September 25, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

H.V.Z.,
Appellant,

v.

UNITED STATES,
Appellee,

and

MICHAEL K. FEWELL,
Technical Sergeant (E-6),
United States Air Force,
Real Party in Interest.

USCA Dkt. No. 23-0250/AF

Crim. App. No. 2023-03

ANSWER ON BEHALF OF REAL PARTY IN INTEREST

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INDEX

TABLE OF AUTHORITIES

CASES

Supreme Court

Court of Appeals for the Armed Forces and Court of Military Appeals

Service Courts of Criminal Appeals

Federal Circuit Courts of Appeal and District Courts

STATUTES AND RULES

OTHER

PREAMBLE

The Real Party in Interest, Technical Sergeant (TSgt) Michael K. Fewell, through undersigned counsel, respectfully requests this Honorable Court deny H.V.Z.'s (Appellant's) application for extraordinary relief in the nature of a writ of mandamus brought to this Court through a certificate for review of the decision of the United States Air Force Court of Criminal Appeals ("Air Force Court").

HISTORY OF THE CASE

TSgt Fewell agrees with the Appellant's history of the case.

ISSUES PRESENTED

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 HEATH RECORD AS HE FOUND SHE DID NOT HAVE STANDING NOR A RIGHT TO BE HEARD?

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

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

STATEMENT OF FACTS

Background of TSgt Fewell's Stayed Court-Martial

"He hit me about a month ago. I needed a ct scan, xrays and getting an mri on friday. This was not the first time. He is a narcissistic abuser." Certificate for Review Attachment (CA) I at 58 (errors in original). In a text from April 20, 2021, TSgt Michael Fewell's wife since 2016, soon to become former wife, launched into setting the stage for her ongoing "military investigation." *Id*. She was divorcing him. *Id*. He had "hit [her] so hard that he actually changed [her] spine." CA I at 59. She was going "to go see a spine specialist in a week and a half." CA I at 62. She goes on: "Family [A]dvocacy has deemed him as the domestic abuser. And me as the victim. I'm getting ready to blow the entire thing up. Because not even 3 weeks after he hit me across the camper he's with another woman." CA I at 63.

By mid-August 2021, TSgt Fewell was under investigation by the Air Force Office of Special Investigations. CA I at 65. Appellant had leveled a multitude of allegations against him, to include domestic violence and sexual assault, only some of which were charged. CA I at 37-38, 41. She further claimed he unlawfully used her Adderall prescription. CA I at 38, 42.

On October 17, 2022, TSgt Fewell's commander preferred charges. CA I at 37. The Nineteenth Air Force Commander referred almost identical charges on January 10, 2023. CA I at 37-39. Trial was set to occur on June 26, 2023. CA I at

119. Appellant was to be the primary witness against TSgt Fewell on each of the charged allegations. CA I at 113. But now, 888 days after Appellant's texts wherein she claimed serious injuries and treatment from the charged allegations, TSgt Fewell's day in court is stayed—because *Appellant* objected to discovery relating to those very same alleged injuries and treatment. CA II at 1.

Discovery Battle Between the United States and TSgt Fewell

On April 28, 2023, on behalf of TSgt Fewell, the trial defense counsel moved to compel discovery of Appellant's medical records, including non-privileged mental health records, in the possession of the Government. CA I at 41. As asserted by trial defense counsel, as a spouse of an active duty or reservist Air Force member, Appellant had access to the military health system and Tricare. CA I at 42, 52. Per her own words, Appellant had access—and spoke—to Family Advocacy, a subordinate clinic of the 56th Medical Group (56 MDG) on Luke Air Force Base (LAFB), Arizona. CA I at 63, 118. Per her own words, Appellant had apparently received injuries from TSgt Fewell and subsequent medical treatment. CA I at 58-63. Based on Appellant's assertions, the defense wanted to know if the Government had any such records. *See* CA I at 46, 51 (arguing relevant medical records may exist in the Government's possession and the Government needed to evaluate whether they did).[1]

[1] *See United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) ("The scope of

The motion to compel was based on the initial discovery request from January 19, 2023, which requested "any and all medical records" of Appellant in possession of the Government, to include *Mellette*[2] matters, especially about Adderall prescriptions (the basis for one of the charged specifications). CA at 42, 75-76. Trial defense counsel itemized the requested discovery for the ease of the military judge in a draft "Order of the Court," Attachment 9 to their motion:

> All [Appellant's] records maintained at 56 MDG or any subordinate clinic (including family advocacy program and mental health), or DoD clinic related to:
>
> a. Dates and times of visits to mental health providers;
> b. Content of current and past lists of prescription medications;
> c. Current and past medical diagnoses, including mental health diagnoses;
> d. Any **treatment or treatment plan** for such diagnosis or diagnoses; and,
> e. Any and all medical records.

CA I at 92. The draft order explicitly excluded any privileged communications protected under Military Rule of Evidence (Mil. R. Evid.) 513.[3] *Id.*

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the due-diligence requirement with respect to governmental files beyond the prosecutor's own files generally is limited to . . . other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity . . . .") (citations omitted).

[2] *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022).

[3] Unless otherwise indicated, all references to the Uniform Code of Military Justice (UCMJ), Mil. R. Evid. and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2019 ed.).

Leading up to the motion to compel, the United States and TSgt Fewell disagreed over how much was discoverable, but not whether discovery was warranted. At the outset, the Government had asserted it was "working this request and will provide copies of evidence that is discoverable and responsive." CA I at 75-76. The Government's broad initial response changed over time, CA I at 42, 78-85, and the military judge became involved on or around April 17, 2023, when the Government submitted a draft order[4] to produce medical records. CA I at 43. The military judge instructed the parties to "work together to compile their positions in writing." *Id*. What was revealed through this process was that the defense wanted *all* medical records held by LAFB MDG, while the Government deemed only those medical records held by LAFB MDG *around the charged timeframe* were relevant, and therefore discoverable. *Id*.

Days before the motion to compel, on or about April 26, 2023, Appellant, through her counsel, "opposed the provision of the Defense's requested discovery." *Id*. She submitted a "response motion" to the defense motion to compel on May 2,

[4] This is the draft order in Attachment 7 to the defense motion to compel, which is what the Government initially submitted to the military judge *before* the motion to compel. CA I at 87-88. It differs from Attachment 9 of the defense motion, which was referenced earlier and was offered by the defense for the military judge's ease. *Compare* CA I at 87-88 *with* CA I at 92-93. At first glance, these attachments appear identical, but they differ in temporal scope, which was the primary dispute between the parties.

2023, asserting standing under Rule for Courts-Martial (R.C.M.) 703, Mil. R. Evid. 513, and "to enforce her rights under Article 6(b) [sic]." CA I at 95.

The Government's response to the defense motion to compel only opposed the production of records from prior to January 19, 2020, the start of the charged timeframe. CA I at 107. In all other regards, the Government agreed to provide the requested discovery to the defense. CA I at 111.

Military Judge's Ruling on the Defense Motion to Compel

On May 11, 2023, the military judge granted in part and deferred in part on the defense motion to compel. CA I at 116. He determined, "[T]he defense is entitled to discovery of [Appellant's] medical records and non-privileged mental health records relevant to the charged offenses that are maintained by the medical treatment facility located at [LAFB]." CA I at 115. In making this determination, he concluded the defense made a valid request for discovery under R.C.M. 701(a)(2)(B), finding such records are within the possession, custody, or control of military authorities. *Id*. The military judge came to the same conclusions of law (and factual underpinnings) for the Family Advocacy records. *Id*. His ruling required trial counsel to "identify what medical records, nonprivileged mental health records, and nonprivileged Family Advocacy records of [Appellant were] within the possession, custody, or control of military authorities, located at [LAFB], including those generated before, during, and after the charged timeframes." CA I at 116. He

ordered a privilege log for any privileged or non-disclosed records. *Id*. Relevant records were ordered disclosed. *Id*.

In making his ruling and order, the military judge did not consider Appellant's response motion due to lack of standing "before this trial court," citing *In re HK*, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. Sep. 13, 2021) (order), and because his ruling did not implicate R.C.M. 703(g)(3)(C), evidence not under the control of the Government. CA I at 113.

The military judge issued an order on May 11, 2023, to 56 MDG (LAFB) "to provide any medical, mental health, and family advocacy records maintained at the [56 MDG] or any subordinate clinic." CA I at 118. The order explicitly provided, "**None of the responsive records should include confidential communications between [Appellant] and any mental health provider.**" *Id*. The military judge issued protective measures for the disclosed records as well. CA I at 119.

The Air Force Court Decision

TSgt Fewell's court-martial came to a halt on May 19, 2023, when the Air Force Court issued a stay. CA II at 2. Appellant had petitioned the Air Force Court through Article 6b, UCMJ, requesting relief in the form of a writ of mandamus to "vacate the trial court's decision to order disclosure of extensive medical records." CA II at 1. However, upon considering the petition and responsive briefs, the Air

Force Court denied Appellant's requested relief. *In re HVZ*, Misc. Dkt. No. 2023-03, 2023 CCA LEXIS 292, at *2 (A.F. Ct. Crim. App. July 14, 2023).

Issues I and II before this Court were presented to the Air Force Court. *Id.* at *11. The Air Force Court analyzed Appellant's petition under the traditional standard of review for writs. *Id.* at *7. In her petition to the Air Force Court, Appellant affirmatively embraced this standard of review, acknowledging she must show the absence of other means to attain relief, a clear and indisputable right to issuance of a writ, and propriety under the circumstances. CA I at 10 (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)). Applying this standard, the Air Force Court first found Article 6b, UCMJ, does not create standing at the trial level. *In re HVZ*, 2023 CCA LEXIS 292, at *11-12. Next, linking the two issues together, the Air Force Court found R.C.M. 701 does not provide Appellant the right to be heard at trial. *Id*. at *12. When looking at the second issue to make that determination, the Air Force Court found Appellant "fails to demonstrate the military judge was clearly and indisputably incorrect" in applying R.C.M. 701. *Id*. at *12-18. In a concise summary, the Air Force Court held:

> [M]edical records maintained by the 56 MDG would seem to fall within the plain meaning of 'papers, documents, [and] data . . . within the possession, custody, and control of military authorities . . . ,' and the military judge did not clearly and obviously err in reaching that conclusion.

Id. at *16. The Air Force Court denied relief and lifted the stay. *Id*. at *21.

However, based on the Air Force Court's Rules of Practice and Procedure, because decisions of the Air Force Court are not self-executing, the stay was *not* lifted until time passed for reconsideration or an attempt to have the writ-appeal heard by the Court. A.F. CT. CRIM. APP. R. 30.3. With Appellant's petition to the Judge Advocate General of the Air Force (TJAG) and subsequent certificate for review to this Court, such a writ-appeal occurred. Certificate for Review at 1-2. TSgt Fewell's court-martial remains stayed—each day becoming another day he cannot defend himself at court-martial for allegations occurring over three years ago.

SUMMARY OF THE ARGUMENT

This Court may address Appellant's final question—whether to issue a writ of mandamus—and go no further. The plain language of Article 6b, UCMJ, shows Appellant's grievances fall outside of the scope for which a court *can* issue a writ. Before this Court becomes the proverbial Article 6b(a)(9), UCMJ, arbitrator, the Court should recognize Appellant's claim for what it is—an alleged right to intervene on discovery matters. In doing so, this Court can outright deny this discovery writ as not authorized by Article 6b, UCMJ, such that a writ is not "in aid" of this Court's jurisdiction.

TSgt Fewell, however, requests that this Court to go one step beyond that holding and provide more guidance on what constitutes a violation of Article 6b(a)(9), UCMJ, to avoid repeat cases like his. Even here, as it stands, there is

nothing stopping Appellant from again derailing TSgt Fewell's court-martial as further discovery issues arise when operating in a legal landscape where Article 6b(a)(9), UCMJ, has no judicial interpretation.

In the event this Court finds Appellant's discovery intervention falls under Article 6b, UMCJ, the next question is the proper standard of review (Certified Issue III). Appellant waived this issue by failing to raise it in her previous writ before the Air Force Court. Even if not waived, Appellant must show the military judge clearly and indisputably erred because traditional mandamus review applies. Appellant reads words into the statute that Congress did not write, and ignores the textual differences between Article 6b, UCMJ, and the Crime Victims' Rights Act (CVRA).

While traditional mandamus standards should apply here, Appellant cannot prevail even under her preferred "ordinary" standards of review. The military judge did not err. A military medical treatment facility's records falls under the plain language of R.C.M. 701, as records in the possession, custody, or control of military authorities. This is what the military judge determined. Next, neither R.C.M. 701 or Article 6b, UCMJ, afford standing to Appellant at trial to contest a discovery matter between the United States and TSgt Fewell. The military judge correctly reached this result. Therefore, under any standard of review, Appellant has not shown error and is not entitled to relief. As such, this Honorable Court should deny Appellant's request to issue a writ of mandamus.

Appellant's grievances retain their procedural posture of an application for extraordinary relief. Consequently, TSgt Fewell is answering the certified questions in a revised sequence to take up predicate questions of law before the issues relying on the specific facts of this case.

ARGUMENT

CERTIFIED ISSUE IV.[5]

A WRIT IS NOT "IN AID" OF ANY COURT'S JURISDICTION WHEN THE BASIS FOR INTERVENTION UNDER ARTICLE 6B(A)(9), UCMJ, IS A DISPUTE SOLELY BETWEEN THE PARTIES THAT THE MILITARY JUDGE HAPPENED TO ADJUDICATE.

This Court may answer Certified Issue IV—whether to issue a writ of mandamus—and stop because the plain language of Article 6b, UCMJ, shows Appellant's grievances are outside of the scope for which a court *can* issue a writ. This discovery writ is not authorized by Article 6b, UCMJ, such that the relief request, a writ of mandamus, is not "in aid" of this Court's jurisdiction. But in finding as such, this Court can also provide more guidance on what constitutes a violation of Article 6b(a)(9), UCMJ.

Appellant's request for a writ of mandamus falls outside the basis for relief that this—or any—Court can provide.

A writ of mandamus should not be issued for a discovery issue raised pursuant

[5] "Whether this Court should issue a writ of mandamus?"

to Article 6b, UCMJ, because doing so goes beyond the jurisdictional hook afforded by that statute. A writ of mandamus can only be issued "in aid" of this Court's jurisdiction.[6] TSgt Fewell does not contest that, procedurally, this case is lawfully before this Court. Appellant "believes" her Article 6b(a)(9), UCMJ, right "to be treated with fairness and with respect for [her] dignity and privacy" was violated, thereby creating jurisdiction for petitioning the Air Force Court for a writ of mandamus. Article 6b(e), UCMJ. Upon the Air Force Court's denial of her petition for a writ of mandamus, TJAG certified this case for review by this Court.[7] Article 67(a)(2), UCMJ.[8]

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[6] "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

[7] Judge Fletcher's dissent in *United States v. Redding* offers this Court a way to limit a Judge Advocate General's certification of writ-based issues by emphasizing the purpose of certification: to "bring about uniformity among several panels within the same [Court of Criminal Appeals (CCA)] or between two divergent opinions from different CCAs." 11 M.J. 100, 114 (C.M.A 1981) (citations omitted). If it appears a particular certification does not comply with Congressional intent, arguably, the issues were not properly certified. The plain language of Article 67(a)(2) does not facially require such a requirement, but the Congressional intent present at enactment remains. *Id*. (citing Hearings Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., on H.R. 2498 (1949)). Note, this is not the same logic Appellant applies throughout her brief—any implied language or meaning she gives to Article 6b, UCMJ, is from Congressional comments about the CVRA, not from comments about Article 6b, UCMJ, itself. The Congressional intent cited in *Redding* is about Article 67(a)(2) itself (formerly "(b)(2)").

[8] *See M.W. v. United States*, No. 23-0104/AF, ___ M.J. ___, 2023 CAAF LEXIS 472, *6-7 (C.A.A.F. Jul. 13, 2023) (noting the relevant Judge Advocate General can

However, the issuance of a writ, at any level, is predicated on the scope and meaning of the enumerated rights of Article 6b, UCMJ (or other laws, if invoked as the basis). This becomes an evaluation of whether Appellant's "believed" violation is correctly before this Court as something that is covered by Article 6b(a)(9), UCMJ. This Court should find Appellant's claim does not constitute a violation of Article 6b(a)(9), UCMJ, and deny the requested relief outright with no further discussion of the remaining certified issues.

There is no debate; neither the words "discovery" nor "production," whether relating to evidence about the named victim or otherwise, are found in Article 6b, UCMJ. Even under R.C.M. 703, which provides that a named victim can move to quash a subpoena, there is no link to Article 6b, UCMJ.[9] Petitioner thinly veils this discovery writ as one that impinges the "right to be treated with fairness and with respect for the dignity and privacy of the victim," Article 6b(a)(9), UCMJ, because she has to hook Article 6b, UMCJ, to have her case be heard in any court. However, just because Appellant says something does not make it so.

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seek review of a denial of a writ of mandamus by a CCA).

[9] It is not even contemplated that if a named victim were to lose under the procedures outlined in R.C.M. 703(g)(3)(G) that said named victim would then be able to appeal under Article 6b, UCMJ. In fact, if a named victim were to lose, such that records had to be produced, the recordholder—not the named victim—would be subjected to compliance—and a warrant of attachment upon refusal. R.C.M. 703(g)(3)(H).

Discovery, especially under R.C.M. 701, is not an issue contemplated by Article 6b(a)(9), UCMJ. R.C.M. 701 operates in a neutral fashion: if the Government has the information, it must be provided to the Defense. Article 6b, UCMJ, does not alter R.C.M. 701's neutrality or the Government's obligation. If Article 6b(e), UCMJ, permits review of Article 6b(a), UCMJ, violations, but neither discovery of evidence nor production of evidence are rights captured by Article 6b(a), UCMJ, then this Court should decline to read them in. If Congress wanted a victim to be able to appeal on discovery or production issues, it would have said so. It did not. As such, Appellant's requested writ should be denied outright as outside the bounds of Article 6b.

> *Limiting the meaning of Article 6b(a)(9), UCMJ, ensures named victims do not frivolously intervene on issues solely between the parties to derail the pursuit of truth and justice.*

"Privacy," the Article 6b(a)(9), UCMJ, hook for this writ, cannot be a catch-all—nor, to be clear, is it even the right under Article 6b(a)(9), UCMJ, which actually says only to *treat* victims with *respect* for their privacy and dignity. This Court should decline to expand the plain meaning of the statute and, instead, strictly confine future litigation over Article 6b(a)(9), UCMJ, by saying what is *not* a violation of the "right to be treated with respect for the privacy and dignity of the victim." It can do so by considering the nature of the underlying matter.

Appellant's position suggests any ruling a military judge issues could implicate Article 6b(a)(9), UCMJ, which cannot be true. Assume, for a moment, the Government did not deny the defense's request for discovery or the parties worked out the scope of the discovery at issue—this case would not exist; there would have been no *ruling* for Appellant to hook her alleged violation of Article 6b(a)(9), UCMJ, on. *See* 10 U.S.C. § 806b(e) (requiring a *ruling* to violate the rights of the named victim). Article 6b(a)(9), UCMJ, instructs the *court-martial* to treat named victims with respect for their dignity and privacy. *Id.* This liberal mandate to *treat* someone *with respect*[10] cannot mean that any action by the parties that needs

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[10] As described by one district court in 2005 when discussing the comparable provision under the CVRA:

> Neither the text of the statute nor its legislative history provides guidance as to what specific procedures or substantive relief, if any, Congress intended this provision to require or prohibit. The provision's broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom. Nevertheless, the Senate sponsors of the law were clear in their articulation of the overall import of the provision: to promote a liberal reading of the statute in favor of interpretations that promote victims' interest in fairness, respect, and dignity.

United States v. Turner, 367 F. Supp. 2d 319, 335 (N.Y. E. Dist. Ct. 2005). There is no clear answer on what this provision means, even under the CVRA, *but* the overarching takeaway is that named victims are to be *treated with* fairness, dignity, and respect. Government compliance with the law as written, such The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other laws and directives, ensures such treatment for a non-party. If Appellant does not like the law as written, the courts are not the ways of rewriting the laws. This Court, though, has a duty to those who practice in the military justice system to clarify what does and

adjudication by the military judge suddenly becomes a basis for intervention by a non-party, the named victim, simply because she or he does not like the result.

This is different from the CVRA, which, *inter alia*, allows victims to be heard at trial, requires the tribunal to "ensure that the crime victim is afforded [rights nearly identical to Article 6b, UCMJ]," and mandates the "Government" "make[s] their best efforts" to provide those rights. 18 U.S.C. § 3771. By the language of the statute, there appears, arguably, to be an initial affirmative obligation on the Government and court to "ensure" named victim rights. Article 6b, UCMJ, does not have such a broad and sweeping scope; it is limited by its plain language, and it contains none of the "affirmative" obligations the CVRA does. The military justice system is unique for the accused who stands trial. *See United States v. Anderson*, 83 M.J. 291, 2023 CAAF LEXIS 439, at *5-6 (C.A.A.F. 2023) ("[C]ourts-martial do not give an accused the same protections that exist in the civilian courts . . . .") (citations omitted)). By extension, it goes without saying that the military-justice system is also unique for the named victim who stands to face the accused.

TSgt Fewell respectfully urges this Court to hold an R.C.M. 701 discovery ruling does not implicate Article 6b(a)(9), UCMJ. This provides clear guidance to the CCAs. In any case still certified, this Court can rule summarily based on this rule. This would eliminate extensive delays, like that in TSgt Fewell's case, in future

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does not constitute a violation of Article 6b(a)(9), UCMJ.

cases. If this Court declines to issue guidance on what falls under Article 6b(a)(9), UCMJ, TSgt Fewell's situation will repeat with countless other Airmen and Guardians pending court-martial.

If, however, this Court determines it *can* issue a writ of mandamus because Appellant's asserted violation *does* fall under Article 6b(a)(9), UCMJ, it nevertheless *should not* because Appellant has not demonstrated error, as explained below.

CERTIFIED ISSUE III.[11]

THE CORRECT STANDARD OF REVIEW IS THE TRADITIONAL MANDAMUS STANDARD OF SHOWING A "CLEAR AND INDISPUTABLE" RIGHT TO RELIEF.

At the outset, Appellant did not raise this issue to the Air Force Court and thus, this Court should find Certified Issue III waived. *United States v. King*, 83 M.J. 115, 120 (C.A.A.F. 2023) ("[A] valid waiver leaves no error to correct on appeal."). However, any evaluated issues (i.e., Certified Issues I and II) must be viewed through a standard of relief. As this case remains a petition for extraordinary relief by its nature and certificate for review, the appropriate standard of review for Certified Issues I and II is traditional mandamus review, as this Court has always applied. *Hasan*, 71 M.J. at 418.

[11] "Whether H.V.Z. must show the military judge clearly and indisputably erred for writ to issue under Article 6b(e) UCMJ or shall ordinary standards of appellate review apply?"

To the extent this Court considers Certified Issue III as an independent issue, Appellant requests that this Court find the "ordinary standards of appellate review" apply to these issues. Appellant's Brief (App. Br.) at 48. However, in arguing for the "ordinary standard," Appellant ignores the legal principles of statutory interpretation and the reality of Congress' actions.

When analyzing legislation, there is a presumption that Congress selected the language it intended to apply. *See United States v. Guess*, 48 M.J. 69, 70 (C.A.A.F. 1998) (citation omitted). Congress is further presumed to know both the current state of the law and how to change it. *See United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). And since Congress is likewise "presumed to be aware of . . . judicial interpretation of a statute" when enacting legislation, when it later uses the same language to enact an entirely separate statute, it is understood that Congress is adopting "the interpretation given to the incorporated law." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978).

Appellant spends significant time analogizing the history of the CVRA with Article 6b, UCMJ, but then overlooks glaring differences in the text. It is issue dispositive that Congress, after amending the CVRA to *add in* an explicit standard of review, *did not do the same for Article 6b, UCMJ*, when it amended that statute less than six months later. *Compare* Pub. L. 114-22, § 113(c)(1), 129 Stat. 227

(2015) *with* Pub. L. 114-92, § 531(e), 129 Stat. 726 (2015). Since Congress is presumed to adopt the original meaning of a statute when it incorporates such language into another law, Congress adopted the interpretation given to the original CVRA for Article 6b, UCMJ: the traditional mandamus standard. Despite Congress being aware of the "regrettable"[12] federal circuit split interpreting the original CVRA, it added no such language to Article 6b, UCMJ. Congress provided different standards of review for the CVRA and Article 6b(e), UCMJ. This disparate treatment fatally undercuts Appellant's argument.

If Congress chooses to amend Article 6b, UCMJ, at some future date, it is certainly free to do so. Until that time, this Court should decline Appellant's invitation to read meaning into the statute that the plain language and statutory interpretation does not support.

Ultimately, then, the correct standard of review for a grant of a writ of mandamus requires the petitioner to show "(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 (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004)). "To justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than gross error; it must amount to a judicial usurpation of power or

[12] App. Br. at 46 (citing 160 Cong. Rec. S. 6154).

be characteristic of an erroneous practice likely to recur." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (citations omitted) (internal quotation marks omitted).

CERTIFIED ISSUE I.[13]

UNDER ANY STANDARD OF REVIEW, TSGT FEWELL'S REQUEST FOR DISCOVERY OF APPELLANT'S RELEVANT MEDICAL RECORDS IS GOVERNED BY R.C.M. 701.

The military judge did not clearly and indisputably err when he found the records the defense requested were governed by R.C.M. 701. Even if this Court determines "ordinary standards of appellate review apply," the military judge did not abuse his discretion[14] to compel records held by a military treatment facility. When analyzing what "military authorities" means in that context, the correct standard of review is de novo.[15]

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[13] "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)?"

[14] *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010) ("We review a military judge's ruling on a request for the production of evidence under the strict standard of an abuse of discretion.")

[15] *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) ("The interpretation of provisions of the R.C.M. . . . [is a question] of law that we review de novo.")

R.C.M. 701 properly controls discovery of records held by military treatment facilities, as such records are in the possession of "military authorities."

As the Air Force Court concluded, "[M]edical 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." *In re HVZ*, 2023 CCA LEXIS 292, at *16. R.C.M. 701 states "*military* authorities," and Appellant can point to no case law excising a *military* treatment facility from "*military* authorities." In fact, numerous cases use the term "military authorities" to refer to the military overall, military decision makers, or military entities,[16] including in issues of discovery and medical records.[17]

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[16] *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (using "military authorities" as a stand-in for decisionmakers in the military); *Jones v. United States*, 419 U.S. 907, 910 (1974) (Douglas, J., dissenting) ("Penalties not involving imprisonment are frequently employed by military authorities . . . ."); *Trop v. Dulles*, 356 U.S. 86 (1958) (using "military authorities" as a stand-in for decisionmakers in the military when evaluating propriety of citizenship decisions); *United States v. Gray*, 37 M.J. 730, 735 (A.C.M.R. 1992) (referring to a court's order that "military authorities" perform additional medical tests, not law enforcement or another limited, particularized entity); *Barkley v. Warner*, 409 F. Supp 1303, 1304 (E.D. Mich. 1976) (detailing how records, "medical, personnel and pay, were lost by military authorities," not limiting the term to any particular entity or individual).

[17] *See, e.g.*, *Graner*, 69 M.J. at 107-108 (analyzing a *Department of Defense* report on the use of torture under R.C.M. 701); *United States v. Morris*, 52 M.J. 193 (C.A.A.F. 1999) (analyzing the refusal to disclose mental health records held at a *Marine Corps Air Station's* Family Service Center and "all other Family Service

A military treatment facility—here, the 56 MDG—is a unit within the United States Air Force.[18] It, like any other unit within the military, controls, *inter alia*, certain documents and records. As a military unit of the United States Air Force, the United States Air Force *itself* also controls such documents and records, placing such documents and records "under the control of military authorities." Construing the words otherwise evades the plain language and meaning of the text without cause and contravenes case law.[19]

Appellant attempts to narrow "military authorities" to "military investigative authorities" through *United States v. Simmons* but fails. App. Br. at 13 (citing 38 M.J. 376, 381 (C.A.A.F. 1993)). *Simmons* merely provides "military authorities" *includes* "military investigative authorities." 38 M.J. at 381. It does not limit the definition, as Appellant contends. The same is true for Appellant's cramped reading of *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). Appellant claims *Stellato*

Centers" under R.C.M. 701); *United States v. Skaggs*, 327 F.R.D. 165, 175 n.7 (S.D. Ohio 2018) (ordering the "government to acquire the remainder of the alleged victim's medical/psychiatric records within the possession of military authorities," then, in a footnote, noting if this had been a court-martial, R.C.M. 701 would *require* disclosure of such medical records).

[18] While not stated as such, this is a factual finding, which underpins the military judge's conclusions of law that R.C.M. 701 applies. CA I at 115. Such a finding is not clearly erroneous under "ordinary appellate review standards," let alone traditional mandamus standards.

[19] *Goldman*, 475 U.S. at 507; *Jones*, 419 U.S. at 910 (Douglas, J., dissenting); *Trop*, 356 U.S. 86; *Graner*, 69 M.J. at 107-108; *Morris*, 52 MJ 193; *Skaggs*, 327 F.R.D. at 175 n.7.

defines "'military authorities' is a term of art specifically referring to 'the prosecution team.'" App. Br. at 11, 11 n.4.[20] This is incorrect; *Stellato* did not narrow the term "military authorities," but extended it to other non-military agencies the prosecutor had access to by examining how Article III courts have addressed similar situations. *Stellato*, 74 M.J. at 484-85.

Appellant also attempts to limit the plain language of the text by citing the specific subpoena authority under R.C.M. 703, which contemplates subpoenas to medical professionals. However, invoking R.C.M. 703(g)(3)(C)(iii) to prove military treatment facilities do not fall under "military authorities" misses the point. The section Appellant relies on is titled, "Civilian witnesses and evidence *not under the control of the Government*—subpoenas." R.C.M. 703(g)(3) (emphasis added). Before even getting to the subcategory about subpoenas, the initial question of whether a military treatment facility is or is not "under the control of the Government" still must be answered.

By jumping to this provision, Appellant overlooks the structure of R.C.M. 703. Contrary to Appellant's conclusion, the "plain language of R.C.M.

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[20] *Simmons* also contradicts Appellant's position that "military authorities" is limited to "the prosecution team." *See* App. Br. at 11. "This rule makes one point crystal clear. When results or reports of military scientific tests or experiments are requested by the defense, such a request cannot be satisfied by making available for inspection only those reports within the possession, custody, or control of *trial counsel*." *Simmons*, 38 M.J. at 381 (emphasis added).

703" does *not* establish records at a military treatment facility are outside the possession, custody, or control of military authorities. *See* App. Br. at 13. In fact, by R.C.M. 703's plain language, the word "Government" would surely include a medical facility *owned and operated by the Government.* Considering the language of both R.C.M. 701 and 703, military treatment facilities fall squarely into "military authorities." Like Appellant's other claims, the plain language of the text controls over the implied language Appellant requests this Court to read in.

If this were any other military unit—maintenance, finance, morale/welfare/recreation—there would be no question that these units are "military authorities" under R.C.M. 701.[21] Appellant tries to distinguish medical facilities through the fact that legal and procedural safeguards are in place to protect medical records. Yet, any military unit could possess records with private, personal, confidential, protected, privileged, or even classified information. If so, there are additional safeguards[22] to protect the rights and interests therein if records are requested in discovery. The same goes for medical records held by the military, as the Air Force Court recognized. *In re HVZ*, 2023 CCA LEXIS 292, at *16-18. By the plain language of R.C.M. 703(g)(2), records obtained this way still are records

[21] As noted previously on pages 21-22, footnotes 16 and 17.

[22] *E.g.*, MIL. R. EVID. 505(h) (providing detailed discovery procedures for classified information).

"under the control of the Government." As such, Appellant's argument that the *process* to obtain such records transforms these records from ones under military control to ones outside of military control is also unpersuasive. *See also* App. Br. at 16-29 (discussing whether the definitions from *Stellato* concerning knowledge, access, and legal right apply[23]).

The military judge did not clearly and indisputably err in applying R.C.M. 701 to Appellant's medical records held by the 56 MDG.

Applying the traditional mandamus test to Certified Issue I, the military judge did not clearly and indisputably err. The discovery request and motion to compel asked *the Government* whether *it* possessed or controlled exculpatory or impeachment information based on the fact it *controls* LAFB medical facility.[24] It is not a "judicial usurpation of power" to read R.C.M. 701's plain language and conclude a medical facility controlled and operated by the Air Force, located on an

[23] Appellant spends significant time attempting to argue prosecutors have no knowledge, access, or legal right to evidence they need to use a "legal process" to obtain. App. Br. at 22-29. The Air Force Court dealt with this argument swiftly, as should this Court. *In re HVZ*, 2023 CCA LEXIS 292, at *15-16. There is no need to reach this argument when the plain language of the statute answers this question. Moreover, as the Air Force Court rightly pointed out, "[T]he definition of 'possession, custody, or control' by the *prosecution* set forth in *Stellato* is not necessarily the *exclusive* definition of 'possession, custody, or control of *military authorities*.'" *Id*. at *15 (emphasis added).

[24] *Williams*, 50 M.J. at 441.

Air Force Base, is a "military authority," particularly the medical facility in TSgt Fewell's case.

LAFB has a medical facility, run by the 56 MDG. *See* CA I at 115. The 56 MDG, like any other military unit, is run by a military commander. This military commander, through his or her unit, can access and provide any record within the facility, if doing so for a valid purpose—such as if properly requested pursuant to Department of Defense Manual (DoDM) 6025.18 ¶ 4.4.f.(1)(b)3.[25] As an entity, the 56 MDG can provide to prosecutors medical records (pursuant to the DoDM) held at LAFB for *anyone*.

As applied, and when recognizing a prosecutor's due-diligence requirement to simply *go look*, it was not a judicial usurpation of power for the military judge to order facilitate discovery of what *may* exist at 56 MDG.[26] TSgt Fewell is assigned

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[25] As summarized by the Air Force Court:

> 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 . . . authorized investigative demand . . . if: [ ] [t]he information sought is relevant and material to a legitimate law enforcement inquiry[;] [ ] [t]he request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought[; and] [ ] [d]e-identified information could not reasonably be used.

In re HVZ, 2023 CCA LEXIS 292, at *16-17 n.3.

[26] Briefly, casting back to Certified Issue IV, medical records have not even been disclosed yet; it is unclear whether any even exist. *In re HVZ*, 2023 CCA LEXIS 292, at *13-14. Assuming they do—why else is Appellant intervening unless

to LAFB. CA I at 37. Based on the personal jurisdiction language in the charges, TSgt Fewell was assigned to LAFB during the charged timeframe. *Id*. Appellant was married to TSgt Fewell during the charged timeframe, CA I at 38, 113, and invoking common sense and ways of the world, it is reasonable to conclude she *could have* received the treatment she affirmatively claimed—and her alleged Adderall prescription (and related treatment)—at LAFB based on her location (Scottsdale, AZ, and Fort McDowell, AZ, CA I at 37-38) and benefit entitlements, CA at 42. It was not error for the military judge to facilitate discovery under R.C.M. 701 under this fact pattern.

Even assuming traditional mandamus review does not apply, upon de novo review, Appellant's medical records requested in discovery are within the possession, custody, or control of military authorities for all the same reasons articulated above. As such, their discovery is governed by R.C.M. 701 and R.C.M. 703(g)(2), which is what the military judge found. There was no abuse of discretion. Appellant has not demonstrated relief under either standard of review. As such, this Court should not issue a writ of mandamus on this issue.

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something exists—and once those records are disclosed, whether under R.C.M. 701 or R.C.M. 703 (Appellant truly only seeks to delay the inevitable), what is stopping Appellant from intervening again because she does not like the result? From TSgt Fewell's point of view—or possibly *any* accused's vantage point—there must be some guidance as to what Article 6b(a)(9) means, else he ever gets his day in court.

CERTIFIED ISSUE II.[27]

APPELLANT HAD NO STANDING UNDER ANY LAW TO BE HEARD AT TRIAL ON HER NEBULOUS ASSERTION HER "PRIVACY RIGHTS" WERE VIOLATED.

Regardless of which standard of review applies,[28] Appellant had no right to be heard, or standing at the court-martial, for this issue. Article 6b, UCMJ, does not confer standing at trial—especially without a ruling—and no other law, rule, or statute otherwise implicated a right to be heard.[29] The plain language of the statute answers this issue.

Article 6b(a)(9), UCMJ, does not offer a right for Appellant to be heard at trial.

As enacted, there is no right to be heard at trial for every perceived grievance a named victim may allege under Article 6b, UCMJ. Courts are to apply the law as Congress enacted it. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 413-14 (2017). This Court need go no farther than the text of the statute to see that only Article 6b(a)(4), UCMJ, explicitly offers standing to be heard at trial.

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[27] "Did the military judge err when he did not consider H.V.Z.'s written objection to production of her DoD Heath record as he found she did not have standing nor a right to be heard?"

[28] As this is an assessment of whether the statute, Article 6b(a)(9), UCMJ, confers a right to be heard, under "ordinary standards of appellate review," de novo review would apply. *See United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2016) (reviewing de novo questions of statutory interpretation).

[29] Mil. R. Evid. 513 was not implicated, as the defense discovery request—and military judge's ruling—avoids discovery to defense of any privileged matters.

Certain other provisions, read in conjunction with Article 6b, UCMJ, require the military judge to allow the named victim to be heard. *See, e.g.*, MIL. R. EVID. 412(c)(2) ("The [named] victim must be afforded a reasonable opportunity to . . . be heard."), 513(e)(2) (noting the patient whose records are at issue has the right to be heard), 514(e)(2) ("The [named] victim must be afforded a reasonable opportunity to . . . be heard."). However, the basis for Appellant's perceived violation of her rights is solely from Article 6b(a)(9), UCMJ, "to be treated . . . with respect for [her] dignity and privacy." *See* App. Br. at 33-37 (arguing Article 6b is a basis for standing if R.CM. 703 is not applicable). Neither the statute overall nor the section at issue grants or offers standing, despite Congress, or the President, clearly granting standing or a right to be heard in other situations. Again, this is where the CVRA and Article 6b, UCMJ, differ, and it is correct to defer to Congress' plain language in Article 6b, UCMJ, as opposed to adopt Appellant's implied language. *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007); *United States v. Martinelli*, 62 M.J. 52, 81 n.24 (C.A.A.F. 2005) (Crawford, J., dissenting) ("'When the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)).

Appellant argues, as before, Article 6b, UCMJ, is the same as the CVRA. By the plain language of the statute, it is not. The CVRA explicitly permits a victim to

seek enforcement of her rights at the court where the case is being prosecuted and then she may petition the court of appeals for a writ of mandamus if denied at the trial level. 18 U.S.C. § 3771(d)(3). Article 6b, UCMJ, has no equivalent enforcement mechanism at trial. 10 U.S.C. § 806b(e)(1). Named victims are instructed to pursue their requested relief through the CCAs. *Id*. The plain language of the statute demonstrates Appellant had no standing at TSgt Fewell's court-martial on her perceived violation of the "right to be treated with respect for her dignity and privacy" as implicated by a *discovery issue*.

Case law does not confer standing to Appellant either, considering the underlying facts.

Appellant relies on *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013) to otherwise confer standing, if this Court elects not to read in standing based on Appellant's argument that Article 6b, UCMJ, is equivalent to the CVRA. App. Br. at 37-39. Appellant's reliance on *Kastenberg* is misplaced for two reasons.

First, *Kastenberg* notes limited standing can be conferred to protect a privilege, 72 M.J. at 368, but Article 6b, UCMJ, rights are not privileges. *Compare* MIL. R. EVID. 500 et seq. (enumerating the privileges in the military justice system) *with* 10 U.S.C. § 806b (identifying "rights" not otherwise incorporated as privileges). Furthermore, factually, there is no privileged material at issue here. The defense discovery request explicitly excluded any material that could be privileged under Mil. R. Evid. 513. CA I at 42, 92. The military judge also explicitly ordered

the Government to make a privilege log if privileged material was located when complying with the discovery order. CA I at 118. Appellant makes a hypothetical case, speculating about possibly privileged material existing, to try to argue standing. App. Br. at 38. But standing requires a concrete and actual injury. Without any actual invasion of a privilege, no actual injury—or standing—exists. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Therefore, Appellant's reliance on *Kastenberg* and intervening on the basis of privilege is misplaced.

Second, the limited standing referenced in *Kastenberg* that Appellant broadly cites, App. Br. at 37 ("*See Kastenberg*."), is inapplicable here. Predominantly, those cases dealt with balancing hearing closures and the public's right to know what occurs in court,[30] not the parties' overall right to access evidence or the accused's

[30] *Church of Scientology v. United States*, 506 U.S. 9, 11, 17 (1992) (standing created by attorney-client *privilege*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (standing created by *First Amendment right* of the public and press to attend criminal trials); *United States v. Antar*, 38 F.3d 1348, 1350 (3d Cir. 1994) (standing created through *press's* right to access certain parts of proceedings); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1561 (11th Cir. 1989) (standing conferred to *press* due to scope of closure order); *Doe v. United States*, 666 F.2d 43, 45 (4th Cir. 1981) (standing conferred to victim over issue involving *victim's sexual history*, i.e., via Mil. R. Evid. 412); *Anthony v. United States*, 667 F.2d 870, 872-73 (10th Cir. 1981) (standing by third-party over discovery issue conferred through *plain language of statute*); *In re Smith*, 656 F.2d 1101, 1102-05, 1107 (5th Cir. 1981) (standing created via *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975) through *actual harm* with *defamation-based* underpinnings); *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980) (standing created by intervening with *public* disclosure of sealed

right to relevant discovery. The Article 6b, UCMJ, right to dignity and privacy is not comparable to the rights underlying these cases, particularly where no standing is afforded by statute when it could have been, like in Article 6b(a)(4), UCMJ. Overall, it is inappropriate to extend standing based on *Kastenberg* or *Kastenberg*'s unanalyzed or undiscussed string citation.

As applied, the military judge did not clearly and indisputably err in electing not to consider Appellant's "written objection."

Per the text of Article 6b, UCMJ, no standing—statutory or otherwise—existed at TSgt Fewell's court-martial for Appellant to voice her perceived violation of Article 6b, UCMJ. The military judge correctly determined—without any error, let alone a *clear and indisputable* error—that Article 6b(a)(9), UCMJ, does not confer standing to Appellant to be heard at the trial level for a "believed" violation under this section of Article 6b, UCMJ. As the Air Force Court put it:

> The military judge's comments imply he concluded . . . that victim rights enumerated in Article 6b(a), UCMJ, including *inter alia* the 'right to be treated with fairness and with respect for the dignity and privacy of the victim,' do not create an independent right for a victim to be heard by the military judge at the trial level with regard to such rights. . . . Article 6b, 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.

In re HVZ, 2023 CCA LEXIS 292, at *11-12. This is far from error; it is the law.

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records at trial and noting in footnote 67 other constitutional-, subpoena-, or privilege-based cases of intervention).

Additionally, as discussed, the military judge correctly determined that R.C.M. 701 applied to Appellant's underlying complaint. There is no standing granted to Appellant under R.C.M. 701; it is a neutral provision, affording no greater right to intervene to anyone, let alone non-parties. The military judge did not have to hear Appellant's complaints. He did not err—let alone clearly and indisputably—in electing not to consider Appellant's "written objection."

The only avenue for a writ to issue on standing is if this Court finds that Appellant's medical records are *not* in the possession, custody, or control of military authorities.[31] Only under this procedural posture does Appellant arguably have standing under R.C.M. 703.[32] Only R.C.M. 703 provides a limited ability for named victims to move to quash subpoenas or "otherwise object." R.C.M. 703(3)(C)(ii). However, to reach this conclusion, this Court would have to find every certified issue before in favor of Appellant: a writ should be issued, the standard of review is "ordinary appellate review," and R.C.M. 703 applies. A writ could be a valid form of relief at that point, such that this Court need not reach Certified Issue II; any analysis would be arguably moot or purely advisory.

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[31] Even then, though, under the traditional mandamus standard, it is not clear or indisputable error for the military judge to find a military medical facility on a military base is not covered by the undefined concept of military authorities. It "would seem to fall within the plain meaning" of such. *In re HVZ*, 2023 CCA LEXIS 292, at *16.

[32] As there is no right to be heard under Article 6b(a)(9), UCMJ, or under R.C.M. 701 by the plain language of the statutes.

Ultimately, if this Court denies relief on Certified Issue I and addresses Certified Issue II, Appellant has still not demonstrated relief under any standard of review. Therefore, this Court should not issue a writ of mandamus on this issue.

CONCLUSION

The underlying legal issue here is not novel, but a named victim's intervention on an issue solely between the Government and an accused is. Article 6b(a)(9), UCMJ, cannot be the hook for any named victim to challenge a ruling she or he disagrees with. This Court can begin prescribing guidance on what is and is not a violation of Article 6b(a)(9), UCMJ, to avoid extensive named-victim driven delays of courts-martial. Even if this Court only provides an as applied rule for this case, Appellant's "believed" violations are *not* violations of Article 6b(a)(9), UCMJ. On that basis alone, Appellant's request for a writ should be denied.

However, if this Court determines otherwise and engages with the underlying issues, it should apply traditional mandamus review, as this Court has always done and as Appellant invited from the Court below. In doing so, the military judge did not clearly or indisputably err on either "believed" violation. Appellant's medical records maintained by a *military* medical treatment facility *facially* fall under the plain language of R.C.M. 701, as the military judge concluded. Additionally, neither R.C.M. 701 nor Article 6b, UCMJ, require the military judge to hear Appellant on her objections to such a discovery matter. Issuing the drastic remedy of mandamus

by way of this certificate for review is simply inappropriate, given the scope of Article 6b, UCMJ, and the underlying issues themselves.

WHEREFORE, TSgt Fewell respectfully requests this Honorable Court deny the Appellant's requested relief for a writ to issue.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent to the Court, the trial military judge who decision is the subject of the petition for extraordinary relief, the Air Force Court, Appellate Victims' Counsel (Appellant), Counsel for the United States Navy Victims' Legal Counsel Program (Amicus Curiae), Counsel for the United States Coast Guard Special Victims' Counsel Program (Amicus Curiae), and the Air Force Appellate Government Division (Appellee) on September 25, 2023.

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CERTIFICATE OF COMPLIANCE

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

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