IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF ON BEHALF OF APPELLANT
Appellant	)	
	)	
v.	)	Crim.App. Dkt. No. 201200264
	)	
Stephen P. HOWELL,	)	USCA Dkt. No. _____/MC
Staff Sergeant (E-6)	)	
U.S. Marine Corps,	)	
Appellee	)	

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

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II.

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IV.

IF A MEMBER'S ORIGINAL SENTENCE INCLUDES AN EXECUTED REDUCTION TO PAY GRADE E-1 AND THE SENTENCE IS SUBSEQUENTLY SET ASIDE, DOES THE ACTION OF PAYING THAT MEMBER AT THE E-1 RATE PENDING REHEARING CONSTITUTE ILLEGAL PRETRIAL PUNISHMENT IN THE ABSENCE OF ANY PUNITIVE INTENT?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective

jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This Court has jurisdiction pursuant to Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2) (2012); *see LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013); *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996); *United States v. Redding*, 11 M.J. 100, 102-05 (C.M.A. 1981).

Statement of the Case

On October 12, 2012, a panel of Members with enlisted representation convicted Appellee, contrary to his pleas, of a violation of a general regulation, rape, aggravated sexual contact, forcible sodomy, assault consummated by a battery, and adultery, in violation of Articles 92, 120, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 925, 928, 934 (2006). The Members sentenced Appellee to confinement for eighteen years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence.

On May 22, 2014, the lower court set aside the findings and sentence due to apparent unlawful command influence, remanding the case to the Judge Advocate General (JAG) with a rehearing authorized. (J.A. 27-28.) On June 20, 2014, the JAG, in accordance with Article 66(e), UCMJ, transferred the case to the Convening Authority with instructions authorizing a rehearing.

At the rehearing held on April 29, 2015, a panel of Members with enlisted

representation convicted Appellee, contrary to his pleas, of violating a lawful general order, abusive sexual contact, and adultery, in violation of Articles 92, 120, and 134, UCMJ. The Members sentenced Appellee to confinement for nine years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority has not yet acted on the findings or sentence.

Subsequent to Appellee's conviction and sentence, the United States filed a Petition for Extraordinary Relief requesting that the lower court stay post-trial processing and vacate the Military Judge's ruling directing the Convening Authority to provide sentencing credit premised on his ruling of illegal pretrial punishment under Article 13, UCMJ. (J.A. 53.)

On December 29, 2015, the lower court issued an *en banc* decision—split between a four-judge "plurality" and a four-judge dissent—approving in part, and denying in part, the United States' Petition.

On January 19, 2016, Appellee, as the Real Party in Interest, filed a Writ-Appeal with this Court challenging the lower court's jurisdiction to entertain the Petition. The United States filed its Writ-Appeal Answer on January 29, 2016.

On February 29, 2016, the JAG certified this case. Article 67(a)(2), UCMJ; C.A.A.F. R. 22(b)(2), 33(a).

Statement of Facts

A. Appellee was paid at the E-1 pay grade pending rehearing based on a legal opinion from the Defense Finance and Accounting Service.

Appellee's adjudged reduction to pay grade E-1 and adjudged forfeiture of all pay and allowances were executed and took effect by operation of law on October 26, 2012. Article 57(a)(1)(A), UCMJ, 10 U.S.C. § 857(a)(1)(A). On November 26, 2012, while serving his adjudged post-trial confinement, Appellee reached his End of Active Obligated Service (EAOS) and his pay entitlement ceased.[1] (J.A. 270.)

On May 22, 2014, the lower court set aside Appellee's conviction. On June 25, 2014, the Convening Authority directed a rehearing, and Appellee was released from the U.S. Disciplinary Barracks, transferred, and assigned to Headquarters and Service Battalion, Marine Corps Recruit Depot, Parris Island, South Carolina. (J.A. 268.)

As part of the administrative process of returning Appellee to active duty, Chief Warrant Officer 4 (CWO4) W. C. Smith, Director of the Installation Personnel Administration Center (IPAC), Parris Island, immediately began trying to determine Appellee's entitlement to pay. (J.A. 163-65.) After receiving what he perceived as inconsistent guidance by officials from Headquarters U.S. Marine

[1] *See* DoD Financial Management Regulation (DoD FMR) 7000.14-R, Vol. 7A, Ch. 1, para. 010402.G.5 (J.A. 424); *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005).

Corps, the Marine Corps Administrative Analysis Team, and the Defense Finance and Accounting Service (DFAS) as to what pay grade Appellee should be paid pending rehearing, CWO4 Smith sent an e-mail to these agencies asking them to confer. (J.A. 163-66.) They responded with direction to place Appellee on full pay and allowance status in the pay grade of E-1. (J.A. 165-67.) The Staff Judge Advocate initially disagreed with this determination; however, she was satisfied when the Office of General Counsel, DFAS (DFAS OGC) directed IPAC personnel to case law and to the DoD FMR explaining and justifying its position. (J.A. 164-67.)

B. The Military Judge ordered sentencing credit for every day Appellee was paid as an E-1 from the date the lower court set aside the findings and sentence.

As part of pretrial litigation, Defense Counsel moved the Trial Court to restore Appellee's pay to the grade of E-6 and to order back pay at that grade beginning on May 22, 2014, the date the lower court set aside the findings and sentence. (J.A. 239.) Trial Counsel responded that Article 75(a), UCMJ, requires governmental officials to wait until the outcome of a rehearing to determine an appellant's entitlement to pay. (J.A. 254-67.)

The Military Judge disagreed. He concluded that Article 75(a) prevented only the repayment of past forfeitures, and that the failure to pay Appellee at his original pay grade pending rehearing violated Article 13, UCMJ. (J.A. 278-79.)

The Military Judge concluded that he lacked the authority to grant the requested remedy—to compel the Government to pay Appellee at the E-6 rate and restore back pay at that rate. (J.A. 283.) Instead, he ruled that for every day from May 22, 2014, onward, Appellee was entitled to one day of confinement credit. (J.A. 283.)

The Military Judge found that CWO4 Smith was responsible for ensuring that personnel aboard Parris Island were paid according to DoD regulations. (J.A. 271.) He found that after consulting DFAS and the Marine Corps Administrative Analysis Team, CWO4 Smith was instructed to pay Appellee as an E-1, but was never instructed to deny E-6 pay to Appellee as a form of punishment. (J.A. 271-72.) However, citing *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005), the Military Judge found that even though there was no punitive intent, the "punitive effect" of the paying Appellee at the E-1 rate violated Article 13. (J.A. 281-83.)

C. <u>The Military Judge concluded that DFAS's decision to pay Appellee at the E-1 rate was based on its "good-faith" interpretation of Article 75(a) and appellate case law, but he did not reconsider his ruling</u>.

On November 13, 2014, DFAS OGC provided Trial Counsel a formal legal opinion explaining that Article 75(a) and two federal appellate decisions—*Dock v. United States*, 46 F.3d 1083 (Fed. Cir. 1995), and *Combs v. United States*, 50 Fed. Cl. 592 (2001)—provided DFAS with positive legal authority to pay Appellee only at the E-1 rate pending rehearing. (J.A. 304-06.)

Based on the DFAS legal opinion, the Government moved the Military Judge to reconsider his ruling. (J.A. 284.) First, the Government argued that the legal opinion provided justification for the decision to pay Appellee at the E-1 rate. (J.A. 284-85.) Second, the Government argued that the Military Judge's ruling to start the illegal punishment calculation from the date the lower court aside the sentence was incorrect because opinions by Courts of Criminal Appeals are inchoate until the JAG takes action under Article 66(e). (J.A. 286.) Trial Defense Counsel filed an Answer and Cross-Motion requesting that the Military Judge abate the proceedings or, alternatively, grant five days confinement credit for every day that the Government refused to pay Appellee at the E-6 rate. (J.A. 297.)

On February 26, 2015, the Military Judge denied the Government's Motion for Reconsideration as well as the Defense's Cross-Motion. (J.A. 318, 323.) Although the Military Judge agreed that the lower court's decision was not "effectuated" until the JAG took appropriate action, it did not change the date Appellee "began to suffer harm"—when he "stood convicted of nothing and was presumed innocent." (J.A. 321-22.) Additionally, the Military Judge rejected DFAS's legal opinion, including the underlying federal appellate opinions upon which the opinion was based; however, he concluded that DFAS personnel "have taken a good-faith position that they believe is backed in statutory and case law." (J.A. 322.) Nonetheless, he left "intact" his original ruling. (J.A. 323.)

D. The United States filed a Petition for Extraordinary Relief.

Subsequent to Appellee's conviction and sentence, the United States filed a Petition for Extraordinary Relief requesting that the lower court stay post-trial processing and vacate the Military Judge's ruling directing the Convening Authority to provide sentencing credit. (J.A. 53-90.) The United States, citing *Dock* and *Combs*, argued that: (1) Appellee was only entitled to pay and allowances at the E-1 rate pending rehearing; (2) the Military Judge therefore clearly abused his discretion in finding an Article 13 violation; and (3) the Military Judge usurped his authority by rejecting the core holding of *Dock*—that Article 75(a) is an "entitlement to pay" provision. The lower court granted the United States' request to stay the post-trial proceedings pending its resolution of the Petition. (J.A. 91-92.)

Sitting *en banc*, the lower court heard oral argument and on December 29, 2015, issued a divided four-to-four opinion that partially granted the United States' Petition. (J.A. 1.) In a four-judge "plurality" opinion, Judge Marks concluded that with regard to the period of thirty-five days of sentencing credit—from May 22, 2014 (the day the lower court set aside the findings and sentence) to June 26, 2014 (the day Appellee was returned to duty)—the Military Judge abused his discretion and usurped his authority. (J.A. 14.) With regard to the period from June 26, 2014

"until the effective date" of Appellee's sentence at rehearing, the plurality concluded the United States had not met its burden for the Writ to issue. (J.A. 14.)

In a four-judge dissent, Senior Judge Brubaker concluded that the Military Judge exceeded his statutory authority in finding an Article 13 violation and ordering sentencing credit. (J.A. 16.) He reasoned that the Military Judge's conclusion—and the plurality's—that Appellee was subject to illegal pretrial punishment was based on the flawed premise he was entitled to pay at the E-6 rate pending rehearing. (J.A. 16.) He also found that the Military Judge and the plurality failed to recognize that the pay entitlement question was beyond the court-martial's jurisdiction:

> A court-martial ruling on the correctness of a pay determination as here thus is contrary to express Congressional intent for such disputes to be settled either administratively by the Secretary of Defense or judicially by a designated Article III court. I see no indication that Congress intended Article 13 as offering an alternative forum to litigate good faith agency pay determinations in a court-martial.

(J.A. 19.)

Summary of Arguments

II.

The plurality erred when it found that the Military Judge acted within his authority when he found an Article 13 violation premised on a finding that Appellee was statutorily entitled to pay at the E-6 rate pending rehearing. Congress vested exclusive jurisdiction over such military pay entitlement issues

with the U.S. Court of Federal Claims and its superior court, the U.S. Court of Appeals for the Federal Circuit—not military courts—and these courts have definitively ruled on the pay entitlement question in this case. The Military Judge's rejection of this precedent was a judicial usurpation of power, and the plurality's contrary conclusion was erroneous. Furthermore, the pay entitlement determination of DFAS was entitled to *Chevron* deference, but the Military Judge and the lower court gave it none. Instead, they erroneously relied on *dicta* from decisions by this Court inapplicable to the facts of this case.

III.

The plurality erred when it found, as a matter of law and contrary to this Court's opinion in *Shelton*, that the setting aside of Appellee's findings and sentence rendered his previously adjudged and executed reduction to pay grade E-1 "unexecuted" pending rehearing. To justify this conclusion—which was implicit in the Military Judge's award of sentencing credit—and to harmonize it with the plain text of Articles 57(a), 71(c), and 75(a) indicating that an adjudged reduction, once executed, remains so pending rehearing, the plurality erroneously relied on this Court's decision in *Johnson*. *Johnson* analyzed an outdated version of Article 71 and does not stand for the proposition for which the plurality cited it.

IV.

The plurality erred when it relied on, and then misapplied, *dicta* from this Court's decision in *Fischer* to justify the Military Judge's ruling that good-faith efforts by government officials to follow fiscal law requirements constituted illegal pretrial punishment in the absence of any punitive intent. Neither this Court nor any Court of Criminal Appeals has ever before so held. Even under the *Mendoza-Martinez* factors this Court applied—but did not rely upon—in *Fischer*, the Military Judge and the lower court clearly and indisputably erred when they found an Article 13 violation due to "punitive effect" based on the facts of this case.

Argument

II.

THE PLURALITY ERRED WHEN IT FOUND THAT THE MILITARY JUDGE ACTED WITHIN HIS AUTHORITY WHEN HE REJECTED (1) APPLICABLE HOLDINGS BY THE FEDERAL COURTS DESIGNATED BY CONGRESS TO RULE ON MILITARY PAY ENTITLEMENTS AND (2) DETERMINATIONS BY THE DEFENSE AGENCY RESPONSIBLE FOR STATUTORY AND REGULATORY COMPLIANCE IN THE AREA OF MILITARY PAY WITH REGARD TO APPELLEE'S PAY ENTITLEMENT PENDING HIS REHEARING.

A. Standard of review.

In reviewing whether a Court of Criminal Appeals improperly denied an extraordinary writ, this Court reviews issues of jurisdiction and interpretation of

statutes *de novo*. *LRM*, 72 M.J. at 367-69. To the extent this Court has jurisdiction to consider military pay entitlement questions, this Court reviews such questions *de novo*. *United States v. Shelton*, 53 M.J. 387, 389 (C.A.A.F. 2000).

B. Issuance of an extraordinary writ is appropriate where an inferior court exceeds its prescribed jurisdiction or takes action amounting to a judicial usurpation of power.

This Court has recognized that issuance of an extraordinary writ is appropriate in order "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (quoting *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979) and *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)); *see Will v. United States*, 389 U.S. 90, 95-96, 104 (1967) (stating that the purpose of the writ is "to confine the lower court to the sphere of its discretionary power"). "To justify reversal of a discretionary decision by mandamus, the judicial decision . . . must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which is likely to recur." *Labella*, 15 M.J. at 229 (internal citations omitted).

To prevail on a writ, a 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." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367 (2004)). Military courts have

interpreted this to require a petitioner to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g.*, *Dettinger*, 7 M.J. at 224; *McKinney v. Jarvis*, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

C. Other than via Writ, the United States had "no adequate means to attain relief" from the Military Judge's ruling erroneously ordering sentencing credit.[2]

The lower court unanimously, and correctly, held that it had jurisdiction to entertain the United States' Writ Petition. (J.A. 3-4.) The Military Judge's ruling was not subject to appeal under Article 62, UCMJ, nor was relief attainable on direct review under Articles 66 or 69, UCMJ. In the absence of action by this Court or the lower court, the Convening Authority would be required to apply the sentencing credit when taking action on the findings and sentence. R.C.M. 1107(f)(4)(F). Such an action would deprive the United States of any ability to challenge a military judge's finding of an Article 13 violation, rendering the Military Judge's ruling—no matter how unwarranted—legally unreviewable. Thus, the ruling—which had the effect of improperly limiting the quantum of sentence that the Convening Authority may approve—would become irrevocable and not amenable to correction in the ordinary course of appellate review. *Cf. Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

[2] This part of the United States' argument regarding why there was no adequate means to attain relief other than via Extraordinary Writ applies with equal force to Certified Issues III and IV, *infra*, which discuss additional reasons why the right to issuance of the Writ was "clear and indisputable."

Indeed, the Convening Authority's only means of remedy, if he disagrees with the Military Judge's ruling, would be via "the extraordinary writ process." *United States v. Suzuki*, 14 M.J. 491, 492 (C.M.A. 1983) (citing *Redding*, 11 M.J. 100 (C.M.A. 1981)); *see also United States v. Ruppel*, 49 M.J. 247, 254 (C.A.A.F. 1998) (analyzing sentence credit as a judicially-created remedy and stating that the "only means available for the Government to appeal the sentence credit would be via an extraordinary writ") (Effron, J., concurring in part and in the result).

D. The right to issuance of the Writ was "clear and indisputable" because the Military Judge clearly exceeded his authority when he rejected *Dock* and *Combs* and accorded no deference to DFAS regarding Appellee's statutory pay entitlement pending rehearing.

1. The power of military courts is narrowly circumscribed by statute, and Congress has never given military courts the power to determine servicemember pay entitlement.

This Court has repeatedly recognized the limited jurisdiction of Article I courts, and has noted that military courts do not have the types of inherent powers characteristic of Article III courts:

> Article I 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 [C]onstitution, but limited as well by the powers given to it by Congress.' Unless Congress has given us the authority to act, we may not do so.

United States v. Leak, 61 M.J. 234, 249 (C.A.A.F. 2005) (quotations omitted); *accord Clinton v. Goldsmith*, 526 U.S. 529, 533-34 (1999).

When Congress created the position of the military judge in 1968, the powers of courts-martial remained narrowly circumscribed and were not expanded to allow military judges to make determinations or issue orders outside the narrow scope of the criminal matter before the court-martial. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; *see United States v. Weiss*, 510 U.S. 163, 175 (1994) (stating that "military judges do not have any inherent judicial authority separate from the court-martial to which they have been detailed") (internal quotations omitted); *United States v. Reinert*, 2008 CCA LEXIS 526, *37-38 (A. Ct. Crim. App. August 7, 2008) ("[N]othing in Article 13, UCMJ, or any other article of the Code, authorizes a military judge to sanction illegal pretrial punishment outside the bounds of the court-martial over which he presides.") (J.A. 335).[3]

Although the powers exercised by military judges have become more robust over time,[4] Congress has never given military trial or appellate courts the power to override the determinations of government pay officials or the U.S. Court of Federal Claims regarding a servicemember's statutory pay entitlement. *See United*

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[3] *See generally* Report of the Military Justice Review Group, Part I: UCMJ Recommendations 263-65 (analysis of Article 26, UCMJ) (J.A. 380-83).

[4] For example, Article 48, UCMJ, gives military judges the power to hold civilian witnesses and attorneys in contempt for violating judicial orders. But this power has never been used to compel government officials to increase a servicemember's pay. *See generally* MJRG Report, *supra*, at 421-25 (J.A. 383-87).

States v. Allen, 33 M.J. 209, 215 (C.M.A. 1991) (recognizing that "the power of an appellate court in the military justice system is limited to correcting illegal sentences or the execution thereof," and holding that questions of entitlement to pay are collateral to the lawfulness of a court-martial sentence and that military courts are therefore unable to order the return of pay withheld from an accused).

2. This Court has recognized the exclusive jurisdiction of the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit over military pay entitlement issues.

In the Tucker Act, 28 U.S.C. § 1491 (1982), Congress gave the U.S. Court of Federal Claims jurisdiction to address pay entitlement questions such as Appellee's and, when necessary, to order appropriate relief:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or *any Act of Congress or any regulation of an executive department* . . . . To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, *issue orders directing restoration to office or position, placement in appropriate duty or retirement status*, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

28 U.S.C. § 1491(a)(1)-(2) (emphasis added). In *Allen*, this Court recognized that through this legislation "Congress made such [pay entitlement] matters exclusively the province" of the U.S. Court of Federal Claims. *Allen*, 33 M.J. at 215; *accord*

Anderson v. United States, 54 Fed. Cl. 620, 624 (Fed. Cl. 2002).[5] "We have recently reaffirmed our position that such claims must be placed before those fora in view of their particular expertise in dealing with claims for pay. *Keys v. Cole*, *supra*; *accord* B-189465, 57 Comp. Gen. 132 (1977) (decisions of Court of Military Appeals strictly limited to matters of military justice and do not extend to status of servicemember's pay)." *Allen*, 33 M.J. at 215-16; *see also Keys v. Cole*, 31 M.J. 228, 234 (C.M.A. 1990) (denying Keys' mandamus petition for back pay based on the setting aside of his court-martial conviction and concluding that the appropriate venue to pursue his claim was the U.S. Court of Claims).

Since *Allen* and *Keys*, this Court and the Courts of Criminal Appeals have routinely deferred to the U.S. Court of Federal Claims on military pay entitlement questions. *See, e.g.*, *Fischer*, 61 M.J. at 421 (C.A.A.F. 2005) (stating that if Fischer "takes issue with the propriety of the underlying decisions as a matter of fiscal law, he must pursue that issue before the United States Court of Federal Claims"); *Shelton*, 53 M.J. at 391 (stating that Shelton's claim for back pay for the period he was awaiting new action by the convening authority "should be brought before the United States Court of Federal Claims") (Sullivan, J., concurring in the result); *United States v. Dodge*, 60 M.J. 873, 878 (A.F. Ct. Crim. App. 2005)

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[5] *See also* 28 U.S.C § 1295 (U.S. Court of Appeals for the Federal Circuit "shall have exclusive jurisdiction . . . of an appeal from a final decision of" of U.S. Court of Federal Claims).

(stating that Congress vested the U.S. Court of Federal Claims with jurisdiction over military pay entitlement issues), *aff'd*, 61 M.J. 288 (C.A.A.F. 2005) (summary disposition); *United States v. Ward*, 39 M.J. 1085, 1089 (A. Ct. Crim. App. 1994) (stating that Ward's pay entitlement claim is "exclusively the province of the U.S. Court of Federal Claims").

3. As the government agency responsible for statutory and regulatory compliance in the area of military pay, DFAS is owed deference regarding pay entitlement questions.

The Supreme Court has recognized that in areas where Congress has granted authority to an executive agency to administer the execution of a particular function, courts are required to give considerable weight to an executive agency's interpretation of the law. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (holding that if there is express delegation to "elucidate a specific provision of [a] statute by regulation," that regulation is binding unless manifestly contrary to the statute).

In the area of servicemember pay, Congress granted the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense (USD (C)/CFO) authority to "oversee all financial management activities relating to the programs and operations of the agency . . . [and to] direct, manage, and provide policy guidance and oversight of agency financial management personnel, activities, and operations." 31 U.S.C. § 902; *see* DoD Directive 5118.03 (J.A.

454). Additionally, Congress delegated USD (C)/CFO statutory authority to assist the Secretary of Defense "in establishing and supervising the execution of policies and procedures relating to the expenditure and collection of funds administered by the Department of Defense." 10 U.S.C. §135; *see also* 10 U.S.C. §113 (requiring the Secretary of Defense to submit annual budget to Congress).

In executing his delegated duties, USD(C)/CFO is required to maintain the DoD FMR. DoDI 7000.14 (J.A. 480). Director, DFAS, is the principal DoD executive responsible for executing this statutory function of "necessary to comply with finance and accounting statutory and regulatory requirements." DoD FMR 7000-14-R, Vol. 1, para. 010603 (J.A. 451); DoD Directive 5118.05, para. 6.c. (J.A. 469). Thus, to the extent there is any interpretative ambiguity associated with the operation of Article 75(a) with regard to an accused's pay entitlement pending rehearing, the statutory interpretations and pay entitlement determinations of DFAS are entitled to *Chevron* deference. *See Chevron*, 524 U.S. at 844 ("We have long recognized the considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); 2002 DOHA LEXIS 598, *9-10 (Def. Off. of Hear. & App. Dec. 12, 2002) ("[W]hen a statute is silent or ambiguous with respect to the specific issue, the question for our Office or a court is whether the agency's interpretation is a permissible construction of the statute. If Congress has explicitly left a gap for the

agency to fill, there is an express delegation for the agency's construction of a statutory scheme it is entrusted to administer.").[6]

4. *Dock* and *Combs* ruled definitively on pay entitlements pending rehearing under Article 75(a); DFAS's determination regarding Appellee's pay entitlement is consistent with these rulings.

Article 75(a), UCMJ, provides that "all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved . . . 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." 10 U.S.C. § 875(a) (2012). Thus, by its plain text, for Appellee's pay entitlement claim to succeed, he must prove either that: (1) a rehearing was not ordered after the lower court set aside his findings and sentence and authorized a rehearing; or (2) a rehearing was ordered, but the sentence imposed at the rehearing did not include reduction to pay grade E-1. *See* H.R. Rep. 81-491, at 34 (1949) ("If a new trial or rehearing is ordered, restoration is to be made in regard to such part of the original sentence as is not adjudged upon the new trial or rehearing."). Because neither of these conditions is present in this case, the plurality clearly erred when it agreed with the Military Judge that Appellee was statutorily entitled to E-6 pay pending rehearing.

[6] As the dissent noted, "[t]he military judge's ruling also bypasses the Secretary of Defense's expressly delegated authority to settle such claims administratively" at the Defense Office of Hearings and Appeals (DOHA), pursuant to 31 U.S.C. § 3702(a). (J.A. 18-19.)

This interpretation of the operation of Article 75(a) is consistent with the authoritative interpretations of the U.S. Court of Appeals for the Federal Circuit in *Dock* and the U.S. Court of Federal Claims in *Combs*.[7] The *Dock* Court identified "[t]hree general principles of military law [that] provide the framework for" analyzing military pay entitlement questions. *Dock*, 46 F.3d at 1086. "First, the rights and benefits of a member of the military services, including pay and allowances, are defined by statute . . . and [are] not a *quid pro quo* for services rendered to the military." *Id.* (citing 37 U.S.C. § 204(a)(1) and *Bell v. United States*, 366 U.S. 393 (1961) (a soldier's entitlement to pay is statutory, not contractual)). "Second, by law once a member's pay has accrued it cannot be forfeited by court-martial." *Id.* (citing Article 57(a)). And "[t]hird, forfeiture of future pay 'can only be imposed by the sentence of a lawful court-martial.'" *Id.* at 1087 (quoting *Walsh v. United States*, 43 Ct.Cl. 225, 231 (1908)).

After identifying these "rather general principles of military law," the *Dock* Court then analyzed the legislative history of "the more specific Article 75(a)" and concluded that when "a rehearing is ordered, no restoration is called for until the outcome of the rehearing is known, and then only to the extent the forfeiture is not

[7] This interpretation is also consistent with the official position of the Department of Defense, as expressed in the MJRG Report. *See* MJRG Report, *supra*, at 656-58 (noting that "current law has been interpreted as providing that an accused will not receive pay and allowances at the former grade, even if performing full military duties while awaiting the rehearing" and proposing amendments to Article 75). (J.A. 389-91.)

reimposed." *Dock*, 46 F.3d at 1087. "When Congress enacted Article 75(a), it addressed a singular circumstance, that of a member of the military service whose conviction and sentence are set aside, and who is re-convicted and re-sentenced for the same offense. In that singular circumstance, Congress has decreed that the executed part of the first sentence that is included in the second sentence remains in effect." *Id.* at 1093; *see Shelton*, 53 M.J. at 391 (noting that "[t]he purpose of Article 75(a) was to provide for restoration only after an acquittal or the setting aside of charges and sentence . . . [not] to provide restoration in situations where a procedural error was corrected and the same or greater sentence was reimposed.").

The *Dock* Court also held that the U.S. Court of Federal Claims was "simply wrong" in concluding that Article 75(a) "deal[t] with the mechanics of restoration." *Dock*, 46 F.3d at 1087. "To the contrary, Article 75(a)—by its own terms and . . . consistent with its legislative history—is a statute that deals with entitlement to pay." *Id*; *see Brown v. United States*, 1999 U.S. App. LEXIS 18438 (Fed. Cir. 1999) (granting summary judgment approving U.S. Court of Federal Claims judgment ordering Brown to return pay given to him in error, stating that if rehearing "reimposes the same forfeiture" there is no legal entitlement to pay) (J.A. 337-38).

Subsequent to *Dock*, the U.S. Court of Federal Claims in *Combs* considered the exact question that faces this Court: When an appellant's original sentence *and*

the sentence imposed at rehearing both include reduction to E-1, does Article 75(a) operate to entitle the member only to E-1 pay while on active duty awaiting rehearing? *Combs*, 50 Fed. Cl. at 601. Confirming that the *Dock* Court's reasoning with regard to adjudged forfeitures applies equally with regard to adjudged reductions in pay grade, the *Combs* Court denied Technical Sergeant (E-6) Combs' claim for back pay between his sentence set-aside and his sentence at rehearing during which he was in a full-duty status but was only earning pay and allowances at the E-1 rate. *Id.* at 601-05.

The *Combs* Court acknowledged and analyzed this Court's preceding opinion in *United States v. Combs*, 47 M.J. 330, 334 (C.A.A.F. 1997), where the plurality suggested that Combs was statutorily entitled to E-6 pay pending rehearing. *Combs*, 50 Fed. Cl. at 602-605. First, the U.S. Court of Federal Claims noted that the issue before this Court in *Combs* was not whether Combs was statutorily entitled to E-6 pay, but rather whether his command *intentionally punished him* prior to his rehearing in violation of Article 13. *Id.* at 602-03. "The CAAF did not address plaintiff's civil claim for back pay for two reasons: 1) he did not ask it to do so; and 2) it declined to exercise jurisdiction over the pay claims." *Id.* at 603. Thus, the part of the plurality's opinion suggesting that Combs "should have been paid at the E-6 rate" was *dicta*. *Id.* at 604. To the extent it was not *dicta*, the U.S. Court of Federal Claims held that "given the fact that *10 U.S.C. §*

875, as interpreted by the Dock court, clearly operates to entitle plaintiff [Combs] only to E-1 pay, any decision of a prior court awarding him E-6 pay would be clearly erroneous." *Id*.

DFAS's determination regarding Appellee's specific pay entitlement pending rehearing not only was consistent with these rulings, it discussed them extensively and cited them as positive fiscal authority. (J.A. 304-06.) "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." (J.A. 306.) Furthermore, DFAS counsel stated that:

> The Court of Appeals for the Federal Circuit and the Court of Federal Claims have jurisdiction to decide questions regarding the pay entitlements of military members. *See* 28 U.S.C. 1295 and 1491. Respectfully, the military criminal courts do not have jurisdiction in this area. *See* 10 U.S.C. 862, 866, 867. Thus, DFAS is required to abide by the rulings of the Court of Appeals for the Federal Circuit and the Court of Federal Claims in paying restoration entitlements under 10 U.S.C. 875.

(J.A. 305.) Noting that "paying a member at the unreduced rate before the rehearing results are known" would result in highly problematic "speculative payments," DFAS cautioned that "[c]ertifying officers are responsible for the legality of a proposed payment [under] 31 U.S.C. § 3528 . . . [and] cannot certify a payment to which a member may be entitled depending upon the outcome of a future event." (J.A. 306.)

5. The plurality erred when it held that the Military Judge did not exceed his authority when he ordered sentencing credit.

Based on the above, the plurality clearly erred when it held that the Military Judge did not commit "clear and indisputable error" when he found an Article 13 violation and ordered sentencing credit premised on Appellee's statutory entitlement to E-6 pay pending rehearing. (J.A. 14-15.)

a. First, the plurality erred when it assumed that the Military Judge had jurisdiction to determine Appellee's pay entitlement.

The plurality erred when it assumed that the Military Judge—and, by extension, the lower court itself—had jurisdiction to determine Appellee's pay entitlement pending rehearing. (J.A. 14-15.) As noted *supra*, Congress vested exclusive jurisdiction over military pay entitlement issues in the U.S. Court of Federal Claims.[8] The plurality claimed that "in *Keys*, the CMA explicitly asserted its right to interpret Articles 13 and 75(a), UCMJ, in matters of pay." (J.A. 15.) But the *Keys* Court made no such assertion. On the contrary, the *Keys* Court expressly "hesitate[d] . . . to interpret military-pay regulations under circumstances where there is another court whose expertise is in that area of the law," and directed Keys to "pursue his claim of monetary entitlement in the United States

[8] In his Writ-Petition, Appellee claims that the United States withheld approximately $23,000.00. If that amount is accurate, the U.S. Court of Federal Claims has exclusion jurisdiction because the amount exceeds $10,000.00. *Jan's Helicopter Service v. Federal Aviation Administration*, 525 F.3d 1299, 1304 (Fed. Cir. 2008) (citing 28 U.S.C. § 1491(a)(1)).

Claims Court, which has special expertise in this field, rather than in this Court." *Keys*, 31 M.J. at 234. As discussed *supra*, this Court has consistently deferred to the U.S. Court of Federal Claims and its superior court in the area of military pay entitlement; the plurality's claim to the contrary was erroneous.

b. Second, the plurality erred when it found that the Military Judge acted within his authority when he rejected *Dock* and improperly distinguished *Combs*.

The Military Judge clearly exceeded his authority when he rejected *Dock*'s core holding that Article 75(a) is a pay entitlement statute. (J.A. 278) ("To the extent that the *Dock* Court rules that Article 75(a) is an 'entitlement to pay provision' vice a 'restoration' provision, this Court rejects that proposition."). This Court has never held that military judges are free to reject valid case law from federal courts of competent jurisdiction wherever such case law conflicts with their own notions of what the law *should* be. As the dissent succinctly stated: "The entire analysis of the military judge—and the majority—regarding the applicability of Article 13 crumbles if the real party [Appellee] was not entitled to pay at the pay grade E-6 while pending a rehearing." (J.A. 16.) As detailed *supra*, this E-6 pay entitlement premise has been soundly rejected by courts of competent jurisdiction interpreting Article 75(a).

In addition, the plurality failed to recognize or analyze the Military Judge's improper attempts to distinguish *Combs*. First, the Military Judge distinguished

Combs on the ground that *Combs* conducted a post hoc analysis on the pay entitlement claim subsequent to the outcome of the rehearing. (J.A. 279.) This analysis is incorrect because the procedural timing with regard to the filing a pay claim obviously cannot change the underlying statutory entitlement. Once the lower court set aside the findings and sentence until the subsequent rehearing, Appellee was either entitled to pay at the E-6 rate, or he was not. Absent some type of statute of limitation issue, the timing of filing a pay claim is immaterial to this determination. No military appellate court has held that this type of pay entitlement is subject to the vagaries of procedural timing. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 432 (1990) (Funds may be paid out [of the Treasury] only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute."); DFAS Counsel Memo ("DFAS cannot pay members awaiting rehearing at an unreduced rate until it is known whether the reduction has been reimposed at rehearing.") (J.A. 306).

Second, the Military Judge attempted to distinguish *Combs* based on the fact that the U.S. Court of Federal Claims in *Combs* did not address Article 13. (J.A. 306.) This is not a distinguishing factor for two reasons. First, the *Combs* Court expressly recognized that its jurisdiction extended only to military pay issues and deferred to this Court on the Article 13 issue. *Combs*, 50 Fed. Cl. at 598. Second, as to the pay entitlement issue, the *Combs* Court was clear: "[W]e see that part of

the CAAF opinion that says [Combs] *should have* been paid as the E-6 rate as dicta to its holding." *Id.* at 604. Unlike the facts in *Combs*, which revolved around the punitive intent of Combs' command, here the *sole* reason upon which the Military Judge concluded that an Article 13 violation occurred was DFAS's reliance on the plain text of Article 75(a) and appellate holdings by the federal courts expressly designated by Congress to rule on military pay entitlement issues. Thus it is irrelevant that the U.S. Court of Federal Claims did not address Article 13.

c. Third, the plurality erred because it *assumed* a statutory entitlement to E-6 pay without actually addressing the holdings in *Dock* or *Combs*.

In sustaining the Military Judge's conclusion that Appellee was subject to illegal pretrial punishment, the plurality did not address the Military Judge's rejection of *Dock* and *Combs*. (J.A. 15) ("We need not address the MJ's efforts to distinguish [Appellee's] case from *Dock* . . . and *Combs*"). Instead, the plurality *assumed* Appellee's statutory entitlement to E-6 pay, and that assumption infected its follow-on analysis. To the extent the plurality attempted to justify this assumption, it relied on *dicta* from three prior opinions of this Court: *Johnson v. United States*, 19 C.M.A. 407 (C.M.A. 1970), *Keys*, and *Combs*. These cases are inapposite and distinguishable for manifold reasons.

First, *Johnson* was a Writ of Habeas Corpus case that did not implicate, or even mention, Article 75. After his case had been affirmed by the lower court and

his petition had been denied by this Court, Johnson's "sentence was ordered into execution." *Johnson*, 19 C.M.A. at 407. He petitioned for a new trial under Article 73, UCMJ, and the JAG granted the petition. *Id*. The subject matter of his writ was a request for release from post-trial confinement, his conviction having been set aside. The issue in *Johnson* dealt with whether the JAG's granting of a new trial under Article 73 had the legal effect of setting aside the findings and sentence, thereby making Johnson an "unsentenced prisoner." *Id*. at 409. This Court concluded that the executive action granting a new trial had that legal effect; however, the *Johnson* Court specifically noted that the United States had not advanced "any authority for its contention that the original judgment and sentence remains in effect until the new trial is completed or the charges formally dismissed by the Secretary." *Id*. at 408. Not so here.

Second, *Johnson* did not address or even mention that part of the executed sentence at issue here—an adjudged and executed reduction in pay grade. *See* Article 57(a), UCMJ. There is a significant legal distinction between continued post-trial confinement when a sentence has been set aside, and a rejection of appellate holdings by courts of competent jurisdiction regarding a servicemember's statutory pay entitlement pending rehearing. *Combs*, 50 Fed. Cl. at 604; *see Dock*, 46 F.3d at 1093 (stating that that "statutory mandate [in Article 75(a)] leaves no

room for any payment of pay and allowances for the period during which the member awaits rehearing").

Third, nothing in *Johnson* supports the plurality's apparent conclusion that Appellee was entitled to E-6 pay pending rehearing. To the extent the plurality relies on the *dicta* in *Johnson* that no "vestiges of the former court-martial should linger" (J.A. 9), that *dicta* is specific to a new trial, not a rehearing.[9] Accordingly, the plurality's reliance on *Johnson* is an infirm basis upon which to conclude that Appellee was entitled to pay at the E-6 rate, particularly given that it did not even attempt to distinguish *Dock* and *Combs*.

Having cited *Johnson* for authority, the plurality next cited *Keys*, 31 M.J. at 230, as precedent for determining Appellee's entitlement to E-6 pay. (J.A. 10-11.) *Keys* is distinguishable for at least three reasons. First, unlike this case, *Keys* never interpreted Article 75(a) in terms of pay entitlement pending rehearing, because Keys was in post-trial confinement pending appeal on his first sentence "when his term of enlistment expired and his pay stopped." *Id*. at 233. Instead, *Keys* only interpreted Article 75(a) in terms of authorizing 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." *Id*. at 232. This

[9] Unlike a new trial under Article 73, a rehearing under Article 63 is "a continuation of the former proceeding." *United States v. Robbins*, 18 C.M.A. 86, 88 (C.M.A. 1969) (quotations omitted).

conclusion is fully in accord with *Dock*. *See Dock*, 46 F.3d at 1091 (concluding that the *Keys* analysis of Article 75(a) is "fully consistent" with its own).

Second, the *Keys* Court never decided the pay entitlement issue—the sole foundation upon which the plurality based its analysis in sustaining the Military Judge's ruling. Instead, the *Keys* Court denied the extraordinary writ, concluding that Keys would have to file his pay entitlement claim with the U.S. Court of Federal Claims. *Id*. at 234. Thus, to the extent that *Keys* suggested a statutory entitlement to a pre-set-aside-level pending rehearing, this was only *dicta*. *Keys*, 31 M.J. at 234. The plurality recognized this fact by acknowledging that the *Keys* Court "repeatedly suggested that continuing forfeitures post-set aside *might* violate Article 13." (J.A. 11) (emphasis added). Rather than recognizing these repeated "suggestions" as *dicta*, however, the plurality followed up with an equally infirm and hypothetical conclusion to find Appellee's entitlement to E-6 pay: "Had Spec. Keys been released and restored to full duty, his Article 13 argument regarding deprivation of pay *might* have been successful." (J.A. 12.)

Perhaps this type of speculative reasoning may have been persuasive in a vacuum. But courts of competent jurisdiction to address Appellee's underlying pay entitlement have already held contrary to the plurality's hypothetical musings. Additionally, both *Dock* and *Combs* were specific to the underlying statutory entitlement and decided later-in-time to *Johnson* and *Keys*. The plurality's failure

to analyze the holdings in either of these more recent and relevant opinions and to instead rely on *dicta* from a prior decision to find a statutory entitlement to E-6 pay should not be countenanced by this Court.

The plurality's *dicta*-driven hopscotch next took it to this Court's opinion in *Combs*. (J.A. 12-13.) In *Combs*, a two-judge plurality found an Article 13 violation and granted sentencing credit based on a 24-page unrebutted affidavit that "unequivocally established the punitive intent of command authorities." 47 M.J. at 333. Nowhere, however, did the *Combs* Court mention or analyze Article 75(a). This is because the issue in *Combs* was whether the command's treatment of Combs pending rehearing constituted illegal pretrial punishment *due to punitive intent*, not his underlying pay entitlement (the U.S. Court of Federal Claims later determined that Combs was only entitled to E-1 pay pending rehearing). *Compare Combs*, 47 M.J. at 332-34, *with Combs*, 50 Fed. Cl. at 604.[10] The lower court plurality apparently failed to recognize the significance of the fact that, unlike in *Combs*, here it is undisputed that everyone involved in Appellee's pay entitlement determination acted without punitive intent. (J.A. 7, 322.)

The plurality was simply not free to ignore clear holdings by courts with exclusive jurisdiction over military pay entitlement, cobble together miscellaneous

[10] In *Kreutzer* this Court questioned the precedential value of *Combs* because it was a two-judge plurality that concluded Combs was punished under Article 13. *United States v. Kreutzer*, 70 M.J. 444, 447 (C.A.A.F. 2012).

dicta from this Court's prior opinions as a basis to presume Appellee's statutory entitlement to E-6 pay pending his rehearing, and then use that premise to find an Article 13 violation. This is particularly true because as to the core issue—and the only one of moment in Appellee's case—the U.S. Court of Federal Claims *soundly rejected* any potential suggestion from this Court's opinion in *Combs* that he was entitled to E-6 pay. *Combs*, 50 Fed. Cl. at 604.

To buttress its conclusion of an E-6 pay entitlement, the plurality cited to 37 U.S.C. § 204(a) for the unremarkable proposition that a uniformed member is entitled to basic pay at the "grade to which assigned or distributed, in accordance with their years of service." (J.A. 13). This case is not about Appellee receiving *no* pay or allowances.[11] Rather, Appellee's entitlement to E-1 pay is based on the plain language of Article 75(a) as interpreted by *Dock* and *Combs*. *See Anderson v. United States*, 54 Fed. Cl. 620, 626 (2002) ("[F]orfeiture pursuant to a court-martial sentence . . . may alter the general [entitlement] rule" under 37 U.S.C. § 204(a)). Thus, pursuant to Article 75(a), Appellee received basic pay at the grade assigned or distributed based on the executed sentence from his first court-

[11] *Cf. Fischer*, 61 M.J. at 423 (Erdmann, J., dissenting) (citing 37 U.S.C. § 204(a) and disputing that a DoD FMR provision can "take away one of the basic rights associated with active duty military status—the right to pay"). Unlike *Fischer*, Appellee's statutory entitlement to pay at the E-1 rate flows directly from Article 75(a) as interpreted by *Dock* and *Combs*, and is consonant with 37 U.S.C. § 204(a).

martial—E-1 pay "in accordance with [Appellee's] years of service." 37 U.S.C. § 204(a).

d. Fourth, the plurality erred because its opinion accorded no deference to DFAS's determination.

Neither the Military Judge nor the plurality accorded any deference whatsoever to DFAS's interpretation of applicable statutes, pay regulations, and appellate court decisions. Although the Military Judge recognized that DFAS officials "have taken a good-faith position that they believe is backed in statutory and case law," he flatly "disagree[d] with DFAS's reading of the applicable law" and dismissed it. (J.A. 322.) The plurality appeared to join the Military Judge in this disagreement. (J.A. 14-15.) As discussed *supra*, neither the lower court nor the Military Judge were free to accord absolutely *no deference* to the good-faith pay entitlement determination of the government agency responsible for statutory and regulatory compliance in the area of military pay. *Chevron*, 524 U.S. at 844.

E. Issuance of the Writ was appropriate under the circumstances in order to: (1) prevent a situation in which DFAS and military commands are forced to violate the law; and (2) prevent a windfall to Appellee and avoid future recurrences.[12]

As the dissent noted, the plurality's refusal to issue the requested Writ has created a "stand-off":

[12] This part of the United States' argument also applies with equal force to Certified Issues III and IV, *infra*. *See supra*, note 2.

> Article I criminal courts on the one side, holding that persons pending a rehearing are entitled to pay at the previously held pay grade and to sentence relief if paid otherwise; an executive agency on the other, faithfully applying competent fiscal authority to find the opposite: that such payments are not authorized by the law.

(J.A. 26.) Such a "stand-off" puts DFAS and military commands in an untenable position. If they pay an appellant pending rehearing in accordance with Article 75(a) and the holdings of courts designated by Congress to rule on military pay entitlement issues, they violate Article 13. But if they pay that appellant at his previous pay grade in order to avoid an Article 13 violation, they violate fiscal law. "Indeed, DFAS is statutorily *prohibited* from making or authorizing an expenditure unless expressly authorized by law." (J.A. 22.) (citing 31 U.S.C. § 1341 ("No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law)); *see* DFAS Counsel Memo ("[P]aying a member at the unreduced rate before the rehearing results are known is highly problematic, because this method requires DFAS to make speculative payments" and thus undermines the certifying officer's responsibility for ensuring "the legality of a proposed payment.") (citing 31 U.S.C. § 3528)). This is exactly the type of "stand-off" that our system cannot tolerate, and should have weighed in favor of issuing the requested Writ. As the dissent stated, the Military Judge's ruling "fails to accord due respect to an agency's pay determination and is bound to recur." (J.A. 16.)

Issuance of the Writ was also appropriate because, by rejecting the core holdings of *Dock* and *Combs*, the Military Judge's ruling encourages litigants facing rehearings to claim illegal pretrial punishment and thereby receive sentencing credit based solely on good-faith interpretations of federal law and DoD regulations by government pay officials. "Perversely, the majority's opinion [also] gives those in the real party's position a disincentive to bring the issue to the court that could rule authoritatively on the substantive pay question and, if appropriate, *directly* remedy the purported pay shortage." (J.A. 18.) By failing to address the Military Judge's rejection of *Dock* and *Combs*, the lower court's opinion perpetuates this jurisdictionally bereft and erroneous rejection. This is the type of issue likely to recur. *Labella*, 15 M.J. at 229.

III.

THE PLURALITY ERRED WHEN IT FOUND, AS A MATTER OF LAW, THAT THE SETTING ASIDE OF APPELLEE'S SENTENCE RENDERED HIS PREVIOUSLY ADJUDGED AND EXECUTED REDUCTION TO PAY GRADE E-1 "UNEXECUTED" PENDING HIS REHEARING. THIS FINDING WAS IMPLICIT IN THE MILITARY JUDGE'S AWARD OF SENTENCING CREDIT AND CONSTITUTED CLEAR AND INDISPUTABLE ERROR.

A. Standard of review.

As noted above, even in extraordinary writ cases, interpretation of statutes is a question of law this Court reviews *de novo*. *LRM*, 72 M.J. at 369.

B. The UCMJ does not provide that an adjudged and executed sentence to reduction in pay grade becomes "unexecuted" when a Court of Criminal Appeals sets aside the sentence and authorizes a rehearing.

Since the UCMJ was enacted in 1950, Congress has significantly modified how and when different parts of an adjudged sentence are executed. Prior to 1983, if a sentence included a punitive discharge or more than one year of confinement, no part of the sentence could be executed until affirmed under Article 66.[13] In 1983, Congress amended Article 71 to provide that every part of the sentence, except a punitive discharge or death, may be executed once approved by the convening authority. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; *see* H.R. Rep. No. 98-549, at 43-45 (1983); S. Rep. No. 98-53, at 24-25 (1983).

In 1996, Congress amended Article 57(a) to make clear that the part of the adjudged sentence extending to forfeiture of pay and reduction in pay grade are executed by operation of law fourteen days after the date of sentence unless deferred by the convening authority. NDAA FY 1996, Pub. L. No. 104-106, tit. XI, 110 Stat. 461-67; s*ee Shelton*, 53 M.J. at 389 n.2 (based on Article 57(a)(1)(A), adjudged reduction and forfeitures are executed by operation of law); *see also*

[13] *See* Article 71(c), UCMJ (1982) ("No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by the Court of Military Review and, in cases reviewed by it, the Court of Military Appeals.").

Keys, 31 M.J. at 232 ("Keys' first sentence, under which the forfeitures were effected, was an executed sentence.");[14] *Anderson*, 54 Fed. Cl. at 627 (interpreting Article 57(a) to authorize termination of pay fourteen days after sentence).

In *Shelton*, this Court analyzed the interaction of these statutes with Article 75(a), reviewing the legislative history of each article and their implementing regulations in the DoD FMR. *Shelton*, 53 M.J. at 390-91.[15] *Shelton* dealt with the operation of Article 75(a) in a case in which the Army Court of Criminal Appeals set aside the action of the convening authority, who upon remand approved the identical sentence with regard to reduction to E-1 and forfeitures. *Id.* at 388. The CCA affirmed and Shelton petitioned this Court arguing that he should be entitled to relief with regard to forfeiture of pay because the original convening authority's action had been set aside for legal error. This Court specified the following issue:

> Whether the decision of the Court of Criminal Appeals to 'set aside' the original action of the convening authority nullified the reduction in grade and forfeiture of pay executed as a result of the original action by the convening authority; and, if so, whether any sentence to reduction in grade and forfeiture of pay did not become effective until the date of the second convening authority's action.

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[14] At the time of Keys' court-martial, forfeiture of pay and adjudged reduction were not executed until approved by the convening authority. *See* Article 57(a), 10 U.S.C. 857(a) (1984); *Keys*, 31 M.J. at 231.

[15] The *Shelton* Court cited to paragraph 70509 of the DoD FMR, which has since been renumbered as paragraph 480802. (J.A. 277, 437).

Id. at 389. The Court held that Article 75(a) "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 result of trial error and executed sentences disapproved as a result of convening authority error." *Id.*

Additionally, this Court took the extraordinary step of prospectively overruling *United States v. Foecking*, 22 C.M.A. 46, 50 (1972) as inconsistent with the "legislative purpose expressed in Article 75(a), which is to avoid giving an accused a windfall when he or she is resentenced." *Shelton*, 53 M.J. at 391. Despite the fact that Article 75(a) contains a triggering event of a "new trial or rehearing," this Court looked to the legislative history of Article 75(a) and held that if any part of the sentence has been executed, the statute *precludes* any restoration.[16] *Id.* at 389.

C. <u>The plurality and the Military Judge clearly erred in finding that the setting aside of Appellee's sentence rendered his reduction to pay grade E-1 "unexecuted" pending rehearing</u>.

Appellee's adjudged reduction to pay grade E-1 and adjudged forfeiture of all pay and allowances were executed by operation of law on October 26, 2012,

[16] In contrast, Congress intended restoration following set-aside within the context of *automatic* reduction to pay grade E-1. Article 58a(b), UCMJ. This makes sense because automatic reduction is an administrative measure rather than punishment. *United States v. Blocker*, 33 M.J. 349, 352 (C.M.A. 1991); *United States v. Powell*, 12 C.M.A. 288, 291 (C.M.A. 1961).

and every part of the sentence except the dishonorable discharge remained executed while Appellee was pending rehearing. Articles 57(a)(1)(A), 71(c)(1) and 75(a), UCMJ; R.C.M. 1107(f)(4)(B). Unlike in *Shelton*, there is no dispute that Appellee's case fits within Article 75(a). Thus, the legislative history of Article 75(a) as interpreted in *Shelton* clearly supports that Appellee is not and was never entitled to restoration pending rehearing. *Accord Dock*, 46 F.3d at 1088.

To justify its contrary conclusion—and to harmonize this conclusion with the plain text of Articles 57(a)(1)(A), 71(c)(1), and 75(a) indicating that Appellee's reduction, once executed, remained so pending rehearing—the plurality concluded in an *ipse dixit* fashion that when a court-martial sentence is set aside, the entire sentence along with its constituent parts become "unexecuted." (J.A. 9) ("Once a court-martial sentence is set aside and thus invalidated, the Government can no longer execute it."); (J.A. 7) ("Admittedly, once a member's pay grade is reduced, affirmative action is required to restore it . . . [b]ut with each disbursement, DFAS makes a determination of a member's pay entitlement."). The plurality cited no authority for this remarkable conclusion because there is none. Instead, it rested its conclusion on the dubious premise of what it referred to as the "conspicuous manifestation of the *Johnson* Court's clean slate requirement." (J.A. 10.) This premise is flawed for at least six reasons.

First, putting aside the fact that the *Johnson* Court interpreted a completely different statute (Article 73), when *Johnson* was decided, no part of an accused's sentence was executed until the sentence was affirmed by an applicable Court of Military Review. *See* 10 U.S.C. 871(c) (1968).[17] Subsequent to 1983, "only those parts of the sentence subject to mandatory review remained unexecuted." *Matter of: Kenneth A. Glover*, 1992 U.S. Comp. Gen. LEXIS 791 (1992).

Second, the plurality misapprehended the legal meaning and effect of an executed sentence. It hypothesized that because the United States must release an accused from confinement once a sentence is set aside,[18] all other parts of the sentence become prospectively unexecuted. This conclusion confuses the term "execution," as defined in Article 71, with the legal requirement to release an accused from confinement or hold a pretrial confinement hearing under R.C.M. 305. Although the period of confinement begins to run from the date the sentence is adjudged, placing an accused in post-trial confinement immediately following his conviction does not "execute" his sentence to confinement. *See* Articles 57(b)-(c), UCMJ. The requirement to release or hold a pretrial confinement hearing once

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[17] Similarly, the Military Judge erroneously relied on *dicta* from *Rhoades v. United States*, 229 Ct.Cl. 282 (1982), which also analyzed the pre-1983 Article 71.

[18] The lower court cited *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990), for this proposition, which is incorrect because decisions by courts of criminal appeals are not self-executing. *United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997); *Kreutzer*, 70 M.J. at 446.

an accused's right becomes "sufficiently weighty," *Kreutzer*, 70 M.J. at 446, has no bearing on whether the sentence to confinement becomes unexecuted. The sentence to confinement, like the other parts of the sentence, with the exception "of those parts of a sentence subject to mandatory review," remains executed. *Glover*, 1992 U.S. Comp. Gen. LEXIS 791, at *5; *see* R.C.M. 1209(b); R.C.M. 1113(b).

Third, an interpretation that upon set-aside, an accused's sentence to confinement is "unexecuted" is inconsistent with the plain words of Article 57a(c), which authorizes the Secretary concerned to "defer further service of sentence to confinement" pending review under Article 67(a)(2). If the sentence to confinement somehow became unexecuted, Article 57a(c) would be meaningless.

Fourth, the fact that the Government must, following a sentence set-aside, release an accused from post-trial confinement or hold a pretrial confinement hearing has no bearing as to the execution of other parts of the sentence. The "infamous punishment" of imprisonment fits in a different category. *Flemming v. Nestor*, 366 U.S. 603, 616 (1960); Article 58, UCMJ; *see* R.C.M. 1113(e)(2) (articulating various requirements associated with execution of confinement).

Fifth, the plurality's conclusion relied on the Military Judge's obvious misreading of the DoD FMR. Citing Volume 7A, paragraph 480802.A of the DoD FMR, the Military Judge concluded that when Appellee's sentence was set aside, those parts of the sentence extending to reduction, forfeiture of pay, and

confinement became "unexecuted portion[s]" of his sentence. (J.A. 277). But this reading of the provision was clearly wrong. Because adjudged forfeiture of pay and reduction had already been executed, the first sentence of the paragraph, not the second sentence, controls:

> *When an executed court-martial sentence which includes a forfeiture is set aside or disapproved, and a new trial or rehearing is ordered that results in an approved sentence to forfeiture, credit the member with the amount of any forfeiture affected under the first sentence*. When an unexecuted court-martial sentence which includes a forfeiture is set aside or disapproved and a rehearing is ordered, the member is entitled to full pay and allowances (subject to other proper deductions) for the period from the convening authority's action on the original sentence until the convening authority's action on the subsequent sentence. . . .

(J.A. 437.)

Sixth, the plurality addressed only forfeitures, but not Appellee's adjudged and executed reduction to pay grade E-1. These are treated separately in the Code and the DoD FMR. Articles 57(a), 58a, and 58b, UCMJ; *see* DoD FMR, Vol. 7A, para. 480801 ("[R]estoration includes any executed forfeiture *and* any pay and allowances lost as a result of an executed reduction in grade") (emphasis added). (J.A. 436.)

There is simply no legal authority for the plurality's conclusion that Appellee's executed reduction to pay grade E-1 became "unexecuted" when his first court-martial sentence was set aside. To the extent the plurality relied on inapplicable *dicta* from *Johnson* to conclude to the contrary, it clearly erred.

IV.

THE PLURALITY ERRED WHEN IT RELIED ON, AND THEN MISAPPLIED, *DICTA* FROM THIS COURT'S DECISION IN *FISCHER* TO JUSTIFY THE MILITARY JUDGE'S RULING THAT GOOD-FAITH EFFORTS BY GOVERNMENT OFFICIALS TO FOLLOW FISCAL LAW REQUIREMENTS CONSTITUTED ILLEGAL PRETRIAL PUNISHMENT IN THE ABSENCE OF ANY PUNITIVE INTENT.

A. Standard of review.

Whether an accused has endured unlawful pretrial punishment is a mixed question of fact and law that involves both constitutional and statutory considerations. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Notwithstanding the heightened standard of review applicable in extraordinary writ cases with respect to discretionary decisions by the trial court, this Court defers to the findings of fact by the military judge where those findings are not clearly erroneous. *King*, 61 M.J. at 227. This Court's application of those facts to the constitutional and statutory considerations, as well as any determination of whether an accused is entitled to credit for unlawful pretrial punishment involve independent, *de novo* review. *Id.*

B. Illegal pretrial punishment under Article 13 involves government actions having a purpose or intent to punish.

Article 13, UCMJ, provides that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the

charges pending against him." 10 U.S.C. § 813 (2012). This Court has interpreted the statute to prohibit two types of government action: "(1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial." *Fischer*, 61 M.J. at 418 (C.A.A.F. 2005) (citations omitted). Only the first type of action is alleged in this case. (J.A. 6, n.3.).

To constitute illegal pretrial punishment, the official governmental action must have a "purpose or intent to punish an accused before guilt or innocence has been adjudicated." *Id.* at 418 (quoting *McCarthy*, 47 M.J. at 165). Courts apply this standard by examining the intent of detention officials, or by examining whether the purposes served by the restriction or condition are "reasonably related to a legitimate governmental objective." *Id.* (quoting *King*, 61 M.J. at 227); *see United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001) ("Pretrial punishment includes public denunciation and degradation.").

C. <u>This Court and the Courts of Criminal Appeals have consistently denied allegations of illegal pretrial punishment based on neutral application of governmental pay regulations</u>.

In *Combs*, a plurality of this Court found that Technical Sergeant Combs' command violated Article 13 because, *inter alia*, Combs was paid at the E-1 rate pending his rehearing. However, as noted *supra* and by the dissent (J.A. 21), the

key to the *Combs* plurality's holding was Combs' lengthy and unrebutted affidavit which "unequivocally" established the punitive intent of his command. *See Combs*, 47 M.J. at 332-33. Based on this finding of punitive *intent*, the *Combs* Court found that Combs was entitled to confinement credit for the period he suffered "ignominy and other harm from the unlawful demotion" while pending his rehearing. *Id.* at 334. The *Combs* Court did not mention—let alone resolve—the relationship between Articles 13 and 75(a).

In contrast, this Court and the Courts of Criminal Appeals have consistently denied allegations of illegal pretrial punishment arising from neutral application of non-punitive government pay regulations where there is no evidence of punitive intent. In *Fischer*, this Court addressed the question of whether a provision from the DoD FMR that authorizes the Government to hold an accused in confinement beyond his EAOS without pay amounted to illegal pretrial punishment in violation of Article 13. The *Fischer* Court—citing, *inter alia*, *Combs*, 50 Fed. Cl. at 594—disagreed with Fischer's contention that "the implicit purpose" of the regulation in question was "to punish." *Fischer*, 61 M.J. at 418. Instead, this Court found that the EAOS date "is a rational, objective point for termination of pay and it is reasonably related to the legitimate Government objective of not paying people who are not performing duties." *Id.* at 420. The Court concluded that application of the regulation was reasonable given that Fischer had reached his EAOS and was

not performing productive services. Thus, application of the DOD FMR to Fischer's situation did not violate Article 13. *Id.* at 421.

In *Dodge*, the Air Force Court of Criminal Appeals made a similar conclusion regarding the decision of finance officials to leave a confinee in a "no pay" status pending his sentence reassessment. Citing *Dock* and *Combs* (the U.S. Court of Federal Claims case), the *Dodge* court noted that "[t]here are myriad reasons why finance officials could conclude the appellant is not entitled pay, including the not unreasonable belief that Article 75(a) . . . bars his restoration to a pay status until after this Court's decision." *Dodge*, 60 M.J. at 878. The court concluded that Dodge had failed to show that the intent of finance officials was "to subject him to illegal punishment" rather than simply a good-faith decision to follow the requirements of Article 75(a) as interpreted by *Dock* and *Combs*, and therefore the court rejected Dodge's pretrial punishment argument. *Id.* This Court affirmed. 61 M.J. 288 (C.A.A.F. 2005).[19]

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[19] *See also United States v. Banegas*, 2015 CCA LEXIS 329 (A.F. Ct. Crim. App. Aug. 13, 2015), *rev. denied*, 2015 CAAF LEXIS 973 (C.A.A.F. Nov. 9, 2015) (refusal to pay an appellant's lodging expenses did not violate Article 13 where "Air Force personnel legitimately believed the appellant was not entitled to per diem under the applicable travel regulations") (J.A. 343-57); *United States v. Urich*, 2008 CCA LEXIS 472, at *8 (A.F. Ct. Crim. App. Oct. 20, 2008), *rev. denied*, 2009 CAAF LEXIS 235 (C.A.A.F. March 26, 2009) (military judge's denial of Article 13 claim based on withholding of pay by finance officials while appellant was confined not clearly erroneous) (J.A. 358-72).

Following *Dodge*, the Air Force Court of Criminal Appeals in *United States v. Wilson*, No. 37486, 2015 CCA LEXIS 231 (A.F. Ct. Crim. App. June 3, 2015) extended its analysis of the interaction between Articles 13 and 75(a) to a situation nearly identical to the facts of this case. (J.A. 373.) Technical Sergeant Wilson was ordered back to active duty for his sentence rehearing after the Court of Criminal Appeals set aside his original sentence, which included reduction to E-1. (J.A. 377.) While on active duty pending his rehearing, "the appellant remained convicted but did not have an adjudged or an approved sentence." (J.A. 377.) Like Appellee, Wilson was allowed to wear the rank of E-6, but he was still paid at the E-1 rate in accordance with his original sentence. (J.A. 377.) The Air Force Court of Criminal Appeals rejected Wilson's allegation that this pay entitlement decision violated Article 13, noting that "[t]he appellant has not provide any evidence that the reduction to E-1 while he awaited his sentence rehearing was done with intent to punish." (J.A. 378.) Citing *Dodge* and distinguishing this Court's decision in *Combs*, the court found that "[a] mere failure to restore pay status to an appellant awaiting a sentence rehearing is not per se a violation of Article 13, UCMJ." (J.A. 378.) This Court denied review. 2015 CAAF LEXIS 756 (C.A.A.F. Aug. 26, 2015).

D. Although the *Fischer* Court examined the DoD FMR for "punitive effect," this analysis was *dicta* and has never been used to hold that good-faith efforts by government officials to follow the law constitute illegal pretrial punishment.

In *Fischer*, the appellant argued that even if the pay regulation in question was not "implicitly punitive," the policy was "punitive in effect" under the seven factors articulated by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)—an unrelated case concerning the constitutionality of a statute that penalized a draft dodger with loss of citizenship. *Fischer*, 61 M.J. at 420. "Assuming, without deciding, that the *Mendoza–Martinez* factors are applicable to Article 13," the *Fischer* Court found that "these factors do not support a finding that" application of the pay regulation in question to Fischer was punitive. *Id.* Thus, although the Court examined the regulation and the action of government officials both for punitive intent as well as "punitive effect," the latter analysis was *dicta*. *Id.* at 421.

Indeed, in the twenty-three appellate decisions that have cited *Fischer*, only the plurality in this case has applied the *Mendoza-Martinez* factors to find that governmental action constituted illegal pretrial punishment in violation of Article 13 based on punitive effect. In fact, only one other decision citing *Fischer* has even applied the *Mendoza-Martinez* factors. In that case, the Navy-Marine Corps Court of Criminal Appeals *rejected* an argument that application of the factors casted the revised OPNAV instruction on self-reporting criminal charges as

punitive. *United States v. Castillo*, 2014 CCA LEXIS 328, at *20-25 (N-M. Ct. Crim. App. March 27, 2014). (J.A. 363-72.) This Court has cited *Fischer* just three times, and has never revisited the "punitive effect" test or relied on the *Mendoza-Martinez* factors to find an Article 13 violation. *See United States v. Wise*, 64 M.J. 468, 476 n.8 (C.A.A.F. 2007); *United States v. Pena*, 64 M.J. 259, 266 (C.A.A.F. 2007); *United States v. Lonnette*, 62 M.J. 296, 297 (C.A.A.F. 2006).

In other contexts, the Supreme Court has denied allegations of wrongful punishment based on application of the *Mendoza-Martinez* factors to administrative, non-punitive regulations. *See Hudson v. United States*, 522 U.S. 93, 95-105 (1997) (holding that monetary penalties and occupational debarment for violation of federal banking statutes were not criminal punishments and did not bar later criminal prosecution); *Smith v. Doe*, 538 U.S. 84, 99-100 (2003) (holding that Alaska's sex offender registration statute was "nonpunitive" and its retroactive application did not violate the *Ex Post Facto* Clause); *United States v. Ursery*, 518 U.S. 267, 297 (1996) (Scalia, J., concurring) ("Civil forfeiture proceedings of the sort at issue here [for drug transactions and money laundering] are not criminal prosecutions, even under the standard of . . . *Mendoza-Martinez*."); *see also United States v. Gammons*, 51 M.J. 169, 176-79 (C.A.A.F. 1999) (holding that nonjudicial punishment is administrative and does not bar a subsequent criminal trial for the same acts even though penalties may extend to reduction and forfeiture of pay).

E. The action of paying Appellee at the E-1 rate pending his rehearing did not violate Article 13 because: (1) as in *Fischer*, it was not motivated by punitive intent; and (2) even under a *Mendoza-Martinez* analysis, it lacked "punitive effect."

In this case, it is undisputed that the action of paying Appellee at the E-1 rate pending his rehearing was motivated not by punitive intent, but by a good-faith effort to comply with the law. (J.A. 7, 322.) This fact alone should end this Court's analysis of the Article 13 issue, as legal compliance is, by definition, a "legitimate governmental objective." *King*, 61 M.J. at 227. Because it is undisputed that the purpose of paying Appellee at the E-1 rate pending rehearing was to comply in good faith with the law, not to punish him, the plurality erred when it found "no clear and indisputable error in the [Military Judge's] determination of illegal pretrial punishment" following the set-aside pending Appellee's rehearing. (J.A. 15.)

However, assuming *arguendo* that the *Fischer* Court really did announce a "punitive effect" test in the context of Article 13, the plurality erred in sustaining the Military Judge's finding of punitive effect in this case for two reasons. First, even though the Military Judge relied exclusively on the "punitive effect" test from *Fischer*, he never actually applied the *Mendoza-Martinez* factors. (J.A. 269-83, 318-23.) Second, as demonstrated *infra*, the plurality's analysis of the *Mendoza-Martinez* factors was clearly erroneous.

1. Continuing to pay Appellee as an E-1 pending his rehearing did not involve an affirmative disability or restraint.

The plurality found that continuing to pay Appellee at the E-1 rate pending rehearing involved an "[a]ffirmative disability of [sic] restraint" because "the service member receives less money." (J.A. 7.) As in *Fischer*, "it is difficult to characterize this as an affirmative disability because [Appellee], and those in his position, are not entitled to be paid." *Fischer*, 61 M.J. at 419-20. The plurality overcame this difficulty by characterizing Appellee's reduction not as a one-time event that took place pursuant to Article 57(a)(1)(A), but rather as a recurring event that DFAS effectuated "with each disbursement" and with each "determination of [Appellee's] pay entitlement." (J.A. 7.)

There is simply no support for this conclusion. As the dissent noted, "Once a reduction is effected, the servicemember is permanently assigned the lower pay grade absent an affirmative promotion or restoration to the previously-held grade." (J.A. 23.) This is different from forfeitures, which "are collected—and thus executed—one paycheck at a time." (J.A. 23.) As this Court found in *Shelton*, Article 75(a) "precludes restoration when 'such executed part [of a court-martial sentence] is included in a sentence imposed upon the new trial or rehearing." *Shelton*, 53 M.J. at 389. Thus, contrary to the plurality's assertion, DFAS was legally obligated to "maintain the status quo [of] continuing to pay [Appellee] as an E-1 following set aside." (J.A. 7.) And because Appellee was not *in fact*

restored to his pre-set-aside grade of E-6, he had no statutory entitlement to E-6 pay and therefore could not have suffered an "affirmative disability or restraint." *Fischer*, 61 M.J. at 420

2. Continuing to pay an accused in accordance with an executed reduction pending rehearing has not historically been regarded as punishment.

The plurality found that Appellee's pay status pending rehearing "has historically been regarded as punishment" by focusing on the reduction in pay grade itself and ignoring that the reduction was *already executed* at the time the lower court set aside the findings and sentence. (J.A. 8.) The plurality observed that "DFAS's policy applies only following a court-martial sentence," but this observation is meaningless given that the "DFAS policy" referred to involves compliance with a statute and federal case law that *expressly and exclusively* address post-trial, post-sentence actions by reviewing and appellate authorities. Neither Appellee nor the plurality cited any precedent to suggest that maintaining Appellee's pay status at the E-1 rate pending the outcome of his rehearing in accordance with Article 75(a) and applicable federal case law has historically been regarded as punishment. *Cf. Powell*, 12 C.M.A. at 291 (holding that the automatic reduction clause of Article 58a is "an administrative consequence of the enumerated sentence" and is not punitive).

3. Continuing to pay Appellee as an E-1 pending his rehearing did not result from a finding of scienter.

According to the plurality, "DFAS's policy only comes into play on a finding of *scienter*, either through a guilty plea at court-martial or a verdict finding criminal *scienter* on the part of the accused." (J.A. 8.) This is clearly incorrect. The trigger for maintaining Appellee's pay entitlement at the E-1 rate pending his rehearing was not the guilty findings from his initial court-martial. Rather, his continued pay status was "triggered"—although that word is hardly applicable given that his pay entitlement remained unchanged—by the lower court's setting aside Appellee's initial findings and sentence on grounds unrelated to his guilt or innocence (with a rehearing authorized) and the Convening Authority's subsequent decision to order a rehearing. As in *Fischer*, "[c]onsciousness of guilt is not a factor in determining whether to implement the regulation, so the regulation has no role in a finding of scienter." *Fischer*, 61 M.J. at 420-21; *see also Hudson*, 522 U.S. at 104 (statutes allowing debarment and monetary penalties do not involve a finding of scienter because they apply to "any person 'who violates' any of the underlying banking statutes, without regard to the violator's state of mind").

4. Continuing to pay Appellee at the E-1 rate pending his rehearing did not promote retribution and deterrence.

The plurality found that maintaining Appellee's pay status pending his rehearing "promotes the same traditional aims of punishment as the punishment of

reduction in pay grade itself . . . retribution and deterrence." (J.A. 8.) But under this logic, *any* withholding of a servicemember's pay amounts to punishment, no matter the reason for the withholding. Obviously, this is incorrect. *See Fischer*, 61 M.J. at 421 ("The policy . . . is not aimed at all who are accused of a crime and held in pretrial confinement, but only applies if a neutral event occurs—the person's EAS date."); *see also Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("Forfeiture . . . serves a deterrent purpose distinct from any punitive purpose.").

5. <u>The behavior to which DFAS's action applied—Appellee's status as an accused pending rehearing—is not already a crime</u>.

The plurality's tortured analysis of the fifth *Mendoza-Martinez* factor and its conclusion that "[t]he behavior which DFAS's policy applies is necessarily a crime" evades logical comprehension. (J.A. 8-9.) Simply being a servicemember "pending a rehearing on a set-aside sentence" is not a crime. No *actus reus* is involved in this behavior beyond mere participation the military appellate process. The plurality stretched this factor to fit the facts of this case by temporally relating DFAS's pay entitlement decision back to the Convening Authority's initial preferral and referral decisions and his subsequent decision to "persist[] in the prosecution of a crime," rather than to its own decision to set aside the original findings and sentence on grounds *unrelated to guilt or innocence*. (J.A. 28.) In *Fischer*, the "deciding factor [of whether or not to apply the DoD FMR] is whether the servicemember has reached EAS, not whether there is probable cause to

believe the individual violated the UCMJ." *Fischer*, 63 M.J. at 421. So too here with respect to the "deciding factor" of the plurality's decision to set aside the findings and sentence and authorize a rehearing.

6. An alternative purpose may rationally be assigned to DFAS's policy—namely, adherence to fiscal law.

With respect to the sixth *Mendoza-Martinez* factor, there is an obvious alternative purpose that may reasonably be assigned to DFAS's policy of maintaining an appellant's pay status pending rehearing: compliance with fiscal law and adherence to the binding appellate holdings of the U.S. Court of Appeals for the Federal Circuit (*Dock*) and the U.S. Court of Federal Claims (*Combs*). The plurality brushes aside this obvious alternative purpose by claiming that "the agency that enforces a court-martial order cannot disassociate itself from the effects of that order by simply citing its legal obligation to enforce it." (J.A. 9.) But if this were true, there would be no point in asking whether DFAS had an "alternative purpose" at all. The plurality's objection seems to be to the Supreme Court's inclusion of "alternative purpose" as a *Mendoza-Martinez* factor, not to the specific manifestation of that factor here.

7. Paying Appellee at the E-1 rate pending rehearing is not "excessive" in relation to DFAS's alternative purpose.

With respect to the final *Mendoza-Martinez* factor, the plurality again relied on *dicta* from *Keys*, misapprehending such *dicta* as "precedent from our superior

court," in order to conclude that "the punitive effect of pay deprivation while awaiting rehearing" is excessive in relation to DFAS's alternative purpose of complying with fiscal law. (J.A. 9.) The implication is that, for DFAS to avoid having an "excessive" punitive effect in violation of Article 13, it must violate a different statutory mandate of Congress (Article 75(a)), ignore *Dock*, *Combs*, and Comptroller General opinions (e.g. *Glover*), and provide *every* appellant pending rehearing pay and allowances to which he or she *might not be* statutorily entitled. This cannot be the correct result.

Conclusion

In finding an Article 13 violation premised on a finding that Appellee was statutorily entitled to E-6 pay pending rehearing, the Military Judge and the lower court were not free to reject contrary law from the courts with exclusive jurisdiction over military pay entitlement issues. Nor were they free to accord no deference to the pay entitlement determination of DFAS, particularly where government officials acted without any punitive intent. This Court should remand this case to the lower court with specific instructions to reconsider the United States' Petition for Extraordinary Relief, applying *Dock* and *Combs* and according proper deference to the pay entitlement determination of DFAS. Furthermore, this Court should clarify: (1) whether the lower court's setting aside of Appellee's findings and sentence operated to "unexecute" Appellee's adjudged and executed

reduction to pay grade E-1 pending rehearing; and (2) whether, and in what manner, the *Mendoza-Martinez* factors apply in the context of Articles 13 and 75(a).

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I certify that the foregoing was delivered to the Court and a copy was served on opposing counsel on February 29, 2016.

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