No. 16-536

In the Supreme Court of the United States

STEPHEN P. HOWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following the appellate reversal of petitioner's court-martial conviction in which his punishment included a reduction from pay grade E-6 to E-1, the military improperly punished petitioner under Articles 13 and 75(a), Uniform Code of Military Justice, 10 U.S.C. 813, 875(a), by releasing petitioner pending rehearing, but paying him as an E-1 instead of as an E-6.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-27a) is reported at 75 M.J. 386. The opinions of the United States Navy-Marine Corps Court of Criminal Appeals (Pet. App. 28a-67a, 68a-106a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2016. The petition for a writ of certiorari was filed on October 17, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2).

STATEMENT

Following trial by a general court-martial consisting of members with enlisted representation, petitioner was convicted of violating a lawful general order, rape, aggravated sexual contact, forcible sodomy, assault consummated by battery, and adultery, in violation of Articles 92, 120, 125, 128, and 134, Uni-

form Code of Military Justice (UCMJ), 10 U.S.C. 892, 920, 925, 928, 934 (2006). The court-martial panel sentenced petitioner to a dishonorable discharge, 18 years of confinement, reduction to pay grade E-1, and forfeiture of all pay and allowances. On appeal, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside petitioner's conviction and sentence and authorized a rehearing. At the rehearing, petitioner was convicted of violating a lawful general order, abusive sexual contact, and adultery, in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. 892, 920, 934. He was sentenced to a dishonorable discharge, nine years of confinement, forfeiture of all pay and allowances, and a reduction to pay grade E-1.

The government filed a petition for extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a), in the NMCCA, asking the court to vacate the military judge's decision to provide petitioner with sentencing credit. The NMCCA granted the writ in part and denied it in part. Petitioner filed a writ-appeal with the United States Court of Appeals for the Armed Forces (CAAF). The Judge Advocate General of the Navy certified four issues to the CAAF. The CAAF denied petitioner's writ-appeal and resolved the four certified issues, concluding that the military judge exceeded his authority by granting confinement credit.

1. During 2010 and 2011, petitioner was assigned to a Marine Corps recruiting station near Lexington, Kentucky. There, petitioner sent text messages to a married woman and subsequently had sexual intercourse with and sexually abused her. Charge Sheet 1-4. In 2012, as a result of these actions, petitioner was tried by a general court-martial consisting of mem-

bers with enlisted representation. Pet. App. 3a. He was convicted of violating a lawful general order, rape, aggravated sexual contact, forcible sodomy, assault consummated by battery, and adultery, in violation of Articles 92, 120, 125, 128, and 134, UCMJ. *Id.* at 3a-4a. His sentence included a dishonorable discharge, 18 years of confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1. *Ibid.* The reduction to pay grade E-1 and forfeiture of all pay and allowances took effect by operation of law on October 26, 2012. Article 57(a)(1)(A), UCMJ, 10 U.S.C. 857(a)(1)(A). On November 26, 2012, petitioner reached his End of Active Obligated Service and his pay entitlement ceased. Pet. App. 30a.

On May 22, 2014, the NMCCA set aside petitioner's conviction and sentence on the ground that unlawful command influence arising out of a briefing on sexual assault may have affected the court-martial. Pet. App. 69a-70a. The court authorized a rehearing, which the convening authority ordered on June 25, 2014. *Id.* at 4a.

Pending the rehearing, petitioner was released from confinement, returned to full-duty status, permitted to wear his pre-conviction rank insignia of E-6, and assigned regular E-6 duties. Pet. App. 4a. The government, however, following the advice of the Defense Finance and Accounting Service (DFAS), paid petitioner as an E-1 instead of an E-6 pending the results of the rehearing. *Ibid.* Petitioner filed a pretrial motion seeking payment as an E-6 on the basis of Article 75(a), which requires that "all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside * * * be restored unless a new trial or rehearing is

ordered and such executed part is included in a sentence imposed upon the new trial or rehearing." *Id.* at 4a, 10a (quoting Article 75(a), UCMJ, 10 U.S.C. 875(a)). The military judge ruled that he had no authority to restore petitioner to the grade of E-6 pending the rehearing, but determined that the government's failure to pay petitioner as an E-6 constituted illegal pretrial punishment in violation of Article 13, which provides that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him." *Id.* at 4a, 16a (quoting Article 13, UCMJ, 10 U.S.C. 813). To remedy that violation, the judge granted one day of confinement credit for every day petitioner was paid as an E-1, from the date on which his conviction was set aside onward. *Id.* at 4a-5a.

The DFAS General Counsel's Office then provided a legal opinion stating that Article 75(a), as interpreted by *Dock* v. *United States*, 46 F.3d 1083 (Fed. Cir. 1995), and *Combs* v. *United States*, 50 Fed. Cl. 592 (Fed. Cl. 2001), was binding legal authority requiring the government to pay petitioner as an E-1 pending the results of the rehearing. Pet. App. 5a. The government filed a motion asking the military judge to reconsider his illegal-pretrial-punishment ruling based on the DFAS legal opinion. *Ibid.* The military judge denied the motion, but found that the government had acted in good faith in paying petitioner as an E-1 based on statutory interpretation and case law. *Ibid.*

In April 2015, petitioner was retried. Pet. App. 29a. This time, the court-martial panel convicted petitioner of violating a general order, abusive sexual con-

tact, and adultery, in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. 892, 920, 934. *Id.* at 5a. The panel again sentenced petitioner to a dishonorable discharge, total forfeitures, and reduction to pay grade E-1, along with nine years of confinement. *Ibid.*

2. Before the convening authority took final action on the case, the government filed a petition for extraordinary relief with the NMCCA to vacate the military judge's confinement credit ruling. Pet. App. 5a-6a. The en banc NMCCA unanimously granted the petition in part and, by a 4-4 vote, denied it in part. *Id.* at 29a. The NMCCA concluded that the military judge did not commit a clear and indisputable error in finding that petitioner had a right to be paid as an E-6 and that paying him as an E-1 had a punitive effect. *Id.* at 40a, 46a-47a. But the court also determined that the military judge should have awarded confinement credit only from the date of petitioner's release—June 26, 2014—rather than from the date on which his initial conviction was set aside—May 22, 2014. *Id.* at 48a. Accordingly, the court granted the government's petition with respect to the period between May 22 and June 26, but denied the petition with respect to the remainder. *Id.* at 51a.

Four judges concurred in part and dissented in part. They would have held that the military judge misapplied Article 13 and exceeded his authority, because petitioner's entitlement to pay should have been litigated in Article III courts, and in any event, in the absence of showing both punitive intent and punitive effect, there could be no Article 13 violation. Pet. App. 60a-64a.

3. Petitioner filed a writ-appeal with the CAAF, challenging the NMCCA's jurisdiction to hear the

government's petition. Pet. App. 2a. The Judge Advocate General of the Navy certified four additional issues for review:[1] (I) whether the All Writs Act gave the government the authority to file its extraordinary-relief petition with the NMCCA; (II) whether the military judge exceeded his authority in holding that petitioner was entitled to E-6 pay pending his rehearing; (III) whether the lower court erred in holding that the reversal of petitioner's conviction and sentence rendered his reduction to E-1 prospectively unexecuted pending rehearing; and (IV) whether paying petitioner at the E-1 rate pending his rehearing constituted illegal pretrial punishment. *Id.* at 2a-3a & n.85.

The CAAF denied petitioner's writ-appeal and answered the first certified question in the affirmative and the remaining certified questions in the negative by a divided vote. First, the court unanimously concluded the NMCCA had jurisdiction to entertain the government's petition under the All Writs Act. Pet. App. 6a-10a (opinion of Sparks, J.); *id.* at 19a (Stucky, J., concurring in the result); *id.* at 22a (Ohlson, J., concurring in part and dissenting in part).

Next, the CAAF held that the military judge did not clearly and indisputably err by concluding that Article 75(a), required the government to restore petitioner to pay grade E-6 pending his rehearing, in conflict with the holdings of the Federal Circuit and the Court of Federal Claims (Certified Issue II). Pet. App. 10a-11a, 14a (opinion of Sparks, J.) (citing *Dock*,

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[1] The Judge Advocate General generally must certify issues to the Court of Appeals for the Armed Forces in order for the government to obtain review of decisions of the Courts of Criminal Appeals. See 10 U.S.C. 867(a)(2).

supra, and *Combs*, *supra*); *id.* at 22a (Ohlson, J., concurring in part and dissenting in part). The court reasoned that under its precedents, when a new trial is ordered, that leaves the accused servicemember in the same position as if no trial had ever been had. *Id.* at 12a-13a. Thus, the court explained, if an accused's court-martial judgment has been set aside on appeal, and the accused is released from confinement awaiting a rehearing, his pay status should be the same as if he had never been tried in the first place. *Id.* at 13a.

The court thus disagreed with *Dock* and *Combs* as applied to this case, but explained the discrepancy by noting that *Dock* was "retrospective" given that review of the servicemember's pay claim occurred after he was retried and his sentence included a reduction of pay. Pet. App. 13a. In that situation, the court stated, both the rehearing and resentence components of Article 75(a) were satisfied. *Ibid.* But when the pay issue is presented to the government pending a rehearing, the court explained, the government has numerous options and a rehearing often takes some time. *Id.* at 13a-14a. Thus, the court concluded, "if a hearing is ordered and the accused is not confined, it makes perfectly good sense to restore the accused fully, including his preconviction pay grade, until the results of the hearing are known." *Id.* at 14a.

For similar reasons, the court concluded that the lower courts did not err in holding that the government could not enforce the initial sentence that included the reduction in pay to E-1 (Certified Issue III). Pet. App. 15a (opinion of Sparks, J.); *id.* at 22a (Ohlson, J., concurring in part and dissenting in part).

Finally, the court found no Article 13 violation (Certified Issue IV). The court stated that the test for

evaluating alleged Article 13 violations is whether the government intends to punish, determined by looking to the purposes served by the action and whether such purposes are "reasonably related to a legitimate governmental objective." Pet. App. 16a-17a (quoting *United States* v. *Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985)). Three judges rejected petitioner's argument that a punitive effect, standing alone, triggers an Article 13 violation. *Id.* at 18a (opinion of Sparks, J.); *id.* at 19a (Stucky, J., concurring in the result).

Applying that test, the court found no intent to punish petitioner because the government paid petitioner as an E-1 based on a good-faith interpretation of Article 75(a). Pet. App. 17a-18a (opinion of Sparks, J.); *id.* at 19a (Stucky, J., concurring in the result). In addition, the court explained, the government's interpretation of Article 75(a) furthered a legitimate, nonpunitive government objective to provide petitioner with the proper pay entitlement as prescribed by Congress. *Id.* at 18a.

Judge Stucky concurred in the result. He agreed with the majority on the jurisdiction (Certified Issue I) and pretrial punishment (Certified Issue IV) issues. He would have held, however, that the decisions in *Dock* and *Combs* permitting pay reductions or forfeitures under Article 75(a) are binding on military courts in view of Congress's delegation of pay claims to civilian courts under the Tucker Act (Certified Issue II). He would not have answered the related pay issue (Certified Issue III). Pet. App. 19a-20a.

Judges Ohlson and Erdmann concurred in part and dissented in part. They agreed with the majority on the jurisdiction and pay issues (Certified Issues I, II, and III), but dissented on the pretrial punishment

issue (Certified Issue IV). Pet. App. 22a. In their view, the military judge did not clearly err in holding that petitioner was subjected to illegal pretrial punishment under Article 13. *Ibid.* They reasoned that Article 13 is violated when there is punitive intent *or* punitive effect. *Id.* at 24a-25a. Although they agreed that there was no evidence of punitive intent, they believed that the reduction in pay grade had a punitive effect because reduction in pay is an authorized punishment for a conviction, and the government benefitted financially by obtaining petitioner's services at the reduced E-1 pay grade. *Id.* at 24a-26a.

ARGUMENT

Petitioner's claim has two distinct components, neither of which warrants this Court's review. First, petitioner contends (Pet. 16-23) that Article 75(a) requires that he be paid as an E-6. But the CAAF ruled in his favor on this issue, and he therefore would not benefit from further review of that question in this Court. Nor is there a conflict with the Federal Circuit or Federal Court of Claims over this issue. Moreover, Congress recently amended Article 75(a), making the CAAF's interpretation effectively obsolete. Second, petitioner claims (Pet. 23-28) that paying him as an E-1, in violation of Article 75(a), constitutes illegal pretrial punishment, prohibited by Article 13 and the Due Process Clause. The CAAF correctly applied this Court's precedents, however, in ruling that the government's legitimate, nonpunitive objective precluded a finding of pretrial punishment, and the unusual circumstances of this case raise no issue of broad significance. Accordingly, further review is unwarranted.

1. The CAAF held that, on the facts of this case, Article 75(a) entitled petitioner to E-6 pay pending his

rehearing. Having prevailed below, petitioner provides no reason for this Court to intervene at his behest. The purported circuit split petitioner identifies (Pet. 16-22) does not exist, and the issue is of limited prospective importance in any event given recent amendments to Article 75(a). This Court's review is unnecessary.

a. As the CAAF explained, the reversal of a military accused's court-martial conviction on appeal has the same effect as if the accused had not been tried at all. Pet. App. 12a-13a (quoting *Johnson* v. *United States*, 42 C.M.R. 9, 10 (C.M.A. 1970)); see *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969) (explaining that after a conviction has been vacated, it has "been wholly nullified and the slate wiped clean"). The CAAF thus reasoned that if a military accused is released from confinement awaiting a rehearing, his pay status should be the same as if he had never been tried in the first place. According to the CAAF, Article 75(a) does not authorize the withholding of a military accused's pay while he is awaiting a rehearing if the accused raises the issue before the rehearing because, by its terms, Article 75(a) applies *after* the accused has been retried and a new sentence has been imposed. Article 75(a), UCMJ, 10 U.S.C. 875(a) ("[A]ll rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside * * * shall be restored *unless* a new trial or rehearing is ordered *and* such executed part is included in a sentence imposed upon the new trial or rehearing.") (emphases added).

The cases on which petitioner relies, *Dock* v. *United States*, 46 F.3d 1083 (Fed. Cir. 1995), and *Combs* v. *United States*, 50 Fed. Cl. 592 (Fed. Cl. 2001), are not

to the contrary. In *Dock*, the servicemember was convicted by court-martial, and his sentence included a forfeiture of pay. 46 F.3d at 1084. His conviction was set aside on appeal, however, but he was retried and convicted, and his new sentence also included a pay reduction. *Ibid.* Afterwards, the servicemember brought a civil action in civilian court seeking restoration of his pay during the period between the two courts-martial. *Id.* at 1084-1085. The Federal Circuit denied relief, holding that under Article 75(a), the servicemember was not entitled to pay restoration during the period between the two courts-martial where the second court-martial had ordered the pay forfeiture. *Id.* at 1087 ("The second exception, controlling here, is that if a rehearing is ordered, and the member is resentenced, then only that part of the executed first sentence that is *not* included in the second sentence shall be restored to the member."). The facts of *Combs* are similar, and the court in that case followed *Dock*'s holding. See *Combs*, 50 Fed. Cl. at 593-597, 600-601, 604.

Dock and *Combs* arose in a different procedural posture. There, the servicemembers sought pay restoration in civilian courts after their second convictions instead of seeking pay restoration before rehearing. When a convicted servicemember brings a pay claim in civilian court after rehearing and resentencing, *Dock* and *Combs* concluded that Article 75(a) applies and provides that rights will not be restored if the executed part of the first sentence is included in the punishment after rehearing. Here, by contrast, petitioner raised his pay claim before his rehearing, when no new sentence had yet been imposed. *Dock*

and *Combs* do not address that fact pattern and thus do not squarely conflict with this case.

b. In any event, no need exists for this Court to interpret Article 75(a) because, as the CAAF anticipated, Pet. App. 14a n.88, Congress recently amended that provision. On December 23, 2016, the President signed the National Defense Authorization Act for Fiscal Year 2017 (NDAA), Pub. L. No. 114-328, 130 Stat. 2000, which will resolve the very pay restoration issue in this case. As amended, Article 75(a) instructs the President to "prescribe regulations, with such limitations as the President considers appropriate, governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial sentence is set aside." § 5337, 130 Stat. 2937.

Section 5337 and the regulations it authorizes effectively supplant Article 75(a) and the case law construing it in the circumstances of this case. The combination of a favorable decision to petitioner on the Article 75(a) issue and the recent statutory change to that provision makes this case unworthy of this Court's review.

2. Petitioner also contends (Pet. 23-28) that the CAAF, by "fail[ing] to follow" this Court's decision in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), ran afoul of the requirements of Article 13 and due process. That claim lacks merit.

a. The CAAF correctly held that paying petitioner as an E-1 did not constitute illegal pretrial punishment. Contrary to petitioner's assertion that the CAAF "fail[ed] to follow *Mendoza-Martinez*" by "declin[ing] to apply the *Mendoza-Martinez* factors," Pet. 26, the court applied the test prescribed by this

Court's precedents, including *Mendoza-Martinez*. In laying out the appropriate standard, the court of appeals quoted extensively from the portion of *United States* v. *Palmiter*, 20 M.J. 90 (C.M.A. 1985), that adopted the test this Court described in *Bell* v. *Wolfish*, 441 U.S. 520 (1979). And the test in *Bell* was itself an elaboration on the *Mendoza-Martinez* factors. As the *Bell* Court explained, "[t]he factors identified in *Mendoza-Martinez* provide useful guideposts in determining whether" a particular action constitutes punishment. 441 U.S. at 538. But the heart of the inquiry is "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Ibid.* "Absent a showing of an expressed intent to punish * * * that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.* (brackets in original) (quoting *Mendoza-Martinez*, 372 U.S. at 168-169). In short, this Court instructed that "if a particular condition or restriction * * * is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539.[2]

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[2] This Court has also noted that "the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts," and, therefore, "are 'neither exhaustive nor dispositive.'" *Smith* v. *Doe*, 538 U.S. 84, 97 (2003) (quoting *United States* v. *Ward*, 448 U.S. 242, 249 (1980)). The CAAF did not err by applying the more specific formulation drawn from *Bell* to the question whether the government's case-specific pay-grade action while petitioner awaited rehearing was punitive.

That is exactly the test that the court applied here. See Pet. App. 17a (laying out the questions pertinent to the punishment inquiry). The court first concluded that "the record is clear that there was no punitive intent behind the Government's decision to pay [petitioner] as an E-1 pending the rehearing results." *Ibid.* Instead, the court explained, the government "had taken a good-faith position it believed was supported by regulations, statutes, and case law." *Ibid.* Even the dissenting judges agreed that "there is no evidence in the record that government officials * * * had an intent to punish [petitioner]." *Id.* at 24a. "Absent a showing of an expressed intent to punish," *Bell*, 441 U.S. at 538, the court then turned to whether a legitimate, nonpunitive objective existed for the government's actions, and it determined that the government's efforts to comply with the law satisfied that requirement. Pet. App. 18a. Because the pay decision was not made with an intent to punish and was instead made with the legitimate objective of complying with the law, the court concluded that no unlawful pretrial punishment occurred.[3]

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[3] In *Nelson* v. *Colorado*, No. 15-1256 (argued Jan. 9, 2017), this Court is considering whether it is inconsistent with due process for a State to require a defendant, whose conviction is reversed, to prove his innocence by clear and convincing evidence in order to obtain the return of monetary penalties paid with the defendant's money. The petition here need not be held for *Nelson*. This case entails the reduction of pay pending a rehearing at which petitioner was convicted, rather than fines or restitution paid under a vacated conviction. And more importantly, petitioner ultimately seeks not financial compensation but a day-for-day credit against confinement for each day petitioner was paid at pay grade E-1 pending rehearing. Pet. App. 30a-31a. If petitioner wishes to seek financial compensation, he can file civil claims for relief in the

b. The recent amendments to Article 75(a) also make the pretrial punishment issue of doubtful ongoing importance. As described above, the President will "prescribe regulations * * * governing eligibility for pay and allowances for the period after the date on which an executed part of a court-martial sentence is set aside." NDAA § 5337, 130 Stat. 2937. If those regulations disallow a reduction in pay under such circumstances, the pretrial punishment issue will be a nullity. If the regulations permit pay reductions, this Court could assess their punitive nature at the appropriate time. Review of the issue at this time is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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civilian courts. Accordingly, the resolution of *Nelson* is unlikely to affect the result in this case.