IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

In re **Daniel H. WILSON.** Colonel (O-6) United States Marine Corps, Petitioner v. **UNITED STATES** Respondent	**PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF HABEAS CORPUS** Case No. 201800022 Tried at Camp Lejeune, North Carolina, on February 17, April 18, May 11, June 7-8, July 13, August 28-31, and September 4-10, 2017, by a general court-martial convened by Commanding General, II Marine Expeditionary Force.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW Petitioner, Colonel (Col) Daniel H. Wilson, and moves this court to issue a writ of habeas corpus, ordering his immediate release from confinement pursuant to the All Writs Act, 28 U.S.C. § 1651.

Statement of Jurisdiction

This case fell within this Court's Article 66 jurisdiction, thus providing this Court with jurisdiction to grant relief under the All Writs Act.

Issue Presented

Whether petitioner is entitled to immediate release from confinement where this court set aside the findings and sentence in his case and denied reconsideration

and reconsideration en banc; the Government has not provided notice or a request to certify his case to CAAF within the deadlines established by the Assistant Judge Advocate General (Military Justice); and, the Secretary of the Navy has not acted upon his second request for release from confinement?

Statement of Facts

1. On 1 July 2019, this Court dismissed with prejudice the most serious charge against Colonel Wilson, stating that there were insufficient grounds to have found him guilty of the charge. This Court set aside the sentence for the remaining minor charges, authorizing a resentencing hearing if the convening authority deems one appropriate.

2. On 2 August 2019, the Secretary of the Navy denied Colonel Wilson's first request for release from confinement. (Motion to Attach, Attachments 1, 2).

3. On 12 August 2019, this Court denied the Government's request to reconsider its 1 July decision.

4. On 13 August 2019, Colonel Wilson through counsel requested that Code 40 of the Navy-Marine Corps Appellate Review Activity "immediately send this case to the convening authority" pursuant to Manual of the Judge Advocate General (JAGMAN) § 0160(b); disclaimed any intent to seek reconsideration, certification, petition, or further appellate review of the NMCCA's decision;

and, noted "any continued confinement of Colonel Wilson at this point [is] unlawful." (Motion to Attach, Attachment 3).

5. On 26 August 2019, Colonel Wilson sent a renewed request for release to the Secretary of the Navy via the Office of the Judge Advocate General (OJAG) (Code 20) (Motion to Attach, Attachment 4). To date, neither Colonel Wilson nor counsel have received a response.

6. If the Government intended to certify Colonel Wilson's case to the Court of Appeals for the Armed Forces (CAAF), on 26 August 2019 it was required per the "Process for JAG Certification of Cases to the Court of Appeals for the Armed Forces" ("Process for JAG Certification") promulgated by the Assistant Judge Advocate General (Military Justice) ("AJAG 02") on 4 October 2016, to give written "notice that it will file a request for certification (email is acceptable) to AJAG 02, [and] any other party or parties to litigation." (Motion to Attach, Attachment 5, at 2). To date, neither Colonel Wilson nor counsel have received any such notice.

7. On 29 August 2019, the Director of Code 40 stated that: "The word that I am getting is that Code 46 believes that they have 60 days to seek JAG Certification in Col Wilson's case. This will preclude Code 40 from sending the remand back for a rehearing on sentence of the remaining charge. As of right now if that JAG Certification does not occur within 60 days of the Date

the NMCCA denied the Motion for Reconsideration (12 August 2019) Code 40 will forward the remand to Camp Pendleton on or about 12 October 2019." (Motion to Attach, Attachment 6, at 1).

8. If the Government intended to certify Colonel Wilson's case to the CAAF, on 3 September 2019,[1] per the Process for JAG Certification, to "AJAG 02 with electronic copies to any other party or parties." (Attachment 5, at 2). To date, neither Colonel Wilson nor counsel have received any such request.

9. Colonel Wilson remains confined without having been resentenced.

Argument

Petitioner is entitled to immediate release from confinement where this court set aside the findings and sentence in his case and denied reconsideration and reconsideration en banc; the Government has not provided notice or a request to certify his case to CAAF within the deadlines established by the Assistant Judge Advocate General (Military Justice); and, the Secretary of the Navy has not acted upon his second request for release from confinement.

The government has *no legitimate basis* to seek further review of the NMCCA's decision at the C.A.A.F. through the Judge Advocate General (TJAG), because the C.A.A.F.'s appellate authority under Article 67, does not extend to findings a Court of Criminal Appeals has found factually insufficient,

as the NMCCA found here; *and* the charges on which Colonel Wilson is subject to resentencing are relatively minor, and almost guaranteed to be subsumed by the over *31 months* of confinement he has already served.

Despite having no reasonable basis to believe the C.A.A.F. even has the authority to reverse the decision of the NMCCA, TJAG's subordinates have not indicated any intent to expedite their decision on certification.

Colonel Wilson has established a clear and indisputable right to be released from confinement because the Government has no reasonable basis to believe further appeal to the C.A.A.F. will reverse the decision of the N.M.C.C.A., and after such denial, there is no legitimate basis to believe Colonel Wilson will be sentenced to confinement in excess of what he has already served for the minor charges that remain.

Colonel Wilson's case is closely aligned with the facts and procedural setting in *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). In *Moore*, the Appellant was charged with eight specifications of rape, four specifications of carnal knowledge, and one specification of indecent assault. One of the two convictions was for rapes that had allegedly occurred "on or about or between May and June 1985 on several occasions."

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[1] One day after the 21 days after the NMCCA's denial of reconsideration deadline, due to the Labor Day holiday.

The Court of Military Review decided on April 16, 1990, that, since the Government had not established the precise dates when these rapes occurred, it had failed to show that prosecution was not barred by the statute of limitations. As to Moore's conviction for the remaining rape, the Court of Military Review concluded that the evidence was insufficient to prove guilt. Therefore, it dismissed all charges and specifications against petitioner Moore. 30 M.J. at 250 (C.A.A.F. 1990). Moore requested release from confinement from the convening authority pending appellate review, but was repeatedly denied until he filed a writ of habeas corpus, which was granted. The C.M.A. justified its release of Moore based upon a practical reading of then-Article 57(d), explaining:

> The Government's argument seeks to impose a "tyranny of labels." Clearly, the legislative intent was that a practical means be made available to release accused servicemembers from confinement pending appeal in meritorious cases. This was the reason for enacting Article 57(d). We are convinced that Congress did not intend that the outcome should hinge on any distinction between an "inchoate" decision of a Court of Military Review and a mandate issued by a federal court of appeals. Indeed, one of the main purposes of the Military Justice Act of 1968 was to transmute the "boards of review" into "courts;" and we conclude that the decisions of these "courts" must be taken into account for purposes of post-trial confinement even before they have become "final."
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> In our view, the Court of Military Review—as long as Moore's case was pending there—had authority under the All Writs Act, 28 USC § 1651, to enter an order deferring service of confinement pending completion of appellate review. Of course, once the case was certified for review by this Court, the Court of Military

> Review was divested of further authority over the case, unless subsequently the case was remanded to it. However, after the decision was certified to our Court, we have authority under the All Writs Act to enter suitable orders dealing with confinement or other restraint of petitioner.
>
> In the present case, we are convinced that relief should be granted forthwith.

Id. at 253.

Clark v. United States, 74 M.J. 826 (N-M. Ct. Crim. App. 2015) (en banc), *subsequently denied as moot*, 75 M.J. 115 (C.A.A.F. 2015), presents a contrary holding (described as unpublished, even though it is in a reporter[2]) from which two judges dissented, that relies heavily upon the Secretary's power under Article 57a[3], UCMJ in lieu of a writ of habeas corpus to defer further confinement of a servicemember pending appellate review. Manual of the Judge Advocate General (JAGMAN) Paragraph 0160 c. provides: "In accordance with paragraph 57a,[4] UCMJ, in any case in which a court-martial sentences a person to confinement and the sentence to confinement has been ordered executed, but in which review of the case under Article 67a(2), UCMJ, is pending, the

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[2] 74 M.J. at 826 ("Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.").
[3] Now found at Art. 57(b)(5).
[4] Art. 57a has been amended in the 2019 Manual for Courts-Martial, and now appears at Art. 57(b)(5).

Secretary concerned may defer further service of the sentence to confinement while that review is pending. Deferment requests pursuant to Article 57a will be addressed to the Secretary of the Navy via OJAG (Code 20)."

However, Colonel Wilson's case can be distinguished from *Clark*, as he has requested such a deferment from the Secretary and has received no response for nearly three weeks, and the Government has not abided by the deadlines in the "Process for JAG Certification" which the Assistant Judge Advocate General (Military Justice) established the year after *Clark*.

In *Clark*, the NMCCA seemed to suggest that between the time of the CCA's decision and the Government's decision to certify a case to CAAF, there is no right of an Appellant to seek assistance from the court to review their continued confinement. Such a position is fundamentally flawed in that it deprives an Appellant of due process and automatically negates the rights afforded to an Appellant through the All Writs Act. This position effectively creates a rule that prevents the court from doing exactly what the All Writs Act demands the court carry out – review the propriety of the Government's actions in continuing the confinement of a servicemember, even when they may be abusive. *Clark* is fundamentally flawed, and must be addressed anew in this case with the perspective that the Court—if it relies upon this prior rationale—is depriving Colonel Wilson of his rights under the All Writs Act.

Furthermore, Article 57(b)(5) does not specifically address deferment of confinement following issuance of a service court decision overturning a case for factual insufficiency, that is then pending a certification determination by the Judge Advocate General. Thus, Colonel Wilson is limited to a writ of habeas corpus in seeking immediate relief from confinement, as the Government cannot provide any legitimate basis for his continued confinement at this time aside that is not replete with personal animus.

It simply cannot be the situation that an Appellant could have their case overturned by the CCA based upon factual insufficiency, yet be forced to remain confined until such time that the Government eventually seeks review of the case, particularly when the chance of any relief for the Government on continued appeal is exceedingly unlikely.

Colonel Wilson has served over 31 months of confinement, and has received a completely favorable decision from this Court concluding that the evidence does not support his guilt of the sexual assault beyond a reasonable doubt, thereby dismissing the sexual assault charge with prejudice. Just as in *Moore*, prior to his court-martial, Colonel Wilson was under investigation for a prolonged period of time, but was not placed in pretrial confinement. There is thus no indication or evidence in the record that during that time, any concern existed that he was a flight risk or danger to others.

Most significantly, however, the issue that Colonel Wilson raises to the Court pertains to the NMCCA and CAAF rules regarding the calculation of the 60-day clock for the Government to file a petition with CAAF. Colonel Wilson's position is that the conditional calculation of the 60-days based upon whether the Government does or does not choose to request reconsideration from NMCCA is a violation of Colonel Wilson's right to due process.

The idea that NMCCA's rules allow the Government to unilaterally re-set that clock by submitting a request for reconsideration, even without a good faith basis, is a clear violation of such. This means that the Government – without providing Colonel Wilson a right to be heard on the issue – can force him to remain confined for thirty additional days in addition to the time it takes for the Appellant to reply, and for the Court to finally decide the request, whereas another person in the same position would have a shorter calculation of time merely because the Government chose not to request reconsideration. The Court's willingness to allow the idea of the finality of an appellate decision to be determined only retrospectively–after the Government has made decisions to have the case reviewed repeatedly, even without good faith–is a violation of due process.

It is deeply troubling that there is no tool to challenge the legitimacy of the Government's manipulation of the timelines, both when requesting reconsideration and when determining whether to certify a case to the CAAF.

The All Writs Act in conjunction with Colonel Wilson's exhaustion of all other administrative remedies demands that this court review this complaint on its merits as opposed to the decision that was reached in *Clark* where the court created a procedural abyss wherein a petitioner is deprived of all rights for review of a habeas petition during a certain period of time. This suggests that the Court may deprive a petitioner of his statutory right to file a writ, and in doing so, is making the All Writs Act subordinate to the service court's rules and the President's rule regarding the processing of an appeal.

Lastly, to the extent that this Court has previously directed Appellants to the Secretary of the service under Art. 57(b)(5) to review their continued confinement while CAAF certification is pending, Colonel Wilson has repeatedly gone down this path – the most recent time with no response. There are no rules or regulations in place that require a response from the Secretary within any given timeframe, or that allow any review of the Secretary's potential abuse of discretion in these cases. It is again solely within the province of the Court to ensure the rights of an Appellant are protected as the appellate process plays out.

It is high time that this Court review the abusive Government practices that leave a man deprived of due process, and languishing in confinement while the Government sulks over spilled milk for the lengthiest period of time allowed to them under present legal schemes, without being held accountable for their intentional delays and repeated requests for review.

As this Court earlier held in *Frage v. Edington*, 26 M.J. 929, 929, (N.M.C.M.R. 1988), "[w]e cannot allow the Government to continue…confinement of the Petitioner on the hopeful speculation that the [court's] decision will be reversed eventually by a higher appellate court."

Request for Relief

WHEREFORE, this Court should order the immediate release of Colonel Wilson from confinement.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on 13 September 2019: the original and required number of copies of the foregoing were delivered to the Court; a copy was delivered to Director, Appellate Government Division; and, an electronic copy was filed in CMTIS and e-mailed to NMCCA_OJAG_CODE51@navy.mil.

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