IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JORDAN R. MULLER,
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. 39323

USCA Dkt. No. 19-0230/AF

BRIEF ON BEHALF OF APPELLANT

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ISSUES PRESENTED

I.

WHETHER RULE 15.5 OF THE AIR FORCE COURT OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE IS INVALID BECAUSE IT CONFLICTS WITH THE UNIFORM CODE OF MILITARY JUSTICE, THIS COURT'S PRECEDENT, THE JOINT COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE, THE RECENTLY UPDATED JOINT RULES OF APPELLATE PROCEDURE, AND THE PRIOR AND CURRENT APPELLATE RULES OF THE OTHER SERVICE COURTS OF CRIMINAL APPEALS?

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO RAISE ISSUES ON APPEAL WHEN IT DENIED HIS TIMELY REQUEST TO FILE A SUPPLEMENTAL BRIEF ON ISSUES ARISING DURING REMAND PROCEEDINGS?

III.

WHETHER A COURT OF CRIMINAL APPEALS MUST REQUIRE CERTIFICATES OF CORRECTION TO BE ACCOMPLISHED, VICE ACCEPTING DOCUMENTS VIA A MOTION TO ATTACH, WHEN IT FINDS A RECORD OF TRIAL TO BE INCOMPLETE DUE TO A MISSING EXHIBIT?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

STATEMENT OF THE CASE

On June 2, 2017, Airman First Class (A1C) Jordan R. Muller was tried by general court-martial before a military judge alone at Vandenberg Air Force Base, California. In accordance with his pleas, A1C Muller was convicted of one charge and three specifications in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2016). (Joint Appendix (JA) at 152-53.) The military judge sentenced A1C Muller to a bad conduct discharge, nine months confinement, and reduction to the grade of E-1. (JA at 154.) The convening authority approved the adjudged sentence. (JA at 155.)

On December 21, 2018, the Air Force Court affirmed the findings and sentence. (JA at 1-2.) On January 28, 2019, the Air Force Court denied A1C Muller's motion for reconsideration *en banc*. (JA at 3-4.)

STATEMENT OF FACTS

The Air Force Court's remand and the government's numerous attempts to correct the record.

On May 16, 2018, A1C Muller submitted his case to the Air Force Court on its merits with no specific assignments of error. (JA at 5-6). At the time, Major Allen Abrams, then an Air Force appellate defense counsel, represented A1C Muller. (*Id.*) Maj Abrams indicated that although A1C Muller was submitting his case on the merits, A1C Muller nevertheless understood that the Air Force Court would conduct a de novo review of the entire record of trial. (JA at 5.)

On September 12, 2018, the Air Force Court announced that Prosecution Exhibit 7 was missing from the record of trial and ordered the government to show good cause why the record should not be returned to the convening authority for correction pursuant to Rule for Courts-Martial (R.C.M.) 1104(d). (JA at 7.) The government responded on the imposed September 26, 2018 deadline (JA at 8-14), and correspondingly attempted to attach to the record two documents: a declaration from the trial counsel and the purported missing exhibit – an enlisted performance report (EPR) for A1C Muller. (JA at 15-20.) In her declaration, trial counsel indicated that she reviewed the

attached EPR, as well as the record of trial, and was "extremely confident" that the document was the same as what she offered as Prosecution Exhibit 7 at trial. (JA at 18.) The government's response emphasized both trial counsel's attestation and the EPR's identifying characteristics to support its contention that a remand was unnecessary, and cited various examples where Courts of Criminal Appeals (CCAs) appeared to grant similar motions to attach to correct errors in the record. (JA at 10-12.) The government further stated:

> Because certificates of correction are "permissive in nature, merely one method of correcting a record, not the exclusive means," CAAF and all the services' CCAs have consistently accepted an appellate counsel's submission of previously omitted material from the record of trial to find a record complete under R.C.M. 1103. This Court should do the same in this case.

(JA at 12.) The government did not indicate whether it attempted to consult with the military judge or trial defense counsel regarding the incomplete record or the EPR's authenticity.

On October 5, 2018, the Air Force Court denied the government's motion and remanded the case in accordance with R.C.M. 1104(d). (JA at 21-22.) The Air Force Court further directed the corrected record be returned no later than November 4, 2018. (JA at 22.)

On November 1, 2018, the government filed an out of time motion for a 14-day enlargement of time to respond to the Air Force Court's order. (JA at 23-25.) To justify its request, the government attested that "[t]he convening authority's servicing legal office and the military judge have been diligently taking steps to comply with this Court's order." (JA at 23.)

The following day, A1C Muller – now represented by new appellate counsel – opposed the government's motion, arguing that the enlargement request was unreasonable given that the government had already located what it claimed to be the missing exhibit and that any potential review of such a short record of trial should not require 14 days. (JA at 26-28.) A1C Muller also challenged the government's assertion of diligence in complying with the court's order, noting that the convening authority waited 25 days before directing any action from the military judge. (JA at 27.) As proof of the government's inactivity, A1C Muller moved to attach the convening authority's directive memorandum, dated October 30, 2018. (JA at 29-33.) A1C Muller noted that the memorandum was relevant because it supported his opposition to the government's request for an enlargement of time,

and that it may support an assignment of error alleging unlawful command influence (UCI) in that the convening authority ordered the military judge to verify that a particular document whose authenticity was in question was what the military judge reviewed in the case. (JA at 29.)

On the same day A1C Muller opposed the out of time enlargement request, and without acting on A1C Muller's motion to attach, the Air Force Court granted the government's motion. (JA at 34.) Consequently, the government's new deadline to correct the record was November 18, 2018.

The government did not meet this deadline. Instead, the government filed a motion to attach purported corrections on November 21, 2018. (JA at 35-42.) The government did not identify that the motion was filed out of time, which necessitated its return without attachment to the record pursuant to Rule 15.6 of the Air Force Court's Rules of Practice and Procedure (hereinafter Air Force Court Rules). (JA at 122.) The government then refiled its motion to attach on November 26, 2018; a week after its second due date and more than

three weeks after the Air Force Court's originally-established deadline. (JA at 43-51.)

On November 28, 2018, A1C Muller opposed the government's motion. (JA 52-55.) Among other things, A1C Muller argued that the government failed to show good cause for its out of time filing as required by the Air Force Court's rules. (JA at 53.) A1C Muller also asked the Air Force Court to consider the 15-day delay from when the record was returned to court (November 20, 2018) and when the last document in the government's motion to attach was completed (November 5, 2018), as well as the 25-day delay between its remand order and the convening authority's direction to the military judge. (JA at 53-54.) A1C Muller contended that the government's dilatory responses, including two out of time findings, did "not constitute good cause for further accommodations from [the] Court." (JA at 54.)

On November 30, 2018, the Air Force Court granted the government's request. (JA at 56.) The same day, the court denied A1C Muller's November 2, 2018, motion to attach the convening authority's memorandum. (JA at 57.)

A1C Muller's attempt to file a supplemental brief.

During the pendency of A1C Muller's appeal to the Air Force Court, the ability of appellants to file supplemental pleadings was covered by Air Force Rule 15.5.[1] (JA at 122.) For remanded cases not involving rehearings, Rule 15.5 required appellate defense counsel – within 10 days of re-docketing – to move for leave to file a supplemental pleading or notify the Court of an appellant's decision not to file an additional pleading. (JA at 122.) However, this requirement appeared to be limited to those cases where "appellate counsel previously filed an initial brief and assignment(s) of error." (JA at 122.)

In this case, A1C Muller was never notified when or if the Air Force Court re-docketed his case.[2] Nevertheless, on December 6, 2018 – eight days after the Air Force Court granted the government's motion to attach – A1C Muller moved for leave to file a supplemental

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[1] The Air Force Court Rules contain several typographical errors relating to Rule 15.5. For example, the Table of Contents lists the rule for supplemental filings as 15.4, as does Appendix D (summarizing the filing time standards). To be clear, the affecting language appears in the body of the rules, under Rule 15.5. (JA at 122.)

[2] As noted in A1C Muller's motion for reconsideration, and despite its rules, the Air Force Court may not necessarily re-docket certain cases. (JA at 103.)

assignment of errors (AOE). (JA at 58-85.) A1C Muller contemporaneously filed a supplemental AOE raising two issues. (JA at 58-85.) First, A1C Muller faulted how the convening authority directed the military judge to correct the record: "[t]he language used by the convening authority (a major general) did not give the military judge (a lieutenant colonel) any discretion [in verifying the authenticity of a missing exhibit]; rather, the military judge was required to verify that the document was the same exhibit that was heretofore missing from the record of trial." (JA at 63-64.) A1C Muller thus alleged that the convening authority committed both actual and apparent UCI, and asked the Air Force Court to designate a new convening authority and legal office to manage further attempts to correct the record. (JA at 64.) Second, A1C Muller asked for sentence relief to account for the government's failure to provide a complete record of trial and its subsequent dilatory response to the Air Force Court's order to correct the record. (JA at 65-68.) Although A1C Muller based this request primarily on the government's violation of his due process rights to a speedy appellate review, he also asserted that relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002) was warranted "due to the

government's gross indifference." (JA at 68.)

On the same day he filed his supplemental AOE, A1C Muller moved a second time to attach the October 30, 2018 memorandum from the convening authority. (JA at 86-90.) In this motion, A1C Muller argued that the memorandum supported his supplemental AOE in that it demonstrated the alleged UCI as well as "the government's dilatory response to [the Air Force Court's] order to correct the record." (JA at 86-87.) Four days later, A1C Muller moved to attach a personal affidavit attesting that he had experienced difficulties gaining employment and submitting a claim with Veteran's Affairs due to not possessing a DD Form 214, which is not issued until the appellate process is complete and the punitive discharge is approved. (JA at 91-95.)

The government did not oppose A1C Muller's motion for leave to file a supplemental AOE nor his two motions to attach. Yet, on December 21, 2018, the Air Force Court denied all three motions without explanation. (JA at 96-98.) The Air Force Court published its decision the same day, affirming the findings and sentence. (JA at 1-2.) This decision did not address either of the issues A1C Muller

attempted to raise in his supplemental AOE.

On January 9, 2019, A1C Muller moved for reconsideration *en banc*. (JA at 99-110.) Specifically, A1C Muller sought reconsideration of the Air Force Court's denial of his motion to file a supplemental AOE and the two motions to attach, as well as the Court's decision. (JA at 99.) A1C Muller argued that reconsideration was justified because the Air Force Court's decisions denied him his right to raise issues on appeal; namely, his "right to challenge *new* issues created by the government as [a] result of [the Air Force Court's] decision to remand his case." (JA at 106) (emphasis in original.) A1C Muller also contended that if Air Force Court Rule 15.5 – as its language suggests – requires the filing of an initial AOE in order to later file a supplemental AOE following remand, it would "permanently foreclose the ability of some appellants to challenge new issues created during remand and thus impermissibly deprive those appellants of an opportunity to raise issues for [the Air Force Court's] attention." (JA at 107.) A1C Muller further distinguished Rule 15.5's 10-day deadline from timing requirements in the Army and Navy-Marine Corps, where appellants could file supplemental briefs within 60 and 30 days of re-

docketing, respectively. (JA at 108 (citing A. CT. CRIM. APP. R. 2.2(d) (2018) and N-M CT. CRIM. APP. R. 2.2(d) (2018)). Moreover, A1C Muller noted that the Courts of Criminal Appeals Rules of Practice and Procedure (hereinafter Joint Rules) allowed appellants 60 days to file briefs following receipt of the record of trial. (JA at 107-08) (citing JT. CT. CRIM. APP. R. 15(b)).

The government responded to A1C Muller's reconsideration request on January 16, 2019. (JA at 111-15.) The government first condoned the Air Force Court's denials of A1C Muller's motions to attach, contending that the documents at issue were not relevant to valid claims. Specifically, the government asserted that A1C Muller's UCI claim "lacked a factual basis" in that the "plain meaning" of the convening authority's memorandum indicated that the "military judge was expected to independently confirm whether or not the missing exhibit is the same one that was admitted at trial." (JA at 112-13.) Regarding the post-trial delay issue, the government argued that A1C Muller's claim was "not ripe" because the Air Force Court rendered its decision "well short of the required eighteen month deadline required by *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)." (JA at

113.) The government then posited that even if the Air Force Court erred in refusing to consider A1C Muller's issues, there was no prejudice because the court reviewed the entire record pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2016), and was aware of the delay issues:

> If relief were warranted by any delays, this Court was required to address it under Articles 59(a) and 66(c), UCMJ. It did not. Therefore, there was no error to remedy. This Court properly denied Appellant's motion for leave to file supplemental assignments of error and the 10 December 2018 motion to attach.

(JA at 113.)

On 28 January 2019, the Air Force Court denied A1C Muller's request for reconsideration *en banc*. (JA at 3-4.)

Pre-2019 Appellate Rules of Practice and Procedure.

As of December 21, 2018 (the date the Air Force Court decided A1C Muller's case), Article 66(f), UCMJ, 10 U.S.C. § 866(f) (2016), required the Judge Advocates General to "prescribe *uniform* rules of procedure for the Courts of Criminal Appeals." (Emphasis added). Pursuant to this directive, the Judge Advocates General promulgated the Joint Rules. Rule 15(b) of the Joint Rules provided that "[a]ny brief for an accused shall be filed within 60 days after appellate counsel has

been notified of the receipt of the record in the Office of the Judge Advocate General." (JA at 121.)[3] The Joint Rules did not distinguish between initial and supplemental briefs, and did not preclude appellants who never filed initial briefs from later raising errors based on remanded proceedings. Additionally, the Joint Rules did not authorize the CCAs to prescribe rules governing external entities, such as the parties. Rather, the Joint Rules authorized the "Chief Judge of the Court . . . to prescribe *internal rules for the Court*." (JA at 126 (citing JT. CT. CRIM. APP. R. 26)) (emphasis added.)

Despite the limiting language of the Joint Rules, the Air Force Court Rules contained several directives applicable to external entities. In particular, Air Force Court Rule 15.5 addressed supplemental filings, including those sought to be filed after remand:

> When a case returned by the Court to [The Judge Advocate General] for remand to the convening authority for anything other than a rehearing is again before the Court *and appellate counsel previously filed an initial brief and assignment(s) of error, appellate defense counsel shall within 10 calendar days of re-docketing either request leave to file a supplemental pleading under Rule 23 or inform this Court that the appellant does not wish to file additional pleadings*. When a rehearing was conducted, the time for

[3] The Air Force Court published its rules together with the Joint Rules, which appear in bold type. (JA at 119.)

filing briefs and answers will be per Rule 15(b).

(JA at 122) (emphasis added.)

The Army Court of Criminal Appeals (hereinafter Army Court) also utilized a rule covering remanded cases. Namely, the Army Court's Rules of Practice and Procedure (hereinafter Army Court Rules) allowed an appellant to file a supplemental brief in a case remanded by the Army Court within 60 days of the case being re-docketed with the Army Court. (JA at 130 (citing A. CT. CRIM. R. 2.2(d)).) This rule did not further require or suggest that an initial brief and AOE was necessary to file a post-remand supplemental brief.

The Navy-Marine Corps Court of Criminal Appeals (hereinafter Navy-Marine Court) allowed appellants 30 days to file briefs in remanded cases not involving a rehearing on findings and sentencing. (JA at 134 (citing N-M CT. CRIM. APP. R. 2.2(d)).) The Navy-Marine Court also required appellate defense counsel to notify the court if the appellant did not "wish to file any additional pleadings in a case in which a brief was filed prior to remand." (JA at 134 (citing N-M CT. CRIM. APP. R. 2.2(d)).)

The Coast Guard Court of Criminal Appeals (hereinafter Coast

Guard Court) did not have any service-specific rules, but instead relied on the Joint Rules for its appellate practice.

Current Appellate Rules of Practice and Procedure.

Like its previous iteration, the UCMJ currently requires the Judge Advocates General to prescribe uniform rules for the Courts of Criminal Appeals (CCAs). *See* Article 66(h), UCMJ, 10 U.S.C. § 866(h) (2019). Pursuant to this continuing obligation, the Joint Rules were updated on January 1, 2019. (JA at 135.) Now called the Joint Rules of Appellate Procedure (hereinafter JRAP), Rule 18 covers appeals filed by an accused. (JA at 137.) Rule 18(d) further provides that "[a]ny brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." (JA at 138.) The JRAP does not distinguish between initial briefs and post-remand briefs, nor does it preclude appellants who did not file initial AOEs from filing briefs after a case is remanded. Rule 3 of the JRAP authorizes the Chief Judge of each Service Court to "prescribe rules governing that Court's practice"; however, such rules may not be inconsistent with the JRAP. (JA at 136.)

In January of 2019, the Army Court, Navy-Marine Court, and Coast Guard Court all amended their respective rules. Neither the Army Court nor Coast Guard Court have rules establishing specific deadlines for supplemental briefs, or otherwise require the filing of an initial brief and AOE to file a post-remand brief. (JA at 139-143.) However, the Navy-Marine Court's rules still contain a 30-day deadline for post-remand, non-rehearing briefs. (JA at 147 (citing R. 5.2(d).)

On August 1, 2019, the Air Force Court updated its rules. (JA at 148.) These rules do not include any timelines associated with the filing of supplemental briefs, nor do they predicate post-remand briefs on the filing of an initial brief and AOE. (JA at 150 (citing R. 18.4), 151 (citing Appendix D, Box 10).) The rules also do not address filing deadlines following remands from the Air Force Court to the convening authority, but allow 60 days following re-docketing in a case remanded from this Court to a convening authority. (JA at 151.) The cited authority for this rule is JRAP Rule 18(d). (JA at 151.)

SUMMARY OF THE ARGUMENT

The Uniform Code of Military Justice requires the promulgation of joint appellate rules to ensure that all service members, regardless of the Department they serve, are subject to the same requirements and afforded the same rights. Despite this statutorily-required uniformity, Air Force Rule 15.5 placed a greater appellate burden on Airmen than Soldiers, Sailors, Marines, and Coast Guardsmen. Specifically, the rule required Airmen to file supplemental briefs in non-rehearing remanded cases within 10 days of case re-docketing. Rule 15.5 further limited the filing of such briefs to only those appellants who filed initial briefs and AOEs. Both provisions directly conflicted with Joint Rule 15(b), which allowed *any* appellant to file *any* brief within 60 days upon notification of receipt of the record in the Office of the Judge Advocate. Rule 15.5 also varied from the appellate rules of other CCAs, which allowed appellants either 60 or 30 days to file supplemental briefs, and did not explicitly predicate such filings on the submission of earlier pleadings. In addition, Joint Rule 23 limited the Air Force Court to prescribing rules applicable to internal parties only; thus, Rule 15.5's applicability to external entities (i.e., appellants)

was unauthorized. For these reasons, this Court should hold Air Force Court Rule 15.5 invalid.

Unfortunately, merely invalidating Rule 15.5 will be insufficient to correct the errors in the case. By utilizing this rule to deny A1C Muller from filing a supplemental brief, the Air Force Court stripped him of his due process right to have his issues considered on appeal. Where the government has created an appellate court system, the procedures it implements to administer that system must comport with Due Process. Pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2016), A1C Muller was afforded an appeal of right to the Air Force Court. And as articulated by this Court's precedent, the Air Force Court was obligated to consider issues raised by A1C Muller in this appeal of right. Here, however, the Air Force Court refused to hear A1C Muller's issues, despite the fact that his supplemental filing complied with the Joint Rules and pertained to solely to issues occurring after the court used its discretion to remand the case for correction. Given these circumstances, this Court should return the case to the Air Force Court to ensure A1C Muller is afforded his due process right to appeal.

Finally, the government asked this Court to determine whether a CCA must require certificates of correction to be accomplished, vice accepting documents via a motion to attach, if the CCA finds a record of trial to be incomplete due to a missing exhibit. Respectfully, the determination of this issue has no bearing on the outcome of this case and thus represents an advisory opinion. Consequently, this Court should decline to address the matter. Should this Court disagree, however, A1C Muller posits that when a CCA determines that a record must be corrected, a certificate of correction is required. This contention is supported by the plain language of R.C.M. 1104(d), as well as the unambiguous Discussion accompanying R.C.M. 1104(d)(1): "The record of trial is corrected with a certificate of correction."

Argument

I.

RULE 15.5 OF THE AIR FORCE COURT OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE IS INVALID BECAUSE IT CONFLICTED WITH THE UNIFORM CODE OF MILITARY JUSTICE, THIS COURT'S PRECEDENT, THE COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE, AND THE APPELLATE RULES OF THE OTHER SERVICE COURTS OF CRIMINAL APPEALS.

Standard of Review

This Court reviews questions of statutory construction *de novo*. *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018) (citing *United States v. Wilson*, 76 M.J. 4, 7 (C.A.A.F. 2017)).

Law and Analysis

On August 1, 2019, the Air Force Court updated its rules of practice and procedure. (JA at 148.) Tellingly, the Air Force Court omitted Rule 15.5 from its new rules.[4] The Air Force Court further declined to establish a specific deadline for briefs following remands from the court to the convening authority, and the rules do not limit the filing of such briefs to only those appellants who submitted initial briefs and assignments of error.[5] Accordingly, the question of whether Rule 15.5 is invalid due to its conflict with the JRAP and the updated rules of the other Service Courts appears to be moot.[6] However, the

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[4] This Court granted review on the validity of Rule 15.5 on July 30, 2019.

[5] Although the Air Force Court's new rules do not establish a filing deadline for briefs following its own remands to convening authorities, there is a 60-day deadline for briefs following remands from this Court to convening authorities. (JA at 151 (citing Appendix D, Box 8).)

[6] The Navy's updated rules still contain a 30-day deadline for post-remand, non-rehearing briefs. (JA at 147 (citing R. 5.2(d).)

validity of Rule 15.5 remains an issue before this Court because it was applicable during the pendency of A1C Muller's appeal to the Air Force Court. To this end, this Court should deem the rule invalid because it conflicted with the Joint Rules and this Court's precedent, and contravened the UCMJ's requirement for uniformity in the appellate rules of the respective Services.

1. Air Force Court Rule 15.5 is invalid because it established a deadline applicable to external entities that was inconsistent with the Joint Rules and *United States v. Gilley*.

In *Gilley*, this Court squarely addressed the limitations of the Air Force Court's rulemaking authority. 59 M.J. 245. Specifically, this Court considered the validity of an Air Force Court rule requiring the following:

> [T]he parties *must present any filings regarding the case within 7 days* of notification that the record was received by the Appellate Records Branch of the Military Justice Division (AFLSA/JAJM). For good cause shown, the Court may extend the 7-day time limit. . . .
>
> . . . If no filings are received by the Court within 7 days, the Court will *treat the case as a "merits" case*.

Id. at 246 (emphasis in original) (citing A.F. CT. CRIM. APP. R. 2.2). This rule conflicted with the Joint Rules, which allowed an appellant to file "*any brief*" within "*60 days* after appellate defense counsel has

been notified of the receipt of the record in the Office of the Judge Advocate General." *Id.* at 246-47 (emphasis in original). To resolve whether this inconsistency was fatal, this Court examined the language of Article 66(f), UCMJ, 10 U.S.C. § 866(f) (2000). *Id.* at 247-48.

First, this Court noted that Article 66(f) required the Judge Advocates General to "prescribe *uniform rules of procedure for the Courts of Criminal Appeals*. . ." *Id.* at 247 (emphasis in original). Giving these words "their common and approved usage," this Court interpreted the statute as requiring "*identical* rules among all Courts of Criminal Appeals regarding *any* course of action an appellant may take in a case before such court – which includes filing a brief." *Id.* (emphasis in original) (internal citations omitted). Consequently, because Joint Rule 15(b) afforded appellants 60 days to file *any* brief, this Court held that the Air Force Court's seven-day deadline for submitting briefs in remanded cases conflicted with the Joint Rules. *Id.*

This Court further opined that the Joint Rules did not authorize the Air Force Court to create its own deadlines. *Id.* Rather, the

uniform rules merely permitted the Air Force Court to create *internal* rules, applicable only to entities existing or situated within that Court's limits. *Id.* Such internal rules did not include filing deadlines, as those applied to external entities (i.e., the parties). *Id.* Moreover, this Court concluded that an internal rule "logically cannot conflict with a uniform rule of procedure already adopted by the Judge Advocates General." *Id.* at 247-48. Ultimately, then, this Court held that because the Air Force Court's seven-day deadline for post-remand briefs applied to external vice internal entities, and because it logically conflicted with Joint Rule 15(b)'s 60-day filing deadline, the Air Force Court exceeded the scope of its rulemaking authority under the Joint Rules. *Id.* at 248.

Thirteen years after *Gilley*, the Air Force Court mirrored its earlier mistake when it promulgated Rule 15.5. (JA at 122.) Instead of requiring appellants to submit post-remand briefs within seven days of the case's return, the Air Force Court compelled appellants – through counsel – to move for leave to file supplemental briefs in non-rehearing remanded cases within 10 days of re-docketing. (JA at 122.) Read in conjunction with other language from Rule 15.5, as well as

Rules 23(d) (JA at 123) and 23.3(o) (JA at 125), the Air Force Court effectively required appellants to submit post-remand briefs within 10 days of re-docketing.[7] As this deadline applied to external entities (i.e., appellants), and directly conflicted with Joint Rule 15(b)'s extant 60-day deadline to file *any* brief, Rule 15.5 was invalid for the same reasons articulated in *Gilley*. However, there are additional aspects of the rule that are problematic.

Within the same 10-day filing window, Rule 15.5 further required counsel to inform the Air Force Court if the appellant did "not wish to file additional pleadings." (JA at 122.) The clear implication from this notification mandate is that after counsel dutifully complied, the Air Force Court was free to decide the case, irrespective of an appellant's right to file *any* brief in accordance with Joint Rule 15(b)'s 60-day deadline. And without any issues to consider from an appellant, the court would assuredly treat the case as a "merits" case. This is

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[7] Rule 15.5 stated: "Supplemental filings must be submitted by motion for leave to file. If the motion is granted, the opposing party may file a response within 30 days." (JA at 122.) Rules 23 and 23.3(o) likewise mandated that non-required pleadings "be accompanied by a motion for leave to file." (JA at 123, 125.) Accordingly, these provisions indicate that supplemental filings were required to be filed contemporaneously with motions for leave to file.

functionally equivalent to what the Air Force Court impermissibly sought to do in *Gilley*, whereby an appellant who failed to submit a brief within seven days would have the case treated as a "merits" case. 59 M.J. at 246.

Perhaps more troubling, Rule 15.5 limited the filing of post-remand supplemental briefs to those appellants whose "appellate counsel previously filed an initial brief and assignment(s) of error." (JA at 122.) Notably, there was no language in the Joint Rules distinguishing between initial briefs and those filed after remands, nor did the rules preclude appellants who never filed initial briefs from raising errors following remand. Rather, Rule 15(b) plainly allowed an accused (meaning *any* appellant) to file *any* brief within the applicable 60-day window.

Given these facts, Air Force Court Rule 15.5 contravened *Gilley* and the Joint Rules in at least four significant respects. First, its deadlines and preclusions pertained to external vice internal entities, and was thus outside the scope of Joint Rule 26's rulemaking authorization. Second, its 10-day deadline to file a supplemental brief conflicted with Joint Rule 15(b), which afforded appellants 60 days to

file any brief. Third, its 10-day notification requirement of an appellant's desire not to file a supplemental brief conflicted with Joint Rule 15(b)'s 60-day filing deadline. And fourth, its requirement that an appellant must first file an initial brief and AOE in order to later submit a post-remand brief represented a prohibition not otherwise permitted by the Joint Rules. This preclusion further conflicted with Joint Rule 15(b)'s authorization for an accused (again, meaning *any* appellant) to file *any* brief within 60 days.

2. Air Force Court Rule 15.5 is invalid because it conflicted with the appellate rules of the other Service Courts and Article 66(f), UCMJ (2016).

As of December 21, 2018 (the date the Air Force Court denied A1C Muller's supplemental AOE and decided his case), the Service Courts applied different deadlines for their respective members regarding the filing of supplemental briefs. As discussed above, Air Force Court Rule 15.5 provided Airmen 10 days following case re-docketing to move for leave to file and to submit a supplemental filing in a non-rehearing remanded case. (JA at 122.) The Army Court conversely allowed Soldiers 60 days to file a supplemental brief in any case, while the Coast Guard Court implicitly (through its apparent

reliance on the Joint Rules) did the same. (JA at 180 (citing A. CT. CRIM. APP. R. 2.2(d).)

For its part, the Navy-Marine Court afforded Sailors and Marines 30 days to file briefs following remand in non-rehearing cases. (JA at 134 (citing N-M CT. CRIM. APP. R. 2.2(d).) Its applicable rule also required appellate defense counsel to "inform the Court that the appellant does not wish to file any additional pleadings in a case in which a brief was filed prior to remand." (JA at 134.) This language regarding previous filings is somewhat ambiguous, as it may have required all post-remand briefs to be preceded by initial AOEs or merely notice of an intent not to file in those cases where a previous AOE was submitted. In any event, the structure of Air Force Rule 15.5 is more concrete, limiting post-remand briefs in non-rehearing cases to only those appellants who filed initial AOEs. (JA at 122.) Neither the Army nor Coast Guard Courts applied such restrictions. (JA at 130.)

These splits among the Services were inconsistent with Article 66(f), UCMJ, which required the Judge Advocates General to "prescribe *uniform* rules of procedure for the Courts of Criminal Appeals." Notably, Congressional intent behind these uniform rules

was to ensure that "personnel of the armed forces, regardless of the Department in which they serve, will be subject to the same law and will be tried in accordance with the same procedures." *Gilley*, 59 M.J. at 247 n. (quoting S. Rep. No. 486, at 2 (1949)). As further interpreted by this Court, the statute required "*identical* rules among all Courts of Criminal Appeals regarding *any* course of action an appellant may take in a case before such court – which includes filing a brief." *Id.* at 247.

Since filing a post-remand brief is certainly a course of action an appellant may take in a case before a CCA, the UMCJ accordingly required that the respective courts employ the same rule regarding such filings. But that did not occur. Instead, Air Force Court Rule 15.5 subjected Airmen to a markedly more restrictive standard for filing post-remand briefs than the rules applicable to Soldiers, Sailors, Marines, and Coast Guardsmen. For this reason, Rule 15.5 is invalid.

3. Rule 15.5's application prejudiced A1C Muller.

The Air Force Court failed to articulate why it declined A1C Muller's attempt to submit a supplemental brief. (JA at 96, 116-17.) However, it is implausible that the court did not somehow rely on Rule 15.5 – the only Air Force Court Rule pertaining to supplemental briefs.

Indeed, the Air Force Court could have utilized the rule in at least two ways to deny A1C Muller's supplemental brief.

First, although A1C Muller maintains that he filed his supplemental brief within the 10 days required by Rule 15.5, it is unclear when the clock on this deadline began. As indicated by the government, the record of trial was returned to the Air Force Court on November 20, 2018. (JA at 43.) It seems iniquitous that the court would employ this date for timing purposes, as A1C Muller can hardly be expected to respond to a purportedly corrected record that had yet to be recognized or accepted as corrected. (JA at 56 (noting that the Air Force Court accepted the government's certificate of correction on November 30, 2018).) Nevertheless, if November 20, 2018, was the "re-docketing" date recognized by the Air Force Court for Rule 15.5's application, then A1C Muller was untimely in his attempt to submit a supplemental brief on December 6, 2018. (JA at 58.)

The Air Force Court more likely employed Rule 15.5's prerequisite that an appellant file an initial brief and AOE in order to later file a supplemental pleading. (JA at 122.) It is uncontroverted that A1C Muller initially filed a merits brief with the Air Force Court.

(JA at 5-6.) Consequently, even if A1C Muller had timely filed his supplemental AOE, Rule 15.5 would have precluded its consideration by the Air Force Court.

Regardless of the reason(s) upon which the Air Force Court based its decision, A1C Muller's supplemental brief met the requirements of the Joint Rules. His supplemental brief was not otherwise required by the rules, so he submitted it with a motion for leave to file in accordance with Joint Rule 23(d). (JA at 123.) He then filed the brief within the 60 days required by Joint Rule 15(b). (JA at 121.) And the content and form of A1C Muller's brief comported with the general standards required by Joint Rule 15(a). (JA at 120.) Even assuming, *arguendo*, that the issues A1C Muller raised lacked merit in some regard (JA at 112-13), the Air Force Court should have addressed such failings in a decision rather than a denial to even consider those issues. *See infra* Issue II. In this regard, A1C Muller was prejudiced in a manner not present in *Gilley*.

The appellant in *Gilley* failed to demonstrate that he was unable to submit an AOE within the Air Force Court's impermissible seven-day deadline. 59 M.J. at 248. In fact, the appellant failed to "identify

any assignments of error that appellate defense counsel would have submitted even with the benefit of [Joint Rule 15(b)]." *Id.* This Court thus held that the appellant was unable to establish prejudice. *Id.* Conversely, A1C Muller submitted to the Air Force Court two specific assignments of error: (1) unlawful command influence, and (2) unreasonable post-trial delay. (JA at 58.) But for the apparent operation of a rule that was equally as impermissible as the rule invalidated by this Court in *Gilley*, the Air Force Court would have accepted A1C Muller's supplemental brief and considered the raised the issues pursuant to its obligations under Article 66, UCMJ, 10 U.S.C. § 866 (2016).

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS DEPRIVED A1C JORDAN MULLER OF HIS DUE PROCESS RIGHT TO RAISE ISSUES ON APPEAL WHEN IT DENIED HIS TIMELY REQUEST TO FILE A SUPPLEMENTAL BRIEF ON ISSUES ARISING DURING REMAND PROCEEDINGS.

Standard of Review

Whether an accused's due process rights were violated is a question of law that this Court should review *de novo*. *Cf. United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (applying *de novo*

review to determine whether service members have a due process right to timely review and appeal of courts-martial convictions).

Law and Analysis

Where the government has created an appellate court system, the procedures it implements to administer that system must comport with the demands of due process. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). This necessarily includes establishing safeguards to ensure that a first of appeal of right is "adequate and effective." *Id.* at 392 (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1951)).

Review by a CCA pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2016), is a first appeal of right. *See*, *e.g.*, *United States v. Ribaudo*, 62 M.J. 286, 288 (C.A.A.F. 2006) (citing *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003)). Pursuant to this right, a CCA must consider issues raised by an appellant. *Cf. United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982) (requiring a CCA to "at a minimum, acknowledge that it has considered those issues enumerated by the accused and its disposition of them"); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (noting that where a CCA indicates it has considered an issue raised by an appellant, a written opinion on that

issue is not required). An appellant must also have a fair chance to present arguments during the appellate process. *See Moreno*, 63 M.J. at 149 (Crawford, J., dissenting); *cf. United States v. Boyce*, 76 M.J. 242, 253 (C.A.A.F. 2017) (federal courts have an independent interest in ensuring that legal proceedings appear fair to all who observe them). If an appellant is not presented such an opportunity, or if his/her issues are not afforded due consideration, then the appellate process is not "adequate and effective." *Evitts*, 469 U.S. at 392. Rather, it is akin to a meaningless ritual. *Cf. Moreno*, 63 M.J. at 135 ("An appeal that is inordinately delayed is as much a 'meaningless ritual,' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings.") (internal citations omitted).

In the present case, A1C Muller – then represented by a different appellate defense counsel – did not initially raise any assignments of error. However, in an exercise of its "awesome, plenary, and *de novo* power of review," the Air Force Court saw fit to remand the case to fix an error in the record of trial. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). After this error was purportedly corrected, A1C Muller's appeal should have remained open at least to the extent that

he could comment on matters related to the remand. Instead, the Air Force Court declined to consider A1C Muller's raised issues despite the fact that his supplemental brief satisfied the filing requirements of the Joint Rules.

Notably, this was not a situation invoking the dangers of piecemeal litigation. *See*, *e.g.*, *Murphy v. Judges of the United States Army Court of Military Review*, 34 M.J. 310, 311 (C.M.A. 1992). Nor did it involve the waiver or forfeiture of any issue not raised prior to remand. Rather, it was a straightforward attempt by A1C Muller to exercise his right to challenge *new* issues created by the government as result of the Air Force Court's decision to remand his case. Under these circumstances, the Air Force Court should have granted A1C Muller's motion for leave to file a supplemental assignment of errors, and then properly considered his raised issues prior to issuing its decision.

As further support for A1C Muller's position, *United States v. Mitchell*, 250 M.J. 350 (C.M.A. 1985) (per curiam), is instructive. In *Mitchell*, the appellant initially appealed his case on the "merits." *Id.* at 350. Ten days later, and prior to Court of Military Review's (CMR)

decision, he moved for leave "to file a signed, unsworn, undated letter" raising several issues. *Id.* The government opposed the motion, arguing that an unsworn letter was an improper vehicle to raise claims. *Id.* at 351 n. 2. The government further indicated that it had considered the issues raised by the appellant and found them to be without merit. *Id.* Ultimately, the CMR denied the motion without explanation.

On appeal, this Court's predecessor criticized several aspects of the case, including the CMR's failure to articulate its reasons for denying the appellant's motion. *Id.* at 351 (calling the need to speculate "as to the basis of the denial" a "shoe [that] pinches our toes"), 351 n. 3 (observing that if the CMR had notified counsel that the basis of denial was noncompliance with a rule, counsel could have remedied the issue). The Court also dismissed the government's "review" of the issues: "the Government's failure to be impressed with the merits of appellant's claims more appropriately is a response to the substance of the letter once admitted, instead of being a matter urged as a ground in opposition of acceptance." *Id.* at 351 n. 2. In the end, the Court concluded that the appellant's letter addressed the factual sufficiency

of the findings, an issue "peculiarly within the province of the [CMR]." *Id*. at 352. Consequently, it declined to exercise its discretion to review the merits of the claim and instead remanded the case so that the CMR could consider the appellant's contentions. *Id.*

The present case, by comparison purposes, provides this Court with even greater incentive to remand the case to the Air Force Court. Unlike the appellant in *Mitchell*, A1C Muller's supplemental brief clearly complied with the Joint Rules. This included conformity with the filing deadline and the format of the filing itself, as evidenced by the government's failure to oppose the supplemental filing. A1C Muller also did not merely change his mind about filing a brief; rather, the issues he sought to raise occurred as a result of the Air Force Court's decision to remand the case for corrections. Moreover, one of these issues – post-trial delay – involves an issue that is "peculiarly within the province" of the Air Force Court, particularly given the court's ability to provide sentence relief even without a showing of actual prejudice.[8] *See Tardif*, 57 M.J. at 224.

[8] A1C Muller maintains he was prejudiced by the government's dilatory response to the Air Force Court's order for a certificate of correction. (*See* JA at 95.)

In sum, the procedures followed in this case "do not produce the type of appellate review contemplated by Congress." *Mitchell*, 250 at 352. The Air Force Court had an obligation to consider A1C Muller's timely raised issues, thus affording him an "adequate and effective" opportunity for relief. *Evitts*, 469 U.S. at 392; *cf. Grostefon*, 12 M.J. at 436. The Air Force Court was not relieved of this obligation by its separate responsibility to independently review the record, unconstrained by A1C Muller's assertions. *Cf. United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998). Consequently, the Air Force Court denied A1C Muller his due process rights on appeal, and this Court should rectify the error by returning the case to the Air Force Court.

III.

A CERTIFICATE OF CORRECTION WAS REQUIRED TO CORRECT A1C MULLER'S RECORD OF TRIAL.

Standard of Review

This Court applies ordinary rules of statutory construction in interpreting the Rules for Courts-Martial. *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017) (citing *United States v. Muwwakkil*, 74 M.J. 187, 194 (C.A.A.F. 2015), *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007)).

Law and Analysis

Whether a CCA must require a certificate of correction to correct a record of trial is a question whose answer is unnecessary to the resolution of this case. It is indisputable that the government failed to include a prosecution exhibit in A1C Muller's record of trial. The government later complied (belatedly) with the Air Force Court's order to correct its error in accordance with R.C.M. 1104(d). (JA at 43-51.) The Air Force Court subsequently accepted the government's corrections and attached the missing exhibit to the record of trial. (JA at 56.) Accordingly, there is no controversy for this Court to decide and to answer the presented question would constitute an advisory opinion. *See United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019) (citing *United States v. Chisolm*, 59 M.J. 151, 152 (C.A.A.F. 2003)); *accord United States v. Bryant*, 12 M.J. 307 (C.M.A. 1981) (summarily disposing of a certified issue whose "resolution . . . would not materially alter the situation for the accused or the Government.") (citations omitted); *United States v. McNally*, 10 M.J. 270 (C.M.A. 1981); *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981).

If the government refused or was otherwise unable to comply

with the Air Force Court's order, or if the Air Force Court found the government's certificate of correction inadequate in some regard and declined to attach the missing exhibit to the record, then perhaps the government could provide this Court with a justiciable issue. But none of these events occurred. Instead, the government complied with an order that even it conceded was based on a valid and acceptable means of correcting the record (JA at 12), and the record was indeed corrected. (JA at 56.) Under such circumstances, there is no controversy left to address and the presented question has no bearing on the outcome of this particular case.

Assuming *arguendo* that this Court finds it necessary to intervene, A1C Muller respectfully posits that once the Air Force Court deemed it necessary to correct his record of trial, a certificate of correction was required to effect those corrections. The R.C.M. provides:

> A record of trial found to be incomplete or defective after authentication *may* be corrected to make it accurate. A record of trial *may* be returned to the convening authority by superior competent authority for correction under this rule.

R.C.M. 1104(d)(1) (emphasis added).[9]

The language from the first sentence of this provision appeared to denote two things: (1) an incomplete or defective record *could* be corrected after authentication, and (2) not all defects or omissions required correction. This latter inference is less clear than the former, and may seem contrary to the general goal of providing a CCA with a complete and accurate record to review. *See*, *e.g.*, *United States v. Kulathungam*, 54 M.J. 386 (C.A.A.F. 2001) (noting that the requirement for a verbatim record of trial, authenticated by a military judge, facilitates appellate review and instills confidence in the military justice system). But the rule was clearly permissive, utilizing "may" rather than "shall." It is thus reasonable to conclude that where an omission from the record was not qualitatively or quantitatively

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[9] Similar language appears in the current Rules for Courts-Martial:

> A record of trial found to be incomplete or defective before or after certification *may* be corrected to make it accurate. A superior competent authority *may* return a record of trial to the military judge for correction under this rule.

R.C.M. 1112(d)(2) (2019) (emphasis added). This rule did not apply during A1C Muller's case. Accordingly, this brief does not address how the updated rule may prospectively apply to similarly situated appellants.

substantial, a CCA (or other superior competent authority) was not required to return the record for correction. *Cf. United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) ("In assessing whether a record is complete or whether a transcript is verbatim, the threshold question is 'whether the omitted material was 'substantial,' either qualitatively or quantitatively.'") (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)).

With regards to how the second sentence provided that a record "may" be returned for correction to the convening authority, it is tempting to apply a similar two-part interpretation: (1) a record *could* be corrected by sending it to the convening authority or military judge, and (2) not all corrections required remand to the convening authority. Once again, this latter inference is less clear than the former. But viewing the language as allowing alternative means to correct a record seems consistent with other provisions of the rule, particularly:

> An authenticated record of trial believed to be incomplete or defective *may* be returned to the military judge or summary court-martial for a certificate of correction.

R.C.M. 1104(d)(2) (emphasis added). It would also cohere with the posture of this Court's predecessor, which permitted affidavits to

correct records of trial vice certificates of correction. *See*, *e.g.*, *United States v. Roberts*, 7 U.S.C.M.A. 322, 325 (C.M.A. 1956) ("[T]he use of [a Certificate of Correction] appears to be permissive in nature, merely one method of correcting a record, not the exclusive means.") (citing *United States v. Self*, 3 U.S.C.M.A. 568 (C.M.A. 1953)); *United States v. Carey*, 23 U.S.C.M.A. 315, 316 (C.M.A. 1975) ("This Court has long recognized that gaps in the record of proceedings may be bridged not only by certificates of correction, but also by a post-trial affidavit, the means that was employed in this case."); *United States v. Solak*, 12 U.S.C.M.A. 440 (C.M.A. 1959); *United States v. Clark*, 18 U.S.C.M.A. 458 (C.M.A. 1969).[10] Nevertheless, there are at least three significant flaws with such a reading.

Perhaps most obviously, it disregards the elaborative Discussion that accompanied R.C.M. 1104(d)(1): "The record of trial is corrected with a certificate of correction." Unlike the language of the underlying rule, this persuasive authority was unambiguous. It definitely

[10] The cited cases are not controlling because they do not address R.C.M. 1104(d). *See*, *e.g.*, *Clark*, 18 U.S.C.M.A. at 461 (citing paragraph 95 of the Manual for Courts-Martial (1968 ed.) regarding corrective actions to the record).

clarified that when a record was deemed to require correction, a certificate of correction was to be used.

Second, allowing alternative methods to correct a record of trial would undermine mandates in the UCMJ and R.C.M. to have records authenticated by the military judge. Specifically, Article 54(a), UCMJ, 10 U.S.C. § 854(a) (2016), required authentication by the military judge unless the military judge was unavailable due to death, disability, or absence.[11] R.C.M. 1104(a) implemented this statutory authentication requirement, whose purpose was "to ensure the verity of the record." *United States v. Ayers*, 54 M.J. 85, 92 (C.A.A.F. 2000) (citations omitted). Correspondingly, R.C.M. 1104(d)(3) required certificates of correction to be authenticated in accordance with R.C.M. 1104(a); hence, by a military judge unless otherwise unavailable. Collectively, then, the required procedure appears to be one whose result – whether corrections are needed or not – was a record that had been properly authenticated by the military judge. *Cf. National Credit Union*

[11] Article 54(a), UCMJ, 10 U.S.C. § 854(a) (2019) now requires the record to be certified by the court report. The military judge has separate obligations, including the production of an entry of judgment. Article 60, UCMJ, 10 U.S.C. § 860 (2019).

Administration v. First National Bank & Trust Co., 522 U.S. 479, 501 (1998) (discussing the canon of statutory construction whereby similar language contained in the same section of a statute must be accorded a consistent meaning). To conclude otherwise would produce an incongruous scenario whereby a military judge was statutorily obligated to authenticate the record unless the record was later found to be incomplete or defective. In such a case, the party responsible for the error (i.e., the government) could then circumvent the military judge to ensure the accuracy of the record without any further authentication. This cannot be the sort of verity envisioned by Congress or the President, and would not inspire confidence in the military justice system. *Cf. Kulathungam*, 54 M.J. 386; *United States v. Jones*, 37 M.J. 321, 324 (C.M.A. 1993) ("[I]t is often not enough that the military justice system be fair. It must also be perceived as fair by those men and women subject to the Uniform Code of Military Justice.")

Finally, R.C.M. 1104(d) provided an established procedure for correcting a record of trial through a certificate of correction. This procedure notably afforded rights of fair notice, an opportunity to

respond, and reasonable access to recordings and notes of the proceedings. R.C.M. 1104(d)(2). If records of trial can be corrected through alternative methods, it is unclear whether these required protections can survive when the government is able to shoehorn the purported corrections through the assertions of its own representatives; especially where those very representatives were responsible for the offending error. *See* R.C.M. 1103(b)(1) (assigning trial counsel the responsibility to prepare the record of trial in general courts-martial).

To be sure, obtaining a certificate of correction can be a burdensome and potentially time-consuming process; particularly where, as here, the government fails to complete such certificates in a timely fashion. And it is certainly tempting to allow alternative methods to correct the record, especially where such methods could expedite the appellate review process and thus benefit certain appellants.[12] However, since the R.C.M. and the UCMJ did not appear to allow alternative correction methods, and because appellants may

[12] A1C Muller did not oppose the government's initial attempt to correct the record through a declaration and attachment. (JA at 21.)

not be afforded certain rights if the government was able to fix its errors through mere declarations from trial counsel, A1C Muller respectfully adopts the position of the Discussion accompanying R.C.M. 1104(d)(1): "The record of trial is corrected with a certificate of correction."

CONCLUSION

This Court should hold Air Force Court Rule 15.5 invalid due to its logical conflict with the Uniform Code of Military Justice, the Joint Rules, this Court's precedent, and the respective rules of the other CCAs. This Court should then return A1C Muller's case to the Air Force Court, to ensure that A1C Muller is afforded his due process right to raise issues for consideration in his appeal of right. Finally, this Court should decline to address the question regarding certificates of correction. In the event that this Court believes intervention is warranted, then it should hold that where a CCA deems a record of trial requires correction, such correction is to be accomplished through a certificate of correction.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This Brief complies with the type-volume limitation of Rule 24(c) because: this Brief contains 9,395 words and 974 lines of text.

This Brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on August 28, 2019.

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