IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States,

Appellant/Cross-Appellee

v.

Stephen P. Howell
Staff Sergeant (E-6)
U.S. Marine Corps
Real Party in Interest,

Appellee /Cross-Appellant

David M. Jones
Lieutenant Colonel
U.S. Marine Corps
Military Judge,
Respondent

ANSWER ON BEHALF OF THE APPELLEE

Crim.App. Dkt. No. 201200264

USCA Dkt. No. 16-0367/MC

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

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Statement of Statutory Jurisdiction

This case is before this Court pursuant to certification under Article 67(a)(2), UCMJ.[1] However, as discussed in cross-appellant's opening brief, SSgt Howell challenges the jurisdictional basis of the Government's petition for extraordinary relief.

Statement of the Case

The statement of the case is unchanged from that presented in SSgt Howell's opening brief in this matter filed with this Court on February 29, 2016.

Statement of Facts

On June 26, 2014, the Government released SSgt Howell from confinement.[2] The Government assigned him to Headquarters and Service Battalion (H&S Bn), Marine Corps Recruit Depot, Parris Island, South Carolina.[3]

After arriving at H&S Bn, the Government reinstated SSgt Howell to his pre-trial rank and assigned him the duties of a Staff Sergeant.[4] However, the Government forced him to remain in his post-trial pay-grade of E-1, which it had

[1] 10 U.S.C. § 867(a)(2) (2012).
[2] J.A. at 222-53.
[3] *Id.*
[4] *Id*.

done since his case was overturned on May 22, 2014.[5] SSgt Howell continued to work as a Staff Sergeant until his rehearing was completed.[6]

After his release from confinement, SSgt Howell, through his detailed military counsel and his civilian defense counsel, sought reinstatement of his pay as a Staff Sergeant.[7]

On August 12, 2014, the Staff Judge Advocate to the Convening Authority sent an email to the Director, Installation Personnel Administration Center (IPAC), MCRD, Parris Island, SC stating:

> As discussed previously, I reached out to Judge Advocate Division, HQMC, to get their legal opinion regarding SSgt Howell's pay. In accordance with the UCMJ and applicable case law, SSgt Howell should be wearing the rank of SSgt and performing duties commensurate to a SSgt, however, he is only entitled to receive the pay of a Pvt until the conclusion of his retrial. Any restoration of pay will occur after the retrial.[8]

On August 20, 2014, SSgt Howell's civilian defense counsel wrote the Convening Authority, requesting that he order IPAC to restore SSgt Howell's pay to pay-grade E-6.[9] On August 27, 2014, the Staff Judge Advocate replied:

> The Commanding General and I received your email and letter regarding SSgt Howell's pay. Although entitled to wear E-6 rank and perform duties commensurate as an E-6, in accordance with

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[5] J.A. at 222-53.
[6] *Id*.
[7] *Id.*
[8] J.A. at 240.
[9] J.A. at 241-45.

applicable federal laws and regulations, SSgt Howell does not rate pay as a SSgt or back pay until conclusion of the rehearing.[10]

On September 17, 2014, SSgt Howell brought a motion for appropriate relief to receive pay as an E-6.[11] In the alternative, SSgt Howell argued that receiving E-1 pay while performing E-6 duties amounted to unlawful pretrial punishment under Article 13, UCMJ.[12]

On October 8, 2014, the military judge granted the Defense motion and awarded day-for-day confinement credit for each day SSgt Howell was paid as an E-1.[13]

On November 13, 2014, the Government moved the military judge to reconsider his ruling.[14] In its motion, it attached a "formal legal opinion" from the Defense Finance and Accounting Service (DFAS), and requested the Court reconsider its decision.[15] The DFAS opinion reiterated that its position on pay pending a rehearing remained the same, and stated, "DFAS is bound by 10 U.S.C. § 875, its interpreting case law and fiscal law principles to pay members, such as SSgt Howell, who are awaiting rehearing at the rate to which the member was

[10] J.A. at 288-317.
[11] J.A. at 222-53.
[12] *Id*.
[13] J.A. at 253.
[14] J.A. at 284-287.
[15] J.A. at 304-06.

reduced in the original court-martial sentence."[16] DFAS failed to address Article 13 or cite the relevant case law.[17]

On November 25, 2014, SSgt Howell filed an answer and cross-motion requesting the military judge abate the proceedings until SSgt Howell received pay as an E-6 or in the alternative, to grant him five days of confinement credit for every day he was paid as an E-1.[18]

On February 19, 2016, a pretrial Article 39(a) session was held to litigate the Government's motion to reconsider and SSgt Howell's cross motion.[19] Ms. Regina M. Tanner, a command secretary and administrative specialist at the Navy-Marine Corps Appellate Leave Activity (NAMALA), testified that other servicemembers awaiting rehearing were restored to their pretrial ranks and pay-grades.[20] She cited *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013), as an example.[21] She further testified that since the beginning of her employment at NAMALA in February 2009,[22] "[SSgt Howell's case] is the first time I seen where the person hasn't been restored."[23] She explained that to her knowledge the number of cases

[16] J.A. at 304-06.
[17] *Id.*
[18] *Id.*
[19] J.A. at 202.
[20] J.A. at 203-04.
[21] J.A. at 204.
[22] J.A. at 203.
[23] J.A. at 205.

where the accused's pay at their current rank has been restored pending rehearing outnumber the cases where it has not.[24]

On February 26, 2015, the military judge denied the Government's motion for reconsideration, as well as the Defense's cross-motion.[25]

SSgt Howell's rehearing concluded with sentencing on April 29, 2015. In addition to confinement, his sentence again included reduction to pay-grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.[26]

Over the course of 343 days (May 22, 2014 to April 29, 2015), the Government withheld approximately $23,000 of basic pay from SSgt Howell.[27]

Summary of the Argument

II

The military judge did not exceed his authority, let alone abuse his discretion, when he awarded SSgt Howell confinement credit for the Government's unlawful pretrial punishment. His decision cannot be deemed a usurpation of judicial authority because: (1) the federal cases of *Dock v. United States* and *Combs v. United States* are inapplicable; (2) the military judge followed this

[24] J.A. at 211.
[25] J.A. at 318-23.
[26] J.A. at 222.
[27] This figure is calculated as the difference between the basic pay SSgt Howell received from May 22, 2014 to April 29, 2015, and the basic pay for an E-6 with over 14 years of service during the same period. This calculation does not include any other entitlements such as Basic Allowance for Housing (BAH).

Court's controlling precedent regarding interpretations of Article 75(a) and Article 13; and (3) *Chevron* deference is unwarranted. As such, the Government fails to establish a clear and indisputable right to issuance of the writ. It also cannot demonstrate that the writ is necessary or appropriate in this case.

III

The Government argues that when the findings and sentence are set aside, "every part of the sentence except the dishonorable discharge remained executed while [SSgt Howell] was pending rehearing."[28] However, this argument fails for the following three reasons: (1) a rehearing returns an accused to his pretrial status; (2) an executed sentence requires a valid conviction to remain in effect; and (3) Article 75 does not permit the Government to continue executing a sentence after it is set aside.

IV

The Government's affirmative act of paying SSgt Howell as an E-1 while he awaited completion of his rehearing constituted illegal pretrial punishment under Article 13. Despite the lower court setting aside the findings and sentence of his original court-martial, the Government intentionally and unlawfully continued to punish SSgt Howell without a valid conviction. Even if the Government did not intend to punish SSgt Howell, the punitive effect of paying him as an E-1

[28] Govt. Br. at 39.

warranted relief. Moreover, the Government's actions were arbitrary and purposeless as it picked and chose which punishments it wished to continue carrying out despite the set-aside, and returned other servicemembers awaiting rehearing to their pretrial rank *and* pay-grade.

Argument

Standard of Review

An extraordinary writ is "a drastic instrument which should be invoked only in truly extraordinary situations."[29] Extraordinary writs are limited to "the exceptional case where there is a clear abuse of discretion or usurpation of judicial power."[30]

A trial judge's decision may be erroneous, but does not rise to the level of usurpation of judicial power, so long as the ruling is "made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it."[31] This is an unparalleled level of deference afforded to a military judge, literally the highest level of deference in jurisprudence. "[W]hen a trial judge performs a discretionary act within the bounds of his legal authority, a superior tribunal will

[29] *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983).
[30] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953); *accord Will v. United States*, 389 U.S. 90, 95 (1967) ("[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.").
[31] *Bankers Life*, 346 U.S. at 382.

not, in the exercise of extraordinary writ powers, substitute its own discretion for that of the trial judge."[32]

II

THE MILITARY JUDGE DID NOT EXCEED HIS AUTHORITY WHEN HE RELIED ON THIS COURT'S CONTROLLING PRECEDENT TO AWARD STAFF SERGEANT HOWELL CONFINEMENT CREDIT.

Discussion

To obtain relief via an extraordinary writ, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances."[33] Furthermore, the requested writ must be "in aid of" the court's existing jurisdiction. [34]

The Government's petition fails to demonstrate that their right to issuance of the writ is clear and indisputable, nor can it demonstrate that it is appropriate under the circumstances. Here, the military judge did not exceed his authority, let alone abuse his discretion, when he awarded SSgt Howell confinement credit for the

[32] *United States v. Redding*, 11 M.J. 100, 109 (C.M.A.1981) (internal citations omitted).
[33] *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (internal citations and quotations omitted).
[34] *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted).

Government's unlawful pretrial punishment. As discussed below, the military judge did not exceed his authority for the following three reasons:

1. *Dock* and *Combs** are inapplicable

2. The military judge followed this Court's controlling precedent regarding interpretations of Article 75(a) and Article 13; and

3. *Chevron* deference is unwarranted

A. *Dock* and *Combs are inapplicable.**

1. SSgt Howell's situation is distinct from that of the plaintiffs in *Dock* and *Combs.**

To justify withholding SSgt Howell's pay, the Government relies on the federal claims cases of *Dock v. United States*,[35] and *Combs v. United States*.[36] However, these cases are inapplicable.

In *Dock*, the plaintiff (an E-3) was initially convicted of murder and sentenced to reduction to pay-grade E-1, a dishonorable discharge, total forfeitures, and death.[37] On appeal, the Army Court of Military Review set aside both the findings of guilt and the sentence and ordered a rehearing.[38] During the period between the Army Court of Military Review's decision and his second trial, the

[35] 46 F.3d 1083 (Fed. Cir. 1995).
[36] 50 Fed. Cl. 592 (Fed. Cl. 2001). After the CAAF completed review of his criminal case in *United States v. Combs*, 47 M.J. 330, 333 (C.A.A.F. 1997), Combs brought suit in the United States Court of Federal Claims to obtain monetary relief from the Government's actions. Reference to his federal claims case is indicated by the use of *Combs**.
[37] 46 F.3d at 1085.
[38] *Id*.

plaintiff was held in pretrial confinement.[39] Further, he had reached his end of active obligated service (EAOS) before his initial conviction was set aside, which meant he was not entitled to receive pay.[40]

At the rehearing, the plaintiff was again found guilty of murder and again sentenced to reduction to pay-grade E-1, a dishonorable discharge, and total forfeitures. This time, instead of death, he was sentenced to life imprisonment. [41] He subsequently sued in the United States Court of Federal Claims seeking restoration of the pay and allowances withheld from him prior to his second sentence. [42] The United States Court of Appeals for the Federal Circuit concluded that Private Dock was not entitled to restoration of any of his pay and allowances, including the period between the set-aside and the second sentence.[43]

By contrast, SSgt Howell had been released from confinement, he was wearing the rank of E-6, performing duties commensurate with that rank, and was in a pay status unlike Dock. These critical factual differences distinguish *Dock* to such an extent that it is not controlling here.

In *Combs**, the plaintiff (formerly an E-6) brought suit for back pay after this Court determined that reducing him in rank while awaiting his rehearing

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[39] *Id*. at 1092.
[40] *Id*. at 1093.
[41] *Id*. at 1085.
[42] *Id*.
[43] *Id*. at 1085.

amounted to unlawful pretrial punishment under Article 13.[44] During the interim period between his two trials, the plaintiff was stripped of his rank and his pay was reduced to that of an E-1.[45] However, he was released from confinement and brought back to a full-duty status.[46] The Court of Federal Claims held that the plaintiff was not entitled to back pay for the time period between his two trials.[47] That Court found that it was permissible to pay him as an E-1 during the interim period due to his other convictions from his first trial that were not set aside and the fact he was convicted at his second trial.[48] The court relied on *Dock*'s interpretation of Article 75(a), noting, "that 10 U.S.C. § 875(a), as interpreted by the *Dock* court, clearly operates to entitle plaintiff only to E-1 pay."[49]

Unlike Combs, SSgt Howell's convictions and sentence from his first trial were completely set aside. Because of this, the Government did not have a conviction or confinement status upon which to base its decision to pay him as an E-1. *Combs'** reliance on the affirmed convictions in reaching its holding, makes it inapplicable here. As a result, the military judge did not exceed his authority in awarding confinement credit. To fully comply with this Court's order, the

[44] 50 Fed. Cl. at 593.
[45] *Id*. at 594.
[46] *Id*.
[47] *Id*. at 604.
[48] *Id*. at 604.
[49] *Id*.

Government should have ceased executing the prior sentence entirely due to the presumption of his innocence as he awaited his rehearing.

In addition to the factual differences between SSgt Howell's case and *Dock* and *Combs**, these cases are inapplicable for the following reasons:

(1) *Dock* misinterprets Article 75(a);

(2) these cases concern a post-hoc analysis regarding an individual's entitlement to pay after being retried and resentenced; and

(3) *Combs** does not disturb this Court's holding that reduction in rank amounts to punishment under Article 13.

2. *Dock* misinterprets Article 75(a), UCMJ.

Dock misinterprets Article 75(a). Article 75(a), states:

> Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing. [50]

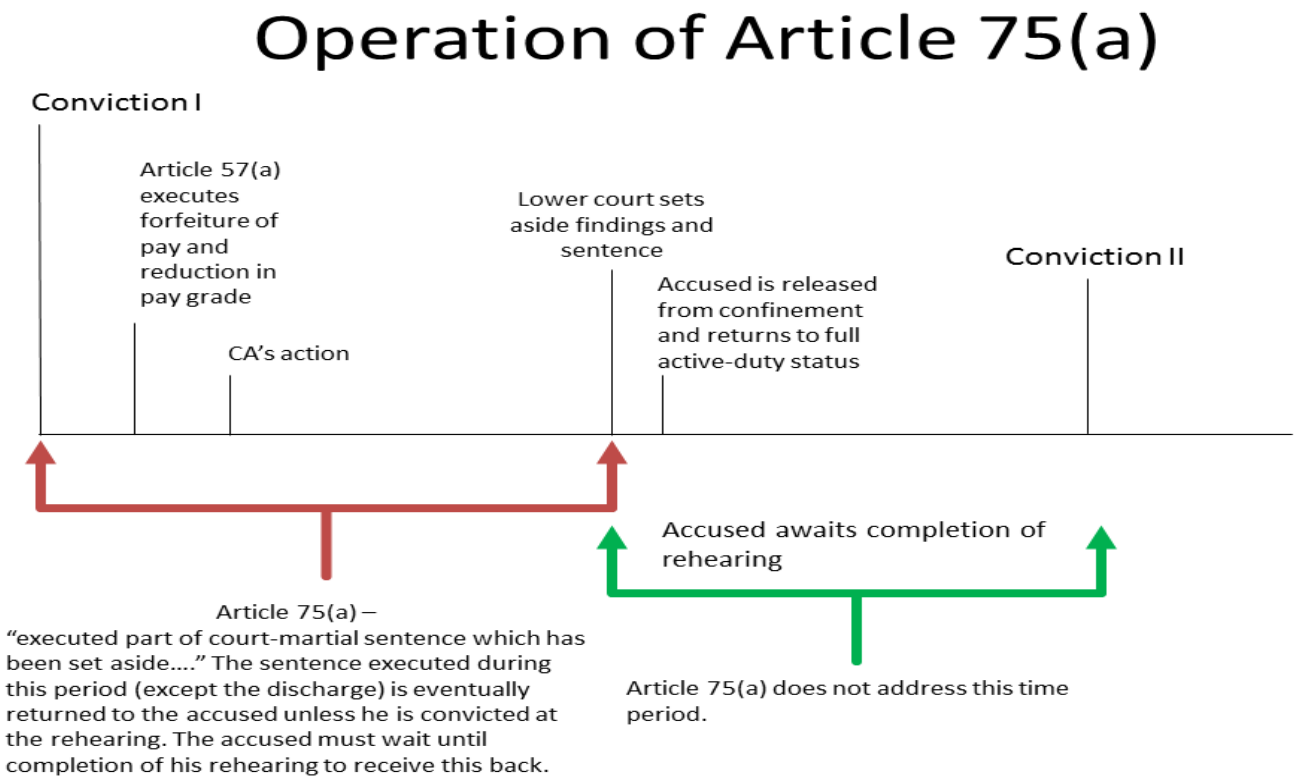
In *Dock*, the Court of Appeals for the Federal Circuit held that Article 75(a) deals with entitlement to pay, rather than mechanics of restoration.[51] The court explained:

> In a case in which forfeiture of all pay and allowances is decreed in the first sentence, the sentence of forfeiture is executed, and then reimposed by the second court martial, Article 75(a) means expressly what it says -- no pay and allowances will be paid to such a member

[50] 10 U.S.C. § 875(a) (2012).
[51] 46 F.3d at 1087.

from and after the first conviction until the member is restored to full-duty status, if ever.[52]

Dock interpreted Article 75(a)'s restoration provisions as providing a permissible statutory basis to withhold all pay until the results of a rehearing.[53] However, *Dock* failed to recognize that Article 75(a) does not provide for the withholding of pay during the interim period after an entire set of findings and sentence was set aside, and the member is returned to full-duty status and his previous rank.[54] The operation of Article 75(a) is depicted below:



[52] *Id*. at 1093.
[53] *Id*. ("In these circumstances, the statutory mandate leaves no room for any payment of pay and allowances for the period during which the member awaits rehearing.").
[54] *Cf. Keys v. Cole*, 31 M.J. 228, 232 (C.M.A. 1990).

Notably, *Dock* does not address SSgt Howell's situation in which the accused is released from confinement and restored to a full-duty status while awaiting a rehearing. Further, the *Dock* Court's conclusion that Article 75(a) may operate to deprive an accused of *all* pay while in a duty status would contravene the Thirteenth Amendment to the United States Constitution.[55] This result would not even be permissible as an adjudged punishment.[56] Thus, the *Dock* Court's broad interpretation that Article 75(a) provides a statutory basis to withhold the accused's pay while he awaits a rehearing is incorrect.

3. *Dock* and *Combs** concern a post-hoc analysis regarding an individual's entitlement to pay.

Even if this Court determines the *Dock* Court correctly interpreted Article 75(a), the Government's writ should still not be granted. *Dock* and *Combs** are inapplicable because both concern a post-hoc analysis regarding an individual's entitlement to pay after being retried and resentenced. These cases determine what pay, if any, the accused is entitled to when the findings and sentence of his first trial are set aside and he has been convicted at the rehearing. These decisions have nothing to do with whether a military judge may award confinement credit. *Dock* and *Combs** only address what pay a plaintiff is entitled to while he awaits rehearing either in a confined status or when other convictions remain. SSgt

[55] *See* U.S. CONST. amend. XIII, § 1.
[56] *See United States v. Warner*, 25 M.J. 64, 65-66 (C.M.A. 1987).

Howell's pay claim would likely succeed given that he was in a full-duty status with no valid convictions.

4. Neither case disturbs this Court's holding that reduction in rank amounts to punishment under Article 13.

These cases do not address whether the Government's actions in this case amount to unlawful pretrial punishment. Neither *Dock* nor *Combs** addressed whether ignoring a court order to set aside the findings and sentence and thereafter imposing forfeitures and reduction in rank constitute punishment under Article 13. In fact, the *Combs** court explained:

> We are not holding, however that the CAAF was, in fact, erroneous, only that plaintiff is entitled to pay at the rate of E-1. . . . The CAAF's decision merely stated the plaintiff should have been held at the rank of E-6 during the relevant periods, and gave him confinement credit for the denial of such, without actually ordering the Air Force to pay him the difference between E-1 and E-6. . . . Thus actual pay was not awarded. As a consequence, we see the part of the CAAF opinion that says plaintiff should have been paid at the E-6 rate as dicta to its holding that the Air Force violated [Article 13, UCMJ]. Accordingly, we rule as above with no comment, nor criticism, of the CAAF's 1997 holding that the Air Force violated [Article 13, UCMJ] by reducing plaintiff in rank to E-1, an issue we do not address herein.[57]

The *Combs** Court deferred to this Court and recognized that determining pretrial punishment under Article 13 is the purview of the military justice system. Thus, cases addressing entitlement to pay are not instructive on issues of what

[57] 50 Fed. Cl. at 604.

constitutes pretrial punishment under Article 13 and do not disturb this Court's holding in *Combs*.

B. The military judge correctly followed this Court's precedent regarding interpretations of Article 75(a) and Article 13.

The Government also argues that the military judge erred when he rejected *Dock* and *Combs** because the Court of Federal Claims and the Federal Circuit are the courts of competent jurisdiction to interpret Article 75(a) and to resolve issues of pay entitlement. But this argument fails to recognize that this Court is the court of competent jurisdiction to interpret provisions of the UCMJ and to determine matters of military justice.[58] The Court of Federal Claims and the Federal Circuit should have deferred to this Court's interpretation of the UCMJ.[59] As such, the military judge could not have exceeded his authority when he relied on this Court's controlling precedent to award SSgt Howell confinement credit.

The military judge relied on this Court's interpretation of Article 75(a) set forth in *Keys v. Cole*, as well as this Court's decisions regarding Article 13 in *United States v. Combs,*[60] *United States v. Fischer,*[61] *and United States v.*

[58] 10 U.S.C. § 867(a)(2) (2012).
[59] *See Combs**, 50 Fed. Cl. at 604.
[60] 31 M.J. 228, 232 (C.M.A. 1990).
[61] 61 M.J. 415 (C.A.A.F. 2005).

McCarthy,[62] to reach his conclusion that the Government engaged in unlawful pretrial punishment of SSgt Howell.

In *Keys v. Cole*, this Court explained:

> It is clear to us that the unambiguous language of this statute [Article 75(a), UCMJ] implies that, if a new trial or rehearing is ordered, as in this case, all property -- *i.e.* forfeitures -- will *not* be restored until that rehearing is held. Again, of course, **this provision would not entitle the United States to *continue* in the interim to withhold pay otherwise due by relying on the forfeiture element of a set-aside sentence.** *See generally* Art. 13; *cf. Moore v. Akins*, *supra.* However, it does quite clearly entitle the United States to *retain* pay *already* withheld prior to the sentence being set aside, until such time as either a decision is made not to hold a rehearing or a rehearing is held.[63]

In *United States v. Combs*, this Court held "reduction in rank is a well-established punishment, which unlawfully imposed, warrants sentence relief" under Article 13.[64] This Court found that the Combs had been punished under Article 13 during the interim period between his original trial and his rehearing. During the interim period between his two trials, Combs was released from confinement, but stripped of his rank as an E-6, and his pay was reduced to that of an E-1.[65] Based on these facts, this Court awarded twenty months of confinement

[62] 47. M.J. 162 (C.A.A.F. 1997).
[63] 31 M.J. at 232 (italics in original) (bold emphasis added).
[64] 47 M.J. 330, 333 (C.A.A.F. 1997).
[65] *Id*. at 332, 334.

credit for the period between the remand of his case for a sentence rehearing and his rehearing.[66]

Chief Judge Cox, concurring in the result, found Combs was "entitled to pretrial credit for his interim period."[67] He explained: "This case is simple to me. Appellant was deprived of his status as an ordinary Technical Sergeant during the pendency of his rehearing. The point is *the fact* that his rank was reduced, not whether such reduction was right or wrong as a matter of law." [68]

Under *Fischer*, the Government's actions may also constitute unlawful pretrial punishment if there is punitive effect, regardless of any punitive intent.[69]

Under *McCarthy*, the Government's actions may constitute unlawful pretrial punishment if it is arbitrary and purposeless.[70]

The military judge's reliance on the aforementioned case law demonstrates that he did not exceed his authority. By recognizing that *Dock* and *Combs* are inapplicable, the military judge correctly deferred to this Court's interpretation of Article 75(a) set forth in *Keys*. *Keys* correctly recognized that Article 75(a) only addresses what was taken from the accused as a result of the first trial and what impact a later rehearing has on what was already taken from him. Article 75(a)

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[66] *Id*. at 334.
[67] *Id*. at 334 (Cox, C.J., concurring).
[68] *Id*. (emphasis in the original).
[69] 61 M.J. at 421.
[70] 47 M.J. at 167.

does not address the rights, privileges, and property to which an accused is entitled during the interim period between an accused's first trial and rehearing.

Regarding Article 13, the military judge correctly identified that the Government's insistence on paying SSgt Howell as an E-1 despite a set aside of the findings and sentence constituted unlawful pretrial punishment. Recognizing that the Government's actions were punitive in effect, as well as arbitrary and purposeless,[71] the military judge's reliance on this Court's holdings in *Combs*, *Fischer*, and *McCarthy* demonstrate he did not exceed his authority.

While the Court of Federal Claims and Federal Circuit may determine how much pay an accused is entitled to, the ultimate question of whether the Government's actions constitute illegal pretrial punishment is the purview of the military justice system. Here, the Government cannot establish that the military judge even abused his discretion—much less usurped power—simply by following this Court's precedent in awarding Article 13 credit.

C. *Chevron* deference is unwarranted.

The Government argues that the military judge erred because he did not give proper deference to DFAS' interpretation of Article 75(a). But such deference is unwarranted given that Article 75(a)'s explicit delegation of rule-making authority to the President is limited to the what was taken away from the accused as a result

[71] See *infra*, Argument section IV.

of his first court martial.[72] Article 75(a) does not address the interim period while the accused awaits completion of his rehearing.[73]

Although Article 75(a) is silent regarding the interim period while an accused awaits rehearing, an agency's interpretation is only lawful if it is a permissible interpretation of a statute.[74] DFAS regulations and legal opinions fail to acknowledge this Court's interpretation of Article 75(a) in *Keys*, as well as the requirement to return the accused to his pretrial status upon the setting aside of the findings and sentence.[75] They also fail to address concerns under Article 13.[76] As such, any reading of DFAS regulations prohibiting pay while the accused awaits rehearing in a full-duty status deserve no deference.

Article 75(a)'s limited applicability to SSgt Howell's situation is further underscored by the recommendations of the Military Justice Review Group

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[72] *See* 10 U.S.C. § 875(a)(2) (2012) ("Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing.").
[73] *See Keys*, 31 M.J. at 232.
[74] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984) ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").
[75] J.A. at 304-06.
[76] *Id.*

(MJRG).[77] The MJRG identified this gap, recommending that the President be provided rule-making authority to address the situation SSgt Howell and other similarly situated servicemembers face while awaiting rehearing, and are in a full-duty status.[78] Given that the current regulations do not squarely address this issue, the MJRG's recommendation underscores the Government's impermissible construction of the statute.

Conclusion

The Government must meet its burden to show it has a "clear and indisputable" right to issuance of the writ. As the NMCCA plurality recognized, to establish a "clear and indisputable" right, the Government must show "there is no debate" on the issue.[79] The NMCCA's decision was split 4-4. Clearly, there is a robust debate, not a clear and indisputable right to issuance of a writ reversing the military judge.

Furthermore, the Government fails to demonstrate that issuance of the writ is necessary or appropriate. Given that the military judge gave proper deference to this Court's controlling legal precedent, the Government fails to establish usurpation of judicial authority.

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[77] J.A. at 388-90.
[78] J.A. at 390.
[79] *Jones*, 2015 CCA LEXIS 573, at *8.

III

THE LOWER COURT DID NOT ERR WHEN IT CONCLUDED THAT THE GOVERNMENT COULD NO LONGER EXECUTE A SENTENCE ONCE THE ORIGINAL FINDINGS AND SENTENCE WERE SET ASIDE AND INVALIDATED.

Discussion:

The Government argues that when the findings and sentence are set aside, "every part of the sentence except the dishonorable discharge remained executed while [SSgt Howell] was pending rehearing."[80] However, as discussed below, this argument fails for the following three reasons:

1. A rehearing returns an accused to his pretrial status;
2. An executed sentence requires a valid conviction to remain in effect; and
3. Article 75 does not allow the Government to continue executing a sentence after it is set aside.

A. A rehearing returns an accused to his pretrial status.

The Government asserts that setting aside the findings and sentence does not return the accused to his pretrial rank and pay-grade. However, "the effect of ordering a rehearing is . . . to place the United States and the accused in the same position as they were at the beginning of the original trial."[81]

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[80] Govt. Br. at 39.

[81] *United States v. Von Bergen*, 67 M.J. 290, 294 (C.A.A.F. 2009) (internal citations omitted).

The lower court correctly recognized this requirement. Relying on this Court's decision in *United States v. Johnson*,[82] the lower court identified the importance of placing the accused in the same position as he was prior to his original trial.[83] In *Johnson*, this Court explained:

> "An order granting a new trial reopens the whole case, which then stands for trial de novo, and places the accused in the same position as if no trial had been had." 24 CJS, Criminal Law, § 1511. As stated in *Salisbury v Grimes*, 223 Ga 776, 158 SE2d 412 (1967), the grant of a new trial "wiped the slate clean as if no previous conviction and sentence had existed." *See also Manor v. Barry*, 62 Ariz 122, 154 P2d 374 (1944), and 39 Am Jur, New Trial, § 204, wherein it is declared: 'An order directing a new trial has the effect of vacating the proceedings and leaving the case as though no trial had been had.'[84]

Although Johnson dealt with a new trial pursuant to Article 73, its discussion of a clean slate requirement squarely addresses SSgt Howell's situation. The only difference between a new trial and a rehearing is the maximum punishment the accused may receive.[85] Substantively and procedurally, they are the same.[86]

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[82] *Johnson v. United States*, 19 C.M.A. 407, 42 C.M.R. 9 (C.M.A. 1970).
[83] *Id.* at 10 ("implicit in ordering a new trial is a change in the accused's status from sentenced prisoner to one awaiting retrial.") (citation omitted).
[84] *Id.*
[85] *See* 10 U.S.C. § 867(a)(2) (2012) (capping maximum sentence to what was adjudged at the previous court-martial).
[86] *See* R.C.M. 810(a)(1) (providing that a "[rehearing] procedure shall be the same as in an original trial.").

In addition, the requirement to return the accused to his pretrial status is further supported by this Court's decisions in *United States v. Staten*,[87] *United States v. Von Bergen*,[88] *United States v. Beaty*,[89] and *United States v. Ruppel*.[90] In *Staten*, this Court explained:

> The effect of directing a rehearing demonstrates that the rehearing may normally be regarded as the ordering of another trial…. Reversal of a conviction by appellate authority and the direction of a rehearing of the case generally leaves the proceedings in the same position as before trial. . . [.][91]

The requirement to return the accused to his pretrial status and start anew is reinforced by a rehearing's procedural requirements. Under *Von Bergen*, the accused is entitled to a new Article 32 hearing upon remand unless he/she waives it prior to his/her rehearing. This Court relied on its previous holding in *Staten* to reach this conclusion.[92] Under *Beaty*, the accused is entitled to the same trial defense counsel as he had in his first trial.[93] Under *Ruppel*, the military judge presiding over the rehearing is not bound by the decisions made by the original military judge of the accused's first trial.[94]

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[87] 21 C.M.A. 493, 495, 45 C.M.R. 267, 269 (C.M.A. 1972).
[88] 67 M.J. 290, 294 (C.A.A.F. 2009).
[89] 25 M.J. 311, 314 (1987).
[90] 49 M.J. 247, 251 (C.A.A.F. 1998).
[91] *Staten*, 21 C.M.A. at 495 (internal citations omitted).
[92] 67 M.J. at 294.
[93] 25 M.J. at 314.
[94] 49 M.J. at 251.

This Court's emphasis on starting anew when a rehearing is ordered requires the accused be placed in the same position as he once was pretrial.[95] To do otherwise, allows the Government to continue to punish the accused without due process or a valid conviction. Thus, the lower court did not err when it recognized the necessity of returning the accused to his pretrial status.

B. An executed sentence requires a valid conviction in order for it to remain in effect.

The Government further argues that Articles 57, 71, and 75, permit it to withhold pay from SSgt Howell while awaiting a rehearing because the sentence remains executed. But this argument ignores the important prerequisite to an executed sentence–a valid conviction.

Upon the setting aside of the findings and the sentence, the Government no longer has a valid conviction to support its actions. The lower court correctly recognized that "once a court-martial sentence is set aside and thus invalidated, the Government can no longer execute it."[96]

Articles 57[97] and 71[98] only come into effect with a valid conviction adjudged at the court-martial. If an accused's convictions are deemed invalid, such as when

[95] 67 M.J. at 294.
[96] J.A. at 9.
[97] Under Article 57(a), reduction in rank and forfeiture of pay are automatically executed, as a matter of law, fourteen days after the sentence is adjudged or when the Convening Authority takes its action, whichever comes first. *See* 10 U.S.C. § 857(a) (2012). Under Article 57(c), the running of confinement begins

the lower court sets aside the findings and sentence, the sentence becomes unexecuted as there is no conviction to support the executed sentence. This is the only logical conclusion given that a set aside of the findings and sentence returns the accused to his/her pretrial status.[99]

Moreover, a set-aside of the findings and sentence also sets aside the Convening Authority's action (CA's action).[100] Without a CA's action, Article 71 is inoperative. Therefore, without a valid conviction or CA's action, the sentence can no longer be executed.

Furthermore, the Government's interpretation of Articles 57, 71, and 75(a) leads to absurd results. When the ordinary meaning of a statute would lead to absurd results, courts must seek an alternative reading of the statutory text.[101]

Based on the Government's logic, the confinement portion of the sentence remains executed, regardless of whether SSgt Howell is confined. For every day

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immediately. The portion of the sentence concerning confinement is considered executed, once the Convening authority takes action. *See* 10 U.S.C. § 857(a) (2012).

[98] Under Article 71, the Convening Authority's action (CA's action) executes any remaining part of the sentence except for discharge or death. *See* 10 U.S.C. § 871 (2012).

[99] *See Von Bergen*, 67 M.J. at 294.

[100] *United States v. Shelton*, 53 M.J. 387, 391 (C.A.A.F. 2000) (Gierke, J. concurring in part and dissenting in part) ("While it is true that setting aside a sentence always has the effect of setting aside the convening authority's action, setting aside the convening authority's action does not set aside the sentence.")

[101] *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

he awaits rehearing, SSgt Howell should then receive post-trial confinement credit. But this is not the case given that the Government must release the accused after the findings and sentence are set aside. Should the Government wish for SSgt Howell to remained confined, it must do so in compliance with R.C.M 305. Under this logic, the Government may not pick and choose the punishments it chooses to continue to execute. But this is exactly what the Government did.

C. Article 75 does not allow the Government to continue executing a sentence while the accused awaits his rehearing.

The Government argues that Article 75(a) precludes it from returning SSgt Howell to his pretrial rank and paygrade. It relies on this Court's decision in *United States v. Shelton*[102] to support its theory. But *Shelton* is inapplicable because it does not address when the findings and sentence are entirely set aside and the accused awaits rehearing in a full-duty status.

In *Shelton*, the Court of Criminal Appeals (CCA) set aside the Convening Authority's Action (CA's Action) due to an erroneous Staff Judge Advocate Recommendation and remanded the case for new post-trial processing; neither the CCA nor the CA set aside any findings, or any portion of the sentence.[103] This Court specified an issue asking what the effect of setting aside the CA's Action

[102] 53 M.J. 387(C.A.A.F. 2000).
[103] *Id*. at 388.

was and whether portions of the sentence were ineffective until the section CA's Action.[104]

In resolving the issue, this Court held that the accused is not entitled to pay at his pretrial rank and pay-grade for the period between the original CA's action and its new action where the original action had been set aside.[105] In reaching this narrow holding,[106] the *Shelton* Court explained that Article 75(a) does not apply unless a finding or a portion of the sentence has been set aside or disapproved, which did not occur in *Shelton*.[107] Thus, *Shelton* does not address the interim period that exists in SSgt Howell's case where the accused awaits completion of his/her rehearing. This Court explained:

> By its terms, Article 75(a) applies to situations where the sentence was set aside or disapproved. Under Article 75(a), when that portion of a court-marital sentence that includes forfeitures has been executed, and the executed sentence subsequently is set aside or disapproved, the amount so forfeited must be restored except when that amount is included in a sentence imposed upon a new trial or rehearing. The Article applies to the "executed part of a court-martial sentence," precludes restoration when "such executed part is included in a sentence imposed upon the new trial or rehearing," and makes no distinction between executed sentences that are disapproved as a

[104] *Id*. at 389.
[105] *Id.* at 391.
[106] *Id.* ("We conclude that restoration under the facts of appellant's case would run counter to both congressional intent and to this Court's efforts to encourage corrective action of erroneous statements in the staff judge advocates'recommendations."); *see also id.* at 389, n.2 ("As a result, it is unlikely that the issue presented in this case, involving the relationship between Article 75(a) and action by a convening authority on forfeitures, will recur in the future.").
[107] *Id.* at 389.

> result of trial error and executed sentences disapproved as a result of convening authority error.[108]

As this discussion of Article 75(a) demonstrates, "restoration" only refers to what was taken from the accused as a result of his first court-martial. The statute does not address the interim period while he awaits his rehearing. This interpretation of Article 75(a) is consistent with *Keys*.

Moreover, *Shelton*'s applicability is limited given that forfeitures of pay and reduction in rank are now executed fourteen days after an adjudged sentence.[109] At the time of *Shelton*'s trial, forfeitures could only be executed under Article 57(a) only upon approval of the Convening Authority.[110] If *Shelton* occurred today, setting aside just the CA's action would not "un-execute" the portion of the sentence related to forfeitures of pay and reduction in rank. Rather, as a matter of law, if only the CA's action is set aside, forfeitures would remain executed.

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[108] *Id.*
[109] *See* 10 U.S.C. § 857(a) (2012).
[110] 53 M.J. at 389, n.2.

IV

PAYING A SERVICEMEMBER AT PAY-GRADE E-1 WHILE HE AWAITS COMPLETION OF HIS REHEARING IN A FULL-DUTY STATUS AS AN E-6 CONSTITUTES ILLEGAL PRETRIAL PUNISHMENT UNDER ARTICLE 13.

Standard of Review

The Government argues that the "any determination of whether an accused is entitled to credit for unlawful pretrial punishment is reviewed *de novo*."[111] During the normal course of appellate review, a military judge's decision to award confinement credit is reviewed for an abuse of discretion,[112] while the denial of Article 13 credit is reviewed de novo.[113] However, the Government fails to recognize that only the accused may challenge a military judge's awarding or denial of confinement credit.[114] Due to the liberty interest at stake, these standards of review are reserved for the accused, not the Government.

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[111] Govt. Br. at 44 (citing *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005)).

[112] *See United States v. Williams*, 68 M.J. 252, 257 (C.A.A.F. 2010) (finding that the militaryjudge did not abuse his discretion in awarding confinement credit; *see also United States v. Hancock*, 2011 CCA LEXIS 114, *10-11 (N-M. Ct. Crim. App. June 28, 2011) (unpublished) (discussing that a military judge's decision to award confinement credit under Article 13 isreviewed under an abuse of discretion standard).

[113] *Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (noting that the ultimate question of whether the appellant is entitled to credit under Article 13, UCMJ, is reviewed *de novo* and that the appellant bears the burden of establishing his entitlement to credit when a military judge denies an appellant's motion for relief).

[114] 10 U.S.C. 10 U.S.C. § 866 (2012).

In the context of a writ, this Court must review a military judge's decision to award confinement credit for "*clear abuse of discretion* or usurpation of judicial power"[115] as the awarding of confinement credit falls squarely within his/her authority and discretion.[116] "[W]hen a trial judge performs a discretionary act within the bounds of his legal authority, a superior tribunal will not, in the exercise of extraordinary writ powers, substitute its own discretion for that of the trial judge."[117]

Discussion

Article 13 prohibits two types of activity: (1) the intentional imposition of punishment on an accused prior to trial; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial.[118]

Forfeiture of pay and reduction in rank are well-established punishments, which unlawfully imposed, may amount to pretrial punishment under Article 13.[119] The Government's actions may also constitute unlawful pretrial punishment if

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[115] *Bankers Life*, 346 U.S.at 383 (emphasis added).
[116] *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001) (citing *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983) (discussing that "A military judge has broad authority to order administrative credit against adjudged confinement as a remedy for Article 13 violations.").
[117] *Redding*, 11 M.J. at 109 (internal citations omitted).
[118] *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997).
[119] *See generally United States v. Stebbins*, 61 M.J. 366, 371-72 (C.A.A.F. 2005) (discussing forfeitures of pay as punishment); *see also Combs*, 47 M.J. at 333 (holding that reduction in rank, unlawfully imposed, warrants sentence relief under Article 13).

there is punitive effect, regardless of any punitive intent.[120] As discussed below, the Government's action of paying SSgt Howell at the E-1 rate pending rehearing constituted illegal pretrial punishment.

A. The Government intentionally and unlawfully punished SSgt Howell.

In the present case, the Government's affirmative act of limiting SSgt Howell to E-1 pay amounted to unlawful pretrial punishment under Article 13. The sole basis for paying SSgt Howell as an E-1 is the sentence from his first trial. The Government concedes this point.[121] However, the lower court set aside the findings and sentence to all charges and specifications. Upon issuance of the mandate carrying out this Court's decision, SSgt Howell should have been restored to his same pre-trial position –a Staff Sergeant receiving full pay. This did not happen.

Instead, the Government took intentional steps to continue executing the portion of his sentence affecting his rank and paid him as an E-1. The Government consulted with DFAS, the General Counsel's office of DFAS, and Judge Advocate Division of Headquarters Marine Corps.[122] After being presented with different options, along with full knowledge of this Court's order, the Government decided

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[120] *See United States v. Fischer*, 61 M.J. 415, 420 (C.A.A.F. 2005) ("Under an Article 13 claim, we look to whether there was intent to punish or a punitive effect.").
[121] J.A. at 16-17.
[122] J.A. at 222-53.

to pay SSgt Howell as an E-1.[123] Though the Government allowed SSgt Howell to wear the rank of staff sergeant, this was a nominal gesture disguising the fact that it was still executing part of the court-martial sentence. Here, the Government's affirmative act of paying SSgt Howell as an E-1, and its disregard for this Court's order setting aside the findings of guilt and the adjudged sentence are direct evidence of its intent to impose unlawful punishment.

B. Even if the Government did not intend to punish SSgt Howell, the punitive effect of the Government's actions warrant relief.

Even if this Court determines there was no intent by the Government to punish SSgt Howell, the Government's actions still had a punitive effect. A punitive effect, even absent a punitive intent, may serve as a basis for relief.

As Chief Judge Cox points out in *Combs*, the focus of the inquiry under Article 13 is what happened to the accused as a result of the Government's actions.[124] With this focus, allowing SSgt Howell to wear the rank of staff sergeant merely disguised the fact that the Government was still executing part of the court-martial sentence. It is also a form of reduction in rank.

Assuming *arguendo* the Government's decision to follow the DFAS legal opinion was lawful and in good faith, this does not change the fact that SSgt Howell suffered. The regulations and case law the Government relied on to

[123] J.A. at 164-67; *see also* J.A. at 246-48.
[124] 47 M.J. at 334.

deprive SSgt Howell unnecessarily imposed forfeiture upon him in the absence of any due process or adjudication of guilt. The effect of this action as punishment is illustrated by how the forfeiture is linked to the results of his first trial. Thus, the Government's actions had a punitive effect even without malicious intent.

The Government argues that application of the pay regulations to those awaiting rehearing do not constitute illegal pretrial punishment. It relies on this Court's decision in *Fischer*, as well as the Air Force Court of Criminal Appeals decisions in *United States v. Dodge*[125] and *United States v. Wilson*.[126] But SSgt Howell's case is distinct from the appellants in *Fischer*, *Dodge*, and *Wilson*. SSgt Howell was not confined like the appellant in *Fischer*, nor was he awaiting rehearing on sentence alone like the appellants in *Dodge* and *Wilson*. Furthermore, SSgt Howell properly raised this issue at trial.[127] The Government in *Dodge* and *Wilson* had potentially other permissible bases to withhold pay (such as confinement beyond EAOS and the findings not being set aside). Therefore, these cases do not support the broad proposition that the Government's withholding of pay in all cases while the accused awaits rehearing is not illegal pretrial punishment. Instead, when compared to a case where the findings and sentence are

[125] 60 M.J. 873 (A.F. Ct. Crim. App. 2005).
[126] No. 37486, 2015 CCA LEXIS 231 (A.F. Ct. Crim. App. June 3, 2015).
[127] *See Dodge,* 60 M.J. at 878; *Wilson*, 2015 CCA LEXIS 231 at *13. Both Dodge and Wilson raised the Article 13 issue for the first time on appeal.

completely set aside, these cases demonstrate the opposite and further underscore the illegal punishment imposed on SSgt Howell.

The punitive effect of the Government's actions is further highlighted when analyzed under the seven-factor test set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez.*[128] In *Mendoza-Martinez*, the Supreme Court held that a policy or regulation may have a punitive effect after balancing the following factors: (1) Affirmative disability or restraint; (2) historical perspective; (3) scienter; (4) retribution and deterrence; (5) application to criminal behavior; (6) alternative purpose; and (7) excessiveness.[129] While this Court has not held that this multifactor test applies in the Article 13 context,[130] they nonetheless provide a useful framework to identify punitive effect.

As discussed below, the balancing of these factors supports a finding of punitive effect:

1. Affirmative disability or restraint. Paying SSgt Howell as an E-1 is both an affirmative disability and restraint because it fails to return him to his pretrial status and deprives him of the pay he is entitled to.

2. Historical perspective. Reduction in rank and pay-grade as well as forfeiture of pay are recognized punishments under the UCMJ. Without a valid

[128] 372 U.S. 144, 168-69 (1963).
[129] *Id.*
[130] *See Fischer*, 61 M.J. at 420.

conviction, the Government had no basis to pay SSgt Howell at an E-1 rate. Instead, it chose to continue punishing SSgt Howell without a valid conviction.

3. Scienter. The Government's policy only applies through a finding of guilty (whether through the accused's pleas or verdict) at the original court-martial. This regulation imposes a forfeiture upon a servicemember in the absence of any due process or adjudication of guilt.

4. Retribution and deterrence. The Government's policy only applies if the accused is convicted at his first trial and receives a rehearing, usually due to the Government's legal errors.

5. Application to criminal behavior. The Government's withholding of pay only applies to those who have been falsely convicted at their original trial and await a rehearing. Servicemembers who await court-martial do not face such forfeitures and reduction in rank, and pay, prior to trial.

6. Alternative purpose. The Government argues that compliance with fiscal law, as well as *Dock* and *Combs* supports its actions. But in doing so, the Government ignores the lower court's order setting aside the findings and sentence, as well as this Court's decisions in *Von Bergen*, *Combs*, and *Keys*.

7. Excessiveness. The Government's actions are excessive given that it imposed punishment upon SSgt Howell in the absence of any due process or adjudication of guilt.

These factors weigh in favor of SSgt Howell. Even if there is no punitive intent, the Government unnecessarily punished a servicemember without due process or adjudication of guilt. Thus, the Government's actions towards SSgt Howell warrant relief under Article 13.

C. The Government's actions do not reasonably relate to any legitimate Government interest and thus warrant relief.

"[C]onditions which are 'arbitrary or purposeless' and are 'not reasonably related to a legitimate' Government objective may allow a permissible inference of punishment."[131]

Here, the Government's decision is arbitrary and purposeless given the fact that this Court set aside the findings and sentence of SSgt Howell's first trial. The Government, in effect, nullified this Court's order to set aside both the findings *and* the sentence. By paying SSgt Howell as an E-1, the Government unlawfully imposed punishment since there was no conviction or adjudged sentence upon which to base its actions.

Furthermore, the arbitrary and purposeless nature of the Government's actions is demonstrated by the fact that it allowed SSgt Howell to wear the rank of a staff sergeant, but nonetheless paid him as an E-1. Since the basis for paying him as an E-1 was linked to the results of his first trial, as the Government concedes,

[131] *See McCarthy*, 47 M.J. at 167 (internal citations omitted).

there was simply no rational basis to let him wear the insignia of a staff sergeant and perform the duties, but still pay him as an E-1.[132]

The arbitrary and purposeless nature of the Government's actions is also underscored by its disparate treatment of those awaiting completion of their rehearing. While the Government continued to punish SSgt Howell, it restored other servicemembers to their pretrial rank and pay-grades while they awaited their rehearings.[133] Such unequal treatment amongst servicemembers is direct evidence of the arbitrary and purposeless nature of the Government's actions.

Lastly, the arbitrary and purposeless nature of the government's actions can be seen in how the Government treats officers and enlisted servicemembers who await rehearing differently. The Government argues that because the sentence remains executed, SSgt Howell must be paid as an E-1. However, if SSgt Howell was Major Howell, and was not in pre-trial confinement, there would be no question that he would receive his full pay at pay-grade O-4. The Government may respond that this is because there is no mechanism for a court-martial to

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[132] The Government allowed SSgt Howell to wear the rank of a staff sergeant during the rehearing so that he was not prejudiced in front of the members by appearing to have already been punished. However, the members (one Lieutenant Colonel, two Captains, one Master Sergeant, one First Sergeant, and four Gunnery Sergeants) were informed during sentencing that SSgt Howell's monthly pay was only $1546.80 instead of $ 3,627.30. J.A. at 1471-72. This situation surely prejudiced SSgt Howell at sentencing and further underscores how the Government's actions are arbitrary and purposeless.

[133] *See supra* at 5.

reduce an officer in rank.[134] Still, what it highlights is that the Government's version of Article 75 treats officers and enlisted differently. While many statutes treat officers and enlisted differently, there is a military purpose for such differentiation. Here, there is none. Article 75(a) makes no distinction between officers and enlisted. This disparate treatment further highlights the unlawful pretrial punishment that occurs even if there is no punitive intent and the arbitrary and purposeless nature of the Government's actions.

Conclusion

The Government withheld over $23,000 in basic pay from SSgt Howell while he awaited his rehearing. This amounts to over half the pay he was entitled to for the nearly one year he awaited his rehearing. As the military judge clearly recognized, there is simply no justifiable reason for this. The Government punished SSgt Howell before his second court-martial even began. Thus, the military judge did not usurp his authority when he determined that the Government's actions amounted to unlawful pretrial punishment that warranted confinement credit under Article 13. The Government has not established a clear and indisputable right to the writ.

[134] *See* R.C.M. 1003 (discussing punishment of officers, which does not permit officers to be reduced in rank or in pay-grade).

Wherefore, should this Court reach the merits, SSgt Howell respectfully requests this Court affirm the lower court's decision denying, in part, the Government's petition for extraordinary relief.

Respectfully submitted,

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