No. _____

IN THE

Supreme Court of the United States

JONATHON V. TYSON; TYLIR D. CUNNINGHAM;
DIODERSON AUGUSTIN; AND DERRICK E. BRADDY
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 Jonathon V. Tyson, Tylir D. Cunningham, Dioderson Augustin, and Derrick E. Braddy, 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. Tyson*, No. 26-0213/AF, U.S. Court of Appeals for the Armed Forces (judgment entered July 29, 2026).
- *United States v. Tyson*, No. ACM 40617, Misc. Dkt. No. 2026-02, Air Force Court of Criminal Appeals (judgment entered Apr. 13, 2026).
- *United States v. Cunningham*, No. 26-0220/AF, U.S. Court of Appeals for the Armed Forces (judgment entered Aug. 5, 2026).
- *United States v. Cunningham*, No. ACM 40746, Air Force Court of Criminal Appeals (judgment entered Apr. 24, 2026).

- *United States v. Augustin*, No. 26-0160/AF, U.S. Court of Appeals for the Armed Forces (judgment entered June 3, 2026).
- *United States v. Augustin*, No. ACM 40655 (f rev), Air Force Court of Criminal Appeals (judgment entered Jan. 21, 2026).
- *United States v. Braddy*, No. 26-0255/AF, U.S. Court of Appeals for the Armed Forces (judgment entered Sep. 10, 2026).
- *United States v. Braddy*, No. ACM 40810, Air Force Court of Criminal Appeals (judgment entered June 5, 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 new authority to issue writs of certiorari in cases where 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 the denial itself. 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 to 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 Tyson's case is unreported. It is available at 2026 CCA LEXIS 178, 2026 WL 989200, and is reproduced at pages 2a–44a. The CAAF's decision denying review of Petitioner Tyson's case is not yet reported. It is available at 2026 CAAF LEXIS 631, 2026 WL 2279524, and is reproduced at page 1a.

The decision of the AFCCA in Petitioner Cunningham's case is unreported. It is available at 2026 CCA LEXIS 198 and is reproduced at pages 46a–63a. The CAAF's decision denying review of Petitioner Cunningham's case is not yet reported. It is available at 2026 CAAF LEXIS 653, 2026 WL 2643310, and is reproduced at page 45a.

The decision of the AFCCA in Petitioner Augustin's case is unreported. It is available at 2026 CCA LEXIS 11 and is reproduced at pages 67a–105a. The CAAF's decisions denying review of Petitioner Augustin's case are not yet reported. They are available at 2026 CAAF LEXIS 402, 2026 WL 1766218 (May 4, 2026), and 2026 CAAF LEXIS 489, 2026 WL 2031031 (June 3, 2026), and are reproduced at pages 64a–66a.

The decision of the AFCCA in Petitioner Braddy's case is unreported. It is available at 2026 CCA LEXIS 267 and is reproduced at pages 107a–46a. The CAAF's decision denying review of Petitioner Braddy's case is not yet reported. It is available at 2026 CAAF LEXIS 756 and is reproduced at page 106a.

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 AFCCA also had jurisdiction over Petitioner Tyson's case pursuant to Article 73, UCMJ, 10 U.S.C. § 873. 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 July 29, 2026 (Petitioner Tyson), August 5, 2026 (Petitioner Cunningham), June 3, 2026 (Petitioner Augustin, on reconsideration), and September 10, 2026 (Petitioner Braddy). On August 19, 2026, the Chief Justice of the United States granted Petitioner Augustin's application for an extension of time to and including October 31, 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 Tyson

Petitioner Tyson was a senior airman (E-4) in the United States Air Force at the time of his conviction. At a general court-martial, a panel of lay members convicted him, contrary to his pleas, of six specifications (the military equivalent of a count) and acquitted him of another three specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. App. 3a. The members sentenced Petitioner Tyson to a bad-conduct discharge, confinement for one year, and reduction to the grade of Airman Basic (E-1). App. 3a–4a.

In 2021, Petitioner Tyson met MR on Tinder, an online dating App. 9a; Trial Tr. 517. MR moved in with Petitioner Tyson on Minot Air Force Base, North Dakota, a month and a half later. Trial Tr. 631. During their relationship, MR lied to Petitioner Tyson by claiming to be six years younger than she really was. Trial Tr. 642.

In October 2022, they became engaged, but Petitioner Tyson ended the engagement shortly thereafter. Trial Tr. 527, 642, 650–54, By early January 2023, Petitioner told MR that she had four months to move out of his house and began seeing other women. Trial Tr. 655–57, 666, 669–70. MR stayed in Petitioner Tyson's house past that deadline despite Petitioner's demands that she leave. Trial Tr. 584–85, 657.

Their relationship exploded on April 14, 2023. On that day, MR called her supervisor and said that Petitioner Tyson was destroying her stuff, but that she was "safe." Trial Tr. 296. At trial, MR testified that Petitioner Tyson was also strangling her. Trial Tr. 602. However, no domestic violence claims were relayed to the supervisors who arrived at Petitioner Tyson's home. Trial Tr. 302–03, 337–38.

During the investigation, photos of MR were taken to document bruise progression. Trial Tr. 466–71. There were marks on her neck, which experts said were likely not self-inflicted. Trial Tr. 995–96. MR also provided a photo showing a red mark on her neck, which she claimed came from Petitioner Tyson when he pinched her in February 2023. Trial Tr. 814–15; Pros. Ex. 19 at 1. An expert noted the similarities between the pinch marks in the February 2023 photo and the strangulation marks from April 2023. Trial

Tr. 1003–05. The experts could not age the bruises, explain where they came from, or explain what caused them. Trial Tr. 943, 997–1003, 1011.

MR was the only witness to testify about the source of injuries as there were no outcry witnesses or eyewitnesses to any physical violence. Yet, the only witness who opined on MR's character for truthfulness was MR's former co-worker—an officer tasked with auditing medical records for improper access by the clinic staff. Trial Tr. 968. She testified that MR is not a truthful person. *Id.* Furthermore, it was undisputed that MR lied about her age repeatedly. *E.g.*, Trial Tr. 637–43, 798–800, 807–08, 845–47, 918–20.

MR had many motives to fabricate: anger over the breakup, Trial Tr. 592, 647; alleged infidelities, Trial Tr. 667–70; embarrassment, Trial Tr. 662–64; revenge; and previously slapping Petitioner Tyson or 'snapping' emotionally during arguments, Trial Tr. 681, 694–95. All these motives were also heightened by the fact that MR lied about her marital status by holding herself out as married to Petitioner Tyson and claiming to be enrolled in military-facilitated marital counselling. Trial Tr. 558, 592, 660.

In Facebook messages between MR and Petitioner Tyson in the days leading up to April 14, 2023, MR accused him of infidelity and using her for sex. Trial Tr. 662–64, 679–701. She accused him of hitting her and doing something to her rib within the past day but then invited him to "go round [two]." Trial Tr. 678–80. A video of Petitioner Tyson and MR from April 13, 2023, the same timeframe as these texts, only included an accusation of him breaking her phone—

no physical abuse. Trial Tr. 699–701; *see* Trial Tr. 823 (discussing the phone in the video).

In response to allegations that he recently hurt her, Petitioner Tyson messaged, "Take me to court," "Take me to court bitch," and "You're wasting your time." Pros. Ex. 16 at 17, 25. MR responded, "All of the pictures and video I have will never be dismissed," followed with, "You have no marks on you but everything is on me." *Id.* She asserted that she would "deal with him" the next morning. *Id.* at 39. The next morning, Petitioner Tyson was arrested for domestic violence. Trial Tr. 401–03.

After Petitioner Tyson was arrested in April 2023, MR began dating AF. Supplement to Petition for Grant of Review at 9, *United States v. Tyson*, 2026 CAAF LEXIS 631 (C.A.A.F. July 29, 2026) (No. 26-0213/AF) (filed June 25, 2026) [hereinafter Tyson Supplement]. AF attempted to break up with MR in 2024. *Id.* Thereafter, in various recordings made by AF, MR says the following:

> I'm actually going to set it up so that way it's going to look like you hit me and I'm going to call the cops and it's going to get really ugly really quick because that's what you deserve for fucking with me bro.

Id.

> I'm going to have my brother pinch the fuck out of me. As soon as I touch down in Minot, Imma call the cops and be like this man literally just fucking hit me and threw me around his fucking apartment -- er his house.

Id. at 10

> I'll deal with you Tuesday.

Id.

> Just writing down ideas for what I'm going to do on Tuesday . . . . I'm not telling you . . . . I'm just tired, you know, tired of being treated like shit by men. So, I'm, I'm literally taking you down, each one of you down, one by one so.

Id.

> I hope you know you're gonna get in a lot of trouble . . . . I hope you know for the time you fucking hit me! Yeah! Yeah! You wanna go there! Yes you did, yes you did! I have pictures! I have pictures . . . . You wanna do what the fuck I say or do you want me to get you in trouble?

Id.

MR repeatedly states that AF will "pay," either money for "wasting a year" of her life or in "another" way. *Id.* at 10. She also accuses him of being the reason she must start a new life and for her not having a home or a job. *Id*.

AF repeatedly denies all allegations of abuse. *Id.* At one point, when AF confronts MR about threatening him and "trying to falsely . . . accuse [him] of a crime," MR responds, "[T]hat's crazy cause that's exactly what [Petitioner] Jonathon [Tyson] was saying, only for him to be found guilty of the crime." *Id.*

While Petitioner Tyson appealed to the AFCCA on several grounds, this appeal is concerned solely with

his petition for a new trial. After filing his appellate brief with AFCCA, Petitioner Tyson filed a petition for new trial based on the newly discovered evidence: recordings of MR threatening AF with false domestic violence allegations. App. 5a, 39a–40a. He asserted that this evidence went to the heart of the case—MR's credibility—because every allegation relied on MR being credible and her allegations being true, which the newly discovered evidence cast doubt on. App. 39a–40a. The AFCCA disagreed. App. 39a–43a.

Petitioner Tyson petitioned the CAAF to review his case. One of the three questions raised to CAAF was "[w]hether the lower court abused its discretion in denying . . . [his] petition for a new trial where the newly discovered evidence demonstrated the complaining witness's knowledge and willingness to fabricate domestic violence by staging injuries and then making a false report to law enforcement." Tyson Supplement at 1. The Government waived its opportunity to submit a reply. Waiver Letter, *United States v. Tyson*, 2026 CAAF LEXIS 631 (C.A.A.F. July 29, 2026) (No. 26-0213/AF) (filed June 26, 2026). The CAAF summarily denied review. App. 1a.

B. Petitioner Cunningham

Petitioner Cunningham, then an Air Force airman basic (E-1), was tried by a general court-martial in 2024. App. 46a. The court-martial panel found him guilty of one specification of absence without leave in violation of Article 86, UCMJ, 10 U.S.C. § 886, one specification of negligent dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. App. 47a–48a.

The sexual assault specification is the subject of

this petition and prior appeals. It arises from an allegation of nonconsensual sexual intercourse made by AP. App. 48a.

AP and Petitioner Cunningham were friends from technical school and were physically intimate multiples times in January and February 2023, App. 48a–49a, despite AP having a boyfriend at the time. Supplement to Petition for Grant of Review at 6, *United States v. Cunningham*, 2026 CAAF LEXIS 653 (C.A.A.F. Aug. 5, 2026) (No. 26-0220/AF) (filed Jul. 8, 2026) [hereinafter Cunningham Supplement]. They had consensual sex in the early hours of February 12, 2023, and previously discussed "that it was mandatory for AP to know a condom would be used before she would consent to sex." App. 49a. According to AP, her "body language at least was kind of like you need a condom to sleep with me, I'm not going to sleep with you without a condom." *Id.* AP had also told Petitioner Cunningham earlier that night, unprompted, that "sex isn't going to happen because I didn't shave." Cunningham Supplement at 6.

AP testified that, approximately seven hours later, she woke up "and [Petitioner Cunningham] was trying to penetrate me." App. 50a. AP testified that she pretended to be asleep as Petitioner Cunningham penetrated her for ten to fifteen minutes. *Id.*; Cunningham Supplement at 8. However, AP was not actually asleep, and she believed Petitioner Cunningham never saw her face during this. App. 50a. When asked why she did not say anything to Petitioner Cunningham, AP testified, "I think I was really scared" and "I don't think I really understood what was going on. And I think I just kind of froze. Like I don't know." App. 51a. AP's testimony on what woke her up contradicted itself: pain associated with

penetration or Petitioner Cunningham repositioning her legs. Cunningham Supplement at 9. AP told a friend a third version: that she woke up to Petitioner Cunningham pulling down her underwear. *Id.*

Five to ten minutes later, AP was awake scrolling on her phone in bed when Petitioner Cunningham "pretended to wake up for the first time." App. 50a. AP and Petitioner Cunningham went to Dunkin' Donuts to have breakfast together. App. 51a. Afterward, AP went back to her dorm room and showered. *Id.* She then reported the above-described encounter as a sexual assault, omitting the fact that she had consensual sex with Petitioner Cunningham about seven hours prior. *Id.* Later, AP and Petitioner Cunningham texted about how this sexual encounter was awkward. App. 52a; Cunningham Supplement at 12. When confronted with AP's lie that she was asleep during this encounter, Petitioner Cunningham apologized and said he did not think AP had been asleep at that time. App. 52a; Cunningham Supplement at 12.

During the Government's closing argument, the prosecutor told the jury that "whether or not [AP]'s asleep or awake at this point, is irrelevant because he still doesn't have consent." App. 59a.

Petitioner Cunningham appealed to the AFCCA on two grounds: that the sexual assault conviction is factually insufficient, and that the special trial counsel committed prosecutorial misconduct during closing argument by conflating theories of liability for sexual assault in such a way that effectively eliminated Petitioner Cunningham's mistake of fact as to consent defense. App. 48a. The AFCCA disagreed, focusing their analysis on no condom being

used during the second sexual encounter on February 12, 2023, and shifting the burden to disprove the mistake of fact as to consent defense beyond a reasonable doubt away from the Government. *See* App. 57a–59a. Petitioner Cunningham petitioned the CAAF to review his case, asking the court to decide if "the [AFCCA] err[ed] in its application of the factual sufficiency standard by giving undue deference to the trial court's findings despite significant evidence that raised a reasonable doubt[ ]" and if "the special trial counsel commit[ted] prosecutorial misconduct during closing argument by arguing that it was 'irrelevant' whether the complaining witness was awake or asleep, thereby conflating distinct theories of [liability] and eliminating a mistake of fact as to consent defense[.]" Cunningham Supplement at 5. The Government waived its opportunity to submit a reply. Waiver Letter, *United States v. Cunningham*, 2026 CAAF LEXIS 653 (C.A.A.F. Aug. 5, 2026) (No. 26-0220/AF) (filed Jul. 12, 2026). The CAAF summarily denied review. App. 45a.

C. Petitioner Augustin

Petitioner Augustin was a senior airman (E-4) in the United States Air Force at the time of his court-martial. He was tried by a general court-martial in 2024 and, contrary to his pleas, was convicted of two specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one specification of indecent conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. App. 68a. The military judge sentenced him to a dishonorable discharge, confinement for thirty-six months, and reduction to the grade of E-1. *Id*.

Petitioner Augustin elected trial by a panel of officer members. Trial Tr. 29. After initial voir dire and challenges for cause, the panel fell below quorum. Of the eighteen members then detailed, the military judge excused thirteen, leaving five—fewer than the eight members a general court-martial requires. Trial Tr. 376–77.

The next morning, the special court-martial convening authority (SPCMCA) forwarded the general court-martial convening authority (GCMCA) a memorandum captioned "Proposed Additional Court Members," listing twelve officers for consideration. Supplement to Petition for Grant of Review at 2, *United States v. Augustin*, 2026 CAAF LEXIS 402 (C.A.A.F. May 4, 2026) (No. 26-0160/AF) (filed Apr 20, 2026) [hereinafter Augustin Supplement]. Only one was a woman, Captain SH. *Id.* The GCMCA acted on that list the same day. On a separate document captioned "Proposed Replacement Court Members," which he signed, he recorded his selections by hand: eleven of the twelve names bear handwritten initials, and Captain SH's line is blank. *Id.* Special Order A-23, issued the same day, detailed sixteen members—the eleven men selected from the list of twelve and the five members carried over from earlier orders. *Id.* Captain SH was the only proposed member not detailed.

Unlike the memorandum detailing the original panel, which disclaimed that the convening authority "did not consider race or gender while selecting these individuals," the replacement memorandum contains no such statement. *Compare* Special Order A-21, *with,* Special Order A-23. The record discloses no reason, gender-neutral or otherwise, for the omission of Captain SH.

Defense counsel placed the disparity on the record that morning, before the members were called. He told the military judge that the memorandum "indicated that there was only one female list[ed] within the proposed replacement members," and that "the only member not selected by the GCMCA was that female." Trial Tr. 388. Defense asked to interview the convening authority as to "why[ ] only one proposed female was sent to GCMCA," but was told the officer was unavailable. Trial Tr. 388–89. The military judge raised *United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023), on his own motion, asking how that decision bore on "a convening authority's consideration of gender." Trial Tr. 389. The interview never occurred, and no reason for the omission has been offered since, at trial or on appeal. Trial Tr. 635.

On appeal, Petitioner Augustin argued that the convening authorities impermissibly considered gender. The Government responded that the claim was waived and, in the alternative, that the convening authority "did not automatically select the sole female member on the list, [Lieutenant Colonel] KP, who, at the time, was still on the panel." Augustin Supplement at 7–8. That explanation identified the wrong officer. Lieutenant Colonel KP had been detailed by an earlier convening order and was not among the twelve proposed replacement members.

The AFCCA did not resolve those arguments or identify the legal standard governing the claim. It merely stated that it had "carefully considered" the member selection issue but did "not find this issue requires discussion or relief," *citing United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987), and affirmed. App. 69a.

Petitioner Augustin petitioned the CAAF for grant of review on March 20, 2026, and filed a supplement presenting the member selection issue on April 20, 2026. The Government waived its opportunity to submit a reply. Waiver Letter, *United States v. Augustin*, 2026 CAAF LEXIS 402 (C.A.A.F. Sep. 10, 2026) (No. 26-0160/AF) (filed Apr. 20, 2026). The CAAF denied the petition on May 4, 2026. App. 66a. Petitioner Augustin petitioned for reconsideration and moved to submit matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). On June 3, 2026, the CAAF granted reconsideration, granted the motion, and again denied the petition for grant of review. App. 64a.

D. Petitioner Braddy

Petitioner Braddy, then an Air Force master sergeant (E-7), was tried by a general court-martial in 2024. App. 107a. The court found him guilty of three specifications of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. App. 108a.

Petitioner Braddy's convictions arise from accusations made by his niece, EH, relating to two incidents that allegedly happened at his home in 2022 when EH was around 12 years old. App. 109a. The two incidents allegedly took place during separate periods when EH stayed at Petitioner Braddy's home near Scott Air Force Base. App. 110a–13a.

According to EH, the first incident took place in Spring 2022. App. 110a. EH alleged that she fell asleep on Petitioner Braddy's couch and woke up with her right arm stretched out to her right, her right palm facing upwards, and her fingers wrapped around what she thought was a penis moving back and forth in her hand. *Id.* The Government charged this

incident as sexual abuse of a child involving sexual contact. App. 111a.

EH alleged that the second incident occurred a couple months later. App. 112a. In June 2022, EH stayed at Petitioner Braddy's home and one evening, near the end of her stay, EH told Petitioner Braddy she was bored and that she wanted to play a game, "Truth or Dare." *Id.* During the game, Petitioner Braddy dared EH to "[t]ake a pair of your underwear and put them on over your shorts," to imitate a cartoon character. App. 112a-13a; Trial Tr. 708, 756. However, EH remembered it differently, and testified that Petitioner Braddy said, "I dare you to take your underwear off, but you can put your shorts back on." App. 112a-13a; Trial Tr. 419. EH declined to perform the dare and they moved on with the game. App. 113a. The Government charged Petitioner Braddy's dare as sexual abuse of a child involving indecent conduct. App. 134a–35a.

EH testified that Petitioner Braddy subsequently asked her to tell a "truth," specifically, "What is the type of porn you watch?" App. 113a. Petitioner Braddy denied that he ever asked EH that question during the game of Truth or Dare. App. 123a–24a. The Government charged Petitioner Braddy's question to EH as sexual abuse of a child by communicating indecent language. App. 136a–37a.

Petitioner Braddy appealed to the AFCCA on several grounds, including that his conviction for indecent conduct, the "dare," was legally insufficient because "conduct" does not include "language." App. 109a. The AFCCA disagreed. App. 143a–46a.

Petitioner Braddy petitioned the CAAF to review his case, asking the court to decide "[w]hether

Congress established separate theories of liability under 10 U.S.C. § 920b for sexual abuse of a child involving indecent conduct and indecent communication, rendering Appellant's conviction legally insufficient." Supplement to Petition for Grant of Review at 1, *United States v. Braddy*, 2026 CAAF LEXIS 756 (C.A.A.F. Sep. 10, 2026) (No. 26-0255/AF) (filed Aug. 6, 2026). The Government waived its opportunity to submit a reply. Waiver Letter, *United States v. Braddy*, 2026 CAAF LEXIS 756 (C.A.A.F. Sep. 10, 2026) (No. 26-0255/AF) (filed Aug. 7, 2026). The CAAF summarily denied review. App. 106a.

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* Articles 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). Article 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. Article 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. Article 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).[1] Cases in the second category are more common but account for only

[1] 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 plenarily reviewed over the past three terms combined.[2]

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 2, at 7; CAAF FY 2024 Annual Report, *supra* note 2, at 7; CAAF FY 2023 Annual Report, *supra* note 2, at 6.

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[2] *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 2, at 8; CAAF FY 2024 Annual Report, *supra* note 2, at 8; CAAF FY 2023 Annual Report, *supra* note 2, 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 2, 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 2, at 1. CAAF FY 2023 Annual Report, *supra* note 2, 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 National Defense Authorization Act for Fiscal Year (NDAA for FY) 2024's reforms, which became effective December 22, 2024.[3]

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,

[3] 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).

https://docs.house.gov/meetings/AS/AS00/20230621/115846/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. 1a, 45a, 66a, 106a. 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 Tyson demonstrated good cause for review.

Petitioner Tyson showed good cause for review by the CAAF because the AFCCA decision to deny his petition for a new trial was based on incorrect legal principles and abrogated law. App. 39a–43a.

The AFCCA erroneously applied the "manifest injustice" standard, holding that Petitioner Tyson "failed to meet his burden to demonstrate a new trial is necessary to avoid a manifest injustice." App. 41a–42a. This standard was changed by Rule for Courts-Martial (R.C.M.) 1210 in 1984. *Compare* R.C.M. 1210, *Manual for Courts-Martial*, *United States* ¶ 109.*d* (1969 rev. ed), *with* Exec. Order No. 12473, 49 Fed. Reg. 17152, 17249 (Apr. 23, 1984). There is no "establish[ing] . . . an injustice" requirement in today's R.C.M. 1210. It was an abuse of discretion for the AFCCA to apply this abrogated, non-textual standard.

In the military justice system, the presidentially prescribed R.C.M.s are construed using "[o]rdinary rules of statutory construction." *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). "[W]hen the statutory language is plain," a court "must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) ("[I]f possible, every word and every provision is to be given effect and . . . no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision . . . ."). R.C.M. 1210(f)(2)(C)'s standard for granting a petition for new trial is plain. It was AFCCA's duty to apply that presidentially prescribed language in accordance with its plain terms, which it failed to do.

The AFCCA compounded its legal error by conflating two different reasons to grant a petition for a new trial: newly discovered evidence and fraud on the court-martial. App. 42a (deciding that the newly discovered evidence did not reveal MR admitting to perjury). In its cursory, incomplete analysis, the AFCCA focused only on MR's failure to admit to lying and on her thorough impeachment at trial. App. 42a–43a. However, Petitioner Tyson did not raise fraud on the court-martial. The AFCCA's analysis failed to consider whether "the newly-discovered evidence [would likely] produce a substantially more favorable result for [Petitioner Tyson]"—the correct and expressly stated standard under R.C.M. 1210(f)(2)(C), which the AFCCA was required but failed to apply.

Citing no case law in support of its decision, the AFCCA concluded that MR's credibility was sufficiently attacked at trial, App. 43a. *Contra United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005) (the

pertinent inquiry is "whether a different court-martial might have reached a result more favorable to the accused in light of arguments defense counsel might have brought to bear with knowledge of [the new evidence] as well as the differences in the testimony of the [witnesses]"). Inexplicably, the AFCCA failed to consider that "noncumulative, uncontradicted impeachment evidence" is "relevant not only to a material issue in this case but the dispositive issue in this case—the victim's credibility." *Williams*, 37 M.J. at 357 (citations omitted).

Evidence that shows a motive and a willingness to fabricate allegations like the charged misconduct is exactly the type of evidence that requires a new trial. For example, in *United States v. Velarde*, a new trial was warranted because the complaining witness's "testimony was virtually the only evidence of [appellant's] guilt" and because "near the time of trial [the complaining witness] made *similar false accusations against two other men* creates a reasonable probability that, had the defense known of this evidence, the result of the proceeding would have been different." 485 F.3d 553, 563 (10th Cir. 2007) (emphasis added). Because MR's testimony and carefully curated photos and videos were the only evidence of Petitioner Tyson's guilt and because she threatened to make false allegations against a different dating partner less than a year after Petitioner Tyson was convicted, this case required the same outcome as in *Velarde*—a new trial.

Petitioner Tyson's trial "came down to a single question: Who did the [court-martial] members believe." *Sztuka*, 43 M.J. at 269 (quoting *United States v. Singleton*, 41 M.J. 200, 204–05 (C.M.A. 1994)). Had the members heard MR calmly relay to AF how she

was "going to set it up so . . . it's going to look like [AF] hit [her]" and how she was going "have [her] brother pinch the fuck out of [her] . . . . , call the cops and be like [AF] literally just fucking hit [her] and threw [her] around his fucking apartment," the members would have looked at MR's testimony about what happened with Petitioner Tyson and evaluated her already weak credibility in a different light. *United States v. Quiles*, 618 F.3d 383, 397 (3d Cir. 2010). (finding that "there must be an exculpatory connection between the new impeachment evidence and the witness's testimony at trial or the impeachment evidence must undermine critical trial testimony").

The AFCCA's perfunctory treatment of the newly discovered evidence and failure to recognize the significance of the change in the law meets the "good cause shown" requirement of 10 U.S.C. § 867 and should have been reviewed by the CAAF.

B. Petitioner Cunningham demonstrated good cause for review.

There was good cause for the CAAF to review Petitioner Cunningham's case because AP's testimony was not credible, Petitioner Cunningham did *not* make a mistake about AP being awake and reasonably believed she consented to sex with him, and the members' weighing of the evidence was tainted by the prosecutor's improper closing argument. Petitioner Cunningham demonstrated all this to the CAAF. *See generally* Cunningham Supplement.

On appeal before the AFCCA, Petitioner Cunningham challenged his Article 120, UCMJ, conviction as factually insufficient due to AP's lack of credibility, AP's motive to fabricate, the general

unlikelihood on AP's version of events, and the strange breakdown of AP being awake, Petitioner Cunningham correctly believing she was awake, yet AP lying to Petitioner Cunningham and telling him that she was asleep, and then testifying that she pretended to be asleep. This factual scenario seems strange enough to have been a false story created by AP to present to her then-boyfriend that she was cheating on with Petitioner Cunningham. Brief on Behalf of Appellant at 6, *United States v. Cunningham*, 2026 CCA LEXIS 198 (A.F. Ct. Crim. App. Apr. 24, 2026) (No. ACM 40746) (filed Jan. 20, 2026) [hereinafter Cunningham Brief to AFCCA]. However, the AFCCA denied relief. App. 63a. The AFCCA reasoned Petitioner Cunningham must have known AP was not consenting to sex with him because he did not use a condom after AP told him that she would not have sex without a condom. App. 57a–58a. However, AP testified that she may have only expressed to Petitioner Cunningham through body language that she did not want to have sex without a condom. App. 49a. The evidence did not reveal what such body language looked like or how it would have been comprehensible. AP's testimony also established that she previously changed her mind about her willingness to participate in sex regardless of whether her previously imposed conditions were met. Cunningham Supplement at 6 (AP told Petitioner Cunningham that "sex isn't going to happen because I didn't shave," but then initiated consensual sex with him later without shaving in the interim). The AFCCA's analysis skips over whether the *Government* proved beyond a reasonable doubt that AP did not consent *in the moment*, and whether the *Government* successfully disproved beyond a reasonable doubt that

Petitioner Cunningham reasonably mistook, *in the moment*, that she was consenting. App. 57a–59a.

Petitioner Cunningham's supplement to the petition for a grant of review before the CAAF emphasized the AFCCA's failure to apply correct legal principles in its analysis, Cunningham Supplement at 15, specifically its omission of a "new weighing of the evidence." *United States v. Harvey*, 85 M.J. 127, 131 (C.A.A.F. 2024). The AFCCA picked and chose what facts to discuss in its opinion and did not weigh or even include facts that bore negatively on AP's credibility. *Compare* App. 57a–59a, *with* Cunningham Supplement at 6–12, 22–23 *and* Cunningham Brief to AFCCA at 2–7. Furthermore, Petitioner Cunnigham emphasized that the AFCCA applied incorrect legal principles generally, such as conflating a condition of consent (using a condom) with consent itself. Cunningham Supplement at 20–22; App. 58a.

The AFCCA also analyzed the improper argument issue in three short paragraphs and held that the prosecutor's argument was not erroneous, and even if it was, it was harmless. App. 61a–63a. That ruling downplayed the significance of the prosecutor's mischaracterization of the law, and Petitioner Cunningham brought this error to CAAF's attention. *See* Cunningham Supplement at 26–31. In *United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024), the CAAF clarified that sexual assault without consent and sexual assault while asleep are two distinct theories of criminal liability that cannot be mixed or conflated. However, here the prosecutor suggested that the court-martial members do just that. App. 59a. Furthermore, the prosecutor's suggestion that the members could convict Petitioner Cunningham based on either factual scenario—that

AP was asleep during the charged sexual act or awake but not consenting—muddied the waters on the affirmative defense Petitioner Cunningham raised at trial, which only applies to the charged theory of liability: sexual assault without consent. Lastly, the AFCCA relied on the CAAF's decision in *United States v. Casillas*, 86 M.J. 94, 101 (C.A.A.F. 2025), *id.* at 58a–59a, but in *Casillas*, the victim actually was asleep at the start of the sexual act and then woke up, at which time she did not consent. Here, AP was never asleep.

Because Petitioner Cunningham demonstrated that "the [AFCCA] misapplied the factual sufficiency standard and excused constitutional-level prosecutorial misconduct," Cunningham Supplement at 14, his case warranted further review by the CAAF.

C. Petitioner Augustin demonstrated good cause for review.

Petitioner Augustin showed good cause for review because he made an unrebutted prima facie showing that gender was used in selecting the members who would decide his case, and no court below has ever said otherwise.

The governing standards are not in doubt. A convening authority may not select court-martial members based on an immutable characteristic. *Jeter*, 84 M.J. at 73; *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018) ("gender is not an Article 25, UCMJ, [10 U.S.C. § 825,] factor, and selection on the basis of gender is generally prohibited"); *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). Under *Jeter*, once an accused makes a prima facie showing that an impermissible characteristic played a role in panel selection, "a presumption will arise that the panel was not properly constituted," which the

Government must rebut; if it does not, relief follows. 84 M.J. at 70, 74. Under *Riesbeck*, once the issue is raised by the evidence, the Government must prove benign intent beyond a reasonable doubt. 77 M.J. at 159.

The showing here rests on two documented decisions, made in sequence. A junior convening authority forwarded to the general court-martial convening authority (GCMCA) twelve names, one of them a woman. The GCMCA initialed eleven and left hers blank. Neither decision has ever been explained. This is not a case where an inference of gender bias is drawn from the aggregate composition of a venire, *cf. United States v. Lewis*, 46 M.J. 338, 342 (C.A.A.F. 1997), but two identifiable choices converging on the same result, recorded in the convening authorities' own documents.

The Government has never offered a reason for the exclusion of the female officer from the court-martial panel. It offered none at trial, though the defense counsel asked for one and the military judge kept the question open. Its only explanation appeared for the first time in an appellate brief, and it identified the wrong officer. Nor does it matter that Petitioner Augustin is a man and the excluded member a woman. *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Nor does the presence of a woman on the assembled panel answer the showing: Lieutenant Colonel KP was carried over from an earlier convening order and was not among the twelve names the GCMCA reviewed.

Waiver is no answer either. R.C.M. 912(b)(3) is titled "Forfeiture," and it provides that failure to make a timely motion "shall forfeit the improper selection unless it constitutes a violation of R.C.M. 501(a),

502(a)(1), or 503(a)(2)." Untimeliness forfeits; it does not waive. And counsel did raise the issue on the morning the venire issued and with the military judge's active engagement. Improper member selection may also constitute unlawful command influence, "which cannot be waived." *Riesbeck*, 77 M.J. at 160.

The AFCCA disposed of the claim in a single sentence, without identifying the governing standard or saying whether a prima facie showing had been made, and the CAAF then declined review twice. An unrebutted prima facie showing that gender determined the composition of a court-martial panel is good cause under Article 67(a)(3), UCMJ. Petitioner Augustin thus presented good cause for CAAF to review the AFCCA's decision in his case.

D. Petitioner Braddy demonstrated good cause for review.

Petitioner Braddy's court-martial raised an unresolved question regarding the scope and definition of "indecent conduct" within 10 U.S.C. § 920b(c), *Sexual Abuse of a Child*. The AFCCA incorrectly interpreted 10 U.S.C. § 920b, holding that "'conduct' includes verbal acts," and that "verbal requests" can be properly charged as indecent conduct, rather than communication of indecent language. App. 145a.

The AFCCA's holding renders 10 U.S.C. § 920b's definition of indecent language "devoid of significance" and "mere surplusage," and creates a new legal test for "verbal request," where none was needed. App. 146a. The AFCCA's holding also allows the Government to ignore Congress' creation of separate theories of criminal liability and charge any

communication of indecent language as indecent conduct. *See Mendoza*, 85 M.J. at 218–23. The AFCCA based its legal sufficiency review on this error. App. 143a–46a.

The CAAF should have granted review to determine whether Congress established separate theories of liability under 10 U.S.C. § 920b for sexual abuse of a child involving indecent conduct and indecent communication. Petitioner Braddy 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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