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 REPLY

Crim.App. Dkt. No. 201200264

USCA Dkt. No. 16-0289/MC

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

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RULES FOR COURTS-MARTIAL

Staff Sergeant (SSgt) Howell, through counsel, hereby replies to the Government's Writ-Appeal Answer of January 29, 2016.

I. The Government's petition was not "in aid of" the lower court's jurisdiction because the lower courts do not have jurisdiction to review Government challenges to a military judge's decision to award confinement credit.

The Government argues the lower court had jurisdiction to review its Petition because SSgt Howell's "adjudged sentence was clearly within the lower court's statutory jurisdiction under Article 66(b)(1), UCMJ."[1] But the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) could not review the question of whether the military judge improperly granted confinement credit in its Article 66 review because the Government does not have direct appeals. Therefore, Article 66 does not provide a jurisdictional basis for the Government's writ.

Further, the Government's argument fails to recognize that Article 66 review is invoked by the accused, not the Government.[2] The Government invokes this Court's jurisdiction under Article 62, not Article 66. The former is the only provision of the UCMJ that allows Government appeals. To allow otherwise forces SSgt Howell to loan his Article 66 appellate rights to the Government.

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[1] Govt. Ans. at 14.

[2] *See* 10 U.S.C. § 861 (discussing withdrawal from appellate review); *see also* 10 U.S.C. § 866(b)(2) (2012) (discussing that the appellant may waive appellate review).

As this Court recently made clear in *United States v. Arness*, the lower courts and this Court may not review petitions for extraordinary relief that otherwise fall outside its statutory jurisdiction.[3] In *Arness*, this Court considered whether the CCAs have jurisdiction to entertain petitions for extraordinary relief in Article 69(d) cases that were not referred to it by the Judge Advocate General of the services.[4] This Court concluded that the lower court lacked jurisdiction and explained that "[c]onsideration of extraordinary relief is not 'in aid' of the CCA's jurisdiction, [when] the CCA had none in the first place."[5] The writ "can only be used in aid of jurisdiction that already exists; it does not create or expand jurisdiction."[6]

Under *Arness*, the lower court may not invoke its Article 66 jurisdiction to review cases or collateral matters that have no statutory basis.[7] Article 66 does not

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[3] 74 M.J. 441, 443 (C.A.A.F. 2015).
[4] *Id.* at 442-43.
[5] *Id*. at 443 (noting that the lower court did not have jurisdiction to review every case that is subject to action by the Judge Advocate General pursuant to Article 69 and therefore could not entertain petitions for extraordinary relief in cases that were never referred to the lower court); *cf. United States v. Labella* 75 M.J. 52 (C.A.A.F. 2015) (holding that the Air Force Court of Criminal Appeals lacked jurisdiction to grant the appellant's petition for reconsideration that was filed after the time for filing a petition for review by CAAF had expired).
[6] 74 M.J. at 444 (Baker, J., concurring).
[7] 74 M.J. at 443. To the extent that the Government argues that *United States v. Booker*, 72 M.J. 787 (N-M. Ct. Crim. App. 2013) applies, this argument fails. *Booker* is no longer good law following this Court's holding in *Arness* as it pertains to authorizing the Government to invoke the All Writs Act without establishing a nexus to Article 62.

confer the Government the right to challenge a military judge's decision to award confinement credit.[8] Accordingly, the lower court is without jurisdiction to hear the Government's petition for extraordinary relief.

II. The All Writs Act is not a broad grant of jurisdiction to the Courts of Criminal Appeals to hear the Government's petitions for extraordinary relief.

The United States also argues[9] that this Court's decisions in *United States v. Curtin*,[10] *Dettinger v. United States*,[11] and *United States v. Dowty*[12] provide the CCAs with jurisdiction to hear Government petitions for extraordinary relief. But these cases are not broad grants of jurisdiction.

In *Curtin*, the Government attempted to subpoena financial records from the accused's wife and father.[13] When the accused's wife and father refused to comply under the Right to Financial Privacy Act (RFPA),[14] the Government attempted to litigate this at the court-martial.[15] The military judge held that, according to the RFPA, the proper forum was in United States District Court rather than at court-

[8] *See* 10 U.S.C. § 866 (2012).
[9] Govt. Ans. at 12.
[10] 44 M.J. 439, 440 (C.A.A.F. 1996).
[11] 7 M.J. 216 (C.M.A. 1979).
[12] 48 M.J. 102, 106-07 (C.A.A.F. 1998).
[13] 44 M.J. at 440.
[14] 12 U.S.C. § 3407 (1996).
[15] 44 M.J. at 440.

martial.[16] The Government challenged the military judge's ruling and filed an extraordinary writ. This Court denied the petition. The Judge Advocate General of the Air Force then certified the case to this Court pursuant to Article 67(a)(2). Although not necessary to the Court's holding, it cited *Dettinger* for the proposition that the Government may generally file petitions for extraordinary relief.[17] However, *Dettinger's* holding was not that broad.

In *Dettinger*, the military judge dismissed some charges.[18] The Government petitioned for extraordinary relief. This Court's predecessor held that "*in an appropriate case* the Governmen [sic] may, by application for extraordinary relief, subject a *dismissal of charges* by a trial judge to the scrutiny of the Court of Military Review."[19] Thus, by its own terms, *Dettinger* limits its holding to its facts.

Further, the *Dettinger* court recognized the need to tie jurisdiction under the All Writs Act to UCMJ jurisdiction. It discussed its jurisprudence on Government appeals noting that it initially construed Article 62(a), UCMJ, to allow them in 1968, but it reserved this decision in 1976.[20] Nevertheless, the *Dettinger* court

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[16] *Id*. Although the military judge's ruling did not explicitly exclude evidence, that was its collateral effect. *Id*. at 439-40.
[17] *Id.*
[18] 7 M.J. at 217.
[19] *Id.* at 222 (emphasis added). The *Dettinger* Court found that the military judge acted within his discretion and reversed the CCA's decision. *Id*. at 244.
[20] *Id.* at 221.

concluded that "[t]he perceived ambiguity of purpose as regards Article 62 suggests Congress did not intend that a trial judge's dismissal of charges be insulated from all judicial scrutiny."[21]

In *Dowty*, the military judge dismissed twelve of the sixteen specifications against the accused because the statute of limitations ran.[22] The Government brought an Article 62 appeal. This Court analyzed whether the RFPA applied to courts-martial and found that "[i]n the absence of a valid military purpose requiring a different result, generally applicable statutes normally are available to protect servicemembers in their personal affairs."[23] This Court cited the All Writs Act as an example of such protective statutes, noting that "[t]he authority of the Courts of Criminal Appeals to exercise jurisdiction under the All Writs Act also is *well established*." [24] It did not address whether the Government could bring an extraordinary writ. [25]

These cases demonstrate that the Government's ability to petition for extraordinary relief is limited. Under *Dettinger*, the Government's ability to

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[21] *Id.* Indeed, Congress expressly codified this intent in 1983 when it amended Article 62 to allow the Government to appeal a military judge's "order or ruling which terminates the proceeding with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding." Pub. L. 98–209, § 5(c)(1), Dec. 6, 1983, 97 Stat. 1398.
[22] 48 M.J. at 104 (emphasis added).
[23] *Id.* at 107.
[24] *Id.* at 106-07.
[25] *Id.*

petition for extraordinary relief is not a matter of right, but must be "an appropriate case."[26] In light of *Arness*, "appropriate cases" for Government writs must be tied to the CCA's existing UCMJ jurisdiction. For Government writs, that involves collateral matters related to Article 62. This is further supported by the fact that *Curtin*, *Dettinger*, and *Dowty* each involved Government appeals or petitions for extraordinary relief regarding collateral issues related to exclusion of evidence and dismissal of charges–the exact matters addressed in Article 62.

Although the Government may wish to petition for extraordinary relief beyond collateral matters related to Article 62, *Curtin*, *Dettinger*, and *Dowty* must be read together with the Supreme Court's holding in *Clinton v. Goldsmith*[27] and this Court's decision in *Arness*. These decisions implicitly hold that the service courts may only hear Government petitions involving collateral matters related to Article 62.

Under *Goldsmith*, the jurisdiction of military courts is "narrowly circumscribed" by the governing statutes.[28] Furthermore the CCAs do not have jurisdiction to review petitions for extraordinary relief that otherwise fall outside their statutory jurisdiction.[29] Government petitions challenging the discretionary decision of a military judge to award confinement credit is not a collateral matter

[26] 7 M.J at 222.
[27] 526 U.S. 529, 534-35 (1999).
[28] *Id.*
[29] 74 M.J. at 443.

related to Article 62. The military judge did not suppress any evidence or dismiss any charges. As such, the lower court was without authority to hear the Government's petition.

Moreover, *Curtin*, *Dettinger*, and *Dowty* and cannot be read to be expansive grants of jurisdiction in light of Article 62's legislative history. Before 1983, Article 62 did not permit Government interlocutory appeals. In examining the legislative history of the enactment of the Military Justice Act of 1983 and the amendments to Article 62, this Court explained:

> Congress legislated against a judicial backdrop that already provided for a broad reading of jurisdiction over 'cases' in the extraordinary writ context, whether arising through certification, as in [*United States v.*]*Redding*, [11 M.J. 100 (C.M.A. 1981)] or by petition, as in *United States v. Caprio*, 12 M.J. 30, 30-33 (C.M.A. 1981). Thus, Congress' decision to permit appeals from either party in the 1983 Act was not a jurisdictional innovation, but an adaptation of the existing Title 18 statute [18 U.S.C. § 3731] to replace the cumbersome extraordinary writ procedure with a direct appeal procedure.[30]

In enacting the legislative amendments to Article 62, Congress intended to limit the Government's ability to petition for extraordinary relief. Therefore, *Curtin*, *Dettinger*, and *Dowty*, do not confer the lower courts broad jurisdiction to entertain Government petitions.

[30] *United States v. Lopez de Victoria*, 66 M.J. 67, 70 (C.A.A.F. 2008).

III. The Government's petition is neither necessary nor appropriate.

In contending that the writ is necessary and appropriate, the Government argues[31] that this Court should defer to the Federal Circuit's decision in *Dock v. United States*[32] and the Court of Federal Claims decision in *Combs v. United States.*[33] This deference is misplaced. When it comes to interpreting provisions of the UCMJ, other Federal appellate courts should defer to this Court. Moreover, this Court's decisions regarding interpretations of Article 75 and Article 13 provide the correct guidance.[34]

As this Court's decision in *Keys v. Cole* points out, military courts are empowered to interpret the UCMJ, in particular Article 75(a):

> It is clear to us that the unambiguous language of this statute [Article 75(a), UCMJ] implies that, if a new trial or rehearing is ordered, as in this case, all property -- *i.e.* forfeitures -- will *not* be restored until that rehearing is held. Again, of course, **this provision would not entitle the United States to *continue* in the interim to withhold pay otherwise due by relying on the forfeiture element of a set-aside sentence.** *See generally* Art. 13; *cf. Moore v. Akins, supra.* However, it does quite clearly entitle the United States to *retain* pay *already*

[31] Govt. Ans. at 9, 18-19.
[32] 46 F.3d 1083 (Fed. Cir. 1995).
[33] 50 Fed. Cl. 592 (Fed. Cl. 2001).
[34] *See Johnson v. United States*, 42 C.M.R. 9, 10 (C.M.A. 1970) (holding that "implicit in ordering a new trial is a change in the accused's status from sentenced prisoner to one awaiting retrial."); *Keys v. Cole*, 31 M.J. 228, 230 (C.M.A. 1990) (interpreting Article 75(a)); *United States v. Combs*, 47 M.J. 330, 333 (C.A.A.F. 1997) (holding "reduction in rank is a well-established punishment, which unlawfully imposed, warrants sentence relief" under Article 13).

> 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. [35]

More importantly, *Dock* and *Combs* are inapplicable. They do not address whether withholding pay constitutes punishment under Article 13–the exact issue that was before the military judge. Nor do *Dock* or *Combs* address SSgt Howell's situation.

Unlike in *Dock*[36] and *Combs*,[37] the Government released SSgt Howell from confinement, restored him to a full-duty status, and allowed him to wear the rank

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[35] 31 M.J. 228, 232 (C.M.A. 1990) (italics in original) (bold emphasis added).

[36] In *Dock*, the plaintiff (an E-3) was initially convicted of murder and sentenced to reduction to pay-grade E-1, a dishonorable discharge, total forfeitures, and death. 46 F.3d at 1085. On appeal, the Army Court of Military Review set aside both the findings of guilt and the sentence and ordered a rehearing. *Id*. During the period between the Army Court of Military Review's decision and his second trial, the plaintiff was held in pretrial confinement and reached his EAOS. *Id*. at 1092. At the rehearing, the plaintiff was again found guilty of murder and sentenced to reduction to E-1, a dishonorable discharge, total forfeitures, and life imprisonment. *Id*. at 1085. He subsequently sued in the United States Court of Federal Claims seeking restoration of the pay and allowances withheld from him prior to his second sentence. *Id*. The United States Court of Appeals for the Federal Circuit concluded that Private Dock was not entitled to restoration of any of his pay and allowances, including the period between the set-aside and the second sentence.

[37] In *Combs*, the plaintiff (formerly an E-6) brought suit for back pay after this Court determined that reducing him in rank while awaiting his rehearing amounted to unlawful pretrial punishment under Article 13. 50 Fed. Cl. at 593. During the interim period between his two trials, the plaintiff was stripped of his rank and his pay was reduced to that of an E-1. *Id*. at 594. However, he was released from confinement and brought back to a full-duty status. *Id*. The Court of Federal Claims held that the plaintiff was not entitled to back pay for the time period between his two trials. *Id*. at 604. The Court of Federal Claims found that it was permissible to pay him as an E-1 during the interim period due to his other

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. Because the NMCCA set aside the findings and sentence to all the charges SSgt Howell faced, the Government did not have a conviction or confinement status to justify cutting his pay to pay-grade E-1. The military judge correctly awarded confinement credit as a result.

Additionally, the Government's Petition is neither necessary nor appropriate given the unauthorized expansion of the lower court's jurisdiction that it seeks. Here, the Government wants to expand its ability to challenge discretionary decisions of military judges, which, in the context of confinement credit, will only result in direct harm to an accused and extend jurisdiction to additional issues. This Court should not endorse such a radical, unsubstantiated Petition.

The Government desires to circumvent Article 62 whenever it disagrees with a decision by a military judge to award any type of confinement credit. If this Court determines the lower court has jurisdiction to grant the Government's requested relief, it will only open the door to Government challenges of other forms of confinement credit.[38]

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convictions from his first trial that were not set aside and the fact he was convicted at his second trial. *Id.* at 604.

[38] *See United States v. Pierce*, 27 M.J. 367, 16 369 (C.M.A. 1989) (allowing the military judge to award confinement credit for punishment received at nonjudicial punishment); *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (the military judge may award confinement credit for restriction tantamount to confinement); *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (allowing the military judge to

Conclusion

The lower court did not have the authority to review the Government's Petition. 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 judge.

Respectfully submitted,

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award day-for-day confinement credit for lawful pretrial confinement); *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (allowing the military judge to award confinement credit for each day of unlawful pretrial confinement); R.C.M 305 (k) (allowing the military judge to award confinement credit for violations of pretrial confinement procedures under R.C.M. 305).

Certificate of Compliance

1. This Writ-Appeal Reply complies with the type-volume limitation of Rule 24(c) because it contains 3,395 words.

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Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on February 5, 2016.

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