IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *-versus-* Sergeant (E-5) **ASHRAF S. WARDA**, United States Army, *Appellant.*	CAAF Dkt. No: 22-0282/AR ACCA Dkt. No: 20200644 **DATE: 12 December 2022**

AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
In Support of *Appellant*

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TO THE JUDGES OF
THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for all criminal defense lawyers.

NACDL is very interested in military justice in general and on behalf of its military criminal defense counsel members. NACDL is dedicated to advancing the proper, efficient, and just administration of justice to include military justice issues. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal (including military) and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants–to include military defendants–especially where there are constitutional issues presented.

NACDL's interest in this case is multifaceted. Broadly, we seek to ensure that

our servicemembers have fundamentally fair trials by courts-martial under both the Due Process Clause of the Fifth Amendment and the *Uniform Code of Military Justice* [UCMJ], 10 U.S.C. § 801 *et seq.* Furthermore, this case raises fundamental constitutional issues implicating Appellant's right to have his Fifth Amendment right to *Brady* material and his Sixth Amendment right to compulsory process in securing evidence from MAB's [the complainant] U.S. Citizenship and Immigration Services [USCIS] Alien File [A-File] produced for an *in camera* judicial review. That was necessary to protect Appellant's right to *confront* his accuser, to include impeaching her at trial. Finally, this case implicates Appellant's Sixth Amendment right to the *effective assistance* of counsel. NACDL is not alleging *ineffective* assistance of counsel [IAC], but rather that Appellant's Trial Defense Counsel [TDC] was improperly thwarted by the government's opposing his request for an immigration law expert to assist the defense, which the military judge denied, as well as access to her A-File.

I. PRELIMINARY MATTERS.

> "*Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.*" *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010)

Appellant's court-martial became derailed when the military judge denied the Defense motion to compel production of an immigration law expert to assist and

consult with the Defense on immigration law and policy (JA 356-60).[1] The military judge, ignoring *Padilla's* warning, chastised Appellant's TDC for making the request, opining that it was both "highly irregular" to seek a lawyer as an expert while stating that it was "unclear" to him why Appellant's TDC simply couldn't self-educate themselves on the intricacies of U.S. immigration law. (JA 190-91).[2]

The importance of this case cannot be overstated; nor can the significant legal errors committed by the military judge and ACCA below, be ignored. Years before Sergeant Warda's court-martial the Supreme Court recognized that immigration law was "complex, and constitutes a legal specialty of its own." *Padilla, supra* at 369. So complex that the U.S. Department of Justice has, within its Civil Division, its own *Office of Immigration Litigation* [O.I.L.].[3]

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[1] Such requests are not uncommon, from NACDL's perspective. Criminal defense lawyers routinely seek expert *legal* assistance in complex or highly specialized areas of law, e.g., criminal tax cases, patent law, securities cases, procurement fraud (indeed, the military sends judge advocates to civilian LL.M. programs in procurement law), environmental crimes and admiralty law. *Amicus* respectfully suggests that the military judge's comments reflect his unfamiliarity with immigration law.

[2] ACCA did not address any issue under *Ake v. Oklahoma,* 470 U.S. 68, 82 (1985), *viz.,* that the denial of expert assistance in immigration law denied Warda the "raw materials integral to the building of an effective defense." *Id.* at 77. But, we suggest as *amicus curiae* that it cannot be ignored in the context of Appellant's Fifth and Sixth Amendment rights.

[3] In 2010, OIL published a handbook entitled, *Immigration Consequences of Criminal Convictions,* where at page Appendix A-1, it defined A-File as:

(continued...)

II. SUMMARY OF ARGUMENT.

Appellant's TDC candidly admitted his lack of expertise in immigration law. Had the guiding hand of an experienced immigration law attorney been provided to the Defense as requested, much of the confusion permeating this case could have been avoided. Specifically, a competent and experienced immigration attorney for the Defense could have exposed the sophistry (if not outright misrepresentations) of the USCIS attorney who refused to confirm the existence of MAB's A-File maintained by DHS / USCIS.[4] What the military judge failed to grasp is that the dispute over the A-File, was one between two *Executive* Agencies, i.e., a component of the Department of Defense (the Army) and the Department of Homeland Security (the USCIS). Congress anticipated such interdepartmental disputes and enacted 28 U.S.C. § 512.[5] Thus, where there are conflicting statutory interpretations or conflicts between

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[3] (...continued)

> A file maintained by the Department of Homeland Security ("DHS") containing an alien's biographical information, applications for immigration benefits, documentation from any prior immigration proceedings, a photograph, and fingerprints.

Aside from demonstrating the military judge's errors as to the *existence* of the complainant's A-File, it also calls into question the ethics of the USCIS attorney involved with the Trial Counsel below.

[4] At the time of the alleged incident, MAB and Appellant were married. *Appellant* divorced *her* shortly thereafter.

[5] This reads in full: "The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of (continued...)

Executive Departments on legal issues, absent Presidential intervention, the U.S. Attorney General [USAG] is charged with resolving such matters. There is no indicia that this occurred below.

The USCIS attorney noted that *if* the complainant had immigration records, they would be maintained in their Alien File ["A-File"]. Had the defense been provided the expert immigration law consultant requested, they would have discovered (and enlightened the military judge) that an A-file exists on *all* alien "interactions with components of the Department of Homeland Security [DHS] . . . ." and the general contents of such files.[6] Both the military judge and ACCA repeatedly harped on Appellant's "failure" to demonstrate that the requested records even existed, in their efforts to justify denying the Defense's request for expert immigration law assistance and other relief. The records existed. The courts below simply could have judicially noted such–something an immigration law expert could have easily demonstrated.[7]

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[5] (...continued)
his department."

[6] *See, e.g., Dent v. Holder,* 627 F.3d 365, 372 (9th Cir. 2010), describing A-Files in detail. *See also* Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brook. L. Rev. 1569, 1570 (2014):

> DHS maintains an "alien file" or "A-file" on every non-citizen in the United States, filled with application forms, notes, and interview transcripts. [footnote omitted]

[7] *See* 72 Fed. Reg. 1755-1757 (Jan. 16, 2007), 2007 WL 86868 (F.R.).

As Appellant's Brief [App.Br.] points out at 7-8, the USCIS counsel paraded a string of (mostly irrelevant) alleged legal reasons why the complainant's A-File records ("if they exist") could not be disclosed. A competent and experienced expert in immigration law could have debunked most of those claims as demonstrated *infra.* Furthermore, the military judge and ACCA failed to grasp that federal statutes and Agency regulations cannot *be applied* in a manner which conflict with core, constitutional commands in criminal cases as herein.

Additionally, in the interests of justice and Appellant's right to a fundamentally fair trial, NACDL respectfully suggests that this Court address the outright defiance by a government (USCIS) attorney in refusing to comply with both a *bona fide* subpoena *duces tecum* (as opposed to moving to quash it), and a specific court *order* to submit the requested records for an *in camera* review by the military judge (JA 395-98). This is especially troubling considering that the Trial Counsel *conceded* that the records were relevant *and* material (JA 408).

Finally, this Court cannot begin to properly evaluate the issues herein *without* itself reviewing the records in question.[8] Consequently, the case should be remanded back to ACCA pursuant to *Thompson* with directions to obtain the Records and

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[8] Neither could ACCA properly assess prejudice without reviewing the disputed records, much less conduct a legally proper review under Article 66, UCMJ. *United States v. Thompson,* __M.J.__, 2022 WL 17169064 (CAAF 2022), at *2-3.

conduct a proper Article 66, UCMJ, review with the *benefit* of those records.

III. INTRODUCTION.

> *To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.*[9]

Simply put, this case is about a bureaucrat in an Executive Agency; a bureaucrat with the title of "lawyer." A bureaucrat who stubbornly refused to honor a discovery request via subpoena from a government prosecutor. A bureaucrat who defied a court order from a presiding military judge to produce records in his possession. This Court respectfully must forcibly repeat and reinforce what it said many years ago: "No witness–military or civilian–may be allowed to thumb his nose at the lawful process of a court-martial." *United States v. Hinton,* 21 M.J. 267, 271 (CMA 1986). Yet, that is precisely what that bureaucrat did below.

The constitutional principle at issue here was resolved by the Supreme Court thirty-five years ago–something that ACCA should have been cognizant of. In *Pennsylvania v. Ritchie,* 480 U.S. 39, 58 (1987)(plurality), that Court held:

> Ritchie is entitled to have the CYS[[10]] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial.

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[9] *United States v. Nixon,* 418 U.S. 683, 709 (1974).

[10] "Children and Youth Services."

That should have ended the issue–it didn't.

Furthermore, when addressing the USCIS records, ACCA applied an erroneous standard, concluding that the records were not important to a fair trial, holding:

> [E]ven if the records existed and were produced they were *arguably* just as helpful to the government, as they would *potentially* serve as a prior consistent statement one the defense attempted to impeach [MAB]. (JA 5-6). [Emphasis added].

Aside from being outright speculation, since ACCA itself lacked access to the records, it ignores precedent going back to the era of Chief Justice John Marshall. As explained by Justice Thomas in his concurring opinion in *United States v. Hubbell,* 530 U.S. 27, 54-55 (2000)(Thomas, J., concurring):

> Soon after the adoption of the Bill of Rights, Chief Justice Marshall had occasion to interpret the Compulsory Process Clause while presiding over the treason trial of Aaron Burr. *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807). Burr moved for the issuance of a subpoena *duces tecum* to obtain from President Jefferson a letter that was said to incriminate Burr. The Government objected, arguing that compulsory process under the Sixth Amendment permits a defendant to secure a subpoenaed *testificandum*, but not a subpoena *duces tecum*. *Id*., at 34. The Chief Justice dismissed the argument, holding that ***the right to compulsory process includes the right to secure papers—in addition to testimony—material to the defense.*** [Emphasis added].[11]

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[11] *Accord United States v. Feeney,* 501 F.Supp. 1337, 1341 (D. Colo. 1980). *Feeney* is also instructive in the context of an Executive Branch regulation commanding its employees to "respectfully decline to comply with a court order...." *Id.* at 1340-41.

IV. ARGUMENT.

A. Due to the Complexities of Immigration Law, the Military Judge Erred to the Substantial Prejudice of Appellant by Denying the Defense Request for Assistance From an Immigration Law Specialist.

Amicus begins where the error in Warda's court-martial left off–there is no dispute that A-File records *existed* pertaining to his ex-wife (an alien) and the complainant below. A competent immigration law expert could have easily pointed the Defense (and thus, the military judge) in the right direction. *See Padilla v. Kentucky, supra.* For example, in *Dent, supra,* that court took judicial notice of such "because they are official agency records from Dent's A-File." 627 F.3d at 371. *Dent* went on to describe just what an A-File is:

> The A-file "contains all the individual's official record material such as naturalization certificates; various forms (and attachments, e.g., photographs), applications and petitions for benefits under the immigration and nationality laws, reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom INS has created a record under the Immigration and Nationality Act. [footnotes omitted].

Id. at 373.

More recently in *Nightingale v. U.S. Citizenship and Immigration Services,* 507 F.Supp.3d 1193, 1198 n.1 (N.D. Cal. 2020), that court held: "An A-File, or Alien File, is the official Government record that contains information regarding noncitizens as they pass through the U.S. immigration and inspection process." That is consistent

with the Agency's 2007 *Notice for Privacy Act Purposes,* placed in the Federal Register:

> The A-File is the record that contains copies of information regarding all transactions involving an individual as he/she passes through the U.S. immigration and inspection process. Previously, legacy Immigration and Naturalization Services (INS) handled all of these transactions. Since the formation of DHS, however, these responsibilities have been divided among USCIS, ICE, and CBP. While USCIS is the custodian of the A-File, all three components create and use A-Files.

72 Fed. Reg. 1755, 1757 (2007).

The military judge's (and ACCA's) rulings questioning the very *existence* of the complainant's A-File, and the fact that the Trial Counsel had by USCIS's own administrative admissions, *access* to them, *could* have been decided correctly had an immigration law expert pointed out this portion of the *Federal Register's* Notice:

> ***Access to the digitized A-Files is provided to*** DHS and other ***Federal*** . . . agencies responsible for . . . ***investigating or prosecuting violations of civil or criminal laws***, or protecting our national security. *Id.* [Emphasis added].

Or, more specifically:

> **"Routine uses of records maintained in the system, including categories of users and the purposes of such uses:**
>
> * * * * *
>
> D. ***To an appropriate Federal*** . . . agency or organization . . . ***charged with investigating, prosecuting, enforcing . . . criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities . . . and the disclosure is appropriate to the proper performance of the official duties of the person receiving the disclosure."*** *Id.*

[Emphasis added].

That is consistent with the provisions of the *Privacy Act,* 5 U.S.C. §552a(b)(ii), regulating disclosure of covered records:

> ***(b) Conditions of disclosure***.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, ***unless disclosure of the record would be–***
>
> * * * * *
>
> (11) ***pursuant to the order of a court of competent jurisdiction***; [emphasis added].

Appellant remains imprisoned based upon both the military judge's and ACCA's reliance on *incorrect* legal principles. *Thompson, supra.* However, based upon the many misrepresentations by the USCIS counsel to the Trial Counsel–and then passed on to the military judge and TDC–none of the participants at Appellant's court-martial seemingly were aware of the relevant law. Again, something that a competent immigration law expert could have pointed out.

Title 8, U.S. Code, contains the laws governing U.S. immigration and naturalization. The dispute at Warda's court-martial over access to the complainant's A-File, *should have* been resolved by 8 U.S.C. §1367(b)(2):

> The Secretary of Homeland Security or the Attorney General may provide in the discretion of the Secretary or the Attorney General ***for the disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose in a manner*** that protects the confidentiality of such information.

[Emphasis added].

If prosecuting a defendant for allegedly raping someone as Appellant was, does not constitute a "legitimate law enforcement purpose," little (if anything) will qualify. Furthermore, there was no dispute below that the military judge was prepared to "protect the confidentiality of such information," by redacting the complainant's contact information and providing a protective order regarding such.[12]

The error by the military judge (compounded by ACCA) in denying Appellant a qualified immigration law expert, prejudiced him and denied him a fair trial, *viz.,* an immigration law expert who could have:

1. Clarified that the complainant did in fact have an A-File with the USCIS, the nature and contents of those files, and the routine government uses of that information;

2. Exposed the USCIS counsel's misrepresentations that the content of an A-File were not discoverable under any circumstances, absent the alien's consent;

3. Advised the Defense that the military judge could have judicially noticed the existence of MAB's A-File records pursuant to MRE 201;[13]

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[12] As the Record below demonstrates, USCIS counsel's feigned concerns about the complainant's "privacy" rights were simply farcical. Appellant's TDC, using ingenuity and due diligence, discovered via an internet search, the complainant's employer (a not-for-profit *immigration* agency) and her work contact information (JA 105-06). Thus, whatever privacy or non-disclosure rights she may have had under New York law with respect to her work location and contact information, the information was publicly available on the internet. Again, an issue ACCA ignored.

[13] *See Dent,* 62 F.3d at 371; *Nightingale*, 501 F.Supp.3d at 1198 n.1; and the (continued...)

and

4. Advised that the DHS/USCIS regulations pertaining to the contents of A-Files, *did not preclude* review *in camera* by the military judge.

B. The Military Judge Abandoned His Role as a Neutral Magistrate by Not Compelling Compliance With His Court Order to USCIS to Produce MAB's A-File Records for His *In Camera* Review or Otherwise Fashioning a Remedy.

It is beyond cavil that an accused in a criminal trial has the right to an impartial and neutral trial judge. *Tuney v. Ohio,* 273 U.S. 510 (1927). Furthermore, in *Ward v. Monroeville,* 409 U.S. 57 (1972), the Court held that a criminal defendant "is entitled to a neutral and detached judge in the first instance . . . ." *Id.* at 62.[14]

1. Facts Relevant to the Issues Herein.

a. The government conceded the relevance of MAB's A-File records (JA 408);

b. The government proffered that the military judge could order the release of the records pursuant to 8 U.S.C. § 1367(b)(3),[15] coupled

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[13] (...continued)
Federal Register provisions cited above.

[14] *United States v. Wright*, 52 M.J. 136, 140 (CAAF 1999)("An accused has a constitutional right to an impartial judge.")

[15] This reads in relevant part:

(b) Exceptions

* * * * *

> (3) Subsection (a) shall not be construed as preventing disclosure of information in connection with ***judicial review*** of a determination in a manner that protects the confidentiality of such information. [Emphasis added].

with a protective order (JA 408-09);[16]

c. On 19 June 2020, the military judge issued an Order to USCIS to produce MAB's records for his *in camera* review (JA 249-50), and provided a number of additional restrictions designed to protect MAB's privacy interests and satisfying USCIS's concerns;

d. The USCIS attorney's response to the military judge, again *refused* to acknowledge the obvious, i.e., that they had an A-File for MAB, but in any event, claimed that USCIS was *statutorily* barred from providing them for even *in camera* review (JA 448-50);[17] and

e. The military judge denied the motion to compel production of MAB's records as well as any form of alternative relief, e.g., abatement, dismissal, mistrial, preclusion, etc., holding *inter alia* that ***Appellant*** had not demonstrated that the records even existed (JA 471), and even if they did, they were "not in the control of the ***military*** authorities." (JA 471; emphasis added).[18]

2. Argument. The military judge simply abdicated his role and

[16] Both the government and the Defense concurred with this approach.

[17] This statutory interpretation was (is) demonstrably wrong.

[18] *But see Kyles v. Whitley,* 514 U.S. 416, 437 (1995)("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others ***acting on the government's behalf*** in the case . . . ." [Emphasis added]).

The records were, however, in the control of the "Government:"

RCM 703(f)(4)(A), Procedures for Production of Evidence:

(A) *Evidence under the control of the Government.*
Evidence under ***the control of the Government*** may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence."
[Emphasis added].

responsibilities–especially where the government conceded the record's relevance. It was his judicial function, in the first instance, to ensure that Appellant had a fair trial within the framework of due process. That meant–at a minimum–that he had a judicial *duty* to protect Appellant's constitutional rights. The Court spelled this out in *United States v. Nixon,* 418 U.S. 683, 709 (1974): "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

In *United States v. Feeney,* 501 F.Supp. at 1341, the District Court judge traced the historical lineage of the federal judiciary's responsibility in protecting the rights of one criminally accused, relying extensively on *United States v. Burr*.[19]

The *Feeney* court continued:

> The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." [Emphasis added; quoting from *United States v. Reynolds*, 345 U.S. 1 (1953)].

Id. at 1344. That court concluded–and this is where the military judge abandoned his judicial role: "The ultimate decision as to a right of secrecy is for the court and not for the executive branch." *Id.* at 1347.

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[19] 25 F.Cas. 30 (No. 14,692D)(CC Va. 1807).

C. ACCA Misunderstood the Law and Legal Principles Herein.

Recently, this Court decided *United States v. Thompson, supra,* which added clarity to the scope and procedures of the CCA's appellate review of qualifying convictions. *Thompson* points out that a proper review by a CCA under Article 66(d)(1), UCMJ, "requires a review of both the legal and factual sufficiency of the evidence." 2022 WL 17169064, at *2. The Court observed that "when the record reveals that a CCA misunderstood the law, this Court remands for another factual sufficiency review under correct legal principles." [citation omitted] *Id.* at *3. That, *amicus* suggests, is the posture of this case, which likewise requires the same disposition, i.e., a remand back to the CCA.

1. ACCA Erred in Its Legal Analysis of Expert Assistance to the Defense.

ACCA affirmed the military judge's denial of the defense request for expert assistance in the specialized area of immigration law and practice. From a *constitutional* perspective, analysis begins with *Ake v. Oklahoma,* 470 U.S. 68 (1985). While *Ake* was an "indigency rights" case, it addressed the underlying issue here–government production of expert assistance for the defense. *Ake* concluded under due process principles that expert assistance must be provided to give a defendant "meaningful access to justice" and access to the "basic tools of an adequate defense or appeal." *Id.* at 77. It may simply be to "assist in evaluation, preparation,

and presentation of the defense." *Id.* at 83. Of particular relevance here is the Court's conclusion:

> [W]here the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield. *Id.,* at 83.

NACDL respectfully submits that the CCA below simply did not understand what *competent* defense counsel use experts for–to help prepare the defense case by assisting in formulating relevant "discovery" requests; educating counsel on the relevant subject-matter (to include esoteric laws and precedents); developing defense theories and strategies within the parameters of the expert's field of expertise; and preparing for cross-examination of government witnesses, to name a few.

Irrespective of the provisions in the *Manual for Courts-Martial* [MCM] (2016 ed.), relied upon by ACCA below, those provisions cannot supercede a fundamental constitutional law principle as enunciated in *Ake* and its progeny.[20] The simple fact that ACCA did not mention nor discuss *Ake* should give this Court pause in the context of ACCA's Article 66, UCMJ, review *and* its legal sufficiency below.

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[20] *See, e.g., United States v. Robinson*, 39 M.J. 88, 89 (CMA 1994), where this Court stated: "The Equal Protection Clause, the Due Process Clause, and *Caldwell v. Mississippi*, 470 U.S. 68 . . . (1985); the Code; and the Manual provide that service members are entitled to expert assistance when necessary for an adequate defense. This right extends from the investigative stage through the appellate process." (Citations omitted). *See also United States v. Gonzalez*, 39 M.J. 459, 461 (CMA 1994).

2. ACCA Erred in Failing to Recognize that MAB, the Complainant, Did in Fact Have an A-File and That the USCIS Counsel Affirmatively Misled the Parties and Military Judge at Appellant's Court-Martial.

In conducting its sufficiency review under Article 66, UCMJ, ACCA simply *assumed* that no A-File records existed for MAB. NACDL submits that ACCA could *not* conduct either a proper factual or legal sufficiency review based upon its misplaced factual assumption, i.e., Warda could *not* prove that his ex-wife's A-File records existed, so they must not exist. But, that premise (their non-existence) was demonstrably wrong and the USCIS counsel's specious arguments (likewise incorrect) were simply an indirect fraud on the court. ACCA had options to correctly resolve the issue of whether the A-File records actually existed for MAB:

- ACCA could have remanded the case for a *DuBay* hearing with directions that the government utilize 28 U.S.C. § 512, to seek the USAG's opinion as to whether MAB's records could be released for an *in camera* review by the military judge with appropriate privacy protections.

- ACCA could have invited *amicus curiae* assistance from O.I.L. or from specialized immigration Bar organizations.[21]

ACCA proceeded on the assumption that there was no evidence that MAB's A-File records existed. An assumption not only wrong, but unjust in the context of

[21] *Amicus* notes that the *American Immigration Lawyers Association* [AILA], a voluntary Bar association of lawyers practicing (or teaching) immigration law, frequently provides *amicus curiae* Briefs on important immigration law issues.

Appellant's trial and appeals. Furthermore, were this matter pending in an Immigration Court (another Article I court), 8 C.F.R. § 1003.35(b)(1), provides: "the Immigration Judge shall have exclusive jurisdiction to issue subpoenas requiring ... the production of books, papers and other documentary evidence . . . ."

3. It Does Not Appear that ACCA Understood, Much Less Accurately Applied, the Correct Legal Principle Governing the A-File Records at Issue.

ACCA did not cite nor discuss the controlling precedent, *Pennsylvania v. Ritchie, supra.* In criminal cases, our adversarial process includes the right of the defense to have the tools necessary to obtain evidence that challenges the government's case to ensure fundamental fairness. Or, as Ritchie argued: "by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross examination." 480 U.S. at 51. The basic premise of the Confrontation right includes the right to obtain necessary material for an effective cross-examination. The Court there noted: "[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Id.* at 51-52.

Ritchie was a child sexual abuse case. The State child protective agency had a file pertaining to the alleged victim which included *verbatim* statements made by the child. But, under State law, the contents of the file were privileged and the trial judge refused to release them. The Pennsylvania high court, citing *Davis v. Alaska,* 415 U.S.

308 (1974), used a "compulsory process" approach and affirmed the intermediate appellate court's reversal of Ritchie's conviction.

The Supreme Court disagreed, holding that the issue was not confrontation–a trial right–as *Davis* was, but rather a *Brady* due process issue.[22] And, as relevant here, the Court concluded:

> We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review.
>
> * * * * *
>
> We agree that Ritchie is entitled to know whether the CYS file contains information that may have changed the outcome of his trial had it been disclosed.

Id. at 60-61. ACCA did not apply the correct law–no relevant statute categorically made MAB's A-File non-discoverable or absolutely privileged. As such the balancing test of an *in camera* inspection was the correct approach, something that both the prosecution and defense agreed to at trial. ACCA's false analysis was this: because USCIS *refused* to comply with valid, legal process, that refusal somehow translated into its holding that the records were not *subject to* compulsory process–adopting the military judge's reasoning. Aside from its inherent illogic, absent an absolute

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[22] Both Confrontation and Due Process/*Brady* issues apply here. At the conclusion of MAB's direct examination, TDC moved for production of any of her statements under RCM 914; the *Jencks Act,* 18 U.S.C. §3500; and RCM's 701 and 703 (JA 56-59). The military judge (again) denied this request. (JA 60-61).

privilege (non-existent here), the records *were* subject to compulsory process, something that *United States v. Burr, supra*, put to rest even with its claim of executive privilege.

D. MAB's A-File Records Were Available *and* Subject to Compulsory Process for Their Production.[23]

There is an axiom which, in essence says, "when one looks through a window, what one sees depends on which side of the window you are looking through." Such is the case here in the context of the A-File records at issue. *Amicus* agrees that when USCIS refused to even acknowledge the existence of MAB's A-File, and then defied both a subpoena *duces tecum* and a Court Order to produce them, from a *practical* perspective the records were not *then* available. But, NACDL submits that such an approach totally ignores the Compulsory Process Clause and where, as here, the military judge ignored the various *enforcement* remedies available, *viz.,* abatement, a warrant of attachment, a writ of *mandamus,* etc. ACCA's fundamental error was that they didn't look *into* the window of compulsory process, rather they looked *out* of that window and saw only the USCIS defiance and said "Oh well."

The Compulsory Process Clause of the Sixth Amendment is not mere surplusage. Nor can a statute, regulation, or policy nullify its constitutional command. Yet, that

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[23] The seminal analysis of the Compulsory Process Clause is Professor Peter Westin's, *Confrontation and Compulsory Process: a Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

is precisely what happened below. But, even a bureaucratic lawyer at USCIS should know that if one opposes a subpoena *duces tecum,* you do not ignore it, you move to *quash* or limit it. That, plus the military judge's throwing up his hands on this issue, emasculated the Compulsory Process Clause for Appellant.[24] That is not due process. Rather, it is the antitheses of fundamental fairness via judicial abdication.

1. Compulsory Process in Context.

> *[T]he confrontation clause is not merely a constitutional rule governing the attendance of witnesses; it also embodies constitutional controls on the manner by which the state presents its case against the accused.*[25]

In *Smith v. Illinois*, 390 U.S. 129 (1968), the Court held that the Confrontation Clause granted a defendant the right to elicit evidence in his favor from prosecution witnesses notwithstanding rules of evidence to the contrary. Then, in *Davis v. Alaska*, the Court held:

> [W]e conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record…is outweighed by [defendant's] right to probe into the influence of possible bias in the testimony of a crucial identification witness.

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[24] NACDL posits that ACCA applied the wrong standard of review, abuse of discretion, versus the correct *de novo* review as the underlying issue is one of law, i.e., the Sixth Amendment's Compulsory Process Clause.

[25] Westen, *supra* at 578.

415 U.S. at 317. The Court began its opinion as follows:

> We granted certiorari in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias . . . .

Id. at 309. Under the circumstances of this case, "bias" was a cogent reason for seeking access to the complainants A-File. Finally, the *Davis* Court held–a holding that governs this issue:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, *Evidence*, § 940, p. 775 (Chadbourn rev. 1970). ***We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.*** *Greene v. McElroy*, 360 U.S. 474, 496 (1959). [emphasis added]

415 U.S. at 316-17.

In this regard, another prominent scholar, Professor Randolph N. Jonakait, notes:

> [C]ompulsory process and confrontation should be interpreted consistently with each other for they serve the same goals. They interrelate with the Sixth Amendment rights to counsel and notice to provide an accused an adversarial trial where the accused has a fair opportunity to defend himself.[26]

NACDL submits that SGT Warda was denied "a fair opportunity to defend himself," by the combined actions of USCIS and the military judge–USCIS by refusing to comply with a facially valid court order and the military judge by his declination to enforce his own court order.

Both the military judge and ACCA failed to understand that in our constitutional scheme, an accused's "rights" contained in the Sixth Amendment are interrelated and must be interpreted *in pari materia.* Thus:

> The Sixth Amendment includes a compact statement of the rights necessary to a full defense . . . . [T]hese rights are basic to our adversary system of criminal justice . . . . The rights to notice, confrontation, and compulsory process, ***when taken together***, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice-through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. ***In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.*** [Emphasis added].

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[26] Jonakait, *Witnesses in the Confrontation Clause*: Crawford v. Washington, *Noah Webster, and Compulsory Process*, 79 Temp. L. Rev. 155, 171 (2006).

Faretta v. California, 422 U.S. 806, 818 (1975).

2. ACCA's Errors Were Plain, Palpable, and Prejudicial.

ACCA based its opinion on a misguided reading of RCM 703(f)(2), "a party is not entitled to the production of evidence which is . . . not subject to compulsory process."[27] That statement is simply wrong *as applied* to Appellant–if it was *bona fide* evidence, it *was* subject to compulsory production or an alternative remedy as the remainder of the rule provides. *Burr* settled that issue 215 years ago. Here, the error was ***plain***[28] because neither the military judge nor ACCA had access to the A-File documents, and thus could *not* assess if those documents rose to the level of "evidence" in an informed and intelligent manner. Its import here is this:

> [T]he government dutifully conceded at the outset that [Redacted]'s immigration records were relevant and necessary and acted to secure them by issuing a subpoena to the Department of Homeland Security, USCIS.

Warda, at *3. But, what ACCA failed to address is how Trial Counsel *could* know that MAB's "immigration records" existed, and that they "were relevant and necessary? One inference is that TC may have discussed the issue with the USCIS

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[27] *But see* RCM 703(f)(4)(A), which uses the phrase "Evidence under the control of the ***government***. . . ." [emphasis added]. This Court can judicially note that the DHS / USCIS is part of our "government."

[28] *See* MRE 103(d). *See generally* Hintz, *The Plain Error of Cause and Prejudice*, 53 Seton Hall L. Rev. 439 (2022).

counsel–but, if so, it is *de hors* the Record.

The error in refusing to apply "compulsory process" was ***palpable***, i.e., tangible. ACCA adopted the military judge's finding that the records "were not subject to compulsory process, as both a subpoena and a court order had failed to secure them due to the statutory privilege." *Id.* Assuming that a statutory privilege even existed (dubious from the statutory language), the military judge's ruling was simply wrong. A "statutory privilege" cannot take precedence over the *constitutional* right to *compulsory* process. This was an inter-Agency dispute entirely within the Executive Branch. Yet, neither the military judge nor ACCA addressed any applicable constitutional reasons why the A-File records were not subject to *in camera* review.

Prejudice: After a litigated trial before Members, Appellant was convicted of rape and sentenced *inter alia* to a Dishonorable Discharge and confinement for seven years (JA 12). *If* Appellant was not guilty, that is prejudice *per se.* The problem here we suggest is that the verdict is "unsafe" in the context of being correct as a result of the military judge's errors–errors that structurally affected the verdict. Those were:

1. The military judge's denial of a qualified defense immigration law expert consultant;

2. The military judge's failure to enforce *his* Order to produce MAB's A-File records for his *in camera* inspection; and, alternatively

3. The military judge's subsequent failure to provide Appellant *any* judicial relief such as abatement, etc.

This, NACDL suggests, rises to the level of *structural* error under the circumstances of this case. No one, including this Court, can know just what MAB's A-File records contain, so ascertaining prejudice (and if such, the extent thereof) is impossible as the case now stands as none of those records are in the Record. Thus:

> The impact of a structural error . . . cannot be so readily isolated or confidently assessed. The nature of a structural error is to undermine a reviewing court's ability to evaluate with any precision the impact of the error on the verdict. Structural errors are resistant to harmless error analysis because a reviewing court cannot readily assess their effect.[29]

In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), the Court referred to the underlying right as "what might loosely be called the area of constitutionally guaranteed access to evidence." That is in essence, what "compulsory process" is all about. In another structural error case, *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), the Court stated ". . . we rest our conclusion of structural error upon the difficulty of assessing the effect of the error." *Id*. at 149, n. 4.

CONCLUSION

For the reasons and upon the authorities herein, Appellant's conviction and sentence should be reversed.

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[29] Blume & Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 Wm. & Mary L. Rev. 163, 185 (1993); *see also* Kwasniewski, *Confrontation Clause Violations as Structural Defects*, 96 Cornell L. Rev. 397 (2011).

12 December 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains **6,637** words per WordPerfect's "word count" function; and

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The undersigned certifies that a true digital copy ["pdf"] of this pleading was filed electronically with the Court [efiling@armfor.uscourts.gov], Counsel for the Government and for the Appellant, this 12th day of December, 2022.

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