IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

EV, Petitioner	)	UNITED STATES' WRIT-APPEAL ANSWER
v.	)	Crim.App. Dkt. No. 201600157
UNITED STATES, Respondent	)	USCA Dkt. No. 16-0398/MC
and	)	
DAVID A. MARTINEZ Sergeant (E-5) U.S. Marine Corps, Real Party in Interest	)	

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

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I

Preamble

COMES NOW THE UNITED STATES, as Respondent,[1] and respectfully requests that this Court deny Petitioner's Writ-Appeal.

II

History of the Case

On June 2, 2015, the United States preferred charges against the Accused, including violations of Articles 80, 107, 120, UCMJ, 10 U.S.C. §§ 880, 907, 920 (2012). (Petitioner's Writ-Appeal, Attach. D at 4, Mar. 16, 2016.) They were referred to a general court-martial on September 3, 2015. (*Id*.) Each Charge arises from events of the night of December 31, 2014, the date on which Petitioner alleges the Accused sexually assaulted her. (*Id*., Attach. B at 2.)

On December 30, 2015, the Military Judge denied the Accused's motion to compel production of Petitioner's mental health records. (*Id*.)

[1] This Court and other Federal appellate courts recognize that the United States is a necessary respondent in extraordinary writ cases. In an original petition for extraordinary relief filed in this Court or in other Federal appellate courts, the United States and Sergeant David A. Martinez, U.S. Marine Corps, would both be "respondents for all purposes," as they are both parties to the trial litigation and have an interest in the appellate litigation. C.A.A.F. R. 8(f); s*ee also* Fed. R. App. Proc. R. 21(a)(1) ("Mandamus or Prohibition" . . . "All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes."). The named Military Judge Respondent, has no personal interest in this case—only his Ruling is at issue and the subject of this Writ-Appeal.

On January 13, 2016, the Military Judge granted the Accused's motion to reconsider and ordered production of the records for *in camera* review. (*Id*. Attach. G, H.)

On January 27, 2016, the Military Judge disclosed limited portions of Petitioner's mental health records to the Accused. (*Id*. Attach. I, L.)

Petitioner filed a Petition for Extraordinary Relief from the Military Judge's Ruling before the Navy-Marine Corps Court of Criminal Appeals on February 19, 2016. (Petitioner's Pet. for Extraordinary Relief, Feb. 19, 2016; Writ-Appeal, Attach. P.) That court denied the Petition on February 25, 2016. *EV v. Robinson*, No. 201600057 (N-M. Ct. Crim. App. Feb. 25, 2016) (order denying relief); (Writ-Appeal, Attach. Q). Petitioner filed a Writ-Appeal Petition before this Court on March 16, 2016.

III

Jurisdictional Statement

This Court has jurisdiction to determine whether it has jurisdiction to act on Appellant's Writ-Appeal and to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a).

IV

Relief Sought

Respondent seeks an Order denying Petitioner's Writ-Appeal Petition.

IV

Issues Presented

I.

WHETHER THE NMCCA ERRED BY ERRONEOUSLY DENYING EV'S PETITION FOR A WRIT OF MANDAMUS DESPITE EV'S CLEAR AND INDISPUTABLE RIGHT TO THE ISSUANCE OF A WRIT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ERRONEOUSLY RULING THE DEFENSE SATISFIED EACH PRONG OF MIL. R. EVID. 513(e)(3) AND BY RULING THAT MIL. R. EVID. 513(d)(5) APPLIED.

III.

WHETHER THE MILITARY JUDGE VIOLATED EV'S ARTICLE 6b RIGHTS BY ERRONEOUSLY APPLYING IMPERMISSIBLE EXCEPTIONS AND DENYING EV A RIGHT TO RECEIVE NOTICE AND TO BE HEARD.

V

Statement of Facts

A. Petitioner alleged the Accused sexually assaulted her.

Petitioner alleges that, on the late evening of December 31, 2014, the Accused sexually assaulted her. (Writ-Appeal, Attach. D at 2-3.) During the six weeks following the assault, Petitioner reported her allegation to multiple parties, including her husband, Naval Hospital personnel, the wife of the Accused, and on February 13, 2015, to Naval Criminal Investigative Service (NCIS). (*Id.*) She also discussed the matter with mental health practitioners. (*Id.*, Attach. D at 4.)

B. Petitioner and her husband requested a Humanitarian Transfer from Okinawa to the United States.

On February 12, 2015, the day before Petitioner reported her allegation to law enforcement, her husband, Staff Sergeant (SSgt) V, an active duty member of the United States Air Force, requested a humanitarian transfer from his duty station in Okinawa to Travis Air Force Base in California. In his request, he wrote

> My dependent spouse was very recently sexually assaulted and is in detrimental [sic] need of family support. We are currently stationed at Kadena Air Base, Okinawa, Japan. Unfortunately, our families all reside in California and we believe that it is imperative that we can be near both of our families as support systems. In attempt to resolve this, my spouse has attended numerous mental health sessions. However, due to the long distance between her and our families overseas, the stress is becoming unmanageable and is beginning to affect our three year old son.

(*Id*., Attach. A, Encl. (8), and Attach. D at 3.) On February 17, 2015, SSgt V's commanding officer recommended approval of the transfer request. (*Id*., Attach. A, Encl. (8) and Attach. D at 4.)

C. Petitioner and her husband supported the humanitarian transfer request by providing two pages of Petitioner's mental health records.

Air Force Instruction 36-2110 requires that a humanitarian transfer be substantiated with medical authority that remaining in the area would be detrimental to the welfare of the family member. (*Id*., Attach. A, Encl. (7).)

On February 18, 2015, an Air Force Personnel Center, Total Force Service Center (AFPC TFSC) representative, responsible for processing SSgt V's transfer request, asked SSgt V by e-mail message for "a letter from your spouse's local

[m]ental health or SARC office supporting your request; to include any police reports and/or medical data concerning why remaining in the area is detrimental to your spouse's health." (*Id*., Attach. E, Encl. (12) and Attach. H. at 2).

SSgt V then attempted unsuccessfully to retrieve this documentation from NCIS. (*Id*.) On February 20, 2015, SSgt V replied to the AFPC TFSC representative that he would not be able to retrieve documents from either NCIS or "outside agencies." (*Id*.) A different representative e-mailed in response, "Sir, In order to complete your request the BPO will need medical authority substantiates [sic] that remaining in the area would be detrimental. Thank you." (*Id*.)

On 20 February 2015, Petitioner checked into the U.S. Naval Hospital (USNH) Okinawa, professing suicidal ideations. The safety risk assessment conducted by a mental health provider indicates: "[t]he patient desires to leave Okinawa soonest because she reports she was sexually assaulted and wants to be away from the individual she reports assaulted her and his friends that live right next to her." (*Id*.)

On February 23, 2015, Petitioner was released from the USNH Okinawa. That day, SSgt V further substantiated his humanitarian transfer request with two pages from Petitioner's mental health records pertaining to her suicidal ideations. The request was accepted by AFPC TFSC the same day and forwarded for

processing. (*Id*., Attach. A, Encl. (7), and Attach. D. at 4). The request was approved on March 11, 2015. (*Id*., Attach. H at 3.)

D. After Charges were referred against him, the Accused requested discovery of Petitioner's mental health records, which the Government denied.

Based on Petitioner's allegations, Charges were preferred against the Accused, including violations of Articles 80, 107, 120, UCMJ. (Writ-Appeal, Attach. P at 4.) The Charges were referred to a general court-martial on September 3, 2015. (*Id*.)

On September 28, 2015, Trial Defense Counsel requested notice of whether Petitioner "has sought or is seeking mental health treatment for the allegations in this case." (*Id*., Attach. A, Encl. (2).) The United States denied the request on the bases of relevance and privilege. (*Id*.) The Accused renewed his request on October 6, 2015. (*Id*., Attach. A, Encl. (3).)

E. When the Accused moved the trial court to compel production of Petitioner's Mental Health Information, the United States opposed the motion and Petitioner invoked her privilege under Mil. R. Evid. 513.

On November 1, 2015, having received no response to his October 6, 2015, discovery request, the Accused moved to compel production of Petitioner's mental health records. (*Id*., Attach. A.) The Accused cited a "constitutional exception" to the Mil. R. Evid. 513 privilege, which he claimed was met because Petitioner's mental health records

> were relevant, necessary and material to the preparation of the defense. To adequately cross-examine the complaining witnesses, the defense requests that these items be turned over to the defense pursuant to the government's discovery obligations…. [T]he defense has a good faith basis to believe that relevant evidence exists within [Petitioner's] mental health records concerning her motives to change her story and report the allegations to law enforcement, as well as her state of mind during and after the alleged events.

(*Id*.)

The United States responded, opposing the motion, on November 9, 2015. (*Id*., Attach. B.) Petitioner's Special Victim Counsel responded, citing and invoking Petitioner's Mil. R. Evid. 513 privilege, on November 13, 2015. (*Id*., Attach. C.)

F. <u>The Military Judge held a closed hearing under Mil. R. Evid. 513, then denied the Accused's motion to compel and review the Mental Health Information *in camera*</u>.

On November 18, 2015, the Military Judge held a closed session of court to receive evidence and hear argument. (*Id*., Attach. J at 28-42.) Petitioner's Special Victim Counsel was present and made argument. (*Id*. at 33-38, 41-42.)

The Military Judge denied the motion on December 30, 2015. (*Id*., Attach. D.) In his Ruling, he cited the threshold requirements for *in camera* review of mental health records:

> (1) did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable

> efforts to obtain the same or substantially similar information through non-privileged sources?

(*Id*., Attach. D at 9) (citing *United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006).

The Military Judge recognized the current "seven listed exceptions to this privilege contained in Mil. R. Evid. 513(d). A former exception—the constitutionally required exception—appears to be the basis the defense contends has applicability to this case." (*Id*., Attach. D at 7) (noting the June 17, 2015, repeal of the "constitutionally required" exception) (footnote omitted).

After noting that preferral here preceded the repeal of the "constitutionally required" exception, the Military Judge also recognized the tension between privileged information and constitutionally required evidence, "assuming *arguendo* that the 'constitutionally required' exception still applies in this case." (*Id*.) He then found that, to meet the *Klemick* standard, the Accused's motion attempted to argue the applicability of "the constitutionally required exception formerly found in Mil. R. Evid. 513(d)(8)." (*Id*., Attach. D at 9).

The Military Judge concluded that the Accused "has not met its burden under *United States v. Klemick* for the court to order an in camera inspection." (*Id*., Attach. D at 11.) Finding that "no evidence was presented to cause doubts about her ability to accurately perceive and recall events based upon her therapy or the suicidal ideations," the Military Judge concluded that the Accused "has not

established a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513. (*Id.*)

G. Citing new evidence and arguing waiver while questioning Petitioner's need for treatment, the Accused moved for reconsideration, which the United States opposed.

On November 19, 2015, the Accused received two matters he had requested in discovery: the two pages of Petitioner's mental health records that she had provided to supplement the humanitarian transfer package, as well as several pages of communications between SSgt V and the AFPC TFSC representatives regarding the humanitarian transfer request. (*Id.*, Attach. E at 3, 5, Encl. (12).)

On January 8, 2016, the Accused moved the trial court to reconsider its Ruling. (*Id.*, Attach. E.) The Accused asserted that, by submitting portions of her mental health records to obtain the benefit of a humanitarian transfer, Petitioner had waived her Mil. R. Evid. 513 privilege. (*Id.*, Attach. E at 8-11.) The United States opposed, arguing that Petitioner's waiver was limited only to those two already-disclosed pages. (*Id.*, Attach. F.)

Separately in his reconsideration motion, the Accused noted that after the humanitarian transfer request was "rejected for a lack of medical documentation," Petitioner had "diminishing opportunity to obtain the desired transfer." (*Id.*, Attach. E at 12-13.) In support, the Accused provided the communications

between SSgt V and the AFPC TFSC representatives. (*Id*., Attach. E, Encl. (12).)

The accused argued that the new evidence showed Petitioner

> again sought to create the required justification, this time using medical resources as opposed to law enforcement. She was admitted to the USNH with a suicidal ideation, wherein she told her provider that her stressor was the sexual assault and the cure was 'to leave Okinawa soonest because she reports she was sexually assaulted and wants to be away from the individual she reports assaulted her and his friends that live right next to her.

(*Id*., Attach. E at 12-13.)

H. In a second closed hearing under Mil. R. Evid. 513, the Military Judge heard arguments about the genesis of Petitioner's in-patient treatment. He then granted the motion to reconsider and ordered production of the mental health records, reviewed them *in camera* and ordered portions released to the Accused.

On January 13, 2016, the Military Judge held a closed session to receive evidence and hear argument. Special Victim Counsel was present. (*Id*., Attach. K.) During oral arguments about the humanitarian transfer request, the Accused claimed in addition to his argument that Petitioner waived her privilege by disclosing her mental health documents, that

> the timeline that is laid out with the routing and the rejection of that request, and the rerouting and rejection again, essentially, has laid out a very, very clear and specific factual scenario of what happened in this case; one that leads to a motive to fabricate, essentially, the theory of the defense case-in-chief here.

(*Id*., Attach. K at 53.)

Trial Counsel and Special Victim Counsel each argued against the applicability of waiver beyond the two pages of records submitted for the transfer

request. (*Id*., Attach. K at 61-62.) Regarding whether Petitioner sought in-patient treatment solely to advance the humanitarian transfer request, Special Victim Counsel presented no evidence, but argued

> They're speculating that her motive—that—one, that she lied, period; two, that she lied to get off island. There isn't any evidence anywhere that they have provided that she lied to get off the island. They're making that argument based on extremely circumstantial evidence, based on some timing. And I would ask that you look closely at the timing if you were seriously considering changing your original ruling in this case.

(*Id*., Attach. K at 63.)

At the end of that hearing, the Military Judge orally granted reconsideration and ordered Petitioner's mental health records to be produced for *in camera* review. (*Id*., Attach. K at 70.) He later issued a written order to compel production. (*Id*., Attach. G.)

a. <u>The Military Judge found several new facts in his reconsideration Ruling</u>.

In his written Ruling upon reconsideration, the Military Judge found additional facts related to the process by which Petitioner had entered in-patient treatment on February 20, 2015:

> 5. On 18 February 2015, the AFPC TFSC Hum Reassign & Defer reviewer returned the request, stating: "Please provide a letter from your spouse's local Mental health or SARC office supporting your request; to include any police reports and/or medical data concerning why remaining in the area is detrimental to your spouse's health."

. . .

8. On 20 February 2015, SSgt [V] responded to the AFPC TFSC Hum Reassign & Defer reviewer's request for documentation, stating, in pertinent part: "Sir/Ma'am, . . . Per NCIS, no information/documentation will be provided at this time, as any potential statements can compromise the case. . . . I was, however, able to obtain, and attach my wife's Unrestricted SAPR report. Unfortunately, this is the only other document any, and all outside agencies that we have contacted (to include the Legal Office, and Mental Health) are willing to release. It is their belief that any documentation regarding this matter may be subpoenaed, and may compromise the investigation, and ultimately the case. . . . Thank you."

9. On 20 February 2015, AFPC TFSC Hum Reassign & Defer reviewer once again requested supporting documentation, stating: "Sir, In order to complete your request the BPO will need medical authority substantiates [sic] that remaining in the area would be detrimental. Thank you."

10. On 20 February 2015, [Petitioner] was checked into the U.S. Naval Hospital (USNH) Okinawa for suicidal ideations.

(*Id*., Attach. H at 2.)

b. Based on these new facts, the Military Judge found that the Accused had met the *Klemick* threshold. The Military Judge supplemented his Ruling to explain how the Accused had satisfied the requirements of Mil. R. Evid. 513.

The Military Judge concluded that the Accused "met [his] burden under *United States v. Klemick* for the court to order an in camera inspection." (*Id*., Attach. H at 4.) He concluded that there was "a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513." (*Id*.) Further, he found that the Accused

> knows very little about [Petitioner's] actual condition and the only person they currently have access to with any information regarding what [Petitioner] presented with is [Petitioner's] husband, [SSgt V]. Further, even if defense had access to [Petitioner], someone undergoing her condition is limited in what they can say about the psychology behind the condition and how that may affect her ability to perceive and record events. Finally, aside from the 2 pages previously provided from [Petitioner's] mental health records, the defense does not have any other non-privileged access to this information regarding the manifestations and severity of [Petitioner's] psychological condition.

(*Id*.)

On February 16, 2016, the Military Judge supplemented his Ruling and specified that the evidence showed the requested mental health records met one of the enumerated exceptions under Mil. R. Evid. 513(d). (*Id*., Attach. N.) He found that, although Petitioner sought treatment for suicidal ideations,

> The evidence presented casts doubts on the validity of any suicidal ideations in this case. The timing of the response from the USAF humanitarian transfer officials, [Petitioner's] in-patient mental health treatment, and the subsequent release and provision of the documents to the transfer officials also calls into question her motive to fabricate.

(*Id*., Attach. N at 4.) The Military Judge concluded that this finding satisfied the exception in Mil. R. Evid. 513(d)(5), addressing communications made in contemplation of future fraud or crime. (*Id*.)

c. <u>The Military Judge reviewed the mental health records *in camera* and released portions of them</u>.

On January 27, 2016, the Military Judge ordered the release of "15 heavily redacted of 83 total pages" within Petitioner's mental health records for their

discovery upon the Accused. (*Id*., Attach. I.) The Military Judge released the documents subject to a Qualified Protective Order. (*Id*., Attach. L.)

I. After the Navy-Marine Corps Court of Criminal Appeals denied the Petition for Extraordinary Relief from the Military Judge's Ruling, Petitioner filed a Writ-Appeal to this Court.

Petitioner filed a Petition for Extraordinary Relief in the form of a writ of mandamus at the Navy-Marine Corps Court of Criminal Appeals on February 19, 2016. (Pet. for Extraordinary Relief; Writ-Appeal, Attach. P.) The lower court noted that the Petition was properly submitted, with all attachments, on February 25, 2016, and denied the Petition that day. *EV v. Robinson*, No. 201600057, *1; (Writ-Appeal, Attach. Q). A footnote in the denial read:

> However, we caution military judges against applying case law establishing the constitutionally required standard as envisioned in Mil. R. Evid. 412 directly to Mil. R. Evid. 513. Mil. R. Evid. 412 permits the admission of evidence the exclusion of which would violate the constitutional rights of the accused. In contrast, when determining whether in camera review or disclosure of privileged materials is constitutionally required under MIL. R. EVID. 513, the military judge should determine whether infringement of the privilege is required to guarantee "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

Id. at n.2. Petitioner appealed to this Court on March 16, 2016. (Writ Appeal.)

VI

Reasons Why The Writ-Appeal Should Be Denied

THE LOWER COURT CORRECTLY DENIED THE WRIT. PETITIONER MAKES NO SHOWING THAT THE MILITARY JUDGE USURPED HIS AUTHORITY UNDER THE PROCEDURAL REQUIREMENTS OF EITHER RULE FOR COURTS-MARTIAL 701 OR MIL. R. EVID. 513.

The issuance of an extraordinary writ is a matter of discretion of the court to which the petition is addressed. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964); *Parr v. United States*, 351 U.S. 513, 520 (1956).

A petitioner bears the burden of showing he has a clear and indisputable right to the extraordinary relief that they have requested. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 314 (1957). To merit relief under the powers granted this Court by the All Writs Act, appellants must demonstrate that the complained of actions were more than mere error, but rather demonstrate a usurpation of judicial power. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). In the context of writs of mandamus and prohibition, military courts have read this rule to require appellants to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger v. United States*, 7 M.J. 216, 224 (C.M.A. 1979); *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

Petitioner's Writ-Appeal states her reasons for requesting extraordinary relief: (1) the Military Judge and the lower court erred in relying on the Mil. R. Evid. 513(d)(5) privilege exception, (Writ-Appeal at 10-17); (2) The Military Judge and the lower court erred in finding a constitutionally-required exception to Mil. R. Evid. 513, (*id*. at 17-23); (3) the Military Judge and the lower court erred in finding that the Accused met his burden under Mil. R. Evid. 513(e)(3)(C)-(D), (*Id*. at 23-26); and, (4) the Military Judge's application of Mil. R. Evid. 513(d)(5) deprived Petitioner of the right to be heard. (Writ-Appeal at 26-27.) None of these constitutes grounds to interrupt an ongoing trial.

A. Petitioner fails to demonstrate a clear and indisputable right to immediate relief or that a writ is necessary and appropriate. The Military Judge has wide discretion to regulate discovery and petitioner fails to identify any usurpation of power.

A writ of mandamus is a "drastic remedy . . . [which] should be invoked only in truly extraordinary situations." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (citing *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)); *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991). Petitioner has the burden to show her "right to issuance of the writ is clear and indisputable." *Bankers Life*, 346 U.S. at 384 (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

"Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp. v.*

Daiflon, Inc., 449 U.S. 33, 35 (1980) (quoting *Will v. Calvert Fire Ins. Co*., 437 U.S. 655, 666 (1978)). "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[2] *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted). In the context of writs of mandamus, military courts have read this rule to require Petitioner to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g*., *Dettinger*, 7 M.J. at 224; *McKinney*, 46 M.J. 870 .

1. The Military Judge has wide discretion to regulate discovery.

Results or reports of mental examinations that "are material to the preparation of the defense" are discoverable subject to limits of patient-therapist privilege. R.C.M. 701(a)(2)(B); Mil. R. Evid. 513.

Rule for Courts-Martial 701(g) entrusts a military judge with regulating the time, place, and manner of discovery, including the provisions for protective orders and sanctions for non-compliance, and a military judge has wide discretion in

[2] "Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations,' *Ex parte Peru*, 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland v. Soper*, 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States v. United States District Court*, 334 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by [the Supreme] Court, *La Buy v. Howes Leather Co*., 352 U.S. 249 (1957); see *McCullough v. Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706, 707 (1927) (dictum)." *Will*, 389 U.S. at 95-96.

applying those powers. *See United States v. Wuterich*, 67 M.J. 63, 83, (C.A.A.F. 2008) (Ryan, J., dissent) (citing *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 898 (D.C. Cir. 2006) ("[T]he district court has wide discretion in managing discovery.")); *Faigin v. Kelly*, 184 F.3d 67, 84 (1st Cir. 1999) ("A district court's case-management powers apply with particular force to the regulation of discovery and the reconciliation of discovery disputes."); *Trepel v. Roadway Express, Inc*., 194 F.3d 708, 716 (6th Cir. 1999) ("Matters of discovery are in the sound discretion of the district court")); *see also* R.C.M. 801(a) ("The military judge shall: . . . (3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual[.]"). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)). "Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004).

2. Petitioner has no clear and indisputable right to a particular decision by the Military Judge.

Petitioner complains that the Military Judge erred, twice, in his ultimate conclusions about whether to compel production and to release her mental health

records under Mil. R. Evid. 513(e). (Writ-Appeal at 10-17, 23-26.) But the rights in Mil. R. Evid. 513 are procedural, and no military court has held that either Mil. R. Evid. 513 or Article 6b, UCMJ, 10 U.S.C. § 806b, entitles a victim to particular discovery or evidentiary rulings. *See, e.g., LRM v. Kastenberg*, 72 M.J. 364 (2013); *DB v. Colonel Lippert, Military Judge, and Ducksworth, Real Party in Interest*, No. 201507690 (A. Ct. Crim. App. Feb. 1, 2016); *see also United States v. McDowell*, 73 M.J. 457, 460 (C.A.A.F. 2014) (Baker, C.J., concurring) (noting that Article 6b, UCMJ, affords victims "the right not to be excluded from, and the right to be heard at any hearing convened pursuant to Article 32[,] . . . an example of a continuing trend toward affording alleged crime victims protections throughout the criminal justice process, particularly in sexual assault cases").

3. The Military Judge applied the Mil. R. Evid. 513(d)(5) exception, found the records not cumulative, and found that the Accused had no other means of accessing them.

Petitioner alleges that the Military Judge erred in his analysis under Mil. R. Evid. 513(e)(3)(B) because he should not have found any exception applied that she sought in-patient treatment "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." *See* Mil. R. Evid. 513(d)(5). She also complains that the Military Judge erred under Mil. R. Evid. 513(e)(C)-(D) because he should have found that the

Accused (1) had other information available and (2) had not made reasonable efforts to obtain the information elsewhere. (Writ-Appeal at 23-26.)

To support his finding that the Mil. R. Evid. 513(d)(5) "crime or fraud" exception applied, the Military Judge cited the timeline of Petitioner's in-patient treatment and the immediate use she made of the records to support the transfer request. (*Id*., Attach. H. at 3.)

Separately, the Military Judge found that the mental health records were "not merely cumulative" given how little the Accused knew about Petitioner's actual condition; and that the Accused had no "other non-privileged access to this information regarding the manifestations and severity of [Petitioner's] psychological condition." (*Id*., Attach. H at 4.)

4. Mil. R. Evid. 513 has no "constitutionally required" exception, as the Military Judge and the Navy-Marine Corps Court of Criminal Appeals recognized. Any reference by the Military Judge to "constitutionally required" or "constitutional exception" appears to refer to rights under the Fifth and Sixth Amendments.

Beyond the substance of the Military Judge's rulings under Mil. R. Evid. 513(e), Petitioner asserts that both the Military Judge and the Navy-Marine Corps Court of Criminal Appeals impermissibly imported a constitutional exception into Mil. R. Evid. 513(d). (Writ-Appeal at 17, 22.)

a. Both the Military Judge and the lower court recognized that there is no "constitutionally required" exception in the current Mil. R. Evid. 513.

The Military Judge explicitly noted the removal of the "constitutionally required" exception from Mil. R. Evid. 513 in his first Ruling. (Writ-Appeal, Attach. D at 7, n.1.) He also discussed the absent clause with Counsel in the first closed hearing. (*Id*.) Likewise, the Navy-Marine Court of Criminal Appeals made plain that analysis under Mil. R. Evid. 513 should not import a constitutional exception from Mil. R. Evid. 412. Contrary to Petitioner's argument, (Writ-Appeal at 17-23), the lower court did not create a constitutional exception to Mil. R. Evid. 513. Instead, the court merely admonished trial courts not to apply rules of admission in determining whether the opportunity to present a complete defense requires piercing a privilege. *EV v. Robinson,* No. 201600057, *n.2.

b. Constitutional protections still apply to all criminal prosecutions.

Rules of evidence are always cabined by the Constitution's guarantee of "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina,* 547 U.S. 319, 324 (U.S. 2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

Holmes did not involve privileges, as Petitioner correctly notes, (Writ-Appeal at 21), but it did reiterate that the Constitution's guarantees are permanent limits on rules of evidence. 547 U.S. at 324-25. Petitioner argues that *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) "prohibits" considering Constitutional protections against privilege rules, even in criminal trials. But *Jaffee* involved a civil wrongful death action against a police officer who was in mental therapy. *Id*. at 3. There, when the therapist refused to disclose her notes to the plaintiff, the trial court instructed the jury they could make an adverse inference from the non-disclosure. *Id*. at 5-6. The Supreme Court reversed, holding that confidential patient-psychotherapist communications are barred from compelled disclosure. *Id*. at 18.

Jaffee did not reach into the Fifth Amendment right to Due Process or Sixth Amendment rights to Compulsory Process or Confrontation, which apply to all criminal trials and all types of rules of evidence. *See Holmes*, 547 U.S. at 324; *see also Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (rule that prohibited defendant from testifying to any post-hypnosis recollection arbitrarily denied right to present defense); *Crane*, 476 U.S. at 689-690 (rule that prevented defendant from challenging voluntariness of his confession at trial was a violation of constitutional guarantee of fair trial.); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (rules disallowing defendant from impeaching his own witness who recanted a previous confession to the charged crime, and disallowing him to enter that witness's

previous statement-against-penal- interest, denied right to present complete defense); *Washington v. Texas*, 388 U.S. 14 (1967) (barring defendant from calling as a witness another alleged participant in the crime, unless the witness had been acquitted, violated the right to put on a defense).

To the extent that language in the Military Judge's Ruling suggests that a "constitutional exception" remains in Mil. R. Evid. 513, (Writ-Appeal, Attach. N at 3-5), such language contextually appears to be a permissible consideration of Fifth and Sixth Amendment rights—not an independent basis for his Ruling.

B. Petitioner exercised her procedural rights under Mil. R. Evid. 513. She fails to demonstrate an additional clear and indisputable right to be heard on findings, and she identifies no new matters that that could have altered the Military Judge's application of Mil. R. Evid. 513(d)(5).

Petitioner separately alleges that the Military Judge did not provide her an opportunity "to be heard" on the decision to apply Mil. R. Evid. 513(d)(5), the "crime or fraud" exception, to her mental health records. (Writ-Appeal at 26-27.) This assertion is unsupported by the text of Mil. R. Evid. 513 and the Record.

1. Petitioner received every procedural protection available before the Military Judge released her records.

Prior to ordering production or admission of any materials over which a patient has claimed a patient-psychotherapist privilege, a military judge must conduct a closed hearing. Mil. R. Evid. 513(e)(2). "The patient must be afforded a reasonable opportunity to attend the hearing and be heard." *Id*. The Military

Judge afforded Petitioner that right, twice. (Writ-Appeal, Attach. J, K.) Appellant was heard each time, without limit from the Military Judge. (*Id*.)

Before reviewing potentially privileged material *in camera*, Mil. R. Evid. 513 requires that a military judge find by a preponderance of the evidence

> (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
>
> (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3). The Military Judge here made findings on each of these matters. (Writ-Appeal, Attach. D, Attach. H at 5, Attach. N. at 3-5.) He did so only after Petitioner was heard. (*Id*., Attach. J, K.)

Petitioner was represented by counsel at every stage of this proceeding. Special Victim Counsel replied to the original motion to compel Petitioner's mental health records, and invoked her privilege. He also appeared at each closed hearing, where he had the opportunity to present evidence. And he made arguments at each hearing, including on the "crime or fraud" issue Petitioner now challenges. Petitioner was not entitled to anything more.

2. The Military Judge's application of the exception under Mil. R. Evid. 513(d)(5) was not a new proceeding that required another opportunity for Petitioner "to attend the hearing and be heard." Application of that exception was based on evidence presented at two previous hearings.

Petitioner asserts that the Military Judge's application of Mil. R. Evid. 513(d)(5) to the mental health records equated to "stepp[ing] into the role of a party, attempting to perfect the defense's motion by relying on brand new legal grounds to pierce the psychotherapist-patient privilege." (Writ-Appeal at 26.) Petitioner alleges that this decision deprived her "of a chance to be heard, a chance to introduce evidence and a chance to call witnesses to rebut the new theory." (*Id*.)

When a court holds a closed hearing to consider patient-psychotherapist's communications, Mil. R. Evid. 513 provides a patient with "a reasonable opportunity to attend the hearing and be heard." Mil. R. Evid. 513(e)(2). Petitioner cites to no other provision or to any case that expands this right into all realms of a military judge's decision-making.

Further, the Military Judge's application of Mil. R. Evid. 513(d)(5) was neither a surprise nor a finding without support in the Record. None of the other six exceptions could reasonably have applied. Mil. R. Evid. 513(d)(1)-(4), (6)-(7). And Petitioner had been on notice that the "crime or fraud" exception was in play long before the Military Judge's supplementary ruling on February 16, 2016. On January 8, 2016, when the Accused filed a motion to reconsider, the propriety of

Petitioner's in-patient treatment was under attack. (Writ-Appeal, Attach. E.) At the second closed hearing, Special Victim Counsel defended against the Accused's claim that the treatment was based on Petitioner's self-serving motives. (Writ-Appeal, Attach. K at 62.) Special Victim Counsel noted the timing of SSgt V's January 20, 205, messages about his humanitarian transfer request; Special Victim Counsel argued the times indicate that these messages did not prompt Petitioner to seek in-patient treatment. (*Id*.; *see also* Writ-Appeal at 15-16.)

The Military Judge's Ruling of January 13, 2016, listed the timeline Petitioner's entry into in-patient treatment. (*Id*., Attach. H at 2.) She already had the opportunity "to attend the hearing and be heard" on those facts. The supplement did not identify any new facts; rather, it merely made explicit the Mil. R. Evid. 513(d) exception that had previously been implicit. (*Id*., Attach. N.)

3. Petitioner has demonstrated no prejudice from the Military Judge's application of Mil. R. Evid. 513(d)(5). She still has not identified any new information that counters the Military Judge's finding.

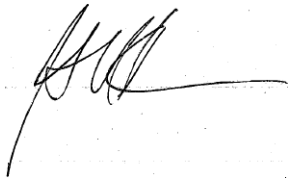
Petitioner complains that the Military Judge did not apply Mil. R. Evid. 513(d)(5) until more than a month after the second hearing, but she cites to no particular prejudice from that delay. But since the Military Judge's Ruling on January 13, 2016, through this filing, Petitioner still has not indicated what new or additional information she would have provided to the Military Judge to rebut his finding that the timing of her in-patient treatment request met the Mil. R. Evid.

513(d)(5) exception for disclosure of a small portion to Petitioner's mental health records. She filed no motion to reconsider before the trial court, and she cites to no evidence in the Record that undermines the Military Judge's view of the existing evidence.

Because she would have been in no different position even had the Military Judge reassembled and offered Petitioner a third chance to appear, she has not demonstrated her clear and indisputable right to relief.

Conclusion

The United States respectfully requests that this Court deny Petitioner's Writ-Appeal Petition.



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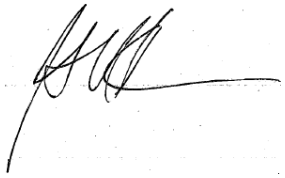

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