PETITIONING THE ARMY COURT OF CRIMINAL APPEALS FOR A WRIT: A PRACTICAL GUIDE FOR SPECIAL VICTIMS' COUNSEL

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> *I dared not trust the case on the presumption that the court knows everything. In fact, I argued it on the presumption that the court didn't know anything.*[1]

I. Introduction

As you approached the final days as a trial counsel representing the government, your Deputy Staff Judge Advocate sat you down and told you that you were headed to the Legal Assistance Office to serve as a special victims' counsel (SVC). As you pondered what you could have done wrong as a trial counsel to be "sent back" to legal assistance, you remembered the frustrations you endured with SVCs over the last eighteen months. You relaxed a little when you imagined going back to normal duty hours. You started to look forward to not having to worry about a military judge scheduling you for hearings after every long weekend and stress-free days clicking through the fields of DL Wills when you are not busy with SVC clients.

Later, you sit next to your client behind the bar and listen as the military judge announces their decision on the Military Rule of Evidence (MRE) 513 motion you expertly crafted and argued. You cannot believe that the government is willing to accept the decision and allow the violation of your client's privacy with no discernable advantage to the

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[1] RECOLLECTED WORDS OF ABRAHAM LINCOLN 243 (Don E. Fehrenbacher & Virginia Fehrenbacher eds., 1996).

prosecution's case. You promised this client that you would have their back and that their mental health history was no one's business and there was no reason that the judge would let the defense bring it up in court. Your client turns to you and whispers, "You said they wouldn't be able to bring this up! I don't want to talk about this in court."

Fortunately, you had a contingency plan for this very situation. You discussed this possibility with your client. You explained the costs and benefits of petitioning the Army Court of Criminal Appeals (ACCA) if the judge's decision did not go your way. You know that your client's number one goal, more important than even the outcome of the trial, is preventing their mental health records from being examined by the judge and possibly shown to the accused. You stand on shaky legs and request permission to address the ACCA. The military judge looks at you over their reading glasses and tells you to move to the lectern in the well. You clear your throat and say, "Your Honor, I respectfully request a stay of these proceedings to allow time to petition the ACCA for a writ of mandamus."

Mandamus is "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu[ally] to correct a prior action or failure to act."[2] A petition for a writ of mandamus from the ACCA is a powerful tool in the SVC arsenal. Special victims' counsel have used it on several occasions to protect the rights of their clients. The ACCA has issued writs and decisions in response to some of these petitions and several of those writs will protect victims for years to come. Like any tool, it is only helpful if the user knows how to employ it properly. This article is intended to serve as a practical guide for an SVC who is faced with an unfavorable decision from the military judge and must figure out whether and how to file such a petition.

This article has three parts. It begins with a brief discussion of the history leading to the creation of the SVC position. Next, it examines, in chronological order, the petitions submitted to the ACCA by SVCs, as well as the responses from the ACCA. Finally, it walks the practitioner through the mechanics of preparing and submitting a petition for a writ of mandamus to the ACCA.

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[2] *Mandamus*, BLACK'S LAW DICTIONARY (9th ed. 2009).

II. Background

A series of well-publicized events led to the creation of the SVC position. The most notable event was a hearing conducted under Article 32, Uniform Code of Military Justice (UCMJ), at the United States Naval Academy, held to investigate charges of sexual assault against three midshipmen.[3] In another incident, an Air Force three-star general overturned a court-martial conviction and sentence of a lieutenant colonel.[4] These two cases were followed by an Air Force case and multiple statutory changes.

A. The First Case

LRM v. Kastenberg, is the landmark case in which the Court of Appeals for the Armed Forces (CAAF) acknowledged the right of a victim of sex assault to have an attorney address the court on their behalf in defense of their rights under Military Rules of Evidence (MRE) 412, 513, and 514, UCMJ. The case arrived at the CAAF on order for review by the U.S. Air Force Judge Advocate General.

The Court of Appeals for the Armed Forces confirmed "a holder of a privilege has a right to contest and protect the privilege"[5] and that the

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[3] The victim, a female midshipman testified for nearly thirty hours over five days. Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, New York Times (Sept. 20, 2013), http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html. During the hearing, the defense counsel questioned her regarding a consensual sexual encounter she had the day after she was assaulted, her "oral sex technique," and whether she "felt like a ho" after the incident. *Id.*

[4] Lt. Gen. Craig Franklin overturned the aggravated sexual assault court-martial conviction and sentence of Lt. Col. James Wilkerson citing "insufficient evidence to prove guilt beyond a reasonable doubt." Craig Whitlock, *Air Force General's Reversal of Pilot's Sexual-assault Conviction Angers Lawmakers*, WASH. POST (Mar. 8, 2013), https://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html?utm_term=.198d3fc72bd8. Lt. Gen. Franklin wrote that he found Lt. Col. Wilkerson and his wife more credible than the accuser, doubting that Lt. Col. Wilkerson would risk his stellar career and happy family to engage in sexual misconduct. Nancy Montgomery, *Wilkerson had Affair That Produced a Child, Air Force Confirms*, STARS AND STRIPES (June 13, 2013), https://www.stripes.com/news/us/wilkerson-had-affair-that-produced-a-child-air-force-confirms-1.225660. Wilkerson was later found to have engaged in an extramarital affair and fathered a child through that affair, for which he gave up parental rights. *Id.*

[5] *L.R.M. v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013).

victim has "[l]imited participant standing" as recognized by the Supreme Court.[6] In addition, the CAAF stated, "the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under MRE 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness."[7] This right to be heard and be heard through counsel is the bedrock the SVC position was constructed upon.

B. New Statutory Position

The National Defense Authorization Act (NDAA) for Fiscal Year 2013 directed the Secretary of each military department to "establish special victim capabilities" for investigating and prosecuting a special set of crimes and providing support to the victims of those crimes.[8] Congress directed the Secretary of each military department to include certain personnel to accomplish the newly established capabilities. One set of personnel Congress directed the Secretaries to identify was a group of "specially trained and selected" judge advocates to provide support for victims of sex offenses, although the position was not yet named.[9] The NDAA for Fiscal Year 2014 created the position we now know as the SVC.[10]

C. New Article 6b

The rights of victims continued to evolve through subsequent NDAAs modifying 10 U.S.C. § 806b which appears in the Manual for Courts-Martial (MCM) at Article 6b, UCMJ. In addition to the changes mentioned above, the NDAA for Fiscal Year 2014 extended crime

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[6] *Id.* at 368.
[7] *Id.* at 370.
[8] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 573, 126 Stat. 1632, 2312 (2013).
[9] *Id.*
[10] "The Secretary concerned shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted." National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1716, 127 Stat. 672, 1164 (2013).

victims' rights[11] to victims of any offenses under the UCMJ.[12] Congress implemented the new statute almost word for word, except for the addition of some language to make the provisions specific to military proceedings.[13] The NDAA for Fiscal Year 2015 provided the right to petition the ACCA for a writ of mandamus when the victim believes a court-martial ruling violates the rights afforded by the UCMJ.[14] The NDAA for 2016 added the ability to petition the ACCA for a writ of mandamus when the victim feels the decision of an Article 32 preliminary hearing officer violates the rights afforded by the code, or to quash a subpoena if they are "subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense."[15] These appellate rights are codified at 10 U.S.C. § 806b(e), Article 6b, UCMJ.

III. Petitions Submitted

Special victims' counsel have submitted eight petitions for writs of mandamus to the ACCA. Below is a chronological overview of the petitions that have been submitted and the responses to those petitions.

A. First Petition

In *C.C. v. Lippert*, the victim petitioned the ACCA for a writ of mandamus asking the court to issue a writ of mandamus ordering the military judge to conduct an evidentiary hearing and make the findings of fact and conclusions of law required by MRE 513(e)(2),[16] and stay a military judge's order for the production of mental health records.[17] The victim alleged that the military judge violated her due process rights by

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[11] Scott Campbell, Stephanie, Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. 108-405, § 101, 118 Stat. 2260, 2293 (2004). The Crime Victims' Rights Act amended Title 18 of the U.S.C. to include § 3771.

[12] National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1701, 127 Stat. 672, 1164 (2013).

[13] *See id.*

[14] *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, § 535, 128 Stat. 3292, 3988 (2014).

[15] National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 531, 129 Stat. 726, 1309 (2015).

[16] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2012).

[17] Brief for Petitioner at 1-2, C.C. v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014).

denying her the reasonable right to be heard on the record when he ordered production of her mental health records without conducting the required evidentiary hearing.[18] The victim filed her petition citing the All Writs Act arguing that review of the petition under the All Writs Act was "properly a matter in aid of the jurisdiction of this court in its supervisory capacity over Army trial courts."[19]

The ACCA did not present any discussion of its reasoning or decision other than their order and the statement regarding jurisdiction.[20] The ACCA cited the All Writs Act and *LRM v. Kastenberg* as its jurisdiction to hear the case.[21] The ACCA granted the victim's petition and issued a writ of mandamus vacating the order for production of the victim's mental health records and ordering the military judge to "comply with MRE 513(e)(2) prior to deciding whether to order production of Petitioner's mental health records."[22] This case gives clear authority for SVCs to use whenever the MRE requires that a military judge conduct a hearing and make findings prior to issuing a decision on a motion, as is the case in MREs 412,[23] 513,[24] and 514.[25]

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[18] *Id.* at 1.
[19] *Id.* at 5.
[20] C.C. v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).
[21] *Id.* at 1.
[22] *Id.* at 2.
[23] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(c)(2–3) (2019) [hereinafter MCM] (requiring the military judge, before ordering production of evidence, to conduct a closed hearing and make findings, if evidence is to be admissible, that the evidence is relevant for a purpose under the rule and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy). *But see United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011) (holding MRE 412(c)(3) is needlessly confusing and could lead a military judge to exclude constitutionally required evidence and the "alleged victim's privacy" interests cannot preclude the admission of evidence "the exclusion of which would violate the constitutional rights of the accused).
[24] MCM, *supra* note 24, MIL R. EVID. 513(e)(2–3) (requiring that before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed and that prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed: a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; that the requested information meets one of the enumerated exceptions under subsection (d) of this rule; that the information sought is not merely cumulative of other information available; and that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources).
[25] MCM, *supra* note 24, MIL R. EVID. 514(e)(2-3) (requiring that before ordering the production or admission of evidence of a victim's records or communication, the military judge must conduct a hearing, which shall be closed and requiring that prior to

B. Second Petition

In *H.C. v. Bridges*, the victim petitioned the ACCA for a writ of mandamus ordering the trial court to grant the victim's request for a continuance."[26] The victim's SVC would not be able to attend the trial on the date set by the military judge because the SVC was already scheduled to appear in another trial on that date.[27] The victim argued that her right to be present included the right to have her SVC present to advise her during all portions of the trial.[28] The victim further argued that her relationship to her attorney was "the relationship between an attorney and client"[29] and was therefore not fungible and her counsel's availability must be considered in docketing.[30]

The ACCA acknowledged that they did have jurisdiction to review the petition based on the All Writs Act and *LRM v. Kastenberg*. However, they denied the petition for a writ of mandamus. The ACCA cited three reasons for their decision. First, they stated that "petitioning a superior court to de-conflict calendars and schedules . . . cannot be the only, or even the best or most practical, means to set trial dates . . . ."[31] Second, the ACCA stated, "2.3.1 of the Rules of Practice Before Army Courts-Martial facilitates notice; it does not mandate personal inclusion of SVC in all future docketing discussions between military judge and the parties and no basis for relief for victims."[32] The ACCA also stated that the victim had not demonstrated that the military judge had violated any other rights provided for in *Kastenberg* and Article 6b, UCMJ.[33] Finally, the ACCA cited a military judge's "broad discretion when ruling on requests for

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conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed: a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege; that the requested information meets one of the enumerated exceptions under subsection (d) of this rule; that the information sought is not merely cumulative of other information available; and that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources).

[26] Brief for Petitioner at 1, H.C. v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (order).

[27] *Id.* at 2.

[28] Petitioner's Response to Court's Order at 8-10, H.C. v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. Dec 1, 2014)

[29] *Id.* at 12 (citing 10 U.S. § 1044e(c)).

[30] *Id.* at 16.

[31] H.C. v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (order).

[32] *Id.* at 4.

[33] *Id.* at 5.

continuances."[34] This issue has faced many SVCs practicing in the field. Special victims' counsel should consider how they might deal with this situation or plan appropriately to prevent it, to the extent possible. Most importantly, SVCs should ensure that their clients are aware of, and understand this possibility at the outset of their representation.

C. Third Petition

In *S.C. v. Schubert*, the victim petitioned the ACCA for a writ of mandamus quashing a subpoena to appear before the deposition and vacating the military judge's order for a deposition.[35] This petition was filed under the All Writs Act.[36] The victim argued that the military judge erred as a matter of law in ordering the deposition based on the victim being allowed to refuse to testify at the Article 32 hearing.[37] The victim also argued that the military judge had good cause for denial of the request for a deposition because she was within her right to refuse a pre-trial interview, and she would be available to testify at trial.[38]

The ACCA rendered an opinion without substantial legal analysis. The ACCA said that the military judge did not abuse his discretion because Rules for Courts-Martial (RCM) 702(c)(3)(A) designated "unavailability of an essential witness at an Article 32 hearing" as an "unusual circumstance" so that there was no good cause for denial of the request for a deposition.[39] The ACCA added that even though they knew that the law was changing, they were "bound by the current rules and controlling precedent."[40] The law has since changed to provide a much higher standard for the ordering of a deposition.[41]

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[34] *Id.* at 6 (citing United States v. Thomas, 22 M.J. 57 (C.M.A. 1986)).
[35] Petition for Writ of Mandamus at 1, S.C. v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. Nov. 12,. 2014).
[36] *Id.* at 3.
[37] Brief for Petitioner at 8-9, S.C. v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. Nov. 12, 2014).
[38] *Id.* at 11-12.
[39] S.C. v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. Nov. 12, 2014) (order).
[40] *Id.* at 2.
[41] The current version of the rule states, "(2) 'Exceptional circumstances' under this rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial. (3) A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered 'exceptional circumstances' under this rule." MCM, *supra* note 24, R.C.M. 702(a)(2-3) (2019).

D. Fourth Petition

In *A.T. v. Lippert*, the victim petitioned the ACCA for a writ of mandamus vacating the military judge's order.[42] The military judge had ordered that records of communication between the victim and her victim advocate be produced for in camera review.[43] The victim alleged three errors on the part of the military judge: (1) that the military judge erred as a matter of law by finding that communications between a victim and a victim advocate were not confidential; (2) that the military judge abused his discretion by ordering the production of the victim's sexual harassment/assault response and prevention records be produced for an in camera review without requiring any threshold showing by the defense; (3) that the defense counsel had not met the standard required for production of victim advocate records in their motion to compel discovery.[44]

The ACCA denied the petitioners request and stated that the military judge did not abuse his discretion as the accused "adequately demonstrated a reasonable likelihood that petitioner's communications to the victim advocate about the very allegations that serve as the basis for the charges against him include evidence admissible under Mil. R. Evid. 514(d)(6) that may not otherwise be discovered."[45] The ACCA did point out that "it is the victim who defines the scope of information to be disclosed to third persons under Mil. R. Evid. 514" [46] conveying the message that communications by a victim to a victim advocate are confidential, even if those communications included the intent to make an unrestricted report of sex assault.

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[42] Brief for Petitioner at 1, A.T. v. Lippert, ARMY MISC 20150387 (A. Ct. Crim. App. June 11, 2015).
[43] *Id.* at 1.
[44] The military judge had ordered production of the records for in camera review without receiving evidence from the government, defense, or SVC. *Id* at 4-5. The SVC made a motion for reconsideration and offered evidence at the resulting 39(a) session. *Id*. The military judge denied the SVC's motion for reconsideration and stated that he would conduct an in camera review of the records. *Id.*
[45] A.T. v. Lippert, ARMY MISC 20150387, 2015 CCA LEXIS 257 at *2 (A. Ct. Crim. App. Jun. 11, 2015).
[46] *Id.* at *2.

E. Fifth Petition

D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016), was the first case of a petition for a writ submitted under the new authority provided by the amended Article 6b, UCMJ.[47] The victim also provided the All Writs Act as authority for the ACCA to hear the case.[48]

The victim argued that the military judge erred as a matter of law when he ordered production of the victim's mental health records for in camera review without first conducting an evidentiary hearing as required by MRE 513(e)(2).[49] The victim also argued that the military judge erred as a matter of law when he ruled that MRE 513(d)(3) required mandatory disclosure of the victim's mental health records based on Alaskan law.[50] Finally, the victim argued that the military judge erred when he ruled that the "constitutional exception" applied under MRE 513, UCMJ.[51]

The ACCA first addressed jurisdiction by stating that the new Article 6b is, "a new and separate statutory authority for this court to issue writs" and "Article 6b, UCMJ, is a distinct authority from the All Writs Act."[52] Due to this change, the ACCA no longer needed to find that the matters raised in the petition had "potential to directly affect the findings and sentence."[53] The ACCA stated that in order for them to issue a writ they "need only to determine that the petition addresses the limited circumstances specifically enumerated under Article 6b(e)."[54]

The ACCA reiterated the three-part test that a petition must meet in order to qualify for extraordinary relief. Specifically, the petitioner must

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[47] Petition for Writ of Mandamus at 3, D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016).
[48] *Id.* at 5.
[49] Brief for Petitioner at 7, D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016).
[50] *Id.* at 17-19. "[P]ractitioners of the healing arts" who "have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department." Alaska Statute 47.17.020(a)(1).
[51] Brief for Petitioner at 19, D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016).
[52] D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 at *5 (A. Ct. Crim. App. Feb. 1, 2016) (mem. op.).
[53] *Id.* at *7.
[54] *Id.* at *7.

show: (1) that there is "no other adequate means to attain relief"; (2) that the "right to issuance of the writ is clear and indisputable"; and (3) the issuance of the writ is "appropriate under the circumstances."[55]

The ACCA emphasized that MRE 513 requires that, "the military judge must 'narrowly tailor' any ruling directing the production or release of records to the purposes stated in the [defense] motion."[56] The ACCA also emphasized that MRE 513 is "the means by which a patient is provided due process prior to the production or disclosure of privileged communications."[57]

The ACCA provided clarity in addressing the principle that "there is not a constitutional right of confrontation during sentencing procedures."[58] The rules of evidence that provide for cross-examination of sentencing witnesses "are regulatory confrontation rights rather than *constitutional* right of confrontation that could form the basis for piercing a privileged communication."[59] This means that a victim may choose not to testify during the merits phase of the court-martial regarding the impact of the accused's actions, but may testify during the pre-sentencing phase regarding the impact of the crimes for which the accused has been convicted without having to disclose their mental health records.

Finally, the ACCA stated that their order restored the disclosed records to their privileged status.[60] Special victims' counsel can cite to this language when records have been inadvertently or erroneously disclosed. When this happens, defense counsel often argue to the military judge that the government has seen the records, and therefore the defense is entitled to them. Special victims' counsel can now argue that the ACCA has recognized the ability of the trial court to "unring the bell," and prevent the defense from using any of the erroneously-disclosed information as the basis for a motion to compel in camera review of mental health records.

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[55] *Id.* at *7-8 (citing Cheney v. United States Dist. Ct. for the Dist. Of Columbia, 542 U.S. 367, 380-81 (2004.)).
[56] *Id.* at *17 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 513(e)(4) (2016)).
[57] D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 at *17 (A. Ct. Crim. App. Feb. 1, 2016) (mem. op.) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 513(e)(4) (2016)).
[58] *Id.* at *20.
[59] *Id.* at *20.
[60] *Id.* at *33.

F. Sixth Petition

In *L.K. v. Acosta*, 76 M.J. 611 (A. Ct. Crim. App. 2017), the victim petitioned the ACCA for "a writ of mandamus ordering the trial court and military judge to hold an evidentiary hearing pursuant to Mil. R. Evid. 513."[61] The victim argued that the ACCA had jurisdiction to issue the writ under the All Writs Act.[62] The victim further argued that the ACCA had jurisdiction to issue the requested writ under the amended Article 6b, UCMJ.[63]

Specifically, the victim alleged three errors on the part of the military judge. First, the victim argued that "the military judge erred by ruling that the defense counsel met the evidentiary standard required for production of mental health records for in camera review."[64] Second, the victim argued that "the military judge erred by failing to narrowly tailor his order piercing her mental health records privilege."[65] Finally, the victim alleged that "the military judge erred by ruling that a plain reading of Mil. R. Evid. 513(d)(2) applies as an exception [her] mental health records privilege."[66]

The ACCA set aside the military judge's ruling and allowed the judge to "reconsider the real party in interest, the accused's motion ab initio in light of their decision," and to "allow the parties and petitioner to file supplemental matters in light of this opinion."[67] The ACCA acknowledged the "unclear guidance" provided to military judges by MRE 513.[68]

The ACCA stated that military justice practitioners must "focus on the fact that MRE 513 is a rule of privilege, not discovery."[69] The ACCA acknowledged that part of the confusion with this rule stems from the standard they set in previous cases and "viewing the issue as one of discovery, governed by Article 46, UCMJ, and Rule for Courts-Martial

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[61] Brief for Petitioner at 2, L.K. v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017).
[62] *Id.* at 4.
[63] *Id.* at 5.
[64] *Id.* at 11-15.
[65] *Id.* at 15.
[66] Brief for Petitioner at 16-19, L.K. v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017).
[67] L.K. v. Acosta, 76 M.J. 611, 620 (A. Ct. Crim. App. 2017).
[68] *Id.* at 613.
[69] "[D]isclosure involves the right to possess information that one currently does not possess" "'admission' involves the right to introduce into a criminal trial information one already possesses." *Id.* at 615.

(RCM) 701, not as a request to access privileged mental health records."[70] This is no longer the standard. The ACCA even acknowledged acceptance of the risk that "when a certain matter is declared privileged, it means the accuracy of the proceeding will, at least occasionally, suffer in order to maintain the privilege."[71] Special victims' counsel need to have a solid understanding of this information and be prepared to argue it to a judge.

Additionally, the ACCA clarified the "constitutional" exception in MRE 513 stating, "the reach of the constitutional exception is the same today as it was prior to the deletion of the constitutional exception pursuant to NDAA 2015."[72] Understanding this principle will save SVCs valuable time when litigating MRE 412, 513, and 514 motions.

The issue that the ACCA had to determine was "if in this case the Constitution requires the 'disclosure' of otherwise privileged material."[73] While acknowledging the constitutional right to confrontation, the ACCA stated that "[t]he right to confront witnesses does not include the right to *discover* information to use in confrontation."[74] Additionally, the ACCA cited *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), to clarify that "[t]here 'is no general constitutional right to discovery in a criminal case'" and that "constitutional 'discovery' is usually delineated by the contours of the seminal case of *Brady*."[75] Accordingly, while the constitutional exception still exists, it only extends to records that are in the possession of the government and disclosable under *Brady.* The ACCA ultimately concluded that, "[m]ental health records located in military or civilian healthcare facilities *that have not been made part of the investigation* are not 'in the possession of prosecution' and therefore cannot be '*Brady*

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[70] "This court initially accorded privileged mental health records the same standards for disclosure as any other matter: which is to say, we treated privileged mental health records s having no privilege at all." *Id.* at 614. "In United States v. Cano, we addressed the propriety of a military judge's order to disclose privileged mental health records of an eleven-year-old sexual assault victim. ARMY 20010086, 2004 CCA LEXIS 331 (Army Ct. Crim. App. 4 Feb. 2004)." *Id.* We described the military judge's order to produce 'everything…even remotely potentially helpful to the defense" from the records as a "fair trial standard." *Id.*

[71] *Id.* at 614-615.

[72] The Army Court of Criminal Appeals (ACCA) clarified that "the Constitution is no more or less applicable to a rule of evidence because it happens to be specifically mentioned in the Military Rules of Evidence." L.K. v. Acosta, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017).

[73] *Id.* at 615.

[74] *Id.* at 615 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987).

[75] *Id.* at 616 (citing Brady v. Maryland, 373 U.S. 83 (1963).

evidence.'"[76] Special victims' counsel will find this language useful if they are ever faced with the defense motion to compel in camera review of mental health records claiming that the military treatment facility has those records, and therefore they are in possession of the "government."

With respect to the exception regarding evidence of child abuse, the ACCA examined the two clauses separately.[77] The ACCA provided clear guidance that the intent of the exception in the first clause was for psychotherapists to provide "information that is necessary for the safety and security of military personnel, operations, installations, and equipment."[78] If a psychotherapist has information that child abuse occurred, they may reveal that information even if privileged. That exception does not apply to "privileged communications that would establish the *absence* of abuse."[79] In examining the second clause of the exception, the ACCA found that the reading of the exception advocated by the defense was absurd.[80] The ACCA made it clear that the "purpose of the exception was not to turn over every alleged child-victim's mental health records to the alleged abuser."[81] The ACCA also stated conclusively that they "read this rule as applying only to the *admission* of psychotherapist patient communications."[82]

Finally, the ACCA addressed the need for the defense motion to compel production to "specifically describ[e] the evidence."[83] This allows both the "opposing party *and the patient*" to have notice of the potential disclosure.[84]

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[76] *Id.* at 616.
[77] "(d) *Exceptions.* There is no privilege under this rule: . . . (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse; . . . ." MCM, *supra* note 24, MIL R. EVID. 513(d)(2).
[78] L.K. v. Acosta, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017).
[79] *Id.* at 618.
[80] *Id.* at 618.
[81] *Id.* at 619.
[82] *Id.* at 618.
[83] L.K. v. Acosta, 76 M.J. 611, 620 (A. Ct. Crim. App. 2017) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 513 (e)(1)(A) (2016)).
[84] *Id.* at 620.

G. Seventh Petition

In *T.C. v. Cook*, ARMY MISC 20170204 (A. Ct. Crim. App. May 5, 2017), the victim petitioned the ACCA for a writ of mandamus alleging three errors on the part of the military judge.[85] The ACCA declined to overturn military judge's decision to allow the admission of MRE 412 evidence.[86]

H. Eighth Petition

In *A.G. v. Hargis*, 77 M.J. 501 (A. Ct. Crim. App. 2017), the victim petitioned the ACCA for a writ under 18 U.S.C. § 3771 and the All Writs Act.[87] "During CID's investigation, a military magistrate signed a search authorization for AG's cell phone . . . ."[88] The victim alleged that the military judge erred in instructing the military magistrate to deny A.G.'s request for the affidavit and documents used to support the government's request for the search and seizure authorization.[89] The victim also alleged that the military judge erred in refusing to consider A.G.'s request that the military judge disclose the same documents.[90]

The ACCA dismissed the petition for lack of jurisdiction because the petitioner failed to establish that the ACCA could take action in a case before referral.[91] The ACCA rejected "petitioner's invitation to extend the jurisdiction of this court under the All Writs Act to the pre-preferral matter raised."[92] They also rejected the argument that they had jurisdiction under 18 U.S.C. § 3771(d)(8), stating "a right to be treated with fairness, dignity, and privacy does not give a victim a right to receipt of discovery and

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[85] The victim alleged "[t]he trial court erred in ruling that defense met its burden to show that the evidence they sought to introduce fell within an enumerated exception to Mil. R. Evid. 412, the trial court erred in ruling that defense met its burden to show the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members under Mil. R. Evid. 403, and the trial court erred in failing to narrowly tailor it's order granting defense motion to introduce evidence under Mil. R. Evid. 412." Brief for Petitioner at 2, T.C. v. Cook, ARMY MISC 20170204 (A. Ct. Crim. App. May 5, 2017).

[86] T.C. v. Cook, ARMY MISC 20170204 (A. Ct. Crim. App. May 5, 2017) (order).

[87] Brief for Petitioner at 8 and 11, A.G. v. Hargis, 77 M.J. 501 (A. Ct. Crim. App. 2017).

[88] A.G. v. Hargis, 77 M.J. 501, 502 (A. Ct. Crim. App. 2017).

[89] Brief for Petitioner at 8 and 11, A.G. v. Hargis, 77 M.J. 501 (A. Ct. Crim. App. 2017).

[90] *Id.* at 18.

[91] A.G. v. Hargis, 77 M.J. 501, 502 (A. Ct. Crim. App. 2017).

[92] *Id.* at 504.

documents without an analysis of the case status and pending legal issue." [93] Additionally, the ACCA stated that "an alleged victim's discovery and production request is not ripe for decision by a military judge in a non-referred case" in spite of the guidance in the Standing Operating Procedure for Military Magistrates, Section IV, dated 10 September 2013.[94] The ACCA further held that "the military judge did not err by advising the military magistrate to deny the SVC's discovery request or by not acting on the SVC request, which created a de facto ruling denying the SVC's discovery and production request."[95] *A.G. v. Hargis* is an example that shows that there are times in which, regardless of the actions of anyone involved in the investigation or prosecution process, a petition for a writ of mandamus from the ACCA is not appropriate.

IV. The Process

A writ of mandamus a very specific remedy for a very specific set of violations of your client's rights. The SVC must provide their clients with the information necessary to make the best decision. By the time the ACCA is considering motions the SVC should already know the client's ultimate desire for the outcome of the case. If the client's goal is to conclude the process as quickly as possible, petitioning the ACCA for a writ will not be a good option as it will likely lead to a stay in the proceedings. Even though the law requires the ACCA to make the petition for a writ a priority,[96] there is no accurate way to predict how long the ACCA will take to make a decision, whether they will invite briefs from amici curiae, and whether they will allow for oral argument. Any of these could result in a considerable delay in the processing of the trial even if the ACCA ultimately decides in favor of the victim.

A writ petition poses additional concerns for a victim. The ACCA could deny the petition and not issue a writ or they could issue a writ that harms the government's case against the accused. It is the SVC's duty as the victim's advocate to ensure that their client is aware of as many of the potential outcomes as possible so that they can make an informed decision.

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[93] *Id.*
[94] *Id.*
[95] *Id.* at 502.
[96] UCMJ art. 6b (2016).

A. Trial Court

The following is a process SVCs are recommended to follow if, and when, they decide to petition the ACCA for a writ.

Once the SVC is certain of their client's wishes and they believe that the victim has made the informed decision to petition the ACCA for a writ, the SVC should contact the SVC Program Manager's Office at the Pentagon.[97] The SVC may contact the SVC Program Manager's Office for assistance with any issue when representing a victim of sexual assault. The Program Manager's office is the SVCs technical chain of command, and therefore SVCs can discuss the specifics of their client's case without violating attorney-client privilege.[98]

The SVC Program Manager's Office does not approve or disapprove an SVC submitting a petition for a writ, but they may be able to offer advice about whether it is advisable for the SVC to take this action. The Program Manager's Office may also be aware of cases similar to theirs that represent a trend that the Program Manager wants to address. The Program Manager's Office could also be aware of recent changes in the law that would make the proposed petition moot. While the victim certainly would not want to hear this, it may save the SVC a lot of time and effort and prevent delays in the trial. In addition, the Program Manager's Office may be able to get the SVC in contact with attorneys with experience in the sister service Courts of Criminal Appeals who are often willing to review petitions drafted by SVCs and offer advice. Finally, it is a professional courtesy to ensure that the Program Manager's Office is aware of a petition that will be submitted to the ACCA so that they are not "blindsided" by someone in the Office of The Judge Advocate General bringing up an SVC issue that they have never heard of.

The SVC should notify the trial court that they intend to petition the ACCA for a writ. They must take special care that this notification is not conveyed as a threat to the military judge. If the SVC has discovered evidence or law that they believe the military judge did not consider when rendering their original decision, the SVC should make a motion for reconsideration to the trial court before petitioning the ACCA for a writ. Soon after, or contemporaneous to, the SVC notifying the military judge

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[97] SPECIAL VICTIMS' COUNSEL PROGRAM, U.S. ARMY, SPECIAL VICTIMS' COUNSEL HANDBOOK FOURTH EDITION para. 10.a.(2) (9 June 2017) [hereinafter SVC HANDBOOK].
[98] *Id.*, para. 8-3.c.

that they intend to petition the ACCA for a writ, it is good practice to request a stay of the proceedings in the court-martial. While military judges are unlikely to grant this stay, it could be helpful in speeding the process of the petition at the ACCA or convincing them to order a stay.

B. Army Court of Criminal Appeals

1. Mechanics

In accordance with the United States Army Court of Criminal Appeals Rules of Practice and Procedure, if SVCs are not already admitted to practice in front of the ACCA, they will need to include a Motion for Leave of the ACCA to Appear pro hac vice.[99] This is required to be submitted with the pleading.[100] This motion must include a Certificate of Good Standing from a qualified bar and an affidavit stating that the SVC has never been disbarred or suspended from the practice of law and is not currently under investigation or pending disciplinary action.[101]

The ACCA requires electronic filing unless given permission by the Clerk of Court.[102] The SVC must adhere to very specific formatting rules for their filing and for the email to which they attach it.[103] The SVC should then serve pleadings on all counsel of record.[104] Finally, they must attach a Certificate of Service attestation to their pleading.[105]

The ACCA requires that SVCs submit a petition for extraordinary relief in accordance with strict formatting rules.[106] The caption of the petition must "specify the type of writ sought (for example, Petition for Extraordinary Relief in the Nature of a writ of Mandamus)."[107] A brief in support of the petition is also required.[108] This is where the SVCs make their legal arguments.

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[99] UNITED STATES ARMY COURT OF CRIMINAL APPEALS, RULES OF APPELLATE PROCEDURE r. 13.1(b) (15 Jan. 2019).
[100] *Id.*
[101] *Id.* r. 13.3.
[102] Filing must be sent to the following email address: usarmy.pentagon.hqda-otjag.mbx.us-army-clerk-of-Court-efiling@mail.mil. *Id.* r. 5.1.
[103] *Id.* r. 5.2.
[104] *Id.* r. 5.6.
[105] *Id.* r. 5.7.
[106] *Id.* r. 20.
[107] *Id.* r. 20.2(a).
[108] *Id.* r. 20(e).

2. Content and Tone

When an SVC begins to draft a brief in support of a petition for a writ, they must first determine if the ACCA has jurisdiction. As mentioned above, the ACCA recognizes the new Article 6b(e)(3), UCMJ, as "a new and separate authority for this court to issue writs" and a "distinct authority from the All Writs Act."[109] In order to find jurisdiction to issue a writ under Article 6b, UCMJ, the ACCA "need only determine that the petition addresses the limited circumstances specifically enumerated under Article 6b(e)."[110] This is all that is required to be cited in the jurisdictional analysis when submitting a petition for a writ to the ACCA. Special victims' counsel should not "rely on pre-1999 cases that assert that the All Writs Act permits military appellate courts to exercise supervisory control over military justice."[111] Notably, in *A.G. v. Hargis*, the ACCA signaled their reluctance to exercise jurisdiction to address rights beyond those contained in Article 6b, UCMJ.[112]

If the SVC believes that the ACCA has jurisdiction, they must determine whether they can make an argument that the petition meets the standards from the *Cheney* decision.[113]

When drafting the brief in support of their petition, it is important that SVCs remember that the ACCA is less accepting of or willing to entertain some of the behavior that is allowed in trial courts. Extreme language or incredulity do not lend weight to the argument or increase the chances that the ACCA will rule in favor of the victim.[114] "Lay off the bluster and the adverbs 'truly, madly, deeply unreasonable.'"[115] It is more likely that the Government Appellate Division will be interested in drafting a brief in support of a petition if it is not offensive to the ACCA on its face.[116]

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[109] D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 at *5 (A. Ct. Crim. App. Feb. 1, 2016) (mem. op.).
[110] *Id*.
[111] E-mail from Captain Samuel E. Landes, Chief, Branch, Government Appellate Division, to author (Oct. 30, 2017, 09:47 EST) (on file with author) [hereinafter CPT Landes E-mail].
[112] A.G. v. Hargis, 77 M.J. 501, 504 (A. Ct. Crim. App. 2017) (denying petitioner's request for writ of mandamus because "jurisdiction does not exist at this juncture under 10 U.S.C. §806b(e)(1) based on the nature of petitioner's writ").
[113] *See infra* note 55.
[114] Interview with Captain Catherine Parnell, Chief, Branch 4, Government Appellate Division (Jan. 25, 2018) [hereinafter CPT Parnell Interview].
[115] CPT Landes E-mail, *supra* note 111.
[116] CPT Parnell Interview, *supra* note 114.

Instead, draft a quality brief applying the facts to the law.[117] Finally, "You have to treat ACCA with the professionalism it is accustomed to from the more frequent litigants from the government and defense bar."[118]

3. Oral Argument

It is possible, if unlikely, that the SVC will get the opportunity to make oral argument in front of the ACCA in support of their petition. If an SVC gets this opportunity, they should notify the SVC Program Manager's Office right away. The Program Manager's Office will likely be able to assist them in their preparation and get them in contact with judge advocates with experience making arguments to the ACCA.

VI. Conclusion

The petition for a writ of mandamus is a useful tool to for an SVC to assist in the zealous representation of your clients. However, it must be used wisely. First, the SVC must help their client decide if this is the best course of action for them. Next, the SVC must master the relevant statutory and case law discussed above. Then, the SVC must leverage the resources available to them to draft a quality petition and brief in support of that petition. For some, petitioning an appellate court is an exciting prospect. For others, it is overwhelming to imagine. Hopefully, with the guidance offered herein, SVCs will be able to properly employ this valuable tool to protect their clients' rights, and possibly those of other victims for years to come.

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[117] CPT Landes E-mail, *supra* note 111.
[118] *Id.*