

Extraordinary Relief: A Primer for Trial Practitioners

Captain Patrick B. Grant*

Introduction

Most counsel have litigated a pretrial motion with the absolute confidence they would win, only to feel the sting of reading “Denied” in the military judge’s ruling. If counsel represents the Government, Article 62, Uniform Code of Military Justice (UCMJ), may give direct access to the appellate courts to challenge an adverse ruling.¹ If the matter does not fall within the scope of Article 62, UCMJ, in the vast majority of cases, counsel cannot successfully seek interlocutory appeal of the adverse ruling and can only hope for relief months or years later on direct appeal. In rare cases however, where the motion concerns an extraordinary matter presenting a clear and indisputable entitlement to relief, counsel should consider seeking redress through an extraordinary writ.²

Appellate courts disfavor granting writs and counsel filing a writ bear an “extremely heavy burden” in seeking extraordinary relief.³ For example, in three years the Court of Appeals for the Armed Forces (CAAF) has granted four of the ninety requests for extraordinary relief filed.⁴ In determining if they can meet their heavy burden, counsel must consider (1) whether the court has jurisdiction to hear the writ; (2) which writ is appropriate; and (3) do the circumstances of the case justify extraordinary relief.⁵ This article will first discuss this three-step analysis and then provide a road map for seeking extraordinary relief. Although Article 62 appeals are not petitions for extraordinary relief, this article will also provide counsel with a road map for filing an Article 62 appeal.

Jurisdiction

Military courts derive their power to hear a writ from the All Writs Act.⁶

The Supreme Court and 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.*⁷

Although military courts are among those empowered to issue extraordinary writs under the All Writs Act, the Act confines a court to issuance of process in aid of its existing statutory jurisdiction and does not enlarge that jurisdiction.⁸

Counsel must therefore look to Articles 66 and 67, UCMJ to determine if their case will aid in the court’s jurisdiction.⁹ The Army Court of Criminal Appeals (ACCA) has statutory jurisdiction of cases with an approved sentence that extends to death, dismissal of a commissioned officer or cadet, dishonorable or bad conduct discharge, or confinement for one year or

* Previous writs coordinator for Defense Appellate Division, and currently assigned to Litigation Division. Several people assisted in the completion of this article. Of particular note is Major Fansu Ku for encouraging me to write, and helping me to edit the article. Lieutenant Colonel Steven Henricks also generously assisted in editing.

¹ UCMJ art. 62 (2008) (granting the government the right to seek an interlocutory appeal a military judge’s order or ruling which terminates the proceeding, excludes evidence that is substantial proof of a material fact, or concerns classified information).

² McKinney v. Jarvis, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

³ *Id.* at 873.

⁴ U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2005 sec. 2, at 6 (2006); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2006 sec. 2, at 4–5 (2007); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2007 sec. 2, at 7 (2008).

⁵ Loving v. United States, 62 M.J. 235, 237 (C.A.A.F. 2005). Before considering merits of petitioner’s claim, the court first answered threshold issues of jurisdiction and whether writ was necessary and proper. *Id.*

⁶ Dettinger v. United States, 7 M.J. 216, 219–20 (C.M.A. 1979) (citing UCMJ art. 67). The Court of Military Review is a court created by Congress for the purposes of All Writs Act, and therefore may entertain petition for extraordinary relief as provided in 28 U.S.C. § 1651(2000). *Id.* at 218.

⁷ 28 U.S.C. § 1651(a) (emphasis added).

⁸ Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999).

⁹ UCMJ arts. 66, 67 (2008).

more.¹⁰ The CAAF has statutory jurisdiction of cases in which the ACCA has affirmed a sentence of death, the Judge Advocate General orders a case sent to the CAAF for review, or cases reviewed by ACCA.¹¹

If counsel has a case that has potential to fall within the scope of Articles 66 or 67 in the future, military courts will likely find that a petition for extraordinary relief is in aid of their jurisdiction. For example, courts have found jurisdiction to hear writs concerning, among other things, Article 32 hearings,¹² illegal pretrial confinement,¹³ and double jeopardy claims.¹⁴ Although none of these cases had an adjudged sentence that definitively placed them within the scope of a court's statutory jurisdiction, they all had preferred charges with the potential to fall within the court's statutory jurisdiction upon completion of the trial.

Conversely, a writ will not be in aid of a court's jurisdiction if the matter falls outside the scope of Articles 66 and 67 because the All Writs Act does not give military courts the power to oversee all matters arguably related to military justice.¹⁵ Courts will therefore not consider writs challenging administrative separations, summary court-martials, non-judicial punishment, letters of reprimand, or other administrative matters because they are not part of the court-martial process that can result in a "findings" or "sentence" reviewable under Articles 66 or 67.¹⁶

The most recent question concerning the scope of the CAAF's jurisdiction arose from a writ filed by four Guantanamo Bay prisoners.¹⁷ The petition argued that CAAF has jurisdiction to hear the writ because the petitioners are "presumptive prisoners of war" subject to the UCMJ and therefore fall within the CAAF's future jurisdiction.¹⁸

The petitioners did not address how the Military Commissions Act affects the CAAF's jurisdiction.¹⁹ The Military Commissions Act provides jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after 11 September 2001.²⁰ It also grants the Court of Military Commission Review, the U.S. Court of Appeals for the District of Columbia, and the Supreme Court exclusive jurisdiction to review military commission decisions.²¹ As such, it is difficult to see how the writ is in aid of the CAAF's jurisdiction when the CAAF does not have jurisdiction to conduct direct appellate review of their cases. Despite this jurisdictional hurdle, the CAAF ordered the Navy Judge Advocate General to appoint government counsel and show cause why the court should not grant the writ.²² Without deciding the question of jurisdiction, the CAAF dismissed the petition without prejudice because the petitioners raised the same challenge in other federal courts.²³

Types of Writs

Once counsel has determined that a writ is in aid of the court's jurisdiction, they must next consider what type of writ is appropriate for the relief sought. Trial practitioners will generally seek writs of mandamus, prohibition, or habeas corpus.

¹⁰ *Id.* art. 66.

¹¹ *Id.* art. 67.

¹² *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

¹³ *Berta v. United States*, 9 M.J. 390 (C.M.A. 1980).

¹⁴ *Burt v. Schick*, 23 M.J. 140 (C.M.A. 1986).

¹⁵ *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999).

¹⁶ *Id.* (holding that the CAAF cannot use the All Writs Act to enjoin military officials from dropping an officer from the rolls as such matter is an executive action).

¹⁷ *In re Ali v. United States*, 66 M.J. 474 (C.A.A.F. 2008).

¹⁸ *Id.* at 3, 10–12.

¹⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C.S. §§ 948a-950j (2008)).

²⁰ *Id.* § 948d.(a).

²¹ *Id.* § 950a.

²² *In re Ali*, 66 M.J. 474.

²³ *Id.*

Military courts will also hear writs of error *coram nobis*, but because of the post-trial nature of *coram nobis* (explained below), trial practitioners will almost never need to use it.²⁴

Mandamus means “we command” and requires the performance of a specified act by a court or official.²⁵ Mandamus is a preemptory writ traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction.²⁶ A court will only grant a writ of mandamus if an inferior court or official has exceeded its authority in a ruling or decision that is contrary to statute, settled case law, or valid regulation.²⁷

A writ of prohibition is the “process by which a superior court prevents an inferior court . . . from exceeding its jurisdiction.”²⁸ It is essentially the inverse of mandamus because it prevents the commission of a specific act rather than ordering an act to be done.

In Latin, habeas corpus means, “you have the body.”²⁹ A habeas corpus writ challenges either the legal basis or manner of confinement. Petitioners have successfully used the writ of habeas corpus to challenge being held in pretrial confinement for their own protection,³⁰ being held in pretrial confinement while pending charges that violate double jeopardy,³¹ and to receive the correct amount of confinement credit.³²

Error *coram nobis* means “let the record remain before us.”³³ It requests the court that imposed the judgment to consider exceptional circumstances, such as new facts or legal developments that may change the result of trial.³⁴ In the military justice system, appellate courts, rather than the trial court, review writs for error *coram nobis* because the trial court does not have independent jurisdiction over a case after authentication of the record of trial.³⁵

Agreeable to the Usage and Principles of Law

After deciding which writ is appropriate, counsel must determine if a writ in their case is agreeable to the usages and principals of law.³⁶ In other words, do the circumstances of their case justify extraordinary relief? Again, the extraordinary nature of relief under the All Writs Act places an extremely heavy burden upon the party seeking relief and issuance of a writ is not generally favored.³⁷ Because counsel bear such an extremely heavy burden, it is critical that the moving party establish the extraordinary nature of their case by addressing the appropriate factors in their writ petition.

No matter what type of writ counsel seeks, appellate courts commonly consider the five *Bauman* factors³⁸ to determine whether to grant extraordinary relief.³⁹ The *Bauman* factors typically apply to a writ of mandamus, but military appellate

²⁴ *Loving v. United States*, 62 M.J. 235, 251–53 (C.A.A.F. 2005). Trial practitioners will not generally use the writ of error *coram nobis* because the writ invites the court’s attention to new facts or evidence that were not known at the time of trial.

²⁵ BLACK’S LAW DICTIONARY 961 (6th ed. 1990) [hereinafter BLACK’S].

²⁶ *Dew v. United States*, 48 M.J. 639, 648 (A. Ct. Crim. App. 1998).

²⁷ *Id.* at 648.

²⁸ *McKinney v. Jarvis*, 46 M.J. 870, 873 (A. Ct. Crim. App. 1997) (quoting BLACK’S, *supra* note 25, at 1212).

²⁹ BLACK’S, *supra* note 25, at 709.

³⁰ *Berta v. United States*, 9 M.J. 390 (C.M.A. 1980).

³¹ *Burt v. Schick*, 23 M.J. 140 (C.M.A. 1986).

³² *United States v. Orzechowski*, 65 M.J. 538 (N-M. Ct. Crim. App. 2006) .

³³ *Loving v. United States*, 62 M.J. 235, 251 (C.A.A.F. 2005).

³⁴ *Denedo v. United States*, 66 M.J. 114, 125 (C.A.A.F. 2008) (citing *Loving*, 62 M.J. at 252).

³⁵ *Id.*

³⁶ 28 U.S.C. § 1651(a) (2000).

³⁷ *McKinney v. Jarvis*, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

³⁸ *Bauman v. United States Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977). In *Bauman*, the Ninth Circuit Court of Appeals identified five factors as guidelines designed to frame the boundaries of a court’s mandamus power. *Id.*

³⁹ *Dew v. United States*, 48 M.J. 639, 648–49 (A. Ct. Crim. App. 1998).

courts have applied the Bauman factors when considering other types of writs. Indeed, ACCA requires counsel to address the first Bauman factor in all petitions for extraordinary relief.⁴⁰

Although the CAAF has never expressly adopted the *Bauman* factors, it has granted or denied writs based upon equivalent considerations. It therefore remains persuasive for counsel to address the *Bauman* factors when articulating why their case is extraordinary and agreeable to the usages and principles of law.

The *Bauman* factors are (1) no other adequate means, such as direct appeal, exist to obtain relief; (2) will the petitioner be damaged or prejudiced in a way not correctable on appeal; (3) is the lower court's order clearly erroneous as a matter of law; (4) is the lower court's order an oft repeated error, or manifests a persistent disregard of federal rules; and (5) does the lower court's order raise a new and important problem, or issues of law of first impression.⁴¹ Courts will balance these factors to determine whether to grant relief, and no one factor is dispositive or always relevant.⁴²

Courts will not consider a matter extraordinary if the petitioner has an alternative adequate means of relief. A failure to exhaust administrative remedies falls within the first *Bauman* factor. For instance, petitioners challenging pretrial confinement or restriction through a writ of habeas corpus must first seek relief through Article 138, UCMJ, or file a motion with the military judge.⁴³ A court, however, will not require a petitioner to first exhaust administrative remedies if it deems further attempts futile.⁴⁴

Courts will also consider whether alternative means of relief are adequate. Indeed, the CAAF has considered whether presidential action under Article 71(a), possible review by an Article III court, or other options constituted an adequate, not just an alternative, means to obtain relief through writs of error *coram nobis*.⁴⁵

In *Loving v. United States*, the petitioner filed two separate writs of error *coram nobis* asking the CAAF to apply two recent Supreme Court decisions to his capital conviction.⁴⁶ The petitioner's case had completed direct appellate review, and the Government forwarded the case to the President for action under Article 71(a).⁴⁷

The CAAF held that presidential action fails as an adequate remedy because it falls outside the judicial process.⁴⁸ The CAAF further held that an Article III court could grant petitioner relief under a habeas petition, but this again fails as an adequate remedy at law because an Article III court was unlikely to grant review before petitioner's case becomes final under Article 76.⁴⁹ Finally, the CAAF dismissed the writs without prejudice because it found that a writ of habeas corpus, rather than error *coram nobis*, the appropriate [or alternative adequate] means of relief when petitioner is in confinement.⁵⁰

A ruling or order damaging or prejudicing a petitioner in a way not correctable on appeal presents another factor courts will consider in deciding whether a writ is extraordinary. In *Chapel v. United States*, the Court of Military Review used this second Bauman factor to deny a writ of error *coram nobis*.⁵¹ After his direct appellate process was over, the petitioner discovered evidence of unlawful command influence (UCI), but could not offer any evidence of the UCI causing prejudice.⁵² Denying the writ, the court reasoned that had the petitioner raised the issue on direct appeal he would have lost because he

⁴⁰ ARMY COURT OF CRIMINAL APPEALS, INTERNAL RULES OF PRACTICE AND PROCEDURE R. 20(a)(7) (2002) [hereinafter ACCA RULES] (requiring petition to contain statement why the relief sought cannot be obtained during the ordinary course of appellate review).

⁴¹ *Dew*, 48 M.J. at 649 (citing *Bauman*, 557 F.2d 650).

⁴² *Id.*

⁴³ *Font v. Seaman*, 43 C.M.R. 227, 391 (C.M.A. 1971).

⁴⁴ *Keys v. Cole*, 31 M.J. 228, 230 (C.M.A. 1990).

⁴⁵ *Loving v. United States*, 62 M.J. 235, 247–48 (C.A.A.F. 2005)

⁴⁶ *Id.*

⁴⁷ *Id.* at 252.

⁴⁸ *Id.*

⁴⁹ *Id.* at 249.

⁵⁰ *Id.* at 254.

⁵¹ 21 M.J. 687 (C.M.R. 1985).

⁵² *Id.* at 689–90.

could not meet the prejudice prong of UCI.⁵³ In other words, the court denied the writ because the damage the petitioner claimed was not correctable on direct appeal.

In *Font v. Seaman*, the Court of Military Appeals (CMA) likewise denied a writ of habeas corpus on the second Bauman factor.⁵⁴ Here the petitioner made statements to the media concerning the poor living conditions of enlisted Soldiers living on Fort Meade, Maryland.⁵⁵ His commander subsequently ordered the petitioner not to enter any barracks unless first given permission.⁵⁶ The petitioner violated the order and the commander preferred charges.⁵⁷ Before the trial, the petitioner filed a writ of habeas corpus claiming, in part, that the order violated his constitutional right of free speech.⁵⁸ The CAAF dismissed the writ reasoning, in part, that the legality of the order could be reviewed in the normal course of appellate review.⁵⁹

A court will also grant a writ if it finds a ruling or order clearly erroneous. In *Kreutzer v. United States*, the CAAF applied this third Bauman factor in granting a writ of mandamus.⁶⁰ In this instance, the ACCA previously set aside the petitioner's capital sentence, but the Army continued to confine the petitioner on death row.⁶¹ The CAAF granted mandamus and ordered the Government to remove the petitioner from death row because Army regulations clearly prohibit commingling of prisoners under sentence of death with other non-capital sentence prisoners.⁶²

The CMA likewise granted a writ of habeas corpus where the trial judge made a clearly erroneous decision.⁶³ In *Berta*, while awaiting his trial for a separate incident, the petitioner attempted to break up a fight between two other Marines.⁶⁴ The next night, approximately seventeen Marines assaulted the petitioner with a knife and a shotgun in the barracks.⁶⁵ The Government could only identify and confine two of the seventeen Marines who assaulted the petitioner.⁶⁶ Upon his release from the hospital, the Government placed the petitioner in confinement for his own protection, and the military judge denied the petitioner's request for release.⁶⁷ In granting the petition for habeas corpus, the court found that the clearly erroneous standard of confining a service member for his personal safety warranted extraordinary relief.⁶⁸

Conversely, the ACCA has denied a writ of mandamus where a military judge did not abuse his discretion in accepting a guilty plea.⁶⁹ In *Dew*, the petitioner made statements during the providence inquiry that alluded to, but did not per se raise, a defense.⁷⁰ After her conviction, the petitioner sought a writ of mandamus ordering the Judge Advocate General to set aside the findings and sentence.⁷¹ The court found that the petitioner's statements were consistent with her plea.⁷² In denying the writ, the ACCA reasoned that perhaps the military judge should have conducted a more thorough plea inquiry, but he did not

⁵³ *Id.* at 690.

⁵⁴ 43 C.M.R. 387 (C.M.A. 1971).

⁵⁵ *Id.* at 389–90.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 390.

⁵⁹ *Id.* 391.

⁶⁰ 60 M.J. 453 (C.A.A.F. 2005).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Berta v. United States*, 9 M.J. 390, 392 (C.M.A. 1980).

⁶⁴ *Id.* at 391.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 392.

⁶⁹ *Dew v. United States*, 48 M.J. 639, 652 (A. Ct. Crim. App. 1998).

⁷⁰ *Id.* at 649.

⁷¹ *Id.* at 642.

⁷² *Id.* at 651.

commit gross error or usurp his judicial authority.⁷³ In other words, the military judge's acceptance of the plea was not clearly erroneous.

There are no examples of military courts applying the fourth Bauman factor, an often-repeated error. In *United States v. McVeigh*, however, the Court of Appeals for the Tenth Circuit denied a writ of mandamus, in part, because of this fourth Bauman factor.⁷⁴ In *McVeigh*, the district court ordered several documents relating to the Oklahoma City bombing sealed.⁷⁵ Several media companies sought a writ of mandamus to order the district court judge to unseal documents.⁷⁶ The fourth Bauman factor was relevant here because the district court also issued an order detailing what factors it would consider in the future to determine whether to seal additional documents.⁷⁷ The court denied the writ, in part, because the district court's order sealing the documents was not clearly erroneous and therefore not a risk of becoming an oft-repeated error.⁷⁸

The author likewise found no examples of military courts applying the fifth Bauman factor. Nevertheless, *United States v. Lopez de Victoria* is an example of a case where the fifth Bauman factor would have been relevant if it was before the court as a petition for extraordinary relief rather than a Government Article 62, UCMJ, appeal.⁷⁹

In *Lopez de Victoria*, the military judge held that the statute of limitations barred appellee's conviction for indecent acts and liberties.⁸⁰ The military judge found that the 2003 amendment to Article 43(b), UCMJ, extending the statute of limitations for child abuse from five years until the child attained the age of twenty-five, did not apply retroactively.⁸¹

The Government appealed the military judge's ruling under Article 62, UCMJ.⁸² *Lopez de Victoria* was the first appellate case to present the issue of whether the 2003 amendment to Article 43, UCMJ, applies retroactively to offenses committed before its effective date, that were not time barred under previous Article 43. If the military judge had ruled that the amendment applied retroactively, the defense counsel could have argued that this presented an extraordinary matter because it was an issue of first impression.

Courts will consider additional factors in determining if a writ of error coram nobis is agreeable to usages and principles of law. The six stringent threshold requirements for a court to issue a writ of error coram nobis are (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available; (3) valid reasons exist for not seeking relief earlier; (4) the new information in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.⁸³

Again, military trial practitioners will almost never have to file a writ of error coram nobis because the writ requires discovery of new evidence that could not have been discovered before the original judgment, or that a change in the law would affect the outcome of the court-martial. Since this primer solely focuses on trial practitioners, it does not discuss how courts have analyzed these six factors.

Procedure for Filing a Writ

Counsel should first litigate a motion at trial or seek relief from an official's decision at the lowest possible level. Appellate courts remain unlikely to grant extraordinary relief where there remains questions of fact or law that were not

⁷³ *Id.* at 652.

⁷⁴ 119 F.3d 806, 808 (10th Cir. 1997).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 808–09.

⁷⁸ *Id.* at 810–11.

⁷⁹ 66 M.J. 67 (C.A.A.F. 2008).

⁸⁰ *Id.* at 68.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Denedo v. United States*, 66 M.J. 114, 126 (C.A.A.F. 2008).

addressed below.⁸⁴ Counsel should also consider filing a motion for reconsideration if the military judge's findings of fact or conclusions of law are clearly erroneous. To develop a record for extraordinary relief, counsel should file a written request to the trial court notifying the court of counsel's intent to seek extraordinary relief, requesting that the military judge make written findings of fact and conclusions of law, and authenticate the record of trial. Counsel may also consider asking the trial court to stay the proceedings until an appellate court has decided whether to grant extraordinary relief. If the military judge refuses to grant any of these requests, counsel can readdress them in the petition for extraordinary relief.

Although not required, before filing a petition for extraordinary relief, trial defense counsel should consult with the writs coordinator of Defense Appellate Division (DAD). However, Government counsel must consult with the Chief of the Government Appellate Division (GAD) before filing a petition for extraordinary relief.⁸⁵ The appellate divisions will assist counsel in determining whether their case will be in aid of the court's jurisdiction, if the circumstances justify extraordinary relief, formatting pleadings, and guiding the writ through the appellate system. The appellate divisions may also assist counsel in drafting the petition and brief. Counsel from the appellate divisions will not represent petitioner or the Government, however, until appointed under Article 70.⁸⁶

Counsel seeking relief at ACCA start the writ process by filing two separate pleadings: a petition for extraordinary relief and a brief in support of the petition.⁸⁷ If counsel are not members of the court, they must also file a motion *pro hac vice*, with the petition and brief. Such motion allows counsel to represent the petitioner for one particular occasion.⁸⁸ The petition must contain a history of the case, an objective statement of relevant facts, a statement of the issue and relief sought, reasons for granting relief, the jurisdictional basis for relief, and the reasons why ordinary relief cannot be obtained in the ordinary course of appellate review.⁸⁹

If desired, counsel must also request appointment of appellate defense counsel in the petition.⁹⁰ Once an appellate defense counsel is appointed, the defense counsel's role in the writ process is limited to assisting the appellate defense counsel.⁹¹

Counsel should also file any relevant documents from the record of trial with the petition and brief.⁹² Counsel should consider filing the relevant documents from the record in a joint appendix format that meets CAAF's rules.⁹³ A joint appendix simply reproduces what the parties agree are the relevant portions of the record of trial.⁹⁴ Although ACCA does not require a joint appendix, taking this additional step at ACCA will make it easier for counsel to later file a writ-appeal at CAAF within the twenty-day deadline because they will not have to spend additional time assembling the joint appendix and adding citations to the appropriate pages of the joint appendix in their writ-appeal.

After receiving the petition and brief, ACCA may dismiss or deny the petition, order the respondent to show cause and file an answer, or take other appropriate action.⁹⁵ A show cause brief is the respondent's opportunity to argue why the court should not grant the writ and the appropriate appellate division usually drafts the show cause brief. The respondent will have ten days to answer a show cause order, and the petitioner will have seven days to reply to respondent's answer.⁹⁶ The ACCA can then set the matter for oral argument or decide to deny or grant the writ based on the pleadings.

⁸⁴ See Summary Disposition, *Lis v. United States*, 66 M.J. 292 (C.A.A.F. 2008) (dismissing writ-appeal filed before Article 32 hearing because ordinary processes of justice should be allowed to take its course).

⁸⁵ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 13-2 (16 Nov. 2005) [hereinafter AR 27-10].

⁸⁶ *Id.*

⁸⁷ ACCA RULES, *supra* note 40, R. 20.

⁸⁸ *Id.* Rules 8, 13.

⁸⁹ *Id.*

⁹⁰ *Id.* at R. 20; see UCMJ art. 70(c)(1) (2008) (requiring appellate counsel to represent the accused when requested); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1202(b)(2)(A) (2008) [hereinafter MCM].

⁹¹ AR 27-10, *supra* note 85, para. C-2(d).

⁹² *Id.*

⁹³ See U.S. COURT OF APPEALS FOR THE ARMED FORCES, RULES OF PRACTICE AND PROCEDURE R. 24(f) (1996) (C3, 1 Sept. 2008) [hereinafter CAAF RULES] (detailing what must be included in a joint appendix).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Counsel can omit filing a writ at ACCA and file an original petition for extraordinary relief at CAAF.⁹⁷ However, counsel must show good cause why they did not first seek relief at the ACCA, and the CAAF rarely grants original petitions for extraordinary relief.⁹⁸ Counsel filing an original petition at the CAAF must do so within twenty days of learning of the action complained of.⁹⁹ Counsel may however file petitions for writs of habeas corpus and error coram nobis at any time.¹⁰⁰

If counsel filed a writ at the ACCA first, they have twenty days to file a writ-appeal at the CAAF after the ACCA's decision is served upon counsel or the appellant.¹⁰¹ An appellee then has ten days to answer the writ-appeal, and appellant has five days to file a reply to appellee's answer.¹⁰²

If the CAAF denies a writ-appeal or an original writ, military counsel cannot seek relief in a federal civil court without prior written approval of The Judge Advocate General.¹⁰³ Trial defense counsel can, however, explain to their clients a pro se petition and the option to retain civilian counsel. Trial defense counsel cannot draft any pleading for their client or civilian co-counsel.¹⁰⁴

Before seeking written approval to appear in a federal civil court, counsel should bear in mind that federal courts have a very limited authority to review decisions made by courts-martial.¹⁰⁵ When a military court has dealt "fully and fairly" with an issue raised in a petition for extraordinary relief, "it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."¹⁰⁶ "Only when the military has not given a petitioner's claim full and fair consideration does the scope of review by the federal civil court expand."¹⁰⁷ An allegation receives "full and fair" consideration when an issue is briefed and argued before a military court, even if the claim is disposed of summarily.¹⁰⁸

Despite this stringent standard, the U.S. District Court for the Western District of Washington (district court) recently stayed a court-martial and ordered a preliminary injunction pending review of the petitioner's habeas petition.¹⁰⁹ In *Watada*, the Government charged the petitioner with, among other things, missing movement for refusing to deploy to Iraq, in violation of Article 87.¹¹⁰ The military judge ruled that the order to deploy was lawful, and that the petitioner could not present evidence on the legality of the war or his motive for missing movement.¹¹¹ Pursuant to a pretrial agreement, the parties subsequently entered into a stipulation of fact that admitted all of the elements of the offense, but contained language concerning the petitioner's belief that the war is illegal.¹¹²

The Government rested its case after introducing the stipulation of fact and other evidence for the panel to consider.¹¹³ Counsel for the petitioner then asked the military judge for a mistake of fact instruction concerning the petitioner's belief that he had a legal and moral obligation not to participate in the war.¹¹⁴ The Government, however, believed that that the

⁹⁷ CAAF RULES, *supra* note 93, R. 4(b)(1).

⁹⁸ *Id.*

⁹⁹ *Id.* R. 4(d).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* R. 4(e).

¹⁰² *Id.*

¹⁰³ AR 27-10, *supra* note 85, para. 1-6(a).

¹⁰⁴ *Id.*

¹⁰⁵ *Burns v. Wilson*, 346 U.S. 137, 139 (1953); *Roberts v. Callahan*, 321 F.3d 994 (10th Cir. 2003); *Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008).

¹⁰⁶ *Burns*, 346 U.S. at 142 (quoting *Whelchel v. McDonald*, 340 U.S. 122 (1950)).

¹⁰⁷ *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1986).

¹⁰⁸ *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986).

¹⁰⁹ *Watada v. Head*, 530 F. Supp. 2d 1136 (W.D. Wa. 2007).

¹¹⁰ *Id.* at 1138.

¹¹¹ *Id.* at 1139.

¹¹² *Id.*

¹¹³ *Id.* at 1140.

¹¹⁴ *Id.*

petitioner had entered into a confessional stipulation and did not have a defense to missing movement.¹¹⁵ The military judge therefore rejected the stipulation of fact because no meeting of the minds had occurred, and, over the petitioner's objection, granted the Government's motion for a mistrial.¹¹⁶

Upon re-referral of the charges, the petitioner sought extraordinary relief through a writ of prohibition at the ACCA and the CAAF, arguing jeopardy had attached at the first trial.¹¹⁷ Both the ACCA and the CAAF summarily denied the writ of prohibition.¹¹⁸

The district court adopted a four-prong test for determining whether the military had given "fair consideration" under *Burns* to petitioner's allegation.¹¹⁹ The four inquires are: (1) the alleged error in the court-martial [is] one of constitutional significance or so fundamental as to have resulted in a miscarriage of justice; (2) the alleged error must be a question of law, and not intertwined with disputed facts previously determined by the military; (3) whether factors peculiar to the military or important to military considerations require a different constitutional standard; and (4) whether the military courts adequately considered the issues raised in the habeas corpus proceeding and applied the proper legal standard.¹²⁰

Applying this test, the district court found that the petitioner's double jeopardy claim is subject to collateral attack under 28 U.S.C. § 2241.¹²¹ The court reasoned that double jeopardy is a substantial constitutional claim, the petitioner alleged an error of law independent from facts, and the petitioner did not raise matters peculiar to the military. The court further reasoned that because the ACCA and the CAAF did not write opinions when denying the writ, it could not conclude that the petitioner's claims received full and fair consideration.¹²² The district court granted a preliminary injunction staying the court-martial proceedings.¹²³ In a subsequent opinion, the district court decided that the Fifth Amendment bars the petitioner's retrial on the charges that were the subject of the original court-martial.¹²⁴

Article 62 Appeal

Unlike defense counsel who can only interlocutory challenge an adverse ruling with the appellate courts through an extraordinary writ, Government counsel have direct access to the appellate courts for certain adverse rulings through Article 62, UCMJ.¹²⁵ If a military judge presides over a court-martial in which a punitive discharge may be adjudged, Government counsel can appeal an order or ruling that: (1) terminates the proceeding with respect to a charge or specification; (2) excludes evidence that is substantial proof of a fact material in the proceedings; (3) directs disclosure of classified information; (4) imposes sanctions for nondisclosure of classified information; (5) a military judge's refusal to issue a protective order to prevent disclosure of classified information; and (6) a military judge's refusal to enforce an order to issue a protective order by appropriate authority.¹²⁶

¹¹⁵ *Id.* at 1142.

¹¹⁶ *Id.* at 1144-45.

¹¹⁷ *Id.* at 1145-46.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1150 (quoting *Calley v. Callaway*, 519 F.2d 184, 203 (5th Cir. 1975)).

¹²⁰ *Id.*

¹²¹ *Id.* at 1151.

¹²² *Id.* at 1150.

¹²³ *Id.* at 1533. In deciding whether to grant injunctive relief pending determination of the action on the merits, courts must find that: (1) the moving party will suffer irreparable harm if relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and (4) the public interest favors granting relief. Finding that a party will likely prevail on the merits for purposes of a preliminary injunction does not resolve the merits of an accompanying habeas petition. *Id.*

¹²⁴ Order Granting in Part and Denying in Part Petitioner's Second Amended Petition For Writ of Habeas Corpus, *Watada v. Head*, C07-5549, at 21 (W.D. Wa. Oct. 21, 2008).

¹²⁵ See generally Captain Howard G. Cooley & Bettye P. Scott, *The Role of the Prosecutor in Government Appeals*, ARMY LAW., Aug. 1986, at 38. (providing a more in depth analysis of the history of Article 62 and tactical considerations for trial counsel filing an Article 62 appeal).

¹²⁶ UCMJ art. 62 (2008); MCM, *supra* note 90, R.C.M. 908(a).

Trial counsel must provide the military judge with a written notice of appeal within seventy-two hours of the adverse ruling or order.¹²⁷ Before filing the notice, Government counsel must first obtain authorization from the general court-martial convening authority or the staff judge advocate.¹²⁸ Counsel should also consider consulting GAD before filing notice as GAD makes the decision whether to file an Article 62 appeal with an appellate court. The notice of appeal shall identify the ruling or order to be appealed, the charges and specifications effected, the date and time of the military judge's ruling or order, and the time and date of service of notice upon the military judge.¹²⁹ The trial counsel must also certify that the appeal is not taken for delay or, if relevant, that the evidence excluded is substantial proof of a fact material in the proceedings.¹³⁰

Once the trial counsel files the notice, the court-martial proceeding concerning the ruling or order appealed is automatically stayed.¹³¹ The court-martial can proceed, however, on the charges and specifications not affected by the ruling or order.¹³²

The trial counsel then has twenty days to forward the notice of appeal and original and three copies of the verbatim record of trial, or a portion of the record concerning the issue to be appealed, to the Chief of GAD.¹³³ The Chief of GAD will file the original record of trial with the ACCA, and serve a copy of the record of trial on DAD. The GAD then has twenty days after filing the record with the court to either file an appeal with the ACCA or withdraw the appeal.¹³⁴ Defense Appellate Division will have twenty days to file an answer to the Government's appeal.¹³⁵ The Government can appeal an adverse decision from ACCA to CAAF by asking the Judge Advocate General to certify the issue to CAAF, and the defense can directly appeal an adverse decision to CAAF.¹³⁶

Government Writs

Because of the wide scope of Article 62, Government writs are uncommon. The Government may nonetheless seek extraordinary relief through a writ if a matter does not fall within the scope of Article 62. For instance, the ACCA recently decided a Government writ of prohibition in *United States v. Reinert*.¹³⁷

In *Reinert*, five noncommissioned officers (four of them drill sergeants) publically ridiculed and stigmatized the accused by making such comments as "you're going to jail soon to look for a boyfriend," and telling other Soldiers not to be like this "scumbag."¹³⁸ The military judge granted the accused twenty days of Article 13 credit, but further stated that the, "credit alone I don't think will solve Article 13 issues."¹³⁹ The military judge therefore ordered the Government to have a brigade-level commander or sergeant major counsel each of the noncommissioned officers, and to conduct post-wide training for every drill sergeant, through an article in the post newspaper, letter, or other means, concerning Article 13.¹⁴⁰ If the Government failed to comply with the judge's order, he would award the accused an additional five days of confinement credit.¹⁴¹

¹²⁷ UCMJ art. 62(a)(2); MCM, *supra* note 90, R.C.M. 908(b)(3).

¹²⁸ AR 27-10, *supra* note 85, para. 13-3(a); MCM, *supra* note 90, R.C.M. 908(b)(2).

¹²⁹ MCM, *supra* note 90, R.C.M. 908(b)(3); AR 27-10, *supra* note 85, para. 13-3(b).

¹³⁰ MCM, *supra* note 90, R.C.M. 908(b)(3).

¹³¹ *Id.* R.C.M. 908(b)(4).

¹³² *Id.*

¹³³ *Id.* R.C.M. 908(b)(6); AR 27-10, *supra* note 85, para. 13-3(c).

¹³⁴ ACCA RULES, *supra* note 40, R. 21(d)(1).

¹³⁵ *Id.*

¹³⁶ MCM, *supra* note 90, R.C.M. 908(c)(3); *see* *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F. 2008) (affirming the Defense right to appeal an adverse Service Court of Criminal Appeals Article 62, UCMJ, decision to the CAAF).

¹³⁷ Army Misc. 20071195 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

The Government counseled the five noncommissioned officers, but failed to conduct the post-wide training, arguing on the grounds that the military judge's order exceeded his authority.¹⁴² The military judge's order did not fall within the scope of Article 62 because it did not dispose of a charge or specification, excluded evidence, or concern confidential evidence. The Government therefore sought a writ of prohibition as it had no other recourse to challenge the military judge's order.

In an unpublished opinion, the ACCA first affirmed that the Government could not meet the statutory requirements of Article 62 or the procedural prerequisites of Rule for Court-Martial (RCM) 908¹⁴³ because the military judge's order did not terminate any charges or specifications, excluded evidence, or address disclosure of classified information.¹⁴⁴ The court proceeded to express concern that the Government could use the All Writs Act to circumvent the carefully crafted jurisdictional and procedural requirements of Article 62 and RCM 908.¹⁴⁵ It nevertheless concluded that it had jurisdiction to consider the Government writ because *Suzuki*, *Caprio*, and *ABC Inc.*, a line of superior cases, bound the ACCA to allow the Government to seek extraordinary relief under the All Writs Act.¹⁴⁶

Given the ACCA's hesitation to find jurisdiction to hear a Government writ concerning a matter that is beyond the scope of Article 62, it is somewhat surprising that the respondent did not appeal the opinion. Although the ACCA felt bound by *Suzuki*, *Caprio*, and *ABC Inc.*, *Suzuki*, and *Caprio* predate Article 62 and *ABC Inc.* involved the media seeking a writ of mandamus to open an Article 32 hearing, rather than the Government seeking relief under the All Writs Act. It therefore remains prudent for counsel in future Government writ cases to address whether the Government can seek relief under the All Writs Act for a matter that exceeds the scope of Article 62.

Conclusion

Because counsel bear a very heavy burden in establishing the extraordinary nature of a writ, a petition must address how the writ is in aid of the court's jurisdiction and is agreeable to the usages and principles of law. Counsel can do this by articulating how their case falls within the scope of either Articles 66 or 67, and by applying the relevant Bauman factors to the circumstances of their case. Counsel representing the government must first consult with the GAD before seeking extraordinary relief. It is also prudent for defense counsel to first consult with the DAD before deciding to seek extraordinary relief so they can receive assistance in analyzing the merits of their writ and avoiding procedural pitfalls in the filing process. Counsel must also realize that rarely will a case be an extraordinary matter in which a clear and indisputable entitlement to relief exists. Counsel should therefore only consider a writ for matters that are truly extraordinary.

¹⁴² *Id.*

¹⁴³ MCM, *supra* note 90, R.C.M. 908.

¹⁴⁴ *Reinert*, Army Misc. 20071195.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (citing *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *United States v. Caprio*, 12 M.J. 30 (C.M.A. 1981)).