IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

EV, Petitioner, v. E.H. ROBINSON, JR. Lt. Col., US Marine Corps, Respondent, and DAVID A. MARTINEZ, Sergeant, U.S. Marine Corps, Real Party in Interest.	REPLY BRIEF ON BEHALF OF PETITIONER Crim. App. No. 201600057 USCA Misc. Dkt. No. 16-0398/MC 12 April 2016

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EV, Petitioner, v. E.H. ROBINSON, JR. Lt. Col., US Marine Corps, Respondent, and DAVID A. MARTINEZ, Sergeant, U.S. Marine Corps, Real Party in Interest.	REPLY BRIEF ON BEHALF OF PETITIONER Crim. App. No. 201600057 USCA Misc. Dkt. No. 16-0398/MC 12 April 2016

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

Issues Presented

A. THIS COURT HAS JURISDICTION TO HEAR THIS PETITION AND ISSUE THE WRIT BECAUSE E.V.'S RIGHT TO CHALLENGE THE MILITARY JUDGE'S RULING THAT VIOLATES HER MIL. R. EVID. 513 PRIVILEGE AND ARTICLE 6B RIGHTS IS CLEAR AND INDISPUTABLE.

Respondent and the Real Party in Interest (RPI) identify one justification for issuing an writ that reverses a military judge's ruling but failed to include the second legal justification, which is when there has been "a clear abuse of discretion." … [An abuse of discretion by the military judge] "will justify the invocation of this extraordinary remedy." *Cheney v. United States Dist. Court*, 542 U.S. 367, (U.S. 2004) citing *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S.

379, 383, 98 L. Ed. 106, 74 S. Ct. 145 (1953), *Will* v. *United States*, 389 U.S. 90, 95, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967).[1] In the National Defense Authorization Act for Fiscal Year 2016 (2016 NDAA) , Pub. L. 114-92, § 531(e)(3) (2015) (Enforcement of Certain Crime Victim Rights by the Court of Criminal Appeals), Congress specifically give victims the right to petition a Court of Criminal Appeals when a court-martial ruling violates a victim's rights afforded by Mil. R. Evid. 513. In this case, the military judge abused his discretion in his ruling. The opportunity for a victim to appeal a court-martial ruling, by way of writ, is meaningless if the victim cannot seek final determination of the propriety of the ruling in the superior appellate court. EV has an indisputable right to request extraordinary relief from a decision that is clear abuse.

Contrary to RPI's answer, the Respondent abused his discretion when he failed to follow the law. The military judge improperly applied R.C.M. 701(a)(2) and the constitutionally required exception in determining he would release EV's privileged mental health records. The Military Judge also abused his discretion when he failed to provide EV the opportunity to be heard.

[1] Other Courts have required a judge's decision to be "characteristic of an erroneous practice which is likely to recur." *United States v. Jones,* 2015 CCA LEXIS 573 (N-M.C.C.A. Dec. 29, 2015) , *Dillon, Inc. v. Bohanon*, 612 F.2d 1249, 1257 (10th Cir. 1979), *rev'd.,* 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980). *See* LaBuy *v. Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957);*Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

In his 19 February 2016 supplemental order, the Respondent concludes that E.V.'s mental health records are discoverable under R.C.M. 701(a)(2). Privileges are not disregarded based upon discovery rules, such as R.C.M. 701(a)(2), because the privileged communications are confidential, are considered protected from disclosure and the standard for releasing the records go far beyond ordinary discovery rules. There is a reason separate rules exist for determining whether privileged communication should or should not be released. The Respondent misapplied the law when he used R.C.M. 701(a)(2) to justify the release of E.V.'s mental records.

The Respondent also applies the "constitutionally required" exception and uses the Mil. R. Evid. 412 standard as part of his legal justification for releasing the records. What is disconcerting is that the Respondent applies the "constitutionally required" exception in conjunction with the crime/fraud exception. This is clearly against what Congress intended when they removed this Mil. R. Evid. 513 (d)(8) exception in the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA), *Pub. L. No. 113-291, § 535, 128 Stat. 3292, 3368 (2014)* (Enforcement of Crime Victims' Rights Related to Protections Afforded by Certain Military Rules of Evidence).

Additionally, he denied her the right to be heard on the applicability of the fraud/crime exception after she asserted her Mil. R. Evid. 513 privilege and her

right to be heard in two previous motions hearings. He essentially denied her, through her counsel, any opportunity to present evidence or address the specific requirements, or lack thereof, for establishing the crime/fraud exception. Respondent's last minute supplemental ruling, without any notice, repudiates the meaning and intention of the enactment of The Military Crime Victims' Right Act (MCVRA) (2014). The MCVRA specifically confers a right for the victim to be treated with respect for the dignity and privacy of the victim. Art. 6b, UCMJ. According to RPI, if E.V. received some due process in one hearing then there cannot be a violation of her rights without a hearing later on in the process. The MCVRA was enacted and victims' right laws continue to develop as violations continue to occur.

In passing the federal Crime Victims' Rights Act, 18 U.S.C. §3771, Pub. L. 108–405 (2004). Congress specifically intended that victims of crime would be afforded due process as part of the right "to be treated with fairness and with respect for the victim's dignity and privacy." Federal Courts recognize that Congress intended to provide victims with "due process" in all criminal proceedings.

B. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FOUND AN EXCEPTION TO THE PRIVILEGE EXISTED UNDER MIL. R. EVID. 513 WHEN HE DETERMINED THAT THE EVIDENCE "CASTS DOUBTS" UPON THE VALIDITY OF THE VICTIM'S CLAIM OF SUICIDAL IDEATION AND "CALLS INTO QUESTION HER BIAS/MOTIVE TO FABRICATE," BECAUSE THE RULE REQUIRES THE EVIDENCE SUPPORT A *CLEAR CONTEMPLATION* OF THE FUTURE COMMISSION OF A FRAUD OR CRIME, A MUCH HIGHER THRESHOLD THAN WHAT THE JUDGE FOUND

The military judge abused his discretion when he relied upon Mil. R. 513(d)(5) as support for why he ordered the release of privileged mental health records. The Respondent and the RPI, in their respective Answers, argue that the military judge properly applied Mil. R. Evid. 513 (d)(5) and found the released mental health records non-cumulative and that the accused had no other means of accessing them. United States' Writ-Appeal Answer, p. 19. To support its argument, both parties cite to the military judge's use of the timeline of events relating to the victim's treatment. The timeline is merely circumstantial and does not rise to the standard required by Mil. R. Evid. 513(d)(5) for the release of privileged mental health records.

After hearing argument, and originally denying the defense motion to order production of the victim's mental health records, the military judge eventually conducted an *in camera* review and on 27 January 2016, determined that selected portions of the victim's mental health records should be released to the defense. In response, the victim's counsel informed the judge that he would be filing a writ at

the service court challenging that ruling. The military judge then responded to that by supplementing his ruling for production, on the same day as the writ was filed. In that ruling, the judge supplied additional rational to support his decision to pierce the victim's privilege in her own mental health records.

In his Supplemental Ruling RE: Defense Motion to Reconsider Court's Ruling on Defense Motion to Compel Specific Discovery of Mental Health Records, 19 February 2016, the military judge relied upon a different and unsubstantiated basis by which to pierce the victim's privilege. As well, the military judge continued to rely upon (1) *U.S. v. Klemick*, despite the update of Mil. R. Evid. 513 which displaced *Klemick*, and (2) the old "constitutional exception" despite the updated rule which no longer includes that section. Supplemental Ruling, p. 4. The only evidentiary finding the judge made was that "Ms. E.V.'s bias, motive to fabricate and inconsistent statements which could be used to her impeach her" would be found in the records. His subsequent release of the records with a new basis can be construed to say that: if I decide to release the records, then there must be an exception that applies. Supplemental Ruling, p. 4.[2]

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[2] Although the government explains, in its Answer, that "[c]onstitutional protections still apply to all criminal prosecutions, that is not disputed in this case. What is relevant is whether or not there is a constitutional right to the mental health records in this case. The judge, in his most recent ruling, held that "Mrs. E.V.'s Mental Health Records should be disclosed to the defense under exception to Mil. R. Evid. 513 (d)(5) *and the constitutional exception.*" Supplemental Ruling, p. 3 (emphasis added). The judge's continued reliance upon the "constitutional

In the Supplemental Ruling the military judge opined that the defense had presented evidence that "casts doubts on the validity of any suicidal ideations in this case." Id. The military judge also opined that "[t]he timing of the response from the USAF humanitarian transfer officials, Mrs. E.V.'s inpatient mental health treatment, and the subsequent release and provision of the documents to the transfer officials also calls into question her bias/motive to fabricate." Supplemental Ruling, p. 4. Calling into question, and casting doubt is not the applicable standard under which the privilege may be pierced under Mil. R. Evid. 513(d)(5). Rather, the standard is much higher. The applicable language states that

> if the communication *clearly contemplated* the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit *what the patient knew or reasonably should have known* to be a crime or fraud.

Mil. R. Evid. 513 (d)(5) (emphasis added). Evidence that calls into question or casts doubt upon a witness's motive or biases, is a far cry from evidence that "clearly contemplate[s] the future commission of a fraud or crime." Nor is such evidence anywhere close to showing that the patient sought mental health help in

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exception" was error, as the United States Supreme Court has not yet held that there is a constitutional right to discover impeachment evidence not in the possession of the government. *DB v. Colonel Lippert, Military Judge, and Ducksworth, Real Party in Interest*, No. 201507690 (A. Ct. Crim. App. Feb. 1, 2016), at fn 14.

order to enable someone else to commit what the patient knew or should have known to be crime or fraud. The defense did not present evidence, nor did the judge include any such evidence in his ruling. Rather, the judge relied upon the timing of several communications and events as evidence that bias and motive to fabricate existed. Specifically, the dates of when the victim sought mental health help, the date of a response by the USAF humanitarian transfer office, and the release of some mental health records to that office are all that the military judge pointed to as evidence that the victim was clearly contemplating a fraud or a crime. Except that he did not say that the evidence showed that the victim was clearly contemplating fraud. He stated that doubt was cast and that her motives were called into question. The timeline the judge relied upon is tenuous and merely circumstantial; hardly the type of evidence that the rule explains is necessary before the privilege can be pierced.[3]

The timeline the judge relied upon does *not* establish that the victim "clearly contemplated" a future crime or fraud, as is required by Mil. R. Evid. 513(d)(5). Nor does the second clause of Mil. R. Evid. 513(d)(5) support the military judge's ruling. There was no evidence presented, nor did anyone argue, that the victim sought psychiatric services in order to enable herself or anyone else to commit

[3] Petitioner previously showed that the key component, relied upon by the military judge and the defense, in this timeline is wrong based on both parties' failure to explore the time difference between where EV's husband received the message in Japan and from where it was sent in Texas. Petitioner's Writ-Appeal pg. 15-16.

what the victim knew or reasonably should have known was a crime or fraud. The word "fraud" doesn't appear in the motions or rulings until the day EV filed her original writ when the military judge acknowledged his rulings had been unclear.

The military judge abused his discretion when he relied upon circumstantial evidence that did not rise to the level required by Mil. R. Evid. 513(d)(5), but based on a lower standard than what the rule requires, he reviewed and ordered the disclosure of privileged mental health records.

C. THE MILITARY JUDGE ABUSED HIS DISCRETION BY RELYING EXCLUSIVELY ON THE ELIMINATED CONSTITUTIONALLY REQUIRED EXCEPTION TO MIL.R.EVID. 513 TO PIERCE EV'S MENTAL HEALTH PRIVILEGE

Even if the military judge's ex post facto application of Mil. R. Evid. 513(d)(5) is found to be appropriate despite the lack of evidence, argument and notice to support it, the military judge still abrogated E.V.'s mental health privilege relying *exclusively* on the eliminated constitutionally required exception. This is clear because the military judge pierced records that were the result of therapy occurring after E.V.'s humanitarian transfer *and* records that existed before E.V. was admitted to the hospital for suicidal ideations. Although the RPI and Respondent have failed to explain how unreleased records could have been used to perpetuate a crime or fraud, it is clear that records falling outside the window of

possibility of the defense's theory could only have been released using the constitutionally required exception.

The RPI argues that *DB v. Lippert*, and its analysis regarding constitutionality, is not applicable because here the military judge relied on the constitutional exception *and* Mil. R. Evid. 513(d)(5) whereas the military judge in *Lippert* relied only upon the constitutional exception. RPI's Writ-Appeal Answer, pg. 22, footnote 70. This claim ignores the facts before the court and the reality that Mil. R. Evid. 513(d)(5) could not apply to the significant portion of the pierced records. Just as in *Lippert*, the Petitioner was denied procedural due process by never receiving notice or an opportunity to be heard on the crime/fraud exception to Mil. R. Evid. 513. The military judge in this case has essentially declared the rule of evidence unconstitutional without analysis.

As it is clear the constitutional issue is paramount in this case, both the RPI and Respondent argue that *Jaffee v. Redmond*, 518 U.S. 1 (1996) does not apply because it is was a civil case with no bearing on the 5th or 6th Amendments. United States' Writ- Appeal Answer, pg. 22; RPI's Writ-Appeal Answer, pg. 22. Both ignore the fact that although the case was civil in nature, the ruling concerned a rule of evidence, specifically a privilege, which applies with equal force in a criminal case. Additionally, the Supreme Court, in recognizing the psychotherapist privilege in *Jaffee*, relied significantly on criminal cases. Consider the following

cases relied on and cited by the *Jaffee* Court are all criminal cases: *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906 (1980); *United States v. Gillock*, 445 U.S. 360 (1980); *Funk v. United States*, 290 U.S. 371 (1933); *United States v. Bryan*, 339 U.S. 323 (1950); *Elkins v. United States*, 364 U.S. 206 (1960); *Hawkins v. United States*, 358 U.S. 74 (1958). This is not an exhaustive list. The fact that *Jaffee* was a civil case is irrelevant to the Court's determination.

Neither the RPI, Respondent or Navy-Marine Corps Court of Criminal Appeals produced a single case suggesting that protection of a privilege violates a defendant's constitutional right to present a defense. In other words, privileges outweigh an accused's ability to discover all evidence that exists. This is why military judges never weigh the constitutional rights of an accused against the attorney-client, clergy-penitent, and spousal privileges of witnesses. The RPI suggests that the President's decision founded on the advice of Congress to remove the constitutionally required exception, and any balancing of the privilege against the need for disclosure, "would certainly not survive scrutiny." RPI's Writ-Appeal Answer, pg. 23. And yet the attorney-client, clergy-penitent, and spousal privileges, each promulgated by the President, are all in derogation of an accused's constitutional rights without challenge on a weekly basis in the military.

Conclusion

E.V.'s communications, which both Congress and the President intend should be protected, absent few exceptions, were improperly released by the Military Judge. Not only did the Military Judge misconstrue the facts, but he misapplied the law, denying EV both her procedural and substantive rights.

WHEREFORE, Petitioner respectfully requests the original writ-appeal be granted.

Respectfully Submitted,

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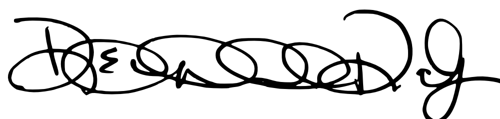

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing motion was transmitted by electronic means on 12 April 2016 the Court and all parties to include Navy-Marine Corps Appellate Government Division, Navy- Marine Corp Appellate Defense Division, the Respondent, Col E. H. Robinson, the Clerk of NMCCA and the amicus curiae counsel .

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