

No. _____

IN THE
Supreme Court of the United States

JOSE A. ASTACIO BURGESS,
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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QUESTION PRESENTED

Petitioner entered a plea agreement with the Government whereby, in exchange for his guilty plea to certain offenses, the Government agreed to “withdraw and dismiss, with prejudice, [the remaining offenses] after such time as the military judge announces the sentence and before the court-martial adjourns.” At the trial, the military judge announced the sentence and the Government trial counsel, who functions as the prosecutor, “move[d], pursuant to the plea agreement, to withdraw and dismiss, with prejudice [the remaining offenses].” On appeal, the United States Air Force Court of Criminal Appeals (AFCCA) specified an issue as to whether the withdrawn offenses were “dismissed with prejudice, vice dismissed with prejudice conditioned upon the completion of appellate review.” Pet. App. 4a.

The Government argued not only that prejudice did not attach until final appellate review was complete, but also that success by the Petitioner on appeal “cancelled [the] original plea agreement” and that the case should be returned to the trial level to allow the Government to retry Petitioner. Rather than address the issue it specified, the AFCCA side-stepped it and held, without analysis, that the “issue [was] not ripe and decline[d] to address it.” Pet. App. 4a.

The question presented is:

Did the lower court err in applying ripeness to decline to resolve whether prejudice attached to the dismissal of three of Petitioner’s charges immediately or only after completion of appellate review?

PARTIES TO THE PROCEEDING

Petitioner is Airman First Class (A1C) Jose A. Astacio Burgess, United States Air Force. Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for the purposes of Rule 14.1(b)(iii). The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Astacio Burgess*, No. 26-0124/AF, U.S. Court of Appeals for the Armed Forces (judgment entered April 7, 2026).
- *United States v. Astacio Burgess*, No. ACM S32827, Air Force Court of Criminal Appeals (order entered December 12, 2025).

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INTRODUCTION

Petitioner was serving in the United States Air Force when he pled guilty and was convicted by a court-martial. On appeal, the AFCCA directed Petitioner to file a brief regarding whether prejudice attached immediately to the offenses dismissed pursuant to his plea agreement or after completion of appellate review. The AFCCA did not rule on the merits of the issue, instead finding the issue to not be ripe. Pet. App. 4a. Petitioner then petitioned the Court of Appeals for the Armed Forces (CAAF) to review the AFCCA's use of the ripeness doctrine to avoid reviewing the underlying issue. The CAAF declined to grant review. Pet. App. 1a.

Since December 22, 2024, this Court has had jurisdiction to review cases in which the CAAF refused to grant review. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136, 261 (2023) (codified at 28 U.S.C. § 1259, effective one year from date of enactment).

PETITION FOR A WRIT OF CERTIORARI

A1C Jose A. Astacio Burgess respectfully petitions for a writ of certiorari to review the decision of the lower courts' decisions in his case.

OPINIONS BELOW

The AFCCA's decision is unreported. It is available at 2025 CCA LEXIS 573, and is reproduced at Pet. App. 2a-12a. The CAAF's decision is pending publication, is available at 2026 CAAF LEXIS 316, and reproduced at Pet. App. 1a.

JURISDICTION

The AFCCA had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. The CAAF had jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). The CAAF declined to grant review and issued its order denying review on April 7, 2026. This Court granted the Petitioner’s application for an extension of time to and including September 4, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3), in pertinent part, provides,

A Court of Criminal Appeals shall have jurisdiction over a court-martial in which the judgment entered into the record under section 860(c) of this title (article 60c) includes a sentence of . . . a bad-conduct discharge

Article 67, UCMJ, 10 U.S.C. § 867, provides, in pertinent part, that “[t]he [CAAF] shall review the record in . . . all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the [CAAF] has granted a review.”

Section 1259 of Title 28 of the U.S. Code provides, in pertinent part, that “[d]ecisions of the [CAAF] may be reviewed by the Supreme Court by writ of certiorari in . . . [c]ases in which the [CAAF] granted or refused to grant a petition for review under section 867(a)(3) of title 10.”

STATEMENT OF THE CASE

Airman First Class Jose A. Astacio Burgess (Petitioner) was tried by a special court-martial composed of a military judge alone at Beale Air Force Base (AFB), CA, on May 13, 2025. The charges and specifications on which he was arraigned, his pleas, and the findings of the court-martial are summarized as follows:

Charges were “withdrawn and dismissed with prejudice” for Charge I and its specification (Fraudulent Enlistment), Charge III and its specification (Attempted Introduction of a Controlled Substance on an Installation), and Charge IV and its specification (Obstructing Justice).

Plea of Guilty to Charge II and its four Specifications for possession of psilocybin mushrooms; distribution of psilocybin mushrooms; introduction of psilocybin mushrooms onto Beale Air Force Base, California, with intent to distribute on or about 9 February 2024; and introduction of psilocybin mushrooms onto Beale Air Force Base, California, with intent to distribute on or about 14 February 2024.

Petitioner and the convening authority entered into a plea agreement whereby in exchange for Petitioner pleading guilty to Charge II and its specifications, *inter alia*, the convening authority agreed to dismiss the remaining charges and specifications. Specifically, Petitioner affirmed the following in the plea agreement:

Pursuant to this agreement . . . [t]he Government will withdraw and dismiss, with

prejudice, Charge I and its specification, Charge III and its specification, and Charge IV and its specification after such time as the military judge announces a sentence and before the court-martial adjourns. I understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty.

Despite being written from Petitioner's perspective, the Government drafted the plea agreement.

After the military judge announced the sentence, Trial Counsel "move[d], pursuant to the plea agreement, to withdraw and dismiss, with prejudice, the remaining offenses." Trial Counsel's motion to the military judge did not include any qualifiers as to whether appellate review had to be completed before prejudice attached to the dismissal. The military judge then granted Trial Counsel's motion.

Trial Counsel then crossed-out Charges I, III, and IV from the Charge Sheet in red ink pen, wrote "withdrawn and dismissed with prejudice 13 May 2025," and affixed his initials.

That same day the acting Wing-level Staff Judge Advocate (SJA) – the main legal advisor to the convening authority – indorsed the Statement of Trial Results, which stated that Charges I, III, and IV and their associated specifications were "withdrawn and dismissed with prejudice."

On June 2, 2025, the Convening Authority—after consulting with his SJA—made the decision to take no corrective actions. Two days later, on 4 June 2025, the SJA indorsed a "corrected Statement of Trial Results," which also stated that that Charges I, III, and IV and

their associated specifications were “withdrawn and dismissed with prejudice.”

Then, on June 12, 2025 in the Entry of Judgement (EOJ), the military judge again stated that Charges I, III, and IV and their associated specifications were “withdrawn and dismissed with prejudice.” The SJA indorsed the EOJ with its provision regarding prejudice that same day.

On appeal, the AFCCA specified three issues, the third of which ordered Petitioner and the Government to brief the question of whether “Charges I, III and IV and their Specifications [were] dismissed with prejudice, vice dismissed with prejudice conditioned upon the completion of appellate review as agreed upon in the plea agreement?” Pet. App. 4a. In its brief to the AFCCA, the Government argued that prejudice would not attach to the dismissed charges “until the close of appellate review.”

The AFCCA never reached the merits of the issue it specified. Instead, the court summarily dismissed the issue with one sentence in the unpublished opinion stating, “As to specified issue (3), we determined this issue is not ripe and decline to address it.” Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW BECAUSE THE AFCCA DECIDED A CASE BASED ON THE RIPENESS DOCTRINE IN SUCH A WAY THAT DIRECTLY CONTRADICTS THIS COURT'S CASELAW ON RIPENESS, AND IN DOING SO MADE AN ENTIRE CLASS OF CASES UNREVIEWABLE.

In 1973 this Court held that ripeness is satisfied by a “sufficiently direct threat of personal detriment” such that litigants “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Doe v. Bolton*, 410 U.S. 179, 188 (1973). The AFCCA’s ruling directly contradicts that holding, and results in a situation whereby the Government’s actions of inducing a guilty plea to certain offenses by agreeing to dismiss other offenses with prejudice, then breach that plea agreement cannot be reviewed until an accused faces criminal prosecution for those offenses.

A. Petitioner bargained with the Government not just for a dismissal, but for an immediate dismissal with prejudice.

Petitioner’s and Government’s plea negotiations culminated in an agreement whereby Petitioner would plead guilty to four controlled substance offenses, and in exchange “[p]ursuant to this agreement . . . [t]he Government [would] withdraw and dismiss, with prejudice, [the other offenses] after such time as the military judge announces a sentence and before the court-martial adjourns.”

Petitioner upheld his end of the bargain and pled guilty to the four controlled substances offenses. Trial counsel then made an oral motion to dismiss

Petitioner's remaining charges and specifications with prejudice. The Government did not condition the attachment of prejudice on any other subsequent action occurring. Thus, the effect of the military judge granting that motion is that the judge ordered the prejudice to attach immediately. Indeed, the Government trial Counsel crossed-out Charges I, III, and IV and their specifications from the Charge Sheet in red ink and wrote, "withdrawn and dismissed with prejudice" without any qualifiers. Trial Counsel did not wait for the completion of appellate review to physically effectuate these charges' withdrawal and dismissal with prejudice, further showing that withdrawal and dismissal with prejudice is not conditioned upon that event.

On appeal, the Government took an entirely different position that partially strips Petitioner of the benefit of his bargain. Specifically, the Government has argued that prejudice will not attach to the dismissal of charges "until completion of appellate review." The Government further argued that Petitioner's success on any other issue he raised on appeal would constitute good cause to invalidate the plea agreement, return the case to the trial level, and try Petitioner for all the offenses brought against him, including those that were dismissed by the military trial judge upon the Government trial counsel's motion.

It is arguable that the plea agreement, which was drafted by the Government, was ambiguous. Specifically, the plea agreement states, "[t]he Government will withdraw and dismiss, with prejudice, [the remaining offenses] after such time as the military judge announces a sentence and before the court-martial adjourns." This language is

immediately followed by, “I understand that prejudice will not attach until the completion of appellate review of the offense to which I have pleaded guilty.” Both sentences cannot be correct; offenses cannot be dismissed with prejudice before a court martial adjourns, but then be dismissed without prejudice until appellate review is complete. To the degree that this causes an ambiguity in the plea agreement, that ambiguity should be decided in Petitioner’s favor. *See e.g., United States v. Tripodis*, 94 F.4th 1257, 1261 (11th Cir. 2024) (holding that “[w]hen the plea agreement language is ambiguous, it is construed against the government”).

B. The AFCCA’s finding that Petitioner’s issue was not ripe for review contradicts the Court’s caselaw on ripeness.

On appeal, the AFCCA specified an issue for briefing as to whether Charges I, II, and IV and their specifications were dismissed with prejudice when the military trial judge granted the trial counsel’s motion, or was the prejudice conditioned upon the completion of appellate review. Pet. App. 4a. As discussed above, the Government’s appellate counsel—rather than maintain the position of the Government’s trial counsel’s—took the position that prejudice did not attach until appellate review was completed and, in doing so, prejudiced Petitioner.

The AFCCA then avoided the issue that it specified by holding that the issue was not ripe for review. Pet. App. 4a. Thus, the AFCCA’s holding makes unreviewable the Government’s partial nullification of a benefit that an accused bargained for (the immediate dismissal of charges with prejudice in exchange for a plea of guilty on other charges) unless

the Government first attempts to criminally prosecute him for the offenses that they agreed to dismiss with prejudice.

“A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). In *Texas v. United States*, this Court employed the two-part test it previously articulated in *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). *Id.* at 301.

A claim is ripe if (1) the issue is fit for judicial decision, and (2) a hardship would result to a party if the court’s consideration is withheld. *Id.* First, reviewing the effect of a military trial judge’s ruling upon an appellant is certainly an issue that is fit for review; indeed, many actions at the appellate level involve this very thing. *See, e.g., United States v. Gurczynski*, 76 M.J. 381, 385 (C.A.A.F. 2017) (stating “this Court reviews the military judge’s decision directly”). Thus, the only question at issue in this case is whether a hardship would result to Petitioner if the Court’s consideration is withheld. The AFCCA’s implicit holding, therefore, is that Petitioner would suffer no hardship by the AFCCA withholding the consideration of the issue.

C. Petitioner has suffered a “sufficiently direct threat of personal detriment;” therefore, he “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.”

In *Doe v. Bolton*, this Court has held that ripeness is satisfied by a “sufficiently direct threat of personal

detriment” such that litigants “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” 410 U.S. at 188.

As discussed immediately below, Petitioner has suffered a sufficiently direct threat to satisfy any issue with ripeness. Not only has Petitioner lost a portion of benefit he bargained for in that the *timing* of the dismissal of his other offenses was a material term of his agreement, but also the Government’s position on appeal has made the issue ripe for review. Therefore, the AFCCA erred in finding the specified issue not ripe for review.

1. Petitioner’s partial loss of the benefit of bargain is a sufficiently direct threat to Petitioner’s detriment to satisfy ripeness.

“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971).

In the instant case, the Government promised to “withdraw and dismiss, with prejudice, [Petitioner’s other offenses] after such time as the military judge announces a sentence and before the court-martial adjourns.” This promise induced, at least in part, Petitioner to plead guilty to the other offenses. While at trial the Government appeared to abide by this promise, on appeal it has made a 180-degree turn, breached its promise, and argued that prejudice has not attached to the dismissal.

Further, the timing of the attachment of prejudice is significant. Under the terms of the agreement, the offenses were to be dismissed with prejudice before the court ever adjourned. Thus, Petitioner should

have been able to walk out of the courtroom with absolutely no fear that the offenses the Government promised would be dismissed with prejudice would ever even possibly be brought back against him. But, because the Government has gone against its promise, Petitioner has now had to live since the time of his court martial with these offenses hanging over his head as he awaits a possible decision by the Government to return those offenses to the trial level and prosecute him again. This is a sufficiently direct threat to satisfy ripeness.

2. The Government's position on appeal also creates a sufficiently direct threat to Petitioner's detriment to satisfy ripeness.

Additionally, Petitioner would endure further hardship if this Court, like the AFCCA and the CAAF, withheld consideration of the issue.

This Court has analyzed the parameters of the hardship requirement of the ripeness doctrine. On one end of those parameters is *Abbott Labs v. Gardener* where the hardship requirement was met, and the issue was found to be ripe for review. 387 U.S. at 152. *Abbott* involved the promulgation of an administrative regulation that forced a drug manufacturer into a situation where they could either comply with the regulation at great cost to themselves or face criminal prosecution for non-compliance. *Id.* at 152. Despite no criminal prosecution having been brought against the drug manufacturer, this Court found hardships to exist and the issue ripe. *Id.* at 149. Specifically, this Court said that “the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage” even though the drug

manufacturer had not yet been prosecuted for noncompliance. *Id.* at 152.

On the other end of those parameters is *Texas v. United States*, whereby the hardship requirement was not met and the issues were found to not yet be ripe for review because it relied on a “contingent future event[] that may not occur as anticipated, or indeed may not occur at all.” 523 U.S. at 300.

Petitioner’s case is more like *Abbott* than *Texas*. Like the plaintiff in *Abbott*, Petitioner faces a real non-speculative possibility of criminal prosecution. See 387 U.S. at 152. We know that it is a “real non-speculative possibility” because the Government appellant counsel argued for it at the AFCCA level. Specifically, Government appellant counsel argued that if the AFCCA found that prejudice had attached, then “Charges I, III, and IV have not yet been properly withdrawn or dismissed pursuant to the direction of the convening authority.” The Government appellate counsel further argued that if “any of Appellant’s guilty pleas were not provident, [the AFCCA] should do nothing regarding Charge I, III, and IV, and, instead, return the case to The Judge Advocate General to allow the convening authority to withdraw from the now cancelled original plea agreement.” Then, as the Government argued, if the convening authority so desires, the Government can “proceed to trial on all four charges, as well as any other charges or specifications for misconduct known by the legal office, law enforcement agencies, or the convening authority at the time the plea agreement was signed.”

This solidifies Petitioner’s prejudice because AFCCA did, in fact, find portions of Petitioner’s pleas improvident. Under the Government’s current

position, the plea agreement is cancelled, and the timing of the attachment of prejudice is irrelevant because the trial judge's dismissal order has been cancelled. Thus, it is the Government's position that the convening authority is free to retry Petitioner for all the original Charges and Specifications, as well as any other charges.

Where the Petitioner was once secure in the fact that there was no possibility that he could be tried by the Federal Government for the acts contained in Charges I, II, and IV and their Specifications, the Government has stripped that security away. Rather than abide by the results of the trial counsel's motion, the Government appellate counsel hung the sword of Damocles over Petitioner's head and explicitly stated that the Government was free to prosecute him again. Petitioner had security in the fact that the charges and specifications could not be referred against him, and the Government took that security away.

CONCLUSION

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

Respectfully submitted,

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