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Re: *Notice of Proposed Changes to Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces*

Gentlemen:

Thank you for the opportunity to comment on the proposed changes to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces. The National Institute of Military Justice ("NIMJ") respectfully submits the following comments for the Court's consideration.

The current version of Rule 30A(a) contains no guidance on when or how the Court will consider facts outside the record. We generally support the Court's desire to clarify the procedures and standard it will use when considering requests to supplement the record. As the Court has noted, "[t]he essence of post-trial practice is basic fair play - notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). The introduction of matters not considered at trial risks upsetting that balance, and should be only sparingly permitted.

The proposed change, however, still gives appellate practitioners who must determine whether to attempt to supplement the record or how to respond to such an effort little insight as to how the Court will decide. There is for example no discussion of what constitutes good cause to supplement the record, or the factors the Court will examine to determine whether such cause exists.

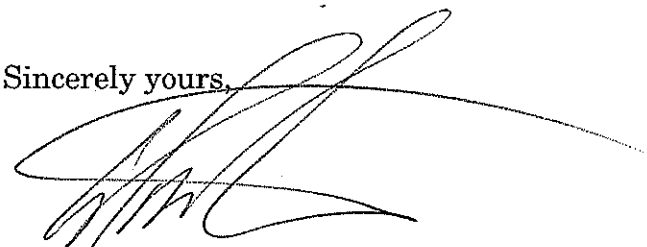
Federal courts often hear requests to consider matters outside the record, in the context of claims of ineffective assistance of counsel (*see, e.g., Smith v. Lockhart*, 946 F.2d 1392 (8th Cir. 1991); *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996)), *Brady* violations (*United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995)), or juror misconduct (*Smith v. Lockhart*, 946 F.2d 1392 (8th Cir. 1991); *United States v. Sabir*, 628 F.Supp. 414, 421 (S.D.N.Y. 2007)). Such requests may also be entertained in aid of a writ of habeas corpus (*Townsend v. Sain*, 373 U.S. 293 (1963), *superseded by statute,* 28 U.S.C. § 2254(d), *as recognized in Joyner v. King,* 786 F.2d 1317, 1322-23 (5th Cir. 1986)) or a writ of error coram nobis (*Korematsu v. United States*, 584 F.Supp. 1406, 1411-12 (D.C.Cal. 1984)). There is thus an existing body of federal precedent for the Court to draw upon, if it chooses, when deciding whether to permit a party to supplement the record. Practitioners would benefit from knowing whether the Court intends to adopt any of these

existing standards, to look to them for guidance, or to develop its own body of law to accompany the proposed change.

In addition, the proposed change requires an appellate litigant to articulate not only why the new matter was not raised at trial or before the service court of criminal appeals, but also why it is appropriate for the new matter to be considered for the first time by the Court. The proposed change does not distinguish between cases on direct review and those in which an extraordinary writ is sought, and suggests that the Court may now consider new factual matters on direct review without remand. This would be at odds with the Court's existing Rules 30A(c) and (e) and a departure from the statutory scheme envisioned in Article 66(c), which vests appellate fact-finding authority in the service courts. We do not support such a procedure.

The Federal Register comment accompanying the proposed change does not suggest that there is an immediate need to revise Rule 30A(a). We therefore respectfully request that the proposed change be revisited at public hearing by the Court or the Rules Advisory Committee to address the issues raised in this letter.

Sincerely yours,



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