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

REPLY ON BEHALF OF THE CROSS-APPELLANT

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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II

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.

A. Article 66 is reserved for the accused.

The Government argues that it may invoke Article 66, UCMJ, to bring a petition for extraordinary relief. But Article 66 is reserved for the accused, not the Government. The Government cannot invoke Article 66 during the normal course of appellate review.[1] As such, it should not be able to circumvent the statutory framework imposed by Congress via a writ petition. To permit otherwise, allows the Government to borrow SSgt Howell's appellate rights to aid its prosecution. Such a drastic result cannot be said to be "in aid" of the lower court's jurisdiction.

Moreover, the Government ignores Article 61's presence in the statutory framework. Article 61 explicitly bars appellate review should the accused withdraw from or waive appellate review.[2] Article 61(c) states: "A waiver of the right to appellate review or the withdrawal of an appeal under this section bars

[1] 10 U.S.C. § 866 (2012).
[2] *Id.*

review under section 866 or 869(a) of this title (article 66 or 69(a)).”[3] While the Judge Advocate General may refer a case to the lower court, he/she cannot force the accused to undergo appellate review, unless his/her sentence includes death.[4]

The accused’s Article 61 right to waive or withdraw from appellate review demonstrates that Article 66 is reserved for the accused, not the Government. Article 66 does not grant the Government direct appeal rights. Therefore, when considering the UCMJ’s entire statutory scheme, the Government may not invoke parts of the UCMJ meant solely for the accused in order to bring a writ petition.

B. Federal criminal cases from Article III courts are not broad grants of jurisdiction to entertain Government petitions for extraordinary relief.

The Government also argues it may petition for extraordinary relief because other Federal appellate courts have entertained Government writ petitions. It relies on several Federal appellate cases.[5] But this argument fails to take into account that military courts of appeals do not have the same type of inherent powers that

[3] 10 U.S.C. § 861 (2012).
[4] *Id.*
[5] *United States v. Pabon-Cruz*, 391 F.3d 86, 91-92 (2d Cir. 2004); *United States v. Wexler*, 31 F.3d 117, 121 (3d Cir. 1994) *In re: United States*, 397 F.3d 274 (5th Cir. 2005); *United States v. Jarman*, 687 F.3d 269, 270 (5th Cir. 2012); *In re: United States*, 578 F.3d 1195 (10th Cir. 2009).

characterize Article III courts.[6] Unless Congress has given this Court and the lower courts the authority to act, they may not do so.[7]

Instead, this Court and the lower courts "are courts of special jurisdiction created by Congress that cannot be given the plenary powers of Article III courts. The authority of the Article I court is not only circumscribed by the Constitution, but limited as well by the powers given to it by Congress."[8] Therefore, the Federal cases the Government cites are inapplicable given the broad powers that Article III courts have to entertain petitions for extraordinary relief.

While these Federal cases do not apply in the military justice context, they are nonetheless instructive because they underscore the need to tie a petition for extraordinary relief to a court's existing statutory jurisdiction. The Government's petitions in these cases dealt with collateral issues related to its right of appeal

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[6] *See United States v. Denedo*, 556 U.S. 904, 922-23 (U.S. 2009) (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).

[7] *See id.* at 912 ("Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts. *Bowles v. Russell*, 551 U.S. 205, 212, (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."). This rule applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8 of the Constitution. *Goldsmith*, 526 U.S. at 533-534.").

[8] *In re United Mo. Bank of Kansas City, N.A.*, 901 F.2d 1449, 1451-52 (8th Cir. 1990) (internal citation omitted); *see also United States v. Leak*, 61 M.J. 234, 249 (C.A.A.F. 2005) (Gierke, C.J, concurring in part and dissenting in part).

under 18 U.S.C. § 3731 (hereinafter Section 3731). In each of these cases, the Government petitioned the appellate court, seeking to overturn a trial judge's ruling that had a collateral impact on its ability to present evidence (discovery orders)[9] or obtain a conviction on all of the alleged charges (unlawful jury instructions that would likely result in acquittal).[10]

It is important to note that the Government's right to appeal under Section 3731[11] in Article III courts is more expansive than its Article 62 counterpart. As a result, the Government has broader latitude to bring extraordinary writs in Article III courts when it invokes Section 3731 than it does under Article 62. Unlike its Article 62 counterpart, Congress intended for Section 3731 to provide the

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[9] *See United States v. Jarman*, 687 F.3d 269, 271-72 (5th Cir. 2012) (denying the Government's petition to prevent discovery of child pornography to the accused after the district court found that the Government failed to provide the accused with ample opportunity to examine the child pornography evidence at a Government facility).

[10] *See United States v. Pabon-Cruz*, 391 F.3d 86, 88 (2d Cir. 2004) (discussing the court's previous ruling granting a Government petition to prohibit the trial judge from instructing the jury about a mandatory ten-year sentence); *United States v. Wexler*, 31 F.3d 117, 129 (3d Cir. 1994) (granting a Government petition to prevent the trial judge from giving a jury instruction that would lead to a high probability of failure of a prosecution); *In re: United States*, 397 F.3d 274, 287 (5th Cir. 2005) (granting a Government petition to overturn the district judge's decision to give an unlawful jury instruction regarding the Government's discovery violation that "could deprive society of a lawful punishment"); *In re: United States*, 578 F.3d 1195 (10th Cir. 2009) (granting the Government's mandamus petition to prevent the district court from providing an improper jury instruction that clearly violated the law, risked prejudicing the Government at trial with jeopardy attached, and provided the Government no other avenue of appeal).

[11] *See* Appendix 1, 18 U.S.C. § 3731 (2016).

Government a broader ability to appeal. Section 3731 states that "The provisions of this section shall be liberally construed to effectuate its purposes."[12] Article 62 contains no such language.[13] Furthermore, unlike civilian practice, the Government may bring appeals to this Court via the certification process.[14] Therefore, the Federal cases the Government cites cannot be read to be broad grants of jurisdiction given the substantial differences between Article 62's military practice and Section 3731's civilian practice. Instead, these cases reinforce the requirement that a writ petition must be tied to the court's existing statutory jurisdiction.

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 that have no statutory basis.

The Government also argues that this Court's decisions in *United States v. Curtin*,[15] and *L.R.M. v. Kastenberg*,[16] as well as the lower court's decisions in *United States v. Reinart*[17] and *United States v. Mahoney*,[18] provide service courts of criminal appeals with jurisdiction to hear Government petitions for extraordinary relief. But these cases are not broad grants of jurisdiction.

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[12] *Id.*
[13] *See* 10 U.S.C. §862 (2012).
[14] *See* 10 U.S.C. §867(a) (2012).
[15] 44 M.J. 439, 440 (C.A.A.F. 1996).
[16] 72 M.J. 364 (C.A.A.F. 2013).
[17] No. 20071195, 2008 CCA LEXIS 526 (A. Ct. Crim. App. Aug. 7, 2008).
[18] 36 M.J. 679 (A.F.C.M.R. 1992)

In *Curtin*, the Government attempted to subpoena financial records from the accused's wife and father.[19] When they refused to comply under the Right to Financial Privacy Act (RFPA),[20] the Government attempted to litigate this at the court-martial.[21] The military judge held that, according to the RFPA, the proper forum was in United States District Court rather than the court-martial.[22] The Government challenged the military judge's ruling and filed an extraordinary writ. This Court denied the petition. The Judge Advocate General of the Air Force then certified the case to this Court.

The Government potentially met the All Writs Act's jurisdictional predicate in *Curtain* because the issue fell short of exclusion of evidence,[23] but was related to the Government's access to evidence. However, *Curtin* did not hold that the Government had unlimited ability to bring petitions for extraordinary relief. Instead, it established the opposite—the Government's ability to petition for extraordinary relief is limited to collateral matters related to Article 62.

In *Katsenberg*, the military judge limited the victim's right to be heard on factual matters during the accused's court-martial.[24] The military judge denied the

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[19] 44 M.J. at 440.
[20] 12 U.S.C. § 3407 (1996).
[21] 44 M.J. at 440.
[22] *Id*. Although the military judge's ruling did not explicitly exclude evidence, that was its collateral effect. *Id*. at 439-40.
[23] Article 62(a)(1)(B).
[24] 72 M.J. at 366.

victim's motion to reconsider.[25] The victim then filed a petition for extraordinary relief in the nature of a writ of mandamus and petition for stay of proceedings.[26] The lower court concluded that it lacked jurisdiction to review her petition.[27]

This Court determined the lower court had jurisdiction because the victim sought "to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2)."[28] It did not address whether *the Government* could bring petitions for extraordinary relief.

Katsenberg is inapplicable in this case because its holding was extremely limited. First, *Katsenberg* only dealt with the rights of the victim to petition for extraordinary relief, not the Government. Second, this Court did not address the statutory basis of the victim's petition and instead relied on M.R.E.s 412, 413, and 513. As this Court made clear in *United States v. Arness*, which it decided after *Katsenberg*, a petition for extraordinary relief must be tied to the lower court's existing statutory jurisdiction.[29] Thus, *Katsenberg* is not a broad grant of jurisdiction.

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[25] *Id.* at 367.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 368.
[29] 74 M.J. 441, 443 (C.A.A.F. 2015). *Arness* will not have any impact on the right of a victim to litigate extraordinary writs because Congress resolved the issue facing the victim in *Katsenberg* by providing alleged victims the right to petition

In *Reinart*, the military judge awarded five days' confinement credit when the Government ignored his order and failed to train soldiers on Article 13. The Government filed a writ petition to challenge the credit. The Army Court of Criminal Appeals expressed reluctance to entertain the Government's writ petition in light of this Court's discussion of extraordinary writs in *United States v. Lopez de Victoria*.[30] It nevertheless entertained the Government's writ on the basis of *stare decisis* and this Court's decision in *Dettinger v. United States*, and held the military judge usurped his authority.[31]

In *Mahoney*, the lower court denied a Government writ challenging both the military judge's authority to detail himself to a court-martial and his order for a post-trial session to examine allegations of command influence.[32] In finding jurisdiction to hear the Government's petition, it also relied on *Dettinger*.[33]

Reinart and *Mahoney* are inapplicable because of their reliance on *Dettinger*. Expansive readings of *Dettinger* were overtaken by legislation in 1983.[34] The Government's ability to petition for extraordinary relief was further limited by the

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for extraordinary relief. *See* 10 U.S.C. § 806b(e)(3) (2016); *see* Pub. L. 114–92, div. A, title V, § 531, Nov. 25, 2015, 129 Stat. 814.
[30] 66 M.J. 67, 70 (C.A.A.F. 2008); J.A. at 331.
[31] 7 M.J. 216 (C.M.A. 1979); J.A. at 331-32.
[32] 36 M.J. at 691-92.
[33] *Id.* at 684.
[34] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; *see also, United Lopez de Victoria*, 66 M.J. at 70.

Supreme Court's decision in *Clinton v. Goldsmith*[35] and this Court's decision in *Arness*.[36] Moreover, under *Dettinger*, the Government's ability to petition for extraordinary relief is not a matter of right, but must be "an appropriate case."[37] In light of *Arness*, "appropriate cases" for Government writs must be tied to the lower court's existing UCMJ jurisdiction. As such, *Reinart* and *Mahoney* can no longer be read as broad grants of jurisdiction.

As these cases demonstrate, the Government's ability to petition for extraordinary relief is extraordinarily limited. The Government never articulates how challenging a military judge's decision to award confinement credit is related to its appeal rights under Article 62.

D. The awarding of confinement credit does not affect the findings or the sentence.

The Government argues that its petition is in aid of this Court's jurisdiction because the military judge's decision to award confinement credit directly affects the findings and the sentence. It argues that because such credit must be included in the Convening Authority's (CA) action, it must directly affect the findings and sentence. But this argument ignores the fact that sentencing credit is

[35] 526 U.S. 529 (1999).
[36] 74 M.J. at 441.
[37] 7 M.J at 222.

administrative[38] and does not affect the findings and the sentence.[39] As Judge Effron correctly pointed out in *United States v. Ruppel*:

> Even though a credit is related to the sentence and may be addressed during the sentencing proceeding, the sentence-credit determination is not part of the adjudged findings or sentence that Congress has determined should be final and not subject to judicial review (such as an acquittal or sentence cap). The basis for the credit is not a consideration in the sentencing process, and the credit itself is not a reduction of the sentence.[40]

Given that sentencing credit is administrative, R.C.M. 1107(f)(4)(F) imposes an administrative requirement upon the convening authority to include the military judge's order in its action.[41] This requirement does not affect the adjudged findings and sentence, nor does it prohibit the CA from granting clemency or affirming the adjudged sentence. As such, the Government fails to demonstrate that its petition was "in aid" of the lower court's jurisdiction.

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[38] *See, e.g.*, *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001) ("A military judge has broad authority to order administrative credit against adjudged confinement as a remedy for Article 13 violations.") (citing *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983)); *United States v. Adcock*, 65 M.J. 18, 26 (C.A.A.F. 2007); *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005) (denying administrative credit for alleged Article 13 violation, but granting the accused additional administrative credit under R.C.M. 305).

[39] *United States v. Williams*, 68 M.J. 252, 258 (C.A.A.F. 2010) ("…administrative credit does not affect the findings and sentence..."); *see also Adcock*, 65 M.J. at 26 (same).

[40] 49 M.J. 247, 254 (C.A.A.F. 1998) (Effron, J. concurring in part and in the result).

[41] *See* R.C.M. 1107(f)(4)(F) ("When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the action.").

Conclusion

The lower court did not have the authority to review the Government's petition. This error allowed the Government to delay the normal appellate review of SSgt Howell's case. As of the time of this filing, SSgt Howell has waited 322 days to begin the appellate review process since his rehearing concluded on April 29, 2015 and continues to wait. Given that the CA has yet to take its action and the Government filed its petition 7 days before the 120-day *Moreno* clock expired (August 10, 2015), it is conceivable that normal appellate review of SSgt Howell's case will not begin until sometime in 2017, almost two years after his rehearing. This cannot be the intent of Congress when it enacted the All Writs Act.

Rather than allow the Government to bring cases to a halt and clog appellate dockets whenever a military judge awards Article 13 administrative confinement credit, or any other administrative confinement credit, this Court should overturn the lower court's decision and confine the lower court to its express statutory jurisdiction.

Respectfully submitted,

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on March 17, 2016.

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Appendix

18 U.S.C § 3731

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.