IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas L. WHEELER** Master-at-Arms Petty Officer Third Class (E-4) U.S. Navy, Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 202100091 USCA Dkt. No. 23-0140/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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II.

DID THE LOWER COURT ERR BY DEFERRING TO A CONVENING AUTHORITY'S CASE-BY-CASE REFERRAL DECISION RATHER THAN AN OBJECTIVE STANDARD TO DETERMINE WHETHER AN OFFENSE IS SERIOUS?

At sentencing, Master-at-Arms Petty Officer Third Class (MA3) Thomas Wheeler told the military judge, "I refused mast because I wanted a fair hearing." (J.A. 159.) In military justice, no safeguard protects the right to a fair trial like a multi-member factfinder. Since 1775, any time a member of our country's armed forces faced trial by court-martial, he has had the right to elect a panel of members. That is, until 2019, when Congress created a new type of judge-alone special court-martial. Now, as implemented by the President, the convening authority alone may decide whether a servicemember will face criminal conviction without a trial of the facts by a multi-member panel—even for serious offenses.

The lower court here erroneously held that the protections of the Due Process Clause of the Fifth Amendment do not apply to this new judge-alone

forum. At his court-martial, MA3 Wheeler's due process rights were violated when he was prosecuted for an objectively serious offense without the option to be tried by a multi-member panel. This Court should reverse the lower court.

Statement of Statutory Jurisdiction

The Judge Advocate General of the U.S. Navy forwarded this matter for review to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). The NMCCA exercised jurisdiction under Article 69(d)(1)(A), Uniform Code of Military Justice (UCMJ).[1] Master-at-Arms Petty Officer Third Class (MA3) Thomas Wheeler now invokes this Court's Article 67, UCMJ, jurisdiction.[2]

Statement of the Case

The Convening Authority referred this case to a judge-alone special court-martial under Article 16(c)(2)(A), UCMJ.[3] The Military Judge convicted MA3 Wheeler, contrary to his plea, of one specification of Article 95, UCMJ (sleeping on post). The Military Judge sentenced MA3 Wheeler to fifteen days' confinement. The Convening Authority later suspended all confinement in excess of seven days for six months from the Entry of Judgment, to be remitted at that time without further action unless sooner vacated.[4]

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[1] 10 U.S.C. § 869(d)(1)(A) (2019).
[2] 10 U.S.C. § 867(a)(3) (2019).
[3] 10 U.S.C. § 816(c)(2)(A) (2019).
[4] Convening Authority Action, July 29, 2020.

On 17 February 2023, the lower court affirmed the findings and sentence.[5] Petty Officer Wheeler timely petitioned this Court for review on 18 April 2023.[6] On 23 June 2023, this Court granted MA3 Wheeler's petition.[7] This Court later ordered that MA3 Wheeler file his brief on or before 26 July 2023.[8] On 25 July 2023, this Court granted a motion to extend the filing deadline for MA3 Wheeler's brief to 31 July 2023.[9] On 31 July, 2023, this Court granted a second motion to extend the filing deadline to 4 August 2023.[10]

Statement of Facts

In the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Congress amended Article 16, UCMJ, by creating a special court-martial composed of a military judge and no members.[11] The result of the amendment (and corresponding amendment to Article 19, UCMJ)[12] is that a convening authority

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[5] *United States v. Wheeler*, No. 202100091, slip op. at 18 (N-M. Ct. Crim. App. Feb. 17, 2023).
[6] *United States v. Wheeler*, No. 23-0140/NA, 2023 CAAF LEXIS 221 (C.A.A.F. petition filed Apr. 18, 2023).
[7] *United States v. Wheeler*, No. 23-0140/NA, 2023 CAAF LEXIS 427 (C.A.A.F. petition granted June 23, 2023).
[8] *United States v. Wheeler*, No. 23-0140/NA, 2023 CAAF LEXIS 452 (C.A.A.F. July 7, 2023).
[9] *United States v. Wheeler*, No. 23-0140/NA, 2023 CAAF LEXIS 529 (C.A.A.F. July 25, 2023).
[10] Ct. Order, July 31, 2023.
[11] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5161, 130 Stat. 2000 (2016); 10 U.S.C. § 816(c).
[12] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5161, 130 Stat. 2000 (2016); 10 U.S.C. § 819.

may refer charges to a special court-martial at which an accused is not permitted to elect to be tried by members. Under Article 19, UCMJ, an accused so tried cannot receive (1) confinement in excess of six months, (2) forfeitures in excess of six months, or (3) a punitive discharge.[13]

Congress placed no limitations on the type of offenses that could be brought to this forum, delegating that authority to the President.[14] The President prescribed only two limitations, both under Rule for Courts-Martial (R.C.M.) 201(f)(2)(E). The Rule provides that an accused may object to trial by judge-alone special court-martial if (1) the maximum authorized confinement for the alleged offense would be greater than two years if tried by a general court-martial (except if the specification alleges wrongful use or possession of a controlled substance in violation of Article 112a(b) or an attempt thereof); or (2) the specification alleges an offense that would require sex offender notification.[15]

In April 2020, Commanding Officer, Naval Station Everett referred a charge of sleeping on post in violation of Article 95, UCMJ, 10 U.S.C. § 895 (2019), against MA3 Wheeler.[16] If prosecuted at a general court-martial, the maximum punishment would have included one year of confinement, forfeiture of all pay and

[13] 10 U.S.C. § 819(b).
[14] 10 U.S.C. §§ 816(c)(2), 819(a).
[15] R.C.M. 201(f)(2)(E).
[16] Charge Sheet, Apr. 24, 2020.

allowances, and a dishonorable discharge, as well as a reprimand, fine, and reduction to the lowest enlisted paygrade.[17] But employing his authority under R.C.M. 201(f)(2), the Convening Authority referred the Charge to trial under Article 16(c)(2)(A), UCMJ, dictating a forum of military-judge alone.

At trial, the Military Judge explained the limited circumstances under which MA3 Wheeler could object to this forum.[18] As those R.C.M. 201 bases did not apply, MA3 Wheeler did not object on either ground.[19] He did, however, file a motion to dismiss the charge against him for a lack of jurisdiction, arguing that the referral of his case to a judge-alone special court-martial violated his rights under the Fifth and Sixth Amendments to the Constitution.[20] After denying MA3 Wheeler's motion to dismiss, the Military Judge convicted and sentenced MA3 Wheeler.[21]

After trial, MA3 Wheeler submitted an application for review to the Judge Advocate General pursuant to Article 69, UCMJ.[22] The Judge Advocate General

[17] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶22.d.(1)(c) (2019) [hereinafter MCM]; R.C.M. 1003(b).
[18] Joint Appendix (J.A.) 146-47.
[19] J.A. 147-48.
[20] J.A. 132-35, 149-53.
[21] J.A. 141-45, 153, 155, 164.
[22] *United States v. Wheeler*, 83 M.J. 581, 583 (N-M. Ct. Crim. App. 2023).

declined to set aside the finding or sentence, but forwarded the matter for review by the NMCCA under Article 69(d)(1)(A), UCMJ.[23]

Summary of Argument

The fundamental right to a multi-member panel at a criminal trial outweighs the balance Congress struck for the regulation of the armed forces. The Supreme Court has looked to historical practice, existing safeguards, and the effect of implementing a new procedural safeguard when determining whether a due process safeguard outweighs deference to Congress. There is no substitute for a multi-member panel. Impartial multi-member panels have determined guilt at courts-martial since 1775. And there is no evidence that the mandatory judge-alone special courts-martial created in 2019 have increased efficiency in the military-justice system. As such, the lower court erred in holding that the Due Process Clause does not protect a servicemember's fundamental right to a multi-member panel at a criminal trial.

The Supreme Court has articulated an objective standard for determining whether an offense is "serious": courts must look to the maximum authorized penalty for the offense. Based on the maximum punishment, Petty Officer Wheeler was charged with an objectively serious offense. He had a right to a multi-member panel at his criminal trial. But he was stripped of this right. The lower court's

[23] *Id.*

reliance on a convening authority's unilateral forum determination to determine which offenses are serious contradicts Supreme Court law.

Argument

I.

The lower court erred in holding that the Due Process Clause does not protect a servicemember against conviction by a mandatory judge-alone court-martial.

A. Standard of review.

Whether the Due Process Clause of the Fifth Amendment protects against mandatory judge-alone court-martial for any offense under the UCMJ is a question of law. This Court reviews questions of law de novo.[24]

B. The Due Process Clause always applies to a servicemember at court-martial.

The Due Process Clause of the Fifth Amendment provides that no one shall be "deprived of life, liberty or property without due process of law."[25] Although Congress may authorize courts-martial "without all the safeguards given an accused by Article III and the Bill of Rights,"[26] this Court has been unequivocal that "the Due Process Clause of the Fifth Amendment applies to a service member

[24] *United States v. Watson*, 71 M.J. 54, 56 (C.A.A.F. 2012) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)) ("[W]here the issue appealed involves pure questions of law, we utilize a de novo review.").
[25] U.S. Const. amend V.
[26] *Reid v. Covert*, 354 U.S. 1, 19 (1957) (citing *Dynes v. Hoover*, 61 U.S. 79 (1857)).

at a court-martial."[27]

C. The right to a multi-member panel at a criminal trial outweighs the balance struck for the regulation of the armed forces.

A military accused has a constitutional, due process right to a multi-member panel.[28] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[29] While a court-martial panel is not identical to a Sixth Amendment "jury," the constitutional guarantee of an impartial multi-member factfinder for "all criminal prosecutions" is a bedrock procedural right that the Supreme Court recognizes as "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[30] Indeed, an impartial, multi-member panel is the "*sine qua non* for a fair court-martial."[31]

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[27] *United States v. Graf*, 35 M.J. 450, 460 (C.A.A.F. 1992) (citing *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

[28] *See United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); R.C.M. 912(f)(1)(N)) ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.); *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) ("Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts."); *United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice.").

[29] U.S. Const. amend. VI.

[30] *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

[31] *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995) (citing *Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Mack*, 41 M.J. 51 (C.M.A. 1994); *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985)) ("Impartial

When considering due process challenges to the military-justice system, the Supreme Court has applied a balancing test, asking "whether the factors militating in favor" of a particular procedural safeguard "are so extraordinarily weighty as to overcome the balance struck by Congress."[32] In Article 16, Congress struck no balance regarding the historic right to a multi-member panel at a criminal trial. Congress instead deferred to the President to set limitations for a new, mandatory judge-alone special court-martial.[33] While courts must give "particular deference to the determination of *Congress* made under its authority to regulate the land and naval forces,"[34] no similar deference is owed the President. And the right to a multi-member panel at a criminal trial outweighs any balance struck by the President in R.C.M. 201(f).

With deference to Congress—not, as here, the President—courts weigh the interest favoring the right against other factors:

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court-members are a *sine qua non* for a fair court-martial. In the military justice system 'an accused is still entitled to have his guilt or innocence determined by a jury composed of individuals with a fair and open mind."); *see also United States v. Deain*, 17 C.M.R. 44, 49 (1954) ("An accused is . . . entitled to have his guilt or innocence determined by a jury composed of individuals with a fair and open mind.").

[32] *Middendorf*, 425 U.S. at 44 (testing right to counsel at summary court-martial); *see also Weiss v. United States*, 510 U.S. 163, 177-79 (1994) (asking whether the factors militating in favor of fixed terms of office for military judges are "so extraordinarily weighty as to overcome the balance struck by Congress").

[33] *See* R.C.M. 201(f).

[34] *Weiss*, 510 U.S. at 177 (citing *Middendorf*, 425 U.S. at 42.

(1) Has the accused historically been afforded this safeguard?[35]

(2) Do existing mechanisms sufficiently provide this safeguard?[36]

(3) What effect would the safeguard have on the ability of the military to efficiently and appropriately discipline its members?[37]

The answers to these questions cut strongly in MA3 Wheeler's favor. Courts-martial have determined guilt by a panel of members since the establishment of our nation's armed forces. There is no substitute for this safeguard elsewhere in the military-justice system. The military has for nearly 250 years efficiently and properly disciplined servicemembers without the aid of mandatory judge-alone courts-martial that strip accuseds of their right to a multi-member panel. To find otherwise is to ignore that, historically, no such mandatory judge-alone criminal trial has ever existed in the military-justice system nor has one been necessary to maintain discipline.

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[35] *Weiss*, 510 U.S. at 178-79 (specifying that "the historical fact that military judges have never had tenure is a factor that must be weighed" when evaluating whether judge tenure was a due process right).

[36] *Weiss*, 510 U.S. at 179-81 (finding "the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause"); *Middendorf*, 425 U.S. at 46-47 (finding an accused's right to counsel is preserved because an accused can refuse summary court-martial).

[37] *Middendorf*, 425 U.S. at 45-46 (evaluating the effect that counsel at summary courts-martial would have on the administration of military justice).

1. Since the War of Independence, multi-member panels have determined guilt at courts-martial.

Not for one moment between 1775 and 2019 was a military accused denied his right to a multi-member panel at a criminal trial.[38] The "first written military code" in the colonies, along with the one adopted by the First Continental Congress, provided for two military courts: (1) "the 'general' court-martial, to consist of at least 13 officers,"[39] and (2) "a 'regimental' court-martial, to consist of not less than five officers 'except when that number cannot be conveniently assembled, then three shall be sufficient.'"[40] The regulations adopted immediately prior to the drafting of the Constitution required at least five members for a general court-martial and at least three members for a "regimental" or "garrison" court-martial.[41] The maximum punishment that could be awarded by a regimental or garrison court-martial was jurisdictionally limited to a fine of one month's pay and one month's hard labor (for non-commissioned officers)—it was not permitted to imprison.[42]

When the Supreme Court has rejected a Due Process argument for courts-martial, it has done so precisely because—contrary to the right to a multi-member

[38] 1 *Military Criminal Justice: Practice and Procedure* § 1-6(C) (2023).
[39] 1 *Military Criminal Justice: Practice and Procedure* § 1-6(B) (2023) (citing Massachusetts Articles of War, Article 32).
[40] *Id.* (quoting Massachusetts Articles of War, Article 37).
[41] *Id.* (citing Articles of War 1-3 (1786)).
[42] *Id.* (citing Article of War 4, sec. XIV (1786)).

panel—the procedural protection at issue had *not* been provided for historically. In *Weiss*, the Court rejected fixed terms for military judges because "military judges have *never* had tenure."[43] This Court had reached the same conclusion for the same reason two years earlier, explaining in *Graf* that "Great Britain has *never* had professional military or civilian judges presiding at its courts-martial," and the United States did not have military judges prior to 1968.[44] In *Anderson*, this Court similarly rejected a requirement of panel unanimity because of "[m]ore than two centuries of nonunanimous verdicts in courts-martial."[45]

In other words, the appellants in *Graf*, *Weiss*, and *Anderson* sought to *add* a procedural right to a military justice system that had historically operated without that right. The opposite is true here. Multi-member panels have been part of the American military-justice system for nearly 250 years. While decades or centuries of non-tenured judges and nonunanimous verdicts in courts-martial led the Courts to reject Anderson's, Graf's, and Weiss's due process challenges, the nearly 250 years of multi-member panels at courts-martial require granting MA3 Wheeler's due process challenge. Historical practice is the only factor that the Supreme Court has said *must* be considered when conducting a due-process balancing test, and it is undeniably in MA3 Wheeler's favor.

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[43] *Weiss*, 510 U.S. at 179 (emphasis added).
[44] *United States v. Graf*, 35 M.J. 450, 463 (C.M.A. 1992) (emphasis added).
[45] *United States v. Anderson*, No. 22-0193, slip op. at 13 (C.A.A.F. June 29, 2023).

2. There is no substitute for a multi-member panel at a criminal trial. Nor do any other safeguards protect against the risk of a single-member factfinder.

In conjunction with historical practice, both this Court and the Supreme Court have asked whether other safeguards of the same right in the military-justice system justify omitting a procedural protection. In evaluating a challenge to summary courts-martial in *Middendorf v. Henry*, the Supreme Court emphasized that the accused was free to "refuse trial by summary court-martial," where he was not afforded counsel, "and proceed to trial by special or general court-martial," where he would be entitled to counsel.[46] That is precisely the safeguard the mandatory judge-alone special court-martial has taken away from accused.

In *Anderson*, this Court concluded that the Due Process Clause of the Fifth Amendment does not guarantee a servicemember the right to a unanimous verdict.[47] This Court found that "several unique safeguards in the military justice system" addressed the appellant's "concerns about impartiality and fairness of courts-martial without unanimous verdicts"—(1) panel members voting by secret ballot, and (2) factual sufficiency review on appeal.[48] This Court explained that factual sufficiency review ensures nonunanimous panel verdicts are "subject to

[46] *Middendorf*, 425 U.S. at 47.
[47] *Anderson*, No. 22-0193, slip op. at 11.
[48] *Id.* at 13.

oversight."[49] It further explained that secret ballots protect "junior panel members from the influence of more senior members."[50] But here, Congress stripped an accused of the right to a multi-member panel that he historically enjoyed.

Similarly, in *Weiss*, the Supreme Court pointed to existing safeguards within the military-justice system to ensure judicial impartiality. The Court highlighted provisions in the UCMJ and corresponding regulations that insulate judges from the "effects of command influence," and "sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."[51] The Court specifically highlighted Article 26, UCMJ, which "places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer."[52] The Court found this helped protect judicial independence, while making military judges accountable to a superior officer for the performance of their duties.[53] The Court concluded that Congress "achieved an acceptable balance between independence and accountability."[54]

While "[p]reserving impartiality and fairness does not require identical safeguards in the military and civilian justice systems,"[55] the "safeguards"

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[49] *Id.* at 13.
[50] *Anderson*, No. 22-0193, slip op. at 13.
[51] *Weiss*, 510 U.S. at 179.
[52] *Id.*
[53] *Id.* at 180.
[54] *Id.*
[55] *Anderson*, No. 22-0193, slip op. at 13.

identified by the lower court fail to sufficiently address MA3 Wheeler's fairness interests. The lower court relied on an accused's right to counsel, right to have his proceedings presided over by a military judge, and right to appeal as sufficient safeguards of an accused's right to a fair trial.[56] But these alternate features are actually indicia of the seriousness of the criminal prosecution. They are not "safeguards" against the miscarriage of justice that is risked by trial before a sole fact-finder whose latent biases or limits on interpreting evidence will never be mitigated by the perspectives of fellow fact-finding members.[57]

Further, an accused cannot refuse trial by military judge alone—the acceptable alternate safeguard identified in *Middendorf*—and demand trial by a multi-member panel. Petty Officer Wheeler refused non-judicial punishment because he desired a "fair hearing."[58] Instead, he was forced into a proceeding that stripped him of the fundamental protections afforded by a multi-member panel.

3. Centuries of history conclusively demonstrate that maintaining multi-member panels at criminal trials does not strain the ability of the military to efficiently and appropriately discipline its members.

In *Middendorf*, the Supreme Court found that the addition of counsel at summary court-martial proceedings would "turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding

[56] *Wheeler*, 83 M.J. at 590, 592.
[57] *Duncan*, 391 U.S. at 158.
[58] J.A. 159.

which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried."[59] In contrast, multi-member panels have always existed. We have fought every war in our nation's history with this safeguard and no one ever mentioned it until 2017. And there is no evidence that this new forum has materially increased efficiency over the past four-and-a-half years.

The NMCCA noted that "the attendant burden on a commander to select potential members and detail them to a special court-martial—that might remove them from their normal duties for several days or weeks—often far outweighs the *minor* nature of the misconduct in question."[60] The NMCCA found that "Congress sought to balance the individual's benefit of being tried by a panel of members with a commander's need to efficiently and fairly deal with *minor* military offenses."[61] The NMCCA ignored that commanders have been efficiently and fairly dealing with minor offenses through non-judicial punishment, summary courts-martial, special courts-martial, and general courts-martial.

Further, the lower court injected its own limiting language into the statute and regulation, neither of which discuss "minor offenses."[62] In doing so the lower

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[59] *Middendorf*, 425 U.S. at 45.
[60] *Wheeler*, 83 M.J. at 590 (emphasis).
[61] *Id.* (emphasis added).
[62].*Wheeler*, 83 M.J. at 590.

court appears to recognize that the denial of a multi-member panel in a criminal trial for a serious offense violates due process. This error is compounded by the lower court's failure to apply an objective test for what constitutes a serious offense, discussed below.

II.

The constitutional due process right to a multi-member panel must apply to any criminal trial for a serious offense. What constitutes a serious offense is properly determined by the Supreme Court's settled objective standard.

A. Standard of review.

Questions of law are reviewed de novo.[63]

B. The objective standard for establishing "serious" versus "petty" offenses as outlined in Sixth Amendment case law is applicable when analyzing a servicemember's Fifth Amendment due process rights.

While this Court and the Supreme Court have held that the Sixth Amendment Jury Clause does not apply to courts-martial,[64] civilian rights afforded under the Sixth Amendment have been found to apply to servicemembers under the Fifth Amendment.[65] Thus, the Sixth Amendment objective standard for

[63] *United States v. Watson*, 71 M.J. 54, 56 (C.A.A.F. 2012) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)) ("[W]here the issue appealed involves pure questions of law, we utilize a de novo review.").
[64] *Ex Parte Quirin*, 317 U.S. 1, 39 (1942); *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2017).
[65] *See, e.g., United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) ("Voir dire is a critical tool for ensuring that the accused is tried by an impartial trier of

determining what offenses are serious versus petty applies when assessing MA3 Wheeler's Fifth Amendment due process rights.

C. The maximum punishment for the charged crime plainly demonstrates that the offense is serious.

The constitutional protection against bench adjudications attaches for "serious," not "petty," crimes—a distinction that depends on "objective indications of the seriousness with which society regards the offense."[66] These "objective indications" do not include whether a system classifies offenses as felony or misdemeanor—and the military-justice system does not so classify. As the Supreme Court explained in Baldwin, "some misdemeanors are also 'serious' offenses."[67]

Rather than classification, the Supreme Court has focused on "the severity of the maximum *authorized* penalty" for offenses.[68] The Court has reiterated that

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fact—the 'touchstone of a fair trial.' Voir dire protects an accused's right to an impartial trier of fact 'by exposing possible biases, both known and unknown, on the part of potential jurors.' 'The necessity of truthful answers by prospective [members] if this process is to serve its purpose is obvious.' Although these passages refer to the civilian right to an impartial jury under the Sixth Amendment, they hold equally true with regard to servicemember rights under the Fifth Amendment and the Rules for Courts-Martial." (citations omitted)).

[66] *United States v. Nachtigal*, 507 U.S. 1, 3 (1993) (quoting *Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989)).

[67] *Baldwin v. New York*, 399 U.S. 68, 70 (1970).

[68] *Id*. at 68 (citing *Frank v. United States*, 395 U.S. 147, 148 (1969); *Duncan*, 391 U.S. at 159-61 (1968); *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1935)) (emphasis added).

"[t]he best indicator of society's views is the *maximum penalty set by the legislature*,"[69] and has applied that same analysis even where Congress delegates authority to set maximum punishments to the Executive Branch.[70]

In *Baldwin v. New York*, the Supreme Court established that the jury right applies wherever "the possible penalty exceeds six months' imprisonment."[71] The Supreme Court clarified, in *Lewis v. United States*, that "[a]n offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious."[72] Even then, a defendant may overcome the presumption that an offense is petty by showing that other statutory consequences "viewed together with the maximum prison term, are so severe that the legislature clearly determined that the offense is a 'serious' one."[73]

Relevant here, the President has determined that a violation of Article 95, UCMJ, for sleeping on post warrants a maximum punishment of one year of confinement, forfeiture of all pay and allowances, and a dishonorable discharge.[74]

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[69] *Nachtigal*, 507 U.S. at 3 (emphasis added).
[70] *See id.* at 4 (maximum punishments set by Secretary of Interior); *cf. Codispoti v. Pennsylvania*, 418 U.S. 506, 515-16 (1974) (analyzing criminal contempt "penalty" based on confinement awarded by judge where legislature set no maximum).
[71] *Baldwin v. New York*, 399 U.S. 68, 74 (1970).
[72] *Lewis v. United States*, 518 U.S. 322, 326 (1996).
[73] *Id.*
[74] MCM, pt. IV, ¶ 22.d(1)(c) (2019).

Under *Baldwin*, based on maximum confinement exposure alone, MA3 Wheeler's offense warranted the right to a multi-member panel.

The sentencing limitations articulated in Article 16(c)(2)(A), UCMJ, are immaterial. The Supreme Court has never tested legislative determination of an offense's seriousness based on the *forum* of a criminal trial, which, here, was the Convening Authority's subjective, unilateral decision. Rather, *Lewis* and *Baldwin* require courts to analyze seriousness in all criminal prosecutions based on the objective maximum punishment authorized for "the offense."[75]

The NMCCA found that a convening authority's referral decision is similar to a legislature's assigned maximum punishment. This ignores that the Supreme Court has found that "[t]he best indicator of society's views is the *maximum penalty set by the legislature*,"[76] including when that authority has been delegated to the Executive.[77] Congress—the relevant legislature here—delegated the authority to establish maximum punishments to the President. Those maximum

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[75] *Lewis v. United States*, 518 U.S. 322, 328 (1996) (quoting *Frank v. United States*, 395 U.S. 147, 148 (1969)) ("The maximum authorized penalty provides an 'objective indication of the seriousness with which society regards the offense,' and it is that indication that is used to determine whether a jury trial is required, not the particularities of an individual case."); *Baldwin*, 399 U.S. at 72-74.
[76] *Nachtigal*, 507 U.S. at 3 (emphasis added).
[77] *See id.* at 4 (maximum punishments set by Secretary of Interior); *cf. Codispoti v. Pennsylvania*, 418 U.S. 506, 515-16 (1974) (analyzing criminal contempt "penalty" based on confinement awarded by judge where legislature set no maximum).

punishments should be used to determine which offenses are serious under the UCMJ. Adopting the NMCCA's opinion and letting a convening authority—the individual who chose to bring the accused to court-martial—dictate whether the offense is serious (and as such which rights will be afforded an accused) is on par with a civilian system that leaves the decision of whether a crime is a felony or misdemeanor up to the prosecutor who brought the charges.

Even if maximum confinement alone were insufficient, the military-justice system recognizes the severity of the other portions of the President's maximum sentence. First, a punitive discharge is a grave consequence. As military judges instruct members:

> You are advised that the stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities, and social acceptability.[78]

These particular special courts-martial seek to skirt that prejudicial stigma, but the codified expression of severity remains. Second, the Manual for Courts-Martial directs: "Reduction in grade is one of the *most severe* forms of nonjudicial punishment and it should be used with discretion."[79] That admonition concerns

[78] Dept. Army Pam. 27-9, Mil. Judges' Benchbook § 2-6-9 (Electronic Benchbook 2.14.12, Dec. 18, 2020).
[79] MCM, pt. V, ¶ 5.c(7) (2019) (emphasis added).

reduction by one paygrade—not the three-paygrade reduction that MA3 Wheeler faced. And reduction significantly exacerbates a third portion of the penalty: financial punitive exposure far more than the $500 cited in *Baldwin*. Here, MA3 Wheeler faced a forfeiture penalty of thousands of dollars.

The Navy's own regulations further indicate the offense's severity. Sailors face separation from the naval service for the commission of "a serious offense." The Navy defines that matter by reference to . . . *the President's maximum punishments*.[80] To make the issue concrete, the Navy uses findings from mandatory bench trials like these to bind administrative boards as to factual determinations of misconduct.[81]

The additional penalties for MA3 Wheeler's conviction—far in excess of the limits *Baldwin* recognized for bench trials—demonstrate that MA3 Wheeler faced "serious" charges.[82] Therefore, MA3 Wheeler had a historic due process right to be tried by a panel of members.

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[80] MILPERSMAN 1910-142 ¶ 2.a (Oct. 9, 2019) ("Service members may be separated based on commission of a serious military or civilian offense when the offense would warrant a punitive discharge, per [MCM, Appendix 12] . . . .").
[81] *See* MILPERSMAN 1910-514 ¶ 1.a (July 21, 2018) ("When processing includes . . . any court-martial conviction . . . the board may not render its own findings because these matters have already been judicially . . . determined to have occurred.").
[82] *Nachtigal*, 507 U.S. at 3.

Conclusion

Petty Officer Wheeler respectfully requests that this Honorable Court find that he was denied his fundamental, due process right to a multi-member panel at a criminal trial, reverse the decision of the Navy-Marine Corps Court of Criminal Appeals, and set aside the findings and sentence.

Respectfully Submitted,

/s/

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Certificate of Compliance

The undersigned counsel hereby certifies that: (1) this brief complies with the type-volume limitation of Rule 24 because it contains fewer than 14,000 words; and (2) this brief complies with the type style requirements of Rule 37.

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on 4 August 2023.

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