

3 February 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

DARREN N. HATHORNE,
Airman First Class (E-3)
UNITED STATES AIR FORCE,
Appellant.

Crim. App. No. ACM 2011-02

USCA Dkt. No. 12-6002/AF

APPELLANT'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,)	BRIEF ON BEHALF OF
Appellee)	APPELLANT
)	
v.)	
)	Crim. App. Dkt. No. 2011-02
Airman First Class (E-3))	
DARREN N. HATHORNE)	USCA Dkt. No. 12-6002/AF
USAF,)	
Appellant)	

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

Issue Presented

WHETHER, IN LIGHT OF UNITED STATES V. LOPEZ DE VICTORIA, 66 M.J. 67 (C.A.A.F. 2008), THIS COURT HAS JURISDICTION OVER AN ARTICLE 62, UCMJ, APPEAL WHEN THE COURT-MARTIAL HAS ADJUDGED A SENTENCE THAT DID NOT INCLUDE A PUNITIVE DISCHARGE OR CONFINEMENT FOR ONE YEAR?

Statement of Statutory Jurisdiction

This case was reviewed below by the Air Force Court of Criminal Appeals (AFCCA) pursuant to Article 62(a)(1)(B) of the Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review a Court of Criminal Appeals' ruling on an Article 62 appeal. *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008).

Statement of the Case

On 9 March 2011, Appellant was charged with one specification in violation of Article 112a, wrongful use of

cocaine. (JA at 12, 13). Following a two-day motion hearing, the military judge granted a defense motion to dismiss. (JA at 20-48). On 15 April 2011, the United States filed notice of its intent to appeal with the military judge. (JA at 3).

On 28 July 2011, AFCCA heard oral arguments. On 4 October 2011, AFCCA granted the government's appeal. (JA at 164-174). On 2 November 2011, the case proceeded to trial. On 3 November 2011, Appellant was found guilty and received a subjurisdictional court-martial punishment: confinement for 7 days, hard labor without confinement for 30 days, restriction for 30 days, and reduction to E-1. (JA at 1).

Summary of Argument

This Court has jurisdiction over this case based on the government's initial Article 62 appeal, and that jurisdiction cannot be undermined by subsequent government action. As held in *Lopez de Victoria*, this Court has statutory jurisdiction over Article 62 appeals. Under *United States v. Bourdeux*, this Court's jurisdiction cannot be diminished by a lower court or convening authority. 35 M.J. 291 (C.M.A. 1992). Considering *Lopez de Victoria* in conjunction with *Bourdeux*, this Court has ongoing jurisdiction based on the government's initial appeal, which cannot be subverted.

Argument

IN LIGHT OF UNITED STATES v. LOPEZ DE VICTORIA, 66 M.J. 67 (C.A.A.F. 2008), THIS COURT HAS JURISDICTION OVER AN ARTICLE 62, UCMJ, APPEAL WHEN THE COURT-MARTIAL HAS ADJUDGED A SENTENCE THAT DID NOT INCLUDE A PUNITIVE DISCHARGE OR CONFINEMENT FOR ONE YEAR.

Standard of Review

This Court's jurisdiction is prescribed by statute. *Lopez de Victoria*, 66 M.J. at 70. Determining this Court's jurisdiction is therefore a question of statutory interpretation subject to *de novo* review. See *id.* at 73. "[T]he burden of establishing" that a Court has jurisdiction over a case "rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Law

This Court has jurisdiction to review cases appealed under Article 62, UCMJ, based on its Article 67(a), UCMJ, authority. *Lopez de Victoria*, 66 M.J. at 71; *United States v. Miller*, 66 M.J. 306 (C.A.A.F. 2008); *United States v. Michael*, 66 M.J. 78 (C.A.A.F. 2008). Once this Court has jurisdiction over a case, "no action by a lower court or convening authority will diminish it." *Bourdeaux*, 35 M.J. at 295; *United States v. Seward*, 49 M.J. 369 (C.A.A.F. 1998).

In *United States v. Davis*, 63 M.J. 171 (C.A.A.F. 2006), this Court held that not even an administrative discharge severs jurisdiction for an Article 62 appeal. The Court explained that

the power of the court-martial "was established at [the] initial trial and that the intervening administrative discharge does not divest the appellate courts of the power to correct error, order further proceedings, and maintain appellate jurisdiction over the person during the pendency of those proceedings." *Id.* at 173. Although the accused in *Davis* had already been separated under honorable conditions, this Court still had jurisdiction to hear an Article 62 appeal based on further proceedings.

Even outside the scope of an Article 62 appeal, this Court retains jurisdiction after administrative separation. For example, this Court found that it had jurisdiction to review a military member's findings and sentence even though he had already received an honorable discharge from service. *Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F.1999). This Court has held that, if a person is discharged administratively while appellate review is pending, there is "no good reason to hold the findings and sentence of the court-martial are impaired by the discharge." *United States v. Speller*, 8 U.S.C.M.A. 363, 368, 24 C.M.R. 173, 178 (1957).

Similarly, the power of review authorities over the court-martial is unaffected by the administrative discharge. See *United States v. Woods*, 26 M.J. 372 (CMA 1988); *United States v. Jackson*, 3 M.J. 153 (CMA 1977); *United States v. Entner*, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *Speller*, 8 U.S.C.M.A. 363,

24 C.M.R. 173 (1957); *United States v. Sippel*, 4 U.S.C.M.A. 50, 15 C.M.R. 50 (1954).

Likewise, a court-martial on remand does not deprive the military appellate courts of jurisdiction. Like *Bourdeaux*, this Court's jurisdiction is unaffected by subsequent actions of other parties.

Argument

This Court retains jurisdiction to determine whether Appellant's statements were immunized despite his subsequent punishment of less than one year confinement and no punitive discharge. When considering *Lopez de Victoria* with *Boudreaux*, this Court's Article 62 jurisdiction cannot be diminished by subsequent court-martial proceedings. This Court's jurisdiction was established when the government filed its Article 62 appeal. No one can thwart that jurisdiction by proceeding to court-martial before this Court exercises its discretionary review.

The government cannot deprive this Court of its jurisdiction by proceeding to court-martial after receiving a favorable decision from AFCCA. If the government was able to subvert this Court's jurisdiction through subsequent proceedings, it would create an unfair system. The government would be able to pursue of all appellant avenues and preempt the defense from doing the same by initiating subsequent

proceedings. This Court's jurisdiction should be construed in a manner that is fair for either party.

For the foregoing reasons, Appellant respectfully requests that this Honorable Court find that it has jurisdiction to decide the assigned issue in this case.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Michael S. Kerr", written in a cursive style.

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