

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

EV,
Appellant,

v.

E.H. ROBINSON, JR.
Lt. Col., US Marine Corps,
Respondent,

and

DAVID A. MARTINEZ,
Sergeant, U.S. Marine Corps,
Real Party in Interest.

APPELLANT’S BRIEF
ON SPECIFIED ISSUE

USCA Misc. Dkt. No. 16-0398/MC

Crim. App. No. 201600057

18 April 2016

**TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

SPECIFIED ISSUE

**WHETHER THE UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES HAS STATUORY AUTHORITY TO
EXERCISE JURISDICTION OVER DECISIONS OF THE
COURTS OF CRIMINAL APPEALS RENDERED PURSUANT
TO ARTICLE 6b, UCMJ.**

APPELLANT’S RESPONSE TO SPECIFIED ISSUE

Jurisdiction is a question of law that this Court reviews *de novo*. *LRM v. Kastenber*, 72 M.J. 364, 367 (2013) (citing *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012)). This Court has limited jurisdiction under Art. 67, UCMJ, 10

U.S.C. § 867, which confers jurisdiction upon this court.¹ Appellant does not argue that 10 U.S.C. § 867 applies. This Court has another separate statutory jurisdiction under the All Writs Act, 28 U.S.C. § 1651.

The All Writs Act states that “...all courts established by an 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.” An appeal of a service court’s ruling on a trial court issue of privilege, when there is no other recourse by which to appeal to this Court, is specifically the type of case that the All Writs Act anticipates. Appellate review by this Court of the Navy- Marine Corp Court of Appeals’ (NMCCA) denial of the appellant’s writ is proper under 28 U.S.C. § 1651: it is “necessary and appropriate,” and it is “agreeable to the usages and principles of law.” *Id.*

In this instance, a sexual assault victim is attempting to enforce the rights conferred upon her under Art. 6b, UCMJ, which were violated at the trial level.

¹ 10 USC 867 states specifically: (a) The Court of Appeals for the Armed Forces shall review the record in--

- (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
- (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and
- (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

“Appellate review of military judges’ rulings in courts-martial is at the core of this Court’s jurisdiction. It’s what we do.” *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 131 (C.A.A.F. 2013).² The All Writs Act empowers this Court to protect its appellate jurisdiction by issuing extraordinary writs to lower courts to correct legal errors that would otherwise be unreviewable. “Congress did not intend for military judges to operate without review when applying the Rules for Courts-Martial or the Military Rules of Evidence.” *Id.* Therefore, this Court has statutory jurisdiction to hear this case under 28 U.S.C. §1651.

In this case, the military judge relied upon the abrogated “constitutional exception” in Mil. R. Evid. 513 to pierce the victim’s privilege in her own mental health records. Mil. R. Evid. 513 no longer contains such an exception, and an accused does not have a constitutional right to discover mental health records. The military judge also abused his discretion when he incorrectly found that under

² The *Center for Constitutional Rights* case involved private parties seeking First Amendment public access to court-martial proceedings. Although that Court refused to find jurisdiction in that case, it differs from this case, as the majority explained that “[w]e are thus asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief- expedited access to certain documents – that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial.” *Id.* That is a wholly different case than the present case, where the appellant is not a stranger to the case, but the victim, and the dissent in *CCR* speaks to the issues in the present case.

Mil. R. Evid. 513(d)(5), the crime/fraud exception to the privilege existed. Thus, the military judge abused his discretion.

After this abuse of discretion, the appellant filed a petition for a writ at NMCCA, pursuant to Art. 6b, UCMJ.

Art. 6b(a)(8), UCMJ, provides certain rights to victims of sexual assault; Art. 6(b)(e)³ provides jurisdiction at the service courts whereby a victim can appeal to enforce those rights.

Paragraph 6b(e)(4)(D) specifically enumerates Mil. R. Evid. 513 as a separate ground upon which a victim may to file for a writ of mandamus. The victim in this case sought review pursuant to this paragraph after her “right to be treated with fairness and with respect for the dignity and privacy of the victim []” was violated when the military judge ordered the release of her mental health records. Art. 6b(a)(8) and (e)(4)(D), UCMJ.

NMCCA denied the appellant’s petition for a writ of mandamus by stating that the right to an issuance of a writ was not clear and indisputable under *Cheney*

³ If the victim of an offense under this chapter believes that a...court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule. Art. 6b(e)(1), UCMJ.

v. United States Dist. Court for D.C., 542 U.S. 367, 380-81 (2004). This appeal followed.

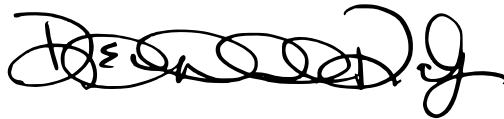
Appellate review by this Court, under the All Writs Act, is necessary to ensure that all victims of crimes punishable under the UCMJ have the same enforceable rights. With no review by this Court, the enforcement of crime victims' rights will very likely vary in the different Services. This supervisory jurisdiction is important to ensure uniformity among the Services. As a one Service court articulated, "[w]e believe that Congress intended the Uniform Code of Military Justice to be unitary and self-contained; that is, it was meant to include all the checks and balances necessary to function as a separate legal system...[and] as the highest Air Force Court, through our reviews we exercise supervisory authority over the actions of the [service] trial judges, and where...an injustice has been done, we have the inherent power to correct it." *San Antonio Express-News v. Morrow*, 44 M.J. 706, 708 (1999) (citation omitted). So, too, does this Court have the inherent power to correct the injustices done in this case, under the All Writs Act.

CONCLUSION

The appellant respectfully requests this Court exercise jurisdiction over the appellant's Writ-Appeal.



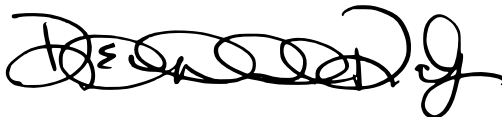
CHAD T. EVANS, Maj, USAF
Senior Special Victim's Counsel
Bldg. 428, Room 113, Lemay Street
Kadena Air Base, Okinawa, Japan
DSN: 315-634-2721
CAAF Bar no. 34257



DEANNA DALY, Lt Col, USAF
IMA to the Chief, Special Victims' Counsel
Air Force Legal Operations Agency USAF
1500 Perimeter Road, Suite 3150
Joint Base Andrews, MD 20762
(240) 612-4672
CAAF Bar No: 34257

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing motion was transmitted by electronic means on 15 April 2016 the Court and all parties to include Navy-Marine Corps Appellate Government Division, Navy- Marine Corp Appellate Defense Division, the Respondent, Col E. H. Robinson, the Clerk of NMCCA and the amicus curiae counsel.



DEANNA DALY, Lt Col, USAF
IMA to the Chief, Special Victims' Counsel
Air Force Legal Operations Agency USAF
1500 Perimeter Road, Suite 3150
Joint Base Andrews, MD 20762
(240) 612-4672
CAAF Bar No: 32342