IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

E.V.,
Petitioner

v.

E.H. ROBINSON, JR.
Lt. Col,
U.S. Marine Corps,
Respondent

DAVID A. MARTINEZ
Sergeant,
U.S. Marine Corps
Real Party in Interest

ANSWER ON BEHALF OF REAL PARTY IN INTEREST

Crim.App. No. 201600057

USCA Dkt. No. _____/MC

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

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Statement of Statutory Jurisdiction

This case is before this Court pursuant to 10 U.S.C. §806b (2015) (hereinafter "Article 6b"). However, as discussed *infra*, Sergeant (Sgt) Martinez challenges the jurisdictional basis of the Appellant's petition for extraordinary relief.

Statement of the Case

Petitioner filed a "Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Application for Stay of Proceedings" on February 19, 2016. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) docketed the case on February 25, 2016 and denied the petition on the same day. Petitioner filed her brief with this Court on March 17, 2016.

Statement of Facts

1. Allegations of Sexual Assault and Humanitarian Transfer

Around January 1, 2015, Mrs. E.V., the Petitioner, made a restricted sexual assault report against Sgt David Martinez, the Real Party in Interest.[1] During January, Petitioner was in therapy sessions, possibly relating to the alleged assault.[2] On February 12, 2015, Petitioner's husband, Staff Sergeant (SSgt) G.V., requested a humanitarian transfer from Okinawa to Travis Air Force Base, California.[3] Staff Sergeant G.V. cited the alleged assault and the distance from family support systems as a reason behind the request.[4]

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[1] Findings of Fact, Conclusions of Law, and Decision Re: Defense Motion to Compel Specific Discovery: Mental Health Records, Dec. 30, 2015, at 3 [hereinafter Judge's Initial Decision].
[2] Judge's Initial Decision at 3.
[3] *Id.*
[4] *Id.*

Sergeant Martinez and his wife were in temporary lodging, preparing to PCS from Okinawa on February 13, 2015.[5] Petitioner was aware the Martinez's were in temporary lodging and preparing to depart Okinawa.[6] She filed an unrestricted report of sexual assault with NCIS on February 13, 2015.[7] On February 17, 2015, SSgt G.V.'s commanding officer approved his request for a humanitarian transfer.[8] The Air Force Personnel Center Total Force Service Center (Personnel Center) reviewer returned the transfer request to SSgt G.V., requesting a letter from E.V.'s mental health or SARC office supporting the request; the Personnel Center asked for police reports or medical data concerning why remaining in the area is detrimental to Petitioner's health.[9]

Staff Sergeant G.V. told the Personnel Center he could only offer the unrestricted SAPR report.[10] The Personnel Center responded they would need medical authority to substantiate Mrs. E.V.'s claim that remaining in the area would be detrimental to her.[11] The very next day, Mrs. E.V. checked herself into Naval Hospital Okinawa for suicidal ideations.[12]

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[5] Judge's Initial Decision at 3.
[6] Defense Motion for Reconsideration at para. ff.
[7] Judge's Initial Decision at 3.
[8] *Id.* at 4.
[9] Findings of Fact, Conclusions of Law, and Decision Re: Defense Mil. R. Evid. 513 Reconsideration, Jan. 13, 2016, at 2 [hereinafter Reconsideration Decision].
[10] Reconsideration Decision at 2.
[11] Reconsideration Decision at 2.
[12] Judge's Initial Decision at 4.

Mental health professionals diagnosed Mrs. E.V. with adjustment disorder with anxious mood and suicidal ideations and prescribed her Zoloft.[13] Three days later, she left the hospital and provided excerpts of her mental health records to substantiate the humanitarian transfer request.[14] The Personnel Center approved the request. Mrs. E.V. and her husband left Okinawa shortly thereafter.[15]

2. Court-Martial Procedure: Investigation and Discovery Issues

The Government preferred charges against Sgt Martinez on June 2, 2015 and referred them to general court-martial on September 3, 2015.[16] The Defense made numerous discovery requests relating to personnel and medical records, including Mrs. E.V.'s.

- June 19, 2015: Defense requests all relevant personnel and medical records of potential witnesses.

- Sept. 28, 2015: Defense requests notice of whether E.V. was seeking mental health treatment for the allegations and requests production of "any and all such evidence."

- Oct. 5, 2015: The Government denied the June 19 request, requesting a proffer. That same day, the Government denied the Sept. 28 request, confirming the existence of the records, but asserting E.V.'s special victim's counsel (SVC) and the Government believed those documents were "irrelevant and privileged."

[13] Reconsideration Decision at 2.
[14] Judge's Initial Decision at 4.
[15] Defense Motion for Reconsideration at para. zz.
[16] Charge Sheet.

- Oct. 6, 2015: Defense renews request for discovery of mental health records. Defense also requests a privilege log for any documents for which the Government asserted a privilege.

On November 18, 2015, the Government, Defense, and special victim's counsel (SVC) presented evidence and oral argument on the Defense's motion.[17] The next day, the Defense received two pages of Petitioner's mental health records following an *in camera* review by the military judge.[18]

The Government, at Defense request, provided the rest of SSgt G.V.'s transfer-request package. On December 30, 2015, the military judge denied the Defense motion for appropriate relief.[19]

When the Defense filed a motion to reconsider, the military judge held another 39(a) hearing on January 13, 2015. Mrs. E.V.'s SVC was present and spoke on her behalf.[20]

The military judge granted the Defense's motion for reconsideration and granted the Defense's motion for production of E.V.'s mental health records for *in camera* review.[21] The military judge found the Defense met its burden under *United States v. Klemick*[22] to order an *in camera* inspection because the Defense showed a reasonable likelihood that the requested privileged records would yield

[17] Reconsideration Decision at 3.
[18] *Id.*
[19] Judge's Initial Decision at 12.
[20] Reconsideration Decision at 1.
[21] Reconsideration Decision at 5.
[22] *United States v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

evidence admissible under an exception to Military Rules of Evidence (M.R.E.) 513.[23]

The *in camera* inspection focused on a possible bias or motive to fabricate.[24] There were several indicators that Mrs. E.V. lacked credibility. She claimed that on the night of the incident a neighbor saw Sgt Martinez grab her hair and tell her to "come back;" the neighbor denies seeing this.[25] She claimed Sgt Martinez pushed her to the ground, attempted to rape her, and that she fought him off by using her shoulder to push him. But at the time, Sgt Martinez was on crutches recovering from a surgically broken and repaired leg.

Before moving to Okinawa, Mrs. E.V. was unfaithful to SSgt G.V. and they temporarily separated.[26] On the night of the alleged assault, Mrs. E.V.'s son saw her kiss Sgt Martinez. Later that night, Mrs. Martinez told her husband that Sgt Martinez tried to have sex with her.[27]

There were also questions regarding the timing of Mrs. E.V.'s admission to Naval Hospital Okinawa with alleged suicidal ideations, and the timing of her unrestricted report with NCIS. The Defense posited this was made up to get a humanitarian transfer to California. After *in camera* review, the military judge

[23] Reconsideration Decision at 4.
[24] *Id.* at 5.
[25] Reconsideration Decision at 2.
[26] Reconsideration Decision at 2.
[27] Reconsideration Decision at 2.

was prepared to release fifteen heavily redacted pages of the eighty-three total pages he received from three sources.[28]

Mrs. E.V.'s SVC sought extraordinary relief in the nature of a Writ of Mandamus and Application for a Stay of Proceedings from the lower court on February 19, 2016. She alleged error in the military judge's decision to order an in camera review of Mrs. E.V's records, as well as his decision to grant discovery of a portion of Mrs. E.V.'s records to the Defense. Because the right to an issuance of a writ was not "clear and indisputable," the NMCCA denied the petition.[29]

Summary of Argument

Petitioner's writ of mandamus is not within this Court's jurisdiction. While it is true that the combination of *LRM v. Kastenberg*[30] and the recent change to Article 6b, UCMJ,[31] authorize an alleged victim to seek a writ of mandamus in a Court of Criminal Appeals, that jurisdiction is narrow. The writs authorized in those cases are limited to the procedural rights in M.R.E. 513, and do not extend to the military judge's decision concerning the discoverability of M.R.E. 513 evidence. Thus, this writ of mandamus is outside that narrow jurisdiction. This Court should deny the petition.

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[28] Petitioner's Br., Appendix I.
[29] *EV v. Robinson*, NMCCA No. 201600057 (N-M. Ct. Crim. App. Feb. 25, 2016) (order).
[30] 72 M.J. 364 (C.A.A.F. 2013).
[31] 10 U.S.C. § 806b (2015).

If this Court finds jurisdiction, it should deny the petition because the military judge followed M.R.E. 513. The military judge held two Art. 39(a) hearings regarding the Defense's motion to compel production of Mrs. E.V.'s records, allowed all parties, including the SVC, to be heard on the issue, and issued written rulings making detailed findings of fact and conclusions of law regarding the discoverability of the disputed records. The military judge analyzed the requirements of M.R.E. 513 and, after briefing and argument of government counsel, defense counsel, and SVC, determined an *in camera* review of the records was appropriate. After review, the military judge determined certain records were discoverable under the crime/fraud exception the patient/psychotherapist privilege (M.R.E. 513(d)(4)), as well as constitutionally required to ensure a fair trial for Sgt Martinez. The military judge did not err.

Argument

Standard of Review

To prevail on a writ for mandamus, the Petitioner must demonstrate (1) there is no other adequate means to attain relief; 2) the right to issuance of the writ is "clear and undisputable; and (3) the issuance of the writ is appropriate under the circumstances."[32] Petitioner has failed to demonstrate a "clear and indisputable" right to the writ.

[32] *Hasan v. Gross*, 71 M.J. 416, 418 (2012) (citation omitted).

An extraordinary writ is "a drastic instrument which should be invoked only in truly extraordinary situations."[33] Extraordinary writs are limited to "the exceptional case where there is a clear abuse of discretion or usurpation of judicial power."[34] A trial judge's decision may be erroneous, but does not rise to the level of usurpation of judicial power, so long as the ruling is "made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it."[35]

This is an unparalleled level of deference afforded to a military judge, literally the highest level of deference in jurisprudence. "[W]hen a trial judge performs a discretionary act within the bounds of his legal authority, a superior tribunal will not, in the exercise of extraordinary writ powers, substitute its own discretion for that of the trial judge."[36]

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[33] *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983).
[34] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953); *accord Will v. United States*, 389 U.S. 90, 95 (1967) ("[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.").
[35] *Bankers Life*, 346 U.S. at 382.
[36] *United States v. Redding*, 11 M.J. 100, 109 (C.M.A.1981) (internal citations omitted).

I

MRS. E.V. CANNOT DEMONSTRATE HER RIGHT TO THE WRIT IS "CLEAR AND INDISPUTABLE" BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THIS PETITION FOR A WRIT OF MANDAMUS.

Standard of Review

Jurisdiction is a question of law that is reviewed *de novo*.[37]

Discussion

Mrs. E.V. cannot demonstrate her "clear and indisputable" right to this writ. Though she attempts to establish standing by urging this Court to adopt a broad interpretation of Article 6b(e), UCMJ,[38] this argument fails for several reasons.

1. The plain reading of Article 6b(e), UCMJ, does not authorize a challenge of a military judge's ruling on the discoverability of evidence under M.R.E. 513.

Petitioner cites section 535 of the National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA)[39] and section 531 of the FY16 NDAA[40] as authority for petitioning the lower court for a writ of mandamus.[41] This argument is misplaced because the modifications to Article 6b, UCMJ, are designed to allow

[37] *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012).
[38] *See* Petitioner's Br. at 17-18.
[39] 10 U.S.C. § 806b, Pub. L. No. 113-291 (2014).
[40] 10 U.S.C. § 806b, Pub. L. No. 114-92 (2015).
[41] Petitioner's Br. at 17.

victims to petition for a writ of mandamus in very limited circumstances. This petition is outside of that narrow allowance.

Article 6b, UCMJ, lists the various rights of a crime victim under 10 U.S.C. §§ 801 *et seq*. In the FY16 NDAA, Congress modified Article 6b, UCMJ, to add that a victim may petition a Court of Criminal Appeals for a writ of mandamus "If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of a victim afforded by a section (article) or rule specified in paragraph (4)."[42] In other words, this change allowed alleged victims to seek a writ of mandamus in Courts of Criminal Appeals when the alleged victim believed a "court-martial ruling violates the *rights* of a victim afforded by [M.R.E. 513.]"[43]

Rule 513 grants three rights to alleged victims:

> (1) the right to notice of any motion filed under M.R.E. 513;[44]
>
> (2) the right to a reasonable opportunity to be heard at the required hearing before a military judge determines discoverability of the evidence,[45] and
>
> (3) the right to "be heard," which includes the right to provide argument through counsel.[46]

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[42] 10 U.S.C. § 806b, Pub. L. No. 114-92, § 531 (2014) (attached as Appendix 1).
[43] *Id*. (emphasis added).
[44] Mil. R. Evid. 513(e)(1)(B) (2012).
[45] Mil. R. Evid. 412(e)(2) (2012).
[46] Mil. R. Evid. 513(e)(2) (2012); *LRM*, 72 M.J. at 370, 372. Sgt Martinez notes that the holding of *LRM* was that alleged victims have *some* right to be heard at the court-martial through counsel, but that right is not absolute and is subject to the

Mrs. E.V. exercised all these rights and the military judge accommodated and preserved all of them.[47] Mrs. E.V. seeks relief from the substance of the military judge's ruling,[48] but that is not her right.

Outside the limited procedural rights found in M.R.E. 513, an alleged victim has no right to challenge the military judge's ruling on discoverability. Thus, Article 6b, UCMJ, does not grant Mrs. E.V. the right to challenge, via a writ of mandamus, the military judge's decision to review evidence *in camera* prior to making a discovery ruling. Nor does Article 6b grant Mrs. E.V. the right to challenge the military judge's decision regarding discovery. As a result, this Court lacks jurisdiction to hear her claim, because she lacks standing. Her standing cannot be predicated on her disagreement with the substance of the military judge's 513 ruling.

Why else would Congress create a statute that authorized an extraordinary writ, instead of a right to appeal in the normal course of appellate review? The answer is simple: the proper reading of Article 6b(e), UCMJ, is that an alleged

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military judge's discretion under R.C.M. 801. This Court determined that the military judge in *LRM* operated under an incorrect view of the law. Despite this, *LRM* was still not entitled to the specific relief sought under a writ of mandamus because the military judge can reasonably limit such rights under R.C.M. 801. This Court declined to issue the writ. *Id*. at 371-72.

[47] R. at 21-42, 47-70.

[48] Petitioner's Br. at 6.

victim's standing is limited to the rare occasion when a military judge unreasonably denies a procedural right guaranteed under M.R.E. 513.

2. Congress did not expressly confer a right for alleged victims to challenge discoverability under Military Rule of Evidence 513.

Given the limited jurisdiction in extraordinary writ cases, in order for Mrs. E.V. to have standing, Congress would have had to clearly and explicitly authorize review of a military judge's discoverability ruling. Congress could have accomplished this by: (1) amending Article 62, UCMJ, to allow an alleged victim to bring a writ of mandamus to challenge M.R.E. 513 discovery rulings; (2) modifying M.R.E. 513 to include an explicit right of alleged victims to challenge the ruling on discoverability; or (3) explicitly and clearly modifying Article 6b, UCMJ, to authorize the writ of mandamus to challenge the substantive judicial ruling on discoverability of M.R.E. 513 evidence. Congress did none of these, and therefore the Petitioner's expansive reading of Article 6b(e), UCMJ, is inappropriate.

Petitioner's reading of Article 6b is also problematic in that, if this Court were to endorse Mrs. E.V.'s reading, it would contravene an accused's right to a speedy trial.[49] The Supreme Court has held that appellate review of interlocutory

[49] As evidenced in this case, where, as of the date of this filing, charges have been pending against Sgt Martinez for 284 days and Petitioner's writ has consumed 32 days of delay since her initial filing on February 25, 2016.

matters must be limited in nature, especially in criminal cases where constitutional speedy trial concerns are looming over the proceedings:

> [J]urisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after judgment has been rendered by the trial court. This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him.[50]

If this Court determines it has jurisdiction for this petition, this would allow an alleged victim to stall criminal proceedings against an accused for as long as it took (and as many petitions as necessary) to satisfy her *beliefs* that her substantive M.R.E. 513 rights were no longer being violated.[51] It defies credulity, and is unsupported by any legislative history, to believe such a substantial procedural block was intended by Congress in amending Article 6b, UCMJ. To do so would

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[50] *Will v. United States*, 389 U.S. 90, 96 (1967).

[51] This problematic interpretation also raises the possibility that a petitioner could re-litigate any decision the alleged victim believes touches on M.R.E. 513 (or M.R.E. 412, 514 or 615) at any time later in the proceeding. What if a preliminary hearing officer determines M.R.E. 513 evidence reviewable, can the victim then petition for writ to reverse that determination? If the military judge makes the same ruling, or rules that the evidence is not only discoverable, but is now actually admissible, does another petition result? What if an alleged victim had ultimately won on admissibility, but then testifies at a court-martial and contradicts the ruling? Could the military judge determine such evidence was now admissible for impeachment purposes? Would the proceedings have to be stayed because the victim chose to petition for a writ of mandamus? What if the military judge determines that evidence is not subject to M.R.E. 513, perhaps because the military judge determined the person was not actually a psychotherapist and therefore no privilege exists? Could an alleged victim petition that decision? How far will this Court allow an alleged victim to stall criminal proceedings of which the alleged victim is not the accused, nor the Government?

contravene the Sixth Amendment and Rule for Courts-Martial (R.C.M.) 707's guarantee of a speedy trial. It would also be unjust.

Finally, for this Court to find Congress gave an alleged victim standing to challenge a military judge's substantive ruling would place military judges in the untenable position of deciding between fundamental rights of the accused. On the one hand, the accused has a right to a speedy trial; and on the other, the accused has a right to confrontation and a right to present a defense. A military judge, when assessing whether M.R.E. 513 evidence should be discovered to the Defense, would know that if evidence is released to the Defense, a writ challenge may follow. And that challenge, regardless of the outcome, may violate the accused's right to a speedy trial. Should military judges rule against an accused simply to preserve his speedy trial rights?

Under a theory that a petitioner has standing to raise such matters, the likely result is that military judges will tend to err on the side of expediency and decline to review the evidence *in camera* or not make evidence available to the Defense in order to avoid the writ petition entirely, particularly in close-call situations. An accused should not be subject to this upending of constitutional jurisprudence.

Conclusion

This Court should find it lacks jurisdiction to hear Petitioner's writ-appeal and dismiss the petition.

II

THE MILITARY JUDGE CORRECTLY DETERMINED THE DEFENSE SATISFIED THE REQUIREMENTS OF MILITARY RULE OF EVIDENCE 513(e)(3) FOR AN *IN CAMERA* REVIEW.

Rule 513 allows a military judge to conduct an *in camera* review if he finds by a preponderance of the evidence that the moving party showed:

> (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.[52]

The military judge made findings of fact that support all four of the above-listed factors required for an *in camera* review of the privileged records. In reconsidering the Defense's motion to compel production of Mrs. E.V.'s medical records, the military judge found the Defense met its burden under *United States v. Klemick* and M.R.E. 513(e) to order an *in camera* inspection. The military judge found that Mrs. E.V. was hospitalized in February 2015 for psychological

[52] Mil. R. Evid. 513(e).

evaluation due to suicidal ideations and Zoloft was prescribed for her as a result.[53] He took judicial notice of information from the Diagnostics and Statistics Manual (DSM) – V that those diagnosed conditions can cause doubts about one's ability to accurately perceive and recall events.

The Defense made a *prima facie* showing that the mental health records were discoverable under an enumerated exception to M.R.E. 513(d), as required by M.R.E. 513(e)(3)(B). Petitioner gave contradictory and inconsistent statements, suggesting she used allegations against Sgt Martinez to transfer off Okinawa. The Defense alleged the timing of Petitioner's seeking treatment and provision of her medical records relating to her treatment to the Personnel Office suggested she used the allegation to facilitate her husband's humanitarian transfer.[54]

The military judge found the Defense's proffer that the timing of these reports showed Mrs. E.V. used this process to obtain a material gain. Accordingly, the Defense asserted, and the military judge found, that it was reasonable to expect the records to contain additional evidence of a bias or motive to fabricate and exaggerate her claims.[55] Before the military judge, the SVC even addressed the

[53] Reconsideration Decision at 4.
[54] Defense Motion for Recon. at 6, 7, 12; R. at 57, 65-66.
[55] Supplemental Ruling Re: Defense Motion to Reconsider Court's Ruling on Defense Motion to Compel Specific Discovery of Mental Health Records, Feb. 19, 2016, at 3 [hereinafter Supplemental Decision].

Defense claims that Mrs. E.V. fabricated her story.[56] While the military judge may not have articulated the crime/fraud exception of M.R.E. 513(d)(5) in his first written ruling, the evidence was clearly before him when he made his decision to order an *in camera* review of Mrs. E.V.'s records. He further clarified his use of the crime/fraud exception in his second written ruling.[57]

The military judge did not find the evidence sought to be merely cumulative. Specifically, the Defense did not have access to Mrs. E.V., and the only person they might have been able to talk to about her condition was her husband, SSgt G.V.[58] Regarding the last prong, the military judge found the Defense had no other non-privileged access to the information regarding the manifestations and severity of Mrs. E.V.'s psychological condition.[59]

The military judge's ruling is correct. Accordingly, it comes nowhere near a clear usurpation of judicial power.

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[56] R. at 63.
[57] Supplemental Decision at 4.
[58] Reconsideration Decision at 4.
[59] Reconsideration Decision at 4.

III

THE MILITARY JUDGE CORRECTLY DETERMINED THAT THE DEFENSE WAS ENTITLED TO LIMITED DISCOVERY OF MRS. E.V.'S RECORDS UNDER THE CRIME/FRAUD EXCEPTION AND UNDER THE CONSTITUTIONAL STANDARD.

A patient generally has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist.[60] There is no privilege 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.[61] While "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,"[62] this latitude is limited. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of

[60] Mil R. Evid. 513.
[61] Mil R. Evid 513(d)(5).
[62] *United States* v. *Scheffer,* 523 U.S. 303, 308 (1998); *see also Crane* v. *Kentucky,* 476 U.S. 683, 689-90 (1986); *Marshall* v. *Lonberger,* 459 U.S. 422, 438, n.6 (1983); *Chambers* v. *Mississippi,* 410 U.S. 284, 302-303 (1973); *Spencer* v. *Texas,* 385 U.S. 554, 564 (1967).

the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[63]

After conducting an *in camera* review of Mrs. E.V.'s records, the military judge determined the records were discoverable under R.C.M. 701(a)(2).[64] The military judge determined there were two bases for granting disclosure to the defense counsel: the crime/fraud exception of M.R.E. 513(d)(5) and that the evidence is constitutionally required to ensure Sgt Martinez's right to a fair trial.[65]

1. The military judge correctly applied the crime/fraud exception of M.R.E. 513(d)(5) in analyzing the discoverability of Petitioner's records.

The military judge articulated several reasons for applying the crime/fraud exception and granting the Defense's motion. He cited specific doubt regarding the validity of Mrs. E.V.'s suicidal ideations. These doubts stemmed from the timing of the response of the Air Force humanitarian transfer officials, her inpatient health treatment, and the subsequent release of those documents to the transfer officials. The military judge cited all of the aforementioned as calling into question her bias and motive to fabricate.[66] The timing of the report and her subsequent treatment "show E.V.'s tactical use (i.e., fraud) of the process to obtain

[63] *Crane*, *supra*, 476 U.S. at 690 (quoting *California* v. *Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (citations omitted)).
[64] Supplemental Decision at 3.
[65] Supplemental Decision at 3-4.
[66] Supplemental Decision at 4.

a material gain."[67] This is squarely within the bounds of M.R.E. 514(d)(5).[68] While Mrs. E.V. may dispute whether this makes a *prima facie* case of fraud, the military judge, based on the evidence before him, did not abuse his discretion in making his decision.

2. The military judge, after an *in camera* review, determined discovery of certain portions of Mrs. E.V.'s mental health records to the Defense was constitutionally required. This is not error.

"When determining whether an *in camera* review or disclosure of privileged materials is constitutionally required under M.R.E. 513, the military judge should determine whether infringement of the privilege is required to guarantee "a meaningful opportunity to present a complete defense."[69] Mrs. E.V. tries to frame the military judge's decision to use a constitutional basis for turning over her records as ignoring "the plain language of a rule, making it appear as though he is

[67] Supplemental Decision at 3.

[68] Petitioner's reading of M.R.E. 514(d)(5) shows a misunderstanding of the rule's applicability. Specifically, Petitioner focuses on the word "future" and argues that piercing of the privilege should be only used to prevent future fraud or crime. The plain language of the rule, however, belies this interpretation. The appropriate time of reference is when the communication occurred, not when someone seeks to pierce the privilege. Regardless, the second clause of M.R.E. 513(d)(5) covers "services of the psychotherapist 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."

[69] *E.V. v. Robinson*, n.2 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)).

ruling [M.R.E. 513(e)] to be facially unconstitutional."[70] This mischaracterizes the military judge's ruling. The military judge did not allow the Defense to engage in a fishing expedition by going through all of Petitioner's records, but rather plans to release certain, heavily redacted, records that are required under M.R.E. 513 and the Fifth and Sixth Amendments.

Mrs. E.V. heavily relies on the Supreme Court's decision in *Jaffee v. Redmond*[71] for the general proposition that access to an individual's mental health records is not a "weighty interest of the accused." She also cites to *Jaffee* in arguing against a balancing test. In *Jaffee*, the Court agreed the records of psychiatrists and social workers were protected from disclosure and not subject to a balancing of a patient's privacy interest against an "evidentiary need for disclosure."[72] *Jaffee*, however, was not a criminal case, and there were no Fifth and Sixth Amendment rights of an accused with which to be concerned. The

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[70] Petitoner's Br. at 19; Petitioner's brief cites to an Army CCA case (*DB v. Lippert*, 2016 CCA Lexis 63, (Army Ct. Crim. App. Feb. 1, 2016) where the judge relied *only* on the Constitutional exception to M.R.E. 513 and determined that it was met for purposes of conducting *in camera* review. The ACCA stated the military judge must have determined the statute to be unconstitutional. There are no parallels to this case. Here, the military judge found both a constitutional and a crime/fraud exception for conducting an *in camera* review. The military judge did not disregard the requirements of the rule unlike the Army CCA judge in *Lippert*. *Lippert* is distinguishable from this case in that the military judge violated the appellant's *procedural* rights. Here, the military judge allowed briefing and for the parties to be heard on the Defense's theory of discoverability. Further, *Lippert* did not address a military judge using a constitutional exception regarding discovery.

[71] 518 U.S. 1 (1996).

[72] *Jaffee*, 518 U.S. at 17.

military judge and the lower court did not take an approach prohibited by *Jaffee*, because *Jaffee* does not address criminal cases or the Military Rules of Evidence. Perhaps if Mrs. E.V. decides to sue Sgt Martinez in civil court, she can rely on *Jaffe*, but not here.

In *United States v. Scheffer*, the Supreme Court recognized that the President may promulgate rules of evidence for the military that "do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve."[73] A blanket ban on balancing tests that ignores an accused's constitutional rights would certainly not survive scrutiny.

Mrs. E.V.'s assertions that either Congress or the President can remove an accused's constitutional protections by ordinary legislative means are simply incredible. Here, the military judge conducted a proper *in camera* review of the appellant's records, made determinations that the records were discoverable through M.R.E. 513(d)(5) and to ensure Sgt Martinez's right to a fair trial, and carefully redacted the documents to provide the Defense no more than what they're entitled to under law.

[73] *Scheffer*, 523 U.S. at 308.

Conclusion

The military judge, acting as the gatekeeper to a fair trial, followed the letter of the law of M.R.E. 513 and the Constitution. The Defense met the threshold requirement for an *in camera* review, and after a careful review of the records, the military judge found "their disclosure is vital to the accused's defense, and thus constitutionally required under either R.C.M. 701 or M.R.E. 513. The accused's constitutional right to a fair trial will be impeded if not disclosed to the defense."[74] This is not a clear abuse of discretion or a usurpation of judicial power.

IV

THE MILITARY JUDGE DID NOT VIOLATE MRS. E.V.'S ARTICLE 6b RIGHTS. SHE RECEIVED NOTICE AND WAS HEARD ON THE SAME THEORY ON WHICH THE MILITARY JUDGE GRANTED THE DEFENSE MOTION.

Mrs. E.V. asserts the military judge *sua sponte* considered the theory of fraud in deciding the Defense's motion to compel and in doing so, "stepped into the role of a party."[75] This is an erroneous claim. In the Defense motion to reconsider, the Government and Mrs. E.V. were on clear notice of the Defense's theory of fraud. From paragraph cc to aaa in the "Summary of Facts" section in the motion for reconsideration, Sgt Martinez laid the ground work for their

[74] Supplemental Ruling at 5.
[75] Petitioner's Brief at 26.

argument that Mrs. E.V. had a motive to fabricate her story.[76] The Defense argued:

> "In this case, Mrs. E.V. seems to be of the position that this information (her records) is extremely sensitive and private and the disclosure of it would cause her irreparable harm, except when she stands to gain a material benefit from disclosure. The Court should be mindful that the ink wasn't even dry on her hospital records when she voluntarily disclosed these records to a third party."[77]

The Defense further alleged Mrs. E.V. had a motive to fabricate, including accusing her of needing to make up a story in order to leave Okinawa as soon as possible. After laying out the obstacles she and her husband faced in trying to get transferred, the Defense stated:

> Faced with diminishing opportunity to obtain the desired transfer, Mrs. E.V. 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…[.]" She was discharged on 23 February and within hours; the records of treatment were delivered to the Air Force Total Force System as justification for her transfer home.[78]

Finally, the Defense argued:

> Like the sexual assault allegations, the suicidal ideation was another attempt by a dishonest person to obtain some benefit, and the unrestricted report, the repeated requests for disclosure of the law enforcement investigation, and the use of mental health records *the*

[76] Defense Motion to Recon.
[77] Motion to Recon at 11.
[78] Defense Motion at 12-13.

> *same day she was released from the hospital* to justify the transfer request show a motive to fabricate and a profit to be made.[79]

The only conceivable way Mrs. E.V. would have been unaware of the Defense theory would be if she and her counsel failed to read the Defense motion – or were not listening during the Article 39(a) session.

At the 39(a) hearing, the Defense presented this theory again:

> When the transfer request was denied . . . Mrs. E.V. went to extreme lengths . . . to obtain that transfer request . . . And before the ink is dry on the mental health records, the same day she leaves the hospital, they're uploaded into the Air Force Total Force Processing Center. That is a tactical decision. That is a calculation to obtain a material benefit.[80]

In summarizing their argument, the Defense stated:

> There is a ***motive to fabricate*** when it comes to getting out of Okinawa. People don't like it here. And there is evidence that she really, really wanted out. To ignore that . . . is to deny Sergeant Martinez a fair trial and the ability to confront his accuser.[81]

Not only did Sgt Martinez broadly state his claim of potential fraud and motive to fabricate through pleadings and during the 39(a), but the SVC even responded directly to these claims:

> ***They're speculating that her motive – that – one, that she lied, period; two, that she lied to get off island*** (sic). There isn't any evidence anywhere that they have provided that she lied to get off the

[79] Defense Motion at 14 (emphasis original).
[80] R. at 57.
[81] R. at 66 (emphasis added).

> island. They're making that argument based on extremely circumstantial evidence, based on some timing.[82]

Conclusion

Mrs. E.V.'s assertions that she lacked the opportunity to be heard on the crime/fraud exception appear to come down entirely to the fact that the Defense did not specifically use the term "crime/fraud exception" or specifically cite M.R.E. 513(d)(5). The nature of the pleadings and arguments, however, show a *de facto* invocation of this exception. The military judge did not introduce a novel legal theory a month after the hearing. Rather, counsel briefed the issue, the parties argued it at the 39(a) hearing, and then the military judge used it to make his decision. There was no lack of notice. Mrs. E.V. exercised her right to be heard. There is no clear and indisputable right of the Petitioner for the requested writ in this case. This Court should deny the petition for extraordinary relief.

Respectfully Submitted,

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[82] R. at 63 (emphasis added). At the time, the SVC seemed to understand what Sgt Martinez's claim was under M.R.E. 513.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on March 28, 2016.

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