

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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UNITED STATES,  
*Appellee,*

v.

Lieutenant Colonel (O-5)  
**MARK K. ARNESS**  
USAF,  
*Appellant.*

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USCA Dkt. No. 14-8014/AF

Crim. App. No. 2013-30

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**BRIEF IN SUPPORT OF PETITION GRANTED**

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**WHETHER THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION TO ENTERTAIN A WRIT OF ERROR CORAM NOBIS WHERE THERE WAS NO STATUTORY JURISDICTION UNDER ARTICLE 66(B)(1), UCMJ, ON THE UNDERLYING CONVICTION AND THE CASE WAS NOT REFERRED TO THE COURT OF CRIMINAL APPEALS BY THE JUDGE ADVOCATE GENERAL UNDER ARTICLE 69(D)(1), UCMJ, AND WHERE THE COURT OF CRIMINAL APPEALS RELIED ON POTENTIAL JURISDICTION UNDER ARTICLE 69(D), UCMJ, AS ITS BASIS FOR ENTERTAINING THE WRIT (CITING DEW V. UNITED STATES, 48 M.J. 639 (ARMY CT. CRIM. APP. 1998)).**

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Contrary to his pleas, Appellant was found guilty of fourteen specifications of absence without authority or leaving his place of duty in violation of Article 86, UCMJ; ten specifications of making a false official statement in violation of Article 107, UCMJ; and two specifications of conduct unbecoming an officer in violation of Article 133, UCMJ. (J.A. 15-24).

Appellant was sentenced to be confined for eleven months and a reprimand. (J.A. 278-79). The convening authority approved the sentence as adjudged. (J.A. 123).

On 26 March 2010, The Air Force Office of The Judge Advocate General (TJAG), exercising review under Article 69, UCMJ, 10 U.S.C. § 869, determined the findings and sentence were supported in law.<sup>1</sup> (J.A. 107). Appellant never received notice of the Article 69(a) review and subsequently submitted a written request for review under Article 69.<sup>2</sup> (J.A. 27-55). On 2 August 2011, the Military Justice Division of the Air Force (JAJM) denied the request for review. (J.A. 56-57).<sup>3</sup> Appellant requested reconsideration and review under Article 69(a) and (b) of the UCMJ.<sup>4</sup> (J.A. 58-59). On 15 September 2011, citing that

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<sup>1</sup> TJAG found the findings and sentence were supported in law. TJAG did not direct review of the record by AFCCA. (J.A. 107).

<sup>2</sup> Appellant's civilian counsel raised the issues of 1) legal insufficiency of specifications 2-15 of Charge I, 2) legal insufficiency of specifications 2-10 of Charge II, and 3) sentence severity. (J.A. 27-55).

<sup>3</sup> JAJM declined to review Appellant's civilian counsel's brief citing that TJAG already reviewed the brief under Article 69(a) and that the 30 day time period to submit a request under Air Force Instruction 51-201, para. 11.5.1, had elapsed. (J.A. 56-57).

<sup>4</sup> Appellant's civilian counsel pointed out that Article 69a, on its face, contained no time limitation, as prescribed in AFI 51-201, para. 11.5.

Appellant's conviction was final under Article 76, UCMJ, 10 U.S.C. § 876, JAJM denied the request for reconsideration. (J.A. 60-61). On 19 December 2013, Appellant filed a *pro se* petition for writ of error *coram nobis* in the Air Force Court of Criminal Appeals ("AFCCA").<sup>5</sup> (J.A. 62-97). On 11 March 2014, AFCCA denied Appellant's petition. (J.A. 1-6). On 27 March 2014, Appellant, again acting *pro se*, filed a writ-appeal petition with this Honorable Court.<sup>6</sup> (J.A. 98-101). On 31 July 2014, this Court granted review to consider the propriety of AFCCA asserting jurisdiction to entertain Appellant's petition for writ of error *coram nobis*.

#### **Statement of Facts**

Relevant facts are set out in each of the argument section, below.

#### **Summary of the Argument**

This case presents the opportunity for this Court to address the ability of the a Criminal Court of Appeals to assert jurisdiction to entertain a petition for writ of error under the All Writs Act, where the requested writ is in aid of the court's

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Further, Appellant's ADC never explained the 30 day time limit to him, and in confinement during this time, and the complicated legal issues could not be properly addressed within the 30 day time limit. (J.A. 58-59).

<sup>5</sup> Appellant raised 1) fourth and fifth amendment violations, 2) ineffective assistance of counsel, military judge abandoning his role as impartial and neutral arbiter, 4) due process rights violation due to post-trial processing delays, 5) legal and factual sufficiency, and 6) sentence severity. (J.A. 62-97).

<sup>6</sup> Appellant adopted this issues raised by civilian counsel in the Article 69 submission and his *pro se* submission to the AFCCA.

existing jurisdiction and the requested writ is necessary or appropriate, in furtherance of relief to an Appellant who has palpably been denied constitutional rights in a court-martial and denied fundamental rights accorded by the UCMJ.

### **Argument**

**THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION TO ENTERTAIN A WRIT OF ERROR CORAM NOBIS WHERE THERE WAS NO STATUTORY JURISDICTION UNDER ARTICLE 66(b)(1), UCMJ, ON THE UNDERLYING CONVICTION AND THE CASE WAS NOT REFERRED TO THE COURT OF CRIMINAL APPEALS BY THE JUDGE ADVOCATE GENERAL UNDER ARTICLE 69(d)(1), UCMJ, AND WHERE THE COURT OF CRIMINAL APPEALS RELIED ON POTENTIAL JURISDICTION UNDER ARTICLE 69(d), UCMJ, AS ITS BASIS FOR ENTERTAINING THE WRIT (CITING *DEW v. UNITED STATES*, 48 M.J. 639 (ARMY CT. CRIM. APP. 1998)).**

#### *Standard of Review*

Jurisdiction is a question of law, which this Court reviews *de novo*. *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012).

#### *Law and Analysis*

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In the context of a petition for extraordinary relief under the All Writs Act, a court must engage in a two pronged inquiry, i.e., whether (1) the requested writ is "in aid of" the court's existing jurisdiction; and (2) the requested writ is "necessary or appropriate". *LRM v.*

*Kastenberga*, 72 M.J. 364, 367-68 (C.A.A.F. 2013); *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008).

The Supreme Court has observed that the All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. *United States v. Goldsmith*, 526 U.S. 529, 534-35 (1999). "When a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system...a writ that is necessary or appropriate may be issued under the All Writs Act 'in aid of' the court's existing jurisdiction." *Denedo*, 66 M.J. at 120 (citing *Loving v. United States*, 62 M.J. 235, 245-46 (C.A.A.F. 2005)); *Goldsmith*, 526 U.S. at 534.

The existing statutory jurisdiction of the AFCCA exists under Article 66 of the Uniform Code of Military Justice which provides:

The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court martial - (1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more..."

Article 66, UCMJ, 10 U.S.C. §866(b).

Appellant sub-jurisdictional sentence was not entitled to review under Article 66. And his case was reviewed under Article 69, which is appropriate if:

The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of



the Judge Advocate General if there is a finding of guilty..."

Article 69(a), UCMJ, 10 U.S.C. §869(a).

A court of Criminal Appeals may review, under section 866 of this title (article 66) - (1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (b) is sent to the Court of Criminal Appeals by order of the Judge Advocate General, and (2) any action taken by the Judge Advocate General under this section in such case.

Article 69(d), UCMJ, 10 U.S.C. §869(d).

Here, the Appellant request for coram nobis is limited to the findings of the Judge Advocate General of the Air Force (AFJAG) under Article 69. AFFCA properly concluded that the requirements were met under the All Writs Act.

**a. Writ is in aid of the court's existing jurisdiction:**

An application for a writ of error coram nobis is "properly viewed as a belated extension of the original proceeding during which the error occurred." *Denedo*, 556 U.S. at 913. Since AFCCA could have properly reviewed the original proceeding under Article 69, UCMJ, a court of criminal appeals (CCA) retains authority to issue extraordinary writs in cases reviewed under Article 69, UCMJ. See *McPhail v. United States*, 1 M.J. 457, 462 (1976); *Dew v. United States*, 48 M.J. 639 (Army Ct. Crim. App. 1998). The potential jurisdiction over these types of cases, i.e. the potential sentence, actual TJAG review, or the fact TJAG can forward the case to the CCA, provides a basis for entertaining writs under the All Writs Act. *Dew*, 48 M.J. at 645

(citing *Addis v. Thorsen*, 32 M.J. 777 (C.G.C.M.R. 1991); *United States Navy-Marine Corps. Court of Military Review v. Carlucci*, 26 M.J. 328, 333 (C.M.A. 1988). This court has "unequivocally declared that [it's] jurisdiction extend[s] beyond the ordinary appellate review of courts-martial." *Gale v. United States*, 37 C.M.R. 304, 307 [1967 WL 4245] (1967). In *McPhail*, this court commented on its authority:

"To deny that it has authority to relieve a person subject to the Uniform Code of the burdens of a judgment by an inferior court that has acted contrary to constitutional command and decisions of this Court is to destroy the "integrated" nature of the military court system and to defeat the high purpose Congress intended this Court to serve. Reexamining the history and judicial applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in "aid" of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67."

*McPhail*, 1 M.J. at 462.

The posture of this case is similar to *McPhail*. In *McPhail*, petitioner had been convicted by general courts-martial. *Id.* at 457. Because the sentence did not meet the statutory threshold for review by the CCA, the case was reviewed by TJAG, who found the case legally sufficient. After that office found the case legally sufficient, *McPhail* petitioned this court for relief. This Court granted review, finding that the review of TJAG's Article 69 review was within its jurisdictional boundaries. Further, review was granted to determine the burden of the lower courts erroneous decision.

Similarly, in *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) the Court of Appeals exercised its extraordinary writ authority when it considered a petition brought by an officer who faced a forum that would not allow statutory review by the court. This Court opined that:

[w]e are convinced that, from the outset, Congress has never intended to allow evasion of the safeguards provided to servicemembers by the Constitution and the Uniform Code. If, however, this Court lacked jurisdiction to grant extraordinary relief in cases like this, it would be easy to bypass those safeguards.

*Id.* at 355. This Court reasoned in *Unger v. Ziemniak* that when Congress established certiorari jurisdiction of the Supreme Court over cases not specifically reviewable under Article 67(b), but in which relief was granted, Congress similarly reaffirmed this Court's jurisdiction to grant extraordinary relief in cases not specifically reviewable. *Unger v. Ziemniak*, 27 M.J. 349, 354 (C.M.A. 1989); 28 U.S.C. §1259. The same reasoning applies in the case at hand. The writ aided AFCCA's existing jurisdiction because Article 69(d)(2) authorized it to review "any action taken by the Judge Advocate General under."

Further, in the military justice system, the trial court- the court-martial - does not have independent jurisdiction over a case after the military judge authenticates the record and the convening authority takes action. *Denedo*, 66 M.J. at 124.

Because the trial court is not available for collateral review under the UCMJ, collateral review within the military justice

system does not occur at the trial court level like it does in the federal system. *Id.* “In that context, the Courts of Criminal Appeals, the first-level standing courts in the military justice system, provide an appropriate forum for consideration of coram nobis petitions regarding courts-martial.” *Id.* *McPhail* and its progeny remain good law and Congress, in its attempts to amend the UCMJ, has voiced no dissatisfaction with the scope of the All Writs Act interpretation.

Finally, Article 76 has no effect on the ability of the CCA to issue a writ. “In terms of the scope of collateral review, the res judicata effect of Article 76 means that the decision on direct review will stand as final unless it fails to pass muster...” *Denedo*, 66 M.J. at 121. “When a coram nobis petition is considered after completion of direct review, finality of direct review enhances that than diminishes consideration of a request for collateral relief. *Id.* (See e.g., *United States v. Morgan*, 346 U.S. 502, 511-12, 74 S. Ct. 247 (1954)). Article 76 provides a prudential constraint on collateral review, not a jurisdictional limitation. *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975).

AFCCA correctly determined that the requested writ was in aid of their existing jurisdiction.

**b. Writ is necessary or appropriate**

Appellant's sentence did not entitle him to review under Article 66, UCMJ and AFCCA observed that at least four of Appellant's claims of error were "allegations of the most fundamental character that were not litigated at trial."<sup>7</sup> (J.A. 4). A writ of coram nobis encompasses constitutional and other fundamental errors, including the denial of fundamental rights accorded by the UCMJ. *Garrett v. Lowe*, 39 M.J. 293, 295 (C.M.A. 1994). *United States v. Bevilacqua*, 39 C.M.R. 10, 11-12 (C.M.A. 1968). This Court has stated in the past that it

is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary.

*Bevilacqua*, 39 C.M.R. at 11-12.

This Court and the lower CCA's have an obligation to require compliance with applicable laws from all courts and persons purporting to act under its authority. *McPhail*, 1 M.J. at 462-63. The inability of Appellant to seek relief would allow the government to potentially bypass the safeguards instituted by Congress by seeking forums that offer sub-jurisdictional sentences

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<sup>7</sup> These asserted errors included (1) erroneous admission of evidence in violation of the Fourth or Fifth Amendment, (2) ineffective assistance of counsel, (3) the military judge's abandonment of his impartial role as a neutral arbiter, and (4) denial of due process rights in post-trial processing. AFCCA declined to review the factual sufficiency and sentence

or by seeking sub-jurisdictional sentences. See *Unger*, 27 M.J. at 355.

Appellant exhausted his post-trial legal remedies. See (J.A. 60-61); See *Goldsmith*, 526 U.S. at 537 (holding that even if this Court had some jurisdictional basis to issue a writ of mandamus, such writ was unjustified as necessary or appropriate in light of alternative remedies available to a servicemember). No other forum existed for Appellant to seek remedy from the injustice that he suffered. *McPhail* and *Unger* make clear that AFCCA has All Writs Act supervisory jurisdiction to consider writs challenging the action taken under Article 69, UCMJ, with regards to this general-court martial. *Unger*, 27 M.J. at 353; *McPhail*, 1 M.J. at 462. As a result, the requested writ was necessary or appropriate, as there are no adequate remedies available to the petitioner.

The AFFCA adopted the position of the Army Court of Criminal Appeals in determining they retained authority to issue extraordinary writs in cases reviewed under Article 69, UCMJ. (J.A. 3). See *Dew v. United States*, 48 M.J. 639 (Army Ct. Crim. App. 1998). That case also involved a military member who received a sub-jurisdictional sentence. *Id.* at 642. The Judge Advocate General of the Army examined Appellants case under Article 69(a) and found the findings and sentence supported by

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severity claims, as this was not a review under Article 66, UCMJ, and lacked

law. *Id.* The Appellant appealed the decision under Article 69(b) and the appeal was denied. *Id.* The court in *Dew* held that "Article 76, UCMJ, does not preclude our examination of petitioner's court-martial to determine whether the issues she has raised in her petition received full and fair consideration at trial and during review in the Office of the Judge Advocate General." *Id.* at 647. AFCCA's determination of authority to issue a writ is consistent with other CCA's and this Court's jurisprudence.

### **Conclusion**

The AFCCA properly asserted jurisdiction to entertain a petition for writ of error under the All Writs Act, because the requested writ was in aid of the court's existing jurisdiction and the requested writ was necessary or appropriate, in furtherance of the extraordinary circumstances presented by the Appellant

WHEREFORE, Appellant respectfully requests this Court find AFCCA had jurisdiction to review Appellant's petition, and in furtherance of Appellants extraordinary circumstances, grant review of the substantive issues raised before this court.

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authority to make those determinations.

Respectfully Submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on August 28, 2014.

A handwritten signature in blue ink, appearing to read 'Michael A. Schrama', with a long horizontal flourish extending to the right.

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