No. 10- 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,

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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QUESTION PRESENTED

When a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause, is the standard of review de novo, as five circuits have held, or abuse of discretion, as six other circuits (and the court of appeals here) have concluded?

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PETITION FOR A WRIT OF CERTIORARI

Webster M. Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 68 M.J. 445. The opinion of the intermediate appellate court, the Coast Guard Court of Criminal Appeals (App. 23a-58a), is reported at 66 M.J. 556. The order and opinion of the trial judge denying petitioner's request to conduct the cross-examination at issue here (App. 59a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT

This case implicates a deep circuit conflict regarding the standard of review that applies when a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause. The Court of Appeals for the Armed Forces (CAAF) held here that the standard of review is abuse of discretion rather than de novo. Applying the former standard, the court rejected petitioner's Confrontation Clause claim by a vote of 3-2.

1. In early 2006, officials at the United States Coast Guard Academy filed sixteen specifications (the military equivalent of criminal charges) against petitioner Webster Smith, a cadet who was then a few months from graduation. *See* CAAF J.A. 89-92. Four weeks later, Academy officials lodged an additional five specifications. *Id.* at 93-95. Most of the specifications alleged that Mr. Smith had engaged in some form of sexual misconduct with one of several female cadets.[1]

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[1] At the time these charges were brought, Academy officials, like their counterparts at the other service academies, were facing

Pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832, an investigation of the charges against Mr. Smith was conducted by an impartial officer. *See* CAAF J.A. 193-195. After completing his investigation (including hearing from all of the accusers), the investigating officer concluded that most of the charges lacked foundation. Specifically, he recommended that twelve of the twenty-one charges be dismissed outright, that two others be resolved administratively by Academy officials, and that just seven be referred for trial by general court-martial. *See* Appellate Ex. 17. As to nine of the twelve charges for which he recommended dismissal, the officer found that there were not even reasonable grounds to conclude that Mr. Smith had committed the offense. *See id.*

Disregarding several of the investigating officer's recommendations, the official overseeing the prosecution (the Academy superintendent) directed that eleven of the twenty-one charges be dismissed and that the other ten be tried by general court-martial. This was the first (and to date only) time in the Academy's 130-year history that a cadet had been court-martialed. *See, e.g.*, Jesse Hamilton, *Coast Guard Admiral Reprimanded: Ex-Academy Superintendent To Retire After Probe Finds Inappropriate Behavior*, Hartford

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intense scrutiny and pressure from the public, the media, and Congress about perceived laxity in their handling of allegations of sexual harassment and sexual assault. *See, e.g.*, David Lightman, *Academy Under Scrutiny; Coast Guard Harassment Issue Gets Attention of Congressional Panels*, Hartford Courant, May 18, 2006, at B1; Patricia Kime, *Academy Takes Heat Over Sex-Assault Cases*, Navy Times, Mar. 27, 2006, at 36; William Yardley, *Coast Guard Addresses Sex Assaults*, N.Y. Times, Feb. 28, 2006, at B7.

Courant, Feb. 27, 2007, at A1. Mr. Smith pleaded not guilty to all ten charges.[2]

2. Prior to trial, the military judge (the military term for the trial judge, *see* 10 U.S.C. § 826) imposed a restriction on the defense's cross-examination of a key prosecution witness, SR.[3] SR, a fellow cadet, accused Mr. Smith of sexually assaulting her and extorting sexual favors from her. The defense maintained that the two cadets' sexual encounter was consensual and that SR was fabricating her accusations because the encounter occurred in Chase Hall, the Academy dormitory, where sexual activity is prohibited by cadet regulations and punishable by expulsion from the Academy, *see* App. 34a, 16a n.3. To support this argument, the defense intended to elicit on cross-examination the fact that SR had previously made a false allegation of sexual assault, telling Mr. Smith (and allowing him to tell others) that a consensual sexual encounter she had had with an enlisted man was not consensual.[4] Like the Chase Hall encounter, the encounter with the enlisted man was prohibited by cadet regulations (and hence the UCMJ, *see* 10 U.S.C. § 892; *see also United States* v. *Cain*, 59 M.J. 285, 292-293 (C.A.A.F. 2004)). The defense thus planned to argue to the jury ("members" in military parlance) that SR was once again falsely accus-

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[2] The general court-martial had original jurisdiction under Article 18 of the UCMJ, 10 U.S.C. § 818. *See, e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 167 (1994).

[3] In their opinions in this case, the appellate courts referred to SR only by her initials. This petition does likewise.

[4] Mr. Smith testified at a pre-trial hearing that SR initially told him the encounter with the enlisted man was not consensual and later acknowledged that it was consensual. *See* App. 4a, 60a.

ing a man of assaulting her in order to evade discipline that she could otherwise face for willingly engaging in sexual activity that was barred by military regulations. *See* App. 27a-28a, 40a, 62a-63a. Noting that the three charges involving SR rested entirely on her testimony—the government offered no other evidence as to any of them—the defense contended that Mr. Smith was constitutionally entitled to inform the jury of facts that bore so directly on her credibility. *See* CAAF J.A. 180-181.

The government sought to exclude the proposed cross-examination of SR pursuant to Military Rule of Evidence 412. *See* CAAF J.A. 183-187. That rule, the nearly identical military counterpart to Federal Rule of Evidence 412, generally bars the admission of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior." M.R.E. 412(a)(1) (2005 ed.).[5] The rule includes an exception, however, for "evidence the exclusion of which would violate the constitutional rights of the accused." M.R.E. 412(b)(1)(C). This exception, which the defense invoked in seeking to conduct the proposed cross-examination of SR, *see* CAAF J.A. 180-181, "addresses an accused's Sixth Amendment right of confrontation," *United States* v. *Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). Hence, the issue for the military judge was whether the Confrontation Clause required that the proposed cross-examination be allowed.

The judge concluded that it did not. *See* App. 59a-64a. He agreed that the defense's theory about SR's

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[5] Minor amendments were made to Military Rule of Evidence 412 in 2008. The version cited herein is the one that was in effect throughout the court-martial proceedings.

prior fabrication of assault "would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C)," i.e., pursuant to Mr. Smith's Sixth Amendment rights. App. 63a. He nonetheless prohibited the proposed cross-examination, in part because allowing it could, he believed, "sidetrack[] the member[s'] attention to a collateral issue," App. 64a, and in part because the only evidence of SR's prior false accusation came from Mr. Smith, whose credibility the judge questioned, *see* App. 63a.[6] The judge ultimately allowed defense counsel to reveal to the jury only that SR had lied to Mr. Smith in unspecified ways about unspecified conduct that she believed involved a violation of cadet regulations and possibly the UCMJ (but for which prosecutors had indicated they would not prosecute her). *See* App. 4a-5a, 19a & n.6; CAAF J.A. 145, 148-149.

3. Following a week-long trial, the jury acquitted Mr. Smith on six of the ten charges. *See* CAAF J.A. 173-174. It convicted on the other four, as well as on a lesser-included offense of one of the six counts of acquittal. *See id.*; App. 2a. The three convictions that pertained to sexual conduct (sodomy, indecent assault, and extortion of sexual favors) were all based on the allegations by SR, whose credibility—including motive to lie—the defense was not permitted to explore fully.

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[6] SR, the only other apparent source of evidence on the point, invoked her privilege against self-incrimination and thus did not testify at the pre-trial hearing on the proposed cross-examination. *See* App. 4a, 54a, 59a; CAAF J.A. 177-178. Although she dropped that invocation in order to testify at trial, the military judge did not require her, upon waiving the privilege, to address whether in fact she had made a prior false accusation so that he could revisit his ruling on the proposed cross-examination in the event she corroborated Mr. Smith's testimony by admitting that she had.

By contrast, the jury acquitted Mr. Smith of every sex-related charge on which his accuser was subject to full cross-examination. The verdict also meant that the government had failed to prove even one of the original sex-related charges that Academy officials had leveled against Mr. Smith. All of those charges were either dismissed before trial (many as lacking any foundation, *see supra* p.3) or resulted in acquittal.

The jury sentenced Mr. Smith to six months' confinement, forfeiture of all pay and allowances, and dismissal from the Coast Guard (i.e., expulsion from the Academy). *See* App. 2a; CAAF J.A. 175. Mr. Smith served his period of confinement immediately after trial, earning release a month early for good behavior.[7]

4. After the Coast Guard Court of Criminal Appeals affirmed his convictions and sentence—over a lengthy dissent regarding the restriction on the cross-examination of SR, *see* App. 40a-58a—Mr. Smith petitioned CAAF for further review. CAAF granted review of the Sixth Amendment question, but following briefing and argument it affirmed by a splintered 3-2 vote. *See* App. 1a-21a.

In presenting his Confrontation Clause claim, Mr. Smith argued that because he was raising a constitutional challenge to the military judge's ruling, CAAF should review the ruling de novo rather than for abuse of discretion. In support of that argument, Mr. Smith

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[7] Following his release, Mr. Smith returned to his home state of Texas, where he has completed his undergraduate work, married, become a father, and remained steadily employed. Upon his return, however, Mr. Smith was also forced to register as a sex offender, as Texas law mandates lifelong registration for indecent-assault convictions.

cited cases from several circuits that employ de novo review of Confrontation Clause claims like his. Writing for a two-judge plurality, Judge Stucky rejected that position, holding that under CAAF precedent, review was only for abuse of discretion. *See* App. 5a (citing *United States* v. *Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006), and *United States* v. *Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).[8]

Applying that standard, the plurality concluded that "[t]he military judge did not abuse his discretion." App. 7a. The plurality deemed it significant that the defense had been allowed to show the jury that SR had lied to Mr. Smith about conduct that she believed could have threatened her career. *See id.* The plurality also reasoned that "[w]hile Cadet SR's credibility was in contention, it is unclear why the lurid nuances of her sexual past would have added much to Appellant's extant theory of fabrication." *Id.* Finally, the plurality sought to distinguish cases cited by Mr. Smith, including this Court's decision in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), that held comparable restrictions on the cross-examination of key prosecution witnesses to be unconstitutional. *See* App. 7a-8a; *see also* App. 29a-31a (court of criminal appeals majority seeking to distinguish other CAAF cases with similar holdings).

Judge Baker, also applying the abuse-of-discretion standard, concurred in the result. *See* App. 8a-10a. He

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[8] CAAF has long applied this standard to Confrontation Clause claims. *See, e.g., United States* v. *Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009); *United States* v. *Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997); *United States* v. *Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996).

acknowledged that the military judge's ruling might well have violated the Confrontation Clause on the theory that the jury "needed to know the nature of 'the secret' in order to assess beyond a reasonable doubt whether SR might succumb to pressure to protect the secret." App. 9a. But in his view, Mr. Smith's alternate "theory of admission [wa]s too far-fetched to pass constitutional ... muster." *Id.*[9]

Judge Erdmann, joined by Chief Judge Effron, agreed that CAAF "review[s] a military judge's decision to admit or exclude evidence for an abuse of discretion." App. 13a (citing *United States* v. *Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). But they dissented from the other judges' application of that standard. *See* App. 10a-21a. The fatal problem in their view was that "the military judge prevented the defense from presenting to the panel an explanation of the circumstances that would have provided a motive for the complainant to make a false allegation of" sexual assault. App. 10a; *see also* App. 21a ("Smith had a commonsense explanation

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[9] Two of Judge Baker's articulated bases for this conclusion were factually incorrect. First, Judge Baker stated that "it was SR herself who reported her sexual contact with Appellant; this cuts against Appellant's theory that SR would lie to conceal her own misconduct." App. 9a. In fact, "[t]he record does not disclose whether SR voluntarily came forward or was first approached by" Coast Guard investigators. App. 52a n.8 (court of criminal appeals dissent); *see also* App. 51a-53a. Second, Judge Baker stated that "to support [Mr. Smith's] theory of admission the members needed to know that SR had 'lied' to Appellant about her sexual misconduct," and "[t]his much the military judge permitted." App. 9a. To the contrary, the military judge did not permit the jury to hear that what "SR had 'lied' to Appellant about [was] sexual misconduct." *Id.* Indeed, that prohibition was the crux of Mr. Smith's challenge on appeal.

for SR's claim that the sexual activity was nonconsensual and the military judge's ruling prevented the members from considering this theory."). Emphasizing that "this was a 'he said-she said' case and for the charges at issue in this appeal, the critical question for the members was the credibility of the sole prosecution witness," App. 17a (footnote omitted), the dissenters concluded—relying on this Court's precedent—that a Sixth Amendment violation had occurred because "'[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination,'" App. 14a-15a (alterations in original) (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986)); *accord* App. 41a (court of criminal appeals dissent) ("The excessive restrictions imposed on Appellant's Sixth Amendment confrontation rights allowed SR to testify through non-factual euphemisms on critical issues related to the Government's proof and her own credibility, and allowed the Government to create a substantially different impression of her truthfulness than what the defense had sought to show through the excluded evidence.").

The dissenters also disagreed with the plurality that the cross-examination allowed by the military judge was sufficient, explaining that "[w]ith this limited information about SR's secret, the members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the proffered evidence directly implicated SR's motive and credibility." App. 19a-20a; *see also* App. 45a-46a (court of criminal appeals dissent) (citing *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974), and *Olden*, 488 U.S. at 232 (per curiam)). As to the plurality's stated doubt about the need for the "lurid nu-

ances" of SR's secret, App. 7a, the dissenters explained that what was important about the proposed cross-examination, and what its focus would have been, was "not the lurid nuances of the victim's sexual past ..., but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances." App. 18a (internal quotation marks omitted).[10]

REASONS FOR GRANTING THE PETITION

CAAF's holding regarding the appropriate standard for appellate review of Confrontation Clause claims like Mr. Smith's conflicts with the holdings of several other courts of appeals. The conflict is established and the issue is both recurring and important. Moreover, this case is a good vehicle for resolving the conflict, both because the issue was raised throughout the case and because CAAF's splintered decision applying abuse-of-discretion review shows that the use of that relatively lax standard may well have determined the outcome here. Finally, CAAF's use of an abuse-of-discretion standard is wrong, as Mr. Smith had a right to plenary appellate review of his constitutional claim raising a mixed question of law and fact. Under these circumstances, this Court's review is warranted.

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[10] In addition to defending the merits of the military judge's ruling, the government raised a jurisdictional objection before CAAF, contending that Mr. Smith's petition for discretionary review by that court was untimely. CAAF unanimously rejected that argument. *See* App. 2a-3a (plurality opinion), 10a (dissent), 8a-10a (Baker, J., concurring in the result) (implicitly rejecting the jurisdictional argument by addressing the merits).

I. CAAF'S STANDARD-OF-REVIEW HOLDING IMPLICATES AN ESTABLISHED CIRCUIT CONFLICT ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

A. The Courts Of Appeals Are Deeply Divided Over What Standard Of Review Applies To Confrontation Clause Claims Like Mr. Smith's

CAAF employed abuse-of-discretion review in resolving Mr. Smith's Sixth Amendment challenge to the military judge's restriction on the defense's cross-examination of SR. *See, e.g.*, App. 5a. That approach conflicts with the holdings of five circuits, which consider comparable Confrontation Clause claims de novo, reserving abuse-of-discretion review for non-constitutional challenges. For example, the Seventh Circuit has stated that "[o]rdinarily, a district court's evidentiary rulings are reviewed for abuse of discretion. However, when the restriction [on cross-examination] implicates the criminal defendant's Sixth Amendment right to confront witnesses against him, ... the standard of review becomes de novo." *United States* v. *Smith*, 308 F.3d 726, 738 (7th Cir. 2002) (citation omitted). The First, Fifth, Eighth, and Tenth Circuits have adopted the same approach. *See, e.g., United States* v. *Vega Molina*, 407 F.3d 511, 522 (1st Cir. 2005); *United States* v. *Jimenez*, 464 F.3d 555, 558-559 (5th Cir. 2006); *United States* v. *Bentley*, 561 F.3d 803, 808 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1275 (2009); *United States* v. *Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005).[11]

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[11] In *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), the Ninth Circuit stated that it was adopting an approach that "br[ought it] in line with [these five] sister circuits,"

Six other circuits, by contrast—the Second, Third, Fourth, Sixth, Eleventh, and District of Columbia Circuits—take the same approach that CAAF does, applying abuse-of-discretion review even when a restriction on the cross-examination of a prosecution witness is attacked on constitutional grounds.[12] The Sixth Circuit, for example, stated in one case that "[defendant] argues that his right to confrontation was violated when the trial court 'unfairly' limited his cross-examination of [a] government witness .... We review the district court's restriction on a defendant's right to cross-examine witnesses for abuse of discretion." *United States* v. *Franco*, 484 F.3d 347, 353 (6th Cir. 2007). Cases from the other circuits in this group are to the same effect. *See, e.g.*, *United States* v. *Rosa*, 11 F.3d 315, 335 (2d Cir. 1993); *United States* v. *Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008); *United States* v. *Shelton*, 200 F. App'x 219, 221 (4th Cir. 2006) (citing *United States* v. *Scheetz*,

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id. at 1101 n.6 (citing a case from each of the five). The court's actual holding, however, was that abuse-of-discretion review is proper for some constitutional challenges, specifically those addressing "a limitation on the scope of questioning within a given area" rather than "the exclusion of an [entire] area of inquiry." *Id.* at 1101.

[12] The dissenters stated in this case that under the abuse-of-discretion standard, conclusions of law are reviewed de novo. App. 13a. The authority they cited for that statement, however, *United States* v. *Ayala*, involved a suppression ruling rather than a restriction on cross-examination. *See* 43 M.J. at 298. To petitioner's knowledge, no CAAF case states that the abuse-of-discretion standard repeatedly applied by the court when reviewing restrictions on defendants' cross-examination includes de novo review of legal conclusions. Nor did the plurality or the concurring judge here indicate that any aspect of their review was conducted de novo.

293 F.3d 175, 184 (4th Cir. 2002)); *United States* v. *Orisnord*, 483 F.3d 1169, 1178 (11th Cir. 2007); *United States* v. *Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996).[13]

In short, CAAF's use of an abuse-of-discretion standard in this case perpetuates a clear—and recognized—conflict in the circuits. *See United States* v. *Larson*, 495 F.3d 1094, 1100 & n.5 (9th Cir. 2007) (en banc) (resolving "an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court's limitations on cross-examination" while acknowledging a parallel "disagreement among the circuits").

B. The Question Presented Is Recurring And Important, And This Case Is A Good Vehicle For Deciding It

The circuit conflict at issue here warrants resolution by this Court. As indicated by the cases cited in the previous section, the constitutionality of restrictions on cross-examination arises frequently in criminal

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[13] A few unpublished decisions from some of the circuits in this group have reviewed restrictions on cross-examination de novo, notwithstanding (and without acknowledging) the contrary precedent cited in the text. *See, e.g., United States* v. *Allen*, 353 F. App'x 352, 354 (11th Cir. 2009) (per curiam); *United States* v. *Askanazi*, 14 F. App'x 538, 540 (6th Cir. 2001) (per curiam). Other cases, addressing other types of Confrontation Clause claims, have proclaimed in dicta that all such claims are subject to de novo review—again without confronting the cases cited in the text. *See, e.g., United States* v. *Jass*, 569 F.3d 47, 55 (2d Cir. 2009) (*Bruton* claim: "We review '[a]lleged violations of the Confrontation Clause ... *de novo*[.]'" (alteration and omission in original) (quoting *United States* v. *Vitale*, 459 F.3d 190, 195 (2d Cir. 2006))), *cert. denied*, 130 S. Ct. 2128 (2010); *United States* v. *Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009) (similar for admission of affidavit).

prosecutions, and in every part of the country. Those cases also show that the conflict over the standard for appellate review of such restrictions is established; there is thus no benefit to be gained by giving the lower courts additional time to consider the issue. Moreover, the question presented is important, because the standard of review can determine the outcome of an appeal. *See Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 238 (1991) ("[T]he difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree." (internal quotation marks omitted)); *see also, e.g.*, *News-Press* v. *United States Dep't of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007) ("In even moderately close cases, the standard of review may be dispositive of an appellate court's decision."); 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 1.02, at 1-16 (3d ed. 1999). That is particularly true when one standard is highly deferential: CAAF, for example, has stated that "the abuse of discretion standard is a strict one," satisfied only when "[t]he challenged action [is] arbitrary, fanciful, clearly unreasonable, or clearly erroneous," *United States* v. *McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks omitted). Finally, disuniformity created by the conflict directly affects a fundamental individual right. Some defendants in criminal cases enjoy less protection of the critical right to confront their accusers because of the fortuity of where their trials were held—or, as to cases decided by CAAF, because they have chosen to wear the nation's uniform.

This case presents a good vehicle to resolve the circuit conflict. To begin with, Mr. Smith's standard-of-review argument was both pressed and passed upon in the court of appeals, *see* Pet'r's CAAF Br. 12-13; App.

5a, rendering the issue suitable for review by certiorari. *See, e.g., Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (quoting *United States* v. *Williams*, 504 U.S. 36, 41 (1992)). In addition, CAAF's rejection of Mr. Smith's argument may well have determined the ultimate outcome. Even applying highly deferential review, CAAF was narrowly divided as to the constitutionality of the military judge's ruling in this case. If even one of the three judges who deemed that ruling not to be an abuse of discretion were to conclude, upon reviewing without deference, that it was inconsistent with the Sixth Amendment, Mr. Smith would prevail.[14]

II. CAAF'S STANDARD-OF-REVIEW HOLDING IS WRONG

This Court's review is also warranted because CAAF's use of an abuse-of-discretion standard to review Mr. Smith's Confrontation Clause claim was erroneous. The military judge's ruling that Mr. Smith challenged presented a mixed question of law and fact. When a constitutional right is involved, as here, this Court has repeatedly held de novo review of such mixed questions appropriate. The decisions from this Court that CAAF and other courts have relied on to justify abuse-of-discretion review are inapposite.

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[14] The military context in which this case arises does not affect its suitability as a vehicle to answer the question presented. Although servicemembers' constitutional rights can be more circumscribed than those of their civilian counterparts when morale, good order and discipline, or other military interests so require, *see Parker* v. *Levy*, 417 U.S. 733, 758 (1974), that is not the case here. CAAF has never articulated a military-specific rationale for employing abuse-of-discretion review in cases like this (nor did the government offer one below), and in fact no military interest would be undermined if CAAF reviewed constitutional challenges to restrictions on defendants' cross-examination without deference.

A. Under This Court's Precedent, Mixed Questions Of Law And Fact Are Reviewed De Novo When Constitutional Rights Are Involved

The military judge's restriction on the cross-examination of SR involved a quintessential "mixed question[] of law and fact—*i.e.*, [a] question[] in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the ... standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982). Under this Court's cases, such questions are reviewed de novo when, as here, they implicate constitutional rights. As a plurality explained in *Lilly* v. *Virginia*, 527 U.S. 116 (1999), the Court's "prior opinions ... indicate that ... with ... fact-intensive, mixed questions of constitutional law, ... '[i]ndependent review is ... necessary ... to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights," *id.* at 136 (alteration and last two omissions in original) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996)); *see also United States* v. *Bajakjian*, 524 U.S. 321, 337 n.10 (1998) (employing de novo review because the pertinent issue "calls for the application of a constitutional standard to the facts of a particular case"); *Pullman-Standard*, 456 U.S. at 290 n.19 ("There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court." (citations omitted)); *United States* v. *Frederick*, 182 F.3d 496, 499 (7th Cir. 1999) (Posner, J.) (noting that this Court has embraced de novo review of mixed questions involving "certain constitutional issues"); *United States* v. *McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc) ("The pre-

dominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights." (citing *Ker* v. *California*, 374 U.S. 23 (1963))).[15]

The Court has thus held that de novo review—though with deference typically given to associated factual findings—is appropriate for a wide variety of trial court rulings that implicate constitutional rights. These include rulings on: whether a hearsay statement bears sufficient indicia of "trustworthiness" to satisfy the Confrontation Clause, *see Lilly*, 527 U.S. at 136 (plurality opinion); whether a fine is unconstitutionally excessive, *see Bajakjian*, 524 U.S. at 336 n.10; whether police had probable cause or reasonable suspicion to conduct a search, *see Ornelas*, 517 U.S. at 699; whether a defendant was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *see Thompson* v. *Keohane*, 516 U.S. 99, 112-113 (1995); whether a confession was voluntary, *see Arizona* v. *Fulminante*, 499 U.S. 279, 287 (1991) (citing *Miller* v. *Fenton*, 474 U.S. 104, 110 (1985)); whether defense counsel was constitutionally ineffective, *see Strickland* v. *Washington*, 466 U.S. 668, 698 (1984); whether a pre-trial identification proce-

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[15] Where constitutional rights are not implicated, "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll.*, 499 U.S. at 233; *see also Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (adopting deferential review of rulings under Federal Rule of Civil Procedure 11); *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988) (citing other examples); *Pullman-Standard*, 456 U.S. at 290 n.19 (citing examples of both approaches).

dure was unconstitutionally suggestive, *see Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam); whether a defendant waived his right to counsel, *see Brewer* v. *Williams*, 430 U.S. 387, 403-404 (1977); and several First Amendment questions, *see Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 685-686 n.33 (1989) (citing cases).[16]

The Court's rationale for these various holdings supports de novo review here. *First*, the Court has repeatedly observed in these cases that "the [relevant] legal rules ... acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the le-

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[16] Although some of these cases involved review of state-court judgments, their standard-of-review holdings apply equally to federal cases like this one. *See Lilly*, 527 U.S. at 136 (plurality opinion) (relying on *Ornelas*, a federal criminal case, to support its standard-of-review holding in a state criminal case); *see also Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[S]urely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts."). That is true even for decisions from this Court on federal habeas review of a state-court judgment. While those cases' standard-of-review holdings generally do not apply in the habeas context post-AEDPA, *see Williams* v. *Taylor*, 529 U.S. 362, 411 (2000) (citing 28 U.S.C. § 2254(d)(1)), they remain valid and instructive for cases on direct review (state or federal). *See Ornelas*, 517 U.S. at 697 (citing *Miller*, a state-habeas case, to support its standard-of-review holding in a direct-review case); *see also, e.g., United States* v. *LeBrun*, 363 F.3d 715, 719 (8th Cir. 2004) (en banc) ("*Thompson*'s rationale [in the habeas context] requires that on direct appeal we review the district court's custody determination de novo."); *United States* v. *Erving L.*, 147 F.3d 1240, 1245 (10th Cir. 1998) (similar, citing *Derrick* v. *Peterson*, 924 F.2d 813, 818 (9th Cir. 1991)).

gal principles." *Ornelas*, 517 U.S. at 697, *quoted in, e.g.*, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *accord Miller*, 474 U.S. at 114. The same is true of the Sixth Amendment "rules" that apply to restrictions on the cross-examination of prosecution witnesses. *Second*, the Court has stated in the search-and-seizure context that a

> policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas, 517 U.S. at 697 (alterations in original) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 171 (1949)). Again, the same is true as to the Confrontation Clause.

More generally, this Court has explained that plenary appellate review of constitutional mixed questions "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-511 (1984); *see also id.* at 503 ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance."). That is surely true of a defendant's right to confront the witnesses against him through cross-examination: This Court has labeled cross-examination "the greatest legal engine ever invented for the discovery of truth."

California v. *Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It has also deemed the right of confrontation to be "one of the fundamental guarantees of life and liberty," *Kirby* v. *United States*, 174 U.S. 47, 55 (1899), and so "fundamental and essential to a fair trial" as to be incorporated against the States, *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). And it has stated that an impermissible restriction on a defendant's right of cross-examination is "constitutional error of the first magnitude." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974). Deferential review of trial-court rulings is insufficient to safeguard such a critical constitutional right.[17]

Finally, this Court's cases support the specific approach espoused by Mr. Smith and adopted by several circuits, whereby non-constitutional challenges to restrictions on cross-examination are reviewed for abuse of discretion while constitutional challenges are reviewed de novo. In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, the Court adopted the same approach for punitive damages awards. "If no constitutional issue is raised" regarding the excessiveness of such an award, the Court stated, "the role of the appel-

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[17] Decisions outside the mixed-question context reinforce the conclusion that de novo review is appropriate here. For example, in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), this Court construed a statutory provision mandating abuse-of-discretion review of certain individual immigration decisions. *See id.* at 485-486 & n.6 (discussing 8 U.S.C. § 1160(e)). The Court held that the statute did not preclude judicial review of due process challenges to the broader immigration program—and part of its rationale was that "the abuse-of-discretion standard ... does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts." *Id.* at 493.

late court ... is merely to review the trial court's [excessiveness] 'determination under an abuse-of-discretion standard.'" 532 U.S. at 433 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). By contrast, the Court went on to hold (relying on *Ornelas* and *Bajakajian*), "courts of appeals should apply a *de novo* standard of review when passing on ... the constitutionality of punitive damages awards." *Id.* at 436.

What all these cases recognize is the anomaly of employing an abuse-of-discretion standard when the issue is whether or not a particular ruling violated a constitutional right. Such a standard suggests that a district court has "discretion" to commit a constitutional violation, and that appellate judges could uphold a ruling even if they believe that such a violation occurred. *See, e.g., Elcock* v. *Kmart Corp.*, 233 F.3d 734, 743 (3d Cir. 2000) ("Of course, an abuse of discretion means much more than that the appellate court disagrees with the trial court."). That is plainly wrong.

B. The Cases Relied On By Courts That Employ Abuse-Of-Discretion Review Do Not Support That Approach

The circuits that have reviewed Confrontation Clause challenges to restrictions on cross-examination deferentially have not addressed the cases discussed in the previous section. They have instead relied on other decisions by this Court that supposedly endorse abuse-of-discretion review. That reliance is misplaced.

To begin with, several circuits have based their choice of deferential review on language in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). *See, e.g., Rosa*, 11 F.3d at 335; *United States* v. *Mussare*, 450 F.3d 161, 169 (3d Cir. 2005). But what the Court said in the rele-

vant portion of *Van Arsdall* is that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." 475 U.S. at 679. That statement reveals nothing about the proper appellate standard of review. It instead addresses the substance of the Confrontation Clause, and in particular it rejects the notion that that clause, as a substantive matter, proscribes any restrictions on defendants' cross-examination. This is clear from the immediately preceding sentence, in which the Court stated that "[i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Id.* It is also clear from the next few paragraphs, where the Court went on to find that a Confrontation Clause violation had occurred—without ever referring to abuse of discretion. *See id.* at 679-680.[18]

The Sixth Circuit has also relied on this Court's statement in *General Electric Co.* v. *Joiner*, 522 U.S. 136, 141 (1997), that "abuse of discretion is the proper

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[18] The Ninth Circuit similarly relied on *Van Arsdall* in holding that the standard of review depends on the details of the defendant's Confrontation Clause challenge, i.e., that de novo review applies when the trial court "exclu[des] ... an [entire] area of inquiry," but not when it limits "the scope of questioning within a given area." *Larson*, 495 F.3d at 1101. As just discussed, however, *Van Arsdall* addressed only the substance of the confrontation guarantee. The Ninth Circuit's holding, moreover, improperly conflates substance with the standard of review.

standard of review of a district court's evidentiary rulings." *See United States* v. *Schreane*, 331 F.3d 548, 564 (6th Cir. 2003) (citing *Joiner* for the proposition that "[a]n appellate court reviews all evidentiary rulings—including constitutional challenges to evidentiary rulings—under the abuse-of-discretion standard"). *Joiner* was not a criminal case, however, and thus did not implicate the Confrontation Clause. Moreover, the relevant ruling in *Joiner* was not a constitutional one but rather a ruling on the exclusion of expert testimony under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Joiner*, 522 U.S. at 138-139. The same is true of the cases *Joiner* cited to support its statement that evidentiary rulings are reviewed for abuse of discretion; each likewise concerned a non-constitutional ruling by the trial judge. *See Old Chief* v. *United States*, 519 U.S. 172, 180 (1997) (balancing under Federal Rule of Evidence 403 in regard to admission of defendant's prior conviction); *United States* v. *Abel*, 469 U.S. 45, 54-55 (1984) (same in regard to admission of government rebuttal testimony); *Spring Co.* v. *Edgar*, 99 U.S. 645, 658 (1879) (admission of expert testimony). In light of the mixed-question precedent from this Court discussed in the previous section, *Joiner*'s reference to "evidentiary rulings" is most sensibly read to refer only to non-constitutional rulings. *Joiner* is thus consistent with Mr. Smith's contention that non-constitutional challenges to restrictions on cross-examination should be reviewed for abuse of discretion while constitutional claims should be reviewed de novo.

CAAF's deferential review in cases like this, meanwhile, traces to *Geders* v. *United States*, 425 U.S. 80 (1976), and *Alford* v. *United States*, 282 U.S. 687 (1931). *See, e.g., United States* v. *Williams*, 37 M.J. 352, 361

(C.M.A. 1993) (citing *Geders*); *United States* v. *Hooper*, 26 C.M.R. 417, 426 (C.M.A. 1958) (citing *Alford*). Neither case supports deferential review of constitutional challenges. The Court in *Alford* did review a restriction on cross-examination for abuse of discretion, *see* 282 U.S. at 694, but nothing in its opinion indicates that the defendant's attack on the restriction was constitutionally based. Indeed, the opinion never mentions either the Sixth Amendment generally or the Confrontation Clause in particular. Not until decades later did this Court state that *Alford*'s holding included a "constitutional dimension," *Davis*, 415 U.S. at 318 n.6 (citing *Smith* v. *Illinois*, 390 U.S. 129, 132-133 (1968))—and in doing so it plainly recognized the inconsistency between that "constitutional dimension" and *Alford*'s use of abuse-of-discretion review, *see id.* ("*Although* ... we reversed [in *Alford*] because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt." (emphasis added)).

Geders provides even less support for CAAF's use of deferential review. The Court in *Geders* did not review a restriction on cross-examination, nor say that such restrictions are reviewed for abuse of discretion. It stated that a trial judge's determination regarding "the order in which parties will adduce proof"—a non-constitutional matter—"will be reviewed only for abuse of discretion." 425 U.S. at 86. In the next sentence the Court, citing *Glasser* v. *United States*, 315 U.S. 60, 83 (1942), noted that, "[w]ithin limits, the judge may ... control the scope of examination of witnesses," *Geders*, 425 U.S. at 86-87. But while *Glasser* did review a restriction on cross-examination for abuse of discretion, as with *Alford* there is no indication in *Glasser* (the relevant portion of which totals only three sentences) that the defendant had raised a constitutional challenge.

See Glasser, 315 U.S. at 83.[19] Again, then, this Court's precedent is consistent with the approach used by five courts of appeals and urged by Mr. Smith here. In any event, to the extent these cases reflect any uncertainty on the question presented, that is an additional factor weighing in favor of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[19] The Court in *Geders* also cited *United States* v. *Nobles*, 422 U.S. 225 (1975), but *Nobles* did not involve the Confrontation Clause. The issue there was whether the defense had to disclose certain material in order to permit adequate cross-examination by the *prosecution*. *See Nobles*, 422 U.S. at 227; *see also id.* at 241 (labeling the defendant's invocation of the Sixth Amendment "misconceive[d]").