IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	REPLY ON BEHALF OF APPELLANT
v.	)	Crim.App. Dkt. No. 201900050
Michael J. Brown, First Sergeant (E-8) U.S. Marine Corps Appellee	)	USCA Dkt. No. 20-0288/MC

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Pursuant to C.A.A.F. Rule 19(b)(2), the United States replies to Appellee's Answer. (Appellee's Answer, July 16, 2020.)

A. An issue's potential to directly affect the findings and sentence, in the abstract, cannot establish potential jurisdiction under the All Writs Act. The determination requires a basis in existing statutory jurisdiction.

The All Writs Act requires two distinct determinations: first, whether the writ is "in aid of" existing jurisdiction; and second, whether the writ is necessary or appropriate. *Howell v. United States*, 75 M.J. 386, 390 (C.A.A.F. 2016) (citing *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008)). Analyzing the Courts of Criminal Appeals' statutory power under Article 66(c), this Court concluded that All Writs Act jurisdiction is "limited to matters that 'ha[ve] the potential to directly affect the findings and sentence.'" *Id.* (quoting *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)).

In *Ctr. for Constitutional Rights,* this Court found it lacked jurisdiction to issue a writ to media petitioners seeking public access to the court-martial of Army Private First Class Manning. 72 M.J. at 128–29. Although the Court previously found in *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), that an accused's right to a public trial was "something which had immediate relevance to the potential findings and sentence of his court-martial," asserting that right as a basis for writ

petition required the accused to join the petition, which Manning had not done. *Ctr. for Constitutional Rights*, 72 M.J. at 129–30.

Thus, although the subject-matter of public access to trials could in some cases directly affect the findings and sentence,[1] this Court nonetheless declined to issue the writ because it lacked statutory authority under Article 67 to adjudicate "what amount[ed] to a civil action" by strangers to the court-martial that had "no bearing on any findings and sentence." *Id*. at 129.

Here, although Appellee requested extraordinary relief based on an allegedly biased military judge—the same issue for which this Court granted relief in *Hasan*—the cases are distinct. And as *Ctr. for Constitutional Rights* shows, the determination of an issue's potential bearing on the findings and sentence is not done in a vacuum, instead taking into account the circumstances of the case. *See* 72 M.J. at 129–30. The relevant circumstance here, and distinct from *Hasan*, is the unavailability of an Article 66(b) qualifying sentence. Unlike *Hasan*, where the possibility of an Article 66(b) qualifying sentence was still available at the time of petition, *see* 71 M.J. at 417, Appellee petitioned the lower court after he received a sentence below the Article 66(b) threshold. Appellee thus erroneously concludes

[1] The Court questioned the applicability of this holding in *Powell*, "decided before [*Clinton v. Goldsmith*, 526 U.S. 529 (1999)] clarified our understanding of the limits of our authority under the All Writs Act" and because the Court in *Powell* "assumed jurisdiction . . . without considering the question." *Ctr. for Constitutional Rights*, 72 M.J. at 129.

that because he asked for the same relief as that granted in *Hasan*, the lower court had jurisdiction to issue the writ. (*See* Appellee's Answer at 7.)

In sum, the "'potential to directly affect the findings and sentence'" is what establishes subject-matter jurisdiction, *LRM v. Katsenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013) (quoting *Ctr. for Constitutional Rights*, 72 M.J. at 129), not statutory jurisdiction. Such language should not be used as a threshold matter for whether jurisdiction exists under the governing statutes themselves—the first determination to be made in finding jurisdiction under the All Writs Act. *See Howell*, 75 M.J. at 390.

B. The United States' conception of potential jurisdiction as tied to the availability of a qualifying sentence under Article 66(b) or the institution of proceedings under Article 69 does not conflict with *Noyd v. Bond*.

In *Noyd v. Bond*, the Supreme Court declined to issue a writ of habeas corpus to a military petitioner who asked for relief before exhausting his remedies in the military appellate courts. *Noyd v. Bond*, 395 U.S. 683, 695–96 (1969). In a footnote, Justice Harlan wrote that there can be no "doubt as to the power of the Court of Military Appeals [under the All Writs Act] to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court." *Id*. at 695 n.7. But he noted a "different question would . . . arise in a case for which the Court of Military Appeals is not authorized to review under the governing statutes." *Id*.

As an exhaustion of remedies case, *Noyd*'s application to the question of potential jurisdiction here is of limited value. Even so, the United States' conceptualization of potential jurisdiction as tied to the availability of a qualifying sentence under Article 66(b) and the institution of proceedings under Article 69 does not "clash" with *Noyd*. (*See* Appellee's Answer at 10.) Indeed, the United States' argument that potential jurisdiction is tied to action under Article 69 aligns with *Noyd's* suggestion that military courts' authority under the All Writs Act is limited to the confines of the governing statutes. *Noyd*, 395 U.S. at 695 n.7. Here, the lower court erred finding potential jurisdiction via Article 69 where the Judge Advocate General had not sent the case to the court, "a statutory prerequisite for review," *United States v. Arness*, 74 M.J. 441, 443 (C.A.A.F. 2015), and where, at the very least, Appellee had not taken the "preliminary step that might lead to appellate jurisdiction" to achieve review via Article 69, *see In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004).

C. Appellee takes *In re Tennant* out of context to mischaracterize the United States' argument that potential jurisdiction under Article 69 remains once a sentence below Article 66(b)'s threshold is announced.

Under *In re Tennant*, it is not enough that only "a proceeding of some kind" has begun for potential jurisdiction to exist, when there are other preliminary steps that an independent party must affirmatively take to lead to appellate review. *See In re Tennant*, 359 F.3d at 529.

Contrary to Appellee's assertion, the United States does not contend that once a sentence below Article 66(b)'s threshold is announced, potential jurisdiction under Article 69 remains forever extinguished. (*See* Appellee's Answer at 10.) Rather, it remains extinguished only until a preliminary step or another triggering event creates the potential anew. (*See* Appellant's Br. at 15–17.) In Appellee's case, that triggering event is some action taken under Article 69— either the Appellee's petition or the Judge Advocate General's referral. (*See id.*)

Appellee uses *In re Tennant* out of context, (*see* Appellee's Answer at 6–7, 10), and in doing so, overlooks the "preliminary step" as applied to potential jurisdiction under Article 69: potential jurisdiction reopens when some action is taken under Article 69. (*See* Appellant's Br. at 15–17.)

D. Both the lower court and Appellee rely too much on the specific context of *Arness*. The United States' argument that potential jurisdiction depends on action under Article 69 does not conflict with *Arness*, which tied All Writs Act jurisdiction to the statutory requirements of Article 69.

In *Arness*, this Court found that a Court of Criminal Appeals is limited to the jurisdiction granted it under Article 69(d). 74 M.J. at 44. Where a Judge Advocate General has declined to refer a case to the court under Article 69, the potential for review under Article 69 is extinguished and cannot be a source of jurisdiction under the All Writs Act. *Id*. The *Arness* Court did not limit its holding to the

particular writ issuance, as the lower court and Appellee claim. *See Brown*, 79 M.J. at 841; (Appellee's Answer at 11–12).

While the nature of *Arness* as a writ of error coram nobis made this Court's analysis inherently retrospective, nothing in *Arness* indicates that the prospective inverse would be true—that potential jurisdiction based on Article 69 would exist under the All Writs Act where a Judge Advocate General has not yet acted on an Article 69 petition. Indeed, the "straightforward" analysis in *Arness* applies equally here: Article 69 "does not authorize the CCA to review every case which is subject to action by the Judge Advocate General pursuant to Article 69." *Id*. at 443. Thus, like *Arness*, absent referral by the Judge Advocate General, the lower court erred relying on Article 69 review as a source of potential jurisdiction under the All Writs Act.

Moreover, *Arness* cannot properly be read as an "application of *Noyd*" because *Noyd* is not a potential jurisdiction case. *Compare* (Appellee's Answer at 12), *with Noyd*, 395 U.S. at 695, 695 n.7. Thus, the United States' reading of the steps required before Article 69 may be a source of potential jurisdiction under the All Writs Act does not conflict with either *Noyd* or *Arness*. *See Noyd*, 395 U.S. at 695, 695 n.7; *Arness*, 74 M.J. at 442–43; *see also* analysis *supra* Section B.

E. The most logical read of both the legislative history and the current statute itself belie Appellee's suggestion that Congress intended for such broad review by Courts of Criminal Appeals under the All Writs Act. Congress created a statutory scheme intended to limit the resort to the All Writs Act.

The Court of Military Appeals Committee Report of 1989, the same year as the Senate Report the United States cites in its Brief, (Appellant's Br. at 17–18, June 29, 2020), expressed further concern that military appeals courts may be "tempted to stretch [their] authority through use of extraordinary writs," Ct. of Military Appeals Comm. Rep. at 5 (Comm. Print 1989), https://www.loc.gov/rr/frd/Military_Law/pdf/Court-Military-Appeals-Comm-Report-1989.pdf. This Report cited *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976), *overruled by Arness*, 74 M.J. at 443, as a case where the "court granted extraordinary relief in [a] case not otherwise reviewable" and thus served as an example of the court undertaking a "supervisory function . . . beyond its intended mandate." Ct. of Military Appeals Comm. Rep. at 5.

Thus, the "most logical reading" of the legislative history is not as Appellee's suggests. (*See* Appellee's Answer at 5, 13–14). That Congress saw fit to create a statutory path for appellate review of special courts-martial under Article 69 is immaterial to whether, and when, that statutory path is a legitimate basis for potential jurisdiction under the All Writs Act. Nor is Appellee's reading the most logical read of the current statute. If Congress had truly intended to

expand Courts of Criminal Appeals review to all special courts-martial, then it would have dispensed with the requirement of the Judge Advocate General's referral under Article 69 altogether or the Article 66(b) requirement for a minimum sentence for automatic review. *Compare* (Appellee's Answer at 13), *with* Article 66(b), 69, UCMJ. But Congress did not—instead instituting a statutory scheme for appellate review of cases with sentences below the Article 66(b) threshold, requiring the undertaking of "preliminary step[s] that might lead to appellate jurisdiction." *See In re Tennant*, 359 F.3d at 529.

The Report concluded that the "Court would do a disservice if it either failed to protect its jurisdiction or it sought to impermissibly expand that jurisdiction." Ct. of Military Appeals Comm. Rep. at 5. Appellee's suggested reading of both the legislative history and the current statute invites this Court to that engage in that very disservice. *See id*.

F. Appellee's concerns about reining in abuses of power are without merit, as Appellee overlooks the key statutory feature of an integrated military justice system meant to protect every accused, regardless of sentence: Article 69 itself.

Article 69 is a mechanism for review for cases not subject to automatic review under Article 66. *See* Article 69(a)–(b), UCMJ. This statutory scheme itself, regardless of its congressional origins, adequately addresses Appellee's concerns that tying potential jurisdiction under the All Writs Act to action under

Article 69 would render military appellate courts "powerless" to "prevent abuses of power at the trial level." (*See* Appellee's Answer at 14–15.)

First, Appellee's analogy to *Howell* is inapt, as the United States' position would still allow for a Government writ appeal in a similar case where the accused has received an Article 66(b) qualifying sentence. Moreover, Congress has already limited the circumstances under which the United States may appeal trial level rulings, regardless of available sentence. *See* Article 62, UCMJ. That Congress' statutory scheme limits, in certain circumstances, the United States' ability to apply for extraordinary relief under the All Writs Act, is no different.

As for relief for the accused, Congress has indeed "created an integrated system." (*See* Appellee's Answer at 16). The United States' argument that potential jurisdiction is tied to action under Article 69 would not require an accused to "resort to an Article III court." (*See id*.) Rather, an accused may file a petition for relief under Article 69—an integrated feature of the military justice system that provides a path to appellate review. However, the mere existence of the statutory pathway to appellate review under Article 69 is an insufficient basis for a Court of Criminal Appeals to find potential jurisdiction under the All Writs Act where the accused never asked for review under Article 69(b) and the Judge Advocate General never referred the case under Article 69(d).

Conclusion

The United States respectfully requests that this Court vacate the lower court's decision and dismiss Appellee's writ for lack of jurisdiction.

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