IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Master Sergeant (E-8) **ALAN S. GUARDADO,** United States Army, Appellant	FINAL BRIEF ON BEHALF OF APPELLEE Crim. App. No. 20140014 USCA Dkt. No. 19-0139/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO GRANT APPELLANT ARTICLE 13, UCMJ, CREDIT IN CONSEQUENCE OF THE *HOWELL V. UNITED STATES*, 75 M.J. 386 (C.A.A.F. 2016) VIOLATION PRESENT HERE.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals [Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2012). The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

In January 2014, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of aggravated sexual contact with a child, three specifications of indecent liberties with a child, three specifications of assault consummated by battery on a child under the age of 16 years, one specification of indecent language, one specification of indecent assault, one specification of indecent act on a child under the age of 16 years, and four specifications of committing a general disorder, in violation of Articles 120, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 928, and 934 (2012 & Supp. V. 2006; 2006; 2006 & Supp. I 2008). (Charge Sheet; R. at 227, 1433). At the

time of his court-martial, Appellant was a Master Sergeant (E-8). The panel sentenced Appellant to reduction to the grade of E-1, total forfeiture of all pay and allowances, and confinement for eight years. (R. at 1555). The convening authority approved the adjudged sentence. (Action).

On November 15, 2016, the Army Court affirmed the findings in part and dismissed one specification of assault consummated by a battery upon a child under the age of 16 years and two specifications of general disorder. *United States v. Guardado*, 75 M.J. 889, 906 (Army Ct. Crim. App. 2016). The Army Court conditionally dismissed one specification of assault consummated by a battery upon a child under the age of 16 years and one specification of indecent assault of a child under the age of 16 years. *Id*. The Army Court affirmed only so much of the sentence as reduction to the grade of E-1, total forfeitures, and confinement for seven years and eight months. *Id.* at 907.

On December 12, 2017, this Court affirmed several specifications but set aside the finding of guilty to one specification of aggravated sexual contact with a child and two specifications of committing a general disorder. *United States v. Guardado*, 77 M.J. 90, 94-96 (C.A.A.F. 2017). This Court authorized a rehearing on the specification of aggravated sexual contact with a child, set aside Appellant's sentence, and authorized a sentence rehearing on the affirmed findings of guilt for the three specifications of indecent liberties with a child, one specification of

battery of a child, one specification of indecent language, and one specification of indecent acts. *Id*. at 96.

At Appellant's rehearing, a military judge acquitted Appellant of the specification of aggravated sexual contact with a child. (R. at 1916). Appellant was sentenced to reduction to the grade of E-1, total forfeiture of all pay and allowances, and confinement for fifty-five months. (JA 1). The convening authority approved the adjudged sentence and credited Appellant with 1,465 days of confinement against the sentence to confinement. (JA 13).

On November 23, 2018, the Army Court affirmed the remaining findings and the sentence. *United States v. Guardado*, ARMY 20140014 (Army Ct. Crim. App. Nov. 23, 2018) (sum. dis. rem.). Although Appellant raised the claim that he is entitled to Article 13, UCMJ, 10 U.S.C. § 813 (2012), credit based upon failure of Defense Finance and Accounting Services (DFAS) to pay him at the E-8 rate pending his rehearing before the Army Court as an assignment of error, the Army Court's opinion did not explicitly address the claim. On January 8, 2019, Appellant filed a Petition for Grant of Review, which this Court granted on April 18, 2019.

Statement of Facts

After this Court's December 12, 2017 opinion, Appellant was moved from post-trial confinement to pretrial confinement on January 5, 2018. (JA 56). Appellant was ordered to be released from pretrial confinement on January 11, 2018. From January 5, 2018 through the date of trial, DFAS paid Appellant at the E-1 rate. (JA 56). The Military Pay Supervisor at Fort Sill based her determination that Appellant was only entitled to pay at the E-1 rate until the outcome of the rehearing on a legal opinion by an Assistant Counsel, Military and Civilian Pay Law, DFAS Office of General Counsel (OGC). (JA 56; Supp. JA. 6).

The DFAS OGC's position that a servicemember "who received a sentence to a reduction in grade that is subsequently set aside is entitled to pay at the reduced rate while on active duty awaiting rehearing" is based upon the interpretation of Article 75, UCMJ, 10 U.S.C. § 875,[1] by the Court of Appeals for the Federal Circuit and the Court of Federal Claims (hereinafter Article III

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[1] Article 75(a), UCMJ, provides:

> Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing.

Article 75(a), UCMJ.

courts).[2] (Supp. JA 12-13). The legal opinion acknowledged this Court's opinion in *Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016), and recognized that, effective 1 January 2019, Article 75, UCMJ, and Rule for Courts-Martial 1208(b) would be revised to explicitly require full pay at the pretrial grade while a rehearing is pending.[3] Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018); Supp. JA 12-13. However, the DFAS OGC reasoned that it "must follow the Article III courts' interpretation of 10 U.S.C. [§] 875 on pay entitlement issues" because only Article III courts have jurisdiction over claims for military pay.[4] (Supp. JA 12-13). The DFAS OGC further noted its belief that this Court's opinion in *Howell* would not change its interpretation of Article 75, UCMJ, because the Court of Federal Claims explicitly stated in *United States v. Combs*, 50 Fed. Cl. 592, 604 (Ct. Fed. Cl. 2001), that it had authority to pay a "member at the

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[2] Consistent with the collective reference to the Court of Federal Claims and the Court of Appeals for the Federal Circuit as "Article III courts" in the DFAS OGC and this Court's reference to those courts as "Article III courts," the government will likewise collectively refer to the Court of Federal Claims and the Court of Appeals for the Federal Circuit as the Article III courts. *Howell*, 75 M.J. at 391-392; (Supp. JA 12-13).

[3] The DFAS OGC further recognized that "[once] the legislative change is effective and the Rule for Courts-Martial has been revised, DFAS's practice will change to comply with these authorities." (Supp. JA 13).

[4] The legal opinion also noted, "The military courts have repeatedly recognized that the Court of Federal Claims, not the military courts, have jurisdiction over military pay claims." *See Keys v. Cole*, 31 M.J. 228, 234 (C.M.A. 1990), *United States v. Allen*, 33 M.J. 209, 215 (C.M.A. 191)9 and [*United States*] *v. Fischer*, 60 M.J. 650, 651-52 (N-M. Ct. Crim. App. 2004) (en banc)."

E-1 rate if it found that a military court's decision on the pay entitlement issue clearly erroneous," and that any interpretation of Article 75, UCMJ, contrary to that by the Court of Appeals for the Federal Circuit in *United States v. Dock*, 46 F.3d 1083 (Fed. Cir. 1995), would be clearly erroneous.[5] (Supp. JA 12-13).

On March 7, 2018, Appellant filed a motion for credit under Article 13, UCMJ, alleging that this Court's interpretation of Article 75, UCMJ, in *Howell* bound DFAS to pay Appellant at the E-8 rate pending his rehearing and that DFAS's position to the contrary no longer serves a legitimate governmental interest. (Supp. JA. 1-3). The government filed its response on March 12, 2018. (JA 42-48).

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[5] In *Dock*, the United States Court of Appeals for the Federal Circuit interpreted Article 75(a), UCMJ to:

> [P]lainly require[] that, with two exceptions, if a member's court-martial sentence is set aside or disapproved, all rights, privileges, and property are to be restored to the member. The first exception is that a set-aside or disapproved sentence does not undo an already executed dismissal or discharge. The second exception, controlling here, is that if a rehearing is ordered, and the member is resentenced, then only that part of the executed first sentence that is *not* included in the second sentence shall be restored to the member.

Dock, 46 F.3d at 1087. In *Combs*, the Federal Claims Court interpreted Article 75(a), UCMJ, to mean that "that when a new trial is conducted, entitlement to restoration of pay is dependent upon the outcome of a new trial." *Howell*, 75 M.J. at 391 (citing *Combs*, 50 Fed. Cl. at 600).

On March 19, 2018, the military judge ruled that Appellant was not entitled to Article 13, UCMJ, credit based upon DFAS's decision to pay Appellant at the E-1 rate from the date of pretrial confinement on January 5, 2018, until the date of trial. (JA 56-59). The military judge found that DFAS paid Appellant "at this rate based on its good faith view that: 1) it is required to follow decisions from the Court of Federal Claims; and 2) that the Court of Federal Claims would not change its previous holding in *Combs v. United States* based on" *Howell*. (JA 56). The military judge further found that this "policy is not particular to [Appellant], is not in complete disregard for the [Appellant's] rights, and the DFAS's policy is not designed to punish the [Appellant]." (JA 56). The military judge rejected Appellant's argument that DFAS was bound to follow the interpretation of Article 75, UCMJ, by this Court in *Howell*. (JA 58). The military judge found that because "DFAS made a good faith analysis of the conflict between the courts to include Howell and was awaiting guidance known to be coming from the President . . . the DFAS policy was not intended to punish the [Appellant] and the policy serves a legitimate, nonpunitive government objective of providing the [Appellant] with the proper pay pending rehearing." (JA 58).

Summary of Argument

This Court should find that Appellant is not entitled to Article 13, UCMJ, credit based upon DFAS's determination that he should be paid at the E-1 rate because, even in light of this Court's opinion in *Howell*, DFAS's actions were not intended to punish Appellant and do further a legitimate nonpunitive government objective.

Standard of Review

Whether appellant is entitled to credit for illegal pretrial punishment is a mixed question of fact and law. *United States v Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citations omitted). Appellate courts "will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous." *Id*. at 310. "Whether the facts amount to a violation of Article 13, UCMJ, is a matter of law the court reviews de novo." *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006) (citing *Mosby*, 56 M.J. at 310).

Law and Argument

Article 13, UCMJ, "prohibits the imposition of punishment or penalty upon an accused prior to trial, as well as pretrial arrest or confinement conditions which are more rigorous than 'the circumstances required' to ensure the accused's presence at trial." *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997) (quoting Article 13, UCMJ). "[T]he question of whether particular conditions amount to punishment before trial is a matter of intent, which is determined by

examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (quoting *Bell v. Wolfish*, 20 M.J. 90 (C.M.A. 1985)). If there is no evidence of intent to punish, "a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *Id.* In addressing whether there is a legitimate nonpunitive governmental objective, the "reasonableness of the conduct designed to secure the non-punitive government objective must also be considered." *United States v. Cruz*, 25 M.J. 326, 331 n.4 (C.M.A. 1987).

Appellant asserts that DFAS's good-faith determination that he is not entitled to pay at the E-8 rate does not serve a legitimate nonpunitive governmental objective in light of this Court's determination in *Howell* that Article 75(a), UCMJ does not provide authority for "the withholding of pay during the interim period after the findings and sentence are set aside." *Howell*, 75 M.J. at 391. Appellant's claim fails because it is premised on the erroneous assumption that this Court's interpretation of Article 75(a), UCMJ, is binding upon DFAS when resolving disputed military pay claims. The DFAS's reliance on legal precedent by the Article III courts interpreting Article 75(a), UCMJ, continues to serve a legitimate

nonpunitive government objective in light of the exclusive jurisdiction of those courts to adjudicate military pay claims.

In *Howell*, this Court reviewed a military judge's ruling that found that the government's failure to pay an appellant at the E-6 rate after he was returned to full duty status pending a rehearing constituted illegal pretrial punishment in violation of Article 13, UCMJ. *Id*. at 388-389. The government requested that the military judge reconsider his ruling in light of a legal opinion from the DFAS OGC "that Article 75(a), UCMJ, as interpreted by *Dock*[] and *Combs*[], provided binding legal authority to pay Appellant at the E-1 rate until the results of the rehearing were known." *Id*. at 389. Although the military judge found that DFAS's determination "was taken in good faith based upon statutory interpretation and case law," he maintained his original ruling because he disagreed with DFAS's interpretation of Article 75(a), UCMJ. *Id*. This Court in *Howell* addressed four questions certified to the Court by the Judge Advocate General of the Navy. Specifically, it considered whether including whether the military judge exceeded his authority by rejecting the Article III courts' interpretation of Article 75(a),UCMJ, that appellant was not entitled to pay at the E-6 rate pending his rehearing, and whether the action of paying a servicemember at the "E-1 rate pending rehearing constituted illegal pretrial punishment in the absence of any punitive intent." *Id*. at 389, n.2.

In determining whether the military judge exceeded his authority by not adhering to the holdings of the Article III courts, this Court noted that the "wait-and-see" approach by those courts "is not an inherently unreasonable interpretation of Article 75(a), UCMJ." *Id*. at 391. This Court then found that the military judge "did not clearly and indisputably err in not following the Article III courts' interpretation of Article 75(a), UCMJ," because Article 75(a), UCMJ "does not provide for the withholding of pay during the interim period after the findings and sentence are set aside." *Id*. This Court acknowledged the military judge's conclusion was "at odds with those of the Federal Circuit and the Court of Federal Claims" and noted "that it is important to express our view with the hope that Congress and the President will clarify this aspect of Article 75(a), UCMJ." *Id*. at 391, n.5 (citing Military Justice Review Group, Dep't of Defense, Report of the Military Justice Review Group Part I: UCMJ Recommendations 657 (2015) (recommending that Article 75, UCMJ, be amended to require the President to establish rules governing the eligibility for pay and allowances during the period after a court-martial sentence is set aside or disapproved)).

The *Howell* decision did not create a blanket holding that all instances of failure to pay a servicemember at his original rank pending a rehearing warrant relief under Article 13, UCMJ. Rather, this Court's review of the military judge's interpretation of Article 75(a), UCMJ, was only relevant to establishing whether

the Article 13, UCMJ, analysis was triggered. *See Id*. at 391. The withholding of pay cannot be "punishment" if the servicemember is not statutorily entitled to the pay that was withheld. *See Allen*, 33 M.J. at 215 (rejecting an appellant's assertion that he suffered pretrial punishment by not being paid regular military compensation because he was statutorily only required to be paid at the rate for retired members given that he was tried as a retired member and not recalled to active duty for purposes of trial). Hence, as this Court noted in *Howell*,

> Determining whether the Government's action of not paying Appellant as an E-6 pending the results of the rehearing amounted to an Article 13, UCMJ, violation is properly within the jurisdiction of the military courts, as well as this Court. This determination necessarily requires interpretation of Article 75(a), UCMJ, 10 U.S.C. § 875(a) (2012), and how this article applies when court-martial findings and sentences have been set aside by an appellate court.

Howell, 75 M.J. at 391.

The mere violation of a statute does not end the Article 13, UCMJ, analysis because this Court must then determine whether there was an intent to punish or whether the action was merely the effect of a legitimate nonpunitive governmental interest. *Palmiter*, 20 M.J. at 95. In *Howell*, despite this Court's disagreement with the interpretation of Article 75(a), UCMJ, by Article III courts, it concluded DFAS's actions did not warrant relief because there was no intent to punish the *Howell* appellant, and "the Government legitimately believed that [the *Howell*]

Appellant was not entitled to be paid as an E-6 pending the results of his rehearing." *Id*. This Court relied upon the military judge's finding that the government did not act in complete disregard of the accused's rights and that "DFAS had taken a good-faith position it believed was supported by regulations, statutes, and case law interpreting Article 75(a), UCMJ, in concluding that there was no authority to pay Appellant at his former pay grade pending the results of the rehearing." *Howell*, 75 M.J. at 393. This Court also noted that "there was a legitimate debate on the proper interpretation of Article 75(a), UCMJ, and disbursements to accused persons pending rehearings." *Id*.

In this case, the military judge's factual findings that the government lacked the intent to punish are not clearly erroneous. DFAS's determination that Appellant was only entitled to pay at the E-1 rate pending the outcome of his rehearing "was in furtherance of a legitimate, nonpunitive governmental objective to provide an accused pending rehearing with the proper pay entitlement as prescribed by Congress" even in light of this Court's interpretation of Article 75(a), UCMJ, in *Howell*. Id. at 391, 393-394. The DFAS OGC conducted a good-faith analysis of the law, including *Howell*, and ultimately concluded that it was bound by the Article III courts' interpretation of Article 75, UCMJ, because the Article III courts have exclusive jurisdiction over military pay claims and prophetically indicated that any military court decision, such as the decision in

Howell, interpreting the statute contrary to their interpretation would be clearly erroneous.

This position is reasonable even in light of this Court's conclusion in *Howell* that the military judge did not clearly and indisputably err in interpreting Article 75(a), UCMJ, in a manner that conflicts with the position taken by the Article III courts. While it is within this Court's statutory authority to interpret Article 75, UCMJ, to determine whether the initial basis for an Article 13, UCMJ, violation exists, as it did in *Howell*, the Article III courts have exclusive jurisdiction to adjudicate military pay issues. *See* The Tucker Act, 28 U.S.C. §§ 1491(a), 1346 (1982); *Combs*, 50 Fed. Cl. at 603; *United States v. Fischer*, 61 M.J. 415, 421 (C.A.A.F. 2005); *Keys*, 31 M.J. at 234. As part of their statutory obligation to adjudicate military pay disputes, the Article III courts must interpret pertinent regulations and statutes, to include Article 75, UCMJ, a statute which, "by its own terms . . . is a statute that deals with entitlement to pay." *Dock*, 46 F.3d at 1087. In contrast, this Court's statutory jurisdiction under 10 U.S.C. § 867(a)-(c), is strictly limited to resolving matters of military justice and this Court's interpretation of the UCMJ is only binding for purposes of adjudicating "criminal violations of law, not administrative questions . . . ." B-189465, 57 Comp. Gen. 132 (1977) (finding that the determination by the Court of Military Appeals that an individual's enlistment is void is not binding up DFAS for the administrative purpose of determining that

individuals' entitlement to pay); *see also Combs*, 50 Fed. Cl. at 603; *Allen*, 33 M.J. at 216-217. Accordingly, this Court's interpretation of Article 75(a), UCMJ, is not binding on the DFAS's administrative determination that Appellant was entitled to pay at the E-1 rate pending his rehearing.

Appellant's position that *Howell* binds DFAS's determination of Appellant's pay renders the Tucker Act devoid of meaning. It further puts DFAS officials in the untenable position of choosing to conflict with Article III courts' interpretation of Article 75(a), UCMJ, or to violate Article 13, UCMJ, as determined by military courts. *Dock* and *Combs* remain valid law concerning military pay entitlement pending a rehearing and "[i]t is axiomatic that government agents cannot bind the Federal Government to pay public funds in violation of positive law." *Dock*, 46 F.3d at 1089. This Court noted that the interpretation of Article 75(a), UCMJ, by the Article III courts was not "inherently unreasonable" and suggested that Congress and the President should clarify Article 75(a), UCMJ, in light of the conflicting interpretations of the statute by the military and Article III courts. In light of these statements and the statutory role the Article III courts play in resolving military pay disputes, DFAS acted reasonably in continuing to adhere to the interpretation of Article 75, UCMJ, by the Article III courts until such amendments to the statute are effective and applicable to a case. Because the goal of complying with the law of Article III courts when determining pay entitlement

is a legitimate nonpunitive governmental objective, this Court should find that Appellant is not entitled to relief under Article 13, UCMJ.[6]

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm Army Court's decision and the findings and sentence in this case.

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[6] If this Court were to find that relief is warranted under Article 13, UCMJ, it should award only day-for-day credit as Appellant originally requested from the military judge. (Supp. JA 3). A new Article 66, UCMJ, review is not necessary because the Army Court fully considered Appellant's dilatory post-trial delay claim and determined that no relief is warranted and this Court's grant of relief under Article 13, UCMJ, is alone sufficient to remedy the failure to pay Appellant at the E-8 rate pending his rehearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on civilain appellate defense counsel, on July 17, 2019.

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