IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY ON BEHALF OF APPELLANT
Appellant	)	
	)	
v.	)	Crim.App. Dkt. No. 201200264
	)	
Stephen P. HOWELL,	)	USCA Dkt. No. 16-0367/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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Argument

II.

A. The Military Judge's Article 13 ruling cannot *itself* provide the basis of Appellee's statutory entitlement to E-6 pay pending rehearing.

As a fundamental aspect of his argument, Appellee claims that "cases addressing entitlement to pay are not instructive on issues of what constitutes pretrial punishment under Article 13." (Appellee's Answer at 16-17.) In other words, *Dock v. United States*, 46 F.3d 1083 (Fed. Cir. 1995), and *Combs v. United States*, 50 Fed. Cl. 592 (Fed. Cl. 2001),[1] may be relevant to determining Appellee's statutory pay entitlement pending rehearing, but their holdings are inapplicable here because this case concerns illegal pretrial punishment under Article 13, not pay entitlement pending rehearing under Article 75(a). Appellee then suggests that the *Dock* and *Combs** courts, despite having exclusive jurisdiction over military pay entitlement matters—*see, e.g.*, *United States v. Allen*, 33 M.J. 209, 215 (C.M.A. 1991)—"should have deferred to this Court's interpretation of the UCMJ" and its authority "to determine matters of military justice." (Appellee's Answer at 17.)

[1] Similar to Appellee, the United States will distinguish between this Court's decision in *United States v. Combs*, 47 M.J. 330 (C.A.A.F. 1997), and the subsequent 2001 decision of the Court of Federal Claims, *Combs v. United States*, 50 Fed. Cl. 592 (Fed. Cl. 2001), by using the short cite "*Combs**" to refer to the latter decision.

The exclusive jurisdiction of the Court of Federal Claims over military pay entitlement questions cannot be ignored simply because a servicemember pending rehearing files a pretrial motion alleging an Article 13 violation. If Appellee was only statutorily entitled E-1 pay grade pending rehearing—as DFAS determined, based on its good-faith interpretation of Article 75(a), *Dock*, *Combs**, and DoD pay regulations—then the Military Judge's finding of an Article 13 violation premised only on Appellee's entitlement to E-6 pay constitutes clear and indisputable error, and the lower court's denial of the United States' requested Writ *must* be erroneous.

Appellee cites to this Court's opinion in *Combs* for authority that illegal pretrial punishment can be based on pay entitlement alone. (Appellee's Answer at 18-19.) But *Combs* makes no reference to Article 75(a) or *Dock*. Instead, this Court found that Combs's 24-page unrebutted affidavit "unequivocally established the punitive intent of command authorities," and that the command's actions *therefore* constituted illegal pretrial punishment. *Combs*, 47 M.J. at 333; *see Combs**, 50 Fed. Cl. at 602-03. Here, by contrast, the Military Judge and the lower court found no evidence of punitive intent. (J.A. 7, 322.) Instead, the Military Judge's finding of an Article 13 violation flowed directly from his flawed assumption of a statutory entitlement to E-6 pay—which necessitated his rejection of DFAS, *Dock*, and *Combs** regarding the operation of Article 75(a). (J.A. 278.)

To the extent Appellee is correct that this Court in *Combs* implicitly found that Article 75(a) operated to entitle Combs to *more* than E-1 pay pending rehearing, the court with exclusive jurisdiction over military pay entitlement issues flatly disagreed, describing such a conclusion as "clearly erroneous." *Combs**, 50 Fed. Cl. at 604.

B. *Dock* and *Combs** are applicable, and Appellee's attempts to distinguish these cases fail.

Appellee attempts to distinguish *Dock* and *Combs** from this case on four grounds: (1) Dock, unlike Appellee, remained in pretrial confinement pending rehearing and reached his EAOS before his initial findings and sentence were set aside; (2) Combs, unlike Appellee, was still "convicted" on other charges pending his rehearing, and therefore was only entitled to E-1 pay; (3) both *Dock* and *Combs**, unlike this case, involved a "post-hoc analysis" regarding pay entitlement pending rehearing; and (4) neither case addressed "whether ignoring a court order to set aside the findings and sentence and thereafter imposing forfeitures and reduction in rank constitute punishment under Article 13." (Appellee's Answer at 10-16.). Appellee's arguments concerning *Dock* and *Combs** fail.

First, although Dock remained in pretrial confinement pending his rehearing and Appellee did not, both were past their EAOS at the time findings and sentence were set aside. *Dock*, 46 F.3d at 1093; (J.A. 270); *see Anderson v. United States*, 54 Fed. Cl. 620, 626 (Fed. Cl. 2002) (stating that although 37 U.S.C. § 204(a)(1)

generally entitles servicemembers "to pay and allowances commensurate with their pay grade . . . a forfeiture pursuant to a court-martial sentence or the expiration of a term of enlistment may alter the general rule"). Thus, the relevant difference between Dock and Appellee is that Appellee was in a full-duty status pending rehearing. But this apparent distinction was squarely addressed in *Combs**, where Combs, like Appellee, was in a full-duty status pending rehearing but was still only entitled to E-1 pay. *See Combs**, 50 Fed. Cl. at 604 ("[W]hile the CAAF may have held that the Air Force's imposition of reduced rank when plaintiff was 'trapped in the twilight of the court-martial process' . . . was unlawful pre-trial punishment in violation of § 813, § 875 and *Dock* make it clear that, considering plaintiff's subsequent conviction and sentence, the reduction in rank and lower pay rate refer *back* to plaintiff's first conviction. . . . As such, plaintiff is only entitled, under the law, to the E-1 rate during the periods he was on full duty status.") (citations omitted) (emphasis in original).

Second, although it is true that the Air Force Court of Criminal Appeals did not set aside Combs's less serious convictions under Articles 92 and 128, it is not accurate that the *Combs** court "found that it was permissible to pay him as an E-1 during the interim period due to his other convictions from his first trial that were not set aside," or that "*Combs** reli[ed] on the affirmed convictions in reaching its holding." (Appellee's Answer at 12.) Appellee's reading of *Combs** is wholly

unsupported by anything in the Court of Federal Claims' decision. In fact, the only time the *Combs** court referenced Combs's other convictions, the court made it clear that distinction was irrelevant to its decision: "While the Air Force Review Court did *not* also set aside the convictions for assault and disobedience, it set aside plaintiff's *entire* sentence, and ordered a new hearing on the still-existing murder charge." *Combs**, 50 Fed. Cl. at 594 (emphasis in original).[2] Indeed, to the extent Appellee raises this argument for the first time before this Court, his argument ignores the plain text of Article 75(a), which refers to "all rights, privileges, and property affected by *an executed part of a court-martial sentence* which has been set aside or disapproved . . . ." Article 75(a), UCMJ, 10 U.S.C. § 875(a) (2012) (emphasis added).

Third, neither *Dock* nor *Combs** can fairly be read to have limited their holdings to situations in which the results of the second court-martial were already known. Such a limiting principle appears nowhere in the cases Appellee is

[2] Appellee's claim that "*Dock* failed to recognize that Article 75(a) does not provide for the withholding of pay during the interim period after an entire set of findings and sentence was set aside, and the member is returned to full-duty status and his previous rank," is similarly unsupported by any authority. (Appellee's Answer at 14.) Appellee cites to *Keys v. Cole*, 31 M.J. 228, 232 (C.M.A. 1990) for this novel proposition, but there is simply nothing in *Keys* that remotely supports Appellee's argument.

attempting to distinguish.[3] As noted by DFAS counsel, such a proposed "post-hoc analysis" distinction would force DFAS certifying officers to make "highly problematic . . . speculative payments" in situations where a members' pay entitlement is unclear, undermining their responsibility for the legality of such government expenditures under 31 U.S.C. § 3158. (J.A. 306.) "Certifying officers cannot certify a payment to which a member *may* be entitled *depending upon the outcome of a future event*. Thus, DFAS cannot pay members awaiting rehearing at an unreduced rate until it is known whether the reduction has been imposed at rehearing." (J.A. 306 (emphasis added).) But even if *Combs** or *Dock* did establish such a "post-hoc" limiting principle, it would not apply in this case because the results of Appellee's second court-martial sentence are now known, and once again they include reduction to E-1. Appellee makes no attempt to address this inconvenient fact.

Fourth, it is not a mystery why the *Dock* and *Combs** courts declined to address Appellee's Article 13 claim. That issue was not before them, and it would have been beyond their jurisdiction to address. But their decision not to venture outside their statutory jurisdiction has no bearing on the correctness of their pay entitlement holdings. This is a meaningless distinction.

[3] Appellee speculates that if he were to file suit in the Court of Federal Claims for back pay his "pay claim would likely succeed" based on his proposed "post-hoc" distinction. (Appellee's Answer at 16.) To the extent Appellee genuinely wants an answer to this speculative claim, he should seek it in the proper court, not here.

Finally, Appellee suggests that *Dock*'s conclusion "that Article 75(a) may operate to deprive an accused of *all* pay and pay while in a duty status would contravene the Thirteenth Amendment." (Appellee's Answer at 15.)

Appellee interpretation of *Dock* with respect to the Thirteenth Amendment is not only wrong, it has no applicability to this case. Far from concluding that an appellant pending rehearing in a full-duty status would be deprived of all pay, the *Dock* court stated:

> In a case in which forfeiture of *all* pay and allowances is decreed in the first sentence, the sentence of forfeiture is executed, and then reimposed by the second court martial, Article 75(a) means expressly what it says—no pay and allowances will be paid to such a member from and after the first conviction *until the member is restored to full-duty status*, if ever.

Dock, 46 F.3d at 1093 (emphasis added). In any case, Appellee's erroneous reading of *Dock* would have no application here because Appellee, unlike Dock, received pay and allowances throughout the pendency of his rehearing. Thus, this Court should reject Appellee's hypothetical musings. Furthermore, while Appellee may find the operation of Article 75(a) unfair in application, "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." *Dock*, 46 F.3d at 1086; *see also Bell v. United States*, 366 U.S. 393 (1961) (holding that a soldier's entitlement to pay is statutory, not contractual).

C. Appellee misunderstands *Chevron*. Based on the legislative history of Article 75(a) and the holdings in *Dock* and *Combs*, DFAS's interpretation of Article 75(a) was clearly a "permissible" construction of the statute entitled to agency deference.

Appellee argues that *Chevron* deference to DFAS's interpretation of Article 75(a) is unwarranted because DFAS's interpretation is not "a permissible construction of the statute." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); (Appellee's Answer at 21). In support of this argument, Appellee states that "DFAS regulations and legal opinions fail to acknowledge this Court's interpretation of Article 75(a) in *Keys* . . . [and to] address concerns under Article 13." (Appellee's Answer at 21.) Appellee clearly misunderstands *Chevron.*

In determining whether an agency's construction is permissible and thus entitled to *Chevron* deference, reviewing courts "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11. Rather, a permissible construction of the statute is one that "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *see Meriden Trust and Safe Deposit Co. v. Federal Deposit Ins. Corp.*, 62 F.3d 449, 453 (2d Cir.1995) (an agency's interpretation of a statute will be reversed "if it appears from the statute

or its legislative history that the [agency's] interpretation is contrary to Congress's intent") (internal quotations and citation omitted). Finally, a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by [an] agency." *Chevron*, 467 U.S. at 844.

Thus, in determining whether DFAS's construction of Article 75(a) is "permissible" and therefore entitled to *Chevron* deference, this Court (and the lower court) need only ask whether it reflects a *plausible* construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. Given the plain language of Article 75(a), the interpretations of *Dock* and *Combs**, and the implementing regulations in the DoD FMR, DFAS's construction of the statute is clearly plausible. Furthermore, the *Dock* court recognized, this construction is consistent with the statute's legislative history. *Dock*, 46 F.3d at 1087-88 (citing S. Rep. No. 81-486, at 2257-58 (1949)); *see also United States v. Shelton*, 53 M.J. 387 (C.A.A.F. 2000) (examining legislative history of Articles 57 and 75); *Matter of: Kenneth A. Glover*, 1992 U.S. Comp. Gen. LEXIS 791 (1992).

III.

A. Appellee's reliance on *Von Bergen*, *Staten*, *Beaty*, and *Ruppel* for the proposition that he had an entitlement to E-6 pay pending rehearing is misplaced.

In support of his argument that the lower court's setting aside of Appellee's findings and sentence rendered his reduction to pay grade E-1 "unexecuted"

pending rehearing, Appellee cites to four cases involving the impact of a rehearing on legal issues wholly unrelated to the relationship between pay entitlement and illegal pretrial punishment: *United States v. Staten*, 21 C.M.A. 493 (C.M.A. 1972) (holding that an accused has a right to be present at his rehearing to the same degree as his original court-martial); *United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2009) (holding that the an accused's conditional waiver of his Article 32 investigation through a pretrial agreement at his first court-martial did not automatically waive the Article 32 requirement upon remand, but finding no prejudice); *United States v. Beaty*, 25 M.J. 311, 315 (C.A.A.F. 1987) (holding that "the military judge erred in holding that appellant was not entitled to request other individual counsel since the convening authority had referred additional charges for trial"); and *United States v. Ruppel*, 49 M.J. 247, 253 (C.A.A.F. 1998) (holding *inter alia* that the military judge at rehearing had authority to reconsider a ruling at the original trial that Ruppel was entitled to sentencing credit).

These cases have nothing to do with whether Appellee was entitled to E-6 pay pending rehearing or sentencing credit, and none of them address the specific statutory language in Article 75(a) that is at issue in this case. They provide no support to Appellee's arguments—and the lower court's conclusion—regarding the legal effect of the lower court's setting aside of Appellee's findings and sentence with regard to his statutory pay entitlement pending rehearing.

B. Appellee's unsupported claim that Article 71 became inoperable when the Convening Authority's action was set-aside is new argument and is contrary to this Court's holding in *Shelton*.

Appellee's argument that "a set-aside of the findings and sentence also sets aside the Convening Authority's action . . . [and that] [w]ithout a CA's action, Article 71 is inoperative . . . [and] the sentence can no longer be executed" was not raised below, and was not relied upon by the Military Judge or the lower court in making their determinations regarding pay entitlement and pretrial punishment. (Appellee's Answer at 27.) Therefore, this argument should not affect this Court's review of whether the lower court's denial of the writ was erroneous.

Even ignoring that Appellee is making this argument regarding the "inoperability" of Article 71 for the first time, the argument defies common sense. Once Appellee's reduction in pay grade was already executed, then *by definition* it could "no longer be executed," because its execution *already happened*. Appellee seems to admit as much just a few pages later, when he says, cryptically: "If *Shelton* occurred today, setting aside just the CA's action would not 'un-execute' the portion of the sentence related to forfeitures of pay and reduction in rank. Rather, as a matter of law, if only the CA's action is set aside, *forfeitures would remain executed*." (Appellee's Answer at 30 (emphasis added).)

Appellee argues that *Shelton* is inapplicable because the *Shelton* Court held that "Article 75(a) does not apply unless a finding or a portion of the sentence has

been set aside or disapproved," whereas that case addressed the effect of setting aside the convening authority's action. (Appellee's Answer at 29.) But the *Shelton* Court rejected the Shelton's identical argument that Article 75(a) "deals with *sentences* which have been set aside, and not with *actions* that have been set aside." *Shelton*, 53 M.J. at 389 (emphasis added). Instead, it held the statute "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*. In both cases, the key questions with regard to restoration of pay are: (1) whether a rehearing has been ordered; and (2) whether "the 'executed part of [the] court-martial sentence . . . is included in [the] sentence imposed upon the new trial or rehearing.'" *Id.*; *see Liggan v. United States*, 52 Fed. Cl. 395, 399 (Fed. Cl. 2002) ("[W]e think it would be contrary to the intent of the statute to distinguish between a sentence of forfeiture whose legal efficacy is impaired because of error in the underlying trial proceeding and a sentence of forfeiture that is impaired because of error on the part of the convening authority in approving the sentence. What matters, so far as the statute is concerned, is whether corrective proceedings reimpose the same forfeiture. Where that occurs, Congress has decreed that no restoration of pay shall be allowed.").

Thus, *Shelton* is not only applicable, it is consistent with *Dock* and *Combs** regarding servicemember pay entitlement pending rehearing under Article 75(a).

IV.

A. The United States concedes that a military judge has wide discretion in awarding sentencing credit, but the underlying legal question of whether an Article 13 violation occurred is reviewed *de novo*.

While "[a] military judge has broad authority to order administrative credit against adjudged confinement as a remedy for Article 13 violations," *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001), the predicate question of whether an accused is entitled to credit for unlawful pretrial punishment to begin with—that is, *whether a violation of Article 13 has occurred*—is a purely legal question involving independent, *de novo* review. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *see United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) ("The question of whether Appellant is entitled to credit for an Article 13 violation is reviewed de novo."); *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000) ("In the absence of a factual finding relating to intent to punish, this Court will address the issue of illegal pretrial punishment *de novo*."). Similarly, several Circuits have held that while an extraordinary writ may only be *granted* where the right to issuance is "clear and indisputable," *denial* of such discretionary relief is reviewed for an abuse of discretion, and the question of whether the legal prerequisites for such relief are present is reviewed *de novo*. *See, e.g.*, *Estes v. Utah Supreme Court*, 3 F. App'x 734, 736 (10th Cir. 2001); *Azurin v. Von Raab*, 803 F.2d 993, 995 (9th Cir.1986), *cert. denied*, 483 U.S. 1021 (1987).

B. There is no evidence of punitive intent.

Contrary to Appellee's assertion that the Government's "intent [was] to impose unlawful punishment" (Appellee's Answer at 33-34), it is uncontroverted that Appellee's command attempted to have him restored to pay grade E-6 pending rehearing, and that DFAS was acting in good faith to comply with fiscal law requirements. Both the Military Judge and the lower court so found. (J.A. 7, 322) So too should this Court.

C. Appellee has no answer to the position of the United States that neutral application of government pay regulations and good-faith efforts to follow the law cannot constitute illegal pretrial punishment.

Despite conceding that that this Court has never held that the *Mendoza-Martinez* factors apply in the Article 13 context, Appellee points to them to argue that "the Government's actions had a punitive effect even without malicious intent." (Appellee's Answer at 35-36.) But his rendition of the *Mendoza-Martinez* factors merely replicates the lower court's illogical conclusions, without any new analysis or any response to the United States' argument. (Appellee's Answer at 36-38.) Furthermore, Appellee makes no attempt to answer the position of the United States that neutral application of government pay regulations and good-faith efforts to follow the law cannot constitute illegal pretrial punishment.

Instead of answering the United States' argument, Appellee attempts to distinguish three cases discussed in the United States' brief where courts found that

neutral application of government pay regulations to appellants in confinement or awaiting rehearing did not violate Article 13 despite what appeared to be "punitive effect." (Appellee's Answer at 35.)

Appellee distinguishes *Fischer* on the grounds that Fischer, unlike Appellee, was in confinement. (Appellee's Answer at 35.) But in *Fischer*, the question this Court confronted was whether Fischer, who was past his EAOS, could be deprived of *all* pay and allowances while in confinement. This Court held that he could, and that the pay regulation in question "was reasonably related to the legitimate Government objective of not paying people who are not performing duties." *Fischer*, 61 M.J. at 420. The *Fischer* Court made no conclusions with regard to what Fischer's pay entitlement would have been had he been in a full-duty status pending rehearing. The case on point for this question is *Combs**.

Appellee distinguishes *United States v. Dodge*, 60 M.J. 873 (A.F. Ct. Crim. App. 2005), and *United States v. Wilson*, 2015 CCA LEXIS 231 (A.F. Ct. Crim. App. June 3, 2015), on the grounds that in these cases, only the sentences were set aside. (Appellee's Answer at 35.) Once again, Appellee cites no authority for this proposed distinction, which runs counter to the plain language of Article 75(a):

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

Article 75(a), UCMJ, 10 U.S.C. § 875(a) (2012) (emphasis added). Essentially, Appellee is asking this Court to create a new rule, one in which Article 75(a) applies differently to servicemembers pending rehearing depending on *how much* of the findings and sentence were set aside in their cases. There is no indication in the statute or the case law that such a rule is what Congress intended.

D. Application of Article 75(a) to Appellee was not "arbitrary and purposeless" or unrelated to a legitimate government objective.

1. Unlike Combs, Appellee was not forced to wear E-1 rank, was not forced to get a new identification card, and was not subject to intentional pretrial punishment.

Several times, Appellee refers to the fact that, unlike Combs, he was allowed to wear the rank of E-6 and continue working in an E-6 billet despite receiving E-1 pay. (Appellee's Answer at 34, 38-39.) He argues that this demonstrated "the arbitrary and purposeless nature of the Government's actions." (Appellee's Answer at 34, 38.) But in *Combs*, a two-judge plurality of this Court found that the Government's *refusal* to allow Combs to wear E-6 rank in combination with various other factors demonstrated punitive intent. *Combs*, 47 M.J. at 332-33. If forbidding Combs from wearing the rank of E-6 was a factor in this Court's finding of an Article 13 violation, then *allowing* Appellee to wear the rank of E-6 surely cannot be a basis for an Article 13 violation here.

Appellee then speculatively asserts that the members at his rehearing "surely" punished him more harshly after they learned that he had only been receiving E-1

pay. (Appellee's Answer at 39 n.132.) Nothing in the Record supports this counterintuitive assertion.

2. Appellee's argument comparing his pay status pending rehearing to that of an unrelated accused is new and was not relied upon by the Military Judge or the lower court.

Appellee raises an entirely new issue that was not relied on by the Military Judge or the lower court when he cites to the testimony of Regina Tanner, a command secretary (GS-7) at the Navy-Marine Corps Appellate Leave Activity (NAMALA), to show that other servicemembers pending rehearing were restored to their pretrial rank and pay-grades. (Appellee's Answer at 5, 39; J.A. 203-11.) This Court should dismiss this argument for several reasons.

First, Ms. Tanner works for NAMALA, not DFAS, and therefore is not in a position to testify (as an expert or otherwise) regarding DFAS's policy on servicemember pay entitlement pending rehearing. This is particularly true in a case in which the servicemember in question was not on appellate leave.

Second, Ms. Tanner was unaware of *United States v. Brown*, another case out of Parris Island where an accused pending rehearing was awarded sentencing credit by the Military Judge based on DFAS's interpretation of Article 75(a). (J.A. 207.) The issue of pay entitlement pending rehearing in *Brown* is now being litigated before the lower court. *United States v. Brown*, No. 201300181 (N-M. Ct. Crim. App. filed Oct. 13, 2015). The case of *Brown* contradicts Ms. Tanner's

assertion that Appellee's case is the only case in which a servicemember pending rehearing was not restored their full pay and allowances. (J.A. 205, 207.)

Third, on cross-examination, Ms. Tanner admitted that she is not an expert on the DoD FMR or DFAS policy, and that "an attorney working at DFAS is probably better situated to interpret the DoD FMR than" she is. (J.A. 209-10.)

Fourth, the only case that Ms. Tanner could cite to as an example of a servicemember pending rehearing receiving pay and allowances at his or her pre-reduction pay grade was *United States v. Hutchins*. (J.A. 204.) But in that case, following the results of Hutchins' rehearing, DFAS imposed a $52,000.00 debt on him to recover the differential in pay and allowances between E-5 and E-1 pay which he improperly received during the pendency of his rehearing.[4] This is consistent with the DFAS counsel memorandum, which warned of the danger of "speculative payments" by outlining the two potential ways to apply *Combs** prospectively: "(1) pay the member at the reduced rate before the rehearing has taken place and then pay the member back pay if the reduction is not imposed at rehearing; or (2) pay the member at his pre-conviction rate before the rehearing has occurred and place him in debt for the overpayment if the reduction is imposed at rehearing." (J.A. 305-06.) The *Hutchins* case demonstrates clearly the problems

[4] The United States is contemporaneously filing a Motion to Attach Clemency Documents with this Reply Brief in order to demonstrate that DFAS is collecting this debt from Sergeant Hutchins based on his overpayment as an E-5 pending rehearing.

associated with the latter method of applying *Combs** prospectively, and supports DFAS's stated preference for avoiding making "speculative payments" that the agency would then have to collect back from the servicemember after completion of the rehearing.

3. Appellee's new argument concerning disparate treatment of officers and enlisted members is belied by *Dodge*.

Appellee argues that application of Article 75(a) to him was arbitrary and purposeless because it treats officers and enlisted servicemembers differently. (Appellee's Answer at 39.) Once again, this argument is entirely new issue and was not relied on by the Military Judge or the lower court. Even so, the argument is belied by *Dodge*, where the Air Force Court of Criminal Appeals, citing *Dock* and *Combs**, found that "[t]here are myriad reasons why finance officials could conclude the appellant [Captain Dodge] is not entitled pay, including the not unreasonable belief that Article 75(a), UCMJ . . . bars his restoration to a pay status until after this Court's decision." *Dock*, 60 M.J. at 878. *Dodge* did not involve reduction in pay grade, but it still illustrates that the application of DFAS's interpretation of Article 75(a) to servicemembers, insofar as practicable, applies equally to officer and enlisted members to the extent that "an executed part of a court-martial sentence has been set aside or disapproved."

Conclusion

A servicemember's statutory entitlement to pay cannot depend merely on whether the servicemember happens to find himself or herself in a military or civilian courtroom. But that is the proposition that the lower court's opinion stands for, and that is the rule that Appellee would have this Court adopt. Adopting such a rule would put Government officials responsible for proper execution of military pay—DFAS officials, military commands—in the untenable position of having to *choose* which law to violate—Article 13 or Article 75(a)—any time a rehearing is ordered in a case in which the accused was sentenced to reduction at his or her first court-martial. This cannot be what Congress intended.

Wherefore, 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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