IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v.	BRIEF OF NIMJ AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S MOTION FOR APPROPRIATE RELIEF
Sergeant (E-5) **GARY A. HEMMINGSEN**, United States Army, Appellant	Crim. App. Dkt. No. 20180611 USCA Dkt. No. 20-0284/AR,

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

Issue

SHOULD THIS COURT DEFER ACTING ON APPELLANT'S PETITION FOR REVIEW UNTIL A "FIFTH" JUDGE IS DESIGNATED TO FILL A VACANCY IN ACCORDANCE WITH ARTICLE 146, UCMJ, OR A NEWLY APPOINTED JUDGE BE SWORN-IN TO THE COURT.

Statement of the Facts

Amicus adopts the Statement of Facts submitted by Appellant, with the following additions.

On 10 August 2020, Appellant petitioned this Court.

On 12 August 2020, the Government submitted a 10-day letter in accordance with Rule 21(c)(2)(i) of this Court's rules.

On 14 August 2020, Appellant moved for appropriate relief until there were five qualified judges who could review his petition.

This Court has denied ten petitions for review and one motion for reconsideration so far in August 2020. The Court has granted one writ-appeal petition of a granted government appeal. These decisions were made, *arguendo*, by a four-person court. The Court has docketed one Certificate for Review under Article 67a(a), UCMJ, 10 U.S.C. § 867a(a). *See* USCAAF Journal, August 2020 [https:// www.armfor. uscourts.gov / journal/2020Jrnl/2020Aug.htm].

The Court further provided notice, "Unless the Court issues a notice that a senior judge or an Article III judge will perform judicial duties, the four judges in active service will perform the functions of the Court. See Articles 142 and 144, UCMJ, 10 U.S.C. §§ 942, 944, and C.A.A.F. Rule 6(a)."

Upon information and belief, a senior judge has been called upon to act in *United States v. Bergdahl* and one other granted case. *See* Notice, *United States v. Bergdahl*, Dkt. No. 19-0406/AR (C.A.A.F. Aug. 3, 2020).

Law.

This Court consists of five judges. Article 142(a), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 942(a).

When there is a vacancy, the judges of the Court may exercise the powers of the court during that vacancy. Article 142(g), UCMJ, 10 U. S. C. § 942(g). *See*, *also*, Article 144, 10 U.S.C. § 944 which allows the Court to determine what constitutes a quorum.

The Chief Judge of this Court may call upon a senior judge of the Court, with that senior judge's consent, to perform judicial duties with the Court, during a period in which a position of the court is vacant. Article 142(e)(1)(A)(ii), UCMJ, 10 U.S.C. § 942(e)(1)(A)(ii).

The Chief Judge may call upon a senior judge whose term has expired, and vacancy occurs to continue to perform judicial duties with the Court until the vacancy is filled. Article 146(e)(1)(B), 10 U.S.C. § 942(e)(1)(B).

The Chief Judge may, under defined circumstances, request the Chief Justice of the United States to appoint a judge from a United States Court of Appeals or a United States District Court during a period when there is a vacancy. Article 146 (e)(1)(B).

Argument

In 2006, this Court was down to three judges. The National Institute of Military Justice (NIMJ) urged the Court to modify its internal procedures so that only a single vote would be needed to grant review. The

court declined to make the change and offered no explanation. *See* Eugene R. Fidell and Dwight Sullivan, Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces, § 6.03[3] at 65 (19th ed. 2020). The problem is not one that NIMJ alone has identified. In 1998, Judge Sullivan observed in *United States v. Roseboro*, 50 M.J. 207, 208 n.* (C.A.A.F. 1998) (Sullivan, J., dissenting), that "failure to fill out the Court . at the petition stage can prejudice the petitioner simply because it makes it that much harder to round up a second vote for a grant."

Amicus agrees with Appellant that when this Court is composed of four judges instead of five, he is at a mathematical disadvantage for the decision regarding a grant of review. This partly is because of small group dynamics.

When this Court is composed of five judges, it follows a minority-grant rule: only two votes out of five, or 40%, are needed to grant review. Eugene R. Fidell and Dwight Sullivan, Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces, § 6.03[3] at 67-68 (19th ed. 2020). When this Court is composed of four judges, a petitioner needs two votes out of four, or 50% of the court's composition, to grant review.

That fifth vote, is therefore, obviously important. In addition to the extra vote opportunity, the "fifth" judge might persuade one of the other four to vote for a grant.

The vote to grant a petition is consequential not just on the petitioned issues but for direct access to the United States Supreme Court. If this Court denies a petition it denies direct appeal through a writ of certiorari to the United States Supreme Court. Article 67a(a), UCMJ, 10 U.S.C. § 867a(a).

There are prudential reasons for maintaining the five-person court for all purposes, including deciding on petitions.

1. Direct access to the United States Supreme Court. The vote to grant a petition is consequential not just on the petitioned issues but for direct access to the United States Supreme Court. Article 167a(a), UCMJ, 10 U.S.C. § 867a(a). If this Court denies a petition, it denies direct appeal through a writ of certiorari. In stark contrast, unlike this Appellant, and all other petitioners before this Court, the United States has direct access to the Supreme Court through the certification process. Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

Appellant's ability to petition to the Supreme Court, narrowly channeled through this Court, is vital—particularly given that resort to an Article III court is generally of little value.

Resort to an Article III court is generally of little value.

"A federal habeas court's review of court-martial proceedings is narrow. *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670 (10th Cir. 2010). The U.S. Supreme Court has explained that "[m]ilitary law, like state law, is a jurisprudence which exists separate from the law which governs in our federal judicial establishment," and that "Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." *Nixon v. Ledwith*, 635 F. App'x 560, 563 (10th Cir. Jan. 6, 2016) (unpublished) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

The federal habeas court's review of court-martial decisions generally is limited to jurisdictional issues and to a determination of whether the military courts gave full and fair consideration to the petitioner's constitutional claims. *See Fricke v. Secretary of the Navy,* 509 F.3d 1287, 1290 (10th

"[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Thomas*, 625 F.3d at 670; *see also Watson v. McCotter,* 782 F.2d 143, 145 (10th Cir. 1986). Instead, it is the limited function of the federal courts "to determine whether the military have given fair consideration to each of the petitioner's claims." *Thomas*, *id.* (citing *Burns*, 346 U.S. at 145). A claim that was not presented to the military courts is deemed

waived. *Id.* (citing *Roberts v. Callahan*, 321 F.3d 994, 995 (10th Cir. 2003)).”

Santucci v. Commandant, No. 19-3116-JWL, 2020 U.S. Dist. Ct. LEXIS 91249 *4 (D.C. Kan. May 26, 2020).

During August, thus far, this Court has denied ten petitions for review and one motion for reconsideration. It has granted one writ-appeal petition of a granted government appeal and has accepted one Certificate for Review. The Court further noticed action in response to the current vacancy on the court. *See* USCAAF Journal, August 2020 [https://www.armfor.uscourts.gov/journal/2020Jrnl/2020Aug.htm] These decisions were made, *arguendo*, by a four-person court. The inequity between a petitioner and the United States is apparent.

2. The appearance doctrine. This Court has been attentive to the perception—the appearance—of fairness in courts-martial and in appeals. *See*, *e.g.*, *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992) (Courts-martial must not only be fair but must appear fair to effectively further the cause of good order and discipline in the armed forces.) While “perception” concerns most frequently arise in trials, there are prudential reasons for concerns of fairness within the appeals process.

The presence and participation of five judges is important to the perception of a fair appeal process. While there is no “right” to five judges,

fairness strongly indicates that a just appeals process should strive mightily to ensure that number.

> "A lawyer [or appellant] who is told that a person entitled to an appeal before a panel comprising three individuals was heard by only two will instinctively conclude that there has been a substantial interference with the rights of that person, for no one can predicate that the presence of the third person could have made no difference to the result."

Westminster City Council v. Cabaj, Court of Appeal (Civil Division) [1996] ICR 960; [1996] IRLR 399. Further,

> It is a bedrock principle of our military justice system that it not only be a fair system of criminal justice, but that it always be perceived as fair. "[J]ustice must satisfy the appearance of justice."

Offutt v. United States, 348 U.S. 11, 14 (1954) (Frankfurter, J.).

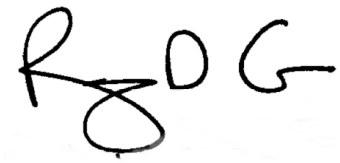
In *Vines*, the appellant's case had been referred to the wrong court of criminal appeals panel for review. This Court has rightly indicated that even though a rule of procedure, a procedural rule should be applied and executed "in a proper judicial manner." *United States v. Vines*, 15 M.J. 247, 250 n.5 (C.M.A. 1983). In *Vines* the issue was a seemingly innocuous assignment of a case to a wrong panel which this Court found to be nonprejudicial. However, this Court stated that only the highest standards of judicial and administrative action are acceptable lest "this only serve to create mistrust of the entire military justice system." *Id.*

A recognition that the perception of fairness is as important as fairness itself runs throughout the military justice system, a system that must be trusted by those willing to serve in uniform. Recently, the Navy-Marine Corps Court of Criminal Appeals determined it was error for the military judge to deny oral argument on a motion. *Brown v. United States*, 79 M.J. 833 (N-M.C. Ct. Crim. App. 2020). That court considered the perception of fairness in concluding the military judge erred.

Amicus does not suggest there is right to a five-judge court to decide on his petition and certainly no case cited here is dispositive. They are instructive and supportive for the continued concern that the military justice process be also perceived as fair by having five judges decided on a petition.

WHEREFORE, Amicus asks this Court to grant Appellant's motion.

Respectfully submitted,



Philip D. Cave
USCAAF Bar No. 22647
Director, NIMJ
1318 Princess St.
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

//Rachel E. VanLandingham//
Rachel E. VanLandingham
USCAAF Bar No. 32852
Vice-President, NIMJ
3050 Wilshire Blvd
Los Angeles, CA 90010
213-738-6864
rvanlandingham@swlaw.edu

CERTIFICATE OF FILING AND SERVICE

I certify that on 19 August 2020, a copy of the foregoing was delivered by electronic mail to this Court, Appellee at Government Appellate Division [usarmy.pentagon.hqda-otjag.mbx.gad-accaservice@mail.mil], Defense Appellate Division [usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil], Clerk of Court, ACCA [usarmy.pentagon.hqda-otjag.mbx.clerk-of-court-efiling@mail.mil], and William E. Cassara, Civilian Appellate Defense Counsel [bill@courtmartial.com].

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief or motion complies with the type-volume limitation of Rule 24(c) because the document has no more than 1981 words and no more than ten pages. This brief complies with the typeface and type style requirements of Rule 37.

Philip D. Cave
USCAAF Bar No. 22647
Director, NIMJ
1318 Princess St.
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com