October 2, 2023

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

H.V.Z.
Appellant

REPLY ON BEHALF OF APPELLANT

v.

Crim. App. Dkt. No. 2023-03
USCA Dkt. No. 23-0250/AF

United States
Appellee

and

TSgt Michael K. Fewell
Real Party in Interest

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SUMMARY OF ARGUMENT

Any cursory review of the Rules for Courts-Martial (R.C.M.s) shows the term "military authorities" does not include Military Treatment Facilities (MTFs), but rather those "involved in the case." R.C.M. 701(d)(discussion). This Court's decision in *Stellato*, as well as *Thompson* and *Abrams*, compel the same conclusion. Because MTFs are not "involved in the case," H.V.Z.'s DoD Health Record is not in the *physical* possession, custody, or control of military authorities.

Likewise, H.V.Z.'s records are not in the *constructive* possession, custody, or control of military authorities because these authorities do not even know whether records exist (i.e. they have no knowledge), and they can only gain access to them if they comply with the Health Insurance Portability and Accountability Act (H.I.P.A.A.), and even then, only if the MTF allows it (i.e. they have no meaningful access). 42 U.S.C. §§ 1320d through 1320d-8 (hereinafter H.I.P.A.A.); see also 45 C.F.R. §§ 164.500-534. Likewise, H.I.P.A.A.[1] does not give prosecutors a "legal right" to H.V.Z.'s DoD Health Record through "administrative requests" or the "valid law enforcement" exception. If it did,

[1] H.I.P.A.A. provides the legal rights and processes that Department of Defense Manual (DoDM) 6025.18 incorporates.

trial counsel would also have a legal right to any other records subject to H.I.P.A.A., civilian or military.

H.V.Z. has standing to object to the disclosure of her medical records under R.C.M. 703(g)(3)(C)(ii). Even without that provision, H.V.Z. can demonstrate traditional standing under the rubric laid out in *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992), specifically through 1) *injury* to her right to privacy, 2) *caused* by the military judge refusing to provide her due process, and 3) the ability of the military judge, the A.F.C.C.A., and this Court to *redress* the problem.

Lastly, ordinary standards of appellate review apply to writs filed under Article 6b(e), UCMJ. The All Writs Act applies in cases where there is no established appellate process. 28 USC § 1651 (hereinafter All Writs Act). Here, Congress created a statutory appellate process for rights violations under Article 6b, UCMJ, patterned deliberately after the appellate process in the Crime Victims' Rights Act (C.V.R.A.). 18 USC § 3771 (hereinafter C.V.R.A.). Thus, the standard of review established in the All Writs Act has no bearing on the appropriate standard of review under Article 6b, UCMJ, whereas the C.V.R.A. does. For these reasons, this Court should issue a writ of mandamus establishing H.V.Z.'s right to object at trial regarding the disclosure of her DoD Health Record.

ARGUMENT

I. BECAUSE H.V.Z.'s DOD HEALTH RECORD IS NOT IN THE POSESSION, CUSTODY, OF MILITARY AUTHORITIES, THE MILITARY JUDGE AND A.F.C.C.A. ERRED AS A MATTER OF LAW AND THE ERROR IS CLEAR AND INDISPUTABLE.

b. "Military authorities" means those involved in the case, not MTFs.

Both the Real Party in Interest (RPI) and the Government take umbrage with H.V.Z.'s understanding of the term "military authorities." *See e.g.* RPI Br. at 24; US Br. at 13 and 16. Both suggest the plain language of R.C.M. 701(a)(1) demands that all units falling anywhere under the umbrella of the Department of Defense are de facto "military authorities." Id. Not so.

To resolve this matter, this Court need look no further than the Rules for Courts-Martial (R.C.M.s) themselves. Importantly, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *United States v. Kelly*, 77M.J. 404, 406-07 (C.A.A.F. 2018) (citations omitted). Here, the applicable context and textual scheme are the R.C.M.s. Aside from disclosure references in R.C.M. 701(a)(2), the R.C.M.s reference "military authorities" six times, and invariably it describes those military officials serving some military justice function. *See* R.C.M. 106 (describing how "[a] member may be placed in restraint by military authorities . . . ."); R.C.M. 305(f) (pre-trial confinees must make requests for counsel "known to military

authorities," and the request shall be granted "within 72 hours of such a request being first communicated to military authorities . . . ."; R.C.M. 305(i)(1) (confinees can "remain[] in civilian custody at the request of military authorities. . . ."; R.C.M. 404A (in preliminary hearings, trial counsel must disclose certain "statements, within the control of military authorities . . . ."; R.C.M. 701(d).

Perhaps the most telling reference is Rule 701(d) which states:

> Trial counsel are encouraged to advise military authorities or *other* governmental agencies *involved in the case* of their continuing duty to identify, preserve, and disclose to the trial counsel or other Government counsel the information required to be disclosed under this rule.

(emphasis added). The Government suggests this reference does not "show how . . . the use of the term 'military authorities' in this passage includes only military investigative authorities." US Brief at 16.

To the extent exegesis is necessary, H.V.Z. will clarify. R.C.M. 701(d) identifies two groups of people with a "continuing duty to identify, preserve, and disclose" records to trial counsel: 1) "military authorities," and 2) "other governmental agencies involved in the case." If military authorities include Military Treatment Facilities (MTFs), then presumably MTFs themselves have a "continuing duty to identify, preserve, and disclose" records to trial counsel—

even when those records are outside the scope of a subpoena, court order, or administrative request. In other words, MTFs would have a duty to seek out exculpatory material and disclose it to trial counsel in the same way investigators would.[2] Moreover, if "military authorities" means all records custodians within the Department of Defense, what is this rule encouraging trial counsel to do? Is trial counsel supposed to encourage all record custodians in every military unit about their respective ongoing disclosure requirements in every case?

The clear alternative explanation is that R.C.M. 701(d) (just like all other references to "military authorities" in the R.C.M.s) employs the term to mean agencies with equity in the military justice process, i.e. those "involved in the case." Again, the rule references two groups 1) "military authorities" and 2) "*other* governmental agencies *involved in the case*." (emphasis added). Both groups are "involved in the case." If "military authorities" does not describe those specific authorities "involved in the case," then why is the second group

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[2] The Government seems to acknowledge that prosecutors, not MTFs, own this continuing duty. (US Brief at 18) ("the *Government* has a vested interest in obtaining the victim's medical records to satisfy *their* ongoing discovery obligations. *See Stellato*, 47 M.J. at 491 (. . . '*parties* to a court-martial are admonished to fulfill their discovery obligations with the utmost diligence')" (emphasis added.)

described as "*other* governmental agencies involved in the case"? In short, military authorities are already presumed to be involved in the case—hence the addendum of *other* governmental agencies involved in the case. Contextually, there is no way to conclude that MTFs are "involved in the case." As such, they are not military authorities.

The Government suggests the operative word for this analysis is "authorities." US Brief at 13. (emphasizing "Appellant does not address the legal definition of 'authority' in her brief.") H.V.Z. agrees. However, the Government relies on a definition of "authority" from *Black's law Dictionary* that cuts against any broad reading for "military authorities." Id. ("authority" means "[a]n official organization or government department with *particular* responsibilities and *decision-making powers.*") (emphasis added.) It follows that "military authorities" have *particular* responsibilities (e.g. investigation and prosecution) and *decision-making* powers (e.g. convening authorities, preferring commanders, prosecutorial discretion). In other words, "authority" is contextual by definition, and in that context, military authorities are those particular individuals with decision making powers, i.e. those "involved in the case." R.C.M. 701(d) (Discussion).

Moreover, the legal meaning of "authorities" becomes patently clear when looking at the R.C.M.s as a whole. The general term "authorities" is used 46

times in the R.C.M.s, but it is never used in a context that would include MTFs: *convening* authorities are referenced 16 times;[3] *military* authorities are referenced 8 times;[4] *appellate* authorities are referenced 8 times;[5] *civilian* authorities are referenced 6 times;[6] *appropriate* authorities are referenced 2 times;[7] and *legal*, *investigative*, *proper*, *reviewing*, *foreign*, and *civilian law enforcement* authorities are all referenced 1 time respectively.[8] In every instance, the term "authorities" is used to describe individuals with some equity in the criminal justice process (i.e. "involved in the case") and never in way that would encompass medical professionals.

To make the context point even more emphatic, consider the use of the term "civilian authorities" in the R.C.M.s. The term "civilian authorities"—presumably the civilian equivalent of "military authorities"—is used five[9] times in the R.C.M.s. *See* R.C.M. 106 ("Delivery of military offenders to civilian authorities"); R.C.M. 201(d) (discussion) (questions of jurisdiction should be

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[3] See Rules 104(a)(1); 105(a); 204(a); 405(j)(3); 601(c); 601(e)(3); 601(f)-(g); 704(b); 705(a)
[4] Rules 106; 305(f); 305(i)(1); 404A; 701(a)(2); 701(d)
[5] See Rules 701(g)(2); 1113(b)(3) and (d)
[6] Rules 106; 201(d)(3); 305(i); 705(a); 1102(b)(2)(C)(ii)
[7] See Rules 303; 703(g)(3)(A).
[8] See Rules 919; 301; 302(b)(1); 914(c); 1102(b)(2)(C)(iii); 701(a); 701(a)(6)
[9] While technically the term is used 6 times, it is used twice in the very same context, i.e. describing the title of R.C.M. 106.

resolved "between appropriate military officials (ordinarily the staff judge advocate) and appropriate civilian authorities (United States Attorney, or equivalent)."); R.C.M. 305(i)(1) ("If the confinee is apprehended by civilian authorities . . . "); R.C.M. 705(a) (convening authorities should not "preclude appropriate action by federal civilian authorities in cases likely to be prosecuted in the Unites States District Courts . . ."); R.C.M. 1102(b)(2)(C)(ii) (". . . the accused is in custody of civilian authorities under Article 14 . . . ."). It is clear and indisputable the R.C.M.s use the term "civilian authorities" to describe those with equity in the civilian justice process, i.e. those "involved in the case," not civilian medical professionals with some broad form of civilian authority. Military authorities are the counterpart to these civilian authorities and must be seen accordingly.

On this point, H.V.Z. is not reading words into the text, but simply considering the "the words of a statute must be read in their context" as *Kelly* requires. In fact, the argument for expanding the text cuts both ways. While H.V.Z. argues disclosure is required for evidence "in the possession of [*the*] military authorities;" both the RPI and the Government argue disclosure is required for evidence "in the possession . . . of [*any*] military authorities." The difference between these two interpretations is straightforward—H.V.Z.'s position is supported by every single reference to "military authorities" (and

every other type of "authorities") in the R.C.M.s; while the Accused's and the Government's interpretation is not supported by a single one.

This Court's opinion in *Stellato* does not address this question head on, but it does underscore a fair reading of "military authorities." Judge Stucky is right in his concurrence: "[t]he issue is whether [evidence] is in possession, custody, or control of 'military authorities,'" not necessarily the "prosecution team." *Stellato*, 74 M.J. at 492. If read in isolation, the "prosecution team" could be misinterpreted as trial counsel only—excluding investigators, convening authorities, preferring commanders, or other military authorities "involved in the case." However, it is understandable why the majority uses the term "prosecution team," i.e. prosecutors *are* the primary military authorities "involved in the case." MTFs simply do not fit this bill, and Judge Stucky's concurrence does not suggest they do; it merely points out that "military authorities" is not limited to trial counsel only, which H.V.Z. concedes.

While this Court has not addressed this specific R.C.M. 701(a)(2) question head on, in *United States v. Thompson*, this Court resolved an analogous question in a R.C.M. 914 context about when witness' statements are "in the possession of the United States." *United States v. Thompson*, 81 M.J. 391, 395-396 (C.A.A.F. 2021). In that case this Court analyzed "whether constructive possession applies to R.C.M. 914" and found "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.* Thus, in a "possession" analysis, even the term "United States"—a phrase much broader than "military authorities"—is not the "all-encompassing term used to refer to overall government agencies," as the Government suggests (US Brief at 13); rather it has a specific meaning "the prosecutorial arm," just as "military authorities" means those military officials "involved in the case."

This Court has applied R.C.M. 703 production standards to military personnel records. *See United States v. Abrams*, 50 M.J. 361, 362 (C.A.A.F. 1999); s*ee also United States v. Bishop*, 76 M.J. 627, 634 (A.F. Ct. Crim. App. 2017) (analyzing data missing from an AFOSI extraction of victim's phone under the R.C.M. 703 production standard, vice R.C.M. 701 disclosure requirements). In *Abrams*, the defense "requested the military records for Seaman P, the Government's key witness" arguing they "needed to see her whole record to determine if there was anything more [aside from the counseling and non-judicial punishment records already provided] in her file that could be used to impeach her credibility." *Id.* Not only did this court apply the production framework in R.C.M. 703 instead of the lower hurdle of R.C.M. 701, but it also noted "the military judge may have been well within his discretion to . . . deny the motion to compel discovery" because—even in an R.C.M. 703 context—

courts "respect [] the confidentiality of another servicemember's personnel records . . . not opening them up to a blanket finishing expedition." *Id.* Thus, not even military personnel records are *de facto* in the possession, custody, and control of military authorities.

Moreover, there is compelling federal circuit precedent addressing the civilian counterpart to R.C.M. 701(a)(2), "which requires the 'government' to permit inspection of certain items within its 'possession, custody or control' which are material to the defense or intended for use as evidence." *United States v. Trevino*, 556 F.2d 1265, 1271-72 (5th Cir. 1977) (quoting Fed. R. Crim. P. 16). In *Trevino* the defense sought to expand the definition of "government" to include "courts and probation officers," but even though these were government officials with at least some equity in law and order, the Fifth Circuit refused to expand the definition of "government" saying:

> As with the *Jencks Act*,[10] however, the surrounding language of 16(a)(1)(C) requires a narrower reading; the subdivision refers, for example, to papers or documents "intended for use by the government as evidence in chief at the trial . . . ." Neither probation

[10] The Jencks Act is the federal equivalent of R.C.M. 914 and C.A.A.F. has officially adopted the case law associated with it. *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015). The fact that civilian courts used use their *Jenks Act* analysis to inform their disclosure analysis under Rule 16 makes this Courts "possession" analysis in *Thompson* even more persuasive in a R.C.M. 701 context.

> officers nor district judges being in the business of introducing evidence in chief at trial, this language tells us that "the government" means the defendant's adversary, the prosecution.

Id. (edits original).

In sum, there is no fair reading of R.C.M. 701(a)(2) in which "military authorities" would include MTFs. This is patently clear when looking at the context of the R.C.M.s themselves, the implied definition from *Stellato*, and analogous interpretations from cases like *Abrams*, *Thompson*, and *Trevino*. Finding MTFs are "military authorities" is clear and indisputable error.

a. Military authorities do not have constructive possession, custody, or control of H.V.Z.'s DoD Health Record.

Neither party responds directly[11] to the "knowledge and access" framework of constructive possession, potentially because the cases on point are so distinguishable. *See e.g. United States v. Bryan*, 868 F.2d 1032, 1037 (9th Cir. 1989) (finding knowledge and access when the IRS was running a joint investigation into the defendant); *United States v. Libby*, 429 F. Supp. 2d 1, 7

[11] The United States conflates "knowledge and access" analysis with "legal right" analysis. (US Brief at 17) ("As to access, prosecutors have a right to obtain medical records through H.I.P.A.A. for a valid law enforcement purpose."). The RPI never addresses the framework of "knowledge and access" from *Stellato*, *Bryan*, and *Libby*, but does make a generic case for access through H.I.P.A.A. exceptions. (RPI Brief at 26.)

n.11 (D.D.C. 2006) (finding knowledge and access when "there ha[d] been a rather free flow of documents to [prosecutors] from both the OVP and the CIA."); *United States v. Rameshk,* 2018 CCA LEXIS 520, at *35-36 (A.F. Ct. Crim. App. 29 October 2018) (unpub. op.); *review denied United States v. Rameshk*, 78 M.J. 421 (C.A.A.F. 2019) (Even though military authorities had both knowledge of and access to the victim's cell phone earlier in the investigation "the cell phone was no longer in the Government's possession once it was returned to [the victim]" so "the appropriate analysis is production under R.C.M. 703(f) rather than discovery under R.C.M. 701.").

Instead, both the RPI and the Government maintain trial counsel has a "legal right" to access MTF records through a H.I.P.A.A. exception. (*See* RPI Brief at 26; US Brief at 19.) However, both parties fundamentally misunderstand the "legal right" form of constructive possession described in *Stellato*. Both essentially argue H.I.P.A.A.[12] establishes a legal right for trial counsel to access medical records through an "administrative request" or "valid law enforcement" exception. (*See* RPI Brief at 26; US Brief at 19.) If that is true, then these H.I.P.A.A. exceptions afford trial counsel the legal right to access not just

[12] H.I.P.A.A. provides the legal rights and processes that Department of Defense Manual (DoDM) 60625.18 incorporates.

military medical records, but all medical records subject to H.I.P.A.A.'s purview. Military prosecutors can avail themselves of the same "administrative request" process and "valid law enforcement" exception when records are housed at a civilian hospital. *See* 45 CFR § 164.512. Put differently, H.I.P.A.A. does not care *which jurisdiction* has the valid law enforcement purpose, it only cares whether there *is* a valid purpose. Id. As such, if the Government is in for a penny (with a legal right to MTF records), it is in for a pound (with a legal right to all records subject to H.I.P.A.A.). This is substantively different than the "legal right" exception as described in *Stellato,* which relies exclusively on *United States v. Stein*, 488 F. Supp. 2d 350, 363 (S.D.N.Y. 2007). In *Stein* the prosecutors had a "legal right" to access KPMG records only because they contractually bargained with KPMG, via a deferred prosecution agreement, for "the unqualified right" to access "any documents it wishes for the purposes of [its] case." Thus, constructive possession via "legal right" is simply inapplicable to H.V.Z.'s case.

Lastly, an "administrative request" does not create a legal right to access H.V.Z.'s records because it is not enforceable under the law. In this case, the Government sought issuance of a court order because the MTF demanded such and would not accept an "administrative request." *See* Attachment I to Cert. at 43, 87-88. Since administrative requests to MTFs composed by trial counsel are not authorized by law there is no legal right to access H.V.Z.'s records through

that mode.

In sum, the military authorities involved in the case do not have the type of access to or knowledge of H.V.Z.'s DoD Health Record described in *Stellato* or its underlying cases, *Bryan*, or *Libby*. Moreover, neither H.I.P.A.A. nor its incorporating regulations establish the Government has a legal right to H.V.Z.'s DoD Health record. At most, they establish a process for access, akin to a subpoena.

II. H.V.Z. HAS STANDING TO OBJECT TO THE PRODUCTION OF HER DOD HEALTH RECORDS BECAUSE, EVEN IF THE PROTECTIONS OF R.C.M. 703(G)(3)(C)(II) DID NOT APPLY, HER STATUTORY AND CONSTITUTIONAL RIGHT TO PRIVACY IS BEING VIOLATED WITHOUT PROCESS.

Because H.V.Z.'s DoD Health Record is not in the possession, custody, or control of military authorities, she has standing to "move for relief . . . or otherwise object" to its production. R.C.M. 703(g)(3)(C)(ii). However, even if her DoD Health Record is in the possession, custody, or control of military authorities, her statutory and constitutional privacy rights establish standing.

Third parties have standing when they can show injury, causation, and the redressability of the harm. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), *quoting Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992). Military courts have adopted these same standards. *See United States v.*

Wuterich, 67 M.J. 63, 69 (C.A.A.F. 2008), *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003). Third parties meet these standards when they show "sufficiently important, legally-cognizable interests in the materials or testimony sought." *United States v. Johnson*, 53 M.J. 459 (C.A.A.F. 2000). Thus, standing turns on whether the third-party has a "legally-cognizable interest" in jeopardy, not on the discovery rules used to obtain it, nor whether there is express language establishing a right to be heard. *See id.* Thus, whether H.V.Z.'s DoD Health Record falls under R.C.M. 701 or R.C.M. 703 is wholly irrelevant to whether she has the "legally-cognizable interest" needed for standing. Equally irrelevant is whether her Article 6b, UCMJ, right to privacy includes express language concerning her "right to be heard."

H.V.Z. suffered injury when the Military Judge summarily denied her the opportunity to be heard regarding the release of her DoD Health Record. H.V.Z. has a *statutory* right to privacy in her medical records. *See* Article 6b(a)(9); R.C.M. 703(g)(3)(C)(ii). H.V.Z. also has a *constitutional* right to privacy in her medical records—a point even the A.F.C.C.A. concedes. *In re HVZ*, 2023 CCA LEXIS 292, at *14 (A.F. Ct. Crim. App. 14 July 2023) (unpub. op.); *see also Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995) (interpreting *Whalen v. Roe*, 429 U.S. 589, 599-600, (1977)); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) (citations omitted). It also well

established that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Thus, invading H.V.Z.'s privacy without *any* process, to say nothing of *due* process, injures her right to privacy.

Importantly, standing stems from substantive rights, not evidentiary privileges. At times, the right to privacy is protected by privilege. *E.g.* Mil. R. Evid. 513. However, standing does not apply to third parties *only* in matters of privilege. *E.g.* Mil. R. Evid. 412; *see also United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (granting standing to CBS Broadcasting in combined cases including a petition for extraordinary relief under R.C.M. 703 brought by CBS Broadcasting regarding a subpoena for raw footage of an interview); *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (granting standing to ABC on First Amendment matters). In summary judgment, this Court in *Carlson v. Smith* granted a writ of mandamus to third party victims seeking to protect privacy, including confidential equal opportunity office documents. *Carlson v. Smith*, 43 M.J. 402 (C.A.A.F 1995). Thus, it is rights, not privileges, that create standing. *Id.*

To be clear, H.V.Z. recognizes her right to privacy is not absolute and, in certain circumstances, must give way to an Accused's due process rights and the interests of justice. However, she does assert that when her statutory and constitutional rights are implicated, she has a right to be heard. The Military

Judge summarily denied her this opportunity, which directly caused the harm in this case.

The military judge can redress H.V.Z.'s injury at the trial level by considering her objections, and when appropriate, protecting her records from unwarranted disclosure. Military Judges are charged to "promote the purposes of these rules [for Courts-Martial] and this Manual [for Courts-Martial]." R.C.M. 801(a)(3). One such purpose the Military Judge duty is supposed to promote is H.V.Z.'s "right to be treated with fairness and with respect for [her] dignity and privacy." Article 6b(a)(9). Even if, arguendo, this "does not create an independent right for a victim to be heard by the military judge *at the trial level* with regard to such rights," *In re HVZ*, unpub. op. at *12 (emphasis original), that does not mean the military judge is prohibited from hearing H.V.Z. on a matter implicating her statutory and constitutional rights to privacy. *See e.g. In re KK*, 2023 CCA LEXIS 31, at *17 (A.F. Ct. Crim. App. 24 January 2023) (unpub. op.) In In re KK, the A.F.C.C.A. acknowledged the military judge was "well within his discretion" to hear from a victim when her Article 6b(a)(7) right "to proceedings free from unreasonable delay" was implicated. *Id.* Importantly, there is no express "right to be heard" language associated with this right, but it was clearly within the military judge's ability to address. *Id.* To that end, when it comes to standing, the question is not whether H.V.Z. has an indefeasible right

to be heard enshrined in the Manual for Courts-Martial; rather, the question is whether some provision of law *prevents* the Military Judge from hearing H.V.Z. and considering her position. There is no such prohibition. *See id.* As such, the Military Judge has redressability in this case.

In sum, because H.V.Z. can show injury, causation, and redressability, it does not matter whether these records fall under R.C.M. 701 or R.C.M. 703. Likewise, because H.V.Z. satisfies the Supreme Court's standing criteria in *Lujan*, it does not matter whether H.V.Z.'s right to privacy in Article 6b(a)(9) includes specific language expressly providing the right to be heard. Because H.V.Z. can satisfy the standing requirements of *Lujan*, she has the right to assert her right to seek redress at trial, full stop.

III. ARTICLE 6b IS SILENT AS TO THE STANDARD OF REVIEW TO ISSUE A WRIT OF MANDAMUS

The argument that omission of a standard of review in Article 6b(e) speaks to Congressional intent, fails to account for the reality that Congress need not explicitly prescribe a standard of review in statute. "For some *few* trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. [. . .] For *most others*, the answer is provided by a long history of appellate practice. But when, as here, the trial court determination is one for which neither a clear statutory

prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (emphasis added). RPI asserts "Congress provided different standards of review for the C.V.R.A. and Article 6b(e), UCMJ." (RPI Answer at 19.) Congress did not do what RPI asserts, Article 6b(e) provides *no* standard of review.

Congress' omission of a standard of review in Article 6b(e) makes sense since Article 6b(e)(3)(A) states, "[a] petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, *by such means as may be prescribed by the President*, subject to section 830a of this title (article 30a)." As with many statutes in the UCMJ, Congress concedes to the Executive to put forth the rules implementing the statute. The Government's and RPI's conclusions that an omission of a standard of review in Article 6b(e) meant Congress intended for disparate standards of review for writs issued under the C.V.R.A. and Article 6b is wrong. Congress provided that the President may prescribe rules for that very process and Congress needed not provide a standard of review in the statute. Certainly, such divergent review standards would not render the military justice system as "[…]the most victim-friendly criminal justice system in the world." 159 Cong. Rec. S8151

(statement of Sen. Claire McCaskill) (emphasis added).

When Congress does not provide a standard of review, a court must determine the appropriate standard. Because the statute is silent on the question of the appropriate standard of review, ordinary standards of review should apply, just as they do in the C.V.R.A. Instead, the A.F.C.C.A. erred by superimposing a standard from the All Writs Act—legislation designed specifically to deal with those instances where there is no congressionally sanctioned appellate process. Neither A.F.C.C.A., nor the RPI, nor the Government offer any legal basis for assuming the higher standard of review is applicable—other that arguing that Congress could have included specific language and did not. However, that argument cuts both ways, Congress could have just as easily included language establishing the high standard of review in the All Writs Act, but it did not. The difference between these two arguments is the All Writs Act became manifestly inapplicable when Congress created a statutory appellate process for Article 6b, UCMJ, rights. Whereas ordinary standards of review are the default, and have clear precedent in the C.V.R.A.

IV. THE UNAUTHORIZED COURT ORDER DEMANDING PRODUCTION OF ANY PART OF H.V.Z.'S DOD HEALTH RECORD DENYING H.V.Z AN OPPORTUNITY TO OBJECT IS A USURPATION OF JUDICIAL AUTHORITY AND WRIT SHOULD ISSUE

a. <u>The Military Judge's court order is extra-jurisdictional.</u>

H.V.Z. argues this Court and all CCAs shall 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 56th Medical Group is a military authority under R.C.M. 701(a)(2). Nevertheless, even if this Court determines H.V.Z. must demonstrate clear and indisputable error for writ to issue, H.V.Z. has met the standard as the Military Judge usurped authority in issuing an unauthorized court order to the 56th Medical Group because the Military Judge does not have that authority. "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.

The Military Judge's unauthorized Order states, "The 56th Medical Group (Luke Air Force Base, Arizona) is hereby ordered to provide any medical, mental health, and family advocacy records maintained at the 56th Medical Group, or any subordinate clinic." Attachment I to Certificate at 118. The Order then goes on to direct "[i]n complying with this order, and making the necessary redactions to responsive records, the Medical Group should work closely with a medical law attorney." Id. The Order fails to state the authority upon which it is issued, H.V.Z. 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 H.V.Z.’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 having trial counsel issue a subpoena for which H.V.Z. could move to quash under the R.C.M.s.

b. The Military Judge needed to consider H.V.Z.’s privacy right and interests before ordering production of her DoD Health Record.

H.V.Z. 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. H.V.Z. 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 H.V.Z.’s personal and private

medical records, the Military Judge deprived H.V.Z. of any ability or process to prevent the unreasonable search and seizure of those records by the Government. Not only does H.V.Z. 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, 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 H.V.Z. the opportunity to object and then a duty to consider her objection. The Military Judge did neither and writ should issue.

CONCLUSION

Military authorities do not have *physical* possession, custody or control of H.V.Z.'s DoD Health Record because MTFs are not military authorities, i.e. they are not involved in the case. The R.C.M.s alone clearly and indisputably establish this understanding of "military authorities," but it is also supported by this Court's precedent in *Stellato*, as well as *Thompson*, *Abrams*, and *Trevino* by analogy.

Moreover, military authorities do not have *constructive* possession, custody, or control of H.V.Z.'s DoD Health Record because they have no knowledge of the records at all, and unlike *Stellato*, *Bryan*, or *Libby,* the only

circumstance in which the MTF *may* (not must) provide access to these records is in accordance with strict H.I.P.A.A. requirements. Likewise, H.I.P.A.A. does not afford trial counsel a legal right to H.V.Z.'s DoD Health Record—if it did, trial counsel would have a legal right to civilian medical records in H.I.P.A.A.'s reach—but a process to gain access, just like a subpoena.

R.C.M. 703(g)(3)(C)(ii) gives H.V.Z. express standing to object to the disclosure of her private medical records, but even if it did not, she has the legally-cognizable right necessary to be heard on this issue. Her right to privacy is injured when she has no opportunity to object, the Military Judge's decision to ignore her rights is the direct cause, and this Court can cure injury by reaffirming her right to be heard on a matter implicating her constitutional right to privacy.

Finally, normal appellate standards of review apply to writs filed pursuant to Article 6b(e), UCMJ. Like the C.V.R.A., the appellate process outlined in Article 6b, UCMJ, does not depend on the authority or jurisprudence of the All Writs Act. It is a congressionally created process that makes no effort to incorporate the All Writs Act or its surrounding case law. As such, All CCAs should use ordinary standards of appellate review, as appellate courts do with the C.V.R.A., when resolving writ appeals brought under Article 6b, UCMJ. For all the reasons above, the Military Judge clearly and indisputably erred when

ordering production of H.V.Z.'s medical records under R.C.M. 701 and without hearing from H.V.Z. A writ should issue.

RESPECFULLY SUBMITTED this 2nd day of October, 2023.

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CAAF Application will be sent in accordance with Rule 38(b)

CERTIFICATE OF FILING AND SERVICE

I certify that on October 2, 2023, the foregoing was electronically filed with the Court and served on the counsel for the Real Party in Interest, counsel for the Government, the lower court, the detailed military judge and other relevant parties via email at the following addresses:

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This reply brief complies with Rule 24(b) because this brief contains

approximately

5996 words.

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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.

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 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

[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.).

"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 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.

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

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

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

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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

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 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

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> 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*.

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**.

In re KK

United States Air Force Court of Criminal Appeals

January 24, 2023, Decided

Misc. Dkt. No. 2022-13

Reporter
2023 CCA LEXIS 31 *

In re KK, Petitioner, Jason R. HALGREN, Master Sergeant (E-7), U.S. Air Force, Real Party in Interest

Prior History: [*1] Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. Military Judge: Lance R. Smith.

Counsel: For Petitioner: Captain Taracina R. Bintliff, USAF; Devon A. R. Wells, Esquire.

For Respondent: Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

For Real Party of Interest: Major Heather M. Caine, USAF; Captain Cynthia A. McGrath, USAF.

Judges: Before KEY, ANNEXSTAD, and GRUEN, Appellate Military Judges. Senior Judge KEY delivered the opinion of the court, in which Judge ANNEXSTAD and Judge GRUEN joined.

Opinion by: KEY

Opinion

PUBLISHED OPINION OF THE COURT

KEY, Senior Judge:

On 21 October 2022, Petitioner—the alleged victim in the proceedings below—requested this court issue a writ of mandamus vacating a military judge's decision to deny a Government-requested continuance. Petitioner further asked us to find that her access to an attorney should be considered when assessing her availability as a witness at trial "and that her rights may not be used as a sword of the accused." This court docketed the petition on 24 October 2022. We granted the Government and the real party in interest ("the accused") leave to file an answer to the petition and Petitioner the option to file a reply to those answers. Having **[*2]** considered the petition, the answers, and Petitioner's reply, we decline to order the requested relief.

I. Background

The accused is currently facing various charges of sexually assaulting Petitioner in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*. According to documents submitted by Petitioner, an assistant trial counsel notified the Air Force Central Docketing Office on 14 September 2022 that the parties had agreed to an arraignment and motions hearing date of 28 February 2023 and a trial date of 13 March 2023 at Spangdahlem Air Base, Germany. The accused's court-martial was subsequently docketed for those dates.

On 23 September 2022, the Government made a motion for a continuance, proposing either to move the trial date earlier—so that trial occurred immediately after motions—or to move the trial date later, specifically to 8 May 2023. According to the Government, this later date is the Defense's "next ready date."

In its motion, the Government indicated that "Government Counsel" learned on 15 September 2022 that neither circuit trial counsel nor Captain (Capt) Bintliff—Petitioner's victims' counsel—were available for the trial date, as they were both detailed to another court-martial scheduled for the same time. **[*3]** The Government further asserted:

> On 15 September 2022, Captain Bintliff consulted with her client, [Petitioner], to determine whether she could be released to accommodate the trial date. [Petitioner] declined to release her representation and stated she was unavailable for the scheduled date. In addition, Captain Bintliff notified the Government that all other Victims' Counsel in Europe were docketed for the same conflicting trial.

No evidence was attached to the motion, and the Government did not request a hearing on the matter.

The Government primarily based its motion on the premise that Petitioner is an essential witness, is unavailable, and that the Government lacks subpoena power over her "while she is overseas."

On 30 September 2022, the accused, through counsel, opposed the continuance, objecting to both of the Government's proposed new trial dates. The Defense contended the earlier date would not allow for adequate preparation time and that the later date prejudiced the accused's speedy trial rights. In its response to the motion, the Defense alleged: "[Petitioner] does not have a personal conflict to the trial dates. . . . She is voluntarily deeming herself unavailable because **[*4]** Capt Bintliff is not available due to Capt Bintliff docketing in another proceeding." In support of this point, trial defense counsel attached a short text message in which Capt Bintliff wrote: "My client will not appear without counsel and she will not get another attorney, so she is personally unavailable for that date." Like the Government, the Defense did not request a hearing on the motion.

The military judge issued a written ruling denying the Government's motion on 3 October 2022. The military judge concluded the Government had failed to establish, by a preponderance of the evidence, that either the circuit trial counsel or Petitioner were unavailable for the court-martial dates, and that Petitioner's victims' counsel's unavailability did not operate to render Petitioner unavailable. He wrote: "Certainly, [Petitioner] can refuse to release her unavailable [victims' counsel], and refuse to participate without her current [victims' counsel]. Those, however, are personal preferences that do not render her unavailable for trial." The military judge determined the Government had not proven Petitioner was actually unavailable, and the Government, therefore, had failed to prove its **[*5]** "essential" evidence was unavailable.

Pointing to this court's ruling in *In re HK, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 13 Sep. 2021)* (order), *rev. denied, H.K. v. Eichenberger, 82 M.J. 123 (C.A.A.F. 2022)*, the military judge asserted that *Article 6b, UCMJ, 10 U.S.C. § 806b*, does not give a victim (or his or her counsel) the right to request a continuance based on the counsel's schedule, and that it appeared Petitioner's victims' counsel was "attempting to drive a continuance based on her non-availability." The military judge also noted that granting the continuance would "deprive [Petitioner] of her right to proceedings free from unreasonable delay" under *Article 6b(a)(7), UCMJ*.

Before this court, Petitioner argues the military judge violated her right to be "treated with fairness and with respect for [her] dignity" under *Article 6b(a)(8), UCMJ*, by: (1) not considering Petitioner's unwillingness to appear at trial without the presence of her counsel, and (2) using Petitioner's "right to proceedings free from unreasonable delay" under *Article 6b(a)(7), UCMJ*, against her. Petitioner further argues we should employ an "abuse of discretion" standard of review in assessing her petition as opposed to the standard commonly applied for mandamus petitions. The Government avers Petitioner has established neither that we have jurisdiction to hear her claim[1] nor that she was treated unfairly. The accused **[*6]** takes the position that Petitioner has not identified any legal right of hers which was violated. Both the Government and the accused oppose Petitioner's view regarding the appropriate standard of review and maintain Petitioner has not met her burden to warrant the issuance of a writ of mandamus.

II. Law

This court has jurisdiction over a petition under *Article 6b, UCMJ*, which establishes a victim's ability to petition this court for a writ of mandamus when the victim "believes . . . a court-martial ruling violates the rights of the victim afforded" by that article. *Article 6b(e)(1), UCMJ*, *10 U.S.C. § 806b(e)(1)*. If granted, such a writ would require compliance with *Article 6b, UCMJ*. *Id.*

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, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (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, 74 S. Ct. 145, 98 L. Ed. 106 (1953)*). A military judge's decision warranting reversal via a writ of mandamus "must amount to more than even gross error; it must amount to a judicial usurpation of power . .

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[1] On this point, the Government argues we only have jurisdiction over *Article 6b, UCMJ*, mandamus petitions in which a petitioner presents a "legitimate claim" of a violation of a victim's rights (as opposed to a perceived violation). However, *Article 6b(e)(1), UCMJ*, specifically permits a petition when a victim "believes" a violation has occurred.

. 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).

In order to prevail on a petition for **[*7]** a writ of mandamus, a petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)* (per curiam) (citing *Cheney, 542 U.S. at 380-81*).

III. Analysis

Article 6b, UCMJ, sets out rights held by victims of offenses under the UCMJ. Three specific rights are relevant here: (1) the right not to be excluded from court-martial proceedings;[2] (2) the right to proceedings free from unreasonable delay;[3] and (3) the "right to be treated with fairness and with respect for the dignity and privacy of the victim."[4]

Petitioner makes a number of interrelated arguments. First, Petitioner contends a petition for a writ of mandamus under *Article 6b, UCMJ*, should be analyzed under an "abuse of discretion" standard of review rather than the typical standard, as adopted in *Hasan, 71 M.J. at 418*. Second, she asserts the military judge erred in not granting the Government's requested continuance because, in Petitioner's view, the military judge both incorrectly found her "available" for trial and gave unwarranted credence to the accused's demand for a speedy trial—a demand which Petitioner decries as "disingenuous." Third, she claims the **[*8]** military judge did not give appropriate consideration to her victims' counsel's schedule, and that his ruling essentially amounts to unfairly forcing her to sever her attorney-client relationship with her victims' counsel. Fourth, she contends the military judge erred by factoring Petitioner's right to proceedings free from unreasonable delay into his analysis of whether a continuance should be granted—a continuance which Petitioner supported.

A. Writ of Mandamus Standard of Review

Petitioner contends we should review the military judge's decision for abuse of discretion (or, alternatively, "legal error") rather than under the typical "extraordinary relief" mandamus standard. Petitioner's argument is premised on a 2015 modification to the *Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771*.

The CVRA, originally passed in 2004, permits a victim to seek enforcement of his or her rights in the federal district court in which the relevant case is being prosecuted. *18 U.S.C. § 3771(d)(3)*. If such a victim is denied relief, he or she may petition the court of appeals for a writ of mandamus. *Id.* *Article 6b, UCMJ*, was enacted to extend victims' rights to victims of offenses under the UCMJ in 2013, but it did not include any sort of enforcement provision. *See National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013)*. In the years following **[*9]** the CVRA's passage, a split of opinion developed in the federal circuits over what standard of review applied in mandamus petitions brought under the law. *Compare, e.g., In re Dean, 527 F.3d 391, 394 (5th Cir. 2008)* (per curiam) (applying usual mandamus standards to a CVRA appeal); *In re Antrobus, 519 F.3d 1123, 1130 (10th Cir. 2008)* (order) (same); *with Kenna v. United States Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006)* (declining to apply usual mandamus standards); *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562-63 (2d Cir. 2005)* (same). In May 2015, Congress amended the CVRA, specifically *18 U.S.C. § 3771(d)(3)*, by adding the following language: "In deciding such application, the court of appeals shall apply ordinary standards of appellate review."[5] *See, e.g., In re Wild, 994 F.3d 1244, 1252 n.8 (11th Cir. 2021)*, *cert. denied sub. nom. Wild v. United States Dist. Court, 142 S. Ct. 1188, 212 L. Ed. 2d 54 (2022)*.

Six months later, in November 2015, Congress amended *Article 6b, UCMJ*, to add an enforcement mechanism, granting victims the ability to petition a Court of Criminal Appeals for a writ of mandamus in the event of an alleged violation of any of the eight rights set

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[2] *Article 6b(a)(3), UCMJ*.

[3] *Article 6b(a)(7), UCMJ*.

[4] *Article 6b(a)(9), UCMJ*.

[5] At the time of this amendment, Senator Diane Feinstein explained in the Senate Record that the provision was meant to resolve the circuit split and to avoid "imposing an especially high standard for reviewing appeals by victims, requiring them to show 'clear and indisputable error'" instead of "the ordinary appellate standard of legal error or abuse of discretion." 160 Cong. Rec. S6149, 6150 (daily ed. 19 Nov. 2014).

out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. NDAA for Fiscal Year 2015, *Pub. L. No. 113-291 § 535, 128 Stat. 3292 (2014)*. Unlike the CVRA provision, the *Article 6b, UCMJ*, provision does not contemplate a petitioner first raising the matter to trial court. Also absent from *Article 6b, UCMJ*, is any indication that "ordinary standards of appellate review" were intended to supplant the traditional extraordinary relief standard. The fact this language was not included in **[*10]** the *Article 6b, UCMJ*, amendments just months after it was added to the CVRA is an indication Congress has provided different standards of review for mandamus petitions brought under the two laws.

Congress has specified that a victim may seek a "writ of mandamus" from the Courts of Criminal Appeals under *Article 6b(e), UCMJ*. Giving effect to the plain meaning of the words of the statute and the longstanding standard for a petitioner to secure mandamus relief, we conclude Petitioner bears the burden to meet the traditional mandamus standard as set out in *Hasan, 71 M.J. at 418*, and not the abuse of discretion standard which Petitioner encourages us to adopt.

B. The Military Judge's Determination of Petitioner's Availability

Petitioner's second argument is largely rooted in the question of whether she is "unavailable" for the set court-martial date. Based upon the record before us, Petitioner has said she is unwilling to voluntarily participate in the accused's court-martial as currently scheduled because her victims' counsel cannot attend. Due to the overseas situs of the court-martial, there is no subpoena power to compel Petitioner's presence. *See* Rule for Courts-Martial (R.C.M.) 703(g), Discussion ("A subpoena may not be used to compel a civilian to travel outside the United States **[*11]** and its territories."). Assuming Petitioner's victims' counsel will not be present at the accused's court-martial, and assuming Petitioner stands fast on her position that she will not testify without her counsel's presence, Petitioner may very well be unavailable for the purposes of that trial. How this translates into a violation of Petitioner's rights or warrants relief for Petitioner is less apparent.

The unavailability of a witness is generally a prerequisite for introducing testimonial evidence by means other than that witness's live testimony. For example, such a witness's prior testimony may be introduced under Mil. R. Evid. 804(b)(1). Similarly, a party may seek a continuance to facilitate the availability of an essential witness. R.C.M. 906(b)(1), Discussion. But these options do not confer any rights upon witnesses or persons of limited standing; instead, they are remedies available to the parties regarding the presentation of their respective cases.

Although we presume Petitioner would be a key witness in the accused's court-martial, Petitioner has not identified any obligation—and we are aware of none—that either party call her to testify. Petitioner has also not alleged any matters will be raised at the court-martial **[*12]** which would trigger her independent rights to participate in the proceedings.[6] Petitioner has the right to observe the accused's court-martial, and—as a named victim—she has the right not to be excluded from those proceedings unless her testimony would be "materially altered" by virtue of watching the court-martial. *Article 6b(a)(3), UCMJ*. But Petitioner also has the right—in the absence of process compelling her presence—to not attend the accused's court-martial, if she so chooses.

What Petitioner has not identified is any right to have the accused's court-martial dates set such that they accommodate either her or her victims' counsel's schedule. Instead, Petitioner's potential absence more directly impacts the ability of the Government to present its case, which is to say that if Petitioner's live testimony is important to the Government's case, then it is the Government which would seek relief in order to ensure Petitioner's presence. In this case, the Government requested a continuance for this very reason. That request was denied, and the Government has not sought relief from our court.[7] Just as Petitioner has no legal ability to force the Government to call her as a

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[6] *Article 6b(a)(4), UCMJ*, entitles a victim to be reasonably heard at: (1) pretrial confinement hearings; (2) sentencing hearings; and (3) clemency and parole hearings. *See also* Mil. R. Evid. 412(c)(2) (requiring victims be afforded the opportunity to attend and be heard at hearings related to the admissibility of evidence of his or her sexual behavior or predisposition); Mil. R. Evid. 513(e)(2) (same in cases regarding patients' communications with psychotherapists); Mil. R. Evid. 514(e)(2) (same in cases regarding victims' communications with victim advocates). Should the accused be convicted, Petitioner would have the right to make a sworn or unsworn statement under Rule for Courts-Martial 1001(c), but whether there will be a conviction is speculative at this point.

[7] Notably, the Government does not join Petitioner's request that the military judge's ruling be vacated.

witness, *Article 6b, UCMJ*, does not provide **[*13]** Petitioner with authority to challenge—on the Government's behalf—the military judge's substantive ruling on the continuance motion with respect to such matters as her availability. 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.

C. Petitioner's Victims' Counsel's Availability

Petitioner argues that the military judge's denial of the Government's continuance request requires her to sever her attorney-client relationship with her victims' counsel. This, however, is a mischaracterization of the military judge's ruling. That ruling has resulted in the accused's trial still being scheduled for the same time as another trial in which Petitioner's victims' counsel is involved. Thus, the ruling means Petitioner's victims' counsel will potentially be unavailable to attend the accused's trial in person if she is obligated to be elsewhere. Even so, Petitioner remains, at a minimum, free to retain counsel who is available to be present at the accused's court-martial instead of—or in addition **[*14]** to—her current counsel; or she can continue with her current attorney-client relationship and participate in the accused's court-martial despite her counsel's inability to be physically present. We appreciate Petitioner's desire to have her currently assigned counsel present at the accused's court-martial. We also appreciate Petitioner's understandable desire to avoid having to forge a new relationship with an unfamiliar counsel. Yet, these desires do not transform the military judge's denial of the continuance into a requirement that Petitioner must sever her existing attorney-client relationship.

The real crux of Petitioner's argument here is her assertion that the military judge did not treat her with fairness as required by *Article 6b(a)(9), UCMJ*. Petitioner contends the military judge did not consider her counsel's scheduling conflicts, but his ruling refutes this claim—the military judge *did* recognize Petitioner's victims' counsel had a conflict, but he determined that conflict did not render Petitioner unavailable or otherwise justify delaying the accused's court-martial. Petitioner seems to actually be arguing that a "fair" consideration of her counsel's projected inability to be personally present **[*15]** for the accused's court-martial would have resulted in the granting of the continuance motion. Alternatively, Petitioner may be arguing that granting the continuance would have been tantamount to treating Petitioner "with fairness." Petitioner points to no legal precedent supporting either conclusion.

The first hurdle Petitioner faces is defining what "fairness" means for a victim involved in a court-martial. There is little military precedent regarding the "with fairness" provision found in *Article 6b, UCMJ*, with one court finding that the provision does not entitle victims to a right to receive discovery (at least "without an analysis of the case status and pending legal issue"). *AG v. Hargis, 77 M.J. 501, 504 (A. Ct. Crim. App. 2017)*. With respect to the CVRA, federal courts have found victims' fairness rights implicated by such matters as delays in ruling on victim's motions, *In re Simons, 567 F.3d 800, 801 (6th Cir. 2009)* (order); venue choice, *United States v. Kanner, No. 07-CR-1023-LRR, 2008 U.S. Dist. LEXIS 108345, at *22 (N.D. Iowa 2008)* (order); court decisions to dismiss indictments, *United States v. Heaton, 458 F.Supp.2d 1271, 1272 (D. Utah 2006)* (mem.); and preventing court observers from seeing sexually explicit videos of victims, *United States v. Kaufman, Nos. 04-40141-01, 02, 2005 U.S. Dist. LEXIS 23825, at *5 (D. Kan. 2005)* (mem. and order). If decisions on venue choice and the dismissal of charges impact a victim's right to be treated with fairness, then there seems to be little argument that court rulings which impact the nature and **[*16]** quality of a victim's legal representation similarly impact that right. This is especially true in light of the fact Congress has required the military services to provide legal counsel to victims of sex-related offenses. *See 10 U.S.C. § 1044e*.[8]

While we conclude a victim's legal representation falls within the ambit of a victim's right to fairness, Petitioner does not convincingly explain how that fact leads to the conclusion that the military judge's ruling was wrong or violated her rights. Even those cases identifying particular issues touching on victims' fairness rights do not conclude the lower courts were required to rule a particular way—just that the rights were valid considerations in deciding the issues at hand. Similarly, we conclude that in the context of a motion for a continuance, Petitioner's right to be treated with fairness does not entitle her to a trial date of her choosing, but is rather a factor for the military judge to consider in balancing competing interests and making scheduling decisions. Given the accused has a constitutional right

[8] Petitioner asserts she is a dependent of an active-duty service member, and therefore entitled to be detailed a victims' counsel. Neither the Government nor the accused dispute this point.

to a speedy trial, and he has asserted that right, Petitioner's argument that the case should be delayed for her benefit definitely faces strong **[*17]** headwinds. Here, the military judge did consider Petitioner's counsel's unavailability, but took issue with the Government's theory that this rendered Petitioner personally unavailable. The military judge ultimately concluded the Government had failed to prove that Petitioner was actually unavailable, as the Government failed to carry its evidentiary burden.[9] Thus, the military judge's ruling can be read to say more about the quality of the Government's presentation than the dilemma the scheduling confusion had created for Petitioner. In the end, the military judge's ruling on the matter was well within his discretion, and far from a "judicial usurpation of power" or even "an erroneous practice."

D. Petitioner's Right to Proceedings Free from Unreasonable Delay

Like Petitioner, we are troubled by the military judge's invocation of *Petitioner's* right to proceedings free from unreasonable delay as a reason to deny a continuance which Petitioner plainly supported. Our concern is compounded by the fact that Petitioner was supporting the continuance for the purpose of ensuring in-person legal representation by her detailed victims' counsel—a reason which falls within the ambit of her right **[*18]** to be treated with fairness. We think it would be entirely reasonable to conclude that Petitioner's support of the continuance meant she did not believe the continuance would amount to unreasonable delay or that she wished to waive the matter. The military judge did not provide any substantive analysis of this point; instead, the last line of his written ruling simply reads: "Pursuant to *Article 6b(7)* [sic], granting the Government's motion would also deprive the named victim of her right to proceedings free from unreasonable delay." This leads us to conclude that this point was not a key factor in the military judge's analysis, but was instead an observation, albeit one of questionable validity. Had this been the sole reason—or at least the driving force—for the military judge's denial of the motion, we might have greater concern regarding the degree to which he treated Petitioner with fairness, but we conclude that is not the case here. The bulk of the military judge's analysis focuses on the Government's failure to prove Petitioner's unavailability as well as the accused's speedy trial rights.

IV. CONCLUSION

Based on the foregoing, Petitioner has not demonstrated that the right to issuance of **[*19]** the writ she seeks is clear and indisputable, and she has therefore failed to show the appropriateness of the relief she requests.

Accordingly, the Petition for Writ of Mandamus dated 21 October 2022 is **DENIED.**

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[9] The military judge went so far as to bold and underline the word "proffered" when explaining what information had been presented by the Government before finding there was "no evidence" Petitioner was unavailable for trial. No other words in the ruling received similar emphasis.

United States v. Rameshk

United States Air Force Court of Criminal Appeals

October 29, 2018, Decided

No. ACM 39319

Reporter
2018 CCA LEXIS 520 *; 2018 WL 5623634

UNITED STATES, Appellee v. Kamron R. RAMESHK, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Rameshk, 78 M.J. 259, 2018 CAAF LEXIS 788 (C.A.A.F., Dec. 19, 2018)*

Motion granted by *United States v. Rameshk, 78 M.J. 261, 2018 CAAF LEXIS 795 (C.A.A.F., Dec. 20, 2018)*

Review denied by *United States v. Rameshk, 2019 CAAF LEXIS 196 (C.A.A.F., Mar. 19, 2019)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: James R. Dorman. Approved sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence ad-judged 20 April 2017 by GCM convened at Whiteman Air Force Base, Missouri.

United States v. Benfield, 2018 CCA LEXIS 335 (A.F.C.C.A., July 10, 2018)

Counsel: For Appellant: Major Meghan R. Glines-Barney, USAF; Robert A. Feld-meier, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Tyler B. Musselman, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, DENNIS, and LEWIS, Appellate Military Judges.Senior Judge JOHNSON delivered the opinion of the court, in whichJudge DENNIS and Judge LEWIS joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Senior Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of one specification of failure to obey a lawful order, two specifications of rape, and one specification of wrongfully endeavoring to impede an investigation on divers occasions in violation of *Articles 92*, *120*, and *134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 892*, *920*, *934*.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for eight years, total forfeiture of pay and allowances, **[*2]** and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant raises six issues on appeal: (1) whether the military judge erroneously applied Military Rule of Evidence (Mil. R. Evid.) 412 to *Article 92, UCMJ*, exclude constitutionally required evidence; (2) whether the military judge committed plain error by admitting certain expert testimony; (3) whether Appellant's rape convictions are factually sufficient; (4) whether Appellant's sentence is unreasonably severe; (5) whether the military judge abused his discretion by failing to suppress statements Appellant made to his supervisor; and (6) whether the Government violated its discovery obligations by failing to secure and disclose exculpatory text messages.[2] We find no error that materially prejudiced Appellant's substantial rights. Accordingly, we affirm the findings and sentence.

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[1] The military judge found Appellant not guilty of one specification of failure to obey a lawful order in violation of *10 U.S.C. § 892*.

[2] Appellant personally raises the fifth and sixth issues pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

I. Background

In May 2016, Appellant was a Security Forces Airman stationed at Whiteman Air Force Base (AFB), Missouri. On the night of 7 May 2016, Appellant attended a party at the off-base residence of another member of his squadron, Airman First Class (A1C) NG. The party consisted of four male Airmen—Appellant, A1C NG, A1C AW, and Airman **[*3]** Basic (AB) Joshua Benfield—and one female civilian drinking alcohol and socializing around an outdoor fire. The female civilian, JK, had been invited to the party by AB Benfield, with whom she previously had an intimate relationship and still considered a friend.[3] JK had never before met Appellant or the other attendees. During the course of the party, other attendees witnessed JK sit on AB Benfield's lap with her shorts somewhat lowered and witnessed her perform oral sex on AB Benfield.

The party broke up in the early morning hours of 8 May 2016. JK rode with AB Benfield and Appellant in JK's car to AB Benfield's nearby house. JK believed they were going to "hang out." JK later testified that once they went inside, AB Benfield removed JK's clothing, placed her on a sofa, and initiated sexual intercourse without her consent. As AB Benfield sexually assaulted JK, Appellant approached JK, put his hands on her head, and inserted his penis into her mouth without her consent. In the course of the assault, AB Benfield repeatedly struck JK on the back of her legs. AB Benfield eventually withdrew and Appellant then inserted his penis in JK's vagina. JK later testified that in the course **[*4]** of the assault she told both AB Benfield and Appellant to stop and pushed against them with her legs. After AB Benfield laid down to sleep and JK had put her shorts and pullover back on, Appellant pulled JK by her arm to a back room in the house. Appellant pushed JK against a wall and told her he "wasn't done" with her. However, JK resisted Appellant's efforts to remove her shorts until Appellant became upset and told her to leave. JK departed, leaving her purse behind.

From her car, JK called her mother, who did not answer. JK then contacted a male friend, DR. "[S]obbing and crying profusely" according to DR, JK told DR she had been raped by two Airmen. JK drove to DR's location. After JK arrived, DR called civilian police. JK later underwent a sexual assault forensic examination. Subsequent testing of samples taken during the exam did not indicate the presence of Appellant's DNA.

After the incident, Appellant participated in several conversations with one or more of the other three Airmen present at the party during which they discussed what they should say and not say to investigators. In particular, A1C AW recalled that he saw Appellant the morning after the incident, and Appellant **[*5]** denied having sexual intercourse with JK. A1C AW testified at trial that during this conversation Appellant instructed him to "not talk about the night. If anybody asks, we were just over a[t] [A1C NG's] house, just hanging out, having a good time. That is all the information [Appellant] wanted [A1C AW] to give." However, later that day Appellant told A1C NG that he did have vaginal intercourse with JK. Yet when A1C AW confronted Appellant a few days later, after rumors of a sexual assault began to circulate in the squadron, Appellant again denied engaging in sexual intercourse with JK and said she was lying.

A1C AW recalled another conversation among all four Airmen who were at the party during which Appellant said he wanted A1C AW to deny Appellant had gone to AB Benfield's house that night. However, A1C AW objected to this plan, saying it was a "bad lie" that could easily be disproved. As A1C NG later described this meeting, Appellant and AB Benfield asked A1C NG to recount what he remembered from that night. As A1C NG spoke, Appellant and AB Benfield interjected at various points, telling him not to provide certain information to any investigators.

As the investigation progressed, **[*6]** Appellant was ordered to have no contact with JK. In addition, Appellant, AB Benfield, A1C NG, and A1C AW were relieved of their regular duties, placed in a "do not arm" status, and assigned to the "Facility Improvement Team" (FIT) to perform alternative duties. After their first day together on the FIT, their squadron commander ordered the four Airmen not to have contact with each other. Thereafter the four Airmen were dispersed to perform their alternative duties in different locations. However, after receiving the no contact order, Appellant continued to contact A1C AW using the SnapChat mobile phone application, inquiring whether A1C AW had spoken to investigators and, if so, what A1C AW had said. Appellant also had another member of the squadron call

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[3] AB Benfield was an Airman First Class at the time of the party. AB Benfield subsequently pleaded guilty and was convicted of sexual assault against JK at a general court-martial. *See* United States v. Benfield, No. ACM 39267, 2018 CCA LEXIS 335, at *1 (A.F. Ct. Crim. App. 10 Jul. 2018) (unpub. op.). After his conviction, AB Benfield testified as a prosecution witness at Appellant's trial.

A1C AW on Appellant's behalf, seeking information.

II. Discussion

A. Military Rule of Evidence 412

1. Additional Background

At trial, the Defense attempted to introduce evidence of JK's alleged sexual predisposition and other sexual behavior by JK under exceptions to Mil. R. Evid. 412. The Government and JK, through counsel, opposed its introduction. Ultimately, the military judge allowed the Defense to introduce some of this evidence, including evidence that JK sat on AB Benfield's **[*7]** lap and engaged in oral sex with AB Benfield in front of the other Airmen during the party, which was offered to rebut JK's testimony that she had not flirted with anyone at the party.

The military judge excluded several other items of evidence pursuant to Mil. R. Evid. 412. *Inter alia*, the military judge excluded testimony regarding JK's purported preference for engaging in sexual activity with two men at the same time.[4] The Defense contended this particular testimony was relevant to the issue of consent and met the exception for constitutionally required evidence under Mil. R. Evid. 412(b)(1)(C). The military judge disagreed. In a written ruling, the military judge found as a threshold matter the proffered evidence did not actually demonstrate JK had such a preference. The military judge further found that, even if it did demonstrate such a preference, it was still not relevant to whether JK consented to Appellant's acts, or to a defense of mistake of fact as to consent. Finally, the military judge found any probative value was substantially outweighed by the dangers of "unfair prejudice and the ordinary countervailing interests reviewed in making a determination as to whether evidence is constitutionally required," although **[*8]** he did not specify what interests were implicated in this case.

[4] The trial transcript, appellate exhibits, and briefs addressing this excluded evidence were sealed pursuant to Rule for Courts-Martial (R.C.M.) 1103A. These portions of the record and briefs remain sealed, and any discussion of sealed material in this opinion is limited to that which is necessary for our analysis. *See* R.C.M. 1103A(b)(4).

2. Law

"We review a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017)* (citation omitted). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)* (citing *United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008))*. The application of Mil. R. Evid. 412 to proffered evidence is a legal issue that appellate courts review de novo. *United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010)* (citation omitted).

Mil. R. Evid. 412 provides that in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions, one of which is pertinent to this case. The burden is on the defense to overcome the general rule of exclusion by demonstrating an exception applies. *United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998)* (citation omitted).

Mil. R. Evid. 412(b)(1)(C) provides that evidence of an alleged victim's other sexual behavior or sexual predisposition is admissible if its exclusion "would violate the constitutional rights of the accused." **[*9]** Generally, such evidence is constitutionally required and "must be admitted within the ambit of [Mil. R. Evid.] 412(b)(1)(C) when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011)* (citation omitted). Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. Materiality "is a multi-factored test looking at 'the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.'" *Ellerbrock, 70 M.J. at 318* (alteration in original) (citations omitted). The dangers of unfair prejudice to be considered "include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is

repetitive or only marginally relevant.'" *Id. at 319* (quoting *Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*).

3. Analysis

Appellant contends the military judge abused his discretion by excluding testimony regarding JK's purported preference for engaging in sexual acts with two men at the same time. Specifically, Appellant contends **[*10]** that testimony regarding a purported statement by JK on a previous occasion when Appellant was not present, expressing interest in engaging in sexual activity with AB Benfield and a third individual, was relevant to the issue of JK's consent in Appellant's case and constitutionally required in light of Appellant's rights to due process and confrontation under the *Fifth*[5] and *Sixth*[6] *Amendments*. *See* Mil. R. Evid. 412(b)(1)(C). We disagree.

As a threshold matter, we find the evidence the Defense sought to introduce qualifies as evidence of JK's "sexual predisposition" for purposes of Mil. R. Evid. 412(a). Indeed, JK's purported predisposition to engage in sexual activity with multiple partners simultaneously is exactly what trial defense counsel sought to establish. Accordingly, the evidence was inadmissible unless an exception applied.

Evidence of sexual predisposition is not constitutionally required if it is not relevant. *See Ellerbrock, 70 M.J. at 318*; Mil. R. Evid. 402(b) ("Irrelevant evidence is not admissible."). We find the military judge did not abuse his discretion in determining the proffered evidence was not relevant to the issue of consent. Testimony to the effect that on a separate occasion, at which Appellant was not present, JK expressed interest in simultaneously engaging in sexual activity **[*11]** with AB Benfield and another male, without any reference to Appellant, creates no inference that JK consented to sexual activity *with Appellant*.

The Government draws our attention to this court's decision in *United States v. Stephan, No. ACM 38568, 2015 CCA LEXIS 347 (A.F. Ct. Crim. App. 25 Aug. 2015)* (unpub. op.). In *Stephan*, the military judge excluded evidence the victim engaged in consensual sex with one individual while squeezing the hand of another in the presence of the appellant and others. *2015 CCA LEXIS 347 at *3-4*. Later, the appellant attempted to pull down the victim's pants without her consent. *Id.* In rejecting the appellant's argument that evidence of the victim's sexual activity prior to the offense was constitutionally required, we stated:

> The fundamental question is whether the victim's sexual conduct with others, in the presence of the appellant, makes the existence of her consent to contact by the appellant, or a reasonable belief of such consent, more or less probable. We find it does not. *Consent to sexual contact is based on the identity of the partner*, *not on the victim's willingness to engage in any specific type of contact with others*.

*2015 CCA LEXIS 347 at *6* (emphasis added) (citation omitted). What was true in *Stephan* is even more pertinent in the case of Appellant, **[*12]** who was not even present when JK purportedly expressed interest in engaging in sexual activity with multiple partners. *See also United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987)* ("[C]onsent to the [sexual] act is based on the identity of the prospective partner.").

Appellant contends his position is consistent with *Stephan* because the proffered evidence *was* based on the identity of a particular partner, specifically AB Benfield, in addition to a "random" other male. We are not persuaded. The testimony would perhaps be relevant to JK's subsequent willingness to participate in sexual activity with AB Benfield, or with the unnamed male whom she purportedly indicated at the time; however, it is not probative of her consent to engage in sexual activity with Appellant.

To be clear, we are not holding that such statements could never meet the criteria for constitutionally required evidence under Mil. R. Evid. 412(b)(1)(C). For example, depending on a victim's testimony in a particular case, such a statement could become relevant and material for impeachment purposes. However, in this case, we agree with the military judge's conclusion that the proffered testimony was not relevant, and therefore was inadmissible under Mil. R. Evid. 412 as well as Mil. R. Evid. 402(b).

B. Expert Testimony

1. Additional Background [*13]

[5] *U.S. CONST. amend. V*.

[6] U.S. CONST. amend. VI.

At trial, JK testified that she received a mark on her neck when Appellant "tried to give [her] a hickey" at some point during the assault.[7] In addition, JK testified that AB Benfield held her by the neck during the assault. DR, the friend to whom JK initially reported the assault, testified that when he saw JK shortly after the assault he saw "scratches and red marks all up and down her inner thighs, and slight red marks around her neck." JK's mother, SS, testified that she saw JK on the evening of 7 May 2016 before JK went to the party and did not see any bruises on her. When SS saw JK in the hospital the following day, she saw bruises on JK's neck. DM, a civilian police detective at the time, testified that he also saw bruises on JK's neck when he responded to the hospital that morning.

The Prosecution also called as a witness HG, a registered nurse who treated JK. HG testified that she had a bachelor's degree in nursing and had practiced as a nurse for approximately 20 years, with the majority of her nursing experience in labor and delivery. On 8 May 2016, HG was working in the hospital's emergency department. After HG described some of her duties and experience, including assessing, **[*14]** documenting, and assisting in the treatment of bruises and other injuries, assistant trial counsel sought to have HG recognized as an expert in "Emergency Room Nursing." The military judge so recognized HG after civilian trial defense counsel stated he had "[n]o objection."

Assistant trial counsel then had HG describe the "lifecycle" of bruises and how they change in appearance over time. HG described taking photos of JK to document injuries, including bruises on JK's neck. The Government introduced a number of photographs taken of JK that morning, including photos depicting scratches or abrasions on her hands, back, legs, and buttocks, as well as the bruises on her neck. When asked by assistant trial counsel, HG opined that the neck bruises were recent because of their color. Trial defense counsel did not object to this testimony. However, on cross-examination HG conceded that she did not have any "expert training" on determining the age of a bruise, other than her 20 years of experience as a nurse.

[7] On cross-examination, HG, a registered nurse called by the Government as an expert in "Emergency Room Nursing," testified as to how a "hickey" is "typically formed": "someone would place their mouth on the skin and then be sucking on that skin, or biting on that skin to draw the blood to the surface."

2. Law

A military judge's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *Ellis, 68 M.J. at 344* (citation omitted). However, "failure to make the timely assertion of a right" **[*15]** constitutes forfeiture, whereas "the intentional relinquishment or abandonment of a known right" constitutes waiver. *United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017)* (citation omitted). Where an appellant forfeits a right by failing to make a timely assertion at trial, appellate courts will review the forfeited issue for plain error. *Id.* (citing *United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009)*. In a plain error analysis, the appellant "has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011)* (footnote omitted) (citation omitted). Waiver, by contrast, "leaves no error to correct on appeal." *Ahern, 76 M.J. at 197* (citing *United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009)*.

Mil. R. Evid. 702 governs the testimony of expert witnesses in a trial by court-martial. The rule provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles **[*16]** and methods to the facts of the case.

The Court of Appeals for the Armed Forces (CAAF) has articulated six factors for military courts to analyze to determine whether a proponent of expert testimony has met the Mil. R. Evid. 702 criteria:

> (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony outweighs the other considerations outlined in [Mil. R. Evid.] 403.

United States v. Billings, 61 M.J. 163, 166 (C.A.A.F. 2005) (citing *United States v. Houser, 36 M.J. 392, 397*

(C.M.A. 1993)). Though *Houser* predates the leading United States Supreme Court decisions in this area, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), *Houser* is consistent with these decisions and continues to guide the admission of expert testimony in courts-martial. Billings, 61 M.J. at 166 (citations omitted).

However, "while satisfying every *Daubert* or *Houser* factor is sufficient, it is not necessary." United States v. Sanchez, 65 M.J. 145, 149 (C.A.A.F. 2007). The military judge's inquiry is "flexible" and "tied to the facts of [the] particular case." *Id.* (citations omitted).

3. Analysis

Appellant now contends the military judge committed plain error when he permitted HG to testify about the age of the bruises on JK's neck because the "testimony was plainly outside of the scope of [HG]'s **[*17]** training and was not based upon an accepted and proven methodology." The Government responds that Appellant waived this issue when civilian trial defense counsel stated he had "no objection" to HG's qualification as an expert in "Emergency Room Nursing." We do not find waiver. The existence of waiver depends on the facts and circumstances of each case. United States v. Elespuru, 73 M.J. 326, 328 (C.A.A.F. 2014) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Waiver is the intentional abandonment or relinquishment of a known right. Ahern, 76 M.J. at 197. The failure to contest a witness's qualification as an expert in a particular field is not a relinquishment of the right to object at trial or on appeal to every opinion subsequently elicited from that witness by the opposing party. We find Appellant forfeited rather than waived his objection to this testimony, and therefore we test for plain error.

We do not find a "plain or obvious" error by the military judge. A witness may be qualified as an expert not only by reason of "training or education" but also by "knowledge, skill, [or] experience." Mil. R. Evid. 702. Prior to expressing her opinion that the bruises on JK's neck were new, HG testified that she had been a registered nurse for approximately 20 years. Her duties included assessing, documenting, and assisting **[*18]** in the treatment of injuries. She estimated she had seen "[h]undreds, maybe thousands" of patients with bruises and had assisted in the treatment of their injuries. HG further demonstrated her familiarity with the lifecycle of a bruise by explaining how bruises are formed and how their appearance changes over time. The foundation for HG's opinion was not the application of some controversial or newly-emerging scientific theory or technique that required the military judge to conduct a detailed analysis of *Houser* and *Daubert* factors to fulfill his gatekeeper role. Rather, it was an expert opinion based on HG's practical experience in observing and treating bruises and other injuries during her 20-year career as a registered nurse, as well as her personal observation of JK as one of the attending health care providers. Based on this foundation, we find no fault with the military judge's failure to *sua sponte* exclude HG's opinion that, based on her experience, the bruises she saw on JK's neck were newly-formed.

Assuming *arguendo* that the military judge did plainly err by permitting the testimony, we nevertheless find no material prejudice to Appellant's substantial rights. We test nonconstitutional **[*19]** errors for prejudice by assessing whether the error had a "'substantial influence' on the findings." United States v. Walker, 57 M.J. 174, 178 (C.A.A.F. 2002) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). In doing so we consider four factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Clark, 62 M.J. 195, 200-01 (C.A.A.F. 2005) (quoting United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)).

In this case, the materiality and quality of the admitted opinion testimony are most significant. HG simply opined that the bruises were newly-formed because of their red color. This was consistent with SS's testimony that JK did not have bruises on her neck before she went to the party on the evening of 7 May 2016. It was also essentially consistent with the photographs the Government introduced, with the testimony of SS, DR, and DM who described seeing red marks on JK's neck after the assault, and with the testimony of JK that Appellant attempted to give her a hickey and that AB Benfield held her by the neck during the assault. In contrast, there was no evidence the bruises were present before the assault. Because HG's opinion testimony added little to the other evidence in the case regarding the neck bruises, its materiality was low and its impact **[*20]** was insubstantial.

Appellant contends HG's opinion testimony was prejudicial because it was "the only means by which to

assign a specific injury of [JK] to Appellant" as opposed to AB Benfield. However, the materiality of whether Appellant or AB Benfield was the specific source of one of the bruises on JK's neck was low. Appellant was charged not for giving JK a hickey, but for raping her. We are confident the question of whether Appellant caused one of the bruises by putting his lips on JK's neck, or whether AB Benfield was the source of all the bruises on JK's neck as well as the numerous scratches on JK's thighs, buttocks, and back, had no substantial influence on the military judge's determination of Appellant's guilt.

C. Factual Sufficiency

1. Law

We review issues of factual sufficiency de novo. *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." **[*21]** *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*; *see also United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

As charged in this case, the elements of the offenses of rape in violation of *Article 120, UCMJ*, of which Appellant was convicted include: (1) that Appellant committed a sexual act upon JK by causing penetration, however slight, of JK's vulva and mouth by Appellant's penis; and (2) that Appellant did so with unlawful force, specifically, holding JK down with Appellant's hands and body weight and holding JK's head with Appellant's hand and inserting his penis in her mouth. *See Manual for Courts-Martial, United States* (2016 ed.) *(MCM)*, pt. IV, ¶ 45.b.(1)(a). "Force" means "the use of a weapon;" the use of physical strength or violence "sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the victim." *MCM*, pt. IV, ¶ 45.a.(g)(5). "'[U]nlawful force' means an act of force done without legal justification **[*22]** or excuse." *MCM*, pt. IV, ¶ 45.a.(g)(6).

2. Analysis

Appellant advances several arguments as to why this court should not be convinced of his guilt beyond a reasonable doubt. *Inter alia*, Appellant contends the evidence of JK's behavior and other evidence suggests she in fact consented to sexual intercourse with Appellant. Appellant points to testimony regarding JK's flirtatious behavior and sexual act with AB Benfield at the party prior to the assault. However, a victim may of course consent to one sexual act but not to another. Furthermore, JK's behavior at the party with AB Benfield created no inference that she desired to engage in sexual intercourse with Appellant, someone she had never met before and in whom she expressed no sexual interest.

Appellant points to the absence of rips or tears in JK's clothing and to JK's testimony that Appellant did not hit or choke her to force her to open her mouth when he inserted his penis. He also relies on AB Benfield's testimony to argue that, contrary to JK's testimony, Appellant did not grab JK's head and JK never told Appellant "no" or pushed him away. However, AB Benfield, who admitted he was "feeling the effects" of alcohol that night, did **[*23]** not firmly deny these events occurred, only that he either did not see them or did not remember them.

Appellant also points to certain physical evidence. He emphasizes that AB Benfield, A1C AW, and A1C NG all saw what appeared to be one or more hickeys on Appellant's neck the day after the party, which Appellant said were made by JK although no witness observed how they were created. Appellant also cites the forensic testing which failed to identify Appellant's DNA on vaginal swabs from JK. However, the forensic biologist from the United States Army Criminal Investigation Laboratory called by the Defense testified on cross-examination that there were several possible explanations for this absence consistent with Appellant's penis penetrating JK's vagina. These potential explanations included the possibility that Appellant wore a condom; that he did not ejaculate; and that he simply shed relatively few skin cells that were not detected in the sample.

Conversely, the Government introduced compelling

evidence of Appellant's guilt. JK testified Appellant held her head with his hands to insert his penis in her mouth and later penetrated her vagina with his penis, both without her consent. **[*24]** Although AB Benfield did not recall some of the events JK described, he saw Appellant insert his penis in JK's mouth. Although he did not see Appellant's penis enter JK's vagina, he testified that after he withdrew from JK he saw Appellant "laying on top" of JK and "thrusting." AB Benfield also confirmed that, consistent with his earlier guilty plea to sexually assaulting JK, he knew she did not consent to the sexual intercourse. Appellant argues that the DNA evidence coupled with his highly intoxicated state suggest he did not actually penetrate JK's vagina. But Appellant's argument is undercut by his subsequent statements to A1C NG and AB Benfield that he did vaginally penetrate JK.

Appellant contends AB Benfield's testimony must be viewed with "extreme skepticism" given the two-year reduction to AB Benfield's own confinement that he received by virtue of his pretrial agreement to plead guilty to sexually assaulting JK. This agreement was undoubtedly a legitimate basis on which to cross-examine AB Benfield for potential bias. However, we are not persuaded that it was likely that AB Benfield falsely pleaded guilty to sexually assaulting JK. Moreover, AB Benfield's testimony was not **[*25]** uniformly helpful to the Government. Furthermore, we do not find that the relatively minor inconsistencies between AB Benfield's testimony and his prior statements demonstrate substantial bias against Appellant, as opposed to difficulty in remembering details attributable to the passage of time and AB Benfield's inebriated state at the time of the incident.

In addition, the Government introduced evidence that JK immediately reported the sexual assault to her friend DR in a highly distraught state. The Government introduced a recording of DR's 911 call in which JK can be heard sobbing in the background. The extensive scratches on JK's thighs, back, and buttocks and the bruising on her neck further indicate the violence of the encounter. Furthermore, Appellant's later attempts to have witnesses falsify or withhold information from investigators evidence consciousness of guilt. Having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See* *Turner, 25 M.J. at 325*. Accordingly, we find Appellant's convictions for rape to be factually sufficient.

D. Sentence Appropriateness

1. Law [*26]

We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (citing *United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)*). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)* (en banc) (alteration in original) (citing *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam)). Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

2. Analysis

Appellant asserts his sentence to eight years in confinement and a dishonorable discharge is "unduly severe" and requests this court reduce his term of confinement to five years. However, Appellant declines to articulate particular circumstances of his case that demonstrate this purported undue severity. Instead, Appellant simply asserts that "[a]n analysis of the past year's sexual assault trials reveals no sentence which survived appellate review and which was nearly as severe as [A]ppellant's," with the notable exception of AB Benfield's **[*27]** sentence. Appellant identifies five such cases by name but declines to describe the facts or circumstances of any of them.

We acknowledge that we may compare an appellant's case to other non-"closely related" cases in order to assess the propriety of the sentence, although we are not required to do so.[8] *See* *United States v. Wacha, 55*

[8] Cases are "closely related" when, for example, they involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *United States v. Lacy, 50 M.J. 286,*

M.J. 266, 267 (C.A.A.F. 2001); United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999). However, unless the cases are closely related, "[t]he appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases." United States v. LeBlanc, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015) (en banc) (citing United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)). We find no reason to engage in such comparisons here. Other than his mere assertion that these other Airmen were also convicted of sexual assault and received lighter sentences, Appellant offers no rationale as to why his sentence should be closer to theirs or was otherwise inappropriate. Ironically, Appellant received a lesser sentence than the one Airman whose case *is* closely related to his own, AB Benfield, who even with the benefit of his pretrial agreement received confinement for ten years, a dishonorable discharge, and reduction to the grade of E-1. United States v. Benfield, No. ACM 39267, 2018 CCA LEXIS 335, at *1 (A.F. Ct. Crim. App. 10 Jul. 2018) (unpub. op.).[9]

Appellant was convicted of orally raping a woman he had just met while **[*28]** she was being sexually assaulted by another Airman. Appellant then vaginally raped her as well. In addition, Appellant repeatedly violated a no-contact order from his commander and asked witnesses to provide false information in an effort to obstruct the investigation of his crimes. The military judge determined that a sentence to eight years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1, in addition to the mandatory dishonorable discharge, was an appropriate punishment for these offenses. Having given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we cannot say the sentence imposed by the military judge is inappropriately severe.

E. Suppression of Appellant's Statements to Staff Sergeant GW

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288 (C.A.A.F. 1999).

[9] AB Benfield was convicted of one specification of sexual assault against JK and one specification of physical assault by touching another person's arm and shoulder without consent. AB Benfield's sole assignment of error in his appeal to this court was that *his* sentence was inappropriately severe compared to Appellant's. Benfield, 2015 CCA LEXIS 347, unpub. op. at *1.

1. Additional Background

At some point in the days following the rape of JK, Appellant sent a text message to his supervisor, Staff Sergeant (SSgt) GW, requesting to speak with him. SSgt GW was on temporary duty away from Whiteman AFB at the time, but after SSgt GW returned a few days later they met at Appellant's dormitory room on **[*29]** 15 May 2016. Appellant selected the location. At trial, SSgt GW testified he went not as an "investigator" but as a "supervisor" in order to "take care of [Appellant's] well-being and make sure he [wa]s okay."

When SSgt GW arrived, Appellant appeared "nervous" and "fidgety." At the time, SSgt GW was unaware of the sexual assault investigation and did not suspect Appellant of any offense. However, he did know Appellant was under the legal drinking age for alcohol. Because Appellant was hesitant to speak, SSgt GW explained:

> I just started asking him, you know, like what's going on? What's bothering you? Or what did you want to talk about? I don't think [Appellant] knew exactly how to start the conversation. So, I just gave him some stuff, you know, I was like is it family issues? Is it girlfriend, or, you know, what kind of incident was it? I said was there alcohol involved? And then that is when he kind of -- it sparked his reaction and he went into his -- his story.

SSgt GW did not advise Appellant of his Article 31, UCMJ, 10 U.S.C. § 831, rights; however, SSgt GW testified:

> Before we got full into our story, or like him giving me his story, I let him know, I was like, you know, I am your supervisor, **[*30]** but at Security Forces. We are mandatory reporters, so anything that is very serious, that is a crime, I have to report. And I said, you know, with that, do you still want to get into this, or do you want me to refer you to someone else and [Appellant] said that he still wanted to talk so --.

Appellant then described to SSgt GW the party in very general terms and identified the attendees. He told SSgt GW he had gotten sick from the amount of alcohol he drank, "started to blackout" around the time he was preparing to proceed to AB Benfield's house, and did not remember anything after that until he awoke at AB Benfield's house the next morning and prepared for work. Appellant then told SSgt GW that AB Benfield

later approached Appellant and said they needed to "make up a story" that would "cover" them. Appellant told SSgt GW that he "didn't understand what [AB] Benfield was talking about."

At trial, the Defense moved to suppress Appellant's statements to SSgt GW because of SSgt GW's failure to advise Appellant of his *Article 31, UCMJ*, rights. The military judge denied the motion in an oral ruling. The military judge found that SSgt GW was not acting in a law enforcement or disciplinary **[*31]** capacity but merely as a concerned supervisor. He further found that Appellant did not subjectively view the conversation as an interrogation by SSgt GW in an official capacity, and similarly that an objectively reasonable person in Appellant's position would not have perceived the conversation as such an interrogation. The military judge further found that even if SSgt GW were required to advise Appellant of his Article 31 rights for suspicion of underage drinking, the rights advisement was not required for his statements related to the offense of sexual assault.

2. Law

We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Jones, 73 M.J. 357, 360 (C.A.A.F. 2014)* (citation omitted). "When there is a motion to suppress a statement on the ground that rights' warnings were not given, we review the military judge's findings of fact on a clearly-erroneous standard, and we review conclusions of law de novo." *Id.* (quoting *United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000))*. Whether a questioner was acting or could reasonably be considered to be acting in a law enforcement or disciplinary capacity is a question of law requiring de novo review. *Id. at 361* (citations omitted).

Article 31, UCMJ, states in pertinent part:

> (b) No person subject to this chapter may **[*32]** interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> . . . .
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

"Thus, *Article 31(b), UCMJ*, warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected." *Jones, 73 M.J. at 361* (footnotes omitted) (citation omitted). However, the second of these prongs is met only if the questioner was acting in an official law enforcement or disciplinary capacity, or could reasonably be considered to be acting in such a capacity by a "reasonable person" in the suspect's position. *Id. at 362*. "Questioning by a military superior **[*33]** in the immediate chain of command 'will normally be presumed to be for disciplinary purposes,'" although such a presumption is not conclusive. *Swift, 53 M.J. at 446* (quoting *United States v. Good, 32 M.J. 105, 108 (C.M.A. 1991))* (additional citations omitted).

An "interrogation" includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Mil. R. Evid. 305(b)(2).

3. Analysis

In the military judge's oral ruling, he cited various factors in support of his conclusions that SSgt GW was not acting in an official law enforcement or disciplinary capacity during his conversation with Appellant, and that a reasonable person would not have perceived SSgt GW in such a role. These factors include that Appellant requested the conversation, chose the location, and chose the topic. The military judge acknowledged that although "in certain circumstances" SSgt GW's warning to Appellant that as a Security Forces member SSgt GW would have to report any crimes "could be interpreted as acting in an official capacity," in this case it was "merely a reminder that their discussion was not confidential." We are not so sanguine. In light of SSgt GW's specific reference to his law enforcement role and the CAAF's admonition **[*34]** that questioning by a military superior is "normally presumed" to be in a disciplinary capacity, we decline to base our decision on a conclusion that SSgt GW had no such role in this

case.[10] *See* Swift, 53 M.J. at 446.

Nevertheless, assuming *arguendo* SSgt GW was or might reasonably have been perceived to be acting in a disciplinary or law enforcement capacity, we find Appellant was not prejudiced by any error with respect to SSgt GW's testimony. Failure to advise of Article 31, UCMJ, rights, absent evidence the suspect's statement was "involuntary" or the result of "custodial interrogation," is a nonconstitutional error. United States v. Evans, 75 M.J. 302, 305-06 (C.A.A.F. 2016). Therefore, we test for prejudice by assessing whether the error had a "substantial influence" on the findings. Walker, 57 M.J. at 178 (quoting Kotteakos, 328 U.S. at 765). In doing so we consider four factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." Clark, 62 M.J. at 200-01 (quoting Kerr, 51 M.J. at 405).

Appellant argues SSgt GW's testimony was not harmless with respect to the charge that Appellant endeavored to impede an investigation because the testimony "confirmed a scheme to obstruct justice involving Appellant and [AB Benfield]." **[*35]** We disagree. The relevant portion of SSgt GW's testimony was essentially comprised of two short paragraphs in which, as related by SSgt GW, Appellant did not describe participating in a scheme but rather tended to deflect blame onto AB Benfield. Trial defense counsel declined to cross-examine SSgt GW on this brief testimony. More importantly, the testimony of A1C AW and A1C NG, whose accounts were corroborated in a general way by AB Benfield, directly indicated Appellant's efforts to impede the investigation of the sexual assault on JK. Considering the relative strength of the Government and Defense cases with respect to this charge, as well as the quality and materiality of SSgt GW's testimony, we find any error in the admission of that testimony did not substantially influence the military judge's findings of guilt.

[10] We note the record would support a finding that SSgt GW did not "interrogate" Appellant; that is, one could conclude there is an absence of evidence that SSgt GW asked any question intended or likely to elicit an incriminating response at a point in time when he had reason to suspect Appellant of an offense. *See* Mil. R. Evid. 305(b)(2); Jones, 73 M.J. at 361. However, because neither the military judge at trial nor the Government on appeal rely on this basis, and in light of the alternative basis for rejecting Appellant's argument, we also decline to rest our decision on a finding that there was no "interrogation."

F. Discovery and Production

1. Additional Facts

During the investigation of the assault on JK, Special Agent (SA) ZP of the Air Force Office of Special Investigations (AFOSI) interviewed JK and extracted data, including text messages and call logs, from JK's cell phone on 10 June 2016. SA ZP then returned JK's cell phone to her. At trial, SA ZP testified he did not find **[*36]** any text messages between AB Benfield and JK from 8 May 2016 or earlier. Prior to trial, the Government provided 263 pages of text messages and 26 pages of call logs from JK's cell phone to the Defense.

At trial, there was some testimony that AB Benfield and JK exchanged text messages during the party on 7-8 May 2016. A1C NG testified that he saw a text message between AB Benfield and JK sometime that evening. AB Benfield testified he saw text messages from JK during the party, including messages about Appellant, but he believed JK had deleted them. For her part, JK testified she took a few SnapChat photos during the party, but she could not remember if she had shared text messages with AB Benfield during the party, or if so, whether she had deleted such messages.

2. Law

Each party to a court-martial must have an equal opportunity to inspect evidence and to obtain witnesses and other evidence. United States v. Stellato, 74 M.J. 473, 483 (C.A.A.F. 2015) (citing R.C.M. 701(e) and Article 46, UCMJ, 10 U.S.C. § 846). The CAAF "has interpreted this requirement to mean that the 'Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused.'" *Id.* (quoting United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986)). "The duty to preserve includes: (1) evidence that has an **[*37]** apparent exculpatory value and that has no comparable substitute; (2) evidence that is of such central importance to the defense that it is essential to a fair trial; and (3) statements of witnesses testifying at trial." *Id.* (citations omitted).

"Each party is entitled to the production of evidence

which is relevant and necessary." R.C.M. 703(f)(1); *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)*. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is 'necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'" *Rodriguez, 60 M.J. at 246* (quoting R.C.M. 703((f)(1), Discussion).

3. Analysis

Although the Defense did not raise the issue at trial, Appellant now contends the Government failed to exercise due diligence to obtain exculpatory evidence. Specifically, Appellant contends the Government was on notice that text messages JK wrote during the party on 7-8 May 2016 existed, that these messages were exculpatory because they tended to show JK was attracted to Appellant and consented to the subsequent sexual encounter, and that JK's cell phone was "within the **[*38]** control of the [G]overnment" because JK worked on the base and her phone would have been subject to search and seizure at the direction of military authorities. We disagree.

Because the cell phone was no longer in the Government's possession once it was returned to JK, the appropriate analysis is production under R.C.M. 703(f) rather than discovery under R.C.M. 701. *See United States v. Bishop, 76 M.J. 627, 634 (A.F. Ct. Crim. App. 2017)*, *rev. denied*, *76 M.J. 401 (C.A.A.F. 2017)*. Appellant fails to demonstrate that, having received the AFOSI data extraction, any remaining information on JK's cell phone was either relevant or necessary. *See Rodriguez, 60 M.J. at 246*. There is no indication the AFOSI data extraction on 10 June 2016 failed to retrieve any text messages existing on the phone as of that date. In other words, there is no reason to believe that text messages from prior to 9 May 2016 that were not on the cell phone on 10 June 2016 would be found on the phone at a later date.

Furthermore, Appellant fails to demonstrate that such text messages, if they ever existed, were in fact helpful to the Defense, much less "exculpatory." Neither of the witnesses who purportedly saw such messages testified that they indicated JK was attracted to Appellant. To the contrary, AB Benfield testified that during the party JK told AB Benfield **[*39]** she was not interested in Appellant. Appellant is therefore entitled to no relief on this basis.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*.

Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

United States v. Reinert

United States Army Court of Criminal Appeals

August 7, 2008, Decided

ARMY MISC 20071195 and ARMY MISC 20071343

Reporter
2008 CCA LEXIS 526 *; 2008 WL 8105416

UNITED STATES, Petitioner v. Colonel PATRICK REINERT, Military Judge, Respondent and Private E1 DARYUS C. GIPSON, Petitioner v. THE UNITED STATES ARMY, Major General WILLIAM H. MCCOY, and Colonel DARIA P. WOLLSCHLAEGER, Respondents

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** U.S. Army Maneuver Support Center and Fort Leonard Wood. Timothy Grammel (arraignment) and Patrick Reinert (trial), Military Judges, Colonel Jerry L. Linn, Staff Judge Advocate (trial), Lieutenant Colonel Francisco A. Vila, Acting Staff Judge Advocate (post-trial recommendation), and Colonel Daria P. Wollschlaeger, Staff Judge Advocate (addendum).

Counsel: For United States, Petitioner: Captain Adam S. Kazin, JA (argued); Colonel John W. Miller II, JA; Lieutenant Colonel Stephen P. Haight, JA; Major Elizabeth G. Marotta, JA; Captain Adam S. Kazin, JA (on brief); Captain Larry W. Downend, JA.

For Reinert, Respondent: Lieutenant Colonel Steven C. Henricks, JA (argued and on brief).

For Gipson, Petitioner: Captain Christopher W. Dempsy, JA (argued); Colonel Christopher J. O'Brien, JA; Major Sean F. Mangan, JA; Captain Christopher W. Dempsy, JA (on brief).

For Other Respondents: Captain Adam S. Kazin, JA (argued); Colonel John W. Miller II, JA; Lieutenant Colonel Stephen P. Haight, JA; Major Elizabeth G. Marotta, JA; Captain Adam S. Kazin, JA (on brief); Captain Larry W. Downend, JA.

Judges: Before GALLUP, ZOLPER, and MAGGS, Appellate Military Judges. Senior Judge ZOLPER and Judge MAGGS concur.

Opinion by: GALLUP

Opinion

MEMORANDUM **[*2]** OPINION ON PETITIONS FOR EXTRAORDINARY RELIEF

GALLUP, Senior Judge:

Colonel (COL) Patrick Reinert, a military judge sitting as a special courtmartial, convicted Private (PVT) Daryus C. Gipson, pursuant to his pleas, of conspiracy to commit housebreaking and larceny, absence without leave (AWOL), disobeying a superior commissioned officer, disobeying a superior noncommissioned officer, larceny, housebreaking, and communicating a threat, in violation of Articles 81, 86, 90, 91, 121, 130, and 134 of the Uniform Code of Military Justice, *10 U.S.C. §§ 881*, *886*, *890*, *891*, *921*, *930*, and *934* [hereinafter UCMJ]. Colonel Reinert sentenced PVT Gipson to a bad-conduct discharge, confinement for seven months, and forfeiture of $ 867.00 pay per month for seven months. The convening authority has not taken action in the case. This matter is before us as a result of petitions for extraordinary relief filed by the United States and PVT Gipson pursuant to the All Writs Act, *28 U.S.C. § 1651(a) (2000)*. [1]

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[1] In a petition for Extraordinary Relief in the Nature of a Writ of Prohibition, the government (petitioner in Army Miscellaneous 20071195) asks this court to prohibit enforcement of an order by COL Reinert **[*3]** to the government, and to prohibit enforcement of COL Reinert's grant of five days confinement credit to PVT Gipson as a sanction for the government's failure to carry out the order. Colonel Reinert is the named respondent in Army Miscellaneous 20071195. In a separate petition arising out of the same court-martial, PVT Gipson (petitioner in Army Miscellaneous 20071343), seeks extraordinary relief in the Nature of a Writ of Mandamus. Private Gipson asks this court to direct the staff judge advocate (SJA) to submit her recommendation pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 1106 and order the convening authority to take initial action in the case. The

As the two petitions are necessarily intertwined, we consider them together. Resolution of Army Miscellaneous 20071195 **[*4]** will remove any impediment to the speedy completion of the very action sought by Army Miscellaneous 20071343; in an exercise of logical and judicial economy the court will discuss and resolve Army Miscellaneous 20071195 first. All the sections below, with the exception the decretal paragraph, address the government's petition for a Writ of Prohibition.

We first address two threshold questions. First, does the UCMJ provide this court jurisdiction under the All Writs Act to review an interlocutory appeal on behalf of the government when *Article 62*, UCMJ, does not otherwise permit such review? Second, assuming there is jurisdiction, is the subject matter "extraordinary" under the All Writs Act? We then address the substantive question of whether a judge can order confinement credit unrelated to *Article 13*, UCMJ. [2]

FACTS

After arraignment, but before entering **[*5]** pleas, PVT Gipson filed a motion alleging he was subjected to illegal pretrial punishment in violation of *Article 13*, UCMJ, and requesting twenty days confinement credit. Private Gipson averred he was publically ridiculed by a number of drill sergeants and noncommissioned officers. On one occasion a drill sergeant told a group of soldiers waiting in line at a dining facility, "You see these 2 privates [(PVT Gipson and another soldier)] . . . you don't want to be like them . . . going to jail . . . looking for a boyfriend. . . . You privates don't want to be like those scumbags." On several other occasions, another drill sergeant, in the presence of other soldiers, referred to PVT Gipson as "big Louie's [a local entertainment establishment] bitch" and said PVT Gipson was "[going] to jail." Another noncommissioned officer, when leaving the supply room where PVT Gibson and two other soldiers remained, made a point to take all of his personal belongings, telling the rest of the soldiers in the room, "I don't want nothin' to be takin . . . you 'all the ones who stole it; you're the one with the records." Finally, on at least four occasions, another drill sergeant would sing lyrics from **[*6]** a song entitled "Locked Up" when he saw PVT Gipson.

Private Gipson filed a second *Article 13*, UCMJ, motion several days later and requested three additional days of confinement credit claiming a drill sergeant standing with several other drill sergeants told him to "get your hands out of your pockets Jailbird." There were other soldiers present and close enough to hear this comment.

At the *Article 39(a)*, UCMJ, session on the motions, the government conceded the alleged acts occurred and acknowledged they constituted illegal punishment under *Article 13*, UCMJ. The government agreed PVT Gipson should receive twenty days of confinement credit. Colonel Reinert, while accepting the government's concession there was illegal pretrial punishment, required argument from both parties before determining the remedy for these violations. After hearing the parties' positions, COL Reinert ruled on the motion for illegal pretrial punishment credit as follows:

> All right, in light of the facts that we have here, I'm going to grant the *Article 13*[, UCMJ,] motion and I'm going to give you some credit. I'm also going to grant some other relief. To a certain extent I agree with trial counsel that the level **[*7]** of the misconduct isn't as bad as some *Article 13*[, UCMJ,] motions I've seen. It's not the old Peyote platoon kind of approach, but the thing that is disconcerting to me is the fact that you've got a relatively wide path of misconduct. You've got senior noncommissioned officers, E-7s and E-6s, who in this training environment are charged with building the backbone of the Army, they are charged with instilling the Army values, and they are acting like juvenile school children. In short, they are running amuck.
>
> I am going to grant the accused twenty days credit for the *Article 13*[, UCMJ,] violations, but credit alone I don't think will solve *Article 13*[,UCMJ,] issues. I'm also going to direct that the government

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SJA advised the convening authority not to take action pending resolution of the Writ of Prohibition; the convening authority has not taken action. Private Gipson urges this court to grant a Writ of Mandamus directing the convening authority to take action regardless of the disposition of the Writ of Prohibition. The SJA and the convening authority are the named respondents in Army Miscellaneous 20071343.

[2] *Article 13*, UCMJ, "Punishment prohibited before trial," provides in pertinent part:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement . . . nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence. . . .

> cause each of these noncommissioned officers named in the defense motion to be taken to a brigade level commander or sergeant major. Each of them will be counseled about *Article 13*[,UCMJ,] and the need to stop this kind of idiotic behavior.
>
> In addition to that individual counseling, the government shall conduct training, orientation, or guidance to every drill sergeant on this installation to make sure that they understand that when a [s]oldier is accused of misconduct they cannot **[*8]** go out of their way to punish the accused prior to trial in violation of *Article 13*[, UCMJ]. Now, whether reaching out to all the drill sergeant on this post is through a training session or through a letter or article in the post newspaper, I will leave that to your discretion. But you need to make sure that everyone understands the need to comply with *Article 13*[, UCMJ].
>
> In the event that the government fails to follow through with the individual counseling of these [s]oldiers or fails to get the word out generally by either the way of class, newspaper article or some other appropriate means, I will grant an additional 5 days credit.
>
> So, what that means PVT Gipson is that I have granted your motion because of the way you were treated prior to trial here. We are going to give you some credit off of the sentence that is going to be imposed today. I'm going to give you twenty days off that sentence. I have also ordered the government to do something to hopefully correct this situation in the future. In the event that the government refuses to do that, then you will get an additional 5 days off your sentence.

Colonel Reinert further ordered the government to file a "certificate of compliance **[*9]** with the court's order" as an appellate exhibit and stated:

> If when I get that record for review and there is no [appellate exhibit to that effect] then that tells me the government has not complied. I will then order a posttrial [Article] 39a[, UCMJ,] session. . . . [I]n the event [the government has] not complied by the time it is time to authenticate the record, then [I] will grant the additional 5 days credit at that point and then I will authenticate the record.

The government eventually certified it complied with all but one part of COL Reinert's order--the order to conduct installation-wide training for all drill sergeants. As a result, on 10 September 2007, PVT Gipson filed a motion for appropriate relief asking COL Reinert to grant him the additional five days confinement credit. On 14 September 2007, the government acknowledged it did not conduct the installation-wide training and asked COL Reinert to reconsider his earlier ruling. The government argued COL Reinert's order exceeded his authority. In light of the government's admissions, COL Reinert, with the agreement of the parties, determined a post-trial *Article 39(a)*, UCMJ, session was unnecessary, finding he possessed **[*10]** necessary facts to make a ruling.

On 24 September 2007, COL Reinert supplemented his prior ruling on the *Article 13*, UCMJ, motions and authenticated the record of trial. Asserting it was within his power to "take appropriate actions to enforce judicial orders," he awarded PVT Gipson the additional five days of confinement credit for the *Article 13*, UCMJ, violations based on the government's failure to comply with his order. He further ordered the government to "take appropriate steps to notify the confinement facility and convening authority of the change in credit."

On 28 September 2007, the convening authority, in accordance with the advice of his acting SJA, decided not to take action on PVT Gipson's case so that the United States could pursue a petition for extraordinary relief with this court.

PROCEDURAL HISTORY

On 26 October 2007, the United States filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition asking this court to find:

> 1. [COL Reinert's] order to conduct mandatory training is outside the authority of the military judge, and therefore, is prohibited from enforcement against the Government.
>
> 2. [COL Reinert's] order awarding PVT Gipson five additional **[*11]** days of sentence credit as a consequence of the Government's non-compliance with the training order is outside the authority of the military judge, and therefore, is prohibited from enforcement against the convening authority or Government[.]
>
> 3. [COL Reinert's] awarding five days of confinement credit to PVT Gipson shall be treated as a recommendation for clemency . . . . The convening authority is free to award PVT Gipson the additional five days confinement credit as a discretionary act of clemency.

On 6 December 2007, PVT Gipson filed a petition for

Extraordinary Relief in the Nature of a Writ of Mandamus asking this court to order the SJA to submit a post-trial recommendation (SJAR) to the convening authority and order the convening authority to take action on his case. On that same day, the acting SJA signed a SJAR pursuant to Rule for Court-Martial [R.C.M.] 1106(d) and provided a copy to PVT Gipson's trial defense counsel pursuant to R.C.M. 1106(f). The acting SJA recommended delaying action in the case "until the appellate courts resolve the legality of [COL Reinert's] order."

On 10 December 2007, PVT Gipson, through his trial defense counsel, submitted matters to the convening **[*12]** authority under R.C.M. 1105(b) and 1106(f)(4). The accused requested the convening authority consider alternate clemency in taking initial action on the case: either disapproval of the adjudged punitive discharge, or approval of a request for discharge under the provisions of Army Reg. 635-200, Personnel Separations: Enlisted Personnel, ch. 10 [hereinafter Chapter 10] (6 June 2005). The SJA supplemented the SJAR on 17 December 2007 with an addendum pursuant to R.C.M. 1106(f)(7). The SJA recommended, *inter alia*, the convening authority "disapprove the Accused's requests for a Chapter 10 . . . [and] the Accused's request for disapproval of the bad conduct-discharge [sic]." The SJA again recommended deferral of final action until "final decision on the writ."

On 17 December 2007, the convening authority disapproved PVT Gipson's request for discharge under Chapter 10; moreover, he "disapprove[d] the Accused's request for disapproval of the bad conduct discharge," while nevertheless deferring "final action" until disposition of the government's writ. We heard oral argument in both petitions on 19 December 2007.

LAW and DISCUSSION

Government Interlocutory Appeals

The jurisdiction of this court **[*13]** is narrowly prescribed by Congress. *See* Articles 62, *66*, *69*, and 73, UCMJ. *Article 66*, UCMJ, affords this court jurisdiction to review "the findings and sentence as approved by the convening authority" in a court-martial. *See 10 U.S.C. § 866(c)*. Article 62, UCMJ, allows this court to review certain kinds of interlocutory government appeals. *See id*. § 862(a). *Article 69*, UCMJ, gives us jurisdiction to review cases in which the Judge Advocate General has taken certain actions. *See id*. at *§ 869(d)*. Finally, Article 73, UCMJ, permits this court to review petitions for a new trial for newly discovered evidence or fraud on the court. *See id*. at § 873.

As this is a government interlocutory appeal of a military judge's ruling, arguably the most applicable statutory basis for review is Article 62, UCMJ. [3] That article, however, limits the scope of an appeal to any ruling or order made by a military judge which terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material in the proceeding, or involves the disclosure of classified information. *See* 10 U.S.C. § 862(a)(1)(A)-(D). In addition, contemporaneous with the enactment **[*14]** of Article 62, UCMJ, the President provided for government interlocutory appeals consistent with the article's mandate and limitations. *See* R.C.M. 908(a) (*Manual for Courts-Martial, United States* (1984 ed.) [hereinafter, *MCM*, 1984]; *see also* Drafters' Analysis of R.C.M. 908, *MCM*, 1984 ("Article 62[, UCMJ,] now provides the Government with a means to seek review of certain rulings or orders of the military judge."). [4]

While Article 62, UCMJ, limits an appellate court's jurisdiction to those issues indentified within the statute, the article **[*15]** has been interpreted broadly to ensure the government has the same opportunity to appeal adverse trial rulings the prosecution has in federal civilian criminal proceedings. *See* United States v. Lopez de Victoria, 66 M.J. 67, 71 (C.A.A.F. 2008); United States v. Brooks, 42 M.J. 484, 486 (C.A.A.F. 1995) ("Article 62 was intended by Congress to be interpreted and applied in the same manner as the [federal] Criminal Appeals Act, 18 U.S.C. § 3731.").

In this case, the government has not petitioned for review under Article 62, UCMJ, nor would this court find jurisdiction under the statutory scheme Congress has

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[3] Since 1 August 1984, Article 62, UCMJ, allows an appeal by the United States in any trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged. *See* Military Justice Act of 1983, Pub. L. 98-209 (1983). Article 62, UCMJ, was amended again in 1996 to provide for interlocutory appeals of certain questions relating to classified information. National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 1141(a), 110 Stat. 186, 467 (1996).

[4] The current R.C.M. 908 remains relatively unchanged since its inception. *See* R.C.M. 908(c)(3), *Manual for Courts-Martial, United States* (2005 ed.) [hereinafter *MCM*].

prescribed. Colonel Reinert has not issued any orders terminating any charges or specifications, excluded evidence, or addressed disclosure of classified information. *But cf.* United States v. True, 28 M.J. 1, 3 (C.M.A. 1989) (Article 62, UMCJ, is intended to avoid the "technical barriers to government appeals" and should be interpreted broadly). Therefore, it is clear neither the statutory nor procedural prerequisites for a successful Article 62, UCMJ, appeal have been met. *See also* R.C.M. 908.

Government Appeals under the All Writs Act

Since this court concludes it has no jurisdiction **[*16]** under Article 62, UCMJ, the principle jurisdictional question before this court is whether an alternative form of interlocutory appeal exists for the government to seek redress. In particular, the government avers, and COL Reinert concedes, "[t]his court has jurisdiction pursuant to the All Writs Act." Although both parties agree we have jurisdiction under the All Writs Act, 28 U.S.C. § 1651, we question this authority. Accordingly, the immediate question is whether we can issue a writ under this act in a case that does not fall within the specific statutory language of Articles 62, *66*, *69*, or 73, UCMJ.

The All Writs Act, 28 U.S.C. 1651(a), provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The authority of this court to exercise jurisdiction under the All Writs Act has been recognized by the Supreme Court. *See* Noyd v. Bond, 395 U.S. 683, 695 n.7, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969). In general terms, the military appellate courts can intervene under authority of the All Writs Act in extraordinary cases where the normal review process does not afford an adequate remedy. *See, **[*17]** e.g.*, ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997); Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982); United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988).

The All Writs Act, however, is not applied without limitation. The Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In Goldsmith v. Clinton, 526 U.S. 529, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999), the Supreme Court held the Court of Appeals for the Armed Forces (CAAF) lacked jurisdiction to issue a writ, under 28 U.S.C. § 1651, enjoining the President and various military officials from dropping an officer from the rolls of the Air Force. The officer was convicted at court-martial and sentenced to confinement but was not dismissed. The officer claimed, *inter alia*, an administrative action dropping him from the roles would violate double jeopardy. The CAAF granted the writ under 28 U.S.C. § 1651 and the Supreme Court reversed. The Court ruled:

> [T]he CAAF is accorded jurisdiction by statute (so far as it concerns us here) to "review the record in [specified] cases reviewed by" the service courts of criminal appeals, **[*18]** *10 U.S.C. §§ 867(a)(2)*, *(3)*, which in turn have jurisdiction to "revie[w] court-martial cases," *§ 866(a)*. Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence," *§ 867(c)*, that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it.

Id. at 535 (footnote omitted). The Court further explained "the express terms of the [All Writs] Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id. at 534-35* (citations omitted); *see also* Loving v. United States, 62 M.J. 235, 247 (C.A.A.F. 2005) (the All Writs Act authorizes employment of extraordinary writs, but is not generally available to provide alternatives to other adequate remedies at law; a writ may not be used when another method of review will suffice).

If *Goldsmith* was the only case interpreting the All Writs Act, we would conclude there is no jurisdiction because neither Article 62 nor *66*, **[*19]** UMCJ, provide for this court's review of government appeals under the All Writs Act. [5] However, *Goldsmith* is not the only case and our

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[5] The holding of *Goldsmith* has limited application to the factual and procedural posture of this case. As previously noted, *Goldsmith* involved a writ filed after the conviction became final under Article 76, UCMJ, and addressed our superior court's jurisdiction to review such writs under ***Article 67***, UCMJ. *See* Goldsmith, 526 U.S. at 534. While the Supreme Court also rejected a more general jurisdictional basis under the All Writs Act to "oversee all matters" related to military justice, this case does broadly concern an approved "finding or sentence" as cited in *Goldsmith.* *Id. at 535* (citation omitted). Moreover, unlike Goldsmith, there are no alternative

superior court has exercised jurisdiction under the All Writs Act in several instances in which the requirements of Article 62 and *66*, UCMJ, were not satisfied. In United States v. Caprio, 12 M.J. 30, 30 (C.M.A. 1981), our superior court conceded, "Congress fail[ed] to provide specifically for submission by the Government of petitions for review in extraordinary writ matters"; however, the court ultimately concluded it had jurisdiction to review the government's petition under the All Writs Act. *See also* United States v. Redding, 11 M.J. 100, 104-06 (C.M.A. 1981) (military appellate courts have jurisdiction under the All Writs Act to review government interlocutory petitions); Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979). *But cf.* Carroll v. United States, 354 U.S. 394, 401, 77 S. Ct. 1332, 1 L. Ed. 2d 1442 (1957) (appeals by the government in criminal cases are permitted only where there is specific statutory authority and only within the narrow limits statutorily granted). Additionally, the legislative history of the Military Justice Act of 1983 suggests Congress saw no existing **[*20]** statutory means for government interlocutory appeals prior to the enactment of Article 62, UCMJ. [6] *See also* True, 28 M.J. at 4 (Everett, C.J., dissenting) ("Until 1983, the Uniform Code contained no statutory provision whereunder the Government could appeal from an adverse ruling at the trial level.").

Accepting our superior court's premise in Caprio that the All Writs Act was available to the government in that case because no statutory authority existed for an interlocutory appeal by the government, the enactment of Article 62, UCMJ, seemingly superseded the government's **[*22]** ability to appeal interlocutory matters under the All Writs Act. *See* Lopez De Victoria, 66 M.J. at 68 ("Thus, Congress' decision to permit appeals from either party in the 1983 Act was not a jurisdictional innovation, but an adaptation of the existing Title 18 statute *to replace* the cumbersome extraordinary writ procedure with a direct appeal procedure." (emphasis added)). As our superior court recently noted, "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act that is controlling." Loving, 62 M.J. at 247 (citation omitted).

Given the narrowly prescribed congressional scheme for government interlocutory appeals under Article 62, UCMJ, in the absence of restraint from this court, appellate use of extraordinary writs under the All Writs Act could easily circumvent the carefully crafted jurisdictional and procedural requirements of Article 62, UCMJ, and R.C.M. 908. *See generally* United States v Roberts, 88 F.3d 872, 883 (10th Cir. 1996) (government's petition to issue writ of mandamus was denied, since issuance of **[*23]** writ would expand government's right to bring interlocutory criminal appeals beyond terms of 18 U.S.C. § 3731); United States v Weinstein, 511 F.2d 622, 626 (2d Cir. 1975), *cert. denied*, *422 U.S. 1042, 95 S. Ct. 2655, 45 L. Ed. 2d 693 (1975)* (citing Will v. United States, 389 U.S. 90, 96-97, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967)) (use of writ of mandamus as substitute for appeal or as means of circumventing Criminal Appeals Act is barred).

Jurisdictional Precedent and Stare Decisis

While we have significant concerns for the viability of government interlocutory appeals under the All Writs Act, particularly after *Goldsmith*, we are bound to follow precedent established by our superior court and are mindful "of the importance that the doctrine of stare decisis plays in our decision-making." United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003). In particular, stare decisis is "most compelling" where courts undertake statutory and rule construction. Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 205, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991); *see also* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of

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administrative or judicial remedies available for the government to seek redress. *See* id. at 537. Therefore, Goldsmith is not controlling precedent in this case. *See generally* United States v. Riley, 55 M.J. 185 (C.A.A.F. 2001), *aff'd* ***[*21]*** *after remand*, ***62 M.J. 212 (C.A.A.F. 2005)*** (discussing the precedential authority of Supreme Court cases to the military appellate courts).

[6] *See* S. Rep. No. 98-53, at 23 (1983); *Hearings Before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate*, 98th Cong. 33, 46, 48, 52, 97 (1982) (statements of: Honorable William H. Taft IV, Department of Defense General Counsel; Major General Hugh J. Clausen, Judge Advocate General of the Army; Major General Thomas B. Bruton, Judge Advocate General of the Air Force; Rear Admiral John S. Jenkins, Judge Advocate General of the Navy; Honorable Robinson O. Everett, Chief Judge, Court of Military Appeals); *Hearings on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on Armed Forces, House of Representatives*, 98th Cong. 38 (1983) (Honorable William H. Taft, IV, Department of Defense General Counsel).

stare decisis."). Indeed, our superior court **[*24]** cautioned:

> When an intermediate appellate court sets out to discover whether it continues to be bound by precedent of a higher court, which that higher court has not repudiated, it undertakes a risky venture. While negotiating such a path is not inevitably fatal, it is so marked with pitfalls that it should not be undertaken with temerity.

United States v. Kelly, 45 M.J. 259, 262 (C.A.A.F. 1996).

As previously noted, our superior court has asserted jurisdiction to issue writs for government appeals under *28 U.S.C. § 1651* prior to the enactment of *Article 62*, UCMJ. *See Redding, 11 M.J. at 104-06*; *Dettinger, 7 M.J. at 218*; *Caprio, 12 M.J. at 30-33*. More recently, in *ABC, Inc. v. Powell, 47 M.J. 363*, our superior court issued a writ of mandamus to a convening authority requiring him to open a hearing under *Article 32*, UCMJ, to the press and public. The case did not fall within the language of *Article 67*, UCMJ, because it had not been reviewed first by a court of criminal appeals. *See 10 U.S.C. § 867(a)*. Our superior court nonetheless granted the writ of mandamus, citing *28 U.S.C. § 1651* as its jurisdictional authority. *See ABC, Inc. v. Powell, 47 M.J. at 364*. [7]

Finally, in *Suzuki* our superior court declared the proper form for government appeals of confinement credit issues is through an extraordinary writ petition. *United States v. Suzuki, 14 M.J. 491, 492-93 (C.M.A. 1983)* (citing *Redding, 11 M.J. 100*; *Dettinger, 7 M.J. 216*). This principle was reinforced more recently by now Chief Judge Effron in his concurring opinion in *United States v. Ruppel, 49 M.J. 247, 254 (C.A.A.F. 1998)* (concurring in part and in the result) ("The only means available for the Government to appeal **[*26]** the sentence credit would be via an extraordinary writ.").

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[7] Our court similarly has issued **[*25]** writs under *28 U.S.C. § 1651* in cases not strictly within the ambit of *Articles 62* and ***66***, UCMJ. In *McKinney v. Jarvis, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997)*, we held that we have "supervisory jurisdiction" over Army courts-martial and that we therefore could issue a writ of prohibition under *28 U.S.C. § 1651* against an officer appointed as an Article 32 investigating officer. Likewise, in *Dew v. United States, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998)*, we concluded we had supervisory authority to issue a writ concerning actions of the Judge Advocate General even though the case did not fall within the jurisdictional language of *Articles 62*, ***66***, ***69***, or *73*, UCMJ.

The Supreme Court has announced the lower courts should not lightly assume its decisions have been overruled:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)*). We apply this same standard to the decisions of our superior court.

Applying this principle, we conclude that *ABC, Inc. v. Powell*, *Caprio*, and *Suzuki* remain good law. Not only do the facts of these cases differ significantly from those of *Goldsmith*, but our superior court continues to cite to these cases without suggesting those decisions have any infirmity. *See generally Lopez De Victoria, 66 M.J. 67*; *United States v. Davis, 64 M.J. 445, 447 (C.A.A.F. 2007)*; **[*27]** *United States v. Montesinos, 28 M.J. 38, 44 (C.M.A. 1989)*. We thus conclude the All Writs Act empowers us to issue a writ of prohibition in aid of our jurisdiction over a pending court-martial, even if the case does not fall strictly within the jurisdiction conferred by *Articles 62*, *66*, *69*, *73*, UCMJ.

Petition for an Extraordinary Writ of Prohibition

Although we conclude we may exercise extraordinary writ jurisdiction, we must also determine whether the relief requested fits with the narrow boundaries of an "extraordinary" matter to justify its use. Under our All Writs Act jurisdiction, a petitioner must present compelling reasons why it is "necessary and appropriate" that we grant relief. *Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008)* (quoting *28 U.S.C. § 1651(a)*). An extraordinary writ constitutes a "drastic instrument which should be invoked only in truly extraordinary situations." *Harrison v. United States, 20 M.J. 55, 57 (C.M.A. 1985)* (quoting *United States v. LaBella, 15 M.J. 228, 229 (C.M.A. 1983)*). 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 **[*28]** relief. With these general principles in mind, we examine what criteria might justify extraordinary relief suggested in this case-a writ of prohibition. *See* Black's Law Dictionary 1228 (7th ed. 1999) ("An extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power.").

The government frames the issue in this case as one pitting the authority and responsibility of a convening authority against that of a military judge. The government argues adequate relief cannot be obtained in any other form than an extraordinary writ and the matter cannot wait for review in the ordinary course of this court's exercise of statutory appellate authority under *Article 66*, UCMJ. Colonel Reinert rejects the government's argument this is an extraordinary matter; rather, he argues the question of five days' relief for unlawful pretrial punishment is simply *de minimis* and the government had only to take the most minor of communicative steps to comply with his order. As a consequence, COL Reinert contends there really is no tension between the commander's and judge's authority.

First, we find that **[*29]** the subject matter is "in aid of" our jurisdiction and is proper for our consideration under the All Writs Act. Determining the proper exercise of a military judge's authority with respect to remedying illegal pretrial punishment goes directly to the validity and integrity of military justice and so serves in "aid of" our jurisdiction. Moreover, granting a writ of prohibition would serve the interests of our jurisdiction precisely as the Supreme Court has directed, "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)*.

Second, we find no authority for COL Reinert's argument that a dispute over five days confinement credit cannot be an extraordinary matter. On the contrary, the government's claim squarely contrasts the respective powers of convening authorities and military judges. Since the subject matter of the writ in this case concerns the fundamental question of judicial authority, and since there is no reportable precedent on point, we are convinced this is an extraordinary matter. That the substance concerns five days of credit **[*30]** for the government's failure to obey COL Reinert's order, or that the government could have avoided the award of five days credit by the simple expedient of a post-wide email, is immaterial to the fundamental nature of the controversy.

Finally, we acknowledge the general proposition that government extraordinary writs will not be considered in criminal cases "which [do] not have the effect of a dismissal [of a charge or termination of a prosecution]." *Will, 389 U.S. at 98*. We are, however, also guided by the clear mandate of our superior court in *Suzuki, 14 M.J. 491*. A convening authority "cannot unilaterally ignore a military judge's ruling, even when believing it to be beyond the military judge's authority; rather, [a convening authority] *must* invoke the extraordinary writ process." *Id. at 492* (emphasis added).

In this case, we agree with the government there is no way to address the order except through the exercise of our extraordinary powers. As advanced in *Suzuki*, there is simply no other appellate means for the government to contest the military judge's ruling. We, therefore, hold this is a proper situation for the exercise of our extraordinary powers under the All Writs Act.

The [*31] Scope of a Military Judge's Authority and Merits of the Writ of Prohibition

We turn now to the final question in this case, whether COL Reinert's order to the convening authority was beyond the scope of his authority. At the outset, we note our superior court faced an almost identical scenario on direct appeal in *United States v. Stringer, 55 M.J. 92 (C.A.A.F. 2001)*. [8] The *Stringer* court specified the question of "whether the military judge had authority to order the staff judge advocate to publish the newspaper article"; however, the court ultimately ruled the issue was moot since the government published the article and complied with the military judge's ruling. *Id. at 93-94*. We now address the issue specified but mooted in *Stringer*.

The government agrees PVT Gipson suffered illegal pretrial punishment. As to the additional five days

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[8] In *Stringer*, the military judge found that the accused had suffered illegal pretrial punishment under *Article 13*, UCMJ, and ordered thirty-one days of credit against confinement. *Id. at 93*. In addition, the military judge directed the government to publish an article in the post newspaper outlining illegal pretrial punishment. Just as here, the military judge in *Stringer* announced that he would award additional confinement credit as a sanction should **[*32]** the government fail to publish the article before the convening authority took action. *Id*.

confinement credit, however, the government argues this was not credit for illegal pretrial punishment, but an award for the government's failure to carry out COL Reinert's training order. The government asserts COL Reinert's order was beyond his powers because it was generally intended as a prophylactic measure to prevent future instances of illegal pretrial punishment, instead of specific remedial action to redress PVT Gipson's illegal pretrial punishment.

Conversely, COL Reinert asserts his order was lawful, given the wide latitude judges enjoy to redress illegal pretrial punishment. Moreover, he argues a writ of prohibition is not warranted because the government's entitlement to relief is not clear and indisputable.

We agree with the government that a military judge's orders must relate to the court-martial to which the judge is detailed. This is consistent with the tenor of Article 26, UCMJ, which, *inter alia*, sets forth the detailing, qualifications, and administrative supervision of a military **[*33]** judge, but which only briefly touches on the duties of a military judge. [9] Other UCMJ articles are similar. [10] None of these 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 courtmartial over which the judge presides. [11]

The Rules for Courts-Martial contemplate an equally limited scope. For example, R.C.M. 801(a)(3) provides that "[s]ubject to the code and this Manual, [the military judge shall] exercise reasonable control over *the proceedings* to promote the purposes of these rules and this Manual" (emphasis added). The *MCM* provides for no plenary authority to promote either the purposes of the *MCM* or generally to advance the interests of justice beyond the existing proceeding. [12]

Our interpretation of a military judge's authority is consistent with the analysis of our superior courts. In United States v. Weiss, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994), the Supreme Court commented on the military judge's status and authority:

> [T]he position of the military judge is less distinct from other military positions than the office of full-time civilian judges is from other offices in civilian society. As the lead opinion in the Court of Military Appeals noted, *military judges do not have any "inherent judicial authority separate from a court-martial to which they have been detailed*. When they act, they do so as a courtmartial, not as a military judge. Until detailed to a specific court-martial, they have no more authority than any other military officer of the same grade **[*36]** and rank."

Id. at 175 (emphasis added) (quoting United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992); *see also* United States v. Chisholm, 58 M.J. 733, 736 (C.A.A.F. 2003) (citing Articles 38 and 54, UCMJ and R.C.M. 1103) ("Once detailed to a court-martial, a military judge's statutory and regulatory trial responsibilities continue until he completes his "directing" of the preparation of the record of trial and authenticates it); *cf.* Blakely v. Washington, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (citing Apprendi v. New Jersey, 530

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[9] In pertinent part, Article 26(c), UCMJ, states, "[a] commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General . . . and may perform duties of a judicial nature other than those relating to his primary duty as a military judge . . . when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee."

[10] *See, e.g.*, Article 39, UCMJ, "Sessions"; Article 41, UCMJ, "Challenges"; Article 48, UCMJ, "Contempts"; and Article 51, UCMJ, "Voting and rulings."

[11] *See Legal and Legislative Basis, MCM, United States*, **[*34]** 1951 at 69 (prepared by the drafters of the 1951 Manual) ("[T]he legislative intent is so clear on this point, the law officer has been charged generally with the responsibility for the fair and orderly conduct of the *proceeding*." (emphasis added); *See also Hearings No. 37 before House Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 607, 671, 754, 772, 774, 820, 824, 1152 (1949); *House of Representatives Report No. 491 on H.R. 4080*, 81st Cong., 1st Sess. 6, 7, 16, 18 (1949); *Hearings before Senate Committee on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 40, 41, 57, 108, 125, 129, 184, 288, 308 (1949); *Senate Report No. 486 on H.R. 4080*, 81st Cong., 1st Sess. 6, 15, 18, 20, 22 (1949).

[12] The **[*35]** authority of a military judge as prescribed or delegated, and not plenary, is also reflected in service regulations. Army Reg. 27-10, Legal Services: Military Justice para. 8-4d.(3) (16 November 2005), sets out the power and duties of a military judge, and expressly admonishes military judges to "tak[e] care [and] avoid any act that may be a usurpation of the powers, duties, or prerogatives of a convening authority. . . ."

U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000))* ("[T]he judge's authority to sentence derives wholly from the jury's verdict.").

We agree with COL Reinert that a military judge exercises considerable latitude in conducting a court-martial, as the military judge is ultimately responsible for ensuring a fair trial. *United States v. McIlwain, 66 M.J. 312, 313 (C.A.A.F. 2008)*.

> [He] has broad discretion in carrying out this responsibility, including the authority to call and question witnesses, hold sessions outside the presence of members, govern the order and manner of testimony and argument, control voir dire, rule on the admissibility of evidence and interlocutory questions, exercise contempt power to control **[*37]** the proceedings, and, in a bench trial, adjudge findings and sentence.

Id., 66 M.J. at 313-314 (quoting *United States v. Quintanilla, 56 M.J. 37, 41 (C.A.A.F. 2001))*. *See also United States v. Tilghman, 44 M.J. 493 (C.A.A.F. 1996)* (appellant received ten-for-one credit for less than twenty-four hours in illegal pretrial confinement).

This discretion also applies to crafting an appropriate remedy for a violation of *Article 13*, UCMJ, in relation to a particular accused within the framework of a particular case. *See United States v. Fulton, 55 M.J. 88, 89 (C.A.A.F. 2001)* (A military judge's authority to redress illegal pretrial punishment is extensive and "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." (citation omitted)); *United States v. Stamper, 39 M.J. 1097, 1099 (A.C.M.R. 1994)* (The form of reassessment [for illegal pretrial punishment] is a matter within our discretion."); *see also* R.C.M. 305(k) (a military judge's authority to grant more than day-for-day credit in unusual cases, is now explicitly recognized in the *MCM*).

Notwithstanding this discretion, nothing in *Article 13*, UCMJ, or any other **[*38]** article of the Code, authorizes a military judge to sanction illegal pretrial punishment outside the bounds of the court-martial over which he presides. A military judge's discretion in fashioning an appropriate remedy for illegal pretrial punishment must relate to and confine itself to the court-martial to which the judge has been detailed. The five days confinement credit awarded to PVT Gipson was not a remedy for the illegal pretrial punishment PVT Gipson suffered. It was an *ultra vires* measure directed at preventing future pretrial punishment in other cases.

CONCLUSION

However well-intentioned his actions in this case, Colonel Reinert lacked authority to order the government to train soldiers on *Article 13*, UCMJ. The award of five days credit shall not be enforced.

Petitioner's Request in ARMY MISC 20071195 is GRANTED. When taking action in this case, Petitioner is not required to apply the five days credit ordered by COL Reinert.

Given our disposition of ARMY MISC 20071195, we DENY without prejudice ARMY MISC 20071343. Our decision today in ARMY MISC 20071195 removes the only impediment to the convening authority's taking action, thus mooting the relief sought in ARMY MISC 20071343. **[*39]** Should the convening authority not take timely action, nothing within this decision would limit PVT Gipson's ability to resubmit his petition for relief.

Senior Judge ZOLPER and Judge MAGGS concur.

United States v. Walker

United States Army Court of Criminal Appeals

October 22, 2018, Decided

ARMY 20160239

Reporter
2018 CCA LEXIS 506 *

UNITED STATES, Appellee v. Specialist CHASTIN L. WALKER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Walker, 2019 CAAF LEXIS 89 (C.A.A.F., Feb. 6, 2019)*

Prior History: **[*1]** Headquarters, 82d Airborne Division. Deidra J. Fleming, Military Judge. Colonel Travis L. Rogers, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Tiffany M. Chapman, JA; Lieutenant Colonel Christopher D. Carrier, JA; Captain Cody Cheek, JA (on brief).

For Appellee: Colonel Tania M. Martin, JA; Captain Jeremy Watford, JA (on brief).

Judges: Before WOLFE, SAULSSOLIA, and ALDYKIEWICZ, Appellate Military Judges.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Senior Judge:

Today we address a claim that the military judge did not grant appellant enough confinement credit for his command's violation of *Article 13, 10 U.S. C. § 813 (2012)*, Uniform Code of Military Justice [UCMJ]. For about eleven and a half months appellant was subject to a no contact order that prohibited him from seeing his step-children while he was investigated, prosecuted, and ultimately convicted of sexually abusing a neighborhood girl.[1] The military judge awarded 58 days confinement credit as an appropriate remedy for the violation. In deciding the claim, we consider the purpose and limitations of providing *Article 13, UCMJ*, credit. We conclude that no additional relief is warranted.[2]

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[1] A military judge sitting as a general court-martial convicted appellant, contrary to his plea, of the sole offense alleged: sexual abuse of a child in violation of *Article 120b, UCMJ, 10 U.S.C. § 920b (2012)*. The military judge sentenced appellant to a bad-conduct discharge, confinement for nine months, and reduction to the grade of E-1.

[2] In a separate assignment of error, appellant asserts the military judge erred by admitting Miss JE's statement to her mother, made the morning after the assault, as an excited utterance. The military judge found that the statement, made less than twelve hours afterwards and made to the first trusted adult Miss JE could disclose to, was still made under the stress of "a startling event." Military Rule of Evidence [Mil. R. Evid.] 803(2). It was therefore admissible as an excited utterance. *Id.* At trial and on appeal, appellant argues that Miss JE's crying resulted from a verbal confrontation with her mother rather than because of appellant's assault. We agree with the military judge's ruling and find the conclusion that Miss JE was still "under the stress of a startling event at the time of [her] statement . . ." to be supported by the record. *United States v. Donaldson, 58 M.J. 477, 483 (C.A.A.F. 2003)*.

We also reject appellant's claim he is entitled to sentence relief because it took 309 days to conduct the post-trial processing of appellant's case. We find no due process violation and no prejudice to appellant. *See generally United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*. Nor do we find that appellant is entitled to any sentencing relief because of the undue delay. *See generally United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*.

Appellant also personally raised matters pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. Appellant correctly asserts that the Secretarial designation of the general court-martial convening authority was not included in the record of trial despite the trial counsel's on the record promises to the contrary. We have obtained a copy and placed it in the record. After due consideration, we find the remainder of appellant's *Grostefon* matters do not warrant discussion nor relief.

BACKGROUND

Appellant **[*2]** has twin stepdaughters. On 28 February 2015, Miss JE, a fourteen year-old girl, was at appellant's house for a sleep over. After the twins had gone to sleep, appellant came down stairs and asked Miss JE if she wanted to cuddle and watch movies with him. He then pulled a blanket over her, and began to rub her lower back, buttocks, and upper leg. Miss JE wanted him to stop and told appellant that she needed to go to sleep. Appellant complied, and then told her not to tell anyone what had happened.

Miss JE called and sent her mother contemporaneous text messages asking her to immediately come and pick her up. Her mother did not answer the phone or see the text messages. The next morning, Miss JE, while stuttering and crying, told her mother what had happened.

Appellant was interviewed by military law enforcement and wrote a statement that was consistent with Miss JE's accusation. He stated he had become sexually attracted to Miss JE that night after she had given him a hug. When asked if he was sexually aroused while rubbing her back and buttocks appellant responded, "Yep." After the offense was reported, appellant was given a series of no contact orders by his commander. The orders were **[*3]** not well written, and at least two were impossible to comply with. Government counsel at trial described them, if read literally, to be "ludicrous." For example, one order required appellant to remain away from "any residents within 100 miles" of the street where appellant and Miss JE resided. The street was on Fort Bragg. Appellant was assigned to Fort Bragg. We take judicial notice that Fort Bragg is well-less than 100 miles across.

However broadly the orders were written, at trial the military judge properly focused on how the orders were interpreted and enforced. Appellant was not required to stay away from all persons who lived within 100 miles from Miss JE's address. However, the military judge found that the no contact orders (through the various amendments and reissuances) effectively prohibited appellant from having any contact with his stepchildren during the approximately eleven and a half months the offense was investigated and prosecuted. The military judge's finding is reasonable.

At trial, the defense introduced evidence that appellant's children were subjected to a forensic interview. Additionally, police conducted canvas interviews of other neighborhood children. Neither **[*4]** investigatory step revealed additional allegations of abuse.

The defense filed a motion requesting two days of sentencing credit for each day appellant was subjected to the order. The defense claimed that since the police had identified no other allegations of sexual abuse involving children, there was no legitimate government interest behind the order.

The government argued that the order was given in order to protect children from the accused. The government referenced the accused's sworn statement to law enforcement in which the accused admitted to acting on his sexual attraction to a fourteen-year-old girl who was visiting his house for a children's sleep over.

The military judge found no "legitimate government interest" in the no contact order.[3] The military judge made no finding as to whether the order was given with a punitive intent.

LAW AND DISCUSSION

Appellant alleges that the military judge abused her discretion in only awarding 58 days of confinement credit. Appellant argues that the "meager credit awarded in this case was insufficient to communicate that the law applies to the government as well as the accused." Appellant argues, "such an unconscionable abuse of military authority **[*5]** should not withstand appellate review."

In assessing the claim, we briefly consider the purpose and limitations on providing sentencing credit for *Article 13, UCMJ* violations.

A. The Limits of Article 13, UCMJ

Courts-martial (and the Courts of Criminal Appeals) are Article I courts of limited jurisdiction. *See U.S. Const. art. I, § 8, cl. 14* (granting Congress the power to discipline members of the military); *UCMJ, arts. 16-18*;

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[3] One of appellant's stepdaughters was called as a government witness. The government did not argue at trial, and we will therefore not consider on appeal, whether there was a legitimate government interest in preventing contact between appellant and his stepdaughters as witnesses. *United States v. Carpenter, 77 M.J. 285, 289 (C.A.A.F. 2018)* ("[O]ur review for error is properly based on a military judge's disposition of the motion submitted to him or her . . . .").

see generally United States v. Ortiz, 138 S. Ct. 2165, 2170-71, 201 L. Ed. 2d 601 (2018) (describing Congressional authority over military courts to adjudicate charges against service members). The responsibility of administering the military justice system is shared between commanders, staff judge advocates, military judges, and others. While the roles of the various players sometimes overlap, each player has a proper lane. We have previously rejected the view that Article 13, UCMJ, is a broad tool for judicial supervision over alleged abuses of military power, and have instead focused on determining whether the case in front of us is correct in law, correct in fact, and should be approved. *UCMJ, art.66(c)*.

In United States v. Reinert, 2008 CCA LEXIS 526 (Army Ct. Crim. App. 7 Aug. 2008) we considered a petition for extraordinary relief filed by the United States against a military judge. The military judge had ordered soldiers **[*6]** who had violated Article 13, UCMJ, be counseled by their brigade commander or command sergeant major. 2008 CCA LEXIS 526 at *7. The military judge further ordered that all drill sergeants at the installation receive training on Article 13, UCMJ. 2008 CCA LEXIS 526 at *8. When the government failed to follow the military judge's order, the military judge awarded the accused additional confinement credit. 2008 CCA LEXIS 526 at *9-10.

We described the judge as "well intentioned" but having far exceeded his authority. Reinert, 2008 CCA LEXIS 526, at *38. 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. 2008 CCA LEXIS 526 at *37-38. While Article 137, UCMJ, specifically requires training on the Uniform Code of Military Justice, to include Article 13, UCMJ, it is not the role of the military judge to direct or supervise training.

Similarly in United States v. Alston, 75 M.J. 875 (Army Ct. Crim. App. 2016), we considered the claim that Captain Alston was unlawfully punished pretrial when he was reassigned duties and faced increased supervision while awaiting trial. We found that absent an intent to punish, Article 13, UCMJ, does not provide a mechanism for judicial review of command personnel decisions. Id. at 886.

Appellant's argument to this Court could be understood as arguing for sentencing relief that is beyond what **[*7]** is necessary to cure the harm suffered. He stated that "the meager credit awarded in this case was insufficient to communicate that the law applies to the government as well as the accused." In other words, that we might order "extra" sentencing credit in order to punish or deter future government conduct. We do not think that is what appellant means, but if it is, we reject it as being beyond our limited authority. Accordingly, we focus instead on the Article 13, UCMJ, motion as litigated at trial.

B. Requirement for Punitive Intent

Our superior Court, since the very beginning of Article 13, UCMJ, jurisprudence, has required a punitive intent before finding a violation of Article 13. *See, e.g.,* United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985).

A requirement that there be an intent to punish as a prerequisite to finding a violation of Article 13, UCMJ, ensures that it is not transmogrified into a means of seeking redress of military grievances generally, and that courts-martial do not become a mechanism for review of command decisions unrelated to military justice. As we stated in Alston:

> The Supreme Court of the United States has stated "courts are ill equipped" to review problems regarding prison administration, and that it is not **[*8]** "wise for [a court] to second-guess the expert administrators on matters on which they are better informed." Military judges are likewise disadvantaged when it comes to reviewing a commander's administration of his or her command. Unless there is an intent to punish, Article 13, UCMJ, does not provide for judicial review of command personnel decisions; even in circumstances where appellant asserts the commander's decision was wrong, misguided, or negligent. What Article 13 prohibits is *extra-judicial* punishment of a person "held for trial." This addition reflects not merely the plain language of Article 13, UCMJ, and its interpretive case law, but also the different duties imposed on a commander and a military judge.

75 M.J. 875, 886 (citations omitted).

Recently, the United States Court of Appeals for the Armed Forces (CAAF) explicitly stated that in order to find a violation of Article 13, UCMJ, "[t]he record *must* disclose an intent to punish on the part of the Government." Howell v. United States, 75 M.J. 386, 394 (C.A.A.F. 2016) (emphasis added). "[A] finding of [punitive] intent is a threshold requirement for finding a

violation of *Article 13, UCMJ*." *Alston, 75 M.J. at 885*. Our superior Court has rejected the view that a "punitive effect" without finding a punitive intent is sufficient **[*9]** to support a violation of *Article 13, UCMJ*. *Howell, 75 M.J. at 393-94*.

When a commander's official action goes wrong, as appellant alleges happened here, there are multiple mechanisms for correction. The chain of command, the Inspector General, and *Article 138, UCMJ*, are among the means that a soldier may use to seek relief from an oppressive action such as an overly broad or illegal order.[4]

If a finding of punitive intent is required to trigger *Article 13, UCMJ*, relief, the question then becomes, how does an accused show that the government acted with a punitive intent? Just as with evidence of intent generally, in the absence of direct evidence, evidence of intent can be inferred circumstantially. *Alston, 75 M.J. at 885*. Here, the military judge found the no contact order was not reasonably related to a legitimate government interest.[5] This was not the only possible finding, but it was a reasonable one. This finding allows, but does not require, an inference that the government acted with punitive intent. As the Supreme Court stated in *Bell v. Wolfish*:

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition **[*10]** is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment . . . .

441 U.S. 520, 539, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

In other words, the presence or absence of a legitimate governmental objective informs, but does not necessarily answer, the question of whether there is a violation of *Article 13, UCMJ*. The same official action may violate *Article 13, UCMJ*, (or not) depending on the motive.

Here, while the military judge found no legitimate government interest at play, she made no finding on whether the no contact orders were issued with punitive intent. If the no contact orders were issued by a commander who was (over-zealously) seeking only to protect children, no *Article 13, UCMJ*, violation occurred, and any relief from the overbroad order would have to come from a source other than the military judge. But, if the order was issued by a commander who sought to use a no-contact order as a means to exact pretrial punishment on appellant, there would be a clear violation of *Article 13, UCMJ*.[6]

Evidence was introduced that the government had good cause to believe that: a) the accused had a sexual interest in a child; b) that **[*11]** at the time the accused was acting in loco parentis; and c) the accused acted on his sexual interest. The government then dedicated significant investigatory resources in trying to determine whether appellant had abused other children. On balance, this supports the argument the no contact orders originated from an honest concern about child welfare.

On the other hand the no contact orders were not carefully drafted and were not narrowly tailored to achieve their purported purpose. Also, the strength of the government's interest may have waned as the months passed and no new allegations of abuse were discovered. Given the military judge's finding that the orders did not actually serve a legitimate government purpose, it is a permissible inference that the orders were issued with an intent to punish appellant.

We assume, without deciding, that the no contact orders

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[4] Not only are these options often the appropriate mechanism for error correction, in the overwhelming instances where there is not a court-martial, they are the only options. Even if *Article 13, UCMJ*, was construed as a means of imposing judicial supervision of command decisions, it would be a poor one.

[5] We do not address whether the no contact order violated appellant's parental rights. The factual record of appellant as "step-parent" was not sufficiently developed.

[6] Our superior Court has stated that when "an accused fails to complain of the conditions of his pretrial confinement to the military magistrate or his chain of command, that is strong evidence that the accused is not being punished in violation of *Article 13*." *United States v. Huffman, 40 M.J. 225, 227 (C.A.A.F. 1994)*. The initial order was issued on 26 March 2015. On 23 September 2015, the defense counsel sent an email to the trial counsel requesting that the no contact orders be revoked. In response, the government revoked one of the orders, but left the remainder in place. Appellant next complained of the no contact order when he filed the motion for relief under *Article 13, UCMJ*, on 8 March 2016.

in this case constituted a violation of Article 13, UCMJ.[7] Two prudential concerns guide this determination. First, on appeal the government does not challenge the finding of an Article 13, UCMJ, violation. Although our review under *Article 66(c), UCMJ*, is not limited to the issues developed and briefed by the parties, the absence **[*12]** of briefing on the issue gives us pause. Second, we cannot reject the possibility the military judge found an intent to punish, but simply failed to put the finding on the record.

Accordingly, we next answer whether appellant received sufficient relief for the Article 13, UCMJ, violation.

C. What is the appropriate amount of relief?

Appellant claims the military judge abused her discretion by granting him too little confinement credit for the Article 13, UCMJ, violation. "The burden is on appellant to establish entitlement to additional sentence credit because of a violation of Article 13." United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002) (citing Rule for Courts-Martial [R.C.M.] 905(c)(2), *Manual for Courts-Martial, United States* (2000 ed.)).

Providing sentence credit for violations of Article 13, UCMJ, serves to ensure that an accused is not doubly punished for an offense. "[I]f the accused has already been punished pretrial, that pretrial punishment must be credited against the sentence." Alston, 75 M.J. at 887 (citing United States v. Ruppel, 49 M.J. 247, 254 (C.A.A.F. 1998)).

> Article 13, UCMJ, relief can range from dismissal of the charges, to confinement credit or to the setting aside of a punitive discharge. Where relief is available, meaningful relief must be given for violations of Article 13, UCMJ. However, relief is not **[*13]** warranted or required where it would be disproportionate to the harm suffered or the nature of the offense.

United States v. Zarbatany, 70 M.J. 169, 170 (C.A.A.F. 2011).

The CAAF has described Article 13, UCMJ, credit as "[a] judicially-created remedy, adopted by this Court under our supervisory powers to enforce Article 13, UCMJ." Ruppel, 49 M.J. at 254. A sentence credit does not reduce the sentence per se, but rather is a determination that part of the sentence has already been served. *See* United States v. Rock, 52 M.J. 154, 157 (C.A.A.F. 1997); Ruppel, 49 M.J. at 254 ("[t]he credit itself is not a reduction of the sentence.") (Effron, J. concurring).

In the case of a de minimus violation of Article 13, UCMJ, it may be that no confinement credit is due. United States v. Corteguera, 56 M.J. 330, 334 (C.A.A.F. 2002) (where the pretrial confinee was made to sing "I Believe I Can Fly" and to run from window to window in the jail yelling, "I'm an inmate and I'm here because I can't get it right" constituted "*de minimis*" impositions for which "administrative credit was not required.").

In United States v. Villamil-Perez, 32 M.J. 341, 343 (C.M.A. 1991), our superior Court found no relief warranted when a report documenting the accused's alleged offense was posted on a unit bulletin board for three days. While the court found a violation of Article 13, UCMJ, the violation did not amount to material prejudice to a substantial right, *see* Article 59(a), UCMJ, and therefore **[*14]** no relief was warranted.

On the other hand, the CAAF has repeatedly stated that an accused may receive more than day for day credit in the case of serious violations of Article 13, UCMJ. *See* United States v. Suzuki, 14 M.J. 491, 492 (C.M.A. 1983) (condoning three-for-one credit because of "unusually harsh circumstances").

More recently, the CAAF has described the appellate inquiry as follows: "[t]he question of what relief is due to remedy a violation, if any, requires a contextual judgment, rather than the pro forma application of formulaic rules. Whether meaningful relief has been granted and should be granted will depend on factors such as the nature of the Article 13, UCMJ, violations, the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses for which the appellant was convicted." Zarbatany, 70 M.J. at 176-77 (C.A.A.F. 2011).

We understand this framework as requiring a military judge to, as best he or she can, cure the harm caused by the illegal pretrial punishment while avoiding a windfall to the accused. The goal is to make the

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[7] Normally, in reviewing claims for Article 13, UCMJ, credit where the military judge makes no finding of an intent to punish, we must review the claim de novo. United States v. Smith, 53 M.J. 168, 170 (C.A.A.F. 2000) ("In the absence of a factual finding relating to intent to punish, this Court will address the issue of illegal pretrial punishment de novo. . . .").

accused whole and prevent double punishment. *Alston, 75 M.J. at 887* (citing to *Ruppel, 49 M.J. at 254 (C.A.A.F. 1998))*.

Our superior Court has wisely rejected formulaic approaches for determining how much credit is due. But, a non-formulaic **[*15]** inquiry does not suggest there is no framework with which to consider the question. One must start somewhere, and in a case where credit towards confinement is the remedy, one can ask how many days of confinement is roughly equivalent to the illegal punishment inflicted on the accused. The military judge must weigh the harm caused by the *Article 13, UCMJ*, violation against the remedy sought. While the goal is to seek equipoise, judgment, not math, provides the answer.

In this case, one might ask how many days of confinement should the accused be deemed to already have served in order to balance the harm caused by an order that prohibited him from seeing his stepchildren for over 11 months?

Appellant asked for two days of credit for each day he could not see his stepchildren. The military judge determined that 58 days of confinement credit was an appropriate remedy.

We find the military judge's award of 58 days of confinement credit provided appellant with meaningful relief. We also conclude that the military judge did not abuse her discretion in determining that 58 days was a sufficient remedy.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and sentence are AFFIRMED. **[*16]**

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