IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Stephen P. HOWELL, Staff Sergeant (E-6) U.S. Marine Corps	)	UNITED STATES WRIT-APPEAL ANSWER IN THE NATURE OF A WRIT OF PROHIBITION
Appellant	)	Crim. App. Dkt. No. 201200264
v.	)	USCA Dkt. No. 16-0289/MC
UNITED STATES, Appellee	)	

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

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Preamble

COMES NOW THE UNITED STATES and respectfully requests that this Court deny Appellant's Writ-Appeal Petition.

I

History of the Case

On October 12, 2012, a panel of Members with enlisted representation convicted Appellant, 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, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 920, 925, 928, 934 (2006). The Members sentenced him 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 those findings and the sentence due to apparent unlawful command influence, remanding the case to the Judge Advocate General with a rehearing authorized. *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014). On June 20, 2014, the Judge Advocate General, in accordance with Article 66(e), UCMJ, transferred the case to the Convening Authority with instructions that authorized a rehearing.

At the rehearing held on April 29, 2015, a panel of Members with enlisted representation convicted Appellant, contrary to his pleas, of violating a lawful general order, abusive sexual contact, and adultery, in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934 (2006). The Members sentenced Appellant 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 and sentence.

II

Jurisdictional Statement

This Court has jurisdiction to act on Appellant's Writ-Appeal and to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United* States, 62 M.J. 235, 239 (C.A.A.F. 2005).

III

Specific Relief Sought

The United States seeks an Order denying Appellant's Writ-Appeal Petition, which argues that the lower court had no jurisdiction to entertain the United States Petition for Extraordinary Relief in the Nature of a Writ of Prohibition.

IV

Issue Presented

THE GOVERNMENT'S INTERLOCUTORY APPEALS ARE LIMITED BY STATUTE. THE ALL WRITS ACT DOES NOT ALLOW THE GOVERNMENT TO BORROW AN ACCUSED'S RIGHT TO APPEAL UNDER ARTICLE 66, UCMJ, TO AID IN ITS PROSECUTION OF THAT SAME ACCUSED. HERE, THE ACCUSED WAS AWARDED CONFINEMENT CREDIT AND THAT DECISION IS NOT SUBJECT TO APPEAL. THE LOWER COURT ERRED IN HEARING THE GOVERNMENT'S PETITION BECAUSE IT LACKED JURISDICTION.

V

Statement of Facts

A. Appellant was paid at the E-1 pay grade based on a legal opinion from the Office of General Counsel, Defense Finance and Accounting Service.

Appellant'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); *see United States v. Shelton*, 53 M.J. 387, 389 n.2 (C.A.A.F. 2000).

On November 26, 2012, while serving his adjudged post-trial confinement, Appellant reached his End of Active Obligated Service (EAOS).[1] (Appellate Ex. X at 2.)

[1] On November 26, 2012, his entitlement to pay ceased. Department of Defense Financial Management Regulation (DoD FMR), DoD 7000.14-R, Vol. 7A, Ch. 1, subpara. 010402.G.5; *see United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (authority to hold service member beyond his EAOS in confinement without pay pending court-martial "unless there is an acquittal

On May 22, 2014, the lower court set aside Appellant's conviction. On June 20, 2014, the Judge Advocate General transferred the case to the Convening Authority with instructions that authorized a rehearing. On June 25, 2014, the Convening Authority directed a rehearing, and Appellant was released from the U.S. Disciplinary Barracks, transferred, and subsequently assigned to Headquarters and Service Battalion, Marine Corps Recruit Depot, Parris Island, South Carolina. (*Id.*; Appellate Ex. V).

As part of the administrative process of returning Appellant 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 Appellant's entitlement to pay. (R. 23-25.) He received what he perceived as inconsistent guidance by officials from Headquarters U.S. Marine Corps, the Marine Corps Administrative Analysis Team, and the Defense Finance and Accounting Service (DFAS) as to what pay grade Appellant should be paid during the pendency of his rehearing. (R. 23-26.)

CWO4 Smith sent an e-mail to those agencies asking them to confer and adopt a common position. (R. 25.) The agencies responded with direction to place Appellant on full pay and

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constitutes a 'settled rule of law'") (quoting *Simoy v. United States*, 64 Fed. Appx. 745, 746 (Fed. Cir. 2003)).

allowance status in the pay grade of E-1. (R. 25-27.) The Office of General Counsel, DFAS, directed IPAC personnel to case law and to the Department of Defense Financial Management Regulation to explain and justify its position. (R. 25-27.)

The Staff Judge Advocate initially disagreed with the determination that Appellant be paid as an E-1. (R. 24-25.) However, she was satisfied when CWO4 Smith informed her that he had requested and received clarification of that legal position from DFAS officials. (R. 24-25.)

B. The Military Judge ordered that Appellant receive confinement credit for every day he was paid as an E-1 from the date of this Court's decision that set aside the original findings and sentence.

As part of pretrial litigation, Defense Counsel for Appellant moved the Trial Court to restore his pay at the grade of E-6 and to order back pay at the grade of E-6 beginning on May 22, 2014——the date the lower court set aside the findings and sentence. (Appellate Ex. II at 13-17.)[2] Trial Counsel responded that Article 75(a), UCMJ, operated in a manner that required governmental officials to wait until the rehearing to determine Appellant's entitlement to pay. (Appellate Ex. III.)

[2] Defense Counsel argued that Appellant's pay at the E-1 rate amounted to unlawful pretrial punishment under Article 13, UCMJ. He also argued that Appellant's pay at the E-1 rate violated his Sixth Amendment right to counsel in that it interfered with his ability to pay his civilian counsel. The Military Judge dismissed that part of the argument. (Appellate Ex. X at 15.)

The Military Judge concluded that he lacked the authority to grant the requested remedy——to compel the Government to pay Appellant at the E-6 level and restore back pay at the grade of E-6 beginning May 22, 2014. (Appellate Ex. X at 15.) Instead, he recast the requested remedy and concluded that for every day from May 22, 2014, onward——the date this Court set aside the findings and sentence in Appellant's first trial——Appellant was entitled to one day of confinement credit.[3] (*Id*.)

The Military Judge found that CWO4 Smith was responsible for ensuring that personnel aboard Parris Island were paid according to Department of Defense regulations. (Appellate Ex. X at 3.) He found that after consulting the Office of General Counsel for DFAS and the Marine Corps Administrative Analysis Team, CWO4 Smith was instructed to pay Appellant as an E-1. (*Id*.) The Military Judge also found that CWO4 Smith was never instructed to deny E-6 pay and allowances to Appellant as a form of punishment. (*Id*. at 4.)

The Military Judge concluded that Article 75(a), UCMJ, prevented only the repayment of past forfeitures of pay and allowances but not payments to Appellant at his original pay grade once his sentence had been set aside. (*Id*. at 10-11.)

[3] Defense Counsel conceded that he would have to wait until the rehearing to determine whether Appellant was due back pay that had been forfeited as a result of his original October 12, 2012, conviction. (Appellate Ex. X at 9.)

Relying on *dicta* from this Court's opinion in *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005), the Military Judge also concluded that even if there was no punitive intent, the "punitive effect" of the governmental action violated Article 13, UCMJ. (*Id*. at 13-15.)

C. The Government moved the Military Judge to reconsider his ruling, but he denied the reconsideration request and left his original ruling intact.

On November 13, 2014, the Office of General Counsel, DFAS, provided Trial Counsel a formal legal opinion explaining that Article 75(a), UCMJ, 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), gave DFAS the legal authority to only pay Appellant at the E-1 rate until his rehearing. (*See* Appellate Ex. XXX at 17-19.)

Based on the DFAS legal opinion, the Government moved the Military Judge to reconsider his ruling. (Appellate Ex. XXIX.) First, the Government argued that the legal opinion from DFAS provided justification for the decision to pay Appellant at the E-1 rate pending resolution at his rehearing. (*Id*.) Second, the Government argued that the Military Judge's ruling to start the illegal punishment calculation from the date this Court set aside the findings and sentence was incorrect because appellate opinions by the Navy-Marine Corps Court of Criminal Appeals are

inchoate until the Judge Advocate General takes action under Article 66(e), UCMJ. (*Id*. at 3.)

Defense Counsel for Appellant filed an Answer and Cross-Motion requesting that the Military Judge abate the proceedings until Appellant is paid as an E-6, or alternatively, grant five days confinement credit for every day that the Government refused to pay Appellant as an E-6. (Appellate Ex. XXX.)

On February 26, 2015, the Military Judge issued his Findings of Fact and Conclusions of Law. (Appellate Ex. XLV.) He denied the Government's Motion for Reconsideration as well as the Defense's Cross-Motion. (*Id*. at 6.) Although the Military Judge agreed that the appellate decision was not "effectuated" until the Judge Advocate General decides to take appropriate action, it did not change the date Appellant "began to suffer harm"——when he "stood convicted of nothing and was presumed innocent." (*Id*. at 4-5.) Additionally, the Military Judge rejected DFAS's legal opinion and rationale, including the underlying federal appellate opinions upon which DFAS's opinion was based; however, in his legal analysis, the Military Judge concluded that DFAS personnel "have taken a good-faith position that they believe is backed in statutory and case law." (*Id*. at 5.) Nevertheless, the Military Judge left "intact" his original ruling of October 8, 2014. (*Id*. at 6.)

Subsequent to Appellant's conviction and sentence on April 29, 2015, but prior to the Convening Authority's Action, the United States filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition. (Pet. for Extraordinary Relief, Aug. 10, 2015.) The United States requested that the lower court vacate the Military Judge's ruling directing the Convening Authority to provide sentencing credit for illegal pretrial punishment under Article 13, UCMJ.

The United States, citing principally *Dock*, 46 F.3d 1083, argued: (1) that Appellant was only entitled to pay and allowances at the E-1 rate pending his rehearing; (2) that since Appellant's entitlement extended only to pay and allowances at the E-1 rate, *Dock*, 46 F.3d at 1093, then the Military Judge clearly abused his discretion in finding an Article 13, UCMJ, violation; and, (3) that the Military Judge usurped his authority by specifically rejecting the core holding of *Dock*—— that Article 75(a), UCMJ, is an "entitlement to pay" provision.[4]

The lower court granted the United States' request to stay the post-trial proceedings pending its resolution of the

[4] *Compare* Appellate Ex. X at 10 ("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."), *with Dock*, 46 F.3d at 1087 ("Article 75(a) is not, as the trial court and Dock would interpret it, a statute that deals with the mechanics of restoration. To the contrary, Article 75(a)——by its own terms and, as will be discussed below, consistent with legislative history——is a statute that deals with entitlement to pay.").

Petition. (Petition for Extraordinary Relief, Aug. 10, 2015.) Sitting *en banc*, the lower court heard oral argument and on December 29, 2015, issued a divided 4-4 opinion that partially granted the United States' Petition. *United States v. Jones*, 2015 CCA LEXIS 575 (N-M. Ct. Crim. App., Dec. 29, 2015). The lower court unanimously concluded it had jurisdiction to consider the Petition and that it was "in aid of" its jurisdiction. *Jones*, 2015 CCA LEXIS 575, at *5.

On the merits of the Petition, 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 date Appellant was restored to full duty)——the Military Judge abused his discretion and usurped his authority. *Id.* at *24-25. With regard to the period from June 26, 2014 "until the effective date" of Appellant's sentence, the lower court reasoned that the United States had not met its burden for the Writ to issue. *Id*. The lower court did not address the central argument of the United States: that the Military Judge usurped his authority by rejecting the core holding of *Dock*. *See id*. at *26 ("[w]e need not address the [Military Judge's] efforts to distinguish this case from *Dock* . . . .").

In a four-judge dissent, Senior Judge Brubaker concluded that the Military Judge exceeded his statutory authority in

finding an Article 13, UCMJ, violation and granting sentencing credit. *Id.* at *28. He reasoned that the conclusion of both the Military Judge and the lower court that Appellant was subject to illegal pretrial punishment was based on the flawed premise that Appellant was entitled to pay and allowances at the E-6 rate pending his rehearing. *Id.* at *29 (stating that "the applicability of Article 13 crumbles if the real party was not entitled to pay at pay grade E-6 pending a rehearing.").

Thus, the dissent agreed with the core argument of the United States: Appellant——by statute (Article 75(a), UCMJ), regulation (DoD 7000.14-R (DoD FMR)), and appellate case law (*Dock*, 46 F.3d 1083 and *Combs v. United States*, 50 Fed. Cl. 592 (Ct. Fed. Cl. 2001))——was only entitled to pay and allowances at the E-1 rate pending the outcome of his rehearing.[5] *Compare id.* at *34-36 *with* Pet. for Extraordinary Relief at 22-27.)

[5] *See Combs*, 50 Fed. Cl. at 604 ("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.")

VI

Reasons Why This Writ-Appeal Should Be Denied

THE LOWER COURT CORRECTLY CONCLUDED IT HAD JURISDICTION TO ENTERTAIN THE PETITION FOR EXTRAORDINARY RELIEF UNDER THE ALL WRITS ACT AND AS AN AID TO ITS STATUTORY JURISDICTION UNDER ARTICLE 66, UCMJ.

A. The lower court had jurisdiction to address the Military Judge's award of confinement credit for a violation of Article 13, UCMJ.

Thirteen years after Congress amended Article 62, UCMJ, and forty-eight years after Congress passed the All Writs Act, this Court confirmed that Courts of Criminal Appeals have jurisdiction to hear petitions for extraordinary relief filed by the United States. *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996) (citing *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979)); *see United States v. Dowty*, 48 M.J. 102, 106-07 (C.A.A.F. 1998) (reaffirming "well established" procedure of filing petitions for extraordinary relief including those "filed by the Government with the Court of Criminal Appeal under the All Writs Act.").

In 2013, the Navy-Marine Corps Court of Criminal Appeals concluded it had the "authority under the All Writs Act to hear petitions of extraordinary relief on behalf of the Government for issues not subject to appeal . . . under Article 62." *United States v. Booker*, 72 M.J. 787, 796 (N-M. Ct. Crim. App. 2013) (internal quotation and citation omitted). Acknowledging

that the All Writs Act limits issuance of writs to situations where "the requested writ is 'in aid of' the court's existing jurisdiction [and] is 'necessary or appropriate,'" the *Booker* court granted the United States' Petition for a Writ of Mandamus to direct the Military Judge to apply the proper maximum punishment calculation for an alleged violation of Article 120(b), 10 U.S.C. § 120(b) (2012). *Id*. at 791, 808 (quoting *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008)).

The real party in interest in *Booker*, Petty Officer Schaleger, filed a Writ-Appeal arguing *inter alia* the lack of appropriateness of the lower court to have issued the writ. This Court denied the Writ-Appeal. *United States v. Schaleger*, 73 M.J. 92 (C.A.A.F. 2013) (summary disposition). Under normal circumstances, denials of petitions by this Court lack precedential authority; however, because jurisdiction involves a "court's power to hear a case," *United States v. Cotton*, 535 U.S. 625, 630 (2002), it stands to reason that this Court would have stepped in, had it concluded that deviation from the *Dettinger-Curtin-Dowty* line of cases was necessary in *Schaleger*.

As was the case in *Booker*, issuance of the requested Writ Petition in this case was "in aid of" the lower court's existing jurisdiction and "necessary and appropriate."

B. Issuance of the Writ was "in aid of" the lower court's jurisdiction.

In the context of military justice, "'in aid of' includes cases where a petitioner seeks 'to modify an action that was taken within the subject matter jurisdiction of the military justice system.'" *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (quoting *Denedo*, 66 M.J. at 120).

Appellant's adjudged sentence was clearly within the lower court's statutory jurisdiction under Article 66(b)(1), UCMJ. Appellant does not argue otherwise. Instead, he argues that because the sentencing credit was not part of the adjudged sentence, the Writ was not "in aid of" the lower court's jurisdiction. (Writ-Appeal Pet. at 12-13, Jan. 18, 2016.) Appellant is mistaken. To establish jurisdiction, the harm need only have "the potential to directly affect the findings and sentence." *LRM*, 72 M.J. at 368 (quoting *Ctr. for Constitutional Rights v. United States (CCR)*, 72 M.J. 126, 129 (C.A.A.F. 2013)).

This case directly affects the findings and sentence because the Convening Authority must——when taking action on the sentence——apply the quantum of sentencing credit directed by a military judge. *See* R.C.M. 1107(f)(4)(F) (requiring convening authority, upon action, to apply sentencing credit to the adjudged sentence). *See also* Article 66(c), UCMJ ("Court of

Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority"). As this Court held long ago, a Convening Authority has no power to disregard a military judge's sentencing-credit ruling. *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983). Thus, the sentencing credit becomes part of the sentence that must be applied and approved by the Convening Authority.

Appellant's argument that the lower court's extraordinary writ jurisdiction extends only to the adjudged findings and sentence ignores this Court's precedent and the lower court's jurisdictional authority that extends to not only the "adjudged" sentence but also to the "approved" sentence. Article 66(c), UCMJ. In this regard, the argument that the United States' Writ Petition was "in aid of" the lower court's jurisdiction is more closely linked to the findings and sentence than in *LRM*. Accordingly, the lower court's unanimous conclusion that the requested Writ was "in aid of" its jurisdiction was correct.

C. The requested Writ was necessary and appropriate.

To merit extraordinary relief, a military judge's decision must amount to more than gross error; it must amount to a judicial usurpation of power, or be characteristic of an erroneous practice that is likely to recur. *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983).

To prevail, the United States "'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, 380-81 (2004)). Here, the United States met its three-part burden.

1. No other "adequate means to attain relief" existed because the lower court had no jurisdiction to resolve this matter under Articles 62, 66, or 69, UCMJ.

In this case, the Military Judge's ruling was not subject to appeal by the United States under Article 62, UCMJ. Moreover, the relief sought by the United States is not attainable on review under Articles 66 or 69, UCMJ. As such, this Writ was the only adequate means for the United States to attain relief. 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." *Suzuki*, 14 M.J. at 492 (citing *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981)); *cf. 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).[6]

2. The right to issuance of the Writ was "clear and indisputable" because the Military Judge exceeded his authority by applying confinement credit to remedy conduct that did not violate Article 13.

Questions of entitlement to pay are collateral to the lawfulness of a court-martial sentence and within the jurisdiction of the Court of Federal Claims. *United States v. Allen*, 33 M.J. 209, 215 (C.M.A. 1991); *see also Keys v. Cole*, 31 M.J. 228, 234 (C.M.A. 1990) (denying Specialist Keys' mandamus petition for back pay based on his court-martial conviction having been set aside and concluding that the appropriate venue to pursue his claim was with the U.S. Court of Federal Claims); *Fischer*, 61 M.J. at 421 (stating that if Lance Corporal 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"). The remedy crafted by the Military Judge did not provide Appellant with his requested remedy (pay to which he might be entitled), did not alter the behavior of the United States, and currently leaves Appellant

[6] The Petition was not ripe until findings and sentence were adjudged. Had Appellant been acquitted at his rehearing, there is no dispute or controversy that he would have been entitled to all back pay and allowances at the E-6 rate relating back to his original conviction.

free to pursue his relief at the proper Court, rendering the confinement credit of almost a year a complete windfall.

If this Court has explicitly held that military pay entitlements are the exclusive purview of the U.S. Court of Federal Claims, it follows *a fortiori* that the Military Judge in this case was not authorized to freely reject the legal interpretation by the U.S. Court of Federal Claims on military pay entitlement claims. Such a rejection exceeded the proper scope of his jurisdiction and the lower court was clearly correct to step in to resolve this matter.

3. The issuance of the Writ was appropriate under the circumstances to prevent a windfall to Appellant and avoid future recurrences.

This Court has held that the issuance of an extraordinary writ is appropriate to address issues that are likely to recur. *Labella*, 15 M.J. at 229. This was particularly true in this case because the Military Judge specifically rejected the core holding of *Dock v. United States*, 46 F.3d 1083, 1087 (Fed. Cir. 1995). (Appellate Ex. X at 10.) Only by rejecting *Dock* and concluding instead, in an *ipse dixit* fashion, that Article 75(a), UCMJ, is a "restoration of pay" provision, could the Military Judge justify his ruling of illegal pretrial punishment. The determination of whether Article 75(a), UCMJ, is an "entitlement to pay" provision or a "restoration of pay"

provision was outside the jurisdiction of the Trial Court.[7] *See United States v. Fischer*, 60 M.J. 650, 651-52 (N-M. Ct. Crim. App. 2004) (*en banc*) (holding that determination of entitlement to back pay is beyond the court's jurisdiction), *aff'd*, 61 M.J. 415 (C.A.A.F. 2005). The Military Judge's ruling deviates from precedent, provides a windfall to Appellant, and denies the United States the rightful fruits of a validly adjudged period of confinement. Moreover, the confusion associated with the correct interpretation of Article 75(a), UCMJ, with regard to entitlement to pay for service members facing a rehearing will persist. This likelihood of recurrence weighed in favor of issuing the requested Writ. *See Jones*, 2015 CCA LEXIS 573, *29 (stating that Military Judge's ruling "fails to accord due respect to an agency's pay determination, and is bound to recur") (Brubaker, S.J., dissenting). Thus, on the threshold question of jurisdiction, the lower court was clearly correct in entertaining the Writ Petition.

[7] Indeed, *Dock* specifically held that the Court of Federal Claims was "simply wrong" in in concluding that Article 75(a), UCMJ, "deal[t] with the mechanics of restoration." *Dock*, 46 F.3d at 1087. "Article 75(a) is not, as the trial court and Dock would interpret it, a statute that deals with the mechanics of restoration. To the contrary, Article 75(a)——by its own terms and, as will be discussed below, consistent with legislative history——is a statute that deals with entitlement to pay." *Id*.

VII

Conclusion

WHEREFORE, the United States respectfully requests that this Court deny Appellant's Writ-Appeal premised on the argument that the lower court was without jurisdiction to entertain the United States' Petition for Extraordinary Relief.

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Certificate of Compliance

1. This Writ-Appeal Answer complies with the type-volume limitation of Rule 24(c) because it contains 4,269 words.

2. This Writ-Appeal Answer complies with the type style requirements of Rule 37 because it has been prepared a monospaced typeface using Microsoft Word 2016 with 12 point, Courier New font.

Certificate of Filing and Service

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

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