DEPARTMENT OF THE NAVY
NAVY AND MARINE CORPS APPELLATE REVIEW ACTIVITY
APPELLATE GOVERNMENT DIVISION
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May 4, 2016

The Honorable Elizabeth Holtzman
Chair
Judicial Proceedings Panel
One Liberty Center, Suite 150
875 North Randolph St.
Arlington, VA 22203

Dear Representative Holtzman:

This responds to the Judicial Proceedings Panel's (JPP's) public notice of April 13, 2016, requesting comments on the proposed amendments to Articles 6b and 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 806b and 870. I understand the JPP has already received comments on these proposals from the Department of Defense, Office of General Counsel (DoD OGC). My purpose is not to repeat those comments, but to supplement them with additional observations regarding the proposal and military appellate practice.

First, as a threshold matter, I believe it is important to recognize that the rights and roles of victims and Special Victims' Counsel—Victims' Legal Counsel (VLCs) in the Navy and Marine Corps—in the military appellate process is an emerging issue, the contours of which have only recently begun to be explored by practitioners and military appellate courts. *See, e.g.*, *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013); *DB v. Lippert*, No. 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016). My office recently hosted a day-long training symposium for Navy and Marine Corps VLCs geared toward training them in the basics of appellate procedure, discussing recent cases, and building effective lines of communication between the appellate counsel in my office and VLCs stationed around the globe. I believe it would be a mistake to impose statutory changes to the appellate process at a time when practitioners themselves are only beginning to understand the nature of the issues at play and the unique roles that VLCs/SVCs might play in the appellate process in appropriate cases. As the relevant legal and practical issues become more well-defined, and as practitioners have the opportunity to communicate, share concerns, and litigate these matters before the Courts of Criminal Appeals (CCAs) and the Court of Appeals for the Armed Forces (CAAF), we will be better positioned to identify areas where regulatory and/or legislative changes may be appropriate. But at this stage, such change—particularly legislative change—is premature.

With respect to the SVC program managers' specific legislative proposal, multiple aspects of the proposal demonstrate a fundamental misunderstanding of the role and scope of authority of the CCAs and CAAF under Articles 66 and 67, UCMJ, and of appellate practice and procedure generally. For example:

- The proposal blurs the distinction between trial and appellate functions, and uses the ambiguous term "appellate matters" (which appears nowhere else in the UCMJ) to refer to, interchangeably: proceedings, hearings, issues, cases, specific pleadings, and

a broad category of appellate review that includes within it "post-trial review." Such statutory imprecision, if enacted into law, would create confusion among practitioners, would be a catalyst for costly and unnecessary appellate litigation, and would create new grounds for public criticism of the military justice system as being "out of sync" with federal civilian practice.

- In connection with the above, the proposed amendments appear to treat appellate proceedings as an extension of trial proceedings, in which in-person hearings are held in every case, parties offer testimony and other evidence, and argue before military judges. But the vast majority of appeals in the military justice system are decided based on the briefs alone, and are generally limited to a review of the transcribed record of trial. *See, e.g.*, *United States v. Leak*, 61 M.J. 234, 245 (C.A.A.F. 2005). Thus, it is unclear how the proposed victims' "right to be reasonably heard" in "appellate matters" would be implemented in virtually every case.

- The proposal conflates "sentencing hearings"—trial-level proceedings following a conviction that take place prior to appellate review—with "sentence reassessment" under Article 66, UCMJ. Victims already have a "right to be reasonably heard" at the former under Article 6b(a)(4)(B), UCMJ. By contrast, "sentence reassessment" is a function of the CCAs when some, but not all, findings of guilt are set aside for legal error. In such cases, the court must analyze various factors to determine whether it can assess the impact of this set-aside on the overall sentence or whether a trial-level sentence rehearing should be ordered. *See United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013). Importantly, because the CCA is required to review the "entire record" in every case it reviews, sentence reassessment necessarily includes CCA review of a victim's trial testimony and any statements he or she may have offered during sentencing. Article 66(c), UCMJ. Thus, the proposed additional "right to be reasonably heard at . . . sentence reassessment" would contravene the CCA's limited scope of review under Article 66, UCMJ, and introduce unnecessary redundancy into the appellate decision-making process.

- The proposal would require "appellate victims' counsel" to appear before "the Court of Military Review [sic], the Court of Military Appeals [sic], or the Supreme Court" upon request by the victim, upon Judge Advocate General certification of a case to the CAAF under Article 67(a)(2), UCMJ, *or* "when any Article 6b right is implicated during trial or in any appellate pleading or matter." This broad requirement would include virtually every case on appeal under Articles 66, 67, and 67a, UCMJ, regardless of the nature of the issues. Moreover, it purports to permit appellate victims' counsel to file appellate pleadings whenever their clients' "statutory, regulatory or Constitutional right[s are] implicated." It is unclear what function such broad requirements are designed to serve given the lack of any parallel provisions under the Crime Victims' Rights Act, 18 U.S.C. § 3771. Nor is it clear what contributions "appellate victims' counsel" would be expected to make in the appellate representation of their clients—particularly in cases in which their clients' rights under Article 6b are either not implicated, or were fully exercised at the trial level.

As the JPP contemplates recommending potential statutory or regulatory changes in this area, I believe it essential that you receive input from experienced appellate practitioners regarding: (1) how military appellate courts function and the scope of their statutory authority; (2) relevant case law in the areas of sentence appropriateness, sentence reassessment, factual sufficiency, *Dubay* hearings, extraordinary writ procedure, sealed exhibits and proceedings, and other areas that may implicate the rights and interests of crime victims in specific cases on appeal; and (3) concerns that appellate government and appellate defense counsel may have with respect to the expansion of victims' statutory rights at the appellate stage—including, but not limited to, concerns that such an expansion may undermine due process and the efficient and effective administration of justice.

I would be happy to discuss these issues in more detail with you in person or by telephone at a future JPP meeting.

Very respectfully,

Mark K. Jamison

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