IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

E.V.,	)	BRIEF OF *AMICUS CURIAE*
Petitioner,	)	PROTECT OUR DEFENDERS IN
	)	SUPPORT OF WRIT-APPEAL
	)	PETITION FOR REVIEW OF NAVY-
v.	)	MARINE CORPS COURT OF
	)	CRIMINAL APPEALS DECISION
	)	ON APPLICATION FOR
E.H. ROBINSON, JR.,	)	EXTRAORDINARY RELIEF
Lieutenant Colonel, U.S. Marine Corps,	)	
Respondent,	)	Crim. App. Dkt. No. 201600057
	)	
And	)	
	)	USCA Misc. Dkt. No. 16-0398/MC
DAVID A MARTINEZ,	)	
Sergeant, U.S. Marine Corps,	)	
Real Party In Interest	)	March 28, 2016
	)	

BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS

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

Preamble

Protect Our Defenders files this *amicus* brief to plead that this Honorable Court grant E.V.'s Writ-Appeal Petition for Review and the relief requested by the Petitioner.

STATEMENT OF PROTECT OUR DEFENDERS' INTEREST

Protect Our Defender's honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted or harassed by fellow service members. This *amicus* brief makes additional relevant arguments that were not made by Petitioner E.V. but should be considered by this Honorable Court as it decides its disposition of the Petition for Review.

HISTORY OF THE CASE AND RELIEF SOUGHT

Amicus Curiae Protect Our Defenders accepts the History of the Case and Relief Sought presented in the Petition.

ISSUES PRESENTED BY PETITIONER

I. WHETHER THE NMCCA ERRED BY DENYING E.V.'S PETITION FOR A WRIT OF MANDAMUS DESPITE E.V.'S CLEAR AND INDISPUTABLE RIGHT TO THE WRIT.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY RULING THAT THE CRIME/FRAUD EXCEPTION TO MIL. R. EVID. 513 APPLIED.

III. WHETHER THE MILITARY JUDGE VIOLATED E.V.'S RIGHT TO RECEIVE NOTICE AND BE HEARD.

REASONS WHY A WRIT SHOULD ISSUE

I. NO ARTICLE I COURT, INCLUDING THIS HONORABLE COURT, THE SERVICE COURTS OF CRIMINAL APPEALS AND ALL COURTS-MARTIAL, HAS THE POWER TO DECLARE AS UNCONSTITUTIONAL THE LAWS ENACTED BY CONGRESS OR RULES LAWFULLY PROMULGATED BY THE PRESIDENT.

Congress, pursuant to its authority under Article I, Section 8 of the Constitution, gave the President authority to promulgate rules of evidence. 10 U.S.C.A. §836 (Article 36), President May Prescribe Rules. The President, pursuant to his authority as Commander in Chief under Article II, Section 2 of the Constitution and Article 36, promulgated Mil. R. Evid. 412, and in it he required military judges to weigh the victim's privacy when determining whether to admit certain evidence.

The Respondent Military Judge, the Navy-Marine Corps Court of Criminal Appeals and this Honorable Court do not have authority under the Constitution to rule that elimination of the "constitutionally required" exception to Mil. R. Evid. 513 is unconstitutional.

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982) and in *Stern v. Marshall*, 564 U.S. 2 (2011), the Supreme Court made it clear that Congress violated Article III of the Constitution when it authorized Article I courts to decide certain claims that are constitutionally entitled to Article III adjudication. *Wellness Int'l Network, Ltd. v. Sharif*, --- U.S. ---, 135 S. Ct.

1932, 1939 (2015). The Constitution vests the "judicial Power of the United States" in Article III courts. Constitution, Article III, §1. A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996).

Congress passes laws that it believes are constitutional. Military courts must presume the constitutionality of the rules of evidence. *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000).[1] Congress may not delegate to an Article I court the power to declare as unconstitutional its own acts or the acts of the President in executing the laws.

If courts-martial, service courts of criminal appeals and this Honorable Court were able to declare the laws of Congress and rules of the President unconstitutional, the accountability of Congress and the President would be thwarted. *Wellness Int'l'*, 135 S. Ct. at 1950 (Roberts, J., dissenting) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). Congress and the President have

[1] "The presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998)." *Wright*, at 481. "Judges are not free, in defining "due process," to impose [their] "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin v. California*, 342 U.S. 165, 170, 72 S. Ct. 205, 208, 96 L. Ed. 183 (1952)." *Wright*, at 481, quoting *Dowling v. United States*, 493 U.S. 342, 352, 353, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990); see also *United States v. Lovasco*, 431 U.S. 783, 790, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977).

determined that patients shall enjoy a privilege from disclosing confidential communications with their psychotherapists. This Court is not the Congress or the Commander in Chief, and it cannot overrule them when they are exercising their constitutional power.[2]

Even if military courts had the power in general to determine the constitutionality of congressional laws or presidential rules, Congress and the President removed the specific authority of military courts to rule upon whether the Constitution would ever require disclosure of mental health records when it removed the "constitutionally required" exception to Mil. R. Evid. 513. The Supreme Court has held that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-374, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974). Congress has clearly made its intent clear when it removed the "constitutionally required" exception from Mil. R. Evid. 513.

[2] "The constitutional issues are unusual with regards to Mil. R. Evid. 513 in that the rule is the result of *both* a legislative and executive act. . . . Accordingly, the President was likely at the apex of his authority in implementing Mil. R. Evid. 513 as he acted in his constitutional role as Commander in Chief and under a specific legislative direction. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty." *D.B. v. Lippert*, 2016 CCA LEXIS 63, 26-28 (A. Ct. Crim. App. 2016).

II. THE CONSTITUTION DOES NOT REQUIRE DISCLOSURE OF E.V.'S PSYCHOTHERAPY RECORDS.

Even if the Article I military courts had the power to overrule Congress's laws and the President's rules on constitutional grounds, the Constitution does not require disclosure of E.V.'s psychotherapy records under the "constitutionally required" exception.[3] First, there are many state and federal courts that have

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[3] In the body of its Order, the Navy-Marine Corps Court of Criminal Appeals affirmed the Respondent Military Judge's Supplemental Ruling solely on the basis of the crime/fraud exception to Mil. R. Evid. 513. It does not cite any authority or provide any analysis to its conclusion. Protect Our Defenders discusses the crime/fraud exception below.

Nevertheless in a cautionary footnote, the Navy-Marine Corps Court of Criminal Appeals appears to affirm the Respondent's Supplemental Ruling on the basis of the "constitutionally required" exception. The appellate court's analysis within the footnote requires some discussion.

The Respondent's Supplemental Ruling is based upon both the "constitutionally required" and the crime/fraud exceptions. See Supplemental Ruling, Analysis at 4, and Ruling at 5. The Supplemental Ruling's Conclusions of Law states that disclosure of E.V.'s mental health records is constitutionally required, and does not make any conclusion concerning the crime/fraud exception.

The Respondent acknowledges there is no case law from this Honorable Court or any court of criminal appeals concerning the "constitutionally required" exception, and then it proceeds to apply case law interpreting Mil. R. Evid. 412's "constitutionally required" exception. Supplemental Ruling at 2, 4. The Respondent offers no other constitutional analysis or authority.

The Navy-Marine Corps Court of Criminal Appeals cautions military judges against applying Mil. R. Evid. 412 case law to Mil. R. Evid. 513 issues. It is plain that the entirety of the Respondent's "constitutionally required" analysis is incorrect and disapproved by the appellate court.

The Navy-Marine Corps Court of Criminal Appeals then proceeds to inaccurately cite *Holmes v. South Carolina*, 547, U.S. 319, 324 (2006). The appellate court states that "the military judge should determine whether *infringement of the privilege* is required to guarantee 'a meaningful opportunity to present a complete defense.'" Order at fn. 2 (emphasis in original).

Holmes is not about any privilege, and it is not about whether any evidence rule should be "infringed." It is about evidence rules that infringe upon a weighty interest of the accused **and**

found that the psychotherapy privilege is absolute, and the Constitution never requires disclosure of privileged communications. Second, even though some federal Article III courts and some state courts have held that under certain circumstances the privilege may need to yield to a defendant's constitutional rights, this Honorable Court should, like Article III courts, defer to determinations and judgments made by Congress and the President.

A. The Constitution Never Requires Disclosure of Confidential Communications Between a Patient and Psychotherapist.

The "constitutionally required" exception in the old Mil. R. Evid. 513 did not mean that disclosure would ever be constitutionally required. Mil. R. Evid. 513 was promulgated shortly after the Supreme Court recognized in *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996) and *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) that privileges could possibly be limited in "exceptional circumstances implicating a criminal defendant's constitutional rights." *Id.* at 409. The Supreme Court has never found such exceptional circumstances. Like Mil. R. Evid. 513's "constitutionally required" exception, the Supreme Court was simply holding out the possibility that under some hypothetical fact pattern the privilege may have to bow to a defendant's constitutional rights. The Real Party in Interest

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are arbitrary or disproportionate to the purpose the rules are designed to serve. *Holmes*, at 324. There is no analysis as to whether Mil. R. Evid. 513 is arbitrary or disproportionate, and therefore the Navy-Marine Corps Court of Criminal Appeals' Order cannot justify applying the "constitutionally required" exception to Mil. R. Evid. 513.

SGT Martinez's request for E.V.'s psychotherapy records is not the fact pattern that could possibly meet the "constitutionally required" standard.

In *Jaffee*, 518 U.S. at 17-19, the Supreme Court rejected the balancing test used by some courts and states because making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.[4] Although *Jaffee* was a civil case, the privilege has been applied in criminal cases as well. *Kinder v. White,* 609 Fed. Appx. 126 (4th Cir. 2015).[5]

In *Kinder v. White,* the 4th Circuit Court of Appeals reversed the district court when it relied upon a West Virginia statute that contained a balancing test. *Id*. at 131. The district court ordered disclosure of Kinder's mental health records based upon a "perfect storm of facts" including the defendant's need to challenge the credibility of the central government witness. *Id.* Despite the "perfect storm," the circuit court held that *Jaffee* made it clear that the psychotherapist privilege overrides the quest for relevant evidence and is not subject to any balancing test.

[4] The Respondent inappropriately used the Mil. R. Evid. 412 balancing test.
[5] *Kinder* was also heavily relied upon by the Real Party in Interest in his 8 January Motion to Reconsider. Petition Attachment E at 9 and 14. However, Defense Counsel's citation of *Kinder* is deceptive because he fails to note that his quotes are from the dissenting opinion. State and federal courts and disciplinary boards do not look favorably upon this practice.

The privilege is not arbitrary or disproportionate to the purpose it serves. Both *Jaffee* and *Kinder* extensively discuss the public good the privilege serves.

In numerous states, the privilege is absolute and the defendant has no right to access privileged records or even obtain an *in camera* review of them. Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 19. In Colorado, *People v. District Court of Denver*, 719 P.2d 722, 727 (Colo. 1986) and *People v. Turner*, 109 P.3d 639, 647 (Colo. 2005) the state supreme court held that the privilege was absolute and that the witness could testify.

An intermediate appellate court in Illinois has adopted a similar approach. *See People v. Harlacher*, 634 N.E.2d 366, 372 (Ill. App. Ct. 1994).

The Pennsylvania Supreme Court read *Pennsylvania v. Ritchie, 480 U.S. 39 (1987)* as permitting a state to create an absolute privilege without negative repercussions. *See Commonwealth v. Wilson*, 602 A.2d 1290, 1297-98 (Pa. 1992). The court held that where the statutory privilege is absolute in its terms, the defendant is not entitled to any form of discovery or in camera review; nor, apparently, is the complainant's testimony subject to exclusion. See also, *Commonwealth v. Counterman*, 719 A.2d 284, 295 (Pa. 1998).

The Indiana Supreme Court, after thorough analysis of all of the defendant's constitutional claims and all United States Supreme Court case law, upheld

Indiana's absolute victim advocate privilege. *In re Crisis Connection, Inc.*, 949 N.E.2d 789 (Ind. 2011).[6]

Two Florida courts also determined that the Constitution did not require piercing the state's absolute privilege. *State v. Famigliglietti* 817 So. 2d 901, 906(Fla. Dist. Ct. App. 2002) and *State v. Roberson* 884 So. 2d 976, 980 (Fla. Dist. Ct. App. 2004).

In *Johnson v. State*, 342 S.W. 3d 405 (Ark. 2000), a six year old girl witnessed the brutal murder of her mother and sought psychotherapy to help deal with the trauma. The defendant sought the daughter's medical records. The Arkansas Supreme Court, relying on *Jaffee*, held that the privilege preempts the need to discover all admissible evidence. *Id.* at 196. The therapy records were "subject to an absolute privilege *without regard to their content"* and that the daughter's privilege outweighed the defendant's right to present a defense. *Id.* at 198 (emphasis in original).[7]

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[6] "In sum, by providing a complete ban to disclosure in cases like the present one, Indiana's victim advocate privilege advances the State's compelling interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse. For the reasons stated above, this interest is not outweighed by [the defendant's] right to present a complete defense. Accordingly, [the defendant] does not have a constitutional right to an in camera review of Crisis Connection's records." *In re Crisis Connection*, at 802.

[7] *Johnson* was recently reaffirmed in *Holland v. State*, 471 S.W.3d 179. In addition to analysis of the psychotherapist privilege, *Holland* also analyzed the Arkansas rape shield rule (the Arkansas equivalent to Mil. R. Evid. 412). The psychotherapist privilege is absolute and no balancing test is used, while the rape shield rule balances the probative value of the evidence against the privacy rights of the victim. The analyses of the two rules are different, and the

Numerous federal courts have also ruled that the psychotherapist privilege is absolute. The 4th Circuit Court of Appeals in *Kinder* and the 8th Circuit Court of Appeals in *Johnson v. Norris*, 537 F. 3d 840, 845-847 (8th Cir. 2008); and *Newton v. Kemna* 354, F. 3d 776, 781-782 (8th Cir. 2004) are the only federal appellate courts to consider this issue, and both have determined that the privilege applies despite a defendant's constitutional rights.[8]

Several lower federal courts have also held that the psychotherapist privilege is not subordinate to a defendant's constitutional rights. In *United States. v. Doyle*, 1 F. Supp.2d 1187 (D. Oregon 1996), the defendant argued that his Sixth Amendment right to compulsory process trumped the victim's right to confidentiality. The Government sought an upward sentencing departure due to the victim's extreme psychological injury, and the defendant argued that her psychotherapy records could perhaps dispel her testimony. The court disagreed. It noted that other privileged communications are not subordinate to the Sixth Amendment, and stated that *Jaffee* made clear that balancing tests are inappropriate. Moreover, the court declined to conduct an in camera review of the

balancing test used in the rape shield rule is not appropriate for analyzing the psychotherapist privilege.

[8] The 8th Circuit cases upholding state trail court decisions did not review the decisions *de novo* because of the extremely deferential standard of review used in a *habeas corpus* review. This Honorable Court, as discussed below, should likewise use a deferential standard of review.

records, noting that "[t]he court's review of the files would itself be a breach of the privilege." *Id.* at 1191.[9]

In *Petersen v. United States*, 352 F. Supp.2d 1016, 1023-24 (D. S.D. 2005), the district court rejected an argument that the psychotherapist-patient privilege is secondary to a defendant's rights. In *United States v. Haworth,* 168 F.R.D. 660, 660-62 (D. N.M. 1996), the district court concluded that the psychotherapy records were privileged after *in camera* review and not subject to discovery. The court stated that the defendants "mistakenly equate their confrontation rights with a right to discover information that is clearly privileged.").

In *United States v. Shrader,* 716 F. Supp. 2d 464 (S.D. W.Va. 2010), the district court held that the psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of a defendant. It reasoned that *Jaffee* court explicitly foreclosed the possibility that the privilege contain a balancing test, and that it is impermissible for the court to balance the defendant's rights against the privilege. The court found that the emphatic language used in *Jaffee* regarding the fallacy of a balancing test demonstrates that the Supreme Court intended for the privilege to apply in all circumstances, civil and criminal. Exceptions to the privilege, even in

[9] The district court in *Doyle* made a useful comparison of the psychotherapist privilege to the attorney client privilege. It asked if anyone could imagine a court granting a motion by criminal co-defendants to examine a cooperating defendant's attorney *in camera* regarding the privileged statements made by the cooperating defendant to his attorney to determine if any could be helpful to the defense. *Doyle*, at 1191. Few lawyers could imagine a court granting such a motion.

the Sixth Amendment context, "would," indeed, "eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17. Like the district court in *Doyle*, the *Shrader* court noted that any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs.[10]

B. Even if the Constitution Required Disclosure of Confidential Communications Between a Patient and Psychotherapist In a Civilian Court, the Supreme Court's Clear Deference to the Congress and President in Military Matters Requires Upholding as Constitutional Mil. R. Evid. 513 as Written.

The Constitution grants to Congress the power to govern and regulate our nation's military. The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). "Unlike courts, it is the primary business of armies and navies to fight." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

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[10] Protect Our Defender acknowledges that other lower federal courts have reached a contrary conclusion on this issue. *Bassine v. Hill*, 450 F. Supp. 2d 1182, 1185-86 (D. Oregon 2006) (distinguishing *Jaffee* as a civil case, and holding that the habeas petitioner's rights of confrontation, cross-examination, and due process outweighed the psychotherapist-patient privilege); *United States v. Mazzola*, 217 F.R.D. 84, 88 (D. Mass.2003) (holding that the societal interest in guarding the confidentiality of communications between a therapist and client were outweighed by a criminal defendant's constitutional rights); *United States v. Alperin*, 128 F. Supp. 2d 1251, 1253 (N.D. Cal. 2001); *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D. Mont. 1997) (finding that the defendant's need for the privileged material outweighed the interests of the deceased victim and the public in preventing disclosure).

Nevertheless, given the deference provided by Article III courts to Congress and the President in military justice matters, the many state and federal cases discussed above upholding an absolute privilege require this Honorable Court to uphold Petitioner E.V.'s privilege.

The trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. Military tribunals have not and "probably never can be constituted in such a way that they can have the same kind of qualifications that the constitution has deemed essential to fair trials of civilians in federal courts." *Id.*

The Supreme Court recognizes that the tests and limitations of due process may differ in the military context. *Weiss v. United States*, 510 U.S. 163,177 (1994). The Constitution gives Congress plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline. *Id.* "Judicial deference thus 'is at its apogee' when reviewing congressional decisionmaking in this area." *Id. (quoting Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). The deference extends to rules relating to the rights of service members because Congress has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Id.*

The Court of Appeals for the Armed Forces has held that military courts must presume that "the statutory scheme established by Congress and implemented by the President constitutes both the parameters of what process is due and a fair trial in the military context. *United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013).

In *Schmidt v. Boone*, 59 M.J. 841 (A.F. Ct. Crim. App. 2004), the Air Force Court of Criminal Appeals stated: "In deference to the Executive Branch, courts are reluctant to intrude upon the discretionary authority of the Executive in military and national security matters." As discussed above in footnote 1, the presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown. "Judges are not free, in defining 'due process,' to impose [their] 'personal and private notions' of fairness." *Wright*, at 481.[11] Since so many state and federal courts had upheld absolute privileges against constitutional challenge, it is not possible that the lack of constitutionality is "clearly and unmistakably" shown.

The President has stated that military sexual assault destroys unit cohesion and threatens our national security, and this Court must defer to the President's judgment on this issue. Congress and the President have given Petitioner E.V. the privilege to refuse to disclose and to prevent any other person from disclosing the confidential communications she had with her therapists. Even if there were some Supreme Court case (but there is none) that held the psychotherapist-patient privilege in a civilian criminal court must bow to a defendant's constitutional due process rights, this Court should still defer to the President's determination and

[11] That the Respondent Military Judge used his personal and private notions of fairness is made plain by the fact that he does not and cannot cite a single applicable case to support his ruling. He does not refer to any specific Constitutional clause that may have been violated.

judgment that patients' communications with their psychotherapists shall be privileged in military courts. This Court should not find a constitutional right where none exists, and should defer to Congress and the President.

C. There Is No Basis To Treat the Psychotherapist Privilege Any Differently Than Any Other Privilege.

Sexual assault victims and every other privilege holder should be able to trust the promises made by the Military Rules of Evidence especially since no military appellate court nor the United States Supreme Court has ever held otherwise. Another profound injustice is visited upon victims when military judges, in unpublished orders that are not generally accessible because they are often filed under seal, order disclosure of the privileged communications between the victims and their psychotherapists. The military justice system is betraying sexual assault victims who serve our country.

Victims' communications with their Special Victim Counsel are protected by Mil. R. Evid. 502, with their clergy by Mil. R. Evid. 503, with their spouse by Mil. R. Evid. 504, with their psychotherapist by Mil. R. Evid. 513, and with their Victim Advocate by Mil. R. Evid. 514. There is not a single case in which a military appellate court found any of these privileges or psychotherapist privilege subject to a defendant's constitutional rights. Not one. If this Court finds that the "constitutionally required" exception still exists (despite Congress's deletion of this exception), then there would be no basis to prevent defense counsel from

seeking the records and communications of Special Victim Counsel, clergy and spouses since in each case it may be possible that the records or communications would be relevant. It would be especially difficult for this Court to differentiate the psychotherapist privilege from the clergy privilege since the Court of Appeals for the Armed Forces has already recognized that the psychotherapist privilege is based upon the social benefit of confidential counseling and "is similar to the clergy-penitent privilege." *United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (emphasis added); and M.C.M., App. 22, at A22-44. The Supreme Court has favorably compared the psychotherapist privilege to the spousal and attorney-client privileges. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Like the spousal and attorney-client privileges, the psychotherapist privilege is 'rooted in the imperative need for confidence and trust'").

Even if military courts had the power under the Constitution to rule that laws and rules are unconstitutional, this Honorable Court should hold that enforcement of E.V. privilege is not unconstitutional because so many state and federal courts have upheld the psychotherapist privilege despite constitutional challenges, the Supreme Court gives great deference to the constitutional determinations made by the Congress and President concerning military justice, and there would be no logical basis to limit any ruling to the psychotherapist privilege.

III. EVIDENCE OF BIAS OR MOTIVE TO FABRICATE IS LEGALLY INSUFFICIENT TO SATISFY THE CRIME/FRAUD EXCEPTION IN MIL. R. EVID. 513(d)(5).

The Respondent Military Judge's *ex post facto* Supplemental Ruling is the epitome of victim blaming and shaming. His ruling is frightening because if this Honorable Court approves of the Respondent Military Judge's Ruling, the crime/fraud exception will be used to vitiate Mil. R. Evid. 513 to the same extent the now deleted "constitutionally required" exception did.

Real Party in Interest SGT Martinez never raised the crime/fraud exception. The crime/fraud exception was never discussed by any party or the Respondent Military Judge in any motion, brief, hearing or ruling until the 19 February Supplemental Ruling. To be clear, there were numerous motions and briefs filed, at least two Article 39(a) hearings held, and three rulings or orders issued before the Supplemental ruling.[12] "Crime/fraud" was never uttered. According to the Supplemental Ruling, the "constitutionally required" exception "appears" to be the only basis the Real Party in Interest contended applied. Supplemental Ruling at 2.

The Respondent Military Judge's 13 January Decision does not mention the crime/fraud exception, and incredibly contains absolutely no basis for its decision to conduct an *in camera* review of Petitioner E.V.'s therapy records. Specifically,

[12] See Petitioner's Attachment of Pertinent Parts of the Record on page 28-29 of Petition. The rulings and orders are Petitioner's Attachments D, G, H and L.

it does not mention any exception including the "constitutionally required" exception. In fact, no form of the word "constitution" is used in the Supplemental Ruling. Not a single element of Mil. R. Evid. 513(e)(3) is discussed, analyzed or met.[13] The 13 January Decision contradicts itself. In the section labeled Analysis, the Respondent states that the Real Party in Interest "proffered evidence from the DSM V that [E.V.'s] diagnosed condition can cause doubts about [her] ability to accurately perceive and recall events."[14] The Respondent then concludes his Analysis by stating that he would "review the file for material that meets a standard [sic] under Mil. R. Evid. 513, with **particular emphasis on bias/motive to fabricate."** 13 January Decision at 5 (emphasis added). "Ability to accurately perceive and recall events" has no relationship to "bias or motive to fabricate." The Respondent had no basis to conduct any *in camera* review of Petitioner E.V.'s psychotherapy records.

Even after conducting the *in camera* review, the Respondent still could provide no legal basis to disclose E.V.'s records. He simply ordered them disclosed. The 27 January Protective Order does not mention any form of the word "constitution," and it does not even hint at any crime or fraud. The Protective

[13] Mil. R. Evid. 513(e)(3) requires that the requested information meets one of the enumerated exceptions of the rule. The 13 January Decision mentions the word "exception" only once, but it does not identify, or even hint at, which exception could be applicable.
[14] This statement is incorrect. The proffered evidence from DSM V does not indicate E.V.'s diagnosis would cause doubts about her ability to perceive or recall. See discussion of this issue in Petition at 3.

Order states in its Analysis that E.V.'s records are being disclosed for their possible use in cross-examining E.V. at trial "concerning a **possible** bias or motive to fabricate." Protective Order at 2 (emphasis added). The Respondent examined the records, and he is still unable to find that the records contain any evidence of bias or motive. He only finds that such evidence may be possible.

By 19 February, the Respondent was aware that Petitioner E.V. intended to file a writ (see Petition Attachment O), and may have been aware that the Army Court of Criminal Appeals reversed Military Judge Colonel Jeffrey D. Lippert under similar circumstances. *D.B. v. Lippert*, 2016 CCA LEXIS 63, 14-15 (A. Ct. Crim. App. 2016). Just as the Respondent did not mention the "constitutionally required" exception but by all appearances actually applied such exception, Military Judge Colonel Jeffrey D. Lippert did not make his application of the "constitutionally required" clear on the record. *Lippert*, at 25. The Army Court of Criminal Appeals noted that Military Judge Colonel Jeffrey D. Lippert did not cite any authority or explain his reasoning.

Respondent Military Judge issued the Supplemental Order because he knew he provided no basis to conduct an *in camera* review or to disclose E.V.'s records in either the 13 January Decision or the 27 January Protective Order. After undertaking to write the Supplemental Ruling, the Respondent recognized that he, like Military Judge Colonel Jeffrey D. Lippert, could not cite any authority or

explain his reasoning for ordering review of E.V.'s records. Without notice to or input from E.V. or the parties, the Respondent *ex post facto* created a new theory of admissibility: The evidence that the Real Party in Interest presented to show E.V.'s bias or motive to fabricate was sufficient to demonstrate that E.V. clearly contemplated the commission of a fraud or crime. Supplemental Ruling at 3.

The evidence of E.V.'s bias or motive consisted of the fact that two pages of E.V. therapy records were used to obtain a compassionate reassignment of her husband. This is an extraordinary leap of logic. It is questionable whether this evidence is relevant to the issue of bias or motive to fabricate. The Real Party in Interest argued that it was relevant to bias and motive, but even he did not attempt to argue that it was evidence of a crime or fraud.

Every human being has biases and motives. That does not make us all frauds or criminals. There is a huge gulf between being accused of bias and being accused of a crime.

The Respondent does not cite any authority or provide any analysis for his ruling that the crime/fraud exception applies.[15] He states only that the timing of

[15] The Petition at 12 discusses, with persuasive citation to authority, the proper legal analysis that the Respondent should have conducted. The Respondent should have required a threshold showing of a factual basis adequate to support a good faith belief by a reasonable person and that an *in camera* review may reveal evidence that the crime/fraud exception applies. *United States v. Zolin*, 491 U.S. 554, 572 (1989) (crime/fraud exception to attorney client privilege). See also, *In re Sealed case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud).

the therapist's treatment and report "show Mrs. E.V.'s tactical use (i.e., fraud) of the process to obtain a material gain." Is a soldier injured in battle tactically and fraudulently seeking material gain when he seeks medical care for his injuries and uses the medical report as justification for a compassionate reassignment near his home so that family members can help care for him? The Respondent's *sua sponte* and baseless accusation will discourage sexual assault victims to either forego either needed psychotherapy treatment or forego reporting the real crime.

If Congress and the President intended to vitiate the privilege whenever there is evidence of bias or motive to fabricate, then it would have included a bias/motive exception to Mil. R. Evid. 513. There is no bias/motive exception. As a matter of law, evidence of bias and motive is insufficient to satisfy the crime/fraud exception under Mil. R. Evid. 513. This Honorable Court must make this clear to all military judges.

CONCLUSION

President Clinton established the Mil. R. Evid. 513, *Psychotherapist- Patient Privilege,* in 1999. Exec. Order No. 13140, 64 Fed. Reg. 55115 (Oct. 12, 1999). The rule was created to clarify military law in light of the Supreme Court's recognition of the psychotherapist privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). Mil. R. Evid. 513 was created with eight exceptions where the privilege

would not apply. The two exceptions applicable to this case are the crime/fraud exception and the "constitutionally required" exception.

In the sixteen 16 years since Mil. R. Evid. 513 was established, this Honorable Court has never provided any guidance on the Mil. R. Evid. 513 exceptions.[16] This lack of guidance has allowed military judges to routinely violate the rule by reviewing and ordering the disclosure of privileged psychotherapy communications. *D.B. v. Lippert*, at 14-15.[17] Military judges do not cite any applicable military case law in their decisions concerning the rule's "constitutionally required" exception, but rely solely upon on their own personal opinion or upon case law applicable to Mil. R. Evid. 412.[18] The routine review and

[16] See Major Michael Zimmerman, *Rudderless: 15 Years and Still Little Direction on Boundaries of Military Rule of Evidence 513*, 223 Mil. L. Rev. 312, 315 and 329 (2015).

[17] The court in *Lippert* cited Major Cormac M. Smith, *Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice*, Army Lawyer, Nov. 2015, at 10. MAJ Smith explained that *in camera* review had become "almost certain" upon a party's request because "prudent" military judges felt "essentially compelled" to conduct an *in camera* review in order to protect the record. Smith, at 6, 8, 9-10. The *Lippert* court concluded, "If such commentary is correct – and our own routine review of courts-martial records does not lead us to believe otherwise – the purpose of Mil. R. Evid. 513 is clearly frustrated by such routine reviews." *Lippert*, at 14-15. See also Zimmerman, *supra* note 16, at 324.

[18] The Respondent Military Judge applied Mil. R. Evid. 412 analysis to the Mil. R. Evid. 513 issue in this case (see Petitioner's Attachment N, p. 2). The Navy-Marine Corps Court of Criminal Appeals "cautioned" military judges against this application (see Petitioner's Attachment Q, fn. 2). For discussion of how common this error is, see Zimmerman, *supra* note 1, at 315 and 329.

disclosure of privileged communications between patients and psychotherapists has been failure by the military justice system.[19]

Congress and the President has remedied this injustice by eliminating the "constitutionally required" exception to Mil. R. Evid. 513 and establishing specific requirements that must be satisfied before a military judge may order production for an *in camera* review. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014) (hereinafter "2015 NDAA); and Exec. Order No. 13696, 80 Fed. Reg. 35783 (June 22, 2015).

Military judges are now refusing to apply this change by hubristically declaring, without any analysis or precedent, that Congress and the President cannot eliminate the "constitutionally required" exception. *Lippert*, at 25-26 and Respondent Military Judge's various orders.[20] This chaos and lawlessness must end.

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[19] *In camera* reviews of mental health records became so "ubiquitous" that the government requests them or fails to object to them on behalf of victims, and military judges order production prior to conducting the required hearing. Smith, *supra* note 17, at 9. At least one military judge, Colonel Jeffery D. Lippert, refused to follow the rules despite numerous reversals by the Army Court of Criminal Appeals. *C.C. v. Lippert*, No. 20140779, slip. Op. at 2 (A. Ct. Crim. App. October 16 2014); *A.T. v. Lippert*, 2015 CCA LEXIS 257 (A. Ct. Crim. App. June 11, 2015) (application of Mil. R. Evid. 514 and not Mil. R. Evid. 513); and *D.B. v. Lippert*, 2016 CCA LEXIS 63, 14-15 (A. Ct. Crim. App. 2016).

[20] Perhaps military judges have been encouraged by military justice law reviews that spout their personal beliefs that Congress cannot eliminate the "constitutionally required" exception. Smith, *supra* note 17, at 6 and 10; Zimmerman, *supra* note 1, at 314, 319-320, and 335-336, and Major Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of military and College Sexual Assault*, 223 Mil. L. Rev. 223, 294 (2015) (Congressional elimination of "constitutionally required" exception likely to receive "judicial scorn."). Military

Over sixteen years ago, Congress and the President gave the military justice system the authority and duty to consider and develop reasonable guidance on whether the Constitution could ever supersede the Mil. R. Evid. 513 privilege by including in the rule the "constitutionally required" exception. The power of this Honorable Court to now consider this issue is past. By their actions in enacting 2015 NDAA and signing its implementing executive order, Congress and the President have removed the authority of any military court (including this Honorable Court) from considering whether the Constitution ever requires piercing the psychotherapist privilege. The only courts with authority to consider whether a "constitutionally required" exception should ever apply would be Article III courts. This Honorable Court may not now provide any guidance on the "constitutionally required" exception except to clearly and unequivocally order military judges to apply Mil. R. Evid. 513 as it is written.

judges and military scholarship are uniformly and casually dismissive of the constitutional role of Congress and the President. This is disturbing, and this Honorable Court should make it clear that Congress and the President are to be deferred to and respected. Each of the military articles argue for particular "judicial" interpretations of Mil. R. Evid. 513, as though the military courts are placed above, and may pass judgment upon, the Congress and the President.

WHEREFORE, Protect Our Defenders respectfully requests this Honorable Court to grant the Petitioner's Writ-Appeal Petition for Extraordinary Relief and issue a writ of mandamus ordering the Respondent Military Judge to deny Real Party in Interest SGT Martinez's Motion to Compel Discovery of Petitioner E.V.'s Mental Health Records.

Respectfully submitted,

/ELECTRONICALLY SIGNED/

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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains 6854 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on 28 March 2016, to the following:

(1) This Court: efiling@armfor.uscourts.gov

(2) Clerk of Court, NMCCA: Robert.Troidl@navy.mil

(3) Counsel for Air Force Special Victims Program: deanna.daly.mil@mail.mil

As explained in the accompanying Motion, Protect Our Defenders does not have the email addresses for the counsel Petitioner E.V., Respondent, Government Appellate Counsel, Government Defense Counsel, or Counsel for Real Party in Interest SGT Martinez. Protect Our Defenders is using email addresses for these persons based solely upon email naming protocols. Protect Our Defenders will verify correct email addresses and serve persons with incorrect email addresses tomorrow. If necessary, Protect Our Defenders will file an updated certificate of service.

Respectfully submitted,

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