

No. _____

IN THE
Supreme Court of the United States

JOSHUA D. ALLEN; KYSHOWN D. CAMPBELL; WILLIAM
J. FUNDIS; AND KENNETH M. GRIFFIN

Petitioners,

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

In 1984, this Court acquired statutory certiorari jurisdiction over some decisions of what is now the United States Court of Appeals for the Armed Forces (CAAF). That jurisdiction, however, excluded review of any action by that court refusing to grant discretionary review of an intermediate military appellate court’s decision.

Effective December 22, 2024, Congress amended the statute governing this Court’s certiorari jurisdiction over the CAAF to include “[d]ecisions of” that court in cases in which it refused to grant discretionary review. 28 U.S.C. § 1259. The resulting statutory regime presents significant questions concerning the nature of this Court’s certiorari jurisdiction over a CAAF decision denying discretionary review. May this Court review the decision of the intermediate military appellate court that the CAAF declined to review, similar to its practice in the 28 U.S.C. § 1257 context, or is this Court’s expanded jurisdiction limited to the CAAF’s denial of discretionary review itself? If the latter, what standard should this Court apply?

Petitioners—four service members whose petitions for review the CAAF denied—ask this Court to decide this Question Presented:

Does the amended version of 28 U.S.C. § 1259 give this Court supervisory authority over the CAAF’s denial of discretionary review and, where good cause is shown, to remand for plenary consideration?

PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates appeals from four servicemembers convicted by court-martial.

All parties to this proceeding appear in the caption on the cover page of this petition. Those parties are Joshua D. Allen, Kyshown D. Campbell, William J. Fundis, and Kenneth M. Griffin, the Petitioners, and the United States, the Respondent.

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. Allen*, No. 26-0239/AF, U.S. Court of Appeals for the Armed Forces (judgment entered Aug. 12, 2026).
- *United States v. Allen*, No. ACM 40809, Air Force Court of Criminal Appeals (judgment entered June 25, 2026).
- *United States v. Campbell*, No. 26-0190/AF, U.S. Court of Appeals for the Armed Forces (judgment entered June 25, 2026).
- *United States v. Campbell*, No. ACM 40652, Air Force Court of Criminal Appeals (judgment entered Mar. 11, 2026).

- *United States v. Fundis*, No. 26-0165/AF, U.S. Court of Appeals for the Armed Forces (judgment entered May 12, 2026).
- *United States v. Fundis*, No. ACM 40689, Air Force Court of Criminal Appeals (judgment entered Jan. 29, 2026).
- *United States v. Griffin*, No. 26-0162/AF, U.S. Court of Appeals for the Armed Forces (judgment entered May 11, 2026).
- *United States v. Griffin*, No. ACM 40642, Air Force Court of Criminal Appeals (judgment entered Jan. 26, 2026).

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INTRODUCTION

This case presents a significant issue of first impression: what is the nature of this Court’s review of CAAF decisions under this Court’s relatively new authority to issue writs of certiorari in cases in which the CAAF denied discretionary review?

When reviewing denials of discretionary review by the highest court of a state or the District of Columbia Court of Appeals under 28 U.S.C. § 1257, this Court’s practice is to treat the intermediate appellate court’s decision as reviewable where the superior court has denied discretionary review. Stephen M. Shapiro et al., *Supreme Court Practice* § 3.13 (11th ed. 2019). The wording of 28 U.S.C. § 1259, however, suggests a different approach. That statute provides that this Court may review “[d]ecisions of the” CAAF by writ of certiorari in cases in which the CAAF “granted or refused to grant a petition for review.” When, as it does in the vast majority of cases, the CAAF denies a petition for review, the “[d]ecision[] of the” CAAF is that denial. Thus, the statute’s plain meaning suggests that this Court’s role is to supervise the CAAF’s exercise of its discretionary review rather than bypass the CAAF to address the intermediate appellate court’s decision in certiorari-worthy cases.

As a result of a statutory expansion of this Court’s certiorari jurisdiction over the CAAF to include cases in which that court denied review, what had previously been a trickle of military justice certiorari petitions is likely to grow into a steady stream. This Court should grant review to define the nature of this Court’s exercise of jurisdiction in the newly certiorari-eligible cases where the CAAF denied discretionary review.

OPINIONS AND ORDERS BELOW

The decision of the AFCCA in Petitioner Allen's case is unreported. It is available at 2026 CCA LEXIS 302, 2026 WL 1834572, and is reproduced at pages 2a–27a. The CAAF's decision denying review of Petitioner Allen's case is not yet reported. It is available at 2026 CAAF LEXIS 673, 2026 WL 2641286, and is reproduced at page 1a.

The decision of the AFCCA in Petitioner Campbell's case is unreported. It is available at 2026 CCA LEXIS 117, 2026 WL 688223, and is reproduced at pages 29a–84a. The CAAF's decision denying review of Petitioner Campbell's case is not yet reported. It is available at 2026 CAAF LEXIS 551, 2026 WL 2031020, and is reproduced at page 28a.

The decision of the AFCCA in Petitioner Fundis's case is unreported. It is available at 2026 CCA LEXIS 32, 2026 WL 242886, and is reproduced at pages 86a–101a. The CAAF's decision denying review of Petitioner Fundis's case is not yet reported. It is available at 2026 CAAF LEXIS 431, 2026 WL 1770142, and is reproduced at page 85a.

The decision of the AFCCA in Petitioner Griffin's case is unreported. It is available at 2026 CCA LEXIS 29, 2026 WL 194687, and is reproduced at pages 103a–38a. The CAAF's decision denying review of Petitioner Griffin's case is not yet reported. It is available at 2026 CAAF LEXIS 413, 2026 WL 1769338, and is reproduced at page 102a.

JURISDICTION

The AFCCA had jurisdiction over each Petitioner's case 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 orders denying review on August 12, 2026 (Petitioner Allen), June 25, 2026 (Petitioner Campbell), May 12, 2026 (Petitioner Fundis), and May 11, 2026 (Petitioner Griffin). On September 15, 2026, the Chief Justice of the United States granted Petitioner Campbell's application for an extension of time to and including November 23, 2026. On July 10, 2026, the Chief Justice of the United States granted Petitioner Fundis's application for an extension of time to and including October 9, 2026. On July 24, 2026, the Chief Justice of the United States granted Petitioner Griffin's application for an extension of time to and including October 8, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

Article 67, UCMJ, 10 U.S.C. § 867, provides, in pertinent part:

Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in . . . (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

Article 67a, UCMJ, 10 U.S.C. § 867a, provides, in pertinent part:

Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28.

28 U.S.C. § 1259 provides, in pertinent part:

Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases: . . .

(3) Cases in which the Court of Appeals for the Armed Forces granted or refused to grant a petition for review under section 867(a)(3) of title 10.

STATEMENT OF THE CASE

A. Petitioner Allen

Petitioner Allen, then an Air Force Airman First Class (E-3), was tried by a general court-martial in 2024. App., *infra*, at 2a. The court found him guilty of one specification (the military equivalent of a count) of sexually assaulting his wife, AG, on divers occasions when he knew or reasonably should have known that she was asleep in violation of Article 120, UCMJ, 10 U.S.C. § 920. *Id.*

On August 25, 2022, AG reported to the Air Force Office of Special Investigations (OSI) that Petitioner Allen had sexually assaulted her. *Id.* at 5a. During the resulting investigation, OSI agents asked AG for consent to access her cell phone. *Id.* She agreed but limited her consent to a search of the phone for

pictures, videos, and text messages regarding Petitioner Allen from July 1, 2021, to August 25, 2022. *Id.* OSI agents then created a digital extraction of all data from her phone. *Id.* The prosecution provided the defense with discovery from the extraction limited to the scope of AG's consent. *Id.* at 5a–9a. The defense then filed a motion seeking access to all data extracted from AG's phone. *Id.* at 7a. The motion invoked the defense's right to discovery under Rule for Courts-Martial (R.C.M.) 701 and 703. *Id.* at 8a–9a.

R.C.M. 701 provides, in relevant part, that “upon request of the defense, the Government shall permit the defense to inspect” any item that “is within the possession, custody, or control of military authorities” and “is relevant to the defense.” R.C.M. 701(a)(2)(A), *Manual for Courts-Martial, United States* (MCM) (2019 ed.). R.C.M. 703 provides, in relevant part, that “[e]ach party is entitled to the production of evidence which is relevant and necessary.” R.C.M. 703(e)(1). The military judge denied the defense access to evidence from the cell phone extraction that was within OSI's possession but that exceeded the scope of AG's consent. App., *infra*, at 8a–9a. Petitioner Allen was ultimately convicted of sexually assaulting AG. *Id.* at 2a.

On appeal to the AFCCA, Petitioner Allen challenged the military judge's ruling. *Id.* at 4a. The AFCCA denied relief on two bases. First, it ruled that notwithstanding R.C.M. 701's language, the Government need not divulge information to the defense that it received under limited consent to access, as long as the Government's agents did not exceed the scope of the consent. *Id.* at 13a–14a. Second, it held that the defense had not made an

adequate showing that unproduced items were relevant to the defense's preparation. *Id.* at 14a.

Petitioner Allen petitioned the CAAF to review his case, asking the court to decide whether the alleged “victim’s phone data was within the possession, custody, or control of the government for purposes of R.C.M. 701(a) where the government made a full forensic extraction of the data pursuant to limited consent” and, if so, whether relief is warranted. Supplement to Petition for Grant of Review at 1, *United States v. Allen*, 2026 CAAF LEXIS 673, 2026 WL 2641286 (C.A.A.F. Aug. 12, 2026) (No. 26-0239/AF) (filed July 8, 2026) [hereinafter Allen Supplement]. The Government waived its opportunity to submit a reply. Waiver Letter (filed July 22, 2026). The CAAF summarily denied review. App., *infra*, at 1a.

B. Petitioner Campbell

Petitioner Campbell, then an Air Force Staff Sergeant (E-5), was tried by a general court-martial in 2023. *Id.* at 29a. The court found him guilty of one specification of domestic violence against his then-wife, RC, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. *Id.* at 30a–31a.

RC discovered an SD card among Petitioner Campbell’s belongings. When she examined its contents, she found that the SD card contained sexual videos and photographs that indicated Petitioner Campbell had been engaging in extramarital affairs. She and Petitioner Campbell had a short telephone conversation during which she told him that she “found something.” *Id.* at 32a. When Petitioner Campbell arrived home, RC was on her cell phone with a friend. *Id.* at 32a–33a. According to RC, he tried

to grab her cell phone but she would not release it. He then allegedly hit her in the rib cage twice, causing her to let go of the phone. *Id.* at 33a. That was the basis of Petitioner Campbell's domestic assault conviction.

The defense moved in limine to exclude RC's testimony concerning two previous incidents in which Petitioner Campbell allegedly assaulted her. *Id.* at 43a–44a. The military judge admitted the evidence under Military Rule of Evidence 404(b), MCM (2019 ed.), finding that it went to Petitioner Campbell's "motive." *Id.* at 46a. The military judge reasoned that it demonstrated that when RC confronted Petitioner Campbell with allegations of infidelity, he responded by assaulting her. *Id.* at 48a–49a. However, there was no evidence that RC confronted Campbell with allegations of infidelity before the charged assault. Moreover, RC testified to other incidents in which she accused Petitioner Campbell of infidelity with no resulting violence. Trial Tr. 29. In ruling that the evidence of the uncharged misconduct was admissible, the military judge explained that he found "the strength of proof of these uncharged assaults is strong" and twice stated that its probative value was "high." App. Ex. VIII, ¶¶ 59, 60, 65.

Sitting as the factfinder, the military judge convicted Petitioner Campbell of domestic violence. App., *infra*, at 30a. Petitioner Campbell appealed the conviction to the AFCCA on several grounds, including that the military judge erred by admitting evidence of the previous alleged assaults against RC. The AFCCA rejected that argument and affirmed the conviction. *Id.* at 42a–61a, 84a.

Petitioner Campbell petitioned the CAAF to review his case, asking the court to decide “[w]hether the military judge err[ed] by admitting evidence of prior alleged domestic assaults as motive evidence under Military Rule of Evidence 404(b)(2) rather than excluding it as propensity evidence under 404(b)(1).” Supplement to Petition for Grant of Review at 1, *United States v. Campbell*, 2026 CAAF LEXIS 551, 2026 WL 2031020 (C.A.A.F. July 25, 2026) (No. 26-0190/AF) (filed May 26, 2026) [hereinafter *Campbell Supplement*]. The Government waived its opportunity to submit a reply. Waiver Letter (filed May 26, 2026). The CAAF summarily denied review. App., *infra*, at 28a.

C. Petitioner Fundis

Petitioner Fundis, an Air Force major (O-4), was tried by a general court-martial in 2024. App., *infra*, at 86a. Pursuant to a plea agreement, the court found him guilty of two specifications of assault consummated by a battery upon his spouse in violation of Article 128, UCMJ, 10 U.S.C. § 928, and eight specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. *Id.* at 87a. The military judge sentenced him to a dismissal (the officer equivalent of a dishonorable discharge), confinement for 40 months, and a reprimand. *Id.* at 88a.

Petitioner Fundis was a Tactical Air Control Party member and operated as a Joint Terminal Air Controller. Trial Tr. 328. He spent a significant portion of his Air Force service in combat and was awarded the Bronze Star in 2021 for meritorious service supporting the Special Operations Joint Task Force–Afghanistan. Def. Ex. C at 12.

In the military justice system, judges render sentences following an adversarial presentencing hearing. In an unsworn statement delivered during the defense's case-in-chief at that hearing, Petitioner Fundis detailed multiple stressors that impacted his judgment during the years when the offenses occurred, specifically upon his return home from Afghanistan. Trial Tr. 326–48. Among these stressors were the nature of his combat service and the loss of his brother and parents. *Id.* at 334–36.

Petitioner Fundis was “boots on the ground” during the 2021 withdrawal from Afghanistan and described the experience as “rapidly changing” and “confusing.” *Id.* at 329–30. He explained that as the mission became “ambiguous,” it became “very unclear . . . who we were killing.” *Id.* at 330. At the time, Petitioner Fundis was married to AF (one of the victims). *Id.* at 331. During his deployment, their relationship deteriorated to such an extent that AF stopped facilitating communication between Petitioner Fundis and his children. *Id.*

When Petitioner Fundis returned from Afghanistan, he struggled with transitioning back to family life. *Id.* at 332–33. AF was not there on the day he came home because she was at basic military training. *Id.* at 333. The very next morning, his in-laws, who were watching their children, withdrew their help with childcare. *Id.* Petitioner Fundis was in shock as he had to quickly adjust from his mission in Afghanistan to being a full-time single parent of multiple children. *Id.* He “took everything mentally frustrating from the deployment and pushed it aside.” *Id.* The stress he already felt was compounded by guilt when he learned of the attack at Abbey Gate that took place just one week after his return home—that

attack was at a checkpoint he had overseen before his departure. *Id.* at 334¹; *see also* Def. Ex. H at 13–14.

In the wake of his deployment, Petitioner Fundis's reactions during arguments became violent, and his marriage with AF deteriorated. Trial Tr. 336–37. Shortly after his return to the United States, Petitioner Fundis and AF got divorced, resulting in a custody battle. *Id.* at 339–40. All those stressors continued into his relationship with SF, whom he met in 2022 and married soon after. *Id.* at 337–40. These strains on his marriage caused him to seek help, including checking himself into inpatient treatment. Trial Tr. 340–44; *see* Def. Exs. H, I, J. During that treatment, Petitioner Fundis was diagnosed with post-traumatic stress disorder (PTSD), insomnia, and depressive disorder, and given medications for those conditions. Trial Tr. 342–43.

Based on the acts described in the stipulation of fact, Petitioner Fundis entered into a plea agreement that required any sentence of confinement to be calculated using an agreed-upon table. App. Ex. XIV at 4. He also agreed that a dismissal *may* be adjudged, while the Government agreed that a dismissal need not be adjudged. App. Ex. XIV.

Based on his guilty pleas, Petitioner Fundis was convicted of ten total specifications—two specifications of assault consummated by a battery

¹ Thirteen U.S. service members were killed in the August 26, 2021, Abbey Gate attack during the non-combatant evacuation of Kabul, Afghanistan. *See* U.S. Dep't of Defense, U.S. Central Command Releases Report on August Abbey Gate Attack (Feb. 4, 2022), <https://www.war.gov/News/News-Stories/Article/article/2924398/uscentral-command-releases-report-on-august-abbey-gate-attack/>.

and eight specifications of domestic violence. Charge Sheet; Trial Tr. 28, 142–43.

The trial judge sentenced Petitioner Fundis to forty months' confinement, a dismissal, and a reprimand. App., *infra*, at 88a.

Under the version of the UCMJ that applied to Petitioner Fundis's case, the intermediate military appellate courts performed a unique review of the appropriateness of sentences. *Id.* at 97a. On appeal to the AFCCA, Petitioner Fundis challenged the dismissal as inappropriately severe. *Id.* at 88a. The AFCCA found "that the portion of [Petitioner Fundis's] sentence which included a dismissal is not inappropriately severe punishment." *Id.* at 99a.

Petitioner Fundis petitioned the CAAF to review his case, asking the court to decide whether the AFCCA "abused its discretion by failing to take into account Major Fundis's history of combat service and combat-related mental health diagnoses in determining whether his sentence was too severe." Supplement to Petition for Grant of Review at 1, *United States v. Fundis*, 2026 CAAF LEXIS 431, 2026 WL 1770142 (C.A.A.F. May 12, 2026) (No. 26-0165/AF) (filed Apr. 21, 2026). The Government waived its opportunity to submit a reply. Waiver Letter (filed Apr. 27, 2026). The CAAF summarily denied review. App., *infra*, at 85a.

D. Petitioner Griffin

Petitioner Griffin, then an Air Force master sergeant (E-7), was tried by a general court-martial in 2024. *Id.* at 103a. The court found him guilty of two specifications of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. *Id.* at 104a.

Petitioner Griffin was involved in a romantic relationship with JA. *Id.* at 106a. JA had a daughter, LA. *Id.* Petitioner Griffin broke off his relationship with JA around October 2020. *Id.* at 107a, 109a. While Petitioner Griffin was dating her mother, LA had a close relationship with him; she considered Petitioner Griffin to be a father figure. *Id.* at 109a. After the breakup, LA saw that her mother was upset by the relationship ending. *Id.* at 107a. In November 2020, LA removed Petitioner Griffin from her social media account. *Id.* In January 2021, JA learned that Petitioner Griffin was seeing another woman. *Id.* When LA learned of Petitioner Griffin's new relationship, she thought he had betrayed her mother and was angry. *Id.* at 108a–09a.

After her breakup with Petitioner Griffin, JA overheard LA and one of LA's friends talking about something that an unnamed male had done to LA. *Id.* Upon questioning by JA, LA indicated that Petitioner Griffin had hurt her. *Id.* That led to an investigation that culminated in the charges against Petitioner Griffin. *Id.* at 108a–09a.

At trial, the prosecution elicited testimony concerning two hearsay statements LA had made. *Id.* at 109a. LA's friend AH testified that LA had told her that her mother's boyfriend had touched her. *Id.* at 110a. Accounts differed as to when LA made that statement. According to LA, the conversation occurred in February 2021, about a week before she made her allegation about Petitioner Griffin to her mother, and thus long after she developed her animus against him. *Id.* at 110a, 115a. AH, on the other hand, testified that the conversation occurred sometime around the end of the 2020 school year and before August 2020. *Id.* at 110a. The defense argued that the statement was

inadmissible as a prior consistent statement because, according to LA's own testimony, it was made after her motive to fabricate had already arisen. *Id.* The military judge, however, credited AH's testimony and admitted it as a prior consistent statement. *Id.* at 111a–12a.

The military judge also allowed testimony concerning a statement LA had made to her friend HC in 2021—after LA had become angry with Petitioner Griffin because of his treatment of her mother. Trial Tr. 413, 418–19. HC's testimony suggested that LA made the statement to him before she told her mother that Petitioner Griffin had hurt her. *Id.* at 413. LA, however, testified that she made the statement to HC only after telling her mother. App., *infra*, at 116a. The military judge held the statement was admissible because he found it was made before LA had made her allegation against Petitioner Griffin to her mother. *Id.* at 111a. The military judge ultimately found Petitioner Griffin guilty of two specifications of sexually abusing LA. *Id.* at 104a.

Petitioner Griffin appealed to the AFCCA on several grounds, including that the military judge erred by admitting evidence of the prior consistent statements. *Id.* at 105a. The AFCCA disagreed. *Id.* at 114a. The court ruled that the military judge had not abused his discretion by crediting AH's account of when LA had told her about Petitioner Griffin touching her, notwithstanding LA's divergent testimony. *Id.* at 114a–15a. As to LA's statement to HC, the AFCCA ruled that “the basis for admission as a prior consistent statement is less compelling. Even so, the military judge's ruling was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Accordingly, we find the military judge did not abuse

his discretion.” *Id.* at 116a (quotation marks and citation omitted).

Petitioner Griffin petitioned the CAAF to review his case, asking the court to decide “[w]hether the military judge err[ed] by admitting two prior ‘consistent’ statements when there was conflicting testimony about whether the statements preceded the motive to fabricate the allegations, and the statements were not ‘for the most part consistent’ on facts of central importance.” Supplement to Petition for Grant of Review at 1, *United States v. Griffin*, 2026 CAAF LEXIS 413, 2026 WL 1769338 (C.A.A.F. May 11, 2026) (No. 26-0162/AF) (filed Apr. 17, 2026). The Government waived its opportunity to submit a reply. Waiver Letter (filed Apr. 20, 2026). The CAAF summarily denied review. App., *infra*, at 102a.

REASONS FOR GRANTING THE PETITION

This Court now has a unique certiorari authority over decisions by the CAAF. This Court may review by writ of certiorari “[d]ecisions of the” CAAF in cases in which that court “refused to grant a petition for review.” 28 U.S.C. § 1259. This Court should grant certiorari to determine the nature of its review of such cases.

I. The expanded 28 U.S.C. § 1259 provides this Court with supervisory authority over the CAAF’s exercise of its discretionary jurisdiction.

A. Overview of the CAAF’s exercise of discretionary jurisdiction.

The military justice system includes three judicial tiers. Special and general courts-martial are the trial-level criminal courts. *See* Arts. 16–19, UCMJ, 10 U.S.C. §§ 816–19. The intermediate appellate courts, to which any special or general court-martial conviction may be appealed automatically or as of right (depending on the sentence), are the Courts of Criminal Appeals (CCAs). Art. 66, UCMJ, 10 U.S.C. § 866. There are four CCAs, one for each military department and another for the Coast Guard.

Above the CCAs is the CAAF. The CAAF consists of five civilian judges appointed by the President with the advice and consent of the Senate for fifteen-year terms. Art. 142, UCMJ, 10 U.S.C. § 942. The CAAF must consider two types of cases: (1) those in which a CCA has affirmed a death sentence, and (2) those that one of the Judge Advocates General sends to the CAAF for review. Art. 67(a)(1), (2), UCMJ, 10 U.S.C. § 867(a)(1), (2). Cases falling within the former category are rare; since the current military death penalty system took effect in 1984, the CAAF has received only ten cases with an affirmed death sentence (one of which it received twice).² Cases in the second category are more common but account for only

² Eugene R. Fidell et al., *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* § 4.03[9] (25th ed. 2026).

13 percent of the cases the CAAF has plenary reviewed over the past three terms combined.³

Although the statutory authority for the Judge Advocates General to certify cases to the CAAF is facially “neutral as to which party (an accused or the Government) may be the one on whose behalf a Judge Advocate General will act,” in practice “most” (in fact, almost all) “of the certified issues are submitted in cases where the accused has triumphed in the court below.” *United States v. Caprio*, 12 M.J. 30, 31 n.1 (C.M.A. 1981). The certification power thus acts as a lopsided vehicle for government appeals to the CAAF—the government may obtain review as of right via certification by the applicable Judge Advocate General while convicted service members must seek seldom-granted discretionary review.

The bulk of the cases the CAAF reviews arrive via petition for grant of review filed by service members whose convictions were affirmed by the applicable CCA. CAAF FY 2025 Annual Report, *supra* note 3, at 7; CAAF FY 2024 Annual Report, *supra* note 3, at 7; CAAF FY 2023 Annual Report, *supra* note 3, at 6.

³ See Report of the United States Court of Appeals for the Armed Forces, October 1, 2024 to September 30, 2025, at 7, <https://www.armfor.uscourts.gov/annual/FY25AnnualReport.pdf> [hereinafter CAAF FY 2025 Annual Report]; Report of the United States Court of Appeals for the Armed Forces, October 1, 2023 to September 30, 2024, at 7, <https://www.armfor.uscourts.gov/annual/FY24AnnualReport.pdf> [hereinafter CAAF FY 2024 Annual Report]; Report of the United States Court of Appeals for the Armed Forces, October 1, 2022 to September 30, 2023, at 6, <https://www.armfor.uscourts.gov/annual/FY23AnnualReport.pdf> [hereinafter CAAF FY 2023 Annual Report].

A convicted service member seeking discretionary review files a “supplement to petition for grant of review,” which sets out the basis for the CAAF’s exercise of jurisdiction. *See* C.A.A.F. R. 21(a), (b). The Government may then file a brief in opposition or a letter summarily supporting or opposing review. *Id.* at R. 21(c)(2). As it did in each of Petitioners’ cases, the Government typically summarily opposes review while waiving the right to submit a brief in opposition.

The CAAF denies the great majority of convicted service members’ petitions seeking discretionary review. Over the past three terms, the CAAF acted on 684 convicted service members’ petitions for review, denying 547 (80%) of them. CAAF FY 2025 Annual Report, *supra* note 3, at 8; CAAF FY 2024 Annual Report, *supra* note 3, at 8; CAAF FY 2023 Annual Report, *supra* note 3, at 7. In many instances, including Petitioners’ cases, the CAAF has denied review despite the presence of important legal issues.

The CAAF’s output is underwhelming. In its October 2024 term, it issued opinions in just 35 cases. CAAF FY 2025 Annual Report, *supra* note 3, at 1. Its previous three terms were even less busy, producing opinions in only 28, 25, and 25 cases, respectively. CAAF FY 2024 Annual Report, *supra* note 3, at 1. CAAF FY 2023 Annual Report, *supra* note 3, at 1; Report of the United States Court of Appeals for the Armed Forces, October 1, 2021, to September 30, 2022, at 13, <https://www.armfor.uscourts.gov/annual/FY22AnnualReport.pdf>. For comparison, in its 2000 Term, the CAAF issued 110 opinions. Opinions: 2000 Term of Court, Court of Appeals for the Armed Forces, <https://www.armfor.uscourts.gov/opinions/2000Term.htm>.

In light of the constricted scope of review that applies to federal civilian courts' collateral review of military convictions, *see, e.g., Santucci v. Commandant, U.S. Disciplinary Barracks*, 66 F.4th 844 (10th Cir. 2023); *Bergdahl v. United States*, __ F.4th __, Nos. 24-5150, 24-5154, 2026 U.S. App. LEXIS 26758, 2026 WL 2577131 (D.C. Cir. Sep. 1, 2026), the CAAF is generally a convicted service member's last realistic potential source of legal relief.

B. History of this Court's certiorari jurisdiction over military justice cases.

This Court first obtained statutory certiorari jurisdiction over decisions by the CAAF (then named the United States Court of Military Appeals (CMA)) in 1984. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405–06 (effective July 1, 1984) (codified as amended at 28 U.S.C. § 1259, 10 U.S.C. § 867a). That legislation expressly precluded this Court from reviewing by writ of certiorari any action of the CMA “in refusing to grant a petition for review.” *Id.* § 10(c)(2), 97 Stat. at 1406. That restriction remained in place until the NDAA for FY 2024's reforms, which became effective December 22, 2024.⁴

The statutory provision expanding this Court's certiorari jurisdiction over military justice cases has scant legislative history. The provision originated in the House Armed Services Committee (HASC) Chairman's Mark of the NDAA for FY 2024. Chairman's Mark, H.R. 2670—National Defense Authorization Act for Fiscal Year 2024, at 73, <https://docs.house.gov/meetings/AS/AS00/20230621/1>

⁴ National Defense Authorization Act for Fiscal Year (NDAA for FY) 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136, 261 (2023) (codified at 28 U.S.C. § 1259(3); 10 U.S.C. § 867a).

15846/BILLS-118HR2670ih-U1.pdf. The provision was included in the bill as reported by HASC. H.R. 2670, § 541, 118th Cong., 1st Sess. (2023) (as reported in House on June 30, 2023), <https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670rh.pdf>. The accompanying committee report succinctly, albeit imprecisely, explained, “This section would permit the Supreme Court of the United States to review writs of certiorari regardless of whether a petition for review was granted or denied by the Court of Appeals for the Armed Forces.” H.R. Rep. No. 118-125, at 165 (2023). The provision remained in the bill as passed by the House. *See* H.R. Rep. No. 118-301, at 1050–51 (2023). The Senate’s version of the NDAA for FY 2024 contained no similar provision. *See id.* at 1051. A slight revision of HASC’s original language emerged from the House-Senate conference committee. *See id.* The conference report explained:

The House bill contained a provision (sec. 542) that would amend section 1259 of title 28, United States Code, and article 67a of the Uniform Code of Military Justice (10 U.S.C. 867a(a)) to authorize the Supreme Court of the United States to review, by a writ of certiorari, any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would make this provision effective one year after the date of enactment of this Act, and would apply to any action of the United States

Court of Appeals for the Armed Forces in granting or refusing to grant a petition for review submitted to such Court for the first time on or after such effective date.

Id. at 1050–51.

C. Construing the expanded 28 U.S.C. § 1259.

28 U.S.C. § 1259 now provides that this Court may review “[d]ecisions of the” CAAF in “[c]ases in which the” CAAF “granted or refused to grant a petition for review.” In a case in which the CAAF denies review, its decision is its choice not to exercise discretionary review, which does not constitute a substantive ruling. The CAAF has made that point clear by noting that “denial of a petition, although it allows the decision below to stand, does not suggest that we either agree or disagree with the merits of a lower court’s resolution of the case.” *United States v. McGriff*, 78 M.J. 487, 487 (C.A.A.F. 2019) (per curiam). Thus, 28 U.S.C. § 1259 does not appear to create an opportunity for this Court to review the substance of a CCA’s opinion where the CAAF has denied review. Rather, 28 U.S.C. § 1259’s plain meaning is that this Court has the statutory authority to review the CAAF’s discretionary decisions to deny review—and to do no more—in cases in which the CAAF “refused to grant a petition for review.” 28 U.S.C. § 1259(3).

In a case in which the CAAF has denied review, there is no independent grant of statutory authority for this Court to review anything other than the CAAF’s denial itself. Thus, in such a case, this Court’s authority is limited to reversing the CAAF’s decision to deny review and returning the record to that Court

for review. In the rare instance in which the underlying issue itself is certiorari-worthy, the losing party at CAAF can then seek certiorari once the CAAF has rendered a substantive decision.

“When Congress acts to amend a statute,” this Court will presume that Congress “intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995). Thus, this Court should interpret the amendment to 28 U.S.C. § 1259 in a manner to ensure that it is meaningful. Erecting a standard of review that would never result in a reversal of the CAAF’s denial of review would, therefore, be inappropriate.

This Court should determine the appropriate standard to apply in exercising its expanded certiorari jurisdiction. Even though the CAAF is a court rather than an administrative agency, *see Ortiz v. United States*, 585 U.S. 427 (2018), this Court’s case law governing judicial review of agency decisions provides a helpful model. The Administrative Procedure Act allows a reviewing court to determine whether an agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This Court has clarified that in carrying out that authority, a reviewing court considers whether “the agency committed ‘a clear error of judgment.’” *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

If this Court were to apply a “clear error of judgment” review of the CAAF’s decisions to deny review, carrying out that authority would require an examination of any given case. When the CAAF denies

review, it does so via a cursory non-substantive order. *See, e.g.*, App., *infra*, at 1a, 28a, 85a, 102a. Thus, the CAAF’s decision itself will not indicate whether it exercised its judgment well or poorly. This Court’s review of the underlying case would be necessary.

In carrying out this new authority, this Court should apply the “clear error of judgment” standard while erring on the side of directing the CAAF to review issues presented to it. Although this Court will rarely grant review to correct an erroneous factual finding or the misapplication of a properly stated rule of law, S. Ct. R. 10, the CAAF’s role is to provide a civilian judicial check on the military justice system. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). Thus, it should protect service members from erroneous convictions and unlawful sentences. When the CAAF fails to perform this function by denying a petition for grant of review notwithstanding good cause, it is appropriate for this Court to return the case to the CAAF for plenary consideration.

The 2023 amendment thus makes this Court the CAAF’s supervisor in the exercise of its discretionary jurisdiction. This Court should grant review to announce that scope of its expanded 28 U.S.C. § 1259 authority.

II. This case is a good vehicle for construing the expanded 28 U.S.C. § 1259.

This case provides a good vehicle for this Court to consider the nature of its review of cases in which the CAAF denied discretionary review. It presents four instances in which petitioners established good cause for review, but the CAAF nevertheless denied their petitions. Collectively, these cases demonstrate that the CAAF’s high denial rate reflects its refusal to

review some cases that present issues important to the military justice system as a whole, as well as to individual convicted service members who presented good cause for review. The expanded 28 U.S.C. § 1259(3) allows this Court to exercise supervisory authority over the CAAF and direct it to review Petitioners' cases.

A. Petitioner Allen demonstrated good cause for review.

Petitioner Allen's supplement to the CAAF raised a particularly significant unresolved legal issue: whether an alleged victim's cell phone data were within the possession, custody, or control of the government for purposes of the military's liberal discovery regime when government agents had made a full forensic extraction of the cell phone's data pursuant to the alleged victim's limited consent. Allen Supplement at 1.

The CAAF had previously found good cause to grant review of that issue in *United States v. Braum*, 85 M.J. 370 (C.A.A.F. 2025) (mem.). In that case, however, the CAAF left the substantive issue undecided. There was no opinion of the court. *United States v. Braum*, __ M.J. __, No. 25-0046, 2026 CAAF LEXIS 343, 2026 WL 1002044 (C.A.A.F. Apr. 8, 2026). Two judges concluded that any error was harmless beyond a reasonable doubt and, therefore, did not reach the substantive issue. *Id.*, 2026 CAAF LEXIS 343, at *1–12 (Sparks, J., joined by Maggs, J.). Two judges concluded that the alleged victim's Fourth Amendment interest prevailed over the military justice system's discovery rule. *Id.* at *12–24 (Hardy, J., joined by Johnson, J.). The fifth judge concluded that the discovery rule required providing relevant

contents of the alleged victim's cell phone extraction to the defense notwithstanding the limited consent and that the military judge's erroneous failure to compel that discovery was not harmless beyond a reasonable doubt. *Id.* at *24–29 (Ohlson, C.J.).

In light of *Braum's* failure to resolve the issue, granting review in Petitioner Allen's case to settle the matter would have been appropriate. Yet the CAAF declined to review Petitioner Allen's case. App., *infra*, at 1a. That harmed both Petitioner Allen, who was deprived of the chance to overturn his court-martial conviction, and the military justice system, which was deprived of a definitive resolution of an important recurring legal issue.

B. Petitioner Campbell demonstrated good cause for review.

Petitioner Campbell was found guilty of an act of domestic violence against his then-wife, RC, that purportedly occurred in 2021. App., *infra*, at 30a–31a. At Petitioner Campbell's court-martial, the military judge admitted evidence of two purported incidents of domestic violence against RC in 2018. *Id.* at 43a–44a. In ruling that the evidence was admissible under Military Rule of Evidence 404(b), the military judge reasoned that Petitioner Campbell engaged in a pattern of responding violently when RC confronted him with evidence of infidelity. *Id.* at 46a–47a. But the military judge's ruling was influenced by a misunderstanding of the facts; RC never claimed to have confronted Petitioner Campbell with evidence of infidelity preceding the charged act. Moreover, the military judge failed to appreciate that RC testified about other incidents in which she did confront Petitioner Campbell with allegations of infidelity with

no ensuing violent reaction. Trial Tr. 29. Thus, the military judge erred by finding a trigger-and-response causal chain that he believed justified admitting the uncharged misconduct.

The military judge's erroneous admission of the evidence was prejudicial. In his ruling admitting the evidence of the two uncharged acts under Military Rule of Evidence 404(b), he twice referred to its probative value as "high." App. Ex. VIII, ¶¶ 60, 65. Sitting as the factfinder in Petitioner Campbell's case, the same military judge found him guilty of the 2021 domestic assault allegation.

On appeal before the AFCCA, Petitioner Campbell challenged the military judge's Military Rule of Evidence 404(b) ruling. App., *infra*, at 31a. The AFCCA denied relief. *Id.* at 70a. The AFCCA reasoned that the "military judge was not clearly wrong in his determination of the facts." *Id.* at 81a. The court expressly endorsed the military judge's observation that "on the night of the charged offense of 30 June 2021, RC confronted [Petitioner Campbell] about evidence of infidelity she had discovered on [an] SD card, and [Petitioner Campbell] reacted with physical violence by punching RC in the ribcage with his fist and smashing her phone." *Id.* at 82a. But that description was factually erroneous. RC never indicated that she confronted Petitioner Campbell with evidence of infidelity on June 30, 2021.

Petitioner Campbell's supplement to petition to grant of review before the CAAF emphasized the factual error in the military judge's Military Rule of Evidence 404(b) analysis. Campbell Supplement at 15–17. It also noted that despite the military judge's reasoning that RC's allegations of infidelity triggered

violence by Petitioner Campbell, there were multiple instances of RC making such allegations with no resulting violence. *Id.* at 17. Petitioner Campbell's supplement also identified numerous instances in which RC's accounts of what occurred on June 30, 2021, were belied by other highly reliable evidence, including police body camera footage. *Id.* at 9.

In addition to relying on erroneous facts to hold that the military judge's Military Rule of Evidence 404(b) ruling was not erroneous, the AFCCA also held that if the ruling was erroneous, it was harmless. *Id.* at 58a–61a. That ruling downplayed the significance of RC's testimony about Petitioner Campbell's prior violent acts; the AFCCA opined that “the quality” of the uncharged acts evidence “was not particularly high, having taken place nearly three years prior to the charged offenses” and lacking “corroborat[ion] by any other witnesses.” *Id.* at 60a. But the AFCCA overlooked the fact that the military judge—who was the guilt/innocence factfinder—considered the quality of the evidence to be “strong” and twice opined that it was “highly probative.” App. Ex. VIII, ¶¶ 59, 60, 65. The AFCCA's harmless error analysis was thus improperly predicated on *its* assessment that the evidence should have had little weight rather than clear indicia that the factfinder thought it had great weight. Petitioner Campbell's supplement called that error to the CAAF's attention. Campbell Supplement at 24. The supplement also demonstrated that the AFCCA applied a legally incorrect standard in making its harmlessness determination. *Id.* at 24–25. And yet the CAAF denied review without explanation. App., *infra*, at 28a.

In light of the clear indications that Petitioner Campbell's trial was tainted by improperly admitted

evidence, that the factfinder believed that evidence was particularly salient, and that the AFCCA misperceived key facts, his case warranted further review.

C. Petitioner Fundis demonstrated good cause for review.

At trial, Petitioner Fundis presented substantial evidence in extenuation and mitigation, including a diagnosis of PTSD and depressive disorder directly linked to his combat service. Def. Exs. H, I, J. As noted in the AFCCA's opinion, Petitioner Fundis presented "copies of mental health records, which outlined his diagnosis of major depressive disorder and post-traumatic stress disorder," and explained in his unsworn statement his belief that "the trauma he experienced during a combat deployment caused him to lose his 'morality.'" App., *infra*, at 96a.

Despite acknowledging the existence of this evidence, the AFCCA's analysis is devoid of any discussion of its weighing of those mitigators. The opinion contains a single conclusory sentence stating it has "given individualized consideration to [Petitioner Fundis], including evidence of his mental health history and post-deployment struggles [and] record of service." *Id.* at 99a. After that sentence, the court dedicated the remainder of the "Analysis" section of its opinion to a detailed discussion of the aggravating circumstances of the offenses, using them as the sole basis to conclude that the sentence is not inappropriately severe. *Id.* at 98a–100a.

The AFCCA's opinion does not explain (1) how it weighed Petitioner Fundis's combat record and decorations; (2) how it factored his diagnoses of PTSD and Major Depressive Disorder into the sentencing

calculus; and (3) why these powerful mitigating factors, directly linked to a loss of judgment and control, were insufficient to warrant relief from the adjudged dismissal.

A Court of Criminal Appeals' duty under the version of 10 U.S.C. § 866 that applies to Petitioner Fundis's case is not merely to acknowledge the evidence in the record, but to perform a meaningful and holistic reassessment of the sentence. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106–07 (1959)) (holding that “sentence appropriateness should be judged by ‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offenses and the character of the offender.’”). Ignoring a combat veteran's PTSD diagnosis and the resulting symptoms fails to provide the type of assessment *Snelling* mandates. The AFCCA was required to look at Petitioner Fundis as an individual, not just at the conduct to which he pled guilty.

By simply listing the mitigation and extenuation evidence and then proceeding to an analysis based entirely on aggravation, the AFCCA abused its discretion. *See United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010) (holding that the CAAF will review a CCA's sentence appropriateness decision to determine if the lower court “abused its discretion or acted inappropriately—that is, arbitrarily, capriciously, or unreasonably—as a matter of law”). The AFCCA's review was perfunctory rather than substantive and failed to give the “individualized consideration” required.

To do what the AFCCA did—merely listing Petitioner Fundis’s mitigation evidence in a single sentence—is insufficient. In *United States v. Baier*, the CAAF remanded the appellant’s case because the intermediate appellate court’s opinion made it “impossible . . . to determine whether [it] conducted an independent assessment of the appropriateness of Appellant’s sentence” or if it merely deferred to the trial level outcome. 60 M.J. 382, 383 (C.A.A.F. 2005). A Court of Criminal Appeals is not strictly required to detail its full analysis, but when it provides an analysis that reveals a misunderstanding of the law or a failure to meaningfully weigh the totality of the circumstances, it abuses its discretion. *Id.* at 383.

Here, reminiscent of *Baier*, the AFCCA’s conclusory acknowledgment of Petitioner Fundis’s combat service and his resulting mental health struggles, followed entirely by an aggravation analysis, constitutes a failure to conduct the independent assessment required by 10 U.S.C. § 866. The court’s failure to meaningfully engage with the individualized mitigation considerations of Petitioner Fundis’s case betrays either a misunderstanding of its 10 U.S.C. § 866 duty or a failure to properly weigh all factors in determining whether the sentence was “necessary” to promote justice or to maintain good order and discipline in the armed forces. 10 U.S.C. § 856(c)(1) (“In sentencing an accused . . . a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces.”).

The AFCCA’s perfunctory treatment of Petitioner Fundis’s extensive combat service and resulting severe mental health diagnoses falls short of the

meaningful, individualized review required by 10 U.S.C. § 866. By reducing profound service-connected trauma to a passing acknowledgment while exclusively weighing aggravating factors, the AFCCA abused its discretion and departed from the accepted and usual course of judicial proceedings. Service members who sacrifice their mental and physical well-being in combat are entitled to a sentence review that genuinely weighs those sacrifices. Petitioner Fundis thus presented good cause for the CAAF to review the AFCCA's decision in his case.

D. Petitioner Griffin demonstrated good cause for review.

Petitioner Griffin's court-martial presented close evidentiary calls in a case where a conviction would have been doubtful absent the purportedly prior consistent statements bolstering the alleged victim's testimony. As the AFCCA's opinion suggested, the basis for admitting LA's statements to HC "as a prior consistent statement" is not compelling. App., *infra*, at 116a. According to both LA and HC, LA made that statement long after she had become angry with Petitioner Griffin, thereby giving her a motive to fabricate an allegation against him. A prior statement made after a motive to fabricate has already arisen does not rebut a charge of recent fabrication and is, therefore, inadmissible hearsay. *United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2000). The CAAF should have granted review to determine whether the military judge's ruling admitting the statement into evidence—a ruling that the AFCCA acknowledged was less than compelling—was erroneous. If so, that error alone would have warranted setting aside the convictions and ordering a retrial.

But that was not the only problematic hearsay ruling in Petitioner Griffin’s case. The military judge also admitted into evidence a statement that LA herself testified she made in February 2021. The military judge nevertheless determined that the statement was made more than half a year earlier, crediting the account of the other person involved in the conversation.

The CAAF should have granted review to determine whether the military judge abused his discretion by discounting the testimony of LA—the alleged victim whose account he found sufficient to prove two criminal allegations beyond a reasonable doubt—as to when she made her statement to AH. Petitioner Griffin presented good cause for the CAAF to review the AFCCA’s decision in his case.

CONCLUSION

Congress’s expansion of this Court’s certiorari jurisdiction to include decisions by the CAAF denying discretionary review established a mechanism to correct that court’s overly parsimonious exercise of its jurisdiction. This Court should grant review to consider how it will exercise that expanded authority. Doing so will clarify the applicable standard that applies to this new portion of this Court’s docket.

Respectfully submitted,

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