IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

THOMAS J. RANDOLPH Damage Controlman Second Class (E-5) United States Coast Guard, Appellant v. H.V., Appellee and United States, Respondent	APPELLANT'S BRIEF ON SPECIFIED ISSUE USCA Dkt. No. 16-0678/CG Crim. App. No. 001-16 30 September 2016

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

JASON W. ROBERTS
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-7389
Bar No. 36766

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Specified Issue

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

Article 6b, UCMJ, does not say anything about this Court's power to hear writ-appeal petitions from either an alleged victim or an accused.[1] It does not preclude an accused from seeking review of a Court of Criminal Appeals' decision granting a writ to an alleged victim.

Rather, this Court can review a Court of Criminal Appeals' decision on a petition of the accused under Article 67(a)(3), UCMJ, since the lower court's decision constitutes a "final action" in a "case." This is in keeping with this Court's clear jurisprudence.

[1] Article 6b, UCMJ; 10 U.S.C.A. §806b (West 2016)

Argument

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS JURISDICTION OVER A WRIT-APPEAL PETITION FILED BY AN ACCUSED WHO SEEKS REVIEW OF A LOWER COURT'S DECISION RENDERED PURSUANT TO ARTICLE 6b(e), UCMJ

Standard of Review

Jurisdiction is a question of law that is reviewed *de novo*.[2]

Discussion

A. This Court's decision in *E.V. v. United States* does not affect Appellant's writ appeal.

Article 6b, UCMJ, does not affect Appellant's appellate rights. Rather, it grants victims limited appellate rights.

On June 21, 2016, this Court held in *E.V. v. United States* that it did not have jurisdiction to review a decision of a Court of Criminal Appeals on a writ-appeal petition filed by an alleged victim under Article 6b, UCMJ.[3]

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

[3] *E.V. v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016).

In that case, the Appellant, a "victim" as defined by Article 6b(b), UCMJ, sought relief from a trial court ruling by filing a petition for a writ of mandamus with the Navy-Marine Corps Court of Criminal Appeals pursuant to Article 6b(e)(1), UCMJ.[4] The lower court denied the victim's petition; she then sought "identical relief" from this Court.[5]

This Court held that Article 6b(e), UCMJ, expressly limits its grant of jurisdiction over petitions by alleged victims for writs of mandamus to Courts of Criminal Appeals.[6] This Court recognized that the statute is silent regarding whether an alleged victim can seek mandamus from this Court. It explained that Congress, as the author of the statute, could have provided alleged victims a right to seek review at this Court if their petitions for mandamus are denied at the Courts of Criminal Appeals, but it did not.[7]

By contrast, Article 6b, UCMJ, does not preclude the *accused* from seeking review of the lower court's decision. First, Appellant does not seek a writ of mandamus under Article 6b(e), UCMJ. Rather, he seeks

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[4] *Id.* at 333.

[5] *Id.*

[6] *Id.*

[7] *Id.*

review of the Court of Criminal Appeals' decision, relying on the jurisdiction of this Court under Article 67(a)(3), UCMJ, as discussed in detail below.[8]

Second, this Court's exercise of jurisdiction over an *accused's* writ appeal petition does not conflict with *E.V.'s* holding. This is because the party seeking review of the lower court's decision is not the alleged victim. An alleged victim could not successfully petition this Court for review of a Court of Criminal Appeals' decision because under Article 67(a), UCMJ, only an accused may petition this Court for review. Thus, *E.V.'s* holding does not prevent this Court from hearing Appellant's writ appeal given the procedural posture of this case.

B. The lower court's decision constitutes a "case" that this Court may review pursuant to Article 67(a)(3).

This Court has jurisdiction to hear this writ-appeal "in aid of" its existing statutory jurisdiction under Article 67(a), UCMJ.[9] This Court has jurisdiction under Article 67(a)(3) when there is (1) *a case*, (2) review by a Court of Criminal Appeals, and (3) a petition from the

[8] Art. 67(a)(3), 10 U.S.C. §867(a)(3); *see also* C.A.A.F. Rule 4(b)(2).
[9] 28 U.S.C. §1651(a)(2012).

accused showing good cause.[10] Each of these requirements is met here, giving this Court jurisdiction over Appellant's writ-appeal petition.

While this Court may act only with respect to the findings and sentence of any case it reviews,[11] the term "case" is not restricted to only those proceedings where findings and a sentence have been reached. The term "case" includes decisions by a Court of Criminal Appeals on a petition for extraordinary relief from a trial court ruling.[12]

In *United States v. Redding*, this Court's predecessor held that the Navy Court of Military Review's denial of a Government petition for extraordinary relief constituted a final action for purposes of Article 67, UCMJ.[13] The Court concluded that because the denial was a final action, certification by the Judge Advocate General of the Navy was appropriate.[14]

Several years later, in *United States v. Tucker*, this Court's predecessor exercised jurisdiction over an accused's petition following a

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[10]10 U.S.C. §867(a)(3) (emphasis added).

[11] 10 U.S.C. §867(c).

[12] *United States v. Redding*, 11 M.J. 100, 104 (C.M.A. 1981).

[13] *Id.*

[14] *Id.* at 104-05.

government appeal made pursuant to Article 62, UCMJ. The Navy Court of Military Review reversed the military judge's ruling and reinstated a charge and specification.[15] This Court's predecessor partially relied on its decision in *Redding*, finding that review was proper even though no findings or sentence had been rendered.[16] Notably, the action by the Navy Court of Military Review in *Tucker*–reinstating a charge and specification–was completely opposite from the action it took in *Redding*, which effectively ended court-martial proceedings.

Eleven years later, in *United States v. Curtin,* a certified case, this Court held a "case" includes a "final action" by an intermediate appellate court, regardless of whether the court's "final action" was "tantamount to a final disposition of the case."[17] At issue was whether the military judge correctly held that a court-martial was not a proper

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[15] *United States. v. Tucker*, 20 M.J. 52 (C.M.A. 1985).

[16] *Id.* at 53.

[17] *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996) (deciding that a military judge may exercise jurisdiction over a witness' challenge to subpoenas issued by trial counsel acting under a provision of the Right to Financial Privacy Act, 12 U.S.C. §3407).

forum for a third party to challenge a particular class of subpoenas issued by the trial counsel.[18]

The Government filed a petition for extraordinary relief with the Air Force Court of Criminal Appeals, which the lower court denied.[19] While this Court declined to order the military judge to reconsider the motions filed by the parties, it determined that jurisdiction existed under Article 67(a)(2), UCMJ, because the Air Force's denial of the petition constituted a "final action" in a "case."[20]

In 2008, this Court reaffirmed *Tucker* in *United States v. Lopez de Victoria*, holding that an accused may petition the Court under Article 67(a), UCMJ, for review of a Court of Criminal Appeals decision rendered in an Article 62, UCMJ, appeal.[21]

In *Lopez de Victoria*, the Government, as appellee, argued that Article 67(c), UCMJ, was fatal to jurisdictional claims because the Court of Criminal Appeals had not acted with respect to the findings

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F. 2008).

and sentence of the court-martial.[22] This Court rejected that argument, "…believ[ing] it 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."[23]

This overall jurisdictional concept includes 28 U.S.C. §1259, which provided the Supreme Court with direct appellate jurisdiction over this Court's decisions. This includes interlocutory decisions, such as decisions regarding petitions for extraordinary relief. [24]

Finally, in 2013, in *L.R.M. v. Kastenberg*, this Court relied on *Curtin* to hold that certification was proper after the Air Force Court of Criminal Appeals denied a victim-witness' petition for extraordinary relief in the nature of a writ of mandamus.[25] This Court held that the

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[22] *Id.* at 69.

[23] *Id.*

[24] *See generally Solorio v. United States*, 483 U.S. 435 (1987); *see also Lopez de Victoria*, 66 M.J at 70-71.

[25] *L.R.M. v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013).

Court of Criminal Appeals' denial of the victim-witness' motion was a "final action" in a case.[26]

Following this line of precedent, the matter before this Court is a "case" because the Coast Guard Court of Criminal Appeals took a final action on the alleged victim-witness' petition for extraordinary relief. Under Article 67(a)(3), UCMJ, this Court has jurisdiction based upon the petition of the ***accused*** showing good cause, just as this Court would have jurisdiction if a service Judge Advocate General certified a case under Article 67(a)(2) before findings and a sentence exist. Therefore, this Court may review the decision of the Court of Criminal Appeals when petitioned by the accused.

C. Due process and policy concerns support a finding of jurisdiction.

Should this Court determine it does not have jurisdiction to hear the writ appeal on the basis that the victim filed the writ pursuant to Article 6b, the appellate rights granted to the victim will have operated to limit the accused's longstanding appellate rights. And it will do so without any explicit desire of Congress to do so.

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[26] *Id.*

Furthermore, there is a fundamental unfairness in allowing the victim to petition for extraordinary relief and subsequently denying Damage Controlman Second Class (DC2) Randolph the opportunity to seek review of the lower court's decision regarding a ruling that was originally in his favor. This is particularly true given that it could result in DC2 Randolph serving confinement that is ultimately set aside. This cannot be what Congress intended when it provided an alleged victim with a limited right to petition for extraordinary relief.[27]

In the absence of express language from Congress statutorily overruling this Court's interpretation of Article 67, this Court should apply the principles and follow the cases discussed above rather than change course now. In *Payne v. Tennessee*, the Supreme Court explained that under the stare decisis doctrine "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

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[27] When the ordinary meaning of a statute would lead to absurd results, courts must seek an alternative reading of the statutory text. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

perceived integrity of the judicial process."[28] Should this Court find it lacks jurisdiction to hear Appellant's writ appeal petition filed pursuant to Article 67(a)(3), such a ruling would call into question, if not expressly overturn, decades of case law affecting the Judge Advocate Generals' ability to certify cases and appellants' ability to successfully petition this Court.

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[28] 501 U.S. 808, 827 (1991); *see also Neal v. United States*, 516 U.S. 284, 295 (1996) (holding *stare decisis* carries great weight in statutory construction because "Congress is free to change this Court's interpretation of its legislation") (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1979)); *see also Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J. dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled, than that it be settled right. This is commonly true even where the error is a matter of serious concern provided correction can be had through legislation.") (internal citations omitted); *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).

Conclusion

DC2 Randolph respectfully requests this Court find it does have jurisdiction to hear his writ-appeal petition.

/s/

JASON W. ROBERTS
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-7389
Bar No. 36766

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 30 September 2016.

/s/

JASON W. ROBERTS
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-7389
Bar No. 36766

Certificate of Compliance

This brief complies with the type-volume limitation of Rule 24(c) because it contains less than 14,000 words and complies with the typeface and type style requirements of Rule 37. Using Microsoft Word version 2010 with 14-point-Century Schoolbook font, this brief contains 1,773 words.

/s/

JASON W. ROBERTS
Lieutenant, USCG
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-7389
Bar No. 36766