

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Respondent

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A NEW TRIAL**

Docket No. ARMY 20180058

v.

Major (O-4)

DAVID J. RUDOMETKIN

United States Army

Petitioner

Tried at Redstone Arsenal, Alabama, on 8 November and 20 December 2016; 3 February, 31 May, 10 August, and 15 September 2017; and 29–31 January, 1–2 February, 12 March, 22 June, and 6 September 2018; before a general court-martial appointed by the Commander, U.S. Army Aviation and Missile Command, Lieutenant Colonel Richard Henry, Colonel Jeffrey R. Nance, and Colonel Douglas K. Watkins, military judges, presiding.

**TO THE HONORABLE THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Statement of the Case

On 1 December 2022, petitioner, Major (MAJ) David J. Rudometkin, through appellate defense counsel, filed his Brief in Support of Petition for a New Trial. On 3 January 2023, the Government filed its opposition brief. In accordance with Rule 21(c) of this court's Rules of Appellate Procedure, petitioner files this reply to the government's brief.

Law and Argument

The government correctly acknowledges that this court is reviewing this petition as a court of first instance, so its review is in effect de novo. (Gov't Br. at 5). However, the government's argument that such review is limited in any way by prior Article 66 or Article 67 proceedings is without basis in statute, rule, or precedent. (*See* Gov't Br. at 6).

Article 66 is the statutory scheme for direct review of a court-martial conviction, requiring the reviewing court "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ (2016). A new trial petition under Article 73 is a statutorily authorized collateral review to a court-martial conviction by the Judge Advocate General or designated courts while direct appeal is still pending. Article 73, UCMJ. The standard and scope of review pursuant to a new trial petition fundamentally differs from Article 66 review. Under Article 73 this court considers whether there is sufficient grounds, without limitation to only the record of trial, to order a new trial for either fraud on the court-martial or newly discovered evidence. *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982); *United States v. Cade*, 75 M.J. 923, 929 (Army Ct. Crim. App. 2016); R.C.M. 1210. Additionally, Congress specifically empowered petitioners to seek relief under Article 73 as an exception to the finality

of proceedings after completion of appellate review under Article 66 and Article 67. *See* Article 76, UCMJ (“Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United states, *subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73). . .*) (emphasis added).

The government also erroneously suggests the issues presented by this petition concerning Judge [REDACTED] have “already been addressed during appellate review.” (Gov’t Br. at 6). But petitioner’s Article 66, UCMJ review is not even complete. The original opinion reversing petitioner’s conviction did not address the issue of fraud on the court as presented in petitioner’s brief. Further, the review by the Court of Appeals for the Armed Forces [CAAF] under Article 67, UCMJ was limited to the two discrete issues¹ certified by TJAG, neither of which addressed petitioner’s current fraud on the court claim. Similarly, the CAAF’s decision to not

¹ I. WHETHER THE ARMY COURT ERRED BY NOT PROPERLY CONSIDERING THE MILITARY JUDGE’S POST-TRIAL 39(a) PROCEEDINGS RELATING TO APPELLANT’S REQUEST FOR MISTRIAL.

II. WHETHER THE MILITARY JUDGE CLEARLY ABUSED HIS DISCRETION WHEN HE DID NOT GRANT A MISTRIAL AND FOUND THAT RELIEF WAS NOT WARRANTED UNDER *LILJEBERG v. HEALTH SERVICES ACQUISITION CORP.*, 486 U.S. 847 (1988).

attach the marriage certificate to the record before it has no bearing on this petition, since the CAAF's review was limited both by the certified issues and the record of trial.

Conclusion

WHEREFORE, petitioner respectfully requests this court set aside the findings and the sentence, and grant a new trial.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 10 January 2023.



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