25 September 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In RE HVZ, *Appellant* v. UNITED STATES, *Appellee* Technical Sergeant (E-7) MICHAEL K. FEWELL United States Air Force *Real Party in Interest*	)	UNITED STATES' BRIEF IN RESPONSE TO THE CERTIFIED ISSUES Crim. App. Dkt. No. 23-0250/AF USCA Dkt. No. 2023-03 25 September 2023

UNITED STATES' BRIEF IN RESPONSE TO THE CERTIFIED ISSUES

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INDEX

IV.

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

FEDERAL COURTS

STATUTES

OTHER AUTHORITIES

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

CERTIFIED ISSUES

I.

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

II.

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

III.

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

IV.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS?

STATEMENT OF STATUTORY JURISDICTION

Article 67(a)(2), UCMJ, provides that this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

STATEMENT OF THE CASE

Appellant's Statement of the Case is correct.

STATEMENT OF FACTS

In pertinent part, Appellant was charged with sexual assault and domestic violence against his wife that occurred between 1 January 2020 and 31 March 2021. (Cert., Attachment I at 37-39.) The named victim (Appellant) sought medical and mental health treatment due to alleged injuries caused by the Real Party in Interest (Accused). (Id. at 113.) Appellant also spoke to Family Advocacy personnel on Luke Air Force Base, Arizona. (Id.) Prior to her marriage with the Accused, Appellant was married to a Naval officer from approximately

2004 to 2014. (Id.) The Accused and Appellant were then married in 2016. (Id. at 41.) As a DoD dependent, Appellant had Tricare medical coverage for the majority of the past two decades. (Id.)

On 28 April 2023, trial defense counsel moved to compel Appellant's medical records within the military's possession, including non-privileged mental health records. (Id.) Specifically, trial defense counsel sought to compel approximately 20 years' worth of medical records, including decades of medical records when Appellant was married to a different military officer, unrelated to the case against the Accused. (Id.) Trial defense counsel argued it was "highly likely" these records existed and were in the military's possession. (Id.) Trial defense counsel further argued, "Review of these records is relevant to assess whether there are any existing conditions, prescriptions, or other medical statuses that would impact the complaining witness' ability to remember or perception, and generally credibility." (Id.)

On 4 May 2023, the Government filed its response to the defense's motion to compel Appellant's medical records. (Id. at 107.) The Government did not oppose the defense's request to produce non-privileged Family Advocacy Program ("FAP") records and medical records relevant to the charged offense. (Id.) Specifically, the Government agreed to produce records from 19 January 2020 (the time of the first charged offense) until the present day (4 May 2023). (Id.) The

Government opposed production of any records prior to 19 January 2020. (Id.) On 2 May 2023, Appellant, through counsel, opposed the defense's motion to compel her records. (Id. at 95.) Appellant contended that the defense's request was overly broad and speculative. (Id.) Appellant conceded the defense had met its burden to compel records regarding a neck and back injury the victim sustained related to the charged offenses with Appellant between 1 March 2021 and 5 June 2021. (Id.)

On 11 May 2023, the military judge issued his ruling granting, in part, and deferring, in part, the defense's motion to compel. (Id. at 113.) Consistent with R.C.M. 701(g)(1), the military judge ordered three things:

> (1) Trial counsel will identify what medical records, nonprivileged mental health records, and nonprivileged Family Advocacy records of the named victim are within the possession, custody, or control of military authorities, located at Luke Air Force Base, including those generated before, during, and after the charged timeframes;
>
> (2) If any such records are privileged or not subject to disclosure, trial counsel will respond to the Defense stating any basis for non-disclosure and notify the Court; and
>
> (3) If any such medical, mental health, or Family Advocacy Program record is subject to disclosure and is relevant to the defense's preparation, trial counsel will discovery such information to the Defense.

(Id.)

In a separate order directed to the 56th Medical Group located at Luke AFB, Arizona, the military judge directed the Medical Group to "work closely with a medical law attorney." (Id. at 118.) The military judge reasoned, "The appropriate medical professional, in coordination with the medical law attorney, will ensure any and all matters subject to privilege under Military Rule of Evidence 513 are redacted prior to providing the information." (Id.) In his order, the military judge reiterated, "**None of the responsive records should include confidential communications between [Appellant] and any mental health provider."** (Id.) (emphasis in original). Finally, the military judge directed the Medical Group to send any responsive records to the trial counsel detailed to Appellant's case. (Id. at 119.)

The military judge concluded that "the portion of the defense's motion seeking to compel discovery of any records not maintained by either the Luke Air Force Base MTF, mental health facility, or Family Advocacy program office is not ripe at this time." (Id. at 115.) Accordingly, the military judge limited his order to only those medical records housed at the 56th Medical Group at Luke AFB, Arizona.

Also in his ruling, the military judge noted that Appellant submitted a written response to the defense motion to compel, asserting that the motion be denied. (Id. at 113.) However, citing In re HK, 2021 CCA LEXIS 535 (A.F. Ct.

Crim. App. 2021) (unpub. op.), the military judge "did not consider it due to lack of standing before this trial court. (Cert., Attachment I at 113.) The military judge continued, "the court's ruling does not implicate R.C.M. 703(g)(3)(C), and as such, does not provide the named victim standing under the provisions of this rule." (Id.)

The victim did not request reconsideration of the military judge's order to compel the victim's records be provided to trial counsel nor request clarification of the scope of the order.

Appellant's AFCCA Petition

On 16 May 2023, pursuant to Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b, and Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant petitioned the Air Force Court of Criminal Appeals (AFCCA) to issue a writ of mandamus to "vacate the trial court's decision [dated 11 May 2023] to order disclosure of extensive medical records" of Appellant. (Id. at 1.) Appellant claimed the military judge violated her right to privacy by ordering production of her medical records, argued the Accused made no showing of relevance and necessity to justify the court order, and asserted that intent behind Article 6b supports her right to privacy.

In denying Appellant's petition, AFCAA stated the petition raised two primary issues: (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). (Cert., Attachment VI at 6-7.) Notably, Appellant did not challenge the standard of review to be applied for a writ of mandamus under Article 6b, UCMJ.

Regarding the standing issue, AFCCA held that while "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, . . . Article 6b, UCMJ, does not *create* the right to be heard *by the trial court* on any and all matters affecting those rights, other than during presentencing proceedings in accordance with Article 6b(a)(4)(B), UCMJ." (Id. at 7) (emphasis in original.)

Further, while noting that "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," AFCCA held, "R.C.M. 701, like Article 6b, UCMJ, itself, does not provide Petitioner the right to be heard at the trial court." (Id.)

AFCCA then explained why Appellant failed to demonstrate the military judge was clearly and indisputably incorrect when he 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. In doing so, AFCCA found the military judge "did not clearly and indisputably err by concluding that [Appellant'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.'" (Id. at 8.)

Appellant, citing to United States v. Stellato, 74 M.J. 473, 481 (C.A.A.F. 2015) and Department of Defense Manual (DoDM) 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs*, argued that since the trial counsel was prohibited from accessing Appellant's medical records without a court order, then the medical records were not in the possession of military authorities for purposes of R.C.M. 701(a)(2)(A). (Id. at 9.)

AFCCA was not persuaded. First, AFCCA held, "medical records maintained by the 56 MDG would seem to fall within the plain meaning of 'papers, documents, [and] data . . . within the possession, custody, and control of military authorities . . . ,' and the military judge did not clearly and obviously err in reaching that conclusion." (Id.)

Additionally, AFCCA disagreed with Appellant's assertion that the trial counsel required a court order prior to accessing patient records at the 56 MDG. AFCCA, stated, "HIPPA, read in conjunction with its implementing regulations,

with Article 46(a), UCMJ, and with R.C.M. 703(g)(2), facially permits trial counsel to obtain evidence under the control of the 'Government' . . . using an 'administrative request' that meets certain criteria, rather than a court order." (Id., *citing* DoDM 6025.18 ¶ 4.4.f.(1)(b)3.) AFCCA surmised, "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." (Id., *citing* Stellato, 74 M.J. at 484–85.)

AFCCA also disagreed with Appellant's converse argument that categorizing military health system (MHS) records in the possession, custody, and control of military authorities meant any MHS patient records were accessible by the prosecution without process. Using the same reasoning as above, AFCCA stated, "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." (Id. at 10, *citing* DoDM 6025.18 ¶ 4.4.f.(1)(b)3.)

Notably, AFCCA recognized the current states of affairs with regard to Appellant's medical records. AFCCA highlighted that "[w]hether any of the records are in fact relevant and to be disclosed to the Defense is effectively yet to

be determined," since the military judge had only, to this point, "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." (Id. at 8.) (emphasis added.) However, AFCCA recognized that "[t]hose 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." (Id.) (emphasis added.)

SUMMARY OF ARGUMENT

AFCCA correctly found Appellant did not demonstrate she was clearly and indisputably entitled to relief regarding the discovery of her medical records. Appellant, as she does here, failed to show the military judge clearly and indisputably erred when he determined Appellant's medical records, maintained by the 56 MDG, were in the possession, custody, and control of military authorities in accordance with R.C.M. 701(a)(2)(A)(i). Appellant also failed to show the military clearly and indisputably erred when he determined Appellant did not have standing to contest a discovery issue at trial. Further, AFCCA used the correct standard of review, namely the long-established and stringent writ standard of review , when denying Appellant's writ petition. Finally, as Appellant has failed to show clear and indisputable proof that either the military judge of AFCCA erred

in deciding the issues of this case, a writ of mandamus is not necessary or appropriate in this case.

ARGUMENT

I.

AFCCA DID NOT ERR IN DETERMINING THE MILITARY JUDGE DID NOT CLEARLY AND INDISPUTABLY ERR IN DETERMINING APPELLANT'S MEDICAL RECORDS WERE IN THE POSSESSION, CUSTODY, AND CONTROL OF MILITARY AUTHORITIES PURSUANT TO R.C.M. 701.

Standard of Review

The All Writs Act authorizes "all courts established by an Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) This Court is among the courts authorized under the All Writs Act to issue "all writs necessary and appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a); *see also* L.R.M. v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013).

"The 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) (citations and quotations omitted). To justify the issuance of a writ, a military judge's decision "must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power.'" United States v. Labella, 15 M.J. 228,

229 (C.M.A. 1983) (*quoting* United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972)).

Under this standard, Appellant must satisfy three conditions before a writ of mandamus may be issued. 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 (2004)). Specifically: (1) Appellant "must have no other adequate means to attain the relief [she] desires"; (2) Appellant "must satisfy the burden of showing that [her] right to issuance of the writ is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Cheney, 542 U.S. at 380-81 (citations, quotations, and alterations omitted).

Law and Analysis

"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 authorities and [ ] the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i).

Here, Appellant has failed to show that AFCCA erred in determining the military judge did not clearly and indisputably err when he determined Appellant's medical records, maintained by the 56 MDG, were in the possession, custody, and control of military authorities in accordance with R.C.M. 701(a)(2)(A)(i). Instead,

Appellant misconstrues multiple holdings by this Court to claim the term "military authorities" is limited either to a "prosecution team" or a "military investigative authority." Appellant is mistaken.

To start, *Black's Law Dictionary* defines "authority" as "An official organization or government department with particular responsibilities and decision-making powers; esp. a governmental agency or corporation that administers public enterprise <transit authority>. – Also termed *public authority*." *Black's Law Dictionary* 164 (11th ed. 2019). This legal definition shows "authority" is an all-encompassing term used to refer to overall government agencies; it is certainly not confined, as Appellant claims, to only law enforcement agencies or criminal prosecution teams. Appellant does not address the legal definition of "authority" in her brief.

Instead, Appellant misinterprets multiple holdings by this Court. First, Appellant claims this Court has held that the term "military authorities," as used in R.C.M. 701(a)(2) (A) "specifically refer[s] to 'the prosecution team.'" (App. Br. at 11, *citing* Stellato, 74 M.J. at 484. However, this Court made no such ruling. There, this Court focused on whether the prosecution was readily able to gain possession of a piece from evidence from a local sheriff's office. While this Court generally agreed with the proposition that an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of

military authorities, this Court still noted that a trial counsel cannot avoid R.C.M. 701(a)(2)(A) by not having physical possession of an item. This Court then noted that "Article III courts have identified a number of scenarios in which evidence not in the physical possession of the prosecution team is still within its possession, custody, or control."

Here, when read in context, this Court used "prosecution team" because the prosecution was the "military authority" in that case, and whether the "prosecution team" had possession of evidence was the central focus of this Court's analysis. This Court certainly was not making a definitive conclusion that "military authorities" specifically referred only to "the prosecution team." Judge Stucky, in his dissent, made this point specifically clear when he stated in a footnote, "Of course, it matters not whether the item is within the possession, custody, or control of the prosecution team. The issue is whether it is in possession, custody, or control of 'military authorities.'" Id. at 492.

Next, quoting United States v. Simmons, 38 M.J. 376, 381 (C.M.A 1993), Appellant claims the "meaning of military authorities is plain" under R.C.M. 701(a)(2)(A) because "'trial counsel . . . ha[s] a duty to seek out and examine the [records] in the possession of military investigative authorities,' not medical providers." (Id. at 12.)

However, Appellant notably paraphrases out the exact "records" at issue in Simmons. The full quote from Simmons reads, "Thus trial counsel in this case had a duty to seek out and examine the polygraph-report evidence in the possession of military investigative authorities which was favorable to the defense." Simmons, 38 M.J. at 381.) Here, the evidence at issue were polygraph reports of polygraph tests conducted by Army CID and that were possessed by Army CID. Thus, this Court used "military investigative authorities" in its quote there because that was the military authority who possessed the polygraph report. Like in Stellato, this Court certainly was not making a definitive conclusion that "military authorities" specifically referred only to "military investigative authorities."

Appellant then cites to a litany of cases where law enforcement are described by military appellate courts as "military authorities." However, none of those cases involve R.C.M. 701(a)(2)(A), let alone involve holdings by any Court that "military authorities" as used in R.C.M. 701(a)(2)(A) refers *only* to military law enforcement. Appellant also cites to an AFCCA case, United States v. Harrow, 62. M.J. 649, 661 (A.F. Ct. Crim. App. 2006), where she claims AFCCA distinguished between "hospital officials" and "military authorities." (App. Br. at 12.) However, Appellant fails to note that the "hospital officials" involved in case worked for a civilian mental health center.

Next, Appellant claims the discussion section of R.C.M. 701(d) "draws a clear line between 'military authorities' and other agencies." (App. Br. at 13.) However, Appellant fails to account for the possibility that the reference to "other governmental agencies" in R.C.M. 701(d)'s discussion refers to *non-military* government agencies, which could include numerous federal, state, or local agencies and organization that may become involved in an investigation or prosecution. Appellant has failed to show how this discussion excludes military medical treatment facilities from the term "military authorities" or that the use of the term "military authorities" in this passage includes only military investigative authorities.

Here, Appellant has provided no law, regulation, caselaw, or precedent showing any military appellate court has ever limited "military authorities" under R.C.M. 701(a)(2)(A) to only trial counsel, military investigative authorities, or a "prosecution team." In contrast, Appellant is forced to recognize an AFCCA case, United States v. Lizana, 2021 CCA LEXIS 19 (A.F. Ct. Crim. App. 25 January 2021) (unpub. op.), where AFCCA held that the Air Force Personnel Center, an entity that is undoubtedly not a military investigative authority, was a "military authority" pursuant to R.C.M. 701(a)(2)(A). (*See* App. Br. at 12.)

However, Appellant then claims this Court's opinion in United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014) "preempted such overreach." (App.

Br. at 14.) Yet, Appellant then provides no analysis as to why McPherson does such a thing.

All told, Appellant has failed to show that AFCCA erred by finding the military judge did not clearly and indisputably err in finding that medical records maintained by the 56 MDG at the medical treatment facility located at Luke Air Force Base were not in the possession, custody and control of military authorities pursuant to R.C.M. 701(a)(2)(A).

Still, as she did before AFCCA, Appellant seems to argue the trial counsel did not possess her medical records, either physically or constructive, and, pursuant to Stellato, neither had the access or legal right to obtain her medical records. (App. Br. at 16-22.) Appellant is again mistaken.

As to access, prosecutors have a right to obtain medical records through HIPAA for a valid law enforcement purpose. DoDM 6025.18, ¶ 3.1.b.(5). DoDM 6025.18, ¶ 3.1.b.(5), entitled *Other Permitted and Required Uses and Disclosures That May be Made Without Authorization or Opportunity to Object*, lists 12 instances where, subject to specific terms and conditions, DoD covered entities may use or disclose protected health information (PHI) without the individual's authorization or opportunity to object. Some of those situations include judicial and administrative proceedings, law enforcement purposes, specialized government functions, including certain military services' personnel activities,

when required by law, and in cases involving victims of abuse or neglect. Thus, independently from the military judge's order in this case, trial counsel would have been lawfully entitled to obtain the same records under HIPAA. DoDM 6025.18, ¶ 4.4(f)(1)(b)(3).[1]

As to legal right, while Petitioner has a right to privacy that encompasses her confidential medical information, that right is not absolute and "must be weighed against the [G]overnment's interest in obtaining the records in particular circumstances." In re AL, No. 2022-12, 2022 CCA LEXIS 702, at *14 (A.F. Ct. Crim. App. 7 December 2022) (unpub. op.) (*quoting* In re Grand Jury Subpoena, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002) (additional citation omitted)). Here, the Government has a vested interest in obtaining the victim's medical records to satisfy their ongoing discovery obligations. *See* Stellato, 74 M.J. at 491 ("Full and timely compliance with discovery obligations is the lifeblood of a fair trial. Accordingly, parties to courts-martial are admonished to fulfill their discovery

[1] This section states a DoD covered entity may disclose PHI in compliance with the relevant requirements of an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if the information sought is relevant and material to a legitimate law enforcement inquiry, the request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought, and de-identified information could not reasonably be used. A government request for evidence "under the control of the Government" based R.C.M. 703(e)(2) is a process authorized under law, which would allow a MTF to disclose PHI.

obligations with the utmost diligence"); *see also* R.C.M. 701(a) (requiring the prosecution engage in good faith efforts to obtain requested discovery).

Here, since they made a request, the Accused has a right under R.C.M. 701(a)(2)(B)(i) "to inspect the results and reports of physical or mental examinations . . .which are in the possession, custody, or control of military authorities" and are "relevant to defense preparation." By obtaining the medical records in the possession of the MTF and determining what is relevant, the Government is fulfilling their discovery obligations under R.C.M. 701. Such obligations establish a legal right for the trial counsel to obtain these relevant records.

Significantly, the military judge did not require the medical records to be turned over wholesale to the defense. Instead, he crafted a procedure compatible with R.C.M. 701: trial counsel, who had their own ability under HIPAA to obtain the medical records for a valid law enforcement purpose, would obtain the medical records under control of military authorities and review them for relevancy. Only then would documents relevant to preparation of a defense be provided to the defense in discovery.

In sum, Appellant has not demonstrated she is clearly and indisputably entitled to relief on the basis that the military judge determined her medical records were under the possession, custody, or control of military authorities. Accordingly, this Court should deny her claim.

II.

AFCCA DID NOT ERR IN DETERMINING THE MILITARY JUDGE DID NOT CLEARLY AND INDISPUTABLY ERR IN DETERMINING APPELLANT DID NOT HAVE STANDING TO CONTEST A DISCOVERY ISSUE AT TRIAL.

Standard of Review

The standard of review for this issue is the same as that in Issue I.

Law

AFCCA's opinion in this case regarding Appellant's standing issue relied on its previous decision in In re HK, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 2021) (unpub. op.). There, where a victim sought to be heard at the trial level regarding her right to proceedings free from unreasonable delay, AFCCA provided a history of Article 6b and a victim's right to be heard at the trial level. AFCCA noted that Article 6b, as originally enacted, defined eight substantive rights for victims of crimes under the UCMJ, including the right to be reasonably protected from an accused, the right to notice of certain events, and the right to be treated with fairness and respect for his or her dignity and privacy. Article 6b(a), UCMJ,

10 U.S.C. § 806b. Another, the right to be reasonably heard at certain proceedings, entitles a victim to be reasonably heard at: (1) pretrial confinement hearings; (2) sentencing hearings; and (3) clemency and parole hearings. Id. AFCCA also noted that, separate from Article 6b, victims had the right to be heard at courts-martial with respect to matters as specifically permitted by other authorities, such as Mil. R. Evid. 412 and Mil. R. Evid. 513. In re HK, at *6.

However, AFCAA noted that original Article 6b did not include any enforcement mechanism related to alleged violations of these rights. In 2015, Congress added an enforcement mechanism to the article, 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 out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. Id. (citations omitted). Most recently, in 2021, victims were given the right to notice of certain post-trial motions, filings, and hearings.

Still, as AFCCA noted in In re HK, "In spite of the frequent amendments of Article 6b, UCMJ, what has not changed is its overall structure with respect to victim rights. The article sets out the eight rights, one of which is the right to be heard. But this right to be heard only extends to hearings related to an accused's sentencing and pre- and post-trial confinement. The article further permits a victim to seek a petition for extraordinary relief from a Court of Criminal Appeals for

violations of those eight rights in addition to violations of various other rules. Nowhere in Article 6b, UCMJ, are victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; instead, the enforcement of victims' rights is sought through petitions to appellate courts." Id, at *7.

In In re HK, the Petitioner, as Appellant does here, argued she had a right to be heard on other grounds at the trial level based on the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The Petitioner asserted, as Appellant does here, that Article 6b was derived from the CVRA, which was passed in 2004 and addresses victim rights in federal courts. However, while AFCCA noted the "textual similarities between the CVRA and Article 6b," the court noted that the CVRA, unlike Article 6b, explicitly called for alleged violations of victims' rights to be raised before, and decided by, the district court in which the defendant is being prosecuted. Id., *citing* 18 U.S.C. § 3771(d)(3). In the CVRA, a victim to whom the CVRA applies may *then* seek a writ of mandamus from the relevant court of appeals only upon an adverse ruling at the district court.

In denying that Petitioner's attempt to derive an Article 6b right to be heard at the trial level from the CVRA, AFCCA reasoned, "If Congress did in fact use the CVRA as a template in crafting Article 6b, UCMJ, the absence in the latter of a requirement for the trial court to first hear matters of alleged victim-right violations

tells us Congress likely considered—and rejected—applying the CVRA's trial-level enforcement mechanism to the military." Id. at *8-9. AFCCA concluded, "Our role . . . is not to try and divine either why Congress declined to legislatively entitle victims in the military justice system to be heard by trial judges on alleged violations of any of the eight rights in Article 6b, UCMJ, or why the article only specifically entitles victims to be heard at confinement- and sentence-related hearings. Instead, our role is to apply Article 6b, UCMJ, as Congress enacted it, and that article includes 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." Id. at *9; *see also* In re VM, 2023 CCA LEXIS 290 (A.F. Ct. Crim. App. 2023) (unpub. op.).

Analysis

Here, Appellant argues the military judge erred by finding she did not have standing to be heard at trial on the discovery of her military records. Appellant is incorrect.

First, Appellant again claims R.C.M. 703(g)(3) applies to her medical records and that R.C.M. 703(g)(3) grants her standing to address the trial court. However, as shown in Issue I above, R.C.M. 703 does not apply to the records at issue. Thus, the issue of whether or not R.C.M. 703(g)(3) grants a victim standing to be heard at the trial court is not germane for this Honorable Court to review.

Next, Appellant presents the same argument as the Petitioner in In re HK, namely that since the CVRA includes a victim's right to be heard at the trial level, this Court should intuit that Congress intended that provision to apply to Article 6 as well. Appellant is incorrect.

Here, the CVRA, which includes a victim's right to be heard at the district court, predates Article 6b, which does not contain such a provision. As reasoned by AFCCA in In re HK, if Congress had meant for this provision in the CVRA to carry over into Article 6b, it would have specifically included that provision in Article 6b. However, it did not. While Article 6b has a section entitled *Enforcement by Court of Criminal Appeals* at Article 6b(e), there is no similar section involving enforcement by either a military judge or a court-martial.

Considering the lack of such a provision in Article 6b, as well as AFCCA's denying similar Article 6b standing claims, the military judge's decision to not grant the victim standing at the trial level does not rise to the level of a "judicial usurpation of power." Labella, 15 M.J. at 229. Furthermore, there is no military case that affords victims standing to be heard at the trial level on discovery issues.

Amicus cites several federal cases where courts have recognized victim or third party standing. (Am. Br. at 19-20.) But standing in federal courts requires the alleged injury suffered by the party seeking standing to be "redressable." *See* e.g. California v. Texas, 141 S. Ct. 2104, 2115 (2021). As discussed above, unlike

the district court under the CVRA, the court-martial itself has no authority to redress or provide a remedy to a victim for violations of their enumerated Article 6b rights. Congress decided to give the authority for "enforcement" of those Article 6b rights exclusively to the Courts of Criminal Appeals. It follows that a victim has standing before the Court of Criminal Appeals, not at the court-martial. Thus, unlike the third party in the In re Grand Jury Proceedings, 450 F.2d 199, 300 (3d Cir. 1971) case cited by Amicus, it is not as if the trial court "is the only time [victims at courts-martial] may have the opportunity to vindicate" their Article 6b rights. (Am. Br. at 19.)

Notably, even though the military judge found Appellant had no standing to be heard regarding the discovery issue, the military judge still treated Appellant with fairness, dignity and respect, and also respected her privacy. Here, the military judge did not order all of Appellant's medical records discovered to the defense. Instead, he only ordered discovery to the defense of those medical records that were relevant. The military judge also issued a protective order over Appellant's medical records, which provided Appellant with a number of fair protections that protected her privacy and dignity. These robust protections alleviate many of Appellant's privacy concerns mentioned within her brief. Furthermore, if any of the victim's medical records become

exhibits at trial, the military judge could seal the records in accordance with RCM 1103A.

In sum, the military judge did not clearly and indisputably err when he determined Appellant did not have standing to contest a discovery issue at trial, and AFCCA did not err in making such a finding. Accordingly, this Court should deny Appellant's claim.

III.

AFCCA USED THE CORRECT STANDARD OF REVIEW WHEN REVIEWING APPELLANT'S WRIT OF MANDAMUS.

Standard of Review, Law and Analysis

The standard of review for granting a writ of mandamus is discussed in Issue I above. AFCCA employed this proper standard when reviewing Appellant's request for writ of mandamus.

However, Appellant claims AFCCA erred, arguing that "Article 6b is analogous to the Crime Victims' Relief Act" (CVRA) and that "ordinary standards of appellate review should apply." (App. Br. at 39.) Appellant is incorrect.

In enacting the enforcement provision in Article 6b(e), Congress expressly provided "writ of mandamus" as the available remedy. In turn, the threshold requirements for a writ of mandamus are well established in both military and civilian courts. *See* Hasan, 71 M.J. at 418 (*citing* Cheney, 542 U.S. at 380-81).

According to Supreme Court precedent, where Congress uses a legal term of art, "it presumably knows and adopts" the judicial interpretation of the term. Morissette v. United States, 342 U.S. 246, 263 (1952). Consistent with this principle, military courts have applied the "clear and indisputable" right standard to petitions filed under Article 6b(e). *See*, e.g., In re A.H., 79 M.J. 672, 673 (C.G. Ct. Crim. App. 2019) (petitioner failed to show a "clear and indisputable right"); In re Kc, Misc. Dkt. No. 2021-06, 2021 CCA LEXIS 593, at *6 (A.F. Ct. Crim. App. 10 September 2021) (unpub. op.) (finding the same). *See also* AG v. Hargis, 77 M.J. 501, 504 (Army Ct. Crim. App. 2017) (applying the three-part Cheney test).

Cited in its opinion to this case, AFCCA analyzed this issue earlier this year in In re KK, __ M.J. __ , Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *10 (A.F. Ct. Crim. App. 24 Jan. 2023). There, AFCCA noted that 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, and, if denied relief, he or she may petition the court of appeals for a writ of mandamus. However, when Article 6b, UCMJ, was enacted to extend victims' rights to victims of offenses under the UCMJ in 2013, it did not include any sort of enforcement provision. Id. (citations omitted). After 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 CVRA. Eventually, in May 2015, Congress

amended the CVRA by adding the following language, "In deciding such application, the court of appeals shall apply ordinary standards of appellate review." *See* 18 U.S.C. § 3771(d)(3).

Six months later, in November 2015, Congress amended Article 6b, UCMJ, adding its own enforcement mechanism that granted 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 out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. *See* NDAA for Fiscal Year 2015, Pub. L. No. 113-291 § 535, 128 Stat. 3292 (2014).

However, in contrast to the CVRA provision, the Article 6b, UCMJ, provision did not include an avenue for a petitioner to first raise the matter to the trial court. Also in contrast to the CVRA provision, Article 6b, UCMJ, included no indication that "ordinary standards of appellate review" were intended to supplant the traditional extraordinary relief standard.

Based on this analysis, AFCCA held, "The fact this language was not included in 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." AFCCA continued, "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." In re KK, *10. AFCCA applied that holding in this case.

Still, Appellant asserts error by claiming the "writ of mandamus in Article 6b(e) is commensurable to the CVRA" and is "unique and divorced from the traditional mandamus." (App. Br. at 43.) However, Appellant can point to no authority to show any indication on the part of Congress that it intended its very specific and clarifying language within the CVRA regarding review standards to be incorporated into the review standards of Article 6(b), especially considering Congress amended Article 6b *after* it added the questioned language into the CVRA.

Adding further credence to this point is the CVRA's inclusion of a expedited review process for writs of mandamus filed under that rule. There, a court of appeals "shall take up and decide" a writ of mandamus filed pursuant to the CVRA "within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3). Thus, while the writ has an ordinary standard of review, it must be handled in a very short period of time.

However, Article 6b contains no such expeditious review requirement, other than saying that "to the extent practicable" a victim petition for mandamus "shall have priority over all proceedings before the Court of Criminal Appeals." Article 6b(e)(3)(B). Thus, when a victim files a petition and is granted a stay of the proceedings, the matter has the practical effect of delaying a court-martial for months. This case, for instance, has been delayed for over four months. Considering the lack of a strict time limits for resolution of such litigation in Article 6b, it follows that Congress intended military appellate courts to use the very high standard of review for granting extraordinary relief such as a writ of mandamus. Applying such a high standard of review encourages petitioners to limit filing interlocutory appeals, which will result in lengthy delays, to only those circumstances where the trial error was so egregiously incorrect that the strict mandamus standard can be met.Put simply, there is no reason for this Court to assume that Congress intended a different standard of review under Article 6b than what is ordinarily required for a writ of mandamus. Accordingly, this Court should find no error in AFCCA's utilization of the long-established standard to prevail on a mandamus writ.

IV.

AFCCA USED THE CORRECT STANDARD OF REVIEW WHEN REVIEWING APPELLANT'S WRIT OF MANDAMUS.

Standard of Review, Law and Analysis

The standard of review for granting a writ of mandamus is discussed in Issue I above. As a threshold matter, this case came to this Court through Article 67(a)(2), rather than Article 6b. Even if, arguably Article 6b required some level of review other than traditional mandamus standards, that standard would not apply to this Court's granting of a writ of mandamus. This Court has already said that it does not have jurisdiction under Article 6b to review victims petitions. M.W. v. United States, No. 23-0104/AF, ___ M.J.____ (C.A.A.F. 13 July 2023). Although this Court has jurisdiction under Article 67(a)(2) to review this case, its authority for this Court to grant a writ of mandamus would come through the All Writs Act, 28 U.S.C. § 1651 (2018). *See* Kastenberg, 72 M.J. at 367. Under such circumstances, traditional standards of mandamus would apply. Hasan, 71 M.J. at 418.

Appellant seeks a writ of mandamus from this Court using the same arguments that proved unpersuasive at AFCCA. They should meet a similar fate before this Honorable Court.

Here, Appellant claims the military judge "abused his discretion and committed legal error" by concluding Appellant's medical records were in the possession, custody, or control of military authorities and that he "exceeded his authority" in issuing an order to the medical group for those records. (App. Br. at 48.) Appellant cannot demonstrate a "clear and indisputable right" to a writ because her argument is without basis in law. Cheney, 542 U.S. at 380-81. The military judge predicated his ruling on the correct facts and law. Applying the governing rule and binding case law, the military judge ordered a limited swath of medical records be produced to trial counsel so that trial counsel could disclose only those records that were "subject to disclosure and relevant to the defense's preparation." (Cert., Attachment I at 113.) Therefore, the military judge's decision did not amount to "gross error," let alone a "judicial usurpation of power." Labella, 15 M.J. at 229. Therefore, the issuance of the writ is not clear and indisputable.

CONCLUSION

WHEREFORE, this Honorable Court should find that AFCCA did not err in finding Appellant failed demonstrate she was clearly and indisputably entitled to relief regarding the discovery of her medical records as the Appellant has failed to show the military judge clearly and indisputably erred when he determined Appellant's medical records were in the possession, custody, and control of

military authorities in accordance with R.C.M. 701(a)(2)(A)(i), and when he determined Appellant did not have standing to contest a discovery issue at trial. Additionally, AFCCA used the correct standard of review in its opinion of this case and, as Appellant has failed to show clear and indisputable proof that either the military judge or AFCCA erred in deciding the issues of this case, a writ of mandamus is not necessary or appropriate in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 25 September 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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2. This brief complies with the typeface and type style requirements of Rule 37 because:

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/s/
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Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 25 September 2023

APPENDIX

Unpublished Cases

In re A.L.

United States Air Force Court of Criminal Appeals

December 7, 2022, Decided

Misc. Dkt. No. 2022-12

Reporter
2022 CCA LEXIS 702 *; 2022 WL 17484780

In re A.L., Petitioner

Subsequent History: Review granted by, in part, Review denied by, in part, Request granted, Request denied by *A.L. v. United States, 2023 CAAF LEXIS 175 (C.A.A.F., Feb. 28, 2023)*

Core Terms

records, military, medical record, discovery, trial counsel, privacy, indisputably, disclosure, writ of mandamus, in camera, Appeals, patient, stay of proceedings, defense counsel, court-martial, specification, disclose, entitled to relief, appellate review, motion to compel, mandamus relief, defense motion, communications, regulations, memorandum, documents, issuance, mandamus, reply

Case Summary

Overview
HOLDINGS: [1]-Petitioner, an alleged victim of the charged offenses in the court-martial, had not clearly and indisputably demonstrated the prosecution unlawfully obtained her medical records from the military treatment facility in violation of her constitutional, statutory, or other privacy rights; [2]-Assuming for purposes of argument that the prosecution did improperly obtain petitioner's records, the court was not persuaded that the military judge clearly and indisputably erred by analyzing the defense's motion to compel as a matter of discovery under R.C.M. 701 rather than a matter of production under R.C.M. 703; [3]- Petitioner, however, had clearly and indisputably demonstrated she was entitled to relief with respect to Mil. R. Evid. 513 and the Family Advocacy Program records.

Outcome
Petition for extraordinary relief in the nature of a writ of mandamus granted in part and denied in part.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN1[] **Judicial Review, Extraordinary Writs**

The All Writs Act, 28 U.S.C.S. § 1651(a), grants a Court of Criminal Appeals authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction. 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. 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. A writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN2[] **Posttrial Procedure, Actions by Convening Authority**

Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, refers to the rights of victims of offenses under the UCMJ, including at pretrial, trial, and post-trial phases of court-martial proceedings.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

HN3[] Posttrial Procedure, Actions by Convening Authority

Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, provides that the victim of an offense under the UCMJ has, among other rights, the right to be treated with fairness and with respect for the dignity and privacy of the victim.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

HN4[] Disclosure & Discovery, Disclosure by Government

In general, disclosure to the defense of documents in the possession of the prosecution is governed by R.C.M. 701, Manual Courts-Martial, whereas production to the defense of documents not in the possession, custody, or control of military authorities is governed by R.C.M. 703, Manual Courts-Martial. Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. R.C.M. 701(e), Manual Courts-Martial. 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 authorities and the item is relevant to defense preparation. R.C.M. 701(a)(2)(A)(i). R.C.M. 703(e)(1) provides that, in general, each party is entitled to the production of evidence which is relevant and necessary.

Business & Corporate Compliance > ... > Healthcare Law > Medical Treatment > Patient Confidentiality

HN5[] Medical Treatment, Patient Confidentiality

A covered entity may use or disclose protected health information without the individual's authorization or opportunity to object to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *45 C.F.R. § 164.512(a)(1)*.

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN6[] Compulsory Attendance of Witnesses, Interrogation & Presentation

The patient must be afforded a reasonable opportunity to attend the hearing and be heard. Mil. R. Evid. 513(e)(2). The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Mil. R. Evid.

513(e)(3). Mil. R. Evid. 514 provides a similar privilege and procedures with respect to confidential communications between an alleged victim and a victim advocate made for the purpose of facilitating advice or assistance to the alleged victim. Mil. R. Evid. 514(a).

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Finality

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN7[] Judicial Review, Extraordinary Writs

It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute. In *Unif. Code Mil. Justice art. 6b(e), 10 U.S.C.S. § 806b(e)*, Congress specified that a victim may seek a writ of mandamus from the Court of Criminal Appeals. Giving effect to the plain meaning of the words of the statute and the longstanding standard for a petitioner to secure mandamus relief, petitioner bears the burden to demonstrate: (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.

Constitutional Law > Substantive Due Process > Privacy > Personal Information

HN8[] Privacy, Personal Information

A right to privacy is not absolute and must be weighed against the Government's interest in obtaining the records in particular circumstances.

Business & Corporate Compliance > ... > Medical Treatment > Patient Confidentiality > Medical Records Under HIPAA

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN9[] Patient Confidentiality, Medical Records Under HIPAA

HIPAA permits disclosure of protected health information without the individual's consent or opportunity to object to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *45 C.F.R. § 164.512(a)(1)*. DoDM 6025.18, implementing HIPAA within the DoD, permits certain disclosures for law enforcement purposes, including pursuant to an administrative request that is authorized by law, provided the information sought is relevant and material to a legitimate law enforcement inquiry; the request is in writing, specific, and limited in scope; and de-identified information could not reasonably be used. Dep't Def. Directive 6025.18 ¶ 4.4.f.(1)(b)3. Unif. Code Mil. Justice art. 46(a), 10 U.S.C.S. § 846b, provides trial counsel shall have the opportunity to obtain evidence in accordance such regulations as the President may prescribe. R.C.M. 703(g)(2), Manual Courts-Martial provides trial counsel may obtain evidence under the control of the Government simply by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN10[] Compulsory Attendance of Witnesses, Interrogation & Presentation

Mil. R. Evid. 513(a) generally provides a patient a privilege to refuse to disclose and to prevent any other person from disclosing subject communications between the patient and psychotherapist or assistant. Certain enumerated exceptions exist, and the Courts of Criminal Appeals have suggested the continuing

existence of a non-enumerated constitutionally required exception. However, before a military judge orders the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed, where the patient must be afforded a reasonable opportunity to attend and be heard. Mil. R. Evid. 513(e)(2).

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans
Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

Military & Veterans
Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN11[] **Admissibility of Evidence, Admissions & Confessions**

The core privilege established by Mil. R. Evid. 513(a) broadly empowers a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure. Mil. R. Evid. 513(e) provides the procedure that must be followed when a party seeks to discover information pursuant to any of the enumerated exceptions.

Opinion

[*1] ORDER

Special Panel

On 21 October 2022, pursuant to *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b*, and Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Petitioner requested this court issue a stay of proceedings and a writ of mandamus in the pending court-martial of *United States v. Captain Theodore J. Slusher*. Petitioner is an alleged victim of charged offenses in the court-martial. On 24 October 2022, this court granted a stay of proceedings and ordered counsel for the Government and counsel for Captain Slusher (the Accused) to submit briefs in response to the petition. On 8 November 2022, the Government and the Defense submitted responsive briefs with certain attached documents. On 15 November 2022, Petitioner submitted a reply to the Government's response brief, and on 21 November 2022 Petitioner submitted a timely reply to the Defense's response brief.[1]

Having considered the petition, the responsive briefs, Petitioner's reply briefs, and the matters attached thereto, we grant the petition in part and deny it in part as specified below.

I. Background

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

On 4 May 2022, the convening authority referred for trial one charge and four specifications of violations **[*2]** of *Article 120, UCMJ, 10 U.S.C. § 920*; one charge and one specification of a violation of *Article 120c, UCMJ, 10 U.S.C. § 920c*; one charge and six specifications of violations of Article 128, UCMJ, *10 U.S.C. § 928*; and one charge and one specification of a violation of Article 134, UCMJ, *10 U.S.C. § 934*.

On 17 May 2022, trial defense counsel sent an initial discovery request to trial counsel, requesting production of, *inter alia*, "[a]ny relevant personnel, medical, and mental health records of any complaining witness . . . to include records in the possession of the Family Advocacy Program (FAP) . . . ." On 13 June 2022, the Defense sent a second discovery request to the Government.

On 16 June 2022, assistant trial counsel submitted a "Memorandum for Release of Healthcare Information" to a military treatment facility (MTF) located on Fort Bragg, North Carolina, requesting "all of [Petitioner]'s medical records for the period from 1 November 2017 - 16 May 2020." The memorandum asserted the "information sought [was] relevant and material to a legitimate law enforcement inquiry" and that examination of the records was "required as part of an official investigation."

---

[1] Petitioner's deadline to file a reply to the Defense's brief was extended due to an error in the service of the Defense's response brief.

On 27 June 2022, the MTF records custodian responded to assistant trial counsel's request and provided 575 pages of medical records, including 42 pages of **[*3]** FAP records.

On 21 September 2022, trial defense counsel filed a motion to compel production of, *inter alia*, "[a]ll of [Petitioner]'s medical records maintained by [Petitioner]' s unit," as well as mental health records.

On 2 October 2022, the Government submitted its response to the motion to compel, wherein trial counsel stated the Government had obtained Petitioner's "medical file from 1 November 2017 (earliest date of specifications) through 16 May 2020 (3 months following last alleged specification)." Trial counsel further stated the Government was preparing a redacted copy of the records for review by Petitioner's victims' counsel and, "if necessary," in camera review by the military judge. Trial counsel intended to leave unredacted those portions of the records relating to injuries to Petitioner's wrist allegedly caused by the Accused, "materials relating to consultations in which abuse is alleged," and "sufficient information to identify dates and locations of instances that [Petitioner] otherwise received medical consultations."

On 4 October 2022, the military judge held a hearing on the motion to compel. At the hearing, trial counsel restated that the Government was in possession **[*4]** of Petitioner's medical records, to include FAP records, and trial counsel had reviewed both sets of records. Trial counsel told the military judge that portions of Petitioner's medical records were "relevant" to the Defense's discovery request. According to a subsequent declaration by Major (Maj) DC, the detailed special trial counsel representing the Government at the hearing, Petitioner asserted through her counsel that the FAP records contained materials privileged under Military Rule of Evidence (Mil. R. Evid.) 513. According to Maj DC, Petitioner did not assert the non-FAP medical records contained Mil. R. Evid. 513 material, or that any of the records contained material privileged under Mil. R. Evid. 514. Petitioner's counsel requested the military judge conduct an in camera review of the records to determine their relevance.

On 11 October 2022, the military judge issued a written ruling ordering the Government to provide all 575 pages of Petitioner's medical records to the Defense, without in camera review. The military judge explained:

> Government counsel acknowledged during the motions hearing that portions of the medical records are relevant in response to the defense discovery request and the [G]overnment had no objection to turning the records over **[*5]** to defense counsel.
>
> . . . .
>
> This court finds that the defense counsel has met their burden to show the information sought exists and is material to the preparation of the defense. [Petitioner's] counsel has requested that the Court review the medical records and FAP records in camera to determine relevancy. However, here, where the [G]overnment has reviewed the records, acknowledged the material is relevant, and has had the full benefit of reviewing the material, this Court finds that the [D]efense should not be denied the same opportunity of access. . . .
>
> Wherefore, the Defense Motion to Compel Discovery is **GRANTED**. The [G]overnment shall turn over [Petitioner's] medical records and the FAP records in their position [sic]. Before doing so, I am instructing the [G]overnment to redact the appropriate personally identifiable information in the records
>
> . . . .

The military judge denied a request by Petitioner's counsel to file a motion for reconsideration. In subsequent communications, the military judge clarified that the Prosecution was to turn over all of Petitioner's FAP records currently in its possession, and that the military judge would not perform an in camera review.

On 12 October **[*6]** 2022, Petitioner's counsel moved the trial court for a stay of proceedings and a protective order. On 13 October 2022, the military judge denied the motion to stay proceedings, but issued a protective order limiting the disclosure of the records in question to the Prosecution, defense counsel, expert consultants, Petitioner, and Petitioner's counsel. Eight days later, Petitioner filed the request for this court to issue a stay of proceedings and a writ of mandamus.

In addition to the stay of proceedings, which we previously granted, Petitioner has requested this court (1) vacate the military judge's ruling with respect to the 21 September 2022 defense motion to compel discovery; and (2) order the copies of the subject medical and FAP records be destroyed or, in the alternative, order the military judge to conduct in camera review "that will apply the standards of relevance and afford protections of Mil. R. Evid. 513 and [Mil. R. Evid.] 514."

II. Law

HN1[] The All Writs Act, 28 U.S.C. § 1651(a), grants a Court of Criminal Appeals "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 **[*7]** 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)). 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[2] of an offense under this chapter believes that . . . a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the . . . court-martial to comply with the section (article) or rule.

Article 6b(e)(4), UCMJ, provides that this right to petition the Court of Criminal Appeals for a writ of mandamus applies with respect to protections afforded by, *inter alia*, Article 6b, UCMJ; Mil. R. Evid. 513; and Mil. R. Evid. 514.

HN3[] Article 6b(a), 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 . . . ."

[*8] HN4[] 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). "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 authorities and [ ] the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i). R.C.M. 703(e)(1) provides that, in general, "[e]ach party is entitled to the production of evidence which is relevant and necessary."

HN5[] "A covered entity may use or disclose protected health information [without the individual's authorization or opportunity to object] to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a)(1).

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), provides procedures for Department of Defense (DoD) compliance with the privacy regulations adopted under HIPAA, Public Law 104-191, including at 45 C.F.R. § 164. DoDM 6025.18 ¶ 4.4.f.(1)(b)3 provides:

> A DoD covered entity may disclose [protected health information] [i]n compliance with, and as limited by, the relevant requirements of . . . [a]n administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if: [t]he information sought is relevant and material to a legitimate law enforcement inquiry[;] [t]he request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the **[*9]** information is sought[; and] [d]eidentified information could not

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[2] HN2[] Article 6b, UCMJ, refers to the rights of "victims" of offenses under the UCMJ, including at pretrial, trial, and post-trial phases of court-martial proceedings. The use of the term "victim" in this order reflects no determination or implication on the court's part as to the merits of the charged offenses in the Accused's court-martial.

reasonably be used.

Article 46(a), UCMJ, 10 U.S.C. § 846(a), provides: "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." R.C.M. 703(g)(2) provides: "Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence."

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, the military judge must conduct a hearing, which shall be closed. . . . HN6[] The patient must be afforded a reasonable opportunity **[*10]** to attend the hearing and be heard." Mil. R. Evid. 513(e)(2). "The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications." Mil. R. Evid. 513(e)(3). Mil. R. Evid. 514 provides a similar privilege and procedures with respect to confidential communications between an alleged victim and a victim advocate "made for the purpose of facilitating advice or assistance to the alleged victim." Mil. R. Evid. 514(a).

III. Analysis

The petition, responsive briefs, and Petitioner's replies require us to address three distinct issues: (1) whether an alleged victim's petition under Article 6b, UCMJ, must meet the usual standard of review for a petition for a writ of mandamus, or the lower standard of demonstrating the military judge abused his discretion; (2) whether Petitioner is entitled to relief based on her right to be treated with fairness and respect for her dignity and privacy under Article 6b(a), UCMJ; and (3) whether Petitioner is entitled to relief with respect to the privileges afforded by Mil. R. Evid. 513 or Mil. R. Evid. 514.

A. Standard of Review

Petitioner contends this court should apply the ordinary standard of appellate review for a military judge's ruling regarding discovery: abuse of discretion. *See* **[*11]** Stellato, 74 M.J. at 480. The Government and Defense contend the appropriate standard is the three-part test for relief the United States Court of Appeals for the Armed Forces (CAAF) applied in Hasan, including Petitioner's burden to demonstrate her entitlement to relief is "clear and indisputable." 71 M.J. at 418 (citation omitted). We find the standard for mandamus relief articulated in Hasan applies.

Petitioner notes that the version of the Crime Victims' Rights Act (CVRA) codified at 18 U.S.C. § 3771 and in effect prior to 2015 contained a provision analogous to Article 6b(e)(1), UCMJ, which enabled a crime victim who was denied relief in district court to "petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Petitioner further notes there was a split among the federal circuits regarding whether to apply the usual strict standards for mandamus relief in the context of appellate review of a district court's ruling on rights under the CVRA. *Compare, e.g.*, In re Dean, 527 F.3d 391, 394 (5th Cir. 2008) (applying usual mandamus standards to CVRA appeal); *In re Antrobus, 519 F.3d 1123, 1130 (10th Cir. 2008)* (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). Petitioner argues the specific provision for mandamus review in Article 6b, UCMJ, is authority independent of this court's power under the All Writs Act upon which the United States Supreme Court's decision in Cheney, 542 U.S. at 380-81, and **[*12]** by extension the CAAF's decision in Hasan, were based. Therefore, she reasons, because Article 6b, UCMJ, does not specify a particular standard of review, the ordinary standards of appellate review should apply.

We are not persuaded. In May 2015, Congress revised 18 U.S.C. § 3771(d)(3) to add the following sentence regarding appeals of CVRA-related decisions: "In deciding such application, the court of appeals shall apply ordinary standards of appellate review." However, when Congress subsequently codified in Article 6b(e), UCMJ, a victim's right to petition the Court of Criminal

Appeals for a writ of mandamus in November 2015, it did not mirror the language in the CVRA specifying "ordinary standards of appellate review;" nor have subsequent changes to the article inserted equivalent language. The implication is that Congress has provided different standards of review for *18 U.S.C. § 3771(d)(3)* and *Article 6b(e), UCMJ*.

HN7[↑] "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira, ___ U.S. ___, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019)* (alteration and omissions in original) (quoting *Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (2018)*). In *Article 6b(e), UCMJ*, Congress specified that a victim may seek a "writ of mandamus" from the Court of Criminal Appeals. Giving effect to the plain **[*13]** 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 demonstrate: "(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, 71 M.J. at 418* (citation omitted); *see also In re HK, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535, at *3 (A.F. Ct. Crim. App. 13 Sep. 2021)* (order) (following *Hasan* and applying the usual standard for mandamus relief to a petition filed pursuant to *Article 6b(e), UCMJ*).

B. *Article 6b(a), UCMJ*, Right to Fairness and Respect for Dignity and Privacy

Petitioner asserts the military judge's ruling on the Defense's motion to compel violated her right to respect for her privacy under *Article 6b(a), UCMJ*. She contends the military judge ignored the fact that the Government unlawfully obtained her records, and the military judge erred by analyzing the motion as a matter of discovery under R.C.M. 701 rather than a matter of production under R.C.M. 703. Petitioner contends that the assistant trial counsel's 16 June 2022 memorandum to the MTF record custodian was inadequate authority for release of her records to the Prosecution, and that a court order or subpoena was required. She further contends that, although at the motion hearing **[*14]** she agreed with the Government that a portion of her records should be released to the Defense, the military judge's ruling that the Defense should receive all 575 pages of the records in trial counsel's possession without in camera review was improper. We find Petitioner has not demonstrated she is clearly and indisputably entitled to relief with respect to her *Article 6b(a), UCMJ*, right to respect for her privacy.[3]

As an initial matter, Petitioner asserts that she has a constitutional right to privacy that encompasses her confidential medical information. *See 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). ***HN8***[↑] However, such a right is not absolute and "must be weighed against the [G]overnment's interest in obtaining the records in particular circumstances." *In re Grand Jury Subpoena, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002)* (citing *Whalen, 429 U.S. at 602*; *Doe, 72 F.3d at 1138*). Petitioner does not assert that HIPAA, its implementing regulations, or DoDM 6025.18, which govern access to protected health information, are unconstitutional in this respect. Accordingly, for purposes of our analysis of Petitioner's entitlement to relief under the "clear and indisputable" standard, we presume that government compliance with these directives would be sufficient to safeguard Petitioner's constitutional privacy interest in her medical **[*15]** records.

HN9[↑] HIPAA permits disclosure of protected health information without the individual's consent or opportunity to object "to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." *45 C.F.R. § 164.512(a)(1)*. DoDM 6025.18, implementing HIPAA within the DoD, permits certain disclosures for "law enforcement purposes," including pursuant to an "administrative request" that is "authorized by law," provided the information sought is "relevant and material to a legitimate law enforcement inquiry;" the "request is in writing, specific, and limited in scope;" and "[d]e-identified information could not

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[3] We emphasize that in accordance with *Article 6b(e), UCMJ*, the issue before us is Petitioner's request for relief with regard to the military judge's ruling on the Defense's motion to compel. The propriety of the means by which the Government obtained Petitioner's records from the MTF is not *directly* before us, and our conclusion that Petitioner has not met the high standard to demonstrate her entitlement to mandamus relief with regard to the subject ruling is not a decision as to whether, in other forums and under ordinary standards of review, Petitioner would be entitled to relief with regard to how her records were obtained from the MTF.

reasonably be used." DoDM 6025.18 ¶ 4.4.f.(1)(b)3. *Article 46(a), UCMJ*, provides trial counsel "shall have" the "opportunity to obtain . . . evidence in accordance such regulations as the President may prescribe." R.C.M. 703(g)(2) provides trial counsel may obtain "[e]vidence under the control of the Government" simply by "notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence."

Assistant trial counsel's 16 June 2022 memorandum to the MTF records custodian specifically referred to HIPAA, asserted **[*16]** the request was relevant and material for a legitimate law enforcement purpose, was in writing and specifically requested records from a date range relevant to the charged offenses, and asserted de-identified information could not reasonably be used. The memorandum was evidently intended as an "administrative request" that satisfied the DoDM 6025.18 ¶ 4.4.f.(1)(b)3 law-enforcement exception. Moreover, because the records in question were possessed by an MTF on Fort Bragg, the records were "under the control of the Government," that is, an agency of the United States within the DoD. Therefore, under R.C.M. 703(g)(2)—that is, a regulation prescribed by the President—unlike evidence not under the control of the Government, it is not apparent that assistant trial counsel's request for the MTF records required a subpoena and related due process covered by R.C.M. 703(g)(3). Accordingly, we are not persuaded that Petitioner has clearly and indisputably demonstrated the Prosecution unlawfully obtained her medical records from the MTF in violation of her constitutional, statutory, or other privacy rights.

Assuming for purposes of argument that the Prosecution did improperly obtain Petitioner's records, we are not persuaded the military judge clearly **[*17]** and indisputably erred by analyzing the Defense's motion to compel as a matter of discovery under R.C.M. 701 rather than a matter of production under R.C.M. 703. The military judge was presented with a situation in which, whether by proper or improper means, the Prosecution was in possession of and had reviewed the records. At the motion hearing, Petitioner and the Government evidently conceded at least some of the records should be disclosed to the Defense. This situation implicates R.C.M. 701. We need not decide and do not suggest the military judge lacked the authority or discretion to address Petitioner's concerns regarding how the Government obtained her records from the MTF, had Petitioner raised such concerns; however, that was not the issue before the military judge. The issue for the military judge was the Defense's request for access to relevant and material documents in the possession of the Prosecution.

Furthermore, in light of the protective order limiting access to defense counsel and expert consultants, we find Petitioner has not demonstrated she is clearly and indisputably entitled to relief on the basis of her right to respect for her privacy under *Article 6b(a), UCMJ*, in light of the military judge's decision to **[*18]** provide the records to the Defense without in camera review. Certainly, the military judge had the discretion to resolve the Defense's motion to compel in other ways, and we need not and do not specifically indorse his ruling. However, considering the Defense's right to access under R.C.M. 701(a)(2) and R.C.M. 701(e), we are not persuaded the military judge's decision to forego in camera review of all of the medical records was clearly and indisputably erroneous.

C. Mil. R. Evid. 513 and Mil. R. Evid. 514

In addition to her right for respect for her privacy under Article 6b, UCMJ, as discussed above, Petitioner invokes the "protections of Mil. R. Evid. 513 and [Mil. R. Evid.] 514."

With respect to Mil. R. Evid. 514, the matters provided by Petitioner, the Government, and the Defense do not substantiate that the medical and FAP records at issue contain confidential communications between an alleged victim and victim advocate that would be subject to the rule, or that Petitioner or either party represented to the military judge that they did. Accordingly, we find Petitioner has failed to demonstrate her clear and indisputable right to relief on the basis of Mil. R. Evid. 514.

However, we find Petitioner has demonstrated her entitlement to some relief with respect to Mil. R. Evid. 513. Maj DC's declaration confirms that Petitioner's counsel did assert **[*19]** to the military judge that the FAP records in particular contained material privileged under Mil. R. Evid. 513. The petition and the Government's brief both indicate that Mil. R. Evid. 513 was raised. The Defense states "neither Petitioner nor the Government made firm assertions to the military judge that Petitioner's records included information subject to Mil. R. Evid. 513." However, the Defense does not deny Petitioner's counsel invoked Mil. R. Evid. 513 to some extent, and has not provided matter for our consideration that contradicts Maj DC's declaration. The military judge's ruling on the defense motion to compel

is silent on the matter, and in fact does not refer to Mil. R. Evid. 513 at all. Although we have not requested or been provided a recording or transcript of the motion hearing itself, we find Maj DC's unimpeached declaration is a sufficient factual basis to conclude Petitioner's counsel asserted the FAP records contained Mil. R. Evid. 513 material.

HN10[↑] Mil. R. Evid. 513(a) generally provides a patient "a privilege to refuse to disclose *and to prevent any other person from disclosing*" subject communications between the patient and psychotherapist or assistant. (Emphasis added). Certain enumerated exceptions exist, and the Courts of Criminal Appeals have suggested the continuing existence of **[*20]** a non-enumerated "constitutionally required" exception. *See* United States v. Morales, No. ACM 39018, 2017 CCA LEXIS 612, at *12-28 (A.F. Ct. Crim. App. 13 Sep. 2017) (**unpub**. **op.**). However, before a military judge orders "the production or admission of evidence of a patient's records or communication, the military judge *must* conduct a hearing, which shall be closed," where the patient "must be afforded a reasonable opportunity to attend . . . and be heard." Mil. R. Evid. 513(e)(2) (emphasis added). The matters before us establish the military judge ordered the disclosure of FAP records as to which Petitioner asserted the Mil. R. Evid. 513 privilege without holding the required closed hearing.

As noted above, the military judge's order did not address Mil. R. Evid. 513 at all. Therefore, we cannot be certain how the military judge analyzed the application of the rule. For purposes of our analysis, we considered that one might subject the term "production" to a narrow interpretation echoing the distinction in R.C.M. 701 and R.C.M. 703 between "discovery" and "production." Thus, one might argue that discovery from one party to another under R.C.M. 701 is distinct from "production" and does not trigger the application of Mil. R. Evid. 513(e)(2). However, we find such a cramped interpretation of "production" and the application of Mil. R. Evid. 513(e)(2) is not appropriate. HN11[↑] The core privilege established by Mil. R. Evid. 513(a) broadly empowers **[*21]** a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure. *See* United States v. Beauge, 82 M.J. 157, 161 (C.A.A.F. 2022) ("[Mil. R. Evid.] 513(e) provides the procedure that must be followed when a party seeks to *discover* information pursuant to any of the enumerated exceptions." (Emphasis added).).

Accordingly, we conclude Petitioner has clearly and indisputably demonstrated she is entitled to relief with respect to Mil. R. Evid. 513 and the FAP records. Moreover, we find there is no other adequate means to secure relief, as Congress has specifically authorized Petitioner to seek mandamus relief from this court for a military judge's ruling affecting protections afforded her by Mil. R. Evid. 513. Furthermore, we find the issuance of such a writ is appropriate under the circumstances.

Accordingly, it is by the court on this 7th day of December, 2022,

ORDERED:

Petitioner's petition for extraordinary relief in the nature of a writ of mandamus is **GRANTED IN PART** and **DENIED IN PART**. The military judge's 11 October 2022 ruling granting the defense motion to compel discovery is **SET ASIDE IN PART**, specifically with respect to the FAP records in the Government's possession. The defense motion to compel discovery remains pending before **[*22]** the military judge with regard to the FAP records in the Government's possession.

The stay of proceedings issued by this court on 24 October 2022 is hereby **REMOVED**. Court-martial proceedings may resume consistent with this order and with Mil. R. Evid. 513.

End of Document

In re HK

United States Air Force Court of Criminal Appeals

September 13, 2021, Decided

Misc. Dkt. No. 2021-07

Reporter
2021 CCA LEXIS 535 *

In re HK, Petitioner

Core Terms

rights, military, hearings, writ of mandamus, alleged violation, court-martial, proceedings, Appeals, Authorization, confinement, violations

Case Summary

Overview
HOLDINGS: [1]-An alleged victim's petition for a writ of mandamus dated 13 September 2021 requesting the vacation of a trial judge's decision to grant a defense-requested continuance was denied since the victim did not have the right to be heard by the military judge at the trial level on the continuance issue because nowhere in Unif. Code Mil. Justice art. 6b, were victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; Article 6 includes 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.

Outcome
Petition denied.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Finality

Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN1 **Judicial Review, Extraordinary Writs**

This court has jurisdiction over the petition under Unif. Code Mil. Justice art. 6b, which establishes a victim's ability to petition this court when the victim believes a court-martial ruling violates the rights of the victim afforded by that article. Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b(e)(1). 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. In order to prevail on a petition for a writ of mandamus, a petitioner must show that (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. A writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN2 **Judicial Review, Extraordinary Writs**

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 or be characteristic of an erroneous practice which is likely to recur.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN3[] Apprehension & Restraint of Civilians & Military Personnel, Circumstances Warranting Confinement & Restraint

The right to be heard under Unif. Code Mil. Justice art. 6b only extends to hearings related to an accused's sentencing and pre- and post-trial confinement. The article further permits a victim to seek a petition for extraordinary relief from a Court of Criminal Appeals for violations of those eight rights in addition to violations of various other rules. Nowhere in Article 6b are victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; instead, the enforcement of victims' rights is sought through petitions to appellate courts.

Military & Veterans Law > Military Justice > Judicial Review > Finality

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN4[] Judicial Review, Finality

The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771--unlike Unif. Code Mil. Justice art. 6b--explicitly calls for alleged violations of victims' rights to be raised before, and decided by, the district court in which the defendant is being prosecuted. 18 U.S.C.S. § 3771(d)(3). Upon an adverse ruling, a victim to whom the CVRA applies may then seek a writ of mandamus from the relevant court of appeals.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN5[] Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial

Unif. Code Mil. Justice art. 6b includes 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.

Judges: [*1] Before PANEL 1.

Opinion

ORDER

On 13 September 2021, Petitioner requested this court issue a writ of mandamus vacating a trial judge's decision to grant a defense-requested continuance. Petitioner further asks us to find that she has standing to argue for her rights under *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b*, before the trial judge. This court docketed the petition on 16 September 2021; we thereafter granted the Government and the accused leave to file answers to the petition, and granted Petitioner leave to file a reply to those answers. Having considered the petition, the answers, and the reply, we find Petitioner is not entitled to the requested relief.

I. BACKGROUND

On 9 June 2021, four charges against TSgt LB ("the accused") were referred to a general court-martial; one of these charges alleges the accused sexually assaulted Petitioner. During voir dire of the potential court members on 23 August 2021, the Defense learned the Government intended to rely on evidence which the Defense had not been provided in discovery. The Government then turned over nearly 2,000 pages of text messages to the Defense. The next day, on 24 August 2021, the Defense sought a continuance, via a written **[*2]** motion, to review the evidence. The Government opposed the Defense's request but did not submit a written response to the motion. Also on 24 August 2021, Petitioner, through her special victims' counsel, submitted a written response to the military judge, objecting to any continuance. She argued that *Article 6b, UCMJ*, guaranteed her the right to

proceedings free from unreasonable delay, and that any delay in the case would only compound the financial burdens she was already suffering by virtue of being required to be present for the court-martial. She asserted that her hourly job did not pay her when she was not present for work, and the prospect of missing more work endangered her ability to pay her rent and support her family.

Also on 24 August 2021, the military judge granted the Defense's motion and set the court-martial for 11 April 2022, nearly eight months later.[1] In his written ruling, the military judge concluded Petitioner did not have standing to be heard on the matter, and that Petitioner's avenue of redress was to seek a writ of mandamus from a military Court of Criminal Appeals. The instant petition followed, in which Petitioner asks us to vacate the military judge's ruling and to direct **[*3]** the military judge to permit her to assert her rights under *Article 6b, UCMJ*, at the accused's court-martial.[2]

II. Law

HN1[] This court has jurisdiction over the petition under *Article 6b, UMCJ*, which establishes a victim's ability to petition this court 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)*. 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 Association, 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, 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)* (citing *Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459, (2004)*). 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)* (per curiam)).

HN2[] 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 . . . or be characteristic of an erroneous practice which is **[*4]** likely to recur." *Labella, 15 M.J. at 229* (internal quotation marks and citations omitted).

III. Analysis

We begin our analysis with a brief review of victims' rights in the context of the military justice system, because an understanding of the evolution of those rights helps define what Petitioner is and is not entitled to under *Article 6b, UCMJ*.

In July 2013—prior to the enactment of *Article 6b, UCMJ*—the United States Court of Appeals for the Armed Forces (CAAF) ruled on a petition for extraordinary relief brought by LRM, the named victim in a then-ongoing sexual assault court-martial. *LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)*. The trial judge in that case had said he was prohibiting LRM from being heard through her detailed special victims' counsel on matters pertaining to Mil. R. Evid. 412 (victim's sexual behavior or predisposition) and Mil. R. Evid. 513 (psychotherapist-patient privilege). *Id. at 366-67*. LRM's subsequent petition for extraordinary relief sought an order directing the military judge to reverse his position and receive motions and accompanying papers from her. *Id. at 372*. The CAAF found the military judge's ruling to be erroneous—in part because both Mil. R. Evid. 412 and Mil. R. Evid. 513 explicitly granted LRM a reasonable opportunity to attend the relevant hearings and be heard at them. *Id. at 370-71*. The court further concluded neither rule **[*5]** precluded her from being heard *through counsel*. *Id.*

Later that year, Congress passed the *National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (26 Dec. 2013) (FY14 NDAA)*. *Section 1701* of that act was titled, "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice," and created Article 6b, UCMJ. As originally enacted, that article defined eight substantive rights for victims of crimes under the UCMJ, including the right to be reasonably protected from an accused, the right to notice of certain events, and the right to be

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[1] Trial defense counsel told the military judge their first available date for trial was 24 January 2022. The Government, meanwhile, said it could not be prepared to proceed until 11 April 2022 due to witness availability.

[2] Petitioner does not challenge the military judge's decision on the continuance request itself, but rather the fact he ruled without hearing from her.

treated with fairness and respect for his or her dignity and privacy. Article 6b(a), UCMJ, 10 U.S.C. § 806b. Two of those eight specific rights are relevant here: (1) the right to proceedings free from unreasonably delay, and (2) the right to be reasonably heard at certain proceedings. *Id.* The latter provision entitles a victim to be reasonably heard at: (1) pretrial confinement hearings; (2) sentencing hearings; and (3) clemency and parole hearings. *Id.* The FY14 NDAA did not include any enforcement mechanism related to alleged violations of these rights; however, it directed the Secretary of Defense to recommend changes to the Manual for Courts-Martial and prescribe relevant regulations to address such issues as enforcement and complaints of violations. **[*6]** FY14 NDAA § 1701(b). Thus, as a result of the FY14 NDAA, victims of offenses under the UCMJ were given the right to be heard at hearings related to an accused's sentencing, as well as pre- and post-trial confinement-related proceedings. In addition, and separate from Article 6b, UCMJ, victims had the right to be heard at courts-martial with respect to matters as specifically permitted by other authorities, such as Mil. R. Evid. 412 and Mil. R. Evid. 513.

Since its enactment, Article 6b, UCMJ, has been repeatedly amended, but its overall structure has remained the same. In the National Defense Authorization Act for Fiscal Year 2015, Congress added an enforcement mechanism to this article, 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 out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. *Pub. L. No. 113-291 § 535, 128 Stat. 3292 (2014).*[3] The following year, the writ of mandamus provision was expanded to reach alleged violations of Mil. R. Evid. 514 (victim advocate-victim privilege) and Mil. R. Evid. 614 (exclusion of witnesses from a courtroom). *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 § 531, 129 Stat. 726 (2015). In the National Defense Authorization Act for Fiscal Year 2018 amendments, the CAAF was given authority to review rulings by the Courts of Criminal Appeals on petitions seeking to enforce **[*7]** those protections afforded under Article 6b, UCMJ. Pub. L. No. 115-91 § 531, 131 Stat. 1283 (2017). Most recently, in 2021, victims were given the right to notice of certain post-trial motions, filings, and hearings. *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 § 541, 134 Stat. 3388 (2021).

In spite of the frequent amendments of Article 6b, UCMJ, what has not changed is its overall structure with respect to victim rights. The article sets out the eight rights, one of which is the right to be heard. HN3[↑] But this right to be heard only extends to hearings related to an accused's sentencing and pre- and post-trial confinement. The article further permits a victim to seek a petition for extraordinary relief from a Court of Criminal Appeals for violations of those eight rights in addition to violations of various other rules. Nowhere in Article 6b, UCMJ, are victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; instead, the enforcement of victims' rights is sought through petitions to appellate courts.

Petitioner and the parties offer various theories on whether HK has standing to be heard on her right to proceedings free from unreasonable delay under Article 6b(a)(7), UCMJ. 10 U.S.C. § 806b(a)(7). By the plain language of Article 6b, UCMJ, she does. The salient question here is whether she has the right to be heard by the military judge at the trial **[*8]** level on this issue, and we conclude she does not.[4]

Petitioner points us to the Crime Victims' Rights Act

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[3] This amendment also authorized petitions with respect to preliminary hearings under ***Article 32, UCMJ, 10 U.S.C. § 832***, as well as to any order directing a victim's deposition.

[4] The accused in this case argues that Petitioner's claim is moot by virtue of the original trial date having passed. As a result of the military judge's ruling on the motion for a continuance, however, the court-martial is not scheduled to recommence until April 2022. Thus, if we were to vacate the military judge's ruling and direct a new hearing in which Petitioner is permitted to be heard, a new trial date might be established which takes Petitioner's interests into consideration and results in an agreeable schedule. As a result, we conclude we can redress the injury alleged here, and Petitioner's claim is not moot. *Cf.*, Uzuegbunam v. Preczewski, U.S. , 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021) (concluding that even nominal damages of one dollar may provide redress and defeat a claim of mootness). Similarly, insofar as the accused's court-martial is still pending, we find it entirely foreseeable one or both of the parties might seek future continuances, and that the military judge would again refuse to hear from Petitioner and issue further near-immediate rulings. This determination renders the issue presented here "capable of repetition, yet evading review," an exception to the general doctrine of mootness. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911)).

(CVRA), 18 U.S.C. § 3771, which was passed in 2004 and addresses victim rights in federal courts. Her theory is that Article 6b, UCMJ, was generally derived from the CVRA, and the CVRA's legislative history shows that the bill's sponsors were concerned about the impact of trial delays on victims. In support of this theory, she points to federal district courts which have considered victims' inputs regarding proposed delays. Petitioner's theory is not without basis, in light of both the textual similarities between the CVRA and Article 6b, UCMJ, and the fact the act creating Article 6b, UCMJ, titled that provision as "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice." However, even if we were to assume Article 6b, UCMJ, is based on the CVRA, this would not help Petitioner's argument here. HN4[↑] The CVRA—unlike Article 6b, UCMJ—explicitly calls for alleged violations of victims' rights to be raised before, and decided by, the district court in which the defendant is being prosecuted. 18 U.S.C. § 3771(d)(3). Upon an adverse ruling, a victim to whom the CVRA applies may *then* seek a writ of mandamus from the relevant court of appeals. *Id.*

If Congress did in fact use the CVRA **[*9]** as a template in crafting Article 6b, UCMJ, the absence in the latter of a requirement for the trial court to first hear matters of alleged victim-right violations tells us Congress likely considered—and rejected—applying the CVRA's trial-level enforcement mechanism to the military. Our role, however, is not to try and divine either why Congress declined to legislatively entitle victims in the military justice system to be heard by trial judges on alleged violations of any of the eight rights in Article 6b, UCMJ, or why the article only specifically entitles victims to be heard at confinement- and sentence-related hearings. Instead, our role is to apply Article 6b, UCMJ, as Congress enacted it, and that HN5[↑] article includes 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.

For the foregoing reasons, Petitioner has not demonstrated that the right to issuance of the writ she seeks is clear and indisputable, and she has therefore failed to show the appropriateness of the relief she requests.

Accordingly, it is by the court on this 22d day of October, 2021,

ORDERED:

The Petition for Writ of Mandamus dated 13 September 2021 is **DENIED [*10]** .

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In re Kc

United States Air Force Court of Criminal Appeals

November 09, 2021, Filed

Misc. Dkt. No. 2021-06

Reporter
2021 CCA LEXIS 593 *; 2021 WL 5217704

In re KC, Petitioner

Notice: THIS ***OPINION*** IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION.

Prior History: *United States v. Leipart, 2021 CCA LEXIS 595 (A.F.C.C.A., June 14, 2021)*

Core Terms

military, writ of mandamus, proceedings, reply

Case Summary

Overview
HOLDINGS: [1]-The victim's Motion to Stay Proceedings and Petition for Extraordinary Relief was denied since the military judge's rulings were within the broad discretion granted him and did not obviously infringe the rights she invoked, she had not demonstrated the right to issuance of the writ was clear and indisputable, or that issuance of the requested relief was appropriate under the circumstances, therefore, she failed to show she was entitled to the relief she requested.

Outcome
Motion and petition denied.

LexisNexis® Headnotes

HN1[] Courts look at the substance of the writ, rather than the form.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN2[] **Judicial Review, Courts of Criminal Appeals**

Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, establishes a victim's ability to petition the United States Air Force Court of Criminal Appeals when the victim believes that a court-martial ruling violates the rights of the victim afforded by that article. Unif. Code Mil. Justice art. 6b(e)(1), 10 U.S.C.S. § 806b(e)(1).

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN3[] **Judicial Review, Extraordinary Writs**

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. In order to prevail on a petition for a writ of mandamus, a petitioner must show that (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. A writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN4 **Judicial Review, Extraordinary Writs**

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 or be characteristic of an erroneous practice which is likely to recur.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN5 **Posttrial Procedure, Actions by Convening Authority**

Unif. Code Mil. Justice art. 6b(e)(1) and (4), 10 U.S.C.S. § 6b(e)(1) and (4), specifically authorizes the victim of an offense to petition the Court of Criminal Appeals for a writ of mandamus to require compliance with the victim's rights. A victim has the right, inter alia, to be reasonably protected from the accused, to proceedings free from unreasonable delay, and to be treated with fairness and respect for her dignity and privacy. Unif. Code Mil. Justice art. 6b(a)(1), (7), and (8), 10 U.S.C.S. § 806b(a)(1), (7), and (8).

Opinion

[*1] ORDER

On 10 September 2021, Petitioner filed with this court a Petition entitled "Motion to Stay Proceedings and Petition for Extraordinary Relief" seeking to allow KC to "testify via remote means at the [*United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967)]* hearing in this case." Petitioner alternatively requests relief in the form of "stay[ing] proceedings until the end of the COVID-19 National Emergency if the Petition is unsuccessful." Petitioner has attached a ***number*** of appendices consisting of government motions, defense replies, rulings of the military judge, and related documents.

This court docketed the petition on 14 September 2021; we thereafter granted the United States and Technical Sergeant (TSgt) Matthew P. Leipart[1] leave to file answers to the petition, and granted Petitioner leave to file a reply to those answers. On 1 October 2021, we received answers from the Government and TSgt Leipart. On 11 October 2021, we received Petitioner's reply. Having considered the petition, the answers, and the reply, we find Petitioner is not entitled to the requested relief.

I. Background

On 29 November 2018, at Whiteman Air Force Base (AFB), Missouri, a general court-martial composed of a military judge alone found **[*2]** TSgt Leipart, pursuant to his pleas, guilty of two specifications of communicating a threat in violation *Article 134*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 934*;[2] two specifications of assault consummated by a battery, in violation of Article 128, UCMJ, *10 U.S.C. § 928*; and one specification of aggravated assault with a dangerous weapon, means, or force, in violation of Article 128, UCMJ. In addition, contrary to TSgt Leipart's pleas, the military judge found TSgt Leipart guilty of two specifications of sexual assault, in violation of Article 120, UCMJ, *10 U.S.C. § 920*. The military judge sentenced TSgt Leipart to a dishonorable discharge, confinement for 21 years, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. On 31 May 2019, the convening authority approved the adjudged sentence. Petitioner was the victim of the offenses for which TSgt Leipart was found guilty.

On 26 April 2021, TSgt Leipart filed a petition for a new trial pursuant to Article 73, UCMJ, *10 U.S.C. § 873*, alleging newly discovered evidence of fraud upon the court. TSgt Leipart claimed Petitioner committed perjury during her testimony at TSgt Leipart's trial. On 14 June 2021, we ordered that the record of trial and petition be

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[1] Appellant in *United States v. Leipart*, ACM 39711, and Petitioner in ***Misc***. ***Dkt***. ***No.*** 2021-03.

[2] Unless otherwise noted, all references in this order to the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.).

returned to The Judge Advocate General, **[*3]** so that an appropriate convening authority could direct a post-trial fact-finding hearing.[3] We ordered that the detailed military judge "may require the presence of any witnesses deemed necessary" and shall have broad authority with regard to "control of the courtroom, docketing, and rulings on continuances."

A post-trial *DuBay* hearing was docketed for 9 August 2021. On 5 August 2021, the Government submitted a motion to the detailed military judge requesting a continuance and requesting that all witnesses, including Petitioner, be permitted to provide testimony via remote means. The military judge granted the continuance, but denied the request for remote testimony. Petitioner submitted a motion for reconsideration of the military judge's ruling, which the military judge considered and then denied. The military judge stated he would provide the reasons for his ruling on the record at the *DuBay* hearing. The hearing was continued to 19 January 2022, and is scheduled to take place at Fort Leavenworth, Kansas, where TSgt Leipart is confined.

Petitioner seeks extraordinary relief relating to the military judge's order requiring her physical production for the *DuBay* hearing. Petitioner contends that **[*4]** her travel to the United States from Australia for the hearing violates: her "right to be reasonably protected from the accused," *see* *Article 6b(a)(1), UCMJ, 10 U.S.C. § 806b(a)(1)*; her "right to be treated with fairness and with respect for [her] dignity and privacy," *see* *Article 6b(a)(8), UCMJ, 10 U.S.C. § 806b(a)(8)*; and her "right to proceedings free from unreasonable delay," *see* *Article 6b(a)(7), UCMJ, 10 U.S.C. 806b(a)(7)*. Petitioner argues that requiring in-person testimony violates her Article 6b, UCMJ, rights because: (1) it will subject her to ongoing fear of TSgt Leipart and his family; (2) requiring her to travel halfway around the world for a hearing during the COVID-19 is cruel and "defies tenets of basic dignity and fairness;" and (3) delaying the hearing is unreasonable when remote testimony is a viable option.

Petitioner did not request a writ of mandamus, arguing that JT. CT. CRIM. APP. R. 29(b) supports our continued jurisdiction over the *DuBay* hearing and the military judge's ruling on Petitioner's motion for reconsideration. However, in her reply, Petitioner acknowledges that we might characterize the petition as a writ of mandamus and argues that she is still entitled to relief under that standard.

The United States and TSgt Leipart both request the petition be denied.

II. LAW

HN1[] "[C]ourts look at the substance of the writ[,] rather than the **[*5]** form." *Loving v. United States, 62 M.J. 235, 252 (C.A.A.F. 2005)* (citations omitted).

HN2[] *Article 6b, UMCJ, 10 U.S.C. § 806b*, establishes a victim's ability to petition this court when the victim "believes that . . . 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)*.

HN3[] 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 Association, 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, 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)* (citing *Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459, (2004)*). 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)* (per curiam)).

HN4[] 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 . . . or be characteristic of an erroneous practice which is likely to recur." *Labella, 15 M.J. at 229* (internal quotation marks and citations omitted).

III. ANALYSIS

To the extent Petitioner likens the petition **[*6]** to a motion for reconsideration of our 14 June 2021 order, we find the petition is without merit.

HN5[] *Article 6b(e)(1)* and *(4), UCMJ*, specifically

[3] *See* *DuBay, 37 C.M.R. at 413*.

authorizes the victim of an offense to petition the Court of Criminal Appeals for a writ of mandamus to require compliance with the victim's rights. A victim has the right, *inter alia*, to be reasonably protected from the accused, to proceedings free from unreasonable delay, and to be treated with fairness and respect for her dignity and privacy. *See* Article 6b(a)(1), (7), and (8), UCMJ, 10 U.S.C. § 806b(a)(1), (7), (8). Accordingly, the Petition is properly before this court. However, we find the military judge's rulings are within the broad discretion granted him and do not obviously infringe the rights Petitioner invokes. Petitioner has not demonstrated that the right to issuance of the writ is clear and indisputable, or that issuance of the requested relief is appropriate under the circumstances. Petitioner has therefore failed to show she is entitled to the relief she requests.

Accordingly, it is by the court on this 9th day of November, 2021, **ORDERED:**

Petitioner's "Motion to Stay Proceedings and Petition for Extraordinary Relief," dated 10 September 2021, are **DENIED**.

End of Document

In re VM

United States Air Force Court of Criminal Appeals

July 11, 2023, Decided

Misc. Dkt. No. 2023-04

Reporter
2023 CCA LEXIS 290 *; 2023 WL 4448010

In re VM, Petitioner, Christopher P. MARTINEZ, Technical Sergeant (E-6), U.S. Air Force, Real Party in Interest

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. Military Judge: Matthew P. Stoffel. GCM convened at: Joint Base Elmendorf Richardson, Alaska.

Core Terms

military, rights, continuance, proceedings, divorce, unreasonable delay, court-martial, scheduled, writ of mandamus

Counsel: For Petitioner: Captain Bryant A. Mishima-Baker, USAF; Devon A. R. Wells, Esquire.

For Respondent: Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Es-quire.

Judges: Senior Judge RICHARDSON delivered the ***opinion*** of the court, in which Judge CADOTTE and Judge ANNEXSTAD joined.

Opinion **by:** RICHARDSON

Opinion

RICHARDSON, Senior Judge:

On 30 May 2023, Petitioner requested this court issue a writ of mandamus vacating the trial judge's decision to grant a defense-requested continuance of the scheduled court date. Petitioner further asked us to mandate that the trial judge consider her inputs in making his ruling on the defense request.

When this court docketed the petition on 31 May 2023, we required the Government provide this court with the Prosecution's response to the defense motion to continue; on 8 June 2023, the Government complied. We also granted the Government and the Real Party in Interest leave to file answers to the petition, and granted Petitioner leave to file a reply to those answers. We received an answer from the Government, and Petitioner's reply **[*2]** to that answer on 21 and 28 June 2023, respectively; we did not receive an answer from the Real Party in Interest. Having considered the petition, the answer, and the reply, we find Petitioner is not entitled to the requested relief.

I. Background

On 15 July 2022, two charges against the Real Party in Interest ("the accused") were referred to a general court-martial. Specifically, the accused is charged with one specification of abusive sexual contact against VM in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*, and six specifications of battery against VM—the accused's wife—and two specifications of battery against a child, in violation of *Article 128, UCMJ, 10 U.S.C. § 928*.[1] The specifications allege misconduct from January 2015 through March 2021. By agreement of the parties, the initial trial date was set for 12 June 2023.

Appellant retained new counsel, Mr. CH, who filed a notice of appearance with the trial court on 17 April 2023. On 19 April 2023, the Defense filed a motion to continue the trial to a date no earlier than 1 August 2023. On the same date, Mr. CH clarified that his appearance was limited to his request for a continuance, as he would not be able to represent the accused if the request was denied. **[*3]**

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[1] Unless otherwise noted, all references in this ***opinion*** to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

The Prosecution opposed the defense motion in writing on 24 April 2023. The Prosecution asserted as fact that

> On 24 April 2023, counsel for named victim [VM] provided a memo from [VM] in which she states she suffered pecuniary loss from the long waiting period before trial and expect[s] to suffer further loss if there is any further delay. The loss is due to legal fees because the Accused's divorce from [VM] has been continued due to the court-martial. (Att. 6)

The referenced "Att. 6" consists of a statement signed by VM and a state-court listing of the progress of the accused's and VM's divorce proceeding.[2] In the statement, VM explains how a delay will affect her and her family mentally, emotionally, and financially.

The Prosecution argued that a delay would cause prejudice to the Government's "search for truth" and "directly affects the victims in this case. . . . The victims have vested Article 6b[, UCMJ,] rights in a trial without unreasonable delay." Further, the Prosecution devoted one paragraph to asserting VM's position on the defense motion:

> Victim's counsel for [VM] has notified the Government that [VM] will suffer undue hardship because of a continuance. Specifically, that [VM] **[*4]** will be required to retain the services of a lawyer for [a]ccused's divorce from her for a longer period because the court handling the divorce will not finalize the divorce until this court-martial is complete. The Government notes both victim's [sic] rights to proceedings "free from unreasonable delay." *Art[icle] 6b(a)(5), UCMJ* [sic]. The continuance of this trial will create an unreasonable delay because the [a]ccused currently has three attorneys representing him including the civilian defense counsel of his choosing.

Neither party requested a hearing under *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*. The military judge considered the parties' filings, but did not consider the separate responses from the detailed victims' counsel for VM and the child. Citing *In re HK, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 22 Oct. 2021)* (order), the military judge explained in a footnote: "This court received the responses but did not consider them due to lack of standing before this trial court." VM's counsel's response totaled 49 pages, comprised of an 8-page document from counsel and 7 attachments, including VM's memorandum and attachment.[3] VM's counsel asserted the Defense had not established a reasonable basis for a continuance; a continuance is not just as it violates VM's *Article 6b, UCMJ*, rights; and the accused's interest in "convenience" **[*5]** does not outweigh VM's *Article 6b, UCMJ*, rights.

In an email on 3 May 2023, the military judge informed the parties he would be granting the defense motion. He issued a written ruling to that effect on 9 May 2023. In his ruling, the military judge found as fact:

> [VM], one of the alleged victims, is in the midst of divorce proceedings involving the accused. The next scheduled court date for the divorce proceedings is 22 June 2023. It is likely that a continuance of the accused's court-martial will result in delay of the civilian divorce proceedings.

The military judge ended his conclusions of law as follows:

> While a continuance may cause emotional difficulty and expenditure of additional legal fees for one of the named victims, she remains available for trial and is willing to participate. Taking these factors into account, and in consideration of the fundamental nature of the accused's right to be represented by civilian counsel at no expense to the [G]overnment, the court concludes granting a continuance is just under the circumstances.

The military judge set 25 July 2023 as the date for arraignment and to hear motions. He set a new trial date of 28 August 2023. The instant petition followed, in which **[*6]** Petitioner asks us to vacate the military judge's decision to continue the scheduled court date and to mandate the military judge consider VM's inputs in making a decision on the Defense's motion.

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

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[2] "Att 6" is the same document Petitioner submitted with this writ petition as "Attachment 8." The documents are identical except Petitioner's submission does not have redactions of personal information. Moreover, while the subject of VM's statement begins "Affidavit," the document is not sworn.

[3] The other attachments are: (1) excerpt from report of investigation, (2) charge sheet, (3) excerpt from preliminary hearing report, (4) emails regarding the initial scheduling of the court-martial, (5) Defense's motion to continue, and (6) Mr. CH's notice of appearance.

the victim afforded' by that article." *In re KK, M.J. , Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *6 (A.F. Ct. Crim. App. 24 Jan. 2023)* (omission in original) (quoting *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.*

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 Association, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943)* (citations omitted). 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)*).

In order to prevail on a petition for a writ of mandamus, a petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)* (per curiam) (citing *Cheney, 542 U.S. at 380-81* **[*7]**); *see also In re KK, 2023 CCA LEXIS 31, at *9-10* (rejecting abuse of discretion as the standard to determine mandamus relief and endorsing the traditional mandamus standard in *Hasan*).

"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 . . . or be characteristic of an erroneous practice which is likely to recur.'" *In re KK, 2023 CCA LEXIS 31, at *6* (omission in original) (quoting *United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)* (per curiam)).

"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." *Id.* at *13. In the context of a motion for a continuance, a victim's rights under *Article 6b, UCMJ*, to proceedings free from unreasonable delay and to be treated with fairness do "not entitle her to a trial date of her choosing," but are "factor[s] for the military judge to consider in balancing competing interests and making scheduling decisions." *Id.* at *16-18.

III. Analysis

Petitioner makes two requests of this court: (1) vacate the military judge's order delaying the scheduled court date, and (2) require the military judge consider VM's inputs in making a decision on the Defense's motion. We find no writ should issue.

Article 6b, UCMJ, delineates eight victim **[*8]** rights, and only one of those rights—*Article 6b(a)(4)*—specifically provides for an opportunity to be heard. As such, Petitioner does not have a statutory right to be heard on the rights she has asserted in this petition—to proceedings free from unreasonable delay and to be treated with fairness under *Articles 6b(a)(7)* and *(8), UCMJ*. Petitioner does not assert a non-statutory right to be heard.

Importantly, absence of a specific statutory right to be heard does not mean that a military judge is *prohibited* from considering a victim's effort to exercise *Article 6b, UCMJ*, rights. To the extent the military judge in this case believed otherwise based on the unpublished order *In re HK*, he was mistaken, but any such mistake in this case is not dispositive on the issues before us.

The military judge denied VM the opportunity to be heard through counsel, but otherwise allowed her exercise of rights to proceedings free from unreasonable delay and to be treated with fairness under *Article 6b, UCMJ*. VM was not entitled "to a trial date of her choosing," but her circumstances were "factor[s] for the military judge to consider in balancing competing interests and making scheduling decisions." *In re KK, 2023 CCA LEXIS 31, at *16-18*. The military judge considered VM's personal statement and its attachment, as **[*9]** well as the argument from the Prosecution on VM's behalf. He considered how a delay would affect VM and her family. He balanced VM's rights with the accused's rights, and ultimately ruled in favor of the accused.

IV. Conclusion

For the foregoing reasons, Petitioner has not demonstrated that the right to issuance of 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 30 May 2023 is **DENIED**.

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United States v. Lizana

United States Air Force Court of Criminal Appeals

January 25, 2021, Decided

No. ACM 39280 (reh)

Reporter
2021 CCA LEXIS 19 *; 2021 WL 237419

UNITED STATES, Appellee v. Anthony R. ***LIZANA***, Technical Sergeant (E-6), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. **Lizana**, 2021 CAAF LEXIS 256, 2021 WL 1393434 (C.A.A.F., Mar. 24, 2021)*

Review denied by *United States v. **Lizana**, 2021 CAAF LEXIS 573 (C.A.A.F., June 22, 2021)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Bradley A. Morris (motions); Shelly W. Schools. Approved sentence: Bad-conduct discharge and reduction to E-3. Sentence adjudged 6 March 2019 by GCM convened at Joint Base San An-tonio-Lackland, Texas.

*United States v. **Lizana**, 2018 CCA LEXIS 348 (A.F.C.C.A., July 13, 2018)*

Core Terms

sentence, records, military, unsworn statement, discovery, trial judge, court-martial, post-trial, motions, rebut, military authorities, trial defense counsel, specification, contributed, disclosure, convening, anxiety, sexual

Case Summary

Overview

HOLDINGS: [1]-The nondisclosure of the abusive sexual contact victim's medical evaluation records did not affect the outcome of the servicemember's court-martial, Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846*, because the discharge records did not lead to admissible evidence that rebutted factual assertions in the victim's unsworn statement, and the trial judge gave a clear signal that she found the victim's impression of the impact of the servicemember's actions on her was not a "fact" that was susceptible to being disproved by the contents of a medical evaluation discharge package; [2]-The five-day breach of the Moreno standard did not violate the service member's due process rights because, inter alia, neither the adjudged or approved sentence included any term of confinement, so the post-trial delay could not have caused oppressive incarceration.

Outcome

Sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

HN1[] **Sentences, Deliberations, Instructions & Voting**

The standard for disclosure of material in the possession of military authorities under R.C.M. 701(a)(2), Manual Courts-Martial, is material to the preparation of the defense.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

HN2[] **Disclosure & Discovery, Depositions & Interrogatories**

An appellate court reviews a military judge's ruling on a motion to compel discovery for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN3[] **Procedural Due Process, Scope of Protection**

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The United States Supreme Court has extended Brady, clarifying that the duty to disclose such evidence is applicable even though there has been no request by the accused and that the duty encompasses impeachment evidence as well as exculpatory evidence.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN4[] **Disclosure & Discovery, Disclosure by Government**

A military accused has the right to obtain favorable evidence under Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846*, as implemented by R.C.M. 701-703. Article 46, and the implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. With respect to discovery, R.C.M. 701(a)(2)(A), Manual Courts-Martial, requires the Government, upon defense request, to permit the inspection of, inter alia, any documents within the possession, custody, or control of military authorities, and which are material to the preparation of the defense.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Appellate Review

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Criminal Law & Procedure > Appeals > Reversible Error > Discovery

HN5[] **Brady Materials, Appellate Review**

In reviewing discovery matters, an appellate court conducts a two-step analysis: first, the appellate court determines whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, the appellate court tests the effect of that nondisclosure on the appellant's trial. An appellate court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial. Where the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable doubt. Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN6 **Military Justice, Counsel**

R.C.M. 1001A(e), Manual Courts-Martial, provides that during presentencing proceedings, the victim of an offense of which the accused has been found guilty may make an unsworn statement and may not be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial. The prosecution or defense may rebut statements of fact in a victim's unsworn statement. R.C.M. 1001A(e), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN7 **Judges, Challenges to Judges**

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8 **Procedural Due Process, Scope of Protection**

The four factors the United States Court of Appeals for the Armed Forces has identified to assess whether an appellant's due process right to timely post-trial and appellate review has been violated are as follows: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. An appellate court reviews de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed

Forces

HN9[] Procedural Due Process, Scope of Protection

The United States Court of Appeals for the Armed Forces has identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN10[] Procedural Due Process, Scope of Protection

Where an appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. Similarly, where the appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. With regard to anxiety and concern, the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Counsel: For Appellant: Major M. Dedra Campbell, USAF; Major Meghan R. Glines-Barney, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Anne M. Delmare, USAF.

Judges: Before J. JOHNSON, MINK, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge MINK and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

At Appellant's original trial, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of two speci-fications of willfully failing to maintain a professional relationship, one specification of negligently failing to maintain a professional relationship, one specification of sexual assault, one specification of assault consummated by a battery, two specifications of adultery, and two specifications of providing alcohol to minors, in violation of *Articles 92*, *120*, *128*, and *134, Uniform Code of Military Justice (UCMJ)*, **[*2]** *10 U.S.C. §§ 892*, *920*, *928*, *934*.[1] The court-martial sentenced Appellant to a dishonorable discharge, confinement for three months, hard labor without confinement for one month, forfeiture of $450.00 pay per month for one month, and reduction to the grade of E-3. The convening authority reduced the term of hard labor without confinement to nine days and affirmed the remaining elements of the sentence as adjudged.

Upon our initial review, this court set aside Appellant's sexual assault conviction as factually insufficient, but affirmed the lesser-included offense of abusive sexual contact in violation of *Article 120, UCMJ*, as well as the other findings of guilty. *United States v. **Lizana**, No. ACM 39280, 2018 CCA LEXIS 348, at *31 (A.F. Ct. Crim. App. 13 Jul. 2018)* (unpub. op.). This court also set aside the sentence and returned the record to The Judge Advocate General for remand to the convening authority, who was authorized to direct a rehearing as to the sentence. *Id. at *31-32*.

The convening authority directed a sentence rehearing. A general court-martial composed of a military judge alone sentenced Appellant to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge and reduction **[*3]** to the grade of E-3.

Appellant now raises a single issue on appeal: whether the military judge abused his discretion by refusing to order the production of the medical evaluation board records of MH, the abusive sexual contact victim. In addition, although not raised by Appellant, we consider

[1] Unless otherwise noted, all other references to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*).

whether Appellant is entitled to relief for facially unreasonable post-trial delay. We find no error that materially prejudiced Appellant's substantial rights, and we affirm the sentence.

I. Background

Appellant's convictions arose from his behavior with several lower-ranking female Airmen whom Appellant knew from his workplace at Joint Base San Antonio-Lackland, some of whom were Appellant's direct subordinates. The circumstances underlying Appellant's conviction for abusive sexual contact against MH by touching her vaginal area without her consent are described in more detail in our prior opinion; it is not necessary to expound them for purposes of this opinion. *Id. at *17-24*. MH was on active duty with the Air Force at the time of Appellant's first court-martial; however, she was subsequently separated from the Air Force as a result of a medical evaluation board (MEB), and was a civilian at the time of Appellant's **[*4]** sentence rehearing.

Prior to the sentence rehearing, the Defense submitted a motion to compel discovery of several types of evidence it asserted was in the possession of the Government, including *inter alia* MH's "MEB discharge package." In support of this request, the Defense cited MH's response to a disciplinary action administered before she separated from the Air Force,[2] in which MH stated she had mental health issues related to Appellant's offense against her. In addition, the Defense contended it needed the MEB discharge package to see if it contained any "conflicting statements."

The Government opposed the Defense's request for the MEB discharge material, contending that trial counsel "d[id] not have access to this, and from what the Government understands, the package is replete with material privileged under [Mil. R. Evid.] 513." Therefore, the Government argued, the Defense was required to seek disclosure of the MEB information in accordance with the procedural requirements of Mil. R. Evid. 513, and it had not done so.

On 13 December 2018, the first military judge assigned to Appellant's sentence rehearing (motions judge) conducted a hearing on the discovery motion. At the hearing, trial defense counsel clarified **[*5]** that any information covered by Mil. R. Evid. 513 might be made the subject of a separate motion, and was not requested by the Defense "at this time." However, trial defense counsel maintained the request for documents regarding MH's medical separation were not covered by Mil. R. Evid. 513. In response, trial counsel told the motions judge:

> [I]t's the government's understanding at this time that there is nothing AFPC [the Air Force Personnel Center] can do to provide those records without a judicial order, based on our conversations with Air Force Personnel Center's records custodian. From my understanding, the records are replete with diagnostic communications between the victim and her providers. To the extent that there may have been a waiver of that privilege in an administrative hearing, the government isn't ready to opine on, but the government's position is that there is a process for determining that under MRE 513, and so that issue is not ripe at this moment, because the government cannot access — cannot turn over anything without a judicial order . . . .

After the hearing, the motions judge issued a written ruling on the motion. With respect to MH's MEB discharge records, the motions judge wrote the following:

> This **[*6]** Court finds that this material is not within the possession, custody, or control of military authorities. As such, the Defense is required to abide by the requirements of [Rule for Courts-Martial (R.C.M.)] 701(f)(3) [sic][3]] and has failed to do so. Even if they had, this Court would find that the Defense has further failed to show how the MEB materials of MH that occurred after the trial, are relevant and necessary to their sentencing case at this sentence rehearing. Should an Appellate Court later determine the materials were in the possession, custody or control of military authorities in the more broad definition of "military authorities", this Court would have determined that the Defense failed in their burden to show how these documents were material to their preparing an adequate defense to the charge of which he was convicted as

[2] The Defense obtained the records of this disciplinary action and MH's response from the Government through discovery.

[3] The 2016 *MCM* does not contain a Rule for Courts-Martial 701(f)(3). Later in the trial, trial defense counsel and the second military judge interpreted the motions judge's intent was to refer to R.C.M. 703(f)(3), which would apply to the production of material that is not in the possession of military authorities that is "relevant and necessary." *See* R.C.M. 703(f)(1).

> required under [R.C.M.] 701 since these materials did not exist at the time of his initial court-martial. Lastly, this Court does not find the materials to be protected by [Mil R. Evid.] 513 as the statements, if any, contained in the materials are no longer confidential due to their disclosure to a third party as part of the MEB process. Regardless, due to the above, this request is **DENIED**.

Appellant's sentence rehearing **[*7]** reconvened on 5-6 March 2019, and was presided over by a different military judge (the trial judge). Appellant elected to be sentenced by the military judge alone. Pursuant to R.C.M. 1001A, MH read an unsworn statement to the trial judge, wherein she described how Appellant's offense had affected her and stated, *inter alia*, "[t]his incident has caused me years of stress and has contributed to an early end to my Air Force career."

After MH read her unsworn statement, the Defense asked the trial judge to reconsider the motions judge's denial of the discovery motion with respect to MH's MEB discharge records. Trial defense counsel asserted that in light of the Defense's right to rebut statements of fact in a victim's unsworn statement, MH's assertion that Appellant's offense contributed to separation from the Air Force made the MEB discharge records "relevant and necessary" to the Defense at the sentence rehearing. When questioned by the trial judge, trial defense counsel could not identify any information he expected to find in the MEB discharge material that would rebut MH's unsworn statement, but he asserted the applicable standard at that point was simply "relevance and necessity" to the Defense **[*8]** under R.C.M. 701.[4]

The trial judge denied the request for reconsideration. She explained:

> The purpose of the law that allows crime victims to provide statements in sentencing is to give them a voice in the process to speak to what they view as the impact of a crime on them personally. I read this statement for exactly what it is; her personal perception and opinion of how she's been impacted by this -- by at least in part -- by this behavior of [Appellant]. I don't read it to mean that any and all of her life struggles are all attributed to [Appellant], but at least some aspect of them are, in her opinion, and she has the right to say that, and I will give it the weight that it deserves in this process.

II. Discussion

A. Discovery of MH's MEB Discharge Records

1. Law

HN2[↑] We review a military judge's ruling on a motion to compel discovery for an abuse of discretion. *United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004)* (citation omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *Id.*

HN3[↑] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either **[*9]** to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*; ***see*** *United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017)*.

HN4[↑] "A military accused also has the right to obtain favorable evidence under [*Article 46, UCMJ*,] . . . as implemented by R.C.M. 701-703." *United States v. Coleman, 72 M.J. 184, 186-87 (C.A.A.F. 2013)* (footnotes omitted). *Article 46, UCMJ*, and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. ***See*** *id. at 187* (additional citation omitted) (citing *Roberts, 59 M.J. at 327*). With respect to discovery, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense . . . ."

HN5[↑] In reviewing discovery matters, we conduct a

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[4] We note "relevant and necessary" is the standard for production of evidence under R.C.M. 703(f)(1). *HN1*[↑] The standard for disclosure of material in the possession of military authorities under R.C.M. 701(a)(2) is "material to the preparation of the defense."

two-step analysis: "first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, **[*10]** we test the effect of that nondisclosure on [Appellant's] trial." *Coleman, 72 M.J. at 187* (quoting *Roberts, 59 M.J. at 325*). "[A]n appellate court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial." *United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004)*. Where the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable doubt. *Coleman, 72 M.J. at 187* (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *Id.* (citation omitted).

HN6[↑] R.C.M. 1001A(e) provides that during presentencing proceedings, the victim of an offense of which the accused has been found guilty "may make an unsworn statement and may not be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial." The prosecution or defense may rebut statements of fact in a victim's unsworn statement. R.C.M. 1001A(e).

Mil. R. Evid. 513(a) provides:

> 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 **[*11]** or an assistant to a 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.

The privilege is subject to a number of specific exceptions. Mil. R. Evid. 513(d).

2. Analysis

Appellant contends the motions judge abused his discretion by denying the Defense's motion to compel disclosure of MH's MEB discharge records. He asserts the record of trial indicates the information was located at AFPC, and therefore was within the "possession, custody, or control of military authorities." R.C.M. 701(a)(2)(A). He further asserts trial defense counsel demonstrated the information was material, relevant, and necessary because without it the Defense "could not rebut [MH's] unsworn statement and identify the accurate causes of her separation."

The motions judge's ruling on the motion is perplexing in multiple respects. We find no basis in the record for the conclusion that MH's MEB discharge records were not in the possession of military authorities; trial counsel's proffers clearly indicated such records existed at AFPC, a component of the Air Force. The fact that AFPC was unwilling to release sensitive mental health **[*12]** information without a court order did not remove it from the military's possession and control. Moreover, the motions judge's determination that the Defense "failed in their burden to show how these documents were material to their preparing an adequate defense to the charge" because "these materials did not exist at the time of his initial court-martial" was inapposite. The records evidently existed at the time of Appellant's sentence rehearing, and Appellant had a right to discovery of information in the possession of the Air Force that was material to the preparation of his defense at a sentence rehearing, provided it was otherwise discoverable under the Rules for Courts-Martial and Military Rules of Evidence. Furthermore, we are puzzled by the judge's pronouncement in his ruling that the records in question were not protected by Mil. R. Evid. 513 given that he did not have adequate information to determine whether the privilege was applicable to the information in the records at issue, and such a determination was unnecessary for his ruling.

However, we decline to definitively determine whether the failure to compel disclosure of the MEB records was error. We question whether the Defense made an **[*13]** adequate demonstration of materiality in its initial motion. Arguably, information regarding the reasons for MH's discharge would not become material, if it ever did, until MH's unsworn statement (if any) or evidence at the rehearing attributed Appellant's offense as a contributing factor. On the other hand, because the military judge did not cite such a rationale for denying the motion, we decline to uphold his ruling on that basis.

Instead, we resolve the issue by finding any error was harmless beyond a reasonable doubt. *See Santos, 59 M.J. at 321*. As an initial matter, we note that the significance of MH's MEB records to Appellant's court-martial, if it had any, existed in a very narrow context—to enable the Defense to respond in case MH stated, as anticipated, that Appellant's offense against her contributed to the early end of her Air Force career. This anticipated significance was borne out at the sentence rehearing when MH said just that in her unsworn

statement. Thus, in order to affect the proceedings, the MEB discharge records would need to have led to admissible evidence that rebutted factual assertions in MH's unsworn statement.

We find no indication that anything in these records would have led **[*14]** to admissible rebuttal evidence. At no point was the Defense able to identify any specific information that was likely to be in the records that would rebut MH's unsworn statement. Even assuming *arguendo* that the records included no suggestion by MH that Appellant's actions contributed to her discharge, that would not "rebut" her impression at the sentence rehearing that his actions had contributed to it.

Furthermore, we note that Appellant elected to be sentenced by the trial judge alone. The trial judge explained her reasoning for denying the Defense's motion to reconsider the motion judge's ruling. Rather than adopting the rationales in that ruling, as described above, the trial judge focused on the nature of MH's unsworn statement and highlighted the subjective nature of MH's "personal perception and opinion." The trial judge gave a clear signal that she found MH's impression of the impact of Appellant's actions on her was not a "fact" that was susceptible to being disproved by the contents of a MEB discharge package. *Cf.* United States v. Fetrow, 76 M.J. 181, 185 (C.A.A.F.) (stating the standard of review for a military judge's decision on the admission of evidence is an abuse of discretion) (citation omitted). Relatedly, the trial **[*15]** judge stated she would give MH's "personal perception and opinion" expressed through he unsworn statement "the weight that it deserves in this process." **HN7**[↑] "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." United States v. Rodriguez, 60 M.J. 87, 90 (C.A.A.F. 2004) (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)). Reviewing the proceedings as a whole, including the sentence adjudged, we are confident beyond a reasonable doubt that the nondisclosure of MH's MEB records did not affect the outcome. *See* Coleman, 72 M.J. at 187.

B. Post-Trial Delay

Appellant's court-martial concluded on 6 March 2019. However, the convening authority did not take action until 9 July 2019. This 125-day period exceeded by five days the 120-day threshold for a presumptively unreasonable post-trial delay the United States Court of Appeals for the Armed Forces (CAAF) established in United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006). **HN8**[↑] Accordingly, we have considered the four factors the CAAF identified in *Moreno* to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." Id. at 135 (citing United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005); Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)). "We review de novo claims that an appellant **[*16]** has been denied the due process right to a speedy post-trial review and appeal." *Id.* (citations omitted).

HN9[↑] In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138-39 (citations omitted). In this case, neither the adjudged or approved sentence included any term of confinement, so the post-trial delay cannot have caused oppressive incarceration. **HN10**[↑] Furthermore, where the appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. Id. at 139. Similarly, where Appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. Id. at 140. With regard to anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has made no claim or showing of such particularized anxiety or concern in this case, and we perceive **[*17]** none.

Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). We conclude that under the circumstances, the five-day breach of the Moreno standard was not so egregious, and we do not find a violation of Appellant's due process rights.

Recognizing our authority under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See* United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F.

2002). After considering the factors enumerated in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is appropriate.

III. Conclusion

The findings were previously affirmed. The approved sentence is 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 sentence is **AFFIRMED**.[5]

End of Document

[5] We note several errors in the court-martial order with respect to the charges and specifications: Charge III, Specification 2 omits the word "her;" the "Finding" with respect to Charge III, Specification 3, should indicate "Article 120" vice "Article 120DB;" and Charge V, Specifications 1 and 2 omit the phrase "a married man." We direct the publication of a corrected court-martial order to remedy these errors.