

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

THOMAS J. RANDOLPH,)
<i>Appellant,</i>) <i>AMICUS CURIAE</i> BRIEF ON
) BEHALF OF THE AIR FORCE
v.) APPELLATE GOVERNMENT
) DIVISION
H.V.,)
<i>Appellee,</i>)
) USCA Dkt. No. 16-0678/CG
And) Crim. App. No. 001-16
)
United States,)
<i>Respondent.</i>)

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

Pursuant to this Court’s order dated 16 September 2016 “That the Appellate Government and Appellate Defense Divisions of the Army, Navy-Marine Corps and Air Force are invited to submit *amicus curiae* briefs on the issue specified in this Order” and Pursuant to Rule 26(a) of this Court’s Rules of Practice and Procedure, the Air Force Appellate Government Division respectfully submits this *amicus curiae* brief to present the position that this Court does not have jurisdiction to review Appellant’s writ-appeal petition.

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.**

STATEMENT OF STATUTORY JURISDICTION

The Coast Guard Court of Criminal Appeals (CGCCA) reviewed this petition pursuant to Article 6b(e)(1), UCMJ. For reasons noted below, this Court does not have jurisdiction to review this writ-appeal petition under Article 6b(e), Article 67(a)(3), or the All Writs Act.

HISTORY OF THE CASE

The procedural posture of this writ-appeal petition is dispositive of the specified issue concerning jurisdiction.

Appellee, the alleged victim in this case, filed a petition for extraordinary relief in the nature of a writ of mandamus and invoked the jurisdiction of Article 6b(e), UCMJ. CGCCA found that it had jurisdiction to entertain the victim's petition as provided in Article 6b(e)(1), and the lower Court issued a decision granting the victim's petition for extraordinary relief.

Appellant filed writ-appeal decision of the CGCCA's decision on the victim's petition for extraordinary relief brought under Article 6b(e) to this Court and expressly invoked Article 67(a)(3) as his jurisdictional basis for doing so.

Appellee filed an answer to Appellant’s writ-appeal petition with this Court in which Appellee was silent as to this Court’s jurisdiction to hear this writ-appeal and instead asked this Court to uphold the CGCCA decision on the merits.

ARGUMENT

THIS COURT HAS NO JURISDICTION OVER APPELLANT’S WRIT-APPEAL PETITION UNDER ARTICLE 6B(E), ARTICLE 67(A)(3), OR THE ALL WRITS ACT.

Standard of Review

This Court reviews questions of jurisdiction de novo. EV v. United States and Martinez, 75 M.J. 331 (C.A.A.F. 2016).

Law and Analysis

The Air Force Appellate Government Division respectfully asserts that Appellant has failed to meet his sole burden to establish that this Court has jurisdiction to review his writ-appeal petition. This Court should promptly dismiss Appellant’s petition for lack of jurisdiction.

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute. . . .” United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)). “[T]he burden of establishing” that a Court has jurisdiction over a case “rests upon the party asserting jurisdiction.” Kokkonen, id. As this Court

noted in Loving v. United States, 62 M.J. 235, 239 (C.A.A.F. 2005), “We approach this issue knowing that ‘every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction.’” (Internal citation omitted.) *See also*, United States v. LaBella, 75 M.J. 52 (C.A.A.F. 2015). As this Court plainly noted in EV, “As a federal court of appeals inferior to the Supreme Court, our jurisdiction and, indeed, our existence are wholly dependent upon statutes enacted by Congress. . . .” EV, 75 M.J. at 333.

A. This Court has no jurisdiction to review any writ-appeal petition brought under Article 6b(e), UCMJ, whether brought by a victim or accused.

This Court resolved this question of jurisdiction just three months ago in EV v. United States and Martinez, 75 M.J. 331 (C.A.A.F. 2016). The only distinction between EV and Appellant’s case is that the victim filed the writ-appeal over which this Court held it had no jurisdiction in EV, while the accused brought the writ-appeal in the present case. Simply put, that is a distinction irrelevant to the specified jurisdiction question here.

In EV, this Court directly answered the question of its jurisdiction to review a writ-appeal petition of decision of a Court of Criminal Appeals brought under Article 6b(e) and held none existed. This Court quickly rejected any notion that it could review a writ-appeal petition brought under Article 6b(e) by extrapolating or transferring jurisdiction from another statute, namely the All Writs Act, to review

an Article 6b(e) case. EV held true to the familiar principle that “it is axiomatic that the All Writs Act is not an independent source of jurisdiction, but only operates ‘in aid of’ our existing statutory jurisdiction. (Internal citations omitted.) We therefore must look to Article 6b, UCMJ, itself for any grant of jurisdiction.” EV, 75 M.J. at 333. This Court concluded and held it had no jurisdiction to review a writ-appeal petition under Article 6b:

When examined, 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. There is no mention whatsoever of this Court. 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. Congress certainly could have provided for further judicial review in this novel situation. It did not.

EV, 75 M.J. at 334.

In this case, Appellant cannot surmount two jurisdictional obstacles, and each is fatal to his writ-appeal jurisdiction. First, as noted, this Court has already concluded in EV that it has no jurisdiction to review a CCA decision under Article 6b. Second, the very clear language of Article 6b(e) limits enforcement by a CCA to petition brought by a victim of an offense under the chapter; Appellant clearly is not a victim and simply cannot invoke the jurisdiction provided by Article 6b(e). So, even if Congress extended jurisdiction to this Court under Article 6b, which it did

not, Appellant is not an authorized person to invoke jurisdiction. Appellant has failed to meet his burden to establish this Court's jurisdiction to review his writ-appeal petition, and this Court should dismiss it for lack of jurisdiction.

B. Likewise, this Court has no jurisdiction to review Appellant's writ-appeal petition as a petition for review under Article 67(a)(3) as asserted by Appellant.

In Appellant's writ-appeal petition, Appellant "invokes this Court's jurisdiction under Article 67(a)(3)" (App. Br. at 2.) However, Appellant's claim must fail as his case is not before this Court on direct appellate review and not before the Court on a petition for review provided in the inapposite statute (Article 67(a)(3)) as asserted by Appellant.

Appellant seems to confuse, conflate, and combine statutes in order to support his claim of jurisdiction. Again, the procedural posture leaves no doubt this case is governed only by Article 6b. Appellant never filed a petition for review under Article 67(a)(3), nor could he at this premature stage of the appellate process. This case involves only an interlocutory appeal brought by the victim. At an appropriate time and assuming there is a sentence that qualifies for direct appellate review at some point in the future, Appellant's case would then be reviewed on direct appellate review under Articles 66 and 67. But such jurisdictional triggers simply have not yet

occurred, and there is no authority at this time for Appellant to file a petition for review under Article 67(a)(3).

C. Finally, as noted above and by this Court in EV, this Court also does not have jurisdiction under the All Writs Act to review Appellant's writ-appeal petition of CGCCA's decision on the Article 6b petition for extraordinary relief.

This Court already rejected any claim of All Writs Act jurisdiction in EV, and little more needs to be mentioned. As the Supreme Court and this Court have held, The All Writs Act is not an independent source of jurisdiction, and it cannot be used to expand this Court's existing jurisdiction. As this Court has already concluded that it has no existing jurisdiction under Article 6b, the All Writs Act provides no jurisdiction to review Appellant's writ-appeal petition.

CONCLUSION

The Air Force Appellate Government Division respectfully submits that this Court has no jurisdiction to review Appellant's writ-appeal petition, and Appellant failed to meet his burden to demonstrate otherwise. This Court should dismiss the writ-appeal petition for lack of jurisdiction.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to counsel for the United States, LT Tereza Ohley, to counsel for Appellee, LCDR Kismet Wunder, USCG, to counsel for Appellant, LT Jason Roberts, USCG, on 30 September 2016 via electronic filing.

A handwritten signature in black ink, appearing to read 'G.R. Bruce', with a long horizontal flourish extending to the right.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains 1,684 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

This brief has been prepared in a proportional type using Microsoft Word Version 2013 with 14-point Times New Roman font.

/s/

GERALD R. BRUCE

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Date: 30 September 2016