IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE RW, *Petitioner,*	)	UNITED STATES' MOTION FOR LEAVE TO FILE MEMORANDUM OF ARGUMENT
v.	)	Before Panel 2
Staff Sergeant (E-5) **CHASE N. ARNOLD** United States Air Force *Real Party in Interest.*	)	Misc. Dkt. No. 2023-08 20 December 2023

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

The United States hereby moves for leave to file the following memorandum of argument regarding matters that arose during the 14 December 2023 oral argument, in accordance with Rule 25.2(f) of this Honorable Court's Rules of Practice and Procedure.

MEMORANDUM OF ARGUMENT

A. The military judge's production orders properly required the custodian of the records to work with a "duly appointed medical law attorney" to ensure privileged matters were redacted.

During oral argument, this Court questioned the medical law attorney's authority to review the records that the military treatment facility (MTF) intended to produce in response to the order compelling production of nonprivileged diagnosis and treatment records, *prior* to the r[illegible]tually being produced to the parties at the court-martial.[1]

[illegible]week, this Court noted in two separate opinions that it was unpersuaded that "having a[illegible]n receive legal advice in order to lawfully comply with their obligations is a

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[1] Oral Argument Audio Recording at 28:01.

'disclosure.'" In re SB, Misc. Dkt. No. 2023-10 (A.F. Ct. Crim. App. 12 December 2023) (unpub. op.); In re SC, Misc. Dkt. No. 2023-11 (A.F. Ct. Crim. App. 12 December 2023) (unpub. op.). That is effectively what occurred in this case and is why this Court should not find that the military judge clearly and indisputably erred.

In this case, the military judge's original order to produce, dated 26 September 2023, directed the following:

> I direct the 31st Operational Medical Readiness Squadron, Mental Health Flight commander, Maj [AK], located at Aviano Air Base, Italy to *work with* DHA Medical-Legal Consultant, Mr. T[redacted] S[redacted] or *other duly appointed medical law attorney* to ensure that any and all matters subject to privilege under Military Rules of Evidence 513 are fully redacted prior to providing the information to Government counsel.

(Order, 26 September 2023.)

The following day, 27 September 2023, the military judge supplemented his order and named the specific medical law attorney who would ensure the appropriate redactions had been made before the documents were produced to the parties. (Order, 27 September 2023.) The military judge's orders cannot be read in isolation—they must be read together, as one supplements the other. Together, the orders establish that the military judge intended for the mental health flight—the custodian of the records—to consult with legal advisors about the records that should be released. But instead of simply ordering the production of diagnosis and treatment records without prescribing any other conditions, the military judge went the extra mile to protect Petitioner's privacy by mandating consultation and review that should, ideally, always occur. This was not clear and indisputable error because the military judge was simply exercising his authority under R.C.M. 701(g)(1) to regulate discovery by "prescribe[ing] such terms and conditions as are just." That the military judge supplemented his order to name a

specific attorney does not change what the mental health flight was directed to do—that is, "work with…[a] duly appointed medical law attorney" to produce the responsive records.[2] Rather, the military judge's decision to name another medical law attorney in his supplemental order was a lawful exercise of his authority under R.C.M. 703(g)(3) to "[e]nter such other order as is just under the circumstances" when a party does not comply with discovery. Here, because the medical law attorney named in the original 26 September 2023 order indicated that he was unavailable to conduct the review, the military judge named another "duly appointed medical law attorney" within the Air Force in order to enforce compliance with his order. By so doing, the military judge was attempting to fulfil his responsibilities as the presiding officer to ensure that the proceeding was "conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources." R.C.M. 801(a), Discussion.

The military judge's orders were designed to ensure that the custodian of the records consulted their legal counsel and received the appropriate assistance in ensuring that only the requested, non-privileged records were being produced to the parties at the court-martial. This was not a judicial usurpation of power—it was a lawful exercise of the military judge's authority in service of Petitioner's right to be treated with dignity.

[2] This verbiage was in the 26 September 2023 order but absent from the 27 September 2023 order; however, the latter order *supplemented* the former one without negating or rescinding it, therefore the language from the first order is still relevant to this Court's analysis.

B. There was no "per se" violation of Petitioner's privilege because the duly appointed medical law attorney's review was complete prior to any production within the meaning of R.C.M. 701.

During oral argument, this Court asked whether it was a "per se violation" to share Petitioner's "privileged information" with the medical law attorney assigned to review the records.[3] For the reasons set forth below, the United States asserts that it was not.

The patient-psychotherapist privilege outlined in Mil. R. Evid. 513(a) allows the privilege-holder to prevent disclosure "in a case arising under the Uniform Code of Military Justice." While a "case arising under the Uniform Code of Military Justice" may seem to imply the privilege applies broadly, it is important to remember that the Military Rules of Evidence and the protections afforded therein "apply to courts-martial proceedings." Mil. R. Evid. 101(a). Read together, these rules establish that the privilege in Mil. R. Evid. 513 exists to prevent the production of confidential communications to parties in a court-martial proceeding. Thus, when it comes to Mil. R. Evid. 513, the context—who, what, when, where, and why—matters to the application of the privilege. The analysis should consider who is receiving what information, when they are receiving it, and for what purpose—what matters is what is produced to the *parties* to the court-martial and why, because that is where the protections of Mil. R. Evid. 513 apply.

Where information has not yet been produced to the parties, the privilege does not apply. R.C.M. 701(g)(2) and R.C.M. 703(g)(3)(B) establish that "disclosure" or "production" only occurs when the requesting party in a court-martial actually receives or is able to inspect the evidence requested. Under R.C.M. 701(g)(2), a military judge may review materials in camera as part of discovery dispute—if the military judge decides certain evidence is not discoverable

[3] Oral Argument Audio Recording at 23:16.

and does not allow disclosure to the requesting party, that evidence is sealed and attached to the record of trial. In such a situation, even though there has been a "disclosure" (to the military judge) within the plain meaning of the word, there has not been a disclosure for purposes of discovery because the *parties* did not receive the evidence. Similarly, production pursuant to a subpoena under R.C.M. 703(g)(3)(B) is logically not complete until the custodian produces the requested evidence "at the proceeding or at an earlier time for inspection by the parties."

Within this framework, the medical law attorney's receipt of Petitioner's records did not constitute a "disclosure" within the meaning of the Rules for Courts-Martial. At the point that the medical law attorney was reviewing Petitioner's records, they had not been "produced" to either the Government or the Defense in their capacity as parties—not only did neither party have the records, they also did not have any ability to inspect them. By extension, because the Mil. R. Evid. 513 privilege is designed to prevent disclosure to the parties in a case arising under the UCMJ, there was no violation of the privilege. The medical law attorney's involvement was designed to *protect* Petitioner's privilege and privacy by ensuring that the MTF produced to the court-martial only that which it had been ordered to produced—nonprivileged diagnosis and treatment records. By double checking the MTF's work, the medical law attorney was effectuating the equivalent of in-house counsel review. The military judge's decision to explicitly require such review was not clear and indisputable error, as evidenced by this Court's decisions in In re SB, and In re SC.

C. Because the Government and Defense agreed to substituting the medical law attorney who would review the records, the military judge was authorized to expeditiously resolve the matter by approving the substitution during an R.C.M. 802 conference.

During oral argument, this Court questioned the military judge's authority to modify his 27 September 2023 order during an R.C.M. 802 conference—specifically, replacing one medical law attorney with another.[4]

Generally, a military judge may conduct conferences with the parties "to consider such matters as will promote a fair and expeditious trial." R.C.M. 802(a). The purpose of such conferences is, *inter alia*, "to expeditiously resolve *matters on which the parties can agree*, not to litigate or decide contested issues." R.C.M. 802(a), Discussion (emphasis added). In the same vein, "[o]ccasionally it may be appropriate to resolve certain issues, in addition to routine or administrative matters, if this can be done with the consent of the parties." Id.

Such is the case here. The military judge's supplemental order, dated 27 September 2023, named a specific medical law attorney, Ms. CM, as the individual who would review what the MTF intended to produce. As set forth in Lt Col LW's declaration, the Director of the Medical Law Branch subsequently recommended that Maj AW—another medical law attorney—conduct the review instead, given that Maj AW had greater familiarity with military justice due to a previous assignment as a victim's counsel. The parties—the Government and the Defense—both agreed to the substitution of the medical law attorney.[5] Because the substitution was neither a contested issue nor one that altered the order's substantive effect, it was within the military judge's authority "to expeditiously resolve" the matter in an R.C.M. 802 conference without requiring the parties the litigate it on the record.

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[4] Oral Argument Audio Recording at 28:48.

[5] The military judge's order was issued in the context of a discovery dispute, as part of a ruling on a defense motion to compel production.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court grant its motion for leave to file a memorandum of argument. The United States requests this Honorable Court deny Petitioner's writ.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and Petitioner's counsel on 21 December 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE RW *Petitioner*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **CHASE N. ARNOLD**, United States Air Force *Real Party in Interest*	)	Misc. Dkt. No. 2023-08 21 December 2023

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to the record:

Appendix 1 – Declaration of Lt Col L[redacted] M. W[redacted], dated 19 December 2023 (4 pages)

Appendix 2 – Order to Produce Mental Health Diagnosis and Treatment Records, dated 26 September 2023 (2 pages)

On 14 December 2023, this Court heard oral argument from counsel in this case. The appendices provide additional factual background about issues raised during oral argument. There are no sealed or classified portions that require delivery of a separate hard copy.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion to attach.

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4 JAN 2024

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Appellate Defense Division, and Petitioner's counsel on 21 December 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re RW, *Petitioner,* *v.* **UNITED STATES** *and* **CHASE N. ARNOLD** **Staff Sergeant (E-5)** **United States Air Force,** *Real Party in Interest.*	**MOTION TO AMEND REAL PARTY IN INTEREST'S BRIEF IN RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF** Before Special Panel Misc. Dkt. No. 2023-08 21 December 2023

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

Pursuant to 23.3(n) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Chase Arnold, the Real Party in Interest, hereby moves to amend his Brief in Response to Petition for Extraordinary Relief, submitted 30 October 2023. The amended portion of the pleading is included as an Appendix to this motion.

On 14 December 2023, counsel for RW notified the undersigned counsel that she had not been included on the email for the original filing of the Defense Answer to this Court. This was an unintentional oversight by undersigned counsel. The certificate of service on page of 15 of SSgt Arnold's Response erroneously stated that the Response was served on Petitioner on 30 October 2023. The Real Party in Interest moves to correct the certificate of service to reflect that service on Petitioner was achieved on 14 December 2023.

nting this motion will clarify the date that service was rendered and properly document of service.

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21 DEC 2023

WHEREFORE, the Real Party in Interest respectfully requests this Court grant this motion.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on Petitioner and the Appellate Government Division on 21 December 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
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Appellate Defense Division
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Appendix

Amended Certificate of Service

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and the Appellate Government Division on 30 October 2023. I certify that a copy of the foregoing was sent via email to Petitioner on 14 December 2023.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner*	)	**MOTION FOR LEAVE TO FILE PETITIONER'S REPLY TO RPI'S ANSWER**
	)	Misc. Dkt. No. 2023-08
Chase Arnold Staff Sergeant (E-5) 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.W., by and through the undersigned Victims' Counsel (VC), pursuant to Rule 23(d) seeking leave to file in accordance with Rule 19(f)(1) replying to the Real Party in Interest's (hereinafter "RPI") Answer.[1] RW was forwarded the RPI's Answer on 14 December 2023 after the Oral Argument, pursuant to RW's counsel's request. RW had not previously been served the RPI's Answer and was unaware of its existence until this Court revealed it during oral argument. A copy of the email filing RPI's Answer with this Court is included hereto evidencing RPI omitted service on Petitioner despite a Certificate of Service indicating such service.

R.W. requests 1) the issuance of a writ of mandamus, 2) vacation of the military judge's order dated 27 September 2023, compelling production of R.W.'s medical records, 3) destruction of records disclosed to Government and Defense pursuant to the unauthorized 27 September 2023 order, and 4) direction to the Military Judge to comply with M.R.E. 513 for the production of the [illegible].

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[1] In the 7 November 2023 reply submitted by RW, RW mistakenly indicated in the first paragraph that she was replying to the RPI's Answer, that was a scrivener's remnant from a prior filing. RW only received the RPI's Answer in this case on 14 December 2023 and has not otherwise replied.

ARGUMENT

1.THE DEFENSE HEALTH AGENCY IS NOT A MILITARY AUTHORITY.

a. A defense agency is not a military department.

The Defense Health Agency (hereinafter "DHA") maintains custody and control of RW's electronic DoD Health Record and is not a military authority. See System of Records Notice *Military Health Information System, EDHA 07* (Jun. 15, 2020). On 1 October 2013 the Department of Defense established DHA as a combat support agency. Dept. of Def. Directive 5136.13, *Defense Health Agency* (Sep. 2013). Congress reorganized administration of military treatment facilities, placing them under DHA, beginning 1 October 2018 (subsequently amended by statute to 30 Sep 2021). 10 U.S.C. §1073c. Among its prescribed mission, DHA "[m]anages military medical treatment facilities (MTFs) [. . .] functioning as the ***single agency*** responsible for the administration of MTFs." Id. at 3.c. The DHA is an agency separate from a military department. 10 U.S.C. §101(a)(11); *compare with* 10 U.S.C. §101(a)(8). Military Departments are the Department of the Army, the Department of the Navy, and the Department of the Air Force. 10 U.S.C. §101(a)(8). As DHA is not even a Military Department, it is not a "military authority." The RPI provides no citation to his emphatic statement that "[h]aving been in the custody of a military treatment facility, the records were within the possession of military authorities, triggering the application of R.C.M. 701." *RPI Answer* at 7. MTFs are merely buildings not military commands or military authorities.

b. RPI conflates evidence under the control of the Government at large with "possession, custody, and control of military authorities."

RPI states, "[d]iscovery of evidence in the possession of the Government is regulated by R.C.M. 701; whereas production of evidence from outside sources is regulated by R.C.M. 703." *RPI Answer* at 7. This is a misstatement of the rules as "possession of the Government" is not the standard. R.C.M. 701(a)(2)(A) guides discovery "if the item is within the possession, custody, or

control of ***military authorities*** and—(i) the item is relevant to defense preparation[. . .]" DHA is a Defense Agency and part of the United States Government, but, as previously stated, DHA is not a military authority. Moreover, RPI does not acknowledge that R.C.M. 703(g)(2) directly addresses "[e]vidence under the control of the Government." Evidence under the control of the Government must be *produced* and not merely *disclosed.* A party is entitled to production of evidence only after it has made a sufficient proffer that the requested material is both relevant and necessary. R.C.M. 703(e)(1). "Relevance is defined by Mil. R. Evid. 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to the party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(e)(1), Discussion.

Since RW's records are not in possession of military authorities, R.C.M. 703 provides the standard to compel PHI which falls outside the scope of M.R.E. 513.[2] R.C.M. 703(e)(1) entitles the accused to "production of evidence which is relevant and necessary." "[T]he defense, as the moving party … [is] required as a threshold matter to show that the requested material exist[s]." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). This is why defense requests for discovery are required to "include a description of [the] item sufficient to show its relevance and necessity." R.C.M. 703(f). In this case, RPI made no such proffer and relies on the strained notion that the entirety of the Military Health Systems' records are within the "possession, custody, and control of military authorities" demanding disclosure upon a simple discovery request and nothing more.

RPI, interestingly, cites to *United States v. Jones* to support its position that R.W.'s PHI was automatically "discoverable" upon a defense request, despite its failure articulate why that material,

[2] R.W. does not concede her records at issue in this case fall outside the procedures required under M.R.E. 513(e), but to the extent this Court or a higher court holds certain PHI is not covered by M.R.E. 513(e) procedures, then the production standard of R.C.M. 703 would apply for records not in the "possession, custody, and control of military authorities."

if it existed, would be relevant and necessary to further its case. 2023 CCA LEXIS 230 (A.F. Ct. Crim. App. 2023). However, in that case, this Court found that the military judge's application of M.R.E. 513(e) procedures was not erroneous where defense had only requested diagnoses and prescriptions, and that the denial of a defense motion to compel production after defense failed to establish relevance and necessity was not unreasonable. Specifically, this Court said, even after defense proffered evidence of a specific diagnosis, "the military judge reasonably found that evidence a victim with [a certain] disorder was in an 'active episode' as opposed to at 'baseline' would be relevant, but no evidence suggested [victim] was suffering an active episode on [the date of the charged offense]." *Id.* Likewise, concerning the prescription records, A.F.C.C.A. recognized that prescription records "would do little to show that [the victim] ingested medication at any relevant time." *Id*.

2. IF RW'S DOD HEALTH RECORD IS IN THE POSSESSION, CUSTODY, AND CONTROL OF MILITARY AUTHORITIES DEMANDING DISCLOSURE, THEN RPI'S DOD HEALTH RECORD ALSO IS ACCESSIBLE WITHOUT PROCESS.

RW has a right to privacy preventing unreasonable searches and seizure of her medical records as captured in the Constitution's Fourth Amendment, and a statutory right to respect that privacy codified at Article 6b(a)(9). Both have been violated in this case. The Supreme Court recognized that the constitutional right to privacy protects "an individual's interest in avoiding disclosure of personal matters." See *Whalen v. Roe*, 429 U.S. 589, 599 (1977)(internal quotations omitted). As a liberty interest under the United States Constitution, minimum due process is required for any and all infringements of privacy by the government. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (An individual is constitutionally entitled to procedural due process "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."). Cf. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192−93, 196−97 (3d Cir. 2000) (stating that police threats to disclose sexual orientation of individual to his

family violated constitutional right to privacy sufficient to justify cause of action under § 1983); see also *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1107−08 (D. Mass. 1993).

RPI enjoys identical Fourth Amendment protections, yet RPI seemingly declares his electronic DoD Health Record is also subject to disclosure without due process. This argument only makes sense if RPI contends "the people" alluded to in the Fourth Amendment does not include crime victims. IV Amend, US Const. Just as an accused or a witness in a criminal process receives privacy protections, a named victim receives those same protections.

RPI claims that RW's assertion of her rights and demand for process "completely overlooks the competing interests at stake and the necessity of justice...Whatever privacy interest [R.W.] may have must yield to [RPI's] constitutional right to present a complete defense." *RPI Answer* at 14. This directly conflicts with the Supreme Court's holding in *Jaffee v. Redmond*. 518 U.S. 1 (1996) (acknowledging the "substantial public interest" in facilitating appropriate mental health care and finding that protecting the psychotherapist privilege is "sufficiently important to outweigh the need for probative evidence").

3. *UNITED STATES v. MELLETTE* DOES NOT CREATE A DISCOVERY RIGHT TO "UNDERLYING FACTS" DEVOID OF PROCESS.

Consistent with the United States' Answer, RPI asserts that *United States v. Mellette* created a ***discovery right*** to non-privileged "underlying facts" of mental health treatment. 82 M.J. 374, 380 (C.A.A.F. 2022). A reading of *Mellette* shows it did no such thing, as it did not state that all rules of discovery and production are inapplicable to "non-privileged" "underlying facts." *Id.* Even if the records are "R.C.M. 701" records, as the RPI and United States propose, R.C.M. 701 still demands a proffer of relevance. *Mellette* certainly does not stand for the proposition that the prosecution need to search through all witnesses' DoD Health Records seeking information that may assist the Defense without even a proffer of relevance – nevertheless, that is what the Military Judge's ruling and order seem to assume along with the United States' and RPI positions.

Mellette narrowly holds, "[t]o the extent that [dates visited said mental health provider, the treatment provided and recommended, and S.S.'s diagnosis] existed—and were otherwise admissible under the Military Rules of Evidence and the Rules for Courts-Martial—they should have been ***produced or admitted subject to the procedural requirements of M.R.E. 513(e)***." *Id.* at 381. Moreover, *Mellette* distinguishes between privileged, "partially privileged," and "partially protected" patient records. *Id.* at 379 (stating, "[w]e interpret these provisions as simply recognizing that to the extent testimonial or documentary evidence reveals what M.R.E. 513(a) expressly protects—confidential communications—they are also ***partially protected***; not, as the Government argues, that the entirety of every patient record is necessarily included within the patient-psychotherapist privilege."). M.R.E 513(e)(3) contemplates a procedure for not just the production of privileged records but of "protected" records as it states, "[t]he military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of ***protected records*** or communications." RW's DoD Health Record is by definition "protected" because it is "**Protected** Health Information**.**" (PHI). PHI is "individually identifiable health information: (1) Except as provided in paragraph (2) of this definition, that is: (i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium." 45 C.F.R. §164.103.

Department of Defense Instruction 6025.18 affirms the protected nature of health information, specifically mental health records by stating, "[i]n doing so, DoD covered entities and business associates must follow the policies regarding mandatory and prohibited releases of PHI pursuant to DoD Instruction 6490.08 to dispel stigma associated with seeking mental health services, substance misuse education services, or both." DoDI 6025.18, *Health Insurance and Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs*, at 1.2(a)(3). In fact the Department of Defense just issued an updated DoDI 6490.08

stating it is DoD Policy that,

> DoD fosters a culture of support and strives to create an environment that promotes help-seeking behaviors and reduces the stigma for help-seeking in the provision of mental health care and voluntarily sought substance misuse education to Service members, in order to dispel the stigma of seeking mental health care or substance misuse education services. Unrestricted, non-stigmatizing access to mental health care services, which includes voluntarily sought substance misuse education, is essential to maintaining the health and readiness of the total force.

DoDI 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members*, (Sep. 16, 2023).

As recently as the 2022 National Defense Authorization Act, Congress made clear that service members enjoy the protections of the HIPAA Privacy Rule when passing The Brandon Act aimed at reducing stigma associated with receiving mental health treatment; as Congress intended to "protect[] the confidentiality of the member to the maximum extent practicable, in accordance with requirements for the confidentiality of health information under [HIPAA] and applicable privacy laws." National Defense Authorization Act for Fiscal Year 2022, § 704, 117 P.L. 81 (2021). Congress recognized service members enjoy confidentiality in health information, that is saying nothing of amplified statutory rights as a crime victim provided by Article 6b.

Just as a witness receives privacy protections from off-base medical providers under HIPAA, the rules gives those witnesses the same privacy protections for on-base medical treatment. A contrary reading of the rules would discourage service members from seeking treatment at their military treatment facilities and prevent service members from receiving the same privacy protections received by civilians off base. Reading the rules to allow the same privacy protections to military members for their on-base medical treatment is consistent with DoD policy and congressional intent. *Id.*

In this case, the Military Judge did not follow M.R.E. 513(e) procedures before ordering the

production of R.W.'s protected personal, private, confidential, and privileged patient records to a "taint attorney." Pursuant to M.R.E. 513, the military judge's order compelling the production of any records should have been sufficiently narrow to eliminate the need for "privilege review" and to minimize the disclosure of privilege. Then, before releasing the information to the parties, the Military Judge should have exercised his duty to appropriately safeguard unlawful disclosures and unnecessary invasions of R.W.'s privacy by conducting a review of the records in camera to ascertain relevance and necessity as proffered by the Defense.

Even if this Court does not find M.R.E. 513 should apply, the Military Judge did not even require a showing of mere relevance pursuant to R.C.M. 701 prior to ordering the trial counsel to take the "initial step" of obtaining information about any mental health treatment that R.W. may have received, over R.W.'s objection. Then, the military judge erred by requiring the broad production of RW's most private PHI and privileged communications without first demanding a proffer of relevance and necessity based on a factually supported assertion that the information sought actually exists. See *Rodriguez* at 246. Finally, the military judge erred when he refused to safeguard the produced records by reviewing them *in camera* to ascertain that no PHI was released to either party unnecessarily, as is required pursuant to R.C.M. 701.[3]

Therefore, writ should issue: 1) vacating the military judge's order, dated 27 September 2023, compelling production of R.W.'s medical records, 2) demanding destruction of records disclosed to Government and Defense pursuant to the unauthorized 27 September 2023 order, and 3) directing the Military Judge to comply with the rules of discovery and production and M.R.E. 513 before ordering the production of the records at issue.

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[3] The military judge cannot issue a final ruling of the relevance and necessity of records and information he has not yet seen. Even where the threshold requirements are met for production, the military judge should still ascertain that sensitive or protected information is, in fact, relevant and necessary prior to disclosure.

Respectfully submitted,

[redacted]

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[redacted]

MORGAN BREWINGTON, Capt, USAF
Counsel for R.W.
Victims' Counsel
AF/JAJS
HAF/JAJS
Department of the Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 20 December 2023, the foregoing was electronically filed with the Court and served on all relevant parties via email at the following addresses:

[redacted]

AF.JAJA.AFLOA.Filing.Workflow@us.af.mil;

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

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

[redacted]

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[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner*	)	**MOTION FOR LEAVE TO FILE PETITIONER'S REPLY**
	)	Misc. Dkt. No. 2023-08
Chase Arnold Staff Sergeant (E-5) 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.W., by and through the undersigned Victims' Counsel (VC), pursuant to Rule 23(d) seeking leave to file in accordance with Rule 19(f)(1) replying to the United States' and Real Party in Interest's Answers. R.W. requests 1) the issuance of a writ of mandamus, 2) vacation of the military judge's order, dated 27 September 2023, compelling production of R.W.'s medical records, 3) destruction of records disclosed to Government and Defense pursuant to the unauthorized 27 September 2023 order, and 4) direction to the Military Judge to comply with M.R.E. 513 for the production of the records at issue.

ARGUMENT

In March 2023, the Attorney General of the United States issued "The Attorney General Guidelines for Victim and Witness Assistance 2022."[1] The ethos of the Department of Justice is captured in Article II.A. of the document,

> A strong presumption exists in favor of providing, rather than

[1] https://www.justice.gov/ag/page/file/1546086/download

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> withholding, assistance and services, including assistance from Department personnel, to victims of crime. ***Federal statutes define mandatory services and court-enforceable rights for federal crime victims that establish a minimum baseline for the Department's obligation to crime victims.*** Department personnel are encouraged to provide additional assistance to crime victims where appropriate and within available resources, as situations warrant.

The Attorney General's Guidelines place an affirmative duty on all personnel working within and for the Department of Justice. The military justice system would be well-served by adoption of a similar stance and point of view.

1. THE REQUESTED RECORDS ARE AND WERE PRIVILEGED UNDER M.R.E. 513.

The United States' Answer states, "the records requested were non-privileged material under Mellette that did not warrant a hearing under Mil. R. Evid. 513;" Answer at 9. This statement misrepresents the facts for two reasons: 1) the records ordered produced in this case unquestionably contained privileged communications; and 2) *Mellette* does not stand for the proposition that an M.R.E. 513(e) procedure is no longer required since records may contain non-privileged records. The Military Judge attempted to circumvent the requirement to conduct an M.R.E. 513(e) hearing by unlawfully and unreasonably issuing an order to an unaccountable-to-the-Rules-for-Court-Martial non-party attorney (Ms. C. M.) to review and redact R.W.'s privileged communications. The United States avoids addressing the factual realities to take a legal position solely focused on abridging R.W.'s – a crime victims' – right to privacy and to undercut to greater societal interest that R.W. seek mental health treatment. *See Jaffee v. Redmond,* 518 U.S. 1, 22 (1996).

a. The Military Judge ordered the release of privileged communications.

The Military Judge's order on its face acknowledges he is ordering the release of potentially privileged mental health communications as the order devises a unique, unlawful scheme to require a random attorney unaccountable to the Court—and to R.W.—to review and redact her

unquestionably private, privileged communications to a psychotherapist. The United States' Answer assumes that since the prosecution nor the Court will see R.W.'s personal and private mental health records, the Military Judge need not comply with M.R.E. 513(e). Yet the privilege of M.R.E. 513(a) states, "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 this case, if the Military Judge had ordered the totality of R.W.'s mental health records produced to him to conduct an *in camera* review to redact privileged communications, unquestionably the procedures of M.R.E. 513(e) would apply. The United States' Answer endorses devising a scheme to circumvent the procedural requirements of M.R.E. 513(e) to adhere to some notion that producing R.W.'s privileged records to an unknown, unaccountable person to redact is not actually ordering the production of R.W.'s privileged records. This is nonsensical.

b. As Defense sought records pertaining to communications, the Military Judge must comply with the procedural requirements of M.R.E. 513(e).

The United States purports that M.R.E. 513(e) no longer applies to any mental health records because those records may contain information not privileged under M.R.E. 513(a). Nevertheless, that is not the holding in *Mellette* as the C.A.A.F. holds the definition of the privilege under M.R.E. 513(a) does not prevent the ***disclosure*** of diagnoses and treatment. *United States v. Mellette*, 82 M.J. 374, 381 (C.A.A.F. 2022). *Mellette* however also holds, "[t]o the extent that [dates visited said mental health provider, the treatment provided and recommended, and S.S.'s diagnosis] existed—and were otherwise admissible under the Military Rules of Evidence and the Rules for Courts-Martial—they should have been ***produced or admitted subject to the procedural requirements of M.R.E. 513(e)***." *Id.* In other words, upon compliance with the procedural requirements of M.R.E. 513(e), if records are produced that contain diagnoses, treatment, or prescriptions, that information must be disclosed and is not privileged.

2. "MILITARY AUTHORITIES" IN THE CONTEXT OF R.C.M. 701 DOES NOT INCLUDE MILITARY-RUN MEDICAL TREATMENT FACILITIES.

The argument that "military authorities" does not include military medical treatment facilities is well documented in R.W.'s supplemental brief. This argument hinges on a determination that "military authorities" means more than simply anything in the possession of the military. A medical treatment facility has privacy protections that others do not as laws demand protecting disclosure of Personally Identifiable Information (PII) and Protected Health Information (PHI). 5 USC § 552a; Health Insurance Portability and Accountability Act of 1996 (H.I.P.A.A.) 42 U.S.C. §§ 1320d through 1320d-8. While the court is not the general public, it must follow appropriate processes to receive records and information.

The Government's answer cites HIPAA's "military command" exception as support for its position that HIPAA does not apply to the Military Health System (MHS) and its records; thus, Government counsel somehow has constructive possession, custody, and or control of all DoD Health Records. The specific exception cited by the United States' Answer gives medical treatment facilities authority to disclose certain protected health information "to assure the proper execution of the military mission." 45 C.F.R. § 164.512(k). It is a narrow exception. This part of the Code of Federal Regulations includes several provisions authorizing disclosures with limited purposes. These disclosures are captured in the Defense Health Agency's (DHA) own Notice of Privacy Practices.[2] The Notice of Privacy Practices makes it clear that DHA does not see immediate and ready access to PII and PHI by any and all Government officials or

[2] The DHA NoPP is located here https://www.health.mil/Reference-Center/Publications/2013/10/01/NoPP-Print-Ready-Version

prosecutor as compliant with its obligations under HIPAA.

MHS Practices Regarding Protected Health Information (PHI)

This notice describes MHS practices regarding your PHI. The terms "we" and "our" in this notice refer to the MHS. The MHS includes the following:

- MTFs including Coast Guard treatment facilities
- All MHS/TRICARE health plans
- TRICARE Regional Offices
- TRICARE managed care support contractors and certain other organizations with access to your PHI under agreements with the MHS. However, private sector providers in contractor networks must issue their own Notices of Privacy Practices.
- MHS and Coast Guard headquarters functions, such as activities of DHA and the Military Departments' Surgeons General

Our Duties to You Regarding Your PHI

The HIPAA Privacy Rule requires the MHS to:

- Ensure that your PHI is properly safeguarded
- Notify you if we determine that your PHI was inappropriately used or disclosed
- Provide you this notice of our legal duties and privacy practices for the use and disclosure of your PHI
- Follow the terms of the notice currently in effect

The Notice goes on to state,

How We May Use or Disclose Your PHI Without Your Authorization

Armed Forces PHI for Military Activity and National Security. To certain officials and for special government functions including:

- Military command authorities, where needed, to ensure the proper execution of the military mission, including evaluation of fitness for duty
- The Department of Veterans Affairs (VA) for determinations of your eligibility for benefits
- Foreign military authorities with respect to their armed services members
- Authorized Federal officials for national security or intelligence activities, or protective services for the President and others

Required by Law. To government and other entities as required by federal or state law (including DoD and Military Department regulations). For example, we may be required to disclose your PHI to the Department of Health and Human Services (HHS) investigating HIPAA violations or to a DoD Inspector General conducting other investigations.

Legal Proceedings. To parties and entities in proceedings of courts and administrative agencies, including in response to a court order or subpoena.

The 45 C.F.R. § 164 limitations reflect Presidential intent to prevent broad disclosure unless required under particular facts and did not carve out the totality of records in the MHS as excepted because the military is a special society, as suggested by the United States. If

Congress wished to exempt the entirety of the MHS from HIPAA compliance it could have—it did not. It is unclear whether the Defense Health Agency endorses the United States' view that the DoD Health Record is readily accessible, without process, by Government counsel. To determine how "military authorities" relates to medical treatment facilities in this case, does not require the court to determine exactly what "military authorities" means. Rather, the court can determine, in the context of military case law and applying principles of statutory construction, it does not include medical treatment facilities.

The United States' Answer stands for the proposition that all DoD Health Records are in the possession, custody, and control of military authorities making every single DoD Health Record subject to the disclosure rules of R.C.M. 701. This would include DoD Health Records of the Accused, Government Counsel, Defense Counsel, Military Judges, panel members, and even the spouses and children of the above. *Arguendo*, under the United States' position if a Defense Counsel submits a discovery request to Government Counsel for "all '*Mellette* Records' of the detailed panel members' prescriptions because they are relevant as medication may affect their ability to sit a panel," the Government would have to retrieve the DoD Health record of panel members, and those panel members would have no standing or recourse to object. Defense counsel could submit a discovery request for "the DoD Health Record of the spouse of the Military Judge because if he or she was a victim of a crime the Military Judge may be bias;" and under the United States' legal position, the Government counsel would have to comply and the Military Judge's spouse would have no standing to object. Certainly, and evidently, this is not what the law requires or even plainly states. Writ should issue so R.W. does not have to suffer the unlawful and unreasonable invasion of her privacy and the indignity of forfeiting her statutory and Constitutional right to privacy in her medical records simply because she is a crime victim

willing to participate in the military justice system. At a minimum, she should be afforded due process and her objections acknowledged before the court ordered productions of those records. *See* Article 6b(a)(9).

3. CURRENT EXECUTIVE AND LEGISLATIVE ACTIONS DO NOT GIVE MILITARY JUDGES AUTHORITY TO ISSUE COURT ORDERS FOR MEDICAL RECORDS.

As currently postured, the Military Judge lacks the authority to order production of medical records from military medical treatment facilities. R.C.M. 703 governs production of records not in possession of the military authorities. It gives "trial counsel of a general or special court-martial" authority to issue subpoenas. The updating amendments to R.C.M. 703, effective 27 December 2023 give Military Judges this authority, authority they do not currently have.

Granting Military Judges with this authority in the 27 December 2023 amendments reflects an executive understanding that subpoena authority currently only rests with trial counsel. The amendments give Military Judges authority at the end of the year, but without this authority, any order or subpoena to produce records lacks efficacy. After 27 December 2023, the Military Judge will have authority to issue subpoenas, allowing a Military Judge, under appropriate circumstances, to issue a subpoena to produce the records.

A self-labeled court order is not the appropriate vehicle to produce records for the court. As the United States notes in its answer, Article 46, U.C.M.J. allows for a "subpoena or other process" to "compel the production of evidence." 10 U.S.C. §846(d)(1). Article 46 does not just allow self-definition of "other process" as Article 46(a) requires "accordance with such regulations as the President may prescribe." The President has prescribed rules effectuating Article 46 through R.C.M.s 701-703a. See U*nited States v. Coleman*, 72 M.J.

184, 186-87 (C.A.A.F. 2013). The R.C.M.s define the Military Judge's authority over discovery. Nowhere in R.C.M. 701-703a may a Military Judge devise a Court Order to do what the rules do not permit. The President has prescribed a process in R.C.M. 703, allowing subpoenas to be issued by trial counsel. The omission of authority in R.C.M. 701 or R.C.M. 703 for a Military Judge to issue court orders outside the confines of court-martial participants is a limitation of the authority of the Military Judge, not an oversight to leave a void allowing judges to assume such authority.

In describing contempt of court authority, Article 48, U.C.M.J. expressly mentions ***lawful*** orders, reflecting congressional intent for military judges to have this power if the law allows. 10 U.S.C. § 848(a)(1). Military Judges do have some authority to issue orders, but neither Congress nor the President has allowed Military Judges authority to order medical treatment facilities to do anything. This authority is not expressly given, but referenced as a power Military Judges may have if the Rules for Court-Martial allow. The court cannot interpret these two references to suggest a military judge may order production from private companies, international entities, or even civilian medical facilities.

There are appropriate circumstances for a Military Judge's orders. For example, the Stored Communications Act grants Military Judges authority to issue orders. 18 U.S.C. § 2703. This is specifically given for "electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system." Id. This specific statutory grant is effectuated in R.C.M. 703a. The orders process is valid for specific circumstances. Other lawful orders may include orders to court members or potentially other circumstances. However, those circumstances do not exist here and do not include to a medical treatment facility. If so, there would be no need for the upcoming amendment of R.C.M. 703 to grant subpoena power to Military

Judges. Once these amendments are enacted, then the court may issue subpoenas only that meet the criteria of R.C.M. 703.

While this court may interpret statute and executive action to set limits on what a Military Judge's order may look like, R.W. does not ask this court to do so now. Rather, R.W. requests the court acknowledge orders may be issued under appropriate circumstances, but the Military Judge lacks authority to do so now, consistent with R.C.M. 703, its upcoming amendments, and the plain language of Article 46 and Article 48 of the U.C.M.J. If Congress or the President intended Military Judges to have power to order production of records from medical treatment facilities, they would have included at least broad authority in either statute or executive action (the R.C.M.s). If currently Military Judges could just issue court orders equivalent to subpoenas, the President would not be granting additional subpoena power to military judges in the pending amendments. The only such broad power comes in the amendments to R.C.M. 703, effective 27 December 2023. Accordingly, the Military Judge lacked authority to issue the order to the 31st Medical Group to provide counsel R.W.'s medical and mental health records.

CONCLUSION

Accordingly, R.W. seeks an issuance of writ of mandamus directing 1) the Military Judge to comply with M.R.E. 513 for the production of the records at issue; 2) vacation of the Military Judge's order, dated 27 September 2023, compelling production of R.W.'s privileged medical records, 3) destruction of records disclosed to Government and Defense pursuant to the unauthorized 27 September 2023 order.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that on 7 November 2023, 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 RW, *Petitioner,*	)	UNITED STATES' ANSWER TO PETITION FOR EXTRAORDINARY RELIEF
v.	)	
	)	Before Panel 2
Staff Sergeant (E-5) **CHASE N. ARNOLD** United States Air Force *Real Party in Interest.*	)	Misc. Dkt. No. 2023-08
	)	30 October 2023

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

COMES NOW the United States, by and through undersigned appellate government counsel, pursuant to the Rules of Practice and Procedure for this Honorable Court, and provides this answer to Petitioner's petition for extraordinary relief. Petitioner requests a writ of mandamus (1) vacating the military judge's 27 September 2023 order compelling production of the victim's medical records, (2) directing destruction of the records produced pursuant to the military judge's 27 September 2023 order, and (3) requiring the military judge to "comply with M.R.E. 513." (Pet. Supp. Br. at 27.)[1] Petitioner has failed to meet her heavy burden to establish a clear and indisputable entitlement to extraordinary relief. Thus, the United States asks that Petitioner's writ be denied in full.

[1] This Court stayed the military judge's order to produce on 28 September 2023, *after* the records had already been produced—accordingly, Petitioner's first request for relief is moot. Given that the court-martial has been continued pending resolution of this petition, Petitioner's second and third requests for relief are not moot.

STATEMENT OF CASE

[redacted]RW (Petitioner) is a named victim whose mental health records are the subject of a discovery dispute in the general court-martial *of United States v. SSgt Chase N. Arnold*. The Accused faces five charges comprised of 32 specifications that allege wrongful communication of various threats; sexual assaults; assaults consummated by battery; and domestic violence spanning a 30-month timeframe between 24 December 2017 and 30 May 2020. (Pet. Supp. Br. at Attachment II.) Petitioner is the named victim in all but one of the specifications. (Id.) This petition for extraordinary relief is before the Court as a result of the military judge's ruling on a defense motion to compel discovery of Petitioner's mental health records pursuant to United States v. Mellette, 82 M.J. 374 (C.A.A.F. 2022). (Pet. Supp. Br at 27.) At the time of Petitioner's original filing with this Court, trial had been continued twice since February 2023. Following Petitioner's filing, the military judge continued the trial for a third time at the defense's request. Trial is now scheduled to begin on 12 February 2024.

STATEMENT OF FACTS

The Defense Motion to Compel

On 1 September 2023, the Accused's trial defense counsel filed a motion to compel discovery of "any records relating to any mental health diagnosis and treatment received [by Petitioner] December 2017 to present pursuant to United States v. Mellet[te]." (Pet. Supp. Br., Attachment I at 4.) Accused's trial defense counsel noted that Petitioner was a member of the United States Air Force during the relevant time period, therefore any such records would be "within possession of an on-base USAF agency." (Id.) In explaining their basis for believing that mental health records related to Petitioner might exist, Accused's trial defense counsel asserted that their recent 18 August 2023 deposition of another witness, Ms. DI, had revealed

information that Petitioner was "working on moving past her trauma." (Id.) Trial defense articulated the following rationale regarding the discoverability and relevance of Petitioner's mental health records:

> This entire case centers on [Petitioner's] credibility, ability to perceive events during the charged timeframe, ability to form accurate and reliable memories, and ability to recollect such memories regarding the charged conduct … If [Petitioner] is taking prescription medications or suffering from a mental health condition that impacts any of these abilities or her credibility, it is highly relevant, material, and necessary to be investigated and interpreted by Defense and its experts.

(Id.)

In their request for relief, Accused's trial defense counsel asked the military judge to compel production of "[Petitioner's] mental health diagnosis and treatment records in accordance with United States v. Mellet[te]." (Pet. Supp. Br., Attachment I at 6.)

Upon receiving the motion to compel, the prosecution promptly informed Petitioner's victim's counsel (VC) and disclosed that the prosecution was attempting to obtain sealed copies of any responsive records, if they existed, "in order to stave off another continuance." (Pet. Supp. Br., Attachment I at 75.) The prosecution assured Petitioner's VC that they did "not plan on having anyone access them absent [Petitioner's] consent or court order." (Id.)

In its written response to the defense motion to compel, the prosecution maintained that the request for Petitioner's records should be denied. (Pet. Supp. Br., Attachment I at 25.) As the basis for the denial, the prosecution asserted that Accused's trial defense counsel had not demonstrated "how the requested information can be obtained" or "met its burden to show that the records exist." (Pet. Supp. Br., Attachment I at 24.)

The Military Judge's Initial Ruling

In a ruling dated 14 September 2023, the military judge denied the defense's request for Petitioner's mental health records with respect to "records *not* within the possession, custody, or control of military authorities," citing the absence of particularized information regarding the same. (Pet. Supp. Br., Attachment I at 32) (emphasis added).

By contrast, the military judge agreed with trial defense counsel's inference that Petitioner's status as a military member suggested there might be relevant records within the possession, custody, or control of military authorities:

> Owing to the fact that [Petitioner] is listed as a Staff Sergeant on the charge sheet for each of the relevant specifications, *it is certainly possible* she received medical care or treatment from a military provider, such that military authorities, particularly at any of [Petitioner's] station of assignments [sic], might be in possession of [Petitioner's] mental health diagnosis and treatment records.

(Pet. Supp. Br., Attachment I at 33) (emphasis added).

Noting, however, that the Government had "not yet taken the preliminary step of identifying if any of the requested medical records exist," the military judge deferred ruling on the defense request as it related to such records as "not ripe." (Id.) Instead, the military judge ordered the prosecution to first determine whether the requested records existed at the local military treatment facility (MTF) and whether they were subject to disclosure, and to respond to the defense request accordingly. (Id.)

The Petitioner's Opposition

Upon receiving the military judge's ruling, Petitioner's VC notified the prosecution that The Judge Advocate General (TJAG) had "just certified a petition to C.A.A.F. on this exact issue," and that she was "likely going to be filing a motion for reconsideration." (Pet. Supp. Br., Attachment I at 70.) Trial counsel acknowledged Petitioner's position and stated that if the

prosecution received responsive documentation from the MTF, they would "hold off on providing to Defense, until the issue is settled on [Petitioner's] end." (Id.) Petitioner's VC then expressed her belief that the military judge's analysis was "incorrect and fails to recognize the applicable procedural requirements," and that "ordering government counsel to go collect a victim's confidential health records … violates [Petitioner's] constitutional right to privacy as well as her rights under Art. 6b." (Pet. Supp. Br., Attachment I at 69-70.) In response, the prosecution offered to "instruct the MTF to keep the records in their possession until the issue is fully resolved." (Pet. Supp. Br., Attachment I at 69.)

Several days later, the prosecution confirmed in an email to all parties—the military judge, trial defense counsel, and Petitioner's victim's counsel—that the requested records existed, but that the MTF had denied release of the records "due to privilege." (Pet. Supp. Br., Attachment I at 60.) The parties then had an R.C.M. 802 conference, during which the military judge proposed issuing an order to the MTF. (Pet. Supp. Br., Attachment 1 at 53-54.) At that time, Petitioner's counsel expressed her intent to request a hearing under Mil. R. Evid. 513(e)(2) and *in camera* review of her records "prior to taking any further action to obtain production of [Petitioner's] records." (Id.)

In a follow-up email after the conference, the prosecution confirmed that the MTF would "provide diagnosis information pursuant to the military judge's ruling and would provide additional records if they receive[d] a court order." (Pet. Supp. Br., Attachment I at 53.) The prosecution caveated that they were "standing by to proceed at the direction of the Court before pursuing [Petitioner's] treatment and diagnosis information further," given Petitioner's intent to request a hearing. (Id.)

On 20 September 2023, Petitioner, through counsel, filed a motion requesting the following relief related to her records:

> [Petitioner] asserts her privilege and protections in her mental health records pursuant to M.R.E. 513 and requests that your honor withdraw the ruling and suspend any further action on the same until the procedural requirements have been met under M.R.E. 513(e)(2) and a proper hearing has been held pursuant to M.R.E. 513(e)(3). [Petitioner] further requests that this court issue a supplemental ruling concerning the improper disclosures and that use of that information be limited. VC requests an Article 39(a), UCMJ, session on this issue.

(Pet. Supp. Br., Attachment I at 35.)

In her motion, Petitioner advanced several arguments advocating against the production of the requested records. First, Petitioner argued that the defense had not met its burden under Mil. R. Evid. 513 "to demonstrate that some enumerated exception applies to allow for the production of privileged materials." (Pet. Supp. Br., Attachment I at 46.) Second, Petitioner asserted that although she "shared details about her past traumatic experiences with a trusted fellow airman," this did not constitute a waiver of that privilege. (Pet. Supp. Br., Attachment I at 47.) Third, Petitioner challenged the military judge's determination that medical records maintained at an MTF are within the possession, custody, and control of military authorities and application of R.C.M. 701 as "run[ning] afoul of the protections afforded under Art. 6b and M.R.E. 513." (Id.) Fourth, Petitioner insisted that the defense had not made a "sufficient showing" under R.C.M. 703, citing their perceived failure to identify specific diagnoses, conditions, or prescription medications that might be affecting Petitioner. (Pet. Supp. Br., Attachment I at 48.) Fifth, Petitioner alleged that allowing the defense to access her mental health records would "unnecessarily exploit [Petitioner's] privacy and render the protections afforded under M.R.E. 513 meaningless." (Pet. Supp. Br., Attachment I at 49.) Finally,

Petitioner contended that the military judge had no authority to order the MTF to produce the requested records. (Id.)

In response, the prosecution averred that it had complied with applicable discovery rules, had not violated Petitioner's rights, and had made no improper disclosures. (Pet. Supp. Br., Attachment I at 80.) The prosecution asserted that it "[was] not, nor ever has been, in possession of [Petitioner's] mental health records," and had "taken no further steps" to access the same. (Pet. Supp. Br., Attachment I at 77.) The defense response contended that the outstanding discovery *was* within the possession of military authorities; that the requested material was discoverable under Mellette; and that Petitioner's VC lacked standing on matters regarding the production of discovery. (Pet. Supp. Br., Attachment I at 90-93.) After receiving the above filings, the military judge determined that Petitioner lacked standing to be heard on the issue. (Pet. Supp. Br. at 4.)

The Military Judge's Order Directing Release

On 27 September, the military judge issued an order[2] directing the MTF to provide "mental health diagnosis and treatment records pertaining to [Petitioner] from 1 December 2017 to present." (Appendix.) The order directed the MTF to first release the records to Ms. CM, a medical law attorney within the Air Force Judge Advocate General's Corps, for review to "ensure that only treatment and diagnosis records are released." (Id.) The order further required that "any and all matters subject to privilege under Military Rule[] of Evidence 513" be fully

[2] The military judge initially issued an order on 26 September 2023 that required the prosecution to review the records; on 27 September 2023 he amended it to require review by an independent attorney, Ms. CM, from the Air Force Judge Advocate General Corps' medical law branch. (Appendix.) Later the same day, the military judge substituted Ms. CM with Maj VW as the reviewing attorney. (Pet. Supp. Br. at 5.)

redacted prior to the release of the records to counsel. (Id.) Finally, the military judge ordered that only counsel, their experts, and Petitioner were to have access to any records disclosed. (Id.)

The Petition for a Writ of Mandamus

On 25 September 2023, Petitioner filed with this Court a petition under Article 6b for relief in the form of a writ of mandamus, accompanied by a motion to stay the proceedings. The next day, this Court docketed this case but denied Petitioner's request for a stay of the proceedings. On or about 28 September 2023, the redacted records were released to the prosecution, who then provided them to the defense. (Pet. Supp. Br. at 5.) The same day, this Court stayed the military judge's 27 September 2023 order to produce the records, after they had been produced. (Id.) On 29 September, the trial proceedings were continued to 12 February 2024 at trial defense counsel's request, given the pendency of this petition. (Id.)

ARGUMENT

Standard of Review

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court has the authority to issue a writ of mandamus if it is "necessary or appropriate in aid of its jurisdiction." Chapman v. United States, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016). The purpose of a writ is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

However, "[t]he writ of mandamus is a drastic instrument," United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983), and "only exceptional circumstances … will justify the invocation of this extraordinary remedy." Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004) (citations omitted). Accordingly, to justify reversal of a military judge's discretionary decision by mandamus, the decision "must amount to more than even 'gross error'; it must amount 'to a

judicial usurpation of power' or be 'characteristic of an erroneous practice which is likely to recur.'" Labella, 15 M.J. at 229 (citations omitted).

To prevail on her petition for a writ, Petitioner must show that (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012).

Law & Analysis

Here, as discussed below, Petitioner has failed to demonstrate that the right to issuance of the writ is clear and indisputable, given that: (1) the military judge's determination that Petitioner's mental health records were under military control mirrors this Court's position on the same issue; (2) the records requested were non-privileged material under Mellette that did not warrant a hearing under Mil. R. Evid. 513; and (3) the military judge had the authority to issue an order to produce said records. Under these circumstances, issuance of a writ would be highly inappropriate. Accordingly, this Court should deny the petition for a writ of mandamus.

I. The military judge did not err by determining that Petitioner's records maintained by the military treatment facility were within the "possession, custody, and control" of military authorities.

The first issue this Court must consider is one that it has addressed before—whether Petitioner's Department of Defense (DoD) Health Record[3] is within the "possession, custody, and control" of military authorities. *See* In re HVZ, No. 2023-03, 2023 CCA LEXIS 292 (A.F. Ct. Crim. App. 14 July 2023) (unpub. op.). Like this Court did in HVZ, the military judge in this case determined that because Petitioner was a military member, any records of care by "military

[3] "[T]he DoD Health Record is the primary record of medical, dental, and mental healthcare documentation, regardless of medium, for individuals receiving care in the [military health system]." DHA-PM 6025.02 at 1.

provider[s]" would be in the "possession" of military authorities. (Pet. Supp. Br., Attachment I at 62.) Petitioner, for her part, disagrees and contends that her medical record is "not ordinarily in the custody, possession, or control of military authorities." (Pet. Supp. Br. at 8.) Given that this Court has previously decided this issue, the military judge did not clearly and indisputably err, and no further discussion is warranted. Nevertheless, the Government addresses, *arguendo*, Petitioner's assertions.

A. The plain meaning of "military authorities" includes military treatment facilities.

As Petitioner concedes, her DoD Health Record is "the property of the United States Government." DHA-PM 6025.02, *DoD Health Record Lifecycle Management, Vol. 1: General Principles, Custody and Control, and Inpatient Records* at 20, (23 November 2021). The Department of Defense bears general responsibility for the "maintenance and availability of the DoD Health Record at all times." Id. Accordingly, individual military treatment facilities are required to "maintain all official health records and documents to permanently document the health care provided to patients." Id. Ultimately, a military treatment facility has authority to release such records "in compliance with a valid court order or as otherwise required by law." Id. at 30. This framework alone demonstrates that Petitioner's mental health records *are* within the possession, custody, and control of military authorities.

Petitioner, however, contends that a military treatment facility is not a "military authority." (Pet. Supp. Br. at 9.) According to Petitioner, the term "military authorities," as it is used in the Manual for Courts-Martial, "has always been referring to entities vested with a law enforcement role over members of the military." (Pet. Supp. Br. at 11.) The Manual, however, contains no such narrowing construction. *See generally* MCM. Given the absence of any indication that the term "military authorities" is limited strictly to those engaged in a law

enforcement function, this Court should look to the ordinary, everyday meaning of the word "authorities" instead.

Although Petitioner asserts that "there is no plain meaning of 'military authorities' that would include the MTF," (Pet. Supp. Br. at 12), this is untrue. The Merriam-Webster Dictionary defines "authorities" as "persons in command,"[4] while the Cambridge Dictionary defines it to mean "a group of people with official responsibility for a particular area of activity."[5] Black's Law Dictionary defines "authority" as "[a]n official organization or government department with particular responsibilities and decision-making powers; esp. a governmental agency or corporation that administers public enterprise <transit authority>. – Also termed public authority." *Black's Law Dictionary* 164 (11th ed. 2019).

These definitions show that "authority" is an all-encompassing term used to refer to government agencies generally; it is certainly not confined, as Petitioner claims, to only law enforcement agencies or criminal prosecution teams. Thus, "military authorities" can reasonably be read to mean military persons in a position of supervision or command (such as the mental health flight commander) or military organization persons with "particular responsibilities" for "a particular area of activity" (such as an installation's military treatment facility or medical group). *See* United States v. Gray, 51 M.J. 1, 9 (C.A.A.F. 1999) (referring to military medical personnel as "military authorities").

Considering the above, the military judge's determination that the military treatment facility constituted a "military authority" does not come close to even "gross error," much less

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[4] *Authorities*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/authority (last visited Oct. 24, 2023).

[5] *Authorities*, DICTIONARY.CAMBRIDGE.ORG, https://dictionary.cambridge.org/us/dictionary/english/authoriy (last visited Oct. 24, 2023).

the kind of "judicial usurpation of power" that is required for a writ to issue. Labella, 15 M.J. at 229.

B. The prosecution need not possess information for it to be considered "within the possession, custody, and control" of military authorities.

Recognizing, perhaps, the futility of arguing that a military treatment facility is somehow not a military authority, Petitioner alternatively suggests that the "possession, custody, and control" contemplated by R.C.M. 701 refers exclusively to "items in the physical possession of the prosecution team, not the military writ large." (Pet. Supp. Br. at 11) (quotation marks omitted). In support of this proposition, Petitioner cites United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015). (Pet. Supp. Br. at 13.) However, Stellato stands for the exact opposite.

In Stellato, our superior court examined a military judge's findings regarding discovery violations, which included, *inter alia*, (1) the prosecution's failure to produce exculpatory evidence in the form of a plastic banana that was kept at the local sheriff's department, and (2) failure to secure and disclose the contents of a box containing exculpatory evidence, which was in the possession of a prosecution witness. 74 M.J. at 484-488. In upholding the military judge's determination that the prosecution "exercised control over the banana despite [its] physical presence in the sheriff's department," the Court reasoned that the prosecution had "access" to other evidence at the department and was "readily able to gain possession of the banana" once ordered to retrieve it. Id. at 484. The Court similarly ratified the military judge's finding that the box of evidence—though it was maintained by a witness—was within the prosecution's control, given that trial counsel knew about the box, had the ability to review the materials within, and cautioned the witness about handing over the box. Id. at 485-488. In so doing, the Court made it clear that "the Government need not physically possess an object for it

to be within the possession, custody, or control of military authorities." Id. at 485. Thus, Petitioner's argument to the contrary is without merit.

The ramifications of Stellato on Petitioner's position do not end there. Stellato establishes that the R.C.M. 701 inquiry focuses not so much on *who* owns the requested information, but on whether military authorities actually exercise any "possession, custody, or control" over it. Id. at 484-488. This undermines Petitioner's argument that military treatment facilities are not military authorities when one considers the unique nature of healthcare in the military, which is a "specialized society" with "separate concerns that must be met to ensure military readiness and national security." Drafters' Analysis, Manual for Courts-Martial, United States A22-51 (2016 ed.). These concerns are reflected in HIPAA's "military command" exception, which allows disclosure of military members' protected health information "for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission." 45 C.F.R. § 164.512(k). Put simply, military authorities—commanders—can obtain members' health information if the mission demands it. While not quite the same, an argument could be made this is akin to the access that the prosecution in Stellato had to the sheriff department's evidence, which only further supports the conclusion that records maintained at a military treatment facility are within the possession, custody, and control of military authorities.

II. The military judge has authority to compel production of discovery and lawfully exercised that authority within his prescribed jurisdiction.

Irrespective of whether the records were in the possession, custody, and control of military authorities, Petitioner contends that the military judge did not have authority to issue the order and that he "could not order a person outside the proceedings to review evidence." (Pet. Supp. Br. at 22-24.) These claims are without merit because the military judges possess statutory

authority to regulate discovery, and that authority enables them to specify parameters for the same.

A. The military judge had authority to order production of the requested records.

First, Petitioner's assertion that the military judge did not have authority to order the production of discovery seeks to discount a fundamental tenet of what makes trial practice fair: the court's authority to regulate it. *See* United States v. Pomarleau, 57 M.J. 351, 360 (C.A.A.F. 2002) (noting that both civilian and military courts have "statutory authority" to regulate discovery).

"The adversary system of trial … is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Williams v. Florida, 399 U.S. 78, 82 (1970). "Full and timely compliance with discovery obligations is the lifeblood of a fair trial." Stellato, 74 M.J. at 491. This is because "discovery … together with pretrial procedures[,] make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Proctor, 356 U.S. 677, 682 (1958); *see also* R.C.M. 701(a)(1), Discussion.[6]

Given the paramount importance of discovery in ensuring an even playing field, "[a] military judge has the *duty* to regulate the discovery process to ensure the timely administration of justice." Pomarleau, 57 M.J. at 364. Thus, if it is brought to the military judge's attention that a party has failed to comply with their discovery obligations, the military judge is authorized, *inter alia*, to "order the party to permit discovery" or "[e]nter such other order as is just under the circumstances." R.C.M. 701(g)(3). The flexibility accorded to military judges in regulating

[6] "Discovery in the military justice system is intended to eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial." R.C.M. 701(a)(1), Discussion.

discovery enables them "[t]o ensure a good balance between an accused's right to a fair trial, judicial efficiency, and confidentiality considerations." United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999).

Here, the limited record before this Court demonstrates that the military judge in this case was acting well within those bounds. A discovery dispute arose, and in keeping with his duty to regulate discovery, the military judge fashioned an order which (1) limited the scope of discovery, and (2) set forth specific parameters regarding the "manner" of discovery. *See* R.C.M. 701(g). Although Petitioner asserts that the military judge exceeded his authority by issuing what she calls an "ad hoc" order when a subpoena should have issued instead, this argument belies Petitioner's understanding of process in the military justice system. (Pet. Supp. Br. at 23-24.) Article 46, U.C.M.J.—the statute from which military discovery rules arise—provides that "[a] subpoena or *other process* may be issued to compel the production of evidence." 10 U.S.C. §846(d)(1). Here, the military judge issued an order—in lieu of a subpoena—because the military treatment facility specifically indicated that they would release the requested records upon receipt of a *court order*. Under these circumstances, it was not error for the military judge to oblige.

Nevertheless, Petitioner contends that the military judge had no authority to "direct an MTF, an entity not part of the military justice proceedings," to do anything at all. (Pet. Supp. Br. at 23.) But statute says otherwise. Article 48, U.C.M.J., empowers military judges to "punish for contempt *any person* who… willfully disobeys a lawful writ, process, *order*, rule, decree, or command *issued with respect to the proceeding*." 10 U.S.C. § 848(a)(1) (emphasis added). Statutory power to enforce an order is necessarily predicated on having authority to issue the same. Read in conjunction, Articles 46 and 48 establish that the military judge *did* have

authority to issue the order to the military treatment facility. Accordingly, Petitioner's claim fails on this front.

B. The military judge had authority to appoint an independent privilege-review attorney, and it was not error to do so.

Petitioner also contends that the military judge had no authority to order a "non-party" to conduct a privilege review of her records. (Pet. Supp. Br. at 24.) Although Petitioner asserts that there are "no rules and processes to reference with regards to the … ordering of an attorney completely removed from the proceedings," this is simply not true. (Pet. Supp. Br. at 24.)

R.C.M. 701(g)(1) authorizes military judges to "specify the time, place, and *manner* of making discovery and … prescribe such terms and conditions as are just." Further, the military judge "may at any time order that the discovery or inspection be denied, restricted, or deferred, or make *such other order as is appropriate*." R.C.M. 701(g)(2) (emphasis added). Such an order "may provide parameters for examination by or disclosure to those persons or entities whose interests are being protected." R.C.M. 701(g)(2), Discussion. The military judge's order in this case did precisely that. It "prescribe[d] such terms and conditions as are just"—review and redaction of privileged material by an independent attorney—to protect against unauthorized disclosure of Petitioner's privileged communications.

Petitioner, for her part, asserts that such a process is "unauthorized and uncontemplated." (Pet. Supp. Br. at 24.) But independent review of privileged materials is not unheard of. *See, e.g.,* B.M. v. United States, 83 M.J. 704, 710 (N-M Ct. Crim. App. 2023) (suggesting that a military judge could order a "taint team" to review medical records for privileged material and redact them); United States v. Al-Nashiri, 374 F. Supp. 3d 1190, 1198 (C.M.C.R. 2018) (where military judge ordered the establishment of a "Privilege Review Team"); In re Fattah, 802 F.3d 516, 530 (3d Cir. 2015) (endorsing use of a "taint team" where first level of privilege review will

be conducted by an independent attorney); United States v. Myers, 593 F.3d 338, 341 n.5 (4th Cir. 2010) (noting that courts sometimes allow privilege review by government attorneys uninvolved in the matter). Such independent review—much like a military judge's ability to issue orders and hold closed hearings—facilitates the balancing of "an accused's right to a fair trial, judicial efficiency, and confidentiality considerations." Abrams, 50 M.J. at 363.

Considering the above, it is self-defeating to assert that the procedure "questionably invaded [Petitioner's] privilege and privacy" when the parameters specified therein were designed to protect those very interests. Accordingly, it was not error for the military judge to specify the manner in which the Petitioner's records should be reviewed and disclosed. Moreover, the basis upon which Petitioner seeks relief from this Court is the alleged violation of her right to be treated with respect for her privacy under Article 6b(a)(9). (Pet. Supp. Br. at 6.) In this case, the military judge did take steps to protect Petitioner's privacy interests. That Petitioner was not fully satisfied with those steps does not equate to a violation of Article 6b(a)(9) that warrants the drastic remedy of a writ of mandamus.

III. The military judge was not required to hold a hearing under Mil. R. Evid. 513 or conduct *in camera* review because the requested discovery was of non-privileged material.

Petitioner nevertheless contends that the military judge's order was "clear and indisputable error and a usurpation of judicial authority" because it "devised a process outside the confines of M.R.E. 513 to order production of privileged records." (Pet. Supp. Br. at 18.) However, this is a misstatement. The military judge did not order the military treatment facility to produce Petitioner's mental health records *en masse* without any type of review for privileged communications. On the contrary, the military judge limited his order to records from December 2017 through the present, and explicitly directed that an independent attorney review for—and redact—any privileged information prior to releasing the records to counsel. It is this nuance

that explains the lack of a hearing or *in camera* review under Mil. R. Evid. 513, which Petitioner asserts was "required." (Pet. Supp. Br. at 18-22.)

Mil. R. Evid. 513 codifies the psychotherapist-patient privilege in military practice:

> 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).

The rule provides that before ordering the production or admission of evidence that is *privileged* under this rule—be it testimony from psychotherapists or patient records pertaining to privileged communications[7]—the military judge must conduct a closed hearing. Mil. R. Evid. 513(e)(2) (emphasis added). The military judge may also examine the evidence *in camera*, "if such examination is *necessary* to rule on the production or admissibility of *protected* records or communications." Mil. R. Evid. 513(e)(3) (emphasis added).

However, "*in camera* review is not automatically appropriate every time one party seeks information over which another claims privilege." United States v. Wright, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015). That is because the psychotherapist-patient privilege must *actually exist* for the protections of Mil. R. Evid. 513 to apply. *See* In re KS, No. 2023-06, 2023 CCA LEXIS 406, at *10 (A.F. Ct. Crim. App. 26 September 2023) (unpub. op.). The privilege, however, "is not absolute." United States v. Chisum, 75 M.J. 943, 947 (A.F. Ct. Crim. App.

[7] The phrase "evidence of a patient's records or communications" as it is used in Mil. R. Evid. 513(e)(2) is specifically defined as "testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(b)(5).

2016). As our superior Court recently recognized, "[t]he phrase 'communication made between the patient and a psychotherapist' does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist." Mellette, 82 M.J. at 378. Accordingly, "diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513." United States v. Mellette, 82 M.J. 374, 375 (C.A.A.F. 2022).[8] Thus, the procedural requirements of Mil. R. Evid. 513(e) would not apply to "diagnoses and treatment" information.

Such is the case here. At the outset, the defense sought to compel only non-privileged records of diagnoses and treatments pursuant to Mellette. It is clear the military judge understood as much, given that he specifically ordered the production of "mental health diagnosis and treatment records" and directed that "any and all matters subject to privilege under [Mil. R. Evid.] 513" be "fully redacted." (Appendix.) Because the responsive documentation would not contain privileged communications, it fell outside the scope of Mil. R. Evid. 513 and its procedural requirements, therefore the military judge did not err by declining to hold a closed hearing. Similarly, because there were no claims of privilege for the military judge to adjudicate in an *in camera* review, it was not error to forego it.

IV. Petitioner's rights were not violated by either the military judge's order or the prosecution's compliance therewith.

The overarching theme of Petitioner's position is that the military judge's order compelling production of her records and the prosecution's compliance with that order violated various rights, including her Fourth Amendment right against unreasonable search and seizure

[8] "The phrase 'communication made between the patient and a psychotherapist' does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist." Mellette, 82 M.J. at 378.

and her right to privacy. (*See generally* Pet. Supp. Br.) This Court should decline to find such any such violations for the below reasons.

First, Petitioner's characterization of the military judge's order as an unlawful "seizure" is inapt because it conflates the protections afforded by HIPAA with those afforded by the Fourth Amendment—neither of which were violated in this case. To start, HIPAA does not create a private cause of action. 42 USCS § 1320d-5; *see* Acara v. Banks, 470 F.3d 569, 571 (5th Cir. 2006) ("HIPAA does not contain any express language conferring privacy rights upon a specific class of individuals"); Meadows v. United Servs., 963 F.3d 240, 242 (2d Cir. 2020) ("there is no private right of action under HIPAA, express or implied"). Accordingly, this Court has held that HIPAA does not apply in the context of unreasonable searches and searches under the Fourth Amendment. *See* United States v. Lane, No. ACM S30930, 2007 CCA LEXIS 282, *12-13 (A.F. Ct. Crim. App. 13 July 2007) (unpub. op.).

Even if HIPAA did apply in such a context, there would be no violation because HIPAA permits the disclosure of health information "in response to an *order of a court* or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1) (emphasis added). The military judge's order—and the subsequent disclosure—falls squarely within those bounds.

Similarly, there would be no Fourth Amendment violation because "[t]he Fourth Amendment does not protect against all searches. Rather, it proscribes only *unreasonable* searches." United States v. Michael, 66 M.J. 78, 80 (C.A.A.F. 2008) (emphasis). Here, the military judge lawfully exercised his authority to order the production of Petitioner's records—thus, the purported "search and seizure," if it should even be called that, was reasonable.

Ultimately, Petitioner does not challenge HIPAA, its implementing regulations, or DoDM 6025.18, which govern access to protected health information, as being unconstitutional. Therefore, this Court should, as it did in In re AL, presume that compliance with these directives is sufficient to safeguard whatever constitutional privacy interest Petitioner has in her medical records. 2022 CCA LEXIS 702, at *14-15. After all, "HIPAA was enacted in order to assure an individual's right to privacy in his or her medical records." United States v. Prentice, 683 F.Supp.2d 991, 1001 (D. Minn. 2000). Thus, when the procedure for obtaining patient records complies with HIPAA—as it did in this case, given the military judge's order—the patient's right to privacy is assured.

Moreover, while Petitioner may have a constitutional right to privacy that encompasses her medical information, that right is not absolute and "must be weighed against the [G]overnment's interest in obtaining the records in particular circumstances." In re AL, No. 2022-12, 2022 CCA LEXIS 702, at *14 (A.F. Ct. Crim. App. 7 December 2022) (unpub. op.) (quoting In re Grand Jury Subpoena, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002) (additional citation omitted)). Here, that interest is informed by the Due Process Clause of the Fifth Amendment, which requires that the Accused "be afforded meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). Once the military judge determined that a portion of Petitioner's records should be turned over, the prosecution had an obligation under Article 46 to "remove obstacles to defense access to information and to provide such other assistance as may be needed." United States v. Williams, 50 M.J. 436, 442 (C.A.A.F. 1999). This obligation exists because the prosecution, like the military judge, is responsible for ensuring the fairness of the court-martial process:

> "The [prosecution] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

> impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law…"

Berger v. United States, 295 U.S. 78, 88 (1935).

Only by ensuring that the intervening process is fair can the prosecution safeguard the integrity of the result—such as a conviction—that follows.

CONCLUSION

Petitioner's request that the military judge's order be vacated should be denied because the military judge did not err by determining that records maintained by the 31st Medical Group were within the "possession, custody, and control" of military authorities, because the plain meaning of "military authorities" includes military treatment facilities, not just the prosecution. Further, the military judge lawfully exercised his statutory authority to regulate discovery to order production of the records and specify parameters for their disclosure, which included an independent review for privileged materials. Moreover, because the request for Petitioner's records was limited to non-privileged material, the military judge was not required to hold a hearing under Mil. R. Evid. 513 or conduct *in camera* review since he had no claims of competing privilege to adjudicate. Accordingly, Petitioner's request for a closing hearing until Mil. R. Evid. 513 should also be rejected.

The record demonstrates that Petitioner's rights were not violated by either the military judge's order or the prosecution's compliance therewith. Thus, Petitioner has failed to demonstrate a "clear and indisputable right" to issuance of the writ. By extension, Petitioner is unable to demonstrate that a writ would be appropriate under the circumstances.

For these reasons, the United States respectfully requests that this Honorable Court deny Petitioner's writ.

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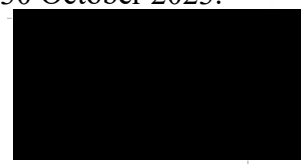
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Petitioner's Counsel, and the Air Force Appellate Defense Division on 30 October 2023.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE RW, *Petitioner,*	)	MOTION TO CITE SUPPLEMENTAL AUTHORITIES
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **CHASE N. ARNOLD** United States Air Force *Real Party in Interest.*	)	Misc. Dkt. No. 2023-08
	)	7 December 2023

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit supplemental citation of authorities because additional relevant law has come to the government's attention. The below cases are relevant for this Court to consider when deciding whether the military judge clearly and indisputably erred by ordering an attorney from the medical law branch of the Headquarters Air Force Claims and Tort Law Litigation Division (JACC) to review Petitioner's mental health diagnoses and treatment records to ensure privileged communications were not released to the prosecution or defense.

The use of "taint teams" or "filter" protocols to conduct independent screening of potentially privileged materials in the government's possession is recognized as an acceptable practice in every single circuit across the nation. *See* United States v. Derman, 211 F.3d 175, 181 (1st Cir. 2000); SEC v. Rajaratnam, 622 F.3d 159, 183 n.24 (2d Cir. 2010); United States v. Scarfo, 41 F.4th 136, 173 (3d Cir. 2022); United States v. Myers, 593 F.3d 338, 341 n.5 (4th Cir. 2010); United States v. Jarman, 847 F.3d 259, 266 (5th Cir. 2017); United States v. Coffman, 541, 564 (6th Cir. 2014); In re Grand Jury Subpoenas (04-124-03 & 04-124-05), 1, 522-23 (6th Cir. 2006); United States v. Snyder, 71 F.4th 555, 569 (7th Cir. 2023);

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United States v. Hari, 67 F.4th 903, 911-12 (8th Cir. 2023); Grand Jury Subpoena v. Kitzhaber, 828 F.3d 1083, 1094 (9th Cir. 2016); United States v. Ary, 518 F.3d 775, 780 (10th Cir. 2008); United States v. Korf, 11 F.4th 1235, 1248-49 (11th Cir. 2021); Bismullah v. Gates, 378 U.S. App. D.C. 179, 198, 501 F.3d 178, 197 (D.C. Cir. 2007).

In Derman, the First Circuit reviewed the search and seizure of a law office and found that both the search and seizure were not unreasonable despite the "pervasiveness there of privileged items." 211 F.3d at 181. In reaching this conclusion, the Court credited the involvement of a "privilege team composed of attorneys, separate from the team of searching agents" that reviewed the seized material for privileged information. Id.

In Rajaratnam, the Second Circuit observed that "ethical walls" are often erected to prevent the "tainting" of attorneys on a given case and cited "taint teams" as an example of such a measure. 622 F.3d at 183 n.24.

In Scarfo, the Third Circuit reviewed a challenge to the use of numerous "filter teams" to "weed out any discussions protected by [appellant's] attorney-client privilege" from wiretap evidence. Finding no error, the Court explicitly noted that "[t]he use of filter teams is an acceptable method of protecting constitutional privileges." 41 F.4th at 173.

In Myers, the Fourth Circuit similarly noted that "[c]ourts sometimes allow privilege review by government attorneys uninvolved in the matter; they are called a 'privilege team' or 'taint team.'" 593 F.3d at 341 n.5.

In Jarman, the Fifth Circuit endorsed the use of a taint team process to screen seized documents for attorney-client privileged materials, noting that the process "was designed to protect [appellant's] clients' privileged information." 847 F.3d at 266.

In Grand Jury Subpoenas, the Sixth Circuit opined that when "potentially-privileged documents are *already in the government's possession*… the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." 454 F.3d at 522-23.

In Snyder, the Seventh Circuit reviewed a claim that the government's "filter process" for screening appellant's emails for attorney-client privilege was deficient because it was "conducted solely by government agents, without court oversight or participation by [appellant's] counsel." 71 F.4th at 569. Despite finding that the filter process "did not operate perfectly," the Court declined to find it deficient, noting that it was "not convinced…that the filter process used here would have been rejected by other circuits." Id.

In Hari, the Eighth Circuit reviewed an appellant's claim that the government violated his Sixth Amendment rights through its inadvertent receipt of documents summarizing attorney-client communications. 67 F.4th at 911-12. The Court noted that an independent government attorney and federal agent "promptly conducted a privilege review" of the documents to ensure that the prosecution team was not exposed to any such information and did not criticize the privilege review procedure. Id.

In Kitzhaber, the Ninth Circuit reviewed a district court's decision to have a government "taint/filter team" review appellant's emails for attorney-client privileged information, which were produced in response to a grand jury subpoena. 828 F.3d at 1094. Though the Court ultimately did not reach the question of whether the "taint team" protocol was appropriate based on its order that the subpoena be quashed in its entirety, it noted that "one option, not mentioned by the parties, would be engaging a *neutral third party* to sort Kitzhaber's emails." Id.

In Ary, the Tenth Circuit reviewed a case that involved, at one point, the use of a government "taint team" to filter through seized materials for attorney-client privileged information and did not criticize the procedure. 518 F.3d at 780.

In Korf, the Eleventh Circuit considered whether the use of a government filter team to review seized materials that are claimed to be privileged necessarily violated the privilege holder's rights. 11 F.4th at 1238. In finding that the filter team was not "per se violative" of the appellant's rights, the Court noted, *inter alia*, that the records were already in the government's possession, which made the use of a filter team "respectful of, rather than injurious to, the protection of privilege." Id. (citing Grand Jury Subpoenas, 454 F.3d at 522-23).

In Bismullah, the District of Columbia Circuit approved the use—through a court order—of a "Privilege Team" charged with reviewing materials sent between a detainee and his counsel. 501 F.3d at 197.

These cases demonstrate that the military judge's order in this case—which (1) ordered the production of *non-privileged* records, and (2) appointed an independent attorney as an *additional* screening mechanism—was neither a "judicial usurpation of power" nor an "erroneous practice" that would warrant the drastic remedy of a writ of mandamus. United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983). Rather, the procedure implemented by the military judge was "respectful of, rather than injurious to, the protection of [Petitioner's] privilege," to the extent the privilege applied at all. Grand Jury Subpoenas, 454 F.3d at 522-23.

WHEREFORE, the United States respectfully requests that this Honorable Court grant its motion to submit supplemental citations of authority.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 December 2023.

KATE E. LEE, Capt, USAF
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner,* v. **Chase N. ARNOLD** Staff Sergeant (E-5) U.S. Air Force *Real Party in Interest.*	**ENTRY OF APPEARANCE** Before Panel 2 Misc. Dkt. No. 2023-08 13 December 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, undersigned counsel enters her appearance. Undersigned counsel will be sitting second chair at Staff Sergeant Chase Arnold's table as supervisory counsel.

Respectfully submitted,

[redacted]

MEGAN P. MARINOS
Senior Counsel
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[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent to the Court, the Air Force Appellate Government Division, and Victim's Counsel on 13 December 2023.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re RW, *Petitioner,* *v.* **UNITED STATES** *and* **CHASE N. ARNOLD** **Staff Sergeant (E-5)** **United States Air Force,** *Real Party in Interest.*	**REAL PARTY IN INTEREST'S BRIEF IN RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF** Before Special Panel Misc. Dkt. No. 2023-08 31 October 2023

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

COMES NOW Staff Sergeant (SSgt) Chase N. Arnold, by and through counsel, pursuant this Honorable Court's Order to file a brief in response, and respectfully requests this Court deny the Petitioner's (RW) Petition Under Article 6b for Relief in the form of a Writ of Mandamus.

Summary of Argument

Petitioner does not bring forward any issues that rise to a level warranting the extraordinary relief requested. In fact, the arguments advanced by Petitioner have largely already been considered by this Court in *In Re HVZ*, Misc. Dkt. No. 2023-03, 2023 CCA LEXIS 292 (A.F. Ct. Crim. App. Jul. 14, 2023)[1], which was resolved against the petitioner. Crucially, this Court need not delve into complex issues of privilege, because the military judge only ordered non-privileged discoverable material be inspected and provided to trial counsel. The military judge ultimately made no error, and certainly not one of such an extraordinary nature that it represents a judicial

[1] *In Re HVZ* is currently pending review before the Court of Appeals for the Armed Forces for multiple certified issues, and is scheduled for oral arguments on 5 December 2023.

usurpation of power. Similarly, Petitioner's request for the destruction of mental health records already produced is without merit and contrary the principles of discovery.

This Court need not determine whether Petitioner had standing at trial to be heard on this discovery matter because it is not germane to the ultimate disposition of the issue before this Court. However, this Court's ruling in *In Re HVZ* remains instructive. Misc. Dkt. 2023-03, 2023 CCA LEXIS 292 (holding that petitioner, an alleged victim, did not have a right to be heard on issues of discovery at the trial level under Article 6b, Uniform Code of Military Justice (UCMJ)). Article 6b, UCMJ, simply does not provide Petitioner standing at the trial to be heard on issues of discovery.

Finally, the circumstances before the trial court did not call for the military judge to grant discretionary in camera review under Mil. R. Evid. 513(e), because none of the materials at issue are privileged.

Statement of Facts

On 6 April 2022, the convening authority referred the following charges and specifications against SSgt Arnold to a general court-martial: one charge and two specifications of indecent language, one charge and two specifications of communicating threats, one charge and four specifications of rape, one charge and seven specifications of assault consummated by battery, and one charge and 17 specifications of domestic violence in violation of Articles 115, 120, 128, 128b, and 134, UCMJ, 10 U.S.C. §§ 915, 920, 928, 928b, 134. Pet'r. Br. at Attachment II, Charge Sheet.

On 1 September 2023, trial defense counsel filed a motion to compel discovery. Pet'r. Br., *Attachments to Original Petition* at 1. The Defense requested non-privileged medical records related to treatment and diagnoses that RW may have received from military medical providers between 1 December 2017 to 1 September 2023. *Id*. In doing so, the Defense specifically tailored

the request to include only evidence discoverable under *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022). Pet'r. Br., *Attachments to Original Petition* at 95. The request was based on text messages that Defense had received through discovery where Petitioner self-identified having mental health issues that she was working through prior to the charged allegations. *Id.* at 11. The request did not seek any evidence of communications subject to privilege under Mil. R. Evid. 513. *Id.* at 7. The military judge found and ruled as follows:[2]

> 31. Where the Government has not yet taken the preliminary step of identifying if any of the requested medical records exist, the Government cannot know if any records are relevant to the Defense's preparation, and the issue is not ripe for the Court to compel production. Therefore, consistent with R.C.M. 701(g)(1):
>
> > a. The Government will identify whether there are any mental health diagnosis and treatment records of R.W., within the possession, custody, or control of military authorities, which were created during the timeframe of the charged offenses involving R.W., specifically, between 24 December 2017 and 30 May 2021. *See* R.C.M. 701(a)(2)(A).
> >
> > b. If any such medical records are privileged or not subject to disclosure, see R.C.M. 701(f), the Government will respond to the Defense stating any basis for non-disclosure and notify the Court. *See also* Uniform Rule 3.3.
> >
> > c. If any such medical record is subject to disclosure and is relevant to the Defense's preparation, trial counsel will provide the record to the Defense. *See* R.C.M. 701(a)(2)(A)(i). Consistent with R.C.M. 701(g)(2), nothing limits the trial counsel from requesting the Court to deny, restrict, or defer discovery upon a sufficient showing.

On 18 September 2023, trial counsel emailed the military judge explaining that the mental health treatment facility, the 31st Operational Medical Readiness Squadron, "denied the production of records due to privilege." *Id.* at 60. On 19 September 2023, after a Rule for Courts-Martial (R.C.M.) 802 conference, trial counsel indicated that the mental health provider could furnish the records if they received a court order. *Id.* at 53. Following this, Petitioner's Counsel filed a motion

[2] This Court may adopt the military judge's findings of fact in their entirety. *See* Pet'r. Br., *Attachments to Original Petition* at 33. No finding of fact is clearly erroneous.

for appropriate relief seeking in camera review to prevent disclosure of privileged materials, even though no privileged materials were requested. *Id.* at 35. On 25 September 2023, the military judge denied the motion for lack of standing. Pet'r. Br. at 4. the military judge then issued two orders directing for RW's medical record to be released and inspected by a medical law attorney to ensure that no items subject to privilege under Mil. R. Evid. 513 were tendered to trial counsel.[3] On 28 September 2023, the redacted mental health records were delivered to trial counsel and provided to the defense. Pet'r. Br. at 5.[4]

Petitioner filed this instant petition and motion to stay the proceedings on 25 September 2023. This Court partially granted the stay as to the military judge's order to bar further inspection or release of Petitioner's medical records. This Court granted Petitioner an opportunity to supplement her petition and also permitted counsel for SSgt Arnold and the Government to file responsive briefs by 31 October 2023.

ARGUMENT

PETITIONER FAILED TO DEMONSTRATE A "CLEAR AND INDISPUTABLE" RIGHT TO THE RELIEF SHE SEEKS.

Standard of Review

The extraordinary relief sought by Petitioner through a writ of mandamus is only available where (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; (3) the issuance of the writ is appropriate under the circumstances. *Hasan*

[3] The military judge's initial order issued on 26 September 2023 directed for an attorney with the Department of Health Administration to conduct the initial review of the documents. Following this, the military judge issued a supplemental order on 27 September 2023, directing an Air Force medical law advisor to conduct the review instead. Pet'r. Br. at 23.

[4] The production of Petitioner's mental health records rendered her petitioner to halt said production moot. Petitioner's remaining requests for the destruction of already tendered mental health records and compliance with Mil. R. Evid. 513 are not moot.

v. Gross, 71 M.H. 416, 418 (C.A.A.F. 2012) (*citing Cheney v. United States District Court*, 542 U.S. 367, 380-81 (2004)).

A Writ of Mandamus is Not Appropriate in These Circumstances

Petitioner's assertion that "ordinary standards of appellate review should apply" is unsupported by any authority, and wholly inappropriate under this case's posture. Pet'r. Br. at 7. A writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary cases." *EV v. United States*, 75 M.J. 331, 332 (C.A.A.F. 2016) (*quoting Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004)). "Extraordinary writs serve 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction.'" *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013) (*quoting Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382 (1953)). For a military judge's decision to call for reversal through a writ of mandamus, said decision "must amount to more than even gross error; it must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which is likely to recur." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (*per curiam*) (internal quotation marks and citations omitted). "When acting on [an extraordinary writ in the nature of mandamus, this Court does] not determine the correctness of the military judge's ruling as [it is] not at liberty to substitute [its] judgement for his." *United States v. Mahoney*, 24 M.J. 911, 914 (A.F.C.M.R. 1987). "Because of their extraordinary nature, writs are issued sparingly, and a petitioner bears an extremely heavy burden to establish a clear and indisputable entitlement to extraordinary relief." *Dew v. United States*, 48 M.J. 639, 648 (A. Ct. Crim. App. 1998) (emphasis added) (citations omitted). Petitioner does not raise any issue that rises to such a level. Rather, Petitioner appears to simply challenge rulings made by the military judge which were well within his authority to make.

Article 6b

Victims' rights in the military are codified by statute in Article 6b, UCMJ. 10 U.S.C. § 806b. There are nine enumerated rights provided for in the statute. Article 6b(a), UCMJ. Petitioner cites Article 6b(a)(9), UCMJ, as the basis for this petition, alleging the military judge's ruling is contrary to her "right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter." Article 6b(a)(9), UCMJ. However, this provision affords Petitioner no standing to be heard on the discovery issue at bar.

While Article 6b provides an enforcement mechanism before this Court for instances where a victim's rights under that article have been violated, the remedy is an order compelling the military judge to comply with the offended provision. Article 6b(e)(1), UCMJ; *see also In Re KK*, Misc. Dkt. 2022-13, 2023 CCA LEXIS 31 at *13 (A.F. Ct. Crim. App. Jan. 24, 2023) ("Victims involved in court-martial proceedings do not have the authority to challenge every ruling by a military judge with which they disagree; but they may assert their rights enumerated in Article 6b, UCMJ, in the Manual for Courts-Martial, and under other applicable laws."). No relief is therefore possible in an instance such as this where Petitioner has not suffered a harm under any of the identified rights under Article 6b. Because Petitioner lacks standing to challenge the issue of discovery under Article 6b at the trial level, the enforcement mechanism does not yield any relief. Put differently, there is no infringed provision that the military judge could be ordered to comply with. This negates any claim that Petitioner has a clear and indisputable right to a writ of mandamus.

This Court's ruling in *In Re HVZ* is analogous, if not completely overlapping in the issues presented. Much like the this case, HVZ petitioned for a writ of mandamus to prevent disclosure of her mental health records that had been order for inspection by the military judge. 2023 CCA

LEXIS 292 at *6. In ruling against the petitioner, this Court recognized that "Article 6b, UCMJ, does not create the right to be heard *by the trial court* on any and all matters affecting those rights, other than during presentencing proceedings in accordance with Article 6b(a)(4)(B), UCMJ." *Id.* at *12. Likewise, in the context of non-privileged matters of discovery, "Article 6b, UCMJ, itself, does not provide [the petitioner] the right to be heard at the trial court." *Id.* Given this, Petitioner has not articulated a clear and indisputable right that would trigger the extraordinary relief sought.

R.C.M. 701 & 703

Petitioner's assertion for relief in the context R.C.M. 703 is similarly misplaced. Discovery of evidence in the possession of the Government is regulated by R.C.M. 701; whereas production of evidence from outside sources is regulated by R.C.M. 703. *See United States v. Jones*, No. ACM 40226, 2023 CCA LEXIS 230, at *24-34 (A.F. Ct. Crim. App. May 30, 2023) (discussing the interplay between the rules and Mil. R. Evid. 513). Upon request of the accused, the Government must disclose papers and documents within the possession, custody, or control of military authorities and relevant to defense preparation. R.C.M. 701(a)(2)(i). Evidence not under control of the government may be obtained by subpoena. R.C.M. 703(g)(3)(A).

Petitioner correctly recognizes that this Court has previously determined that "medical records maintained by the [local military treatment facility] would seem to fall within the plain meaning of 'papers, documents, [and] data . . . within the possession, custody, and control of military authorities . . . .'" Pet'r. Br. at 10; *In Re HVZ*, 2023 CCA Lexis 292 at *16. The same remains true here. The record establishes that the documents ordered for release and inspection by the military judge were limited to medical records maintained by the 31st Operational Medical Readiness Squadron. Having been in the custody of a military treatment facility, the records were within the possession of military authorities, triggering the application of R.C.M. 701.

Petitioner argues, without merit, that the term "military authorities" should be confined to those entities that serve some law enforcement capacity but provides no actual authority to support this. Petitioner argues discovery items subject to R.C.M. 701(a)(2) only include items in the possession of the "prosecution team," citing *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) out of context. Pet'r. Br. at 11. This is contrary to the plain language of R.C.M 701(a)(2) which states it applies to materials in the "possession, custody, or control of *military authorities*." This Court echoed this application of the R.C.M. 701(a)(2) in *In Re HVZ*, holding that "the military judge did not clearly and indisputably err by concluding that Petitioner's records 'maintained' by the 56 MDG—a unit within the United States Air Force—were within the 'possession, custody, or control' of a 'military authority.'" 2023 CCA Lexis 292 at *13. This Court went on to explain:

> [T]he definition of "possession, custody, or control" by the prosecution set forth in *Stellato* is not necessarily the exclusive definition of "possession, custody, or control of military authorities." *Stellato* did not address control over medical records maintained by a military unit; rather, *Stellato* addressed whether the military judge in that case abused his discretion by finding the Army prosecutors exercised "control" over a piece of evidence held by a local sheriff's department. *Stellato*, 74 M.J. at 485. As we indicated above, medical records maintained by the 56 MDG would seem to fall within the plain meaning of "papers, documents, [and] data . . . within the possession, custody, and control of military authorities . . . ," and the military judge did not clearly and obviously err in reaching that conclusion.

Id. at 15.

Contrary to Petitioner's brief, the military judge possessed the authority to direct and set conditions on the manner of discovery. R.C.M. 701(g)(1) provides that "the military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just." Elsewhere under R.C.M. 701(g)(2), "[u]pon a sufficient showing, the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." While Petitioner insists that her medical records could only be obtained through the subpoena process in accordance with

R.C.M. 703, this runs against the expansive authority granted to the trial court under R.C.M. 701, as applicable in cases such as this where the records were maintained by military authorities.

This feature of R.C.M. 701 was elucidated by the Court of Appeals for the Armed Forces in *Gray v. Mahoney*, 39 M.J. 299 (C.A.A.F. 1994). In that case, the Court of Appeals for the Armed Forces (CAAF) explained that "R.C.M. 701 is a comprehensive rule that *addresses virtually all aspects* of the discovery process." *Id.* at 305 (emphasis added). Moreover, "[i]f the defense balks or if the Government was to place some other restriction or condition on making such sensitive evidence available, R.C.M. 701(g)(1) provides resource."

The current case illustrates the scenario envisioned in *Gray v. Mahoney*. After considering the Defense motion to compel, the military judge ordered that the Government perform the initial step of determining whether any responsive items were maintained by the mental health treatment facility. Pet'r. Br. at *Attachments to Original Petition*, 33. Following this, the Government placed a condition on the review of the evidence, namely that the review would be undertaken by a third party, but only if ordered to do so by the military judge. *Id.* at 53. The military judge obliged this request by exercising proper authority under R.C.M. 701(g)(1) and issuing an order. Pet'r. Br. at 18. This process paralleled the one outlined by the Court of Appeals for the Armed Forces, and was in accordance with the applicable provisions of the R.C.M. *See Gray*, 39 M.J. at 305.

As it pertains to this petition, the military judge's actions complied with his granted authority and did not amount to a judicial usurpation of power that would clearly and indisputably entitle Petitioner to the relief sought.

Similarly, Petitioner's appeal to privacy rights under Health Insurance Portability and Accountability Act (HIPAA) does not advance her argument for extraordinary relief. While Petitioner cites HIPAA seemingly as a blanket prohibition again trial counsel having access to her

health records, "HIPAA and its implementing regulations provide a process for trial counsel to obtain protected health information pursuant to a 'legitimate law enforcement inquiry,' provided the request meets certain criteria." *In Re HVZ*, 2023 CCA LEXIS 292 at *18 (*quoting* DoDM 6025.18 ¶ 4.4.f.(1)(b)3). Petitioner has not demonstrated how the inquiry into her mental health records fails to conform with a legitimate law enforcement inquiry. *See also In Re AL*, Misc. Dkt. No. 2022-12, 2022 CCA LEXIS 702 *14 (A.F. Ct. Crim. App. Dec. 7, 2022) (rejecting petitioner's argument that HIPAA prevents disclosure of mental health records to trial counsel where disclosure had legitimate law enforcement purpose).

In Camera Review Under Mil. R. Evid. 513 Was Inapplicable

Petitioner's assertion that in camera review of the records was necessary per Mil. R. Evid. 513 defies the fact that the records requested by Defense, and ordered for release by the military judge, were explicitly non-privileged. Mil. R. Evid. 513 provides that "[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." (emphasis added). Thus, while Mil R. Evid. 513 recognizes privilege over confidential communications, this has no bearing in the present matter where only non-privileged communications were at issue.

This is even more evident in the present circumstances where the military judge had not ordered the release of the records, but only for the Government to take the initial step of determining whether responsive records were even in existence. To that end, the military judge correctly determined that the issue had not yet become ripe.

The nuance of privilege in this case is controlled by *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022). While Petitioner speaks of this case as inviting unwarranted "creative" actions on the part of military judges, *Mellette*'s application is simple and weighs against this petition. As a bright line rule, CAAF held that "[a] patient's diagnosis and the treatment that a patient received to care for those conditions are 'underlying facts,' [internal citation omitted], not confidential communications." *United States v. Mellette*, 82 M.J. 374, 380 (C.A.A.F. 2022). While Petitioner seems to suggest that reference to *Mellette* was somehow blanket evocation for Defense to acquire privileged materials, the actual Defense request was specifically in line with that case's limited ruling. Pet'r. Br. At 1. In particular, Defense requested medical records only to the extent that they contained Petitioner's mental health diagnosis and treatment records. Pet'r. Br., *Attachments to Original Petition* at 7. The tailoring of the request to exclude any communications "made for the purpose of facilitating diagnosis or treatment," is squarely compliant with *Mellette*, and the military judge's determination to that effect was hardly an act of judicial usurpation.

Given that the military judge's order was limited to the initial question of whether responsive materials to the Defense request even existed, Mil. R. Evid. 513's in camera review procedure was inapplicable. To that end, Petitioner misapprehends the utility and function of Mil. R. Evid. 513(e). That rule is concerned with controversy over "the production or admission of records or communications of a patient other than the accused." Mil. R. Evid. 513(e)(1). It does not cover circumstances such as this where the only materials covered for release are non-privileged information about treatment or diagnosis.

Moreover, while Petitioner advocates for in camera review, this procedure is not required even where the materials in question consist of the types of communications covered by privilege under Mil. R. Evid 513. Mil. R. Evid. 513(e)(3) explains that "[t]he military judge *may* examine

the evidence or a proffer thereof in camera, *if* such examination is necessary to rule on the production or admissibility of protected records or communications." Hence, in camera review is discretionary. The purpose of this review is not to distinguish between protected communications and non-privileged medical information, but to determine whether an exception for admission applies to privileged materials. This is evident from Mil. R. Evid. 513(e)(3)(A), which states that the purpose of the hearing is to determine whether "a specific, credible factual basis demonstrating a reasonable likelihood that the records of communications would contain or lead to the discovery of evidence admissible under an exception to the privilege." This is a type of inquiry that is categorically different than the question of whether privilege even applies to begin with. The military judge's order for the Government to confirm whether responsive, non-privileged materials were in the possession of military authorities does not warrant formal in camera review by the trial court. The military judge's decision not to conduct the discretionary in-camera review under these circumstances was hardly an impermissible deviation in judicial authority.

Petitioner's citation to *United States v. Under Seal (In re Search Warrant Issued June 13, 2019)* is inapposite. 942 F.3d 159 (4th Cir. 2019). In that case, law enforcement agents seized records from a law firm pursuant to an investigation of a lawyer suspected of conspiring in illicit activities. *Id.* at 164-65. A filter team was setup by order of a federal magistrate judge to sift through the materials to distinguish those subject to "client confidences and secrets" from those not entitled to confidence under the crime-fraud exception. *Id.* at 165. Hence, the filter team was tasked per a search warrant, with distinguishing between categories of privileged materials, namely those subject to an exception and those that were not. The Fourth Circuit held that this was a judicial task that could not be delegated to investigators. *Id.* at 176.

The Fourth Circuit ruling, even if applicable in a military context, aligns with the limited scheme drawn out under Mil. R. Evid. 513(e). Mil. R. Evid. 513(e) affords in camera judicial review of privileged materials to determine whether an exception may apply. This is, however, categorically different from the case at bar where the court order only called for the inspection of materials by medical law attorney to sift through for materials that were never privileged to begin with, as understood under *Mellette*. Neither Mil. R. Evid. 513(e) or the Fourth Circuit case contemplate this situation. To that end, Petitioner complains that somehow a judicial function, delegated to trial counsel, is misplaced on account of the military judge's explicit order for a medical law attorney to inspect the materials before release. This individual is distinct from the filter team identified in the Fourth Circuit case in that they had no affinity with the prosecution team. Rather, the medical law attorney was more akin to an in-house counsel at the medical treatment facility performing an internal review. *Cf. Id.* at 168. This provides an appropriate safeguard against the release of privileged information that may be intermingled with the non-privileged materials compelled by the military judge's order. Regardless, the military judge's order was in line with acceptable judicial practice under Mil. R. Evid. 513 and does not warrant correction through this petition.

Petitioner Has Not Met Her Burden to Demonstrate that She is Clearly and Indisputably Entitled to Relief.

Even if this Court were to find that Petitioner has standing to be heard, it should deny relief on the merits. The military judge committed no error, and certainly no error that would amount to a judicial usurpation warranting the extraordinary remedy sought. While Petitioner describes the Defense discovery request as a "fishing expedition" this completely overlooks the competing interests at stake and the necessity of justice. The requested records are certainly relevant, especially given their potentially exculpatory impact on the court-martial. Given this, they are

highly relevant to the Defense's preparations because they call into question the Petitioner's recollection of events. *See United States v. Luke*, 69 M.J. 309, 319-20 (C.A.A.F. 2011). Both the Defense request, and the military judge's ruling are compliant with *Mellette*. Whatever privacy interest the Petitioner may have must yield to SSgt Arnold's constitutional right to present a complete defense. *See generally*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Given these considerations, the military judge's order for the inspection of non-privileged records which are highly relevant to Defense preparation can hardly be considered a clear and indisputable error warranting the extraordinary relief sought by Petitioner here.

WHEREFORE, SSgt Arnold respectfully requests that this Honorable Court decline to vacate the military judge's ruling.

Respectfully submitted,

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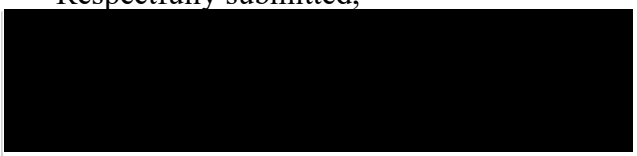
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on Petitioner and the Appellate Government Division on 30 October 2023.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re RW	)	**Misc. Dkt. No. 2023-08**
Petitioner	)	
	)	
	)	
	)	**ORDER**
Chase N. Arnold	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Real Party in Interest	)	**Panel 2**

On 28 November 2023, this court issued an order to hear oral argument in in the above-captioned case, at 1000 hours on Thursday, the 14th day of December 2023, on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ORDERING AN ATTORNEY FROM THE MEDICAL LAW BRANCH OF THE HEADQUARTERS AIR FORCE CLAIMS AND TORT LAW LITIGATION DIVISION (JACC) TO REVIEW PETITIONER'S HEALTH RECORDS AND IDENTIFY AND REDACT INFORMATION PRIVILEGED UNDER MILITARY RULE OF EVIDENCE 513 AND RELEASE NON-PRIVILIGED INFORMATION TO GOVERNMENT COUNSEL TO PROVIDE TO DEFENSE COUNSEL.**

The court provides further guidance for the parties in its decretal paragraph below.

Accordingly, it is by the court on this 7th day of December, 2023,

ORDERED:

Each of the parties will be allotted **20 minutes** to present oral argument. *See* A.F. Ct. Crim. App. R. 25.2(b) (stating each side will be allotted 30 minutes to present oral argument, "[u]nless the Court specifies otherwise"). The order of

oral argument will be Petitioner, Government, and then Real Party in Interest. Petitioner may reserve a portion of the allotted 20 minutes for rebuttal.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE RW *Petitioner*	)	**NOTICE OF APPEARANCE OF GOVERNMENT COUNSEL**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **CHASE N. ARNOLD.** United States Air Force *Real Party in Interest*	)	Misc. Dkt. No. 2023-08 4 December 2023

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

The undersigned hereby enters appearance as counsel for the United States in the above captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will sit second chair for oral argument on behalf of the United States.

[redacted]
J. PETER FERRELL, Lt Col, USAF
Director of Operations
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 4 December 2023.

[redacted]

JAMES P. FERRELL, Lt Col, USAF
Director of Operations
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re RW	)	**Misc. Dkt. No. 2023-08**
Petitioner	)	
	)	
	)	
	)	**ORDER**
Chase N. Arnold	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Real Party in Interest	)	**Panel 2**

On 7 November 2023, Petitioner in the above-captioned case moved this court to hear oral argument. The Government opposed the motion. The court orders oral argument on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ORDERING AN ATTORNEY FROM THE MEDICAL LAW BRANCH OF THE HEADQUARTERS AIR FORCE CLAIMS AND TORT LAW LITIGATION DIVISION (JACC) TO REVIEW PETITIONER'S HEALTH RECORDS AND IDENTIFY AND REDACT INFORMATION PRIVILEGED UNDER MILITARY RULE OF EVIDENCE 513 AND RELEASE NON-PRIVILIGED INFORMATION TO GOVERNMENT COUNSEL TO PROVIDE TO DEFENSE COUNSEL.**

Accordingly, it is by the court on this 28th day of November, 2023,

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Thursday, the 14th day of December 2023**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews, Maryland 20762.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner* Chase Arnold Staff Sergeant (E-5) United States Air Force *Real Party in Interest*	)))))))))	**MOTION FOR ORAL ARGUMENT** Misc. Dkt. No. 2023-08

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

COMES NOW R.W., by and through the undersigned Victims' Counsel (VC), pursuant to Rule 23.3(a) and Rule 25 motioning this Court to order oral argument in the above-captioned case. R.W. seeks an order for oral argument to assert her position, provide R.W. further process as contemplated under Article 6b(a)(9)'s mandate that she be treated with fairness, and as an opportunity to better understand the United States' adversarial position to R.W. in the case in interest.

Respectfully submitted,

[redacted]

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

[redacted]

MORGAN BREWINGTON, Capt, USAF
Counsel for R.W.
Victims' Counsel
AF/JAJS
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Department of the Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that on 7 November 2023, 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 RW, *Petitioner,*	)	UNITED STATES' OPPOSITION TO MOTION FOR ORAL ARGUMENT (OUT OF TIME)
v.	)	
	)	Before Panel 2
Staff Sergeant (E-5) **CHASE N. ARNOLD** United States Air Force *Real Party in Interest.*	)	Misc. Dkt. No. 2023-08
	)	15 November 2023

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

Pursuant to Rules 23(c) and 25 of this Court's Rules of Practice and Procedure, the United States opposes Petitioner's motion for oral argument, filed 7 November 2023. This opposition is filed out of time due to an administrative oversight while undersigned counsel was traveling for temporary duty this week.

Petitioner requests oral argument for three purposes: (1) to "assert her position," (2) to "provide R.W. further process as contemplated under Article 6b(a)(9)'s mandate that she be treated with fairness," and (3) to "better understand the United States' adversarial position to R.W." (Pet. Mot. at 1.) This Court should deny the motion because Petitioner has not established why oral argument is necessary in this case. Petitioner has had sufficient opportunity to assert her position through her written filings. Further, while Article 6b provides that victims may petition for a writ of mandamus, it does not require "further process" in the form of oral argument. Finally, the United States' position requires no additional explanation when viewed in light of its obligation to the Constitution and its position as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as

compelling as its obligation to govern at all." Berger v. United States, 295 U.S. 78, 88 (1935).

Petitioner has not satisfactorily explained why oral argument would be helpful to this Court, and holding an oral argument could further delay trial proceedings in a case that has been delayed multiple times already.

WHEREFORE, the United States respectfully requests that this Court deny Petitioner's motion for oral argument.

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MARY ELLEN PAYNE
Associate Chief
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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 15 November 2023.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner* **Chase N. ARNOLD** Staff Sergeant (E-5) U.S. Air Force *Real Party In Interest*	**PETITIONER'S SUPPLEMENTAL BRIEF TO PETITION UNDER ARTICLE 6b FOR RELIEF in form of *WRIT OF MANDAMUS*** Misc. Dkt. No. 2023-08

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

COMES NOW [redacted] R.W., by and through the undersigned Victims' Counsel (VC), and pursuant to Air Force Court of Criminal Appeals (A.F.C.C.A.) Rules of Practice and Procedure Rule 19, Petition for Extraordinary Relief in the case in interest *United States v. SSgt Chase Arnold*.

R.W. submits this supplemental brief pursuant to Orders of this Court dated 26 September 2023 and 29 September 2023, respectively.

For ease of reference, R.W. attached hereto a paginated duplicate of the attachments to her Petition Under Article 6b for Relief filed on 25 September 2023 substituting page 129 of 150 for the redacted version and omitting the sealed pages 141-150 pursuant to the granted motion on 5 October. R.W. also inserts the Charge Sheet at Attachment II to this brief.

PROCEDURAL STATEMENT OF THE CASE

This court-martial was originally docketed for 16 November 2023 and 9 February 2023 to accomplish arraignment and motions practice and then trial on the merits in bifurcated sessions. Arraignment and motions practice was conducted as scheduled and the court issued rulings on the motions which were before the court in accordance with the military judge's scheduling order. After motions practice concluded, Defense requested two additional continuances of the scheduled trial date to 15 May 2023 and then to 25 September 2023, respectively. Despite the passing of the

motions deadline on 4 November 2022 and the soon-approaching third scheduled trial date, Defense filed a motion to compel discovery of R.W.'s medical records, specifically including those related to her mental health on 1 September 2023. (*Defense Motion to Compel* at 1-20) The Defense's motion cited a change in area defense counsel as its "good cause" for filing the motion approximately eleven months out of time without mentioning any other new circumstances. On 6 Sep 2023, the Government filed its response opposing the Defense's motion to compel. (*Government Response to Motion to Compel* at 21-27.) Within the Government's response, it stated that the requested records were outside the possession, custody, and control of the Government and asserted that Defense had failed to meet the requirements pursuant to R.C.M 703(f), to include the failure to provide a statement sufficient to show its relevance and necessity and where the evidence can be obtained. No party requested oral argument.

The Military Judge, without addressing the untimeliness of the motion, issued his ruling on the Defense Motion to Compel on 14 September 2023. (*Ruling on Defense Motion to Compel Discovery* at 28-34). Regarding the motion to compel production of mental health records maintained outside the military treatment facility (MTF), the judge denied the motion finding that these records were outside the possession, custody, and control of the Government. However, concerning the request for records for the MTF records, the military judge stated that the Government's position that they had not been properly notified of their location under R.C.M. 703(g) was "disingenuous" due to R.W.'s military status as reflected on the charge sheet. The ruling noted that the motion to compel discovery of mental health records at the MTF was not yet ripe, because the Government had not taken the "preliminary step" of identifying whether any medical treatment facility records exist for the specified timeframe. In the conclusions of law section he stated "Under R.C.M. 701, once requested by the Defense, trial counsel are obligated to provide records within the possession, custody, or control of military authorities if they are relevant

to the Defense's preparation and not otherwise privileged or protected from disclosure by a military rule of evidence. See R.C.M. 701(f). Relevant to defense preparation means the requested item(s) could impact defense decisions on investigation, trial defenses, trial strategy, or pleas." (*Ruling on Defense Motion to Compel* at 33).

On 15 September 2023, the military judge emailed the parties to inquire as to whether they had received his ruling. In response, Government counsel responded affirmatively and informed the military judge that they had already contacted the Aviano MTF to request the records with the military judge's ruling attached to the request. Then, on 18 September 2023, Government counsel informed the military judge that a response had been received, confirming the existence of mental health records for the prescribed timeframe but indicating that no actual records would be produced absent a court order for the same because the information was privileged.

In her written motion for appropriate relief under M.R.E. 513, [redacted] R.W. asserted her rights, through counsel, under M.R.E. 513, Health Insurance Portability and Accountability Act of 1996 (H.I.P.A.A.), 42 U.S.C. §§ 1320d through 1320d-8 (implemented in 45C.F.R. §§ 164.500-534 and Department of Defense Manual 6025.18, March 13, 2019) and Article 6b, U.C.M.J., highlighting that her statutory rights will be violated if the Government obtains the medical records in question without the required showing under R.C.M. 703, M.R.E. 513, and H.I.P.A.A.. (*(Victims' Counsel Motion for Appropriate Relief* at 35-51*); Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d through 1320d-8 (implemented in 45 C.F.R. §§ 164.500-534 and Department of Defense Manual 6025.18, Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs, Health Insurance Portability and Accountability Act of 1996, (March 13, 2019).*

On 22 September 2023, in its responsive motion, Defense asserted that R.W. lacks standing to object to the production of her mental health records pursuant to R.C.M. 701 and, for the first

time, admitted that its motion to compel was based on contents of M.R.'s medical records which had been in the Defense's possession since the date charges were preferred against the Accused, which included a 500+ page release of medical information to OSI referencing visits for purposes characterized as "mental health."

On 26 September 2023, in an Article 39a session, the detailed Military Judge indicated that R.W. lacked standing to be heard on the issue and disallowed the victims' counsel to present any oral argument. Despite having learned that the Defense no longer needed the Government to take the "preliminary step of identifying whether any responsive records exist," which was the conclusion of the prior ruling, the military judge did not inquire any further as to the Defense's theory of relevance of the additional material sought or make any ruling on the Defense's motion to compel discovery. Instead, he opted to issue an order directing the 31st Operational Medical Squadron to turn over to Government counsel all mental health records maintained at their location. And rather than conducting an *in camera* review of the responsive records for M.R.E. 513 privilege, personal identifiable information ("PII"), and relevance to defense preparation, the court's order directed the mental health flight commander to engage with the DHA legal advisor to redact privileged information and then deliver the records to Government counsel to facilitate distribution to Defense and appointed experts.

On 25 September 2023, R.W. moved for this Court to stay the proceedings to prevent the production of R.W.'s medical records. Although the military judge halted the proceedings in response to the filing of the petition, he still executed his order directing the 31st Operational Medical Readiness Squadron to turn over R.W.'s mental health records after conducting a privilege review and making necessary redactions and directed Government Counsel to serve the order. On 26 September 2023, this Court denied R.W.'s requested stay. On 27 September 2023, Government Counsel again provided an update to the court relaying that the DHA legal advisor will not accept

responsibility to conduct a review for privilege and relevance, as he is not "qualified," but he would turn the records over to the military judge for *in camera* review or to a designated detached and neutral reviewer. On 27 September the military judge amended his prior order directing the delivery of records to Maj A. Victoria Wright, who would be tasked with conducting a privilege review and redacting any protected information. Promptly upon receiving the amended order, R.W. motioned this Court to reconsider the denial of the stay. However, that same evening or on the morning of 28 September 2023, the redacted medical records were delivered to the detailed assistant trial counsel, Capt E[redacted] M[redacted]. Without further review, Government counsel disclosed the redacted records in their entirety to Defense counsel. This Court stayed the order to produce the records, after their production, on 28 September 2023. The records notably contained information which was not relevant or material to defense preparation as well as R.W.'s PII unredacted at the bottom of all 370 pages.

On 29 September 2023, proceedings were continued for the third time at the request of Defense, and based, in part, on the issues related to R.W.'s mental health records. Trial has since been rescheduled to 12 February 2024.

SUPPLEMENTAL BACKGROUND FACTS

R.W. adopts the facts in the Petition for Relief and Motion to Stay filed on 25 September 2023. Maj W[redacted] gave Government Counsel 370 pages of R.W.'s medical records on 27 or 28 September 2023. Government counsel received records containing information from visits from as early as 2017 to as recently as September 2023. There is no record of how and why Government Counsel determined what disclosed protected health information (PHI) was "relevant and material." See R.C.M. 701. There is further no indication that Government Counsel conducted any review of the records prior to disclosing the redacted records received to Defense in their entirety.

STATEMENT OF THE ISSUES

R.W. petitions this Court for relief in the form of a writ of mandamus issued pursuant to Article 6b(e), as the Military Judge's rulings violate R.W.'s rights to be treated with fairness and respect for her dignity and privacy in violation of Article 6b(a)(9), U.C.M.J. The order to produce mental health records without conducting an M.R.E. 513 hearing violates R.W.'s right to be heard before the Court orders production of mental health records. The Military Judge issued an unlawful ruling without authority to produce R.W.'s mental health records violating R.W.'s right to privacy in her medical and mental health records and underwriting an unreasonable search of the private confines of her life. Military judges do not currently have authority to compel production of medical and mental health records through a court order.

The ruling foreclosed requisite due process to R.W. in violation of her right to be treated with fairness and failed to respect her privacy and dignity under Article 6b(a)(9). See 27 September 2023 Order; see also R.C.M. 701 (a)(2)(A),(B); see also US CONST Amend IV. R.W. has a right to be free from unreasonable searches and seizure of private information protected by the Constitution. These constitutional and statutory rights were violated. Her right to be free from unreasonable Government intrusion is meaningless without a way to remedy a violation, and she seeks issuance of a writ to provide such a remedy. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803); see also generally Article 6b(e). Moreover, R.W. seeks relief under Article 6b(e)(4)(D) as the Military Judge's over-inclusive and imprecise order required potential disclosure of privileged material under M.R.E. 513 before the Court conducted the requisite hearing and in camera review. See M.R.E. 513(a) ("[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." (emphasis added)); see also M.R.E. 513(e)(2) ("[b]efore ordering the production or admission of evidence of a patient's records or

communication, the ***military judge must conduct a hearing***, which shall be closed.(emphasis added)); see also M.R.E. 513(b)(5) (defining "*Evidence of a patient's records or communications* means testimony of a psychotherapist, or assistant to the same, or ***patient records that pertain to communications*** by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition." (emphasis added)).

Although R.W.'s PHI and PII was produced prior to this Court's granting of the stay of the military judge's 27 September 2023 order, this Court can still issue a writ requiring vacation of the order to the 31st Medical Group, requiring the Military Judge to comply with Article 6b, to follow M.R.E. 513, to carry out his duty as a member of the Armed Forces to accord R.W. her rights, and to act within the bounds of his explicit authority. This Court may also issue a writ directing the destruction of all records disclosed to Government and Defense pursuant to the unauthorized 27 September 2023 Order.

STANDARD OF REVIEW

In re K.K. established this Court's standard for issuance of a writ. 2023 CCA Lexis 31 (A.F.C.C.A. 2023). KS 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)). Whether this is the appropriate standard of review is an issue certified to the C.A.A.F. in *HVZ v. United States and Fewell.* R.W. asserts ordinary standards of appellate review should apply and whether an M.R.E. 513 hearing is required should be reviewed *de novo*. See *LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013). Furthermore, whether the Military Judge has the authority to issue a Court Order to compel discovery from a third party is also a question of law and should be reviewed *de novo. Id.*

If this Court applies the standard of review for traditional mandamus relief, R.W. must seek issuance of a writ of mandamus as Article 6b requires this mode of relief. The issuance of a writ by this Court is the statutorily-prescribed method for enforcement of victims' rights. As a result, issuance of a writ under Article 6b(e) is always an appropriate act of this Court. In short, the only *Cheney* criteria necessary to satisfy is that R.W.'s right to an issuance of the writ is clear and indisputable.

In his concurrence in *United States v. McDowell,* Judge James Baker states, "[t]o justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power' or be 'characteristic of an erroneous practice which is likely to recur." 73 M.J. 457, 459 (C.A.A.F. 2014)(internal citations and quotations omitted).

ARGUMENT

I.

RW's DEPARTMENT OF DEFENSE HEALTH RECORD IS NOT ORDINARILY IN THE CUSTODY, POSSESSION OR CONTROL OF MILITARY AUTHORITIES.

The DoD Health Record is "the primary record of medical, dental, and mental healthcare documentation, regardless of medium, for individuals receiving care in the [Military Health System]." DHA-PM 6025.02, Volume I, *DoD Health Record Lifecycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records* at 11 (November 23, 2021) ("6025.02"). "The DoD Health Record is the property of the U.S. Government, not the beneficiary or the beneficiary's guardian." DoDI 6040.45, *DoD Health Record Life Cycle Management* at 1(April 11, 2017). Although DoD Health Records are US Government property, they "are protected by the HIPAA Privacy, Breach Notification, and Enforcement Rules." *Id.* at 2. "DoD Health Records in paper and digital form are protected by the HIPAA Privacy, Breach Notification, and Enforcement Rules." *Id.* at 17. Furthermore, "[d]isclosure [of PHI] to third parties is

prohibited, except pursuant to the written authorization of the individual to whom the record pertains or in specified limited circumstances." 6025.02 at 28. "Before using and disclosing PHI, [Military Treatment Facilities] need to comply with the provisions in both the Privacy Act […] and HIPAA." *Id*. at 30. "Original health documents or records will not be released to any person or agency outside the MTF or DTF, except in compliance with a valid court order or as otherwise required by law." *Id*. at 31. "MTF personnel will not release information from DoD Health Records if such disclosure would result in a clearly unwarranted invasion of privacy." *Id*. at 29.

It is the Defense Health Agency's policy that an MTF may not disclose an entire health record, even to a DoD Investigative Agency. "Requests will be specific and limited in scope to the extent reasonably practicable given the purpose for which the information is sought. The MTF or DTF may not disclose an entire health record, except when the entire record is specifically justified as the amount that is reasonably necessary to accomplish the purpose of the disclosure." *Id.* at 39. To safeguard PHI, the DHA limits access to such information, "DoD Health Records contain PII and PHI, which are personal to the individual and must be properly safeguarded to avoid compromise of health information during the movement of the record inside and outside the MTFs and DTFs. ***Only medical personnel are authorized access*** to the information except as noted throughout this DHA-PM." *Id*. at 73. In sum, even the Department of Defense's own publications make clear trial counsel are not authorized access to PHI; and even when a valid request for PHI is made, the entire records will not be disclosed.

<u>31st Medical Group is not a military authority</u>.

In its 14 July 2023 unpublished opinion, this Court denied a writ petition in a similar case based on 1) the plain meaning of R.C.M. 701(a)(2)(A),and 2) the test laid out by our Superior Court in *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). *In re HVZ*, 2023 CCA LEXIS at 292. With respect to R.C.M. 701(a)(2)(A), this Court found "medical records maintained by the

[local military treatment facility] would seem to fall within the plain meaning of 'papers, documents, [and] data . . . within the possession, custody, and control of military authorities . . .' and the military judge did not clearly and obviously err in reaching that conclusion." *Id.* Likewise, regarding the *Stellato* standard, this Court found that "at least arguably, in the instant case trial counsel would have had knowledge, access, and a legal right to obtain Petitioners medical records . . ." simply because the records were housed at the local military treatment facility. *Id.*

The standard that documents in possession, custody, or control of "military authorities" required disclosure appeared in the first Manual for Courts-Martial (1951). "***Production of documents in control of military authorities***.- If documents which are to be introduced in evidence are in the custody and control of military authorities, the trial counsel, the court, or the convening authority will, upon proper request, take necessary action to effect the production of such documents without the necessity of further legal process." ¶115c. Manual for Courts-Martial (1951). In the 1951 Manual the term "military authorities" is used substantively in the rules ten times including in ¶115c.[1] As the rules evolved over time, the language requiring disclosure remained similar. In the 1969 Manual for Courts-Martial ¶ 115c states, "c. ***Use and examination of documentary and other evidence in control of military authorities***. If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge, or the president of a special court-martial without a

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[1] See ¶ 29 ("Charges are initiated by someone bringing to the attention of the **military authorities** information concerning an offense suspected to have been committed by a person subject to the code.); ¶ 115c; ¶ 164a ("that while absent he was in the neighborhood of military posts or stations and did not surrender to the **military authorities**."); ¶ 213b Discussion ("He should not be brought to trial unless in the opinion of the **military authorities** the facts and lam are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by him. The **military authorities** will not attempt to discipline officers and enlisted persons for failure to pay disputed private indebtedness or claims, that is, when there appears to be a genuine dispute as to the facts or the law"); ¶ 213d Discussion ("A person who has knowledge of the actual commission of a felony by another and who conceals and does not as soon as possible make known to the same to the civil or **military authorities** is guilty of misprison of the felony."); ¶ 213d Proof ("(a) That the accused had knowledge of the actual commission of a felony by another; and (b) that he concealed and did not as soon as possible make known the same to the civil or **military authorities**."); ¶ 214c Scope of Inquiry ("The correction of any errors it may have committed is for the **military authorities** and the Court of Military Appeals, which are alone authorized to review its decision."); ¶ 215 (". . . and by similar means will report that fact to the appropriate commander of the army area, naval district, air command, coast guard district, or other comparable command in which the person held by the **military authorities** is located."); ¶ 218 ("Normally, the preparation and filing of the return or other pleadings are accomplished by the United States attorney for the district, with such participation and assistance from the **military authorities** as he may desire.") 1951 Manual for Courts-Martial

military judge will, upon reasonable request and **without the necessity of further process**, take necessary action to effect their production for use in evidence and, within any applicable limitations. . .” 1969 Manual for Courts-Martial (emphasis added). After the sweeping changes of the Military Justice Act of 1983 the 1984 Manual devised new rules for discovery, although the Military Justice Act of 1983 made no changes to Article 46, UCMJ.[2] The 1984 Manual R.C.M. 701(a)(2) is exactly as it is today, carrying over the term “military authorities” from the 1951 and 1969 Manuals. In sum, reference to military authorities has always been referring to entities vested with a law enforcement role over members of the military – not a medical treatment facility. Medical treatment facilities are not where one reports a crime, they do not arrest and detain individuals, they do not investigate crimes, and they certainly are not charged with prosecution of cases. In short, R.W.’s DoD Health Record is not in the possession, custody, or control of military authorities.

The plain meaning of R.C.M. 701(a)(2) establishes the defense can inspect items in “the physical possession of the prosecution team” not the military writ large. See *Stellato*, 74 M.J. at 484. R.C.M. 701(a)(2)(B) only requires disclosure of physical examinations “which are within the possession, custody, or control of military authorities.” As a threshold matter, “[u]nless ambiguous, the plain language of a statute will control unless it leads to an absurd result.” *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (citation omitted). In all events, “[w]hether the statutory language is ambiguous is determined ‘by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Robinson v. Shell Oil Co.*, 519

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[2] Uniform Code of Military Justice (1950) provides “Opportunity to Obtain Witnesses and Other Evidence. The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence 1n accordance with such regulations as the President may prescribe. Process • issued 1n court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal Jurisdiction may lawfully issue and shall run to any part of the United states, its Territories, and possessions." The subsequent Manuals and Military Justice Acts did not substantively and meaningfully modify Article 46 until the Military Justice Act of 2016. See National Defense Authorization Act for 2017 §5542(a)

U.S. 337, 341 (1997)). When looking at 1) the text, 2) the specific context, and 3) the broader context of R.C.M. 701(a)(2)(A),(B), the meaning is plain: "military authorities" means military law enforcement officials, not medical providers.

The text of R.C.M. 701(a)(2)(A) says "the Government shall permit the defense to inspect any . . . documents . . . within the possession, custody, or control of military authorities." (emphasis added). Both the Military Judge and this Court in *HVZ* presume, without any statutory analysis, that the plain meaning of "military authorities" is broad enough to include MTFs. Op. at *9. Not so. Of course, the MTF is an agency of the military, but that is fundamentally different than a military authority. See, e.g., R.C.M. 701(d) discussion (distinguishing between authorities and agencies: "Trial counsel are encouraged to advise military authorities or other governmental agencies involved in the case . . . ."). Moreover, the plain language begs the question: if the MTF is a "military authority" what authority does it have? Certainly not the investigation and prosecution of a crime. In the context of crime, especially criminal prosecution, the plain meaning of "authorities" would be those responsible for investigating and prosecuting the offense, e.g. "the victim reported the crime to authorities," or "the criminal tried to evade authorities." In fact, if the judge's order was granted, the plain way to describe the transfer of medical records would be: "the MTF is turning the victim's medical records over to military authorities." The text alone suggests such a meaning. Context matters— the text must not be read in a vacuum. There is no plain meaning of "military authorities" that would include the MTF.

Prosecutors cannot possess PHI.

The clarity of the statutory plain meaning that a MTF is not a military authority is evident when considering *Stellato*, which suggests the baseline question is whether the evidence is in the "physical possession of the prosecution team," before deriving four exceptions to the rule. Other provisions of the R.C.M.s raise even more examples about what it means for the government to be

"in possession" of evidence. See, e.g., *United States v. Thompson*, 81 M.J. 391, 395-396 (C.A.A.F. 2021). In *Thompson* our Superior Court addressed what "in the possession of the United States" means for R.C.M. 914 purposes, deciding "whether constructive possession applies to R.C.M. 914" and "conclud[ing] that R.C.M. 914 applies only to statements possessed by the prosecutorial arm of the federal government or when a nonfederal entity has a joint investigation with the United States." *Id.* (emphasis added). In his concurring opinion, Judge Ohlson explained how this inquiry relates to 701(a)(2)(A):

> [T]his Court's decision in *Stellato* (albeit in the R.C.M. 701 context) demonstrates that the constructive possession doctrine can certainly extend to those situations where the government has the ability to control the handling and disposition of evidence in the custody of a cooperating witness. 74 M.J. at 483 (citing *United States v. Muwwakkil*, 74 M.J. 187). As this Court observed in *Stellato*, 'the Government need not physically possess an object for it to be within the possession, custody, or control of military authorities.' 74 M.J. at 485.

Thompson, 81 M.J. at 398(C.J., Ohlson, concurring). . Judge Ohlson is not alone in making this connection.

The meaning of R.C.M. 701(a)(2)(A) is even more plain when considering *Stellato* relies heavily on interpretations of Federal Rule of Criminal Procedure 16(a)(1)(A)—the civilian counterpart to R.C.M. 701(a)(2)(A). See *Stellato*, 74 M.J. at 484-85. These cases undermine this Court's interpretation of 701(a)(2)(A),(B). For example, in *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997), the court refused to interpret the concept of "government possession" broadly because "[b]inding precedent has construed the term 'government' in Rule 16(a)(1) to refer to the 'defendant's adversary, the prosecution . . .'" rather than the federal government writ large.

The sheer volume of case law on the topic, the history of blending the "possession" analyses of R.C.M. 701 and R.C.M. 914 "possession" analysis, and the explicit reliance on federal interpretations, show that any resolution based on the plain meaning of the text is fraught. Put differently, if the meaning of terms like "military authorities" and "possession" were plain, there

would be no need to import interpretations from federal case law or to superimpose doctrines from R.C.M. 916.

It is clearly erroneous to rule Prosecutors have a legal right to R.W.'s DoD Health Record

In *HVZ* this Court denied relief because "HIPAA, read in conjunction with its implementing regulations, with Article 46(a), UCMJ, and with R.C.M. 703(g)(2), facially permits trial counsel to obtain evidence under the control of the 'Government'[…] using an 'administrative request' that meets certain criteria, rather than a court order. Thus, at least arguably, in the instant case trial counsel would have had knowledge, access, and a legal right to obtain Petitioner's medical records." Op. at 9 citing *In re AL*, "2022 CCA LEXIS 702 (A.F.C.C.A. 2022).

The proponent of the HIPAA Privacy Rule is the Department of Health and Human Services (HHS). 42 U.S.C. § 1302-d. The Department of Defense Manual 6025.18 simply implements the federal regulations for HHS is the proponent. DoDM 6025.19 at Purpose. ("[t]his issuance, in accordance with the authority in DoD Directive (DoDD) 5124.02, implements the policy in DoD Instruction (DoDI) 6025.18, assigns responsibilities, and provides procedures for: DoD compliance with the privacy regulations adopted under HIPAA, Public Law 104-191, at: Part 160 and Part 164, Subpart E of Title 45, Code of Federal Regulations (CFR) (also known and referred to in this issuance as the "HIPAA Privacy Rule")"). The DoDM 6025.18 ("Manual") cannot contradict or change the rules provided in the Code of Federal Regulations (CFR) as it is not the proponent of the HIPAA Privacy Rule. To the extent the Manual contradicts the CFR, the CFR supersedes DoD's internal implementation guidance. The Manual reinforces this truism as it states, "Applicability of HHS Rules and Procedures to DoD. Rules and procedures established by the Secretary of HHS pursuant to the HIPAA rules for covered entities and their business associates are applicable through this Manual to DoD covered entities and their business associates." Manual at para. 3.2c(1).

"[A]ll organizational units and military, civilian, contractor and volunteer staff working at the Air Force military treatments facilities" must comply with HIPAA. AFI 41-200, *HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)*, Certified Current on 10 April 2020. "Leadership of all organizations within the [Air Force Medical Service] must comply with the administrative, technical, and physical requirements described in HIPAA Privacy Rule, including reporting, investigating, and mitigating breaches." AFI 41-200 para 6.1.1. In short, any entity of the Air Force Medical System, to include the 56th or any Medical Group, must comply with HIPAA, rendering a memorandum from a trial counsel requesting PHI unauthorized. 45 CFR § 164.512(f)(1) relays "Permitted disclosures: ***Pursuant to process and as otherwise required by law***. A covered entity ***may*** disclose protected health information []." (emphasis added). No law prescribes trial counsel's authority to demand PHI in the form of an administrative request. Second, "required by law"

> means a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is ***enforceable in a court of law***. *Required by law* includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; Medicare conditions of participation with respect to health care providers participating in the program; and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits. 45 CFR § 164.103.

In other words, a trial counsel's self-composed, self-labelled "administrative request" does not derive from a mandate in law nor is it enforceable in any court; thus, trial counsel has no legal right to PHI under this theory. Furthermore, 45 CFR § 164.512 leaves discretion to the covered entity to disclose or not disclose as it ***may*** release – how can the Government counsel have a legal right to PHI when access relies on the covered entity's discretion?

On 17 April 2023, HHS issued a Notice of Proposed Rulemaking to solicit comments on its proposed updates to the HIPAA Privacy Rule. *HIPAA Privacy Rule To Support Reproductive*

Health Care Privacy: A Proposed Rule by the Health and Human Services Department on 04/17/2023, 88 FR 235056 (April 17, 2023) ("NPRM"). In the NPRM, HHS espouses the original intent behind the HIPAA Privacy Rule, "[f]rom [the Privacy Rules] inception, the Department's regulations implementing the statute have sought to ensure that individuals do not forgo lawful health care when needed—or withhold important information from their health care providers that may affect the quality of health care they receive—out of a fear that their sensitive information would be revealed outside of their relationships with their health care providers." *Id.*

The April 2023 NPRM squarely addresses "administrative requests." The NPRM highlights current practice that HHS interprets is against the current plain language of the rule,

> The ***examples of administrative requests provided in the existing regulatory text include only those requests that are enforceable in a court of law, and the catchall "or similar process authorized by law" similarly is intended to include only requests that, by law, require a response.*** This interpretation is consistent with the Privacy Rule's definition of "required by law," which enumerates these and other examples of administrative requests that constitute "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." However, the Department has become aware that some regulated entities may be interpreting this provision in a manner that is inconsistent with the Department's intent. Therefore, the Department is taking this opportunity to clarify the types of administrative processes that this provision was intended to address.

The NPRM then proposes a change to 45 CFR § 164.512(f)(1)

> Specifically, the Department proposes to insert language to clarify that the administrative processes that give rise to a permitted disclosure include only those that, by law, require a regulated entity to respond. Accordingly, the proposal would specify that PHI may be disclosed pursuant to an administrative request "for which a response is required by law." This ***is not intended to be a substantive change***, as the proposal is consistent with preamble discussion on this topic in the 2000 Privacy Rule.

The policy of the President espoused in a December 20, 2000 Executive Order declares,

> That is, protected health information may not be so used unless the public interest and the need for disclosure clearly outweigh the potential for injury to the patient, to the physician-patient relationship, and to the treatment services. Protecting the privacy of patients' protected health information promotes trust in the health care

> system. It improves the quality of health care by fostering an environment in which patients can feel more comfortable in providing health care professionals with accurate and detailed information about their personal health. E.O. 13181 of Dec 20, 2000 65 FR 81321

Finding RW's DoD's Health Record was in the possession, custody, and control of military authorities was a clearly erroneous holding and doing so prevented due process and invaded her right to privacy.

When looking at the language that composes Art 6b(a)(9), it's important to note it was adopted directly from the Crime Victims' Rights Act (CVRA). National Defense Authorization Act 2014. During the Congressional session about this specific CVRA right, co-founder of the act, Arizona Senator Jon Kyl, explained the word choice:

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

150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004). Thus, the right is to be treated with fairness and with respect was intended to signify something—the right is intended to afford victims a right to be heard as it relates to their inherent rights to dignity and privacy. Moreover, R.W. has a Constitutional right to prevent unreasonable Government searches and seizures of places and effects wherein she maintains a reasonable expectation of privacy. US Const. IV Amend. R.W. is the only person who can assert and object to an unwarranted search and seizure of her private medical information, "[w]e adhere to […] the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). In foreclosing standing to object to the production of R.W.'s personal and private medical records, the Military Judge deprived R.W. of any ability or process to prevent the unreasonable search and seizure of those records by the Government. Not only does R.W. clearly and indisputably have standing to object to this search, she is the ***only*** one who can object to protect her Fourth Amendment rights. Victims do not

abrogate any and all Constitutional rights because they had the misfortune of being violated[3], to the extent an intrusion of rights is necessary to effectuate a prosecution, victims should be afforded a process and opportunity to object. Moreover, the Military Judge had a duty to accord R.W. the opportunity to object and then a duty to consider her objection. The Military Judge did neither and writ should issue.

II.

THE MILITARY JUDGE FAILED TO HOLD THE REQUISITE HEARING UNDER M.R.E. 513 BEFORE ORDERING DISCLOSURE AND PRODUCTION OF EVIDENCE OF RW'S RECORDS OR COMMUNICATIONS.

Since the C.A.A.F. issued its opinion in *United States v. Mellette* Military Judges have seemingly devised creative solutions to get to the "Mellette Records." 82 M.J. 374 (C.A.A.F. 2022). These creative solutions, as in this case, defy any prior notions and truisms about requisite showings of relevance and necessity before production. In this case, the Military Judge not only devised a creative solution to get to the "non-privileged Mellette Records," but he also devised a process outside the confines of M.R.E. 513 to order the production of privileged records under M.R.E. 513 – this is clear and indisputable error and a usurpation of judicial authority. R.W. objected multiple times and demanded an M.R.E. 513 hearing to no avail.

The Military Judge refused to conduct an M.R.E. 513 hearing, and instead the Military Judge ordered all R.W.'s ***mental health*** records be accessed and downloaded by the 31th Medical Group provider Maj. A[redacted] K[redacted] who is not the current care provider for R.W. and may not have ever treated R.W. Maj. K[redacted] was to the provide the records to a Mr. T[redacted] S[redacted], a DHA civilian attorney, to redact privileged communications. Mr. S[redacted] refused

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[3] In the pending 2024 Manual for Courts-Martial, the President has ordered the insertion of a paragraph stating, "[t]he military operates a modern criminal justice system that ***recognizes and protects the rights of both the victims of alleged offenses and those accused of offenses***." 2023 Amendments to the Manual for Courts Martial, United States, 88 Fed. Reg. 50,597 (Aug. 22, 2023)(emphasis added)/

to conduct such a service. The Government Trial Counsel then recommended a Ms. C[redacted] M[redacted] to conduct such a service. It appears Ms. M[redacted] is an Air Force civilian attorney who works in the torts and claims section of the Air Force Legal Operations Agency. At some point, it was realized that Ms. M[redacted] would not do the redactions, so years of R.W.'s mental health records were then sent to a Maj. A. V[redacted] W[redacted], an Air Force Judge Advocate in the medical tort branch. The records were sent without any M.R.E. 513(e) hearing, meaning R.W. was not empowered to prevent the disclosure of known and unequivocally privileged communications.

Moreover, the Military Judge ordered persons unrelated to the case and not subject to supervision of the Court to determine and define what records are "privileged" which is a term of only legal significance not used in the world of medical treatment. Privilege is "a special ***legal*** right, exemption, or immunity granted to a person." *Privilege*¸ Black's Law Dictionary, 7th Ed. (1990). A Fourth Circuit Court overruled a District Court's refusal to enjoin the US Government from using a filter team to review documents seized from a legal office for attorney-client privilege as, "use of the Filter Team is improper for several reasons, including that, inter alia, the Team's creation inappropriately assigned judicial functions to the executive branch." *United States v. Under Seal (In re Search Warrant Issued June 13, 2019)*, 942 F.3d 159, 164 (4th Cir. 2019). The opinion goes on to say, "a court simply cannot delegate its responsibility to decide privilege issues to another government branch." *Id*. at 177. Military Judges engaging in judicial functions should not delegate those to the trial counsel or some unknown entity unaccountable to his judicial oversight.

M.R.E. 513 is a rule of privilege, not discovery, and was promulgated in response to the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), where the Court concluded the "psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id*. at 11. The

Jaffee court went on to explain the importance of candid conversations in therapy because "the mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id*. M.R.E. 513 provides that, in general "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 UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." MRE 513(a). A patient is any "person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition." See M.R.E 513(b)(1). Evidence of a patient's records or communications includes patient records that pertain to communications by a patient to a psychotherapist. See M.R.E by the psychotherapist or trial counsel on behalf of the patient. See M.R.E. 513(c). Once the privilege is claimed, disclosure of a patient's records is prohibited unless one of seven enumerated exceptions applies. See M.R.E 513(d).

"In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge…Before ***ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed***…" M.R.E. 513(e)(1)-(2).

> The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior 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; (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.

Military judges use ***in camera review*** to resolve competing claims of privilege and a right to review information. See *United States v. Chisum*, 75 M.J. 943 (A.F. Ct. Crim. App. 2016) (affirmed without reaching granted issue in *U.S. v. Chisum*, 77 M.J. 176 (C.A.A.F. 2018)). "However, in camera review is not automatically appropriate every time one party seeks information over which another claims privilege." *Id*. A Military Judge may only conduct an in camera review of protected records when a moving party has met this threshold requirement and an examination of the protected records is necessary to rule on whether those records ought to be produced to the parties or admitted into evidence at trial by court-martial. M.R.E. 513(e)(3). "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).

Even in *Mellette* the C.A.A.F seems to allude to needing to follow M.R.E. 513(e) before producing or admitting non-privileged records as it states in the remedial paragraph,

> Before trial, Appellant filed a motion to compel production and in camera review of "S.S.'s mental health records: to include the dates visited said mental health provider, the treatment provided and recommended, and her diagnosis." These documents were ***not protected from disclosure by M.R.E. 513(a)*** [t]o the extent that these documents existed—and were otherwise admissible under the Military Rules of Evidence and the Rules for Courts-Martial—they should have been produced or admitted ***subject to the procedural requirements of M.R.E. 513(e)***. *Id.* at 381.

In other words, the Military Judge needed to follow the procedures of M.R.E. 513(e) before ordering the production of R.W.'s medical records. In failing to do so the Military Judge clearly

and erroneously circumvented M.R.E. 513 and unfairly discounted R.W.'s privacy rights.

III.

THE MILITARY JUDGE UNAUTHORIZED ORDERED AND UNDERWROTE A FISHING EXPEDITION INTO THE PRIVATE CONFINES OF RW's LIFE, DISREGARDING HER RIGHTS.

The Military Judge's court order is extra-jurisdictional.

R.W. argues this Court should employ ordinary standards of appellate review to determine whether writ should issue. In this case, a writ should issue because as a matter of law the Military Judge legally erred when determining 31st Medical Group is a military authority under R.C.M. 701(a)(2). Nevertheless, even if this Court determines R.W. must demonstrate clear and indisputable error for writ to issue, R.W. has met the standard as the Military Judge usurped authority in issuing an unauthorized court order to the 31st Medical Group and to Maj. W[redacted] because the Military Judge does not have that authority to issue such orders. "To the extent that [military judges] perform judicial duties such as authorizing searches and reviewing pretrial confinement, their authority is not inherent but is either delegated or granted by executive order. See Mil. R. Evid 315(d)(2), Manual, supra (military judge may authorize searches if authorized by regulations of Secretary of Defense or Secretary concerned); R.C.M. 305(g) (military judge may release from confinement); R.C.M. 305(i)(2) and R.C.M. 305(j) (military judge may review propriety of pretrial confinement)." *United States v. Weiss*, 36 M.J. 224, 228 (C.A.A.F. 1992)(plurality opinion); aff'd by *Weiss v. United States*, 510 U.S. 163, 114 S. Ct. 752 (1994); see also *United States v. Reinert*, 2008 CCA LEXIS 526, at *33 (A. Ct. Crim. App. 2008) ("None of these [(Article 39, UCMJ; Article 41, UCMJ; Article 48, UCMJ; and Article 51, UCMJ)] provide that a military judge exercises plenary authority; they either explicitly confer or imply authority solely in the context of the court-martial to which the military judge has been detailed. Furthermore, the legislative history of the Code also reflects that the military judge's functions and

duties are limited to the court-martial over which the judge presides.").

In short, the Military Judge has authority over court-martial proceedings, including the parties, but not over all DoD entities and servicemembers. The Military Judge's unauthorized Order states,

> I direct the 31st Operational Medical Readiness Squadron, Mental Health Flight commander, Maj A[redacted] Kr[redacted], located at Aviano Air Base, Italy to release the above referenced mental health diagnosis and treatment records to [Maj. A. V[redacted] W[redacted]], Medical Law Attorney, HQ USAF/JACC (Claims and Tort Litigation Division) to review to ensure that only treatment and diagnosis records are released and that any and all matters subject to privilege under Military Rules of Evidence 513 are fully redacted prior to providing the information to Government counsel. After review, Ms. M[redacted] shall deliver the records with appropriate PII, PHI or any other applicable warnings to the 31st Fighter Wing Office of the Staff Judge Advocate, Unit 6140, Box 115 APO AE 09604-0115, ATTENTION: Captain E[redacted] M[redacted], [DSN [redacted]]. Contact Capt M[redacted] immediately to discuss delivery methods for the records.

Furthermore, the 27 September 2023 Order fails to state the authority upon which it is issued, R.W. contends there is no such authority. Comparing the Military Judge's Order to a DD Form 453 (Subpoena) makes the ad hoc, unauthorized nature of the Court Order clear. The Subpoena references statutory and regulatory authority throughout, "[y]ou are hereby Commanded, pursuant to 10 U.S.C. §§ 846-47[]. The Subpoena even advises, "[y]ou may, before the time specified for compliance, request relief on the grounds that compliance is unreasonable or oppressive (R.C.M. 703(g)(3)(G))." When the custodian of the records demanded process to produce the records, issuance of a subpoena was and is—the only authorized method to access R.W.'s DoD Health Record. A Court Order directing an MTF, an entity not part of the military justice proceedings, is not valid. See *United States v. Walker*, 2018 CCA LEXIS 506, at *6 (A. Ct. Crim. App. 2018)(stating "A military judge's authority is limited to the court-marital to which he or she is detailed, and it does not extend to broader policy concerns.") In this case, the Military Judge usurped his

authority to attempt to direct the MTF via an invalid court order; and doing so circumvented the requisite M.R.E. 513(e) hearing and the authorized process wherein trial counsel issues a subpoena.

The Military Judge cannot order a person outside the proceedings to review evidence.

The extra-jurisdictional nature and usurpation of authority is even clearer when addressing the inherent assumption in the order that the Military Judge could order a non-party, seemingly random person to look at and redact R.W.'s privileged mental health records—Maj. A. V[redacted] W[redacted]. In this case, the unorthodox approach should have been evidenced by Mr. Silberman's refusal to execute the Military Judge's 26 September 2023 unauthorized order. It appears that the appointment and designation of a neutral, detached attorney is employed to avoid accountability for the piercing of the privilege and the necessity to conduct an in camera review – after the requisite M.R.E. 513(e) hearing. There are no rules and processes to reference with regards to the attempted—in this case successful—ordering of an attorney completely removed from the proceedings of which the Military Judge presides. Such a process appears unauthorized and uncontemplated. The production of R.W.'s records to Maj. W[redacted] unquestionably invaded R.W.'s privilege and privacy, but more troubling is the entire process could compromise any conviction that may occur as how this process would be captured in The Record and on appeal remains unclear. It would seem a wise course of action would be to append R.W.'s unredacted mental records as an Appellate Exhibit, but that means R.W.'s privileged mental health records are susceptible to disclosure to appellate counsel. This harm is even more pronounced knowing there was no M.R.E. 513 hearing that led to the production of the records. Trial defense counsel could, possibly, waive objections to the process of production to Maj. W[redacted], but there would remain a question as to plain error. On a more tactical level, what happens when trial defense counsel objects to over-redaction by Maj. W[redacted]? How would fact-finding to address the objection occur?

As this Court denied R.W.'s initial request to stay the proceeding to prevent Government

counsel's unwarranted and erroneous intrusion into her health record including mental health records, she sustained the injury, but R.W. asserts the Military Judge's disregard for her rights and equities still demands issuance of a writ. The Military Judge's order ignores, "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, 999 (1987). "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded…." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977) (internal quotations and citations omitted). In other words, there is nothing demanding an accused access his victim's health record warranting the Military Judge's whole-cloth refusal to acknowledge R.W.'s rights and equities when ordering the total disclosure of her mental health records to Maj. W[redacted]. Even more pointedly, the Army Court of Criminal Appeals in *US v McClure,* affirmed by C.A.A.F., writes "Appellant's constitutional argument amounts to little more than a claimed right to discover information, regardless of any privilege, that may or may not prove useful in their cross-examination of victim. Such an absolute right, however, does not exist." 2021 CCA LEXIS 454, at *23 (A. Ct. Crim. App. Sep. 2, 2021) (aff'd at *United States v. McClure*, 83 M.J. 14 (C.A.A.F. 2022)). Even in *Mellette* C.A.A.F. contemplates the appropriateness of considering a victims' privacy interests, "As the promulgator of the Military Rules of Evidence, the President has both the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy." *Mellette* at 380. In other words, victims' rights are not relegated to the world of illusory in courts-martial.

In according victims' statutory rights Congress unquestionably intended that all personnel in the Military Justice system make best efforts to accord crime victims the newly provisioned

rights under Article 6b. The 2014 NDAA directed the Secretary of Defense to promulgate implementing instructions to effectuate Article 6b, in its prescription for minimum requirements for such policy the NDAA states, ". . . [t]he recommendations and regulations required . . . shall include the following . . . [m]echanisms for ensuring that members of the Armed Forces. . . make their best efforts to ensure that victims are notified of, and accorded, the rights specified in [Article 6b]." National Defense Authorization Act for Fiscal Year 2014, § 1701(b)(2), 113 P.L. 66 (2013). In other words, it is Congressional intent, in the Article I Tribunals forged by the U.C.M.J. statutes, established by the same Congress who provides victims Article 6b rights, under that same U.C.M.J., that all "make their best effort" to accord victims their rights.

There appears no legitimate, reasoned support for the Military Judge's intransigent refusal to acknowledge the rights and equities of R.W. in this process. This Court has implied it is not clear and indisputable error to deny victims an opportunity to assert their rights at trial or to acknowledge their undeniable statutory and Constitutional rights – rights not forfeited by being a crime victim willing to testify against an accused – R.W. disagrees. See generally *In re HVZ.* The Military Judge's ruling is far removed from Senator Claire McCaskill's hopes in debating the newly added provisions to the UCMJ in 2014 where, ". . . every single victim gets their own lawyer. I don't think many Members understand how extraordinary that is. That reform alone will make our military ***the most victim-friendly criminal justice system in the world***. In no other criminal justice system anywhere—civilian, military, United States, our allies—does a victim get that kind of support." 159 Cong. Rec. S8151 (daily ed. Nov. 19, 2013) (statement of Sen. Claire McCaskill)(emphasis added). It seems only in the military justice system that such recalcitrance to affording victims' rights and disrespect for victims is endorsed despite White House and Congressional proclamations to the contrary.

REASON WHY WRIT SHOULD ISSUE

Wherefore, R.W. respectfully requests issuance of a writ vacating the 27 September 2023 Order. Writ should issue further requiring the Military Judge appropriately recognize any production of mental health records requires an M.R.E. 513(e) hearing and that the DoD Health Record is subject only to the rules and process of R.C.M. 703 when seeking disclosure of non-privileged records. Issuance of a writ ensures R.W. and future victims are afforded a process that accords R.W. her right to fair treatment and right to have her privacy and dignity respected. Writ should issue to further order the Military Judge to comply with M.R.E. 513 and to accord R.W. rights as is his duty and required by law.

Respectfully Submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 10, 2023, the foregoing was electronically filed with the Court and served on the following addresses:

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner* **Chase N. ARNOLD** Staff Sergeant (E-5) U.S. Air Force *Real Party In Interest*	**PETITIONER'S MOTION FOR ENLARGEMENT OF TIME TO FILE SUPPLEMENTAL BRIEF** Misc. Dkt. No. 2023-08

COMES NOW R.W. by and through her undersigned Victims' Counsel (VC) motioning the Court for an enlargement of time to file a supplemental brief to the Petition for a Writ of Mandamus Pursuant to Article 6b(e). R.W. seeks until 10 October 2023.

SUPPLEMENTAL FACTS

On 25 September 2023, R.W. petitioned this court seeking a writ of mandamus and a stay of proceedings in the case in interest *United States v. SSgt Chase Arnold*. In that Petition R.W. sought a stay of proceedings and leave of this Court to file a supplemental brief to that petition by 29 September 2023. The United States opposed the stay, R.W. supplemented the motion and petitions, and on 26 September 2023 this Court issued an Order denying the stay and allowing R.W. until 29 September 2023 to supplement the petition. On 27 September 2023 R.W. motioned this court to reconsider its denial of the stay and supplemented the filing with a new Court Order issued by the Military Judge on 27 September 2023. Despite R.W. seeking a reconsideration of the denial of the stay, Government counsel served the 27 September 2023

n 31st Operational Medical Readiness Squadron (OMRC). Sometime after the

's Motion to Reconsider, Government informed the Military Judge that Ms. C.M.

conducting the review and redaction of R.W.'s mental health records, but a Maj. A.

GRANTED
29 SEP 2023

V[redacted] W[redacted], Medical Law Branch, Medical, Tort and Personal Property Law Division would receive a copy of R.W.s privileged, unredacted records and be charged with conducting redactions consistent with the Court Order. Sometime on 27 September 2023 or 28 September 2023, 31st OMRC sent the records to the 31st Wing Staff Judge Advocate Office who then sent the unredacted, privileged mental health records to Maj W[redacted]. The records contained approximately 360 pages. Maj W[redacted] redacted the records according to an unknown standard, and released the records to Government counsel, sometime the morning of the 28th, who then immediately released to trial defense counsel. At 1521EST on 28 September 2023 this Court stayed the Court Order for production; yet, the records had already been produced. At the time of this filing, it is unclear what remedy the Military Judge will provide for the production of R.W.'s mental health records.

Currently, appropriations to fund the United States Government are due to lapse on 1 October 2023 requiring the shutdown of non-excepted functions and activities the United States Government. Ms. Devon A. R. Wells, R.W.'s counsel. is unsure whether she will be excepted or furloughed.

GOOD CAUSE SHOWN

As the violations of R.W. rights provided for in Article 6b, M.R.E. 513, and the United States Constitution are ongoing and ever-changing, R.W. seeks an enlargement of time to file a supplemental brief that will capture the totality her rights violations in the case in interest. Moreover, it remains unclear what remedy, if any, the Military Judge will provide for the production of R.W.'s mental health records that was subsequently stayed by this Court. R.W. proposed a date of 29 September 2023 to file the supplemental brief in hopes this Court would have stayed the proceedings. R.W. sought to demonstrate due diligence to expeditiously place

the issues before this Court. R.W. respectfully requests until 10 October 2023 to file the supplemental brief. Also, R.W. requests leave to seek another enlargement of time, if necessary, if there is a lapse of appropriations to fund the United States Government, as her counsel Ms. Devon A. R. Wells, may be subject to furlough.

Respectfully submitted this 29th day of September 2023.

[redacted]

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

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MORGAN BREWINGTON, Capt, USAF
Counsel for R.W.
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CERTIFICATE OF FILING AND SERVICE

I certify that on September 29, 2023, the foregoing was electronically filed with the Court and served on the following addresses:

af.jajg.afloa.filng.workflow@us.af.mil

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[redacted]

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

[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re RW	)	**Misc. Dkt. No. 2023-08**
Petitioner	)	
	)	
	)	
	)	**ORDER**
	)	
Chase N. ARNOLD	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Real Party In Interest	)	**Panel 2**

On 25 September 2023, Petitioner filed a petition for extraordinary relief pursuant to Article 6b, Uniform Code of Military Justice, 10 U.S.C. § 806b, in the nature of a writ of mandamus and a motion to stay the proceedings. On 26 September 2023, the petition was docketed, and in an order, dated this same date, the court denied Petitioner's motion to stay the proceedings and established filing deadlines for the underlying petition.

On 27 September 2023, Petitioner filed a Motion to Reconsider Denial of Stay and to Supplement the Record. The supplemental materials included a new order issued by the military judge, dated 27 September 2023, which provided as follows:

> I direct the 31st Operational Medical Readiness Squadron, Mental Health Flight commander, Maj[or AK], located at Aviano Air Base, Italy to release the above referenced mental health diagnosis and treatment records to Ms. [CM], Medical Law Attorney, HQ USAF/JACC (Claims and Tort Litigation Division) to review to ensure that only treatment and diagnosis records are released and that any and all matters subject to privilege under Military Rule[ ] of Evidence 513 are fully redacted prior to providing the information to Government counsel. After review, Ms. [CM] shall deliver the records with appropriate [personally identifiable information (PII)], [personal health information (PHI)] or any other applicable warnings to the 31st Fighter Wing Office of the Staff Judge Advocate, Unit 6140, Box 115 APO AE 09604-0115, ATTENTION: Captain [EM], [DSN [ ]; [ ]@us.af.mil]. Contact Capt [EM] immediately to discuss delivery methods for the records.

On 28 September 2023, the Government opposed the motion for reconsideration.

We find the supplemental information provided in Petitioner's motion for reconsideration is new and material to the underlying extraordinary writ petition, and accordingly, have reconsidered our prior order denying Petitioner's motion for stay of proceedings.

Accordingly, it is by the court on this 28th day of September, 2023,

ORDERED:

Having considered the supplemental information, Petitioner's Motion for Reconsideration of Stay and to Supplement the Record, dated 27 September 2023, is hereby **GRANTED**.

It is further ordered:

Petitioner's Motion for Stay of Proceedings is **GRANTED IN PART**. Implementation of the trial court's order dated 27 September 2023 to the 31st Operational Medical Readiness Squadron, Mental Health Flight Commander, to provide Petitioner's mental health records to Ms. [CM], Medical Law Attorney, HQ USAF/JACC (Claims and Tort Litigation Division), and for Ms. [CM] to review and deliver the records to the 31st Fighter Wing Office of the Staff Judge Advocate is hereby **STAYED**. During the stay of proceedings as to the military judge's order, all other proceedings in the court-martial of *United States v. Staff Sergeant Chase N. Arnold*, unaffected by this order, may proceed.

No further 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.W. *Petitioner*	**PETITIONER'S MOTION TO RECONSIDER DENIAL OF STAY AND TO SUPPLEMENT THE RECORD** Misc. Dkt. No. 2023-08

COMES NOW R.W. by and through her undersigned Victims' Counsel (VC) motioning the Court for reconsideration of the denial of the stay of proceedings and to supplement the Record. Currently, the Military Judge is poised to issue another unauthorized Court Order aimed at directing an unlawful search and seizure of R.W.'s mental health records in violation of her Constitutional right to be free from unreasonable searches and seizures and in violation of her right to fair treatment and respect for her privacy. US Const. IV Amend; Article 6b(a)(9), UCMJ. The Military Judge has ordered the production of R.W.'s mental health records without the requisite M.R.E. 513 hearing.

SUPPLEMENTAL FACTS AND ARGUMENT

Yesterday, the Military Judge issued a Court Order attempting to direct 31st Operational Medical Readiness Squadron to ***produce*** R.W.'s mental health records stating,

> I direct the 31st Operational Medical Readiness Squadron, Mental Health Flight commander, Maj A[redacted] K[redacted], located at Aviano Air Base, Italy to work with DHA Medical-Legal Consultant, Mr. T[redacted] S[redacted] or other duly appointed medical law attorney to ensure that any and all matters subject to privilege under Military Rules of Evidence 513 are fully redacted prior to providing the information to Government counsel. The records shall be delivered with appropriate PII and/or PHI warnings to the 31st Fighter Wing Office of the Staff Judge Advocate, Unit 6140, Box 115 APO AE 09604-0115, ATTENTION:

> Captain E[redacted] M[redacted], [redacted]. Contact Capt M[redacted] immediately to discuss delivery methods for the records.

From information ascertained by Capt Morgan Brewington, Mr. T[redacted] S[redacted] would not comply with the order. An R.C.M. 802 session occurred this morning, and Government Counsel, Lt Col L[redacted] W[redacted] appears to have spent the morning seeking people willing to abide by the Military Judge's unauthorized Court Order to delve into the confines of R.W.'s personal and private life – her mental health records. With that, since it appears a DHA civilian attorney – Mr. S[redacted] – would not comply with the order, they have sought out an Air Force civilian attorney – a Ms. C[redacted] M[redacted] – to review R.W.'s mental health records after Maj A[redacted] K[redacted] accesses R.W.'s records. The authority for Maj K[redacted] to access the records is unknown and unclear. The Supplemental Order is attached hereto and R.W. moves for leave to supplement with that order, it states:

> I direct the 31st Operational Medical Readiness Squadron, Mental Health Flight commander, Maj A[redacted] K[redacted], located at Aviano Air Base, Italy to release the above referenced mental health diagnosis and treatment records to Ms. C[redacted] A. M[redacted], Medical Law Attorney, HQ USAF/JACC (Claims and Tort Litigation Division) to review to ensure that only treatment and diagnosis records are released and that any and all matters subject to privilege under Military Rules of Evidence 513 are fully redacted prior to providing the information to Government counsel. After review, Ms. M[redacted] shall deliver the records with appropriate PII, PHI or any other applicable warnings to the 31st Fighter Wing Office of the Staff Judge Advocate, Unit 6140, Box 115 APO AE 09604-0115, ATTENTION: Captain E[redacted] M[redacted], [redacted]. Contact Capt M[redacted] immediately to discuss delivery methods for the records.

Military Judges do not possess the authority to issue a court order to compel production as no statutory authority exists for such an issuance outside the subpoena process. In the case in interest, the Military Judge has devised an unsanctioned production process to evade using the subpoena process as required by law and R.C.M. 703(g)(3). Article 46 states, "(a) Opportunity to obtain witnesses and other evidence. In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and

other evidence in accordance with such regulations as the President may prescribe." (emphasis added). In other words, the authority of the Military Judge to "obtain [] other evidence" must derive from a Rule of Court-Martial. R.C.M.s 701-703a implement Article 46. As it stands, the only personnel authorized to issue subpoenas are: "[. . .] (ii) the trial counsel of a general or special court-martial; [. . .] (v) in the case of a prereferral investigative subpoena, a military judge [. . .]" R.C.M 703(g)(3)(D) (2023 M.C.M.). R.C.M. 703 vests subpoena authority in trial counsel and not Military Judges.

The absence of authority for the Military Judge to issue a subpoena directing 31st Medical Group is not an oversight to be cured by inventing authority to issue a court order. The amendments to R.C.M. 703 effective on 27 December 2023 highlight that Military Judges currently lack the authority to issue a subpoena. Inventing a court order to demand 31st Medical Group produce records to a Ms. M[redacted]—unquestionably vesting R.W. with the right to move to quash such a subpoena—is clear and indisputable error. Moreover, it is some form of judicial gymnastics that treats R.W. unfairly and without regard for her rights to privacy and due process. "To the extent that [military judges] perform judicial duties such as authorizing searches and reviewing pretrial confinement, ***their authority is not inherent but is either delegated or granted by executive order***. See Mil.R.Evid 315(d)(2), Manual, supra (military judge may authorize searches if authorized by regulations of Secretary of Defense or Secretary concerned); RCM 305(g) (military judge may release from confinement); RCM 305(i)(2) and RCM 305(j) (military judge may review propriety of pretrial confinement)." *United States v. Weiss*, 36 M.J. 224, 228 (C.A.A.F. 1992)(plurality opinion); aff'd *Weiss v. United States*, 510 U.S. 163, 114 S. Ct. 752 (1994)

Moreover, Ms. C[redacted] M[redacted] is not accountable to the Court, R.W., or anyone in her role as "reviewer of R.W.'s privileged and private information." What is the remedy if Ms. M[redacted] releases privileged information? What is R.W.'s remedy if Ms. M[redacted] posts R.W.'s records on the internet? What is the remedy when Ms. M[redacted] decides to tell the Accused's attorneys everything she saw and undermines her privilege? How are these records preserved for appeal? Who scrutinizes Ms. M[redacted]'s actions? There are no easy answers to these questions because this process is completely removed from anything contemplated in the Manual for Courts-Martial.

R.W. respectfully requests this Court stay the proceedings to allow time for a supplemental brief and to put a stop to the acrobatics to produce R.W.'s records only necessary because the Military Judge is clearly and indisputably not complying with the laws of discovery and staying within the parameters of his authority as a Military Judge.

Respectfully submitted this 27th day of February,

[redacted]

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

[redacted]

MORGAN BREWINGTON, Capt, USAF
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Victims' Counsel
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Department of the Air Force
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CERTIFICATE OF FILING AND SERVICE

I certify that on September 27, 2023, the foregoing was electronically filed with the Court and served on the following addresses:

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AF.JAJA.AFLOA.Filing.Workflow@us.af.mil

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

[redacted]

27 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re RW	)	UNITED STATES'
	)	OPPOSITION TO PETITIONER'S
	)	MOTION TO RECONSIDER
	)	DENIAL OF STAY
Petitioner,	)	
	)	
	)	
	)	Misc. Dkt. 2023-08
	)	
	)	Panel No. 2
	)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Petitioner's Motion to Reconsider Denial of Stay. Petitioner has not cited any new facts or law that should cause this Court to reconsider its denial of the stay in this case. The military judge has now ordered non-privileged records for RW, from 1 December 2017 to present, maintained by the 31st Operational Medical Readiness Squadron, Mental Health Flight to be produced to the office of the Aviano AB Staff Judge Advocate. (Military Judge's Supplemental Order, Mot. for Recon. PDF at 6-7.) Petitioner has still cited no law holding that records maintained by a military mental health flight are not within the possession, custody, or control of military authorities, and therefore are not subject to discovery under Rule for Courts-Martial (R.C.M.) 701(a)(2)(B). Nor has Petitioner cited any law holding that a subpoena must be issued in order to obtain records maintained by a military mental health flight.

Petitioner insists that "Military Judges do not possess the authority to issue a court order to compel production as no statutory authority exists for such an issuance outside the subpoena process." (Mot. for Recon. at 2.) But this statement disregards R.C.M. 701(g)(3). Since discovery

of these military-maintained records is governed by R.C.M. 701 – and Petitioner has not shown clearly and indisputably otherwise – the government must "permit the defense," upon request, "to inspect" them if they are "relevant to defense preparation." *See* R.C.M. 701(a)(2)(B)(i). If the government fails to comply with its R.C.M. 701 duties, the military judge has authority under R.C.M. 701(g)(3)(D) to "[e]nter any such other order as is just under the circumstances." The military judge's order for military authorities to produce the non-privileged records in this case is an order that is "just under the circumstances" to effectuate compliance with R.C.M. 701(a)(2)(B)(i).

The military judge has also set up safeguards to ensure that no privileged M.R.E. 513 material is produced to trial counsel or defense counsel. (Military Judge's Supplemental Order, Mot. for Recon. PDF at 6.) Under such circumstances, this Court will not be able to conclude that the military judge clearly and indisputably violated RW's right to be treated fairly and with respect for her privacy under Article 6b(a)(9), UCMJ.

In sum, Petitioner has offered no new facts and law suggesting she will be able to show a clear and indisputable right to relief. A stay is still unwarranted.

WHEREFORE, the United States respectfully requests that this Court deny Petitioner's motion for reconsideration.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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, to Victim's Counsel and to the Air Force Appellate Defense Division on 27 September 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

***In re* RW**	)	**Misc. Dkt. No. 2023-08**
Petitioner	)	
	)	
	)	
	)	**ORDER**
	)	
Chase N. ARNOLD	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Real Party In Interest	)	**Panel 2**

Petitioner asserts she is a victim pursuant to Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b, involved in the general court-martial of Staff Sergeant Chase N. Arnold at Tyndall Air Force Base, Florida. On 25 September 2023, Petitioner filed a two-part petition: relief in the form of a writ of mandamus, and a motion to stay the court-martial. On 26 September 2023, this court docketed the petition.

Petitioner asks for relief to "halt unauthorized and unreasonable disclosure of private medical records, mental health records, and potentially privileged records under [Mil. R. Evid.] 513." Petitioner asks this court to issue a writ of mandamus countermanding the military judge's written 14 September 2023 ruling on a Defense Motion to Compel Discovery which required the Government to: (a) identify whether there are any mental health diagnosis and treatment records of RW, within the possession, custody, or control of military authorities, which were created during the timeframe of the charged offenses involving RW; (b) if any such medical records are privileged or not subject to disclosure, respond to the Defense stating any basis for non-disclosure and notify the court; and (c) if any such medical record is subject to disclosure and is relevant to the Defense's preparation, to provide the record to the Defense.

On 20 September 2023, Petitioner filed a motion for appropriate relief with the military judge requesting the military judge "withdraw" his 14 September 2023 ruling. Petitioner recites that the military judge issued an oral ruling on 25 September 2023 denying the motion for appropriate relief. The military judge then issued an e-mail directive on 26 September 2023 to the parties, directing the Mental Health Flight commander, 31st Operational Medical Readiness Squadron, to work with the organization's medical law attorney to: "ensure that any and all matters subject to privilege under [Mil. R. Evid.] 513 are fully redacted prior to providing the information to [g]overnment counsel." He

further ordered the "records shall be delivered with appropriate PII and/or PHI warnings to the 31st Fighter Wing Office of the Staff Judge Advocate."[1]

In regard to the anticipated trial schedule, Petitioner advises that the military judge currently intends to press ahead with the trial, with voir dire scheduled to commence today.

Petitioner requests a stay "to allow time to supplement this Petition for a Writ of Mandamus under Article 6b[, UCMJ,] and for this [c]ourt to properly decide whether writ should issue." Specifically, Petitioner "asks for leave to substantively supplement [her] Petition for Relief Under Article 6b[, UCMJ,] no later than 29 September 2023." (Footnote omitted). On 26 September 2023, the Government filed opposition to Petitioner's motion for a stay of proceedings. Petitioner then filed two "replies" to that response this same day, which we duly considered[2] prior to issuing this order.

Having considered the filings, we decline to issue a stay. However, we grant Petitioner's request to supplement her petition.

Accordingly, it is by the court on this 26th day of September, 2023,

ORDERED:

Petitioner's Motion to Stay Proceedings dated 25 September 2023 is hereby **DENIED**.

Petitioner's motion for leave to file a supplement to Petitioner's petition and motion to stay is **GRANTED**. Petitioner may file a supplement to her Petition Under Article 6b for Relief in the form of a Writ of Mandamus, dated 25 September 2023, **not later than 29 September 2023**.

It is further ordered:

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 any forthcoming supplement to Petitioner's petition, **not later than twenty days after receipt of such sup-**

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[1] We understand PII to mean personally identifiable information and PHI to mean protected health information.

[2] We note that Petitioner's first reply was not accompanied by the requisite "motion for leave to file" as required under the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 23(d). Nonetheless, we treated Petitioner's first reply as a motion for leave to file a reply and considered it because it included factual information necessary to the adjudication of the underlying motion for stay of proceedings which was not reasonably available through the exercise of due diligence at the time of the motion's filing.

plement. JT. CT. CRIM. APP. R. 19(f)(1). Any answer filed will address any potential issues of "mootness" of the underlying issues raised in the petition given the disposition of the court-martial at that time.

No further 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.W. *Petitioner*	**PETITIONER'S MOTION TO SEAL AND SUPPLEMENT THE RECORD** Misc. Dkt. No. 2023-08

COMES NOW R.W. by and through her undersigned Victims' Counsel (VC) motioning to seal certain attachments from her Petition for a Writ of Mandamus and Motion for Stay filed on 25 September 2023. R.W.'s personally identifiable information appears at page 135 and pages 147-156, and R.W. seeks to seal those pages. R.W. is attaching pages with redactions to PII that she moves to supplement the record for page 135 and pages 147-156. As pages 147-156 contain protected health information, she moves to seal those pages with the redaction for PII as well.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that on September 26, 2023, the foregoing was electronically filed with the Court and served on the following addresses:

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re RW	)	**Misc. Dkt. No. 2023-08**
Petitioner	)	
	)	
	)	
	)	
	)	**NOTICE OF DOCKETING**
	)	
Chase N. ARNOLD	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Real Party in Interest	)	

On 25 September 2023, this court received a petition for extraordinary relief pursuant to Article 6b, UCMJ, 10 U.S.C. § 806b, in the nature of a Writ of Mandamus and a Motion to Stay Proceedings, in the above-styled case.

In the early morning hour of 26 September 2023, the Government filed opposition to Petitioner's motion to stay the proceedings.

Later this same date, Petitioner filed a reply to the Government's response. While a reply in motions practice is not generally accepted, the court will treat Petitioner's reply as a motion for leave to file a request to consider additional information with regards to the military judge's order.

Accordingly, it is by the court on this 26th day of September, 2023,

ORDERED:

The case is assigned Misc. Dkt. No. 2023-08 and referred to Panel 2.

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

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner*	**PETITIONER'S REPLY TO UNITED STATES' OPPOSITION TO STAY OF PROCEEDINGS** Misc. Dkt. No. 2023-XX

COMES NOW R.W. by and through her undersigned Victims' Counsel (VC), replying to the United States' opposition to the Motion to Stay in the case in interest *United States v. SSgt Chase Arnold*. The United States' position is further delay in the case in interest is unacceptable and R.W.'s rights should be subrogated to the United States' interest in moving forward without delay and potential logistical difficulties a stay would cause. If this Court does not grant the stay of proceedings, a precedent will be set wherein the Government and the Military Judge just need to ignore victims' assertions of their rights until the eve of trial; then rule victims do not have standing as the inertia of the trial will foreclose an opportunity for victims to seek enforcement of their rights at this Court as provided for in Article 6b(e). The irony is the United States is, presumably, prosecuting this case in large part because R.W. was victimized by the Accused, in opposing the stay the United States is mystifyingly putting form over substance at the expense of R.W.

SUPPLEMENTAL INFORMATION

Although this case has been ongoing for years, Defense did not file a Motion to Compel until 1 September 2023 and the Military Judge did not initially rule until 14 September 2023. R.W.'s rights should not be dismissed and discounted due to dilatory pleadings so close to trial.

In response to the 14 September 2023 ruling, R.W. asserted her M.R.E. 513 privilege to Government counsel on or about 16 September 2023. In other words, the United States ignored R.W.'s assertions of privilege and now opposes a stay – a standard far below making best efforts to accord R.W. rights.

On 25 September 2023 the Military Judge denied standing to R.W. to object to the production of her medical and mental health records as she did not have a "right to be heard" at trial. On 25 September 2023 the Military Judge made an oral ruling. The Military Judge ruled medical records, including mental health records, accessible by a Military Treatment Facility are in the possession, custody, or control of military authorities. No M.R.E. 513 hearing has been conducted, and the Military Judge intends to order mental health records produced to a DHA attorney not party to the court-martial to determine privilege. The Military Judge intends to issue a "Court Order" to compel production of R.W.'s DoD Health Record, circumventing the authorized subpoena process squarely placing medical records outside the possession, custody, or control of military authorities.[1] The Military Judge has devised a novel course of action as indicated in the attached email. The plan from the Military Judge,

[1] Article 46 states, "(a) Opportunity to obtain witnesses and other evidence. In a case referred for trial by court martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." (emphasis added). In other words, the authority of the Military Judge to "obtain [] other evidence" must derive from a Rule of Court-Martial. R.C.M.s 701-703 implement Article 46. "A military accused also has the right to obtain favorable evidence under Article 46, U.C.M.J., 10 U.S.C. § 846 (2006) as implemented by R.C.M. 701-703." *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013). Rules 701-703A do not authorize issuance of a court order by a military judge for Protected Health Information. As it stands, the only personnel authorized to issue subpoenas are: "[. . .] (ii) the trial counsel of a general or special court-martial; [. . .] (v) in the case of a prereferral investigative subpoena, a military judge [. . .]" R.C.M 703(g)(3)(D) (2023 M.C.M.). R.C.M. 703 vests subpoena authority in trial counsel and not Military Judges (we note 703(g) also requires R.W. to have the opportunity to motion the court for relief before such a subpoena is issued). The absence of authority for the Military Judge to issue a subpoena directing MTFs is not an oversight to be cured by inventing authority to issue a court order. The amendments to R.C.M. 703 effective on 27 December 2023 highlight that Military Judges currently lack the authority to issue a subpoena as the President vests Military Judges with the subpoena authority in the new R.C.M. 703 they currently lack in the current version. "In particular, [CAAF], and courts-martial in general, being creatures of Congress created under the Article I power to regulate the armed forces, must exercise their jurisdiction in strict compliance with authorizing statutes." *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013). Currently, issuance of a court order to obtain PHI is an extra-jurisdictional act not authorized by R.C.M.s which implement Article 46.

> I direct the 31st Operational Medical Readiness Squadron, Mental Health Flight commander, Maj A[redacted] K[redacted], located at Aviano Air Base, Italy to work with DHA Medical-Legal Consultant, Mr. T[redacted] S[redacted] or other duly appointed medical law attorney to ensure that any and all matters subject to privilege under Military Rules of Evidence 513 are fully redacted prior to providing the information to Government counsel. The records shall be delivered with appropriate PII and/or PHI warnings to the 31st Fighter Wing Office of the Staff Judge Advocate, Unit 6140, Box 115 APO AE 09604-0115, ATTENTION: Captain Elyse M[redacted] [[redacted]]. Contact Capt M[redacted] immediately to discuss delivery methods for the records.

Prior to the 25 September rulings, R.W.'s victim counsel motioned the trial Court for appropriate relief in response to the Court's 14 September 2023 ruling. VC had been in discussion with Government counsel and the Court indicating her objection to the 14 September 2023 ruling and asserting M.R.E. 513 privilege. VC attempted to work with Government counsel to ascertain their position as to production of medical and mental health records hoping Government would also protect R.W.'s privacy within the limits of the law. On 20 September 2023, VC filed a Motion for Appropriate Relief, among other things VC sought an M.R.E. 513 hearing as,

> M.R.E. 513 provides that, in general "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 UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." MRE 513(a).
>
> A patient is any "person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition." See M.R.E 513(b)(1). Evidence of a patient's records or communications includes patient records that pertain to communications by a patient to a psychotherapist. See M.R.E 513(b)(5). The privilege may be claimed by the patient, the patient's guardian or conservator, or by the psychotherapist or trial counsel on behalf of the patient. See M.R.E. 513(c).
>
> Once the privilege is claimed, disclosure of a patient's records is prohibited unless one of seven enumerated exceptions applies. See M.R.E 513(d). "In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory

> ruling by the military judge…**Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed**…" M.R.E. 513(e)(1)-(2). (emphasis added)
>
> [. . .]
>
> *Mellette* does not stand for the proposition that diagnoses, treatments, and prescriptions of a victim are wholly unprotected. A patient's diagnoses, treatments, prescriptions, and other "nonprivileged" information nevertheless remain confidential within the meaning of HIPAA, its implementing regulations, and governing case law. In *Mellette*, the C.A.A.F. determined that M.R.E. 513(a) protection "does not extend to all evidence that might reveal a patient's diagnoses and treatments." 82 M.J. 374, 380. At the same time though, *Mellette* did not establish an automatic entitlement to Defense or Government discovery of this type of confidential, but "nonprivileged," information of a named victim. Instead, the Court explained in detail why the limited records sought were, in fact, relevant and necessary to a specific theory of Defense.

VC was in regular communication with Government counsel and emailed the Court on multiple occasions before 25 September 2023. The Military Judge held an R.C.M. 802 conference on 19 September 2023 where the VC asserted R.W.'s M.R.E. 513 privilege. However, it was not until 25 September 2023 the Military Judge ruled that R.W. has no "standing" to advocate for her privilege under M.R.E. 513 or to assert and protect her rights to fair treatment and privacy; thus the motion for a stay on the eve of trial.

ARGUMENT

Government Counsel and the Military Judge have a duty to make best efforts to accord R.W. her rights. The United States' opposition to the stay reflects its belief that there is no such duty. R.W. will irreparably suffer the harm of the refusal of the Government Counsel and Military Judge to acknowledge their duties. In 2014 Article 6b codified crime victims' rights in the military justice system. Implementing instructions directed "(1) ISSUANCE.—Not later than one year after the date of the enactment of this Act— (A) the Secretary of Defense shall recommend to the President changes to the Manual for Courts-Martial to implement section 806b

of title 10, United States Code (article 6b of the Uniform Code of Military Justice)." Congress then continued to prescribe provisions that the proposed changes to the M.C.M. shall include. The M.C.M. was to contain, "(B) Mechanisms for ensuring that members of the Armed Forces […] make their best efforts to ensure that victims are notified of, and accorded, the rights specified in such section. (C) Mechanisms for the enforcement of such rights, including mechanisms for application for such rights and for consideration and disposition of applications for such rights." National Defense Authorization Act for Fiscal Year 2014, § 1701(b)(2), 113 P.L. 66 (2013). Trial Counsel and Military Judges of general or special courts-martial are by statute members of the Armed Forces.

Moreover, release of privileged records for in camera review or "impartial attorney" without a requisite M.R.E. 513(e) hearing unlawfully pierces R.W.'s psychotherapist-patient privilege. R.W. maintains ". . . 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. . . ." M.R.E. 513(a). M.R.E. 513(e) clearly states, "In any case in which the ***production or admission of records*** or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must [conduct a hearing]."

A stay is necessary to ensure R.W. can attempt to enforce her rights currently under the only legal avenue to do so – seeking a writ of mandamus from this Court. The Department of Defense and the President have not promulgated rules or regulations to ensure enforcement of R.W.'s rights outside the statutory language of Article 6b(e). To not grant the stay allows trampling on Article 6b and M.R.E. 513, setting a precedent that a Military Judge can avoid scrutiny and accountability for violating victims' rights by 1) denying "standing" to the victim on

the eve of trial to object to violations of her rights[2]; and 2) avoid rulings on issues implicating victims' rights until the eve of trial. It is unclear why the United States' position places R.W.'s rights below its desire for logistical convenience.

R.W. seeks an immediate, emergent stay to prevent a violation of her rights and preserve the singular opportunity for redress afforded to her in the military justice system – seeking a writ of mandamus from this Court.

[redacted]

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[2] In this case R.W. asserted her privilege under M.R.E. 513 providing her a "right to be heard."

CERTIFICATE OF FILING AND SERVICE

I certify that on September 26, 2023, the foregoing was electronically filed with the Court and served on the following addresses:

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26 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re RW,	)	UNITED STATES'
	)	OPPOSITION TO PETITIONER'S
	)	MOTION FOR A STAY OF
	)	PROCEEDINGS
Petitioner,	)	
	)	
	)	
	)	Misc. Dkt. _____
	)	
	)	Panel No. _____
	)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Petitioner's Motion to Stay Proceedings. Petitioner cannot meet her heavy burden for establishing a right to extraordinary relief, so staying the proceedings below is unwarranted. Further, a stay would be detrimental to the United States' ability to prosecute this complex and already long-delayed case.

Under this Court's published opinion in In re KK, __M.J.____, Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *10 (A.F. Ct. Crim. App. 24 Jan. 2023), traditional mandamus standards of review are applicable to Article 6b(e), UCMJ, petitions. This means a petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012).

The military judge has not yet ordered production of any medical or mental health records that are privileged under M.R.E. 513. The military judge has only ordered the government to ascertain whether there are any mental health diagnoses or treatment records (which are not

privileged under M.R.E. 513 per United States v. Mellette, 82 M.J. 374 (2022)) within the possession, custody or control of military authorities. (Petition PDF at 133.) The government has not been ordered to obtain any privileged records – rather if any records are privileged or "not subject to disclosure," the government must respond to the defense's discovery request by stating the basis for non-disclosure. (Id.) The government is only required to provide the defense with medical records that are subject to disclosure (i.e. not privileged) and which the government determines are relevant to the defense's preparation. (Id.)

As of 19 September 2023, the military treatment facility (MTF) has said it will turn over diagnosis information, which is not privileged under M.R.E. 513, based on the military judge's 14 September 2023 ruling, but that it will require a court order before turning over any additional records. As of the date of this filing, the military judge has not yet issued any order to the MTF. (Pet. PDF at 59.)

Petitioner's motion does not establish that the military judge has committed any errors of law, much less that Petitioner has a clear and indisputable right to relief. The military judge has not ordered production of any materials that are privileged under M.R.E. 513. Petitioner has cited no law holding (1) that records maintained by an MTF are not within the possession, custody, or control of military authorities; (2) that the military judge does not have the authority to order production of non-privileged records maintained by an MTF; (3) that an in camera review is required for records that are not privileged under M.R.E. 513. In the absence of any such law, Petitioner will be unable to show a clear and indisputable right to relief. Further, a stay is premature since the military judge has not even issued any order compelling the MTF to produce any records yet. Petitioner's preliminary failure to establish any legal error by the military judge shows that a stay is unwarranted.

The fact that The Judge Advocate General has certified similar issues in a different case has no bearing on whether a stay should be granted in this case. Such a certification is not an indicator that the decision below was wrongly decided or is no longer good law, or that the petitioner in that case is likely to prevail before the Court of Appeals for the Armed Forces.

Finally, a stay in this case would seriously hamper the government's ability to try this case. This case is scheduled to be tried this week at Tyndall AFB. The case was originally docketed for November 2022 and has now been delayed twice due to witness availability issues. There are 24 witnesses, 8 of whom are civilians. Each side retains 3 expert witnesses. The case had to be relocated from Aviano AB to Tyndall AFB due to witness availability. Three legal personnel from Aviano AB have had to travel from Aviano to Tyndall to support this case. Delaying this case again – possibly for months – will require extreme logistical difficulties with witnesses and travel arrangements. Furthermore, it could require additional turnover of legal personnel involved in this case, which could result in even further delays, since this complex case involves 26 specifications and conduct that occurred over a three-year period. Finally, delaying the case for several more months always risks the possibility that witnesses' memories will degrade. The detrimental effects of delaying this case any further weigh heavily against granting a stay under the circumstances here – especially where Petitioner can cite no error of law made by the military judge.

WHEREFORE, the United States respectfully requests that this Court deny Petitioner's motion for a stay.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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, to Victim's Counsel and to the Air Force Appellate Defense Division on 26 September 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re R.W. *Petitioner*	**PETITION UNDER ARTICLE 6b FOR RELIEF** *in the form of a* **WRIT OF MANDAMUS** and **MOTION TO STAY PROCEEDINGS** Misc. Dkt. No. 2023-XX

COMES NOW R.W. by and through her undersigned Victims' Counsel (VC), and pursuant to Air Force Court of Criminal Appeals (A.F.C.C.A.) Rules of Practice and Procedure Rule 19, Petition for Extraordinary Relief in the case in interest *United States v. SSgt Chase Arnold*. A.F. CT. CRIM. APP. R. 19. R.W. moves for an immediate stay of proceedings to halt unauthorized and unreasonable disclosure of private medical records, mental health records, and potentially privileged records under M.R.E. 513. The detailed Military Judge is Col Michael Taber. The Military Judge ruled 1) R.W. does not have standing to object to disclosure or production of private and or privileged information about R.W; 2) R.W.'s medical and mental health records are within the possession, custody, and/control of military authorities; 3) he intends to issue a Court Order for R.W. DoD Health Record; and 4) he did not indicate an intention to conduct an in camera review. The trial with members is scheduled to begin **TOMORROW**. On 12 September 2023, The Judge Advocate General certified four issues to C.A.A.F. in *HVZ v. United States and Fewell* which specifically address these same issues on whether R.W. should be granted relief in this case in interest.[1]

[1] The four issues certified are:

R.W asks for leave to substantively supplement this Petition for Relief Under Article 6b no later than 29 September 2023.[2]

STATEMENT OF THE ISSUES

R.W. petitions this Court for relief in the form of a writ of mandamus issued pursuant to Article 6b(e), as the Military Judge's rulings violate R.W.'s rights to be treated with fairness and respect for her dignity and privacy in violation of Article 6b(a)(9), U.C.M.J. The order to produce mental health records without conducting an M.R.E. 513 hearing violates R.W. right to be heard before the Court orders production of mental health records. The Military Judge has issued a verbal court order, to be followed in writing, without authority and violating R.W.'s right to privacy in her medical and mental health records. Military judges do not currently have authority to compel production of medical and mental health records through an order.

PROCEDURAL STATEMENT OF THE CASE

On 1 September 2023, Defense filed a Motion to Compel Discovery of R.W. mental health and medical records seeking "non-privileged Mellette records." Government responded. The MJ issued a ruling on 14 September 2023. In response to the Ruling, Victims' Counsel filed

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I. DID THE MILITARY JUDGE ERR WHEN HE DETERMINED THAT H.V.Z.'S DOD HEALTH RECORD WAS IN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES PURSUANT TO RCM 701(a)(2)(A) AND RCM 701(a)(2)(B)?

II. DID THE MILITARY JUDGE ERR WHEN HE DID NOT CONSIDER H.V.Z.'S WRITTEN OBJECTION TO PRODUCTION OF HER DOD HEALTH RECORD AS HE FOUND SHE DID NOT HAVE STANDING NOR A RIGHT TO BE HEARD?

III. WHETHER H.V.Z. MUST SHOW THE MILITARY JUDGE CLEARLY AND INDISPUTABLY ERRED FOR WRIT TO ISSUE UNDER ARTICLE 6b(e) UCMJ OR SHALL ORDINARY STANDARDS OF APPELLATE REVIEW APPLY?

IV. WHETHER THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS ?

[2] As this Court previously informed Ms. Devon Wells, victims cannot file a Motion to Stay separate from the underlying Petition for Relief. The violation of R.W.'s rights may be irreversible without an immediate stay, they Petition this Court with haste and seek additional time to submit a supplemental brief.

a Motion for Appropriate Relief on 20 September 2023. Defense and Government replied. Victims' Counsel responded.[3] In an Article 39(a) session today, the Military Judge orally ruled: 1) R.W. does not have standing to object to disclosure or production of private and/or privileged information about R.W's medical and mental health records; 2) R.W.'s medical and mental health records are within the possession, custody, and/control of military authorities; 3) he intends to issue a Court Order for R.W. DoD Health Record; and 4) he did not indicate an intention to conduct an in camera review. The Military Judge stated he would issue a written ruling codifying these actions.

A STAY IS APPROPRIATE

Article 6b(e)(1) states "[i]f the victim of an offense under this chapter believes that a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus. . ." R.W. seeks an immediate, emergent stay to protect her rights to 1) object to enforce her rights involving production of these records expressly enumerated in R.C.M. 703; 2) her right to be treated with respect for her privacy and dignity under Article 6b(a)(9); 3) ensure her fair treatment to include due process as required under Article 6b(a)(9); 4) to prevent the unauthorized disclosure of potentially privileged M.R.E. 513 records while this Court reviews the merits of this Petition; and, 5) ensure the Military Judge does not unreasonably order invasion of her privacy by issuing a court order for which the law does not currently authorize.

The Judge Advocate General certified these very issues before C.A.A.F, which has received filings from relevant parties today. Whether R.W. has standing to address the trial court to argue against production of her sensitive mental health and other medical records pursuant to

[3] Due to connectivity issues, R.W. requests leave to supplement with this filing and other requisite documents.

the process articulated in R.C.M. 703(g) is among those issues The Judge Advocate General certified to C.A.A.F. for consideration.

Additionally, denying R.W.'s petition for a stay while C.A.A.F is considering these specific issues immediately causes R.W. harm without an avenue for R.W. to seek redress. The stay prevents the trial court from continuing to pursue production of R.W.'s sensitive medical and mental health records, the disclosure of which violates privacy rights Congress and the President meant to protect in Article 6b, U.C.M.J. and R.C.M. 703. Granting the stay allows R.W. to seek redress from this court on an issue of law C.A.A.F is currently considering. Any ruling by C.A.A.F will affect R.W.'s rights.

There is no Rule for Court-Martial effectuating the right of crime victims to seek redress in the Courts of Criminal Appeals under Article 6b, UCMJ; nevertheless, RCM 908 provides guidance on processing of interlocutory appeals by the United States. R.W. contends her seeking redress from this Court is similar. R.W. believes the ruling violated her Article 6b, UCMJ rights, and, if executed, will be irreparable without a stay. Victims' Counsel is expeditiously filing this Petition for a Writ of Mandamus under Article 6b and Motion for Stay, but does seek until 29 September 2023 to file a brief to supplement this Petition.

R.W. seeks an immediate, emergent stay to prevent a violation of her rights.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 25, 2023, the foregoing was electronically filed with the Court and served on the following addresses:

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