IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant v. **Michael J. BROWN,** First Sergeant (E-8) U.S. Marine Corps Appellee	**ANSWER ON BEHALF OF APPELLEE** Crim. App. Dkt. No. 201900050 USCA Dkt. No. 20-0288/MC

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

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Issue presented

DID THE LOWER COURT ERR IN FINDING THAT IT HAD POTENTIAL JURISDICTION?

Statement of Statutory Jurisdiction

This Court has jurisdiction to hear this case under Article 67(a)(2), Uniform Code of Military Justice (UCMJ).

Statement of the Case

At a special court-martial, a panel of officer and enlisted members convicted Appellee, contrary to his pleas, of one specification of abusive sexual contact under Article 120(d), UCMJ, and one specification of disorderly conduct under Article 134, UCMJ.[1] He was sentenced to be reduced to the paygrade of E-7.[2] The convening authority has not acted on the findings or sentence.

Statement of Facts

Following trial, in which Appellee was convicted of grabbing the buttocks of a female soldier at a military ball,[3] the convening authority directed a post-trial session to have the military judge reconsider various trial rulings.[4] One such ruling

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[1] J.A. 27-30.
[2] J.A. 31.
[3] *Brown v. United States*, 79 M.J. 833, 834 n.17 (N-M. Ct. Crim. App. 2020).
[4] *Id*. at 836 ("Prior to acting on the sentence, the convening authority granted Petitioner's request to convene a post-trial hearing . . . to address the following issues: "(1) whether the military judge properly declined to provide a mistake of fact instruction; (2) whether he properly prohibited the Defense from presenting

was the military judge's refusal to issue a mistake of fact instruction despite evidence Appellee believed he was touching his girlfriend—who resembled and was wearing a similar uniform as the female soldier—at the time of the incident.[5]

The post-trial hearing did not go smoothly. Before the hearing, defense counsel moved for a mistrial based on the rulings being reconsidered.[6] And at the hearing, defense counsel asked the military judge to recuse himself.[7] In support of the motion, the court reporter, bailiff, brig chaser, and others variously stated the military judge behaved unfairly toward defense counsel throughout the trial.[8]

The military judge denied the recusal motion—and abruptly ended the hearing.[9] Before receiving evidence on the recusal motion, he told counsel that he would allow oral argument on the reconsidered rulings.[10] But after the recusal motion, he suddenly backtracked, stating: "I am not granting any oral argument on

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evidence of Petitioner's character for truthfulness; and (3) whether he properly prohibited the Defense from rehabilitating a key Defense witness' character for truthfulness.").

[5] J.A. 119-120.

[6] *Brown*, 79 M.J. at 845.

[7] *Id*.

[8] *Id*. at 844 ("In the affidavits, these observers stated that the military judge had appeared to favor the Government in dealing with objections, used a harsher tone of voice and attitude when addressing the Defense, and afforded the Government wider latitude in questioning witnesses.").

[9] *Id*. at 846.

[10] *Id*. ("[T]he military judge repeatedly told the civilian defense counsel that he could make those points during argument.").

these issues, therefore this Article 39(a) is terminated."[11]

Later that day in a separate court-martial, the military judge acknowledged the post-trial hearing made him uncomfortable.[12] Of his decision to deny oral argument, he admitted he had only done so once in hearing hundreds of motions.[13]

Appellee then petitioned the Navy-Marine Corps Court of Criminal Appeals (CCA) for extraordinary relief, including for a writ of *mandamus* ordering the military judge's removal from the case.[14]

The CCA, sitting *en banc*, found it had jurisdiction to entertain the petition.[15] Citing the doctrine of potential jurisdiction, the Court noted an appeal of the case could later be perfected under Article 69(d), UCMJ, or—in the event of a mistrial—possibly Article 66(c), UCMJ.[16] The Court also found the issue for which Appellee sought relief, removal of a biased judge, potentially affected the findings and sentence.[17] The Court ultimately granted a writ of *mandamus* removing the military judge from the case.[18]

There are still no approved findings or sentence, nor have the issues for

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[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*. at 849.
[15] *Id*. at 836.
[16] *Id*. at 849.
[17] *Id*.
[18] *Id*. at 848.

which the convening authority directed the post-trial hearing been resolved.

Summary of Argument

Under the All Writs Act,[19] a court may entertain a petition for extraordinary relief if the case may ultimately be reviewed by the court and the issue has potential to directly affect the findings or sentence. Here, Appellee's court-martial is eligible for at least Article 69(d), UCMJ, review. Thus, since a potential path to CCA review of the case is available, the CCA correctly concluded it had jurisdiction to entertain the petition for extraordinary relief.

The rule the Government would have this Court adopt—that All Writs Act jurisdiction is extinguished upon mere announcement of a sentence not entitling *automatic* CCA review—conflicts with *Noyd v. Bond*.[20] There, the Supreme Court held jurisdiction under the All Writs Act is available as long as the case *may* ultimately be reviewed by the court.[21] And here, as stated above, Appellee's case is eligible for at least Article 69(d), UCMJ, review.

The lower court's opinion does not conflict with *United States v. Arness*.[22] In *Arness*, this Court simply extended the *Noyd* rule in the context of a petition for a writ of error *coram nobis*. In particular, since TJAG never sent Arness' case to

[19] 28 U.S.C. §1651(a) (2012).
[20] *Noyd v. Bond*, 395 U.S. 683 (1969).
[21] *Id*. at 695 n.7.
[22] *United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015).

the CCA and the convictions were final, this Court unsurprisingly held the CCA had no jurisdiction years later to issue a writ of error *coram nobis*—the type of extraordinary relief available only where the CCA previously reviewed the case. Here, by contrast, the court-martial could receive CCA review through Article 69(d), UCMJ. Additionally, it is not even final at the trial stage because it could end in a mistrial ruling in the post-trial Article 39(a) hearing. Thus, Appellee's case is distinguishable from *Arness*.

Congress' intent to expand the appellate jurisdiction of CCAs is manifest by the statutory language of Article 69(d), UCMJ. Thus, there is no need to consider legislative history on this point. Regardless, the committee report the Government cites does not conflict with finding jurisdiction in this case. The most logical reading of the report is that Congress wanted to enact Article 69(d) to prevent resort to the All Writs Act for ordinary appellate review of courts-martial not entitled to such review. But this is not what happened in Appellee's case.

Finally, the Government's proposed rule would render courts powerless to correct certain abuses of power. For example, military appellate courts would be powerless in cases not entitled to automatic review to prevent erroneous confinement credit rulings. By the same token, an accused would have no recourse in military courts if a convening authority refused to enforce a pretrial agreement in a case not entitled to automatic review. Indeed, the Government's rule would

require an accused to seek relief in Article III courts, which would call into question the notion that military justice is integrated.

Argument

THE CCA PROPERLY ENTERTAINED THE PETITION FOR EXTRAORDINARY RELIEF BECAUSE (1) THIS COURT-MARTIAL IS NOT OVER, (2) THE WRIT ISSUE POTENTIALLY AFFECTS FINDINGS AND SENTENCE, AND (3) THERE IS A PATH TO POTENTIAL CCA APPELLATE REVIEW.

A. The standard of review is *de novo*.

Jurisdictional questions are reviewed *de novo*.[23]

B. A CCA has jurisdiction to entertain extraordinary relief if it is possible it may later review the case on appeal and if the issue potentially affects the findings or sentence of the court-martial.

Under the All Writs Act, a court "'is not confined to the issuance of writs in aid of a jurisdiction already acquired[.]'"[24] Rather, a court may entertain a petition for extraordinary relief if the case "may ultimately be reviewed" by the court.[25] "Once there has been a proceeding of *some* kind instituted before an agency or

[23] *Howell v. United States*, 75 M.J. 386, 389 (C.A.A.F. 2016).
[24] *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943)); *accord Howell*, 75 M.J. at 390 n.4 ("[T]he doctrine of potential jurisdiction allows appellate courts to issue opinions in matters that *may* reach the actual jurisdiction of the court.") (emphasis added).
[25] *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969).

court that might lead to an appeal, it makes sense to speak of the matter as being 'within [our] appellate jurisdiction' -- *however prospective or potential that jurisdiction might be*."[26]

One further jurisdictional requirement is the issue must "ha[ve] the potential to directly affect the findings and sentence" of the court-martial.[27] This follows from a CCA's subject-matter jurisdiction generally: to act "only with respect to the findings and sentence as approved by the convening authority."[28]

C. Here, the CCA correctly identified the writ issue, a biased judge, potentially affects findings or sentence and that the case may receive CCA appellate review. Thus, it properly entertained the petition.

Appellee's writ issue—a biased military judge—is properly cognizable under a petition for extraordinary relief.[29] Thus, the only question is whether this case "may ultimately be reviewed" by the CCA.[30] The lower court correctly answered this question in the affirmative because there are at least three paths to

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[26] *In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004) (Roberts, J.) (second emphasis added).
[27] *Howell*, 75 M.J. at 390 (quoting *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)).
[28] 10 U.S.C. § 866(c) (2012); *United States v. Denedo*, 556 U.S. 904, 911 (2009) ("[A] court's power to issue any form of relief, extraordinary or otherwise, is contingent on its subject-matter jurisdiction over the case or controversy.").
[29] *Ctr. for Constitutional Rights*, 72 M.J. at 129 ("Nor is it like *Hasan v. Gross*, where the harm alleged by the appellant—that the military judge was biased—had the potential to directly affect the findings and sentence.").
[30] *Noyd*, 395 U.S. at 695 n.7.

CCA review of the case.

First, TJAG could send this case to the CCA under Article 69(d), UCMJ.[31] As with any special court-martial not entitled to automatic Article 66(c), UCMJ, review, a judge advocate would review the case under Article 64,UCMJ.[32] If the judge advocate were to recommend corrective action, he or she would forward the case to the officer exercising general court-martial jurisdiction—who cannot have served as the convening authority.[33] If this officer were to disagree with the judge advocate's recommendations, the case would be sent to TJAG,[34] who could send the case to the CCA via Article 69(d), UCMJ.[35]

There is a second way TJAG could send this case for Article 69(d), UCMJ, review: through direct petition of Appellee. For cases not entitled to direct CCA review, an appellant may petition TJAG within two years of the convening authority's action to have his or her case reviewed for legal error.[36] TJAG may

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[31] 10 U.S.C. § 869(d) (2012).
[32] 10 U.S.C. § 864 (2012); Manual for Courts-Martial, United States, Rule for Court-Martial 1112(a)(2) (2016) [hereinafter R.C.M.] (providing a judge advocate shall review every special court-martial not entitled to automatic CCA review).
[33] R.C.M. 1112(e); Judge Advocate General Instruction 5800.7F § 0153(2)(b) (26 Jun 2012).
[34] 10 U.S.C. § 864(c)(3) (2012) (mandating record of trial and action thereon sent to TJAG if officer exercising general court-martial jurisdiction disagrees with recommendations of judge advocate conducting legal review).
[35] 10 U.S.C. § 869(d) (2012).
[36] 10 U.S.C. § 869(b) (2012); R.C.M. 1201(b)(3)(A) (providing TJAG may, upon application of the accused, review a special court-martial not reviewed by CCA);

send such cases to the CCA under Article 69(d), UCMJ.[37]

Finally, as the lower court correctly noted, [38] Article 66(b), UCMJ, review is not foreclosed. The military judge could declare a mistrial in the post-trial Article 39(a) hearing based on the reconsidered evidentiary rulings.[39] This would simply withdraw the charges, allowing them to be retried at a rehearing.[40] Of course, a rehearing is simply a continuation of the prior court-martial.[41] And at a rehearing, a convening authority may add new charges that do not contain a sentence limitation.[42] Thus, if convicted on new charges and sentenced to a punitive discharge or confinement for one year, Appellee would be eligible for Article 66(c), UCMJ, review—of his entire case.[43]

Judge Advocate General Instruction 5800.7F § 0162 (26 Jun 2012) (describing how to petition TJAG for Article 69(b) relief).

[37] 10 U.S.C. § 869(b), (d) (2012).

[38] *Brown*, 79 M.J. at 838.

[39] R.C.M. 1102(b)(2); *Cf. United States v. Commisso*, 76 M.J. 315, 324 (C.A.A.F. 2017) (holding military judge's failure to grant defense's post-trial motion for mistrial following post-trial hearing was abuse of discretion).

[40] R.C.M. 915(c) (stating declaration of mistrial withdraws charges and allows rehearing).

[41] *United States v. Beatty*, 25 M.J. 311, 314 (C.M.A. 1987).

[42] *United States v. Cook*, 12 M.J. 448, 456 (C.M.A. 1982); *United States v. Raynor*, 66 M.J. 693, 694 (A-F. Ct. Crim. App. 2008) (affirming increased sentence at rehearing after convening authority referred new charges).

[43] 10 U.S.C. § 866(b) (2012) (mandating TJAG shall refer to a CCA the record of trial "in each case" in which the approved sentence includes punitive discharge or confinement for one year or more).

The Government dismisses CCA review of this case as speculative.[44] But it is not the *likelihood* of CCA review that matters. In fact, this Court has issued extraordinary relief in cases that, for all the court knew, would end in acquittal.[45] Rather, jurisdiction under the All Writs Act hinges on the court's *possible* future appellate jurisdiction over the case—"however prospective or potential that jurisdiction might be."[46]

As the above scenarios show, Appellee's case meets this standard. Thus, the CCA properly entertained his petition.

D. The Government's claim that All Writs Act jurisdiction vanishes upon mere announcement of certain sentences contradicts *Noyd v. Bond*.

The Government asks this Court to adopt a rule that announcement of a sentence below what *automatically* entitles an accused to CCA appellate review *extinguishes* CCA jurisdiction over the case—even before the convening authority has acted on the findings and sentence.[47]

This clashes with Supreme Court precedent. In *Noyd v. Bond*, the Supreme

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[44] Appellant's Br. at 16-17.
[45] *Brown*, 79 M.J. at 839 ("In *LRM and Hasan*, the writ petitions were filed *prior to trial*.") (emphasis original) (citing *LRM v. Kastenberg*, 72 M.J. 364 (2013); *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)).
[46] *In re Tennant*, 359 F.3d at 529.
[47] Appellant's Br. at 12 ("But once an accused is adjudged a sentence below the Article 66(b) threshold for review, or if the charge sheet can never produce a sentence meriting review under Article 66(b), the 'potential jurisdiction' on that basis is never possible.").

Court found jurisdiction under the All Writs Act obtains where, as here, the case "*may* ultimately be reviewed" by the Court.[48] The Court's only expressed limitation on jurisdiction was where the appeals court "is *not* authorized to review under the governing statutes."[49]

But here, as stated above, Appellee's case "may ultimately be reviewed" under the governing statutes of Article 69(d) or perhaps Article 66(b), UCMJ. Thus, under a plain application of *Noyd v. Bond*, the Government's claim fails.

E. The Government misreads *United States v. Arness*, which is simply the corollary of *Noyd v. Bond* in the context of a petition for a writ of error *coram nobis*.

The Government claims *United States v. Arness* forecloses jurisdiction in this case.[50] But the Government misreads *Arness* and the facts on which it turned.

In *Arness*, the appellant petitioned the CCA for a writ of error *coram nobis*.[51] Such a writ requires the CCA to have already reviewed the case on appeal.[52] But this never happened in Arness' case since (1) his approved sentence

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[48] *Noyd*, 395 U.S. at 695 n.7 (emphasis added).
[49] *Id*. (emphasis added).
[50] Appellant's Br. at 7-8 ("*Arness* held that no All Writs Act relief was possible because the Judge Advocate General never referred the case to the Court of Criminal Appeals. So too here.").
[51] *United States v. Arness*, 74 M.J. at 441, 441 (C.A.A.F. 2015).
[52] *Denedo*, 556 U.S. at 914 ("Because respondent's request for *coram nobis* is simply a further 'step in [his] criminal' appeal . . . the NMCCA's jurisdiction to issue the writ derives from the earlier jurisdiction it *exercised* to hear and determine the validity of the conviction on direct review.") (emphasis added).

did not entitle him to direct review, (2) TJAG declined to send his case to the CCA; and (3) his convictions became final.[53] Thus, this Court unsurprisingly held the CCA lacked jurisdiction to entertain *coram nobis* where it had never exercised review in the first place.[54]

Put differently, *Arness* is an application of *Noyd v. Bond* in the context of a petition for a writ of error *coram nobis*: since the CCA never reviewed the case and the convictions became final, the case could not "ultimately be reviewed" by it.[55] And the expressed limitation in *Noyd* applied too: since TJAG never referred this case to the CCA under Article 69(d), UCMJ, the CCA was "not authorized to review under the governing statutes."[56]

Not so here. Here, unlike in *Arness*, the court-martial is not over—much less are the convictions final. Unlike the petitioner in *Arness*, Appellee asked the CCA for a writ of *mandamus* to remove a purportedly biased military judge in an ongoing court-martial—one which the CCA "may ultimately" review.[57] Thus, *Arness* is distinguishable from this case.

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[53] *Arness*, 74 M.J. at 442.
[54] *Id*. at 443 ("As the Judge Advocate General did not refer Appellant's case to the CCA—a statutory prerequisite for its review—the CCA was without jurisdiction to review it.").
[55] *Noyd*, 395 U.S. at 695 n.7 (emphasis added).
[56] *Id*.
[57] *Id*.

F. Congress' intent to expand potential CCA appellate review to all special courts-martial is clear from the text of Article 69(d), UCMJ. Regardless, the legislative history the Government cites does not conflict with the lower court's opinion in this case.

The text of Article 69(d), UCMJ, shows Congress intended to expand potential CCA appellate review to all special courts-martial. Before Article 69(d), UCMJ, was enacted, TJAG could only send *general* courts-martial to a CCA.[58] But Article 69(d), UCMJ, changed this by adding language giving a CCA jurisdiction to review "*any* court-martial" sent to it by TJAG.[59] Thus, Congress' intent to expand CCA review is clear from the statutory language, obviating the need to consult legislative history.[60]

Regardless, the report from the Senate Armed Services Committee the Government cites does not conflict with the lower court's opinion in this case. The Government quotes a line from the 1989 report explaining the Committee's view of the proposed Article 69(d).[61] The report refers to the "anomaly" of some courts' opting "to review cases with lesser sentences under the All Writs Act, which under

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[58] J.A. 24-25.
[59] J.A. 26; National Defense Authorization Act for Fiscal Year 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1576 (1989).
[60] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) ("'Only where "the statute [remains] unclear, [does the court] look next to the legislative history).'" (citing *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999)).
[61] Appellant's Br. at 17.

applicable law should be used only in extraordinary cases."[62] The report does not explain the type of "review" it was referring to, nor does it provide cases on point.

Still, the report gives valuable clues of its intent. By referring to the practice of military courts' "review" of "cases with lesser sentences" and contrasting this with "extraordinary" cases entitled to relief under the All Writs Act, the report suggests it is talking about the practice of courts' granting *ordinary* appellate review in cases not entitled to it.[63] As evidence of this, in the next sentence, the report states the purposes of the UCMJ "would be better served" if "*such review* were conducted under a jurisdictional statute as opposed to the ad hoc procedures of the All Writs Act."[64] Of course, Article 69(d), UCMJ, became the jurisdictional statute allowing ordinary appeal of legal issues where there formerly was none.

Thus, even if this Court considers the committee report, its likely meaning does not conflict with the lower court's decision to entertain *extraordinary* relief.

G. The rule the Government asks this Court to adopt would render military courts powerless to rein in clear abuses of power, contrary to this Court's precedents.

As a final matter, under the Government's rule, military appellate courts

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[62] J.A. 153.
[63] *McPhail v. United States*, 1 M.J. 457, 463 (C.M.A. 1976) (granting writ ordering Air Force TJAG to vacate appellant's conviction for lack of subject-matter jurisdiction in special court-martial not entitled to ordinary appeal).
[64] *Id*. (emphasis added).

would be powerless to issue extraordinary relief to prevent abuses of power at the trial level, contrary to this Court's prior holdings.

In *Howell v. United States*, for example, this Court held the CCA properly entertained extraordinary relief to stop a military judge from erroneously granting confinement credit following trial.[65] But if this Court adopts the Government's position, military courts would be powerless if a situation like the one in *Howell* arises in a case not entitled to automatic review. This would be true even though this Court has held extraordinary writs are proper to appeal erroneous sentence credit rulings.[66]

An accused would also have no relief. For example, in *Clinton v Goldsmith*, the Supreme Court alluded to the problem of unlawfully *increased* punishment.[67] The Court stated that while a military appeals court lacked jurisdiction to entertain extraordinary relief to prevent an administrative separation,[68] "[i]t would presumably be an entirely different matter if a military authority attempted to alter

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[65] *Howell v. United States*, 75 M.J. 386, 390 (C.A.A.F. 2016).
[66] *United States v. Suzuki*, 14 M.J. 491, 492 (C.M.A. 1983) ("Moreover, we conclude that a convening authority cannot unilaterally ignore a military judge's ruling, even when believing it to be beyond the military judge's authority; rather he must invoke the extraordinary writ process."); *United States v. Ruppel*, 49 M.J. 247, 254 (C.A.A.F. 1998) (Effron, J., concurring) ("The only means available for the Government to appeal the sentence credit would be via an extraordinary writ.").
[67] *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999).
[68] *Id*. at 535.

a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ[.]"[69]

But under the Government's rule, it would *not* be an entirely different matter—at least in cases not entitled to automatic review. For example, an accused could not petition a CCA for extraordinary relief to stop a convening authority from increasing his punishment by breaking a pretrial agreement.[70] Nor could an accused petition for extraordinary relief if the convening authority disregarded a trial ruling favorable to the accused.[71]

Indeed, it would seem the Government's rule would require resort to an Article III court. To say the least, if an accused had to seek relief in a downtown United States district court because his commanding officer was not abiding by a pre-trial agreement, this would challenge the notion of an "integrated" military justice system.[72]

Fortunately, though, Congress *has* created an integrated system. A CCA's potential appellate review of a court-martial empowers an accused to petition the

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[69] *Id*. at 536.
[70] *United States v. Cox*, 22 U.S.C.M.A. 69, 71 (1972) (holding that a convening authority may not unilaterally refuse to enforce a pretrial agreement).
[71] *Suzuki*, 14 M.J. at 492.
[72] *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018) ("And courts-martial are now subject to several tiers of appellate review, thus forming part of an integrated 'court-martial system' that closely resembles civilian structures of justice.").

CCA to remedy an injustice before his court-martial has concluded as long as an appeal of the case "may ultimately be" perfected.[73]

Conclusion

The Appellee respectfully requests this Court affirm the lower court's decision.

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[73] *Noyd*, 395 U.S. at 695 n.7.

Certificate of Compliance

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on July 16, 2020.

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