NO. 24-386

IN THE

Supreme Court of the United States

B.M.,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF R.R. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LT COL SETH W. DILWORTH*
CAPT TIFFANY R. CAMPBELL
CAPT E. CHRISTIAN KOBRES, II
DEVON A. R. WELLS
Department of the Air Force
Victims' Counsel Division
1500 W. Perimeter Rd., Ste. 1300
Joint Base Andrews, MD 20762
(202) 480-3424
seth.dilworth.1@us.af.mil

Counsel for Amicus Curiae

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*Counsel of Record

TABLE OF CONTENTS

Page

Table of Contents

Page

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Cited Authorities

Page

Interest of *Amicus Curiae*[1]

Pursuant to Supreme Court Rule 37, R.R.[2] respectfully submits this brief *amicus curiae* in support of Petitioner Major Briana McFarland.

R.R. was sexually assaulted by Airman First Class Brock Anderson, a United States Air Force member, when she was 13 years old. R.R. was forced to disclose hundreds of pages of her privileged mental health records to her abuser or have her case remain in abatement as a direct result of the Court of Appeals for the Armed Forces (CAAF) opinion the Petitioner seeks to challenge in this case.

At trial, the military judge placed R.R. in a similar position as the Petitioner, abating the proceedings after R.R. declined to waive her privilege. R.R. filed a petition for a *writ of mandamus* under 10 U.S.C. § 806b(e), Uniform Code of Military Justice (UCMJ) with the Air Force Court of Criminal Appeals (AFCCA). 10 U.S.C. § 806b(e) (2024). R.R. specifically petitioned the AFCCA to protect her privileged communications with a psychotherapist and lift the abatement. However, citing to the CAAF's opinion in *B.M. v. United States,* 84 M.J. 314 (C.A.A.F. 2024) (hereinafter *B.M.*), the AFCCA found that 1) R.R. did

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amicus* provided timely notice of intent to file an *amicus curiae* brief to the parties' counsel of record.

[2] R.R. is a minor at the time of filing. Initials are used to protect her privacy.

not have standing to challenge the abatement, and 2) the violations of her statutory rights were not ripe due to the abatement.

The CAAF's *B.M.* opinion and the AFCCA's ruling against R.R. forced R.R. to "waive" her privilege to pursue justice. Her seemingly coerced "waiver" then gave her abuser access to hundreds of pages of her mental health records before his ultimate conviction. R.R. files this *amicus curiae* brief in support of Petitioner as another sexual assault victim whose rights were adversely affected by the CAAF's refusal to recognize a victim's statutory standing, requiring her to choose between the pursuit of justice or waiving a recognized privilege.

SUMMARY OF THE ARGUMENT

The CAAF's decision in *B.M.* unnecessarily limited access for victims to seek relief through the appellate process directly contradicting the text and intent of 10 U.S.C. § 806b, causing foreseeable second order effects to the detriment of future crime victims. The CAAF's failure to adhere to the statute and the lack of regulatory guidance implementing the statute have denied victims' the rights and voices expressly given to them by Congress. The dearth of rules effectuating victims' rights and the CAAF's inaction has led to disparate treatment of victims among the Military Services, and consequently inconsistent results for crime victims. Additionally, despite congressional action, victims whose offenders are tried in military courts receive unequal treatment compared to victims whose offenders are tried in federal district courts.

Ultimately, the CAAF's opinion in *B.M.,* combined with regulatory inaction, led to adverse impacts on the rights of R.R. and Major McFarland. Preventing victims' access to military courts through misplaced findings that they lack standing—as the CAAF decided in *B.M.*—degrades the purpose of Mil. R. Evid. 513 and undermines any accountability for rulings that facially abrogate victims' statutory rights. Unfortunately, Major McFarland's case is neither unique nor an isolated set of circumstances in the military justice system. The case of R.R.'s offender demonstrates how other victims are adversely impacted by the CAAF's decision in *B.M.* Granting certiorari in this case is currently the singular avenue remaining to guarantee victims their legally promised voice and rights under these circumstances in the military justice system.

PROCEDURAL BACKGROUND OF *IN RE R.R.*

On 9 August 2024, a General Court-Martial convicted Airman First Class Anderson of sexual assault of a child against R.R. Prior to trial, the Military Judge conducted an *in camera* review of R.R.'s mental health records and determined that portions of the privileged records contained information constitutionally required for the Defense. Like Major McFarland, R.R. was informed by the Military Judge that she must waive her privilege over the documents or the trial against her abuser could not move forward. R.R., then 15 years old, refused to waive the privilege, and the Military Judge abated the case. Pursuant to 10 U.S.C. § 806b, R.R. filed a writ petition to the AFCCA requesting the court vacate the abatement ruling and provide various other remedies

related to the erroneous release of her records. However, on 7 May 2024, 34 days after the CAAF issued the *B.M.* ruling challenged by the Petitioner in this case, the AFCCA dismissed R.R.'s petition for lack of standing, relying exclusively on the *B.M.* ruling. *See In re R.R.*, 2024 CCA LEXIS 286 (A.F.C.C.A. 7 May 2024).

Without appellate relief, R.R. was forced to waive her privilege to end the abatement. With the case no longer in abatement, R.R. refiled her petition with the AFCCA and sought a stay from the release of her records. Prior to the release of their opinion, the AFCCA denied the stay request and R.R.'s mental health records were released to her abuser. In the renewed petition, R.R. claimed the Military Judge erred: (1) in determining R.R. waived her privilege under Mil. R. Evid. 513 through a parental waiver; (2) in reviewing Petitioner's mental health records *in camera*; and (3) in determining a "constitutional exception" existed under Mil. R. Evid. 513 requiring production of some of her records. The AFCCA's findings on the first two issues are inconsequential to this filing. However, as to the third issue, the AFCCA determined since the underlying judicial question remains unresolved by superior courts, specifically unanswered by the CAAF in *B.M.*, trial court judicial decisions are not so clearly erroneous to necessitate the issuance of a writ. *See In re R.R. v. Anderson*, 2024 CCA 293 A.F. Ct. Crim. App. July 22, 2024.

ARGUMENT

A. Failures interpreting the statute and promulgating adequate guidance under 10 U.S.C.

§ 806b leave victims without other judicial recourse.

The Hobson's choice wherein military judges[3] present a crime-victim-witness the option of waiving a codified common-law privilege or abating the prosecution of her abuser is wholly unique to the military justice system and contravenes 10 U.S.C. § 806b.[4] Nowhere in 10 U.S.C. § 806b is the provision of victims' rights conditioned on purported procedural due process of an accused.[5] The Rules for Courts-Martial (RCM) do not prescribe this course of action. Further, abatement of proceedings is an absurd remedy in this context, seemingly holding a victim hostage to choose between an invasion of her private relationship with

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[3] *See Weiss v. United States*, 510 U.S. 163 (1994). "[Military judges] are selected and certified as qualified by the Judge Advocate General of their branch of the Armed Forces. They do not serve for fixed terms and may perform judicial duties only when assigned to do so by the appropriate Judge Advocate General." *Id*. at 168.

[4] This remedy emerged in *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M Ct. Crim. App. 2017) and was affirmed by the CAAF in a concurrence in *B.M.* It has no anchor in law or in the Rules for Courts-Martial and eviscerates the privilege promoting a mentally healthy society and medical treatment for crime victims. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.")

[5] No military court, including the CAAF, has analyzed 10 U.S.C. § 806b to determine whether the asserted due process challenges of an accused are "so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. 163, 177-78 (1994) (quoting *Middendorf v. Henry,* 425 U.S. 25, 44 (1976)).

a psychotherapist—treatment often sought because of an offender's abuse—or justice. Abatements, like those Major McFarland and R.R. faced, pause the proceedings, leaving victims and those accused of crimes waiting indefinitely unless victims relent by waiving a privilege. Additionally, the lack of appropriate implementation and recognition of victims' rights throughout the RCMs creates a void, to the detriment of Major McFarland, R.R., and other military and civilian victims. This Court is singularly positioned to provide relief.

1. The CAAF disregarded the statutory text and congressional intent of 10 U.S.C. § 806b, leaving a secondary effect that unnecessarily strips away victims' rights.

The CAAF in *B.M.* acknowledged the victim could petition the Service appellate court but prioritized the military judge's abatement order over victim standing.[6] The CAAF looked to the statute through the lens of what could happen under specific circumstances, but then tangentially focused on abatement. Instead of focusing on the victim's ability to challenge the underlying court ruling, the court embraced

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[6] Congress created the CAAF by statute and expressly stated it falls administratively to the Executive. 10 U.S.C. § 941. This Court has reasoned the CAAF, likewise, falls to the Executive for non-administrative purposes. *Edmond v. United States*, 520 U.S. 651, 664 (1997) (explaining the Executive branch oversight of the CAAF.) Although 10 U.S.C. § 946 has since been amended, the reasoning still stands as the CAAF recommends members to sit on committees to review military justice.

abatement without considering the expressed language of 10 U.S.C. § 806b, congressional intent, or even the practical effects of its opinion.

First, the text of the statute expressly states a victim may challenge a trial judge's ruling based on Mil. R. Evid. 513. 10 U.S.C. § 806b(e)(4). The text allows a victim to "petition the Court of Criminal Appeals for a writ of mandamus to require the…court-martial to comply with the section or rule." 10 U.S.C. § 806b(e)(1). Without the statute, victims lack the express authority granted by Congress to petition appellate courts, a necessary jurisdictional provision.[7] Both Major McFarland and R.R. challenged the underlying rationale of the abatement of the proceedings against their offenders as violations of the psychotherapist-patient privilege under Mil. R. Evid. 513. By strict reading of the statute, the Service courts had authority to review the victim petitions, but they declined to do so.

Second, Congress intended victims to have more, not fewer rights, with the implementation of 10 U.S.C. § 806b. Senator Lisa Murkowski had hoped statutes like 10 U.S.C. § 806b and 10 U.S.C. § 1044e would ". . . work to protect the rights of victims; to ensure that justice and accountability are achieved in an open and transparent fashion so that victims know there is a system that works for them." 159 CONG. REC. S8148 (daily ed. Nov. 19, 2013) (statement of Sen. Lisa Murkowski). Senator McCaskill believed

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[7] Courts-Martial and military appellate courts are only allowed to exercise jurisdiction according to specific Congressional mandate. S*ee Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999).

the provision of victims' counsel would ". . . make our ***military the most victim-friendly criminal justice system in the world***. In no other criminal justice system anywhere—civilian, military, United States, our allies—does a victim get that kind of support." *Id.* at S8151 (statement of Sen. Claire McCaskill) (emphasis added).

In terms of the military justice system, Senator Kelly Ayotte said:

> [t]he issue of ending sexual assaults in our military is an issue for everyone. This is an issue about justice. This is an issue about fairness. This is about making sure that victims of crimes . . . get the justice they deserve, the support they deserve in our military, and that they understand and appreciate that we want them to have a climate in the military where if they are a victim, they can come forward and receive the support they need and that they deserve.

Id. (statement of Sen. Kelly Ayotte). That right to fairness is codified in 10 U.S.C. § 806b(a)(9) and affirmed in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (". . .[]affirm[ing] the view expressed by Justice Cardozo, 'Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'") (internal citations omitted).

The CAAF's opinion stripping away the right to seek redress at an appellate court directly contradicts the expressed intent to create the most victim-

friendly military in the world. 159 Cong. Rec. at S8151 (statement of Sen. Claire McCaskill). Likewise, following Justice Cardozo's reasoning, if justice is due to the accuser, the accuser must have redress when harmed at the trial level. *Payne*, 501 U.S. at 827. The foreclosure of relief for a violation of Major McFarland's privacy rights is a result clearly antithetical to Congressional desires to grant more rights to victims. Dismissing the victim's case, because it did not comply with the self-imposed "cases and controversy requirement" of CAAF, simply based on an abatement order by a military judge, not only harms the victim of a crime, but also wholly ignores congressional intent.

Third and finally, under the CAAF's opinion, a military judge can effectively prevent a victim from petitioning an appellate court by abating proceedings. R.R.'s petition at the AFCCA resulted in a denial after the CAAF's opinion in *B.M*, leaving R.R. with the choice of either waiving a privilege or not having a day in court. However, had the Military Judge waited to abate the proceedings, R.R. could have challenged the invasion of privacy without the legal barrier the CAAF created. Effectively, by the CAAF's decision, military judges can now, intentionally or not, circumvent an appellate filing and a victim's statutory rights simply by abating the proceeding. Because, as the AFCCA reasoned in R.R., the victim cannot appeal an abatement decision, the victim no longer has those rights granted by Congress. The victim is then left to the mercy of the Government trial counsel to appeal a proceeding, distorting the independent nature of victims' rights and leaving the victim without the

fairness, dignity, and respect guaranteed by 10 U.S.C. § 806b(a)(9).[8]

Even if it was determined that abatement preempts statutory standing and jurisdiction, victims may rely on traditional standing doctrine. R.R. petitioned AFCCA for relief pursuant to 10 U.S.C. § 806b, believing the military judge erroneously violated her privacy under Mil. R. Evid. 513. However, R.R. also had standing based on injury caused by the military judge and redressable by the Service appellate court. The AFCCA disregarded both sources of standing, preventing her and future victims from having any voice in a complex military justice process. *See* A. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 882 (1983).

In sum, without the meaningful provision or implementation of 10 U.S.C. § 806b, victims have no redress for privacy violations. Mil. R. Evid. 513 allows a victim to be heard through counsel at the trial level. If the military judge rules against the victim, the victim must either produce the privileged records or petition the Service appellate court. However, a military judge can abate the proceedings before the victim can petition the court, resulting in an impossible position for a victim, who has the right to petition

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[8] The right to confer with the government, as articulated in 10 U.S.C. § 806b(a)(5) shows the victims' rights are independent from prosecutorial decisions. If Congress meant for these rights to be collaborative, the right to confer would not be expressly outlined and the victims' appellate procedures would align with the Government's.

a Service appellate court, but no standing to do so under the CAAF's opinion.

The textual review of 10 U.S.C. § 806b, the congressional intent behind it, and the effects of the CAAF's opinion all require a different outcome than what the CAAF decided. Under the CAAF's ruling, victims have no option but to waive privilege or forego testifying to hold their abuser accountable. The CAAF created an unsustainable construct. Accordingly, the CAAF's ruling violates 10 U.S.C. § 806b, preventing Major McFarland, R.R., and all future victims in the military justice system from seeking appropriate redress in appellate courts when a military judge abates proceedings.

2. The RCMs do not appropriately incorporate 10 U.S.C. § 806b.

Congress expressly gave Military Service appellate courts jurisdiction to review victims' petitions for writs of mandamus under specific circumstances. Consistent with stated intent, Congress further directed the Secretary of Defense recommend changes to the Manual for Courts-Martial (MCM) implementing the statute. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, § 1701(b) (26 Dec. 2013). However, even after several years, such changes were never fully implemented, leaving a regulatory gap military judges must fill without adequate guidance.

When Congress enacted 10 U.S.C. § 806b, the statute should have transformed the military justice system. As previously noted, statements of Senator

Lisa Murkowski, Senator Claire McCaskill, and Senator Kelly Ayotte emphasize the intent to strengthen the rights of victims in the military justice system. The statutory provision of victims' rights in military justice is not a statement of ideals but a clear grant of rights to victims that shall be afforded to them "not whittled down or marginalized." 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).[9] In the 2014 National Defense Authorization Act, Congress required implementation of 10 U.S.C. § 806b into the MCM within one year of its issuance and mechanisms for affording those rights. Pub. L. 113–66, § 1701(b).

The changes to the MCM effectuating the endowment of rights under 10 U.S.C. § 806b have been limited, and the restrained execution of 10 U.S.C. § 806b in rules prescribed by the President is not consistent with the Presidential authority in 10 U.S.C. § 836. The first Executive Order amending the MCM following the insertion of 10 U.S.C. § 806b into the UCMJ was only 28 pages long and does not mention a single rule to account for the rights of victims to be treated with fairness, respect for their dignity, and with respect for their privacy. *See* Exec. Order No.

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[9] Although speaking of the national Crime Victims' Rights Act (CVRA), much of the same language was later adopted into the MCM. 18 U.S.C. § 3771. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013) (hereinafter "2014 NDAA"). At the end of 2013, Congress statutorily granted rights to victims of crimes in the military justice system. The title of that section was "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice," indicating Congress intended to confer rights under the CVRA through Article 6b, UCMJ.

13669, 79 Fed. Reg. 34999 (Jun. 13, 2014). The second Executive Order after 10 U.S.C. § 806b in 2015 conservatively implemented more of the statutory provisions. Exec. Order No. 13696, 80 Fed. Reg. 35783 (Jun. 17, 2015). To account for 10 U.S.C § 806b, the 2015 Executive Order amended four (4) RCMs and added RCM 1001A—there were approximately one hundred twenty-six (126) RCMs at the time. *See* Appendix 21, *Analysis of Rules for Courts-Martial*, 2016 MCM. The privacy of crime victims is mentioned once under the amended RCM 405, but there is not a single mention in an amendment aimed at treating victims with fairness or with respect for their dignity. *Id.* The same pattern continues with the 2018 Executive Order amending the MCM and it has continued to this day. *See* Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018); *see also* Exec. Order No. 14103, 88 Fed. Reg. 50535 (Jul. 28, 2023). Victims in the military justice system have the Congressionally granted rights to be treated with fairness, with respect for their dignity, and with the respect for their privacy—but there are no rules effectively affording those rights.[10]

Additionally, the MCM incorporates no rules related to appellate review of issues noted in 10 U.S.C. § 806b(e)(4), including allowing victims to petition an

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[10] Rules in military courts carry weight similar to statute. In military justice, violations of the RCMs can form the basis to overturn a finding or sentencing. See *United States v. Sigrah*, 82 M.J. 463 (C.A.A.F. 2022) (holding a violation of RCM 914 demands setting aside a finding of guilty). Likewise, rules are so important in military courts they get *de novo* review and interpreted as statutes.

appellate court for a writ of mandamus for issues related to mental health privileges.[11] For crime victims like Major McFarland and R.R., a failure to incorporate these Congressional provisions means a failure to allow crime victims a voice in challenging rulings that violate their privacy or stated privilege. While "treated with fairness and with respect for the dignity and privacy of the victim" is undefined in statute, fairness at a minimum includes a voice in the process.

In short, Congress acted intending to give victims more rights in the military justice process and expressly did so, but failure to implement those rights through executive regulations, leaves military judges and Service appellate courts torn between statutory and regulatory frameworks.[12] Had these regulations

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[11] Further, the CAAF's previous interpretation of its jurisdiction over cases prevents victims from petitioning the CAAF, leaving crime victims with recourse only through certification from The Judge Advocate General. *M.W. v. United States*, 83 M.J. 361 (C.A.A.F. 2023). A failure to achieve certification leaves victims without any voice after a Service appellate court ruling. The CAAF's opinion precluding victims seeking relief directly to the CAAF also contradicts the text of 10 U.S.C. § 806b(e)(3)(C), which specifically says, "[r]eview of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces."

[12] If at one time the executive branch's interpretation of 10 U.S.C. § 806b requirements may have been afforded *Chevron* deference, this is no longer the case. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.") (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). Neither is *Auer* deference appropriate here. *Auer v. Robins*, 519 U.S. 452 (1997). An executive agency may be afforded *Auer* deference

fully implemented 10 U.S.C. § 806b in a transformative way as both expressed and intended, military judges would have greater clarity in how to afford victims their statutory rights. This Court should consider Major McFarland's petition to review the tension between the statute, regulatory provisions, and the CAAF's ruling—and this Court is positioned to resolve this dispute. *See generally Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (asserting the federal courts' roles as the authority on the interpretation of statutes).

3. This Court should ensure the President faithfully executes 10 U.S.C. § 806b.

10 U.S.C. § 836 provides the authority for the President to promulgate rules for courts-martial. It states:

> [p]retrial, trial, and post-trial procedures. . .for cases arising under this chapter triable in courts-martial. . .may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence

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in interpreting any ambiguous regulations implementing 10 U.S.C. § 806b. *See Kisor v. Wilkie*, 588 U.S. 558, 590 (2019). But to the extent its regulations contradict the plain meaning and intent of the statute—as they do in this case—*Auer* is not applicable. *See United States v. Kahn*, 5 F.4th 167, 174 (2d Cir. 2021) (citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26. (1982)). The plain meaning of 10 U.S.C. § 806b, rather than the executive's interpretation of it, should govern the Court's analysis.

> generally recognized in the trial of criminal cases in the United States district courts, but which may not. . . be contrary to or inconsistent with this chapter [the UCMJ].

As the Executive promulgates RCMs, the CAAF presumes their validity. *See Sigrah*, *supra* note 10 (The CAAF presumes RCM 914 is valid without analyzing whether it is contrary or inconsistent with the UCMJ*); see also United States v. Harrington*, 83 M.J. 408, 418 (C.A.A.F. 2023) (The CAAF presuming validity of RCM 1001(c) wherein analysis of Rules demand de novo review. "We review a military judge's interpretation of RCM 1001 de novo."). Moreover, the jurisdictional enumerations of the CAAF limit whether the court can invalidate an RCM. Congress ". . . confined [the CAAF's] jurisdiction to the review of specified sentences imposed by courts-martial. . ." *See Clinton, supra* note 7 at 534. Contrarily, in the past, the military courts provided judicial review of the MCM, but the current trend, as reflected in *B.M.* and the unquestioning de novo review of RCMs suggest the military courts are generally unwilling to do so. *See Judicial Review of The Manual for Courts-Martial*, 160 Mil. L. Rev. 96, 122 (1999).

This Court's authority to review decisions of the CAAF is decided and recently affirmed in *Ortiz v. United States*. 585 U.S. 427, 441 (2018) ("[T]his Court's appellate jurisdiction, as Justice Story made clear ages ago, covers more than the decisions of Article III courts."). Victims with abusers tried in military courts enjoy lesser, disparate, and unequal rights as compared to civilian counterparts because 10 U.S.C. § 806b is not fully implemented. Although

the CAAF could have addressed this absence of regulatory guidance, the CAAF's opinion in *B.M.* highlights the apparent recalcitrance to provide victims meaningful rights in the military justice system consistent with the statutory requirement to do so. Accordingly, this Court provides the appropriate meaningful avenue for redress.

B. The military courts' inconsistent and unsupported applications of a constitutional exception to Mil. R. Evid. 513 impermissibly removes victims' statutory rights.

The CAAF's refusal to answer the questions The Judge Advocate General of the Navy certified under 10 U.S.C. § 867 is a failure by the military courts to uniformly resolve whether Mil. R. Evid. 513 grants a firm and statutorily defined privilege, as unambiguously intended by Congress and the President, or whether the Constitution demands the privilege fall to the whims of a subjective and undefined balancing test. R.R. and Major McFarland suffer harm because the CAAF refused to answer this question.

1. The CAAF's denial of standing failed to resolve a split among the Military Service courts, resulting in an absurd result for R.R. and future victims.

The question presented to the CAAF in *B.M.* focused on a split among the Military Service courts, but the CAAF failed to resolve the split. The Army and Navy-Marine Courts each have opinions addressing what may be constitutionally required mental

health records. Specifically, the Army Court of Criminal Appeals (ACCA) has ruled that there is no constitutional entitlement by an accused to privileged mental health records of a victim. *United States v. Tinsley*, 81 M.J. 836, 849 (A. Ct. Crim. App. 2021). Meanwhile, the Navy-Marine Court of Criminal Appeals (NMCCA) has ruled the exact opposite finding that when a Military Judge determines privileged records are sufficiently relevant to the case, an accused is entitled to those records and the case must be placed in abatement if the victim refuses to "waive" the privilege, as occurred with the Petitioner in this case. *See J.M., supra* note 4, at 787. Following the CAAF's opinion in *B.M.*, the AFCCA followed suit, designing a third standard, issuing its opinion through R.R.

After R.R.'s first petition was denied as a direct result of the CAAF's decision in *B.M.*, she "waived" her privilege to move the court-martial forward. After the military judge lifted the abatement, she filed a second petition, once again seeking to challenge the military judge's ruling that the accused has a constitutional right to her privileged records. The AFCCA once again denied her appeal. *In re R.R. v. Anderson*, at 15 (A.F.C.C.A. July 22, 2024).

In addressing the constitutional question presented, the AFCCA stated,

> [W]e note that recently our superior court, the United States Court of Appeals for the Armed Forces, expressly did not resolve the question 'whether a constitutional exception to the privilege

> in [Mil. R. Evid.] 513 still exists.' We need not ourselves resolve this question here. We cannot conclude that the military judge's determination was 'a judicial usurpation of power' or 'characteristic of an erroneous practice which is likely to recur' where the underlying legal question remains unresolved. *Id.* (citing *B.M.*, 84 M.J. 314 (C.A.A.F. 2024).

In making this ruling, the AFCCA essentially determined a victim cannot challenge a military judge's determination of a constitutional entitlement given the applicable standard of review.[13] As a result, individual military trial judges in the Air Force are free to decide whether to enforce a victim's rights based on their own individual interpretation of the Constitution, with no avenue for relief available to victims.

The CAAF's decision not to answer the question presented created a split among the Military Service

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[13] Despite the codification of 10 U.S.C § 806b(a) rights provision mirroring the C.V.R.A., the CAAF ruled victims with cases tried by courts-martial seeking a writ of mandamus to enforce their rights must demonstrate clear and indisputable error by the military judge; whereas, victims with cases in the federal court system enjoy ordinary standards of appellate review. *H.V.Z. v. United States*, No. 23-0250, 2024 CAAF LEXIS 410 (C.A.A.F. July 18, 2024). The standard of review in military justice for issuance of writs of mandamus on behalf of victims seeking enforcement of their statutory rights is the same standard adopted in the case where convicted mass-murderer Nidal Hasan sought disqualification of a military judge. *Id.* at *7 citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012).

courts with the absurd result that three different Services' members accused of a crime will have access to three entirely different sets of "constitutional rights" depending on their Service branch. The split creates an un-uniformed response in a system governed by a uniformed legal code.[14] This split produces an unacceptable result for victims and accused.

The purpose of the psychotherapist-patient privilege is to provide a patient with the ability to engage in open and honest discussion with their mental health provider to receive effective mental health care. *See Jaffee, supra* note 4. Sexual assault victims have a strong need for mental health treatment, and they have valid reasons to value their privacy and keep their private and intimate thoughts out of the hands of their own abusers. Today, under the CAAF's opinion, even a victim represented by competent counsel and given the benefit of a comprehensive explanation of the privilege by their own therapist cannot predict whether sharing private thoughts and memories will be protected communications.

2. The CAAF's refusal to grant standing impacts all types of victims of sexual assault committed by military members.

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[14] Members of the armed forces are subject to the Uniformed Code of Military Justice, which was enacted by statute. 10 U.S.C. § 802(a).

The population affected by the CAAF's ruling is vast.[15] Victims of sexual assault who encounter the military justice system goes beyond our service members. The UCMJ extends to crimes committed by service members against any person, anywhere in the world. Victims affected by this ruling extend to men and women, military members and civilians, U.S. citizens and foreign nationals, adults and children. Major McFarland, a National Guard member, and R.R., a civilian minor with no connection to the military, were both stuck in a system of rules determined by the status of their abusers. Regardless of a victims' status, the CAAF's ruling applies.

R.R.'s case is a single example showing how far the CAAF's opinion in this case reaches. R.R. is a minor from a civilian family. At 13 years old, her only connection to the United States Armed Forces was that she was assaulted by a member of the Air Force. R.R.'s only other exposure to the military has been through the military justice process where she experienced a different form of violation. R.R. never consented to the release of her mental health records

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[15] The CAAF's adoption of justiciability standards—specifically the standing doctrine—necessary to ensure Article III courts only hear cases and controversies as required by the Constitution is a peculiar jurisprudential path. The CAAF is unequivocally not an Article III court by statute, and closing victim access to the CAAF in the name of "standing" under these standards is clear and obvious error. 10 U.S.C. § 941 (establishing the CAAF under Article I and placing the CAAF for administrative purposes in the Department of Defense); *See Edmond, supra* note 6 at 664 (1997) (explaining the CAAF also falls to the Executive Branch for non-administrative purposes). *See also TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

to the Government. R.R. had a moment of empowerment that she could protect her sensitive records when she filed the writ petition. However, after the ruling and subsequent dismissal, R.R. had to witness her abuser get access to her mental health records and hold the knowledge that it would be used to hurt her. Even today, with her assailant in confinement, R.R. must live with the fact that he was able to use our court system to violate her one last time. Major McFarland, a military member, and R.R., a civilian minor with no connection to the military, have cases that are not uncommon for victims in the military justice system.

This court's review of Major McFarland's petition can resolve issues faced by R.R. and other crime victims. Congress expressly gave victims voice in a military justice process. By no fault of theirs, these victims find themselves in a military court governed by different rules than federal courts and different rules among the Military Services, hindering their rights to challenge violations of their basic privacy interests. Because of the CAAF's opinion, a military judge's decision to abate a proceeding effectively circumvents a victim's petition to an appellate court, violating the text and intent of the statute, creating a practical removal of victims' rights at the trial level. R.R.'s case demonstrates Major McFarland is not the only victim to face the choice of waiving a privilege or preventing a trial, and R.R.'s case reflects the secondary effect of the CAAF's opinion. Therefore, the Court should grant review of Petitioner's case to resolve the inconsistencies of regulatory guidance, the CAAF's opinion, and the statute.

Conclusion

The Victims have a statutory voice in military justice. The Court should grant review of Major McFarland's petition.

Respectfully submitted,

LT COL SETH W. DILWORTH*
CAPT TIFFANY R. CAMPBELL
CAPT E. CHRISTIAN KOBRES, II
DEVON A. R. WELLS
Department of the Air Force
Victims' Counsel Division
1500 W. Perimeter Rd., Ste. 1300
Joint Base Andrews, MD 20762
(202) 480-3424
seth.dilworth.1@us.af.mil

**Counsel of Record*

Counsel for Amicus Curiae

November 4, 2024

Appendix A

In re RR	**)**	**Misc. Dkt.**
Petitioner	**)**	**No. 2024-02**
	)	
	)	
	)	**ORDER**
	)	
Brock T. ANDERSON	**)**	
Airman First Class (E-3))		
U.S. Air Force	**)**	
Real Party in Interest	**)**	**Special Panel**

On 14 March 2024, this court received a petition for extraordinary relief pursuant to Article 6b, UCMJ, 10 U.S.C. § 806b, in the nature of a writ of mandamus, in the above-styled case. Specifically, Petitioner requests we vacate the trial judge's abatement ruling of 23 February 2024, disqualify the military judge, disqualify the trial counsel "who examined [RR's] privileged records," and seal all patient records reviewed to date. Along with the petition, Petitioner filed a Motion to File Attachments to the Petition for Relief under Article 6b, UCMJ, Under Seal. The court docketed the petition on 15 March 2024.

On 21 March 2024, the Government responded to Petitioner's Motion to File Attachments Under Seal and stated the Government did not oppose this motion but requested the court order Petitioner to serve

said attachments on the Government. The attachments provided by Petitioner to the court appeared to be materials that may have been filed during the trial proceedings. "To enable our review of the petition and to verify what materials were marked by the military judge and entered into the record at trial," we issued an order on 28 March 2024 denying the motion and ordering "the preparation of a verbatim transcript of all trial proceedings and inclusion of all appellate exhibits,"[1] to be provided to the court not later than 1 May 2024. This court also granted leave for the Government and the Real Party in Interest each to file an answer to the petition for a writ of mandamus not later than 20 days after the certified record of trial is served on the court.[2]

On 9 April 2024, the Real Party in Interest moved for leave to file a motion to dismiss, citing the recently published case *In re B.M. v. United States and Bailey*, No. 23-0233, __

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[1] In that order, we noted that pursuant to Mil. R. Evid. 513(e)(6) (*Manual for Courts- Martial, United States* (2024 ed.)) any portions of the transcript relating to involving Mil. R. Evid. 513 pleadings and rulings entered into the record of trial, must be sealed.

[2] *See* JT. CT. CRIM. APP. R. 19(f)(1).

Appendix A

M.J. ___, 2024 CAAF LEXIS 201 (C.A.A.F. 3 Apr. 2024).

On 19 April 2024, Petitioner moved for leave to file out of time opposition to the Real Party in Interest's motion to dismiss. This same day, Petitioner filed a Motion to Attach email communications in support of its opposition. Both motions were unopposed, and the court granted Petitioner's motions.

In his motion, the Real Party in Interest asserts the United States Court of Appeals for the Armed Forces (CAAF) in *In re B.M.* held "[a] named victim lacks standing to challenge the abatement order of a trial court before" our court and the CAAF. Additionally, he asserts we should conclude, as the CAAF did in *In re B.M.*, that "the rest of the victim's requests for relief [are] either not ripe for decision or moot"

At this time, Petitioner and the Real Party in Interest agree that during the court-martial of the Real Party in Interest, the trial judge conducted an in- camera review of RR's medical records. The trial judge offered RR, through her counsel, the opportunity to waive or not waive her privilege over a portion of her mental health records. Due to RR's decision

not to waive, the trial judge abated proceedings.

We agree with the Real Party in Interest that *In re B.M.* is controlling. Out of judicial economy, we choose to rule on the motion to dismiss although this court has not received the certified record of trial to date. Specifically, we find(1) Petitioner does not have standing in this court to challenge the abatement, *see In re B.M.,* 2024 CAAF LEXIS 201, at *11, and (2) due to the abatement, the remaining issues in the petition are not ripe. *See id.* at *14.

Accordingly, it is by the court on this 7th day of May, 2024,

ORDERED:

The Real Party in Interest's Motion for Leave to File Motion to Dismiss is **GRANTED**.

The Real Party in Interest's Motion to Dismiss is **GRANTED**. This order does not preclude further filings should the abatement be lifted.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

Appendix B

Misc. Dkt. No. 2024-08

In re RR
Petitioner

Brock T. ANDERSON
Airman First Class (E-3), U.S. Air Force
Real Party in Interest

Petition for Extraordinary Relief in the Nature of a Writ of Mandamus

Decided 22 July 2024

Military Judge: Bradley J. Palmer.

GCM convened at: Altus Air Force Base, Oklahoma.

Appendix B

For Petitioner: Captain Tiffany R. Campbell, USAF; Captain Erick C. Kobres II, USAF;

Devon A.R. Wells, Esquire[1]

Before RICHARDSON, DOUGLAS, and WARREN, *Appellate Military Judges.*

Judge DOUGLAS delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge WARREN joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

DOUGLAS, Judge:

On 9 June 2024, pursuant to Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Petitioner submitted to this

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[1] There were no other parties to this petition because no briefs were to be filed "unless ordered by the court;" and the court did not order any briefs to be filed.

court a petition for extraordinary relief in the form of a writ of mandamus in the pending general court-martial of *United States v. Airman First Class Brock T. Anderson* (the Real Party in Interest). The Real Party in Interest is charged with one specification of sexual assault of a child who had not attained the age of 16 years, and three specifications of sexual abuse of a child who had not attained the age of 16 years, in violation of Article 120b, Uniform Code of Military Jus- tice (UCMJ), 10 U.S.C. § 920b.[2]

Petitioner, RR, is a minor and the named victim in all specifications. Petitioner requests we issue a writ vacating the trial judge's order to discover her privileged mental health records; order all released mental health records sealed and removed from the possession of trial counsel and trial defense counsel; disqualify all counsel who have reviewed these records; and order the procedural

requirements of Mil. R. Evid. 513 be followed. We find issuance of a writ is not appropriate.

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[2] All references to punitive articles of the UCMJ are to the *Manual for Courts-Martial*, *United States* (2019 ed.) (2019 *MCM*). All other references to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial are to the *Manual for Courts- Martial*, *United States* (2024 ed.).

Appendix B

I. BACKGROUND

The Real Party in Interest is alleged to have committed the charged offenses on or about 10 May 2022. While investigating the allegations, the Air Force Office of Special Investigations (OSI) requested authorization from Petitioner's biological mother, SH, to obtain Petitioner's records maintained in a civilian facility, Coastal Harbor Treatment Center. On 11 July 2022, SH signed a form authorizing the "disclosure of health information" concerning RR with a handwritten entry specifying "any and all information regarding the rape with [the Real Party in Interest]." According to Petitioner, the facility released 359 pages to OSI, ten of which were included in their report of investigation (ROI). Trial counsel later provided the ROI to trial defense counsel.

On 7 September 2023, the trial judge appointed SH as legal representative for

Petitioner, pursuant to Article 6b(c), UCMJ, 10 U.S.C. § 806b(c). The judge's order specifically stated SH, as Petitioner's legal guardian, "may assume the rights of the victim" because RR is "under 18 years of age." On 8 September 2023, trial defense counsel

submitted a supplementary discovery request, asking the Government to produce mental health records at additional facilities mentioned in the ROI. On 18 September 2023, trial counsel declined production of these additional records, citing Petitioner's psychotherapist-patient privilege under Mil. R. Evid. 513.

On 24 October 2023, Petitioner's victims' counsel entered a notice of appearance. On 30 October 2023, trial defense counsel asked victims' counsel if Petitioner would voluntarily release the mental health records located at the other facilities. Trial defense counsel specifically stated they were looking for information discoverable under *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022), as well as evidence of child abuse or neglect.

On 31 October 2023, the Government informed victims' counsel of the mental health records OSI possessed. On 1 November 2023, victims' counsel invoked privilege over these records, pursuant to Mil. R. Evid. 513, and requested the records be sealed and maintained in the trial judge's custody pending a hearing on the matter.

Appendix B

On 2 November 2023, the trial judge ordered the trial counsel to "place any records potentially involving matter privileged . . . in a separate envelope and for them not to be reviewed or disclosed until a hearing could be held."

On 4 December 2023, the trial judge held a closed Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing. On 21 December 2023, the trial judge issued a "notice of a partial ruling." He explained by email that he was denying the defense request for production of mental health records outside the Government's possession. He also ruled Petitioner had waived her privilege "through her parent and guardian" for the mental health records possessed by the Government concerning "the offenses alleged in this case."

The trial judge also determined an in camera review of the records "was necessary to determine which documents" in the Government's possession "were covered by the waiver." He performed this review and, in his email, the trial judge described four categories of records found as follows:

> 1. Documents subject to the waiver that **will** be provided to the Defense.

> 2. Documents not subject to the waiver but that I have determined fall under the Due Process protections discussed in Brady v. Maryland and Giglio v. United States and their progeny (constitutionally required).[3]
>
> 3. Documents that are privileged but not subject to the waiver or constitutionally required. These **will not** be provided to the Defense.
>
> 4. Documents that are not privileged (including documents exempted from the privilege under M[e]llette) and that **will** be pro- vided to the Defense.

In the same email, the trial judge asked victims' counsel to inform him and the parties whether Petitioner intended to waive privilege for the documents in category 2, *supra*.

On 3 January 2024, the trial judge supplemented his previous partial ruling via

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[3] *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

another email. He acknowledged "[t]here is no binding case law regarding whether a parent can waive a privilege on behalf of a child." He further stated, however,

> The general rule in other jurisdictions appears to be that a parent can assert or waive a privilege on a child's behalf when doing so would be in the child's best interest but not when the parent and child are adversarial or when the parent is asserting or waiving the privilege for their own interests.

The trial judge cited *Garcia v. Guiles*, 254 So. 3d 637, 640 (Fla. Dist. Ct. App. 2018), which he summarized as "holding that [a] parent could not waive [the] privilege on [a] child's behalf because of their adversarial relationship but[a] guardian *ad litem* could [waive the privilege] because she was acting in [the] child's interest." The trial judge

reasoned SH had properly waived Petitioner's privilege, pursuant to Mil. R. Evid. 510, "based on what [she] believed was in

[Petitioner's] best interests to support [Petitioner's] allegations."[4]

Also on 3 January 2024, victims' counsel informed the trial judge and par- ties by email that her client was "willing to waive privileges on the documents except" four pages. On 12

January 2024, the trial counsel filed a supplemental brief informing the trial judge "it is the Government's position it is now obligated under [R.C.M.] 703, *Brady* and *Giglio* to disclose" certain records in its possession where the privilege no longer applied because the trial judge had ruled Petitioner had waived it. On the same date, the Real Party in Interest moved to abate the proceedings "unless and until the alleged victim, RR, waives her . . . privilege and allows disclosure of the previously identified four documents."

On 23 February 2024, the trial judge supplemented his findings of fact and conclusions of law, and ordered the

proceedings abated until such time as Petitioner waived her privilege for the four

[4] We do not have before us how the trial judge came to this conclusion.

remaining pages of mental health records he deemed constitutionally required.

On 14 March 2024, Petitioner filed an initial petition with this court for extraordinary relief, pursuant to Article 6b, UCMJ, 10 U.S.C. § 806b. Specifically, Petitioner requested we issue a writ of mandamus

requiring the trial judge to vacate his abatement ruling of 23 February 2024, disqualify the trial judge and the trial counsel "who examined [Petitioner's] privileged records," and seal all patient records reviewed to date. The court docketed the petition on 15 March 2024, and granted leave for the Government and the Real Party in Interest each to file an answer to Petitioner's petition for a writ of mandamus. On 9 April 2024, the Real Party in Interest moved for leave to file a motion to dismiss Petitioner's petition of 14 March 2024.

On 7 May 2024, this court granted the Real Party in Interest's motion to dismiss the petition, in accordance with *In re B.M.*, No. 23-2033, 2024 CAAF LEXIS 201, at *10-11 (C.A.A.F. Apr. 3, 2024), which held a named

victim does not have standing to challenge an abatement order in an accused's case because such an order is not a court-martial ruling that affects the victim's rights under Mil. R. Evid. 513 or Article 6b, UCMJ.[5]

On 17 May 2024, Petitioner waived her privilege and agreed to disclosure and production to trial counsel and trial defense counsel of the four pages of mental health records identified by the trial judge as constitutionally required. Petitioner explained that she waived her privilege regarding these pages be- cause the trial judge ruled the court-martial could not continue absent her waiver and she could not attain relief from our court while proceedings were in abatement.

The trial judge then lifted the abatement and rescheduled the trial for 8 July 2024. Petitioner is now before this court a second

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[5] As a result of our ruling of the Real Party in Interest's motion to dismiss, we did not decide the substantive issues raised in Petitioner's 14 March 2024 petition, but stated, "This order does not preclude further filings should the abatement be lifted." *See In re RR*, Misc. Dkt. No. 2024-02, 2024 CCA LEXIS 286, at * 3 (A.F. Ct. Crim. Appl. 7 May 2024).

time with her petition of 9 June 2024, in which she has the standing she lacked when she filed her previous request for a writ of mandamus.[6]

II. LAW

The Uniform Code of Military Justice affords certain rights to victims of offenses, including to be treated with "fairness" and "respect for" their "dignity and privacy." Article 6b(a)(9), 10 U.S.C. § 806b(a)(9). Such victims "do not have the authority to challenge every ruling by a military judge" at a court-martial "with which they disagree; but they may assert [certain] rights enumerated in Article 6b, UCMJ, in the *Manual for Courts-Martial*, and under other applicable laws." *In re KK*, ___M.J. __, Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *13 (A.F. Ct. Crim. App. 24 Jan. 2023). Accordingly, if a victim believes a court-martial ruling violates any of these rights, "the victim may petition the Court of Criminal Appeals for a writ of mandamus to

[6] Contemporaneously included in this petition, Petitioner filed a motion to stay the proceedings and to stay the disclosure of additional medical records pages for which she recently waived privilege; on 13 June 2024, we denied Petitioner's motion to stay proceedings.

require the . . . court- martial to comply[.]" Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1). "If granted, such a writ would require compliance with Article 6b, UCMJ." *In re KK*, 2023 CCA LEXIS 31, at *6.

More broadly, 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 (1943) (citations omitted). A writ of mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *EV v. United States*, 75 M.J. 331, 332 (C.A.A.F. 2016) (quoting *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004)).

"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)).

Appendix B

> 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 issu- ance 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); *see also In re KK*, 2023 CCA LEXIS 31, at *10 (rejecting abuse of discretion as the standard to determine mandamus relief and endorsing the traditional mandamus stand- ard in *Hasan*).

As a matter of discovery, "[a]fter service of charges, upon request of the defense, the Government shall permit the defense to inspect any . . . papers, documents, [or] data . . . or copies of portions of the items, 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). Nevertheless, "Upon a sufficient showing, [a] military judge may at any time order that . . . discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate.

> R.C.M. 701(g)(2). This rule generally allows a military judge to "review any material in camera." *Id*. If the military judge does so, they "shall seal any materials

examined in camera and not disclosed and may seal other materials as appropriate." *Id.*

Moreover, the Manual for Courts-Martial recognizes certain privileges that may limit the availability of evidence at courts-martial. In particular, 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 or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagno- sis or treatment of the patient's mental or emotional condition.

In light of this privilege, Mil. R. Evid. 513(e)(2)

> requires a military judge to conduct a hearing before ordering the production or admission of "evidence of a patient's records or communication," defined as

> "testimony of a psychotherapist, or assistant to the same, or patient records *that pertain to* communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition."

Mellette, 82 M.J. at 379 (quoting Mil. R. Evid. 513(b)(5)). "The patient must be afforded a reasonable opportunity to attend the hearing and be heard." Mil. R. Evid. 513(e)(2). A "confidential communication made between the patient and a psychotherapist or an assistant" as referred to in Mil. R. Evid. 513(a) "does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psycho- therapist." *Mellette*, 82 M.J. at 378. "[D]iagnoses and treatments contained within medical records [including mental health records] are not themselves uniformly privileged under [Mil. R. Evid.] 513." *Id.* at 375.

Appendix B

Paragraph (a) of Mil. R. Evid. 510(a), *Waiver of privilege by voluntary dis- closure*, provides:

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

III. ANALYSIS

Petitioner alleges several errors in violation of her rights under Article 6b, UCMJ, specifically her right to be treated with fairness and with respect for her dignity and privacy. She claims the trial judge erred: (1) in determining Petitioner waived her

privilege under Mil. R. Evid. 513; (2) in reviewing Petitioner's mental health records in camera; and (3) in determining a "constitutional exception" existed under Mil. R. Evid. 513 requiring discovery of some of these records.

We have carefully considered Petitioner's claims. We find Petitioner has failed to show the right to issuance of the writ is clear and indisputable and the issuance of the writ is appropriate under the circumstances. *See Hasan*, 71 M.J. at 418.

First, Petitioner has provided no binding authority for us to conclude the trial judge's

application of Mil. R. Evid. 510 to determine whether Petitioner's waiver of the privilege under Mil. R. Evid. 513 was erroneous such that it is clear and indisputable that a writ should issue. Petitioner argues Mil. R. Evid. 513 should be interpreted to mean "a parent has the ability to assert but not waive their child's privilege." Petitioner acknowledges, however, "a jurisdictional split" on the issue of whether a parent may waive their minor child's privilege. Petitioner cites cases from

other jurisdictions where the court found a parent could waive the privilege on behalf of the child when there is no adversarial relationship between parent and child, or when the parent is not waiving the privilege for their own interests. *See*, *e.g.*, *Garcia,* 254 So. 3d at 640. Petitioner has not provided any support for us to conclude Petitioner's mother was not acting in furtherance of Petitioner's best interests, was adversarial to Petitioner's interests, or was acting in pursuit of her own personal interests or that of someone else.

Second, Petitioner argues the trial judge erred by reviewing Petitioner's mental health records in camera. In this case, Petitioner's

mother authorized the voluntary disclosure of certain records held by a civilian treatment facility about her daughter's treatment, and transfer to military law enforcement in furtherance of their investigation into the alleged crimes against the Real Party in Interest. If this is proper waiver, the in camera review procedures provided in Mil. R. Evid. 513(e)(3) do not apply to Petitioner's records because such procedures do not apply to records for which the privilege was waived. Petitioner does not provide authority for us to

conclude the trial judge's in cam- era review of these mental health records was erroneous such that it is clear and indisputable that a writ should issue. We agree Mil. R. Evid. 513 has certain procedural requirements that must be met for an in camera review, but an in camera review is also authorized under other rules as well R.C.M. 701(g)(2). On this record we cannot determine the trial judge's conclusions were erroneous.

Third, we reject Petitioner's argument that a writ should issue because the trial judge's determination of a constitutional exception to Mil. R. Evid. 513 violates Petitioner's right to privacy and fair proceedings. We agree the Congress has legislative authority over military justice and we acknowledge the language of Mil. R. Evid. 513 has changed over time. However, we note that recently our superior court, the United States Court of Appeals for the Armed Forces, expressly did not resolve the question "whether a constitutional exception to the privilege in [Mil. R. Evid.] 513 still exists." *In re B.M.*, 2024 CAAF LEXIS 201, at *17. We need not ourselves resolve this question here. We cannot conclude that the military judge's determination was "a judicial usurpation of

power" or "characteristic of an erroneous practice which is likely to recur" where the underlying legal question remains unresolved. *In re KK*, 2023 CCA LEXIS 31, at *6.

Petitioner has not demonstrated the right to issuance of the writ she seeks is clear and indisputable, and she has therefore failed to show the appropriate- ness of the requested relief.

IV. CONCLUSION

Petitioner's petition for extraordinary relief in the nature of a writ of mandamus under Article 6b, UCMJ, 10 U.S.C. § 806b, dated 9 June 2024, is **DENIED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court