No. _____

In the Supreme Court of the United States

RICHARD LIVINGSTON,

Petitioner,

v.

DOUGLAS J. CURTIS, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court ruled in *Ramos* v. *Louisiana*, 590 U.S. 83, 89-90 (2020) that non-unanimous criminal verdicts are unconstitutional. The question presented is whether that holding extends to courts-martial?

RELATED PROCEEDINGS

General Court Martial (Commander HQ, Ft. Bliss, TX, Colonel Michael Devine, M.J., presiding):

> *United States* v. *Richard L. Livingston*, (Mar. 7, May 14, Jul. 22, 29-3,1 and Aug. 1-3, 2019) (trials and convictions)

United States Army Court of Criminal Appeals:

> *United States* v. *Chief Warrant Officer Three, Richard L. Livingston United States Army*, No. ARMY 20190587 (Mar. 8, 2022) (memorandum opinion dismissing and affirming in part)

United States District Court (D. Kan.):

> *Richard L. Livingston* v. *Kevin Payne, Commandant, United States Disciplinary Barracks*, No. 5:23-cv-03162-JWL (Jul. 8, 2024) (memorandum and order dismissing remainder of the case previously stayed, denying habeas relief)

United States Court of Appeals (CAAF):

United States of America v. *Richard Livingston*, 82 M.J. 440 (July 25, 2022) (review denied)

United States Court of Appeals (CA10):

Richard L. Livingston v. *Douglas J. Curtis, Commandant, United States Disciplinary Barracks*, No. 24-3128 (Oct. 3, 2025) (district court affirmed)

Richard L. Livingston v. *Douglas J. Curtis, Commandant, United States Disciplinary Barracks*, No. 24-3128 (Nov. 18, 2025) (rehearing denied)

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INTRODUCTION

Servicemembers like Mr. Livingston are not second-class citizens. "When we assumed the soldier, we did not lay aside the citizen. . . ." George Washington, *Address to the New York Provincial Congress,* June 26, 1775. Following this Court's decision in *United States* v. *Ramos*, courts-martial are now the only criminal courts deriving authority from the United States which deliver non-unanimous verdicts. U. S. 83 (2020). This Court should extend its holding in *Ramos* to courts-martial because it identified jury unanimity as "fundamental to the American scheme of justice," *Ramos*, 590 U.S. at 93, a scheme of justice whose protections undoubtably include Servicemembers.

OPINIONS BELOW

The Tenth Circuit's opinion is reproduced in the Appendix at App.1-12. The District of Kansas's decision is reproduced in the Appendix at App. 14-22. The Army Court of Criminal Appeals' opinion is reproduced in the Appendix at App. 23-43.

JURISDICTION

The Tenth Circuit's decision was entered on October 3, 2025. The Tenth Circuit denied rehearing on November 18, 2025. This Court has jurisdiction under 28 U. S. C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides that "[n]o person shall… be deprived of life, liberty, or property, without due process of law." U.S.Const., Amdt. V.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…." U.S.Const., Amdt. VI.

Article III of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury…" U.S.Const., Art III, § 2.

The Uniform Code of Military Justice provides that "No person may be convicted of an offense in a general or special court-martial, other than…in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken." 10 U. S. C. §852 (2024).

STATEMENT OF THE CASE

On August 1, 2019, a panel of officer members convicted Mr. Livingston, contrary to his pleas, of rape, sexual assault (two specifications), aggravated sexual contact, assault consummated by a battery (two specifications), assault upon a commissioned officer (six specifications, including the three to which appellant pled guilty to assault consummated by a battery), conduct unbecoming an officer and a gentleman (three specifications), and obstructing justice, in violation of Articles 120, 128, 133, and 134, UCMJ. App. 24. The military judge dismissed the conviction for sexual assault in Specification 1 of Additional Charge IV contingent upon the conviction for rape by unlawful force in Specification 2 of Additional Charge IV surviving

appellate review. *Ibid.* Mr. Livingston pled guilty to willful disobedience of a superior commissioned officer, making a false official statement, conduct unbecoming an officer and a gentleman, and obstructing justice, in violation of Articles 90, 107, 133, and 134, Uniform Code of Military Justice [UCMJ], 10 U. S. C. §§ 890, 907, 933, and 934. *Ibid.* Mr. Livingston also pled guilty to three specifications of assault consummated by a battery, each as a lesser-included offense of three charged specifications of assault upon a commissioned officer, in violation of Article 128, UCMJ, 10 U. S. C. §928. *Ibid.*

The officer panel sentenced appellant to a dismissal, confinement for seventeen years, forfeiture of all pay and allowances, and a reprimand. *Ibid.* The convening authority approved the adjudged sentence. *Ibid.*

On March 8, 2022, the Army Court of Criminal Appeals [ACCA] addressed two of Petitioner's eight assigned errors. App.23-43. ACCA concluded that the military judge's error in declining to instruct on self-defense was not harmless beyond a reasonable doubt, set aside and dismissed Specification 1 of Charge II, affirmed the remaining findings, affirmed confinement for sixteen years and eleven months, and otherwise affirmed the sentence. App. 34.

The Court of Appeals for the Armed Forces [CAAF] declined to grant review following review of his case by the Army Court of Criminal Appeals. *United States* v. *Livingston*, 81 M. J. 303 (CAAF 2021) (e-journal entry). Following that decision, Mr. Livingston exhausted his military remedies.

On July 6, 2023, Mr. Livingston petitioned the United States District Court for the District of Kansas for a writ of *habeas corpus*, alleging, *inter alia*, that

the court-martial that tried him reached non-unanimous findings in violation of the Constitution. On July 8, 2024, the district court denied the requested writ to Mr. Livingston. App. 14-22.

On August 29, 2024, Mr. Livingston filed notice of appeal with the Tenth Circuit Court of Appeals. On October 3, 2025, the Tenth Circuit issued its decision, declining to grant to Mr. Livingston relief. App. 1-13. On November 18, 2025, that court declined to grant rehearing and reconsider its decision. App. 14.

REASONS FOR GRANTING THE PETITION

This Court should grant review of Mr. Livingston's petition because this court should address the applicability of this Court's decision in *Ramos* to courts-martial. Additionally, this court should clarify its "full and fair" consideration jurisprudence relative to the standard of review Article III courts apply when reviewing courts-martial findings. *Burns* v. *Wilson*, 346 U. S. 137 (1953).

II. *Ramos* imposes a due process requirement for panel unanimity

The Framers did not give Congress unlimited power over what is now termed "military justice." Their complaints against the British Sovereign included that "He has affected to render the military independent, of, and superior to the civil power." *Declaration of Independence* (1776). Although Congress has significant authority in the realm of military discipline, that authority is not "superior" to the due process requirement contained in the highest civilian power, the Constitution.

"As a matter of due process, [the] jury-unanimity rule is incorporated to state criminal proceedings in the same way that it applies to federal ones because it is "fundamental to the American scheme of justice." *Ramos*, 590 U. S. at 93.

Article 52(a)(3), UCMJ, 10 U. S. C. §852(a)(3) provides for non-unanimous findings. It requires only "the concurrence of at least three-fourths of the members present when the vote is taken." Courts-martial panels are already smaller than civilian juries. They ordinarily consist of eight members in a general court-martial and four members in a special court-martial. Article 16(b)(1), (c)(1), UCMJ, 10 U. S. C. §816(b)(1), (c)(1). However, "[a]fter impanelment, as a result of excusals, [a general-court martial panel] could be reduced to no fewer than six members." Dept of the Army Pamphlet 27-9, Military Judges' Benchbook (Feb. 29, 2020) [Benchbook], para. 2-1-3. Therefore, in cases of a six member court, it is possible for only five of six members to determine the fate of a Servicemember like Appellant. Such a proceeding does not

comport with basic notions of fairness "fundamental to the American scheme of justice." *Ramos*, 590 U. S. at 93.

Article 52, UCMJ is violative of the due process clause because non-unanimous panel findings "raise[] serious doubts about the fairness of [a] trial" and they fail to "assure the reliability of [a guilty] verdict." *Brown* v. *Louisiana*, 447 U. S. 323, 334, n. 13 (1979). "[A] line must be drawn somewhere, and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired." *Id*. at 331. A servicemember has the same right as a civilian to require proof beyond a reasonable doubt. *United States* v. *Gay*, 16 M. J. 475, 477 (C.M.A. 1983). Here, the fundamental function of a panel, determination of guilt beyond a reasonable doubt, cannot be assured where reasonable exists because, despite the government's evidence, some panel vote to acquit. Therefore, this court should find that Article 52 is on the wrong side of the line that *Brown* requires this Court to draw and is unconstitutional.

Ramos announced a right which is "fundamental" because it announced a right that is incorporated to the states. *Ramos*, 590 U. S. at 93. The due process clause incorporates to the States only those rights which are fundamental to the American scheme of justice. *McDonald* v. *City of Chicago*, 561 U. S. 742, 767 (2010). If due process requires states to conduct criminal proceedings via unanimous jury verdict, it also requires courts-martial to utilize unanimous panel findings. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs and that Clause

provides some measure of protection to defendants in military proceedings." *Weiss* v. *United States*, 510 U.S. 163, 176 (1994). A "right [that] is a part of due process under the Fifth Amendment… applies to courts-martial…" *United States* v. *Santiago-Davila*, 26 M. J. 380, 390 (C.M.A. 1988).

Mr. Livingston's court-martial indisputably did not employ unanimous finding. It therefore violated the due process clause.

III. The Sixth Amendment's unanimity requirement now applies in courts-martial because it is a component of impartiality

Previous holdings from military and civilian courts declining to apply the unanimity requirement of the Sixth Amendment are no longer tenable because *Ramos* holds that unanimity is included within the Sixth Amendment's impartiality requirement. *Ramos*, 59 U. S. at 89. The impartiality component of the Sixth Amendment applies to courts-martial.

> [T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. [citation and internal footnote omitted] This case involves the latter aspect of impartiality.

United States v. *Lambert*, 55 M. J. 293, 295 (CAAF 2001).

Most other components of the Sixth Amendment are already applicable to military justice. They include:

1. ***Speedy Trial:*** *United States* v. *Cooper,* 58 M. J. 54, 57 (CAAF 2003);
2. ***Public Trial:*** *United States* v. *Hershey,* 20 M. J. 433, 435 (C.M.A. 1985);
3. ***Confrontation:*** *United States* v. *Blazier,* 69 M. J. 218, 222 (CAAF 2010);
4. ***Notice:*** *United States* v. *Girouard,* 70 M. J. 5, 10 (CAAF 2011);
5. ***Compulsory Process:*** *United States* v. *Bess,* 75 M. J. 70, 75 (CAAF 2016);
6. ***The Right to Counsel:*** *United States* v. *Wattenbarger,* 21 M. J. 41, 43 (C.M.A 1985);
7. ***The Right to the Effective Assistance of Counsel:*** *United States* v. *Gooch,* 69 M. J. 353, 361 (CAAF 2011).

The only components of the Sixth Amendment that courts have not applied to the military justice system are the vicinage requirement and the unanimity requirement. Of those, only the exclusion of the vicinage requirement from the miliary justice system has a foundation in the common law known to the framers. See, *e.g.*, *United States* v. *Wheeler*, 83 M. J. 581, 585, n. 18 (N-M. Ct. Crim. App. 2023). There is, however, no basis for exclusion of the impartiality requirement from military justice. *Lambert*, 55 M. J. at 295. As unanimity is a component of impartiality, unanimity therefore applies to courts-martial.

IV. The Tenth Circuit declined to reach the merits of Mr. Livingston's claim because of an improperly narrow view of *Burns*

The Tenth Circuit improperly held that any consideration that a military court gives to a military petitioner's claim in summarily disposing of a constitutional allegation automatically constitutes full and fair consideration under *Burns*. The Tenth Circuit held that it must "defer to the military court's determination that the claim was not meritorious when that claim is briefed and argued before the military court." App. 9. In other words, the Tenth Circuit circularly reasoned that because the military courts summarily rejected Mr. Livingston's panel unanimity claim, without any discussion or rationale, their holding was full and fair and may not be reviewed in a civilian court because the rationale for that holding is unknown. This holding is contrary to the Tenth Circuit's caselaw and is unsupported by *Burns*.

As an initial matter, Tenth Circuit precedent does not hold that a military court's summary affirmance is always full and fair consideration. Rather, that circuit has held that a summary disposition does not *automatically* mean that military courts *failed* to give full and fair consideration to a claim. "We . . . decline to *presume* a military court has failed to consider all the issues presented to it" simply because the military court issued a summary disposition. *Thomas* v. *U.S. Disciplinary Barracks*, 625 F. 3d 667, 672 (CA10 2010) (emphasis added). "[A] reviewing Article III court *should not assume* that the military court has *failed* to consider the issues presented to it before rendering a decision" on the basis of a summary decision.

Anderson v. *Bolster*, 2020 U.S. Dist. LEXIS 156859, *13 (E.D. Va. Aug. 27, 2020) (unrep.) citing *Thomas*, 625 F. 3d at 672 (emphasis added). Tenth Circuit precedent merely states that a summary decision does not allow a presumption of inadequate consideration.

Burns does not stand for the opposite proposition, however – that military consideration is automatically full and fair consideration where military courts issue a summary decision and decline to explain their reasoning. Instead, *Burns* limits the ability of civilian courts it is not the duty of the civil courts simply "to reexamine and reweigh each item of *evidence*." *Burns*, 346 U. S. at 144 (emphasis added). Mr. Livingston does not seek a reevaluation of the evidence. Instead, he seeks the application of the Constitution to his case. *Burns* does not preclude such an application. This court should grant review for the purposes of finding that the Tenth Circuit incorrectly limits *Burns* to foreclose civilian review of constitutional claims.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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