IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Thomas J. Randolph, Damage Controlman Second Class (E-5) U.S. Coast Guard Appellant	)	BRIEF OF *AMICUS CURIAE* NAVY-MARINE CORPS APPELLATE GOVERNMENT DIVISION IN RESPONSE TO SPECIFIED ISSUE
v.	)	Crim.App. Dkt. No. 201600057
H.V., Aviation Maintenance Technician Second Class (E-5) U.S. Coast Guard Appellee	)	USCA Dkt. No. 16-0678/CG
and	)	
UNITED STATES, Respondent	)	

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

Preamble

The Navy-Marine Corps Appellate Government Division, pursuant to Rule 26 and this Court's Order of September 16, 2016, files this *Amicus* Brief to answer whether this Court has jurisdiction over Appellant's Writ-Appeal Petition seeking review of a Court of Criminal Appeals decision rendered pursuant to Article 6b(e), UCMJ.

Argument

A. In Article 6b, Congress' "clear and unambiguous grant of limited jurisdiction" limits victims' interlocutory appeals, but does not disturb this Court's settled jurisdiction.

1. This Court's statutory jurisdiction extends to interlocutory matters including those under Article 62 and the All Writs Act.

Congress authorized this Court to hear "cases" properly brought before it under Article 67, UCMJ. *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999); *United States v. Lopez de Victoria*, 66 M.J. 67, 69-71 (C.A.A.F. 2008). That jurisdictional statute authorizes this Court to "act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Ctr. for Constitutional Rights (CCR) v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) (quoting Article 67(c), UCMJ). Thus, in the context of this Court's review of petitions for extraordinary relief, Article 67(c) contains a subject-matter jurisdictional requirement of a harm that has "the potential to directly affect the findings and sentence." *Howell v. United States*, Nos. 16-0289 & 16-0367, 2016 CAAF LEXIS 592, at *9 (C.A.A.F. 2016) (citing *CCR*, 72 M.J. at 129).

It is settled law that this Court's Article 67 jurisdiction extends to interlocutory matters under Article 62, UCMJ, 10 U.S.C. § 862 (2012). *Lopez de Victoria*, 66 M.J. at 71; *United States v. Michael*, 66 M.J. 78 (C.A.A.F. 2008); *see also United States v. Wuterich*, 67 M.J. 63, 64-65 (C.A.A.F. 2008); *United States v.*

Tucker, 20 M.J. 52 (C.M.A. 1985). So too for interlocutory matters arising under the All Writs Act, 28 U.S.C. § 1651 (2012). *See LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013); *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012); *United States v. Curtin*, 44 M.J. 439 (C.A.A.F. 1996); *United States v. Caprio*, 12 M.J. 30 (C.M.A. 1981); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); *see also Wuterich*, 67 M.J. at 64-65; *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

This Court has found no jurisdiction, however, over appeals of the lower courts' All Writs Act rulings that either failed to demonstrate any potential to directly affect findings or sentence, *C.C.R.* 72 M.J. at 129, or exceeded a "clear and unambiguous grant of limited jurisdiction" solely to the Courts of Criminal Appeals, *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016).

2. Through Article 6b(e), Congress granted victims a limited right of appeal to the Courts of Criminal Appeals.

"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) (citations and internal quotation marks omitted). In construing the language of a rule "it is generally understood that the words should be given their approved usage." *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (citations omitted). The ordinary meaning of words evidences legislative intent. *See United States v. Easter*, 981 F.2d 1549, 1558 (10th Cir.

1992). Resort to legislative history to determine the meaning of words is appropriate only to resolve statutory ambiguity. *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992); *Board of Trade of the City of Chicago v. S.E.C.*, 187 F.3d 713, 720 (7th Cir. 1999) (Easterbrook, J.) ("legislative history . . . may be used only when there is a genuine ambiguity in the statute").

Article 6b, UCMJ, 10 U.S.C. § 806b (2015), provides victims of offenses under the UCMJ with procedural rights including, *inter alia*, "the right to be reasonably heard" at certain proceedings and "the right to be treated with fairness and with respect for the dignity and privacy of the victim . . . ." 10 U.S.C. § 806b(a). Article 6b also addresses appellate review of preliminary-hearing or trial-court rulings arising from those rights:

> (1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) [10 USCS § 832] 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.
>
> (2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, *the victim may petition the Court of Criminal Appeals* for a writ of mandamus to quash such an order.

10 U.S.C. § 806b(e) (emphasis added).

Congress thus explicitly authorizes a victim to seek appellate review at the Court of Criminal Appeals, but nowhere in Article 6b does Congress inhibit an accused's right to seek review of Court of Criminal Appeals' decisions. Instead, after Article 6b, the statutory subject-matter jurisdiction of this Court remains: "cases" properly brought before it, including review under the All Writs Act of matters with the potential to directly affect findings and sentence.

B. On Article 6b appeal, an incorrect interpretation of Mil. R. Evid. 513 by a Court of Criminal Appeals appeal may impact findings and sentence.

Article 6b grants a victim the right to seek appellate review of rulings that violate protections afforded by Article 6b itself, Article 32, or Mil. R. Evid. 412, 513, 514, or 615. 10 U.S.C. § 806b(e)(4). Such an appeal to the Courts of Criminal Appeals is permitted regardless of potential impact on findings or sentence. "Many victim rights are procedural, and even if a court-martial disregards the rights, such action may often be unlikely to have the potential to directly affect the findings or sentence." *DB v. Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *4 (A. Ct. Crim. App., Feb. 1, 2016). But some such appeals may impact findings or sentence, enabling further review before this Court.

1. Writs of mandamus require the right to relief to be clear and indisputable. The lower court erred in finding clear and indisputable relief where the Rule's text and precedent do not clearly support its conclusion.

The limits of Article 6b are evident in the sole relief—*mandamus*—that Congress codified in the statute. *See Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (describing the writ of *mandamus* as "a drastic remedy . . . [which] should be invoked only in truly extraordinary situations") (quoting *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983).

> The peremptory writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.

Will v. United States, 389 U.S. 90, 95 (1967). A petitioner has the burden to show that his "right to issuance of the writ is clear and indisputable." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). And military courts have traditionally required petitioners to establish that the subject ruling or action is contrary to statute, settled case law, or valid regulation. *See, e.g.*, *Dettinger v. United States*, 7 M.J. 216, 224 (C.M.A. 1979); *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

Here, the only "clear and indisputable" rule was the text of Mil. R. Evid. 513, which the trial court followed. As the lower court's split decision indicates, the definition of what constitutes Mil. R. Evid. 513(b)(4) "communications" remains unsettled. The right to relief was neither clear nor indisputable.

2. When, as here, a Court of Criminal Appeals' Article 6b decision supplants the trial judge's Mil. R. Evid. 513 ruling, that decision has the potential to directly affect the findings and sentence.

To enforce rights under Article 6b, Congress authorized victims to "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*." 10 U.S.C. § 806b(e)(1) (emphasis added).

The lower court here did more than order compliance with Mil. R. Evid. 513. Without finding any violation of Mil. R. Evid. 513(e), the lower court held that "the military judge erred as a matter of law in ordering release to the defense of Petitioner's records" and ordered "that the military judge shall protect the mental health records of Petitioner from disclosure in accordance with [Mil. R. Evid.] 513 as interpreted by this opinion." *H.V. v. Kitchen*, No. 0001-16, 2016 CCA LEXIS, at *7 (C.G. Ct. Crim. App. Jul. 8, 2016).

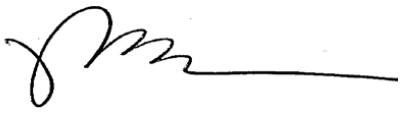
This decision directly altered the discovery available for the preparation of the defense. *See* R.C.M. 701(a)(2), 701(a)(6). In so doing, the lower court's decision had a direct bearing on "evidence considered by the court martial on the

issues of guilt or innocence." *See LRM*, 72 M.J. at 368 (finding that a military judge's Mil. R. Evid. 412 ruling "has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence—which will form the very foundation of a finding and sentence"); *cf. DB v. Lippert*, at *34 (granting a victim's petition for *mandamus* after a procedurally infirm hearing under Mil. R. Evid. 513(e), but denying her request to determine that the materials were inadmissible until "after a properly conducted hearing under Mil. R. Evid. 513 and other applicable rules of evidence"). The lower court's decision is therefore properly before this Court on writ-appeal.

Conclusion

The United States respectfully requests that this Court find jurisdiction to hear Appellant's Writ-Appeal.

JUSTIN C. HENDERSON
Lieutenant Commander, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679
Bar No. 36640



BRIAN K. KELLER
Deputy Director
Appellate Government Counsel
Navy-Marine Corps Appellate
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar No. 31714

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically filed with the Court and served on Counsel for Appellant, Appellee, Counsel for Real Party in Interest, and Amicus Counsel on September 30, 2016.

JUSTIN C. HENDERSON
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679
Bar No. 36640