

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

E.V.,

Petitioner

v.

E.H. ROBINSON, JR.
Lt. Col,
U.S. Marine Corps,
Respondent

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

**REAL PARTY IN INTEREST'S
ANSWER TO APPELLANT'S BRIEF
ON SPECIFIED ISSUE**

Crim. App. No. 201600057

USCA Dkt. No. 16-0398/MC

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

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Specified Issue

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

Summary of Argument

The Court of Appeals for the Armed Forces (CAAF) is a court of limited jurisdiction. Presently, CAAF's only statutory authority to hear cases is under Article 67, Uniform Code of Military Justice (UCMJ).¹ Article 67, UCMJ, does not give this Court authority to hear Petitioner's claim in this case. Neither does the All Writs Act.² Authority under the All Writs Act must be in aid of this Court's existing jurisdiction. The All Writs Act is not a separate jurisdictional authority, nor does it expand a court's existing jurisdiction. As this Court does not have jurisdiction under Article 67, UCMJ, nor under Article 6b, UCMJ,³ it is not empowered to issue a writ under the All Writs Act in this case.

The plain and unambiguous language of Article 6b, UCMJ, specifically says a victim "may petition the Court of Criminal Appeals" (CCA) for a writ of mandamus. This does not include this Court. Congress did not authorize an alleged victim, if unsuccessful at the CCA, to challenge the CCA's decision to this

¹ 10 U.S.C. § 867 (2012).

² 28 U.S.C. § 1651 (2006).

³ 10 U.S.C. § 806b (2015).

Court. A plain reading of the statute clearly limited Petitioner’s challenge, to the extent she had one, to the CCA. In order for Petitioner to have standing, Congress would have had to clearly and explicitly authorize such an action. Congress did not do so. Article 6b(e), UCMJ, squarely limits the jurisdiction of a victim’s challenge to a M.R.E. 513 procedural defect at the CCA.⁴

Argument

Standard of Review

Jurisdiction is a question of law that is reviewed *de novo*.⁵

Discussion

1. CAAF is a court of limited jurisdiction.

This Court, like all federal courts, is a court of limited jurisdiction; “that jurisdiction is conferred ultimately by the Constitution, and immediately by statute.”⁶ “The entire system of military justice is a creature of statute, enacted by Congress pursuant to the express constitutional grant of power to make Rules for the Government and Regulation of the land and naval Forces; in Articles 141 through 146, UCMJ, Congress provided the source authority for the existence of

⁴ 10 U.S.C. § 806b, Pub. L. No. 114-92, § 531 (2014).

⁵ *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012).

⁶ *United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008).

the CAAF; the CAAF's authority or subject matter jurisdiction is defined by Article 67, UCMJ.”⁷

By statute, this Court is authorized to hear cases properly before it under Article 67, UCMJ. None of the three prongs listed in Article 67(a)(1)-(3), UCMJ, however, give this Court jurisdiction over Petitioner's claim. Petitioner, acknowledging as much, instead asserts, “[t]his Court has separate statutory jurisdiction under the All Writs Act.”⁸ This is incorrect.

“While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuances of process in aid of the issuing Court's jurisdiction; *the Act does not enlarge that jurisdiction.*”⁹ Thus, this Court is only empowered to issue writs under the All Writs Act in the exercise of its existing jurisdiction. The All Writs Act is not a separate statutory grant of jurisdiction.

⁷ *United States v. Rodriguez*, 67 M.J. 110, 114 (C.A.A.F. 2009).

⁸ Appellant's Brief on Specified Issue at 2 (filed Apr. 15, 2016).

⁹ *Loving v. United States*, 62 M.J. 235, 245 (C.A.A.F. 2005) (emphasis added); *see also Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (“[A]lthough military appellate courts are among those empowered to issue extraordinary writs under the Act, *see Noyd v. Bond*, 395 U.S. 683, 695, n. 7, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969), the express terms of the Act confine the power of the CAAF to issuing process ‘in aid of’ its existing statutory jurisdiction; the Act does not enlarge that jurisdiction, *see, e.g., Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 41, 88 L. Ed. 2d 189, 106 S. Ct. 355 (1985). *See also* 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3932, p. 470 (2d ed. 1996) (“The All Writs Act . . . is not an independent grant of appellate jurisdiction”); 19 J. Moore & G. Pratt, *Moore's Federal Practice* § 204.02[4] (3d ed. 1998) (“The All Writs Act cannot enlarge a court's jurisdiction.”)).

As this Court stated, “CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice; the Act does not increase the areas of the CAAF’s jurisdiction beyond the limitations set out in Article 67, UCMJ.”¹⁰ Petitioner argues, “this supervisory jurisdiction is important to ensure uniformity among the Services.”¹¹ But as this Court noted in a recent rule change, the Supreme Court expressly rejected an expansive view of this Court’s supervisory power over all aspects of military justice.¹² Previously, this Court’s rules required a Supplement to a Petition for Grant of Review to indicate whether the court below has:

. . . (F) so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a court-martial or other person acting under authority of the UCMJ, *as to call for an exercise of this Court’s power of supervision*; or . . .¹³

The Rule now reads:

. . . (F) so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a court-martial or other person acting under authority of the UCMJ, *as to warrant review by the Court*; or . . .¹⁴

¹⁰ *Center for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)(quoting *Goldsmith*, 526 U.S. at 536).

¹¹ Appellant’s Brief on Specified Issue at 5.

¹² U.S. Court of Appeals for the Armed Forces Proposed Rule Changes, 80 Fed. Reg. 69950 (Nov. 12, 2015); *Goldsmith*, 526 U.S. at 536.

¹³ U.S. Court of Appeals for the Armed Forces Rules of Practice and Procedure 21(b)(5)(f) 2015).

¹⁴ U.S. Court of Appeals for the Armed Forces Rules of Practice and Procedure 21(b)(5)(f) 2016).

Petitioner cannot assert that this Court has jurisdiction as a matter of its supervisory powers over the lower court. This Court's jurisdiction is established by Article 67, UCMJ. Accordingly, this Court's power to issue writs must come from already existing jurisdiction under Article 67, UCMJ. Thus, in order to issue a writ under the Act in this case, CAAF would need a separate statutory grant of jurisdiction to hear petitioner's claim. Contrary to Petitioner's claims, no other statutory authority exists.

2. Article 6b only provides an alleged victim the right to petition the service Courts of Criminal Appeals; not this Court.

Article 6b(e)(1) states:

[i]f the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or 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.¹⁵

Noticeably absent is any mention of CAAF. In excluding this Court from the statute, Congress specifically created an appellate avenue for alleged victims to petition the CCA's for relief if a military judge violated an enumerated procedural right found in Article 6b, and nothing more. "Unless the statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result."¹⁶

¹⁵ 10 U.S.C. § 806b(e)(1) (2015) (emphasis added).

¹⁶ *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013).

“Established principles of statutory construction mandate . . . a narrow interpretation of” an Article I court’s jurisdiction-granting statute.¹⁷ This Court’s “independent statutory jurisdiction is narrowly circumscribed.”¹⁸ Here, the language of the statute is clear and unambiguous. Interpreting this statute to grant this Court jurisdiction over Petitioner’s claim goes against the plain language of the statute.

The juxtaposition of Articles 66 and 67, UCMJ, shows Congress is capable of enumerating separate jurisdictional authority for both the CCA’s and this Court. To read Article 6b, UCMJ, as the Petitioner would have this Court read it would admit Article 67, UCMJ, is redundant and unnecessary. If this Court has jurisdiction when Congress uses the term “Court of Criminal Appeals,” then this Court would be able to exercise jurisdiction under Article 66, UCMJ. Obviously, this is not how the UCMJ is structured.

3. Petitioner’s expansive reading of Article 6b(e), UCMJ, runs contrary to the Constitution and statutory interpretation.

In her brief, Petitioner claims she is “attempting to enforce the rights conferred upon her under Art. 6b, UCMJ, which were violated at the trial level.”¹⁹

Article 6b, however, does not give someone in Petitioner’s position the right to

¹⁷ *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (quoting *Delaware Div. of Health & Social Services v. Dep’t of Health & Human Services*, 665 F. Supp. 1104, 1117-18 (D. Del. 1987)).

¹⁸ *Goldsmith*, 526 U.S. at 535.

¹⁹ Appellant’s Brief on Specified Issue at 2.

challenge the *substantive* nature of a military judge's ruling. Rather, the clear reading of the statute only provides a narrow appellate avenue in the event a military judge violates a *procedural* right of the accused found in Article 6b(a)(1)-(8), UCMJ.

A narrow reading of Article 6b(e), UCMJ, is further supported when compared with the Crime Victims' Rights Act²⁰ (CVRA). The CVRA is applicable to civilian criminal prosecutions, and Congress authorized an alleged victim to petition for a writ of mandamus to enforce the procedural--but not independent substantive, rights²¹--found in the CVRA.²² Similarly, in its modification of Article 6b(e), UCMJ, Congress authorized a writ to protect only the procedural rights of the alleged victim under M.R.E. 412 and 513. Congress did provide additional rights under the statute.

In the CVRA, Congress narrowly circumscribed the amount of time necessary to complete any extraordinary writ litigation at the appellate level. Any

²⁰ 18 U.S.C. § 3771 (2015).

²¹ These rights track almost identically with those found in Article 6b(a), UCMJ, and include the right to be protected from the accused; the right to reasonable, accurate and timely notice of any hearing involving the accused; the right not be excluded from the hearing unless the court determines otherwise; the right to be heard at any public hearing involving a release, plea, sentencing or any parole of the accused; the reasonable right to confer with the attorney for the government in the case; the right to full and timely restitution as provided in law; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a).

²² 18 U.S.C. § 3771(d)(3).

writs filed must be adjudicated quickly: “The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than *five days* for purposes of enforcing this chapter [this section].”²³

Thus, in addition to requiring an appellate court to hear and decide a writ, Congress specifically prohibited proceedings from delaying a criminal proceeding for more than five days. There is no such guarantee in Article 6b, which indicates that Congress anticipated the writ avenue in Article 6b to be easily decided because a record should pretty clearly indicate whether a procedural right was violated. This underscores the fact that Article 6b does not authorize this Court to hear a writ appeal. In contrast, if this Court were to endorse the Petitioner’s reading, it would contravene an accused’s right to a speedy trial.²⁴

In this case, Petitioner claims the military judge violated “her right to be treated with fairness and with respect for the dignity and privacy of the victim” by ordering the release of her mental health records.²⁵ While Petitioner may feel aggrieved about the Military Judge’s decision, disagreement over conclusions of law regarding a discovery issue is not a violation of the right to be treated with

²³ 18 U.S.C. § 3771(d)(3) (emphasis added).

²⁴ As evidenced in this case, where, as of the date of this filing, charges have been pending against Sgt Martinez for 325 days and Petitioner’s writ has consumed 57 days of delay since her initial filing on February 25, 2015.

²⁵ Appellant’s Brief on Specified Issue at 4.

fairness and respect. Even if Petitioner could realistically claim that this amounts to a violation of a procedural right, Article 6b, UCMJ, makes the CCA--not this Court--the appropriate, and only, avenue of redress.

This narrow reading of Article 6b, UCMJ, is the only way to preserve some semblance of an accused's right to a speedy trial. To hold otherwise would be to find that Congress overturned centuries of constitutional,²⁶ statutory,²⁷ precedential,²⁸ and regulatory²⁹ limitations on the ability of appellate courts to review interlocutory matters in criminal cases. This Court should not endorse such a broad reading of the statute.

²⁶ U.S. Const. amend. VI.

²⁷ 10 U.S.C. § 862, Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983); 18 U.S.C. § 3731, ch 645, § 1, 62 Stat. 844 (1948); *see also Kerr v. U.S. Dist. Ct. for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976) (holding “[i]t has been Congress’ determination since the Judiciary Act of 1789 that as a general rule ‘appellate review should be postponed . . . until after final judgment has been rendered by the trial court’”) (citations omitted).

²⁸ *See, e.g., Will v. United States*, 389 U.S. 90 (1967); *Dibella v. United States*, 369 U.S. 121 (1962).

²⁹ U.S. DEP’T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0140 (Jun. 26, 2012) (limiting the sole discretion whether the United States will pursue an appeal of a trial-level evidentiary decision under Article 62, UCMJ, to the Director, Appellate Government Division (Code 46)).

Conclusion

Sergeant Martinez respectfully requests this Court find it does not have jurisdiction to hear Petitioner's case.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Doug Ottenwess', with a stylized flourish at the end.

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Certificate of Compliance

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Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on April 22, 2016.



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