No. 20-301

In the Supreme Court of the United States

TIMOTHY B. HENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether former Article 3(a) of the Uniform Code of Military Justice, 10 U.S.C. 803(a) (1982), provided jurisdiction to try petitioner, an Army servicemember, by court-martial for offenses for which the Double Jeopardy Clause prohibits his trial in state court.

2. Whether petitioner's trial by court-martial on capital murder charges for the murders of three dependents of another servicemember was consistent with the Fifth Amendment's requirement that each prosecution for a "capital, or otherwise infamous crime" be instituted by a presentment or indictment of a civilian grand jury except in "cases arising in the land or naval forces," U.S. Const. Amend. V.

ADDITIONAL RELATED PROCEEDINGS

General Court-Martial (Fort Bragg):

United States v. *Hennis* (Jan. 26, 2012)

United States Army Court of Criminal Appeals:

Hennis v. *Parrish*, No. 20080448 (June 25, 2008) (denying petitions for mandamus, habeas corpus, and prohibition)

United States v. *Hennis*, No. 20100304 (Oct. 6, 2016) (direct review)

United States Court of Appeals for the Armed Forces:

Hennis v. *Parrish*, Misc. No. 08-8022 (Sept. 26, 2008) (denying writ-appeal petition)

Hennis v. *Ledwith*, Misc. No. 14-8008 (Feb. 25, 2014) (denying habeas petition)

Hennis v. *Nelson*, Misc. No. 15-8003 (Nov. 4, 2014) (denying habeas petition)

In re Hennis, Misc. No. 17-0099 (Dec. 15, 2016) (denying mandamus petition)

United States v. *Hennis*, No. 17-0263 (Feb. 28, 2020) (direct review)

United States District Court (E.D.N.C.):

Hennis v. *Hemlick*, No. 09-cv-2169 (Mar. 16, 2010) (dismissing habeas petition without prejudice)

United States District Court (D. Kan.):

Hennis v. *Nelson*, No. 15-cv-3008 (Sept. 23, 2015) (dismissing habeas petition without prejudice)

United States Court of Appeals (4th Cir.):

Hennis v. *Hemlick*, No. 10-6400 (Jan. 17, 2012) (affirming 2010 dismissal of habeas petition)

Supreme Court of the United States:

Hennis v. *Hemlick*, No. 11-9860 (May 14, 2012)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-54a) is reported at 79 M.J. 370. The opinion of the Army Court of Criminal Appeals (Pet. App. 57a-267a) is reported at 75 M.J. 796.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on February 28, 2020. A petition for reconsideration was denied on April 9, 2020 (Pet. App. 56a). On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the order denying reconsideration.

The petition for a writ of certiorari was filed on September 4, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

Petitioner, a member of the United States Army, was convicted before a general court-martial on three specifications of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 (1982). Petitioner was sentenced to a reduction to the grade of E-1, forfeiture of all pay and allowances, a dishonorable discharge, and to be put to death. C.A. App. 115. The convening authority approved the adjudged sentence. *Ibid.* The Army Court of Criminal Appeals (Army CCA), sitting en banc, affirmed. Pet. App. 57a-267a. The Court of Appeals for the Armed Forces (CAAF) also affirmed. *Id.* at 1a-54a.

1. In May 1985, while he was enlisted in the United States Army, petitioner raped and murdered Kathryn Eastburn, the wife of Air Force Captain Gary Eastburn, and murdered the couple's three- and five-year-old daughters in their home in Fayetteville, North Carolina, near Fort Bragg. Pet. App. 2a-3a, 59a-60a, 238a-239a; see *State* v. *Hennis*, 372 S.E.2d 523, 525 (N.C. 1988).

The Eastburn family had placed an advertisement in the local Fort Bragg newspaper to find a new home for their dog before Captain Eastburn's upcoming assignment to England. Pet. App. 2a. On May 10, 1985, while the captain was out of state on temporary duty, petitioner visited Kathryn and the daughters at the family's home to meet the dog. *Ibid.* At some point, there was a struggle, after which petitioner restrained Kathryn and bound her hands, leaving ligature marks. *Id.* at 3a, 60a. Petitioner removed Kathryn's clothes, cut off her

underwear, and raped her, leaving his sperm in her vagina. *Id.* at 3a-4a, 239a. Petitioner then murdered Kathryn and her three- and five-year-old daughters, stabbing each multiple times and slitting their necks with such force that he nearly decapitated one of the girls. *Id.* at 3a, 60a. The three murders were premeditated; they were "preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victims"; and petitioner's murder of Kathryn "was committed while [he was] engaged in the commission of rape." *Id.* at 238a-239a (findings beyond a reasonable doubt).

On May 12, 1985, neighbors telephoned the police because they had not seen the Eastburn family in several days, their newspapers were accumulating outside, and crying could be heard coming from the house. Pet. App. 3a. Officers entered the home to discover a gruesome scene and the Eastburns' third daughter, an infant, alive in her crib. *Id.* at 3a, 60a. Although investigators recovered intact sperm from Kathryn's vagina, *id.* at 3a, the modern DNA-testing technology that would directly link petitioner to the rape and murders would not be developed until years later, *id.* at 4a.

The State of North Carolina prosecuted petitioner in state court, a state jury found petitioner guilty of the murders, and, in July 1986, he was sentenced to death. Pet. App. 3a, 7a. On appeal, however, the state supreme court ordered a new trial based on its determination that the trial judge erred by allowing the jury to view gruesome images of the victims' bodies. *Hennis*, 372 S.E.2d at 526-528. The State retried petitioner but, on April 19, 1989, he was acquitted of the state charges. Pet. App. 3a, 7a.

2. After his acquittal in state court, petitioner returned to active duty in the Army. Pet. App. 3a-4a, 8a. On June 1, 1989, petitioner submitted a reenlistment form in which he listed his then-current Expiration of Term of Service date as June 17, 1989, and asked to reenlist in the Army for an additional four-year period. *Id.* at 9a. On June 12, 1989, five days before that Expiration-of-Term-of-Service date, petitioner was honorably discharged from the Army. *Ibid.* One day later, on June 13, 1989, petitioner reenlisted in the Army for four years. *Ibid.* The government on appeal has assumed *arguendo* in this case that the reenlistment process gave rise to a brief break in petitioner's service between June 12 and 13, 1989, in his otherwise continuous active-duty status from January 1981 until his retirement on July 31, 2004. *Id.* at 14a & n.4; see *id.* at 7a, 9a.

3. In 2006, following advances in DNA analysis, forensic examiners tested the sperm recovered from Kathryn's body and established a DNA match to petitioner to a "near-statistical certainty." Pet. App. 61a; see *id.* at 4a. The Army then recalled petitioner to active duty. *Ibid.*

In November 2006, the Army preferred charges against petitioner, listing three specifications of premeditated murder, in violation of Article 118 of the UCMJ. Pet. App. 10a; C.A. App. 117. Under Article 43's relevant statute-of-limitations provision, those murder offenses "may be tried and punished at any time without limitation." 10 U.S.C. 843(a); accord 10 U.S.C. 843(a) (1982).

Petitioner moved to dismiss the charges for lack of jurisdiction, arguing that this reenlistment procedure in June 1989 deprived the court-martial of jurisdiction to try him for offenses committed before the resulting

break in service. Pet. App. 10a. The military judge denied the motion on two alternative grounds. *Ibid.*; see C.A. App. 1499-1501 (ruling). First, the judge determined that no break in service occurred, finding "no intent to sever [petitioner's] relationship with the Army" and that "[his] discharge was for the sole purpose of," and was "a necessary predicate" for, his reenlistment. Pet. App. 10a. Second, the judge explained that, even assuming a break in service, jurisdiction was proper under former Article 3(a) of the UCMJ. *Ibid.*

The version of Article 3(a) that applies to this case—which was in effect at the time of petitioner's 1985 offense conduct and until Congress amended Article 3(a) in 1992—provides that, subject to Article 43's statute-of-limitations provisions,

> no person charged with having committed, while in a status in which he was subject to [the UCMJ], an offense against [the UCMJ], punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court martial by reason of the termination of that status.

10 U.S.C. 803(a) (1982).[1] The military judge explained that former Article 3(a) rendered any break in service

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[1] As amended in 1992, Article 3(a) now more broadly authorizes court-martial jurisdiction over servicemembers for all crimes committed during prior periods of enlistment, regardless whether they also "can[] be tried" in a civilian court, 10 U.S.C. 803(a) (1982). See 10 U.S.C. 803(a) ("Subject to [Article 43], a person who is in a status in which the person is subject to [the UCMJ] and who committed an offense against [the UCMJ] while formerly in a status in which the person was subject to [the UCMJ] is not relieved from amenability

irrelevant because petitioner "cannot be tried in the courts of the United States or of a State" for his offenses (*ibid.*), since the Double Jeopardy Clause prohibits North Carolina from trying him and "no federal statute" authorizes trial for the offenses in federal district court. C.A. App. 1500-1501.

In a separate ruling, the military judge rejected petitioner's contention that court-martial jurisdiction was lacking on the theory that his offenses were not "service connect[ed]." C.A. App. 1502-1503. The judge explained that this Court has rejected the "service-connection test" in *Solorio* v. *United States*, 483 U.S. 435 (1987), and found that, even if the test were still relevant, the murders of dependents of an Air Force officer very close to Fort Bragg would have "a sufficient service connection" to warrant military jurisdiction. C.A. App. 1502-1503.

In 2010, a general court-martial convicted petitioner on each of the three specifications of murder. Pet. App. 4a. The evidence of aggravating factors for the capital offenses "was exceptionally strong, depicting the calculated and brutal slaying of multiple victims, two of whom were defenseless young children." *Id.* at 226a. The court-martial members unanimously sentenced petitioner to (*inter alia*) death, and the convening authority approved the sentence. *Id.* at 4a; see *id.* at 237a, 240a.

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to the jurisdiction of [the UCMJ] for that offense by reason of a termination of that person's former status."). That current version of Article 3(a) does not apply to this case because it was made effective on October 23, 1992, only "with respect to offenses committed on or after that date." National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1063, 1067, 106 Stat. 2505-2506.

4. The Army CCA affirmed. Pet. App. 57a-267a.

First, as relevant here, the Army CCA determined that jurisdiction was proper under former Article 3(a), notwithstanding its view that petitioner's military status "briefly" terminated in 1989, Pet. App. 82a-84a. See *id.* at 74a-88a. Petitioner claimed that former Article 3(a) was inapplicable, asserting that its condition that an offense "cannot be tried" in a federal or state court was not satisfied because he "could have been" (and was) tried in state court for the murders. *Id.* at 84a. Petitioner argued that although Article 3(a)'s use of the phrase "'cannot be tried'" occurs in the present tense, "the more logical and appropriate definition of 'cannot be tried' [in Article 3(a)] is 'could not have been tried,'" which would limit jurisdiction to offenses for which "civilian jurisdiction" never existed. Pet. Army CCA Reply Br. 34. The Army CCA rejected those contentions, explaining that the statutory use of the "present tense 'cannot'" and petitioner's preferred use of "the past tense 'could not'" are "not fungible." Pet. App. 84a-85a. The court added that "[h]ad Congress intended for [former] Article 3(a), UCMJ, to be applied with a view toward a state or federal court's past ability to try a case," it was "confident [Congress] would have used the 'could not have been tried' phrase" or "an equivalent variant." *Id.* at 85a-86a. Thus, because a "state prosecution" cannot now be brought in light of double jeopardy, a brief break in petitioner's service would not preclude court-martial jurisdiction. *Id.* at 88a.

Second, the Army CCA rejected petitioner's contention that a military offense charged against a service-member must satisfy a "service-connection" test, observing that this Court had "overturned the service-connection requirement for court-martial jurisdiction in

Solorio." Pet. App. 89a; see *id.* at 88a-91a. Although *Solorio* did not involve a capital offense, the court found no basis to limit *Solorio*'s holding—that "an accused's military status," rather than some service connection for an offense, is "the sole criterion" for establishing military jurisdiction—just to noncapital offenses. *Id.* at 90a-91a.

5. The CAAF affirmed. Pet. App. 1a-54a. Like the Army CCA and the military judge, the court found that jurisdiction was proper under former Article 3(a), *id.* at 6a-17a, and that the accused's military status, not a particular offense's service connection, forms the basis for court-martial jurisdiction, *id.* at 17a-21a.

a. With respect to former Article 3(a), the CAAF noted that the government had assumed *arguendo* that a short break in petitioner's service occurred in 1989. Pet. App. 14a. The court then explained that former Article 3(a)'s "plain language," which authorizes military prosecutions notwithstanding a break in service, focuses on whether the charged offenses can be tried in a civilian court "at the time [military] charges were preferred." *Id.* at 15a. And the court reasoned that because the charges here cannot be tried in civilian courts, former Article 3(a) authorized court-martial jurisdiction in this case. *Id.* at 15a-16a.

The CAAF observed that its Article 3(a) ruling was supported by its prior decision in *Willenbring* v. *Neurauter*, 48 M.J. 152 (C.A.A.F. 1998), overruled in part on other grounds by *United States* v. *Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018), which had held that an accused servicemember "'cannot be tried in [civilian] courts'" for "purposes of [former] Article 3(a)" for two rape offenses that occurred within a federal enclave once "[t]he relevant federal civilian statute of limitations"

has expired, *id.* at 176. See Pet. App. 16a. The court explained that *Willenbring* had rejected the contention that former Article 3(a) focuses on the possibility of civilian prosecution "at the time the offenses were committed" as opposed to the time that military charges are brought. *Ibid.*

b. The CAAF separately recognized that court-martial jurisdiction in cases involving capital offenses is not limited to service-connected crimes. Pet. App. 17a-21a. The court observed that the Fifth Amendment requires that any "capital, or otherwise infamous crime" be instituted by the presentment or indictment of a (civilian) grand jury, except in "cases arising in the land or naval forces," U.S. Const. Amend. V. See Pet. App. 18a. And it explained that *Solorio* had specifically rejected a service-connection standard, instead holding that the accused's military status is the sole test for whether a case properly arises in the land or naval forces. *Id.* at 17a-19a.

The CAAF rejected petitioner's contention, based on a possibility suggested by Justice Stevens's concurring opinion in *Loving* v. *United States*, 517 U.S. 748 (1996), that *Solorio* does not extend to capital offenses. Pet. App. 19a-20a. The court explained that the Fifth Amendment's grand-jury requirement applies to both "capital" and otherwise "infamous" crimes, and that "*Solorio* itself was an 'infamous crime' case" that interpreted the Fifth Amendment's "exclusion of 'cases arising in the land or naval Forces'" by citing "military capital cases." *Id.* at 20a. Finding no basis to interpret the Fifth Amendment's use of the phrase "'cases arising in the land or naval Forces'" to mean one thing when the military offense is noncapital and another when it is

capital, the court reasoned that the analysis in "*Solorio* applies to capital cases." *Ibid.*

The CAAF additionally observed that if a service connection were required, even Justice Stevens would have found such a connection in this capital case. Pet. App. 20a-21a. The court noted that *Solorio* involved a servicemember's "off-base sexual abuse of the dependents of Coast Guardsmen," which the Court of Military Appeals (the CAAF's predecessor court) concluded was service connected in light of its impact on the victims' servicemember parents, its effect on their ability to discharge their duties, and the restrictions that the abuse would trigger on the accused's future military assignments. *Id.* at 21a. Given that Justice Stevens expressly agreed with that service-connection rationale in *Solorio*, see *Solorio*, 483 U.S. at 451-452 (Stevens, J., concurring in the judgment), the court stated that it had "no doubt" that the same service-connection determination would apply here, "where [petitioner] slaughtered the wife and two children of a military member." Pet. App. 21a.

ARGUMENT

Petitioner contends (Pet. 11-22) that military jurisdiction under former Article 3(a) of the UCMJ does not extend to this court-martial proceeding on the theory that former Article 3(a) applies only to offenses that could never have been tried in a civilian court. And although this Court in *Solorio* v. *United States*, 483 U.S. 435 (1987), rejected the view that the service-connection test should be used to determine whether military prosecutions are "cases arising in the land or naval forces" within the meaning of the Fifth Amendment, U.S. Const. Amend. V, petitioner contends (Pet. 23-41) that the service-connection test should nevertheless be used for that same purpose in the context of capital military

prosecutions. The decision of the CAAF is correct and does not conflict with any decision of any civilian court of appeals, which have considered challenges to court-martial jurisdiction on collateral habeas review of military convictions. Moreover, Congress in 1992 eliminated the text of former Article 3(a) relevant to this case, making petitioner's contentions about the meaning of that text—which has been inapplicable to offenses committed for nearly the last three decades—of little prospective importance. And petitioner's own court-martial would be valid even under the service-connection test that he advocates. The petition for a writ of certiorari should be denied.

1. a. The CAAF correctly determined that, under the former version of Article 3(a) applicable here, court-martial jurisdiction exists to try petitioner for the murders that he committed in May 1985 while serving in the Army, notwithstanding any brief one-day break in his military service in June 1989. Pet. App. 14a-17a.[2] Former Article 3(a) specifically provides for such jurisdiction where, as relevant here, the accused "cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia" for the military offense for which he is charged. 10 U.S.C. 803(a) (1982). And because petitioner "cannot be tried" in state court for murder due to the prohibition against double jeopardy, former Article 3(a) authorized the exercise of military jurisdiction (by a different sovereign) in this case.

The text of former Article 3(a) provides that:

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[2] As it did in the CAAF, the government assumes *arguendo* that petitioner's reenlistment procedure in June 1989 constitutes a relevant break in his service. Pet. App. 14a n.4.

> no person charged with having committed, while in a status in which he was subject to [the UCMJ], an offense against [the UCMJ], punishable by confinement for five years or more and for which the person *cannot be tried* in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court martial by reason of the termination of that status.

10 U.S.C. 803(a) (1982) (emphasis added). As the CAAF concluded, that text applies directly where, as here, the servicemember charged with the military offense "cannot be tried" in state court, even if he previously could have been tried in the civilian court. Pet. App. 15a.

Congress's use of verb tense demonstrates as much. Former Article 3(a) applies only to a "person charged with having committed" a military offense, and it therefore applies at the time that such person is so charged (the present). 10 U.S.C. 803(a) (1982). Congress reinforced that present-day focus by emphasizing that the person must be charged with "having committed" the offense "while in a status in which he *was* subject" to the UCMJ (past tense). *Ibid.* (emphasis added). Congress then conditioned court-martial jurisdiction notwithstanding the termination of that status on whether the person "*cannot be* tried" for the offense in civilian courts, using a present-tense verb phase composed of the modal verb "can" in its negative form ("cannot") and the verb "be." *Ibid.* (emphasis added). Former Article 3(a) therefore properly focuses on whether, at the time the servicemember is charged with a military offense, he "cannot be tried" in a civilian court for the offense.

Petitioner does not dispute that he now "cannot be tried" for his murders in the courts of North Carolina because of the prohibition against (same-sovereign)

double jeopardy. Petitioner instead appears to contend (Pet. 13, 15) that former Article 3(a) should be interpreted to apply only to offenses that could "*never*" have been tried in a civilian court. Petitioner's submission, however, disregards Congress's use of the present tense in "cannot be tried." Petitioner makes no attempt in this Court to explain how that present-tense phrase, when used in a provision that sets its temporal frame of reference at the time at which a "person [is] charged" with the military offense, would support his position. If Congress had intended to enact petitioner's preferred condition, it would have drafted former Article 3(a) to apply only if the person charged with the military offense "could not have been tried" in a civilian court.

Petitioner has instead argued that "the more logical and appropriate definition of 'cannot be tried' [in former Article 3(a)] is 'could not have been tried.'" Pet. Army CCA Reply Br. 34. But that atextual argument lacks merit. "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992); see *Gundy* v. *United States*, 139 S. Ct. 2116, 2127 (2019) ("This Court has often 'looked to Congress' choice of verb tense to ascertain a statute's temporal reach.'") (quoting *Carr* v. *United States*, 560 U.S. 438, 448 (2010)). "Had Congress intended" to apply former Article 3(a) only to persons charged with a military offense when they *could not have been* tried in any civilian court, "it presumably would have varied the verb tenses [in former Article 3(a)] to convey this meaning." *Carr*, 560 U.S. at 450.

Congress did not do so. That is because it instead intended former Section 3(a) to apply to when a charged offense was committed within Article 43's statute of limitations "*whenever the Federal* [*and State*] *courts do not*

have jurisdiction, and when the offense is serious enough to call for at least 5 years' sentence." S. Rep. No. 486, 81st Cong., 1st Sess. 5 (1949) (emphasis added); see H.R. Rep. No. 491, 81st Cong., 1st Sess. 5 (1949). Congress thus specifically designed former Article 3(a) to prevent "the absurd situation of permitting an honorable discharge to operate as a bar to a prosecution for murder or other serious offenses" committed by a servicemember before his discharge from the Armed Forces. H.R. Rep. No. 491, at 5. This is exactly that case.

Petitioner observes (Pet. 19-21) that Congress enacted Article 3(a) in response to *United States ex rel. Hirshberg* v. *Cooke*, 336 U.S. 210 (1949), which construed prior statutory provisions to preclude a military prosecution after a break in military service. Although petitioner focuses on the fact that the military offense in *Hirshberg* was committed overseas, *Hirshberg*'s analysis rested on the accused's break in service, not the locus of his offense. Former Article 3(a) thus provided the authority needed in light of *Hirshberg*'s statement that "without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service." *Id.* at 215. If Congress had additionally intended to apply the provision only to overseas offenses, it would have said so expressly. Petitioner's citation (Pet. 20 n.7, 21 & nn.8-10) to scattered statements by individual legislators does not suggest otherwise. Such "statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (citing *Milner* v. *Department of the Navy*, 562 U.S. 562, 572

(2011)). And certain legislators' view that former Article 3(a) solved the problem of cases factually similar to *Hirshberg* does not suggest that—despite the provision's express wording—Congress intended the provision to be limited just to *Hirshberg*'s factual context or to offenses that could never have been prosecuted in a civilian court.

The CAAF's decision in this case did not break new ground. The CAAF had previously held that a servicemember charged with two military rape offenses "'cannot be tried in [civilian] courts'" for "purposes of [former] Article 3(a)" where the rapes occurred within a federal enclave (outside the jurisdiction of a State) and were at one point triable in federal civilian court, but "[t]he relevant federal civilian statute of limitations" had expired. *Willenbring* v. *Neurauter*, 48 M.J. 152, 176 (C.A.A.F. 1998), overruled in part on other grounds by *United States* v. *Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018). In the proceedings below, petitioner did not ask the CAAF to overrule its precedent, but instead argued that *Willenbring* was distinguishable because Willenbring was never tried in civilian court, whereas petitioner was. Pet. CAAF Reply Br. 6. That distinction, however, cannot support petitioner's position because the text of former Article 3(a) does not limit military jurisdiction to contexts in which a servicemember *has not* been tried in a civilian court; it requires only that the person "cannot be tried" in a civilian court.

Petitioner now relies (Pet. 14-19, 23) heavily on his contention that the CAAF's interpretation of former Article 3(a) presents double jeopardy concerns. But double jeopardy principles have no application here. This Court recently reaffirmed the "170 years of precedent" uniformly teaching that after one sovereign (here,

North Carolina) has tried an individual for an offense under its laws, the Double Jeopardy Clause does *not* prohibit a different sovereign (here, the United States) from trying the individual for the same conduct constituting an offense under its own laws. *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). The Army therefore could always have prosecuted petitioner for murder under Article 118 consistent with the Double Jeopardy Clause, regardless of any prosecution by the State. The exercise of that power when newly available DNA evidence provides compelling evidence that petitioner committed a rape and triple murder is in no way a "revers[al]" (Pet. 16) of double-jeopardy principles.

b. This Court's review is unwarranted for several additional reasons. First, review is unwarranted because any decision that this Court might render on the meaning of "cannot be tried" in former Article 3(a) would have extremely limited prospective application. When Congress amended Article 3(a) in 1992, it removed its requirement that the accused "cannot be tried" in a civilian court and made that amendment effective for offenses committed on or after October 23, 1992. See p. 5 n.1, *supra*; see also Pet. App. 11a n.3. As a result, former Article 3(a) does not apply to any offense committed over the last 28 years. And with respect to offenses committed before October 1992, former Article 3(a) could apply by its own terms only if (1) Article 43's statute of limitations has not lapsed, (2) the offense is punishable by five or more years imprisonment, and (3) the accused cannot be tried in a civilian court. Most pre-1992 military offenses had a five-year statute of limitations that has long ago expired. See 10 U.S.C. 843(a) and (b) (1988). And petitioner fails

to identify any actual military case beyond his own concerning pre-1992 offense conduct that cannot be tried in civilian court.

Second, the decision of the CAAF does not conflict with any decision of any (civilian) court of appeals, which have entertained such challenges to court-martial jurisdiction on collateral habeas review after direct review in the military-court system is complete. This Court in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), explained that although civil courts are not generally authorized to review acts of courts-martial, "this general rule" applies only with respect to acts within "'the scope of [a court-martial's] jurisdiction.'" *Id.* at 746. The Tenth Circuit, whose territorial jurisdiction includes Fort Leavenworth (where petitioner has been incarcerated), has accordingly determined that collateral review of military convictions in district court habeas proceedings properly may properly extend to review of a court-martial's "jurisdiction" and that a federal court's "review of [those] jurisdictional issues is independent of the military courts' consideration of such issues." *Fricke* v. *Secretary of the Navy*, 509 F.3d 1287, 1289-1290 (10th Cir. 2007).

Federal courts accordingly have entertained jurisdictional claims like petitioner's based on Article 3(a) when they are presented in collateral habeas challenges after the servicemember has exhausted all direct review of his court-martial conviction. The Fourth Circuit, for instance, has determined that "[t]he federal courts possess authority to consider and determine habeas corpus challenges to the jurisdiction of the military courts," including a claim that, after a break in the accused's military service, "the court-martial was not entitled to ex-

ercise continuing jurisdiction over the specifications under [former] Article 3(a)." *Willenbring* v. *United States*, 559 F.3d 225, 230-231 (4th Cir.), cert. denied, 558 U.S. 847 (2009). The Third Circuit has similarly observed that Article III courts have historically had jurisdiction to consider challenges to court-martial jurisdiction, and it has accordingly exercised such jurisdiction on habeas review to conclude that a specification resulting in a conviction did "not fall within the statutory exception of [Article]3(a)" to extend court-martial jurisdiction after a break in service. *Murphy* v. *Dalton*, 81 F.3d 343, 346, 350 (3d Cir. 1996). Notwithstanding such decisions in the courts of appeals conducting such review, petitioner identifies no conflict of authority that might warrant this Court's review. See Sup. Ct. R. 10(a).

2. The CAAF also correctly rejected petitioner's separate jurisdictional contention that his case does not arise "in the land or naval forces," U.S. Const. Amend. V, and therefore cannot be tried by court-martial on the theory that the murders for which he was convicted lack "service connection." Pet. App. 17a-21a. This Court itself specifically rejected that service-connection requirement in *Solorio*, and petitioner's contention (Pet. 23-41) that *Solorio* does not apply to capital offenses lacks merit.

a. Article I of "[t]he Constitution grants to Congress the power '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Solorio*, 483 U.S. at 438 (quoting U.S. Const. Art. I, § 8, Cl. 14) (brackets in original). Reflecting that authority, the Fifth Amendment exempts cases arising in "the land or naval forces" from its requirement that the prosecution of "a capital, or otherwise infamous crime" must be initiated by the presentment or indictment of a (civilian)

grand jury. U.S. Const. Amend. V. "In an unbroken line of decisions from 1866 to 1960," this Court interpreted "the 'natural meaning' of" those constitutional provisions concerning "'the land [and] naval forces'" as one that "condition[s] the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused." *Solorio*, 483 U.S. at 439 (citation omitted). As a result, the longstanding "test for [military] jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a *person* who can be regarded as falling within the term 'land and naval Forces.'" *Ibid.* (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240-241 (1960) (second emphasis added)).

In 1969, this Court in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), overruled by *Solorio*, *supra*, broke with that tradition, holding that courts-martial have jurisdiction only over so-called service-connected *offenses* of servicemembers. But the Court in *Solorio* returned to its longstanding view of court-martial jurisdiction when it squarely rejected *O'Callahan*'s atextual and ahistorical limitation on the type of cases deemed to arise in the land or naval forces. *Solorio* explained that such a "service connection" limitation, 483 U.S. at 436, is inconsistent with Congress's broad authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, finding "no indication" in Article I's text that "the grant of power in Clause 14 [of Section 8] was any less plenary than the grants of other authority to Congress in the same section," *Solorio*, 483 U.S. at 441. The Court further explained that the Constitution vests in Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the

military," *id.* at 447, and specifically observed that "determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress," *id.* at 440. The Court also emphasized that *Callahan*'s brief substitution of a "service connection requirement" for the longstanding military-status rule had resulted in "confusion" stemming from "the complexity" of applying the service-connection requirement in the context of actual cases. *Id.* at 449.

In light of *Solorio*'s determination that a servicemember's offense need not be "service connected" to trigger court-martial jurisdiction, it is now settled that military courts-martial have the constitutional authority to try servicemembers for ordinary criminal offenses "unrelated to military service" and may impose "terms of imprisonment and capital punishment" "on top of peculiarly military discipline," even though the criminal jurisdiction of "federal and state courts" will often overlap "significantly" with that authority. *Ortiz* v. *United States*, 138 S. Ct. 2165, 2174-2175 (2018); see *United States* v. *Kebodeaux*, 570 U.S. 387, 404 (2013) (Alito, J., concurring in the judgment).

Petitioner contends (Pet. 23-35) that *Solorio*'s interpretation of cases arising in the land or naval forces applies only to noncapital offenses, not to capital offenses like murder. Petitioner in particular relies (Pet. 25-26, 35, 39) on Justice Stevens's three-paragraph concurring opinion in *Loving* v. *United States*, 517 U.S. 748 (1996), in which he stated that "because *Solorio* was not a capital case" the question remains "open" whether "a 'service connection' requirement should obtain in capital cases." *Id.* at 774. But Justice Stevens did not conclude

that *Solorio*'s rationale was inapplicable; he simply observed that the issue was not "appropriately * * * raised" under the facts of *Loving*. *Ibid.* And the CAAF correctly rejected petitioner's proffered distinction between noncapital and capital offenses as "unfounded" in this context. Pet. App. 20a.

The meaning of the Fifth Amendment's exception for "cases arising in the land or naval forces," U.S. Const. Amend. V, which *Solorio* interpreted as turning exclusively on the question of the accused's military status, does not vary based on whether the charged offense is capital or not. The text of that exception applies equally to the Fifth Amendment's default requirement of grand-jury presentment for all "capital, or *otherwise* infamous crime[s]." *Ibid.* (emphasis added). Thus, as the CAAF recognized, although *Solorio* did not involve infamous offenses that were themselves capital offenses, this Court "cited military capital cases" to support its reading of the constitutional text. Pet. App. 20a (citing *Solorio*, 483 U.S. at 449 n.14).[3] Petitioner provides no reading of "cases arising in the land or naval forces" that would support a principled distinction between capital and noncapital offenses. And petitioner's position, if adopted, would mean that the test for whether a "case[] arise[s] in the land or naval forces" would vary *in the same case*, where a servicemember is accused of two offenses arising from the same conduct, one of

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[3] Felony offenses punishable by imprisonment in a "prison or penitentiary" are "infamous" within the meaning of the Fifth Amendment. *Mackin* v. *United States*, 117 U.S. 348, 352 (1886); see *Parkinson* v. *United States*, 121 U.S. 281, 281 (1887); see also *Stirone* v. *United States*, 361 U.S. 212, 215 (1960) ("The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment.").

which is capital and the other of which is not. As the CAAF recognized, that interpretation of the Constitution is unsound.

b. In any event, this case would be a poor vehicle to consider petitioner's service-connection contentions. Even under the now-rejected service-connection test, petitioner's offenses were service connected.

Petitioner murdered and raped the wife of a servicemember and murdered their two young daughters. Those horrific crimes by a servicemember, which victimized the immediate family dependents of a military officer, would necessarily affect the officer's ability to discharge his military duties and his unit's morale. Such crimes can also require significant changes in the accused's military responsibilities. For those very reasons, the CAAF's predecessor in *Solorio* determined that the off-base sexual abuse of daughters of servicemembers in private housing had a sufficient service connection to warrant military jurisdiction. Pet. App. 21a (discussing decision). And Justice Stevens—whose concurring opinion in *Loving* is the centerpiece of petitioner's argument—expressly agreed with that service-connection rationale. See *Solorio*, 483 U.S. at 452 (Stevens, J., concurring in the judgment). Petitioner thus provides no reason to doubt that his offenses would fail the very service-connection test that he advocates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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