No. _____

IN THE

Supreme Court of the United States

TIMOTHY B. HENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner was a Soldier in the U.S. Army when, in 1989, a North Carolina court acquitted him of capital murder. Following a break in his military status, Petitioner continued serving in the Army until his retirement in 2004. In 2010, a court-martial sentenced Petitioner to death for the same charges underlying his prior acquittal. Because of the break in Petitioner's military service, the court-martial could not try him unless the charges were ones "for which [he] cannot be tried in the courts of . . . any State." 10 U.S.C. § 803(a) (1982).

This case presents the following questions:

1. Whether the offenses for which Petitioner was tried and acquitted in state court constituted offenses "for which [he] *cannot* be tried in the courts of . . . any State."

2. Whether 10 U.S.C. § 803(a) is unconstitutional insofar as it allowed the government to court-martial Petitioner only because the Double Jeopardy Clause would have barred his retrial in a state court.

3. Whether the Constitution bars the military from subjecting servicemembers to capital trials for non-military offenses.

PARTIES TO THE PROCEEDING

Timothy B. Hennis, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RULE 14.1(B)(III) STATEMENT

This case arises from a conviction by a general court-martial composed of a panel with enlisted representation on April 15, 2010 in *United States v. Hennis*, General Court Martial Order No. 3, Department of Army, Headquarters, XVIII Airborne Corps and Fort Bragg, 28310, (January 26, 2012), and the following proceedings:

United States v. Hennis, No. 17-0263/AR, 2020 CAAF LEXIS 189, at *1 (C.A.A.F. Apr. 9, 2020)

United States v. Hennis, 79 M.J. 370 (C.A.A.F. Feb. 18, 2020)

United States v. Hennis, 77 M.J. 7 (C.A.A.F. Nov. 20, 2017)

United States v. Hennis, 75 M.J. 796 (A. Ct. Crim. App. Oct. 6, 2016)

Hennis v. Nelson, 74 M.J. 77 (C.A.A.F. 2014)

Hennis v. Ledwith, 73 M.J. 240 (C.A.A.F. 2014)

Hennis v. Parrish, 67 M.J. 50 (C.A.A.F. Sept. 26, 2008)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, that directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Timothy B. Hennis respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Armed Forces (CAAF) in this case.

OPINIONS BELOW

The CAAF's opinion is reported at 79 M.J. 370 (C.A.A.F. 2020) and is reproduced in the appendix to this petition at Pet. App. 1a–53a. The opinion of the Army Court of Criminal Appeals (Army Court) is available at 75 M.J. 796 and is reproduced at Pet. App. 55a–259a.

JURISDICTION

The CAAF decided Petitioner's case on February 28, 2020. Pet. App. 1a. The CAAF denied a timely petition for reconsideration on April 9, 2020. Pet. App. 54a. On March 19, 2020, this Court extended the deadline for filing a petition for a writ of certiorari "to 150 days from the date of the . . . order denying a timely petition for rehearing," making this petition due on September 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1259(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8 of the Constitution provides that "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . . ."

The Fifth Amendment of the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . ."

The version of Article 3(a), Uniform Code of Military Justice, 10 U.S.C. § 803(a) (1982), in effect at the time of the alleged offenses, provides:

> [A]ny person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by

> confinement for five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by court-martial by reason of the termination of said status.

STATEMENT OF THE CASE

The government wants to execute Timothy Hennis even though North Carolina acquitted him of the very crimes concerned. In 1989, a jury found Hennis not guilty of capital murder following two trials for his life in the courts of North Carolina. Yet more than twenty years later, the United States court-martialed him and sentenced him to death for the very same allegations. The government predicated its exercise of court-martial jurisdiction on Hennis's status as a military retiree. But an intervening break in his military service meant that the government could only court-martial him if the offenses were ones "for which [Hennis] cannot be tried in the courts . . . any State." 10 U.S.C. § 803(a) (1982). The United States claimed Hennis "cannot be tried" in any state *because* the Double Jeopardy Clause protected him from further prosecution in

North Carolina—a state where he had *already* been tried.

This petition questions the validity of that court-martial on three grounds. First, does 10 U.S.C. § 803(a) authorize a court-martial when, as here, the accused *was in fact tried*, and even acquitted, in a state court? Second, to the extent that § 803(a) does permit such an outcome, is it unconstitutional? Finally, even if § 803(a) permits jurisdiction, can the United States subject a member of the Armed Forces to a capital court-martial for non-military offenses triable in a civilian court?

I. FACTUAL BACKGROUND.

The three trials of Timothy Hennis involve the kinds of evidence, courtroom drama, and legal fencing more common to fictional thrillers than real life litigation.[1] But this petition does not concern these extraordinary facts. Rather, it concerns the

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[1] *See*, *e.g.*, Nicholas Schmidle, *Three Trials for Murder*, THE NEW YORKER, Nov. 14, 2011, https://www.newyorker.com/magazine/2011/11/14/three-trials-for-murder (describing the circumstances leading to Petitioner's court-martial); SCOTT WHISNANT, INNOCENT VICTIMS (Penguin Books Ltd., 1993) (chronicling Petitioner's two trials in North Carolina and providing a "spellbinding account of an unthinkable true crime."); INNOCENT VICTIMS (Cates/Doty Productions 1996) (dramatizing the eponymous book in a television miniseries).

extraordinary actions by which the United States has sought to retry them at a capital court-martial.

The crimes occurred in the city of Fayetteville, North Carolina between the late evening of May 9 and the early morning of May 10, 1985. Pet. App. 2-3a. State and county officials investigated the murders, and ultimately settled on Petitioner as their suspect. Petitioner was a sergeant in the U.S. Army at the time and stationed at Fort Bragg, which abuts the city of Fayetteville. *Id.* Despite his military status, and the fact that the victims were family members of an Air Force officer, military authorities did not pursue any criminal actions against Hennis until 2006, two years after he had already retired from military service.

The State of North Carolina tried Hennis for charges of rape and three counts of capital murder in 1986. Its case was hardly "overwhelming," resting on "circumstantial evidence" and some "direct evidence upon which the witnesses' own remarks cast considerable doubt." *State v. Hennis*, 372 S.E.2d 523, 528 (N.C. 1988). Nevertheless, the State succeeded in convicting Hennis and having him sentenced to death. *Id.*

But its success was short-lived. The Supreme Court of North Carolina disapproved of the State's repeated projections of "grotesque and macabre" photographs onto an "unusually large screen on a

wall directly over defendant's head" during the trial, and it found that such displays could have inflamed the jury. *Id*. The court vacated his conviction and sentence, and authorized a new trial. *Id*. Hennis's second trial ended on April 19, 1989, when the jury acquitted him of all charges. Pet. App. 7a.

The State released Hennis from its custody, and he returned to his military duties. *Id*. The Army issued him an honorable discharge on June 12, 1989 and reenlisted him the next day. Pet. App. 9a. Following this break in his military service, Hennis continued to serve and earn promotions, ultimately achieving the rank of first sergeant and retiring at the corresponding grade in 2004. Pet. App. 3a. Over the course of his career, Hennis gave more than two decades of honorable service to our country.

Some sixteen years after Hennis's acquittal, the Cumberland County Sheriff's Office sent vaginal swabs taken from the body of the adult victim and a vial of Hennis's blood to the North Carolina State Bureau of Investigation (SBI) for analysis. Pet. App. 4a. In May 2006, the SBI concluded that the swabs contained sperm with deoxyribonucleic acid (DNA) profiles matching that in Hennis's 1985 blood sample. *Id*. Two other labs would conduct a total of three more DNA tests on this evidence in preparation for trial, and none would replicate the SBI's result. R. at 5353, 5375-79, 5499, 5503.

Nevertheless, in June 2006, Cumberland County officials knew only what the SBI had reported. They also knew that Hennis's protections against double jeopardy could bar a third trial in North Carolina, and so county officials contacted legal advisors to the Commander of XVIII Airborne Corps and Fort Bragg. R. at 330; App. Ex. XIX. On June 29, 2006, the commander requested authorization to recall Hennis to active duty and specifically based this request on the belief that "the United States Army . . . is the only entity that could exercise jurisdiction over MSG(R) Hennis and try him for the aforementioned allegations." App. Ex. IX, p. 9. On September 14, 2006, a group of civilian police and military personnel served Petitioner with orders directing him to report for duty at Fort Bragg, North Carolina.

II. PROCEDURAL HISTORY.

The United States accused Petitioner of three specifications of premeditated murder in violation of 10 U.S.C. § 918, and referred him to trial before a capital court-martial. Petitioner moved to dismiss the charges for lack of jurisdiction. Pet. App. 6a. He argued that his discharge in 1989 created a break in service that, under *United States ex rel Hirshberg v. Cooke*, 336 U.S. 210 (1949), precluded the exercise of court-martial jurisdiction over crimes committed

before the break in service. Pet. App. 6a. The government contended that 10 U.S.C. § 803(a) allowed it to overcome this prohibition because it had charged Hennis with offenses for which he "cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia." Pet. App. 14a. Specifically, the government argued Hennis "cannot not be tried" in the courts of North Carolina because he had been tried there already, and the Double Jeopardy Clause would bar any retrial.

The military judge denied Petitioner's motion, and the Army Court denied his interlocutory petition for writs of mandamus, habeas corpus, and prohibition. The CAAF denied his subsequent writ appeal as well, and the civilian courts abstained from entertaining Petitioner's collateral challenge while the military proceedings continued. *Hennis v. Hemlick*, 666 F.3d 270, 271 (4th Cir. 2012).

Petitioner's court-martial convened in April 2010. A panel of officers and enlisted members convicted Petitioner and sentenced him to death. Pet. App. 4a. On appeal, Petitioner raised forty-nine assignments of error before the Army Court, which included challenging the court-martial's jurisdiction under 10 U.S.C. § 803(a). Pet. App. 55-258a. The Army Court concluded that Petitioner's discharge on June 12, 1989 created a definitive break in his

service, but that § 803(a) provided jurisdiction in his case.[2] Pet. App. 80a. It determined, however, that because the text of § 803(a) was couched in the present tense, i.e. "cannot" as opposed to "could not," it only concerned what was possible at the time of the court-martial, and at that moment, Petitioner's "constitutional double jeopardy protection against further state prosecution" satisfied the terms and thus revived jurisdiction over conduct preceding his break in service. Pet. App. 85a.

Petitioner also challenged the constitutionality of his court-martial on the grounds that the allegations of capital murder were not connected to his military service, and therefore they did not "arise in the land and naval forces" within the meaning of the Fifth Amendment. Pet. App. 86-89a. The Army Court rejected this, holding that *Solorio v. United States*, 483 U.S. 435 (1987), made the "accused's military status at the time of the offense . . . the sole criterion

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[2] Forty-two years after enacting the UCMJ, Congress revised 10 U.S.C. § 803 to its current form. This revision was only prospective, applying solely to offenses occurring on or after October 23, 1992. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1063, 1067, 102 Stat. 2315, 2505–06 (1992). Unlike the version of the statute at issue here, the 1992 revision permits revived jurisdiction whenever a person previously subject to the Code becomes subject to the Code again. 10 U.S.C. § 803 (1994).

for establishing subject matter jurisdiction in a court-martial, capital or otherwise." Pet. App. 89a.

The Army Court affirmed Petitioner's convictions and sentence of death. Pet. App. 259a. Petitioner renewed these jurisdictional challenges before the CAAF, in addition to thirty-eight other assignments of error. Pet. App. 4a. The CAAF affirmed the judgment of the Army Court on February 28, 2020, and it denied Petitioner's timely motion for reconsideration on April 9, 2020.

This petition follows.

REASONS FOR GRANTING THIS PETITION

This is a case with no precedent. It appears to be the first time in our Nation's history that someone faces the death penalty for charges of which a jury acquitted him. It is the first time a court-martial has ever sentenced a military retiree to death, and it is the first time a court-martial has ever imposed the death penalty for offenses that were not clearly military in nature. This also appears to be the first time our government has invoked a citizen's protection against double jeopardy for the purpose of putting that same citizen in jeopardy yet again—and to take his life, no less.

In weaponizing the Double Jeopardy Clause to retry civilian crimes before a capital court-martial,

the United States has offended the Fifth Amendment twice over. The questions that arise from this court-martial concern the nature of our constitutional protections, the degree to which the government may exploit them, and the extent to which we will tolerate expansions of military jurisdiction into the realms of civilian justice. These are important questions, and only this Court can answer them conclusively.

I. THE UNITED STATES CANNOT USE THE GUARANTEE AGAINST DOUBLE JEOPARDY TO PUT SOMEONE IN JEOPARDY YET AGAIN.

The court-martial of Timothy Hennis raises a question this Court has never confronted directly: can the guarantee against double jeopardy be used to *justify* a second trial for the same offenses? The answer should be an emphatic "no," whether because 10 U.S.C. § 803(a) does not require such an absurd result, or because such an absurd result would be unconstitutional.

A. The CAAF's Opinion Leads to Absurdity and Significant Constitutional Doubts.

The discharge of Timothy Hennis on June 12, 1989 terminated the United States' ability to court-martial him for any offenses preceding that date. *United States ex rel Toth v. Quarles*, 350 U.S. 11

(1955); *United States ex rel Hirshberg v. Cooke*, 336 U.S. 210 (1949). This is true even though Hennis reenlisted the next day. *Id.*; *see also United States v. Clardy*, 13 M.J. 308, 316 (C.A.A.F. 1982). The break in Hennis's military service was therefore a break in court-martial jurisdiction as well.

The government has contended that it could nevertheless subject Hennis to a capital court-martial by relying on 10 U.S.C. § 803(a) (1982) and arguing that Hennis's acquittal in the courts of North Carolina means he "cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia." Pet. App. 14-15a. In other words, the government believes it has the authority to court-martial Hennis precisely *because* a state already tried and acquitted him. It has invoked his protection against further prosecution in North Carolina to unprotect him from court-martial before the United States.

Despite the obvious paradox in its position, the government prevailed in the courts below. The CAAF did not address the logic or constitutionality of the government's theory, and it merely pinned the meaning of the term "cannot be tried" on *when* the term is applied, i.e. at the time of the offenses or of the court-martial. Pet. App. 15a. The CAAF then concluded *ipse dixit* that it must be "at the time charges were preferred," and so "no other

jurisdiction could have tried Appellant at the time charges were preferred." *Id*. This, the CAAF asserted, was what the "plain language" required. *Id*.

But that language is hardly "plain," even under the CAAF's own analysis. The statute supplies no obvious textual answer to the question of "when" it applies; the CAAF simply picked the time when the court-martial was convened rather than the time the crimes were committed. Furthermore, 10 U.S.C. § 803(a) is ambiguous as to what even constitutes an offense that "cannot be tried." Does that mean an offense for which civilian courts could *never* exercise jurisdiction, such as military crimes or crimes committed overseas? Or does it mean some other condition that could prevent trial, such as a prior dismissal with prejudice, a statute of limitations, or a constitutional protection like the one against double jeopardy that only the accused could assert? The CAAF did not acknowledge that these are two separate questions, that the statutory text alone cannot resolve them, and that the significant history and context of § 803(a) could illuminate their answers.

Even if the text purported to address all these questions, "plain language" and "literalness" could not "strangle meaning" or ally with absurdity. *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). This

Court has long recognized that it is a "traditional and appropriate function of the courts" to "construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose." *Sorrells v. United States*, 287 U.S. 435, 450 (1932). "Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455 (1989) (citations omitted). And it is certainly difficult to say that Congress intended to stand the Double Jeopardy Clause on its head and make it enable repeat prosecutions rather than prevent them.

i. Using the Double Jeopardy Clause to enable a prosecution perverts the purposes of both the Clause and the statute.

The conclusion that Petitioner's protection against repeat prosecutions subjects him to a repeat prosecution is an absurdity. The lawmakers who enacted § 803(a) designed it to facilitate prosecution for offenses civil authorities could not try under *any* circumstances, not to ensure re-prosecution for offenses civil authorities had already tried to an acquittal.

And, as noted above, the plain text of § 803(a) does not require such a perverse reading. Rather, it is susceptible to at least two alternative

understandings. First, if the question is whether the offenses could be tried in state court *when committed*, the answer is clearly yes; Petitioner was in fact tried by a North Carolina state court. Second, if the statute's reference to offenses that "cannot be tried" in civilian court is shorthand for military offenses outside civilian jurisdiction, Petitioner's case would also clearly not qualify. Either way, the CAAF's cursory reliance on "plain language" is unjustified, both as a lexical matter—the statute does not compel one plain, single interpretation—and as an interpretative matter, as "[l]iteral interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." *Sorrells*, 287 U.S. at 446. Simply put, the CAAF's interpretation of § 803(a) presents a "gross perversion of its purpose," one that Congress did not intend and one that the text does not compel. *Id*. at 452.

ii. Using the Double Jeopardy Clause to enable further prosecution raises significant constitutional doubts.

And the government's perversion of § 803(a)'s purpose brings about significant constitutional doubts the CAAF did not address. "Statutory language is construed to conform as near as may be to traditional guarantees that protect the rights of

the citizen." *Lee v. Madigan*, 358 U.S. 228, 235 (1959). Yet the lower court's construction of 10 U.S.C. § 803(a) reversed the traditional guarantee of the Double Jeopardy Clause as a protection against successive prosecutions, and instead made it the agent of yet another prosecution.

This Court has never needed to decide whether the government can invoke the Double Jeopardy Clause as a reason for prosecuting someone previously acquitted of the same allegations. But the axiom that constitutional protections do no harm is manifest throughout this Court's jurisprudence. The privilege against self-incrimination, for example, cannot lead to an inference of criminality.[3] The prohibition on laws respecting an establishment of religion cannot undermine the free exercise of religion.[4] The right to be defended by counsel does

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[3] *See*, *e.g.*, *Griffin v. California*, 380 U.S. 609, 615 (1965) ("the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.").

[4] *See*, *e.g.*, *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here . . . It may not be used as a sword to justify repression of

not vitiate the right of autonomy over that defense.[5] Likewise, the right of the people to bear arms collectively in the militia does not abrogate the right of the individual to bear arms for self-defense.[6] Such principles tie together a simple truth: our constitutional rights, privileges, and guarantees protect us, and that means they do no harm. They do not backfire, infight, or turn against their cause. The promise of the Bill of Rights, as James Madison described it, is to present an "impenetrable bulwark against every assumption of power in the legislative or executive." 1 Annals of Cong. 439 (Joseph Gales ed., 1834). Governmental efforts to turn that bulwark against the individual necessarily raise serious constitutional doubts—particularly in a

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religion or its adherents from any aspect of public life.") (citations omitted) (Brennan, J., concurring).

[5] *See*, *e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) ("Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.").

[6] *D.C. v. Heller*, 554 U.S. 570, 662 (2008) ("[T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.").

capital case. *Cf. Reid v. Covert*, 354 U.S. 1, 45–46 (1957) (Frankfurter, J., concurring in the judgment) ("These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.").

The CAAF's opinion sits on uncertain constitutional footings, as it necessarily pits a constitutional protection against the interests of the citizen. Indeed, insofar as § 803(a) allows the government to exploit the Double Jeopardy Clause in pursuit of a capital prosecution it could not otherwise pursue, the statute likely violates the Due Process Clause of the Fifth Amendment. If no case already stands for this principle, that is only because the government has never tried to use the Double Jeopardy Clause offensively in this manner before.

These constitutional concerns give yet another reason why the CAAF's holding is wrong, and why this Court should intervene. When "choosing between competing plausible interpretations of a statutory text," courts must "giv[e] effect to Congressional intent" by relying on "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional

doubts." *Clark v. Suarez Martinez*, 543 U.S. 371, 381-82 (2005). And there is persuasive evidence that Congress never intended to provoke the grave constitutional questions that result from the CAAF's holding.

iii. The purpose of 10 U.S.C. § 803(a) was to provide jurisdiction over offenses not triable in civilian courts, and not offenses so triable they had already been tried in civilian courts.

When the literal reading of a statute is "at war with the clear congressional purpose, a less literal construction must be considered." *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971). All of the contextual evidence surrounding the enactment of 10 U.S.C. § 803(a) shows its purpose was to temper the results of *United States ex rel Hirshberg v. Cooke*, 336 U.S. 210 (1949), a case that concerned military offenses committed outside the United States. It is beyond even "the slightest doubt . . . Congress passed this statute for the principal purpose of covering the situation brought about by the decision in *Hirshberg v Cook*e . . . . The legislative history demonstrates beyond question that the attention of the 81st Congress was focused on this precise issue." *United States v. Gallagher*, 22 C.M.R. 296, 299 (C.M.A. 1957). Indeed, as one

lawmaker observed "the only purpose of this is to avoid a case like the *Hirshberg* case."[7]

The *Hirshberg* case, then, supplies the lens through which § 803(a) must be understood, and the facts of *Hirshberg* differ starkly from those in this case. In 1942, Chief Signalman Harold Hirshberg and a contingent of American servicemembers surrendered to Japanese forces at Corregidor Island in the Philippines. *Id*. at 211. American troops recaptured the island three years later, liberating Hirshberg and his fellow prisoners of war. Hirshberg subsequently received an honorable discharge from the Navy in 1946 and then he reenlisted immediately. *Id*. Within a year, however, Chief Signalman Hirshberg found himself accused of having maltreated his fellow captives on Corregidor, and a general court-martial found him guilty of the charges. *Id*. This Court reversed that conviction, and reiterated the rule that had hitherto prevailed within our Armed Forces: a break in service severs any court-martial jurisdiction over conduct occurring during that prior period. *Id*. at 219.

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[7] 95 Cong. Rec. 883 (1949) (Mar. 18, 1949) (Rep. Charles H. Elston); *see also id*. at 5721 (statement of Rep. T. Overton Brooks, Chairman, H. Subcomm, describing the *Hirshberg* case and stating "there was a solution to this problem and our proposed solution is offered in article 3(a)").

This Court decided *Hirshberg* just days before the 81st Congress began debating what would become the Uniform Code of Military Justice. Legislators regretted the outcome and resolved that "the *Hirshberg* type of case will be taken care of."[8] And the "*Hirshberg* type of case" was one that could *never* be tried in a civilian court, not one that had *already* been tried in a civilian court. In its effort to blunt *Hirshberg*, Congress sought only to address "serious crimes overseas" and uniquely "military offense[s] in this country;" nothing more.[9] The 81st Congress specifically rejected proposals to revive jurisdiction across the board whether or not a case was triable in domestic courts.[10] The legislative

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[8] *Uniform Code of Military Justice, Hearings before a Subcomm. of the Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st Sess., at 884 (1949) [hereinafter *1949 House Hearings*] (statement of Rep. T. Overton Brooks, Chairman, Subcomm).

[9] 96 Cong. Rec. 1358 (1949) (statement of Sen. Estes Kefauver, Member of the Committee on the Armed Services).

[10] *See*, *e.g., 1949 House Hearings* at 881 (statement of Rep. Charles H. Elston) ("I am wondering why you could not reach the whole subject with a very simple provision to the effect that any person who commits any offense and is subject to prosecution under this code may be prosecuted even though he may no longer be in the service, and the only exceptions would be cases which are barred by the statute of limitations.").

record leaves no reason to believe lawmakers wanted to court-martial discharged servicemembers already tried and acquitted in state court.

And why would they? The "trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function," and when resources are "diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Toth*, 350 U.S. at 17. Our constitutional tradition is that military authorities should only wield "the least possible power adequate to the end proposed," and there is no reason to believe the creators of the Uniform Code of Military Justice wished to depart from that wise and time-honored principle. *Toth*, 350 U.S. at 23 (citing *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

The end proposed for 10 U.S.C. § 803(a) was preventing the *Hirshberg* scenario, one in which no court could ever try crimes committed by a servicemember. The CAAF's reading of § 803(a) lets it turn a constitutional protection into a liability, an outcome that perverts the statute's meaning and purpose, and departs from this Court's exhortation to use only the "least possible power possible adequate to the end proposed." *Toth*, 350 U.S. at 23 (citation and internal quotation marks omitted).

B. This Case Presents an Important Question This Court Should Settle.

The CAAF misconstrued 10 U.S.C. § 803(a) in a way that permits a death sentence the government could not otherwise obtain. That is reason enough for this Court to intercede. But the CAAF's interpretation would also permit more maneuvers of this sort for any offenses preceding the statute's 1992 amendment that are not barred by a statute of limitations. Given the government's current interest in prosecuting sexual assault offenses many years after they occurred, *see United States v. Briggs*, No. 19-108 (U.S. to be argued Oct. 13, 2020), this is hardly a hypothetical concern. More fundamentally, the notion that the government can remake the Double Jeopardy Clause into the catalyst for capital prosecutions stands out as the epitome of "an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c).

II. CAPITAL CRIMES TRIABLE IN CIVILIAN COURTS DO NOT CONSTITUTE "CASES ARISING IN THE LAND OR NAVAL FORCES."

The Framers never would have countenanced a court-martial like the one of Timothy Hennis. In their time, there was no such thing as a court-

martial for capital murder—not because they could not contemplate it, but because they could not condone it. They understood the rights to grand and petit juries as vital guarantors of liberty, to be withheld only in "cases arising in the land and naval forces." U. S. Const. Amend. V. And it was beyond cavil that the crime of capital murder on state soil arose solely within the police powers of that state, and not the military forces of the United States. The "cases" which the Framers considered subject to court-martial excluded peacetime murders, a matter that had long rested with the state courts exclusively. That was their understanding of the Fifth Amendment, and it is the key to its meaning now.

That meaning should prevail here as it has in every other military use of the death penalty since the Revolution. No capital court-martial has ever survived appellate review in this country that did not concern an offense arising exclusively or inextricably within the Armed Forces. Petitioner's court-martial is the first of its kind, and an abrupt break from more than two centuries of military precedents and practice.

The CAAF's opinion did not review this history. Instead, it held that this Court forever settled any question about the constitutionality of court-martialing civilian offenses in *Solorio v. United*

States, 483 U.S. 435 (1987). Pet. App. 20a. There, this Court reversed its prior decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which had found court-martial jurisdiction dependent on a connection between the crime and military service.

But *Solorio* was not a capital case. And as four Justices later noted:

> The question whether a "service connection" requirement should obtain in capital cases is an open one both because *Solorio* was not a capital case, and because *Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones.

Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., joined by Souter, J., Ginsburg, J., and Breyer, J., concurring) (citations omitted). This petition is the first to squarely present this question, and that is yet another reason why this Court should grant certiorari here.

Answering this constitutional question requires interpreting the Fifth Amendment "in light of its text, purposes, and 'our whole experience' as a Nation," and looking to "the actual practice of

Government to inform" that interpretation. *NLRB v. Canning*, 573 U.S. 513, 557 (2014) (citations omitted). The actual practice of American courts-martial over the past two centuries shows a steady and hitherto unbroken understanding that the Fifth Amendment prohibits courts-martial for capital crimes triable in civilian courts—precisely like those at bar.

The lower court may have avoided this inquiry, but this Court should not. It should resolve the question that four Justices previously identified. And it should decide them in this case, as Petitioner's court-martial offers the right vehicle for this task. The question presented "is a substantial one because, when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Id.* As the following discussion shows, the concerns Justice Stevens expressed have been manifest in our laws and legal practices since the Founding, and they should not retreat now for the sake of one conviction.

A. Capital Courts-Martial Have Never Tried Civilian Crimes.

The lower court's presumption that *Solorio* reaches both capital and non-capital cases runs against the very foundations of that precedent. The

outcome of *Solorio* depended on the Court's belief that the "history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify" requiring anything more than the military status of the accused. 483 U.S. at 445. This in turn depended on a belief that early American courts-martial actually had the power to try civilian crimes. *Id.* at 444. But this power only reached "crimes not capital:"

> The authority to try soldiers for civilian crimes may be found in the much-disputed "general article" of the 1776 Articles of War, which allowed court-martial jurisdiction over "*all crimes not capital*, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline."

Solorio v. United States, 483 U.S. 435, 444 (1987) (citing American Articles of War of 1776, Section XVIII, Article 5) (emphasis added). Far from perpetuating ambiguity over the jurisdiction to try ordinary capital crimes, the 1776 Articles of War affirmed in blackletter terms that courts-martial had no such authority. Rather than direct us to the lower court's position, the lodestar of *Solorio* leads to

the exact opposite conclusion: courts-martial could not try capital crimes of a civilian character.

And this should come as no surprise. Americans have always abhorred encroachments by military authority into the halls of civil processes. The "attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history." *Lee v. Madigan*, 358 U.S. 228, 232 (1959). And over the course of this long history, the power of courts-martial to impose death sentences remained strictly confined to those offenses that regulated military discipline; courts-martial could punish Soldiers for mutiny, for example, but not murder. *See*, *e.g.*, 6 Op. Atty Gen 413 (1854) (Army surgeon who shot and killed his superior was tried for murder by the state and mutiny at court-martial). This exclusion was "absolute," regardless of how the capital crime "may have affected the discipline of the service;" any effort to court-martial a peacetime murder was simply "void in law." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 721-22 (2d ed. 1920).

And so it was that "prior to 1950, offenses which carried the death penalty and which were common to both the military and civilian communities could not be tried by military courts during time of peace." *United States v. French*, 27 C.M.R. 245, 251 (C.M.A.

1959). Even when Congress expanded the power of courts-martial to try peacetime murders in 10 U.S.C. § 918, the capital cases that followed were those that patently arose in the Armed Forces.

Seven decades of jurisprudence from the CAAF and the Court of Military Appeals demonstrate this. Together, they have reviewed thirty-one courts-martial that resulted in a sentence of death. Each of these cases plainly arose in the Armed Forces, as each involved crimes our civilian courts could not try. The characteristic common to all of these capital courts-martial is that offenses occurred overseas or on military reservations.[11]

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[11] Two cases do not specify the crime's location, but strongly suggest the crimes fell outside civilian jurisdiction. In *United States v. Moore*, 4 C.M.A. 482 (C.M.A. 1954), the accused hailed a taxi at his guard posting, murdered the driver and shot another Soldier with his service pistol, and then returned to his posting. *Id.* at 484. Military authorities investigated, interrogated, detained, and prosecuted Moore without any apparent civilian assistance. In *United States v. Riggins*, 2 C.M.A. 451 (C.M.A. 1953), three Soldiers killed a cabdriver along the outskirts of an installation, then assaulted a fellow Soldier making his way on base. Each accused was apprehended in "a cotton khaki uniform . . . spattered with blood." *Id.* at 456. Army authorities took over the questioning, detaining, and trying of the accused after some initial assistance from local police. *See United States v. Riggins*, 8 C.M.R. 496, 504-06 (U.S. A.B.R. 1952).

Eighteen cases concerned servicemembers who committed their crimes overseas in Germany,[12] Austria,[13] Korea,[14] Japan,[15] or Kuwait.[16]

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[12] *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States v. McFarlane*, 8 C.M.A. 96 (C.M.A. 1957); *United States v. Morphis*, 7 C.M.A. 748 (C.M.A. 1957); *United States v. Dunnahoe*, 6 C.M.A. 745 (C.M.A. 1956); *United States v. McMahan*, 6 C.M.A. 709 (C.M.A. 1956); *United States v. Thomas*, 6 C.M.A. 92 (C.M.A. 1955); *United States v. Edwards*, 4 C.M.A. 299 (C.M.A. 1954); *United States v. O'Brien*, 3 C.M.A. 105 (C.M.A. 1953).

[13] *United States v. Bennett*, 7 C.M.A. 97 (C.M.A. 1956). John A. Bennett was executed in 1961. The United States has not executed anyone condemned by a court-martial since.

[14] *United States v. Ransom*, 4 C.M.A. 195 (C.M.A. 1954); *United States v. Day*, 2 C.M.A. 416 (C.M.A. 1954); *United States v. Bigger*, 8 C.M.R. 97 (C.M.A. 1953); *United States v. Hunter*, 6 C.M.R. 37 (C.M.A. 1952).

[15] *United States v. Hurt*, 9 C.M.A. 735 (C.M.A. 1958); *United States v. Gravitt*, 5 C.M.A. 249 (C.M.A. 1954).

[16] *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015), *cert. denied* 137 S. Ct. 41 (2016).

The other thirteen cases occurred on military reservations and involved military accomplices,[17] military victims,[18] or military weapons.[19]

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[17] *See United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998), *reversing* 46 M.J. 592 (A. F. Ct. Crim. App., 1996) (accused masterminded an on-post robbery that led to the murder of his fellow Airman); *United States v. Hutchinson*, 18 M.J. 281 (C.M.A. 1984) *reversing* 15 M.J. 1056 (N-M.C.M.R. 1983) (accused conspired with another Marine to murder another Marine member of their company on base); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997) and 43 M.J. 550, 562 (N-M Ct. Crim. App. 1995) (accused murdered his wife on base while another Marine helped him conceal evidence). *United States v. Riggins*, 2 C.M.A. 451, 456 (C.M.A. 1953).

[18] *See United States v. Witt*, 75 M.J. 380 (C.A.A.F. 2016) and 73 M.J. 738 (A. F. Ct. Crim. App. 1994) (Airman murdered his commanding officer and the latter's wife inside their military quarters); *United States v. Quintanilla*, 63 M.J. 29 (C.A.A.F. 2006) *and* 60 M.J. 852 (N-M Ct. Crim. App. 2005) (Marine murdered an officer and attempted to murder his commander on base); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) (accused murdered a Soldier, amongst others, on post); *Curtis*, *supra* (Marine murdered his supervisor and the latter's wife inside their military quarters); *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994) (accused murdered another Soldier on post); *United States v. Rojas*, 17 M.J. 154 (C.M.A. 1984), *reversing* 15 M.J. 902 (N-M.C.M.R. 1983) (accused and his accomplice murdered a fellow Marine in their barracks).

[19] *See United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2001) (accused fired an automatic rifle upon a formation of Soldiers, wounding 18 and killing one); *United States v. Henderson*, 11

These cases reflect consistent limits on court-martial authority that have existed since the Founding. And those limits issue from an abiding American belief:

> Civil courts were . . . better qualified than military tribunals to try nonmilitary offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed.

Lee v. Madigan, 358 U.S. 228, 233-34 (1959).

That belief preceded our republic and it has kept pace well into our time. Yes, the differences between military and civilian trials have narrowed since the

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C.M.A. 556 (C.M.A. 1960) (accused used his service pistol to murder a fellow Sailor aboard a ship); *Moore*, 4 C.M.A. 482.

Founding, and the courts-martial of today have evolved beyond the "rough form of justice" their predecessors dispensed. *Covert*, 354 U.S. at 35 (plurality opinion). It is indeed "one of the glories of this country that the military justice system is so deeply rooted in the rule of law," and that modern courts-martial afford servicemembers "virtually the same" procedural protections as civilians. *Ortiz v. United States*, 138 S. Ct. 2165, 2174, 2176 n.5 (2018). But "virtually the same" protections does not mean "entirely the same" protections, especially in the context of capital punishment. By its very nature, the "trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution." *Solorio*, 483 U.S. at 466 (Marshall, J., dissenting). Chief amongst these protections are those that grand and petit juries provide, and which courts-martial necessarily deny.

The rights to grand and petit juries count amongst our "most essential rights and liberties," and they have always been "fundamental to our system of justice." *Duncan v. Louisiana*, 391 U.S. 145, 152-54 (1968). The Framers had no design that these rights would give way to lesser substitutes. And there should be no question that trial before a panel of superior officers, handpicked by the commander convening the court-martial, is not a

trial before a jury of one's peers, summoned from across the community:

> [T]here is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.

Toth, 350 U.S. at 17-19.

The Constitution guarantees a right to trial by jury that persists even when the government accuses a servicemember of a capital civilian crime. The Framers created the Fifth Amendment to secure the indispensable rights and liberties of their time, and to provide for those that later generations would

achieve. The allegations against Timothy Hennis would not have arisen in the land and naval forces in 1791 or any time since. It cannot be the case that the American Soldier has a lesser right to life now than when our Nation first coalesced. And even if this Court disagrees, it is *this* Court, and not the CAAF, that should ultimately say so.

B. This Case Squarely Presents the Question.

The question Justice Stevens identified in his *Loving* concurrence merits this Court's consideration, and this case presents it head-on. The charges against Petitioner were clearly cognizable in a civilian court—indeed, they were *tried* in a civilian court, and handled as a civilian matter at all times prior to 2006. The charges in this case arose in Cumberland County, North Carolina, and not in the Armed Forces—a fact that all parties seemed to accept for more than two decades.

And that is because the civilian character of this case is overwhelming. The crimes occurred in a civilian neighborhood, outside any military reservation. *See United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999). They occurred within a State during a time of peace, not abroad or during a time of war. *See*, *e.g.*, *Relford v. Commandant*, 401 U.S. 355, 364-65 (1971), *overruled by Solorio,* 483 U.S. 435 (1987). They had no connection to military duties, exercises, or operations. *Id*. They involved

no flouting of military authority or procedures, no threats to a military post, and no harm or misuse of military property. *Id*. There was no suggestion that Hennis colluded with other military personnel or used military arms to commit the alleged crimes. The victims, although military dependents, had no military relation to Hennis. *Id*.

All parties understood this was a civilian case from the very beginning, and their conduct over two decades demonstrated this. State and county officials directed the entire criminal investigation and prosecution; they questioned Hennis, arrested Hennis, and tried Hennis without anything but passing military involvement. The State then incarcerated Hennis, fought against his appeals, and then retried him once he prevailed. *See State v. Hennis*, 372 S.E.2d 523 (N.C. 1988). It was the State's case from 1985 until 2006, and the Army was but a bystander. And when the Army did concern itself with this case, that too only resulted from the State's reinvestigation and request to prosecute Hennis in its stead because the Double Jeopardy Clause otherwise stood in the way. R. at 321-31. And the witnesses, evidence, and arguments presented at the 2010 court-martial were just as civilian as those presented to North Carolinian jurors in 1985 and 1989.

The idea that this case arose in the Armed Forces sits poorly with the fact that, for two decades, the Armed Forces never raised a prosecutorial finger against Petitioner. The Army understood then, as it should now, that adjudicating allegations of capital murder triable in civilian court remains the work of civilian courts, as much now as when the Framers penned the Fifth Amendment. The idea that Petitioner's acquittal—and his guarantee against further jeopardy—could unsettle that original promise is itself unsettling. A case cannot arise in the Armed Forces because a state court acquitted the accused twenty years earlier.

Unmoved by any of this, however, the CAAF elevated one circumstance of the offenses above all other considerations, namely the fact that the victims were the family members of an Air Force officer. Pet. App. 20-21a. In doing so, the CAAF ignored its own precedent. When the Court of Military Appeals had to decide whether a rape case previously tried in state court was sufficiently connected to military service, that court underscored the fact that:

> the courts of South Carolina and Georgia were not only open and functioning, but resort to the former's facilities led only to accused's acquittal . . . [the] accused's military status was

> only a happenstance of chosen livelihood . . . and none of his acts were "service connected" . . . they . . . were the very sort remanded to the appropriate civil jurisdiction in which indictment by grand jury and trial by petit jury could be afforded the defendant.

United States v. Borys, 40 C.M.R. 259 (C.M.A. 1969).

The CAAF eschewed that jurisprudence, and appeared more concerned with whether this court-martial had *any* connection to military service. Pet. App. 21a. But the test our Constitution exacts is whether the case *arose in* the Armed Forces, not whether it touched some indirect relation thereto. To "arise in" the Armed Forces means to "originate" in, "stem from," or "result from" uniquely military circumstances. *Arise*, BLACK'S LAW DICTIONARY (8th ed. 2004). The word's meaning was the same in the Framers' time as well. *See* 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th Ed. 1785) ("To proceed, or have its original"); 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828) ("to begin; to spring up; to originate."). The ordinary meaning of the words excludes merely incidental connections to a military community. Consideration of the most elementary aspects of the crimes in this case—their

nature, location, and method of commission—points to decidedly civilian origins, arising out of factors common to civilian society rather than military operations. This case arose in, originated in, and stemmed from conduct in one place—the State of North Carolina—and it must remain there.

C. This Case Presents an Important Question This Court Should Settle.

Justice Stevens's observations in *Loving* convey the importance of this question: "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring).

This concern is compelling on its own. But the dearth of capital defense expertise in the Armed Forces renders it all the more salient. Frequent reassignments of military counsel and the absence of military-specific capital defense guidelines frustrate the rights of servicemembers facing a possible sentence of death at court-martial. As two members of the CAAF remarked:

> Capital defense counsel in the military are at a disadvantage. They are expected to perform effectively in

> surely the most challenging and long-lasting litigation they will face in their legal careers, without the benefit of the exposure, training, guidelines, or experience in capital litigation that is available to federal civilian lawyers. We do military lawyers, and accused servicemembers, a disservice by putting them in this position.

United States v. Akbar, 74 M.J. 364, 440 (C.A.A.F. 2015) (Baker, C.J., dissenting).

The appellate history of this very case proves the point. Both the Army Court and the CAAF denied Hennis's requests for counsel learned in capital litigation, even as the latter court intimated that it would be "prudent" to ensure such representation. *United States v. Hennis*, 77 M.J. 7, 11 (2017). Efforts to close the gulf in capital representation for servicemembers still fall short of what capitally accused civilians and even enemy combatants receive. *See* 18 U.S.C. § 3005; Rules for Military Commissions 506(b). Prior to 2019, servicemembers had no statutory means of seeking counsel experienced in capital litigation. *See Hennis*, 77 M.J. at 11. Even now, a revised Uniform Code of Military Justice only provides capitally accused servicemembers with learned counsel "to the greatest extent practicable." 10 U.S.C. § 870(f). This

means that a capital defendant appearing before a U.S. district court or a commission at Guantanamo Bay can count on the assistance of capitally qualified counsel, whereas a member of our military still cannot, and for no better reason than that he or she stood up to serve our Nation.

All of this illustrates how the differences between our military and civilian justice systems widen when the litigation becomes a literal matter of life and death. The Framers took pains to safeguard against this danger, and since those early days we have always adhered to their wisdom. We have long understood that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Covert*, 354 U.S. at 21. The court-martial of Timothy Hennis demonstrates the form that such encroachments can take.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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