

d. No testimony should be received at this time.....	9
Conclusion	9
Certificate of Service	10

INTRODUCTION

On 5 May 2017, the Court requested briefs on the admissibility of certain matter in aggravation. The government has elected to submit a single document that combines its brief with two motions to recognize victims, one of which seeks reconsideration of AE 11. In the interest of clarity, the defense will address the government’s motions separately from its admissibility brief.

The motions to reconsider and to recognize victims should be denied both on the merits and for lack of standing. The motion to reconsider is also inexcusably late; the decision at issue was handed down nearly a year ago and the government has pointed to no intervening change in the law such as to warrant reconsideration. The Court should adhere to its 21 July 2016 ruling and find that the motion to recognize victims is similarly premature.

Witnesses are unnecessary. If the Court allows the government to call witnesses, we unfortunately cannot be ready to litigate the issue on 21-22 June and therefore will have to request that the question of admissibility be deferred until we have had a reasonable time in which to prepare.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The government, as moving party on its motions, has the burden of persuasion. Proof by a preponderance is required as to factual matters. RCM 905(c)(1).

LEGAL AUTHORITY

1. Art. 6b, UCMJ
2. Art. 6b(b), UCMJ
3. Art. 6b(e), UCMJ
4. Art. 38(a), UCMJ
5. Art. 85, UCMJ
6. Art. 99, UCMJ
7. Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663
8. Mandatory Victims Restitution Act of 1986, 18 U.S.C. § 3663A
9. Crime Victims’ Rights Act, 18 U.S.C. § 3771
10. Mich. Comp. Laws Ann. § 780.826
11. RCM 502(d)(5)
12. RCM 801(a)(6)(B)(i)
13. RCM 1001(b)(4)
14. MRE 804(b)(1)

15. AR 27-10 ¶ 17-12b
16. AR 27-26, Army Rules of Professional Conduct, R. 1.13b
17. *Budde v. United States*, 797 F. Supp. 731 (N.D. Iowa 1991)
18. *United States v. Blake*, 81 F.3d 498 (4th Cir. 1996)
19. *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006)
20. *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006)
21. *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (per curiam)
22. *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453 (D.N.J. 2009)
23. *United States v. Oakum*, 2009 U.S. Dist. LEXIS 24401 4 (E.D. Va. 2009)
24. *In re McNulty*, 597 F.3d 344 (6th Cir. 2010)
25. *United States v. Credit Suisse AG*, 2014 US Dist. LEXIS 144179, 11 (E.D. Va. 2014)
26. *United States v. Rowe*, 2017 CCA LEXIS 89 (A.F. Ct. Crim. App. 2017)
27. *Randolph v. HV and United States*, 76 M.J. 27 (C.A.A.F. 2017)
28. DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (3d ed. 2010)

ARGUMENT

I

THE MOTIONS FOR RECONSIDERATION AND TO RECOGNIZE VICTIMS SHOULD BE DENIED

The defense has the utmost respect for MSG Allen and his family, Mr. Morita, and SCPO (Ret.) Hatch. They are all heroes. As we stated last year with regard to Ms. Allen, see D APP 11, they “should be afforded all courtesies and [be] permitted to attend open sessions of SGT Bergdahl’s court-martial.” The Court should not, however, designate them as Article 6b, UCMJ, victims.

a. The relief sought serves no practical purpose

The Court should deny the government’s motions because they serve no practical purpose. Nothing prevents the government or the Army from providing the rights afforded by Article 6b without the Court’s intervention. The government is responsible for giving effect to that provision. The only time a Military Judge would even arguably be involved at this stage is if the government were not doing as the statute requires. There being no dispute to resolve, no harm would flow from denying the government’s motion to recognize the named individuals as Article 6b victims. The motion achieves nothing.

b. The government lacks standing to litigate who qualifies as an Article 6b victim and in any event its motion for reconsideration is untimely

The government needs no court order to afford Article 6b rights to individuals who come within the statutory definition. We know of no dispute between the government and the persons it proposes to treat as Article 6b victims; certainly none is mentioned in the

government's motions. But if there were some dispute -- which would arise only if the government were *denying* rights rather than *affording* them -- only those who claim Article 6b status would have a cognizable interest. The government itself cannot do so because the definition in Article 6b(b) refers to "individual[s],"¹ and the United States is not an individual. *E.g., Budde v. United States*, 797 F. Supp. 731, 738 (N.D. Iowa 1991).² As a result, even if its motions were not entirely academic, the government lacks standing.

Article 6b(e) confirms this. It provides for Article 6b victims to seek mandamus in the Courts of Criminal Appeals in certain circumstances. But the Court of Appeals correctly observed in *Randolph v. HV and United States*, 76 M.J. 27, 30 (C.A.A.F. 2017), that "Article 6b is meant to confer rights on *victims*, not the accused. It would violate congressional intent for this Court to review Article 6b cases upon petition by the accused but not the victim." (Emphasis in original.) The question of government standing to enforce Article 6b was not directly presented in *Randolph*, but the quoted passage leaves no room for doubt that the Court understood the victim to be the sole beneficiary of Article 6b and hence the only one who can invoke the judicial process to enforce its provisions.

The government has understandably not claimed to be acting for or on behalf of any of the putative victims, at least one of whom -- SCPO (Ret.) Hatch -- has legal representation. Trial counsel are not attorneys for government witnesses or putative victims; they represent only the United States. See Art. 38(a), UCMJ; RCM 502(d)(5). To represent both the government and a witness or putative victim could present a conflict of interest and in any event would violate Army Rule of Professional Conduct 1.13b. (The Army has made other arrangements for the provision of legal advice and other assistance to victims. See *generally* AR 27-10 ¶ 17-12b.)

The government's motion to reconsider AE 11 fares no better. RCM 801(a)(6)(B)(i) does not confer standing on the government; it merely required trial counsel to bring to the Court's attention the question of Ms. Allen's designation as her husband's representative.³ That ministerial duty did not confer standing to litigate the outcome. Alternatively, even if it did, the government's motion for reconsideration should be denied because it was not filed within a reasonable time and refers to no intervening developments such as to warrant reconsideration.

¹ "Most jurisdictions extend victims' rights only to natural persons." DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 43 (3d ed. 2010). Some jurisdictions include governmental entities, see *id.*, quoting Mich. Comp. Laws Ann. § 780.826. Article 6b(b) does not.

² For this reason, the two cases cited at the top of G APP 81 at 17 are completely inapposite. The government's motions turn on -- and fail to meet -- a specific statutory definition.

³ If the Court or the Army had denied Ms. Allen some Article 6b right, her remedy is a mandamus petition. But she has not been denied any such right, and she has not exercised her Article 6b(e) rights.

c. *The putative victims do not qualify under Article 6b*

1. *Article 6b(b) requires direct harm*

The motion should be denied as premature, but in the alternative, it should be denied because the putative victims are not in fact victims within the meaning of Article 6b. Article 6b(b) provides: “In this section, the term ‘victim of an offense under this chapter means an individual who has suffered *direct* physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice)” (emphasis added). While there has been limited military case law development related to this relatively new provision, military courts have acknowledged that it is based primarily on the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. *See, e.g., United States v. Rowe*, 2017 CCA LEXIS 89 (A.F. Ct. Crim. App. 2017). Therefore, it is instructive to review how the CVRA and other victims’ statutes have been applied to help determine whether an individual suffered *direct* harm within the meaning of Article 6b.

2. *Article 6b(b) defines “victim” more narrowly than other federal victims’ rights laws*

The definition of crime victim under the CVRA and other victims’ statutes is broader than under Article 6b(b). Under the CVRA, “[t]he term ‘crime’ victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense” 18 U.S.C. § 3771(e)(2). While harm is not limited under the CVRA, Article 6b(b), in sharp contrast, limits the harm to three categories.

Other victims’ statutes incorporate broader definitions than the one found in the UCMJ. Both the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. § 3663, and the Mandatory Victims Restitution Act of 1986 (MVRA), 18 U.S.C. § 3663A, define “victim” as follows:

a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663(a)(2), 18 U.S.C. § 3663A(a)(2). While a “victim” within the meaning of the VWPA and the MVRA is limited to offenses for which restitution may be ordered, the definition includes harm from criminal conduct in the course of a scheme, conspiracy, or pattern. Article 6b does not have so broad a reach.

Because the definition of “victim” differs among the CVRA, VWPA, and the MVRA, a person may qualify as a “victim” for the purposes of one statute but not another. *Cf. In re McNulty*, 597 F.3d 344, 350 n.6 (6th Cir. 2010) (noting that cases defining “victim” under VWPA and MVRA are not binding on the interpretation of the CVRA because the definitions vary). Similarly, because the definition is broader in the civilian federal statutes

than in Article 6b(b), it is possible for a person to be a “victim” under those statutes but not under the UCMJ. These differences militate against a broad borrowing approach as between the federal case law and cases arising under Article 6b.

3. *Even under civilian federal case law, MSG Allen, Mr. Morita, and SPCO (Ret.) Hatch should not be considered victims*

There is no federal case law directly on point or closely analogous to the case at bar. Nonetheless, it is instructive to see how the federal courts have grappled with the determination of victim status under the relevant statutes. Even if not expressly articulated as such, as a practical matter the courts apply a two-part test. See *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 536 (D.N.J. 2009). *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (per curiam), illustrates the analysis.

To determine a crime victim, then, first, we identify the behavior constituting “commission of a Federal offense.” Second, we identify the direct and proximate effects of that behavior on parties other than the United States. If the behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA.

Id. at 1288.

An alternative formulation of the first prong can be found in *In re McNulty*, 597 F.3d 344 (6th Cir. 2010). According to *McNulty*, “we must (1) look to the offense of conviction, based solely on facts reflected in the jury verdict or admitted by the defendant”. *Id.* at 351. Whether or not the two-part test is expressly articulated, there is a common thread in the case law: a focus on the underlying conduct that constitutes the commission of the offense.

In *United States v. Blake*, 81 F.3d 498 (4th Cir. 1996), the defendant was charged with stealing purses of elderly women and using their credit cards. Similarly, in *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006), the defendant was charged with stealing a woman’s wallet and using her credit card. Both defendants pled guilty to offenses involving *using* the stolen cards. *Blake* at 501; *Davenport* at 367. In each case, the women from whom the cards were stolen were not considered victims within the meaning of the MVRA or VWPA. This was because the conduct underlying the elements of the offense involved *using*, and not *stealing*, the cards. *Blake* at 507; *Davenport* at 374.

United States v. Sharp, 463 F. Supp. 2d 556 (E.D. Va. 2006), extended the *Blake/Davenport* framework to the CVRA. In *Sharp*, after the defendant pled guilty to conspiracy to possess with intent to distribute marijuana in violation of federal law, a putative victim sought standing as a “victim” under the CVRA. *Id.* at 557-58. She claimed that she had been physically, mentally and emotionally abused by one of the defendant’s customers and that the abuse was at least partly attributable to the drugs the defendant sold. *Id.* at 558-59. The court ultimately found that she lacked standing under the CVRA. *Id.* at 564. The court applied the analytical framework from *Blake* and *Davenport*, and

noted that a victim is directly and proximately harmed when the harm results from *conduct underlying an element of the offense of conviction*. *Id.* at 563. Applying that rationale, the court found that the specific conduct underlying the conspiracy to possess marijuana did not include assault and battery, some other variation of abuse, or any other violent conduct. *Id.* at 564 Furthermore, the abuse inflicted on the putative victim “neither assisted the defendant in the commission of his federal offense, nor was it an essential element necessary for the accomplishment of his criminal acts.” *Id.*

Under *Blake*, *Davenport*, and *Sharp*, merely being a “victim” does not make one a victim within the meaning of the governing statute. In each case, the would-be victim suffered harm. Further, the defendants in *Blake* and *Davenport* caused direct and actual harm to the putative victims. Nonetheless, the governing statute was interpreted to require that the harm be attributable to conduct underlying the offense charged. See also *United States v. Credit Suisse AG*, 2014 US Dist. LEXIS 144179, 11 (E.D. Va. 2014) (noting that “direct” harm element requires that the harm to the victim be closely related to the conduct inherent in the offense and must have been caused by the specific conduct that is the basis of the defendant’s offense of conviction).

Applying this analysis, MSG Allen, Mr. Morita, and SCPO Hatch are not victims within the meaning of Article 6b(b). For the first part of the two-part test, we must look to then PFC Bergdahl’s behavior which constitutes the commission of the offense. Or, as formulated in *Sharp*, *Blake*, and *Davenport*, we look to the conduct underlying the elements of the offense. Since the instant case remains at the pre-findings phase, the analysis should consist of the conduct underlying the allegations. *Cf. United States v. Oakum*, 2009 U.S. Dist. LEXIS 24401 4 (E.D. Va. 2009). In both Articles 85 and 99, the *only* conduct or behavior alleged is that then PFC Bergdahl left Observation Post Mest.

The second part of the test involves whether that conduct or behavior is the *direct* cause of the harm. Applying *Sharp*, *Blake*, and *Davenport*, leaving the Observation Post is not violent conduct, such as an assault and battery, which would cause injuries. As in *Sharp*, the injuries inflicted did not assist and were not an essential element necessary for the criminal acts alleged. Consequently, under the relevant federal case law analysis, MSG Allen, Mr. Morita, and SCPO Hatch may be “victims,” but they are not Article 6b(b) victims.

4. *The government has conflated the tests for Article 6b victim status and the admissibility of matter in aggravation*

Claiming that the test for whether an individual is a victim under Article 6b is functionally the same as whether evidence is admissible under RCM 1001(b)(4), the government has mistakenly sought to compress those separate issues into one. G APP 81 at 8 n.5. Merely because issues related to Article 6b and RCM 1001(b)(4) are similar does not mean that case law pertaining to the latter is precedent for victim status determinations under the former. Conversely, the case law that has developed under the civilian federal crime victim statutes is distinct from issues arising under RCM 1001(b)(4). It is as if the government had argued that the test for a hearsay exception for a present

sense impression is indistinguishable from the test for an excited utterance, an existing mental condition, or a dying declaration. While the concepts may on some level be analogous and perhaps even overlap, the concepts, required analysis, and case law are distinct. Similarly, while the law pertaining to Article 6b and RCM 1001(b)(4) may be persuasive or analogous from one to another, they should not be homogenized, as the government has sought to do. The Court should be alert to this dimension as it examines the government's contentions.

II

WITNESSES ARE NOT REQUIRED, BUT IF THEY ARE, THE DEFENSE NEEDS MORE TIME TO PREPARE

The defense will address the government's legal contentions at oral argument. The government having indicated that it intends to call witnesses, the defense objects because no witnesses are needed for the legal determination that the evidence at issue is inadmissible. If the Court for any reason allows witnesses, the defense will not be ready to proceed on 21-22 June.

a. The defense has not had the benefit of a Special Operations expert

The defense was granted an expert consultant in Special Operations on 6 June 2017 and spoke to him for the first time on 8 June 2017 and again this morning. That consultant was improvidently designated by the government because he is about to leave active duty. We learned at approximately 1640 hours today that we will now be provided a different expert. We have telephoned him and learned that he will not be able to meet with us until 20 June 2017. It will take time for him to become familiar with the case, and further time to assist the defense with understanding the highly complex and specialized nature of Special Operations missions. Such an understanding is critical for us to be able to examine witnesses and present a defense case if need be.

b. The defense still does not have access to all the discovery related to the Hatch mission

The defense still does not have access to all of the discovery related to the Hatch mission. Our previous consultant identified additional discoverable material that is required for analysis.

Pertaining specifically to SPCO Hatch, the government stated a year ago (in June 2016) that it would subpoena CNN outtakes as well as a draft of his book. It is virtually certain that the book and outtakes contain statements that are relevant to the substance of his testimony. The government has given no indication of when it will turn over this evidence.

Finally, the defense hopes to review the discovery material that is the subject of our 1 May 2017 motion to compel, D APP 62 (SECRET).

c. *The defense still does not have access to witnesses involved in the Hatch mission*

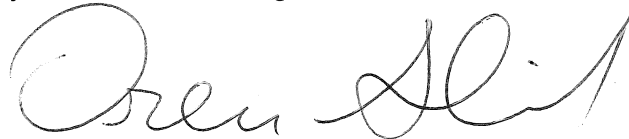
Not until 21 March 2017 did the defense gain full functionality of our discovery software program. Only then were we able to search our own materials and compile the documentation relating the mission in a coherent manner. From that documentation, we were able to develop a partial listing of personnel we believe are relevant. At the government's request, we attempted to work with the Command to obtain contact information for the personnel on that partial list. That list was provided in April. To date, we have only received information regarding a small number. While we certainly want to speak to them, it is crucial for us to speak to other relevant witnesses as well in order to have a complete understanding of the Hatch mission. In any case, in order to conduct productive interviews, it is obviously important to first review the relevant discovery material, discuss matters with our expert, and only then speak to the witnesses.

d. *No testimony should be received at this time*

Pursuant to MRE 804(b)(1), under certain conditions, the former testimony of a witness may be admissible. Should any of the witnesses the government wishes to call later become unavailable, their testimony could therefore be admissible at trial. Given the circumstances described above, the defense is not ready to cross-examine these witnesses. Therefore, it is unfair to take their testimony at this time.

CONCLUSION

For the foregoing reasons, the government's motions should be denied. For the reasons set forth in AE 11, there is no occasion for an evidentiary hearing at this time. In any event, the defense cannot be ready for such a hearing on 21-22 June.



OREN GLEICH
MAJ, JA
Defense Counsel

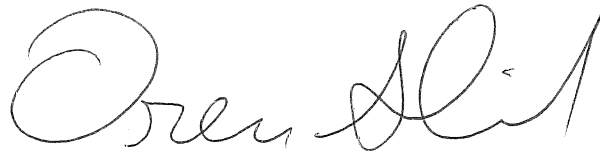
For

EUGENE R. FIDELL
LTC FRANKLIN D. ROSENBLATT
MAJ JASON D. THOMAS
MAJ LOUIS SCAPICCHIO
CPT JENNIFER D. NORVELL
CPT NINA S. BANKS
1LT(P) LORENA M. MAREZ

P. SABIN WILLETT
CAITLIN M. SNYDACKER
CHRISTOPHER L. MELENDEZ
Morgan, Lewis & Bockius LLP
One Federal Street
Boston, MA 02110-1726
(617) 951-8775

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 12 June 2017.

A handwritten signature in black ink, appearing to read "Oren Gleich", written in a cursive style.

OREN GLEICH
MAJ, JA
Defense Counsel