IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

Cross-Appellant

v.

United States,
Cross-Appellee

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

BRIEF ON BEHALF OF CROSS-APPELLANT

Crim.App. Dkt. No. 201200264

USCA Dkt. No. _____/MC

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

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Introduction

Staff Sergeant (SSgt) Stephen P. Howell, U.S. Marine Corps, was convicted at a general court-martial in 2012. The lower court set aside his convictions, and he was retried and again convicted. While awaiting retrial, the Government released SSgt Howell from confinement, restored him to a full-duty status, and allowed him to wear the rank of Staff Sergeant. But it refused to pay him at pay-grade E-6 and instead forced him to remain at pay-grade E-1. The military judge granted SSgt Howell's Article 13 motion and awarded him day-for-day confinement credit for the period during which the Government paid him as an E-1 (343 days).

The Government petitioned the lower court under the All Writs Act to overturn the military judge's decision. The lower court determined it had jurisdiction to hear the Government's petition.[1]

In order to petition for extraordinary relief under the All Writs Act, the petitioner must invoke a court's existing statutory jurisdiction. Article 66, UCMJ, provides the only statutory basis to review the military judge's decision to award confinement credit. But the Government may not invoke the lower court's Article 66 jurisdiction to petition for extraordinary relief because: (1) the lower court's Article 66 jurisdiction is invoked by the accused, not the Government; (2) Article

[1] 28 U.S.C. § 1651; *United States v. Jones*, 2015 CCA LEXIS 573 at *5-6 (N-M. Ct. Crim. App. Dec. 29, 2015).

62, UCMJ, is the sole avenue for the Government to bring interlocutory appeals; and (3) the All Writs Act is not a broad grant of jurisdiction to the Courts of Criminal Appeals to hear the Government's petitions for extraordinary relief.

By finding jurisdiction, the lower court allowed the Government to invoke Article 66, which confers appellate rights to an accused, as the jurisdictional hook to invoke the All Writs Act. This was incorrect. Thus, this Court should overturn the lower court's decision granting the Government's petition in part.

Issue Presented

WHETHER THE GOVERNMENT MAY INVOKE ARTICLE 66, UCMJ, AS THE JURISDICTIONAL BASIS FOR AN EXTRAORDINARY WRIT PURSUANT TO THE ALL WRITS ACT WHEN THE ISSUE IS NOT INCLUDED AS A BASIS FOR GOVERNMENT APPEAL UNDER ARTICLE 62, UCMJ.

Statement of Statutory Jurisdiction

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

Statement of the Case

On October 11, 2012, a panel of members with enlisted representation, sitting as a general court-martial, convicted SSgt Howell, contrary to his pleas, of

[2] 10 U.S.C. § 867(a)(2) (2012).

violating a lawful general regulation, rape, aggravated sexual contact, forcible sodomy, assault consummated by battery, and adultery, in violation of Articles 92, 120, 125, 128 and 134, UCMJ.[3] The members then sentenced SSgt Howell to eighteen years' confinement, reduction to pay-grade E-1, total forfeitures, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed.

On May 22, 2014, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside the findings and sentence and authorized a rehearing.[4] On June 25, 2014, the Convening Authority ordered a rehearing.[5]

On April 29, 2015, a panel of members with enlisted representation, sitting as a general court-martial, again convicted SSgt Howell, contrary to his pleas, of violating a lawful general regulation, abusive sexual contact, and adultery in violation of Articles 92, 120, and 134, UCMJ.[6] The members then sentenced SSgt Howell to nine years' confinement, reduction to pay-grade E-1, total forfeitures, and a dishonorable discharge.[7] The military judge ordered 343 days of

[3] 10 U.S.C. §§ 892, 920, 925, 928, 934 (2012).
[4] *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014).
[5] Appellate Ex. V.
[6] 10 U.S.C. §§ 892, 920, 934 (2012).
[7] J.A. at 221.

confinement credit pursuant to Article 13, UCMJ, because the Government refused to pay SSgt Howell above a private's pay for the year before his rehearing.[8]

On August 10, 2015, the Government petitioned the lower court for a Writ of Prohibition seeking to overturn the military judge's decision to award confinement credit.[9] On August 18, 2015, the lower court ordered the Respondent, Lieutenant Colonel David M. Jones, USMC, and the Real Party in Interest, SSgt Stephen P. Howell, USMC, to show cause. [10] On October 15, 2015, the lower court, sitting *en banc*, held oral argument. [11]

On December 29, 2015, the lower court granted the Government's petition in part and denied in part. [12] The lower court issued a Writ of Prohibition vacating the military judge's award of confinement credit for the thirty-five-day period from May 22, 2014, the date the lower court set aside the sentence, to June 25, 2014, the date the convening authority ordered a rehearing. [13] But the lower court denied the Government's petition for the remaining portion of confinement credit (308 days).[14]

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[8] J.A. at 253.
[9] J.A. at 53.
[10] J.A. at 138.
[11] J.A. at 139.
[12] J.A. at 15.
[13] J.A. at 15.
[14] J.A. at 15.

On January 18, 2016, SSgt Howell filed a writ-appeal with this Court, challenging the lower court's jurisdiction to hear the Government's petition. On January 29, 2016, the Government filed its answer. On February 5, 2016, SSgt Howell filed his reply. The writ-appeal is pending with this Court.

On February 29, 2016 the Judge Advocate General of the Navy certified this case to this Court, requesting review of four issues—three requested by the Government and one by the Defense.

Statement of Facts

On June 26, 2014, the Government released SSgt Howell from confinement.[15] The Government assigned him to Headquarters and Service Battalion (H&S Bn), Marine Corps Recruit Depot, Parris Island, South Carolina.[16]

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.[17] However, the Government forced him to remain in his post-trial pay-grade of E-1,which it had done since his case was overturned on May 22, 2014.[18] SSgt Howell continued to work as a Staff Sergeant until his rehearing was completed.[19]

[15] J.A. at 222-253.
[16] J.A. at 222-253.
[17] J.A. at 222-253.
[18] J.A. at 222-253.
[19] J.A. at 222-253.

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.[20]

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.[21]

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.[22] 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 applicable federal laws and regulations, SSgt Howell does not rate pay as a SSgt or back pay until conclusion of the rehearing.[23]

On September 17, 2014, SSgt Howell brought a motion for appropriate relief

[20] J.A. at 222-253.
[21] J.A. at 240.
[22] J.A. at 241-45.
[23] J.A. at 288-317.

to receive pay as an E-6.[24] 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.[25]

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.[26]

On November 13, 2014, the Government moved the military judge to reconsider his ruling.[27] In its motion, it attached a "formal legal opinion" from the Defense Finance and Accounting Service (DFAS), and requested the Court reconsider its decision.[28] 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 reduced in the original court-martial sentence."[29] DFAS failed to address Article 13 or cite the relevant case law.[30]

On November 25, 2014, SSgt Howell filed an answer and cross-motion

[24] J.A. at 222-253.
[25] J.A. at 222-253.
[26] J.A. at 253.
[27] J.A. at 284-287.
[28] J.A. at 304-06.
[29] J.A. at 304-06.
[30] J.A. at 304-06.

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.[31]

On February 26, 2015, the military judge denied the Government's motion for reconsideration, as well as the Defense's cross-motion.[32]

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.[33]

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.[34]

Summary of the Argument

The Government petitioned the lower court under the All Writs Act to overturn the military judge's decision to award confinement credit. To petition for extraordinary relief under the All Writs Act, the petitioner must invoke a court's existing statutory jurisdiction. Article 66 provides the only statutory basis to review the military judge's decision to award confinement credit.

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[31] J.A. at 304-06.
[32] J.A. at 318-23.
[33] J.A. at 222.
[34] This figure is calculated as the difference between the basic pay SSgt Howell received from May 22, 2014, to April 29, 2015, and 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).

By finding it had jurisdiction to entertain the Government's petition for the writ, the NMCCA allowed the Government to invoke the appellate rights of the accused as the jurisdictional hook to invoke the All Writs Act. As discussed below, the Government may not invoke the lower court's Article 66 jurisdiction to bring an extraordinary writ petition under the All Writs Act for the following three reasons:

1. The lower court's jurisdiction under Article 66 is invoked by the accused, not the Government;

2. Article 62 is the sole avenue for the Government to bring interlocutory appeals**;** and

3. The All Writs Act is not a broad grant of jurisdiction to the Courts of Criminal Appeals to hear the Government's petitions for extraordinary relief.

However, in order for the Government to invoke the All Writs Act, it must demonstrate that the military judge's ruling had a collateral impact on the Government's ability to present evidence or seek a conviction on all of the alleged charges or implicate any other basis for appeal under Article 62.

Standard of Review

Questions of jurisdiction are reviewed *de novo*.[35]

[35] *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

Discussion

The All Writs Act grants military courts the ability to issue writs when "in aid of their respective jurisdictions."[36] But the All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction.[37] Rather, the All Writs Act "confine[s] the power of the CAAF [and the lower courts] to issuing process 'in aid of' its existing statutory jurisdiction" and "does not enlarge that jurisdiction."[38] A court's ability to issue a writ depends on its existing statutory jurisdiction.[39]

The principle that Congress defines the jurisdiction of the lower federal courts "applies with added force to Article I tribunals."[40] That is especially true in military courts. "The military justice system is the last place courts should go about finding 'extensions' of jurisdiction beyond that conferred by

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[36] *United States v. Denedo*, 556 U.S. 904, 911 (2009) (quoting 28 U.S.C. § 1651(a)) (internal quotations omitted).
[37] *Id.*; *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999).
[38] *Goldsmith*, 526 U.S. at 534-535; *see also Noyd v. Bond*, 395 U.S. 683, 695, n.7 (1969) (although military courts can issue extraordinary writs in aid of their direct review jurisdiction, "[a] different question would, of course, arise in a case which the [courts are] not authorized to review under the governing statutes").
[39] *Clinton*, 536 U.S. at 534-35; *United States v. Arness*, 74 M.J. 441, 443 (C.A.A.F. 2015).
[40] *United States v. Denedo*, 556 U.S. 904, 912 (U.S. 2009).

statute."[41] "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act that is controlling."[42]

A. The lower court's jurisdiction under Article 66 is invoked by the accused, not the Government.

The lower court may not review a Government petition by invoking its jurisdiction under the All Writs Act via Article 66. To allow otherwise, forces SSgt Howell to loan his Article 66 appellate rights to the Government, aiding in his own prosecution.

The lower court's Article 66 review powers are invoked by the accused, not the Government.[43] Article 66 does not confer the Government the right to challenge a military judge's decision to award confinement credit.[44] The Government invokes the lower court's jurisdiction under Article 62, not Article 66.

In 2015, this Court held in *United States v. Arness*, that military appellate courts may not invoke their Article 66 jurisdiction to review cases or collateral

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[41] *See id*. at 922-23 (Roberts, C.J., dissenting) (discussing the limited jurisdiction of Article I courts imposed by Congress and emphasizing that "Article III courts have been given broad jurisdiction" unlike their Article I counterparts); *see also Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"); *Goldsmith*, 526 U.S. at 534-35 (discussing that Congress did not grant military courts of appeals "broad responsibility with respect to administration of military justice"; on the contrary, their jurisdiction is "narrowly circumscribed" by the governing statutes) (internal quotation marks omitted).
[42] *Carlisle v. United States*, 517 U.S. 416, 429 (1996).
[43] *See* 10 U.S.C. § 861 (discussing withdrawal from appellate review); *see also* 10 U.S.C. § 866(b)(2) (2012) (discussing appellant's right to waive appellate review).
[44] *See* 10 U.S.C. § 866 (2012).

matters that have no statutory basis.[45] In *Arness*, this Court considered whether the CCAs have jurisdiction to entertain petitions for extraordinary relief in Article 69(d) cases that were not referred to it by the Judge Advocate General of the services.[46] This Court concluded that the lower court lacked jurisdiction and explained that "[c]onsideration of extraordinary relief is not 'in aid' of the CCA's jurisdiction, [when] the CCA had none in the first place."[47] The writ "can only be used in aid of jurisdiction that already exists; it does not create or expand jurisdiction."[48] Accordingly, the lower courts and this Court may not review petitions for extraordinary relief that otherwise fall outside its statutory jurisdiction.[49]

Article 66 is the only UCMJ provision that provides *any* authority to the service courts or this Court to review a military judge's decision to award confinement credit and alleged Article 13 violations. The sole catalyst for such

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[45] 74 M.J. at 443.
[46] *Id.* at 442-43.
[47] *Id*. at 443 (noting that the lower court did not have jurisdiction to review every case that is subject to action by the Judge Advocate General pursuant to Article 69 and therefore could not entertain petitions for extraordinary relief in cases that were never referred to the lower court); *cf. United States v. Labella*, 75 M.J. 52 (C.A.A.F. 2015) (holding that the Air Force Court of Criminal Appeals lacked jurisdiction to grant the appellant's petition for reconsideration that was filed after the time for filing a petition for review by CAAF had expired).
[48] 74 M.J. at 444 (Baker, J., concurring).
[49] 74 M.J. 441, 443 (C.A.A.F. 2015).

review is the accused–not the Government.[50] Moreover, such review may only be invoked *after* an accused has received a conviction at court-martial and *after* the convening authority has affirmed the findings and sentence.[51]

Even if the Government could invoke Article 66 through the lower court's mandate to affirm only such findings and sentence as it finds correct in law and fact, this would not provide a jurisdictional basis for the Government's writ in this case. This is because to establish subject-matter jurisdiction under the All Writs Act, the harm alleged must also have had "the potential to directly affect the findings and sentence."[52] But here, the confinement credit is administrative.[53] And this Court has already held that "administrative credit [towards confinement] does not affect the findings and sentence."[54] Further, the awarding of confinement credit did not impede the Government's ability to prosecute the case, nor did it affect SSgt Howell's trial rights. Thus, it did not otherwise "directly affect the findings and sentence." Accordingly, the Government's petition did not aid the lower court in the exercise of its jurisdiction.

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[50] *See United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (discussing 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).
[51] 10 U.S.C. § 866 (2012).
[52] *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)).
[53] *See generally, United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007).
[54] *Id*. at 26.

In short, given that Article 66 does not contemplate Government appeals or Government challenges to the military judge's decisions, it cannot use the All Writs Act to expand its abilities to appeal a military judge's decisions. Therefore, Article 66 does not provide a jurisdictional basis for the Government's writ.

B. Article 62 is the sole avenue for the Government to bring interlocutory appeals.

The Government may not invoke Article 66 as the jurisdictional basis for its writ because Congress intended Article 62 to be the sole avenue for the Government to bring interlocutory appeals. Article 62 sets forth particular actions by a military judge that "the United States may appeal" and strictly proscribes the circumstances for such an appeal.[55] These circumstances are:

> (A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.
>
> (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.
>
> (C) An order or ruling which directs the disclosure of classified information.
>
> (D) An order or ruling which imposes sanctions for nondisclosure of classified information.
>
> (E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.
>
> (F) A refusal by the military judge to enforce an order described in

[55] 10 U.S.C. § 862 (2012).

> subparagraph (E) that has previously been issued by appropriate authority. [56]

Article 62's plain, unambiguous language conveys Congress' intent to limit the Government's right to interlocutory appeals.[57]

In addition to the plain language of the statute, the legislative history of the Military Justice Act of 1983 and the amendments to Article 62 provide further support that Congress intended to limit the Government's right to interlocutory appeals. Before 1983, the Government's use of writs had become common practice. This Court in *United States v. Lopez de Victoria* explained:

> Congress legislated against a judicial backdrop that already provided for a broad reading of jurisdiction over 'cases' in the extraordinary writ context, whether arising through certification, as in [*United States v.*] *Redding*, [11 M.J. 100 (C.M.A. 1981) (finding the Art. 67(b)(2) certification process may be used for issues considered by the lower court through a writ)] or by petition, as in *United States v. Caprio*, 12 M.J. 30, 30-33 (C.M.A. 1981) [(relying on *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979), for the proposition that the Government may generally seek extraordinary writs through the All Writs Act)]. Thus, Congress' decision to permit appeals from either party in the 1983 Act was not a jurisdictional innovation, but an adaptation of the existing Title 18 statute [18 U.S.C. § 3731] to replace the cumbersome extraordinary writ procedure with a direct appeal procedure.[58]

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[56] *Id.*

[57] *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (citation and internal quotation marks omitted); *see also United States v. Lopez de Victoria*, 66 M.J. 67, 70 (C.A.A.F. 2008).

[58] 66 M.J. 67, 70 (C.A.A.F. 2008).

Taking into account the statute's plain language and legislative history, Article 62 specifically limits which of the military judge's actions the Government may appeal. Given that the All Writs Act does not grant jurisdiction or expand existing statutory jurisdiction, an extraordinary writ cannot allow the Government to circumvent the proscribed rules regarding interlocutory appeals.

If the Government's writ concerned matters collateral to Article 62, then perhaps it would have the jurisdictional predicate necessary to invoke the All Writs Act. For example, had the issue fallen short of exclusion of evidence (which would allow the Government to appeal under Article 62(a)(1)(B)), but been related to the Government's access to evidence, then the Government may be able to invoke the All Writs Act via Article 62.[59] But here there is no nexus to Article 62, so it is not an avenue to the All Writs Act. Thus, the lower court was precluded by statute from hearing such an appeal.

The Government desires to circumvent Article 62 whenever it disagrees with a military judge's decision to award confinement credit. If this Court determines the lower court has jurisdiction to grant the Government's requested relief, it will

[59] *Cf. United States v. Curtin*, 44 M.J. 439 (C.A.A.F. 1996) (addressing certified issue where the Government filed an extraordinary writ at the lower court challenging the military judge's ruling regarding the Government's ability to subpoena financial records that it wished to use as evidence).

open the door to Government challenges of other forms of confinement credit,[60] bringing these cases to a halt and clogging appellate dockets.

In short, Article 62 is the only vehicle Congress has provided for the Government to appeal either by interlocutory appeal or via a petition for extraordinary relief. Given that Government appeals "are disfavored and are permitted only upon specific statutory authorization,"[61] the All Writs Act does not allow the Government to circumvent the clear intent of Congress and pursue writs that are unconnected to Article 62. Consequently, the

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[60] *See, e.g.*, *United States v. Pierce*, 27 M.J. 367, 16 369 (C.M.A. 1989) (allowing the military judge to award confinement credit for punishment received at nonjudicial punishment); *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (the military judge may award confinement credit for restriction tantamount to confinement); *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (allowing the military judge to award day-for-day confinement credit for lawful pretrial confinement); *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (allowing the military judge to award confinement credit for each day of unlawful pretrial confinement); R.C.M 305 (k) (allowing the military judge to award confinement credit for violations of pretrial confinement procedures under R.C.M. 305).

[61] *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010) (citing *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008)); *see also United States v. Wilson*, 420 U.S. 332, 336 (1975) ("This Court early held that the Government could not take an appeal in a criminal case without express statutory authority.") (citation omitted); *Will v. United States*, 389 U.S. 90, 96 (1967) ("[I]n . . . federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored . . . [.]") (internal quotations and citations omitted); *United States v. Watson*, 386 F.3d 304, 307 (1st Cir. 2004) ("The government's ability to appeal in a criminal case is a matter of legislative grace and, thus, requires express statutory authorization.") (citing *United States v. Sanges*, 144 U.S. 310, 312 (1892)).

lower court was without jurisdiction to hear the Government's petition and SSgt Howell suffered as a result.

C. The All Writs Act is not a broad grant of jurisdiction to the Courts of Criminal Appeals to hear the Government's petitions for extraordinary relief.

To find jurisdiction for the Government, the lower court relied on *United States v. Dowty*,[62] *Dettinger v. United States*,[63] and *United States v. Booker*.[64] However, these cases are not broad grants of jurisdiction for the lower courts to entertain Government petitions for extraordinary relief.

Dowty involved an Article 62 appeal, not a Government writ.[65] And it did not address whether the Government could bring an extraordinary writ. In analyzing whether the Right to Financial Privacy Act applied to accused at courts-martial, this Court noted that "generally applicable statutes normally are available to protect service members in their personal affairs."[66] This Court merely cited the All Writs Act as an example of a generally applicable statute providing protection for an accused.[67] *Dowty* provides absolutely no support for the lower court's finding of jurisdiction.

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[62] 48 M.J. 102 (C.A.A.F. 1998).
[63] 7 M.J. 216, 219-22 (C.M.A. 1979).
[64] 72 M.J. 787 (N-M. Ct. Crim. App. 2013).
[65] 48 M.J. at 104.
[66] *Id*. at 107.
[67] *Id.* at 106.

While courts often cited *Dettinger* as the basis for the Government's unconstrained use of the All Writ's Act before 1983, *Dettinger's* holding was narrow. This Court held that "*in an appropriate case* the Government may, by application for extraordinary relief, subject a *dismissal of charges* by a trial judge to the scrutiny of the Court of Military Review."[68]

Further, the *Dettinger* Court recognized the need to tie jurisdiction under the All Writs Act to UCMJ jurisdiction. It discussed its jurisprudence on Government appeals, noting that it initially construed Article 62(a),[69] UCMJ, to allow them in 1968, but it reversed this decision in 1976.[70] Nevertheless, the *Dettinger* Court concluded that "[t]he perceived ambiguity of purpose as regards Article 62 suggests Congress did not intend that a trial judge's dismissal of charges be insulated from all judicial scrutiny."[71]

Under *Dettinger*, the Government's ability to petition for extraordinary relief is not a matter of right, but must be "an appropriate case."[72] In light of *Arness*, "appropriate cases" for Government writs must be tied to the lower court's existing

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[68] 7 M.J. at 222 (emphasis added).
[69] It is important to note that Article 62 was substantively different when this Court's predecessor decided *Dettinger* than it exists today.
[70] *Id.* at 221.
[71] *Id.* Indeed, Congress expressly codified this intent in 1983 when it amended Article 62 to allow the Government to appeal a military judge's "order or ruling which terminates the proceeding with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding." Pub. L. 98–209, § 5(c)(1), Dec. 6, 1983, 97 Stat. 1398.
[72] 7 M.J at 222.

UCMJ jurisdiction. For Government writs, that involves collateral matters related to Article 62. This is further supported by the fact that *Dettinger* involved a Government petition for extraordinary relief regarding dismissal of charges–a matter Article 62 addresses expressly. In any event, expansive readings of *Dettinger* were overtaken by legislation in 1983.

Finally, in *Booker*, the lower court found jurisdiction to hear a Government writ challenging the military judge's ruling on the maximum punishment. In doing so, it also relied on *Dettinger* and *Dowty* , but failed to address Article 62's legislative history, including this Court's discussion of it in *Lopez de Victoria*. Thus, *Booker* is as infirm as the NMCCA's decision in this case.[73]

Although the Government may wish to petition for extraordinary relief beyond collateral matters related to Article 62, *Dettinger* and *Booker* must be read together with the Supreme Court's holding in *Clinton v. Goldsmith*[74] and this Court's decision in *Arness*. *Goldsmith* and *Arness* implicitly hold that the service courts may only hear Government petitions involving collateral matters related to Article 62.

[73] To the extent that the Government argues that *Booker* applies, this argument fails. *Booker* is no longer good law following this Court's holding in *Arness* as it pertains to authorizing the Government to invoke the All Writs Act without establishing a nexus to Article 62.
[74] 526 U.S. 529, 534-35 (1999).

Under *Goldsmith*, the jurisdiction of military courts is "narrowly circumscribed" by the governing statutes.[75] Furthermore, the lower courts do not have jurisdiction to review petitions for extraordinary relief that otherwise fall outside their statutory jurisdiction.[76] Government petitions challenging the discretionary decision of a military judge to award confinement credit is not a collateral matter related to Article 62. The military judge did not make any rulings tending to have a collateral impact on the Government's ability to present evidence or seek a conviction on all of the alleged charges or implicate any other basis for appeal under Article 62. As such, the lower court was without authority to hear the Government's petition.

Conclusion

The lower court did not have the authority to review the Government's petition. This error allowed the lower court to strip SSgt Howell of thirty-five days of confinement credit. This Court should overturn the lower court's decision in order to confine the lower court to its express jurisdiction set forth by the UMCJ. It should also reinstate the confinement credit awarded to him by the military judge for the period between May 22, 2014, to June 25, 2014 (thirty-five days).

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[75] *Id.*
[76] *Arness*, 74 M.J. at 443.

Respectfully submitted,

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