Explaining the Extraordinary: Understanding the Writs Process

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Introduction

Every counsel who has spent hours laboring over a motion, double-checking cites and sentence structure, believes they must prevail. Upon hearing the judge digest and disapprove of thier argument in moments, each one wants a second bite at the apple, another arena in which to make their point. A second chance may indeed exist, if counsel are prepared and understand how to seek such relief.

The defense bar, and to a lesser extent trial counsel, have whispered about the special power of writs practice for more than a generation. Trial counsel have embraced the unique force of the government appeal process for decades. Now with the advent of the Army's Special Victim Counsel (SVC) Program and others like it across the military, more counsel are diving headfirst into the sea of military criminal law. This development has introduced a new class of practitioners looking to do all they can for their clients at trial, including seeking interlocutory relief.

Counsel navigating the muddy waters of pseudo-appellate practice while facing an unfamiliar panel of judges and carrying the albatross of trial-level defeat have new questions to answer. What decisions even merit review by the appellate courts? What issues are "extraordinary"? How long will interlocutory review take? What does a writ filing entail and who actually does the filing?

This article will discuss the legal underpinnings of extraordinary relief and outline the standard procedures for filing writs by defense counsel, trial counsel, and special victim counsel. It will also compare these procedures to those used when trial counsel file appeals under the procedures of Article 62 of the Uniform Code of Military Justice. Following the conclusion, a pair of appendices is included to assist practitioners in the basic analysis of whether to file a writ or an Article 62 appeal.

Writs Overview

A writ is an, "order in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing, some specified act." [1] While practitioners use writs to seek immediate appellate review of decisions, writs practice cannot be used to enlarge the jurisdiction of a court. [2] Writs practice is a means of extraordinary relief because it is outside the normal course of appellate review. An interlocutory appeal is an appeal to a superior court of a trial court's ruling before the trial court's ruling on the entire case.[3] Thus both writs and the procedures outlined in Article 62 of the Uniform Code of Military Justice are mechanisms for interlocutory relief.

Extraordinary relief from a trial judge's decision in the nature of a writ is a tool in the practitioner's tool box, but it is just a tool. Not every project calls for a workman's full complement of tools, not every case or issue lends itself to interlocutory relief. Although the writs process provides a means to seek appellate review of an erroneous ruling, a writ is not always the right tool to choose. Just because counsel has lost a motion, or otherwise found themselves on the wrong end of a judge's decision, does not mean that counsel should file a writ. Before filing a writ, counsel should consult with colleagues and superiors to determine if such action is necessary and appropriate.

The All Writs Act,[4] gives federal appellate courts the ability to grant relief "in aid of their jurisdiction."[5] The Act does not confer an independent jurisdictional basis; rather, it provides a mechanism of review to assist a court in the exercise of its lawful jurisdiction. Before a writ will issue under the Act, every petitioner must answer two questions; (1) is the requested writ in aid of the court's jurisdiction; and (2) is the writ necessary and appropriate.[6] In 1969, the Supreme Court held that the All Writs Act applied to

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[1] BLACK'S LAW DICTIONARY, 1299 (7th ed. 2000).

[2] Ctr. for Constitutional Rights et al., v. United States and Colonel Denise Lind, 72 M.J. 126, 128-29, (C.A.A.F. 2013), United States v. Gross, 73 M.J. 864, 867 (Army Ct. Crim. App. 2014), United States v. Booker, 72 M.J. 787, 791 (N-M.C.C.A. 2013).

[3] BLACK'S LAW DICTIONARY, *supra* note 1, at 74.

[4] 28 U.S.C. §1651(a).

[5] *Id.*

[6] LRM v. Kastenberg, 72 M.J. 364, 368 (C.A.A.F. 2013)(citation omitted)(internal quotation marks omitted).

military appellate courts,[7] comprised of the service courts of criminal appeals and the Court of Appeals for the Armed Forces (CAAF). Any discussion of military writs practice necessarily includes an analysis of military appellate jurisdiction

Jurisdiction

The jurisdiction of the service courts of criminal appeals (CCAs) is described in Article 66 of the UCMJ.[8] The service courts have jurisdiction over cases 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 at least one year.[9] This jurisdiction is broadened by the plenary authority of each service's Judge Advocate General to send other cases to the service courts of criminal appeal, even when the sentence falls below the threshold established in Article 66.[10]

Article 67, UCMJ, meanwhile confines the jurisdiction of the Court of Appeals for the Armed Forces (CAAF) to: cases with a death sentence; "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the [court]; and all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the [court] has granted a review."[11] Additionally, Article 67 mandates that the accused must petition the CAAF for review within sixty (60) days of an adverse CCA decision, a timeline the court has found to be a jurisdictional bar.[12] While understanding the jurisdiction of appellate courts is statutorily straightforward, understanding when it will be exercised is much less clear-cut.

The All Writs Act asserts, "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."[13] To avoid the logic problem in such a definition (i.e. where a court's jurisdiction is based on the approved sentence how can any action be in aid of and yet not enlarging that jurisdiction where no sentence has been entered) military appellate courts have used three main principles which more clearly define interlocutory jurisdiction.

First, the doctrine of potential jurisdiction allows appellate courts to issue opinions in matters that may reach the actual jurisdiction of the court.[14] Second, ancillary jurisdiction is the authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order.[15] Third, supervisory jurisdiction refers to the broad authority of the courts to determine matters within the supervisory function of administering the military justice system. Though these doctrines provide for an expansive jurisdiction, the CAAF and military courts can go too far in exercising their supervisory function of the military justice system as was seen in the landmark case of *Clinton v. Goldsmith.*[16]

In *Goldsmith*, the CAAF exercised jurisdiction under the All Writs Act to stop the government from dropping the accused, an Air Force major, from the rolls of the Air Force.[17] Goldsmith's conviction was upheld by the service appellate court and when he made no appeal to the CAAF his conviction became final.[18] While serving his sentence, Goldsmith was informed that he was to be dropped from the rolls of the Air Force. He pursued a writ stopping his release from the Air Force which the CAAF granted.[19] In a unanimous decision, the Supreme Court held the CAAF lacked jurisdiction to issue the writ because it was not "in aid of" the CAAF's strict jurisdiction to review court-martial findings and sentences, despite the fact the reason why Goldsmith was being dropped from the rolls was the same infraction he was punished for at court-martial.[20]

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[7] *Noyd v. Bond*, 395 U.S. 683, 698-699 (1969).

[8] 10 U.S.C. § 866.

[9] 10 U.S.C. § 866(b). This grant of jurisdiction is further limited because an accused may always withdraw or waive an appeal, except in cases extending to death. *See*, 10 U.S.C. § 861.

[10] 10 U.S.C. § 869.

[11] 10 U.S.C. § 867(a).

[12] 10 U.S.C. § 867(b). *See, e.g.*, United States v. Rodriguez, 67 M.J. 110, 115 (C.A.A.F. 2008).

[13] 28 U.S.C. § 1651(a). *See also*United States v. Denedo, 556 U.S. 904, 911 (2009).

[14] *See e.g*., *Kastenberg*, 72 M.J. at 368; *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997)(accused and media entities challenged an order closing the accused's Article 32 hearing), *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996).

[15] United States v. Davis, 63 M.J. 171, 177 (C.A.A.F. 2006); Boudreaux v. U.S.N.M.C.M.R., 28 M.J. 181 (C.M.A. 1989); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Since the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).

[16] 526 U.S. 529 (1999). While Article III courts also struggle to define the scope of their jurisdiction under the All Writs Act, those courts do exercise writ jurisdiction to protect the legal rights of parties and insure the administration of justice. United States v. New York Telephone Co., 434 U.S. 159 (1977). *See also* Thorogood v. Sears, 678 F.3d 546, 548 (7th Cir. 2012), United States v. Yielding, 657 F.3d 722, 728 (8th Cir. 2011), Gabhart v. Cocke County, 155 Fed. Appx. 867, 872 (6th Cir. 2005), Potomac Electric Power Co. v. Interstate Commerce Com., 702 F.2d 1026, 1035 (D.C. Cir. 1983), *In re Metro-East Mfg. Co.*, 655 F.2d 805, 808-809 (7th Cir. Ill. 1981).

[17] *Id*. at 531-3. Major Goldsmith's prosecution centered the fact he had unprotected sex while carrying HIV and failed to inform his sexual partners, despite being ordered to do so. The CAAF granted the writ by a 3-2 margin. Goldsmith v. Clinton, 48 M.J. 84, 92 (C.A.A.F. 1998).

[18] *Id*. at 532.

[19] *Id*. at 533.

[20] *Id*. at 535-6.

Additionally, even if the CAAF might have had some arguable basis for jurisdiction, the Court ruled the writ was neither "necessary" nor "appropriate," in light of other remedies available.[21]

Some of the CAAF's supervisory jurisdiction was returned a decade later in *United States v. Denedo*.[22] In *Denedo*, the accused sought an extraordinary writ at the Navy-Marine Court of Criminal Appeals, alleging ineffective assistance of counsel more than five years after his case was finalized.[23] After the Navy-Marine Court denied relief, the CAAF granted review of the writ. The government appealed the CAAF's decision to the Supreme Court, asserting that neither the Navy-Marine Court nor the CAAF had jurisdiction in the case. The Supreme Court reasoned that jurisdiction was proper since the petition directly challenged the validity of his conviction and returned the case to the military courts.[24]

Once a practitioner determines whether the court has jurisdiction to hear the writ and issue the requested relief, she must then decide which type of writ is appropriate. There are four main writ types: *mandamus*, prohibition, *habeas corpus*, and *coram nobis*.

Mandamus

In seeking this type of relief, a petitioner is simply asking a court to order that a certain action be done. Because the nature of extraordinary relief review by the appellate courts is unique, the analysis is larger than the substantive issue being appealed. "To prevail on a request for a writ, the petitioner must show that: '(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and undisputable; and (3) the issuance of the writ is appropriate under the circumstances.'"[25] The analysis requires the court to satisfy itself that an issue is not more appropriately addressed as an interlocutory matter or on direct appeal.

Prohibition

Relief through a writ of prohibition is the inverse of mandamus relief, as it requests that the court prohibit a military judge or another entity from taking a certain action. Courts view these writs as drastic tools "to prevent usurpation of judicial power" and do not exercise their power lightly.[26] The analysis for a writ of prohibition uses the same three-factor test as a writ of mandamus and both actions are concerned with confining lower courts to their proper areas of jurisdiction.[27]

Habeas Corpus

Habeas corpus writs are appropriate when a party is seeking review of confinement or detention.[28] The phrase is translated from Latin and asserts "that you have the body"; in essence the petitioner seeks to challenge his confinement outside of traditional appellate review.[29] While courts can use this mode of relief to direct release, such as from pretrial confinement,[30] the CAAF has also seen habeas filings as a mechanism for "post-conviction" relief when an accused's appeals are exhausted. In *United States v. Loving*, Private Loving filed a *habeas* petition at the CAAF in 2006, long after the Supreme Court upheld his conviction and death sentence.[31]

Coram Nobis

The writ of *error coram nobis* is a tool used when new facts or developments have arisen and the petitioner seeks in essence a "belated extension" of an earlier trial.[32] A writ of *error coram nobis* is available only when a writ of *habeas*

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[21] *Id*. at 537.

[22] *Denedo*, 556 U.S. at 915.

[23] *Id.* at 907-08.

[24] *Id*. at 917. The Army Court of Criminal Appeals briefly touched on the idea of supervisory jurisdiction in *U.S. v. Reinert* and *Gipson v. U.S. Army* where the government counsel filed a petition for extraordinary relief. The court had 'significant concerns' about the viability of such writs post-*Goldsmith*, but nevertheless granted relief. United States v. Reinert, 2008 CCA LEXIS 526, * 35, 2008 WL 8105416 (Army Ct. Crim. App. Aug. 7, 2008)(unpub.).

[25] *Gross*, 73 M.J. at 867, *quoting* Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012) (internal citations omitted). Even if a court finds the first two prongs are met, the issuance of the writ remains discretionary.

[26] *Gross*, 73 M.J. at 867 (quotation omitted).

[27] *Hasan*, 71 M.J. at 418 (C.A.A.F. 2012).

[28] BLACK'S LAW DICTIONARY , *supra* note 1, at 569.

[29] *Id*. *See* Rodriguez-Rivera, v. United States, 61 M.J. 19 (C.A.A.F. 2005); United States v. Ferguson, 5 U.S.C.M.A. 68, 73-74 (C.M.A. 1954).

[30] *See* Buber v. Harrison, 61 M.J. 70 (C.A.A.F. 2005). Several of Sergeant Scott Buber's convictions surrounding his role in the death of his son were reversed on appeal to ACCA. Since he had already served the full two years of confinement time ACCA affirmed on appeal, he sought immediate release from jail via a habeas action while his direct appeal continued. Ultimately CAAF set aside the two-year sentence roughly a year after issuing habeas relief. United States v. Buber, 62 M.J. 476 (C.A.A.F. 2006).

[31] 68 M.J. 1, 2 (C.A.A.F. 2009). Private Loving was convicted of premeditated murder, felony murder, attempted murder, and several specifications of robbery. The court-martial sentenced him to a dishonorable discharge, forfeiture of all pay and allowances, and death. The author served on a team of post-conviction counsel for PVT Loving and assisted in the filing of this petition before CAAF, more than ten years after the Supreme Court declined to intervene. *See* 517 U.S. 748, 774 (1996).

[32] Rittenhouse v. United States, 69 M.J. 174 (C.A.A.F. 2010) (quotation omitted).

corpus is not.[33] *Denedo* centered on a writ of *error coram nobis* and Denedo argued he was unaware his guilty plea could have an effect on his immigration status due to ineffective assistance.[34]

Procedures

With the changes to the UCMJ and the introduction of Special Victim Counsel, the landscape of extraordinary writs is changing, and the cases in which they may be necessary and appropriate is on the rise. New issues giving rise to writs, such as whether or not victims can be heard by and through counsel during certain portions of trial, are extraordinary[35] and, because of this, counsel can generally predict potential interlocutory battles.

Upon receipt of the filing, the appellate court will typically take one of several actions: deny the relief on its face, direct the opposing counsel to show cause why the writ should not issue or "whatever other action it deems appropriate." [36] Petitioner has the initial burden of persuasion to show jurisdiction and the extraordinary circumstances that make the writ necessary or appropriate.[37] When reviewing a petition for extraordinary relief, and whether action in a specific case is necessary and appropriate, ACCA reviews several factors:

> (1) the party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the lower court's order is clearly erroneous as a matter of law; (4) the lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules; (5) the lower court's order raises new and important problems, or issues of law of first impression.[38]

The court's rules recognize this high burden, and "issuance by the Court of an extraordinary writ authorized by 28 U.S.C. Section 1651(a) is not a matter of right, but of discretion sparingly exercised."[39]

When seeking relief at ACCA, counsel must file two separate documents, a petition for extraordinary relief and a brief in support of that petition.[40] While the brief's substance is generally patterned after a trial court motion, the petition for extraordinary relief must include the following information: (1) case history; (2) the facts of the case; (3) pertinent parts of the record and all exhibits; (4) an issue statement; (5) what relief is sought; (6) why the writ should issue; (7) jurisdictional basis for relief and why ordinary appeal does not work; and (8) "request for appointment of appellate counsel."[41]

There is no automatic stay of proceedings when a writ is filed, although a military judge may grant a continuance to file a writ and practitioners should ask for one if it benefits their case.[42] If either side loses at the first appellate court, they can appeal to the CAAF.[43]

While writs must generally be filed at the CCA before they can be filed at the CAAF,[44] the CAAF's rules do allow for original filings when good cause is shown.[45] If an original writ is filed at CAAF, the court's rules require the following: (1) a case history; (2) why relief was not sought from the appropriate service court; (3) the relief sought; (4) the issues presented; (5) the facts necessary to understand the issues presented by the petition; (6) reasons why the writ

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

[34] *Denedo*, 556 U.S. at 907-909. The NMCCA denied the requested writ after the case was returned. United States v. Denedo, 2010 CCA LEXIS 27, * 4, 2010 WL 996432 (N-M.C.C.A. Mar. 18, 2010)(unpub.). While Denedo filed a writ appeal of this decision to CAAF, he did so out of time and a motion to file for review out of time was denied by the court. United States v. Denedo, 69 M.J. 262, 263 (C.A.A.F. 2010).

[35] *Kastenberg*, 72 M.J. at 366-67.

[36] Courts of Criminal Appeals Rule (C.C.A. R.) 20(f) (31 July 2009). Article 66(f) allows the service JAGs to create uniform rules of procedure at the courts of criminal appeals, this rule is one that has been adopted by all of the service courts.

[37] McKinney v. Jarvis, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997); United States v. Mahoney, 36 M.J. 679, 685 (A.F.C.M.R. 1992).

[38] Dew v. United States, 48 M.J. 639, 648-49 (Army Ct. Crim. App. 1998), *citing*, Bauman v. U.S. Dis't Court, 557 F.2d 650, 654-55 (9th Cir. 1977)(additional citation omitted).

[39] Army Court of Criminal Appeals Rule 20.1.

[40] C.C.A. R. 20 (31 July 2009).

[41] C.C.A. R. 20(a) (31 July 2009). Requirement (8) pertains exclusively to defense counsel as TDS counsel will file these documents without DAD attorneys signing as co-counsel while government counsel usually file interlocutory petitions with a GAD/TCAP attorney signing the filing as well.

[42] *See* R.C.M. 906(b)(1). While explicitly discussing motions, the rule gives military judges authority to grant continuances at their discretion. In *Gross*, the military judge granted a stay of proceedings pending resolution of a writ filed by trial counsel. 73 M.J. at 866.

[43] CAAF Rules of Practice and Procedure, Rule 19(e), *available at*, http://www.armfor.uscourts.gov/newcaaf/library/Rules/Rules2013Sep.pdf (last visited February 11, 2015). Rule 19(b)(2) draws a distinction when a service TJAG certifies a decision on extraordinary relief from a CCA to the CAAF. Those cases have a sixty (60) day timeline.

[44] There is a preference for initial consideration by a CCA. *See ABC Inc.*, 47 M.J. at 364-5; United States v. Redding, 11 M.J. 100 (C.M.A. 1981) ; *see also*, R.C.M. 1204(a), discussion (service court filing favored for judicial economy).

[45] CAAF Rule 4(b)(1): "The Court may, in its discretion, entertain original petitions for extraordinary relief . . . . Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals." *See* Toohey v. United States, 60 M.J. 100 (C.A.A.F. 2004) (original writ filed after direct appeal sat at NMCCA for more than four years).

should issue; and (7) contact information for each respondent.[46] During the twelve-month term ending August 31, 2014, neither of the two original writs filed at CAAF were granted review by the court.[47] Practitioners filing either petitions for extraordinary review at CAAF do not need to file briefs unless directed to do so by the court.[48] When dealing with a writ-appeal, however, the appellee is required to file an answer to the petition no later than ten (10) days after filing.[49] Finally, the accused must be included as the real party in interest when not otherwise named in a writ filing.[50]

While the decision of whether or not to file for interlocutory relief is often a complex analysis dependent on a variety of circumstances, the question of who files for such relief analysis is much clearer. When an accused is seeking relief, trial defense counsel or civilian defense counsel must file for extraordinary relief as the attorneys at Defense Appellate Division (DAD) have no attorney/client relationship with the client. This construct can lead to an interesting assignment of counsel quandary at DAD when the government counsel, or more recently the victim counsel, files a writ against the military judge who also needs representation.[51]

Conversely, when trial counsel seeks an extraordinary writ, attorneys from the Government Appellate Division (GAD) will file the writ with the appropriate appellate court. When a SVC seeks to file a writ, the counsel files the petition and brief directly with the court, independent of both the trial counsel and staff judge advocate (SJA).

Regardless of who files at the service court of appeals, petitioners must remember to file both a petition for extraordinary relief and a brief in support of the petition.[52]

Article 62 Appeals

The writs process is one part of the military's interlocutory appeal system. But since the 1983 amendments to the UCMJ, government counsel have possessed an ability to appeal certain matters to the appellate courts.[53]

While both writs and the Article 62 system deal with near-immediate review of trial level decisions, Article 62 only applies to certain situations, and only government counsel can avail themselves of its relief. The Article 62 process only applies when a military judge is presiding and a punitive discharge may be adjudged,[54] thus eliminating issues arising at Article 32 preliminary hearings from the Article 62 realm.

Article 62 proceedings are limited to certain rulings as well. Only orders from a military judge which dismiss a charge or specification, "exclude evidence that is substantial proof of a fact material," or fall into four classes of rulings by military judges that potentially require the release of classified material, are appealable under Article 62.[55]

Notice of appeal under Article 62 must be filed within seventy-two hours of the ruling being challenged; listing both the exact ruling being appealed and the timing of the ruling.[56] This timeline is jurisdictional and appeals filed beyond 72 hours are denied.[57] In the Army, this notice must be authorized by either the SJA or General Court-Martial Convening Authority (GCMCA).[58] After the certified notice of appeal is filed, trial counsel must send the GAD an original plus three copies of those portions of the verbatim record of proceedings necessary for the Article 62 appeal within twenty days.[59] Ultimately, the decision to file the Article 62 appeal at ACCA rests with the Chief of GAD.[60] Despite a lack of any clear authority to hear appeals of CCA decisions in Article 62 cases, CAAF has held its jurisdiction, coupled with a desire for ". . . uniformity in the application of the Code among the military services," created authority

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[46] CAAF Rule 27. The CAAF rules also show a template for how to produce the filing.

[47] October 27, 2014 e-mail from Bill DeCicco, clerk of the court, Court of Appeals of the Armed Forces, on file with the author.

[48] CAAF Rules 27-28.

[49] CAAF Rule 27.

[50] *See Kastenberg*, 72 M.J. at 366.

[51] *Reinert*, 2008 CCA LEXIS 526, *2.

[52] C.C.A.R. 20. Rule 20 is a joint CCA rule. *See supra* note 35.

[53] *See* The Military Justice Act of 1983, Pub. L. 98-209 (1983).

[54] *See* 10 U.S.C. § 862(a)(1). These guidelines are jurisdictional and unlike the potential jurisdiction doctrine seen in writs practice, there is no such complement here.

[55] 10 U.S.C. § 862(a)(1)(A)-(F). The classified material categories of interlocutory review were part of the 1996 amendments to Article 62, UCMJ. National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 1141(a), 110 Stat. 186, 467 (1996).

[56] 10 U.S.C. § 862(a)(2) and R.C.M. 908(b)(3).

[57] *See* United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011). In *Daly*, the government asked the military judge to reconsider his original decision nine days after the fact and then sought to file an Article 62 appeal 72 hours after losing the motion. CAAF declined to hear the case. Government counsel however do not need to request a delay to preserve the 72 hours or stall proceedings, the timeline runs from the moment the order is issued. *See* United States v. Neal, 68 M.J. 289 (C.A.A.F 2010).

[58] The requirement for SJA or GCMCA approval before filing a notice of appeal flows from Army Regulation [AR] 27-10, para. 12-3(a) and is not found in the statute itself.

[59] AR 27-10, chapter 12-3(c). Interestingly, AR 27-10 uses the term record of trial, albeit modified by the phrase necessary for the appeal, while R.C.M. 908(b)(5) uses the term record of proceedings, a dichotomy discussed by ACCA in *United States v. Hill*, 71 M.J. 678, 683-84 (Army Ct. Crim. App. 2012).

[60] AR 27-10, ch 12-3(a).

to hear such appeals under its Article 67 grant of jurisdiction.[61]

Article 62 is modeled after a similar provision used in federal civilian prosecutions and military courts often look to Article III for guidance when deciding these appeals.[62]

During an Article 62 appeal, courts of appeal may act only with respect to matters of law.[63] "In an Article 62, UCMJ petition, this Court reviews the military judge's decision directly and reviews the evidence in the light most favorable to the prevailing party at trial."[64] When reviewing the exclusion of certain evidence, the court will examine factual conclusions under the clearly erroneous standard, while conclusions of law will receive *de novo* review.[65] Additionally, where an accused is held in pretrial confinement, commanders must consider the factors outlined for pretrial confinement in determining whether or not the accused will be held during the pendency of the appeal.[66]

While the reach of Article 62 is somewhat narrower when compared to the potential reach of a writ filing, one effect counsel may find useful is that upon notice of filing of an appeal, the proceedings are automatically stayed and only that portion of the trial which does not deal with the order or ruling at issue may continue.[67] Additionally, Article 62 asserts filings, "shall, whenever practicable, have priority over all other proceedings before that court."[68] Practitioners should note, however, that even with such prioritization, the timeline for a writ to the CCA will likely still be several weeks, and CAAF review could stretch the interlocutory review process over a number of months.[69]

The often lengthy process of extraordinary relief is a factor practitioners must analyze before filing an appeal; however, the time spent filing an interlocutory appeal is excludable delay for speedy trial purposes, as long as the appeal is not frivolous.[70]

Current Issues

While SVCs are statutorily foreclosed from filing Article 62 appeals on behalf of their clients, they are not forbidden from filing writs; indeed, the writ in *Kastenberg* was drafted and filed by a victim's lawyer. In fact, writs practice has gained steam recently with the armed forces' full implementation of the SVC program. Since October 1, 2014, Army SVCs have filed four writs at ACCA seeking relief, and the court has issued one order of relief.[71] The 2015 National Defense Authorization Act also recognizes this unique practice tool and explicitly makes clear that SVCs can file writs of mandamus seeking relief in Military Rules of Evidence 412/513 matters.[72]

In *Kastenberg*, the SVC filed a writ of mandamus following a military judge's order to produce documents concerning the victim under Military Rules of Evidence 412 and 513.[73] The Air Force Court of Criminal Appeals did not grant the writ, saying it had no jurisdiction, and denied reconsideration of its finding *en banc*. The Air Force Judge Advocate General certified the case to CAAF, which, while denying the writ, held that victims' counsel can file for interlocutory relief because, although their clients are not a party to the case, they are not strangers to the proceedings, as they could offer evidence to the fact finder.[74] The SVC program gained bona fides in *Kastenberg* and opened the world of writs practice to SVCs, though the limitations of writs practice were not changed.

The *Kastenberg* opinion was issued a few months after CAAF's ruling in *Center for Constitutional Rights (CCR) v. United States*.[75] In *CCR*, relief was denied for a group of media entities seeking real-time transcripts as well as transcripts of R.C.M. 802 conferences in the *United States v.*

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[61] United States v. Lopez de Victoria, 66 M.J. 67, 71 (C.A.A.F. 2008).

[62] United States v. Wuterich, 67 M.J. 63, 71-72 (C.A.A.F. 2008)

[63] United States v Gore, 60 M.J. 178, 185 (C.A.A.F. 2004).

[64] United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014), *quoting* United States v. Baker, 70 M.J. 283, 287-88 (C.A.A.F. 2011).

[65] *Id.*

[66] R.C.M. 908(b)(9).

[67] *See* R.C.M. 908(b)(4). The discussion to R.C.M. 908 notes the rationale behind other parts of the trial continuing likely lays in the fact that unlike civilian practice in a courts-martial unrelated offenses are routinely charged and tried at the same time thus issues may exists which only affect a portion of the offenses at issues leaving others undisturbed. *See also*, R.C.M. 601(e)(2) (discussion noting "ordinarily all known charges should be referred to a single court-martial").

[68] 10 U.S.C. § 862(b). *See* United States v. Danylo, 73 M.J. 183, 187 (C.A.A.F. 2014).

[69] On December 8, 2014, CAAF issued an opinion in *United States v. Vargas*, an Article 62 appeal which arose out of a court order from August 2013. 74 M.J. 1 (C.A.A.F. 2014). This decision reversed NMCCA's earlier ruling that a military judge's denial of a government request for a continuance met Article 62's exclusion of evidence category. The opinion is clear such actions by military judges do not fall under the ambit of Article 62 as they do not exclude evidence but rather fall under the military judge's authority to manage the trial. Additionally in *Hill*, a relatively brief period of three and one-half months elapsed between the notice of appeal and the court's decision. *See Hill, supra* note 58 at 684.

[70] *See* R.C.M. 707(b)(3)(C); R.C.M. 707(c); and United States v. Ramsey, 28 M.J. 370 (C.M.A. 1989).

[71] January 7 & 9, 2015 e-mails from Anthony Pottinger, Chief Deputy Clerk of the Court, Army Court of Criminal Appeals, on file with the author.

[72] National Defense Authorization Act for Fiscal Year 2015, § 535, Pub. L. 113-291 (2014).

[73] *Kastenberg*, 72 M.J. at 369.

[74] *Id.* at 368, 376.

[75] 72 M.J. 126 (C.A.A.F. 2013).

PFC Bradley Manning court-martial, because they were strangers to the proceedings, and unlike the victim in *Kastenberg*, could add nothing to the case.[76]

Analyzed together, *Kastenberg* and *CCR* illustrate the outer edge of modern day writs practice in the military justice system. If a petitioner can add something to the case—contribute evidence to the proceedings—a writ stands a better chance of granted review. If a petitioner is a true stranger with nothing to add to the proceedings, any writ is unlikely to be granted.

Conclusion

The power of a writ is extraordinary in our trial practice, and practitioners must understand that denial of a motion by a trial court does not necessarily mean a writ should issue. By design interlocutory relief is both an extremely powerful and rarely used tool. While a second bite of the apple of a novel or compelling issue can be appealing, the most important question in extraordinary relief practice is "Why?" Why should the Court get involved now? Why is this issue and the ruling, so important to disturb the procedural protections written into the military justice system? Why is this writ necessary or appropriate? The counsel prepared to answer these questions will be in the best position to have their petitions for extraordinary relief granted by the appellate courts.

[76] *Id*. at 129. After losing at CAAF, the petitioners filed in federal district court, however the issue became moot once the Army shifted policy and agreed to release documents through an on-line reading room and permit a private stenographer in the gallery. Interestingly, PFC Manning did not join in the petitioner's filings either in military courts or in U.S. district court. *See*, CCR et al. v. COL Denise Lind et al., No. 1:13-cv-01504-ELH, slip op. at 41-42 (D.Md. Jun. 19, 2013), *available at,* http://www.caaflog.com/wp-content/uploads/20130619-CCR-v-Lind-OPINION-DMd.pdf (last visited February 11, 2015).