IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

Colonel (O-6)
PRITCHARD, CHARLES L.
Military Judge
United States Army,
Respondent

Master Sergeant (E-8)
FERREIRA, KEITH D.
United States Army,
Real Party in Interest

BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF A WRIT OF PROHIBITION

Docket No. ARMY MISC 20220034

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW, Master Sergeant Keith D. Ferreira, by and through undersigned appellate defense counsel, pursuant to the Army Court Rules of Appellate Procedure for the Courts of Criminal Appeals [Rules], (1 Jan. 2019) 19(b), and opposes the government's petition for extraordinary relief in the form of a writ of prohibition. Specifically, this court should not disturb the trial court's decision.

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Summary of the Argument

Only a unanimous verdict jury is a fair and impartial jury. So said the Supreme Court in *Ramos v. Louisiana*. 140 S. Ct. 1390 (2020). Courts have decided time and time again, military service members are statutorily and constitutionally entitled to a fair and impartial panel. The meaning of the word impartial, as defined by the Supreme Court in *Ramos*, requires that any finding of guilt by a military panel must be unanimous to be fair. This is a fundamental right.

Accused service members and civilian defendants are similarly situated in all relevant regards and there is no rational basis, much less a compelling interest, to deny service members of this fundamental right.

According to the government, nonunanimous verdicts exist for good reasons. But those same "good reasons" supported flawed decisions in *Apadoca v. Oregon*, 406 U.S. 404 (1972)) and *Johnson v. Louisiana*, 406 U.S. 356 (1972). In *Apadoca*, the Supreme Court found, "[s]tates have a good and important reason for dispensing with unanimity, such as seeking to reduce the rate of hung juries." *Apadoca* at 411.

The Supreme Court overruled *Apodaca* and *Johnson* in *Ramos v. Louisana*, finding no rational reason existed to support those decisions. Likewise, no rational reason exists now to support nonunanimous guilty findings under the Uniform Code of Military Justice [UCMJ]. This court should avoid the *Apadoca* mistake.

The military judge ruled correctly in this case. To ensure an impartial panel, the law required him to grant defense's motion for appropriate relief. The government's request for a writ should be denied.

Statement of the Case

Master Sergeant (MSG) Ferriera is charged with sexual assault (three specifications), assault consummated by a battery (one specification), aggravated assault (one specification), and kidnapping (one specification), in violation of Articles 120, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 920, and 934.

On 19 July 2021, his trial defense counsel filed a Motion for Appropriate Relief: Unanimous Verdict. The government filed a response on 22 July 2021. On 13 September 2021, the defense filed a form notice electing a military panel. On 12 January 2022, the military judge issued an order for the parties to "brief specified issues re: defense motion for appropriate relief (unanimous verdict)." Both parties filed their response on 12 January 2022. The military judge issued his findings of fact and conclusions of law, granting the defense's motion for appropriate relief on 13 January 2022. The defense demanded speedy trial on 13 January 2022. On 18 January 2022, the government requested a continuance. The accused opposed. The military judge denied the government's request that same day.

The government filed a request for a stay of proceedings and a writ of prohibition on 25 January 2022. This court granted the government's request for a

stay of proceedings on 28 January 2022. Trial was set to begin on 1 February 2022 in Italy.

Statement of Facts

In the Defense Motion for Appropriate Relief: Unanimous Verdict, the defense requested the military judge "require a unanimous verdict for any finding of guilty or modify the instructions accordingly." In the alternative, the defense requested the military judge "provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names." The defense made this request pursuant to the Fifth and Sixth Amendments to the United States Constitution and Rules for Courts-Martial (R.C.M.) 906, 920, and 921.

On 13 January 2022, the military judge granted the defense's motion for appropriate relief, and stated, "the Court will instruct the panel that any findings of guilty must be by unanimous vote, and the Court will ask the panel president before announcement of findings if each guilty findings was the result of a unanimous vote." (Findings and Conclusions Re: Defense Motion for Appropriate Relief).

A. This court lacks jurisdiction to grant the government's petition because issuance of a writ is not necessary or appropriate.

Standard of Review

Whether a court has jurisdiction is a question of law reviewed de novo. *Randolph v. HV*, 76 M.J. 27, 29 (CAAF 2017) (citation omitted). "The burden to establish jurisdiction rests with the party invoking the court's jurisdiction." *United States v. LaBella*, 75 M.J. 52, 53 (CAAF 2015); *see McKinney v. Jarvis,* 46 M.J. 870, 873 (Army Ct. Crim. App. 1997) ("The 'extraordinary' nature of relief under the All Writs Acts places an 'extremely heavy burden' upon the party seeking relief."). The issuance of writs is generally disfavored. *Id*.

Law

This court's authority to issue extraordinary writs derives from the All Writs Act. 28 U.S.C. § 1651; *United States v. Denedo*, 556 U.S. 904, 911 (2009) (citing *Noyd v. Bond*, 395 U.S. 683, 695, n.7 (1969)). Under the All Writs Act, "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act "confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction" and does not enlarge that jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999).

To establish subject matter jurisdiction for a writ, the harm contemplated by the extraordinary writ must "have had the potential to directly affect the findings

and sentence." *United States v. Brown*, 81 M.J. 1, 4 (CAAF 2021) (citation omitted). The power of this court to act "is conferred and strictly confined by statute." *United States v. Jacobsen*, 77 M.J. 81, 85 (CAAF 2017).

Even if this court possesses subject matter jurisdiction, this court must still deny a writ where issuance of the writ is not necessary or appropriate. *United States v. Gross*, 73 M.J. 864, 868 (Army Ct. Crim. App. 2014). A writ is not necessary or appropriate where adequate means of relief exist elsewhere. *Denedo*, 556 U.S. at 911. However, the lack of alternate means of relief itself does not alone make a writ necessary or appropriate. *Gross*, 73 M.J. at 868.

Argument

This court must deny review of appellant's writ because appellant fails to meet its extremely high burden of establishing that the writ is necessary or appropriate, or overcome the general disfavoring of writs. The sole basis alleged for the necessity or appropriateness of the writ is the lack of other adequate legal remedies. By itself, such justification is wholly insufficient. As this court explained, "[e]ven when the petitioner has shown there is no other adequate means to obtain relief and that its right to the writ is clear and indisputable, the issuance of a writ is 'largely discretionary.'" *Gross*, 73 M.J. at 868 (citing *United States v. Higdon*, 638 F.3d 233, 245 (3d Cir. 2011)).

The lack of alternate means of relief itself does not make issuance of the writ necessary or appropriate. By requesting a writ, the government seeks to impermissibly expand this court's jurisdiction to consider an interlocutory issue to which Congress has chosen not to permit government appeals. Congress enacted Article 62, UCMJ to establish the limited bases for which the government may seek interlocutory relief from the decision of a military judge. Congress even explicitly provided for liberal construction of this provision yet excluded the type of issue from which the government now complains. The government aims to circumvent Congress' deliberate decision to deny the government this form of interlocutory appellate jurisdiction. *See United States v. Kane*, 646 F.2d. 4, 9 (1st Cir. 1986) (When "Congress has chosen to deny [a court] appellate jurisdiction; that congressional choice would be thwarted if [the court] were to use [its] mandamus power to review an order of the [lower court] under the same standards as we apply on appeal.").

Further, the issuance of the government's writ is inappropriate and unnecessary in light of the non-extraordinary circumstances underlying the alleged issue. Exercising discretion in this case is unwarranted and unsupported by case law. The government seeks to enjoin the military judge based on an interpretation of the law that has yet to be settled by this court or its superior courts. In *Gross*, this court reversed itself on reconsideration, finding issuance of a writ was only

necessary or appropriate where the military judge refused to abide by controlling precedent. *Gross*, 73 M.J. at 869. In contrast, the issue underlying this government writ petition has yet to be resolved by military courts. In view of the disfavored nature of writs, this court should take up the legal merits of the underlying issue first through its normal course of review of cases under Article 66, UCMJ, before considering such a writ.

B. The military judge's ruling regarding the application of the Equal Protection Clause of the Fifth Amendment is correct.

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (CAAF 2000). Whether a panel is properly instructed is also reviewed de novo. *United States v. Torres*, 74 M.J. 154, 157 (CAAF 2015).

1. A unanimous guilty verdict is a fundamental right guaranteed to service members through the Fifth and Sixth Amendments.

Law

Under the Fifth Amendment, an "equal protection violation" is "discrimination that is so unjustifiable as to violate due process." *United States v. Akbar*, 74 M.J. 364, 406 (CAAF 2015) (quoting *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985)). "This question of unjustifiable discrimination in violation of due process is not raised, however, unless the Government makes distinctions using 'constitutionally suspect classifications' such as 'race, religion,

or national origin . . . *or* unless there is an *encroachment on fundamental constitutional rights* like freedom of speech or . . . assembly.'" *Rodriguez-Amy*, 19 M.J. at 178 (emphasis added).

Government action that treats individuals differently with respect to a fundamental right triggers strict scrutiny review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Strict scrutiny requires the government to show that the challenged government action is narrowly tailored to achieve a compelling public interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)*; see United States v. Hennis*, 77 M.J. 7, 10 (CAAF 2017) (suggesting that when there is interference with a fundamental constitutional right, something more than a rational basis for the disparate treatment is necessary). Once Congress grants a statutory court-martial right to service members, that right "must be attended with safeguards of constitutional due process". *Rodriguez-Amy*, 19 M.J. at 178.

Service members have a constitutional right to have a panel that is impartial: "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (CAAF 2001). As far back as 1964, military courts have explicitly recognized that, even if service members do not have a constitutional right to trial by petit jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United*

States v. *Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added); *see also United States* v. *Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice.").

More recently, the Court of Appeals for the Armed Forces [CAAF] asserted the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but also from the Sixth Amendment *itself*. *See, e.g.*, *United States* v. *Lambert*, 55 M.J. 293, 295 (CAAF 2001) ("[T]he *Sixth Amendment* requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and *the subsequent deliberations*." (emphasis added)).

Lambert is hardly the only case in which this Court has extended Sixth Amendment protections to courts-martial. To the contrary, CAAF has also held that court-martial accused are entitled under the Sixth Amendment—and not just the UCMJ—to (1) a speedy trial, *see United States* v. *Danylo*, 73 M.J. 183, 186 (CAAF 2014); (2) a public trial, *see United States* v. *Hershey*, 20 M.J. 433, 435 (C.M.A. 1985); (3) the ability to confront witnesses, *see United States* v. *Blazier*, 69 M.J. 218 (CAAF 2010); (4) notice of the factual and legal bases for the charges, *see United States* v. *Fosler*, 70 M.J. 225, 229 (CAAF 2011); (5) the ability to

compel testimony that is material and favorable to the defense, *see United States* v. *Bess*, 75 M.J. 70, 75 (CAAF 2016); (6) counsel, *see United States* v. *Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985); and (7) the effective assistance thereof, *see United States* v. *Gooch*, 69 M.J. 353, 361 (CAAF 2011). *Lambert*'s reasoning—that the Sixth Amendment right to an *impartial* jury also applies to court-martial panels—is deeply consistent with this large body of case law. *See also United States* v. *Castellano*, 72 M.J. 217, 219 (CAAF 2013) (holding that, by finding a *Marcum* factor by himself rather than having it found by the panel, the judge violated "Appellant's due process rights [to have it found by the panel] under the Fifth and Sixth Amendments").

Argument

As the military judge in this case stated, "Congress encroaches on service members' fundamental Fifth Amendment due process right to an impartial panel by authorizing the panel to find guilt by a non-unanimous vote." (Govt. App. Ex. 7, page 10). The accused is entitled, and has elected, to be tried by members. R.C.M. 501(a)(1)(A)(i). While civilians have a constitutional right to a jury trial, service members likewise have a statutory and constitutional right to its military equivalent. Article 25(c)(2), UCMJ; 10 U.S.C. § 825(c)(2) and *Wiesen*, 56 M.J. at 174. Just like his civilian analog, the accused is entitled to a fair trial. U.S. Const.

Amend. V. A guilty verdict would only be valid if issued by an impartial, thus unanimous finder-of-fact. *Ramos*, 140 S. Ct. at 1390.

As the Court found in *Ramos*, "the term 'trial by an impartial jury' carried with it some meaning about the content and requirement of a jury trial. One of these requirements was unanimity." *Ramos,* 140 S. Ct. at 1395. The Court was discussing the "impartiality provision," the same provision of the Sixth Amendment CAAF addressed in *Lambert*. Justice Thomas, concurring in *Ramos*, reiterated the fundamental nature of the right to a unanimous guilty verdict stating, "It is within the realm of permissible interpretations to say that 'trial . . . by . . . jury' in [the Sixth Amendment] includes a protection against nonunanimous felony guilty verdicts." *Ramos,* 140 S. Ct. at 1423 (Thomas concurring). In other words, as established in *Ramos* and *Lambert,* the right to an impartial fact-finder is a fundamental right that applies to courts-martial, and a factfinder is only impartial if its guilty verdict must be unanimous.

The government says *Ramos*'s requirement for a unanimous and thus impartial factfinder does not apply to MSG Ferreira's case, and also argues the word "impartial" means something different "in a Fifth Amendment context." (Govt. Br. footnote 5). The word impartial does not appear in the Fifth Amendment. It seems the government is arguing that, as it relates to its role in due process, impartiality has not been defined. This is incorrect.

Whenever a guarantee enshrined in the Bill of Rights is made applicable against the states pursuant to the doctrine of incorporation, it is done so precisely because the Court has made a threshold determination that such a right is required as a fundamental matter of constitutional due process. *Timbs v. Indiana*, 139 S. Ct. 682 (2019). In *Ramos*, the Court found the Sixth Amendment's guarantee to a unanimous guilty verdict was a fundamental matter of due process, and applied to the states pursuant to the incorporation doctrine. *Ramos*, 140 S. Ct. at 1397.

The government's argument fails to acknowledge that only those rights which are required by virtue of due process in the first place are applied against the states. This is the essence of the incorporation doctrine.

Pursuant to incorporation, the question of whether a guarantee enshrined in the Bill of Rights is applicable to the states is whether the right at issue "is fundamental to our [i.e., American] scheme of ordered liberty . . . or as [the Supreme Court has] said in a related context, whether this right is deeply rooted in the Nation's history and tradition." *McDonald v. City of Chi.*, 561 U.S. 742, 767 (2010) (internal quotations omitted). *See also Timbs*, 139 S. Ct. at 687 (2019) (noting that a right may only be incorporated if it is either "'fundamental to our scheme of ordered liberty' or 'deeply rooted in this Nation's history and tradition'" and that once "a Bill of rights protection is incorporated, there is no day light between the federal and state conduct it prohibits or requires.").

Although the Supreme Court did not explicitly find in *Ramos* that unanimous guilty verdicts are required as a matter of due process, it did so implicitly by incorporating the right to a unanimous, and thus impartial, jury to the states. A determination that a right is required as a matter of due process is a fundamental prerequisite to incorporating that right it in the first place. *Cf. Ramos*, 140 S. Ct. at 1423-1424 (Thomas, J., concurring in the judgment) (agreeing that unanimity was required as a matter of the Fourteenth Amendment's Privileges or Immunities Clause but departing from the five-justice majority's holding that it was required as a result of "due process incorporation.").

Of course, incorporation applies by virtue of the Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Due Process Clause. But this makes no meaningful analytical difference. *Mapp v.* Ohio, 367 U.S. 643; 650 (1961); *Ker v. California,* 374 U.S. 23, 30 (1963); *Malloy v. Hogan,* 378 U.S. 1, 4 (1964). The Due Process Clause of the Fifth Amendment, not the Fourteenth Amendment, applies to courts-martial. *Weiss v. United States*, 510 U.S. 163, 165 (1994); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). However, just as in the Fourteenth Amendment "the Fifth Amendment also provides that no person shall be 'deprived of life, liberty or property, without due process of law' and there is no reason to expect that the general scope of the protections would be different in this

context." *United States v. Meakin*, 78 M.J. 396, 405 (CAAF 2019); *see also Bolling v.* Sharpe, 347 U.S. 497 (1954).

Ramos was not just some technical interpretation of the Sixth Amendment's Jury Trial Clause. Rather, both the holding and the result in *Ramos* were based upon an evolving understanding of a fundamental right necessary to ensure a fair criminal process. The military judge was correct when he stated, "Congress encroaches on service members' fundamental 5th Amendment due process right to an impartial panel by authorizing the panel to find guilt by a non-unanimous vote." (Gov. App. Ex. 7, page 10).

2. The military judge's decision is required under the current case law.

Law

The Supreme Court and CAAF have long recognized, "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994) (quoting *Weiss*, 510 U.S. at 194). "Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). "It is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *United States v. Jacoby*, 11 C.M.A. 428, 430-31 (C.M.A. 1960).

The Supreme Court has also recognized that Congress' power to make rules that are necessary and proper to legislate the armed forces is not limitless. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss*, 510 U.S. at 176.

Argument

This court has the power, authority, and responsibility to enforce the accused's constitutional and statutory right to an impartial trial and unanimous guilty verdict. The government argues that the deference to Congress' power prevents the military judge and this court from taking action on this issue. (Govt. Br. at 20-21). The government's argument contradicts the military justice system's long history of adopting changes in the constitutional landscape.

Following the Supreme Court's holding in *Lawrence v. Texas*, the CAAF examined the constitutionality of Article 125, which criminalized "sodomy[,] whether it is consensual or forcible, heterosexual or homosexual, public or private." *United States v. Marcum*, 60 M.J. 198, 202 (CAAF 2004). The CAAF scrutinized whether Article 125 "impinge[d] on a fundamental constitutional liberty interest." *Id*. at 204. Ultimately the court did "not presume the existence of such a fundamental right in the military environment when the Supreme Court

declined in the civilian context to expressly identify such a fundamental right." *Id.* at 205. The CAAF continued:

> The fog of constitutional law settles on separate and shared powers where neither Congress nor the Supreme Court has spoken authoritatively. Congress has indeed exercised its Article I authority to address homosexual sodomy in the Armed Forces, but this occurred prior to the Supreme Court's constitutional decision and analysis in *Lawrence* and at a time when *Bowers* served as the operative constitutional backdrop. *Id*. at 206.

While the court in *Marcum* ultimately found that *Lawrence* did not invalidate Article 125 as it was applied to those specific facts, the analysis shows that CAAF believed it within its purview to examine the constitutionality of the statute, especially in light of a recent Supreme Court decision

Article 52(a)(3) was enacted before *Ramos*, and *Apodaca* served as the operative constitutional backdrop for Congress. In making recommendations to Congress, the Military Justice Review Group (MJRG) noted that Oregon and Louisiana did not require unanimous verdicts, implying that the military's non-unanimous scheme could pass constitutional muster. Report of the Military Justice Review Group, p. 459 (Dec. 22, 2015), available at https://ogc.osd.mil?Links?Military-Justice-Review-Group/. Despite the government's contrary claim, Congress appears doubtful of Article 52's validity after *Ramos.* The Senate Armed Services Committee recently voted 23-3 to include a provision in the National Defense Authorization Act for Fiscal Year 2022

directing the Secretary of Defense to study whether Article 52's provision for non-unanimous convictions is still constitutional in light of *Ramos*. *See* S. Armed Services Cmte., *Fiscal Year 2022 National Defense Authorization Act: Executive Summary*, at 17 (2021).

This court and the military judge have a duty to uphold the Supreme Court's ruling in *Ramos*, which unlike *Marcum*, pronounced a fundamental right: a guilty verdict must be unanimous in order to be fair and impartial.

3. Military accused and civilian defendants are similarly situated at the time of trial and should be afforded the same due process protections.

Law

While this Court can and should find that a unanimous finding of guilt instruction is required under the Sixth Amendment requirement for a panel to be "impartial," the military judge is correct that unanimity is also required under the Due Process Clause of the Fifth Amendment. Civilians and service members are similarly situated when they are alike "in all relevant respects." *United States v. Begani*, 81 M.J. 273, 280 (CAAF 2021).

Three years ago, the Supreme Court observed, "The procedural protections afforded to a service member are '*virtually the same*' as those given in a civilian criminal proceeding, whether state or federal." *United States v. Ortiz*, 138 S. Ct. 2165, 2174 (2018) (emphasis added). Military courts now "closely resemble civilian structures of justice. *Id.* "Each level of military court decides criminal

'cases,' as that term is generally understood, and does so in strict accordance with a body of law (and, of course, the Constitution). If the Supreme Court finds the procedural protections between military and civilian accused to be "virtually the same," and the role of a panel or jury to be the same, certainly a military accused and a civilian defendant are similarly situated in terms of a panel or jury.

The similarities between the military justice system and the civilian justice system have coalesced, especially concerning crimes, such as the alleged offenses at bar, without a military nexus. *Solorio v. United States*, 483 U.S. 435 (1987). "Today, trial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service; as a result, the jurisdiction of those tribunals overlaps with that of state and federal courts." *Ortiz*, 138 S. Ct. at 2170; *see also id.* at 2174-175. The similarities between the two systems of justice allow for expanded court-martial jurisdiction, per *Solorio*, without infringing on the most important foundational element of the Constitution. As the Supreme Court explained, "[t]he procedural protections afforded to a servicemember are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174.

Ortiz is only the most recent in a long and consistent line of cases over the last half century recognizing the UCMJ as a system of justice. "A member of the Armed Forces is entitled to equal justice, under law not as conceived by the

generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws." *Winters v. United States*, 89 S. Ct. 57, 60 (1968). *See also O'Callahan v. Parker*[1], 395 U.S. 258, 273 (1969) (overruled on other grounds); *Weiss*, 510 U.S. at 174. and *Ortiz*, 138 S. Ct. at 2170.

Argument

Anyone who has practiced before civilian and military courts recognizes the vast similarities between the two. Master Sergeant Ferreira is situated no differently than any defendant in civilian court. He is charged with nonmilitary crimes, felonies in any American jurisdiction. He has, like his civilian counterparts, been afforded representation available to him, filed motions before a judge, and elected to be tried by a fact-finding body consisting of members of his community. The accused's counsel are licensed to practice by a State bar, and no specific training is required for an attorney to practice in a military court. At the beginning of his court-martial, the military judge instructs the panel the accused is presumed innocent. Master Sergeant Ferreira will sit next to his defense counsel, confront the witnesses against him, and decide whether or not he should testify on his own behalf. His defense counsel will make appropriate objections regarding evidentiary matters and courtroom procedure. At the conclusion of the

[1] *O'Callahan* was overruled by *Solorio v. United States*, 483 U.S. 435 (1987) on the subject of the service-connection requirement for court-martial jurisdiction. *Id*. at 447.

presentation of evidence, the military judge will instruct the panel members that the government must prove each element of an offense beyond a reasonable doubt. The panel will then deliberate and reach a verdict.

While some procedural differences between a court-martial and a civilian trial exist, the fundamental role of a "panel" and "jury" is the same: to be the ultimate finders-of-fact. Both the civilian criminal justice system and the military justice system depend on a group of persons, whether called a "jury" or "panel," who serve as the ultimate arbiter of fact and truth-seekers in a criminal proceeding. Both jurors and military panel members are tasked with the exalted responsibility to "weigh the credibility of competing witnesses" and to collectively "measure intelligently the weight [of] . . . evidence with some element of untrustworthiness." *Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009).

As found by the military judge, when comparing *relevant* information between the two groups, "[i]n all respects other than grand jury indictment and trial by jury, service members have the same constitutional rights as civilians. . . ." (Govt. App. Ex. 7, page 9). There is not one single constitutional protection granted to civilians not also granted to service members in some robust form.[2]

[2] Please see Appendix A for a comprehensive list of similarities of guaranteed rights between the civilian and military criminal justice systems.

If found guilty, the accused will be sentenced and, as the military judge found, "the consequences of a conviction at a special or general court-martial are no less serious than for civilian criminal convictions." (Govt. App. Ex. 7, page 9). Federal courts are in "wide agreement that convictions by general courts-martial receive the weight of equivalent convictions in the civilian system. *Gourzang v. AG United States*, 826 F.3d 132, 137 (3d Cir. 2016); *see also United States v. Shaffer*, 807 F.3d 943, 948 (8th Cir. 2015) ("[W]e hold that Shaffer's conviction by general court-martial is a conviction in 'a court of the United States' within 18 U.S.C. § 3559(c)"); *United States v. Grant*, 753 F.3d 480, 484-85 (4th Cir. 2014) (holding that a conviction by a general court-martial can qualify as the predicate offense under the Armed Career Criminal Act); *United States v. Martinez,* 122 F.3d 421, 424 (7th Cir. 1997) (holding that convictions by general courts-martial can serve as the predicate felonies-in-possession firearm prohibition at 18 U.S.C. §922(g)(1)); *United States v. MacDonald*, 992 F.2d 967, 970 (9th Cir. 1993); *see also* U.S.S.G. § 4A1.2 (g): Definitions and Instructions for Computing Criminal History ("Sentences resulting from military offenses are counted if imposed by a general or special court-martial.")

A convicted service member can suffer approximately 126 possible collateral consequences as a result of his conviction of a sex offense.[3] He can be required to register as a sex offender[4] or have extreme difficulty finding housing, and these collateral consequences apply to military service members convicted at a general court-martial just as they would to a civilian convicted in federal court.[5]

In another similarity, military members sentenced to confinement at a court-martial may be confined at a civilian institution[6] so long as they are "subject to the same discipline and treatment as" civilians in that institution. Article 58, UCMJ. The CAAF affirmed the plain reading of this statute in *United States v. McPherson* by stating, "[m]ilitary confinees can—and must—receive treatment equal to civilians confined in the same institution." 73 M.J. 393, 396 (CAAF 2014).

A trial and court-martial have the same general process and the burdens and presumptions that are foundational are present. Despite the different terminology, clothing, and optics, a court-martial and a civilian trial vary little.

The government identifies some differences in nomenclature to support the notion civilian and military accused are not similarly situated. But military

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[3] Nat'l Inventory of Collateral Consequences of Conviction. https://niccc.nationalreentryresourcecenter.org/consequences

[4] 34 U.S.C.A. § 20913

[5] 42 U.S.C.S. § 13663

[6] U.S. Dept. of Justice, Federal Bureau of Prisons. Administration of Sentence for Military Inmates (Sept. 13, 2011). https://www.bop.gov/policy/progstat/5110_016.pdf

customs and courtesies, trial location, vocabulary, and other "distinctions" between civilian and military accused are irrelevant. For example, a service member can be tried even if he is not wearing a uniform, or not complying with, for example, grooming standards. *See United States v. Hasan*, 71 M.J. 416, 419 (CAAF 2012). The differences the government identifies address minor matters (indeed, differences between a court in say, Texas, may vary widely from practice in New York State), not the underlying question: whether civilian trials and courts-martial are similar in nature and result. The test is whether they are *similar*, not *identical*.

Furthermore, the government cites to the military's purpose of promoting good order and discipline as separating the military and civilian justice systems. (Govt. Br. at 13). First, that is misleading. Section three of the Preamble to the Manual for Courts-Martial states, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen that national security of the United States." *Manual for Courts-Martial, United States* (2019 ed.) [MCM], Part I, ¶ 3. The first and primary purpose of the military justice system is to promote justice, not the preservation of good order and discipline.

Second, the military's purpose in promoting justice *and* maintaining good order and discipline is not antithetical to unanimous verdicts. Promoting justice is also at the heart of the civilian criminal justice system.

Finally, even if this court accepts the government's argument that these are somehow meaningfully different purposes in the system, that does not change the fact that the military justice system *in practice* is nearly identical to its civilian counterpart, and the military accused in nearly all meaningful ways is similarly situated to his civilian counterpart.

4. There is no rational basis for denying service members the constitutional right to a unanimous finding of guilt.

Law

Even under a rational basis test, Article 52(a)(3) cannot stand. A rational basis suffices for treating similarly situated people differently. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 80 (1981) (asking whether the disparate treatment is "not only sufficiently but also closely related" to Congress' purpose in legislating); *Akbar,* 74 M.J. at 406 ("equal protection is not denied when there is a reasonable basis for a difference in treatment") (internal citation omitted). Even though the Supreme Court has noted, "a jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1440 n. 44. No such rational purpose exists here.

Argument

In the present case, a "rational basis" does not suffice because the right to an impartial finder of fact is a fundamental right. Service members are guaranteed the fundamental right to a fair and impartial trial. *United States v. Commisso*, 76 M.J. 315 (CAAF 2017); *Wiesen*, 56 M.J. at 172; *Lambert*, 55 M.J. at 293 (CAAF 2001). There is no rational basis for not applying the Supreme Court's description of "fair and impartial", as laid out in *Ramos*, to military courts-martial.

a. Verdicts that are not unanimous are less reliable than unanimous guilty verdicts and therefore do not promote efficiency.

The government's first, main, and most robust argument for nonunanimous guilty verdicts is "efficiency." Indeed, the government devotes nearly twenty percent of its brief to the conclusory argument that unanimous verdicts would by definition by inefficient. (Gov. Br. at 25-31). But any system that does not accomplish its intended purpose is – by definition – inefficient.

The definition of efficient is "capable of producing desired results without wasting materials, time or energy." *Efficient*. Merriam-Webster.com. 2022. https://www.merriam-webster.com (10 February 2022). The government conflates efficiency with *expediency*. Something is not efficient just because it is fast. Something is efficient if it produces the desired result, which begs the question: what is the desired result of a courts-martial? Relying on the government's own purpose argument, *supra*, the purpose of the military justice system is, first and

foremost, to "promote justice." MCM, Part I, ¶ 3. It is not to complete a court-martial as quickly as possible.

"Justice" is defined as "the fair and proper administration of laws." *Justice,* Black's Law Dictionary (11th ed. 2019). "Fair" is defined as something "characterized by honesty, impartiality, and candor." *Fair,* Black's Law Dictionary (11th ed. 2019). The military justice system is efficient when it produces the honest, impartial, and proper administration of laws without wasting materials, time, or energy. Ensuring that the military justice system promotes justice is not a waste of time.

Even if this court accepts the government's claim that the goal of military justice is efficiency, empirical data demonstrates unanimous verdicts would, by ensuring reliability, actually promote *greater* efficiency. Requiring unanimous guilty verdicts increases efficiency by strengthening deliberations, reducing the frequency of factual errors, fostering greater consideration of minority viewpoints, and increasing confidence in verdicts and the criminal justice system. Dennis J. Devine et al. *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) [hereinafter *Jury Decision Making*][7].

[7] See also Brief of Law Professors and Social Scientists as *Amici Curaie* in Support of Petitioner, *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020)

Unanimous guilty verdict panels would actually be more efficient in that they would be more *thorough* and more likely to come up with the correct result. In a 1983 study by Dr. Reid Hastie, a psychologist specializing in research of juries and decision-makers, participants who had appeared for jury duty watched a three-hour reenactment of an actual homicide trial. *See* Reid Hastie et al., *Inside the Jury* 115, 145-47 (1983). The jurors then deliberated under unanimous (twelve out of twelve), five-sixths (ten out of twelve), or two-thirds (eight out of twelve) decision rules. *Id*. at 50. Jurors operating under a unanimous decision rule rated their deliberations as more thorough than jurors operating under non-unanimous decision rules. *Id*. at 77. Thus, although perhaps taking slightly longer, a unanimous jury's verdict is more thoughtful and thus more reliable.

Unanimity also reduces the likelihood of error. The same study above found juries required to reach a unanimous verdict in a simulated homicide trial were less likely to reach the legally inaccurate verdict than those not requiring unanimity. *Id.* at 62, 81.

It is more efficient to ensure that all panel members, regardless of race, religion, rank, age, experience, sexual orientation, branch, or ethnicity, are given a meaningful vote. While Article 52(a)(3) may not carry with it the same explicitly racist history as the Louisiana and Oregon non-unanimity laws, the possibility of a discriminatory silencing of minority voices is still present. As Justice Sotomayor

wrote, nonunanimous verdicts can give rise to at least a "perception of unfairness," especially when there are racial disparities in the pool of defendants and/or the composition of the jury. *Ramos* 140 S. Ct. at 1418 (Sotomayor, J., concurring in part).

The ability to dismiss minority voices is particularly distressing because of the racial disparities that already exist in the military justice system. In a May, 2019 report, the Government Accountability Office (GAO) noted the military services' failure to collect and maintain information about race and ethnicity in the military justice system limited the GAO's ability to assess disparities within that system.[8] Nonetheless, voluminous data from the civilian criminal justice system shows that race "matters at all phases and aspects of the criminal process."[9]

For example, the U.S. Sentencing Commission found that between 11 December 2007 and 30 September 2009, black males in the federal civilian criminal system received sentences that were 19.5% longer than those imposed on

[8] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES (2019).

[9] HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES,
INTER-AM. COMM'N H.R., 153RD SESSION, 2 (2014) (written submission of the American Civil Liberties Union on Racial Disparities in Sentencing), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

white males convicted of similar crimes.[10] The U.S. Department of Justice (DOJ) released a report examining racial and ethnic disparities in the federal death penalty system in comparison to the general population.[11] The report noted that between 1995 and July, 2000, the U.S. Attorney's offices submitted 682 cases to the DOJ's death penalty review procedure: 20% involved white defendants, 48% involved black defendants, and 29% involved Hispanic defendants.[11]

Similarly, racial minorities make up 43% of the U.S. Army's active duty force.[12] A study of Army adjudications from 2006-2015, showed that service members of color were 61% more likely to face court-martial than white service members.[13] This finding was echoed in 2020 at the House Armed Services (HASC) Military Personnel Subcommittee hearing titled 'Racial Disparities in the Military Justice System: How to Fix the Culture," where the GAO found that

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[10] U.S. SENTENCING COMM'N, BOOKER REPORT: PART E: DEMOGRAPHIC DIFFERENCES IN SENTENCING 2 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf#page=1.

[11] U.S. ARMY, ARMY DEMOGRAPHICS FY16 ARMY PROFILE, https://m.goarmy.com/content/dam/goarmy/downloaded_assets/pdfs/advocates-demographics.pdf.

[12] U.S. ARMY, ARMY DEMOGRAPHICS FY16 ARMY PROFILE, https://m.goarmy.com/content/dam/goarmy/downloaded_assets/pdfs/advocates-demographics.pdf.

[13] COL (R) Don Christensen and Yelena Tsilker, Racial Disparities in Military Justice 2017 (Protect our Defenders). https://safe.menlosecurity.com/doc/docview/viewer/docN34CE13CFF43Ae0da97ea8ebbfbc5b047283458bfec810f67bbcd59884da867aab0a56f891c3c

service members of color were about twice as likely as white service members to be tried in general and special courts-martial."[14] The report found that there were fewer statistically significant racial disparities in convictions and punishment severity, however because of the increased rate of charging of racial minorities any practice that makes it easier to convict will have a discriminatory effect.

The majority of accused are enlisted people of color, like MSG Ferreira. Department of Defense (2020) Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military.[15] Panels are required to mainly be composed of officers, who are overwhelmingly white men. Art. 25(b)(2), UCMJ, and Department of Defense (2019) 2019 Demographics: Profile of the Military Community.[16] Based on the required make up of MSG Ferreira's panel, it is very likely that it will have few minority viewpoints. Unanimity would avoid even the perception that those

[14] U.S. Senate, House Armed Services Committee, Subcommittee on Military Personnel Hearing: "Racial Disparity in the Military Justice System- How to Fix the Culture." https://armedservices.house.gov/2020/6/subcommittee-on-military-personnel-hearing-racial-disparity-in-the-military-justice-system-how-to-fix-the-culture

[15] Retrieved from, https://dacipad.whs.mil/images/Public/08-Reports/09_DACIPAD_RaceEthnicity_Report_20201215_Web_Final.pdf

[16] Retrieved from, https://download.Militaryonesource.mil/12038/MOS/Reports/2019-demograhics-report.pdf

viewpoints were being ignored and would further both missions of the military justice system: fairness and efficiency.

b. The low risk of delays because of hung juries is not significant enough to warrant denial of a fundamental right.

The government argues that unanimous guilty verdicts would result in a logjam due to hung juries. (Govt. Bt. at 25-26). This is baseless for two reasons. First, the constitutional requirement for a unanimous guilty verdict does not equate to a requirement for a unanimous acquittal. Second, in jurisdictions requiring unanimity, hung juries are rare.

A unanimous guilty verdict does not require deliberation until all members agree. The fundamental right of unanimity before taking an individual's liberty does not equate to a governmental right to a unanimous acquittal. As Justice Thomas observed in *Ramos*, "I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against non-unanimous felony guilty verdicts . . ." *Ramos* 140 S. Ct. at 1421 (Thomas, J., concurring). He used the very specific words "felony guilty verdicts" throughout his concurrence. This emphasizes *Ramos* does not require unanimity in *all* verdicts. That makes sense. The government does not have a liberty interest at stake in a criminal justice process. The Founders were concerned with limiting the extreme power of the government over the individual, not the individual over the government. While post-*Ramos* cases are few, the Oregon Supreme Court

explicitly found the Constitution does not require a unanimous *acquittal*. *State v. Ross*, 481 P.3d 1286, 1293 (Or. 2021) (holding that the trial court's decision to give a jury instruction that an acquittal must be unanimous was error because *Ramos* did not invalidate the Oregon law permitting non-unanimous acquittals).

Hung juries are rare. Statistics show that fewer than one in twenty trials end in a hung jury. While dispensing with the idea that there was a rational basis for not requiring unanimity, the Court in *Ramos* noted, "some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries." *Ramos* 140 S. Ct. at 1401. The Court was referencing a classic study, *The American Jury*, that found a hung jury rate of 5.5% in a sample of over 3,500 criminal trials. H. Kalven & H. Zeisel, *The American Jury* 461 (1966); Diamond, Rose, & Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 207-208 (2006).

A more recent 1999 study reviewing data from the Administrative Office of the U.S. Courts from 1980-1997 found federal criminal hung jury rates were consistently between two and three percent. P. L. Hannaford, *How Much Justice Hangs in the Balance?* Judicature, 83, 59-67 (1999). Because data regarding military panels is unavailable, it is impossible to determine what the rate of hung juries would be, but no reason exists to think that it would be higher than in federal courts. To the contrary, because of the panel member's ability to request

additional evidence, the hung jury rate would likely be significantly *lower* in military courts. R.C.M. 921(b).

c. The government's unlawful command influence argument is flawed.

The government's conclusory argument that non-unanimity protects against unlawful command influence (UCI) rests on their unspoken, but obvious, implication that convening authorities, commanding officers, and panel members from various ranks would regularly ignore the express admonition of a military judge or violate the UCMJ. Article 37(a)(1), UCMJ, states:

> No court martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court . . .

The government fails to show, or even argue, *how* or *why* these service members would ignore their oath and the military judge, and commit UCI in a unanimous verdict system any more than they do in the current system, when the overwhelming majority (six out of eight) of mixed-rank members must vote for guilt.

The government relies on *United States v. Mayo*, 2017 CCA LEXIS 239 (Army Ct. Crim. App. 2017) (mem. op.). In *Mayo*, decided before *Ramos*, this court noted UCI was a "preeminent concern" in the post-World War II years, and "a requirement of unanimous panel decision, while having obvious advantages in

truth-determination, would also undercut several protections against [UCI] that exist under current military justice practice." *Id.* at 7-8. Yet nothing in the legislative history indicates unanimity would undercut protections against UCI. *See* House Armed Services Committee Report, H.R. Doc. No. 491, 81st Cong., 1st Session (1949) at 606 (statement of Prof. Edmund M. Morgan).

On the contrary, there is a list of protections against UCI that does not include non-unanimous verdicts. Rule for Courts-Martial 921(a) states, "Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment." Furthermore, in all cases, the military judges instruct the members, just before they begin deliberations:

> The following procedural rules will apply to your deliberations and must be observed. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented.

Benchbook., para. 2-5-14 (10 January 2020 unofficial update).

To accept the government's argument is to completely swallow the unsupported presumption that officers and other leaders will naturally violate the law and their instructions. What's more, CAAF already directly addressed this point: "Where the vote is unanimous, [the] concerns about command influence

would appear to be unfounded." *United States v. Loving*, 41 M.J. 213, 296 (CAAF 1994).

Finally, and perhaps most compelling, military capital convictions already require unanimity, tacitly demonstrating that UCI is not a rational concern. *Loving*, 41 M.J. at 296. It is irrational to think that UCI is such a certainty during deliberations of noncapital offenses, but that it would cease to exist when a panel is making the weighty decision between life and death.

Conclusion

This court should deny the government's writ, as this court has no jurisdiction to review this case. If this court determines it has jurisdiction, it should still deny the writ, because the military judge correctly found he was bound by the Supreme Court's decision in *Ramos*. It was well within his purview to grant the defense's motion to instruct the panel a finding of guilty required unanimity. The Constitution required the military judge to grant the defense's motion, and it requires this court to uphold the military judge's ruling.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 24 February 2022.

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APPENDIX A:
Similarities between Civilian and Military Justice Systems

Constitutional Protection	**Service Member Protection**	**UCMJ Article, Case Law, and Presidentially promulgated rules**
Free Speech	Limited Protection	*Parker v. Levy*, 417 U.S. 733 (1974); *US v. Rapert*, 75 M.J. 164 (C.A.A.F. 2015)
Free Exercise	Limited Protection	*Cutter v. Wilkinson*, 544 U.S. 709 (2005); *US v. Sterling*, 75 M.J. 407 (C.A.A.F. 2016)
Assembly	Limited Protection	*United States v. Reed*, 24 M.J. 80 (C.M.A. 1987) (Everett, C.J. concurring).
Petition	Limited Protection	*Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Brown v. Glines*, 444 U.S. 348 (1980).
Bear Arms	Full Protection	*District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Smith*, 56 M.J. 711 (A.F. Ct. Crim. App. 2001) pet. denied, 56 M.J. 477 (2002)
Search and Seizures	Limited Protection	*United States v. Stevenson*, 66 M.J. 15 (C.A.A.F. 2008); *United States v. McMahon*, 58 M.J. 362 (C.A.A.F. 2003) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Katz v. United States*, 389 U.S. 347 (1967)); R.C.M. 302–305; Mil. R. Evid. 311–317.
Self-Incrimination and Right to counsel	Full or Modified Protection	Article 31, UCMJ; *United States v. Vela*, 71 M.J. 283 (C.A.A.F. 2012); *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003); Mil. R. Evid. 301, 304, & 305.
Double Jeopardy	Full Protection	Article 44, UCMJ; *Wade v, Hunter*, 3368 U.S. 684 (1949); *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012).
Due Process	Full Protection	*Weiss v. United States*, 510 U.S. 163 (1994) (citing *Rostker v. Goldberg*, 453U.S. 57 (1981) and *Middendorf v. Henry*, 425 U.S. 25 (1976)); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *United States v. Meakin*, 78 M.J. 396 (C.A.A.F. 2019).
Speedy Trial	Full Protection	Article 10, UCMJ; *United States v. Thompson*, 68 M.J. 308 (C.A.A.F. 2010); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); R.C.M. 707.

Impartial Fact Finder	Full Protection	*United States v. Commisso*, 76 M.J. 315 (C.A.A.F. 2017); *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001).
Informed of Charges	Full Protection	Articles 30 & 35, UCMJ; *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013); *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Cole v. Arkansas*, 333 U.S. 196 (1948)).
Confrontation	Full Protection	*United States v. Bess*, 75 M.J. 70 (C.A.A.F. 2016) (citing *Herring v. New York*, 422 U.S. 853 (1975)); *United States v. Katso*, 74 M.J. 273 (2015) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)); *United States v. Israel*, 60 M.J. 485 (C.A.A.F. 2005).
Compel Production	Limited Protection	Article 46, UCMJ; *United States v. Manos*, 17 C.M.A. 10 (C.M.A. 1967); *United States v. Jones*, 20 M.J. 919 (N- M.C.M.R. 1985).
Public Trial	Full Protection	*United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001); *United States v. Fleming*, 38 M.J. 126 (C.A.A.F. 1993); *United States v. Moses*, 4 M.J. 847 (1978).
Counsel	Full Protection	Article 27, UCMJ; *United States v. Gooch*, 69 M.J. 353 (C.A.A.F. 2011); *United States v. Dewrell*, 55 M.J. 131 (C.A.A.F. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984).
Cruel and Unusual Punishment	Full protection (as decided by the Court of Appeals of the Armed Forces)	Article 55, UCMJ; *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007); *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000); *United States v. Martinez*, 19 M.J. 744, 748 (C.M.R. 1984); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. Wappler*, 9 C.M.R. 23 (C.M.A. 1953).
Excessive Fines	Full Protection	Articles 15 and 66, UCMJ; *United States v. Stebbins*, 61 M.J. 366 (C.A.A.F. 2005).