IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. **Eliud I. LOPEZ**, Machinery Technician Third Class/E-4 U.S. Coast Guard, *Appellant*	APPELLANT'S REPLY Ct. Crim. App. Dkt. No. 1487 USCA Dkt. No. 24-0226/CG

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

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A. This Court Should Review CCA Appellate Discovery Rulings *De Novo*, Not for an Abuse of Discretion.

Contrary to the Government's argument,[1] this Court should not review a court of criminal appeal (CCA)'s denial of appellate discovery for an abuse of discretion. The Government's reasoning for using the same standard applied to trial-level discovery rulings fails to account for key distinctions between trial and appellate discovery. As this Court recently reasoned in *United States v. Harvey* with respect to factual sufficiency review, the degree of appellate deference should "depend on the nature of the evidence at issue."[2] Where the reviewing court has exactly the same vantage on the evidence as the court of first instance—which is true for document-based discovery determinations by intermediate appellate courts which are then reviewed by higher appellate courts—there should be no deference.

CCA's are unlike trial judges in this regard. Military judges presiding over courts-martial routinely hear testimony to handle discovery matters and make other pretrial rulings, and thus are both well-versed and well-equipped in making evidentiary determinations, justifying the deference afforded to their decisions. In contrast, CCAs rarely decide contested discovery disputes, and are allowed to

[1] Gov. Answer at 12.
[2] *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, at *8 (C.A.A.F. 2024).

resolve contested factual issues without remanding for additional fact-finding by trial judges only under very limited circumstances.[3] Since this Court has itself ordered both appellate discovery and further fact-finding,[4] similar determinations by a CCA, which are based on exactly the same evidence, merit no deference.

While this Court has never explicitly addressed the standard of review for CCA appellate discovery rulings, this Court has routinely applied the appellate discovery framework established in *United States v. Campbell*, which place a fundamentally different burden on an appellant than trial-level discovery rules.[5] And each of the four factors under *Campbell* call for determinations that this Court is as equally equipped to make as a CCA:

1. Whether the defense has made a colorable showing that the evidence or information exists;

2. Whether the defense was, with due diligence, able to discover from the government the putative evidence;

3. Whether the putative information is *relevant* to appellant's asserted claims or defense; and

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[3] *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).
[4] *See*, e.g., *United States v. Tovarchavez*, 78 M.J. 458, 462 n.4 (C.A.A.F. 2018) ("*DuBay* hearings are an oft-utilized and well-accepted procedural tool [used by appellate courts in the military] for addressing a wide range of post-trial collateral issues." (internal quotation marks and citation omitted)); *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002).
[5] *See*, e.g., R.C.M. 701(a)(2)(A)(i) (requiring that the trial counsel "*shall* [, upon request,] permit the defense to inspect" materials in its possession if they are "relevant to defense preparation") (emphasis added); *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999); *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999).

4. Whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.[6]

This distinction between trial rulings and appellate rulings is critical, particularly with respect to trial and appellate discovery. *Relevance* at trial, for example, relates to the defense's preparation while contesting the prosecution's case, at which the Government bears the burden of proof. In contrast, on appeal, the Defense bears the burden of proving a claim, such as unlawful command influence (UCI) or prosecutorial misconduct in this case. Thus, the prospect of having to do so without access to relevant evidence is a fundamental difference that makes appellate discovery qualitatively distinct from trial discovery.

Likewise, the Government's reliance on federal circuit court standards for new trials[7] is misplaced. Those standards apply when new evidence has been *obtained* after trial, and the required showing is whether it was previously unknown and unobtainable through due diligence. The issue here is not about newly *obtained* evidence—it is about evidence that the Government has improperly *withheld* from Appellant, depriving him of a fair opportunity to assert his claims on appeal and raising concerns of due process and fundamental fairness.

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[6] *Campbell*, 57 M.J. at 138 (emphasis added).
[7] Gov. Answer at 13-15.

Moreover, military courts face distinct challenges, including UCI, which Appellant raised on direct appeal. As Appellant has argued, a Deputy Judge Advocate General (DJAG) can commit UCI, and the Coast Guard DJAG's actions are central to his appellate discovery claims.[8] When the Government purposefully withholds relevant evidence, as it has done here, it is intentionally undermining meaningful appellate review, which calls into question the integrity of the military justice system. And safeguarding public confidence in the military justice system, particularly as it relates to UCI, should be paramount to this Court, which was specifically designed as a bulwark against such distortions.

B. The Lower Court Erred in Denying Appellant's Appellate Discovery Motions Under *Campbell*.

Appellant cannot meaningfully advance his claims of UCI and prosecutorial misconduct and seek meaningful relief for his illegal post-trial confinement without access to the direct evidence he has both specifically requested and shown to exist. Although Appellant has met the threshold burden for appellate discovery under the *Campbell* framework, the lower court erroneously failed to order disclosure, fact-finding, or even in-camera review of key evidence in the Government's possession, which deprived Appellant of the opportunity to fully assert his claims.

[8] Appellant's Brief at 21; JA0189 (Appellant's Assignments of Error at 27).

Appellant has satisfied the first *Campbell* factor by making a colorable showing that, at a minimum, additional emails and correspondence exist among the Military Justice Division Chief (CDR K.C.), the Coast Guard Investigative Service (CGIS), the Inspector General (IG), and DJAG regarding his illegal confinement. Government attorneys acknowledged the existence of additional correspondence, and the Government implicitly acknowledges the existence of the IG complaint by referencing a specific IG case number, yet it has refused to disclose even the documentation of the IG complaint itself.

Further, DJAG presumably did not invent facts when he drafted his email summary to the IG. He would have either received correspondence, or spoken with relevant personnel, or both. Yet the Government has refused to answer interrogatories or produce the direct evidence underlying DJAG's response. The lower court compounded this failure by refusing to order disclosure, fact-finding, or even in-camera review of this direct evidence of the facts and circumstances of Appellant's illegal incarceration.

Appellant has also presented evidence that a professional responsibility investigation was requested or at least suggested regarding potential misconduct. However, the Government has failed to produce any record of such an inquiry or even confirm whether it occurred. The absence of this documentation raises further

due process concerns, particularly in a case where governmental malfeasance resulted in a servicemember serving a month of illegal post-trial confinement.

Regarding the second *Campbell* factor, Appellant has exhausted all reasonable avenues in his diligent efforts to obtain this information. His counsel contacted multiple witnesses with access to the information at issue, only to be intentionally stonewalled from obtaining it absent a court order. His counsel then filed multiple discovery requests (which the Government summarily denied or ignored), two discovery motions (including motions for fact-finding hearings), and a motion for reconsideration. Yet the Government continues to withhold key documentary evidence bearing on why he was not released from confinement pursuant to the clemency order he sought and obtained from the convening authority.

As for the third and fourth *Campbell* factors, Appellant has articulated how this evidence is relevant to his claims of prosecutorial misconduct, UCI, and the lower court's meaningful relief analysis under *Suzuki*.[9] Indeed, to ascertain the prejudice caused by the denial of such relevant evidence, one need go no further than the lower court opinion's repeated view that "[t]here is not a scintilla of evidence of anything beyond negligence in failing to notify the brig" and "there is

[9] *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).

simply no evidence of anything other than negligence."[10] The idea that an appellate court could deny appellate discovery of direct evidence bearing on asserted claims for relief, and then rely on the absence of such evidence to deny those same claims, is simply shocking.

Once an appellant meets the *Campbell* threshold, it is the court's responsibility to either order production, fact-finding, and disclosure to the appellant, or at the very least for in-camera review. A court cannot speculate as to the relevance or impact of evidence it has not reviewed, as the lower court did. In this regard, this Court should consider the surrounding circumstances that further justify ordering discovery, including:

1. The agreement by Government counsel "not to gather or hand over any files pertaining to this issue to the defense, but would cooperate if asked for information about it in the future;"[11]

2. The conducting of an IG investigation that did not conform with established standards;[12] and

3. The Government's failure to submit affidavits from the Coast Guard DJAG, Chief of the Military Justice Division at the Legal Service Command, or any of the trial counsel—or even emails containing direct evidence by the percipient witnesses involved—instead choosing to submit an affidavit from a CGIS agent with no direct knowledge of Appellant's illegal confinement.[13]

[10] JA0012 (*Lopez*, slip op. at 10); JA0013 (*Lopez*, slip op. at 11).
[11] JA0032 (Declaration of LCDR K.B., former Appellate Defense Counsel).
[12] JA0321 (Quality Standards for IG Investigations).
[13] JA0364 (Declaration of CGIS S/A J.K.).

Even if this Court were to apply an abuse of discretion standard to appellate discovery decisions, Appellant has more than met that threshold. The lower court's assertion that "[t]here is not a scintilla of evidence of anything beyond negligence in failing to notify the brig" is unfounded because the court never reviewed the evidence that the Government intentionally withheld before concluding that "there is simply no evidence of anything other than negligence."[14] If *Campbell* stands for anything, it stands for the proposition that a CCA cannot create a Catch-22[15] by denying an appellant's discovery request for certain relevant evidence that has been shown to exist and then, having prevented the appellant from obtaining it, frame its opinion around the absence of such evidence. The lower court's circular reasoning in this regard is clearly unreasonable and an abuse of discretion.

Appellant has shown a reasonable probability that his claims of prosecutorial misconduct and UCI would have been different if his motions for appellate discovery had been granted fully. The lower court relied on DJAG's one-day "investigation" and summary of events while failing to order production of the underlying evidence. Apart from DJAG's email, the Government has provided no

[14] JA0012 (*Lopez*, slip op. at 10); JA0013 (*Lopez*, slip op. at 11).
[15] A "problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *United States v. Warner*, 62 M.J. 114, 122 n.39 (C.A.A.F. 2005) (quoting *Webster's Ninth New Collegiate Dictionary* 215 (9th ed. 1991)).

explanation of what precisely occurred or any assurances that remedial steps have been taken to prevent future such occurrences resulting in illegal confinement.

Justice Brandeis famously wrote that "[s]unlight is said to be the best of disinfectants."[16] Given the trust Congress has placed in this Court to stand as a last sentinel against UCI and the bureaucratic machinations often used to cover it up, this Court should send a clear message that appellate discovery is a legitimate mechanism to unearth and protect against post-trial governmental misconduct and outright obstruction in the Government's efforts to cover up its tracks.[17]

C. The Lower Court Lacked Authority to Award Back Pay for Appellant's Illegal Post-Trial Confinement.

The Government contends that the lower court's authority to award back pay is derived from Article 66(d)(2), UCMJ, which allows CCAs to provide "appropriate relief." This authority, however, is not *carte blanche* to award novel monetary credits such as the kind the lower court purported to provide here. The argument misconstrues the scope of Article 66 and ignores the statutory limitations imposed by Article 75, UCMJ.

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[16] *See Buckley v. Valeo,* 424 U.S. 1, 67 (1976) (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY (National Home Library Foundation ed. 1933)).
[17] *United States v. Globke*, 59 M.J. 878 (N-M. Ct. Crim. App. 2004); *United States v. Peterson*, No. 201900144, 2020 WL 6887862 (N-M. Ct. Crim. App. Nov. 24, 2020).

The CCAs are not courts of equity and do not possess unrestricted authority to grant novel monetary remedies such as the back pay credit awarded here. Congress did not expand the CCA's authorities in Article 66, UCMJ, to overcome the limits it established in Article 75, UCMJ. The basic tenets of statutory construction prevent this Court from interpreting Article 66, UCMJ, in a way that directly conflicts with Article 75, UCMJ. Statutes must be read in harmony with one another whenever possible.[18] Interpreting Article 66, UCMJ, to allow for a monetary credit that Article 75, UCMJ, strictly forbids would be an absurd result. Accordingly, this Court should reverse the lower court's improper attempt to grant monetary relief in lieu of meaningful relief against the adjudged sentence.

Conclusion

This Court should reverse the lower court's denial of the requested discovery of direct evidence of the facts and circumstances of Appellant's unlawful confinement, order the disclosure of such evidence or further fact-finding, or both, reverse the lower court's monetary relief, and remand for further consideration of Appellant's claims of error and for meaningful relief.

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[18] *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

DATE: February 21, 2025

Respectfully Submitted,

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Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court, and that copies were electronically delivered to U.S. Coast Guard Appellate Government Counsel and Special Victim's Counsel on February 21, 2025.

Certificate of Compliance with Rules 24(c) and 37

The undersigned counsel hereby certifies that: 1) This reply brief complies with the type-volume limitations of Rule 24(b) because it contains 2898 words, less than 6,500 words; and 2) this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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