

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

THOMAS J. RANDOLPH,	Appellant) AMICUS CURIAE)) BRIEF IN SUPPORT OF) APPELLANT)))
v.)
H.V.,	Appellee)))
and) USCA Dkt. No. 16-0678/CG) Crim. App. Dkt. No. 001-16)
UNITED STATES,	Respondent))

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

COMES NOW the Air Force Appellate Defense Division, joined by the Army Defense Appellate Division and the Navy-Marine Corps Appellate Defense Division, pursuant to Rule 26(a)(2) of this Honorable Court's Rules of Practice and Procedure, as Amicus Curiae in Support of Appellant in the above-captioned case.

Issue Specified

Whether the United States Court of Appeals for the Armed Forces has jurisdiction over a writ-appeal petition filed by an accused who is seeking review of a Court of Criminal Appeals' decision rendered pursuant to Article 6b(e), UCMJ.

Summary of Argument

The question presented is not whether Article 6b, UCMJ, grants this Court jurisdiction over a writ-appeal petition filed by an accused. It does not. Instead, this Court has jurisdiction to hear this writ-appeal “in aid of” its existing statutory jurisdiction under Article 67(a), UCMJ. Under Article 67(a), this Court has jurisdiction over writ-appeal petitions filed by an accused who seeks review of a decision of a Court of Criminal Appeals. *See Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2012) (“This Court has statutory jurisdiction to review the decision of the Court of Criminal Appeals under Article 67, UCMJ, 10 U.S.C. § 867 (2012)”).

Nothing in the plain language of Article 6b, which is a “clear and unambiguous grant of jurisdiction” for *victims*, *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016), limits this Court’s jurisdiction over a petition from an *accused* pursuant to Article 67(a), UCMJ. Therefore, this Court has jurisdiction over an *accused’s* writ-appeal petition of a case initially brought by a *victim* pursuant to Article 6b.

“[I]t is axiomatic that Article 67 must be interpreted in light of the overall jurisdictional concept intended by the Congress, and not through the selective narrow reading of individual sentences within the article.” *United States v. Leak*, 61 M.J. 234, 239 (C.A.A.F. 2005). And this Court has consistently exercised Article 67(a) jurisdiction over writ-appeal petitions to review decisions of the

Courts of Criminal Appeals.¹ This Court should adhere to long-standing precedent, apply the statutory purpose of Article 67(a), and find jurisdiction to hear the writ-appeal in this case.

Argument

A) The statutory purpose of Article 67 supports jurisdiction in this case.

This Court is a court of limited jurisdiction, and possesses only that power authorized by the Constitution and statute. *United States v. LaBella*, 75 M.J. 52, 54 (C.A.A.F. 2015); *Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013). Article 67(a), UCMJ expressly provides this Court with jurisdiction over “all cases reviewed by a Court of Criminal Appeals” upon petition of the accused. And this “Court clearly has authority, in a proper case, to grant mandamus and other extraordinary or prerogative writs under the All Writs Act, 28 U.S.C. §1651 (2012).” *EV v. United States*, 75 M.J. at 333; *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (citing *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969));

While this Court’s jurisdiction is limited, “this principle does not mean that our jurisdiction is to be determined by teasing out a particular provision of a statute and reading it apart from the statute as a whole.” *United States v. Lopez de*

¹ *Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016); *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012); *Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008); *Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F. 1999); *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998).

Victoria, 66 M.J. 67, 69 (C.A.A.F. 2008). In *United States v. Leak*, this Court considered whether it had jurisdiction to act with respect to a finding set aside by a Court of Criminal Appeals (CCA) as factually insufficient. *Id.* at 238. That Court noted that one possible reading of Article 67(c) was that because the lower court did not affirm the finding, the Court of Appeals for the Armed Forces (CAAF) had no authority to act. *Id.* at 239. The CAAF noted that a narrow reading of Article 67(c) could bring one to the conclusion that CAAF has no jurisdiction in cases where the CCA sets aside the finding as factually insufficient, but not incorrect as a matter of law. *Id.* The *Leak* Court rejected these narrow interpretations of Article 67 and instead found it within the CAAF's Article 67 authority to review a CCA's determination of factual insufficiency for application of correct legal principles, reasoning that a contrary ruling would defeat the overall intent of Article 67, "to grant this Court jurisdiction to decide matters of law raised by appellants or certified by Judge Advocates General." *Id.* at 242.

Looking at the plain meaning of the statutory text of Article 67(a), and applying the Article in the overall jurisdictional concept intended by Congress, brings us to the logical and compelling conclusion that Article 67(a) provides this Court with jurisdiction over "all cases reviewed by a Court of Criminal Appeals" either upon certification by the Judge Advocate General under Article 67(a)(2), UCMJ, or upon petition of the accused under Article 67(a)(3), UCMJ. *See Howell*

v. United States, 75 M.J. 386 (C.A.A.F. 2016) (“This Court has statutory jurisdiction to review the decision of the Court of Criminal Appeals under Article 67, UCMJ, 10 U.S.C. § 867 (2012)”).

B) The passage of Article 6b is irrelevant to this Court’s jurisdiction under Article 67(a) over writ-appeal petitions filed by an accused.

Passage of Article 6b, UCMJ, does not change the above analysis. The statute, “is quite straightforward. It is a clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals to consider petitions by alleged victims for mandamus as set out therein.” *EV v. United States*, 75 M.J. at 334. “Congress having legislated in this area and bestowed certain third-party rights on alleged victims, we must be guided by the choices Congress has made.” *Id.* However, unlike the victim in *EV v. United States*, the rights of an accused are not cabined by Article 6b, UCMJ. Additionally, through Article 67(a), Congress has “provided for further judicial review in this novel situation.” *Id.*

The narrow grant of jurisdiction for victims to engage in litigation below pursuant to Article 6b does not limit the existing jurisdiction of this Court to grant a petition of an accused on good cause shown. Although it is true that Article 6b is silent on whether the accused gets to appeal a Court of Criminal Appeals writ decision to this Court by filing a writ-appeal petition, it does not necessarily follow that this Court has no jurisdiction over such a writ-appeal. Article 6b is not only silent on the issue of writ-appeals, but is also silent on whether the accused gets to

appeal the Court of Criminal Appeals 6b(e) decision at all, even during the course of a regular appeal. Article 6b's silence with regard to an accused's appellate rights is not unusual, because Article 6b was never meant to address the appellate rights of an accused, nor was Article 6b ever meant to change existing jurisdiction over writ-appeals brought by an accused. It's clear that when determining this Court's jurisdiction over an accused's appeal, Congress intended for Article 67, UCMJ, to remain the controlling statute, and for precedent established under Article 67 to remain intact.

Statutory construction begins with a look at the plain language of a rule. *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (citing *United States v. McNutt*, 61 M.J. 16 (C.A.A.F. 2005)); see also *Duncan v. Walker*, 533 U.S. 167, 171 (2001). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). The plain language of Article 6b does not limit the accused existing rights to file a writ-appeal. If Congress had meant to say that Article 6b limits this Court's existing ability to hear writ-appeals of an accused, they would have written that language into the statute. Instead, Congress addressed only the appellate rights of victims in Article 6b.

To say that an accused no longer has the right to file a writ-appeal for “all cases reviewed by a Court of Criminal Appeals” because Article 6b doesn’t affirmatively grant that right, is the same as saying an accused no longer has the right to a pretrial confinement hearing because Article 6b is silent on that point. Article 6b did not change the existing rights of an accused to file a writ-appeal any more than it changed an accused’s existing right to a pretrial confinement hearing. As pertains to this instance, silence by Congress does not mean a previously granted right is gone. To the contrary, Article 6b’s silence as to an accused’s rights stems from a recognition that Article 67 already controls.

C) Stare Decisis militates against disturbing precedent affording an accused the right to file a writ-appeal petition pursuant to Article 67.

This Court should continue established precedent, apply the statutory purpose of Article 67(a), and find jurisdiction to hear the writ-appeal in this case. Legislative intent and the purposes of multiple statutes are best served by following established precedent in this case. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining under stare decisis “adherence to precedent ‘is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”); *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015) (“The doctrine of stare decisis is

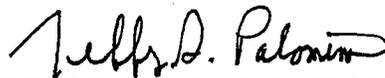
‘most compelling where courts undertake statutory construction.’”) (citation omitted).

Article 67(a), UCMJ, in conjunction with the All Writs Act, 28 U.S.C. §1651(a)(2006), grants this Court jurisdiction over writ-appeal petitions filed by an accused who seeks review of a Court of Criminal Appeals decision. This Court has jurisdiction to hear this writ-appeal within the existing Article 67(a), UCMJ statutory framework. Nothing in the plain language of Article 6b limits jurisdiction previously granted to this Court under Article 67(a), UCMJ.

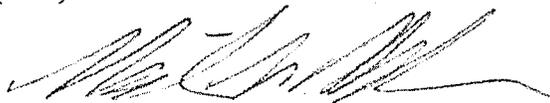
Conclusion

This Court should continue established precedent, apply the statutory purpose of Article 67(a), and find jurisdiction to hear the writ-appeal brought by the accused in this case.

Respectfully submitted,



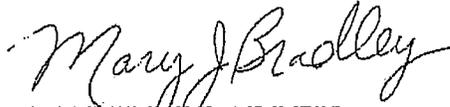
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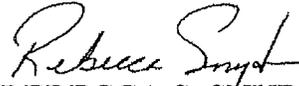
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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on 30 September 2016, pursuant to this Court's order dated 16 September 2016, and that a copy was also electronically served on Counsel for the Appellee, and the Coast Guard Appellate Government and Defense Divisions.

Respectfully submitted,



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