IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

Appellant

v.

United States,

Appellee

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

Respondent

REAL PARTY IN INTEREST'S WRIT-APPEAL PETITION FOR REVIEW OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF

Crim.App. Dkt. No. 201200264

USCA Dkt. No. _____

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

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Preamble

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

The Government petitioned the lower court under the All Writs Act to overturn the military judge's decision. Though SSgt Howell prevailed in keeping all but thirty-five of his 343 days of confinement credit, the lower court was without jurisdiction to hear the Government's appeal. This Court should overturn the lower court's decision granting the Government's petition in part.

History of the Case

On October 11, 2012, a panel of members with enlisted representation, sitting as a general court-martial, convicted SSgt Howell, contrary to his pleas, of violating a lawful general regulation, rape, aggravated sexual contact, forcible sodomy, assault consummated by battery, and adultery, in

violation of Articles 92, 120, 125, 128 and 134, UCMJ.[1] The members then sentenced SSgt Howell to eighteen years' confinement, reduction to pay-grade E-1, total forfeitures, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed.

On May 22, 2014, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside the findings and sentence and authorized a rehearing.[2] On June 25, 2014, the Convening Authority ordered a rehearing.[3]

On April 29, 2015, a panel of members with enlisted representation, sitting as a general court-martial, again convicted SSgt Howell, contrary to his pleas, of violating a lawful general regulation, abusive sexual contact, and adultery in violation of Articles 92, 120, and 134, UCMJ.[4] The members then sentenced SSgt Howell to nine years' confinement, reduction to pay-grade E-1, total forfeitures, and a dishonorable discharge.[5] The military judge ordered 343 days of confinement credit pursuant to Article 13, UCMJ, because the Government

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[1] 10 U.S.C. §§ 892, 920, 925, 928 and 934 (2012).
[2] *United States v. Howell*, No. 201200264, 2014 CCA LEXIS 321 (N-M. Ct. Crim. App. May 22, 2014).
[3] Appellate Ex. V.
[4] 10 U.S.C. §§ 892, 920, and 934 (2012); *see* Unauthenticated Record of Trial at 1458 [hereinafter UROT].
[5] *Id.* at 1604.

refused to pay SSgt Howell above a private's pay for the year prior to his rehearing.[6]

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

On December 29, 2015, the NMCCA granted the Government's petition in part and denied in part. The lower court issued a Writ of Prohibition vacating the military judge's award of confinement credit for the period from the set aside of sentence on 22 May 2014 to the Convening Authority's order for a rehearing on 25 June 2014 (thirty-five days). But the NMCCA denied the Government's petition for the remaining portion of confinement credit (308 days).

Relief Sought

SSgt Howell respectfully requests this Court to (1) overturn the lower court's decision granting in part the Government's petition for a writ of prohibition and (2) reinstate the confinement credit awarded to him by the military

[6] Appellate Ex. X at 15.

judge for the period between May 22, 2014, to June 25, 2014 (thirty-five days).

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.

Statement of Facts

On June 26, 2014, the Government released SSgt Howell from confinement.[7] The Government assigned him to Headquarters and Service Battalion (H&S Bn), Marine Corps Recruit Depot, Parris Island, South Carolina.[8]

After arriving at H&S Bn, the Government reinstated SSgt Howell to his pre-trial rank and assigned him the duties of a Staff Sergeant.[9] However, the Government forced him to remain in his post-trial pay-grade of E-1--which it had done since his case was overturned on May 22, 2014.[10] SSgt Howell continued to work as a Staff Sergeant until the completion of his rehearing.[11]

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[7] Appellate Ex. II.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

After his release from confinement, SSgt Howell through his detailed military counsel and his civilian defense counsel, sought reinstatement of his pay as a Staff Sergeant.[12]

On August 12, 2014, the Staff Judge Advocate to the Convening Authority sent an email to the Director, Installation Personnel Administration Center (IPAC), MCRD, Parris Island, SC stating:

> As discussed previously, I reached out to Judge Advocate Division, HQMC, to get their legal opinion regarding SSgt Howell's pay. In accordance with the UCMJ and applicable case law, SSgt Howell should be wearing the rank of SSgt and performing duties commensurate to a SSgt, however, he is only entitled to receive the pay of a Pvt until the conclusion of his retrial. Any restoration of pay will occur after the retrial.[13]

On August 20, 2014, SSgt Howell's civilian defense counsel wrote the Convening Authority and specifically requested that he order IPAC to restore SSgt Howell's pay to pay-grade E-6.[14]

On August 27, 2014, the Staff Judge Advocate replied:

> The Commanding General and I received your email and letter regarding SSgt Howell's pay. Although entitled to wear E-6 rank and perform duties commensurate as an E-6, in accordance with applicable federal laws and regulations, SSgt Howell does not rate pay as a SSgt or back pay until conclusion of the rehearing.[15]

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

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[12] *Id.*
[13] *Id.* at 19.
[14] *Id.* at 20-24.
[15] Appellate Ex. XXX.

appropriate relief to receive pay as an E-6.[16] In the alternative, SSgt Howell argued that receiving the pay of an E-1 while performing the duties of an E-6 amounted to unlawful pretrial punishment under Article 13, UCMJ.[17]

On October 8, 2014, the military judge granted the defense motion and awarded day-for-day confinement credit for each day SSgt Howell was paid as an E-1.[18]

On November 13, 2014, the Government moved the military judge to reconsider his ruling.[19] In its motion, it attached a "formal legal opinion" from the Defense Finance and Accounting Service (DFAS), and requested the Court reconsider its decision.[20] The DFAS opinion reiterated that its position on pay pending a rehearing remained the same, and stated, "DFAS is bound by 10 U.S.C. § 875, its interpreting case law and fiscal law principles to pay members, such as SSgt Howell, who are awaiting rehearing at the rate to which the member was reduced in the original court-martial sentence."[21] DFAS failed to address Article 13 or cite the relevant case law.[22]

On November 25, 2014, SSgt Howell filed an answer and cross-motion requesting the military judge abate the proceedings

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[16] Appellate Ex. II.
[17] *Id.*
[18] Appellate Ex. X at 15.
[19] Appellate Ex. XXIX.
[20] Appellate Ex. XXX at 17-19.
[21] *Id.*
[22] *Id.*

until SSgt Howell received pay as an E-6 or in the alternative, to grant him five days of confinement credit for every day he was paid as an E-1.[23]

On February 26, 2015, the military judge denied the Government's motion for reconsideration, as well as the defense's cross-motion.[24]

SSgt Howell's rehearing concluded with sentencing on April 29, 2015. In addition to confinement, his sentence again included reduction to paygrade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.[25]

Over the course of 343 days (May 22, 2014 to April 29, 2015), the Government withheld approximately $23,000 from SSgt Howell.[26]

Reasons the Lower Court's Decision Should be Overturned

The lower court believes it had jurisdiction to hear the Government's petition under the All Writs Act.[27] This is incorrect. The All Writs Act is not an independent grant of jurisdiction and does not expand a court's existing statutory

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[23] *Id.*
[24] Appellate Ex. XLV.
[25] *Id.* at 1604.
[26] This figure is calculated as the difference between the basic pay SSgt received from 22 May 2014 to 29 April 2015 and basic pay for an E-6 with over 14 years of service during the same period. This calculation does not include any other entitlements such as Basic Allowance for Housing (BAH).
[27] 28 U.S.C. § 1651; *United States v. Jones*, 2015 CCA LEXIS 573 at *5-6 (N-M. Ct. Crim. App. Dec. 29, 2015).

jurisdiction.[28] To establish subject matter jurisdiction under the All Writs Act, the petitioner must demonstrate: "(1) the requested writ is 'in aid of' the court's existing jurisdiction, and (2) the requested writ is 'necessary or appropriate.'"[29] Here, the Government fails on both prongs.

The lower court erred when it determined it had jurisdiction for three reasons:

> (1) the Government is precluded by statute from appealing a military judge's decision to award confinement credit,
>
> (2) the military judge's actions did not affect the findings or sentence, and
>
> (3) the Government may not invoke the lower court's jurisdiction under Article 66 in order to bring a petition for an extraordinary writ via the All Writs Act.

A. The Government is precluded by statute from appealing a military judge's decision to award confinement credit.

The Government cannot establish that its requested writ is "in aid of" this Court's jurisdiction. The petition challenges the military judge's decision to award confinement credit. However, upon closer examination, the petition is nothing more than a veiled interlocutory appeal seeking to overturn the military judge's decision.

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[28] *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999).
[29] *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted).

Interlocutory appeals by the Government are rare. In fact, they "are disfavored and are permitted only upon specific statutory authorization."[30] Article 62[31] sets forth particular actions by a military judge that "the United States may appeal" and strictly proscribes the circumstances for such an appeal. These circumstances are:

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

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

[31] 10 U.S.C. § 862 (2012).

> order described in subparagraph (E) that has previously been issued by appropriate authority.[32]

This plain, unambiguous language conveys Congress' intent to limit the Government's right to interlocutory appeals.[33] The principle that Congress defines the jurisdiction of the lower federal courts "applies with added force to Article I tribunals."[34] That is especially true in military courts. "The military justice system is the last place courts should go about finding 'extensions' of jurisdiction beyond that conferred by statute".[35] Furthermore, "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act that is controlling."[36]

Here, the UCMJ specifically limits which of the military judge's actions the Government can appeal. And the Government's

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[32] *Id.*
[33] *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (citation and internal quotation marks omitted).
[34] *United States v. Denedo*, 556 U.S. 904, 912 (U.S. 2009).
[35] *See id.* at 922-23 (Roberts, C.J., dissenting) (discussing the limited jurisdiction of Article I courts imposed by Congress and emphasizing that "Article III courts have been given broad jurisdiction" unlike their Article I counterparts); *see also Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"); *Goldsmith*, 526 U.S. at 534-35 (discussing that Congress did not grant military courts of appeals "broad responsibility with respect to administration of military justice"; on the contrary, their jurisdiction is "narrowly circumscribed" by the governing statutes) (internal quotation marks omitted).
[36] *Carlisle v. United States,* 517 U.S. 416, 429 (1996).

writ is outside the subject matter jurisdiction of this Court as limited by Article 62. In fact, the Government correctly conceded "the Military Judge's ruling is not subject to appeal by the United States under Article 62, UCMJ . . . [and that] the relief [sought] is not attainable on review under Articles 66 or 69, UCMJ."[37]

Given that the All Writs Act does not grant jurisdiction or expand existing statutory jurisdiction, an extraordinary writ cannot allow the Government to circumvent the proscribed rules regarding interlocutory appeals. Thus, the lower court was precluded by statute from hearing such an appeal. Consequently, the NMCCA was without jurisdiction to hear the Government's petition and SSgt Howell suffered as a result.

B. The military judge's actions did not affect the findings or sentence.

To establish subject-matter jurisdiction under the All Writs Act, the harm alleged must also have had "the potential to directly affect the findings and sentence."[38] A military judge's decision to award "administrative credit [towards confinement] does not affect the findings and sentence adjudged."[39]

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[37] Govt. Petition at 11.
[38] *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)).
[39] *See United States v. Adcock*, 65 M.J. 18, 26 (C.A.A.F. 2007) (explaining that accused's sentence and findings of guilt did not need to be set aside to provide appropriate relief when

Here, the military judge's award of confinement credit did not affect the findings or sentence adjudged by the members. The credit is merely administrative.[40] The awarding of confinement credit did not impede the Government's ability to prosecute the case, nor did it affect SSgt Howell's trial rights. The members were not aware of the confinement credit, nor did the military judge's decision to award confinement credit influence their decision-making during findings or sentencing.[41] This decision does not change the conviction or sentence adjudged at the court-martial. Accordingly, the Government's petition did not aid the lower court in the exercise of its jurisdiction.

C. The Government may not invoke the lower court's jurisdiction under Article 66 in order to bring a petition for an extraordinary writ via the All Writs Act.

The All Writs Act "confine[s] the power of the CAAF [and the lower courts] to issuing process 'in aid of' its existing statutory jurisdiction" and "does not enlarge that jurisdiction."[42] The UCMJ does not grant jurisdiction to the

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military judge abused his discretion by failing to award confinement credit).

[40] *See Adcock*, 65 M.J. at 26.

[41] UROT at 1461, 1471-72.

[42] *Goldsmith*, 526 U.S. at 534-535; *see also Noyd v. Bond*, 395 U.S. 683, 695, n.7(1969) (although military courts can issue extraordinary writs in aid of their direct review jurisdiction, "[a] different question would, of course, arise in a case which the [courts are] not authorized to review under the governing statutes").

service courts of criminal appeals to review Government challenges to a military judge's decision to award confinement credit. Thus, there is no jurisdiction for an extraordinary writ seeking to overturn that decision to "aid."

Only Article 66 provides *any* authority to the service courts or this Court to review a military judge's decision to award confinement credit and alleged violations of Article 13. But the sole catalyst for such review is the accused and not the Government. Moreover, such review can also only be invoked *after* an accused has received a conviction at court-martial.[43]

Here, the lower court may not review a Government petition by invoking its jurisdiction under the All Writs Act via Article 66. Article 66 does not allow for Government appeals, and is limited to the direct review of cases where the accused was convicted at court-martial. Given that Article 66 does not contemplate Government appeals or Government challenges to decisions of the military judge, the Government may not use the All Writs Act to expand its abilities to appeal decisions of a military judge in light of the existing statutory framework. Article 66 review is invoked by the accused, not the Government.

In short, Article 62 is the only means in which Congress has provided for the Government to appeal. The All Writs Act does not allow the Government to circumvent the clear intent of

[43] 10 U.S.C. § 866 (2012).

Congress. And because the Government has no right of appeal under Article 66 in the normal course of review, the Government may not petition for an extraordinary writ by invoking the Court's jurisdiction pursuant to Article 66. The lower court cannot force SSgt Howell, or any accused, to loan his Article 66 appellate rights to the Government.

Conclusion

The lower court did not have the authority to review the Government's petition. This error allowed the lower court to strip Staff Sergeant Howell of thirty-five days of confinement credit. This Court should overturn the lower court's decision in order to confine the lower court to its express jurisdiction set forth by the UMCJ.

Respondents' Addresses, Telephone, and Facsimile Numbers

The original respondent and petitioner's contact information are provided below:

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Appendices

1. *United States v. Jones*, 2015 CCA LEXIS 573 (N-M. Ct. Crim. App. Dec. 29, 2015).

2. Petitioner's Pet. Extraordinary Relief.

3. Real Party in Interest's Resp. Order Show Cause.

4. Petitioner's Reply to Real Party in Interest's Resp. Order Show Cause.

5. NMCCA Order, *United States v. Jones*, No. 201200264 (N-M. Ct. Crim. App. August 18, 2015).

6. NMCCA Order, *United States v. Jones*, No. 201200264 (N-M. Ct. Crim. App. September 22, 2015).

7. NMCCA Order, *United States v. Jones*, No. 201200264 (N-M. Ct. Crim. App. October 13, 2015).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Court, and copies were electronically delivered to the Clerk of the Navy-Marine Corps Court of Criminal Appeals, Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, and the Respondent on January 18, 2016.

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