No. _____

IN THE
Supreme Court of the United States

ERIC F. KELLY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Seventy years ago, Congress established a scope of appellate review of courts-martial that is significantly broader than direct review in the civil courts. A military Court of Criminal Appeals is commanded by statute to review the results of a court-martial in law and in fact, to determine the appropriateness of the adjudged sentence, and to affirm only that which "should be approved." Yet the decision of a Court of Criminal Appeals is not final; it is subject to review by the Court of Appeals for the Armed Forces and thereafter by this Court.

Petitioner's court-martial was reviewed by the Army Court of Criminal Appeals, and the findings and sentence were affirmed. Then the Court of Appeals for the Armed Forces granted review, set aside the judgment of the Army Court, and remanded the case. But on remand the Army Court conducted only a limited review, concluding that it lacked jurisdiction to conduct what is otherwise ordinary review of a court-martial.

The Question Presented is:

Whether a military Court of Criminal Appeals must review the results of a court-martial anew when the court previously reviewed the case but its judgment was set aside.

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PETITION FOR A WRIT OF CERTIORARI

Sergeant Eric. F. Kelly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The *en banc* decision of the U.S. Army Court of Criminal Appeals (ACCA) on automatic review under Article 66, 10 U.S.C. § 866, is reported at 76 M.J. 793 (A. Ct. Crim. App. 2017) and reproduced in the Appendix at Pet. App. 1a. CAAF's decision setting aside the judgment of ACCA and remanding the case is reported at 77 M.J. 404 (C.A.A.F. 2018) and reproduced in the Appendix at Pet. App. 37a. ACCA's *en banc* decision on remand is reported at 78 M.J. 638 (A. Ct. Crim. App. 2018) and reproduced in the Appendix at Pet. App. 46a. ACCA's order denying reconsideration on remand is not reported. It is reproduced in the Appendix at Pet. App. 58a. CAAF's order denying further review is reported at 79 M.J. 206 (C.A.A.F. 2019) and reproduced in the Appendix at Pet. App. 59a. CAAF's order denying reconsideration is reported at 79 M.J. 258 (C.A.A.F. 2019) and reproduced in the Appendix at Pet. App. 60a.

JURISDICTION

CAAF granted review of Petitioner's direct appeal, set aside the judgment of ACCA, and remanded the case on May 23, 2018. Pet. App. 37a. The CAAF denied further review on July 26, 2019, Pet. App. 59a, and denied reconsideration on Sep. 16, 2019, Pet. App. 60a. On December 11, 2019, the Chief Justice extended the time within which to file a petition for a

writ of certiorari to February 13, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1259(3).

STATUTES INVOLVED

The text of Articles 66, 67, and 76, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 866, 867, and 876 (2018),[1] [hereinafter Article 66, Article 67, and Article 76] appear at pages 61a through 66a of the appendix to this petition.

STATEMENT OF THE CASE

A. Legal Background

When Congress enacted the UCMJ in 1950, it established boards of review (now[2] the Courts of Criminal Appeals (CCAs)) to conduct appellate review of the results of courts-martial and "affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [they] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107, 128 (1950). Today,

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[1] The Military Justice Act of 2016 (MJA 2016) modified Articles 66 and 67 effective on January 1, 2019. *See* National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328, div. E, title LIX, § 5330, 130 Stat. 2000, 2932 (2016). The MJA 2016 made substantive and stylistic changes to both Articles, but those changes do not affect the argument presented in this petition.

[2] Congress designated each board of review as a Court of Military Review in the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat 1335, 1341 (1968). Congress later renamed the Courts of Military Review as the Courts of Criminal Appeals in the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(b), 108 Stat. 2663, 2831 (1994).

"Article 66(c), UCMJ, requires that the CCAs conduct a plenary review and that they affirm only such findings of guilty and the sentence or such part or amount of the sentence, as they find correct in law and fact and determine, on the basis of the entire record, should be approved." *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) (marks and citations omitted). "The scope of review by the Courts of Criminal Appeals differs in significant respect from direct review in the civilian federal appellate courts." *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008). The CCAs

> are intended to not only uphold the law, but provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility. For this reason, Congress endowed the CCAs with authority to find facts as well as address questions of law. As this Court has often noted, such authority is awesome, including as it does broad factfinding power and plenary *de novo* power to review questions of law.

United States v. Jenkins, 60 M.J. 27, 29 (C.A.A.F. 2004) (marks omitted) (citing cases).

Appellate review by a CCA is distinct not only from review in the civilian courts but also from review by CAAF, as CAAF's review is far more limited than review by a CCA. Unlike a CCA, which conducts a plenary review, CAAF "shall take action only with respect to matters of law." Article 67(c) (moved to

Article 67(c)(4) by MJA 2016). Therefore, for example, when an error is waived at trial, there is no error for CAAF to correct on appeal. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (citing *United States v. Olano*, 507 U.S. 725, 733-34 (1993))). But a CCA's review is not so limited, because a CCA

> is commanded by statute to review the entire record and approve only that which "should be approved." A fortiori, the CCAs are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.

Chin, 75 M.J. at 223.

Congress did, however, create a situation where CAAF's action will constrain the review of a CCA. When CAAF remands a case to a CCA for further review, that review is conducted "in accordance with the decision of [CAAF]." Article 67(e). Accordingly, a CCA "can only take action that conforms to the limitations and conditions prescribed by the remand." *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989).

Nevertheless, the result of a court-martial is not final until it is "approved, reviewed, or affirmed as required by [the UCMJ]." Article 76. Within the UCMJ, only the CCAs have explicit the explicit statutory to *affirm* the result of a court-martial. CAAF, in turn, "may act only with respect to the findings and sentence as approved by the convening

authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." Article 67(c).[3]

B. Factual and Procedural History

On November 6, 2015, a general court-martial sentenced Petitioner to confinement for one year, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The dishonorable discharge was a statutory mandatory minimum punishment for the offense of which Petitioner was convicted. The convening authority approved the sentence as adjudged on March 13, 2016, and he suspended the adjudged forfeitures and waived automatic forfeitures for the benefit of Appellant's dependent spouse and children.

Petitioner raised ten issues on appeal, including a request that ACCA disapprove the dishonorable discharge as an exercise of its Article 66(c) power. Respondent conceded that ACCA could review the appropriateness of the mandatory minimum dishonorable discharge, but argued that no relief was warranted. ACCA *sua sponte* considered the case *en banc*, and it affirmed the findings and sentence of Petitioner's court-martial. *United States v. Kelly*, 76 M.J. 793 (A. Ct. Crim. App. 2017) (*en banc*). The Army Court was split, however, on the question of whether it had the power to review the appropriateness of the mandatory minimum dishonorable discharge, with a majority concluding that it lacked such power.

CAAF granted review and reversed. *United States v. Kelly*, 77 M.J. 404 (C.A.A.F. 2018). Writing for a

[3] Substantially identical language is found in the current version of Article 67(c)(1), but without reference to approval by the convening authority due to changes enacted in MJA 2016.

unanimous court, Chief Judge Stucky observed that the CCAs have long enjoyed "discretion over sentence appropriateness," under Article 66(c), and that the Article "remains functionally unchanged since the UCMJ's enactment in 1950." 77 M.J. at 407. Accordingly, CAAF declined to "read an implied repeal of the CCAs' vast powers" to modify the sentence in the establishment of a statutory mandatory minimum punishment. *Id*. CAAF then decreed:

> The judgment of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the United States Army Court of Criminal Appeals for an assessment of sentence appropriateness pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), consistent with this decision.

77 M.J. at 408.

Petitioner renewed his ten issues on remand. Petitioner also asserted that while CAAF's decision compelled ACCA to review the sentence, CAAF did not affirm any part of ACCA's original review nor did it limit the scope of ACCA's review on remand to just a review of the sentence. Petitioner highlighted CAAF's decree that "the judgment of [ACCA] is set aside," 77 M.J. at 408, and he distinguished CAAF's decision in his case from its decisions in a multitude of other cases where CAAF affirmed a CCA's decision as to the findings but reversed as to the sentence, remanding for just a review of the sentence. *See*, *e.g.*, *United States v. Jerkins*, 77 M.J. 225, 229 (C.A.A.F. 2018); *United States v. Chikaka*, 76 M.J. 310, 314 (C.A.A.F. 2017). Petitioner argued that because ACCA's

judgment was set aside by CAAF, finality under the UCMJ required that ACCA affirm (or not) the result of Petitioner's court-martial anew.

ACCA disagreed. In a second *en banc* decision, ACCA unanimously held that "the scope of the remand is limited to determining the appropriateness of the appellant's sentence." *United States v. Kelly*, 78 M.J. 638, 642 (A. Ct. Crim. App. 2018). That holding was based in part on a novel interpretation of CAAF's rules of practice and procedure that led ACCA to conclude that "CAAF has retained jurisdiction over the case." 78 M.J. at 640. ACCA then decreed:

> Upon consideration of the matters remanded to this court, the findings of guilty and the sentence remain AFFIRMED. The Clerk of Court is directed to return the record of trial to the CAAF.

78 M.J. at 642 (emphasis added).

Appellant sought reconsideration, and then sought further review from CAAF, both of which were denied.

REASONS FOR GRANTING THE PETITION

Without this Court's intervention, the statutory right to review of the result of a court-martial will be eroded by a *sub silentio* narrowing of the jurisdiction of the Courts of Criminal Appeals. That is not the result Congress intended when it explicitly commanded the Courts of Criminal Appeals to affirm only that which "should be approved," Article 67(c), and when it declared that the result of a court-martial is not final until it is "approved, reviewed, or affirmed as required by [the UCMJ]," Article 76.

It is settled that "a complete Article 66, UCMJ, review is a 'substantial right' of an accused." *Chin*, 75 M.J. at 220 (quoting *Jenkins*, 60 M.J. at 30). If that substantial right is to be eroded by judicial abatement, such erosion is the prerogative of this Court. That is so because this Court's jurisprudence relies on "the view that the military court system generally is adequate to and responsibly will perform its assigned task," and the "assum[ption] that the military court system will vindicate servicemen's constitutional rights." *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). For that view and assumption to prevail, however, the military court system must actually perform its assigned task. Here it did not, and if the decision below is allowed to stand it will not in future cases as well.

A. The question presented is important.

The question presented strikes at the heart of the deference this Court grants to the military court system. "Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks." *Reid v. Covert*, 354 U.S. 1, 35-36 (1957). But more recently, by its enactment of the UCMJ, "Congress created an integrated system of military courts and review procedures" to vindicate the rights of persons subject to court-martial. *Councilman*, 420 U.S. at 758. As a result, today "the military justice system's essential character" is "judicial." *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018).

That judicial system enjoys substantial deference under this Court's precedent that has long recognized

that military law is a jurisprudence "which exists separate and apart from the law which governs in our federal judicial establishment," and that the Framers "expressly entrusted" Congress with the task of balancing the rights of individuals with the needs of military discipline. *Burns v. Wilson*, 346 U.S. 137, 140 (1953). Accordingly, while military cases are subject to direct review under this Court's appellate jurisdiction, *Ortiz*, 138 S. Ct. at 2180, this Court exercises considerable restraint when dealing with collateral or post-conviction attacks on military proceedings. *Burns*, 346 U.S. at 142; *Councilman*, 420 U.S. at 758. Yet that restraint is not axiomatic; it is the product of numerous considerations, including that

> implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.

Councilman, 420 U.S. at 758.

This petition presents the important question of what is means for the military court system to *perform its assigned task* and thereby vindicate servicemen's constitutional rights. Petitioner's case was reviewed by ACCA pursuant to Article 66, and ACCA issued a judgment that affirmed the findings and sentence. That judgment, however, was set aside by CAAF, and the case remanded to ACCA for further action. While

such remand could have been limited in scope, the remand was not limited here because CAAF – contrary to prior practice in numerous cases – did not affirm any part of ACCA's judgment in its decree.

Having had its judgment set aside by CAAF, ACCA was required to review Petitioner's case anew and affirm (or not) the findings and sentence. The precise nature of that review is largely within the discretion of ACCA – the review may have been informed by ACCA's prior review, and it must have been in accordance with the decision of CAAF – but the completion of that review is the considered mandate of Congress in Article 66 and is the prerequisite for finality under Article 76.

ACCA, however, did not conduct such review, even cursorily. Rather, it construed the purpose of CAAF's remand as limited to only "an assessment of sentence appropriateness," and it opined that "a reexamination of findings is not required, and perhaps may not be permitted." *Kelly*, 78 M.J. at 640 (marks and citations omitted). Then ACCA held that its own authority over the case was limited because "CAAF has retained jurisdiction over the case." *Id*. That holding was not based on CAAF's jurisdiction as established by Congress in Article 67, or even ACCA's jurisdiction as established by Congress in Article 66, but rather involved a novel interpretation of CAAF's rules of practice and procedure applicable to remands for factfinding (a matter not implicated in Petitioner's case). *Id*.

Respondent protested, seeking both reconsideration from ACCA and further review by CAAF. While both were denied, CAAF's denial is particularly significant because it undermines

ACCA's conclusion that CAAF retained jurisdiction. If CAAF retained jurisdiction – as ACCA held – then the case remained pending CAAF's further review, final action, and mandate. CAAF, however, did none of that.

ACCA's holding frustrates Congress' intent in creating the military courts, its delegation of responsibility among the various actors within the military justice system, and its requirements for finality of the results of a court-martial. CAAF's silence allows ACCA's decision to stand, erodes the substantial right of a complete Article 66 review, and undermines "the view that the military court system generally is adequate to and responsibly will perform its assigned task," and the "assum[ption] that the military court system will vindicate servicemen's constitutional rights." *Councilman*, 420 U.S. at 758.

B. This petition is a good vehicle to decide the question presented.

This Petition provides a good vehicle to address the important question presented. Petitioner preemptively raised the scope of ACCA's review after CAAF's initial decision, and consistently asserted there and thereafter that ACCA's review was not limited by the scope of CAAF's remand and that Article 66 mandates a plenary review. ACCA heard oral argument and issued an *en banc* decision addressing the issue. Accordingly, the question presented in this petition is preserved and well defined for this Court's review.

Finally, the answer to the question presented affects the outcome of Petitioner's case, as Petitioner assigned numerous significant errors for ACCA's consideration on remand (including sufficiency of the

evidence, instructional error, prosecutorial misconduct, denial of the right to present a defense, erroneous admission of hearsay, a panel that disobeyed the military judge's instructions, and ineffective assistance of counsel).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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