMJ. The President implemented Congress' definition of "record" in R.C.M. 505(c)(2)(A)(i), to require that the reason for a panel member's excusal be for "good cause" "shown on" the "record," and to require that the military judge ensure the "record" reflects the reason for a panel member's excusal and replacement. R.C.M. 813(c). The President also defined "good cause" as a military exigency or extraordinary circumstance. R.C.M. 505(f). "Good cause does not include temporary inconveniences that are incident to normal conditions of military life." *Id*.

As neither the UCMJ nor the R.C.M. define "shown" or "on," the Court can consider the ordinary definitions of these words, the context in which they are used, and the broader statutory context. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "Shown" is defined as "permit to be seen." MERRIAM-WEBSTER DICTIONARY "Shown."[9] "On" is "used as a function word to indicate the location of something." MERRIAM-WEBSTER DICTIONARY "On."[10] Accordingly, the proper interpretation of the phrase "good cause shown on the record" refers to the post-assembly excusal of a panel member because of "a military exigency or extraordinary circumstance that was referenced in open court, such that the discussion can be seen when reviewing the official written transcript, or can be heard by listening to the official audiotape recording of the court-martial proceedings, and seen in documents referred to during the transcribed and/or

[9] Available at www.merriam-webster.com/dictionary/shown.

[10] Available at www.merriam-webster.com/dictionary/on.

recorded sessions." *King I*, 2021 CCA LEXIS 415 at *47, 50.[11]

Conversely, the phrase necessarily *excludes* post-assembly excusal of a panel member because of "a temporary inconvenience incident to normal conditions of military life," such as Lt Col PBL's transfer to a different unit on the same installation. The phrase also *excludes* "adding documents showing the reason for Lt Col PBL's excusal after the court-martial proceedings are over and the parties are in the middle of an appeal," because *no discussion* about these documents, nor the contents therein, can be seen in the official written transcript, heard by listening to the audio recording of Petitioner's "court-martial proceeding," or by reviewing documents that were referenced during the transcribed or recorded proceedings. *See* R.C.M. 1103(b)(2)(B), (D)(ii) (requiring verbatim transcript and attachment of convening orders and amendments). Further, it should go without saying that a military judge has no ability to ensure the "record" reflects the reason for a panel member's excusal and replacement during an *appeal*.

R.C.M. 505(c)(2)(A)(i) provides greater protection for Petitioner than Articles 1(14) and 29(a), UCMJ, by limiting *where* in the "record" military appellate courts are allowed to search for evidence for the *reasons* panel members were lawfully excused post-assembly, and to ensure those reasons were for "good cause." In Petitioner's case, that meant the AFCCA and the CAAF were limited to reviewing the transcript when the parties discussed the continuance affecting availability of panel members who were

[11] Appendix 51a-52a.

selected, which included Lt Cols PBL and KW, and Col DL as the intended alternate for Lt Col KW (R. 876-83, 890, 892), the transcript when the court-martial reconvened in July with Judge Speranza and new members (R. 1151-55),[12] and the court-martial convening orders referenced in those areas of the transcript. A review of the transcript and documents referenced therein, demonstrates that while there is discussion about the fact that Lt Col PBL was excused, *nothing* in these parts of the record *shows why* he was excused. As a matter of law, transferring to another unit on the same installation is not "good cause." R.C.M. 505(f). Similarly, nowhere in the record is there *any* explanation for Col DL's excusal, "good cause" or otherwise," despite the fact that trial counsel represented to the court that the convening authority intended to substitute Col DL for Lt Col KW if she was excused for her fellowship.[13]

Despite the ordinary meaning of the words "shown" and "on," their placement in R.C.M. 505(c)(2)(A)(i), and the overall regulatory scheme (R.C.M. 505 and 813), the CAAF ignored these rules of statutory construction to conclude that "shown on"

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[12] The record shows Petitioner's female civilian defense counsel was absent for part of the time on this day, due to an issue with a flight. The record shows this counsel had some issues with luggage which had not arrived, and therefore did not have all of the documents she needed for trial (R. 1151).

[13] There is no place "on the record" *other* than these pages in the transcript, or the documents referenced therein, to look for evidence that Lt Col PBL, Lt Col KW, and Col DW were excused for "good cause." "Assembly" of panel members can only occur when they are physically present in court, and the final members who will sit in judgment selected through *voir dire*. Selection of panel members who will sit in judgment during the trial must be completed before a trial on the merits proceeds.

the "record" includes the *entire* record of trial, even portions of the record that are not discussed in open court, and therefore not seen in the transcript or heard on the audio recording. *King II*, 83 M.J. at 121 n.4. The CAAF further extended the definition of "shown on the record" beyond "court-martial proceedings" to include *appellate* proceedings, in misplaced reliance on *Jessie*. *Id*. at 121. Because of the CAAF's reliance on *Jessie*, it considered the Government's mid-appeal documents to hold that Lt Col PBL was excused for "good cause." *Id*. at 121-22. But without these documents, there was *no* basis for either the CAAF or the AFCCA to hold Lt Col PBL was excused for "good cause."

Compounding the CAAF's erroneous decision, the CAAF unjustly criticized Petitioner for not inquiring into the reason for Lt Col PBL's excusal when the court-martial reconvened in July, approximately three months after the members were initially assembled, and despite the senior trial counsel misstatement that Lt Cols PBL and KW were excused during a prior session. *Id*. at 121, 124. An accused's defense counsel has many duties during a court-martial, but ensuring the record reflects the reason for a panel member's excusal is not one of them. R.C.M. 505(c)(2)(A)(i) places that duty squarely on the trial counsel, as the convening authority's representative in court, and R.C.M. 813(c) places that duty squarely on the military judge. "The requirements of [these rules] are mandatory and it is the duty of the court [and the Government], not the appellant or his attorney, to see that [their] provisions are complied with." *United States v. Garner*, 581 F.2d 481, 488 (5th Cir. 1978) (noting the Court Reporter Act mandates transcription of criminal case proceedings, and the

duty to comply with the Act lies with the Court, not the attorney).

"A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in *entire conformity* with the provisions of the statute, or else it is without jurisdiction." *McClaughry v. Deming*, 186 U.S. 49, 62 (1902) (emphasis added). By virtue of Article 36, UCMJ, "statutory requirements" include the procedures set forth in the R.C.M. *See Runkle v. United States*, 122 U.S. 543, 555-56 (1887). Petitioner's court-martial was not convened in "entire conformity" with statutory requirements. While Lt Col KW's excusal appears to be for "good cause shown 'on the record,'" nothing "on the record" shows the reason for her replacement, Col DL's, excusal. Similarly, the only *reason* "shown on the record" for Lt Col PBL's excusal was his expected transfer to another unit on the same installation. As two members of Petitioner's court-martial were not lawfully excused post-assembly, their replacements were not lawfully detailed as replacements. Discounting the two panel members who replaced Lt Cols KW and PBL, only three members legitimately sat for Petitioner's court-martial, which is insufficient for a general court-martial. Article 16(1)(A), UCMJ. Accordingly, the court-martial did not have jurisdiction to try Petitioner.

C. CAAF's Decision is Fundamentally Unfair to Servicemembers

The CAAF's erroneous decision, if allowed to stand, will adversely affect hundreds of Servicemembers, by adversely affecting their constitutional, statutory, and regulatory rights not

just during court-martial proceedings, but also on appeal. Petitioner's case involves at least three Fifth Amendment Due Process violations as outlined below.

The heart of Fifth Amendment Due Process is "fundamental fairness." An action that "violates 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency,'" is fundamentally unfair, and constitutes a Due Process violation. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quotations omitted). Congress and the President established rules delineating the orderly prosecution of a Servicemember. Those rules reflect "fundamental conceptions of [military] justice" and the "[military] community's sense of fair play and decency." *Id*. It should not be too much to expect the Government (or the military judge) to follow these rules and to be held accountable for not following them. Yet, the military appellate courts blamed *Petitioner*, not the Government or the military judge, for not ensuring the "good cause" for Lt Col PBL's excusal was "shown on the record." That is the first Due Process violation.

A second Due Process violation is the AFCCA's application of *Jessie*, and the CAAF's ratification thereof, to allow the Government to add documentation to the record during appeal to prove Lt Col PBL was excused for "good cause," while at the same time, applying *Jessie* to *deny* Petitioner the ability to add documents during appeal to prove his argument that conditions of his post-trial confinement warranted sentencing relief. *King I*, 2021 CCA LEXIS 415 at *150-70 (*Willman*, 81 M.J. 355 (citing *Jessie*, 79

M.J. 437)).[14] In *Jessie*, the CAAF acknowledged its prior case law concerning Article 66's "entire record" provision was inconsistent and exceeded the definition of "record." 79 M.J. at 440. The CAAF then reaffirmed the prohibition on "supplementation" of the record, except in a limited class of cases. *Id*. at 444 (citing *United States v. Fagnan*, 30 C.M.R. 192 (C.M.A. 1961)). The CAAF subsequently narrowed the rule more in *Willman*, holding that even a declaration regarding post-trial confinement conditions could not be considered by a CCA for sentence appropriateness under Article 66(c), UCMJ, because the declaration is not part of the "entire record."

Significantly, *Fagnan*, *Jessie*, and *Willman* all involved a CCA's review of an appellant's sentence under Article 66(c), UCMJ. These cases did not address the supplementation of the record on an issue affecting findings of guilt (here, the very members sitting in judgment on Petitioner's panel), which affects the fairness and integrity of his court-martial proceeding. Here, despite, the Government's failure to excuse Lt Col PBL "for good cause shown on the record," as mandated by R.C.M. 505(c)(2)(A)(i) and R.C.M. 813(c), the CAAF allowed the Government to supplement the record mid-appeal to Petitioner's detriment. Notably, in addressing Petitioner's argument on prejudice, the CAAF acknowledged that the documents the Government attached were "*not a part of the record of trial*, and so the omission of those documents did not make the record incomplete." *King II*, 83 M.J. at 124 n.9 (emphasis added).

Fundamental fairness requires an appellate court to apply a rule equally to both parties. What is "sauce

[14] Appendix 95a-104a.

for the goose" should also be "sauce for the gander." *See Circuit City Stores v. Adams*, 532 U.S. 105, 134 (2001) (Souter, J. dissenting). It is fundamentally *unfair* for a court to apply a rule as a shield for one party while simultaneously applying it as a sword against the other party.

The third Due Process violation is related to the second—allowing a party to "supplement" the record on *appeal* with "new" information. As recognized in *Rivera-Risario*, to permit this constitutes a violation of appellate procedural and substantive due process. *See* 300 F.3d at 9.

D. Whether a Federal Prosecutor in Civilian Courts can also Serve as a Military Judge is a Constitutional Issue Necessitating this Court's Resolution

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U.S. 133, 136 (1955). For this reason, "[d]ue process demands more than that the [judge] actually be impartial; rather, 'justice must satisfy the *appearance* of justice.'" *Id.* (emphasis added) (cited in *Liljeberg v. Health Acquisition Corp.*, 486 U.S. 847, 863 (1988)).

> The neutrality required by constitutional due process helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the

> absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citations omitted). The appearance standard is designed to enhance public confidence in the integrity of the judicial system. *Liljeberg*, 486 U.S. at 860.

The right to an impartial judge is one of constitutional magnitude, even for military accused. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (citations omitted). After all, "[u]nbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label." *In re Al-Nashiri*, 921 F.3d 224, 233-34 (D.C. Cir. 2019). "[T]he validity of the military justice system and the integrity of the court-martial process 'depend[] on the impartiality of military judges in fact *and* in appearance." *United States v, Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (emphasis added) (quoting *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012) (per curiam)). Therefore, judges are required to disqualify themselves in *any* proceeding in which that judge's impartiality *might reasonably* be questioned." 28 U.S.C. § 455(a); R.C.M. 902(a) (emphasis added).

Using reservists to perform duties as military judges presents a challenge throughout the military,[15]

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[15] *See United States v. Martinez*, 70 M.J. 154 (C.A.A.F. 2011). This case involved an Army reservist presiding in his first court-martial as a judge over a guilty plea. The issue in *Martinez* was the Chief Judge's communications with trial counsel and the reservist military judge regarding deficiencies in the providence inquiry. Martinez's defense counsel asked the convening authority to reduce Martinez's sentence to remedy the

particularly when those reservists serve in, or are pursuing, prosecutorial jobs that conflict with the requirement for a judicial officer to maintain impartiality, as occurred with Judge Grocki. For example, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside a Marine's convictions for violating Department of Defense and Navy regulations due to the military judge's (a Marine reservist) failure to disclose he applied for a position as a Highly Qualified Expert for trial counsel in sexual assault cases in his region during litigation of pivotal motions to suppress and limit introduction of evidence, and then ruled in the Government's favor. *United States v. Armendariz*, 82 M.J. 712, 724-28 (N-M. Ct. Crim. App. 2022).[16]

The reality is that a person who advocates for a sovereign as a prosecutor faces the extraordinarily difficult, if not impossible, task of persuading an accused and/or the public that he can impartially judge a case brought by the same sovereign. *See Al-Nashiri*, 921 F.3d at 235. Whether a civilian prosecutor-turned-military judge is employed as a prosecutor for the Department of Justice does not matter because the sovereign bringing the court-martial for the Department of Defense—the United States—is the same. *See id.* (noting that the active-duty Air Force judge was negotiating for employment as an immigration judge in the Department of Justice

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appearance of partiality created by those communications. The convening authority granted the clemency request. As a result, the CAAF held the public's confidence in the military justice system would not be undermined. *Id.* at 159-60.

[16] The NMCCA reversed Master Sergeant Armendariz's sexual assault and adultery convictions for factual insufficiency. *Id.* at 721-23.

while he presided over Al-Nashiri's case). Considering Judge Grocki's extensive, lengthy, and on-going prosecutorial experience, on a personal and supervisory level, in child sex crime cases, of which Petitioner was charged, Petitioner's family and friends—average, reasonable people observing his public proceeding—were understandably concerned. Judge Grocki's disclosures, combined with his contentious interactions with Petitioner's female civilian defense counsel and his commandeering of her *voir dire* of panel members, magnified their concerns and created an unacceptable risk of undermining confidence in the integrity of the military justice system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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