

No. _____

IN THE
Supreme Court of the United States

ANGELO L. CEPEDA,
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

1. Is the constitutional right to a fair trial, which necessarily includes accurate instructions on the elements of the charged offense and correct definitions, so fundamental that it cannot be waived without an affirmative response from the accused on the record?

2. What is the definition of “unwelcome” as this term relates to sexual harassment?

PARTIES TO THE PROCEEDING

Petitioner is Technical Sergeant Angelo L. Cepeda.
Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Cepeda*, General Court-Martial, Minot Air Force Base, North Dakota, January 18, 2022 and April 4-8, 2022.
- *United States v. Cepeda*, No. 40318, 2025 CCA LEXIS 320, 2025 WL 2028559 (A.F. Ct. Crim. App. Jul. 21, 2025) (unpub. op.).
- *United States v. Cepeda*, No. 26-0027/AF, 2026 CAAF LEXIS 141, 2026 LX 46851 (C.A.A.F. 2026). Review denied on Feb. 10, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Technical Sergeant Cepeda, 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 in this case.

OPINIONS BELOW

The CAAF's decision to deny review of Petitioner's case appears at page 1a of the appendix to this petition. It is available at 2026 CAAF LEXIS 141 and 2026 LX 46851. The unpublished opinion of the Air Force Court of Criminal Appeals (AFCCA) appears at pages 2a thorough through 56a of the appendix. It is available at 2025 CCA LEXIS 320 and 2025 WL 2028559.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3). The date of CAAF's order is Feb. 10, 2026.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment, in pertinent part, provides: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law."

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892, Article 51(c), UCMJ, Rule for Courts-Martial (R.C.M.) 920(e)(1), (f), and (g), and Department of Defense Instruction (DoDI) 1020.03, Harassment Prevention and Response in the Armed Forces (February 8, 2018).

STATEMENT OF THE CASE

I. Introduction

Technical Sergeant Cepeda was convicted of willful dereliction of duty for “sexually harassing” a female subordinate, Airman JJ, in violation of Article 92, UCMJ (10 U.S.C. § 892). But, the military judge’s definition of “sexual harassment” was incorrect in several respects: (1) he incorrectly defined sexual harassment as “nonconsensual” instead of “unwelcome;” and (2) omitted the element that requires the conduct to be so severe and pervasive that a reasonable person would believe a hostile environment was created; and (3) omitted the element that the alleged victim actually perceived the environment to be hostile.

II. Factual Background

Petitioner was convicted of willful dereliction of his duty to not “sexually harass” JJ, a female Airman (E-2). They both worked the mid-shift. Petitioner assigned jobs to JJ and drove the airmen to work in their designated areas.¹ Despite her junior rank, JJ was allowed to work on a jet; Petitioner would drive her back and forth from the jet.² He complimented her physical appearance during their drives.³ Although JJ later claimed his compliments were “inappropriate,” she accepted them; she did not tell him to stop or indicate to him that his comments made her “uncomfortable.”⁴ JJ was a “Teal Rope” in technical school, “someone who represented the Sexual Assault Prevention and Response (SAPR) and Sexual Assault

¹ R. 446.

² R. 450.

³ R. 451-52.

⁴ R. 452-53.

Response Coordinator (SARC) or those resources for the Airmen.”⁵

JJ testified that mid-shift had fewer personnel, so usually there were only two four-person crews.⁶ Sometimes Petitioner picked her up by herself.⁷ Sometimes the “run” back to the shop took only a few minutes, but sometimes it took a few hours, depending on where she was on the flightline.⁸ In September or October of 2018, they had to pull over and wait for a jet that was being taxied or towed in front of them.⁹ JJ claimed that during this “pull over and wait” instance, Petitioner tried to touch her thigh and kiss her at this point.¹⁰ When he leaned in to kiss her, JJ told him “no.”¹¹ He stopped.¹² JJ testified that before this incident, she never felt “harassed” by him.¹³

An agent from the Air Force Office of Special Investigations (OSI) interviewed JJ on October 24, 2019.¹⁴ JJ knew she had to tell the truth and that she had to tell them everything Petitioner did to make her feel uncomfortable.¹⁵ JJ repeatedly told the agent that Petitioner did not touch her in a way that made her feel uncomfortable.¹⁶ She told the agent he never asked her questions about her sex life, talked about having sex with her, made any sexual gestures or advances to her, or treated female airmen differently

⁵ R. 505-06.

⁶ R. 454-55.

⁷ R. 455.

⁸ R. 455-56.

⁹ R. 460.

¹⁰ *Ibid.*

¹¹ R. 461-62.

¹² *Ibid.*

¹³ R. 518.

¹⁴ R. 505.

¹⁵ *Ibid.*

¹⁶ R. 504, 750.

than male airmen.¹⁷ She claimed other male airmen harassed her by commenting about her body and telling her she should be dating them instead of her boyfriend at the time.¹⁸ JJ told the agent that she did not think “too much of it” because it was “really common to hear stuff like that” in the Air Force environment; it was so common she questioned if it was really “harassment.”¹⁹

The same OSI agent attempted to interview JJ again, but JJ “blew her off” several times.²⁰ JJ was supposed to return to Minot AFB, but she did not.²¹ The agent asked JJ for consent to search her cell phone several times because JJ claimed it had corroborating evidence, but JJ never provided her phone.²² The agent obtained a search warrant for her phone, but JJ subsequently claimed it was lost.²³ The agent later interviewed JJ a second time in California in March of 2020; she recorded the interview.²⁴ During that interview, JJ claimed Petitioner “sexually harassed” her but denied that he touched her.²⁵

JJ showed TSgt Cepeda pictures of herself on Instagram, mostly her legs.²⁶ She told him about exercises she liked to do at the gym, as he would ask her about her gym progress.²⁷ JJ also told TSgt Cepeda about a time she performed oral sex on her boyfriend with “pop rocks” in her mouth, as she was

¹⁷ R. 506.

¹⁸ R. 508-09, 515.

¹⁹ R. 520

²⁰ R. 744

²¹ *Ibid.*

²² R. 745.

²³ R. 745-46.

²⁴ R. 747-48; Def. Ex. A.

²⁵ R. 750.

²⁶ R. 515-16.

²⁷ *Ibid.*

discussing her sex life at work with co-workers.²⁸ JJ admitted to initiating this conversation, and that she did not feel uncomfortable talking to Petitioner about it.²⁹

The Government introduced an expired Air Force Instruction (AFI) into evidence to prove the source of Petitioner's duty to not sexually harass JJ.³⁰ However, the Government failed to introduce the relevant definition of "sexual harassment" that was contained within the expired AFI.³¹ During discussion of instructions, the military judge denied the Government's request to define "sexual harassment" as "unwanted" instead of "nonconsensual."³² The Defense concurred with the military judge's use of "nonconsensual."³³ The military judge also omitted instructions on essential elements of sexual harassment, namely that Petitioner's conduct was so severe and pervasive that (1) a reasonable person would perceive the work environment as hostile and (2) JJ actually perceived it as such (R. 881).³⁴ Furthermore, because Petitioner was charged with willful dereliction of duty, the Government was also required to prove he actually *knew* his conduct was so severe and pervasive that a reasonable person would perceive the work environment as hostile and that JJ actually perceived it as such.

²⁸ R. 512.

²⁹ R. 512-13.

³⁰ Pros. Ex. 13.

³¹ R. 837-38.

³² R. 840.

³³ *Ibid.*

³⁴ R. 881; *see* DEPT OF DEFENSE INSTRUCTION (DODI) 1020.03, *Harassment Prevention and Response in the Armed Forces*, para. 3.3 (Feb. 8, 2018).

III. Legal Background

Petitioner first sought relief from the Air Force Court of Criminal Appeals (AFCCA). The majority held the evidence was factually and legally sufficient to sustain Petitioner's conviction.³⁵ While agreeing with Petitioner that the expired AFI was insufficient, in and of itself, to prove the source of duty, the AFCCA majority changed the source from the expired AFI to a "custom of the service," based on a witness's testimony regarding a "cultural shift" in the Air Force 10-11 years earlier that made "locker room" talk inappropriate.³⁶ The majority held that Petitioner waived the issue of an erroneous instruction on the definition of sexual harassment because his defense counsel agreed with the military judge's use of the word "nonconsensual."³⁷ The majority went on to find Petitioner's conviction legally sufficient.

Judge Gruen dissented, noting a variety of flaws in the majority's logic, including, but not limited, to: (1) filling in the gaps in the Government's case by taking judicial notice of matters the Government failed to prove (notably the existence of a duty and Petitioner's knowledge of that duty); (2) affirming his conviction based on a "custom of the Air Force," when the Government did not present "custom of the Air Force" as a basis for finding a duty; (3) the military judge's instruction on the definition of "sexual harassment" was incorrect due to using the term "nonconsensual" instead of "unwelcome;" and (4) given the parties' and the military judge's disagreement on the definition of "sexual harassment," Petitioner could not have

³⁵ *United States v. Cepeda*, 2025 CCA LEXIS 320, *16-34 (A.F. Ct. Crim. App. Jul 21, 2015) (unpub. op.)

³⁶ *Ibid.*, *30-31.

³⁷ *Ibid.*, *26, 31.

actually known the scope of his duty.³⁸ Without a correct definition of “sexual harassment,” Petitioner’s conviction was legally insufficient.³⁹

Petitioner moved AFCCA to reconsider; his motion was denied. Petitioner subsequently petitioned the Court of Appeals for the Armed Forces (CAAF) to review his case. The CAAF denied his petition.⁴⁰

REASONS FOR GRANTING THE PETITION

I. The Circuits are Split as to Whether *Neder v. United States* Precludes Application of Waiver to Instructional Error Involving Omissions and/or Incorrect Definitions of Elements of an Offense.

An error is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”⁴¹ In *Neder v. United States*, this Court directed appellate courts to review instructional error involving the omission of an element of an offense for harmlessness instead of holding that such error is “structural,” requiring automatic reversal of a conviction.⁴² “[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested [or] supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.”⁴³

³⁸ *Ibid.*, *44-45 (Gruen, J. dissenting.)

³⁹ *Ibid.*, *45.

⁴⁰ Appendix at 1a.

⁴¹ *Chapman v. California*, 386 U.S. 18, 24 (1967).

⁴² 527 U.S. 1, 18-19 (1999); *see also Pope v. Illinois*, 481 U.S. 497 (1987) (involving an instruction misstating an element of an offense).

⁴³ *Neder*, 527 U.S. at 17.

In *United States v. Conti*, the Ninth Circuit held that when the defense fails to object to an instruction omitting an essential element of an offense, the appellate court must review for harmless error using a “plain error” standard of review.⁴⁴ If the error is “harmless,” then it necessarily also fails the third prong of the plain error test, meaning that it did not prejudice the defendant’s substantial rights.⁴⁵ However, in order to determine if the error is harmless, the court must conduct a thorough examination of all of the evidence in the record to determine if the omitted element was sufficiently supported.⁴⁶

Other circuits have also conducted a *Neder* analysis using the “plain error” standard of review. For example, the Tenth Circuit applied plain error to a *Neder* analysis of a sexual assault conviction in *United States v. Freeman*, and found harmless error in the failure to instruct the jury that the victim was incapacitated, given the overwhelming evidence of the victim’s intoxication and Freeman’s admission that he initiated sex with the victim while she was asleep.⁴⁷ The Fifth Circuit also did so in *United States v. Muhammad*, for the judge’s failure to instruct the jury that the Government had to prove he either knew the chemical substances he created, possessed, and distributed were controlled under the Controlled Analogue Substances Act (CASA), or that he knew his drugs had a stimulant, depressive, or hallucinogenic

⁴⁴ 804 F.3d 977, 981 (9th Cir. 2015); see *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (defining the “plain error” standard of review).

⁴⁵ 804 F.3d at 981.

⁴⁶ *Ibid.* (quoting *Neder*, 527 U.S. at 17).

⁴⁷ 70 F.4th 1265, 1280-84 (10th Cir. 2023).

effect on the central nervous system.⁴⁸ The Fifth Circuit held the evidence was overwhelming that Muhammad knew he was creating, possessing, and distributing substances controlled under the CASA, especially given his own testimony that he researched chemical structures of controlled substances to create analog drugs that had similar effects, created a website advertising his drugs as not being controlled, and therefore, his customers could get high “legally.”⁴⁹ And although not citing to *Neder*, the Eleventh Circuit conducted a plain error analysis in *United States v. Greer* over the judge’s failure to instruct the jury that the Government had to prove Greer *knew* he was a convicted felon, *in addition to* proving he was actually a convicted felon when he possession of a firearm.⁵⁰ Therefore, if the Eleventh Circuit had conducted a *Neder* analysis, it would have held the error to be harmless. In affirming the Eleventh Circuit’s opinion, this Court aptly noted, “If a person is a felon, he ordinarily knows he is a felon. ‘Felony status is simply not the kind of thing that one forgets.’”⁵¹

In contrast, the Seventh Circuit applied waiver to a *Neder* analysis. In *United States v. Lebeau*, the Seventh Circuit held that Labeau waived instructional error by “affirmatively consenting” to the judge’s proposed instruction which did not include the element of “materiality” for fraud⁵² However, the Seventh Circuit went even further, declaring that statements such as “no objection” or “no problem”

⁴⁸ 14 F.4th 352, 358 (5th Cir. 2021).

⁴⁹ *Ibid.*, 358-59.

⁵⁰ 798 Fed. Appx. 483, 486 (11th Cir. 2020), *aff’d*, *Greer v. United States*, 593 U.S. 503 (2021). Greer was convicted of five felonies at the time he possessed the firearm.

⁵¹ *Ibid.*, 508 (quotation omitted).

⁵² 949 F.3d 334, 341-42 (7th Cir. 2020).

constitute waiver.⁵³ The Seventh Circuit nevertheless conducted an “even under a plain error” *Neder* analysis and found none.”⁵⁴ The lower courts in Petitioner’s case did no such alternative review.

II. This Case Presents Issues of Importance to Both the Military and Civilian Criminal Justice Systems.

Protecting the integrity of the criminal justice system and upholding the constitutional rights of the accused, both military and civilian, are important. The right to a fair trial is a fundamental constitutional right.⁵⁵ It is fundamentally unfair to allow the Government to prosecute someone and then gain a conviction with not only insufficient evidence of each actual element of the offense, but also with inaccurate and incomplete instructions on the law applicable to the facts of the case. The irony in Petitioner’s case is that the *Government* invited the error by objecting to “nonconsensual” instead of “unwelcomed.” Now, even though Petitioner’s alleged conduct was not actually criminalized when compared to the elements of his alleged offense, he has a criminal conviction for the rest of his life.

Another reason important to both the military and civilian sectors is that the distinction between “waiver,” which generally precludes appellate review, and “forfeiture,” which allows appellate review under a “plain error” standard, has become so blurred that there is no longer a distinction. “No objection,” which used to count as a lack of objection and therefore

⁵³ *Ibid.*, 342.

⁵⁴ *Ibid.*, 342-43.

⁵⁵ *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

“forfeiture,” has morphed into the equivalent of an intentional abandonment of a known right, *i.e.* “waiver.”⁵⁶ This creates a dilemma for defense attorneys, as they are faced with objecting to a proposed instruction simply to preserve an error for appellate review, without a good-faith basis for objecting, or standing mute, which courts do not allow. Under these circumstances, decisive guidance from this Court as to the “magic language” for preserving instructional error for appellate review is necessary.

Specific to military justice, at least two additional reasons exist to grant this petition for review:

(1) Whether an accused can actually waive a mandatory instruction is debatable. As Judge Gruen noted in Petitioner’s case, military accused cannot waive mandatory instructions.⁵⁷ A description of all of the elements of the offense, which necessarily implies *accurate* descriptions, is required.⁵⁸ Words matter; the meaning of “shall” is “mandatory.”⁵⁹ Even under the rule in effect at the time of Petitioner’s court-martial, a failure to object to a mandatory instruction equals “forfeiture” not “waiver.”⁶⁰ Furthermore, Rule for Courts-Martial 920 was later amended, permitting an accused to waive a mandatory instruction on lesser-included offenses.⁶¹ But that kind of waiver requires the accused to affirmatively acknowledge on the record that he

⁵⁶ See *Lebeau*, 949 F.3d at 342.

⁵⁷ *Cepeda*, 2025 CCA LEXIS 320 at *29 (Gruen, J. dissenting.).

⁵⁸ Rule for Courts-Martial (R.C.M.) 920(e)(1).

⁵⁹ See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) (“shall is mandatory” and “ought to be replaceable by either has a duty to or is required to”) (emphasis in the original).

⁶⁰ R.C.M. 920(f).

⁶¹ R.C.M. 920(g) (2023).

understands the rights involved, and the waiver must be made “freely, knowingly, and intelligently.”⁶² No such exception exists for a waiver of an accurate instruction that fully details all of the elements of the offense. Nor should it. This Court should hold that Due Process precludes an accused from waiving instructions on accurate descriptions of all of the elements of the charged offense(s), which means instructional errors in omitting elements and misstatements of definitions should always be assessed for plain error which may or may not be harmless under *Neder*.

(2) A consistent definition of “unwelcome” is needed for military personnel to correctly understand “sexual harassment.” This legal term of art is not defined in either the UCMJ or military regulations, including the DoDI that prohibits sexual harassment across the services. The Fifth Circuit defines “unwelcome” as “unsolicited or unincited *and* undesirable or offensive to the [complainant].”⁶³ Had this definition of “unwelcome” been considered (if “unwelcome” had been the standard instructed), Petitioner would likely have been acquitted, given JJ’s admission that she initiated a discussion about performing oral sex in the workplace and showed him pictures of herself working out.⁶⁴

III. The Lower Court’s Decision Conflicts with this Court’s Decisions on Changing the Theory of Liability on Appeal, the Definition of “Sexual

⁶² *Ibid*.

⁶³ *Jones v. Flagship Int’l*, 793 F.2d 714, 719 (5th Cir. 1986) (emphasis added).

⁶⁴ R. 512, 515-16.

Harassment,” and Evaluating Legal Sufficiency of the Evidence.

The lower court’s majority decision is incorrect for three reasons. First, it contradicts this Court’s decision in *Dunn v. United States*, prohibiting an appellate court from affirming a conviction based on a theory of liability different from the theory pursued at trial.⁶⁵ The AFCCA majority upheld Petitioner’s conviction, and the CAAF essentially affirmed, based on a non-existent “custom of the service” violation, which was not pursued at trial, instead of the presented theory of an Air Force Instruction violation.⁶⁶ This makes a difference, given acknowledgement that the expired AFI was insufficient to prove the source of Petitioner’s duty to not sexually harass JJ.⁶⁷

Second, the lower courts’ decision to approve the definition of “sexual harassment” as “nonconsensual” instead of “unwelcome” contradicts this Court’s definition in *Meritor Sav. Bank v. Vinson*.⁶⁸ In *Meritor*, this Court held that sexual harassment is conduct that is “unwelcome” instead of “nonconsensual,” as the purported victim’s voluntary participation in the conduct was irrelevant.⁶⁹ The distinction between “unwelcome” and “nonconsensual” is a distinction with a difference, as one can voluntarily respond to unwanted sexual advances.⁷⁰ However, the lower courts in Petitioner’s

⁶⁵ 442 U.S. 100, 106-07 (1979).

⁶⁶ *Cepeda*, 2025 CCA LEXIS 320 at *19-22, 28.

⁶⁷ *Ibid.*, *29.

⁶⁸ 477 U.S. 57 (1986).

⁶⁹ *Ibid.*, 68.

⁷⁰ See Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No?”*, 91 IND. L.J. 1363, 1394 (2016); see also Emily A. Impett

case refused to recognize this nuanced distinction.⁷¹

Third, the manner in which the lower court conducted its legal sufficiency review was contrary to *Musacchio v. United States*,⁷² in which this Court held that the legal sufficiency of the evidence must be evaluated against the actual elements of the offense, not the jury instruction.⁷³ Where an instruction includes all of the elements of the offense, but incorrectly adds an element, “the defendant has received the minimum due process required: a ‘meaningful opportunity to defend’ against the charge against him and a jury finding of guilt ‘beyond a reasonable doubt.’”⁷⁴

Petitioner’s case is not *Mussachio*—the military judge misstated an essential element of the offense of “sexual harassment” by instructing the panel that it had to be “nonconsensual” as opposed to “unwelcomed,” and he omitted two essential elements. The lower courts failed to compare the legal sufficiency of the evidence to the actual elements of Petitioner’s alleged offense. When comparing the evidence presented at trial to the actual elements of the offense, the Government’s case was lacking with respect to Petitioner’s “unwelcomed” conduct, given JJ’s discussion of oral sex in the workplace and showing Petitioner pictures of herself working out.⁷⁵ The case was also utterly lacking in evidence regarding the “pervasiveness and severity” of his

and Letitia Anne Peplau, *Why Some Women Consent to Unwanted Sex with a Dating Partner: Insights from Attachment Theory*, 26 PSYCHOLOGY OF WOMEN QUARTERLY, 360–370 (2002).

⁷¹ *Cepeda*, 2025 CCA LEXIS 320 at *32.

⁷² 577 U.S. 237 (2016).

⁷³ *Ibid.*, 243-44.

⁷⁴ *Ibid.*, 243.

⁷⁵ *Jones*, 793 F.2d at 719.

conduct such that a reasonable person would perceive a hostile work environment. Nor was there evidence that JJ actually perceived her work environment to be hostile; to the contrary, sexual banter occurred in the work place so much that she questioned whether there was any “harassment.”⁷⁶ The one instance during which she alleged Petitioner leaned in to kiss her, she told him to stop; he stopped.⁷⁷ As Judge Gruen noted, the erroneous instruction “invited the members to convict Appellant on an uncharged theory, namely sexual assault, which improperly divorced the sexual advances or requests for sexual favors from the required element of affecting one's job, employment, or career development.”⁷⁸

⁷⁶ R. 520.

⁷⁷ R. 461-62.

⁷⁸ *Cepeda*, 2025 CCA LEXIS 320 at *61 (Gruen, J. dissenting).

CONCLUSION

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

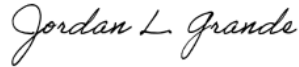
Respectfully submitted,

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