**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| **In Re H. V. Z.**<br>*Petitioner*<br>_____<br>**United States**<br>*Respondent*<br><br>and<br><br>**Michael K. FEWELL**<br>Technical Sergeant (E-6)<br>United States Air Force<br>*Real Party in Interest* | **BRIEF OF *AMICUS CURIAE* NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION IN SUPPORT OF REAL PARTY IN INTEREST**<br><br>USCA Dkt. No. 23-0250/AF<br><br>Crim. App. Dkt. No. 2023-03 |

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


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### UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES



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**STATUTES**

Pursuant to Rule 26 of this Court's Rules of Practice and Procedure, the Navy-Marine Corps Appellate Defense Division (Code 45) respectfully submits this brief in support of the Real Party in Interest (RPI). Specifically, Code 45 addresses the third issue presented:

> WHETHER H.V.Z. MUST SHOW THE MILITARY JUDGE CLEARLY AND INDISPUTABLY ERRED FOR WRIT [SIC] TO ISSUE UNDER ARTICLE 6b(e) U.C.M.J OR SHALL ORDINARY STANDARDS OF APPELLATE REVIEW APPLY?

## Interest of Amicus Curiae

Code 45 represents Sailors and Marines in all aspects of case review before the Navy-Marine Corps Court of Criminal Appeals (NMCCA), this Court, and the Supreme Court. Our representation includes several clients similarly situated to RPI. We seek a judicial resolution that will provide precedent for these clients.

The certified issue asks this Court for a definitive answer as to the standard of review that applies to a petition for a writ of mandamus under Article 6b, Uniform Code of Military Justice (UCMJ). Resolving this issue in favor of RPI will result in a correct consistency in the law on writs of mandamus and the standard of review under Article 6b, UMCJ.

The matters asserted in this brief are relevant to the disposition of this case. Amicus outline the appropriate way to interpret Article 6b, UCMJ in light of the statute's plain language and judicial precedent.

## Summary of Argument[1]

The Air Force Court of Criminal Appeals (AFCCA) correctly recognized that to prevail on a petition for a writ of mandamus, a petitioner must satisfy the writ standard of demonstrating a "clear and indisputable" right to the issuance of the writ.[2] Appellate courts applying this writ standard must find that the lower court's decision amounted to "more than even gross error; it must amount to a judicial usurpation of power"[3] or a "clear abuse of discretion."[4] This is because "[a] writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations."[5]

Congress specifically afforded alleged victims the ability to petition the Court of Criminal Appeals for a writ of *mandamus*.[6] The term 'mandamus' has

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[1] *See In re HVZ*, 2023-03, 2023 CCA LEXIS 292, at *1-7 (A.F. Ct. Crim. App. July 14, 2023) (unpublished) for Statement of the Case and Statement of Facts.
[2] *In re HVZ*, 2023 CCA LEXIS 292, at *7 (quoting *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (internal citations omitted)).
[3] *Hasan*, 71 M.J. at 418 (citations omitted).
[4] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953); *accord Will v. United States*, 389 U.S. 90, 95 (1967) ("[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.").
[5] *In re HVZ*, 2023 CCA LEXIS 292 at *7.
[6] 10 U.S.C. § 806b(e) (2018) (emphasis added) (hereinafter "Article 6b").

been "the subject of longstanding judicial precedent."[7] "That Congress called for 'mandamus' strongly suggests it wanted 'mandamus.'"[8]

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[9]

The plain language of Article 6b and judicial precedent regarding mandamus relief require that military appellate courts reviewing petitions for a writ of mandamus under Article 6b employ the writ standard of clear abuse of discretion or judicial usurpation of power.

[7] *In re Antrobus*, 519 F.3d 1123, 1124-25 (10th Cir. 2008) (per curiam).
[8] *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).
[9] *In re Atrobus*, 519 F.3d at 1124, 1127 (quoting *Morissette*, 342 U.S. at 263).

## Argument

H.V.Z. MUST SHOW THE MILITARY JUDGE CLEARLY AND INDISPUTABLY ERRED FOR A WRIT TO ISSUE UNDER ARTICLE 6b(e), UCMJ.[10]

## Standard of Review

The legal question of which standard of review to apply is reviewed *de novo*.[11] Questions of statutory interpretation are also reviewed *de novo*.[12]

## Discussion

### A. The Standard of Review for a Petition for a Writ of Mandamus is Higher than Ordinary Standards of Appellate Review.

The Supreme Court has routinely articulated a higher, *extraordinary* standard of review for a writ of mandamus.[13] Only exceptional circumstances

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[10] The third and fourth Issue Presented in this case indicate that the Air Force Judge Advocate General's certification has not changed the type of relief sought from a writ of mandamus to anything else. Therefore, this Court should consider the relief requested as a writ of mandamus despite the vehicle by which it arrived at this Court. *See e.g.*, *United States v. Brown*, 81 M.J. 1, 3 (C.A.A.F. 2021) (internal citations omitted) (explaining application of the All Writs Act to a certified question regarding a request for a writ to issue).

[11] *United States v. Evans*, 75 M.J. 302, 304 (C.A.A.F. 2016).

[12] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

[13] *See, e.g.*, *Allied Chemical Corp. v. Daiflon Inc.*, 449 U.S. 33 (1980) (per curiam); *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394 (1975); *see also Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (holding that mandamus is not appropriate absent a "*clear* abuse of discretion") (emphasis added); *Ex Parte Fahey*, 332 U.S. 258 (1947) ("Mandamus [is a] drastic and extraordinary remed[y] . . . reserved for really extraordinary causes."); *Maryland v. Soper*, 270 U.S. 9, 28-30 (1926) (stating that a writ was justified because of the *gross abuse of discretion* of the lower court) (emphasis added).

amounting to a "clear abuse of discretion"[14] or judicial "usurpation of power"[15] will justify the invocation of this extraordinary remedy.[16] In other words, a lower court's decision, ruling or conduct must be "so at variance with any reasonable interpretation of a statute or rule of law as to amount to an arbitrary, capricious, and irresponsible act."[17]

Indeed, the Supreme Court has articulated that it is not enough for a ruling on the question of law to be erroneous for a writ to issue.[18] In *Bankers Life & Cas. Co. v. Holland*, the Court affirmed the Fifth Circuit's decision to deny the petition for a writ of mandamus against the respondent district court judge.[19] The Court rejected petitioner's argument that the judge exceeded his legal powers when he

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[14] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).
[15] *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).
[16] The Supreme Court has cautioned against issuing a writ upon a mere showing of abuse of discretion. *See, e.g.*, *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 n.7 (1978) ("Although in at least one instance we approved the issuance of the writ upon a mere showing of abuse of discretion . . . we warned soon thereafter against the dangers of such a practice.") (citations omitted); *see also In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186-87 (10th Cir. 2009) ("There must be more than what we would typically consider to be an abuse of discretion for the writ to issue."); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309-10 (5th Cir. 2008) (en banc) ("[The Supreme Court's] admonition warns that we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal."), *cert. denied sub nom*. *Singleton v. Volkswagen of Am.*, 555 U.S. 1172 (2009).
[17] *United States v. Wade*, 15 M.J. 993, 996-97 (N-M.C.M.R. 1983).
[18] *Bankers Life*, 346 U.S. at 382-83 (quoting *De Beers Consol. Mines, Ltd.*, 325 U.S. at 317).
[19] *Id*. at 384-85.

issued an erroneous ruling on venue and ordered severance and transfer of the action.[20] The Court held that "[t]he ruling *on a question of law* decisive of the issue presented," even if erroneous, "was made in the course of the exercise of the court's jurisdiction . . . ."[21] The Court chose not to decide whether the ruling on the question of law was erroneous, instead articulating that even if erroneous, the extraordinary writ review power is meant to be used only in the "exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power.'"[22]

More recently in *Cheney v. United States District Court for D.C*, the Supreme Court again cautioned that a writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes."[23] The Court further reiterated "only exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion' will justify the invocation of this extraordinary remedy.'"[24]

Similarly, this Court and its predecessor, the Court of Military Appeals (CMA), have applied this higher standard of review to writ petitions.[25] In *United*

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[20] *Id*. at 382.
[21] *Id*. (emphasis added).
[22] *Id*. at 382-83 (quoting *De Beers Consol. Mines, Ltd.*, 325 U.S. at 317).
[23] *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 370 (2004) (citing *Ex parte Fahey*, 332 U.S. at 259-60).
[24] *Id.* at 380 (citing *Will v. United States*, 389 U.S. at 95; *Bankers Life*, 346 U.S. at 383).
[25] *See, e.g.*, *United States v. Howell*, 75 M.J. 386 (C.A.A.F. 2016) (holding that the military judge must "clearly and indisputably err" for petitioner to obtain relief);

*States v. Labella*, the CMA reviewed the military judge's jurisdictional ruling that the alleged offenses were not service-connected, resulting in the military judge dismissing the charges.[26] The military judge based his ruling on his interpretation of binding case law.[27] The Navy-Marine Corps Court of Military Review (NMCMR) granted the government's petition for a writ of mandamus to overturn the military judge's ruling.[28]

The CMA reversed the NMCMR, holding that the law was subject to differing interpretations and that a writ of mandamus was inappropriate because the military judge's ruling did not breach the high mandamus threshold.[29] The CMA articulated that the military judge's decision "must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power'" to warrant reversal through a writ of mandamus.[30]

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*Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (per curiam) (applying the "heightened standard required for mandamus relief" the Court found that petitioner had shown a "clear and indisputable" right to relief); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979) (articulating the difference between the standards that govern the award of relief in appellate review and the standards that govern in an extraordinary proceeding).

[26] *United States v. Labella*, 15 M.J. 228 (C.M.A. 1983) (per curiam).

[27] *Id*. at 229.

[28] *United States v. Labella*, 14 M.J. 976 (N.M.C.M.R. 1982), *rev'd per curiam*, 15 M.J. 228 (C.M.A. 1983).

[29] *Labella*, 15 M.J. at 229.

[30] *Id*. (quoting *United States v. Di Stefano*, 464 F.2d 845, 850 (2d Cir. 1972)) (internal quotations omitted).

Federal Circuit Courts of Appeals agree.[31] In *United States v. Di Stefano*, for example, the Second Circuit denied the government's petition for an extraordinary writ despite determining that the judge might be "wrong, indeed very wrong," in his ruling.[32] The court held that "mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules," was not enough for petitioner to meet their burden.[33] The United States Court of Appeals for the Federal Circuit applies the same standard, and noted that regardless of the underlying question, the standard of review for the lower court's decision

[31] *See, e.g.*, *In re Volkswagen of Am., Inc.*, 545 F.3d at 309 ("[M]andamus will be granted upon a determination that there has been a clear abuse of discretion."); *In re Bell South Corp.*, 334 F.3d 941, 953 (11th Cir. 2003) ("mandamus 'is to be exercised only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion.'") (internal quotations omitted); *In re Pioneer Hi-Bred Int'l*, 238 F.3d 1370, 1373 (Fed. Cir. 2001) ("The remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power.") (citations omitted); *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1251 (10th Cir. 1979) ("[Petitioner] is required to show that the order was not only erroneous under normal standards of appellate review, but also that the ruling is so extraordinary as to evidence arbitrariness and a clear abuse of discretion."), *rev'd sub nom*. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (holding district court's error was not egregious enough for Tenth Circuit to grant writ); *United States v. Di Stefano*, 464 F.2d 845, 850 (2d Cir. 1972) (conceding that even if the judge was *very wrong*, that was not enough to justify granting the writ) (emphasis added).

[32] *Di Stefano*, 464 F.2d at 850.

[33] *Id*.

under a petition for a writ of mandamus is the more deferential, traditional mandamus standard.[34]

## B. This Court Should Apply this Higher Standard of Review to Petitions for Writs of Mandamus Filed Under Article 6b, UCMJ.

In the 2015 National Defense Authorization Act (NDAA), Congress amended Article 6b to give alleged victims limited standing to petition military Courts of Criminal Appeals for writs of mandamus[35] Article 6b(e) states:

> If the victim of an offense under this chapter believes that a . . . court-martial ruling violates the rights of the victim afforded by [M.R.E. 513], the victim may petition the Court of Criminal Appeals for a *writ of mandamus* to require the . . . court-martial to comply with [M.R.E. 513].[36]

When examining Article 6b in *E.V. v. United States*, this Court stated, "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[37] As this Court has also recognized, "[t]he Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it

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[34] *In re Pioneer Hi-Bred Int'l*, 238 F.3d at 1373 n.2 (noting that although courts may review the district court's decision that certain documents are subject to privilege *de novo*, "it appears that virtually all circuits review the decision of a district court underlying a petition for writ of mandamus for abuse of discretion.").
[35] NDAA for Fiscal Year 2015, Pub. L. No. 113-291, §§ 531(f), 535, 128 Stat. 3364, 3368 (2014).
[36] 10 U.S.C. § 806b(e)(1) (2018) (emphasis added).
[37] *E.V. v. United States*, 75 M.J. 331, 333-34 (C.A.A.F. 2016) (finding article 6b grants victims the right to petition the Courts of Criminal Appeals for a writ of mandamus, but not the C.A.A.F.).

means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'"[38] And when Congress uses a term of art, it is presumed that Congress meant for that term of art to retain its meaning unless it states otherwise:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[39]

Accordingly, in *E.V.*, this Court applied the plain language doctrine to a writ petition filed under Article 6b. Rejecting the petitioner's argument that the Court had jurisdiction to hear Article 6b appeals, the Court explained, "When examined, [Article 6b] is quite straightforward . . . . Congress having legislated in this area and bestowed certain third-party rights on alleged victims, we must be guided by the choices Congress has made."[40]

While the issue in *E.V.* related to jurisdiction, the same principles of statutory construction apply to the issue here. Congress could have provided a different mechanism for alleged victims to appeal issues during trial (similar to

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[38] *Sager*, 76 M.J. at 161 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation marks omitted) (citations omitted)).
[39] *Antrobus*, 519 F.3d at 1124, 1127 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).
[40] *E.V.*, 75 M.J. at 334.

Article 62, UCMJ appeals) or it could have specified a different standard of review than the law recognizes for writs of mandamus (as Congress did in the Crime Victim's Rights Act, discussed below).[41] However, it did not.

That is why appellate courts have applied the higher writ standard of "clear and indisputable" to Article 6b writs of mandamus. The lower court in *E.V.* applied this standard, which this Court endorsed without criticism.[42] The AFCCA (the only service court to rule on this particular issue with respect to Article 6b) has also previously applied the mandamus standard of review to petitions for writs of mandamus filed pursuant to Article 6b.[43]

### C. Legislative Changes to the Crime Victim's Rights Act Highlight Congress' Intent that the Traditional Extraordinary Relief Standard Apply Under Article 6b, UCMJ.

The Crime Victim's Rights Act[44] (CVRA) sheds light on Congress' intent regarding statutes on victim's rights. Similar to Article 6b, the CVRA affords certain enumerated rights to a "crime victim."[45] The relevant provision reads:

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[41] *Cf. id.* ("Congress certainly could have provided for further judicial review in this novel situation. It did not.").
[42] *Id.* at 333.
[43] *In re KK*, 2022-13, 2023 CCA LEXIS 31, at *6-10 (A.F. Ct. Crim. App. Jan. 24, 2023) (finding that the "traditional extraordinary relief standard" applies); *see also J.M. v. Payton-O'Brien*, 76 M.J. 782, 785 (N-M. Ct. Crim. App. 2017) (applying the more deferential mandamus standard of review to a petition for a writ regarding the military judge's order to produce and release the petitioner's privileged records) (citations omitted).
[44] 18 U.S.C. § 3771 (2015).
[45] *Id*.

> Motion for relief and writ of mandamus . . . . The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus . . . . In deciding such application, the court of appeals *shall apply ordinary standards of appellate review*.[46]

The CVRA, which Congress enacted in 2004,[47] did not include this standard-of-review language until May 29, 2015.[48]

Since the amendment of this CVRA language in 2015, Congress amended Article 6b no fewer than four times, including as recently as 2021.[49] Congress has not included standard-of-review language in any of these four amendments. Just as it did for the CVRA, it could have stated a different standard for review for writ petitions pursuant to Article 6b. Alternatively, it could have provided an alleged victim the right to file an interlocutory appeal as it has done for the Government in Article 62, UCMJ, where ordinary standards of review apply.[50] However, Congress

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[46] 18 U.S.C. § 3771(d)(3) (2015) (emphasis added).
[47] Crime Victims' Rights Act, Pub. L. No. 108-405, § 102(a), 118 Stat. 2261 (2004) (current version at 18 U.S.C. § 3771 (2015)).
[48] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113(a), (c)(1), 129 Stat. 240, 241; *see also In re KK*, 2023 CCA LEXIS 31, at *9 (detailing the changes to the CVRA's standard of review versus the lack of change to that standard under Article 6b, UCMJ).
[49] NDAA for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 814 (2015); NDAA for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5105, 5203(e)(1), 130 Stat. 2895, 2906 (2016); NDAA for Fiscal Year 2018, Pub. L. No. 115-91, §§§ 531(a), 1081(a)(22), (c)(1)(B), 131 Stat. 1384, 1595, 1597 (2017); NDAA for Fiscal Year 2021, Pub. L. 116-283, §541, 134 Stat. 3388 (2021).
[50] *See* 10 U.S.C. § 862 (2018).

did neither of these. As the lower court here has previously found, this "is an indication Congress has provided different standards of review for mandamus petitions under the two laws."[51]

Additionally, prior to the addition of this standard-of-review language to the CVRA in 2015, several federal circuit courts addressed the standard of review applicable to petitions for writs of mandamus under the CVRA.[52] Those courts' analysis is relevant here since the language of Article 6b is similar to the CVRA's language prior to its amendment in 2015.

In *In re Antrobus*, the Tenth Circuit applied a plain-language interpretation of the CVRA in denying a petition for a writ of mandamus.[53] The court refused to apply normal appellate standards of review applicable to cases in the ordinary course of appeal, and instead it applied the higher mandamus standard of review.[54] The court noted that "[m]andamus is a well[-]worn term of art in our common law tradition" and "the subject of longstanding judicial precedent."[55] The court went on

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[51] *In re KK*, 2023 CCA LEXIS 31, *9-10.
[52] Six circuits applied the traditional mandamus standard of review. *See* notes 56 through 69 *infra*. *But see, e.g.*, *In re Walsh*, 229 Fed. Appx. 58, *60 (3d Cir. 2007) (unpublished) ("Mandamus relief is available under a different, and less demanding, standard under [the CVRA] in the appropriate circumstances"); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017-18 (9th Cir. 2006) (reviewed for "abuse of discretion or legal error"); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563-64 (2d Cir. 2005) (reviewed for "abuse of discretion").
[53] *Antrobus*, 519 F.3d at 1124, 1127.
[54] *Id*. at 1124, 1127, 1130.
[55] *Id*. at 1124-1125, 1127.

to say, "if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed."[56]

Similarly, in *United States v. Unknown*, the Fifth Circuit addressed whether "the CVRA . . . requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions" and held that no, the traditional mandamus standard applied.[57] The court presumed that absent contrary indication, the "statutory term [mandamus] has its common-law meaning"[58] and Congress "legislate[s] against the background of our traditional legal concepts."[59]

The Sixth, Eighth, Eleventh, and D.C. Circuits all agreed with this interpretation of the CVRA before Congress specifically included language to the contrary (which Congress has *not* done for Article 6b, UCMJ).[60] In *United States v.*

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[56] *Id*. at 1128 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803)).
[57] *United States v. Unknown (In re Unknown)*, 701 F.3d 749, 756-57 (5th Cir. 2012) (en banc), *vacated and remanded on other grounds sub nom. Paroline v. United States*, 572 U.S. 434 (2014) (determining restitution).
[58] *Id*. (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)).
[59] *Id*. at 755 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)).
[60] *See, e.g.*, *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234 (11th Cir. 2014) ("The plain text of the statute . . . support[s] our conclusion that the traditional mandamus standard of review applies to petitions for writs of mandamus filed pursuant to the CVRA."); *United States v. Fast*, 709 F.3d 712 (8th Cir. 2013) ("That Congress called for 'mandamus' strongly suggests it wanted 'mandamus' . . . Had Congress intended an ordinary appellate standard of review, it could have given victims a right to direct appeal.") (internal citations omitted), *vacated and remanded on other grounds sub nom. Vicky v. Fast*, 572 U.S. 1084 (2014) (determining restitution); *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) ("The issuance of a writ of mandamus is relief that is governed by well-established

*Monzel*, the D.C. Circuit analyzed the petitioner's argument that it should apply ordinary appellate review and review *de novo* victims' claims for restitution under the CVRA.[61] The court refused to apply *de novo* review, determined that the traditional mandamus standard applied, and, in accordance with the statute's plain language, reviewed for "clear and indisputable" error.[62]

Like the language of the pre-2015 CVRA that these U.S. Circuit Courts of Appeals addressed, Article 6b provides crime victims the right to petition for writs of mandamus without any stated intent that military appellate courts deviate from the traditional mandamus standards in addressing them.[63] Hence, this Court should the same plain-language approach to Congress's use of the term "writ of mandamus" in Article 6b(e)(1), interpret that term pursuant to its traditional legal meaning, and apply the higher mandamus standard of review it requires.

**Conclusion**

Therefore, in accordance with binding precedent regarding the standard of review applicable to writs of mandamus, this Court should review the military

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standards. The use of that specific term in the statute . . . convinces us that those usual standards apply here.").

[61] *Monzel*, 641 F.3d at 532-33.

[62] *Id*.

[63] 10 U.S.C. § 806b(e)(3) (2018) (instructing the Court of Criminal Appeals to give writs of mandamus priority over all other proceedings).

judge's ruling for a clear and indisputable abuse of discretion or judicial usurpation of power.

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## Appendix

1. *In re HVZ*, 2023 CCA LEXIS 292 (A.F. Ct. Crim. App. Jul. 14, 2023) (unpublished).

2. *In re Walsh*, 229 Fed. Appx. 58 (3d Cir. 2007) (unpublished)

## Certificate of Compliance

This amicus complies with the length limitation of Rule 26(f) because it contains less than 4,500 words. Using Microsoft Word version 2016 with 14-point Times New Roman font, this brief, including all headings, footnotes, and quotations, but excluding the index, table of cases, statutes, and other authorities, appendix, and certificates, contains 4,096 words.

**Certificate of Filing and Service**

I certify that the foregoing was electronically delivered to this Court, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 5, 2023.

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# *In re HVZ*

United States Air Force Court of Criminal Appeals

July 14, 2023, Decided

Misc. Dkt. No. 2023-03

**Reporter**
2023 CCA LEXIS 292 *

In re HVZ, Petitioner, Michael K. FEWELL, Technical Sergeant (E-6), U.S. Air Force, Real Party in Interest

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Later proceeding at *H.V.Z v. United States, 2023 CAAF LEXIS 651 (C.A.A.F., Sept. 13, 2023)*

**Prior History:** **[*1]** Review of Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. Military Judge: Matthew P. Stoffel. GCM convened at: Luke Air Force Base, Arizona.

## Core Terms

military, records, medical record, trial counsel, custody, military authorities, disclosure, non-privileged, discovery, court-martial, patient, proceedings, mental health records, writ of mandamus, preparation, defense motion, trial court, indisputably, privacy, further order, regulations, privileged, documents, contends, offenses

**Counsel:** For Petitioner: Major Marilyn S.P. McCall, USAF; Devon A.R. Wells, Esquire.

For Technical Sergeant Fewell: Major David L. Bosner, USAF; Captain Samantha M. Castanien, USAF; Captain Rebecca J. Saathoff, USAF.

For the United States: Colonel Naomi P. Dennis, USAF; Major Morgan R. Christie, USAF; Mary Ellen Payne, Esquire.

**Judges:** Before JOHNSON, RICHARDSON, and CADOTTE, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge CADOTTE joined.

**Opinion by:** JOHNSON

## Opinion

JOHNSON, Chief Judge:

On 16 May 2023, pursuant to *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b*,[1] and *Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 19*, Petitioner requested this court issue a writ of mandamus and stay of proceedings in the pending court-martial of *United States v. Technical Sergeant Michael K. Fewell* (the Accused). Petitioner requests this court "vacate the trial court's decision [dated 11 May 2023] to order disclosure of extensive medical records" of Petitioner. On 19 May 2023, this court issued an order staying the court-martial proceedings and staying further implementation of the trial court's 11 May **[*2]** 2023 order to the 56th Medical Group (56 MDG), pending further order by this court. This court also ordered counsel for the Government and counsel for the Accused to submit briefs in response to the petition no later than 8 June 2023. This court received the parties' timely responsive briefs opposing the petition on 8 June 2023. Petitioner submitted a reply brief on 15 June 2023.

Having considered the petition, the responsive briefs, Petitioner's reply brief, and the matters attached thereto, we deny the petition.

### I. Background

The petition, responsive briefs, and reply brief, with their several attachments, establish the following sequence of events.

On 10 January 2023, the convening authority referred for trial two specifications of sexual assault in violation of *Article 120, UCMJ, 10 U.S.C. § 920*; two

[1] References in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.).

specifications of domestic violence in violation of *Article 128b, UCMJ, 10 U.S.C. § 928b*; and two specifications of wrongful use of controlled substances in violation of *Article 112a, UCMJ, 10 U.S.C. § 912a*. Petitioner is the alleged victim of the charged *Article 120, UCMJ*, and *Article 128b, UCMJ*, offenses.

On 28 April 2023, the Defense moved the trial court to "immediately secure and produce" Petitioner's "medical records and non-privileged materials within mental health records, specifically **[*3]** unprotected health information as described under *United States v. Mellette[, 82 M.J. 374 (C.A.A.F. 2022)]*," in the possession of the Government.

On 2 May 2023, through her Victims' Counsel, Petitioner submitted to the trial court an opposition to the defense motion, with the exception of medical records relating specifically to injuries to Petitioner's neck and back. Petitioner argued, "[o]utside of this item, Defense has not only failed to show that a treatment or diagnosis exists, but that if they did, such records do not consist solely of privileged information [under Mil. R. Evid. 513]. Nor has Defense shown they would be entitled to such records under R.C.M. 703(e) . . . ." In the alternative, if the military judge granted the defense motion, Petitioner requested the military judge perform in camera review of her records and release only those he determined to be relevant and necessary to the preparation of the defense.

On 4 May 2023, the Government responded and opposed the defense motion in part. The Government did not oppose the motion with respect to nonprivileged Family Advocacy records and medical records dated on and after 19 January 2020—the date of the earliest alleged offense of which Petitioner is the alleged victim—but opposed the disclosure of records **[*4]** from prior to 19 January 2020.

On 11 May 2023, the military judge issued an order granting the defense motion in part. The military judge's findings of fact included, *inter alia*, that Petitioner was the "primary witness against the [A]ccused" on each of the charged offenses; that Petitioner and the Accused were married at the time of the alleged offenses; and that Petitioner had told multiple individuals she had sought medical and mental health treatment due to injuries allegedly caused by the Accused, and had spoken with Family Advocacy personnel. The military judge noted the responses to the defense motion from the Government and from Petitioner, but stated he had not considered the latter due to Petitioner's "lack of standing before this trial court," citing *In re HK, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 2021)* (order). The military judge further explained:

> The court concludes the [D]efense is entitled to discovery of [Petitioner's] medical records and non-privileged mental health records relevant to the charged offenses that are maintained by the medical treatment facility located at Luke Air Force Base [AFB]. The court concludes the [D]efense has made a valid request for discovery of the information in accordance with R.C.M. 701(a)(2)(B). The court **[*5]** further concludes that any such records are within the possession, custody, or control of military authorities. *See generally In re A[L], [Misc. Dkt. No. 2022-12,] 2022 CCA LEXIS 702 (A.F. [Ct. Crim. App. 7 Dec.] 2022)* [(order)]. . . . The court also concludes that the content of the records from the date of the first charged offenses, that is 19 January 2020 through present day is relevant to defense preparation; in fact, the parties are in agreement on this matter. . . .

The military judge similarly found the Defense was entitled to discovery of records maintained at the Family Advocacy office on Luke AFB. The military judge found the defense motion was "not ripe" with respect to records not maintained at Luke AFB because the Defense "has not provided sufficient particularity to the [P]rosecution of where to search for such records . . . ."

Accordingly, pursuant to R.C.M. 701(g)(1), the military judge ordered trial counsel to "identify what medical records, nonprivileged mental health records, and nonprivileged Family Advocacy records of [Petitioner] are within the possession, custody, or control of military authorities, located at Luke [AFB], including those generated before, during, and after the charged timeframes." The military judge further ordered trial counsel to provide to the Defense **[*6]** such records as were subject to disclosure and "relevant to the [D]efense's preparation." Trial counsel were further ordered to inform the Defense and military judge of records that were privileged or not subject to disclosure and the basis for nondisclosure.

In furtherance of his ruling, on 11 May 2023 the military judge also issued a separate order to the 56 MDG located at Luke AFB to "provide any medical, mental health, or Family Advocacy records [pertaining to Petitioner] maintained by the [56 MDG] or any subordinate clinic." The military judge directed the 56 MDG to work with a medical law attorney to "ensure any and all matters subject to privilege under Military Rule of

Evidence 513 are redacted prior to providing the information" to trial counsel "as soon as practicable and no later than 1700 local on 24 May 2023." The military judge further ordered that only the Prosecution and Defense (to include appointed expert consultants), as well as Petitioner and her Victims' Counsel, were to have access to the disclosed records.

As noted above, on 19 May 2023 this court stayed the proceedings of the court-martial and further implementation of the military judge's 11 May 2023 order.

## II. Discussion

### A. Law

The *All Writs Act, 28 U.S.C. § 1651(a)*, grants **[*7]** a Court of Criminal Appeals (CCA) "authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction." *Chapman v. United States, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016)* (citing *Loving v. United States, 62 M.J. 235, 246 (C.A.A.F. 2005)*). The purpose of a writ of mandamus 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, 63 S. Ct. 938, 87 L. Ed. 1185 (1943)* (citations omitted). In order to prevail on a petition for a writ of mandamus, the 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)* (citing *Cheney v. United States Dist. Court, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)*); *see also In re KK*, *__ M.J. __, Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *10 (A.F. Ct. Crim. App. 24 Jan. 2023)* (holding traditional mandamus standard of review applicable to *Article 6b(e), UCMJ*, petitions). A writ of mandamus "is a 'drastic instrument which should be invoked only in truly extraordinary situations.'" *Howell v. United States, 75 M.J. 386, 390 (C.A.A.F. 2016)* (quoting *United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)*).

*Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1)*, states:

> If the victim of an offense under this chapter believes that . . . a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in *paragraph (4)*, the victim may petition the [CCA] for a writ of mandamus to require the . . . court-martial to comply with the section (article) or rule.

*Article 6b(e)(4), UCMJ*, provides **[*8]** that this right to petition the CCA for a writ of mandamus applies with respect to protections afforded by, *inter alia*, *Article 6b, UCMJ*, and Mil. R. Evid. 513.

*Article 6b(a)(8), UCMJ*, provides that the victim of an offense under the UCMJ has, among other rights, "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim . . . ."

In general, disclosure to the defense of documents in the possession of the prosecution is governed by Rule for Courts-Martial (R.C.M.) 701, whereas production to the defense of documents not in the possession, custody, or control of military authorities is governed by R.C.M. 703. *See United States v. Bishop, 76 M.J. 627, 634 (A.F. Ct. Crim. App. 2017)*; *see also United States v. Stellato, 74 M.J. 473, 481 (C.A.A.F. 2015)* (citing R.C.M. 701(a)(2)(A)). "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence . . . ." R.C.M. 701(e); *see also 10 U.S.C. § 846(a)* ("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.") "After service of charges, upon request of the defense, the Government shall permit the defense to inspect any . . . papers, documents, [or] data . . . if the item is within the possession, custody, or control of military **[*9]** authorities and [ ] the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i).

Mil. R. Evid. 513(a) 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.

"Before ordering the production or admission of evidence of a patient's records or communication,[2] ] the

[2] For purposes of the rule, Mil. R. Evid. 513(b)(5) defines "[e]vidence of a patient's records or communications" as

military judge must conduct a hearing, which shall be closed. . . . The patient must be afforded a reasonable opportunity to attend the hearing and be heard." Mil. R. Evid. 513(e)(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." Mil. R. Evid. 513(e)(3). In *Mellette*, the United States Court of Appeals for the Armed Forces (CAAF) held "[t]he phrase 'communication made between the patient and a psychotherapist' [in Mil. R. Evid. 513(a)] does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications **[*10]** between the patient and the psychotherapist," and "that diagnoses and treatments contained within medical records [including mental health records] are not themselves uniformly privileged under [Mil. R. Evid.] 513." *82 M.J. at 375, 378*.

**B. Analysis**

The military judge's ruling and order essentially did three things: (1) required the 56 MDG, with the assistance of a medical law attorney, to identify Petitioner's medical records, mental health records, and Family Advocacy records within the possession or control of the 56 MDG or subordinate clinics, and provide the non-privileged records to trial counsel; (2) required trial counsel to notify the military judge and Defense of the existence of records that were privileged or otherwise not subject to disclosure under R.C.M. 701 (*i.e.*, relevant to the preparation of the Defense); and (3) required trial counsel to provide the discoverable records to the Defense.

Petitioner requests this court "deny [g]overnment and [d]efense counsel [Petitioner's] medical records" and order the rescission of the military judge's 11 May 2023 order to the 56 MDG. In the alternative, Petitioner requests this court order the military judge review the records in camera and "apply the proper standards before producing **[*11]** the records to counsel." The petition raises two primary issues for our consideration: (1) whether the military judge erred by refusing to consider Petitioner's response to the Defense's discovery motion for lack of standing; and (2) whether the military judge incorrectly analyzed the Defense's motion as a matter of discovery governed by R.C.M. 701(a)(2)(A) rather than a matter of production governed by R.C.M. 703(g)(3)(C)(ii). We consider each contention in turn.

**1. Refusal to Consider Petitioner's Motion Response**

As noted above, the military judge refused to consider Petitioner's response to the Defense's discovery motion because he found Petitioner lacked "standing" before the court-martial, citing *In re HK*. In that decision, this court explained that although the alleged victim had standing to petition this court regarding her right to proceedings free from unreasonable delay, *Article 6b, UCMJ*, "include[d] no provision requiring a victim be granted the opportunity to be heard *at the trial level* regarding his or her right to proceedings free from unreasonable delay." *In re HK, order at *7, *9* (emphasis added). The military judge's comments imply he concluded, similar to this court's determination in *In re HK*, that victim rights enumerated in *Article 6b(a), UCMJ*, including *inter alia* ***[*12]*** the "right to be treated with fairness and with respect for the dignity and privacy of the victim," do not create an independent right for a victim to be heard by the military judge at the trial level with regard to such rights. *Article 6b(e), UCMJ*, provides a victim the right to petition this court for a writ of mandamus if he or she believes a ruling by the trial court violates rights protected by *Article 6b, UCMJ*, itself or by other provisions of law specified in *Article 6b(e)(4), UCMJ*. However, *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*.

On the other hand, *Article 6b, UCMJ*, does not remove a victim's right to be heard where that right exists in other provisions of law independent of *Article 6b, UCMJ*. The military judge concluded that the Defense's motion implicated discovery of Petitioner's records under R.C.M. 701 rather than production of her records under R.C.M. 703. As we discuss below, Petitioner fails to demonstrate the military judge was clearly and indisputably incorrect. R.C.M. 701, like *Article 6b, UCMJ*, itself, does not provide Petitioner the right to be heard at the trial court.

**2. Discovery Under R.C.M. 701 versus Production Under R.C.M. 703**

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"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 patent's mental or emotional condition."

Petitioner contends the military judge erred by ordering **[*13]** discovery of her non-privileged medical and mental health records pursuant to R.C.M. 701(a)(2)(B), rather than analyzing the Defense's motion under R.C.M. 703. By doing so, Petitioner contends, the military judge erroneously applied the less-demanding "relevance" disclosure standard of R.C.M. 701(a)(2)(A)(i) rather than the more stringent "relevant and necessary" production standard of R.C.M. 703(e)(1). Petitioner contends the military judge's asserted error also denied her the right to notice and an opportunity to challenge the disclosure afforded to victims by R.C.M. 703(g)(3)(C)(ii) with respect to records "not under the control of the Government." We again find Petitioner has failed to demonstrate the military judge clearly and indisputably erred.

R.C.M. 701(a)(2)(A)(i) provides the Defense access to, *inter alia*, "papers, documents, [and] data," or copies thereof, "if the item is within the possession, custody, or control of military authorities and [ ] the item is relevant to defense preparation . . . ." We find 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."

Whether any of the records are in fact **[*14]** relevant and to be disclosed to the Defense is effectively yet to be determined. At this stage, the military judge has required trial counsel to review the non-privileged records provided by the 56 MDG and to provide to the Defense only those trial counsel determine to be subject to disclosure under R.C.M. 701. Those records the 56 MDG identified as privileged, and those records trial counsel determined to be not subject to discovery, are to be identified to the Defense and military judge without disclosure at this point—potentially to be the subject of further proceedings.

Petitioner offers several arguments in support of her contention the military judge erred. We address the most significant of these in turn.

Petitioner contends she has a constitutional privacy interest in her medical records managed by the 56 MDG. We agree. *See, e.g.*, *Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1137 (3d Cir. 1995)* (interpreting *Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)*); *A.L.A. v. West Valley City, 26 F.3d 989, 990 (10th Cir. 1994)* (citations omitted). However, Petitioner also recognizes there is a "balance [between] the Accused's constitutional right to put on a defense, and the rights of a victim to maintain the privacy of his or her medical records." We disagree with Petitioner's interpretation of how the applicable law strikes the balance between these competing interests. **[*15]**

Petitioner cites *Stellato* for the proposition that "evidence not in the physical possession of the prosecution team is still within its possession, custody, or control . . . when: (1) the prosecution has both knowledge of and access to the object; [and] (2) the prosecution has the legal right to obtain the evidence . . . ." *74 M.J. at 484-85*. Petitioner then contends that the *Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-191*, and its implementing regulations, notably Department of Defense Manual (DoDM) 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs* (13 Mar. 2019), prohibit trial counsel from accessing Petitioner's medical records "without a court order," citing DoDM 6025.18 ¶ 4.4.e. Therefore, Petitioner implies, her medical records were not in the possession of military authorities for purposes of R.C.M. 701(a)(2)(A). In light of the standard of review applicable to the petition, Petitioner's argument is not persuasive.

To begin with, the 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 **[*16]** 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.

Moreover, if we do apply *Stellato* and HIPAA in this situation, we do not reach Petitioner's conclusion that trial counsel access to patient records maintained by the 56 MDG necessarily requires a court order. As this court explained in *In re AL*, 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"—in that case, records maintained by an

Army military treatment facility—using an "administrative request" that meets certain criteria,[3] rather than a court order. *In re AL, unpub. order at 2022 CCA LEXIS 702* (citations omitted). 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. *See Stellato, 74 M.J. at 484-85*.[4]

In her reply brief, Petitioner argues:

> Categorizing [Military Health System] records as in the possession, custody, and [sic] control of military authorities means ***any MHS patient records are accessible by prosecution without process***—to include any accused. Yet, if process is required, as is the case to comply with HIPAA, then [Military Health System] records are not in possession, custody, or control of military authorities or the Government.

We recognize the implied breadth of the military judge's reasoning. However, it is possible for non-privileged but sensitive personal records to be in the possession of military authorities—and **[*18]** the Prosecution in particular—and yet for the subject of those records to retain a protected privacy interest in them. Government attorneys routinely handle sensitive information that is subject to legal protection from unauthorized disclosure. Moreover, it is not accurate to say that finding medical records maintained by an Air Force medical group are within the possession, custody, or control of military authorities means they are accessible "without process."

As indicated above, HIPAA and its implementing regulations do set out a process. Read in conjunction with *Article 46(a), UCMJ*, and R.C.M. 703(g)(2), it is at least fairly arguable 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. DoDM 6025.18 ¶ 4.4.f.(1)(b)3. As in *In re AL*, we need not and do not determine whether this interpretation is definitively correct under ordinary standards of review applicable outside of an *Article 6b(e), UCMJ*, writ petition; we do find Petitioner has not met her burden to demonstrate she is clearly and indisputably entitled to relief.

**3. Additional Considerations**

We pause to address certain additional points made by the **[*19]** military judge and Government, and to clarify the limits of our ruling on the petition.

The military judge's ruling stated Petitioner's medical and non-privileged mental health records maintained by the 56 MDG "are within the possession, custody, or control of military authorities" for purposes of R.C.M. 701(a)(2)(B). For this proposition, the military judge cited generally *In re AL*, where this court stated that records possessed by a medical treatment facility on an Army base "were 'under the control of the Government,' that is, an agency of the United States." *In re AL, unpub. order at 2022 CCA LEXIS 702*. To be clear, and as the military judge perhaps recognized, the cited language from *In re AL* provides only indirect support for his conclusion. The cited language was not interpreting the meaning of "possession, custody, or control of military authorities" in R.C.M. 701(a)(2)(B), but whether a trial counsel could use an administrative request to obtain medical records "under the control of the Government" in accordance with R.C.M. 703(g)(2). The context is important lest *In re AL* be interpreted to stand for a proposition it does not. Moreover, it must be noted that *In re AL*, like the instant matter, was an *Article 6b(e), UCMJ*, mandamus petition, and its explanation of the law must be read cautiously **[*20]** in light of the standard of review and a petitioner's heavy burden to demonstrate a clear and indisputable right to relief.

In its answer brief, the Government notes that in the instant case, like *In re AL*, both the Government and Petitioner conceded at trial that the Defense should receive some portion of the contested records. The Government quotes *In re AL, unpub. order at 2022 CCA*

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[3] DoDM 6025.18 ¶ 4.4.f.(1)(b)3 provides:

> A DoD covered entity may disclose [protected health information] . . . [i]n compliance **[*17]** with, and as limited by, the relevant requirements of . . . [a]n administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if: [ ] [t]he information sought is relevant and material to a legitimate law enforcement inquiry[;] [ ] [t]he request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought[; and] [ ] [d]e-identified information could not reasonably be used.

[4] As in *In re AL*, our conclusion that Petitioner has not met her burden to demonstrate her clear and indisputable right to mandamus relief "is not a decision as to whether, in other forums and under ordinary standards of review, Petitioner would be entitled to relief." *In re AL, unpub. order at 2022 CCA LEXIS 702 n.3*.

*LEXIS 702*, for the proposition that "[t]his situation implicates R.C.M. 701." However, there was a distinction in *In re AL* that rendered the application of R.C.M. 701 more evident there than in the instant case. In *In re AL*, trial counsel had already obtained the records at issue. Thus "[t]he military judge was presented with a situation in which, whether by proper or improper means, the Prosecution was in possession of and had reviewed the records." *In re AL, unpub. order at 2022 CCA LEXIS 702*. The fact that the prosecutors already had the records in their possession is what implicated R.C.M. 701, more so than the concessions by the trial counsel and victim that a portion of the records at issue should be disclosed.

Finally, we note Petitioner's "Statement of the Issue" does not assert any infringement of her substantive or procedural protections under Mil. R. Evid. 513. Accordingly, we have not reviewed whether the procedure specified **[*21]** by the military judge's order—whereby the 56 MDG assisted by "a medical law attorney" determines what matters are privileged and to be withheld before Petitioner's records are delivered to trial counsel—appropriately safeguards Petitioner's privilege to prevent disclosure of confidential communications protected by Mil. R. Evid. 513, and our ruling is without prejudice to Petitioner's future ability to seek review pursuant to *Article 6b(e)(4)(D), UCMJ*.

### III. Conclusion

Petitioner's petition for extraordinary relief in the nature of a writ of mandamus is **DENIED**.

**It is further ordered**:

The stay of proceedings in the court-martial of *United States v. Technical Sergeant Michael K. Fewell* and stay on implementation of the trial court's order dated 11 May 2023 to the 56th Medical Group, previously issued by this court on 19 May 2023, are hereby **LIFTED**.

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# *In re Walsh*

United States Court of Appeals for the Third Circuit

December 15, 2006, Submitted Under Rule 21, Fed. R. App. P. ; April 19, 2007, Filed

No. 06-4792

**Reporter**
229 Fed. Appx. 58 *; 2007 U.S. App. LEXIS 9071 **

IN RE: RORY M. WALSH, Petitioner

**Notice: [**1]** NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Subsequent History:** Motion granted by, in part, Motion denied by, in part, Motion granted by *Walsh v. United States, 2007 U.S. Dist. LEXIS 61610 (M.D. Pa., Aug. 22, 2007)*

**Prior History:** On a Petition for Writ of Mandamus from the United States District Court for the Middle District of Pennsylvania. (Related to Civ. No. 05-cv-00818).

*Walsh v. United States, 2006 U.S. Dist. LEXIS 74361 (M.D. Pa., Oct. 12, 2006)*

## Core Terms

mandamus, temporary restraining order, district court, expedite, requests, writ petition, discovery, military officer, crime victim, break-ins, motions, sovereign immunity, mandamus petition, attempted murder, summary judgment, adequate means, summary action, wrong court, expeditious, entities, military, argues

## LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

***HN1*** **Appellate Jurisdiction, Final Judgment Rule**

Mandamus is an extraordinary remedy. Within the discretion of the issuing court, mandamus traditionally may be used only 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. A petitioner must show no other adequate means to attain the desired relief and a right to the writ that is clear and indisputable. For disagreements with a district court on issues of discovery, sovereign immunity, and summary judgment, a litigant has the ordinary avenue of appeal available to him or her after the district court enters a final order in his or her case.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

***HN2*** **Jurisdiction Over Actions, Limited Jurisdiction**

While mandamus relief is available under a different, and less demanding, standard under *18 U.S.C.S. § 3771* in the appropriate circumstances, *§ 3771(d)(3)*, neither it, nor other relief under *§ 3771*, is available in the United States Court of Appeals for the Third Circuit.

Criminal Law & Procedure > Trials > Witnesses > General Overview

***HN3*** **Trials, Witnesses**

*18 U.S.C.S. § 1514* allows for an order to restrain

harassment of a crime victim or witness.

Civil
Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN4[] **Injunctions, Temporary Restraining Orders**

Fed. R. Civ. P. 65 governs the issuance of temporary restraining orders in the district courts.

Civil Procedure > Appeals > Motions on Appeal

HN5[] **Appeals, Motions on Appeal**

3rd Cir. R. 4.1 provides an avenue for a party to seek an expedited appeal. Expedition under R. 4.1 requires an exceptional reason. 3rd Cir. R. 4.1, Committee Comments, states that he rule require motions for expedited appeals to be made promptly.

**Counsel:** IN RE: RORY M. WALSH, Petitioner, Pro se, York, PA.

For UNITED STATES OF AMERICA, DEPT NAVY, JERRY D. HUMBLE, MICHAEL J. BYRON, THOMAS F. GHORMLEY, JAMES L. JONES, JR., RICHARD M. WENZELL, WEST, M. W. MCERLEAN, PAUL D. ROY, Respondents: Mark E. Morrison, Office of United States Attorney, Harrisburg, PA.

**Judges:** Before: BARRY, AMBRO AND FISHER, CIRCUIT JUDGES.

## Opinion

**[*59]** PER CURIAM

Rory M. Walsh sued the United States of America, the Department of the Navy, and eight military officers relating to incidents, including a burglary and his attempted murder by arsenic poisoning, that allegedly occurred while Walsh was serving in the Marine Corps. In response to Defendants' motions to dismiss, the District Court dismissed all claims against the United States, the Navy, and **[**2]** seven of the military officers. Claims remain against Defendant Jones, but, on October 31, 2006, on Jones's motion, the District Court stayed proceedings against him until February 1, 2007, pursuant to the Service Members Civil Relief Act. Apparently, General Jones was stationed out of the country on active duty in the military.

Walsh now petitions for a writ of mandamus. In his petition, he complains that Jones and the other Defendants "continue to resist discovery" and violate the District Court's orders. He also believes that Jones has orchestrated break-ins at his residence. For these reasons, he contends that he is entitled to relief under the victims' rights statute of 18 U.S.C. § 3771. Specifically, ostensibly proceeding under § 3771(a)(1), he asks for a restraining order against Jones, Defendant Humble, and various other military entities and officers. Pursuant to § 3771(d)(3), he requests the immediate arrest of Humble on charges of attempted murder. He also requests that Assistant United States Attorney Mark Morrison be removed as defense counsel, in part because Morrison has not chosen to prosecute Humble, and in part because Morrison is allegedly **[**3]** involved in removing evidence from Walsh's home during break-ins. Walsh requests restitution under § 3771(a)(6) for discovery violations and for District Court discovery rulings that he **[*60]** deems unsatisfactory. He also argues that the District Court improperly concluded that sovereign immunity bars his claims against the Navy, and asks that we presently consider whether the District Court's ruling on that issue was correct. Walsh also asks that we "seriously consider immediately reviewing and reversing" the District Court's order denying his motion for summary judgment and an order allowing Defendants to withdraw what he terms "de facto admissions."

Soon after filing his petition for writ of mandamus, Walsh filed a motion for summary action on his mandamus petition. In a separate motion, he requests "expeditious consideration" of his petition under Local Rule 4.1. He argues that such consideration is warranted because Jones retired from the Marine Corps on December 8, 2006, and because Naval Intelligence Agents purportedly broke into Walsh's residence on October 18, 2006. With his motion to expedite, Walsh requests a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure. **[**4]** Specifically, he asks that we order Jones to "surrender both his diplomatic and domestic passports" and that we freeze Jones's assets. In another motion, Walsh seeks a temporary restraining order against Jones, Humble, and military officers and entities pursuant to 18 U.S.C. § 1514.

We will deny Walsh's petition and motions. To the extent

that Walsh petitions for a writ of mandamus independently of 18 U.S.C. § 3771, we conclude that he does not overcome the high hurdle for such relief. HN1[] Mandamus is an extraordinary remedy. *See* Kerr v. United States Dist. Court, 426 U.S. 394, 402, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). Within the discretion of the issuing court, mandamus traditionally may be "used … only '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.'" *Id*. (citations omitted). A petitioner must show "'no other adequate means to attain the desired relief, and … a right to the writ [that] is clear and indisputable.'" *See* In re Patenaude, 210 F.3d 135, 141 (3d Cir. 2000) (citation omitted). For his disagreements with the District **[**5]** Court on issues of discovery, sovereign immunity, and summary judgment, Walsh has the ordinary avenue of appeal available to him after the District Court enters a final order in his case. [1] Accordingly, Walsh cannot show that no other adequate means of relief exists. *See* Madden v. Myers, 102 F.3d 74, 79 (3d Cir. 1996).

**[**6]** HN2[] While mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances, *see* 18 U.S.C. § 3771(d)(3); Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006); United **[*61]** States v. Rigas, 409 F.3d 555, 562 (2d Cir. 2005), neither it, nor the other relief Walsh requests under § 3771, is available to Walsh here. Even assuming that Walsh is a crime victim for whom mandamus and other relief is available under § 3771 (a generous assumption, *see* 18 U.S.C. § 3771(e) (defining "crime victim")), Walsh applies for relief in the wrong court. *See id*. at § 3771(d)(3). As Walsh is not entitled to a writ of mandamus under § 3771 or otherwise, he is not entitled to summary action on his mandamus petition.

Walsh's reliance on 18 U.S.C. § 1514 for relief also is misplaced. Not only does he apply for a temporary restraining order in the wrong court, but also he is not the person authorized by statute to apply for such HN3[] an order to restrain harassment of a crime victim or witness. *See* **[**7]** 18 U.S.C. § 1514(a). Accordingly, we deny Walsh's request for a temporary restraining order pursuant to 18 U.S.C. § 1514.

We also deny Walsh's request for a temporary restraining order pursuant to Federal Rule of Civil Procedure 65. HN4[] Rule 65 governs the issuance of temporary restraining orders in the district courts. Furthermore, even if Rule 65 governed in this case, we would not conclude that Walsh satisfied the standard for a temporary restraining order against Jones. *See* Nutrasweet Co. v. Vit-Mar Enters., 176 F.3d 151, 153 (3d Cir. 1999).

We also deny Walsh's "motion for expeditious consideration" under Local Rule 4.1. First, HN5[] Local Rule 4.1 provides an avenue for a party to seek an expedited appeal. The instant case is not an appeal -- it is a petition for writ of mandamus. Second, expedition under Local Rule 4.1 requires an exceptional reason. Walsh does not present an exceptional reason (and to the extent that he seeks expedition because of alleged October break-in, he does not timely present a basis to expedite). *See* Local Rule 4.1 & Committee Comments (requiring motions **[**8]** for expedited appeals to be made promptly).

In sum, we will deny Walsh's petition for writ of mandamus, and we deny his motions.

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[1] Although Walsh believes that at least some of the District Court's orders to which he objects are immediately appealable, we note that none appears to be so. He appears to confuse the appealability of an order denying a motion to dismiss or a motion for summary judgment on the basis of immunity with the appealability of an order granting such a motion on immunity grounds. See Mitchell v. Forsyth, 472 U.S. 511, 525, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); Kulwicki v. Dawson, 969 F.2d 1454, 1459-60 (3d Cir. 1992); Schrob v. Catterson, 948 F.2d 1402, 1407 (3d Cir. 1991). The latter, unlike the former, is not immediately appealable. Nor are orders relating to discovery disputes or denying summary judgment ordinarily immediately appealable. *See* Enprotech Corp. v. Renda, 983 F.2d 17, 20-21 (3d Cir. 1993) (holding that an order denying a discovery motion is not a final decision of the District Court within the meaning of 28 U.S.C. § 1291); McNasby v. Crown, Cork & Seal Co., 832 F.2d 47, 49 (3d Cir. 1987) (holding that an order denying a motion for summary judgment is not an immediately appealable order).