IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

JACQUELINE E. EMANUEL,
Colonel (O-6)
Military Judge,
U.S. Army,
Respondent

and

CARMEN IRONHAWK
Sergeant (E-5),
U.S. Army,
Real Party in Interest

REAL PARTY IN INTEREST RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION

Docket No. ARMY MISC 202400057

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COMES NOW the Real Party in Interest, by and through undersigned appellate defense counsel, and requests this Court DENY the Government's petition for a writ of prohibition and VACATE the stay of trial proceedings.

Introduction

The government asks this court to prevent an *in camera* review of its communications that pertain to a potential charge of unlawful command influence [UCI]. The military judge's own concern about UCI is unsurprising. After all, the staff judge advocate [SJA], at the apparent behest of the Commanding General at

Fort Bliss, emailed the Chief Trial Judge complaining about the military judge's latest grant of an unopposed continuance, and the Chief Trial Judge directly communicated those concerns to the military judge and contemplated "assuming [her] responsibilities."

The military judge later granted trial defense's request for the judge to review *in camera* documents relating to the OSJA's communications with the Chief Trial Judge. The purpose of the review was to determine whether any materials should be disclosed to the defense. The military judge also advised that, prior to any disclosure, she would afford the government an opportunity to appeal.

It is from that reasonable order the government now seeks relief. In other words, the government asks this court to prohibit the trial judge from seeing documents that potentially implicate government actors in committing UCI to which there is already evidence, disclosed on the record by the military judge, but not cited in the Government's petition. This court should deny the government's request for an extraordinary writ as it fails multiple portions of the applicable test, is not necessary or appropriate, and the communications never fell under R.C.M. 109 nor do they clearly implicate Work-Product.

Relevant Facts and History of the Case

On 11 October 2023, the military judge granted trial defense's unopposed motion to continue the accused's murder trial. (App. Ex. XXXVI; App. Ex. XXXVIII). The convening authority and victim's family expressed frustration by this delay. (App. EX XL, Att A-C). To express that concern, the SJA, Colonel (COL) Kristy Radio, emailed COL Chris Kennebeck, Chief of the Criminal Law Division of the Office of the Judge Advocate General, to notify him she intended to contact COL Tyseha Smith, the Chief Trial Judge of the Judiciary, about the delay. (App'x 1)

COL Radio's email to COL Kennebeck did not cite or mention Rule for Courts-Martial (R.C.M.) 109, nor did it request an investigation or issues with other cases. (App'x 1). COL Kennebeck responded, "Send it! I will reinforce." (App'x 1).

The next afternoon COL Radio emailed Chief Judge Smith, cc'ing COL Kennebeck, informing her that, "[g]iven the overwhelming gravity of this murder case, both the Command and the family are disappointed." (App. EX XL, Att A-C). She further noted that delays were "disillusioning their faith in the system" and risking loss of witnesses and evidence. (App. EX XL, Att A-C). Chief Judge Smith acknowledgment receipt and cc'd the Chief of Trial Defense Service [TDS]. (App. EX XL, Att B). That email was later forwarded to trial defense. There was no

objection/ citation to R.C.M. 109 for the next three months even in the Government's October Response to the Defense's discovery request. (App. Ex. XL, Att. D).[1]

The email correspondence caused additional discovery requests. (App. Ex XXXVI, Att. D). These included, among other materials, all communications from members of the OSJA on the continuance, and all communication from the OSJA and the prosecution team relating to the communication with Chief Judge Smith. (App. Ex. XXXVI). TDS also requested interrogatories from COL Radio and Chief Judge Smith. The government denied most these specific requests. (App. Ex. XXXVI; R. 98-101).

Following the denial of its discovery requests, trial defense filed for a motion to compel. (App. Ex. XXXVI). Its motion specifically contemplated the need for an *in camera* review.

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[1] The Government's first ever cite to R.C.M. 109 came more than three months after the October email where there had been no explanation, push-back, or corrections. This suggests the R.C.M. 109 is a *post hoc* rationalization. Generally, *post hoc* rationalizations are given little weight and are disfavored. *See e.g., United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008) (distinguished on other grounds); *United States v. Kirk*, ARMY 20100443, 2010 CCA LEXIS 82 (Army Ct. Crim. App. July 28, 2010) (Mem. Op. and action on appeal pursuant to Art. 62); *United States v. Shelton*, 64 M.J. 32, 47 n.23 (C.A.A.F. 2006) (Crawford, J. dissenting) (quoting *United States v. Flores-Galarza*, 40 M.J. 900, 906 (N.M.C.M.R. 1985)).

On 8 December 2023, Chief Judge Smith called the military judge to discuss COL Radio's email.[2] (R. 85-86). On 22 January 2024, at an Article 39(a) proceeding regarding the defense motion to compel discovery at issue in this petition, the military judge summarized the phone call: The military judge revealed that "[COL Smith] . . . told me that sometime in October she had received an e-mail from COL Radio expressing disappointment because the case had to be continued. […] She told me the reason why she was calling me then . . . was that there was now a discovery request from the defense related to COL Radio's email, and [COL Smith] was thinking of assuming responsibility for the case . . . to avoid any appearance of UCI unlawful command influence."[3] (R. 85-86). The military judge responded by telling COL Smith that replacing her would "have the opposite result" in that it would be perceived as "taking action in response to COL Radio's email." (R. 86)

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[2] It is unclear who informed Chief Judge Smith of the defense's motions and requests, but this indicates that further communications may have taken place.

[3] Chief Judge Smith also expressed concern over how the case could draw Congress' attention to the trial judiciary. The military judge recalled:

> Colonel Smith discussed with me how she did not want the trial judiciary to be the cause of cases being delayed. In particular, she mentioned that, she mentioned the changes to the military justice system that had been directed by Congress and pointed out that they had not seen fit to make changes to the trial judiciary and that she wanted to ensure that that remained the case. (R. 86).

The military judge further disclosed that after her push back on Chief Judge Smith's suggestion, the Chief Judge brought up some of the previous feedback the judiciary received on the military judge, including the time it takes to issue rulings, and as well as concerns of enough "white space" on the military judge's calendar. (R. 85-86). At the end of the conversation, the military judge "asked COL Smith to take the weekend to give some more thought to whether she should assume responsibility." (R. 87).

Four days later, the military judge telephoned Chief Judge Smith and "reiterated to COL Smith that I did not believe that her assuming responsibility for this case would alleviate UCI concerns." (R. 87). The military judge also told COL Smith that she would "hold an Article 39(a) session wherein [she] would disclose the conversations that [she] had COL Smith . . . and . . . give counsel the opportunity to voir dire [her]." (R. 87-88). Though "surprised," Chief Judge Smith agreed this was the proper course. (R. 93).

After voir dire, the Government said, unequivocally, they were not seeking recusal of the military judge. (R. 95). The defense, however, felt the need to see the discovery at issue in this petition before making an informed decision about what actions may be needed. (R. 95-96).

At the end of the Article 39(a) hearing, the military judge indicated she was inclined to have COL Radio and Chief Judge Smith testify for the motion to

compel discovery. (R. 98-101). Following this disclosure, the defense stated that the "discovery was even more important in this case." (R. 96). The parties *agreed* to make COL Radio available to testify, and defense then reiterated its need for the "communications" to help inform the questions it would ask, noting again that an *in camera* review could filter out any non-relevant, privileged materials. (R. 98-101). The military judge concurred, telling government counsel, "I'm going to ask you to produce the requested documents to me so I can conduct an *in-camera* review." (R. 101-102; App. Ex. XLVII; XLIX). At that time, the government counsel indicated it would comply with the order. (R. 101-102).

On 1 February 2024, the military judge ordered the government provide only materials at issue here for an *in camera* review. (App. Ex. XLVII; XLIX). The military judge's order also provided she would not turn over any privileged material until the government had an opportunity to seek appropriate relief.

A few hours before the military judge's 6 February 2024 deadline, the government filed its motion to recuse the military judge and asked the military judge to stay the deadline for production until she ruled on the recusal. (App. Ex. LI).[4] The military judge then moved the deadline to 8 February after a defense motion to dismiss for noncompliance with the deadline. (App. Ex. LII; LIII; LV, p

[4] The Defense opposed the Government's Motion for Recusal. (App. Ex. LV).

17). On 8 February, the Government Appellate Division requested and was granted a Stay, pending their petition for extraordinary relief.

Issue Presented

WHETHER PETITIONER HAS ESTABLISHED THAT THE EXTRAORDINARY WRIT IS NECESSARY AND APPROPRIATE AND THE LAW CLEAR AND INDISUPUTABLE

Law and Argument

A writ "is a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotations and citations omitted); *see also United States v. Howell*, 75 M.J. 386, 390 (C.A.A.F. 2016) ("A writ of prohibition . . . is a drastic instrument which should be invoked only in truly extraordinary situations.") (internal quotations and citations omitted). To achieve this drastic remedy, the acts requires two determinations: 1) whether the requested writ is "in aid of " the lower court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." *Id.* (citing *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted)).Even when the first two prongs are met, the final issue regarding necessary and appropriateness of the writ "is largely discretionary." *Gross*, 73 M.J. at 868-69 (quoting *United States v. Higdon*, 638 F.3d 233, 245 (3d Cir. 2011) (internal citation omitted). In exercising this discretion, the Court of Appeals for the Armed Forces (CAAF) has noted that

"where a military judge's decision is within [her] discretion, the decision 'must amount to more than even gross error; it must amount to a judicial usurpation of power, or be characteristic of an erroneous practice that is likely to recur.'" *Id*. (quoting *Labella*, 15 M.J. at 229 (internal citations omitted)).

A. A writ would not be "in aid of" the lower court's jurisdiction

Unlike a writ during the post-trial portion of a case where the Act is "limited to matters that 'ha[ve] the potential to directly affect the findings and sentence,'" in this situation, the matters only affect documents that are *arguably*, but likely not, "work-product." *Howell*, 75 M.J. at 390 (citing *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013) (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)); *see also LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013). Since there are other remedies available as the military judge has not even viewed the material yet, this fails the first determination since it is not in aid of the court's jurisdiction unlike *Howell* or *United States v. Gross*, 73 M.J. 864, 866-67 (A. Ct. Crim. App. 2014). In *United States v. Pritchard,* 82 M.J. 686, 690 (A.C.C.A. 2022) and *Gross*, both cases directly affected the findings and or sentence and would be, in a manner, a fundamental change in the law or outcome determinative. There is no similar equivalence here.

In this case, the government makes what is essentially, an attenuated parade of horribles argument that (1) the communications (even with external agencies)

may contain materials disparaging the military judge, (2) the military judge will read them, (3) the military judge *may* become bias,[5]and (4) the military judge *may* disregard the law and not recuse herself.

However, this is simply a dispute about a discovery. There is a factual basis (the email and 39a disclosures) and the judge followed the Supreme Court, CAAF, this Court, sister courts, the M.R.E., and R.C.M. for *in camera* review for work-product screening as noted below. Since this does not fatally affect the proceedings like in *Gross* or *Pritchard*, it is not "in aid of" the lower court's jurisdiction.

B. The government fails to show a "clear and indisputable right."

A writ of prohibition is a "drastic instrument which should be invoked only in truly extraordinary situations." *Howell*, 75 M.J. at 390 (citing *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983)). To prevail, the petitioner must show that: "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Id.* (citing *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81)).

[5] The government's argument is confusing. Prior to its writ, the government moved for the military judge to recuse herself based on her current "exposure" to COL Radio's complaint, and thus, is presumably of the position that the military judge is already disqualified. As the motion remains pending, is the government's concern now that she will become too disqualified?

This is "an extremely heavy burden." *Dew v. United States*, 48 M.J. 639, 648 (A.C.M.R. 1998); *United States v. Rechnitz*, 75 F.4th 131, 140 (2nd Cir. 2023) (noting the burden to show a "clear and indisputable right" is "exceptionally high").

Critically, courts "require more than a showing that the court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015); *see also In re McGraw-Hill Global Educ. Hodings, LLC*, 909 F.3d 48, 57 (3rd Cir. 2018) ("reversible error by itself is not enough to obtain [a writ]"). The decision of the military judge "must amount to a judicial usurpation of power[,]" where the decision was directly "contrary to statute, settled case law, or valid regulation." *Dew*, 48 M.J. at 648; *see also In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) ("we will deny [relief] even if a petitioner's argument, though pack[ing] substantial force, is not clearly mandated by statutory authority or case law.") (internal quotations and citations omitted) (second alteration in original).

Here, the government fails to show an abuse of discretion, let alone a "judicial usurpation of power." To start, the materials are demonstrably relevant to trial defense's investigation of UCI. Article 37(a), UCMJ, explicitly prohibits "any person subject to [the UCMJ] from attempting . . . to influence the action of a court-martial." The intent to actually interfere with a case is not required, but it can

often impact the remedy. *Id*; *see also Sayler*, 72 M.J. at 423 (finding UCI where a member of the SJA office called the military judge's supervisor and then the supervisor called the military judge to express that the SJA was "not happy" with a ruling/definition). In *United States v Harvey*, the court noted the effect of "superior rank or official position upon one subject to military law, [is such that] the mere asking of a question under [certain] circumstances is the equivalent of a command." 37 M.J. 143 (C.M.A. 1993). Even an "improper manipulation of the criminal justice process' . . . effectuated unintentionally, will not be countenanced by this [c]ourt." *United States v. Barry*, 78 M.J. 70, 78 (2018) (quoting *United States v Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017)). That manipulation can be from a single phone call. *See United States v. Villareal*, 52 MJ 27 (C.A.A.F. 1999).

For example, in *Lewis*, the SJA "through suggestion, innuendo, and [his] personal characterization" of the judge's out of court actions, influenced the trial counsel to *voir dire* the judge until she recused herself. 63 M.J. at 414. One of the replacement military judges found UCI and disqualified the SJA from further actions in the case. *Id*. at 411. The CAAF was "concerned that the SJA's instrument in the courtroom, the trial counsel, remained an active member of the prosecution . . ." *Id*. at 414. The judge's remedies (disqualification) were not sufficient to remove this taint and CAAF set aside the conviction. *Id*. at 414-17.

Likewise in *Salyer*, the trial counsel's supervisor, told the military judge's supervisor he was "unsure about why" the military judge had made a particular ruling (that the trial counsel did not appeal). 72 M.J. at 420-21. The military judge's supervisor then told the military judge that the OIC informed him that he was "not happy" about the ruling. *Id*. at 421 (citation omitted); *see id*. at 425-26. The military judge recused himself because of the communication from the OIC to the military judge's supervisor, and trial counsel's voir dire. *Id*. at 421-22. The CAAF found UCI citing, in part, the recusal of the challenged judge. *Id*. at 428. Similar to *Lewis*, "the same persons [trial counsel and his supervisor] who" made *ex parte* contact with the military judge's supervisor were not barred from [all] further participation in the case." *Id*. CAAF dismissed with prejudice. *Id*; *see also United States v. Hutchinson*, 2015 CCA LEXIS 269, *32-34 (A.F.C.C.A. 2015) (finding the defense had met the burden of showing the SJA created an appearance of UCI when the SJA called the judge's supervisor to discuss the judge's decision denying a trial counsel request to hold an Article 39(a) session); *Cf*. *United States v. Larrabee*, 2017 CCA LEXIS 723, *10 (N-M.C.C.A. 2017).

Colonel Radio emailed Chief Judge Smith to express disappointment for an unopposed continuance. Nearly two months after that email, and *somehow* aware of trial defense's then-pending discovery request, Chief Judge Smith contacted the military judge, relaying the SJA's "disappointment" and advising her she was

considering "assuming responsibilities." The military judge's own observations showed concern of UCI, and similar *ex parte* conversations have amounted to UCI. *See Salyer*, 72 M.J. at 425-26; *Hutchinson*, 2015 CCA LEXIS 269, *32-34.

Thus, the materials at issue, which relate to the continuance and the potential *ex parte* communication with COL Radio, are likely to make the existence of UCI more (or less) probable, especially as these materials may show whether COL Radio was, in fact, making a "confidential" complaint and may also reveal what other communications were made, to or from, the Chief Judge. *See Sayler*, 72 M.J. at 425-26; *see also United States v. Yates*, 2019 CCA LEXIS 391, *45 (A.F. Ct. Crim. App. 30 Sep. 2019) (finding communications about the "spontaneous resurrection of the charges" relevant to the issue of UCI because it "had some tendency to make the existence of UCI less probable.").[6]

The government's contrary conclusion on relevancy is wholly unpersuasive. For one, its entire argument fails to address, or even mention, any detail of the military judge's disclosure concerning her conversations with Chief Judge Smith. Indeed, it appears the government passed over these facts entirely, as it asserts

[6] While *Yates* was decided on "materiality," the President removed the materiality requirement from RCM 701. *See* RCM 701(a)(2) (2019 ed.).

elsewhere that the "*sole* basis" for the UCI allegation was COL Radio's email.[7] (Pet. Br. at 13) (emphasis added). That may have been so *prior to* the military judge's disclosure, but not after. Moreover, and notably, relevance was not grounds for the government's denial of discovery and production and, as the government acknowledges, it *agreed* to produce COL Radio for a UCI motion.

Similar to *Salyer* and *Hutchinson*, the SJA emailed the military judge's supervisor that she, the convening authority, and the victim's family were "not happy" about the military judge's ruling. 72 M.J. at 421. Like *Salyer*, the government then *voir dired* the judge about the communications. *Id*. 421-22. Then, as in *Salyer*, the government is now seeking to have the military judge recused for *the communication its SJA initiated*. Therefore, there is evidence that of improper communication and UCI, and it would meet even the Petitioner's *Wright* test (discussed below). Importantly, as *Salyer*, *Lewis*, and *Hutchinson* all note, in attempting to cure UCI, military judges often consider disqualifying those who committed the error which makes those involved in the emails relevant.

Given the relevant nature of the materials, the petitioner's "clear and indisputable right" to extraordinary relief turns on whether its claim of "privilege"

[7] It's plausible that government appellate counsel was not aware this existed as it appeared the trial counsel, for an unknown reason, did not forward the transcript that led to the government's stay request until after both government filings.

is an *absolute* bar to an *in-camera* review under the specific facts of this case. That answer is no.

First, it is not clear whether the government properly asserted privilege in the first instance. Rule 701(f) protects the work product privilege, *see United States v. Mellette*, 82 M.J. 374, 379 (C.A.A.F. 2022), which, at its core, covers materials "specifically compiled and prepared with a reasonable anticipation of trial" that "encapsulate the attorney's thought processes" such as his "theory and theme of the case." *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997). Thus, "not every document created by a government lawyer qualifies for the privilege." *Nat'l Assn. of Crim. Def. Lawyers v. United States DOJ Exec. Office for United States Attys*, 844 F.2d 246, 251 (D.C. Cir. 2016). Rather, counsel claiming the privilege must show its applicability with sufficient specificity for the trial court to "test[] the merits" of the claim. *See EEOC. v. BDO USA, L.L.P.*, 876 F.3d 690, 697 (5th Cir. 2017) (alternations in original). A "blanket assertion" of privilege, like the one government offered here, is "generally unacceptable."[8]

[8] The government's denial of trial defense's discovery request offered little more than a recitation of RCM 701(f)'s text, and its response to defense's motion to compel reiterated its discovery response, adding only that the recipients of communications were either "counsel's representatives" or "counsel's assistants." (App. Ex. XL, Att. E; Pet. Br., App. at 26, 31). Importantly, this response on October 27th *did not cite* RCM 109. (App. Ex. XL, Att. D) Before this court, the government's tepid assertion of privilege is even more opaque, claiming only that the materials are "*likely* to contain" work product. (Pet. Br. at 8).

Drummond Co. v. Collingsworth, 816 F.3d 1319, 1327 (11th Cir. 2016). The defense's constitutional, and Art. 46 statutory, rights to produce evidence under the compulsory process clause may even "overcome the attorney-client privilege" which is generally a stronger privilege than work-product given the hierarchy. *Romano*, 46 M.J. at 274.

However, work-product has a narrower definition compared to civilian counterparts. *Id.* (referencing *Goldberg v. United States*, 425 U.S. 94 (1976) (application of the work-product privilege witness statements)). As the Supreme Court in *Nobles* said: "At its core, the work-product doctrine shelters the mental processes of the attorney . . . ." 42 U.S. at 238. The "outer boundaries" of the rule include "memoranda which set forth the attorney's theory and theme of the case." *Romano*, 46 M.J. at 275 (citing *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975)).

To date, this privilege has never been applied to potential UCI evidence where there is credible evidence of an attempt to influence a proceeding (even unintentionally). *See e.g., Salyer,* 72 M.J. at 426) (dismissing for UCI when an SJA contacted a judge's supervisor to indicate unhappiness with a ruling); *Lewis*, 63 M.J. 405; *see also Hutchinson*, 2015 CCA LEXIS 269, *32-34.

Likewise, there is no caselaw regarding communications outside of the prosecution team that are not about specific litigation strategy (such as a case's

theme/theory), but rather discussing whether to contact the judge's supervisor (or OTJAG Criminal Law Division).

Second, *in camera review* is the rule, not the exception. As the government correctly admits, "[n]ormally, *in camera* review is an appropriate mechanism to resolve competing claims of privilege and right to review information[,]" (Pet. Br. at 9) (quoting *United States v. Wright*, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015) (en banc). When there is a claim of work-product that may be discoverable, it is clear and undisputable that the Supreme Court, CAAF, this Court, the Navy-Marine Court, and as the government cites, the Air Force Court have held *in camera* reviews are appropriate when there is a claim of privilege or work-product and some evidence.[9]

[9] *United States v. Zolin*, 491 U.S. 554, 568 (1989) ("holding that a complete prohibition against an opponent's use of in camera review to establish the applicability of the crime-fraud exception to the attorney-client privilege is 'inconsistent with the policies underlying the privilege'"); *Romano*, 46 M.J. at 275 (finding *in camera* review the procedure outlined in the RCM for a claim of work-product protection); *United States v. Shelton*, 59 M.J. 727, 734 n.16 (A.C.C.A. 2004); *United States v. Bowser*, 73 M.J. 889, 900 (A. F. Ct. Crim. App. 2014); *United States v. Thomas*, 2005 CCA LEXIS 399, *5-6 (N-M.C.C.A. 2005) ("We conclude that the military judge did not abuse his discretion. Rather, he followed our superior court's suggestion to examine the disputed notes *in camera,* [and] properly evaluated the notes for relevance and work-product privilege . . .")

While the government cites for its "clear and undisputable" authority one non-controlling Air Force case that finds *in camera* review is not mandated under the specific facts of that case, the overwhelming majority of Air Force cases find *in camera* view proper. *See e.g., United States v. Bowser*, 73 M.J. 889, 900 (A. F. Ct. Crim. App. 2014) ("Military judges routinely inspect potentially privileged material; any applicable privilege is not diminished merely because the military judge privately reviews the material"). The CAAF, in *Romano*, summarized the process in a clear and undisputable way:

> we would expect the military judge to examine *in camera* any documents for which the work-product privilege is claimed. The military judge should determine which documents fall under the work-product privilege in accordance with the principles discussed above. Any documents not released should be sealed. The military judge may issue appropriate protective orders for any documents ordered released to trial defense counsel.

46 M.J. at 275.

This is consistent with the tool that the President proscribed in the Rules for Courts-Martial. For example, RCM 701(g)(2)) permits the military judge to conduct *in camera* reviews over any evidence to which a claim of privilege applies. *In camera* review is appropriate for evidence that is *actually* protected by privilege under the 500 series of the MRE. *See* Mil. R. Evid. 505(h)(2)(B); Mil. R. Evid. 513(e)(3). Our superior court has ruled that even if a qualified newsgathering

privilege exists, such a privilege would not preclude an *in camera* review. *United States v. Wuterich*, 67 M.J. 63, 79 (C.A.A.F. 2008).

And the government fails to provide any *controlling* authority circumscribing the applicability of *in camera* review or otherwise defining cases inappropriate for such review, nor is the real-party-interest aware of any authority. Here, the military judge's ruling balanced the competing interests of discovery and work-product, and without additional controlling authority describing how to conduct the assessment, it cannot be said that she committed a "judicial usurpation of power" or was otherwise unreasonable under the exceptional facts of this case. *See United States v. United States Dist. Court*, 884 F.3d 830, 837 (9th Cir. 2018) ("[t]he absence of controlling precedent weighs strongly against a finding of clear error [for extraordinary relief]."); *Dew*, 48 M.J. at 648 (noting that extraordinary relief is appropriate only where the military judge's clear error violated statute, valid regulation, or "*settled* case law") (emphasis added); *In re Al Baluchi*, 952 F.3d at 369.

Third, even if this court applies the test in *United States v. Wright*, 75 M.J. 501 (A.F. Ct. Crim. App. 2015), the sole authority the government cites, the real-party-interest still. *Wright*, states "[n]ormally, *in camera* review is an appropriate mechanism to resolve competing claims of privilege and right to review information." *Wright*, 75 M.J. at 510. However, it appears to be the only court to

distinguish the *in camera* review, and as the same CCA noted four years later in *Yates*, was limited to specific facts that are not remotely close to this case. *United States v. Yates*, 2019 CCA LEXIS 391, *56 (A. F. Ct. Crim. App. 2019). So even if this court applies the test in *Wright*, the sole authority the government cites, the real-party-interest still prevails.

Wright dealt with the decision to *abate* the proceeding when the government refused an order to produce documents, and was brought to this Court under Article 62, not a writ. *Id.* (citing *Wright* 75 M.J. at 505-08). However, importantly, *Wright* did not involve the known and actual existence of an improper communication like here that the defense and military judge already possess. *Id.*

Wright does not foreclose review of materials *in camera* where there is work product assertion; it only requires the party seeking the review to show that a "sufficient factual basis exists demonstrating a reasonable likelihood that the documents over which the [g]overnment claim[s] privilege contain[] information necessary to [a UCI allegation]." *Id*. at 510. While *Wright* did not meet this criterion because of his highly speculative allegation, which stemmed only from an unorthodox transfer of his case, *id* at 510-11, the same cannot be said here for the reasons previously stated. For this court to require more risks a due process deprivation. *United States v. Nixon*, 418 U.S. 683, 712 (1974) ("the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial

would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.")

The government's remaining complaints as to its "clear and indisputable right" are form over substance and do not serve as grounds for extraordinary relief. Specifically, the government nitpicks the military judge for granting the *in camera* review where the trial defense did not technically offer "some exception" to the work-product privilege. (Pet. Br. at 11). However, the government's own citation to *Wright* establishes "some exception." *Wright*, 75 M.J. at 510.

The government also faults the military judge's ruling that was "bereft of analysis." (Pet. Br. at 12). Yet, while the ruling is not robust, this court has never required technical niceties in affirming a military judge's decision on appeal where the record establishes she was right. *See United States v. Leiffer*, 13 M.J. 337, 345, n. 10 (C.M.A. 1982) ("in the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."). This rule is no less applicable where the standard is something far more onerous than abuse of discretion.

In sum, the government has failed to meet is "extremely heavy burden" that the military judge's decision was "judicial usurpation of power." In failing, they have also attempted to elevate R.C.M. 109 into a new "privilege" without so much as a case-cite.

C. Issuance of the writ is not appropriate under the circumstances.

The petitioner cites no precedent that exempts R.C.M. 109 complaints from discovery or beyond the reach of Article 46. Rule for Court-Martial 109 is intended to govern ethical or unfitness allegations, not disagreements pertaining to an individual ruling on an individual case. *See e.g.,* R.C.M. 109(a)(2) Discussion ("[e]rroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process."). R.C.M. 109's tether to fitness and ethical allegations is found throughout the rule. *See e.g.,* R.C.M. 109(c)(7) ("The Ethics Commission"). R.C.M. 109 is derived from Article 6a of the UCMJ, which deals with "fitness" to serve. 10 U.S.C. § 806a.The Analysis of RCM 109 makes the rule's purpose and basis even more apparent. It notes that the "previous rule was limited to conduct of counsel *in* courts-martial." *Manual for Courts-Martial,* App. 21, R.C.M. 109 (2016 ed.). RCM 109, and the legislative history surrounding it, were meant to follow the same procedures as civilian judges. *Id.* (citing H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 656 (1989)). They are "patterned after the pertinent section of the American Bar Association's Model Standard Relating to Judicial Discipline and Disability Retirement (1978) . . . and the procedures dealing with the investigation of complaints against federal judges in 28 U.S.C. § 372 (1988)."*Id*. (referencing *Chandler v. Judicial Council,* 398 U.S. 74 (1970).

Simply put, the government's *post hoc* rationalization that COL Radio's email was an R.C.M. 109 communication is not supported by the record, facts, or the law; they fit in the improper *Salyer* communication category. First, COL Radio's email never cites RCM 109 nor uses any appropriate words to convey that notion. Second, despite the government now claiming it should have remained confidential, they fail to address why COL Radio sent a similar email to COL Kennebeck and then cc'd COL Kennebeck on her email to Chief Judge Smith. This indicates that this was not intended to be confidential. As the government concedes on page twelve (12), the appropriate person would have been the Chief Trial Judge and *not* OTJAG. Third, disclosure would have happened regardless – if this was a complaint, the military judge would have been given the notice and opportunity to respond under R.C.M. 109. Fourth, this is not about ethics, fitness, or a crime, it is about a single ruling (that COL Radio's counsel concurred in) in a single case – a completely discretionary ruling. Fifth, conveying the convening authority and victim's family's unhappiness does not support the notion that this is a judicial fitness or ethics complaint; it supports that this was a disagreement about the single ruling for a new trial date and an "unhappy" communication like *Salyer*. *See, e.g.*, R.C.M. 109(a)(2) Discussion. [10]

[10] Chief Judge Smith's cc'ing TDS tends to show that this was not an R.C.M. 109 communication and that she viewed this as an *ex parte* communication. That view is reenforced with COL Radio cc'ing COL Kennebeck.

D. There are other adequate means of relief.

Even if the government can show a "clear and indisputable right," the government must also prove there are no other adequate means of relief. *Hasan*, 71 M.J. at 418. The government likewise fails to satisfy this condition.

To show there are no other means of relief, the government does not rely on the harm to its work-product privilege. Nor could it. The "mere *in camera* review result[s] in no cognizable harm to the Government." *United States v. Bowser*, 73 M.J. 889, 900 (A.F. Ct. Crim. App. 2014). The harm would only result on disclosure to the defense, *id*, and the military judge's order affords the government the opportunity to seek redress before any disclosure occurs.

The government instead relies on the harm posed by "[f]urther exposing the military judge to emails by and between government counsel—that may themselves raise issues regarding [her] fitness—[which] would further call into question her ability to remain impartial." (Pet. Br. at 15). The government, however, has alternative means of recourse if this "exposure" occurs—move for the military judge's disqualification based on these new facts.

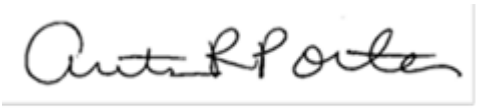
Conclusion

The government has failed to show a clear and indisputable right to the issuance of the writ and has other means of relief. Accordingly, the accused prays

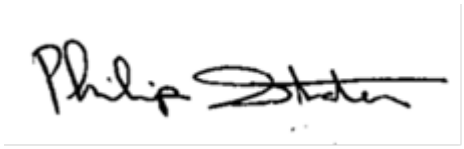
that this Court deny the petition for a writ of prohibition and vacate the stay of the proceedings.

Robert D. Luyties
Major, Judge Advocate
Branch Chief
Defense Appellate Division

Robert W. Rodriguez
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division



Philip M. Staten
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals, the Government Appellate Division, and the Defense Appellate Division on 04 March 2024.

ROBERT D. LUYTIES
Major, Judge Advocate
Branch Chief,
Defense Appellate Division

Appendix 1

Radio, Kristy L COL USARMY 1 AD (USA)

From: Radio, Kristy L COL USARMY 1 AD (USA)
Sent: Monday, October 16, 2023 3:35 PM
To: Kennebeck, Christopher A (Chris) COL USARMY HQDA OTJAG (USA)
Subject: RE: Ironhawk
Signed By: kristy.l.radio.mil@army.mil

Thank you!

From: Kennebeck, Christopher A (Chris) COL USARMY HQDA OTJAG (USA) <christopher.a.kennebeck.mil@army.mil>
Sent: Monday, October 16, 2023 3:25 PM
To: Radio, Kristy L COL USARMY 1 AD (USA) <kristy.l.radio.mil@army.mil>
Subject: RE: Ironhawk

Send it! I will reinforce.

C

v/r
Chris A. Kennebeck
COL, JA
Chief, Criminal Law Division
Office of The Judge Advocate General

Pentagon Rm 3D548
Office: 571-256-8131
DSN: 312-260-8131
Gov't Cell: 703-981-7456

From: Radio, Kristy L COL USARMY 1 AD (USA) <kristy.l.radio.mil@army.mil>
Sent: Monday, October 16, 2023 4:58 PM
To: Kennebeck, Christopher A (Chris) COL USARMY HQDA OTJAG (USA) <christopher.a.kennebeck.mil@army.mil>
Subject: Ironhawk

Chris,

Below is a summary of the Ironhawk delay that we discussed last week.

The case was originally docketed by Judge Jacqueline Emanuel on 20 April 2023 for 24 October – 3 November. The Motions deadline was 28 July 2023 and the Government and Defense each filed 5 Motions:

Government:
- Motion to Exclude 911 Call
- Motion to Exclude Suicide Defense
- Motion to Exclude Mention of Dr. Downs and his Report
- Motion to Exclude Previous DV Instances
- Motion for Clarification on Date of Death

Defense:
- Motion to Compel Discovery
- Motion to Compel Production of Witnesses
- Motion to Suppress Video Interviews
- Motion for Unanimous Verdict
- Motion to Exclude MRE 404b Evidence

The Motions Hearing was on 11 August. The only Motion which generated argument and witnesses was the Motion to Suppress. Judge Emanuel only ruled on one Motion, the Unanimous Verdict, from the bench. The rest she planned to take under advisement and issue written rulings. Some of the Motions could drastically alter trial strategy for both Parties, especially the Government Motion to Exclude Suicide and the Defense Motion to Suppress Video Interviews.

Over the next 8 weeks, Defense asked for a status update a month out from trial and three weeks out, at no point did Judge Emanuel respond or provide a timeline for her rulings. She was responsive to other requests by the Parties over email to add witnesses and sever Closing and Rebuttal Argument - all of which were ruled on in a fairly timely manner.

At two weeks out, Defense filed the Motion for a Continuance on Friday, 6 October at 1800. The Government waited until Tuesday, 10 October to respond to see if the Judge would rule on the Motions over the long weekend. However, she did not. The Government supported the continuance and Judge Emanuel approved it the next day.

The new trial date is 9-19 April 2024 - a six-month delay. Given the overwhelming gravity of this murder case, both the Command and the family are disappointed. In addition to disillusioning their faith in our system, the delay also presents a risk that we lose access to a witness because of illness, injury, or death. The Government is filing a Motion to depose the most critical witness to minimize the risk.

Attached is the original PTO for your reference.

I have not yet emailed or called Ty Smith and wanted to confirm that you do not have any concerns with me sending her this summary. While I want to ensure she is tracking this case, I certainly don't want to do anything that would put the case at risk.

Thank you.

v/r,
Kristy

v/r,
Kristy Radio
COL, JA
Staff Judge Advocate
1st Armored Division & Fort Bliss
Office: (915) 744-6906 (DSN: 621-6906)
Cell: (915) 269-4795