

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

H.K.,
Appellant

v.

COLIN P. EICHENBERGER
Lieutenant Colonel (O-5)
United States Air Force
Military Judge
Appellee

and

LEE B. BROOME
Technical Sergeant (E-6)
United States Air Force,
Real Party in Interest

USCA Dkt. No. 22-0038/AF

Crim. App. Dkt. No. 2021-07

**AMICUS CURIAE PROTECT OUR DEFENDERS’
BRIEF IN SUPPORT OF THE WRIT-APPEAL PETITION
FILED BY APPELLANT H.K.**

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1.

ISSUE PRESENTED

Whether a victim has standing to assert her Article 6b rights at a court-martial.

INTEREST OF AMICUS CURIAE

Protect Our Defenders honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted, or harassed by fellow service members. Military victims of sexual assault are affected by the military judges who deny them standing to assert the statutory rights granted to them under Article 6b.

STATEMENT OF THE CASE AND FACTS

Real Party in Interest TSgt Broome has been charged with sexually assaulting Appellant H.K. Appellant is a victim under Article 6b (10 U.S.C. § 806b).

On August 20, 2021, Appellant travelled to Edwards Air Force Base for the start of the court-martial which had been scheduled since March 2021. Appellant, the sole provider for her family, had to take unpaid leave to attend trial.

The trial counsel failed to comply with their discovery obligations when they did not provide the defense with over 1,900 pages of text messages. August 24, 2021 Ruling on Defense Motion for Continuance, at (“Ruling”) 4, para. 17. The Real Party in Interest requested a continuance by written motion so that he could

evaluate and incorporate the newly disclosed material. *Id.* The trial counsel opposed the continuance but did not provide a written filing. *Id.*, at 1. Appellant submitted a written response asserting her standing and opposing the defense motion for a continuance. *Id.*

The Appellee Military Judge made the following conclusions of law and analysis:

- Under Article 6b(a)(7), a victim has the right to proceedings free from unreasonable delay. *Id.*, at 2, para. 5.
- This Court, in *L.R.M. v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013), recognized “limited participant standing.” *Id.*, para. 8.
- Standing requires three “irreducible” elements: (1) an injury in fact, (2) caused by the conduct complained of, and (3) redressable by a favorable decision. *Id.*, para. 9, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (U.S. 1992).
- The Appellant “has not demonstrated standing as a constitutional matter because she has not shown an ‘injury in fact’ as that term is defined by applicable case law.” *Id.*, para. 10.

The Appellant filed a writ-appeal petition challenging the Appellee’s ruling that she lacks standing to assert her Article 6b rights. The Air Force Court of Criminal Appeals (“AFCCA”) recognized that “[b]y the plain language of Article 6b,” Appellant has standing to assert her right to proceedings free from unreasonable delay, but determined the standing is only at the AFCCA and not at the court-martial level. *In re H.K.*, Misc. Dkt. No. 2021-07, at 4-6 (A.F. Ct. Crim. App. September 13, 2021).

ARGUMENT

I. Victims Must Assert Their Article 6b Rights at the Court-Martial.

The Appellee and AFCCA conflate the enumerated right to be heard under Article 6b(a)(4) with the enforcement procedures under Article 6b(e). They hold that a victim has the right to be heard at three specific proceedings relating to pretrial confinement, sentencing, and parole, and not at any other proceeding. The right and duty to assert rights is distinct from the “right to be heard” under Article 6b(a)(4).

The right to be “reasonably heard” stands on the same footing as the seven other victims’ rights enumerated in Article 6b(a).¹ A victim must first assert her right and demonstrate the reasonableness of the assertion. If a victim requests (or moves) to be heard through a friend, the court-martial would determine whether such request is reasonable. Only if the judge denies the request (or motion) would there be a ruling that can be the basis for a petition to an appellate court. If the victim never asserts her right to be heard at the sentencing hearing, there would be no ruling denying her right to be reasonably heard. The military judge would be unaware of the victim’s interest in being heard. If a victim wants to exercise any right under Article 6b(a), she must first assert the right.

¹ Five of the eight Article 6b(a) rights and three of the four rules of evidence enumerated in Article 6b(e)(4) use some form of the term “reasonable” that must be determined initially by the military judge.

Military judges are not clairvoyant. If a victim failed to assert her right to confer with government counsel or to restitution under Article 6b(a)(6), the judge would be unaware of the facts necessary to grant relief. If victims are denied standing to assert their rights and to inform the military judges of the facts necessary to determine rule upon these rights, then judges would be unable to issue rulings concerning these rights. If victims raised these rights to confer with counsel or to receive restitution only at the appellate courts after the court-martial, the appellate courts would deny relief because there would be no ruling violating the victims' rights. All the rights granted to victims under Article 6b would be illusory.

A victim has a duty, not just a right, to assert her Article 6b rights at the court-martial.

II. The Appellant Clearly and Indisputably has Standing to Assert Her Right to Proceedings Free from Unreasonable Delay.

In his Ruling, the Appellee recognizes that Article 6b gives Appellant the right to proceedings free from unreasonable delay. Ruling, at 2, para. 5. He nevertheless concludes Appellant has not shown an "injury in fact." *Id.*, para. 10. Appellee misapplies applicable precedents and ignores actual, concrete, and particularized financial and emotional injuries his Ruling inflicts upon Appellant.

The Appellee quotes the Supreme Court precedent *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-561 to identify the three irreducible elements required to

establish constitutional standing. First, a person must have suffered an “injury in fact,” which is an invasion of a legally protected interest that is concrete, particularized, and actual or imminent (not conjectural or hypothetical). Second, the injury must have been caused by the action complained of. Third, it must be likely that the injury will be redressed by a favorable decision.

The Appellee concluded without analysis that Appellant has not shown injury in fact. This conclusion is clearly and indisputably wrong.

Appellee’s Ruling acknowledges that Appellant has the right to proceedings free from unreasonable delay. The invasion of this legally protected right is actual, concrete, and particularized. Her injuries are not conjectural or hypothetical. They are real. Appellee will incur financial and emotional injuries. Appellee has suffered injury in fact as that term is used by Supreme Court precedent.²

This Court’s precedents also require recognizing the Appellant’s standing to assert her Article 6(b) rights. In *L.R.M. v. Kastenber*, 72 M.J. at 368-69, this Court held that a person’s position as a nonparty to the court-martial (such as a

² Although the Appellee’s Ruling rests entirely upon the failure to show an injury in fact, Appellant also demonstrates she meets the other two irreducible elements. Her injury, the invasion of her right to proceedings free from unreasonable delay, is caused by the granting of the Real Party in Interest’s motion for a continuance, and if the continuance were denied Appellant’s injury would be redressed. This Court does not need to address the ultimate issue of whether the continuance was an unreasonable delay. For determining whether Appellant has standing, it is sufficient that a favorable ruling would redress her injury.

victim) “does not preclude standing.” *Id.* This Court cited long standing precedent that nonparties have standing. *Id.*, citing *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 126 (C.A.A.F. 2013); *United States v. Wuterich*, 67 M.J. 63, 66-69 (C.A.A.F. 2008); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006); *United States v. Johnson*, 53 M.J. 459, 461 (C.A.A.F. 2000); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997); *Carlson v. Smith*, 43 M.J. 401 (C.A.A.F. 1995). In *Carlson*, this Court added the nonparty as a respondent.

In *Kastenberg*, this Court relied upon the limited participant standing recognized by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); and *Church of Scientology v. United States*, 506 U.S. 9 (1992). This Court explained that other federal courts frequently permit third parties to assert their interests. *Kastenberg*, 72 M.J. at 369, citing *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980); *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir. 1989); *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981); *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981); *In re Smith*, 656 F.2d 1101 (5th Cir. 1981); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975).

This Court’s *Kastenberg* holding clearly and indisputably requires the Appellee to recognize and grant the Appellant’s standing. The Appellant has no

other means to assert her Article 6b rights except through standing at the court-martial, she has a clear and indisputable right to standing, and the issuance of a writ directing the Appellant to grant her standing is appropriate under these circumstances.

Even if this Court (as it did in *Kastenberg*) determines that a writ ordering the Appellee to grant standing is not the appropriate remedy, this Court should remand the issue back to the Appellee so that he can apply the correct law.

Kastenberg, 72 M.J. at 372. As in *Kastenberg*, this writ-appeal petition raises issues of law of first impression. *Id.* These issues would arise whenever Article 6b rights are asserted by victims. Absent guidance from this Court and with no other meaningful way for these issues to reach appellate review, every military judge could deny victims standing or grant Article 6b rights differently, so that a victim's rights vary from courtroom to courtroom. “Under these circumstances, this Court should not decline to address substantive issues which are properly before it, and which present a novel legal question regarding the interpretation of” Article 6b. *Id.*

III. Even If Article 6b Did Not Give Victims the Ability to Assert Their Rights at Courts-Martial, Victims Would Have the Right to Intervene.

As discussed above, Article 6b allows victims to assert rights in the courts-martial and to petition the military appellate courts for review if the courts-martial violate their rights. Even if Article 6b did not explicitly give victims the right to assert their rights at courts-martial, victims would still have the right to intervene to assert their rights.

Like the Rules for Courts-Martial, the Federal Rules of Criminal Procedure have no rule allowing intervention (the Federal Rule of Civil Procedure 24 (Intervention) specifically allows intervention in civil proceedings). Although no federal rule or law recognize the right to intervene in criminal cases, the right is well established. See *United States v. Cuthbertson*, 651 F.2d 189, 193 (3rd. Cir. 1981); *United States v. Bergonzi*, 216 F.R.D. 487, 492 (N.D. Cal. 2003); *United States v. Fishoff*, 2016 U.S. Dist. LEXIS 108301, *4-5 (D. N.J. 2016); *United States v. Hanley*, 2020 U.S. Dist. LEXIS 249215, *7 M.D. La. 2020); *United States v. Carmichael*, 342 F. Supp. 2d 1070, 1072 (M.D. Ala. 2004).

Intervention in criminal cases is limited to instances in which a nonparty's constitutional or other federal rights are implicated by the resolution of a particular issue. *Carmichael*, 342 F. Supp. at 1072. To qualify for intervention in the absence of a statute, a nonparty must show: (1) timeliness of application; (2) a substantial legal interest in the case; (3) impairment of the applicant's ability to

protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006).

In this case, the Appellant provided her response to the Real Party in Interest's motion for a continuance on the same day he filed his continuance motion. The Appellant has a substantial federal Article 6b right to proceedings free from unreasonable delay. The absence of intervention (if Article 6b were found to deny Appellant the ability to assert her rights at the court-martial) would impair her ability to protect her right. Because the government did not submit any written response to the continuance motion, no party adequately represented her interest before the Appellee.

Even if Article 6b did not explicitly permit Appellant to assert her Article 6b rights, the Appellee should have treated her response to the continuance motion as a motion to intervene and allowed intervention. The Appellee's refusal to consider Appellant's Article 6b rights and her arguments within her response to the continuance motion affected his decision on the motion.

If the Appellee had considered the Appellant's response, he may have determined the continuance was an unreasonable delay and denied the motion. Alternatively, he may have granted the continuance but fashioned the continuance to minimize the unreasonableness of the delay and impact on the victim. For

instance, the Appellee considered the availability of other government witness, but did not consider the availability of Appellant. Ruling, at 1. Since the delay was caused by the government, the Appellee could have inquired whether the government could provide the Appellant reasonable fees in accordance with the R.C.M. 703(g)(3)(E) to compensate the Appellant for lost wages necessitated by the continuance. The availability of such fees and consideration of Appellant's rights may have affected the reasonableness of granting the continuance. By denying Appellant standing, Appellee did not even consider her rights or interests.

CONCLUSION

WHEREFORE, Protect Our Defenders respectfully requests this Honorable Court grant the Appellant's writ-appeal petition.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief is less than 7,000 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font. The brief does not require an index or table of authorities because it is less than ten pages long.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter Coote', with a stylized flourish extending to the right.

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 22, 2021 a copy of the foregoing was transmitted by electronic means to the following:

- (1) This Court: efiling@armfor.uscourts.gov
- (2) Appellee Military Judge: LTC Colin Eichenberger, USAF
- (3) Counsel for Appellant: CPT Latanya Wateland, USAF
- (4) Counsel for Real Party in Interest: Joshua R. Traeger; Esq., CPT Victoria H. Clarke, USAF; and CPT Ryan S. Crnkovich, USAF

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