28 August 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

MARK K. ARNESS,	)	UNITED STATES' ANSWER TO
Petitioner,	)	SPECIFIED ISSUE AND
	)	CONTINUED OPPOSITION TO
	)	WRIT-APPEAL PETITION FOR
	)	REVIEW OF THE AIR FORCE
	)	COURT OF CRIMINAL APPEALS'
v.	)	DECISION ON APPLICATION FOR
	)	EXTRAORDINARY RELIEF
	)	
	)	Misc. Dkt. No. 2013-30
UNITED STATES,	)	
Respondent.	)	USCA Dkt. No. 14-8014/AF

UNITED STATES' ANSWER TO SPECIFIED ISSUE

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

PREAMBLE

The United States continues to respectfully request that this Honorable Court deny the Petitioner's Writ Appeal Petition for Extraordinary Relief, which requests that this Honorable Court reverse the decision of the Air Force Court of Criminal Appeals and order the set aside of the findings and sentence of his 2009 court-martial conviction. This Honorable Court should deny Petitioner's Writ Appeal Petition because although the lower Court properly awarded Petitioner no relief on his petition for extraordinary relief in the nature of a writ of coram nobis, the lower Court exceeded its authority by reviewing 13 alleged errors raised by Petitioner following his unsuccessful appeal of his case under Article 69, UCMJ. In effect, the lower Court provided Petitioner direct review under Article 66, and in doing so impermissibly exceeded its

statutory jurisdiction. Moreover, because this erroneous exercise of jurisdiction is very likely to recur, this Court should utilize this case as an opportunity to repudiate in a formal opinion the erroneous precedent relied upon by the lower Court, Dew v. United States, 48 M.J. 639 (Army Ct. Crim. App. 1998) to conclude it had jurisdiction to review Petitioner's request for extraordinary relief.

RELIEF REQUESTED

Petitioner, who was not represented by counsel before this Court when he filed his writ-appeal but has now been provided appellate representation as ordered by this Court, requested this Court set aside his multiple convictions based upon his 13 assignments of error he filed with the lower Court in his petition for extraordinary relief.

HISTORY OF THE CASE

Petitioner was convicted at a general court-martial of 26 specifications in violation of Articles 86, 107, and 133 at a military judge alone trial. He was sentenced to 11 months confinement and a reprimand, and the convening authority approved the sentence as adjudged. (JA at 7-14, 15-26.) The convening authority approved and executed Petitioner's sentence as adjudged on 19 February 2010. (JA at 123.) Because Petitioner was not entitled to review under Article 66 and 67, Petitioner's case was reviewed under Article 69, UCMJ, by The Judge Advocate General

(TJAG), who determined on 25 March 2010 that the findings and sentence were supported in law. Also, TJAG determined that Petitioner's case would not be referred to the lower Court for review under Article 66, UCMJ, as permitted by Article 69, UCMJ. (JA at 14, 105.) Petitioner was notified in writing on 26 March 2010 that his case was examined in accordance with Article 69 and found to be supported in law. (JA at 107.) Petitioner was also informed on 26 March 2010 that his case was not referred by TJAG to the Air Force Court of Criminal Appeals for Article 66 review and that his findings and sentence were final. (Id.)

On 1 September 2010, Petitioner retained civilian defense counsel to represent him regarding his now finalized Article 69 review. (JA at 114, 115.) On some date thereafter, Petitioner's civilian counsel submitted an untimely "Article 69 Brief" on behalf of Petitioner. (JA at 27-55.) On 2 August 2011, TJAG's representative sent Petitioner's counsel a letter returning the "Article 69 brief" because appellate review of Petitioner's case was final. (JA at 56.) TJAG's representative also noted that under Air Force instructions, the Article 69 submission was untimely because it was required to be submitted within 30 days of action, and Petitioner's submission was about 15 months too late. (Id.)

Petitioner requested reconsideration by TJAG on 26 August 2011 (JA at 58-59), and it was denied because Petitioner's findings and sentence were final and conclusive under Article 76,

UCMJ.[1] (JA at 60-61.) Petitioner then filed his coram nobis writ with the lower Court over two years later on 19 December 2013 seeking review of 13 assignments of error. (JA at 62; resubmitted copy.) On 11 March 2014, the lower Court issued an order concluding that it had jurisdiction to review the petition but held Petitioner was not entitled to relief. (JA at 1-6.)

ISSUE SPECIFIED

WHETHER THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION TO ENTERTAIN A WRIT OF ERROR CORAM NOBIS WHERE THERE WAS NO STATUTORY JURISDICTION UNDER ARTICLE 66(b)(1), UCMJ, ON THE UNDERLYING CONVICTION AND THE CASE WAS NOT REFERRED TO THE COURT OF CRIMINAL APPEALS BY THE JUDGE ADVOCATE GENERAL UNDER ARTICLE 69(d)(1), UCMJ, AND WHERE THE COURT OF CRIMINAL APPEALS RELIED ON POTENTIAL JURISDICTION UNDER ARTICLE 69(d), UCMJ, AS ITS BASIS FOR ENTERTAINING THE WRIT (CITING DEW V. UNITED STATES, 48 M.J. 639 (ARMY CT. CRIM. APP. 1998)).

REASONS WHY A WRIT SHOULD NOT ISSUE

THE AIR FORCE COURT OF CRIMINAL APPEALS HAD NO JURISDICTION TO REVIEW PETITIONER'S WRIT OF ERROR CORAM NOBIS, AND THIS COURT SHOULD ISSUE A FORMAL DECISION OVERRULING THE OUTDATED PRECEDENT RELIED UPON THE LOWER COURT.

[1] Article 76 provides: "The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies of the United States. . . ."

Standard of Review

The question of whether the lower Court had jurisdiction to review Petitioner's case is a question of law that is reviewed de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011).

Law and Analysis

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute. . . ." Daly, 69 M.J. at 486 (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)). "[T]he burden of establishing" that a Court has jurisdiction over a case "rests upon the party asserting jurisdiction." Kokkonen, id. When Congress exercised its power to govern and regulate the armed forces by establishing this Court, it confined this Court's jurisdiction to the review of specified sentences imposed by courts-martial. Clinton v. Goldsmith, 526 U.S. 529, 533-34 (1999).

An extraordinary writ is a drastic remedy that should be used only in extraordinary circumstances. United States v. LaBella, 15 M.J. 228, 229 (C.M.A. 1983). The petitioner has the burden to show a clear and indisputable right to the extraordinary relief requested. Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008).

Article 66(b), UCMJ, limits the jurisdiction of a court of criminal appeals to the review of a court-martial in which the "sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year." Simply put, Petitioner's case does not meet the Article 66 jurisdictional

limits of the lower Court's authority to review a court-martial sentence as his approved sentence was only 11 months of confinement and a reprimand. (JA at 11, 123.) Moreover, TJAG did not refer this case for Article 66 review as provided in Article 69. So, the Air Force Court had no existing statutory jurisdiction to review Petitioner's request for extraordinary relief; the lower Court clearly erred by finding "the requested writ is 'in aid of' our existing jurisdiction" and must be reversed by this Court.

The Air Force Court's finding of jurisdiction was fatally flawed. The lower Court correctly recognized that Petitioner's sentence at his court-martial did not entitle him to review before the court of criminal appeals under Article 66 and instead was limited to appellate review under Article 69, UCMJ. (JA at 3.) But the Air Force Court then incorrectly concluded, based upon an erroneous view of Article 69 jurisdiction and reliance upon an outdated and erroneous decision from the Army Court of Criminal Appeals, that it has the authority to review any action taken by The Judge Advocate General under Article 69 regardless of the approved sentence. This expansive view of jurisdiction is mistaken and if not directly corrected by this Court, would permit the Air Force Court to review every Article 69 review even if TJAG did not refer it to the lower Court. This decision simply cannot be permitted to stand. Any such expansion of the courts of criminal appeals' jurisdiction must come from Congress and not the

appellate bench.

Besides an erroneous view of Article 69, the lower Court compounded its error by relying upon outdated and faulty precedent from the Army Court that cannot withstand scrutiny and application of later United States Supreme Court precedent and the precedent of this Court. The Air Force Court expressly relied upon Dew v. United States as authority for a court of criminal appeals to review all action taken by TJAG under Article 69. (JA at 3.) Dew and the decision in this case must be corrected by this Court.

Dew, which predated Clinton v. Goldsmith by one year, is no longer an accurate statement of law, and the Air Force Court should not have relied upon it. In Dew, the Army Court held that it had "supervisory jurisdiction" under the All Writs Act to consider on the merits a writ challenging review of a general court-martial sentence reviewed by the Army TJAG under Article 69 even though the Army Court never acquired statutory jurisdiction under Article 66 and even though the Army TJAG never referred the Article 69 review to the Army Court, precisely the scenario in Petitioner's case. Dew stood for the now erroneous and sweeping proposition that military appellate courts were empowered with the higher "concept of supervisory jurisdiction" -- a concept greater than statutory jurisdiction -- and that the authority to issue extraordinary writs "in aid of their jurisdiction" was without regard to the actual sentence approved in the case. Dew, 48 M.J. at 645.

> Our authority to issue extraordinary writs "in aid of jurisdiction" under the All Writs Act is not limited to our actual or potential appellate jurisdiction defined in Articles 62, 66, and 69, UCMJ. . . (citation omitted). These statutory provisions do not encompass our entire authority as a court. As the highest judicial tribunal in the Army's court-martial system, we are expected to fulfill an appropriate supervisory function over the administration of military justice. . . (citation omitted). The concept of supervisory jurisdiction as support for extraordinary writ authority under the All Writs Act has developed primarily in cases decided by our superior court . . . .

Id. Dew's holding that a court of criminal appeals can review any Article 69 review based upon supervisory military justice jurisdiction greater than the statutes provided by Congress has since been squarely rejected by the Supreme Court and this Court.

Just one year after Dew, the Supreme Court issued Clinton v. Goldsmith, 526 U.S. 529, 533-34 (1999), where supervisory jurisdiction by military appellate courts met its appropriate demise:

> When Congress exercised its power to govern and regulate the Armed Forces by establishing the CAAF, ... it confined the court's jurisdiction to the review of specified sentences imposed by courts-martial . . . .
>
> Despite these limitations, the CAAF asserted jurisdiction and purported to justify reliance on the All Writs Act in this case on the view that "Congress intended [it] to have broad responsibility with respect to administration of military justice," a position that Goldsmith urges us to adopt. This we cannot do. . . .
>
> Thus, although military appellate courts are

> among those empowered to issue extraordinary writs under the Act, . . . the express terms of the Act confine the power of the CAAF to issuing process "in aid of" its existing statutory jurisdiction; the Act does not enlarge that jurisdiction. . . .
>
> Second, the CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed. Simply stated, there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review.

Clinton v. Goldsmith, 526 U.S. at 533-36. This Court has regularly followed the precedent of Clinton v. Goldsmith, perhaps most recently in LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)("The all Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction." Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999)).

The Air Force Court had no statutory jurisdiction to review Petitioner's writ, and the lower Court erred by applying the Army Court's concept of supervisory jurisdiction. Although it may be tempting for this Court to simply resolve this case adversely to Petitioner with a summary disposition order, it is clear the Air Force Court has an erroneous view of its authority, which is why this Court should issue a formal opinion -- perhaps after oral argument is heard -- reversing the Air Force Court and repudiating the Army Court's now-outdated concept of supervisory

jurisdiction set forth in Dew. No doubt should remain that the Air Force Court exceeded its jurisdiction here.

CONCLUSION

The United States respectfully requests that this Honorable Court issue a formal decision reversing that part of the lower Court's order that concluded it had jurisdiction to deny Petitioner's petition for extraordinary relief for the reasons noted above[2].

WHEREFORE, Petitioner has not demonstrated a clear and indisputable right to the extraordinary relief requested.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 August 2014.

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[2] Since the merits of Petitioner's extraordinary writ are beyond the scope of this Court's specified issue, the United States generally opposes the merits of his request and has not briefed those issues here or in any prior pleading before this Court or the lower Court. Once this Court reverses the Air Force Court on the basis of its erroneous jurisdiction ruling, the merits of Petitioner's extraordinary relief request will be moot.