IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re J.F. *Petitioner*	**MOTION FOR LEAVE TO FILE MOTION TO RECONSIDER DENIAL OF STAY**
David H. HER **Technical Sergeant (E-6)** **United States Air Force** *Real Party in Interest*	Misc. Dkt. No. 2024-07

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

COMES NOW J.F. by and through her undersigned Victims' Counsel (VC) motioning for leave of the Court for reconsideration of the denial of the stay of the Court Order issued on 10 June 2024. To the extent the Court relied on the United States' opposition to the stay of the order, J.F. seeks to clarify incomplete information in the United States' opposition to the stay of the order, provide updated Health Insurance Portability and Accountability Act (HIPAA) guidance, and request reconsideration based on existing remedies. First, a stay is necessary to avoid irreparable injury of J.F.'s protected privacy interests because the Military Judge's order inherently requires production of J.F.'s protected mental health records to create non-existent lists. Second, a stay is an appropriate remedy because a stay would be available if the trial court issued a subpoena rather than an order. Lastly, unequivocally, the Defense Health Agency is a third party in the case-in-interest, both the United States and RPI acknowledges the Defense Health Agency is the custodian

of the subject health records and the records sought are in the custody of a third party.

The Military Judge's Order Requires the Production of Health Records not "Only a List."

The Military Judge's order requires J.F.'s records themselves to be produced to create the lists. The United States relays, "[b]ut the information ordered for production is neither a communication nor a record. ***The military judge ordered only a list of health diagnoses, prescriptions, and civilian providers apart from JF's communications and records.***" US Opposition at 4. While the order on its face simply requires a list, how to generate that list creates the privacy concern at issue.

The United States' framing emphasizes the commingled nature of the requested information: that these lists must be "apart" – separated from J.F.'s communications and records. The Military Judge's Order itself states:

ORDER

1. It is hereby ORDERED that the records custodian at the above-captioned Military Treatment Facilities (Kunsan Air Base/JB Langley-Eustis), shall deliver **as soon as practicable and no later than 1700 (EST) on 17 June 2024**, from SSgt J[redacted] F[redacted]'s records within the custody of the DHA and maintained at the Military Treatment Facilities between 1 March 2022 and present the following:

a. A list of any mental health diagnosis or diagnoses (from 1 March 2022 to present);

b. A list of any prescriptions related to such diagnosis or diagnoses; and

c. A list of medical treatments (from 1 March 2022 to present).

2. In complying with this court order, and making the necessary redactions to the responsive records, Military Treatment Facilities should work closely with a medical law attorney.

3. The appropriate medical professional, in coordination with the medical law attorney, will ensure any responsive records are redacted of all information not specifically identified in paragraph 1a-c above.

(Petition – Attachment K). In particular, the Military Judge orders production "from SSgt J.F.s ***records*** a list [. . .] ***any responsive records are redacted*** of all information. . ." The United States continues, "[h]ere the military judge narrowly tailored her order to a two-year window and a list with ***no accompanying records or communications*** to which the psychotherapist-patient privilege would apply." US Opp at 5. Yet, the Order seems to seek production of redacted medical records, not "only a list . . . apart from J.F.'s records," as the United States purports. At no stage have either the United States or the Military Judge laid out a factual basis to suggest—should J.F. have records with diagnoses, prescriptions, and medical treatments—there is a pre-existing list on top that can be plucked from everything that is protected. Neither have they proffered a basis to suggest that any individual would be able to create the final product in the form of a list without flipping through J.F.'s communications and records.

For such an accurate list to exist, someone must comb through file names and documents of the **protected** records to relay the diagnoses, treatments, and prescriptions which are **Protected** Health Information (PHI), albeit not uniformly privileged pursuant to *United States v. Mellette,* 82 M.J. 374 (C.A.A.F. 2022). Therefore, the product of the Military Judge's order begins with ***disclosure*** of any qualifying records that may exist to pick apart any information that would fit on the list. The United States' Response continues to ignore that *Mellette* and privileged material in the requested records may be co-mingled. Moreover, it conflates *privileged* and *protected* information. The result is that the Military Judge and United States mistakenly interpret *Mellette* as a loophole to circumvent the procedural requirements

of M.R.E. 513(e). The way to resolve the issue of how to obtain these records is, in part, following the procedural requirements of M.R.E. 513(e).

J.F. has a privilege to prevent disclosure under M.R.E. 513(a). It is a disclosure because the person creating the list would ***not*** ordinarily be permitted to access J.F.'s records unless that person is an actual provider to J.F.

> DoD Health Records contain PII and PHI, which are personal to the individual and must be properly safeguarded to avoid compromise of health information during the movement of the record inside and outside the MTFs and DTFs. ***Only medical personnel*** are authorized access to the information except as noted throughout this DHA-PM.

DHA-PM 6025.02, Volume I, *DoD Health Record Lifecycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records* at 73 (November 23, 2021) ("6025.02"). If J.F.'s actual provider, to the extent one exists, accessed the records, there would be no means for that provider to not rely on "[e]vidence of a patient's records or communications" which requires process under M.R.E. 513(e) before production. In short, such collation would assuredly require review of protected records, which definitively provides J.F. with standing. To the extent the Order is unclear, the default should be to protect J.F.'s statutory and Constitutional privacy interests in her medical records.

A Subpoena would not be Executed Pending a Petition to Quash

Second, the Military Judge's order is tantamount to a subpoena, giving J.F. the right to motion to quash, and resulting in non-execution of the subpoena until resolution of a petition for relief. In place of the subpoena, the Military Judge issued this order. If the Military Judge had issued a subpoena, J.F. had moved to quash the subpoena, the Military Judge had denied J.F.'s motion to quash, and J.F. had

petitioned this Court as the subpoena violated her rights under Article 6b and the Fourth Amendment, no one would seek to execute the subpoena while litigation was pending. This case is no different. This Court's order denying the Stay is the equivalent of ruling that J.F. has no redress *because* the Military Judge circumvents the R.C.M. 703 requirement to issue a subpoena as opposed to an extra-jurisdictional court order. *See United States v. Reinhart,* 2024 U.S. Dist. LEXIS 33155, at *4 (N.D. Tex. Feb. 27, 2024)(stating, "[r]elevant here, Rule 17(c)(3) [of Federal Rules of Criminal procedure used by all Federal district courts] provides the sole avenue for criminal defendants to obtain personal or confidential information about a crime victim from a third party.") To the extent a stay is practical and appropriate for a subpoena, it is also appropriate for the order. Accordingly, the stay of the Order makes sense and, in fact, is necessary to correct the incorrect ruling.

J.F. seeks a stay to allow her legal right to due process and rights provided her in HIPAA to be realized before invading her **Protected** Health Information. *Health Insurance Portability and Accountability Act of 1996* (H.I.P.A.A.) 42 U.S.C. §§ 1320d through 1320d-8 (hereinafter "HIPAA"). This stay would put the military justice system in parity with Federal district courts discovery practice as required by Article 46, UCMJ and Article 36, UCMJ.

Rule 4.4(a) of the Air Force Rules of Professional Conduct demands "(a) [i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." DAFI 51-110, *Professional Responsibility Program,* Attachment 2 (Dec. 2018). This rule is copied verbatim from

American Bar Association Model Rule of Professional Conduct 4.4, and the Comment to the ABA Rule states,

> [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

American Bar Association, *Model Rules of Professional* Conduct, Rule. 4.4 Comment https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_4_respect_for_rights_of_third_persons/comment_on_rule_4_4/ (last visited 11 June 2024). ***To be very clear, J.F. is not alleging any violations of professional responsibility by any attorney and there is no evidence of any violations***, but she references this rule to highlight the sensibility of staying the Order. If the Order is executed without the requisite due process, the same due process outlined in the subpoena requirements, irreparable violations of her legal rights as provided under the Constitution, Article 6b, and in HIPAA's Privacy Rule will occur. The stay allows for consideration of J.F.'s legal rights while she petitions this court for relief.

The Updated HIPAA Privacy Rule Highlights the Military Judge nor Trial Counsel have Access to Protected Health Information

Lastly, the United States' response ignores the updated HIPAA Privacy Rule that goes into effect on 25 June 2024 adding clarification as to "administrative requests" provided in 45 C.F.R. § 164.512(f)(1). In the rule HHS adds language to the provision stating,

> As we explained in the 2023 Privacy Rule NPRM, the Department [HHS] has become aware that some regulated entities may be interpreting 45 CFR 164.512(f)(1) in a manner that is inconsistent with the Department's intent. Therefore, the Department proposed to clarify the types of administrative processes that this provision was intended to address. Specifically, the Department proposed to insert ***language to clarify that the administrative processes that give rise to a permitted disclosure include only requests that, by law, require a regulated entity to respond***. Accordingly, the proposal would specify that PHI may be disclosed pursuant to an administrative request "for which a response is required by law." The Department does not consider this to be a substantive change because the proposal was consistent with express language of the preamble discussion on this topic in the 2000 Privacy Rule.397 The Department intends that the express inclusion of this language will ensure that regulated entities more fully appreciate the permitted uses and disclosures pursuant to 45 CFR 164.512(f)(1)(ii)(C).

HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 89 FR 32976 , 33044 (Apr. 26, 2024). DoDM 6025.18 adopts § 164.512(f)(1) at paragraph 4.4.(f)(1). In other words, to the extent a Military Judge or Trial Counsel could make an "administrative request" to seek PHI, as the United States alleges, those requests are only valid if enforceable under the law. As J.F. highlights in her petition, the Order at issue here is unenforceable; thus, even if renamed an "administrative request", it is not a valid process to demand production of PHI and not a means for the trial counsel or Military Judge to access J.F.'s PHI.

Importantly, J.F. is utilizing the Courts and processes outlined in the UCMJ to seek protection of her rights provided in the Constitution, in the UCMJ at Article 6b, and HIPAA—as opposed to direct objection of the disclosure to DHA. If a stay is not issued, J.F. will seek to object directly to DHA as is her right under HIPAA. J.F. nor her attorneys wish to impede the orderly and timely prosecution of her alleged abuser, but she does seek to ensure her rights afforded to her under the Constitution, Article

6b, and HIPAA are realized.

WHEREFORE, J.F. moves for reconsideration of the denial of the stay of the Court Order of the Military Judge.

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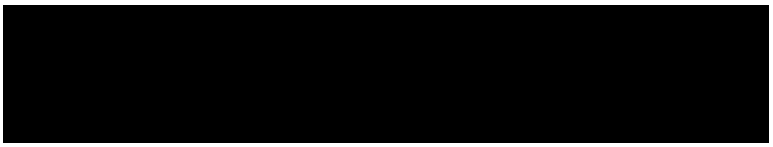

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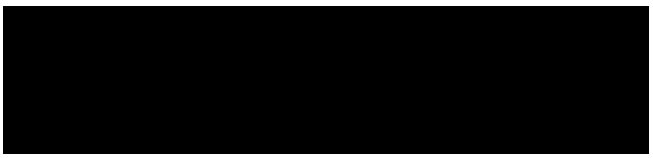

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I certify that on 12 June 2024, the foregoing was electronically filed with the Court and served on the following addresses:

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re J.F. *Petitioner*	)	**OPPOSITION TO MOTION FOR LEAVE TO FILE A MOTION TO RECONSIDER**
v.	)	Before Special Panel
UNITED STATES, *Respondent*	)	Misc. Dkt. No. 2024-07
	)	18 June 2024
Technical Sergeant (E-7) **DAVID H. HER** United States Air Force *Real Party in Interest*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(c) and 23.2 of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Petitioner's Motion for Leave to File Motion to Reconsider Denial of Stay, dated 12 June 2024.

The identification and redaction of privileged information under Mil. R. Evid. 513 will be conducted by the appropriate medical official such that only non-privileged Mellette information will be released from the mental health provider.

Petitioner asserts there is a privacy concern with respect to the military judge's order because in order to generate the list of diagnoses, prescriptions, and treatments, someone must "comb" through privileged medical records to identify non-privileged information. (Pet. Br. at 2.) Petitioner further asserts that the individual assigned to compile this list of non-privileged information would be a person who would not ordinarily be permitted to access JF's records unless that person is an actual provider to JF. (Pet. Br. at 4.) This is not the case.

As acknowledged by Petitioner, JF's mental health provider has access to JF's mental health records. (Id.) In addition to this provider, "medical personnel" acting at the direction of this provider also have access to JF's mental health records. *See* DHA-PM 6025.02, *Volume I,*

DoD Health Record Lifecycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records at 73 (November 23, 2021).

In this case, the military judge ordered that "[T]he **appropriate medical professional**, in coordination with the medical law attorney, will ensure any responsive records are redacted of all information not specifically identified in paragraph 1a-c above." *See* (Pet. Br. at 2.) (emphasis added) Therefore, under DHA regulations and the military judge's order, it is the mental health provider or someone acting at his or her direction, who will identify and compile the non-privileged Mellette information (diagnosis, prescriptions, and treatments). Contrary to Petitioner's assertion, the military judge's order does not contemplate providing access to JF's medical records to a person who would not otherwise have access under Defense Health Agency (DHA) guidance.

Petitioner also asserts that a review of these records by JF's actual provider would implicate Mil. R. Evid. 513 because there would be no means for that provider to not rely on "[e]vidence of a patient's records of communication" in compiling a list of non-privileged information. (Pet. Br. at 4.) However, Mil. R. Evid 513 is not implicated by access to the records by the psychotherapist or his or her assistant. *See* Mil. R. Evid. 513(b)(3). Therefore, once the psychotherapist (mental health provider) is identified, this individual could either conduct the review him or herself or direct his or her assistant to do the same. Mil. R. Evid 513 is not involved because this records review is done by individuals with pre-existing access to the records and does not require any disclosure of confidential communications beyond the psychotherapist or his or her assistant. As a result, the procedures to determine the admissibility of patient records or communications are not implicated. *See* Mil. R. Evid. 513(e).

The military's judge's order and direction to separate privileged from non-privileged information in this case is similar to that adopted and used by the military judge in B.M. v. United States, where the military judge's order to the mental health facility articulated the records to be produced as "...only records containing no actual communications and indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescriptions, and/or treatment, and the date the diagnosis was resolved, if applicable." 83 M.J. 704, 710 (N.M. Ct. Crim. App. 2023), *affirmed,* 2024 CAAF Lexis 201 (C.A.A.F. 2024). Similarly, in this case, the military judge requested a list of non-privileged information including mental health diagnosis or diagnoses, related prescriptions, and a list of medications. (Pet. Br. Attach K at 2.) The military judge in this case ordered in bold print "**None of the responsive records should include confidential communications between [JF] and any mental health provider."** (Id. at 2-3.)

In accordance with the military judge's order in B.M, no privileged information should have been released from B.M.'s mental health provider. B.M., 2024 CAAF LEXIS 201 at 18. Nevertheless, in B.M., the mental health provider erroneously provided nonresponsive mental health records that were privileged. Id. at 22. The Service Court of Criminal Appeal (CCA) reasoned that when, under such circumstances, a military judge inadvertently encounters material privileged under Mil. R. Evid. 513(e)(2), the military judge should cease his or her review, and conduct a hearing as contemplated in Mil. R. Evid. 513(e); alternatively, the military judge should order a taint team to review the records for privileged material and redact them. B.M. at 83 M.J. at 710. On appeal, CAAF similarly reasoned that when the military judge realized that the records contained privileged information, she should have halted her review and invoked the procedures required under Mil. R. Evid. 513(e); or she could have halted her review and returned

the records to the mental health facility as nonresponsive and ordered compliance with the terms of the order. Id. at 22.

Here, the military judge's order is clear that no privileged information should be released from the mental health clinic. (Pet. Br. Attach. K at 1-2.) However, as suggested by CCA in B.M., the military judge ordered the functional equivalent of a "taint team" to ensure that the requested records comply with her order. (Pet. Br. Attach K at 2.) The military judge directed that

> [O]nce the records are delivered to the Government, an attorney, unaffiliated with the above-captioned court-martial will immediately review the records to confirm their compliance with the Court's previous ruling and United States v. Mellette before providing them to the Defense in discovery.

(Id.)

Here, in the event privileged materials are discovered by the individual appointed by the military judge, the military judge may, consistent with the CCA and CAAF's reasoning, invoke the procedures required under Mil. R. Evid. 513(e); or return the records to the mental health facility as nonresponsive and order compliance with the terms of the order. B.W., 2024 CAAF LEXIS 201 at 22.

This situation is distinguishable from In re RW, 2024 CCA LEXIS 71 (A.F. Ct. Crim. App. 2024) (unpub. op.). In RW, the military judge did not appoint the "appropriate medical person" to conduct the records review for privileged information at the mental health clinic, but instead tasked the commander of the clinic and the medical law attorney to conduct the review. RW, 2024 CCA LEXIS 71, at 9. The medical law attorney declined to participate in the review because he did not have the necessary time or expertise. Id. As a result, a JACC medical law attorney was ordered by the military judge to review RW's medical records and redact any

privileged material. Id. The court found that the military judge's order was beyond his authority for two reasons:

> First, the transmittal of the records from the records holding agency to an apparently unaffiliated attorney for review and redaction constituted an unauthorized disclosure of Petitioner's mental health records, over Petitioner's objection, within the meaning of Mil. R. Evid. 513(a). Second, the military judge effectively ordered the JACC attorney to conduct an Mil. R. Evid. 513 review, and only the military judge is authorized to conduct the review.

Id. at 18.

In this case, unlike RW, the military judge has ordered the "appropriate medical professional" in coordination with the medical law attorney, to ensure any responsive records are redacted prior to leaving the mental health facility. (Pet. Br. Attach. K at 2). This is not the wholesale release of JF's medical records to an unrelated third party for review and redaction – as was the case in RW. Instead, the redactions are being made either by JF's mental health provider or someone at his or her direction, consistent with DHA guidance. As discussed above, this internal review does not implicate Mil. R. Evid. 513 because these individuals have access to the records as the psychotherapist/assistant and there is no anticipated disclosure a of confidential communication.

Enlisting the assistance of the appropriate medical personnel and his or her assistant makes it less likely that privileged information will be released. All health records are required to include the diagnosis, treatment and services rendered to promote continuity of care. *See generally* DHA-PM 6025.02, Volume I, DoD *Health Record Lifecycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records*, at 22 (November 23, 2021) As a result, the items necessary to generate the military judge's list should be immediately identifiable to the appropriate medical professional such and it will likely be unnecessary to have

"comb" or sift through a privileged patient "communication" to generate this list. Afterall, it is the psychotherapist/provider and not the patient who comes up with the diagnosis, prescribes the medication, and a plan of treatment. Moreover, if there is a change in a medical provider it is unreasonable that a new provider would be required to sift or comb through patient communications to discern a previous provider's diagnosis, medication and treatment. Rather, the information ordered by the military judge should be readily apparent to a new provider so that he or she will be able to pull this necessary and unprivileged information in the interest of providing expeditious continuity of care. (Pet. Br. at 3.) In short, complying with the miliary judge's order should require little to no review of a patient's confidential communications.

Nevertheless, there exists the possibility that some privileged information may be disclosed. Notably, when dealing with confidential information of any kind there is always the possibility that someone will make a mistake. In order to mitigate this concern, the military judge appointed an attorney, unaffiliated with this case, to review the material from the mental health clinic to ensure that it is responsive to the order. This attorney is not expected to substantially review or redact these records, instead, his or her sole responsibility is to ensure that the appropriate medical official complied with the military judge's order. This review is not the equivalent of an Mil. R. Evid. 513 review – it is only to ensure only responsive, nonprivileged documents are produced.

In sum, the military judge's order is carefully drafted such only the appropriate medical professional in coordination with a medical law attorney are to review JF's mental health records for privileged information. This review is consistent with DHA policies and does not implicate Mil. R. Evid. 513 because this review is done by authorized individuals, and it does not anticipate the disclosure of confidential communications. The military judge properly assigned a

taint team attorney, unaffiliated with this case, whose sole responsibility is not to review or redact medical records, but instead ensure to mental health clinic complied with the military judge's order. Accordingly, this Court should deny Petitioner's motion for reconsideration.

The military judge's order is the appropriate medium to request the medical information from the medical treatment facility.

Petitioner asserts that the military judge did not have authority to issue the order and that it is unenforceable under HIPAA. (Pet. Br. at 5-7.) This is not the case. Irrespective of whether JF's medical records are within the control of military or government authorities, the records are subject to compulsory process. *See* United States v. Warda, 84 M.J. 83, 91 fn.11 (C.A.A.F. 2023).

In Warda, trial defense counsel requested immigration information held by the United States Customs and Immigration Service (USCIS). Id. at 91. Both trial and defense reasoned that the USCIS records were not subject to compulsory process; CAAF disagreed and determined that the records were indeed subject to the court's compulsory process. Id. In a footnote, the Court reasoned as follows:

> Arguably, the requested records are subject to compulsory process. 8 U.S.C. § 1367(b) sets forth multiple exceptions for permissive disclosure. This provision was implemented in Dep't of Homeland Security, Instr. 002-02-001, Revision 00.1, Implementation of Section 1367 Information Provisions para. VI.A.1. (issued Nov. 7, 2013, and incorporating change 1 on May 28, 2019), which recognizes statutory exceptions under 8 U.S.C. § 1367 that "allow[] for disclosure of protected information in limited circumstances" and acknowledges non-statutory exceptions in "instances in which disclosure of protected information is mandated by court order or constitutional requirements." Indeed, the Government conceded in response to the defense motion to dismiss or abate proceedings that disclosure may have been authorized under one of the statutory exceptions enumerated in 8 U.S.C. § 1367(b).

Id. at 91, fn11.

In Warda, USCIC was permitted to disclose the immigration information "for a legitimate law enforcement purpose" *See* 8 U.S.C. § 1367(b)(2). Moreover, Department of Homeland Security Instruction (DHS) 002-02-001, recognized the statutory exceptions and non-statutory exceptions and provided that such information could be released "in connection with judicial review of a Federal agency or court determination in a manner that protects the confidentiality of such information." DHS Instruction 002-02-001, *Implementation of Section 1367 Information Provision,* (7 Nov 2013).

In light of the statute and the DHS Instruction, CAAF reasoned that the immigration records were subject to compulsory process; and in the event USCIS failed to comply with the military judge's order, the matter should be raised by military officials at high levels within the executive branch. Warda, 84 M.J. at 96.

Here, trial defense counsel has requested evidence held by a Defense Health Agency (DHA) Medical Treatment Facility (MTF) and the military judge has ordered the production of certain information. Similar to Warda, this information may be released by the covered medical treatment facility pursuant to a court order under 45 C.F.R. 164.512.

> (1) A covered entity [Medical Treatment Facility] may disclose protected health information in the course of any judicial or administrative proceeding:
>
> > (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order;

45 CFR 164.512(e)(1)(i)

In addition to the code of federal regulations, Department of Defense Manual (DoDM) similarly provides for release of this information in response to a court order. DoDM 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy*

Rule in DoD Health Care Programs, ¶ 4.4.f.(1)(b)1 (13 March 2019). Notably, DoDM 6025.18 is agnostic to the court that issues the order and its organic authority; it levies no further requirements on the issuing court. Therefore, the military judge has the authority to order the medical treatment facility, a DoD agency, to release of the records with the appropriate protective order. *See* Warda, 84 M.J. at 96 (Ohlson, C.J., concurring). Should the MTF fail to release this information, the matter should be raised by military officials at high levels within the executive branch. Id.

Petitioner lastly asserts that the United States failed to consider the updated HIPAA Privacy Rule that has yet to go into effect on 25 June 2024. (Pet. Br. at 6-7.) However, even if this update were in effect, Petitioner acknowledges that the change is not a substantive change, and it only applies to administrative requests. (Pet. Br. at 7.) In this case the military judge has issued an enforceable judicial request for certain information in accordance with 45 CFR 164.512(e)(1)(i) and DoDM 6025.184.4.f.(1)(b)1. Therefore, under its own regulations, the MTF is obligated by law to follow the military judge's order.

Conclusion

The United States opposes Petitioner's Motion for Leave to File Motion to Reconsider Denial of Stay, dated 12 June 2024. The information sought by the military judge does not require the disclosure of privileged communications. Moreover, the military judge has the authority to issue an order for the production of this evidence. This authority is consistent with Department of Defense regulations and therefore the MTF is required to produce the requested information. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Defense Division and Victim's Counsel on 18 June 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re JF	)	**Misc. Dkt. No. 2024-07**
Petitioner	)	
	)	
	)	
	)	
	)	**ORDER**
	)	
David H. HER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Real Party in Interest	)	

Petitioner is a named victim in the general court-martial of Technical Sergeant David H. Her at Kunsan Air Base, Republic of Korea. The charges include violations of Article 120, 128 and 128b, UCMJ, 10 U.S.C. §§ 920, 928, 928b; Petitioner is named in one specification under Article 120, UCMJ. On 7 June 2024, Petitioner filed a petition requesting relief in the form of a writ of mandamus. Specifically, Petitioner requests a writ should issue to vacate the military judge's order to produce health information pertaining to her. On this same date, and accompanying the petition, Petitioner filed a motion to stay the military judge's order. This court docketed the petition on 7 June 2024. On 9 June 2024, the Government opposed Petitioner's motion to stay.

Petitioner contends that "[t]he stay prevents the trial court from continuing to pursue production of [JF]'s sensitive, protected, and private medical and mental health records, the disclosure of which violates the privacy rights Congress and the President intended to protect via Article 6b, [UCMJ]; [Mil. R. Evid.] 513; and the U.S. Constitution" and will allow Petitioner "to seek redress from this court on an issue of law."

We decline to issue a stay.

Accordingly, it is by the court on this 10th day of June, 2024,

ORDERED:

Petitioner's Motion to Stay Order dated 7 June 2024 is hereby **DENIED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re J.F. *Petitioner*	)	**UNITED STATES OPPOSITION TO MOTION TO STAY**
v.	)	Before Special Panel
UNITED STATES, *Respondent*	)	Misc. Dkt. No. 2024-07
	)	9 June 2024
Technical Sergeant (E-7) **DAVID H. HER** United States Air Force *Real Party in Interest*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(c) and 23.2 of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Petitioner's Motion to Stay Trial Proceedings, dated 7 June 2024.

Opposition to Motion to Stay

"Issuance of an extraordinary writ staying court-martial proceedings requires the careful exercise of discretion." United States v. Beck, 56 M.J. 426, 427 (C.A.A.F. 2002). In considering whether to grant a stay of proceedings in a given case, "a court must tread carefully . . . , since a party has a right to a determination of its rights and liabilities without undue delay." Ohio Environmental Council v. United States Dist. Court, Southern Dist., etc.., 565 F.2d 393, 396 (6th Cir. 1977).

The Supreme Court provided general guidance for federal district and appellate courts on when to grant a stay in Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Hilton guidance reviewed Federal Rule of Appellate Procedure 8 and not a Rule for Courts-Marital, but the guidance is highly persuasive. Because Article 36, UCMJ, encourages alignment of the military

rules and procedures with the federal courts, the Hilton standard should be applied here as well. In Hilton the Court provided these factors for issuing a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
> (2) whether the applicant will be irreparably injured absent a stay;
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
> (4) where the public interest lies.[1]

Id.

A stay of proceedings is inappropriate because JF has not made a strong showing that she is likely to succeed on the merits. To prevail on the merits of a petition for a writ of mandamus, a petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012) (per curiam) (citing Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380 (2004)). The writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380 (2004) (internal citations omitted). The issuance of a writ is unclear and disputable here because of the military judge's order to produce nonprivileged records without first holding a hearing under Mil. R. Evid. 513 was not erroneous.

[1] The rest of the motion response focuses on the first Hilton factor. But the remaining factors will be briefly addressed here. JF has not articulated how the release of her nonprivileged diagnoses, prescriptions, and off base medical provider information will cause her to be irreparably injured absent a stay – considering the law under Mellette permits their release. Further, the military judge has issued a protective order over the information to be produced, which also diminishes the chance of irreparable harm to Petitioner. Issuing a stay will injure the accused's right to a speedy trial and the government's interest in expedient justice if the resolution of the petition impedes the 12 July 2024 trial date. And finally, society has an interest in swift justice, and interlocutory matters about mental health information that CAAF has determined are releasable is an undue delay that impedes society's interest in justice.

A. The court only ordered Mellette information stripped of any accompanying records or communications. The order falls outside the privilege and protection of Mil. R. Evid. 513.

The military judge drafted a limited order, and JF's privileged mental health records and communications were not to be produced. Thus, she lacks standing as a patient under Mil. R. Evid. 513. The military judge specifically ordered the production of only non-privileged materials. The military judge's order provides that "None of the responsive records should include confidential communications between [JF] and any mental health provider." As a result, JF cannot claim privilege as a patient under Mil. R. Evid. 513 requiring a writ of mandamus under the All Writs Act or a stay of proceeding. 28 USC 1651. Her Mil. R. Evid. 513 privilege and right to privacy were not violated by the court's order.

An appellate court may only hear a petition for writ of mandamus from a nonparty under Mil. R. Evid. 513(e)(1) if the rule applies to the evidence at issue. The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. 28 USC 1651. Relief is available via a writ of mandamus if Mil. R. Evid. 513 applies, but in this case, it does not apply to the court ordered information.

Mil. R. Evid. 513's general rule provides patients the privilege "to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist." Mil. R. Evid. 513(a). The communications are protected if they were made for diagnosing or treating the patient's mental health. Id. As a privilege, the language of Mil. R. Evid. 513 is narrowly construed. Trammel v. United States, 445 U.S. 40, 50 (1980). Based on the plain language of Mil. R. Evid. 513, CAAF concluded "that diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513." United States v. Mellette, 82 M.J. 374, 375 (C.A.A.F. 2022). "If the President intended M.R.E. 513(a) to broadly protect all patient medical records,

the President could have used express language that unambiguously reflected that intent." Id. at 378.

JF relies heavily on Mil. R. Evid 513(e) as the basis for her claimed harm. (Pet. Br. at 8). But her reliance is misplaced. "In any case in which the **production** or admission **of records or communications** of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge." Mil. R. Evid. 513(e)(1) (emphasis added). But the information ordered for production is neither a communication nor a record. The military judge ordered only a list of health diagnoses, prescriptions, and civilian providers apart from JF's communications and records.

The military judge ordered "[a] list of any mental **health diagnosis or diagnoses**; and any **prescriptions** related to such diagnosis or diagnoses for [JF], from 1 March 2022 through the present." (Pet. Br., Attachment K) (emphasis added). The military judge foot stomped with a bolded statement, "**None of the responsive records should include confidential communications between [JF] and any mental health provider**." (Id.) (emphasis in the original). The military judge did not order any communications or records. She only ordered the medical group to produce a list of the diagnoses, a list of any prescriptions related to such diagnosis or diagnoses; and a list of medical treatments. Before ordering production of this information, she made a relevancy determination under R.C.M. 701, as was appropriate. (Pet. Br., Attachment J at 6).

The specificity with which the military judge crafted his order here reflected the guidance that Chief Judge Ohlson provided in the concurrence of B.M. v. United States, 2024 CAAF LEXIS 201, *25 (C.A.A.F. 2024). The concurrence suggested that military judge's order affidavits or narrowly tailored interrogatories to list the non-privileged Mellette materials. Id.

Here the military judge narrowly tailored her order to a two-year window and a list with no accompanying records or communications to which the psychotherapist-patient privilege would apply. If Mil. R. Evid. 513 applied in this case, then JF may be able to claim the privilege as a patient and a victim under Article 6b. Mil. R. Evid. 513(b)(5). But because of the narrow nature of the ordered information and our superior court's binding precedent in Mellette, Mil. R. Evid. 513 does not apply to the requested information. Thus, JF has no basis for a claim of privilege – and no standing. Because her petition for writ of mandamus would fail under M.R.E. 513, a stay of proceeding is inappropriate. Further, because the military judge issued a protective order over the limited documents to be released (Pet. Br., Attachment L), JF is unlikely to suffer irreparable harm. This is another reason why a stay indefinitely delaying this trial is appropriate.

B. Prosecutors and the military judge have the authority to obtain medical records through Health Insurance Portability and Accountability Act (HIPAA) for judicial and law enforcement purposes.

Petitioner asserts that a stay is necessary so that she may be able to protect her rights under HIPAA. (Pet. Br. at 8, 14-15.) While Petitioner has a right to privacy that encompasses her confidential medical information, that right is not absolute and "must be weighed against the [G]overnment's interest in obtaining the records in particular circumstances." In re AL, No. 2022-12, 2022 CCA LEXIS 702, at *14 (A.F. Ct. Crim. App. 7 December 2022) (unpub. op.) (*quoting In re Grand Jury Subpoena*, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002) (additional citation omitted)

No one is claiming that HIPAA does not apply to JF's records, but prosecutors may obtain medical records through HIPAA for a valid law enforcement purpose. Recent proclamations by the Undersecretary of Defense for Personnel and Readiness do not change this access. (See Pet. Br. at 14-15.) DoDM 6025.18, ¶ 3.1.b.(5). DoDM 6025.18, ¶ 3.1.b.(5), entitled

*Other Permitted and Required Uses and Disclosures That May be Made Without Authorization or Opportunity to Objec*t, lists 12 instances where, subject to specific terms and conditions, DoD covered entities may use or disclose protected health information (PHI) without the individual's authorization or opportunity to object. Some of those situations include judicial and administrative proceedings, law enforcement purposes, specialized government functions, including certain military services' personnel activities, when required by law, and in cases involving victims of abuse or neglect. DoDM 6025.18, ¶ 4.4(f)(1)(b)(3).[2]

In this case, the military judge relied on DoDM 6025.18, ¶ 4.4.e. (1)(a) which specifically authorizes disclosure of protected health information (PHI) by a DoD covered entity in the course of any judicial proceeding in response to a court order, provided that the DoD covered entity discloses only the PHI expressly authorized by such order. DoDM 6025.18, ¶ 4.4.e. (1)(a) Thus in this situation, but the military judge and trial counsel independently had a means to gain access to JF's PHI.

Therefore, while HIPAA applies to the information requested by the military judge's orders, DoDM 6025.18 provides the exceptions and the procedures to obtain this information. Because such information is releasable for judicial proceedings it is unlikely Petitioner would prevail on the merits, and a stay of the proceedings is therefore inappropriate.

[2] This section states a DoD covered entity may disclose PHI in compliance with the relevant requirements of an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if the information sought is relevant and material to a legitimate law enforcement inquiry, the request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought, and de-identified information could not reasonably be used.

CONCLUSION

The United States opposes Petitioner's motion for stay of proceedings pending disposition of writ-appeal petition, and the United States desires to proceed with the court martial as scheduled on 12 July 2024. There is no good cause to delay a court-martial proceeding for this court-martial. A stay is not warranted. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion for stay in the proceeding of United States v. TSgt David H. Her.

[redacted]
ZACHARY A. ETHAKIS, Col, USAF
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[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Defense Division and Victim's Counsel on 9 June 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re JF	)	**Misc. Dkt. No. 2024-07**
Petitioner	)	
	)	
	)	
	)	
	)	**NOTICE OF DOCKETING**
	)	
David H. HER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Real Party in Interest	)	

On 7 June 2024, this court received a petition for extraordinary relief pursuant to Article 6b, UCMJ, 10 U.S.C. § 806b, in the nature of a Writ of Mandamus and a Motion to Stay Order in the above-styled case.

Accordingly, it is by the court on this 7th day of June, 2024,

ORDERED:

The case is assigned Misc. Dkt. No. 2024-07 and referred to a Special Panel. The Special Panel will be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
KEARLEY, CYNTHIA S., Colonel, Appellate Military Judge

No briefs in response to this petition will be filed unless ordered by the court.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re J.F. *Petitioner*	**PETITION UNDER ARTICLE 6b FOR RELIEF** *in the form of a* **WRIT OF MANDAMUS** and **MOTION TO STAY ORDER**
TSgt David H. Her **United States Air Force** *Real Party in Interest*	Misc. Dkt. No. 2024-XX

COMES NOW J.F. by and through her undersigned Victim's Counsel (VC), petitioning for a writ of mandamus under Article 6b(e) in accordance with A.F. CT. CRIM. APP. R. 19. Military Judge Col J[redacted] E. P[redacted]'s ruling (*Email Granting Issuance of an Order* – Attachment 1) to issue an Order (*Military Judge's Order* - Attachment 2) demanding production of J.F.'s private mental health information violates J.F.'s rights by not providing due process. J.F. is a named victim in the case in interest, *United States v. TSgt David H. Her*. She is a victim as defined in Article 6b(b), and the Military Judge's order in the case in interest violates J.F.'s right to be treated with fairness and with respect for her dignity and privacy as guaranteed under Article 6b(a)(9). J.F. also has the right to be free of unreasonable searches and seizures guaranteed by the Fourth Amendment of the U.S. Constitution. J.F. holds a legally recognized privilege to prevent another person from disclosing her privileged mental health treatment information under M.R.E. 513; as the holder of

the privilege, she can avail herself of process that prevents violation of that privilege contained in protected records. J.F. seeks an immediate stay of the Military Judge's Order to produce her Protected Health Information (PHI) without due process and writ should issue to vacate the Order. Capt Sonya Tomasiewicz appears *pro hac vice* and will apply for admission to this Court. Capt Kyle Hoffmeister and Ms. Devon A. R. Wells are admitted to this Court.

JURISDICTION

Article 6b(b) states, "Victim of an offense under this chapter defined. 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 [U.C.M.J.]." Article 6b(b), U.C.M.J. (emphasis in original). Such victims have jurisdiction under Article 6b(e) to seek a writ of mandamus to order Military Judge P[redacted] to afford J.F. due process and respect her privacy as Article 6b(e) states, "(1) If the victim of an offense under this chapter believes that [. . .] 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 court-martial to comply with the section (article) or rule." Article 6b(e)(4) allows Article 6b victims to petition the Court of Criminal Appeals for a writ of mandamus to ensure protections by, *inter alia*, (A) Article 6b itself, and (D) Military Rule of Evidence 513. Per the attached charge sheet, J.F. is a qualifying named victim of a

U.C.M.J. offense in *U.S. v. TSgt Her*. (*US v Her Charge Sheet* – Attachment A). The two sources of rights come from Article 6b(a)(9) and M.R.E. 513.

STANDARD OF REVIEW

This petition seeks a writ of mandamus issued under Article 6b(e) as the Military Judge failed to afford J.F. required due process under Article 6b and M.R.E. 513; the resulting order violates the requirements of M.R.E. 513 by invading J.F.'s legitimate privacy interests in her Protected Health Information without complying with Mil R. Evid. 513(e). The standard of review for such a petition is *de novo*. *United States v. Mellette*, 82 M.J. 374, 377 (C.A.A.F. 2022) (citing *United States v. Beauge*, 82 M.J. 157, 161 (C.A.A.F. 2022)). J.F. asserts the appropriate standard of review for petitions for writ of mandamus under Article 6b(e)'s specific jurisdictional scheme should be ordinary standards of appellate review; this issue is pending before C.A.A.F.

In re K.K. established this Court's standard for issuance of a writ. 2023 CCA Lexis 31 (A.F.C.C.A. 2023). Accordingly, J.F. must show, "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." Id., *see also Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United State Dist. Court*, 542 U.S. 367, 380–81 (2004)).

If the Court finds J.F.'s Petition appropriate under Article 6b(e), she seeks issuance of a writ of mandamus as Article 6b *requires* this mode of relief. The issuance of a writ by this Court is the statutorily prescribed method for enforcement

of victims' rights. As a result, issuance of a writ under Article 6b(e) is always an appropriate act of this Court. In short, the only *Cheney* criteria necessary to satisfy is that J.F.'s right to an issuance of the writ is clear and indisputable.

STATEMENT OF FACTS

On 26 October 2023, the 8th Civil Engineer Squadron Commander preferred three charges against the Accused, including violations of Articles 120, 128, and 128b, U.C.M.J. On 1 November 2023, the Seventh Air Force Commander (the General Court-Martial Convening Authority) referred the charges and their specifications to a general court-martial. (Attachment A). On 12 January 2024, the accused was arraigned on all of the charged offenses. Trial is scheduled to reconvene on 12 July 2024.

The Accused is charged with one specification of sexual assault of J.F. on or about 18 December 2021, in violation of Article 120, U.C.M.J. On 11 January 2024, Trial Counsel notified Defense Counsel that during a witness interview with MSgt L. W., MSgt L. W. stated that J.F. was "in in-patient care around the time of March or April 2022." (Attachment B). On 25 January 2024, the Defense submitted a discovery request in the above-captioned case. (Id.) As part of its request, the Defense requested "[r]ecords of diagnoses and treatments in any/all medical or mental health records of the Complaining Witnesses which are in the custody and/or control of military authorities and pertain to or bear on the allegations in this case; or otherwise affecting [their] credibility[.]" Id. Based on information provided to the Defense in discovery relating to J.F.'s in-patient treatment in March

or April 2022, the Defense further requested "the Government make inquiries to determine if [] evidence exists and provide notice of its existence or non-existence." Id. The Defense also requested "the Government review all records pertaining to [J.F.'s] service, to include medical records in the possession of the DoD or Tricare[,]" citing *United States v. Mellette*, 82 M.J. 372 (C.A.A.F. 2022). Id. at 6. Trial Counsel emailed the VCs for J.F., requesting evidence responsive to Defense's requests. The VC replied they had nothing responsive to the requests and asserted all privileges under M.R.E. 513.

On 14 February 2024, Trial Counsel emailed the Department of Defense, Defense Health Agency's[1] (DHA) Office of the General Counsel, to request J.F.'s mental health records covered under *United States v. Mellette*. (Id.). On 21 February 2024, VC for J.F. emailed Mr. Victor Chen, DHA Office of General Counsel, objecting to any release of J.F.'s mental health records, asserting privilege under

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[1] The Defense Health Agency is the Congressionally mandated Defense Agency (10 USC § 101(11)) established by Department of Defense Directive 5136.13, *Defense Health Agency* that:

> a. Manages TRICARE, integrating health care delivery under the direct care and private sector care components of the Military Health System (MHS).
> b. Manages and executes the Defense Health Program (DHP) appropriation and MHS funding from the Medicare Eligible Retiree Health Care Fund, as directed by the Assistant Secretary of Defense for Health Affairs (ASD(HA)).
> c. Manages military medical treatment facilities (MTFs), in accordance with Sections [10 USC §] 1073c and [10 USC §] 1073d . . . and other applicable requirements of law, functioning as the single agency responsible for the administration of MTFs.
> d. Ensures coordinated management of health care markets to create and sustain a cost-effective, coordinated, and high-quality health care system.
> e. Exercises management responsibility for enterprise activities, functions, and services of the MHS and its common business and clinical processes, as directed by the ASD(HA).
> f. Supports the effective execution of the DoD medical mission.

HIPPA and M.R.E. 513. (Attachment D). On 28 February 2024, Mr. Victor Chen notified Trial Counsel that J.F.'s VC, on behalf of J.F., "object[ed] to any release of her mental health records." In his email, Mr. Chen further concluded, "the requirements under DoDM 6025.18, para. 4.4.e.(1)(c) are not met" and "[a]bsent a qualified protective order satisfying the requirements under para. 4.4.e.(1)(e), DHA is unable to release the requested records without violating HIPAA." (Attachment B).

On 21 March 2024, Defense filed a Motion for Relief and Protective Order, requesting the Military Judge order the Defense Health Agency (DHA) to produce J.F.'s mental health records and information, specifically any diagnoses, treatments, or prescriptions. See Defense Motion. On 28 March 2024, the Government submitted a response, stating it did not oppose an *in camera* review of J.F.'s medical records to determine if discoverable information should be released. See Government Response.

On 28 March 2024, VC for J.F. filed a response requesting the Military Judge deny Defense's motion in full and requesting an Article 39(a), UCMJ, hearing to address the issue. (Attachment D). VC objected on the basis that Defense's request failed to recognize a procedural requirement for a hearing under M.R.E. 513(e) prior to ordering the production of any records relating to mental health. Additionally, VC stated Defense failed to satisfy the prerequisites for discovery and production under R.C.M.'s 701 and 703, respectively. Lastly, VC emphasized that the Military Judge lacked authority over DHA to issue the requested court order

because DHA is not a military authority. On 17 April 2024, the Military Judge requested answers to questions pertaining to Defense's MAR in the form of a Supplemental Filing, to which all parties responded. (Attachment E).

On 3 June 2024, the Military Judge issued a ruling, granting Defense's request to order production of J.F.'s non-privileged mental health diagnoses, treatments, and related prescriptions for the date range 1 March 2022 to present. (*Ruling* – Attachment J). The Military Judge ordered a DHA employee to redact records in concert with a DHA Attorney.[2] Further, the Military Judge issued orders for production and protection for J.F.'s mental health records, specifically mental health diagnoses, prescriptions, and treatment from 1 March 2022 to the present. (*Military Judge Order* – Attachment K; *Order to Protect* – Attachment L). In the ruling, the Military Judge determined that "an Article 39(a), U.C.M.J., session was unnecessary to resolve the motion for appropriate relief," and that, "J.F. did not have standing to be heard on defense counsel's motion." (Attachment J at Footnote 3).

STATEMENT OF THE ISSUES

J.F. petitions this Court for relief in the form of a writ of mandamus issued pursuant to Article 6b(e), as the Military Judge's rulings violate J.F.'s rights to be

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[2] The Military Judge orders "Military Treatment Facilities should work closely with a medical law attorney." A "medical law attorney" is no longer a position within DHA, the structure of legal services in the DHA is outlined in a recent memorandum located here https://health.mil/Reference-Center/DHA-Publications/2024/05/22/DHA-PM-24-015

treated with fairness and respect for her dignity and privacy in violation of Article 6b(a)(9), U.C.M.J. First, the Military Judge erred in denying J.F. standing on the issue. Second, the order to produce mental health records without conducting an Article 39(a) hearing to comply with M.R.E. 513(e)'s procedural requirements violates J.F.'s right to be heard before the Court orders the production of mental health records. Third, the Military Judge has issued a court order without authority that results in violation of J.F.'s right to privacy as to her mental health records. Fourth, J.F. has not been afforded due process, and the Military Judge ordered production of J.F.'s protected health information without the requisite determinations as to its relevance, necessity, and materiality. Under these conditions, issuance of an order to produce J.F.'s protected health information is tantamount to an illegal Government seizure. See *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209, 66 S. Ct. 494, 506 (1946) (finding a court order for documents needs to ascertain that what is being sought is relevant and reasonable). Lastly, military judges do not currently have authority to compel production of medical and mental health records through an order, but they do have the authority to issue subpoenas. R.C.M. 703(g)(3)I(i) (2024 M.C.M.).

A STAY IS APPROPRIATE

Article 6b(e)(1) states, "[i]f the victim of an offense under this chapter believes that 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. . ." J.F. seeks an immediate,

emergency stay of the Military Judge's order to protect her rights to 1) object to enforce her rights under Health Insurance Portability and Accountability Act of 1996 (H.I.P.A.A.) 42 U.S.C. §§ 1320d through 1320d-8 (hereinafter "HIPAA") and M.R.E. 513 involving production of these records; 2) be treated with respect for her privacy and dignity under Article 6b(a)(9); 3) ensure her fair treatment to include due process as required under Article 6b(a)(9); 4) prevent the unauthorized disclosure of potentially privileged M.R.E. 513 records while this Court reviews the merits of this Petition; and 5) ensure the Military Judge does not facilitate an invasion of J.F.'s privacy by using a court order that the law does not currently authorize.

The stay prevents the trial court from continuing to pursue production of J.F.'s sensitive, protected, and private medical and mental health records, the disclosure of which violates privacy rights Congress and the President intended to protect via Article 6b, U.C.M.J.; M.R.E. 513; and the U.S. Constitution. Granting the stay allows J.F. to seek redress from this court on an issue of law.

No Rule for Court-Martial effectuates crime victims' right to seek redress in the Courts of Criminal Appeals under Article 6b, U.C.M.J.; nevertheless, R.C.M. 908 provides guidance on processing interlocutory appeals by the United States. J.F. contends her seeking redress from this Court is similar. J.F. believes the Military Judge's ruling violated her Article 6b, U.C.M.J. rights, due process rights, and constitutional right to be free of unreasonable searches and seizures. If executed, the harm she experiences will be irreparable without a stay of the order.

Victims' Counsel has expeditiously filed this Petition for a Writ of Mandamus under Article 6b and Motion for Stay.

ARGUMENT

I. The Records Requested Should Not Be Disclosed Under R.C.M. 701

The records should not have been disclosed under R.C.M. 701 because R.C.M. 703, not R.C.M. 701, applies to the DHA records that the Military Judge ordered to be produced. The RPI and the Government counsel asserted that J.F.'s records were discoverable and required by R.C.M. 701. This erroneously conflates the requirements of R.C.M. 701 and R.C.M. 703 and assumes the Military Judge has authority she does not have.

R.C.M. 703 applies to any mental health record in DHA's possession because DHA, the proper custodian of those records, is not a military authority. The Military Judge ignores the statutory definition of "military medical treatment facility" in 10 USC § 1073c([j])(3), which states:

> The term "military medical treatment facility" means—
> (A) any ***fixed facility*** of the Department of Defense that is outside of a deployed environment and used primarily for health care; and
> (B) any other ***location*** used for purposes of providing health care services as designated by the Secretary of Defense.

A facility is "something (such as a hospital) that is built, installed, or established to serve a particular purpose." *Facility,* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/facility (2024). In other words, a military medical treatment facility is a ***place,*** not an entity. Military police investigative records are not in the "possession, custody, and control of military

authorities" because they are located at the police station; they should be disclosed under R.C.M. 701 because the military police, as the people who investigated the crime, created the record, and are "involved in the case." See R.C.M. 701(d) (Discussion) (2024 M.C.M.). There are no facts provided that the Medical Group or DHA was "involved in the case." Furthermore, the United States is clear that neither trial counsel nor investigative authorities actually have J.F.'s private, protected health information in their possession.

The 2017 National Defense Authorization Act directed reform to military medical treatment facilities, specifically giving responsibility to the DHA director for administration of military medical treatment facilities. 114 P.L. 328, 702. The DHA has assumed the "provision and delivery of health care within each such facility." 10 U.S.C. 1073c. As such the DHA is the records custodian for military medical treatment facilities.

a. The United States does not have "ready access" to HIPAA-protected health information.

R.C.M. 701 applies when the Government counsel has ready access to the materials or a legal right to possess them. *U.S. v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). Government counsel does not have ready access or a legal right to J.F.'s PHI. PHI is "individually identifiable health information: (1) Except as provided in paragraph (2) of this definition, that is: (i)Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium." 45 C.F.R. §164.103. If they did, they would already be able to

provide the information pursuant to the Defense's request without a subpoena or court order. Further, if these records were in Government counsel's custody and control and counsel failed to disclose them, they could be subject to contempt proceedings. The Military Judge need not facilitate disclosure of documents Government counsel clearly claim to have. See (Attachment C). Evidence in Government counsel's possession, custody, or control should not require any process to obtain.

A recent Idaho District Court case analyzed a similar matter of access to treatment records of a minor victim located at a State (government) hospital. The court concludes access to the records in light of HIPAA protections and the role of the hospital's employees vis-à-vis the case: "[h]ere, the government does not currently have the records [defendant] seeks in its possession or control. Neither the State Hospital South nor any other of Minor 1's treatment providers is acting on the government's behalf; nor are they part of the prosecution team or participating in a joint investigation." *United States v. Powell*, 2023 U.S. Dist. LEXIS 74431, at *8 (D. Idaho Apr. 27, 2023). In contrast to this case, the prosecutors in *Powell* never claimed to possess or control Minor 1's PHI just because they were all State entities.

The circumstances before us parallel those in *Powell*. DHA, not a Military Service and not Government counsel, has the records. Before the issuance of the court order, there is no evidence that J.F.'s providers or anyone in DHA were "acting on the government's behalf" or "participating in a joint investigation." The

judge goes on to state in *Powell*, "[T]he government does not have 'ready access' to these records, as disclosing those health records requires a court order or patient consent. Because the Government does not 'possess' the information that [defendant] seeks, it has no duty to disclose such information under *Brady*, *Giglio*, or Federal Rule of Criminal Procedure 16." *Id.* (internal citations omitted). See also *U.S. v. Warda* 84 M.J. 83 (C.A.A.F. 2023) (stating a Military Judge needed to conduct an R.C.M. 703 analysis for potential immigration records found to be central to the case and held by a separate federal agency).

Even in cases where local law enforcement possesses the information, this court has found Government counsel lacks access. In *Crump*, local law enforcement would not provide military law enforcement or counsel access to relevant evidence regarding an M.R.E. 413 witness without a subpoena. This court held:

> We see nothing in the record of trial to show that the trial counsel had access to [the witness's] SAFE report, the condom, the CD of photographs, or any purported forensic testing results. Without having access to these materials, the trial counsel could not use them to prepare for trial. The record of trial before us shows the trial counsel had the same access as the defense counsel to these objects—none.

U.S. v. Crump, 2020 CCA LEXIS 405, at *104-05 (A.F. Ct. Crim. App. 10 November 2020) (unpub. op.); review denied *U.S. v. Crump*, 81 M.J. 177 (C.A.A.F. 2021). Although files held at DHA differ from files held at local law enforcement, the access is the same. Government counsel lacks access and must follow R.C.M. 703 to gain access to the requested material, even if relevant.

The Government admits it does not have possession or "ready access" to J.F.'s records in its response to Defense Motion for Appropriate Relief (MAR): "[T]he Government is unable to confirm or deny whether J.F. was admitted to in-patient care around the time of March or April, 2022." (Attachment B). If the Government recognizes their obligation to provide the Defense with discovery within their custody and control yet cannot concretely conclude whether records exist, then it is clear the Government does not have custody or control over the proposed records. Additionally, as summarized in the Military Judge's Ruling on Defense MAR: "On 14 February 2024, Trial Counsel submitted an email to Department of Defense, Defense Health Agency's (DHA) Office of the General Counsel, ***requesting*** J.F.'s mental health records covered under United States v. Mellette." If the requested records were in the custody and control of the Government, they would be able to immediately release them in response to Defense's Discovery Request. Because the Government must undertake additional legal steps with another entity for any records to be in their custody and control, production under R.C.M. 701 is not appropriate. Accordingly, ordering disclosure of the requested medical records under R.C.M. 701 is a clear error.

b. HIPAA protects J.F.'s DoD Health Record.

HIPAA presents another insurmountable barrier to the Military Judge's order. On 2 May 2024, the Undersecretary of Defense for Personnel and Readiness reissued a memorandum stating it is the Department of Defense's Policy that,

> "Service member patient rights and confidentiality are protected as much as possible, in accordance with requirements for confidentiality of health information pursuant to Public Law 104-191 (also known and referred to in this DTM 23-005, May 5, 2023 Change 1, 05/02/2024 2 DTM as the "Health Insurance Portability and Accountability Act of 1996"), applicable privacy laws, and DoD privacy regulations, including DoDI 5400.11, DoD 5400.11-R, DoD Manual 6025.18, and DoDI 6490.08."

See DTM 23-005, "Self-Initiated Referral Process for Mental Health Evaluations of Service Members," May 5, 2023; Incorporating Change 1 on May 2, 2024 (whs.mil). While the court is not the general public, it must follow appropriate processes to receive records and information. HIPAA unquestionably applies to J.F.'s DoD Health Record, so although R.C.M. 703(g)(2) says a records custodian shall appear with Government records without process, that is legally impossible for the DoD Health Record maintained by DHA. Tellingly, no one asserts that HIPAA is inapplicable. Here, the Military Judge is ordering DHA employees, who are generally not authorized access to J.F.'s DoD Health Record in the normal course of operations, to do just that because she has issued a court order. But for this order, these DHA employees would not have legal authority to access J.F.'s mental health records. Yet the Military Judge has made her ruling among affirmation by the parties that the DHA employees' general access to the records system is sufficient to go into J.F.'s otherwise isolated records to see if any qualifying records exist.

Further, the Military Judge's Ruling stands on the assumption that all DoD Health Records are in the possession, custody, and control of military authorities, making every single DoD Health Record subject to the disclosure rules of R.C.M.

701. This would include DoD Health Records of any Accused, Government Counsel, Defense Counsel, Military Judge, panel member, and even the spouses and children of the above. *Arguendo*, under the Government's position, if a Defense Counsel submits a discovery request to Government Counsel for "all '*Mellette* Records' of the detailed panel members' prescriptions because they are relevant as medication may affect their ability to sit a panel," the Government would have to retrieve the DoD Health record of panel members, and those panel members would have no standing or recourse to object. Defense counsel could submit a discovery request for "the DoD Health Record of the spouse of the Military Judge because, if he or she was a victim of a similar crime, the Military Judge may be biased;" under the positions provided in the Answers, Government Counsel would have to comply, leaving the Military Judge's spouse with no standing to object. Additionally, individuals would receive different legal protections depending on whether they receive mental health services from a Government provider versus a private provider; the most likely result of this would be substantially more privacy for those who can afford to pay out of pocket. Certainly, and evidently, this is not what the law requires or even plainly states.

Significantly, DHA's own policy makes it clear that such loose disclosure runs counter to the default position and what requirements must be met to release information, "f. In accordance with References (r) and (q), MTF personnel **will not** release information from DoD Health Records if such disclosure would result in a clearly unwarranted invasion of privacy." DHA-PM 6025.02, *DoD Health Record*

Lifecycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records, at Enclosure 5 para 2(f) (2021).

The Military Judge highlights that Department of Defense Manual 6025.18 states, "Any order from a military judge ***in connection with any process under Chapter 47 of Title 10, U.S.C.***, also known and referred to in this issuance as the 'Uniform Code of Military Justice (UCMJ),' is a [court order] order covered by Paragraph 4.4.e.(1)(a)." See Attachment J; see also DoD Manual 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (H.I.P.A.A.) Privacy Rule In DoD* (2019). Nevertheless, there is no process in the UCMJ that permits Military Judges to issue court orders demanding PHI.

c. Current Executive and Legislative Actions Do Not Give Military Judges Authority to Issue Court Orders for Medical Records

As currently postured, the Military Judge lacks the authority to order production of medical records from military medical treatment facilities because the records are held with the DHA. R.C.M. 703 governs production of records not in possession of the military authorities. It gives "trial counsel of a general or special court-martial" authority to issue subpoenas. The updated amendments to R.C.M. 703, effective 27 December 2023, give Military Judges this authority as well. Granting Military Judges this authority in the 27 December 2023 amendments reflects an executive understanding that subpoena authority formerly only rested with trial counsel. Consequently, a self-labeled court order is not the appropriate vehicle to produce records for the court. Article 46, U.C.M.J., allows for a "subpoena

or other process" to "compel the production of evidence." 10 U.S.C. §846(d)(1). Article 46 does not just allow self-definition of "other process" as Article 46(a) requires "accordance with such regulations as the President may prescribe."

Despite the Military Judge's ruling asserting that R.C.M. 701(g) authorizes her to issue the court order to third parties (not a party to the court-martial) to produce evidence, her analysis fails to read the rule in its entirety. R.C.M. 701(g) does not constitute plenary authority for a Military Judge to issue court orders to third parties. If it did, Military Judges would have employed this practice and would not have needed subpoena authority. Tellingly, since DHA is a non-military agency not subject to the Military Judge's orders, if it refused to comply with the order, there is no remedy as Article 48, UCMJ and R.C.M. 809 do not contemplate third parties being ordered by the Military Judge. However, if the Military Judge issued a subpoena, the Manual allows for warrants of attachment as provided for in Article 47 and R.C.M. 703(g)(3)(J)(i) (2024 M.C.M.).

R.C.M. 701(g)(2) only affords a Military Judge authority to ***restrict*** discovery and issue orders to effectuate restrictions. (2024 M.C.M.) The Discussion to that rule makes this clear,

> In reviewing a motion under this paragraph, the Military Judge should consider the following: ***protection of witnesses*** and others from substantial risk of physical harm, bribes, economic reprisals, and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; ***confidential information recognized by law, including protection of confidential relationships and privileges***; and any other relevant considerations.

All of the listed factors favor restriction of discovery, not enabling thereof. Ironically, the Military Judge's order effectuated the opposite of the rule intended to ***protect*** J.F.'s confidential and privileged relationship with her provider—it invaded that relationship without due process and without the requisite M.R.E. 513(e) process.

The President has prescribed rules effectuating Article 46 through R.C.M.s 701-703a. See *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013). The R.C.M. defines the Military Judge's authority over discovery. Nowhere in R.C.M. 701-703a authorizes a Military Judge to devise a Court Order to do what the rules do not themselves permit. The President has prescribed a process in R.C.M. 703 for subpoenas to be issued by trial counsel or, now, the Military Judge. As stated above, military judges do not have authority unless the authority is explicitly provided in statute. Therefore, the omission of authority in R.C.M. 701 or R.C.M. 703 for a Military Judge to issue court orders outside the confines of court-martial participants is an intentional limitation of the authority of the Military Judge, not a void allowing judges to assume such authority. In this case, the Military Judge, at the behest of both the Defense and the Government, circumvented issuing a subpoena to avoid granting J.F. due process to object to the disclosure of her PHI—that is a usurpation of judicial authority.

J.F. concedes there are appropriate circumstances for a Military Judge's orders. For example, the Stored Communications Act grants Military Judges authority to issue orders. 18 U.S.C. § 2703. This is specifically given for "electronic

communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system." Id. This specific statutory grant is effectuated in R.C.M. 703a. The orders process is valid for specific circumstances, such as other lawful orders to court members or to parties. However, those circumstances do not exist here and do not include to a military medical treatment facility or to DHA.

While this court may interpret statutes and executive action to set limits on what a Military Judge's order may look like, J.F. does not ask this court to do so here. Rather, J.F. requests the court acknowledge orders may be issued under appropriate circumstances to parties and as allowed by statute, but the Military Judge lacked authority to do so in this case, a request consistent with R.C.M. 703, its amendments, and the plain language of Article 46, 47, and 48 of the U.C.M.J. If Congress or the President intended Military Judges to have power to order production of records from DHA, they would have included at least broad authority in either statute or executive action (the R.C.M.s). If currently Military Judges could just issue court orders equivalent to subpoenas, the President would not need to grant additional subpoena power to Military Judges. Accordingly, the Military Judge lacked authority to issue the order to DHA to provide J.F.s PHI.

II. Even If the Court Finds the Records Are Within the Custody and Control of the Government , The Military Judge's Action was Improper as the PHI is not Relevant

Even if this court finds that R.C.M.701 is the proper rule to apply to this discovery of these records, this court should still find that the Military Judge was

improper in her actions as the neither party met the burden for discovery under R.C.M.701.

Even if the standard for relevancy under R.C.M. 701 is applicable, which requires discovery of any item that is "relevant to defense preparation," J.F.'s records should not have been ordered and produced. R.C.M. 701(2)(A)(i). Neither party included a proffer of why the information sought was relevant. Simply having a third-party relay that J.F. may have sought mental health treatment and received in-patient care is not enough to establish relevance even in discovery. Federal courts have held that, "[m]ental illness is most highly relevant when 'the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness that dramatically impaired her ability to perceive and tell the truth.'" *United States v. George*, 532 F.3d 933, 937, 382 U.S. App. D.C. 332 (D.C. Cir. 2008) (quoting *United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir.1992)). Also, "[w]e have not discovered a single case in which a witness' credibility was called into question on account of an anxiety disorder. *United States v. Hargrove*, 382 F. App'x 765, 776 (10th Cir. 2010).

Neither party in their initial filings, supplemental filings, or their Joint Motion were able to articulate a specific expectation of any diagnosis J.F. may have nor what impact to J.F.'s credibility may be unveiled by production. This is due to the nature of the information they sought to have produced—privileged and confidential. The parties' rationale is simply that mental health services may have been sought within three months of the charged misconduct, and as the primary

witness, J.F.'s credibility is at issue and she may have said something if she'd been in treatment that may affect the factfinder's perception of her credibility. If this basis is sufficient, the M.R.E. 513 privilege will be rendered a paper tiger. The implications would be profoundly troubling for anyone in need of mental health treatment. People who are victims of traumatizing offenses would be discouraged from seeking out professional medical help for fear of having their treatment opened up to public prodding and weaponizing merely because they sought out help at a particular time. Their counsel would have an ethical obligation to caution their client that the defense will be allowed to peruse their mental health records anytime they ask for them.

For these reasons, the Military Judge should have never ordered production based on inadequate proffer—in this case *no* proffer. The burden was on the parties to make a showing of relevancy to access J.F.'s highly personal and protected information. They failed to meet that burden; accordingly, the Government's actions threaten to invade J.F.'s privacy and constitute an unreasonable search and seizure under the Fourth Amendment and wholly violative of the rules to access *protected* records under M.R.E. 513(e). *See also United States v. Sullivan* 70 M.J. 110, 117 (C.A.A.F. 2011) (finding that the standard of relevance for medical diagnoses and treatments, specifically mental health, as requiring a showing of a sufficient nexus wherein the condition or medication would affect perception and credibility.).

III. The Requested Records Are and Were Protected Under M.R.E. 513

As J.F. has argued in every filing to date, any document that could have been produced under the Military Judge' s order would be protected under M.R.E 513. "Mellette records" sought by Defense are not isolated documents in an individual's records; instead, they are often co-mingled with other mental health records that are privileged and protected as qualifying records of communications. *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022). Therefore, production of anyone's mental health records would first require sifting the privileged from the nonprivileged to avoid violating the record holder's privilege. The Military Judge recognized this risk when she asked the parties to respond to the *In re B.M.* ruling, a case where, upon conducting an *in camera* review after determining records were to be produced under the standards of R.C.M. 703, that Military Judge discovered privileged material in what should have been scrubbed non-privileged material. *See B.M. v. United States,* No. 23-0233, 2024 CAAF LEXIS 201 (C.A.A.F. Apr. 3, 2024). With the potential presence of M.R.E. 513(a) privileged material, M.R.E. 513(e) requires procedural protections before even an *in camera* review. If the movant actually satisfies the requirements for *in camera* review under M.R.E. 513(e), then additional *in camera* review by the Military Judge to separate the wheat from the chaff – the privilege from the nonprivileged—is required. Most importantly, this risk of unauthorized disclosure makes it clear that "Mellette records" do not automatically clear the M.R.E. 513(e) hurdles simply because the sought records are not privileged. In short, *Mellette* is not a loophole to circumvent required M.R.E. 513(e) procedures.

Both Government and Defense purports that M.R.E. 513(e) no longer applies to ***any*** patient records because those records ***may contain*** information not privileged under M.R.E. 513(a). This ignores that M.R.E. 513(e) procedures apply to ***protected*** records. Even if the records are in the literal possession, custody, and control of prosecution, M.R.E. 513(e) procedures would apply because R.C.M. 701(f) states, "[n]othing in this rule shall be construed to require the disclosure of information ***protected*** from disclosure by the Military Rules of Evidence." *United States v. Mellette* did not create a discovery right to non-privileged "underlying facts" of mental health treatment. *Mellette* at 380. *Mellette* did not state or hold that all rules of discovery and production are inapplicable to "non-privileged" "underlying facts." *Id.* Even if the DoD Health Record is an "R.C.M. 701" record, R.C.M. 701(f) still states applies. J.F..'s records, to the extend they exist, albeit may ***not be privileged***, are ***unquestionably protected***. *Mellette* certainly does not stand for the proposition that a DHA employee needs to search through J.F.'s DoD Health Record seeking private information that may not even be relevant without a proffer of relevance as to ***specific information***—nevertheless, that is what the Military Judge's ruling and order seem to assume.

Mellette narrowly holds, that to the extent dates visited the mental health provider, the treatment provided and recommended, and the victim's diagnosis "existed—and ***were otherwise admissible*** under the Military Rules of Evidence and the Rules for Courts-Martial—they should have been produced or admitted ***subject to the procedural requirements of M.R.E. 513(e)***." Id. at 381. Moreover,

Mellette distinguishes between privileged, "partially privileged," and "partially protected" patient records. *Id*. at 379 (stating, "[w]e interpret these provisions as simply recognizing that to the extent testimonial or documentary evidence reveals what M.R.E. 513(a) expressly protects—confidential communications—they are also partially protected; not, as the Government argues, that the entirety of every patient record is necessarily included within the patient-psychotherapist privilege."). M.R.E 513(e)(3) contemplates a procedure for not just the production of privileged records but of "***protected***" records as it states, "[t]he military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of ***protected records*** or communications." J.F.'s DoD Health Record is by definition "protected" because it is "Protected Health Information." (PHI). Certainly diagnoses, treatment plans, and prescriptions contained in the health record are PHI.

C.A.A.F.'s emphasis on adhering to the procedural requirements of M.R.E. 513(e) reflects the PHI should be disclosed *after* – not absent – compliance with M.R.E. 513(e).

In paragraph 34 of her ruling, the Military Judge states:

> Furthermore, consistent with *Mellette*, this Court finds that any diagnoses or treatments are not themselves uniformly privileged under M.R.E. 513. Accordingly, M.R.E. 513's procedural requirements are not required as defense counsel does not seek production of such records. Moreover, this Court does not find it necessary to conduct an *in camera* review of any materials subject to the Court's production order. *See* R.C.M. 701(g)(2).

Again, this rationale ignores that M.R.E. 513(e) procedures apply to ***protected*** records not just ***privileged*** records. M.R.E. 513(e) procedures also apply to records in the possession, custody, and control of military authorities because R.C.M. 701(f) indicates so. The Military Judge conflates protected and privileged. Moreover, the ruling tacitly presumes that, once produced, the "*Mellette* material" can be observed without encountering privileged material. This assumption has no factual basis and runs afoul the plain language and intent of the protections under M.R.E. 513. Accordingly, the procedures under M.R.E. 513(e) must be applied.

IV. The Military Judge improperly denied J.F. standing on Defense's motion for production of any mental health records DHA may have pertaining to J.F. because J.F. has a cognizable legal interest in her Protected Health Information.

Even if the court finds it does not need to apply MRE 513(e) process to this particular discovery, the Military Judge erred in not finding J.F. had standing to be heard on this issue. Contrary to the Military Judge's determination, Article 6b gives J.F. standing to challenge Defense's motion to produce J.F.'s PHI that DHA may possess because Article 6b provides standing for injuries to her privacy. Specifically, J.F. seeks protection of her private medical or mental health records as well as her privileged communications to mental health care providers, to the extent any qualifying records exist, to safeguard J.F. from intentional humiliation and degradation by the accused and to treat her with the fairness and respect for her dignity and privacy as the law requires.

a. Article 6b, UCMJ gives J.F. standing and the right to be heard on matters of her privacy and privilege.

Standing and the right to be heard come from statute and common law. Standing is an Article III concept of justiciability utilized by Article III courts to ensure those courts only hear cases and controversies as required by the Constitution. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Id.* at 2203. While courts-martial are not Article III courts, they rely on both statute and common law. "As this Court early held, Article I gives Congress the power—entirely independent of Article III—to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations." *Ortiz v. United States*, 138 S. Ct. 2165, 2178 (2018) (citation omitted). "In particular, [CAAF], and courts-martial in general, being creatures of Congress created under the Article I power to regulate the armed forces, must exercise their jurisdiction in strict compliance with authorizing statutes." *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013). The doctrine of standing and the right to be heard for victims seeking relief and affording of rights under Article 6b, U.C.M.J. has been specifically codified in the U.C.M.J., vesting victims with the statutory right to intervene and object at courts-martial.

Article 6b vested courts-martial with subject-matter jurisdiction over victims' rights when brought by victims who meet the statutory definition of victim under the same statute. This jurisdiction includes the authority to make rulings to

effectuate rights afforded to J.F by the same article. Thus, when Article 6b states J.F. has the right to be "[]reasonably protected from the accused;" and ". . . treated with fairness and with respect for her dignity and privacy. . .," officers of the court-martial have responsibilities to faithfully execute their duties in compliance with those rights. Article 6b(a)(1) and (9). When they do not, victims have standing to seek redress at the court-martial and to appeal that denial of those rights. Thus, these rights are neither notional nor illusory. See *In re K.K.* Misc. Dkt. 2022-13 (A.F.C.C.A. Jan. 24, 2023) (finding a continuance to ensure representation by a detailed victim's counsel is within the ambit of the right to fairness).

Article 6b(a)(9) gives victims the right to be treated with fairness. When explaining this provision in the federal corollary Crime Victims Rights' Act, the primary drafter of the Act explained the word choice:

> [F]airness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004). The Congressional intent of this provision directly applies to Article 6b, and the right to be treated with fairness reflects more than an ideal, but rather an intentional, specific right that includes due process. Accordingly, both the express language of Article 6b granting victims the right to be treated with fairness and the congressional intent grant J.F. the right to be heard through counsel.

b. Case law affords J.F. the right to be heard through counsel and standing on the issue of her private medical records.

While military courts are not Article III courts, they still follow traditional common law analysis. As Judge Ryan stated in her dissent in *Kastenberg*, "[w]hile we are assuredly not an Article III court, we have, up until now, understood ourselves to be bound by the requirement that we act only when deciding a 'case' or 'controversy.'" 72 M.J. at 373. "[. . . S]ufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992). Non-parties to a court-martial may also have standing. *United States v. Wuterich*, 67 M.J. 63, 66-69 (C.A.A.F. 2008) (assuming a media corporation's standing under, *inter alia*, R.C.M. 703); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (asserting standing under the First Amendment). Finally, C.A.A.F. found victims have standing to address courts-martial on matters of privilege and privacy. *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

Like in *Kastenberg*, J.F. asserts standing over privilege. The records at issue include medical and mental health records. While the diagnoses, prescriptions, and treatments, may not be privileged, providing the non-privileged information may or may not require a review of privileged content. The military judge disregarded this privilege by simply stating J.F. lacks standing. Even if these records are discovery

material regulated by a military judge under R.C.M. 701, they still go through a needed process affording J.F. the right to be heard.

c. J.F. has a reasonable expectation of privacy over her medical records.

J.F. has met the burden to establish that she has a reasonable expectation of privacy in her own PHI. The Supreme Court recognized that the constitutional right to privacy protects "an individual's interest in avoiding disclosure of personal matters." See *Whalen v. Roe*, 429 U.S. 589, 599 (1977)(internal quotations omitted). As a liberty interest under the United States Constitution, minimum due process is required for any and all infringements of privacy by the government. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (An individual is constitutionally entitled to procedural due process "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."). Cf. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192–93, 196–97 (3d Cir. 2000) (stating that police threats to disclose sexual orientation of individual to his family violated constitutional right to privacy sufficient to justify cause of action under § 1983); see also *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1107–08 (D. Mass. 1993).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Standing under the Fourth Amendment hinges on whether the person claiming the protection has a legitimate expectation of privacy. See *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To establish standing, the person claiming the protection must make a threshold

showing that they have "a reasonable expectation of privacy in the area searched and in relation to the items seized[.]" *United States v. Aguirre*, 839 F.2d 854, 856 (1st Cir. 1988).

Here, J.F. has a reasonable expectation of privacy in any records that pertain to mental health or medical treatment she may have received. Specifically, J.F.'s reasonable expectation of privacy arises from the HIPAA, Department of Defense Manual (DoDM) 6025.02, and the M.R.E. 513 privilege, which expressly gives her authority over disclosure of any qualifying records. Furthermore, "[. . .] the general rule [is] that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 966-67 (1969). Not only those accused of crimes enjoy Fourth Amendment protections – all citizens of the United States have a right to Fourth Amendment protections. And not only does J.F. enjoy Fourth Amendment protections, but she is the *only* person who can assert her rights under it, thus making standing and jurisdiction of this Court to issue a writ evident. It must be noted that J.F. does not seek exclusion of evidence possessed by military authorities; she merely seeks to prevent *production* of private, protected information about herself that may exist.

<u>d. J.F.'s right to be heard is akin to the already recognized procedures allowing a third party to motion a court to quash a subpoena.</u>

J.F. seeks to quash a "court order" demanding invasion and seizure of her private, protected health information without due process and without jurisdiction

of the Military Judge to issue such an order. In *United States v. Curtin*, the Military Judge ruled he did not have jurisdiction to act on a motion to quash a subpoena for third-party banking records issued by the trial counsel. *United States v. Curtin*, 44 M.J. 439 (C.A.A.F. 1996). The United States sought a writ of mandamus to order the Military Judge to rule on the motion to quash. C.A.A.F. relayed,

> In compliance with the statute, Mrs. O'Berry and her father were notified of the subpoenas and their right to challenge them, and ***they submitted motions to the Military Judge challenging the subpoenas***. Relying on 12 USC § 3410(a), the Military Judge ruled that the subpoenas were administrative rather than judicial in nature because they had been issued by trial counsel rather than the Military Judge -- or someone who was acting by the judge's direction -- and that the proper forum for such a challenge would be in the appropriate United States District Court rather than at a court-martial.

Id. at 440. C.A.A.F. held

> . . . the President has authorized the trial counsel of a . . . general court-martial to issue subpoenas. RCM 703(e)(2)(C) [1996]. Thus, trial counsel's function in the context of the military justice system parallels the functions of a clerk of court of a United States District Court who issues subpoenas for that court as a ministerial act. Thus, in the terms of the statute: A motion to quash a judicial subpoena shall be filed in the court which issued the subpoena.

Id. at 441.

Neither does the fact J.F. is a third-party to the court-martial block her standing to object in the instant case. In *United States v. Johnson*, C.A.A.F. adopted the position of other federal courts that third-parties may object to subpoenas even in military justice cases:

> We first note that the Supreme Court and other federal courts have permitted third parties to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, ***legally-***

> ***cognizable interests in the materials or testimony sought to give the litigant standing to challenge the validity of that subpoena*** . . . We see no reason why a third-party challenge either to a subpoena duces tecum or a subpoena ad testificandum could not be raised during an Article 32 investigation if a sufficient basis were provided to establish standing.

United States v. Johnson, 53 M.J. 459 (C.A.A.F. 2000). J.F. seeks the same process C.A.A.F. afforded to the third party in *Johnson*. Certainly, if a third-party with a sufficiently important, legally-cognizable interest can object to an Article 32 subpoena, J.F. can object and move to quash a "court order" demanding production of her statutorily protected, private health information. J.F. has a sufficiently important, legally cognizable interest in the information ordered produced. As stated previously, J.F.'s interest in any records that may contain qualifying mental health communications is codified in Article 6b and M.R.E. 513.

Notably, R.C.M. 703 allows a named victim to motion the court to quash a subpoena. It further outlines a process to do so when issuing a subpoena for records outside the custody and control of the military authorities. J.F. seeks recognition from the trial court in a manner already outlined and established for courts-martial.

Here, the Military Judge has not laid out a basis as to why J.F. lacks standing on the issue, instead she only mentioned it in a conclusory footnote of the ruling. The law is evident that J.F. has a legally cognizable interest in protecting her PHI. The potential comingled records prevent any reasonable review for non-privileged material without reviewing protected records. J.F. has an expectation of

privacy in these specific records, protected by HIPAA. Additionally, J.F. has the right to be heard on matters of privacy as afforded her by Article 6b's right to fairness and the congressional intent behind Article 6b. There is no Constitutional harm to the Accused in allowing J.F. the right to be heard at the trial level in the same manner C.A.A.F. and R.C.M. 703 already permits. Accordingly, the Military Judge erred in denying J.F. standing or the right to be heard in matters related to her private records.

CONCLUSION

Wherefore, since J.F.'s DoD Health record is not in the possession, custody, or control of military authorities; there is no requisite proffer of relevance and necessity to support an invasion of J.F.'s privacy to disclose any records that may exist; the Military Judge does not have authority to order third parties to produce records; and the Military Judge failed to follow the procedural requirements of M.R.E. 513(e) before accessing J.F.'s *protected* health records—J.F. seeks an immediate stay of the order to produce her protected, confidential, and private PHI and seeks an issuance of a writ of mandamus demanding compliance with M.R.E. 513(e) procedures before accessing such information.

Respectfully submitted this 7th day of June, 2024

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CERTIFICATE OF FILING AND SERVICE

I certify that on 7 June 2024, the foregoing was electronically filed with the Court and served on the following addresses:

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In re J.F. Writ Attachments

A. Charge Sheet

B. *United States v. Her*, Defense Motion for Release and Protection Order w/ Attachments, 21 Mar 24

C. *United States v. Her*, Government's Response to Defense Motion for Release and Protection Order, 26 Mar 24

D. *United States v. Her,* VC Response to Defense Motion for Release and Production Order, 28 Mar 24

E. *United States v. Her,* Email PDF, US v. Her (Kunsan AB) --Request f/Supplements in Defense Motion f/Release & Protection Order, 17 Apr 24

F. *United States v. Her,* Supplemental Motion to Defense Motion for Appropriate Relief w/ Attachments, 27 Apr 24

G. *United States v. Her,* Government Supplemental Response to Defense Motion for Appropriate Relief, 25 Apr 24

H. *United States v. Her*, Addendum to VC Response to Defense Motion for Release and Protection Order, 25 Apr 24

I. *United States v. Her,* Joint Supplemental Filing: Location of DHA Record w/ Attachment, 3 Jun 24

J. *United States v. Her,* Ruling - Defense Motion for Appropriate Relief, 3 Jun 24

K. *United States v. Her,* Order to Produce Records of [redacted] J.F., 3 Jun 24

L. *United States v. Her,* Order to Protect Records of [redacted] J.F., 3 Jun 24