1 February 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Petitioner,* v. UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS *Respondent.* Staff Sergeant (E-5) JASON K. SLAPE, USAF *Real Party* *In Interest*	)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND BRIEF IN SUPPORT USCA Dkt. No. _____

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

Preamble

The Petitioner hereby prays for an order directing Respondent to conduct a full in camera review of Appellate Exhibit XII, and only allow appellate defense and appellate government counsel to view any portions of that exhibit that the trial judge abused his or her discretion in not releasing to the parties at trial. The Petitioner also requests this Court order the Respondent to consider this Court's precedent in United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2002) to determine if the Real Party in Interest (RPI) met his burden to warrant appellate discovery of these documents.

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I.

History of the Case

On 6 January 2015, Staff Sergeant Jason K. Slape, the Real Party in Interest (RPI), was convicted in a general court-martial of two specifications of sexual abuse of a child in violation of Article 120b, UCMJ. The RPI was sentenced to a dishonorable discharge, confinement for 30 months, and reduction to Airman First Class. The convening authority approved the sentenced as adjudged, and waived mandatory forfeitures for a period of six months, directing the pay and allowances to be paid to Appellant's dependents.

On 16 December 2015, the RPI filed a motion with the Air Force Court of Criminal Appeals (AFCCA) to examine all sealed materials in the record in order to "properly represent and advise Appellant in this case." (Appendix A.) The United States opposed appellate defense counsel or appellate government counsel viewing Appellate Exhibit XII, as the exhibit contained protected medical/mental health records that were reviewed in camera by the military judge but not disclosed to the parties at trial. (Appendix B.)

On 12 January 2016, AFCCA issued its ruling allowing appellate counsel to view all sealed materials, irrespective of whether or not the trial participants had viewed the records and without any analysis or consideration of whether the military judge abused his discretion in not releasing the exhibit. (Appendix C.)

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On 13 January 2016, the United States filed a motion for reconsideration and reconsideration en banc arguing that Appellant's request to view the records contained in Appellate Exhibit XII should also be analyzed under post-trial discovery standards. (Appendix D.) On 14 January 2016, Appellant filed his opposition. (Appendix E.)

AFCCA denied the United States' motion for reconsideration and reconsideration en banc on 15 January 2016. (Appendix F.) On 19 January 2016, the United States filed a motion to stay the proceedings in order to file an extraordinary writ with this Court. (Appendix G.) On 27 January 2016, AFCCA granted this motion. (Appendix H.)

II.

Relief Sought

The United States respectfully petitions this Honorable Court to immediately vacate the Air Force Court of Criminal Appeal's order allowing appellate counsel to examine Appellate Exhibit XII without first conducting an in camera review and determining that the military judge abused his discretion by not releasing the medical/mental health records to the trial participants. Appellate Exhibit XII contains Mil. R. Evid. 513 protected information that was not released to the parties at trial. This Honorable Court should immediately grant the requested relief because AFCCA committed legal error when it granted Appellant's motion to view

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Appellate Exhibit XII without first determining that the military judge had abused his discretion in not releasing the entirety of the exhibit to the trial participants. Furthermore, AFCCA committed legal erred when it ruled that R.C.M. 1103A has overruled United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998), and United States v. Romano, 46 M.J. 269 (C.A.A.F. 1997) and requires sealed materials to be automatically released to appellate counsel, notwithstanding the fact that the records were not released to the parties at trial. Finally, AFCCA committed legal error when it failed to find that Appellate Exhibit XII is not releasable because Appellant has failed to meet all four of the required prongs for appellate discovery this Court established in United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2002). Therefore, the United States also petitions this Court to vacate the lower Court's order and direct the lower Court to determine if the RPI has met his burden for appellate discovery of the records as required by Campbell.

III.

ISSUES PRESENTED

WHETHER R.C.M. 1103A HAS OVERRULED UNITED STATES V. RIVERS, 49 M.J. 434 (C.A.A.F. 1998), AND UNITED STATES V. ROMANO, 46 M.J. 269 (C.A.A.F. 1997), IN ALLOWING APPELLATE COUNSEL TO EXAMINE APPELLATE EXHIBIT XII AND ANY OTHER SEALED MATERIALS THAT WERE VIEWED IN CAMERA BY THE MILITARY JUDGE BUT NOT RELEASED TO THE PARTIES AT TRIAL. ALSO, WHETHER APPELLANT HAS MET HIS BURDEN FOR

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APPELLATE DISCOVERY UNDER UNITED STATES V. CAMPBELL, 57 M.J. 134 (C.A.A.F. 2002).

IV.

Statement of Facts

Additional facts necessary to the disposition of the issue are set forth in the argument below.

V.

Reasons Why Writ Should Issue

THIS HONORABLE COURT SHOULD VACATE AFCCA'S ORDER RELEASING, FOR APPELLATE COUNSEL'S REVIEW, THE VICTIM'S MEDICAL/MENTAL HEALTH RECORDS CONTAINED IN APPELLATE EXHIBIT XII AND DIRECT AFCCA TO WITHHOLD RELEASE OF APPELLATE EXHIBIT XII UNLESS AFCCA CONDUCTS ITS OWN IN CAMERA REVIEW OF APPELLATE EXHIBIT XII AND DETERMINES THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE WITHHELD RELEASE AT TRIAL. THE COURT SHOULD ALSO CONCLUDE RELEASE OF THE RECORDS IS NOT APPROPRIATE UNDER THIS COURT'S PRECEDENT REGARDING APPELLATE DISCOVERY.

This Court has jurisdiction to hear the United States petition for a writ of mandamus as noted in LRM v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013):

> The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and

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> agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Extraordinary writs serve "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382, 74 S.Ct. 145, 98 L.Ed. 106 (1953). "[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act." United States v. Denedo, 556 U.S. 904, 911, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009).

It is true that an extraordinary writ is a drastic remedy that should be used only in extraordinary circumstances. United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983). The petitioner has the burden to show a clear and indisputable right to the extraordinary relief requested. Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008) (internal citations omitted).

> As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ must have **no other adequate means to attain the relief he desires**-a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is **clear and indisputable**. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is **appropriate under the circumstances**.

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 381 (2004) (internal quotation marks and brackets omitted; emphasis added) (quoting Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U.S. 394, 403 (1976)).

1. Petitioner's right to issuance of the writ is clear and indisputable.

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AFCCA ruled that appellate counsel had a right to full access to all sealed exhibits under R.C.M. 1103A. This included an exhibit containing mental health records protected by Mil. R. Evid. 513, which the military judge examined in camera and did not release to the parties at trial as they were not relevant to the proceedings or for discovery. AFCCA erred in allowing appellate counsel to examine Appellate Exhibit XII without first making a determination in regards to the propriety of the military judge's ruling. Examination of Appellate Exhibit XII by appellate counsel should have only been permitted if AFCCA, after its own in camera review, had determined that the military judge erred in not releasing it to the parties at trial. AFCCA also committed legal error when it found that R.C.M. 1103A has overruled Rivers and Romano. Finally, AFCCA committed legal error by not analyzing the request under the requirements for appellate discovery this Court set forth in Campbell.

In opposing the RPI's request to allow his counsel to view Appellate Exhibit XII, the United States fully understands the importance of an appellate defense counsel's ability to review a record of trial for potential errors. However, this must be governed by case law, the Military Rules of Evidence, the Rules for Courts-Martial, and policy considerations.

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Mil. R. Evid. 513(e)(6) states that, "[t]he motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

R.C.M. 701(g)(2) allows the military judge to seal materials that he has inspected and attach them as an appellate exhibit. This material may then only "be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge." R.C.M. 701(g)(2).

In United States v. Branoff, 38 M.J. 98, 99 (C.M.A. 1993), trial defense counsel requested discovery of personnel files of three OSI investigators who had been listed as witnesses. Trial counsel opposed the motion, and the military judge agreed to conduct an in camera review of the files. Id. Eventually, the military judge fully disclosed the files to trial defense counsel. Id. Later, appellate defense counsel, to allow for review of the sealed files, motioned the Air Force Court of Criminal Review; however, the Court denied the request. Id. at 101. In review of this issue, this Court reversed the Court of Criminal Review's ruling for three reasons. Id. at 103. First, the appellant and trial defense counsel had already been permitted to examine and use the files. Id. Second, the military judge's order to seal the records did not expressly prohibit appellate defense counsel from viewing them. Id. Regarding this finding, this Court concluded that the military judge's intent must have been to keep the general public from viewing the records, "but

that they could be examined by the defense during the appellate process *to the same extent permitted at the trial level*." Id. at 103-04 (emphasis added). Third, this Court required disclosure to appellate defense counsel to allow review of trial defense counsel's actions in the case. Id. at 104.

In United States v. Romano, 46 M.J. 269, 275 (C.A.A.F. 1997), this Court discussed how the military judge should examine certain work-product documents in camera. In interpreting R.C.M. 701(g)(2) and Branoff, the Court explained how any documents not released by the trial judge should be sealed and only disclosed to appellate defense counsel after the Court of Criminal Appeals viewed the material in camera and determined that disclosure to appellate counsel was required. Id. "If appellate defense counsel requests disclosure, the Court of Criminal Appeals shall examine the undisclosed document in camera and determine if disclosure of any additional documents to appellate defense counsel is required and whether any additional protective orders are required." Id. This Court determined that any documents that were not released to appellate defense counsel by the CCA would remain sealed and viewable in camera by this Court if further review was granted. Id.

In United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998), this Court gave further detailed analysis of R.C.M. 701(g)(2) and the Branoff and Romano cases. In Rivers, this Court dealt squarely with the issue of whether refusing to allow

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appellate defense counsel to view sealed documents that were only viewed in camera by the military judge and not disclosed to the parties prevented the appellant from obtaining "meaningful review." Id. at 437. In holding that the Court of Criminal Appeals did not abuse its discretion in refusing to disclose the sealed material to appellate defense counsel, this Court distinguished the case from Branoff, where "the evidence had been disclosed to trial defense counsel, leaving no valid purpose to be served by withholding it from appellate defense counsel." Id. at 438. This Court acknowledged the vital importance of review of a case by appellate defense counsel, but recognized that the "need to protect information" may sometimes be more important. Id. at 437 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 59, 61 (1987)).

In 2005, R.C.M. 1103A was added to the Manual for Courts-Martial. R.C.M. 1103A discusses how courts are to deal with sealed exhibits and proceedings. It states that "[r]eviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities." R.C.M. 1103A(b)(4)(A). Appellate defense counsel are included in the definition of "reviewing and appellate authorities." R.C.M. 1103A(b)(4)(E)(iv).

The Drafters' Analysis for R.C.M. 1103A states that the main purpose in creating the provision was to clarify that appellate courts were still allowed to view

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sealed motions under Mil. R. Evid. 412(c)(2), which had been updated in 1998. Drafters' Analysis, Manual for Courts-Martial, United States A21-86 (2012 ed.) (MCM). Additionally, it states that "[t]he rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information." Id. R.C.M. 1103A was drafted to provide authority for appellate and reviewing authorities to view sealed material since "it is unclear whether appellate courts are bound by orders sealing Rule 412 information . . . . [and] [t]he effect and scope of a military judge's order to seal exhibits, proceedings or materials is similarly unclear." Drafters' Analysis, Manual for Courts-Martial, United States A21-86 (2012 ed.) (MCM).

While the United States supports the ability of appellate defense counsel to conduct a review of records of trial, the law has imposed certain safeguards and thresholds that impose a higher priority. In this case, the military judge reviewed in camera mental health records from a victim in accordance with Mil. R. Evid. 513. After this review, the military judge released some of the pages to the parties as Appellate Exhibit XIII. The military judge believed the remaining information was irrelevant to the proceeding, and he sealed them. The purpose of sealing records under Mil. R. Evid. 513 is to protect victims and others from having their records open to those who have no need to view them. It eviscerates the rule and

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undermines the policy behind it to then allow appellate counsel to have access to the very records that a military judge has declared to be irrelevant. According to AFCCA's expansive reading of R.C.M. 1103A, if an appellant were to conduct their appeal *pro se*, without AFCCA first conducting an in camera review, the appellant would then be granted access to the very records Mil. R. Evid. 513 were designed to protect. Additionally, it could allow appellate counsel to view sealed classified records under Mil. R. Evid. 505 without regard to the relevance to the proceedings.

The appropriate course of action in this case is for AFCCA to conduct an in camera review of Appellate Exhibit XII as set forth in this Court's precedent. If AFCCA finds the military judge abused his discretion and finds a relevant issue in the records that necessitates a review by appellate defense counsel, then the Court should disclose only so much of the record to appellate counsel as is needed and impose an appropriate protective order. If AFCCA agrees with the military judge's decision that none of the records are relevant, then the records should not be disclosed to appellate defense counsel or appellate government counsel. The records should then remain sealed for possible review by this Court. Accordingly, the victim's privacy interests are maintained, and the RPI still receives a full review of his case as provided by law. This complies precisely with the purpose

and spirit of R.C.M. 1103A to protect "privacy and other interests" while allowing review by "military justice functionaries." MCM, A21-86.

R.C.M. 701(g)(2) has consistently been interpreted by case law to limit disclosure of sealed materials that have not been provided to all parties by the military judge. In those situations, this Court has repeatedly directed that the appellate courts conduct an in camera review of the material to determine if there is a reasonably necessity for it to be disclosed to appellate counsel.

Both Romano and Rivers, which have never been overruled, stand for this very proposition. Only in Branoff did this Court hold that sealed records be disclosed to appellate defense counsel; however, the reasoning by this Court in Branoff does not apply in this case. Here, trial defense counsel was not permitted to examine Appellate Exhibit XII. Branoff held that the records in that case only "could be examined by the defense during the appellate process *to the same extent permitted at the trial level*." 38 M.J. at 104 (emphasis added). Additionally, as the trial defense counsel did not examine Appellate Exhibit XII, there is no need for appellate defense counsel to examine the records to review the performance of trial defense counsel. Since this exhibit was not examined by trial defense counsel, Branoff does not require disclosure to appellate defense counsel.

While R.C.M. 1103A was incorporated after the above-mentioned cases, absolutely nothing in the Drafters' Analysis of R.C.M. 1103A states that the rule

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was created to override R.C.M. 701 or the prior case law discussed above. The lower Court's order in this case effectively states that R.C.M. 1103A has overridden Romano and Rivers. (Appendix C.) To the contrary, R.C.M. 1103A should be read as an additional mandate to protect sealed materials. As such, R.C.M. 701(g)(2), Romano, and Rivers still apply and still demand that sealed material, which has not been examined by trial defense counsel, be vigorously guarded by the appellate courts. Only this Court is permitted to overrule its own precedent. *See* United States v. Allbery, 44 M.J. 226 (C.A.A.F. 1996). To the extent this Court believes there is conflict between R.C.M. 701(g)(2) and 1103A, there is nothing in the language of R.C.M. 1103A and its Drafters Analysis that directly, or suggests intent to, overrule R.C.M. 701(g)(2), Rivers, or Romano. Indeed, the two rules can be read to be complimentary.

The maxim of *in pari materia* applies to R.C.M. analysis, as it does to statutory construction. *See* United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) (noting that military courts use well-established principles of statutory construction to construe provisions in the Manual for Courts-Martial); United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (ordinary rules of statutory construction apply to Rules for Courts-Martial). This Court has stated,

> In examination of an enactment of Congress, the act should not be dissected, and its various phrases considered in *vacuo*. It must be presumed that the legislature had a definite purpose in every enactment, and

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> *it is the construction that produces the greatest harmony and least inconsistency which must prevail*.

United States v. Johnson, 3 M.J. 361, 362 (C.M.A. 1977) (citing Markham v. Cabell, 326 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945)) (emphasis added). "Finally, it is a recognized principle of statutory construction that statutes *in pari materia are to be construed together*." Johnson, 3 M.J. at 363 (C.M.A. 1977) (citing United States v. Heard, 3 M.J. 14 (C.M.A. 1977) (emphasis added).

As R.C.M. 701(g)(2) and 1103A specifically discuss the same material (sealed matters), they are to be construed together with the greatest harmony and the least inconsistency. This is entirely possible, as R.C.M. 701(g)(2) creates a small exception that only reviewing authorities may access sealed material reviewed in camera but not released to the parties.

As an additional argument demonstrating why Appellant's motion should be denied, Appellant must also meet his burden to satisfy all four prongs set forth by this Court for post-trial appellate discovery in United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2002). In Campbell, this Court set forth four factors to be examined when determining whether the government has an obligation to provide post-trial appellate discovery:

> (1) whether [appellant] has made a colorable showing that the evidence or information exists; (2) whether the evidence or information sought was previously discoverable with due diligence; (3) whether the putative information is relevant to Appellant's asserted claim or

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> defense; and (4) whether there is a reasonable probability that the results of the proceeding would have been different if the putative information had been disclosed.

Id. at 138.

In this case, Appellant has asked for discovery that was not provided to him or his trial defense counsel at trial. The military judge reviewed these records in camera and determined that they were not discoverable, i.e. there was no relevant basis for their release to the trial participants. On appeal, there is an even higher standard for post-trial discovery, and Appellant simply has not met that burden.

While Appellant meets the first and second prong of Campbell, in that it is clear that the records exist as they are sealed and attached to the record of trial and there is no other way for his appellate counsel to see these records other than petitioning the Court, he has failed to meet the other two prongs. The military judge already conducted an in camera review of Appellate Exhibit XII and determined that it contained records that were not relevant to Appellant's defense or court-martial. Appellant has not offered any new rationale for why the unreleased information contained in Appellate Exhibit XII is now relevant to his defense. In fact, this Court has made clear that when conducting Article 66(c) review for the purposes of factual and legal sufficiency, the courts of criminal appeals are limited to considering only evidence that was actually admitted at trial. *See* United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007), and United States v.

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Bethea, 22 U.S.C.M.A. 223 (C.M.A. 1973). Since the records were not relevant and admitted, they are not relevant to the Air Force Court's Article 66 review. Thus, Appellant has not met the third prong for appellate discovery. Furthermore, Appellant has not established that there is a reasonable probability that any information within these irrelevant records would have changed the result at trial, as required under the fourth prong. Thus, Appellant has failed to meet his appellate discovery burden.

Accordingly, AFCCA should not have allowed appellate counsel for either side to view Appellate Exhibit XII as Appellant has not met the required standard required under Campbell. For all of the above reasons, the United States requests this Court to reverse AFCCA's ruling regarding Appellate Exhibit XII.

2. No other adequate means for relief exist.

AFCCA's erroneous ruling regarding the release of mental health records will not be reviewable through the ordinary course of appellate review under Article 66, UCMJ. Also, the United States cannot invoke Article 62, UCMJ, to challenge AFCCA's order. Seeking an extraordinary writ is the only means of relief for the government and the only means for the United States to challenge against the Court's order. Left unchallenged, the damage caused by the erroneous ruling to the case, to the victim, and to future cases will be irreversible. This is precisely why this Court must act now in this matter.

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3. Issuance of the writ is appropriate under the circumstances.

Issuance of the writ is appropriate under the circumstances for three reasons. First, while Romano and Rivers both answer this question directly, no court of criminal appeals has addressed this important question since the introduction of R.C.M. 1103A. This Court should take this opportunity to confirm the continuing vitality of this Court's precedent, notwithstanding the enactment of R.C.M. 1103A. Unless this Court accepts and resolves this Petition, it is unlikely that this question will be directly answered.

Moreover, unless resolved by this Court, this question will continue to recur. There are a number of other cases presently pending Article 66 review at AFCCA with the same issue and procedural posture: a military judge conducted an in camera review of a victim's privileged Mil. R. Evid. 513 records, concluded information was not relevant to the proceedings, and refused to release it to the defense counsel or trial counsel. Appellate defense counsel is continuing to move to view all material for their review. The United States has already petitioned this Court for an extraordinary writ in a number of cases[1] and anticipates filing petitions in additional cases as they become ripe for this Court's review. AFCCA's erroneous and repeated decisions to allow appellate counsel to examine

[1] United States v. Harrison, USCA Dkt. No. 16-0251/AF, United States v. Phillips, USCA Dkt. No. 16-0256/AF, United States v. Mancini, USCA Dkt. No. 16-0270/AF, and United States v. Owens, USCA Dkt. No. 16-0294/AF.

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protected mental health information that was not released to the parties at trial without first making a determination in regards to the propriety of the military judge's ruling will continue unless and until corrected by this Court.

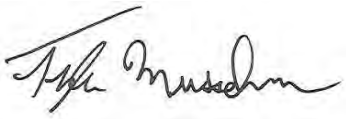
Second, it is appropriate to prevent a potential miscarriage of justice. The victim's mental health records in Appellate Exhibit XII were deemed to be irrelevant by the military judge, who did not release them following an in camera review. AFCCA's legal error in allowing examination of such records without a determination in regards to the propriety of the military judge's ruling must be corrected.

Finally, again, Appellant has not met his appellate discovery obligation to receive these records ruled irrelevant by the military judge.

VI.

Conclusion

WHEREFORE, this Honorable Court should vacate AFCCA's order granting release of the victim's mental health records contained in Appellate Exhibit XII and order Respondent to withhold release of Appellate Exhibit XII unless Respondent conducts its own in camera review of that exhibit and determines that the military judge abused his discretion when he withheld release at trial. This Court should also order Respondent to consider and apply post-trial appellate discovery standards prior to release of Appellate Exhibit XII.



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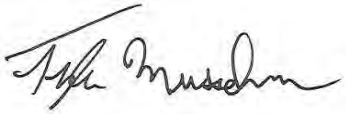
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Respondent, counsel for the Real Party in Interest, and the Appellate Defense Division on 1 February 2016.



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APPENDIX A

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	) MOTION TO VIEW)
v.	) Before Panel No. 1
Technical Sergeant (E-6) **JASON K. SLAPE,** United States Air Force *Appellant.*	) Case No. ACM 38801

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.11 of the Joint Courts of Criminal Appeals Rules of Practice and Procedure, and hereby moves to view all sealed files in this case for defense review. These pages must be reviewed in order for undersigned counsel to properly represent and advise Appellant in this case.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully submitted,

LAUREN A. SHURE, Capt, USAF
Appellate Defense Counsel
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(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 16 December 2015.

Respectfully submitted,

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APPENDIX B

21 December 2015

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	OPPOSITION TO MOTION TO VIEW
v.	)	
	)	ACM 38801
Technical Sergeant (E-6) JASON K. SLAPE, USAF, *Appellant.*	)	Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23 of this Honorable Court's Rules of Practice and Procedure, the United States hereby opposes, in part, Appellant's Motion to View (Sealed Exhibits and Proceedings). In his motion, Appellant states "[p]ursuant to Rule 23.11 of the Joint Courts of Criminal Appeals Rules of Practice and Procedure, [sic] and hereby moves to view all sealed files in this case for defense review." Through its review of the record of trial, the United States identified pages 84-106 and 109-114 of the transcript and Appellate Exhibits XI, XII, XIII, as sealed. The United States only opposes allowing Appellant's counsel to view Appellate Exhibit XII (Full Copy of Reviewed Records), as this exhibit contains M.R.E. 513 privileged materials that were reviewed only by the military judge *in camera* and not released to the parties. The remaining sealed exhibits had been viewed, at trial, by both parties and the military judge. Therefore, the United States

does not oppose Appellant's motion to view as it concerns the remaining sealed exhibits or portions of the transcript, and would have readily consented to their viewing if it had been requested.

Without identifying any specific exhibits or transcript excerpts, Appellant seeks in his motion to allow his appellate counsel to examine "all sealed files." (App. Mot. at 1.) Appellant also did not cite any specific basis for his request other than to "properly represent and advise Appellant in this case." (Id.)

In opposing Appellant's request to allow his counsel to view Appellate Exhibit XII, the United States fully understands the importance of an appellate defense counsel's ability to review a record of trial for potential errors. However, this must be tempered by case law, policy considerations, and stronger interests.

Mil. R. Evid. 513(e)(6) states that, "[t]he motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise." R.C.M. 701(g)(2) allows the military judge to seal materials that he has inspected and attach them as an appellate exhibit. This material may then only "be examined by reviewing authorities in closed proceedings for the purpose

of reviewing the determination of the military judge." R.C.M. 701(g)(2)

In United States v. Branoff, 38 M.J. 98, 99 (C.M.A. 1993), trial defense counsel requested discovery of personnel files of three OSI investigators who had been listed as witnesses. Trial counsel opposed the motion, and the military judge agreed to conduct an *in camera* review of the files. Id. Eventually, the military judge fully disclosed the files to trial defense counsel. Id. Later, appellate defense counsel motioned the Air Force Court of Criminal Review to be able to review the sealed files; however, the Court denied the request. Id. at 101. In their review of this issue, our superior Court reversed the Court of Criminal Review's ruling for three reasons. Id. at 103. First, the appellant and trial defense counsel had already been permitted to examine and use the files. Id. Second, the military judge's order to seal the records did not expressly prohibit appellate defense counsel from viewing them. Id. Regarding this, our superior Court concluded that the military judge's intent must have been to keep the general public from viewing the records, "but that they could be examined by the defense during the appellate process *to the same extent permitted at the trial level*." Id. at 103-04 (emphasis added). Third, our superior Court required disclosure to appellate

defense counsel to allow review of trial defense counsel's actions in the case. Id. at 104.

In United States v. Romano, 46 M.J. 269, 275 (C.A.A.F. 1997), our superior Court discussed how the military judge should examine certain work-product documents *in camera*. In interpreting R.C.M. 701(g)(2) and Branoff, the Court explained how any documents not released by the trial judge should be sealed and only disclosed to appellate defense counsel after the Court of Criminal Appeals viewed the material *in camera* and determined that disclosure to appellate counsel was required. Id. "If appellate defense counsel requests disclosure, the Court of Criminal Appeals shall examine the undisclosed document in camera and determine if disclosure of any additional documents to appellate defense counsel is required and whether any additional protective orders are required." Id. Any documents that were not released to appellate defense counsel would remain sealed and viewable *in camera* by our Superior Court. Id.

In United States v. Rivers, 49 M.J. 434 (C.A.A.F. 1998), our superior Court gave further detailed analysis of R.C.M. 701(g)(2) and the Branoff and Romano cases. In Rivers, the Court dealt squarely with the issue of whether refusing to allow appellate defense counsel to view sealed documents that were only viewed *in camera* by the military judge and not disclosed to

the parties prevented the appellant from obtaining "meaningful review." Id. at 437. In holding that the Court of Criminal Appeals did not abuse its discretion in refusing to disclose the sealed material to appellate defense counsel, the Court distinguished the case from Branoff, where "the evidence had been disclosed to trial defense counsel, leaving no valid purpose to be served by withholding it from appellate defense counsel." Id. at 438. The Court acknowledged the vital importance of review of a case by appellate defense counsel, but recognized that the "need to protect information" may sometimes be more important. Id. at 437 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 59, 61 (1987)).

In 2005, R.C.M. 1103A was added to the Manual for Courts-Martial. R.C.M. 1103A discusses how courts are to deal with sealed exhibits and proceedings. It states that "[r]eviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities....." R.C.M. 1103A(b)(4)(A). Appellate defense counsel are included in the definition of "reviewing and appellate authorities." R.C.M. 1103A(b)(4)(E)(iv).[1]

[1] Appellate defense counsel is an "appellate authority" as a "reviewing authority" is used throughout the MCM as a reference for those who review courts-martial (other than CCAs) and for all appellate review bodies (including CCAs). See R.C.M. 104, 701(g)(2), 905(g), 912(f)(1)(H), 1102(d), 1107(f)(2).

In the Drafters' Analysis for R.C.M. 1103A, it states that the main purpose in creating the provision was to clarify that appellate courts were still allowed to view sealed motions under Mil. R. Evid. 412(c)(2), which had been updated in 1998. Drafters' Analysis, Manual for Courts-Martial, United States A21-86 (2012 ed.) (MCM). Additionally, it states that "[t]he rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information." Drafters' Analysis, MCM A21-86 (2012 ed.) R.C.M. 1103A was drafted to provide authority for appellate and reviewing authorities to view sealed material since "it is unclear whether appellate courts are bound by orders sealing Rule 412 information . . . [and] [t]he effect and scope of a military judge's order to seal exhibits, proceedings or materials is similarly unclear." Drafters' Analysis, MCM A21-86 (2012 ed.).

While the United States certainly supports the ability of appellate defense counsel to conduct a review of records of trial, that does not mean other interests cannot occasionally take precedence. To the extent this Court believes there is conflict between R.C.M. 701(g)(2) and 1103A, there is nothing in the language of R.C.M. 1103A and its Drafters Analysis that directly, or suggests intent to, overrule R.C.M. 701(g)(2),

Rivers, or Romano. Indeed, the two rules can easily be read to be complimentary. The maximum of *in pari materia* applies to R.C.M. analysis, as it does to statutory construction. See United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) (noting that military courts use well-established principles of statutory construction to construe provisions in the Manual for Courts-Martial); United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (ordinary rules of statutory construction apply to Rules for Courts-Martial). Our superior Court has stated, "[i]n examination of an enactment of Congress, the act should not be dissected, and its various phrases considered in *vacuo*. It must be presumed that the legislature had a definite purpose in every enactment, and it is the construction that produces the greatest harmony and least inconsistency which must prevail." United States v. Johnson, 3 M.J. 361, 362 (C.M.A. 1977) (citing Markham v. Cabell, 326 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945)). "Finally, it is a recognized principle of statutory construction that statutes *in pari materia* are to be construed together." Johnson, 3 M.J. at 363 (C.M.A. 1977) (citing United States v. Heard, 3 M.J. 14 (C.M.A. 1977).

This Court has cited to Johnson when determining if a Rule for Courts-Martial and Military Rule of Evidence were in conflict, stating, "[a]pplying normal principles of statutory construction to the alleged conflict [with an R.C.M. and Mil. R.

Evid.], we will construe these provisions to produce the greatest harmony and least inconsistency." United States v. Clark, 2011 CCA LEXIS 314 (A.F.C.C.A. Aug. 15, 2011) (unpub. op.). As R.C.M. 701(g)(2) and 1103A specifically discuss the same material (sealed matters), they are to be construed together with the greatest harmony and the least inconsistency. This is entirely possible, as R.C.M. 701(g)(2) creates a small exception that only reviewing authorities may access sealed material reviewed *in camera* and not released to the parties.

In this case, the military judge reviewed *in camera* mental health records from a victim. After this review, the military judge appears to have released some of the pages to the parties as Appellate Exhibit XIII. The military judge believed the remaining pages were irrelevant to the proceeding, and he sealed them. The purpose of sealing records under Mil. R. Evid. 513 is to protect victims and others from having their records open to those who have no need to view them. It eviscerates the rule and undermines the policy behind it to then allow an appellate defense counsel to have access to the very records that a military judge has declared to be irrelevant.

The appropriate course of action in this case is for this Court to deny Appellant's motion as to Appellate Exhibit XXII and instead conduct an *in camera* review. If this Court finds a relevant issue in Appellate Exhibit XXII that necessitates a

review by appellate defense counsel, then the Court should disclose only so much of the record to appellate counsel as is needed and also impose an appropriate protective order. If this Court agrees with the military judge's decision that none of the unreleased records are relevant, then they should not be disclosed to appellate defense counsel or appellate government counsel. They should then remain sealed for possible review by our superior Court. Accordingly, the victim's privacy interests are maintained, and Appellant still receives a full review of his case as provided by law. This complies precisely with the purpose and spirit of R.C.M. 1103A to protect "privacy and other interests" while allowing review by "military justice functionaries." MCM, A21-86.

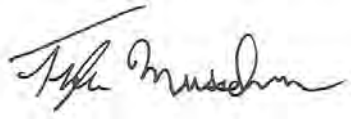
R.C.M. 701(g)(2) has consistently been interpreted by case law to limit disclosure of sealed materials that have not been provided to all parties by the military judge. In those situations, our superior Court has repeatedly directed that the appellate courts conduct an *in camera* review of the material to determine if there is a reasonably necessity for it to be disclosed to appellate counsel.

Both Romano and Rivers, which have never been overruled, stand for this very proposition. Only in Branoff did our superior Court hold that sealed records be disclosed to appellate defense counsel; however, the reasoning by the Court

in Branoff does not apply in this case. Here, trial defense counsel was not permitted to examine Appellate Exhibit XII. Branoff held that the records in that case only "could be examined by the defense during the appellate process *to the same extent permitted at the trial level*." Branoff at 104 (emphasis added). Additionally, as the trial defense counsel did not examine Appellate Exhibit XII, there is no need for appellate defense counsel to examine the records to review the performance of trial defense counsel. Since this exhibit was not examined by trial defense counsel, Branoff does not require disclosure to appellate defense counsel.

While R.C.M. 1103A was incorporated after the above-mentioned cases, absolutely nothing in the Drafters' Analysis of R.C.M. 1103A states that the rule was created to override R.C.M. 701 or the prior case law. To the contrary, R.C.M. 1103A should be read as an additional mandate to protect sealed materials. As such, R.C.M. 701(g)(2), Romano, and Rivers still apply and still demand that sealed material which has not been examined by trial defense counsel be vigorously guarded by the appellate courts. Under these circumstances, only our superior Court is permitted to overrule its precedent. *See* United States v. Allbery, 44 M.J. 226 (C.A.A.F. 1996).

WHEREFORE, this Court should deny Appellant's motion to view sealed material as it pertains to Appellate Exhibit XII.



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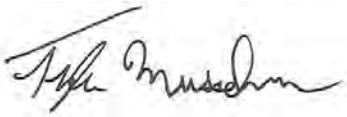
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 December 2015 via electronic filing.



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APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**ACM 38801**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
JASON K. SLAPE	)	
USAF	)	
Appellant	)	
	)	**Panel No. 1**

On 16 December 2015, Appellant petitioned this Court to view all sealed files for appellate defense counsel review. The basis for the request is to allow counsel to properly represent and advise Appellant.

The government only opposes allowing access to Appellate Exhibit XII. In support of its position, the government asserts that despite R.C.M. 1103A, *United States v. Romano,* 46 M.J.269 (C.A.A.F. 1997) and *United States v. Rivers,* 49 M.J. 434 (C.A.A.F. 1998) require this court to vigorously guard sealed material that was not examined by trial defense counsel and require this court to deny appellate defense counsel's motion to review Appellate Exhibits XII absent a showing of relevance. The government further asserts that nothing in R.C.M. 1103A states that the rule was created to override R.C.M. 701 or prior case law, and cites *United States v. Albery*, 44 M.J. 226 (C.A.A.F. 1996) for the proposition that only CAAF is permitted to overrule its precedent. We believe that *Rivers* is distinguishable because it pre-dates the Executive Order creating R.C.M. 1103A and consequently only addressed the language of R.C.M. 701.

R.C.M. 1103A(b)(4)(E)(iv) expressly includes appellate defense counsel as "reviewing and appellate authorities" for the purpose of this rule. The Drafter's Analysis for R.C.M. 1103A further states: "[t]he rule favors an approach relying on the integrity and professional responsibility of those functionaries [appellate counsel], and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place."

This Court has conducted an examination of all of the sealed exhibits and transcripts. We have also considered the ruling of the military judge found at Appellate

Exhibit XI.

Appellate Exhibits IX and X contain pleadings filed by parties to compel mental health records of NS. There were not ordered sealed by the military judge.

Appellate Exhibit XI is the judge's ruling and Protective Order regarding the mental health records of NS which are found at Appellate Exhibit XII. The military judge performed an in camera review of Appellate Exhibit XII. This document is annotated as "sealed" on the Record of Trial (ROT) Index, but it was not sealed in the ROT.

Appellate Exhibit XII contains 107 pages of un-redacted mental health records of NS. After conducting an in camera review, the military judge ordered these sealed in Appellate Exhibit XI. The protective order in this case contains language that the relevant exhibits "will remain sealed until ordered unsealed by a court of competent jurisdiction" and "access to these matters is limited to the following persons…without court order…appellate counsel…."

Appellate Exhibit XIII contains 63 pages of redacted mental health records of NS which were provided to both parties. The judge ordered these sealed in Appellate Exhibit XI and further stated that appellate counsel could access these documents without a court order.

Appellate Exhibit XIV is the government's motion to compel the mental health records of Appellant's wife.

Transcript pages 72-78 contain a M.R.E. 513 hearing involving NS. These pages were not sealed.

Transcript pages 84-106 and 109-114 contain a M.R.E. 513 hearing involving the government's request for the mental health records of Appellant's wife, AS. Appellate Exhibits XIV and XV are associated with this hearing. The military judge ordered this portion of the Record of Trial sealed, but not Appellate Exhibits XIV and XV.

Our review revealed documents within the record of trial containing sensitive materials that were not placed under seal.

Accordingly, it is by the Court, this 12th day of January 2016

ORDERED:

That Appellant's motion to examine exhibits and proceedings is **GRANTED** as to Appellate Exhibits X, XI, XII, XIII, XIV, XV ands XVI as well as transcript pages 84-106 and 109-114.

That both appellate government and appellate defense counsel assigned to the case will be given full access to examine these sealed materials in this court's designated space. Thereafter, the exhibits will be resealed. Appellate counsel will not photocopy, photograph, disclose or make available its contents to any other individual without this court's prior authorization.

That Appellate Exhibit IX, X, XI, XIV and XV be sealed.

IT IS FURTHER ORDERED:

That, counsel for the United States take all steps necessary to ensure that any copies of Appellate Exhibits IX, X, XI, XIV and XV in the possession of Appellant or counsel for Appellant be retrieved and destroyed immediately.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

APPENDIX D

13 January 2016

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION FOR RECONSIDERATION AND RECONSIDERATION EN BANC
v.	)	ACM 38801
Staff Sergeant (E-5) JASON K. SLAPE, USAF *Appellant.*	)	Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rules 17 and 19 of this Honorable Court's Rules of Practice and Procedure (Rules of Practice), the United States respectfully moves this Court to reconsider and reconsider en banc its order dated 12 January 2016 in which it granted Appellant's request for his counsel to review sealed exhibits. Specifically, the United States moves this Court to reconsider and reconsider en banc that portion of its opinion allowing access and viewing of Appellate Exhibit XII.

This Court has jurisdiction to consider this motion for reconsideration and reconsideration en banc because the United States has timely submitted its motion for reconsideration within 30 days of the issuance of the Court's order. Moreover, neither a petition for grant of review nor a certificate of review has been filed with the Court of Appeals for the Armed Forces.

Rule 19.2(b) of the Rules of Practice states the following:

> Ordinarily, reconsideration will not be granted without a showing that one of the following grounds exists:
>
> (1) A material legal or factual matter was overlooked or misapplied in the decision;
>
> (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;
>
> (3) The decision conflicts with a decision of the Supreme Court of the United States, CAAF, another service court of criminal appeals, or this Court; or
>
> (4) New information is received which raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial.

In support of this request for reconsideration, the United States respectfully submits this Court overlooked a material legal matter in permitting Appellant's counsel to view all sealed material. While the United States continues to maintain its position as stated in the opposition to the motion to view, the United States further asserts that Appellant's motion request has failed to satisfy the standard for post-trial discovery.[1] The United States argues that in order to justify viewing Appellate Exhibit XII, Appellant must meet his heavy burden to satisfy all four prongs set forth in United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2002). In Campbell, our superior Court stated four factors to be examined when

[1] The United States did not raise this legal issue in its opposition motion.

determining whether the government has an obligation to provide post-trial appellate discovery:

> (1) whether appellant has made a colorable showing that the evidence or information exists; (2) whether the evidence or information sought was previously discoverable with due diligence; (3) whether the putative information is relevant to Appellant's asserted claim or defense; and (4) whether there is a reasonable probability that the results of the proceeding would have been different if the putative information had been disclosed.

Id. at 138.

In this case, Appellant has asked for discovery that was not provided to him or his trial defense counsel at trial. The military judge reviewed the 107 pages of Appellate Exhibit XII *in camera* and determined that a number of the pages, and a significant amount of information within the records, were not discoverable, i.e. there was no relevant basis for their release to the trial participants.[2] There is an even higher standard for post-trial discovery, and Appellant has not met that burden.

While Appellant meets the first and second prongs of Campbell, in that it is clear that the records exist as they are sealed and attached to the record of trial, and there is no other way for his appellate counsel to see these records other than petitioning the Court, he has failed to meet the other two

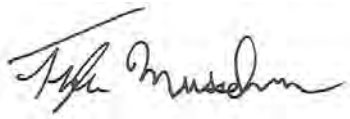
[2] At trial, Appellate Exhibit XII was not released to the parties. Instead, the military judge separately provided discoverable material from Appellate Exhibit XII to the parties in Appellate Exhibit XIII.

prongs. The military judge already conducted an *in camera* review of the records and determined that the records were not relevant to Appellant's defense or court-martial. Appellant has not offered any new rationale for why the information contained in the sealed records is now relevant to his defense. Furthermore, our superior Court has made clear that when conducting Article 66(c), UCMJ review, the courts of criminal appeals are limited to considering only evidence that was actually admitted at trial.[3] *See* United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007); United States v. Bethea, 22 U.S.C.M.A. 223 (C.M.A. 1973). Since the records were not relevant and admitted, they are not relevant to this Court's Article 66 review. Thus, Appellant has not shown how the information contained in Appellate Exhibit XII is relevant to any asserted claim or defense and fails to satisfy prong three. Furthermore, Appellant has not established that there is a reasonable probability that any information within these irrelevant records would have changed the result at trial, as required under the fourth prong. Consequently, Appellant has failed to meet his appellate discovery burden.

As Appellant has not met the required standard required under Campbell, this Court should not allow appellate counsel

[3] In the limited context of sentence appropriateness, the entire record includes not only the evidence admitted at trial, but also the matters considered by the convening authority in his action on the sentence. Beatty, 64 M.J. at 458.

for either side to view Appellate Exhibit XII. For the above reasons, the United States requests this Court reconsider its order permitting review of Appellate Exhibit XII.



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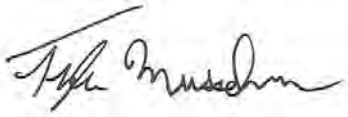
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 13 January 2016.



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APPENDIX E

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION AND**
v.	)	**RECONSIDERATION EN BANC**
	)	Panel No. 1
Technical Sergeant (E-6) **JASON K. SLAPE**, USAF, *Appellant.*	)	ACM 38801

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant, by and through his undersigned counsel, and pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure hereby enters Appellant's general opposition to Government's Motion for Reconsideration and Reconsideration En Banc. The government has failed to offer any grounds which fall into this Court's Rules of Practice to allow Reconsideration. Additionally, *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002) is wholly inapplicable to the situation at hand. At the current posture, this case is presenting a question of access not discovery. *Campbell* does not discuss access to appellate exhibits which are known and available and a part of the record of trial.

As this Court indicated in its order,

> R.C.M. 1103A(b)(4)(E)(iv) expressly includes appellate defense counsel as "reviewing and appellate authorities"... The Drafter's Analysis … further states: "[t]he rule favors an approach relying on the integrity and professional responsibility of those functionaries [appellate counsel], and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place."

Order, 12 January 2016. This Court has so determined appellate counsel needs access in order to fulfil their duties. The government has offered no legal basis to adequately upset that ruling.

WHEREFORE, Appellant respectfully requests that this Court deny the government's request for reconsideration and reconsideration en banc.

Respectfully Submitted,

LAUREN A. SHURE, Capt, USAF
Appellate Defense Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 14 January 2016.

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APPENDIX F

13 January 2016

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION FOR RECONSIDERATION AND RECONSIDERATION EN BANC
v.	)	ACM 38801
Staff Sergeant (E-5) JASON K. SLAPE, USAF *Appellant.*	)	Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rules 17 and 19 of this Honorable Court's Rules of Practice and Procedure (Rules of Practice), the United States respectfully moves this Court to reconsider and reconsider en banc its order dated 12 January 2016 in which it granted Appellant's request for his counsel to review sealed exhibits. Specifically, the United States moves this Court to reconsider and reconsider en banc that portion of its opinion allowing access and viewing of Appellate Exhibit XII.

This Court has jurisdiction to consider this motion for reconsideration and reconsideration en banc because the United States has timely submitted its motion for reconsideration within 30 days of the issuance of the Court's order. Moreover, neither a petition for grant of review nor a certificate of review has been filed with the Court of Appeals for the Armed [illegible].

Rule 19.2(b) of the Rules of Practice states the following:

DENIED
15 JANUARY 2016

APPENDIX G

19 January 2016

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO STAY PROCEEDINGS
v.	)	
	)	ACM 38801
Staff Sergeant (E-5) JASON K. SLAPE, USAF, *Appellant.*	)	Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

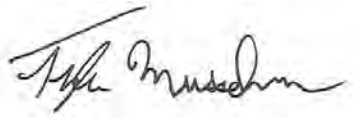
Pursuant to Rule 23.3(c) of this Court's Rules of Practice and Procedure, the United States respectfully moves this Court to stay the proceedings, including the order, dated 12 January 2016, in the above-captioned case. This will allow the United States the opportunity to file a petition for extraordinary relief with the Court of Appeals for the Armed Forces regarding the release of sealed records.

This Court has already granted the United States' request for a stay in United States v. Harrison, ACM 38745, United States v. Phillips, ACM 38771, United States v. Mancini, ACM 38783, and United States v. Owens, ACM 38834, for this same issue. This issue of under what circumstances an appellate defense counsel may examine a sealed Mil. R. Evid. 513 exhibit when the military judge conducted an *in camera* review without disclosing the records to the parties is an exceptionally important issue in a growing area of law with far-reaching

impact. As it did in the above-mentioned cases, we request that this Court stay this case to permit further litigation before our superior Court.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court to grant its motion to stay the proceedings.



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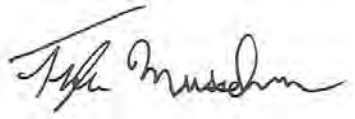
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Air Force Appellate Defense Division on 19 January 2016 via electronic filing.



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Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

APPENDIX H

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**ACM 38801**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Staff Sergeant (E-5)	)	
JASON K. SLAPE	)	
USAF,	)	
Appellant	)	**Panel No. 1**

On 19 January 2016, counsel for Appellee filed a Motion to Stay Proceedings. As of today Appellant has not opposed the Motion.

Appellee specifically asks this Court to issue a stay of proceedings to allow them to file a petition for extraordinary relief with the Court of Appeals for the Armed Forces.

Accordingly, it is by the Court on this 27th day of January, 2016,

ORDERED:

That Petitioner's Motion to Stay Proceedings is **GRANTED** until 22 February 2016.

FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Petitioner

USCA Dkt. No. 16-0310/AF

v.

O R D E R

United States Air Force
Court of Criminal Appeals,

Petitioner

and

Jason K.
Slape,
Real Party In Interest

On consideration of the petition for extraordinary relief in the nature of a writ of mandamus, it is, by the Court, this 11th day of February, 2016,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Petitioner (Musselman)
Counsel for Respondent

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Petitioner

USCA Dkt. No. 16-0294/AF

v.

O R D E R

United States Air Force Court
Of Criminal Appeals,
Respondent

and

Dorian K.
Owens,
Real Party In Interest

On consideration of the petition for extraordinary relief in the nature of a writ of mandamus and the motion for leave to file LF's *amicus curiae* brief in support of the government's petition for extraordinary relief in the forum of a writ of mandamus, it is, by the Court, this 11th day of February, 2016,

ORDERED:

That said motion is hereby denied; and

That said petition for extraordinary relief is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Petitioner (Steelman III)
Counsel for Respondent
Amici Curiae (DeCamara)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Petitioner

USCA Dkt. No. 16-0251/AF

v.

O R D E R

United States Air Force Court
of Criminal Appeals,
Respondent

and

Jerry C.
Harrison,
Real Party in Interest

On consideration of the petition for extraordinary relief in the nature of a writ of mandamus, it is, by the Court, this 8th day of February, 2016,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Petitioner (Steelman III)
Counsel for Respondents
Amicus Curiae (Coote)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Petitioner

USCA Dkt. No. 16-0256/AF

v.

O R D E R

United States Air Force Court
Of Criminal Appeals,
Respondent

and

Cory D.
Phillips,
Real Party In Interest

On consideration of the petition for extraordinary relief in the nature of a writ of mandamus and the motions filed in this case, it is, by the Court, this 11th day of February, 2016,

ORDERED:

That Petitioner's motion to attach a document is hereby granted;

That the motion filed by the Special Victims' Program for leave to file an *amicus curiae* brief is hereby denied;

That the motion filed by Protect Our Defenders for leave to file a proposed *amicus curiae* brief in support of the petition for extraordinary relief is hereby granted;

That the motion for leave to file a supplemental argument for the United States petition for extraordinary relief is hereby denied;

That the motions for leave to file a reply to the Special Victims' Program *amicus curiae* brief, the motion for leave to file a reply to the United States Air Force Appellate Government Division reply to *amicus curiae* brief, the motion to strike nonresponsive portions of the United States Air Force Appellate Government Division reply to *amicus curiae* of the Special Victims Counsel Program, and the motion for leave to reply to RPI's opposition to motion for leave of Special Victims Counsel Program to participate as *amicus curiae* are hereby denied as moot; and

That said petition for extraordinary relief is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Petitioner (Steelman III)
Counsel for Respondent
Amici Curiae (Coote)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Petitioner

USCA Dkt. No. 16-0270/AF

v.

O R D E R

United States Air Force
Court of Criminal Appeals,
Respondent

and

Marcus A.
Mancini,
Real Party In Interest

On consideration of the petition for extraordinary relief in the nature of a writ of mandamus, it is, by the Court, this 8th day of February, 2016,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Petitioner (Steelman III)
Counsel for Respondents

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ACM 38732**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
KELVIN L. O'SHAUGHNESSY,	)	
USAF,	)	
Appellant	)	**Panel No. 1**

On 5 January 2016 this court received a Notice of Appearance and Motion for Leave to Intervene and File Responsive Pleading from "Appellate counsel for the Intervenor real-party in interest, the victim R.S."[1] On 6 and 8 January, the Government and Appellant filed responses opposing the motion to intervene. On 15 January, Appellate Counsel for the victim filed a motion for leave to respond to the motions in opposition.

Accordingly, it is by the Court on this 21st day of January 2016,

ORDERED:

The Motion to Intervene is hereby **DENIED.** Counsel may request leave to file an *amicus curiae* brief in accordance with Rule 15.3 of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure.

FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court

[1] Both the Notice and Motion were delivered to the Government Appellate Division and the Appellate Defense Division on 18 December 2015 but due to an administrative error were not filed with the Court until 5 January 2016.