No. 14-262

In the Supreme Court of the United States

JUSTIN H. MCMURRIN, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The petition for a writ of certiorari includes the following Question Presented:

> Whether the government violated the constitutional prohibition on double jeopardy by prosecuting petitioner for negligent homicide after he had already been acquitted of involuntary manslaughter on the same evidence?

The National Institute of Military Justice ("NIMJ") believes that the following threshold question is presented:

> Does the Court have jurisdiction to grant certiorari when (1) a Judge Advocate General ("JAG") certifies a case to the United States Court of Appeals for the Armed Forces ("CAAF"), (2) that court remands for further proceedings, and (3) following those proceedings the court denies the accused's petition for review?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

Rules:

INTEREST OF THE AMICUS CURIAE*

NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. Its boards of directors and advisors include law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but most of whom have served as military lawyers. NIMJ directors and advisors have practiced before the United States Court of Appeals for the Armed Forces and have served on its Rules Advisory Committee as well as the Code Committee on Military Justice.

NIMJ was an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004).

SUMMARY OF ARGUMENT

The petition is properly filed because the JAG certified the case to CAAF. That the case returned to CAAF on petition for review following a remand does not alter the fact that it had been certified to CAAF in the first place.

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* *Amicus* gave notice to all parties at least 10 days before this brief's due date. Counsel for all parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. Counsel for NIMJ have authored this brief in whole and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

CAAF is the only court in the country that presumes to require petitioners for discretionary review to reveal what issues they wish to raise in *this* Court. In doing so, it impermissibly intrudes on this Court's exclusive authority to determine what issues merit a grant of certiorari.

ARGUMENT

I

The Court has jurisdiction because the JAG certified petitioner's case to CAAF

Congress has conferred on the United States Court of Appeals for the Armed Forces appellate jurisdiction to review decisions of the service courts of criminal appeals in three circumstances: mandatorily in capital cases, mandatorily in cases certified by a JAG, and "for good cause shown" in cases where the accused petitions for discretionary review.[1]

Section 1259 of title 28 prescribes this Court's certiorari jurisdiction over CAAF decisions. It provides:

> 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:

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[1] Art. 67, UCMJ, 10 U.S.C. § 867 (2012). The petition does not address the issue considered in this brief and the United States has waived response. The Court should direct the filing of a response. The jurisdictional issue is an important recurring question in the administration of appellate military justice as to which CAAF and the military appellate bar should not be left in limbo.

> (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
>
> (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
>
> (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
>
> (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

This case falls within paragraph (2) because the Navy JAG certified it to CAAF following a decision of the United States Navy-Marine Corps Court of Criminal Appeals ("CCA"). The fact that that certification led to a remand does not remove the case from paragraph (2). Once a case is eligible for review on writ of certiorari, it remains eligible unless it becomes moot, as with the death of the appellant. It is immaterial whether CAAF grants or denies discretionary review following a remand. This is true whether the case first comes to CAAF mandatorily (in capital cases), on petition for review, or (as here) on certification by a JAG.

The denial of a petition for CAAF review is not itself reviewable on writ of certiorari. Article 67a(a), UCMJ, states:

> The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.[2]

Fireman McMurrin's petition for certiorari is not barred by this provision because it does not seek certiorari to review CAAF's denial of review. To read Article 67a(a) more broadly than its literal text demands, so as to bar this petition, would mean CAAF could convert a case from one in which the appellant had a right to seek certiorari to one in which he or she did not by the simple expedient of remanding a JAG-certified case and then refusing to grant discretionary review following the CCA's decision on remand. That is simply not what Article 67a(a) provides.

A case that has once been the subject of a JAG certification remains the same "case" for purposes of certiorari jurisdiction when it returns to CAAF following a remand to one of the service courts.[3] That is, the door to this Court having once been opened as the result of a JAG certification, it would be contrary to the governing statutes to treat CAAF as having

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[2] 10 U.S.C. § 867a(a) (2012). When it extended the certiorari jurisdiction to court-martial cases Congress did not include a "highest court . . . in which a decision could be had" provision like the one applicable to review of final judgments of state and local District of Columbia courts. 28 U.S.C. § 1257 (2012). As a result, where CAAF denies review, certiorari cannot be sought with respect to the CCA's decision. *Compare Thompson v. City of Louisville*, 362 U.S. 199 (1960) (certiorari to municipal police court).

[3] *See* C.A.A.F.R. 21(b)(5)(G).

the power later to bar the way by denying review. It would also compel litigants, out of an abundance of caution, to seek review here of any CAAF decision ordering a remand, even though they might have substantially prevailed by gaining a remand that might lead to a victory on the merits. Such an interpretation, even if it had a basis in the text of the statute, would have little to recommend it as a matter of sound judicial administration, as we explain at pages 11-12 *infra*.

The Court indicated in *United States v. Denedo*[4] that the statute granting certiorari jurisdiction over court-martial cases should not be read parsimoniously. At issue there was a contention by a Navy enlisted man that the government's petition lay outside the Court's jurisdiction. Here the shoe is on the other foot, but the construction of the statute must remain constant. It is disturbing enough that Congress has, through sentence thresholds, given those who defend the Nation narrower access to this Court than the untrammeled access enjoyed by all other petitioners for certiorari, including even those who are convicted by military commissions.[5] There is emphatically no reason to make that discrepancy

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[4] 556 U.S. 904, 909 (2009).

[5] *Compare* 28 U.S.C. § 1254 (2012) *with* 28 U.S.C. § 1259 (2012); *see* Art. 67a(a), UCMJ, 10 U.S.C. § 867a(a) (2012); Military Commissions Act of 2009, 10 U.S.C. § 950g(d) (2012); *see also* Testimony of Dwight H. Sullivan, H. Comm. on the Judiciary, Subcomm. on Courts and Competition Policy, Hearing on H.R. 569, The Equal Justice for Our Military Act, 111th Cong. (June 5, 2009), available at http://judiciary.house.gov/_files/hearings/pdf/Sullivan090611.pdf (last visited Sept. 16, 2014).

more pronounced by construing the grant of certiorari jurisdiction in court-martial cases more narrowly than the statutory text demands.

II

CAAF's rule arrogating to itself the power to examine a petitioner's anticipated bases for seeking certiorari is an invalid intrusion on this Court's authority

The UCMJ requires good cause for a grant of review by CAAF.[6] Until 2010 (over 25 years after Congress extended the certiorari jurisdiction to permit direct review of CAAF cases) CAAF's Rule 21(b)(5)(G) unmistakably indicated that the court would grant review of cases it had earlier remanded for further review or action:

> . . . The supplement shall contain:
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> * * *
>
> (5) A direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to the substantive rights of the appellant. Where applicable, the supplement to the petition shall also indicate whether the court below has:
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> * * *
>
> (G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that

[6] Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

> appellant wishes to seek review from the Supreme Court of the United States. . . .[7]

This rule had been promulgated in 1990.[8] CAAF changed it in 2010 to require appellants for the first time to specify "the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this court." The current Rule 21(b)(5)(G) was added in order to include among the factors for finding good cause to grant review whether the CCA has

> taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review in the Supreme Court of the United States specifying the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this Court.[9]

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[7] C.A.A.F.R. 21(b)(5)(G) (pre-2010 version).

[8] *In re Changes of Rules*, 31 M.J. 465 (C.A.A.F. 1990); *see generally* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 151-52 (Rules Advisory Committee Comment), 158-59, *available at* http://www.scribd.com/doc/60447836/CAAF13RulesGuide (last visited Sept. 16, 2014).

[9] Because the overwhelming majority of cases reach CAAF on petition for grant of review, it is not surprising that the rule presumes that a case was previously before it on "an earlier petition" rather than as a result of JAG certification (as here) or on capital-case mandatory review. Although the bar's practice is not uniform, we believe the duty to pre-identify certiorari issues to CAAF is generally understood to apply regardless of

CAAF's notice of the proposed 2010 change explained:

> The recent practice of the Court has been to grant petitions for grant of review in cases that have been previously remanded . . . and are returned to the Court on a second petition. The grant of review is intended to protect the right to seek certiorari review at the Supreme Court, and may be accompanied by a summary order of affirmance. The proposed change to the Rule . . . will make it clear that there is no right to further review in this Court in all remanded cases, and also provide a more orderly process for identifying the issues that are being preserved for review on petition for certiorari. The Court can then decide whether to grant and affirm or take other action it deems appropriate.[10]

This comment accurately acknowledges CAAF's history of preserving appellants' opportunity to petition for certiorari.[11] It goes on to imply that CAAF had been wrong for 20 years to preserve the right to

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how a case first came to CAAF. Fireman McMurrin preidentified the questions he wished to present here. Supplement to Petition for Grant of Review 24, 29, *United States v. McMurrin*, No. 14-0114/NA (C.A.A.F., filed Oct. 23, 2013).

[10] 75 Fed. Reg. 8683 (2010).

[11] "[A]n accused whose petition had been granted once could be assured that his right to approach the Supreme Court of the United States would not be lost by the remand." *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 183 n.4 (C.M.A. 1989), *citing United States v. Wynn*, 26 M.J. 405, 406 (C.M.A. 1988).

petition, even though this Court's review is discretionary and only a small percentage of courts-martial are reviewed by CAAF. The import of the rule change is that litigants whose cases are remanded to a service court for further action may lose the option of petitioning this Court for a writ of certiorari.

The change required litigants who seek to show good cause for a post-remand grant of CAAF review to anticipate what they might ask of *this* Court in a certiorari petition. This change subjects the would-be petitioner's issues to screening by the lower court – and not even an Article III court, to boot.[12]

The rule effectively requires military appellants, alone among the universe of criminal appellants, to frame possible certiorari-petition Questions Presented before the lower court has ruled (surely a case of putting the cart before the horse), and to do so in less than the 90 days allowed by this Court's Rule 13.1 for the preparation of certiorari petitions.[13]

Every defendant in a civilian criminal case can apply for review in this Court by first seeking direct review in the system in which he or she was tried and then, not having prevailed in a lower appellate court, seek review here. Only men and women in uniform – those who have served the country but have been convicted of a crime – cannot automatically seek review in this Court.

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[12] CAAF is an Article I court. Art. 141, UCMJ, 10 U.S.C. § 941 (2012).

[13] *See* C.A.A.F.R. 19(a)(1), -(5)(A), 21(b).

CAAF unquestionably has the ability under the system Congress created, for better or worse, to serve indirectly as a "gatekeeper" of sorts for this Court. But there are limits to that role. It is *ultra vires* for CAAF, in determining whether there is good cause for the exercise of its own discretionary jurisdiction, to weigh in the balance – and therefore judge the viability of – the issues a litigant says, under the compulsion of a CAAF rule, he or she wishes to present *here*.

This is judicial boardinghouse reach with a vengeance. Only *this* Court, not CAAF, can require litigants to state the issues on which they may seek a writ of certiorari. Whether a case merits review on certiorari is for *this* Court to decide, not some lower court. CAAF's own rules direct that they not be construed either to extend or to limit its jurisdiction.[14] *A fortiori*, they cannot be permitted to limit *this* Court's jurisdiction.

NIMJ objected to the CAAF rule change.[15] CAAF's order adopting the revised rule[16] made no reference to NIMJ's objections and did not explain why, for example, the new and unique requirement for early identification of the issues to be presented in a certiorari petition in order to secure a CAAF

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[14] C.A.A.F.R. 4(c).

[15] Letter from Eugene R. Fidell, Pres., NIMJ, to Fed. Dkt. Mgt. Sys. Off. (Mar. 22, 2010), *available at* https://web.archive.org/web/20101223013551/http://www.wcl.american.edu/nimj/documents/CAAFRuleComments2010.pdf?rd=1 (last visited Sept. 16, 2014).

[16] *In re Change of Rules*, 69 M.J. 159 (C.A.A.F. 2010).

grant of review should be limited to cases that CAAF had previously remanded. Consistency suggests that if, contrary to our view, "certworthiness" were a proper factor in CAAF's good-cause decision making under Article 67(a)(3), it should equally be taken into account in first-time petitions for grant of review as well, these being far more numerous than post-remand petitions. From this perspective, CAAF's rule is irrational because it is underinclusive. *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543-46 (1993).

Finally, the Court's decision whether to grant certiorari, and its decision on the merits of an issue, are frequently aided by seeing how a legal rule is applied on remand, and of course the outcome on remand may render further appellate proceedings unnecessary. CAAF's rule, however, virtually requires prudent counsel to seek interlocutory certiorari with respect to any CAAF remand in order to preserve the client's opportunity for review here. What is more, it would force this Court to choose between granting review prematurely – without the benefit of application of the legal ruling on remand – and losing the opportunity to review CAAF's legal ruling at all (because CAAF could insulate the case against subsequent review by this Court through the device employed here).

There is a place for this Court's review of interlocutory appeals in courts-martial, as *Solorio v. United States*[17] demonstrates, but CAAF erred in

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[17] 549 U.S. 1025 (2006). *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN

altering its settled practice in a way that effectively imposes on counsel a professional obligation to file, thereby adding – potentially needlessly – to this Court's work.[18]

CONCLUSION

For the foregoing reasons, the petition is within the Court's jurisdiction. The Court should make clear that (1) a certiorari petition may be filed when CAAF denies review in a case that has previously been certified to it by a JAG, and (2) Rule 21(b)(5)(G) is unlawful to the extent that it purports to allow that court to consider what issues a litigant might include in a certiorari petition in deciding whether there is good cause for CAAF review under Article 67(a)(3).

Respectfully submitted,

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HIMMELFARB, SUPREME COURT PRACTICE § 4.18, at 283 n.72 (10th ed. 2013) (noting *Solorio* and other exceptions).

[18] *See* SUPREME COURT PRACTICE, *supra* note 17, at 285 ("Substantial progress toward a final decision creates the possibility that the issues before the Supreme Court will become moot and lessens the likelihood that a Supreme Court ruling will save the parties and the courts from wasted effort").

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