IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re RR *Petitioner,* v. **UNITED STATES** *Respondent* and Airman First Class (E-3) **BROCK ANDERSON** United States Air Force *Real Party in Interest.*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (SECOND)** Before Panel 2 Misc. Dkt. No. 2024-02 3 May 2024

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

Pursuant to Rule 23.3(m)(5) and 23.3(m)(7), the United States respectfully requests that four additional days be allotted to provide a certified record of trial, including a certified verbatim transcript and all exhibits, making the new due date Tuesday, 7 May 2024.

On 14 March 2024, RR filed a petition for writ of mandamus in this case. This Court docketed the petition on 15 March 2024. On 28 March 2024, this Court ordered a certified verbatim transcript and certified record of trial be provided to the court and all parties. (*Order*, dated 28 March 2024). From date of docketing until the new due date, 53 days will have elapsed.

There is good cause for the enlargement of time in this case. The base legal office diligently worked to comply with this Court's order. The original record of trial was shipped and arrived to JAJM on 1 May 2024. The three copies were shipped the same day, but arrived to the office on 3 May 2024, after the typical morning delivery to Joint Base Andrews. According to the tracking information provided by the base legal office, the three copies are in

the local area. The four additional days permit transport from the local post office to JAJM and to this Court.

The Government acknowledges the lateness of this filing. There is good cause for the motion out of time. The three copies were due to arrive on 3 May 2024; however, the timing of the delivery was too late for the local delivery to Joint Base Andrews. Undersigned counsel requested the enlargement of time as soon as practicable after learning the details of this delay.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion for an enlargement of time to provide the record in the above captioned case to this Court.

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CERTIFICATE OF SERVICE

I certify that the foregoing was delivered to the Court and the Air Force Appellate Defense Division, the military judge, appellate defense counsel, and victim's counsel on 3 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re RR, *Petitioner,* Airman First Class (E-3) **BROCK T. ANDERSON,** United States Air Force, *Real Party in Interest.*	**MOTION FOR LEAVE TO FILE MOTION TO DISMISS AND MOTION TO DISMISS** Before Panel No. 2 Misc. Dkt. No. 2024-02 9 April 2024

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

Pursuant to Rules 23 and 23.3 of this Honorable Court's Rules of Practice and Procedure, Airman First Class (A1C) Brock T. Anderson hereby requests that this Court grant leave to file a motion to dismiss and dismiss the petition in the above-styled matter for lack of standing, ripeness, and mootness. The motion for leave to file and the motion to dismiss are combined in a single motion in accordance with Rule 23(d).

Facts

On 23 February 2024, a military judge abated proceedings in the case of *United States v. A1C Brock T. Anderson*. Pet. Under Article 6b for Relief in the form of a Writ of Mandamus, 14 March 2024 (Pet.) at 10.[1] This abatement order followed proceedings in which the military judge conducted an in camera review of records pertaining to R.R., the named victim in the case, which were in the custody of military authorities and found that disclosure of some of the records was constitutionally required. *Id.* at 5, 8. The military judge asked R.R., through counsel, whether she would be willing to waive privilege as to those records which were constitutionally required. *Id.*

[1] A number of attachments are referenced throughout R.R.'s petition, but none of these attachments have yet been served on A1C Anderson or his counsel. *See* Pet. at 1–22. However, the attachments are not necessary to determine the petition is not justiciable, which is evident from the face of the petition itself.

at 8. After R.R. and her attorney reviewed the records, R.R. ultimately waived privilege as to all but four pages of these records, maintaining her privilege as to those four pages for which disclosure was constitutionally required. *Id.* As a result, the military judge determined the proceedings must be abated, agreeing with the positions of both Trial and Defense Counsel, and also "ordered the records of R.R. be sealed." *Id.* at 2, 10.

R.R. petitioned this Court for extraordinary relief in the nature of a writ of mandamus. *Id.* at i.[2] Specifically, R.R. requested this Court (1) "vacate the trial court's decision to abate the scheduled court date," (2) order the disqualification of the military judge and trial counsel "who examined her privileged records," (3) require that Mil. R. Evid. 513 is followed, and (4) order "the sealing of all patient records." *Id.* at 35. To enable review of the petition, this Court ordered the preparation of a verbatim transcript of all trial proceedings and the provision of a certified record of trial including the certified verbatim transcript and all exhibits. Order, 28 March 2024.

Argument

Standard of Review

Questions of justiciability, such as standing, ripeness, and mootness, are questions of law which this Court reviews de novo. *See United States v. Wall*, 79 M.J. 456, 459 (C.A.A.F. 2020).

Law and Analysis

1. The named victim, R.R., does not have standing to challenge the abatement order.

A named victim lacks standing to challenge the abatement order of a trial court before both service courts of criminal appeals and the Court of Appeals for the Armed Forces (CAAF). *In re B.M. v. United States and Bailey*, No. 23-0233, ___ M.J. ___, slip op. at 10 (C.A.A.F. Apr. 3,

[2] The first page of R.R.'s petition does not contain a page number, but it would be page i based on the pagination set out in the Table of Contents that follows.

2024).[3] Applying standing principles employed by Article III courts, the CAAF unanimously reached this conclusion "because the abatement order is not 'a court-martial ruling [that] violates the rights of the victim afforded by' Article 6b(a), [Uniform Code of Military Justice (UCMJ)]" or Mil. R. Evid. 513. *Id.* at 6 (citing *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)), 9–10. Rather than violate the rights afforded to the victim by Mil. R. Evid. 513, the abatement order merely stopped the court-martial proceedings and "did not vitiate [the victim's] privilege or require her to waive the privilege." *Id.* at 9. Further, the CAAF stated the rights afforded a victim by Article 6b(a), UCMJ, "while important, do not provide the named victim with standing to challenge the military judge's abatement order" because those rights do not "give the victim 'a judicially cognizable interest' in the ultimate question of whether the government will or will not prosecute the accused." *Id.* at 10 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

Mil. R. Evid. 513 and Article 6b(a), UCMJ, do not afford R.R. any more rights than they afforded the victim in *In re B.M.* Thus, under this binding precedent, R.R. lacks standing to challenge the abatement order of the military judge.

If the legal conclusions of *In re B.M.* were not already clear enough—and they are—this matter is remarkably similar to *In re B.M.* in its underlying procedural history. In that case, the military judge reviewed records from a military health facility in camera and determined that disclosure of at least portions of those records was constitutionally required "to guarantee the accused a meaningful opportunity to present a complete defense." *Id.* at 4. The named victim declined to waive her privilege over those records, so the military judge abated the court-martial. *Id.* Similarly here, the military judge conducted an in camera review of records which were in the possession of military authorities and determined that disclosure of some of the records was

[3] The slip opinion for *In re B.M.* is included in the Appendix.

constitutionally required. Pet. at 5, 8. After reviewing these records with her attorney, R.R. maintained her privilege as to four pages, waiving her privilege as to the other identified records. *Id.* at 8. As a result, the military judge ordered abatement of the court-martial proceedings. *Id.* at 10. The factual backgrounds of the two cases are nearly indistinguishable, and there is no distinction that could lead this Court to a contrary holding. Just as the CAAF held the named victim in *In re B.M.* lacked standing to challenge that military judge's abatement order before the Navy-Marine Corps Court of Criminal Appeals, slip op. at 10, this Court should hold R.R. lacks standing to challenge this abatement order before this Court.

2. Since the abatement cannot be lifted based on R.R.'s challenge without standing, the additional requests to disqualify the military judge and trial counsel and require that Mil. R. Evid. 513 is followed are not ripe, and the request to seal records is moot.

"[T]his Court does not answer questions that are not ripe for decision or that have become moot." *Id.* at 6. Consequently, the CAAF in *In re B.M.* went on to hold that the rest of the victim's requests for relief were either not ripe for decision or moot, and this Court should reach the same conclusion here. *Id.* at 11.

The petitioner in *In re B.M.* requested disqualification of the military judge, but the CAAF held that request was not ripe because the abatement would not be lifted. *Id.* Similarly here, R.R. requests disqualification of both the military judge and "trial counsel who examined her privileged records." Pet. at 35. Because R.R. lacks standing to challenge the abatement, that abatement cannot be lifted in response to her petition, and R.R.'s request to disqualify the military judge and trial counsel is not ripe as long as the proceedings remain in abatement. Likewise, her request for

"a requirement that Mil. R. Evid. 513 is followed," *id.*, is not ripe because, under the abatement order, there are no proceedings in which such a requirement could be fulfilled.[4]

R.R.'s final request is for "the sealing of all patient records." Pet. at 35. This is similar to the request in *In re B.M.*, where the petitioner asked the court to return the records "to a privileged and protected status." Slip op. at 11. The CAAF held this remedy was moot because the records remained privileged as a result of the petitioner declining to waive her privilege and because the military judge ordered the records sealed, protecting them from disclosure. *Id.* R.R.'s request to seal records is likewise moot. The petition itself states the military judge "ordered the records of R.R. be sealed," meaning there is nothing further for this court to adjudicate and the matter is moot. Pet. at 2.

Due to standing, ripeness, and mootness, none of the relief requested by R.R. is currently justiciable before this Court. Considering the binding precedent from the CAAF in *In re B.M.*, it is not necessary for this Court to receive a record of trial, verbatim transcript, or exhibits before dismissing R.R.'s petition. It is clear from the filings currently before this Court that R.R., as the named victim, does not have standing to challenge the abatement, and as long as the proceedings remain abated, the other requests for relief are either not ripe or moot. This Court has sufficient information to resolve the matter, and it is in the interest of judicial economy to do so before significant resources are dedicated to a petition that is not justiciable because of standing, ripeness, and mootness. This Court should dismiss the petition.

[4] Notably, courts-martial are always required to follow Mil. R. Evid. 513 because it is a rule of evidence, and A1C Anderson does not agree that the military judge failed to do so here. Although Petitioner's prayer for relief does not specifically say so, the argument in the petition suggests this is a request for this Court to order the military judge to utilize standards and procedures that are different from the ones he previously employed. *See* Pet. at 10–28. Such a request is not ripe because the proceedings in which the military judge would do so are in abatement.

WHEREFORE, A1C Anderson respectfully requests this Honorable Court grant this motion and dismiss the Petition Under Article 6b for Relief in the form of a Writ of Mandamus.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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Joint Base Andrews NAF, MD 20762-6604
[redacted]

Counsel for Real Party in Interest

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division and Victims' Counsel Division on 9 April 2024.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.R., *Petitioner*	)	**MOTION FOR LEAVE TO FILE PETITIONER'S OUT OF TIME REPLY IN OPPOSITION TO REAL PARTY IN INTEREST'S MOTION TO DISMISS**
A1C Brock Anderson **United States Air Force** *Real Party in Interest*	)	

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

R.R. through her undersigned counsel pursuant to A.F. CT. CRIM. APP. R. 23.(c) opposes the Real Party in Interest's (RPI) Motion to Dismiss. The RPI's Motion to Dismiss should be denied because this petition is distinguishable from *In re B.M.*, the motion is untimely[1], and the RPI lacks standing for its motion. Petitioner is seeking leave to file this reply out of time as the first filing did not comport with the Court's rules for motions practice—specifically with rules for attachments to the Record.[2]

[1] The certified record has not been compiled or served.

[2] The compilation and definition of "the record" in Article 6b(e) cases is unclear in the statute and not provided for in a Rule for Court-Martial addressing Article 6b(e) petitions; petitioner addresses this tension later in her reply.

I. The petition is brought under Article 6b, U.C.M.J., and challenges violations of petitioner's cognizable rights, not the abatement of the proceeding.

This case is distinguishable from *B.M.*, factually, procedurally, and by the nature of the remedy sought. *In re B.M. v. United States and Bailey*, ___ M.J. ___, No. 23-0233. 2024 CAAF LEXIS 201 (C.A.A.F. 3 Apr. 2024). First, the central issue in this case is not abatement, but rather the protection of R.R.'s privacy rights under Article 6b Uniform Code of Military Justice (U.C.M.J.) and Privilege under Military Rule of Evidence (Mil. R. Evid.) 513. In *B.M.*, the court noted that there was no available remedy for returning the named victim's medical records to a privileged and protected status because any such communications that "were privileged remain privileged." *Id*. In that case the Trial Judge determined that all the relevant records were privileged, and B.M. refused to waive that privilege. *Id*. Here, the Military Judge concluded that privilege over portions of R.R.'s mental health records had been waived by her mother, and he provided those portions of R.R.'s mental health records to counsel for the government and RPI. (*Email Chain from Military Judge, dated 28 December 2023* – Attachment 1). These records, which R.R. contends are privileged, are still in the possession of counsel for both sides and will continue to be in their possession until R.R. obtains the sought relief, regardless of whether the case remains in abatement. Therefore, unlike in *B.M.*, R.R. has suffered a continuing violation of her privacy rights under Mil. R. Evid. 513 and Article 6b. 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 [Military Rule of Evidence 513], 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." (emphasis added). R.R. seeks a writ of mandamus because—she believes—the Military Judge's ruling infringed upon her right to be treated fairly with respect for her privacy, fails to protect her from the RPI accessing her private information, and it defies the plain language of M.R.E. 513.

As to the constitutional issue in this case, R.R. contends that lifting the abatement may be part of an appropriate remedy for the ruling infringing on her rights but does not suggest the abatement order is the violation of her rights. There are two possible ways that a victim could choose to challenge a Military Judge's ruling that an Accused is constitutionally entitled to the victim's private records. First, by filing an appeal challenging the abatement, as was done in *B.M.* *Id*. Second, by waiving the privilege (to prevent or end the abatement) and then filing an appeal asserting that the waiver was involuntary. *B.M.* answered the case of the first scenario but left the second question unanswered. *Id*. However, the reasoning of the court in *B.M.* heavily suggested a different answer for this second scenario, saying:

> "[t]he named victim did not waive the privilege because she did not 'voluntarily disclose[] or consent[] to disclosure of any significant part of' the privileged communications. M.R.E. 510(a). On the contrary, the named victim expressly declined to waive her privilege. Like the NMCCA, we <u>therefore</u> see no basis for concluding that the military judge's in camera viewing of privileged communications—even if done erroneously—diminished the victim's right to assert her

> psychotherapist-patient privilege. *Id.* (citing *In re B.M.*, 83 M.J. at 717 & n.67.) (emphasis added).

R.R.'s petition is unique in that it raises both scenarios simultaneously. After the Military Judge erroneously found parental waiver of R.R.'s privilege, and erroneously found that the RPI was constitutionally entitled to a portion of her mental health records, R.R. agreed to waive pages 1-8 and 13-20 of that portion when asked by the Military Judge. (*Email Chain from Military Judge, dated 3 January 2024* – Attachment 2). R.R. only waived the privilege for these documents because the Military Judge determined these records were constitutionally required to be given to RPI. *Id.* These records were then provided by the Military Judge to Trial and Defense Counsel. *Id.* It is important to note that at the time R.R. agreed to waive pages 1-8 and 13-20 the Military Judge had not notified the parties whether he intended to provide those records to both parties regardless of whether she agreed to the waiver. *Id.* In fact, the judge specifically indicated that certain records "will not" be provided to the Defense, but declined to state whether the "constitutionally required" records would be. *Id.* R.R. contends that her waiver was not voluntary, because it was based on an improper *in-camera* review of her records, and based on erroneous reading of the law by the Military Judge that the RPI was constitutionally entitled to those records. If the Military Judge incorrectly applied the law, then R.R.'s waiver of pages 1-8 and 13-20 was not voluntary—it was coerced—and those records should be properly returned to their status as privileged documents. The issue of abatement only arises in this case as a matter of practicality. If this court finds the Military Judge erred in finding a constitutional

right to R.R.'s privileged records, it would logically follow that the Military Judge also erred in abating the proceeding based on the same error. As a matter of timing to note, the Military Judge did not separately rule as to waiver before conducting in camera review of R.R.'s records. The ruling as to waiver was issued only after the Military Judge reviewed the records; therefore, R.R. did not have a separate opportunity to challenge that determination as a violation of her rights and an infringement on her privilege under Mil. R. Evid. 513.

Finally, R.R. asserts the Military Judge should be statutorily disqualified, making the question of the disqualification *de novo*—R.R.'s petition is merely the vehicle to highlight the statutory basis for disqualification. Article 26(d), UCMJ. As abatement does not dismiss the court-martial, the statutory disqualification of the detailed Military Judge remains ripe. This is distinguishable from the discretionary disqualification sought in *B.M.*

II. The Motion to Dismiss is untimely.

The Motion to Dismiss is untimely without the receipt of the certified record. On 28 March 2024, this Court issued an Order denying R.R.'s motion to file attachments to her petition under seal but ordered a production of a certified record and granted both the Government and Real Party in Interest 20 days to file an answer upon receipt of the record. R.R. has not served any attachments to her petition on either the United States or Real Party in Interest to protect her privacy as all parties await the certified record. Under the A.F.C.C.A. rules, R.R. maintains the responsibility that a non-party crime victim file "[a] copy of any order or opinion

or any parts of the record that may be essential to understand the matters set forth in the petition;" can pose as an obstacle to victim-petitioners especially if the matters are personal and private to the victim. A.F. CT. CRIM. APP. R. 19(b)(2)(C). R.R. is not the custodian of the record, and as victim R.R. cannot produce a certified record, it appears awaiting the record is a sensible course of action.

III. The RPI lacks standing to motion the dismissal of R.R.'s petition.

"[. . . 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). In military courts, standing can be grounded in statute or rules promulgated by the President. *See L.R.M. v. Kastenberg,* 72 M.J. 364, (C.A.A.F. 2013). Even in cases where an accused proffers an injury to his rights:

> "[T]he Sixth Amendment guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Beale*, 921 F.3d 1412, 1424 (11th Cir. 1991) (citation omitted). Thus, we have recognized that "a defendant's right to present a complete defense is not absolute, and is subject to reasonable restrictions." *United States v. Mitrovic*, 890 F.3d 1217, 1221 (11th Cir. 2018) (citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Indeed, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." Id. (citation omitted). In these circumstances, a defendant's Confrontation Clause rights are violated when the district court prohibits questioning that would give a reasonable jury "a significantly different impression of the witness' credibility . . . ." *United*

> *States v. Garcia*, 13 F.3d 1464, 1469 (11th Cir. 1994)." *United States v. Mitc*hell, No. 22-14153, 2024 U.S. App. LEXIS 2961, at *4 (11th Cir. Feb. 8, 2024).

While this court has granted RPI an opportunity to file a response to this petition under A.F. CT. CRIM. APP. R. 19(f)(1), RPI Anderson does not have standing to file a motion to dismiss R.R.'s petition.

> One of [victim M.W.'s] arguments is that Congress in Article 6b(e), UCMJ, created a self-contained appellate review system that exists apart from the avenues of review that Article 66(b)(2), UCMJ, provides for the CCAs and that Article 67(a), UCMJ, provides for this Court. M.W. explains: 'The CCAs need not seek jurisdiction in Article 66 to review and issue writs under Article 6b(e); thus, a need to look to Article 67 for C.A.A.F. to review those actions contradicts the statutory scheme within Article 6b.' ***We agree that the text of Article 6b(e)(1), (2), and (3)(A), UCMJ, grants jurisdiction to the CCAs*** by providing that 'the ***victim may petition*** the Court of Criminal Appeals for a writ of mandamus,' and that a 'petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals.' The victim of an offense may rely on these provisions without relying on Article 66(b), UCMJ, when seeking a writ of mandamus.

M.W. v. United States, 83 M.J. 361, 365 (C.A.A.F. 2023)(emphasis added). In other words, RPI has not stated a jurisdictional basis to motion this Court to dismiss R.R.'s petition filed under Article 6b(e). "In particular, this Court, 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). R.R.'s Article 6b(a), UCMJ rights belong to her as the victim and the according of and enforcement of those rights is independent from the rights of the accused unless the accused specifically says otherwise. Admittedly, an

accused may have a constitutional argument when it comes to affording victims their rights, but RPI has not asserted such in this case. As RPI proffered no injury and Article 6b(e) does not provide jurisdiction for an accused to motion for dismissal of victim petitions filed under that Article, RPI's motion to dismiss R.R.'s petition for lack of standing should be denied for lack of standing.

Respectfully submitted this 19th day of April 2024,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that on 19 April 2024, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re RR *Petitioner,* v. **UNITED STATES** *Respondent* and Airman First Class (E-3) **BROCK ANDERSON** United States Air Force *Real Party in Interest.*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (FIRST)** Before Panel 2 Misc. Dkt. No. 2024-02 27 April 2024

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

Pursuant to Rule 23.3(m)(5) and 23.3(m)(7), the United States respectfully requests that it be allotted two additional days to provide a certified record of trial, including a certified verbatim transcript and all exhibits, making the new due date Friday, 3 May 2024.

On 14 March 2024, RR filed a petition for writ of mandamus in this case. This Court docketed the petition on 15 March 2024. On 28 March 2024, this Court ordered a certified verbatim transcript and certified record of trial be provided to the court and all parties. (*Order*, dated 28 March 2024). From date of docketing until the new due date, 49 days will have elapsed.

There is good cause for the enlargement of time in this case. The base legal office has diligently worked to comply with this Court's order. The court reporter completed and certified the transcript. Trial counsel and trial defense counsel also reviewed and certified it. The base legal office compiled the record of trial with all the documents available at this time. However, the court reporter and the military judge are still finalizing the sealed exhibits. The legal office anticipates the exhibits will be ready early next week but will still need time to properly seal and

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1 MAY 2024

incorporate the sealed items into the record. They anticipate being able to ship the record of trial no later than Tuesday, 30 April 2024. The two additional days accommodates for shipping the record of trial from Altus AFB, Oklahoma to JAJM.

The Government acknowledges the lateness of this filing. There is good cause for the motion out of time. On 26 April 2024, the Altus AFB chief of military justice informed undersigned counsel of the delay with the sealed exhibits and the potential to miss the 1 May 2024 deadline. Undersigned counsel requested the enlargement of time as soon as practicable after learning the details of this delay.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion for an enlargement of time to provide the record in the above captioned case to this Court.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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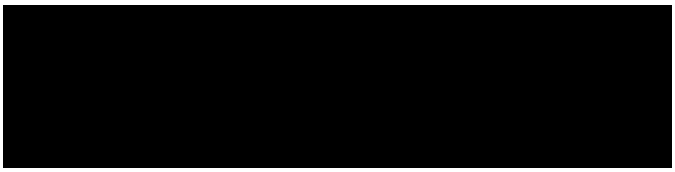

MARY ELLEN PAYNE
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CERTIFICATE OF SERVICE

I certify that the foregoing was delivered to the Court and the Air Force Appellate Defense Division, the military judge, appellate defense counsel, and victim's counsel on 27 April 2024.

JOCELYN Q. WRIGHT, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.R., *Petitioner* **A1C Brock Anderson** **United States Air Force** *Real Party in Interest*	)))))))))))	**MOTION FOR LEAVE TO FILE PETITIONER'S OUT OF TIME REPLY IN OPPOSITION TO REAL PARTY IN INTEREST'S MOTION TO DISMISS**

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

R.R. through her undersigned counsel pursuant to A.F. CT. CRIM. APP. R. 23.(c) opposes the Real Party in Interest's (RPI) Motion to Dismiss. The RPI's Motion to Dismiss should be denied because this petition is distinguishable from *In re B.M.*, the motion is untimely[1], and the RPI lacks standing for its motion. Petitioner is seeking leave to file this reply out of time as the first filing did not comport with the Court's rules for motions practice—specifically with rules for attachments to the Record.[2]

GRANTED
1 MAY 2024

[1] The certified record has not been compiled or served.
[2] The compilation and definition of "the record" in Article 6b(e) cases is unclear in the statute and not provided for in a Rule for Court-Martial addressing Article 6b(e) petitions; petitioner addresses this tension later in her reply.

I. The petition is brought under Article 6b, U.C.M.J., and challenges violations of petitioner's cognizable rights, not the abatement of the proceeding.

This case is distinguishable from *B.M.*, factually, procedurally, and by the nature of the remedy sought. *In re B.M. v. United States and Bailey*, ___ M.J. ___, No. 23-0233. 2024 CAAF LEXIS 201 (C.A.A.F. 3 Apr. 2024). First, the central issue in this case is not abatement, but rather the protection of R.R.'s privacy rights under Article 6b Uniform Code of Military Justice (U.C.M.J.) and Privilege under Military Rule of Evidence (Mil. R. Evid.) 513. In *B.M.*, the court noted that there was no available remedy for returning the named victim's medical records to a privileged and protected status because any such communications that "were privileged remain privileged." *Id*. In that case the Trial Judge determined that all the relevant records were privileged, and B.M. refused to waive that privilege. *Id*. Here, the Military Judge concluded that privilege over portions of R.R.'s mental health records had been waived by her mother, and he provided those portions of R.R.'s mental health records to counsel for the government and RPI. (*Email Chain from Military Judge, dated 28 December 2023* – Attachment 1). These records, which R.R. contends are privileged, are still in the possession of counsel for both sides and will continue to be in their possession until R.R. obtains the sought relief, regardless of whether the case remains in abatement. Therefore, unlike in *B.M.*, R.R. has suffered a continuing violation of her privacy rights under Mil. R. Evid. 513 and Article 6b. 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 [Military Rule of Evidence 513], 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." (emphasis added). R.R. seeks a writ of mandamus because—she believes—the Military Judge's ruling infringed upon her right to be treated fairly with respect for her privacy, fails to protect her from the RPI accessing her private information, and it defies the plain language of M.R.E. 513.

As to the constitutional issue in this case, R.R. contends that lifting the abatement may be part of an appropriate remedy for the ruling infringing on her rights but does not suggest the abatement order is the violation of her rights. There are two possible ways that a victim could choose to challenge a Military Judge's ruling that an Accused is constitutionally entitled to the victim's private records. First, by filing an appeal challenging the abatement, as was done in *B.M.* *Id*. Second, by waiving the privilege (to prevent or end the abatement) and then filing an appeal asserting that the waiver was involuntary. *B.M.* answered the case of the first scenario but left the second question unanswered. *Id*. However, the reasoning of the court in *B.M.* heavily suggested a different answer for this second scenario, saying:

> "[t]he named victim did not waive the privilege because she did not 'voluntarily disclose[] or consent[] to disclosure of any significant part of' the privileged communications. M.R.E. 510(a). On the contrary, the named victim expressly declined to waive her privilege. Like the NMCCA, we <u>therefore</u> see no basis for concluding that the military judge's in camera viewing of privileged communications—even if done erroneously—diminished the victim's right to assert her

> psychotherapist-patient privilege. *Id.* (citing *In re B.M.*, 83 M.J. at 717 & n.67.) (emphasis added).

R.R.'s petition is unique in that it raises both scenarios simultaneously. After the Military Judge erroneously found parental waiver of R.R.'s privilege, and erroneously found that the RPI was constitutionally entitled to a portion of her mental health records, R.R. agreed to waive pages 1-8 and 13-20 of that portion when asked by the Military Judge. (*Email Chain from Military Judge, dated 3 January 2024* – Attachment 2). R.R. only waived the privilege for these documents because the Military Judge determined these records were constitutionally required to be given to RPI. *Id.* These records were then provided by the Military Judge to Trial and Defense Counsel. *Id.* It is important to note that at the time R.R. agreed to waive pages 1-8 and 13-20 the Military Judge had not notified the parties whether he intended to provide those records to both parties regardless of whether she agreed to the waiver. *Id.* In fact, the judge specifically indicated that certain records "will not" be provided to the Defense, but declined to state whether the "constitutionally required" records would be. *Id.* R.R. contends that her waiver was not voluntary, because it was based on an improper *in-camera* review of her records, and based on erroneous reading of the law by the Military Judge that the RPI was constitutionally entitled to those records. If the Military Judge incorrectly applied the law, then R.R.'s waiver of pages 1-8 and 13-20 was not voluntary—it was coerced—and those records should be properly returned to their status as privileged documents. The issue of abatement only arises in this case as a matter of practicality. If this court finds the Military Judge erred in finding a constitutional

right to R.R.'s privileged records, it would logically follow that the Military Judge also erred in abating the proceeding based on the same error. As a matter of timing to note, the Military Judge did not separately rule as to waiver before conducting in camera review of R.R.'s records. The ruling as to waiver was issued only after the Military Judge reviewed the records; therefore, R.R. did not have a separate opportunity to challenge that determination as a violation of her rights and an infringement on her privilege under Mil. R. Evid. 513.

Finally, R.R. asserts the Military Judge should be statutorily disqualified, making the question of the disqualification *de novo*—R.R.'s petition is merely the vehicle to highlight the statutory basis for disqualification. Article 26(d), UCMJ. As abatement does not dismiss the court-martial, the statutory disqualification of the detailed Military Judge remains ripe. This is distinguishable from the discretionary disqualification sought in *B.M.*

II. The Motion to Dismiss is untimely.

The Motion to Dismiss is untimely without the receipt of the certified record. On 28 March 2024, this Court issued an Order denying R.R.'s motion to file attachments to her petition under seal but ordered a production of a certified record and granted both the Government and Real Party in Interest 20 days to file an answer upon receipt of the record. R.R. has not served any attachments to her petition on either the United States or Real Party in Interest to protect her privacy as all parties await the certified record. Under the A.F.C.C.A. rules, R.R. maintains the responsibility that a non-party crime victim file "[a] copy of any order or opinion

or any parts of the record that may be essential to understand the matters set forth in the petition;" can pose as an obstacle to victim-petitioners especially if the matters are personal and private to the victim. A.F. CT. CRIM. APP. R. 19(b)(2)(C). R.R. is not the custodian of the record, and as victim R.R. cannot produce a certified record, it appears awaiting the record is a sensible course of action.

III. The RPI lacks standing to motion the dismissal of R.R.'s petition.

"[. . . 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). In military courts, standing can be grounded in statute or rules promulgated by the President. *See L.R.M. v. Kastenberg,* 72 M.J. 364, (C.A.A.F. 2013). Even in cases where an accused proffers an injury to his rights:

> "[T]he Sixth Amendment guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Beale*, 921 F.3d 1412, 1424 (11th Cir. 1991) (citation omitted). Thus, we have recognized that "a defendant's right to present a complete defense is not absolute, and is subject to reasonable restrictions." *United States v. Mitrovic*, 890 F.3d 1217, 1221 (11th Cir. 2018) (citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Indeed, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." Id. (citation omitted). In these circumstances, a defendant's Confrontation Clause rights are violated when the district court prohibits questioning that would give a reasonable jury "a significantly different impression of the witness' credibility . . . ." *United*

> *States v. Garcia*, 13 F.3d 1464, 1469 (11th Cir. 1994)." *United States v. Mitc*hell, No. 22-14153, 2024 U.S. App. LEXIS 2961, at *4 (11th Cir. Feb. 8, 2024).

While this court has granted RPI an opportunity to file a response to this petition under A.F. CT. CRIM. APP. R. 19(f)(1), RPI Anderson does not have standing to file a motion to dismiss R.R.'s petition.

> One of [victim M.W.'s] arguments is that Congress in Article 6b(e), UCMJ, created a self-contained appellate review system that exists apart from the avenues of review that Article 66(b)(2), UCMJ, provides for the CCAs and that Article 67(a), UCMJ, provides for this Court. M.W. explains: 'The CCAs need not seek jurisdiction in Article 66 to review and issue writs under Article 6b(e); thus, a need to look to Article 67 for C.A.A.F. to review those actions contradicts the statutory scheme within Article 6b.' ***We agree that the text of Article 6b(e)(1), (2), and (3)(A), UCMJ, grants jurisdiction to the CCAs*** by providing that 'the ***victim may petition*** the Court of Criminal Appeals for a writ of mandamus,' and that a 'petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals.' The victim of an offense may rely on these provisions without relying on Article 66(b), UCMJ, when seeking a writ of mandamus.

M.W. v. United States, 83 M.J. 361, 365 (C.A.A.F. 2023)(emphasis added). In other words, RPI has not stated a jurisdictional basis to motion this Court to dismiss R.R.'s petition filed under Article 6b(e). "In particular, this Court, 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). R.R.'s Article 6b(a), UCMJ rights belong to her as the victim and the according of and enforcement of those rights is independent from the rights of the accused unless the accused specifically says otherwise. Admittedly, an

accused may have a constitutional argument when it comes to affording victims their rights, but RPI has not asserted such in this case. As RPI proffered no injury and Article 6b(e) does not provide jurisdiction for an accused to motion for dismissal of victim petitions filed under that Article, RPI's motion to dismiss R.R.'s petition for lack of standing should be denied for lack of standing.

Respectfully submitted this 19th day of April 2024,

[redacted]

TIFFANY R. CAMPBELL, Capt, USAF
Victims' Counsel
AF/JAJS
3112 Coney St, Bldg 207
Moody AFB, Georgia 31699
[redacted]

[redacted]

DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Appellate Victims' Counsel
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1500 W. Perimeter Rd., Ste. 1300
Joint Base Andrews, MD 20762
[redacted]

[redacted]

ERICK C. KOBRES II, Capt, USAF
Victims' Counsel
AF/JAJS
17800 13th Street
Beale AFB, CA 95903
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 19 April 2024, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

[redacted]

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af.ja.jaim.appellate.records@us.af.mil

[redacted]IAN

Appellate Victims' Counsel
Air Force Victims' Counsel Division
1500 W. Perimeter Rd., Ste. 1300
Joint Base Andrews, MD 20762

[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.R., *Petitioner*	)	**MOTION TO ATTACH**
A1C Brock Anderson **United States Air Force** *Real Party in Interest*	)	

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

R.R. through her undersigned counsel pursuant to A.F. CT. CRIM. APP. R. 23.(b) moves to attach to the Petitioner's Reply in Opposition to be considered if the Court chooses to substantively address Real Party in Interest's Motion to Dismiss. The two electronic email strings that Petitioner seeks to attach are only relevant if the Court substantively address RPI's motion. Petitioner asserts RPI's motion is untimely due to the certified record not being served. If the Court agrees with Petitioner as to timeliness, the emails are not a necessary consideration. Moreover, the email strings are also unnecessary if the Court agrees with Petitioner that the RPI lacks standing to motion to dismiss R.R.'s Article 6b(e) Petition.

The two email strings Petitioner moves to attach relay that R.R.'s privileged mental health records were disclosed to RPI, and the emails provide basis for R.R. relief for an ongoing violation of her privilege. The certified record may these emails.

GRANTED
29 APR 2024

Respectfully submitted this 19th day of April 2024,

[redacted]

DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Appellate Victims' Counsel
Air Force Victims' Counsel Division
1500 W. Perimeter Rd., Ste. 1300
Joint Base Andrews, MD 20762
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on the 19th day19 April 2024, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

[redacted]

AF.JAH.Filing.Workflow@us.af.mil

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[redacted]ILIAN

Appellate Victims' Counsel
Air Force Victims' Counsel Division
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Joint Base Andrews, MD 20762

[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re RR	)	**Misc. Dkt. No. 2024-02**
Petitioner	)	
	)	
	)	
	)	
Brock T. ANDERSON	)	**NOTICE OF PANEL**
Airman First Class (E-3)	)	**CHANGE**
U.S. Air Force	)	
Real Party in Interest	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re RR	)	**Misc. Dkt. No. 2024-02**
Petitioner	)	
	)	
	)	
	)	
	)	**ORDER**
	)	
Brock T. ANDERSON	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Real Party in Interest	)	**Panel 2**

On 14 March 2024, this court received a petition for extraordinary relief pursuant to Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b, in the nature of a writ of mandamus, in the above-styled case.[1] This same date, Petitioner filed a Motion to File Attachments to Petition for Relief under Article 6b, UCMJ, Under Seal.

On 21 March 2024, the Government responded to the Petitioner's motion by stating that "[t]he filings submitted by Petitioner do not indicate that any of these materials have been sealed by the military judge," and that the Government "does not oppose Petitioner's motion to file under seal, so long as a sealed copy of the documents is also filed on all other parties." There has been no certificate of service filing with the court by Petitioner indicating that the sealed documents have been served on any parties. Further, the attachments provided by Petitioner to the court appear to be materials that may have been filed during the trial proceedings.

To enable our review of the petition and to verify what materials were marked by the military judge and entered into the record at trial, the court orders the preparation of a verbatim transcript of all trial proceedings and inclusion of all appellate exhibits.[2]

---

[1] The petition was docketed with the court the next day, on 15 March 2024.

[2] Pursuant to Mil. R. Evid. 513(e)(6) (*Manual for Courts-Martial*, *United States* (2024 ed.)), any portions of the transcript relating to Mil. R. Evid. 513 hearings, and any appellate exhibits involving Mil R. Evid. 513 pleadings and rulings entered into the record at trial must be sealed.

Accordingly, it is by the court on this 28th day of March, 2024,

ORDERED:

Petitioner's Motion to File Attachments to Petition for Relief under Article 6b, UCMJ, Under Seal is **DENIED**.

It is further ordered:

A certified record of trial, including a certified verbatim transcript and all exhibits shall be provided to the court, Petitioner, Respondent, and Real Party in Interest **not later than 1 May 2024**.

Pursuant to Rule 19(f)(1) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, the court hereby grants leave for Respondent and Real Party in Interest to file an answer to Petitioner's petition **not later than twenty days** after the record of trial is served on the court.

No other briefs will be permitted absent leave of the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.R., *Petitioner* **A1C Brock Anderson** **United States Air Force** *Real Party in Interest*	)	**MOTION TO FILE ATTACHMENTS TO PETITION FOR RELIEF UNDER ARTICLE 6B UNDER SEAL**

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

R.R. through her undersigned counsel pursuant to A.F. CT. CRIM. APP. R. 23.3(o) moves to file the Appendix/Attachments to her Petition for Relief under Article 6b *in the form of a* Writ of Mandamus under seal. R.R. seeks relief for violations of her right to be treated with fairness and respect for her dignity and privacy and for violations of Mil. R. Evid 513 procedures. Due to the sensitive, private information contained in the matters she seeks to file under seal.

Respectfully submitted this 14th day of March 2024.

[redacted]

TIFFANY R. CAMPBELL, Capt, USAF
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AF/JAJS
3112 Coney St, Bldg 207
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[redacted]

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[redacted]

[redacted]
ERICK C. KOBRES II, Capt, USAF
Victims' Counsel
AF/JAJS
17800 13th Street
Beale AFB, CA 95903
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 14 March 2024, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

[redacted]

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[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE RR,	)	**UNITED STATES' RESPONSE**
Petitioner,	)	**TO PETITIONER'S MOTION**
	)	**TO FILE UNDER SEAL**
v.	)	
	)	Before Panel No. 2
Airman First Class (E-3)	)	
Brock Anderson	)	Misc. Dkt. No. 2024-02
United States Air Force	)	
Real Party in Interest.	)	21 March 2024

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

Pursuant to the Rules of Practice and Procedure for this Honorable Court, the United States provides this response to Petitioner's request to file the appendix and attachments to her petition for extraordinary relief under seal. (*In Re RR – Motion to File Under Seal*, dated 14 March 2024.) Petitioner seeks relief for violations of her right to be treated with fairness and respect for her dignity and privacy, in addition to violations of Mil. R. Evid. 513 procedures. (Id.) Given the sensitive and private information contained in the appendix and attachments, Petitioner seeks to file under seal pursuant to Rule 23.3(o) of this Court's Rules of Practice and Procedure. (Id.) The filings submitted by Petitioner do not indicate that any of these materials have been sealed by the military judge.

The United States does not oppose Petitioner's motion to file under seal, so long as a sealed copy of the documents is also filed on all other parties. As of 21 March 2024, the Government Trial and Appellate Operations Division has not received a copy of the sealed appendix and attachments. Should this Court order the parties to file an answer in accordance

with Rule 19(f)(1) of this Court's Rules of Practice and Procedure, access to the sealed materials will aid in preparing an answer.

WHEREFORE, the United States does not oppose Petitioner's motion to file under seal, and respectfully asks this Court to order Petitioner to hand deliver a copy of the sealed documents to the Government Trial and Appellate Operations Division.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 a copy of the foregoing was delivered to the Court, Petitioner's Counsel, and the Air Force Appellate Defense Division on 21 March 2024.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
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 RR ***Petitioner*** **Brock ANDERSON** **Airman First Class (E-3)** **U.S. Air Force** ***Real Party in Interest***	)	**Misc. Dkt. No. 2024-02** **NOTICE OF DOCKETING**

On 14 March 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, in the above-styled case.

Accordingly, it is by the court on this 15th day of March, 2024,

ORDERED:

The case is assigned Misc. Dkt. No. 2024-02 and referred to Panel 2.

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 R.R., *Petitioner* **A1C Brock Anderson** **United States Air Force** *Real Party in Interest*	**)** **)** **)** **)** **)** **)** **)** **)** **)** **)** **)**	**NOTICE OF APPEARANCE**

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

On 14 March 2024, Capt Campbell and Capt Kobres will apply for admission to the Court. Capt Campbell is registered in Florida under bar number 1019172 and has never been disbarred or suspended from practice before any court, department, bureau, or commission of any state or the United States, nor received any reprimand from any such agency pertaining to his fitness as a member of the bar. She is not under any criminal or any other type of investigation.

Capt Kobres is registered in the District of Columbia under bar number 1617980 and has never been disbarred or suspended from practice before any court, department, bureau, or commission of any state or the United States, nor received any reprimand from any such agency pertaining to his fitness as a member of the bar. He is not under any criminal or any other type of investigation.

Pursuant to Rule 12.2 Ms. Devon Wells also enters her appearance as Victims Counsel. A Notice of Representation is attached hereto.

Respectfully Submitted,

[redacted]

DEVON A. R. WELLS, GS-14, DAF CIVILIAN
Victims' Counsel for R.R.
HAF/JAJS
Department of the Air Force
[redacted]

[redacted]

TIFFANY R. CAMPBELL, Capt, USAF
Victims' Counsel for R.R.
HAF/JAJS
United States Air Force
[redacted]

[redacted]

ERICK C. KOBRES II, Capt, USAF
Victims' Counsel for R.R.
AF/JAJS
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 14 March 2024, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

[redacted]

AF.JAH.Filing.Workflow@us.af.mil

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Air Force Victims' Counsel Division
1500 W. Perimeter Rd., Ste. 1300
Joint Base Andrews, MD 20762
[redacted]

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
VICTIMS' COUNSEL DIVISION

14 March 2024

MEMORANDUM FOR AFCCA

FROM: AF/JAJS (Ms. Devon A. R. Wells, Capt Tiffany Campbell, Capt E. Christian Kobres)

SUBJECT: Victims' Counsel (VC) Notice of Representation – R.R.

1. This notice is to inform you that we represent and have an attorney-client relationship with R.R., a named victim in the case of *U.S. v. Anderson.* We are representing Petitioner/victim R.R. as her victim's counsel.

2. If you have any questions, please contact Ms. Devon Wells at commercial [redacted] or at the [redacted].

[redacted]

DEVON A. R. WELLS, GS-14, USAF
Victims' Counsel for R.R.

[redacted]

TIFFANY R. CAMPBELL, Capt, USAF
Victims' Counsel for R.R.

[redacted]

ERICK C. KOBRES II, Capt, USAF
Victims' Counsel for R.R.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.R.,	)	
Petitioner	)	**PETITION UNDER ARTICLE 6b**
	)	**FOR RELIEF in the form of a**
	)	***WRIT OF MANDAMUS***
	)	
	)	
	)	
A1C Brock Anderson	)	
United States Air Force	)	
Real Party in Interest	)	
	)	

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

COMES NOW R.R. by and through the undersigned Victims' Counsel (VC), and pursuant to Article 6b, U.C.M.J. and Air Force Court of Criminal Appeals (A.F.C.C.A.) Rules of Practice and Procedure Rule 19 petitioning for relief in the form of a writ of mandamus in the case in interest *United States v. Anderson*. The detailed Military Judge is Lt Col B[redacted] J. P[redacted].

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STATEMENT OF THE CASE

On 21 December 2023, the detailed Military Judge emailed all the parties his notice of ruling as it pertains to the privileged mental health records of R.R. (Notice of Ruling—Attachment A). The Air Force Office of Special Investigations (OSI) obtained 359 pages of R.R.'s patient records and included them in OSI's file, and 10 of those pages are in the Report of Investigation. The Notice of Ruling pertained to those records; notably, the notice did not indicate the exception under Military Rules of Evidence (Mil. R. Evid.) 513 that the Military Judge relied on to conduct the *in camera* review. Rather, the Military Judge found that there was waiver under Mil. R. Evid. 510 through R.R.'s mother (M.M.) Thus, the Military Judge completed an *in camera* review to locate "waived" documents in R.R.'s Mil. R. Evid. 513 records.

After conducting the *in camera* review, the Military Judge divided the documents into four categories; "(1) Documents subject to the waiver that will be provided to the Defense (2) Documents not subject to the waiver but that [the Military Judge] … determined fall under the Due Process protections discussed in *Brady v. Maryland* and *Giglio v. United States* and their progeny (constitutionally required) (3) Documents that are privileged but not subject to the waiver or constitutionally required. These will not be provided to the Defense; [and] (4) Documents that are not privileged (including documents exempted from the privilege under [Mellette]) and that will be provided to the Defense." (Notice of Ruling—Attachment A). Additionally, within the notice, the Military Judge asked counsel for R.R. whether R.R. would be willing to waive the documents found in Category 2. The Military Judge went on to inquire as to what remedies exist if R.R. is not willing to

waive her privilege. The documents where the Military Judge found R.R. had waived her privilege were released to the parties.

Subsequently, prior to determining an appropriate remedy, the Military Judge accepted supplemental filings from all parties and heard oral arguments on the issue. Ultimately, on 23 February 2024, the Military Judge, persuaded by the decision in *Payton-O'Brien*, ordered the records of R.R. be sealed and the proceedings be abated. As the proceedings have been abated, R.R. has no other remedy but to file this petition. R.R. requests this court order all released records sealed, direct the disqualification of the Military Judge and Trial Counsel who reviewed the records, and direct the trial to proceed.

STATEMENT OF THE ISSUE

The Military Judge's ruling violated R.R.'s rights to be protected from the accused and to be treated with fairness and respect for her dignity and privacy as required under Article 6b(a)(1),(9), U.C.M.J. The Military Judge failed to uphold the requirements of Mil. R. Evid. 513 when he determined R.R.'s mother could waive R.R.'s psychotherapist-patient privilege. Only the patient is the privilege holder; thus, the R.R. is only person who can legally waive privilege. The Military Judge further erred conducting an *in camera* review of R.R.'s patient records without a finding that an exception to the privilege exists only after a specific, factual proffer from the Defense. This course of action was and is legal error. Additionally, the Military Judge erred and violated R.R.'s right to be treated with fairness and respect for her dignity and privacy afforded by Article 6b(a)(9). He did so by coercing R.R. to either waive her privilege to records of communications with a psychotherapist that the Military Judge *sua sponte* deemed "constitutionally required" or have the proceedings to hold the Accused accountable abated; he then erred by abating the proceedings. This

court should order the abatement lifted. The Military Judge became a *de facto* member of the Defense when discerning his own theory of defense and should be disqualified under Article 26(d), U.C.M.J. Moreover, as Trial Counsel admitted to viewing ill-gotten privileged material, writ should issue to order a qualified military judge to disqualify trial counsel. Lastly, all R.R.'s patient records should be sealed under a protective order and appended to the Record as an appellate exhibit, and Mil. R. of Evid. 513 should be followed.

STANDARD OF REVIEW

As this petition seeks a writ of mandamus as the Military Judge found waiver under Mil. R. Evid. 510 and Mil. R. Evid. 513, the standard of review should be *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). R.R. 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, and this issue is pending before C.A.A.F.

Nevertheless, *In re K.K.* established this Court's standard for issuance of a writ. 2023 CCA Lexis 31 (A.F.C.C.A. 2023). R.R. 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." *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)). [1]

R.R. must seek issuance of a *writ of mandamus* as Article 6b requires this mode of

[1] Whether ordinary appellate review standards should apply to victim petitions for writs of mandamus filed under Article 6b(e) is an issue The Judge Advocate General certified to C.A.A.F. for review in *HVZ v. United States and Fewell*, No. 23-0250/AF, 2023 CAAF LEXIS 846 (C.A.A.F. Dec. 5, 2023).

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 R.R.'s right to an issuance of the writ is clear and indisputable.

The Second Circuit helpfully explains this standard is satisfied when "the court clearly and indisputably base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or . . . render[s] a decision that cannot be located within the range of permissible decisions." *United States v. Manzano (In re United States)*, 945 F.3d 616, 625 (2d Cir. 2019) (internal citations and quotations omitted).

STATEMENT OF FACTS

On 27 February 2023, the Commander, Headquarters Nineteenth Air Force, referred one Charge and four Specifications of sexual assault of a child, in violation of Article 120b, U.C.M.J., in *United States v. A1C Brock Anderson*. (Charge Sheet—Attachment B). Prior to preferral, OSI led the investigation into the allegations of sexual assault of a child by the Accused. During the investigation, the lead agent approached the mother of R.R. for access to R.R.'s mental health records. On 11 July 2022, R.R.'s mother, signed an Authorization to Disclose Health Information release form authorizing the release of "any and all information regarding the rape with Brock Anderson," from Coastal Harbor Treatment Center (Coastal Harbor) to OSI investigators at Altus AFB. (Consent Form – Attachment C). Coastal Harbor is a civilian mental health treatment facility. Unbeknownst to R.R., the entirety of her mental health record located at Coastal Harbor was released to the custody of OSI. At no time during the investigation was R.R. consulted by OSI regarding the release of her mental health records.

On 7 September 2023, R.R.'s mother was appointed as R.R.'s Article 6b representative by the court. (Order Appointing Article 6b Representative – Attachment D). On 2 October 2023, counsel for R.R. was detailed and notice of representation was sent to government counsel. On 24 October 2023, counsel for R.R. filed her notice of appearance with the court and all parties. (Notice of Appearance – Attachment E).

On 30 October 2023, Defense re-submitted a request for mental health records and communications as it relates to R.R. to her detailed counsel. Defense mentioned telephonically that OSI included a portion of R.R.'s mental health records in the Report of Investigation. Defense indicated that their request for all the records was previously denied by Government counsel due to invocation of R.R.'s Mil. R. Evid. 513 rights. In their email, Defense specified that if R.R. does not consent to the release of her records then they would submit a request through the Military Judge. (Motion For Appropriate Relief: Mil. R. Evid. 513 Hearing – Attachment F - See Attachment 1).

On 31 October 2023, the 97 AW/JA's Chief of Military Justice called and notified VC for R.R. that the Government Counsel was in possession of the entirety of R.R.'s mental health records from Coastal Harbor. The documents were discovered while going through their discovery log.

After consulting R.R. on the conversation with Defense and Government, R.R. invoked her privilege on all of her mental health records. On 1 November 2023, VC emailed Government counsel to request that the documents be sealed and placed in the custody of the court until a Mil. R. Evid. 513 hearing was held. On that same day, R.R., through counsel, filed a motion for appropriate relief to request a Mil. R. Evid. 513 hearing as it relates to her mental health records. (Motion For Appropriate Relief: Mil. R. Evid. 513 Hearing –

Attachment F). Defense, in their response, requested that the court grant the requested Mil. R. Evid. 513 hearing. The response did not provide "a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege." Mil. R. Evid. 513(e)(3)(A) (Defense Response to Motion for Appropriate Relief Mil. R. Evid. 513 Hearing – Attachment G). Government did not file a response. A closed Article 39a was scheduled to be held on 4 December 2023.

On 4 December 2023, Trial Counsel disclosed during the closed Mil. R. Evid. 513 motions hearing that at least one member of the trial team reviewed the mental health records in the possession of the Government, and that person believed there may be evidence that would trigger a *Brady-Giglio* obligation for the Government to provide those records to the Defense, if there were not a relevant privilege. Additionally, Trial Counsel indicated that the reason the documents came into their possession was due to a consent form signed by the mother of R.R. Due to this notification, the Military Judge allowed all parties to submit supplemental filings to address the issue of "waiver" of privilege by the parent of R.R., and to address how the court should approach the reported presence of content possibly triggering *Brady-Giglio* obligations within the mental health records. At the conclusion of the hearing, the records were turned over to the Military Judge. The Military Judge indicated that he expected he would need to review the records based on the disclosures from Trial Counsel, but that the scope of such review would be based upon a future determination of wavier, whether possible *Brady-Giglio* material constituted a constitutional exception to Mil. R. Evid. 513, and possibly to sort unprivileged "*Mellette*"

material from privileged material. The facts as presented are as best remembered by victim's counsel as to what was said and argued.

On 11 December 2023, counsel for R.R. filed a supplemental brief after the 4 December 2023 Mil. R. Evid. 513 hearing. In the supplemental motion, VC highlighted that there was no applicable exception to the Mil. R. Evid. 513 rule for *in camera* review. Although the summary section of the VC motion references an *in camera* review would be appropriate, it specifically caveats it should only be for the records that have already been released to Defense counsel. At the time of the filing, the only records partially released were those that had been included in the OSI Report of Investigation. Additionally, the VC argued that there has not been a waiver of Mil. R. Evid. 513 by R.R. and a constructive-waiver by a parent or guardian does not apply. Hence, the argument was that an *in camera* review of the mental health records of R.R. would be inappropriate for both stated reasons. (VC Supplemental Filing – Attachment H).

Defense did not address the issue in their supplemental filings. Rather, focused their motion on the need for the information for the credibility of R.R and to examine her motive to fabricate the allegation. Specifically, "[R.R.]'s motive to fabricate is when [R.R.] was caught after eloping on or about 19 May, she fabricated the allegations to her mother in order to avoid punishment and to justify her behavior." (Defense Supplemental Filing – Attachment I). Government did not file a supplemental motion following the hearing.

On 21 December 2023, the detailed Military Judge emailed all the parties his notice of ruling as it pertains to the privileged mental health records of R.R. (Notice of Ruling— Attachment A). The notice did not indicate the exception under Mil. R. Evid. 513 that the Military Judge relied on to conduct the *in camera* review. Rather, the Military Judge found

that there was waiver under Mil. R. Evid. 510 through the parent of R.R. and that he completed an *in camera* review based on that determination to locate "waived" documents. (Notice of Ruling—Attachment A). No parties were notified officially prior to the *in camera* review taking place.

After the *in camera* review, the documents were divided into four categories; "(1) Documents subject to the waiver that will be provided to the Defense (2) Documents not subject to the waiver but that [the Military Jude has] determined fall under the Due Process protections discussed in *Brady v. Maryland* and *Giglio v. United States* and their progeny (constitutionally required) (3) Documents that are privileged but not subject to the waiver or constitutionally required. These will not be provided to the Defense; [and] (4) Documents that are not privileged (including documents exempted from the privilege under [Mellette]) and that will be provided to the Defense." In that same email, the Military Judge asked VC whether R.R. would be willing to waive the documents found in Category 2 and if not then what other remedies existed. (Notice of Ruling—Attachment A).

On 22 December 2023, counsel for R.R. requested the documents in Category 2 to review with their client on whether they would waive their privilege as it pertains to those pages. On 26 December 2023, the records in Category 2 were released to the VCs for R.R. On 28 December 2023, the Military Judge sent the parties the mental health records from Category 1 and 4.

On 3 January 2024, at the Military Judge's behest R.R. waived privilege to all but four pages of the documents within Category 2. R.R. did not waive her privilege to any other portions of her mental health records.

On 3 January 2024, the Military Judge released a draft of their ruling as it pertains to the mental health records of R.R. (Military Judge Draft Ruling on Mil. R. Evid. 513 – Attachment J). In the ruling, the Military Judge acknowledged that there was no case on point within the military. However, the Military Judge found waiver existed because R.R.'s mother was not in an adversarial role to R.R. and she was acting in what she believed to be R.R.'s best interest. Thus, the Military Judge released records to all the parties that he found to be subject to the "waiver" on the consent form from R.R.'s mother.

On 4 January 2024, there was an Article 39a session held to address issues as it relates to continuation for a separate matter and to hear proposed remedies for the documents as to the four remaining pages of documents under Category 2. During the hearing, the Military Judge indicated that he reviewed *Payton-O'Brien* and *Tinsley* when seeking possible remedies for the remaining documents. The Military Judge allowed all relevant parties present arguments on plausible remedies. In their oral argument, Defense and Government counsel deferred to *Payton-O'Brien* and requested the court be placed in abatement. Counsel for R.R. proposed remedy was the disqualification of the military judge and trial counsel that reviewed the privilege material and seal R.R.'s mental health records. The Military Judge requested supplemental filings as to remedies from all parties.

On 12 January 2024, all parties submitted supplemental filings to the court to address the issue as to R.R.'s records. VC maintained their previous position that the Mil. R. Evid. 513 privilege had not been waived by R.R. and that the *in camera* review was not appropriate as to R.R.'s mental health records when the standard under Mil. R. Evid. 513 had not been met. (VC Second Supplemental Mil. R. Evid. 513 Filing – Attachment K). Additionally, the remedy proposed was the same as iterated at the 4 January hearing. (VC

Second Supplemental Mil. R. Evid. 513 Filing – Attachment K). Defense and Government counsel proposed abatement as the appropriate remedy for the non-disclosure. (Defense Second Supplemental Mil. R. Evid. 513 Filing – Attachment L), (Government Response to Mil. R. Evid. 513 Filing – Attachment M).

On 23 February 2024, the Military Judge issued his ruling on the release of R.R.'s mental health records. (Ruling – Motions Regarding the Release of Mental Health Records of R.R. – Attachment N). The Military Judge was persuaded by the court in *Payton-O'Brien* and the Court ordered abatement of the proceedings. (Ruling – Motions Regarding the Release of Mental Health Records of R.R. – Attachment N). As a result, R.R. now files this petition for appropriate relief.

R.R. has been a minor throughout the court proceeding. R.R. was born in July 2008. R.R. has no limitations on mental capacity as it pertains to legal decisions. Outside of the few pages indicated above, at no time has R.R. waived her rights to the rest of her mental health records. When notified, R.R. has invoked her privilege throughout the proceedings.

Prior to the abatement, the court-martial in this case was scheduled to proceed on 8 July 2024. Upon request from VC, the Military Judge agreed to not remove it from the docket until 15 March 2024.

ARGUMENT

I.

THE MILITARY JUDGE ERRED DETERMINING R.R. WAIVED HER PRIVILEGE UNDER MIL. R. EVID. 513.

The Military Judge erred by interpreting Mil. R. Evid. 510 and Mil. R. Evid. 513 to allow a parent of a patient to waive the patient's privilege on their behalf. The question

raised by the Military Judge's ruling is whether the ability to "claim" the privilege makes a person a holder of the privilege under Mil. R. Evid. 510, or whether it simply gives a person the ability to assert the protections of the privilege to prevent disclosures that would violate the rule. Examination of the plain language of the statute, comparison to other privileges under the Military Rules of Evidence, and analysis of the practical outcomes of each possibility, all support the interpretation that the authority to claim a privilege does not grant the ability to waive the privilege.

a. The plain language of Mil. R. Evid. 513 gives waiver authority to patients exclusively.

As a threshold matter, "[i]t is a well-established rule that principles of statutory construction are used in construing the . . . Military Rules of Evidence [(Mil. R. Evid.)]. . . ." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007). "'[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id*. (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*., 530 U.S. 1, 6 (2000)) (alteration in original). This is true of analyzing the military privileges as well. *Custis*, 65 M.J. at 369 (C.A.A.F. 2007) (refusing to create a non-textual exception to Mil. R. Evid. 504).

Common law privileges "must be strictly construed and accepted." *Trammel v. United States*, 445 U.S. 40, 50 (1980); *see also United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013). However, codified privileges are a different matter. *Custis*, 65 M.J. at 369 (C.A.A.F. 2007) (refusing to create a non-textual exception to Mil. R. Evid. 504 even in light of *Trammel*); *see also* 25 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5586, at 715 (1989) (explaining the limits of *Trammel* when it comes to codified privileges). In any event, the plain language governs even when the

appellate courts are mindful of *Trammel*. *See United States v. Mellette*, 82 M.J. 374, 384 (C.A.A.F. 2022) (basing its opinion on "the plain language of Mil. R. Evid. 513.")

In the military, the psychotherapist-patient privilege offers this basic protection:

> A *patient* has a 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, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Mil. R. Evid. 513(a)(emphasis added). There is no textual basis anywhere within this rule of evidence to suggest a parent, guardian—or anyone other than the patient—can waive this privilege on behalf of the patient, even if the waiver is well-intentioned. Mil. R. Evid. 513(a)-(e). To the contrary, the plain language of the rule confers the privilege upon the patient, to the exclusion of "any other person." Mil. R. Evid. 513 (a). The intent behind Mil. R. Evid. 513 is to give the patient control over the disclosure of protected communications. *United States v. Beauge*, 82 M.J. 157, 164 (C.A.A.F. 2022) (stating "the intent of the rule is to vest control of disclosure with the patient, and in the absence of plain language to the contrary, we should not choose a reading of the rule that subverts this principle")

The Military Judge erred by interpreting Mil. R. Evid. 510 and Mil. R. Evid. 513 to allow a parent of a patient to waive the patient's privilege. Claiming the privilege is fundamentally different from waiving it. Waiver of a privilege occurs through voluntary consent or disclosure by "a person upon whom these rules confer a privilege against disclosure[2]… under such circumstances that it would be inappropriate to allow the claim of

[2] Voluntary disclosure by a predecessor who held the privilege originally also constitutes waiver. Mil. R. Evid. 510(a)

privilege." Mil. R. Evid. 510. The rule of waiver only refers to the holder of the privilege which, in the case of Mil. R. Evid. 513, is the patient. On the other hand, when it comes to *protecting* the patient's records from disclosure, any number of proxies can serve the patient's interests. Mil. R. Evid. 513(c). The rule grants the authority to claim the privilege to the patient, their guardian or conservator, counsel representing the patient, the psychotherapist, or the psychotherapist's assistant. *Id*. This is a marked distinction: clearly the text cares much less about limiting who can *guard* the records, and much more about who can *release* them. *Id*. Indeed, the patient "has a privilege to . . . prevent *any other person* from disclosing," which would include parents or guardians. Mil. R. Evid. 513(a)(emphasis added).

The plain language of Mil. R. Evid. 513 indicates that the ability to *claim* the privilege is synonymous with the ability to assert the protections of the rule, not the ability to waive it. After listing the persons who may claim the privilege the final sentence of Mil. R. Evid. 513(c) states that "the authority of the psychotherapist, assistant, guardian, or conservator *to so assert the privilege* is presumed in the absence of evidence to the contrary." *Id*. (emphasis added). The language "to so assert the privilege" shows that reference to the ability to "claim" in the prior sentences was meant by the drafters of the rule to mean the ability to assert the privilege. *Id*. This interpretation is directly supported by Mil. R. Evid. 501(b), which defines what a claim of privilege means. A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing. Mil. R. Evid 501(b). The language from this provision is clear that claiming a provision

means to assert its protections. Therefore, the Military Judge erred by expanding M.M.'s claim authority beyond its plain meaning into a waiver authority over R.R.'s privileged records.

b. An interpretation of parental waiver authority would produce an absurd result.

Interpreting the authority of a guardian to claim a child's privilege under Mil. R. Evid. 513 as including the authority to waive that privilege would result in blatantly unjust outcomes. Granting a parent the power to waive the privilege of their child would allow a parent to circumvent the rights of their child to their own advantage, in direct opposition to the privacy interests of the patient. For example, a parent accused of assaulting their minor child would have the ability to waive their child's privilege to examine their mental health records seeking evidence to use against the victim child, regardless of whether an exception would otherwise allow a piercing. Nothing from the plain text, context, or history of Mil. R. Evid. 513 indicate that such a violation of a minor patient's right to the privilege was intended. In general, "[a]ll laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *U. S. v. Katz*, 271 U. S. 354, 357, 46 S. Ct. 513, 70 L. Ed. 986 (1926). The Military Judge attempts to avoid the "absurdity doctrine" in his ruling by adopting a common law rule pulled from other jurisdictions. Several jurisdictions with common law privileges or statutory gaps in their privileges have formed a rule that a parent is able to waive a child's privilege when acting in the child's interest, but are not able to do so when

acting against that interest.[3] The problem with the adoption of this rule for the Military Rules of Evidence is that the privilege, and the definition of who holds the privilege, is fully defined in the text of the statute. Nothing in the text suggests that a parent has waiver authority in some situations and lacks the authority in others.

The meaning of "claim" also becomes apparent when considering the consequences of its application to the other persons listed in Mil. R. Evid. 513 as having the ability. Most significantly, if a psychotherapist's ability to claim the privilege includes the ability to waive it, and the authority "to so assert is presumed in the absence of evidence to the contrary," then the receiver of the privileged communication would be free to disclose all communications at their discretion unless the patient explicitly, and publicly, forbade the provider from disclosing. Mil. R. Evid 513(c). Such a result would render the privilege essentially meaningless. It is also worth noting that the single distinction between a guardian's "claim" authority and a psychotherapist's "claim" authority, the language "on behalf of the patient," may at first glance serve to confer greater authority on the guardian than that of the psychotherapist, possibly to include the ability to waive. However, again the last sentence of the paragraph is instructive. The guardian, the psychotherapist, the conservator, and the assistant are all grouped and treated equally in the presumption that they may "so assert" the privilege, with no distinction given between their abilities.

Examination of the other privileges, such as the lawyer-client privilege under Mil. R. Evid. 502, the clergy privilege under Mil. R. Evid. 503, and the marital privilege under Mil. R. Evid. 504 are also instructive. Each of these privileges contain a provision that states

[3] Further analysis of the difference between the psychotherapist privilege as established in the Military Rules of Evidence and these other jurisdictions is discussed below.

that the privilege may be claimed by the privilege holder, their guardian or conservator, and the respective persons who received the communication (i.e., attorney, clergyman, or spouse). The same absurd result would occur with each of these privileges were the ability to claim interpreted to include the ability to waive. An attorney having the ability to waive the privilege of their client, with no requirement for exception, would render the attorney-client privilege up to the whims of the attorney. The "no exceptions" privilege proudly held by chaplains would be subject to a hidden "unless the chaplain feels like it" exception, stemming from the presumed authority of the clergyman to claim the privilege. The spousal privilege is perhaps most instructive of all, due to additional language contained in its "claim" paragraph. Mil. R. Evid. 504(b)(2) states: "the privilege may be claimed by the spouse who made the communication or the by the other spouse on his or her behalf … [t]he privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure." The fact that the receiving spouse is given an explicit exception by which they can subvert the privilege of the communicating spouse clearly shows that the receiving spouse did not otherwise have the general ability to waive the privilege, despite having the ability to claim it.

c. Application of caselaw from other jurisdictions does not support a parental waiver interpretation.

In determining that R.R.'s mother was able to waive her privilege, the Military Judge primarily relied on a review of case law from other jurisdictions, specifically citing to the privilege under the federal system, New Hampshire, Colorado, Florida, and Alabama. The privilege recognized by the federal system is based entirely in common law, and there is

therefore no textual basis for determining who holds the privilege, who can assert the privilege, and who can waive the privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). The Colorado privilege is statutory, but the statute does not define who holds the privilege or who can assert or waive it. *In re L.A.N.*, 292 P.3d 942, 948-50 (Colo 2013); Col. Rev. Stat § 13-90-107(g). The privileges from these two jurisdictions lack statutory language defining the contours of who can hold the privilege, relying exclusively on judges to craft the bounds of the privilege through common law, and are therefore of minimal persuasive value in examining the plain language of Mil. R. Evid. 513.

The remaining three jurisdictions cited all use statutory schemes that are nearly identical to one another, and similar but not identical to the language used in Mil. R. Evid. 513. Fla. Stat. § 90.503(2); N.H. Evid Rule 502(c) and 503(b); Ala. R. Evid. 503(c). The statutes in each of these jurisdictions specifies that the privilege may be claimed by the patient, the patient's guardian or conservator, and the psychotherapist on the patient's behalf. *Id*. Of those jurisdictions, Florida and New Hampshire have interpreted a right to waiver by the parent of a minor patient, while Alabama has interpreted their statute as granting a parent the right to assert but not waive the privilege for their child. *Garcia v. Guiles*, 254 So. 3d 637, 640 (Fla. Ct. App. 2018) (finding the right to parental waiver of the privilege in Florida where there is no adversarial relationship between parent and child); *In re Berg*, 152 N.H. 658, 662-64 (N.H. 2005) (finding the right to parental waiver of the privilege in New Hampshire where there is no adversarial relationship between parent and child); *Borden v. Malone*, 327 So. 3d 1105, 1119 n.3 (Ala 2020) (finding the authority to

claim the privilege by a parent means the authority to assert but not waive the privilege in Alabama).

The Military Judge correctly identified that the jurisdictional split among the states with similar statutory language indicates the meaning of the word "claim" is subject to a reasonable difference in interpretation. However, the language of Mil. R. Evid. 501 and Mil. R. Evid. 513 differs from the language of each of these statues in two critical ways. First, of those statutory schemes, the Military Rules of Evidence is the only one that defines the word "claim," which it defined as being essentially the ability to assert. Mil. R. Evid. 501(b). Second, the military rule is the only one to contain language within the statute directly tying the authority to claim the privilege to being the ability to assert the privilege, as discussed above. Mil. R. Evid. 513(c). These two critical differences eliminate the ambiguity of the term "claim" within Mil. R. Evid. 513 as compared to the language used in the jurisdictions examined by the Military Judge, and clearly favors an interpretation that a parent has the ability to assert but not waive their child's privilege.

d. Even if the authority to claim the privilege included the authority to waive, the presumption has been rebutted in this case.

Finally, even if Mil. R. Evid. 513 provided a parent with the authority to waive their minor child's privilege, the Military Judge erred because the presumption that M.M. had such authority over R.R.'s privilege has been rebutted. As discussed earlier in this brief, "the authority of such a … guardian … to so assert the privilege is presumed in the absence of evidence to the contrary." Mil. R. Evid. 513(c). The facts of this case clearly show evidence contradicting the presumption that M.M was validly acting on R.R.'s behalf when she signed the consent form to release R.R.'s mental health records. Upon learning that the

government was in possession of her mental health records R.R., asserted the privilege, through counsel, and requested that the records be turned over to protective custody of the Military Judge for a Mil. R. Evid. 513 hearing. Any presumption that M.M. was acting on R.R.'s behalf was rebutted by the assertion of the privilege by R.R. at the earliest discovery of the breach. Therefore, any presumed waiver by R.R. was not valid.

II.

THE MILITARY JUDGE ERRED IN REVIEWING R.R.'S MENTAL HEALTH RECORDS *IN CAMERA*

Upon the determination that "waiver" existed through the parent of R.R., the Military Judge conducted an *in camera* review of R.R.'s mental health records to include material that had not been waived by R.R. or her mother. No party was formally notified that this review would occur prior to it being conducted. In his draft and formal ruling, the Military Judge acknowledges the standards under Mil. R. Evid. 513(e)(3). Yet, the Military Judge conducted the *in camera* review on the basis of the limited waiver by the parent of R.R. However, such a review is incongruent with the applicable laws as it relates to protected communications.

As discussed above, due to the sensitive nature of the records involved, Mil. R. Evid. 513 was drafted with certain protections for the holder of the privilege. One of those protections are restrictions on when a patient's protected communications and records can be accessed *by even the military judge*. Mil. R. Evid. 513(e)(3). Under Mil. R. Evid. 513, *prior* to conducting an *in camera* review, the military judge *must* find by a preponderance of the evidence that the moving party showed all four bases for such a review. Mil. R. Evid. 513(e)(3) (Emphasis Added). Specifically, the moving party must show,

> (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;
> (B) that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule;
> (C) that the information sought is not merely cumulative of other information available; and
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

If the moving party fails to meet all four bases, then the "military judge does not have the authority to conduct an *in camera* review." *Beauge* at 166. The plain language of the rule does not authorize a military judge to conduct even an *in camera* review of Mil. R. Evid. 513 material without following the parameters within the rule.

Notably, the Petitioner recognizes that *in camera* review has long been recognized as a useful tool for military judges to resolve issues as it relates to evidentiary documents. However, there are limitations on the use of that tool. For instance, although the court in *Chisum* found that military judges may use *in camera* review to resolve competing claims of privilege and a right to review information, it tempered its ruling in that it "[. . .] is not automatically appropriate every time one party seeks information over which another claims privilege." *United States v. Chisum*, 75 M.J. 943 (A.F. Ct. Crim. App. 2016). Specifically, the court has found that when the Defense has failed to meet the necessary showing under the rules then an *in camera* review can be an inappropriate tool. *United States v. Wright*, 75 MJ 501, 510 (A.F. Ct. Crim. App. 2015) (stating "we find the military judge has not adequately developed the record as to whether the defense provided sufficient facts demonstrating a reasonable likelihood that the records contain relevant, non-cumulative information, necessary for disposition of the defense's … motion"). These

additional requirements have long been recognized as it pertains to psychotherapist-patient protected communications.

On numerous occasions, the courts have also recognized that once the psychotherapist-patient privilege has been asserted then the rules that govern these records are those contained within Mil. R. Evid. 513. Even for non-privileged information, commonly referred to as *Mellette* material, such material is subject to the procedural requirements of Mil. R. Evid. 513(e) prior to production. *United States v. Mellette*, 82 M.J. 374, 381 (C.A.A.F. 2022)(stating "to the extent that these documents [documents relating to S.S.'s diagnoses, prescriptions, and treatment] 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 Mil. R. Evid.513(e)***). Additionally, as cited above, the court in *Beauge*, similarly looked at the issue as it pertains to the authority of the military judge to conduct an *in camera* review of protected communications when the procedural requirements have not been met. *Beague* at 166. Ultimately, the court found that the military judge had no authority to review Mil. R. Evid. 513 material when the requirements under (e)(3) have not been met. *Id*. Even the plain language of R.C.M. 701(f) directs parties to the Military Rules of Evidence, "[n]othing in this rule shall be construed to require the disclosure of information *protected* from disclosure by the Military Rules of Evidence." In this case, even for records in the actual possession, custody, and control of trial counsel – R.C.M. 701(f) clearly states disclosure is *not required.* R.C.M. 701(f) refers to Military Rules of Evidence and Mil. R. Evid. 513 then applies. This own Court's analysis in *In re A.L.* states the same,

> Thus, one might argue that discovery from one party to another under R.C.M. 701 is distinct from 'production' and does not

> trigger the application of Mil. R. Evid. 513(e)(2). However, we find such a cramped interpretation of 'production' and the application of Mil. R. Evid. 513(e)(2) is not appropriate. The core privilege established by Mil. R. Evid. 513(a) broadly empowers a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure.

In re A.L., 2022 CCA LEXIS 702, at *20-21 (A.F. Ct. Crim. App. Dec. 7, 2022)

Here, the Military Judge does not attempt to stick to the parameters under (e)(3). The Military Judge, in his ruling, acknowledged that the general principal of the use of *in camera* review for competing claims of privilege is not applicable to records protected by Mil. R. Evid. 513. (Ruling - Attachment N). However, the Military Judge determined that R.R.'s records do not fall under the rubric of Mil. R. Evid. 513 based on the court's finding that there was a limited waiver as to R.R.'s privileged communications. (Ruling - Attachment N). The Military Judge did not make a determination on whether Defense met its burden for an *in camera* review under Mil. R. Evid. 513(e) as it relates to these documents; nevertheless, he conducted an *in camera* review and delved into substantive communications of records even he determined were not subject to the waiver. However, notably, the Court did determine that Defense failed to meet its burden as to the production of any additional protected records for R.R.

Even in *arguendo*, that a limited waiver existed, the Military Judge still acknowledged that the records also contained non-waived material in which privilege had been invoked. Thus, as the moving party, Defense is still required to make a showing that it met all the requirements under Mil. R. Evid. 513(e)(3) *prior* to the military judge conducting an *in camera* review. That was not accomplished in this case. Also, based on the record and the enumerated exception that Defense relied on in their motion, it would

have been unlikely that the court found that Defense met its threshold showing. Thus, the Military Judge had no authority to conduct an *in camera* review of R.R.'s protected communications.

Upon making the determination that waiver existed, the Military Judge should have notified the parties and requested remedies at that time rather than conducting an *in camera* review into the substantive, unquestionably privileged records. Now, R.R. is in a position that she has to make the difficult decision to waive her privileged communications or the proceedings remain abated.

III.

"READING BACK" AN ILL-DEFINED "CONSTITUTIONAL EXCEPTION" TO MIL. R. EVID. 513 VIOLATES R.R.'S RIGHT TO PRIVACY AND FAIR PROCEEDINGS

a. The Military Judge erred in "reading back" a constitutional exception to the Mil. R. Evid. 513 privilege explicitly removed by the President.

Even if the Military Judge correctly found waiver and did not err in conducting an *in camera* review, the Military Judge erred in the scope of the review and determining any of R.R.'s privileged communications were constitutionally required to be disclosed. The Constitution does not provide an Accused the right to access a victim's privileged mental health records outside the exceptions contained within Mil. R. Evid. 513. The President removed the "constitutionally required" exception to Mil. R. Evid. 513 in 2015 through executive order, at the direction of Congress. Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (June 17, 2015); National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA), Pub. L. No. 113-291, 128 Stat. 3292 (2014). "It is also clear that the military courts do not have the authority to either 'read back' the constitutional exception into M.R.E. 513,

or otherwise conclude that the exception still survives notwithstanding its explicit deletion." *United States v. Tinsley*, 81 M.J. 836, 849 (A. Ct. Crim. App. 2021; rev. denied *United States v. Tinsley*, 82 M.J. 372 (C.A.A.F. 2022). The Military Judge does exactly what the *Tinsley* court proscribes and supports the "read back" of the "constitutional exception"[4] by citing *Payton-O'Brien* for the proposition that the removal of the constitutional exception from Mil. R. Evid. 513 does not sever an Accused's potential constitutional rights to the contents of a victim's privileged mental health records. *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M Ct. Crim. App. 2017). However, the question at hand is two part: (1) *can* the constitution afford an Accused the right to a patient's privileged records as a matter of constitutional supremacy, and (2) *does* the constitution afford an Accused the right to a patient's privileged records outside the written boundaries of Mil. R. Evid. 513 as a matter of constitutional law. The Military Judge correctly determined that the constitution *could* afford an Accused the right to privileged material, but erred in concluding that the constitution *does* afford such a right.

[4] R.R. asserts the lack of a specific, clear definition of "constitutional exception" highlights the fallacy of its existence especially since the right to confrontation is a *trial* right. "[t]he Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony. If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S. Ct. 989, 998-99 (1987) (emphasis in original). Moreover, the Supreme Court has explicitly held privileges only infringe on a defendant's due process right to a complete defense if, "[the] right [to a complete defense] is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 321, (2006); citing *United States v. Scheffer*, 523 U.S. 303, 308 (1998). CAAF in *Beauge* held "[w]e do not find a basis to conclude that the [Mil R. Evid 513] privilege, as applicable in the instant case, was either arbitrary or disproportionate to the purposes served." *Beauge* at 168.

The removal of the constitutional exception from Mil. R. Evid. 513 has generated much discussion about whether Congress and the President have the power to circumvent the reach of the constitution by executive order and statute. *See Id*.; *L.K. v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017). Although the military courts have universally agreed that the President and Congress lack the power to limit the reach of the constitution via simple legislation and executive order, the discussion has been oriented around the assumption that this is what was intended by the change. *Id*. However, the history of the rule suggests that the intent of the drafters was to correct an error, not to circumvent the Constitution. Prior to 2015, the psychotherapist-patient privilege was notably distinct from other privileges contained in the in the Military Rules of Evidence, such as the attorney-client privilege, the clergy privilege, and the marital privilege, all of which contain no enumerated constitutional exception. Mil. R. Evid. 502; Mil. R. Evid. 503; Mil. R. Evid. 504. The result of this distinction was a perception that Mil. R. Evid. 513 was intended to interact differently with an accused's constitutional rights as compared to the other privileges. Indeed, the courts adopted a balancing test to apply the enumerated constitutional exception which is not used for other privileges such as the attorney-client or clergy privileges. *See United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006); *United States v. Chisum*, 75 M.J. 943 (A.F. Ct. Crim. App. 2016). It was likely in response to this disparate treatment that Congress directed the President to remove the exception. In effect, the 2016 change to Mil. R. Evid. 513 did not seek to remove a constitutional right of the Accused, it sought to remove an *impression* of a constitutional right of the Accused that never existed and was created unintentionally.

Although the Court of Appeals for the Armed Forces (CAAF) has not addressed this issue directly, the trend and trajectory of the current body of case law supports the conclusion that the constitution does not grant an accused an independent right to pierce a patient's privilege under Mil. R. Evid. 513. The Military Judge points to *Payton-O'Brien* as a persuasive authority for the proposition that the constitution grants an accused constitution rights to privileged material. However, the ruling in *Payton-O'Brien* has been habitually overstated and misrepresented in recent years in an attempt to breach victims' privileges. The Navy Marine Court of Criminal Appeals (NMCCA) made several key findings in *Payton-O'Brien*: (1) the Constitution applies to Mil. R. Evid. 513 regardless of whether the rule explicitly mentions it, (2) a Military Judge may not order the production of privileged Mil. R. Evid. 513 material even *if* an accused is entitled to it under the Constitution, and (3) *if* an accused is entitled to privileged information under the Constitution the appropriate remedy may include removal of charges or abatement. *Payton-O'Brien* 76 M.J. at 787. Although the *Payton-O'Brien* court discussed several examples of scenarios where they could imagine an Accused might have a constitutional right to privileged communications under Mil. R. Evid. 513, the court did not rule that such a right does exist, ultimately returning the case to the trial judge with an order prohibiting intrusion into the mental health records and for consideration of the appropriate remedy *if* the Accused's constitutional rights were violated by his lack of access to those records. *Id*. This ruling left the door open to the possibility that an Accused may have a constitutional right to a victim's mental health records but ultimately left the question unsettled.

Unlike in *Payton O'Brien*, the Army Court of Criminal Appeals (ACCA) has addressed this question directly and has determined in no uncertain terms that the Constitution does

not grant an Accused any rights to obtain a witness's mental health records outside the rules of Mil. R. Evid. 513 itself. In *Tinsley* the court determined that neither the confrontation clause under the 6th Amendment, nor due process under *Brady/Giglio* provide a Constitutional right to pierce Mil. R. Evid. 513. *Tinsley* at 853 (stating "because there is no requirement to recognize an exception to the psychotherapist-patient privilege based on *Brady* or any other constitutional balancing test, this court lacks the authority to create or otherwise recognize any such exception to Mil. R. Evid. 513. It follows that the *only* exceptions to the psychotherapist-patient privilege are those expressly set forth in Mil. R. Evid. 513(d)(1)-(7)"). The *Tinsley* court reasoned, consistent with the holding of the Supreme Court, that the confrontation clause is a trial right and provides no right to pre-trial discovery of evidence. *Id.; Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (U.S. 1987).

In regards to *Brady*, ACCA reasoned that Mil. R. Evid. 513 protects a patient from disclosures to the Government just as firmly as it protects against disclosures to the Accused. Therefore, the Government cannot properly be in possession of privileged material for the purposes of *Brady* without the privilege having been violated, whether intentionally or inadvertently. This reasoning is consistent with *Brady* itself, which held "that the suppression *by the prosecution* of evidence favorable to an Accused upon request violated due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) (emphasis added). A patient's assertion of their privilege is not a case of suppression *by* the prosecution, but rather a case of suppression *from* the prosecution (as well as the Accused) by right of the holder of the privilege. It, therefore, stands to reason that the proper remedy if the Government comes into possession of privileged information is not

for the information to be turned over to the Accused, the proper remedy is for the information to be *removed* from the possession of the Government, via destruction or sealing of records, and walling off any counsel who have improperly reviewed the evidence.

Overall, the ruling in *Tinlsey* acknowledges that the Constitution *could* entitle an accused to material under Mil. R. Evid. 513 as a matter of law, but that it simply *does not*. Although CAAF has yet to weigh in on this question[5], the best indicator we have into how they might rule comes from their decision to deny review in *Tinsley*, leaving ACCA's interpretation that there is no constitutional right to Mil. R. Evid. 513 material as binding precedent in the Army courts.

b. The Military Judge became *de facto* counsel as he *sua sponte* determined what evidence may be constitutionally required for a complete defense without a proffer by the Defense.

In conducting an *in camera* review of R.R.'s privileged and private patient records and then *sua sponte* deciding some records were "constitutionally required" without a "specific factual basis" proffered as to those records, the Military Judge made himself a *de facto* member of the Defense team. See Mil. R. Evid. 513; *See also United States v. Neis*, 2020 CCA LEXIS 60, at *27 (A.F. Ct. Crim. App. Feb. 27, 2020)(holding the Military Judge did not abuse his discretion in refusing to conduct an *in camera* review because "[. . .] even when an enumerated 'constitutionally required' exception existed in the previous version of Mil. R. Evid. 513, the party seeking production was still required to demonstrate a 'specific factual basis' that the records sought would yield admissible evidence.") In this case, Defense argued nothing of specifics or admissibility, stating:

[5] This issue is pending before CAAF in *B.M. v. United States*, No. 23-0233/NA, 2023 CAAF LEXIS 847 (C.A.A.F. Dec. 5, 2023)

> The records are relevant to [R.R.'s] *potential motives* to fabricate the allegation against A1C Anderson. The statements and surrounding report in those records *could impact* Defense preparation and decisions on investigation, trial defenses, and trial strategy. AV was intermittently treated previously for behavior similar to the circumstances surrounding this case. In particular, she received treatments due to "[R.R.'s presumed diagnoses]" on 26 May 2022, only sixteen (16) days after the alleged offenses occurred on or about 11 May 2022. The evidence *could trigger* further investigation into AV's credibility based on her prior treatment, the individuals that she surrounded herself with, and her integrity throughout the treatment and investigation process.

The rules of production and discovery have always put the burden on the *movant* to proffer that evidence sought *actually exists*. "[I]t was the defense, as the moving party, who was required as a threshold matter to show that the requested material existed." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Judge Maggs' dissent in *Mellette* highlights this is true, even for patient records under RCM 703, "[a]lthough Appellant 'offered some evidence that the [psychotherapist's] records *might* include an additional diagnosis,' the military judge concluded that the defense 'has offered no factual basis upon which to conclude the records would yield evidence admissible under Mil. R. Evid.513.'." *Mellette* at 387-88 (emphasis in original); citing *Rodriguez*, 60 M.J. at 246 "(holding that, where the appellant 'did not carry his burden as the moving party to demonstrate that the [evidence] he requested existed,' he could not show it was relevant or necessary)." Defense in this case never proffered any record "actually existed;" instead Defense asked the Military Judge to look through R.R.'s records to *see if* material "actually existed." This is not permissible as it violates R.R.'s right to be treated with fairness and with respect for her privacy and dignity. Article 6b(a)(9), U.C.M.J.

Article 26(d), U.C.M.J. implemented in R.C.M. 902(b)(2) demands disqualification of a Military Judge "[w]here the military judge has acted as counsel [. . .] as to any offense charged or in the same case generally." (2024 M.C.M). In this case, the Military Judge supplemented his opinion and theory of defense—for one the Defense had not *actually* offered or stated—when he determined certain privileged records demanded disclosure to the Accused. Defense made no "specific, factual" assertion or even theorized what R.R.'s motive to fabricate supposedly was and is, instead the Military Judge distilled what *he* thought was "constitutionally required" if he were to be the Accused's counsel. "[. . .] a military judge may not conduct *in camera* review of privileged material where ***a party moving to compel production of protected records*** or communications has not made a showing that the information sought meets an enumerated exception as required by Mil. R. Evid. 513(e)(3)(A) and (B)." *Beauge* at 168 (emphasis added).

In *United States v. Zolin*, the Supreme Court has even warned that the *in camera* review process of privileged material could make the Court an "unwitting agent." 491 U.S. 554, 571, 109 S. Ct. 2619, 2630 (1989). In *Zolin* the Court succinctly presents the issues,

> [w]e turn to the question whether *in camera* review at the behest of the party asserting the crime-fraud exception [of attorney-client privilege] is always permissible, or, in contrast, whether the party seeking *in camera* review must make some threshold showing that such review is appropriate. In addressing this question, we attend to the detrimental effect, if any, of *in camera* review on the policies underlying the privilege and on the orderly administration of justice in our courts. We conclude that some such showing must be made [. . .] There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.

United States v. Zolin, 491 U.S. 554, 571, 109 S. Ct. 2619, 2630 (1989). In this case, the Military Judge, upon conducting an *in camera* review without basis and himself

determining privileged material was constitutionally required, he became a counsel for the Defense requiring his disqualification. The Military Judge was—and is—faced with a unique set of facts where he carefully and intentionally tried to rule in way he believed was judicious; nevertheless, his path is not supported in the law and he unwittingly made himself an agent for Defense. See Article 26(d).

c. R.R.'s right to be treated with fairness requires disqualification of the Military Judge.

The Military Judge's path to *in camera* review and coerced waiver of privilege without a sufficient proffer by Defense should cause his disqualification. Outside of required disqualification, R.C.M. 902(a) states, "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." (2024 M.C.M.) And, "[t]his section was enacted to maintain public confidence in the judicial system by avoiding 'even the appearance of partiality.'" *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). The CAAF goes on to say in *Butcher*, "[t]he appearance standard helps to enhance confidence in the ***fairness*** of the proceedings because in matters of bias, the line between appearance and reality is often barely discernible." *Id.* at 90 (emphasis added). "We have recognized that the validity of the military justice system and the integrity of the court-martial process depend[] on the impartiality of military judges in fact and in appearance. Therefore, actual bias is not required; an appearance of bias is sufficient to disqualify a military judge." *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021)(internal quotations and citations omitted).

With the codification of victims' right in Article 6b, R.R.'s right to be treated with fairness in the military justice process is statutorily required. Military Judges, as members of the Armed Forces, have a duty to make best efforts to accord victims' rights; the Military

Judge, as a member of the Armed Forces, carries this duty. See National Defense Authorization Act for Fiscal Year 2014, § 1701(b)(2), 113 P.L. 66 (2013). The Military Judge must be fair; and treating R.R. fairly demands due process. The Military Judge foreclosed such process by conducting an *in camera* review or R.R.'s privileged records without the requisite showings and processes codified in the Military Rules of Evidence

Much of the language of Article 6b, U.C.M.J., is intentionally copied from the Crime Victims' Rights Act (C.V.R.A.) codified at 18 U.S.C. § 3771, it follows that Congress imported C.V.R.A. rights into the military justice system. Moreover, the 2014 NDAA inserted Article 6b into the U.C.M.J. under Section 1701 of that Act, which is titled: "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice." Congress explicitly intended to duplicate rights under the C.V.R.A. through Article 6b, U.C.M.J.; thus Congressional history and case law analyzing the C.V.R.A. provides useful reference.

The C.V.R.A. and Article 6b are more than aspirational. 150 CONG. REC. S10, 910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). The C.V.R.A. contains an almost identical right to Article 6b(a)(9), the C.V.R.A. states crime victims have, "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). Senator Kyl, a sponsor of the C.V.R.A., explained the meaning of those rights in the Congressional Record. The right articulated in the C.V.R.A. and Article 6b, to be treated with fairness, "[] 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***." Id. (emphasis added).

Importantly, in *Zolin* the Supreme Court explicitly highlights that a default to *in camera* review may deny due process, "[t]here is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings." *Zolin* at 571. Although *Zolin* addressed the crime-fraud exception to attorney-client privilege it provides guidance in this case. In this case, an *in camera* review for material not subject to an explicit exception to Mil. R. Evid. 513 ["constitutionally required"] should be even more circumspect than an *in camera* review for material specifically subject to a stated exception [crime-fraud exception]. And in determining whether an exception exists, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

Reynolds recognized the interest of keeping "national secrets" away from an Accused in the interest of public security was a worthy privilege and *in camera* review should not be the default as secrecy from even a judge may be necessary. *Id.* Mil. R. Evid. 513 codifies the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee*, "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee* , 518 U.S. 1 at 11.

In this case, the Military Judge reading and learning of R.R.'s patient records and privileged communications is—in itself—a disclosure of personal, private records. Compare to Mil. R. Evid. 513(a)(stating "A patient has a 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, in a case arising under the Uniform Code of Military Justice. . .") The fact that a Military Judge, no less a stranger to R.R. than a random person on a city bus, is reading the records offers no less chill to her desire to seek mental health treatment than if that city bus stranger could read the records. *Id.* at 11-12. ("If the [psychotherapist] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation."). In other words, disclosure to a Military Judge for *in camera* review to seek ill-defined "constitutionally required" communications discloses the *very thing* Mil. R. Evid. 513 privilege seeks to protect and is an unreasonable invasion of R.R.'s privacy. See U.S. Const. Amend. IV.

In this case, the Military Judge reviewed R.R.'s privileged patient records without the requisite proffered specific, factual basis to even conduct an *in camera* review[6]; thus, the Military Judge denied R.R. requisite due process and appears biased for the Accused and against R.R.'s rights to fairness and respect for her privacy. See Art. 6b(a)(9). The Military Judge's discounting R.R.'s privilege and Article 6b rights diminishes confidence that the military justice system can adequately and appropriately treat crime victims in accordance with their rights. See generally *Butcher.*

[6] Defense motions only use *conditional* language. Defense's 8 November 2023 motion states, "The records bear on AV's credibility and *may* contain evidence of her motives to fabricate the allegations." The Motion falls woefully short of the demands of M.R.E. 513(e)(3) that, "[p]rior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed: (A) a *specific, credible factual basis* demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege. . ."

CONCLUSION

The Military Judge legally erred when he determined R.R.'s mother could waive R.R.'s codified psychotherapist-patient privilege provided by Mil. R. Evid. 513. The Military Judge also legally erred when he conducted an *in camera* review of R.R.'s protected records without demanding Defense proffer a specific factual basis of what admissible evidence would be in those records and then stating what exception under Mil. R. Evid. 513(d) applied. The Military Judge, instead, then erred when he "read back" into Mil. R. Evid. 513 a "constitutional exception" that the Defense had not even specifically and factually proffered. His errors demand disqualification because he became a *de facto* counsel when he reviewed the records and *sua sponte* determined privileged information was what *he* would think was constitutionally required if *he* were Defense counsel. Moreover, the Military Judge's appearance of bias to the Accused and the subrogation of R.R.'s Article 6b rights causes one to question the fairness of the proceedings to all participants – including R.R. Because of the legal error leading to a disclosure and piercing of R.R.'s privilege and a disrespect to her privacy rights counter to Article 6b(a)(9)'s demands, R.R. seeks the vacation of the ruling, disqualification of the Military Judge, an order to disqualify trial counsel who examined her privileged records, a requirement that Mil. R. Evid. 513 is followed, and the sealing of all patient records.

RELIEF SOUGHT

Wherefore, R.R. respectfully requests this Court vacate the trial court's decision to abate the scheduled court date, R.R. seeks the disqualification of the Military Judge, an order to disqualify trial counsel who examined her privileged records, a requirement that Mil. R. Evid. 513 is followed, and the sealing of all patient records.

Respectfully submitted 14 March 2024.

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CERTIFICATE OF FILING AND SERVICE

I certify that on 14 March 2024, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

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