IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

EV, Petitioner,	)	
v.	)	WRIT-APPEAL PETITION FOR REVIEW OF NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS DECISION ON APPLICATION FOR EXTRAORDINARY RELIEF
E.H.ROBINSON, JR. Lt. Col., US Marine Corps, Respondent,	)	
and	)	Crim.App. Misc. Dkt. No.____
DAVID A. MARTINEZ, Sergeant, U.S. Marine Corps, Real Party in Interest.	)	USCA Misc. Dkt. No._____
	)	15 March 2016

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PREAMBLE

The petitioner, EV, the named victim in United States v. Martinez, hereby prays for an order directing the respondent to: set aside his ruling of 13 January 2016 and deny the Real Party in Interest's (RPI) motion for production and *in camera* review of EV's mental health records.

I
History of the Case

On 2 June 2015, the RPI, Sgt David Martinez, was charged with two specifications of Article 80, UCMJ, three specifications of Article 107, UCMJ, three specifications of Article 120, UCMJ, and one specification of Article 125,

UCMJ, for events that occurred on or about 31 December 2014. Atch.'s. A, B. On 28 September 2015, the RPI requested notice if the victim was seeking mental health (MH) treatment for the charged allegations, and requested production of any and all such MH records. Atch. A. The government confirmed the existence of records, but claimed they were privileged and irrelevant. *Id*. EV did not consent to the release of her MH records and asserted her privilege. Atch. B, C.

On 18 November 2015, the RPI was arraigned and the military judge (MJ) held an Art. 39a closed session to consider a defense motion to compel production of EV's MH records. Atch. J. At that hearing, the MJ was provided two pages of EV's mental health records, which EV had consented to be released, as they were used by EV's husband to apply for a humanitarian transfer. *Id.* at 4, 5. No witnesses were called to testify at this hearing.

On 30 December 2015, the MJ denied the defense motion to compel, citing that it "had not met its burden under *United States v. Klemick* for the court to order an *in camera* inspection." Atch. D. On 8 January 2016, the RPI filed a motion to reconsider; to which the government responded, requested oral argument and that the MJ deny the motion. Atch. E, F.

The motion to reconsider was heard on 13 January 2016. The defense did not introduce any new substantive evidence and, again, called no witnesses. Nonetheless, the MJ found the defense made the requisite showing under *United*

States v. Klemick, 65 M.J. 576 (N-M.C.C.A 2006) for reviewing the records *in camera*, ruling from the bench at the end of oral argument. Atch. H, K, at 24. The MJ wrote in his subsequent ruling that defense had laid out a specific factual basis for its theory, but he never wrote or stated what enumerated exception applied. Atch. H. The MJ's justification was that EV had been diagnosed with an adjustment disorder and was prescribed Zoloft, although this evidence was before the Court when it denied the original defense motion. *Id. at 4.* The MJ found that the defense's motion contained a quotation from the Diagnostic and Statistics Manual 5 (DSM-5) regarding diagnostic criteria was a proffer that "such diagnosed condition can cause doubts about one's ability to accurately perceive and recall events" and satisfied the defense's burden under *Klemick*. *Id*. The MJ found that evidence of this disorder was not cumulative and that "information regarding the manifestation and severity of Mrs. E.V.'s psychological condition" could not be accessed by non-privileged means. *Id*. DSM-5's description of adjustment disorders does not include impact on perception or recall.[1]

[1] Adjustment Disorder Diagnostic Criteria:
A. The development of emotion or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s).
B. These symptoms or behaviors are clinically significant, as evidenced by one or both of the following: 1. Marked distress that is out of proportion to the severity or intensity of the stressor, taking into account the external context and the cultural factors that might influence symptom severity and presentation. 2 Significant impairment in social occupational or other important areas of functioning.
C. The stress related disturbance does not meet the criteria for another mental disorder and is not merely an exacerbation of a preexisting mental disorder.
D. The symptoms to not represent normal bereavement.
E. Once the stressor or its consequences have terminated, the symptoms do not persist for more than an additional 6 months. DSM-5, at 286-287.

On 13 January 2016 the MJ issued a Judicial Order to Compel Production of Protected Mental Health Information. Atch. G. The Order related to "all 'PMHI' or 'protected mental health information' of [EV]" to be reviewed *in camera*. *Id*. at 1. On 27 January 2016, the MJ issued a Qualified Protective Order (MH Records of EV). Atch. L. The MJ had conducted an *in camera* review, and determined that he would release some of EV's records. The MJ released, with redactions, Appellate Exhibit (AE) XXII pages 1 and 2; AE XXIII pages 2, 17, 18, 20, 25, 28, 31, 34, and 35; AE XXIV pages 15, 16, 29, and 42. *Id*. at 1. The remaining portions of those AEs were sealed and appended to the Record of Trial (ROT). The MJ provided EV's Special Victims' Counsel (SVC) a copy of the signed order. Atch. I. The SVC notified the MJ he was going to file a writ on EV's behalf and thus the MJ has refrained from releasing the MH records to the government and the RPI. *Id*.

As justification for releasing the MH records, the MJ ruled that portions of the record were discoverable "on the issue of credibility of EV." The MJ explained, "[t]o be clear, the material covered by this Order is not admitted into evidence, but is made available to the parties for their possible use in examining and cross-examining EV at trial concerning a possible bias or motive to fabricate." Atch. L, at 2. The MJ released any record that disclosed or recorded "any statements or information from EV about the offenses with which the accused is

charged. Those found are located in the records released herein." *Id*. The MJ also released "all records that would have any tendency to be relevant, less redundant and cumulative." *Id*. Again, the MJ permitted the parties to utilize the records in any manner "reasonably connected with preparing and conducting the defense," but did not rule if the records would be admissible at trial. *Id*.

On 19 February 2016, the MJ supplemented his orders for compelling production of EV's MH records for *in camera* review and releasing a portion of those records to the parties. Atch. N. The MJ's significant supplementation of the record was done knowing that EV's SVC intended to file the Writ of Mandamus that same day. Atch. O, at 1. He stated that after authenticating the ROT, he realized his "ruling needed to be clear on the analysis of how [he] reached the decision to reconsider and release" portions of EV's MH records. *Id*. The supplemental ruling continued to rely on a constitutionally required basis for piercing the privilege, but also added, *sua sponte*, that the defense met its burden under Mil. R. Evid. 513(d)(5) as well. Atch. N.

On 19 February 2016, the petitioner electronically filed a Writ of Mandamus, an accompanying brief and attachments, with the Navy-Marine Corps Court of Criminal Appeals (NMCCA). The petitioner provided copies to the MJ, the defense and the government. The sealed attachments (hard copy) were deposited in the mail on that same date. The NMCCA denied the petitioner's

request for a Writ of Mandamus on 25 February 2016, the day it received the certificate of service upon the Government Appellate division.[2]

II
Relief Sought

Petitioner seeks a Stay until this Court rules on this Petition and Petitioner seeks a Writ of Mandamus setting aside the Trial Court's rulings of 13 January 2016, 27 January 2016 and 19 February 2016, piercing EV's psychotherapist-patient privilege and releasing her records under Mil. R. Evid. 513.

III
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.

[2] On 22 February 2016, The Clerk of Court for NMCCA instructed petitioner's counsel to also send a certificate of service of the filing to the Government Appellate division in accordance with rule 20.1(a) of the NMCCA Rules of Practice and Procedure, which requires service on the director of the opposing appellate division. The petitioner complied with the request of the Clerk of Court on 25 February 2016.

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.

IV
Statement of Facts

The facts necessary for disposition of this case are set forth in argument below.

V
Reasons Why Writ Should Issue

A WRIT OF MANDAMUS IS APPROPRIATE BECAUSE THE NMCCA COMMITTED LEGAL ERROR BY DENYING EV'S PETITION FOR A WRIT OF MANDAMUS OVERTURNING THE MILITARY JUDGE'S PIERCING AND RELEASE OF EV'S PSYCHOTHERAPIST-PATIENT PRIVILEGED RECORDS; THE MILITARY JUDGE ABUSED HIS DISCRETION IN PIERCING AND RELEASING A PORTION OF THOSE RECORDS AND HE DENIED HER RIGHT TO DUE PROCESS UNDER MIL. R. EVID. 513 BY DEPRIVING EV OF A CHANCE TO BE HEARD ON NEW GROUNDS USED TO PIERCE AND RELEASE HER RECORDS.

Jurisdiction.

In December 2014, Article 6b, UCMJ, was amended to provide that a victim of an offense may petition the service courts for a Writ of Mandamus to enforce certain statutory and procedural rights. Article 6b(e), UCMJ; 10 U.S.C. § 806b(e) (2012 Supp. II); *see* Carl Levin and Howard P. "Buck" McKeon 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). The mandate of Article 6b(e)(3), UCMJ (as recently amended), is for such petitions to be forwarded "directly" to the service court and "to the extent practicable" for the court to give such petitions "priority over all other proceedings" to be a new and separate statutory authority for the court to issue writs. National Defense Act for Fiscal Year 2016, Pub. L. 114-92, § 531(e)(3) (2015) (Enforcement of Certain Crime Victim Rights by the CCA). Thus, Article 6b, UCMJ, is a distinct authority from the All Writs Act.

Writ jurisdiction under the All Writs Act is limited to those matters "in aid of [this Court's] respective jurisdiction[]" under Article 66, UCMJ. 28 U.S.C. § 1651(a). Jurisdiction under the All Writs Act is therefore limited to matters that "have the potential to directly affect the findings and sentence." *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 129 (2013) (citing *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012); *see also LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013).

This Petition falls under Article 6b, UCMJ. In order to find jurisdiction to issue a writ under Article 6b, this Court "need only determine that the petition addresses the limited circumstances specifically enumerated in Article 6b(e)". *DB*

v. Lippert, Army Misc. 20150769, at 4 (Army Ct. Crim. App. 1 Feb. 2016) (Memorandum Opinion and Action on Petition for Extraordinary Relief in the Nature of a Writ of Mandamus). The MJ failed to follow Mil. R. Evid. 513, a matter specifically enumerated in Article 6b(e)(4)(D), UCMJ. The NMCCA denied EV's petition for extraordinary relief. This Court has jurisdiction to hear an appeal of the NMCCA's ruling per Rule 4(b)(2) of the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces, which allows review of a military Court of Criminal Appeals' decision on a petition for extraordinary relief.

Standard.

To obtain a Writ of Mandamus, the petitioner must show that: (1) there is "no other adequate means to attain relief;" (2) the "right to issuance of the writ is clear and indisputable;" and (3) the issuance of the writ is "appropriate under the circumstances." *DB v. Lippert,* at 5 (quoting *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (citations and internal quotations omitted)).

The NMCCA erred by denying EV's petition for a stay of proceedings and application for a Writ of Mandamus.

The NMCCA dismissed EV's petition for a stay and Writ of Mandamus in a short paragraph and a footnote, finding that EV's right to an issuance of a writ was not "clear and indisputable" under *Cheney v. United States Dist. Court for D.C.*,

542 U.S. 367, 380-81 (2004). This was error. As stated above, *Cheney* set out a three-part test to determine if a Writ of Mandamus is appropriate. *Cheney*, 542 U.S. at 380-81. In this case, EV met all three prongs. First, EV has no other adequate means of relief because she is not a party to this case and no other court can vindicate her rights under the UCMJ and Mil. R. Evid. 513. Second, EV has shown a "clear and indisputable" right to issuance of the Writ. Her rights under Mil. R. Evid. 513(e) have been violated by a MJ. The NMCCA endorsed the MJ's decision to pierce *all* of EV's privileged MH records with an exception that inherently could not have applied to all of the pierced records. This will be fully developed below. Third, the issuance of a writ is appropriate in this case. *Id*. The MJ has incorrectly applied the law, and the facts do not support piercing EV's privileged records.

The NMCCA denied the Writ with no analysis on any of the three prongs. Because no further analysis was supplied, it is unclear if the NMCCA simply ignored Article 6b(e), or misapplied it, either of which constitute error.

The NMCCA and the MJ erred in relying on Mil. R. Evid. 513(d)(5) as an exception to justify piercing EV's psychotherapist-patient privilege.

The MJ erroneously relied on Mil. R. Evid. 513(d)(5) after the fact when he realized his original justification for piercing the privilege for constitutionally

required reasons fell short. Atch. O, at 1. This supplemental ruling satisfied the NMCCA, and it denied EV's application for a writ.

Mil. R. Evid. 513(d)(5) allows MJs to pierce a patient's privileged mental health records when communications "clearly contemplated the future commission of a fraud or crime or if the services or if the services of the psychotherapist are sought…to enable…anyone to commit or plan to commit what the patient reasonably should have known to be a fraud or crime" *and* each requirement of Mil. R. Evid. 513(e)(1)-(3) are met. The purpose of the exceptions is to allow military commanders to have access to all information necessary to protect the "safety and security of military personnel, operations, installations, and equipment. Therefore, psychotherapists are to provide such information despite a claim for privilege." Analysis of the Military Rules of Evidence, Appendix 22, Mil. R. Evid. 513(d), A22-45.

It is clear the purpose of the Mil. R. Evid. 513(d)(5) exception is to prevent *future* fraud and crime to protect military readiness and property or if the services are sought specifically to enable someone to commit a fraud or crime. In such cases psychotherapists may disclose communications to commanders to prevent harm to personnel, installations and equipment. This exception closely mirrors, when combined with Mil. R. Evid. 513(d)(4), the exception to the psychotherapist-patient privilege recognized by the Supreme Court in footnote 19 of *Jaffee v.*

Redmond.[3] By relying on this section of the rule, the MJ and NMCCA have perverted the purpose and language of Mil. R. Evid. 513(d)(5), pushing it well outside its scope. The piercing by the MJ, based on records from nearly a year before, completely frustrate the purpose of the exception and privilege. The MJ was not preventing harm to personnel, equipment or installation when piercing EV's privilege.

The quantum of evidence required to destroy the privilege is not clear in the rule or case law regarding the psychotherapist-patient privilege. It is necessary to look to the same exception found in other privileges such as attorney-client and spousal to determine what needs to be shown. To pierce the attorney-client privilege, the Supreme Court has required that the evidence must show a *prima facie* case of fraud or crime. *Clark v. United States*, 289 U.S. 1, 15 (1933)(citing *O'Rourke v. Derbishire*,[1920]A.C. 581, 604 (P.C.)). The privilege will not be pierced based on the specter or possibility of fraud. The fraud must be clear at first glance, not dependent on speculation and circumstantial evidence.

This quantum of evidence, though not spelled out in other military cases, is the standard in such cases. In *United States v. Davis*, the pierced communications were known to be about the destruction of specific evidence the government was

[3] "Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example if a serious threat of harm to the patient or to others can be averted only by means of disclosure by the therapist." *Jaffee v. Redmond*, 518 U.S. 1,18 n. 19 (1996)

about to seize. *United States v. Davis*, 61 M.J. 530, 531 (A.C.C.A. 2005). The attorney-client privilege was pierced in *United States v. Smith* when the defense attorney turned over a document prepared by the accused that she intended to introduce in evidence. The defense attorney disclosed she had received it from her client and that he had prepared it. The accused later denied he prepared the document when its veracity was disproven. *United States v. Smith*, 35 M.J. 138,139-140 (C.A.A.F. 1992). In both cases, *prima facie* evidence was needed to pierce the privilege.

The MJ's and NMCCA's reliance, *sua sponte*, on the crime-fraud exception defies logic and the factual record in this case. There is no *prima facie* evidence of fraud. The first glaring problem is trying to determine which privileged, sealed undisclosed records were used by EV to commit fraud. The MJ indicated that the alleged "fraud" is that EV fabricated suicidal ideations to obtain a humanitarian transfer to be closer to family and support.[4] Atch. N, at 3. The only records actually used to obtain the transfer have not been privileged for some time. None of the other records could possibly fall under the Mil. R. Evid. 513(d)(5) exception because they were never used to effectuate the alleged fraud.

The MJ violated EV's right to a Mil. R. Evid. 513 privilege by ordering the release of records that were created after EV's family obtained a humanitarian

[4] Defense never labeled this fraud in its motion. Atch. N, at 3.

transfer. It is impossible for these records to be used to effectuate the alleged fraud, as it would have already been completed. Any records subsequent to the transfer could not have the Mil. R. Evid. 513(d)(5) exception apply; therefore, those records could only have been pierced under the eliminated constitutionally required theory. How were the records that were not released, never seen by the Air Force assignments office, or any other entity, records that EV is still trying to assert her privilege over, being used to perpetuate a fraud or crime? The clear answer upon review of the facts is that they were not.

A review of the facts shows that the crime-fraud theory relied upon by the MJ, NMCCA and defense is legally incorrect.[5] The heart of the theory is the purely circumstantial evidence that the timing of EV's suicidal ideations is questionable. In arguing for the constitutionally required exception, the defense made two bold assertions regarding this timing that were completely wrong, but which the MJ relied on to establish the crime-fraud exception: 1) EV was seeking MH treatment prior to the alleged assault, which defense argues shows she's not a bona fide sex assault victim; and 2) "the records *will* show that despite the severe and aggravated nature of her mental health problems on 20 February 2015, she was miraculously cured upon returning to… Sacramento…and required no further treatment." Atch. E, at 13. These two assertions are immediately refuted by

[5] The defense never intentionally or explicitly argued the facts under a Mil. R. Evid. 513(d)(5) theory.

looking at the dates of the records reviewed by the MJ *in camera*. The three series of records reviewed were from the hospital stay on 20-23 February, the Kadena Mental Health Clinic from 6 January – 26 March 2015, and from a provider in Sacramento, from 1 October 2015 – 6 January 2016. These records show the defense was clearly wrong: 1) treatment did not precede the sexual assault; and 2) treatment continued after returning to Sacramento. The purpose of the amendments to Mil. R. Evid. 513 was not to reward defense counsel for making more unsupported and false claims, but to require them to meet certain legal thresholds before an Mil. R. Evid. 513 exception can be applied.

The next key fact regarding the timing of EV's hospital stay the MJ and NMCCA rely upon involves the receipt of a message from the Air Force Personnel Center Total Force Service Center (AFPC TFSC) that allegedly prompted EV to make fraudulent suicidal ideations. The message is from Amy Corcoran and it was sent at 2:36PM in the Case Management System (CMS) application used to apply for humanitarian transfers. It states, "Sir, In order to complete your request the BPO will need medical authority [that] substantiates that remaining in the area would be detrimental. Thank you." Atch. 3, at 51.

The defense and MJ assumed that the recorded times of the messages were Japanese Standard Time (JST) to advance their respective theories. If JST is the recorded time then, the defense argued, EV's husband received the critical note

requiring additional medical documentation at 1436 on 20 February 2015, leaving EV enough time to fraudulently admit herself into the hospital on the same day. But this is also wrong. AFPC TFSC's system is based on Central Standard Time (CST), where the agency is located in the United States, and defense did not offer evidence to rebut this fact because it does not exist. This means that the cornerstone of the defense's and MJ's argument, an e-mail sent at 1436 CST on 20 February 2015, a message that supposedly spurred EV to pretend to be suicidal, was received by EV's husband at 0536 on 21 February 2015 JST, after EV had already been admitted at the hospital. EV's SVC requested the MJ consider the defense's CMS evidence regarding this timing, but the MJ ruled in favor of defense from the bench at the close of the hearing without looking at this insurmountable problem with the defense's speculative argument. Atch. L, at 24.

Aside from the facts not supporting any legal justification, the record is woefully unsupported by anything other than the MJ's and defense's speculations. The defense and MJ did not call witnesses to testify about EV's emotional state in the week leading up to her hospital stay. No one introduced evidence regarding the circumstances of her admission to the hospital. The defense did not call a single witness regarding when, how or why EV's desire to leave the island arose. Not a single witness suggested she faked suicidal ideations. Not a single witness was called to establish the timeline the defense and the MJ relied so heavily upon. The

issues regarding the timeline were ignored. The defense's incorrect assertions regarding existence of records were ignored. Finally, no one contemplated the (d)(5) exception in any of the motions, any of the arguments or any of the rulings, until the MJ applied it after the fact, the day EV's SVC was filing the Writ of Mandamus with the NMCCA. The MJ committed error by utilizing Mil. R. Evid. 513(d)(5) to pierce EV's mental health records.

The MJ and NMCCA erred in finding a constitutionally required exception to Mil. R. Evid. 513.

The MJ violated Mil. R. Evid 513(e)(3) by piercing EV's MH privilege and misapplying the repealed constitutionally required exception to wrongfully release EV's MH records. The NMCCA erred in upholding this decision by denying the petition for a Writ of Mandamus and stating in a footnote that military judges can infringe on the privilege when needed to guarantee the right to present a complete defense, but did not provide any explanation on how the Supreme Court's ruling in *Holmes v South Carolina* (547 U.S. 319 (2006)) applied to this case.

The MJ cannot release privileged MH records without a showing of the required criteria listed in Mil. R. Evid. 513(e). The need for protection of a victim's privacy in MH records was first articulated by the Supreme Court in *Trammel v. United States*, 445 U.S. 40 (1980), when it determined that recognizing a privilege would, indeed, result in some small evidentiary loss. In 1996, the

Supreme Court squarely recognized an evidentiary privilege guarding against disclosure of MH records as it "serves the public good by rectifying citizens' mental suffering." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). Ten years later, the NMCCA concluded that a failure to require a threshold showing of several enumerated factors would undermine "the social benefit of confidential counseling recognized by *Jaffee*[]." *U.S. v. Klemick*, 65 M.J. 576, 580 (N.M.C.C.A. 2006). The Court in *Klemick* established a three-pronged test for military judges to follow.

Nine years after *Klemick*, both Congress and the President took action to further demonstrate a commitment to the protection of a military victim's right to privacy. The most recent iteration of Mil. R. Evid. 513(e) adopts the *Klemick* factors and additionally requires that any piercing of the privilege be grounded in an *enumerated* exception to the rule. It also gives specific directions to the military judge on the mechanics of the process. On 17 June 2015, the President signed Executive Order 13696 ("2015 Amendments to the Manual for Courts-Martial, United States"). Exec. Order No. 13696, 80 Fed. Reg. 119, 35, 781 (22 Jun 2015). Included in the executive order, which was effective immediately for any case which had not been arraigned, were substantial changes to Mil. R. Evid. 513. *DB v. Lippert* at 7. Military Rule of Evidence 513(e)(3) was amended as follows:

> (3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to

> conducting an in camera review, the military judge must find 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.

Exec. Order No. 13696, 80 Fed. Reg. 119, 35, 819-20.

Where a judge ignores the plain language of a rule, making it appear as though he is ruling it to be facially unconstitutional, "[p]rudence suggests that a detailed analysis should accompany such a significant decision." *Lippert* at 13. "The presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown." *Id*. at 14 (*citing United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000). The MJ, as the judge in *Lippert*, essentially ruled Mil. R. Evid. 513 facially unconstitutional, but provided no analysis, authority or explanation. The MJ did this by finding a constitutional exception to Mil. R. Evid. 513 despite the fact that such an exception has been removed and is not "enumerated" as required by (e)(3)(A)-(B).

In the first MRE 513 hearing, the MJ commented that the President and Congress could not legislate away constitutional requirements. Atch. K, at 7.

Further, the MJ wrote that the "lone authority" to determine when an *in camera* review should be conducted is *United States v. Klemick*. Atch. D, at 8. *Klemick* is no longer the authority. The MJ ignored the authority, Mil. R. Evid. 513, and instead applied standards from case law developed in the Mil. R. Evid. 412 context, a rule of relevance rather than a privilege. He cited *United States v. Ellerbrock*, a case concerning the admissibility of *non-privileged* evidence regarding a victim's sexual past. *Id*., at 9. Even the NMCCA acknowledged that this was not the appropriate framework, and instead provided its own flawed guidance in the footnote of its order. Atch. P, at 1.

The Supreme Court has ruled that the President has authority to pass rules of evidence for military courts as long as they do not hinder an accused's right to present a defense and are not "'arbitrary' or 'disproportionate to the purposes they are designed to serve.' Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998)(holding that Mil. R. Evid. 707, barring an accused from admitting favorable polygraph evidence, does not unconstitutionally curtail an accused's right to present a defense). Access to a victim's mental health records has not been a "weighty interest of the accused" since the Supreme Court's decision in *Jaffee*, which saw the records of psychiatrists to social workers protected from disclosure

and not subject to a balancing of a patient's privacy interest against an "evidentiary need for disclosure." *Jaffee*, 518 U.S. at 17. *Jaffe* prohibits the approach taken by the MJ and the NMCCA in this case—balancing "the need for disclosure" against a "patient's interest in privacy." *Id*. Such balancing results in considerable uncertainty for victims testifying in military courts, which is exactly what the Supreme Court was trying to avoid: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id*. at 18 (*citing Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

In the military, evidentiary privileges are determined by the orders of the President or statute. *See United States v. Rodriguez*, 54 M.J. 156, 157 (C.A.A.F. 2000). With specific regard to the MH privilege, "[i]n the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court." *Rodriguez*, 54 M.J. at 161. Twenty years later, with the help of Congress, the President decided that *Jaffee* should be applied more vigorously by signing Executive Order 13696 and removing the constitutionally required exception from Mil. R. Evid. 513.

Military judges and courts are not to expand, contract or change the contours of evidentiary privileges. This was made clear in *United States v. Custis*, when a

military judge was overturned for importing a common law exception to the spousal privilege of Mil. R. Evid. 504, which was not contained in the language of the rule. *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007). The imported exception in *Custis* was the co-conspirator exception for communications regarding a couple's illegal activity. That exception now exists within Mil. R. Evid. 504 because it was expressly written into the rule after *Custis* through Executive Order 13593, signed 13 December 2011. The Court stated that it "has never held that an exception to a marital privilege not contained within M.R.E. 504(c) may be used to frustrate the privilege established by M.R.E. 504(b)(1)." *Custis*, 65 M.J. at 369. This applies to each military privilege. *Id*. at 370-71.

The NMCCA's Order provided guidance to military judges across the Navy and Marine Corps that there is still a constitutionally required exception to Mil. R. Evid. 513, relying on *Holmes v. South Carolina*, which does not deal with rules of privilege. In a few short key strokes, the NMCCA contravened the clear language and meaning of Mil. R. Evid. 513(e) without any justification, and, in a footnote, established a balancing test of an accused's constitutional right to present a complete defense against anyone else's privilege. Although the footnote reads as if the cited case revolves around privilege, the opinion never touches the subject.[6] *Holmes v. South Carolina,* deals squarely with a statute that prohibited non-

[6] "[W]hen 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." Emphasis contained in the Order.

privileged, third party guilt evidence in the face of strong forensic indicators of guilt of a defendant. If the NMCCA's application of *Holmes* is taken to its logical conclusion, individuals seeking counsel from lawyers, clergy and spouses will soon have lost any meaningful rights to privilege. The NMCCA's proposed balancing test is also directly contrary to the Supreme Court's explicit instructions:

> We reject the balancing component of the privilege implemented by that court and a small number of states. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.

Jaffee v. Redmond, 518 U.S. 1, at 17 (1996). The NMCCA, has flippantly eviscerated the effectiveness of the privilege for all participants in the military justice system, ignored the plain meaning of the rule, and failed to account for Supreme Court precedent set by *Jaffee* and this Court's precedent in *Rodriguez*.

The MJ and NMCCA erred and did not meet the Mil. R. Evid. 513 requirements in finding the defense met its burden under Mil. R. Evid. 513(e)(3)(C)-(D) regarding the crime fraud exception and the constitutionally required exception.

The MJ and defense assert that the evidence is not cumulative and that no non-privileged sources exist. But neither the defense nor the MJ can cite any evidence that shows any party made "reasonable efforts to obtain…substantially similar information from non-privileged sources." Mil. R. Evid. 513(e)(3)(D).

The defense called no witnesses and made no assertions that they sought similar or non-privileged information from anyone. It is unclear how the MJ determined that defense had met this prong of its burden, as there was no evidence admitted or proffered on the issue.

The defense is seeking to find inconsistent statements, information regarding EV's desire to leave Okinawa and evidence showing a motive to fabricate. This information, if found in EV's records, would be cumulative to what defense has already produced, according the defense's own assertions. The MJ challenged the defense on this during oral argument on 18 November 2015 and 13 January 2016. Atch. J, at 11; Atch. K, at 7, 10, 12. The defense claimed that EV's statements are internally inconsistent and her statements to the RPI's spouse are inconsistent. The defense has EV's husband's application for a humanitarian transfer, which states they wanted to leave Okinawa. If, as the defense argues, all these facts prove EV's motive to lie, the defense already has what they need to effectively cross-examine her and satisfy the RPI's constitutional right to confrontation. Furthermore, defense presented no evidence that it interviewed witnesses regarding EV's desire to leave the island or that any witness refused to answer such questions. The defense's only justification for meeting Mil. R. Evid. 513(e)(3)(C)-(D) was that it tried to obtain a "privilege log" of where and when EV sought MH treatment.

Atch. A, at 5-6. The defense even asked the government to create this document. *Id*. at 6.

The defense states there is no non-privileged source of the info unless EV waived the privilege. This is a misunderstanding of the rule's requirement, as pointed out in *Lippert*: "[t]he purpose of this requirement is not to find other means of determining the contents of the mental health records…" *Lippert* at 15. The MJ misapplied Mil. R. Evid. 513(e)(3)(D) in the same way, writing that the "defense does not have any other non-privileged access to this information regarding the manifestations and severity of Mrs. E.V.'s psychological condition." Atch. H at 4. The defense had the means to call acquaintances, friends and family of EV to ask if anything seemed wrong with her memory, perception, recall and mental stability. The defense did not introduce any evidence of this nature or attempt to obtain it from any source.

Mil. R. Evid. 513(e) incorporates the *Klemick* factors, but goes one step further. To simply say that *Klemick* "has been met" is insufficient. "[T]he amendments substituted a requirement for specific findings in place of what had been a somewhat nebulous rule." *Lippert* at 8. It requires specific findings grounded in evidence adduced at the hearing. In support of the findings, the MJ is required to conduct a thorough Mil. R. Evid. 513(e) hearing wherein the defense introduces evidence in the form of witness testimony or other evidence. There was

no evidence introduced that satisfied sections (C) and (D) of Mil. R. Evid. 513(e)(3) and no sufficient analysis to justify piercing EV's MH privilege. The MJ should not have conducted an *in camera* review, nor ordered disclosure without making the required findings grounded in admitted evidence, of which there was none, regarding Mil. R. Evid. 513(e)(3)(C)-(D).

The MJ deprived EV of her right to notice and a chance to be heard regarding the MJ's finding that Mil. R. Evid. 513(d)(5) was an applicable exception in the case.

The MJ supplemented his ruling three weeks after deciding to release EV's MH records, *sua sponte*, stating that Mil. R. Evid. 513(d)(5) also applied. He recognized that the defense did not seek piercing EV's privilege under this exception. The MJ, in doing this, stepped 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. In doing this, he deprived EV of a chance to be heard, a chance to introduce evidence and a chance to call witnesses to rebut the new theory. In doing so, the MJ violated Mil. R. Evid. 513(e)(1)-(2).

Mil. R. Evid. 513 "procedural due process rights can be frustrated when, to the surprise of both the parties and the patient, a completely novel factual and legal theory is introduced at the hearing in support of breach of the privilege." *Lippert*

at 18-19. The MJ's violation of EV's due process rights is worse here, as the MJ introduced his novel legal theory more than a month *after* the hearing.

As discussed above, the MJ had to determine that a *prima facie* case of fraud existed in order to pierce EV's MH privilege. This means that each element of the fraud of EV's suicidal ideations is clearly presumed or established by evidence *unless disproved or rebutted*. If the Court believes this standard was somehow met by the evidence, it must allow EV a chance to rebut the argument and evidence against her. The Eighth Circuit Court of Appeals has, in the past, refrained from piercing a privilege based on the crime or fraud exception in part because the evidence had been rebutted. *In Re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977)(noting that the government's evidence of fraud was "ambiguous and *controverted*" and therefore did not support a *prima facie* case). But this court need not rely on persuasive authority from the Eighth Circuit because Mil. R. Evid. 513, when properly applied, mandates a new hearing and a chance to rebut the relied upon evidence. For this right to be meaningful, the ability must exist for a patient to rebut evidence when the parties fail to introduce available contravening evidence. Because the MJ introduced this legal theory without opportunity for a hearing, EV never had a chance to respond to the MJ's allegation of fraud or dispute the piercing of her privilege on this basis. The MJ violated EV's procedural due process rights under Mil. R. Evid. 513.

Prayer For Relief.

WHEREFORE, petitioner requests this Court issue a stay of proceedings, and set aside the MJ's ruling under Mil. R. Evid. 513.

Attachments of Pertinent Parts of the Record.

A. Defense Motion to Compel Specific Discovery: MH Records and Enclosures, 1 November 2015;

B. Government Response to Defense Motion to Compel Specific Discovery: MH Records and Enclosures, 9 November 2015;

C. Special Victims' Counsel Response to Defense Motion to Compel Specific Discovery: MH Records, 13 November 2015;

D. Findings of Fact, Conclusions of Law, and Decision re: Defense Motion to Compel Specific Discovery: MH Records, 30 December 2015;

E. Defense Motion for Reconsideration: To Compel Specific MH Records and Enclosures, 8 January 2016;

F. Government Response to Defense Motion to Reconsider (MRE 513), 12 January 2015;

G. Judicial Order to Compel Production of Protected Mental Health Information, 13 January 2016;

H. MJ's Findings of Fact, Conclusions of Law, and Decision (RE: Defense Mil. R. Evid. 513 Reconsideration), 13 January 2016;

I. MJ's E-mail to the Parties and SVC, 27 January 2016;

J. ROT Cover pages and Transcript of the Art. 39a closed session, 18 November 2015;

K. Transcript of the Art. 39a closed session, 13 January 2016;

L. Qualified Protective Order, 27 January 2016;

M. Letter of Good Standing, 12 February 2016.

N. Supplemental Ruling Re: Defense Motion to Reconsider Court's Ruling on Defense Motion to Compel Specific Discovery of Mental Health Records, 19 February 2016.

O. E-mail exchange between the MJ, SVC, Trial and Defense Counsel, 18-19 February 2016.

P. Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, filed with NMCCA, 19 February 2016.

Q. Order of NMCCA, 25 February 2016.

R. *DB v. Lippert*, Army Misc. 20150769, at 4 (Army Ct. Crim App. 1 Feb. 2016)

S. Relevant Portions of Executive Order 13696.

VI
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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to the Respondent, the RPI's counsel, the directors of the Navy-Marine Corps Appellate Government Division and Appellate Defense division, and the Clerk of Court for the NMCCA on 16 March 2016. Additionally, I certify that documentary attachments to the writ-appeal that are to be sealed under Mil. R. Evid. 513 were sent to the Court, Appellate Division directors, and the NMCCA Clerk of Court, via FedEx on 15 March 2016. Finally, I certify that two DVD interviews, part of defense and government Mil. R. Evid. 513 motion enclosures, were sent to the Court via certified mail by the Legal Services Support Section of Marine Corps Installations Pacific, Camp Foster, Okinawa, on 16 March 2016. All other members listed in this certification already possess these DVDs.

Certificate of Compliance

This brief complies with the page limitations of Rule 21(b). This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word version 2010 with 14-point-Times-New-Roman font. It contains 7,328 words.

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DB v. Lippert

United States Army Court of Criminal Appeals

February 1, 2016, Decided

ARMY MISC 20150769

Reporter
2016 CCA LEXIS 63

DB, by and through Captain RANDY L. JOHNSON, Special Victim Counsel v. Colonel JEFFERY D. LIPPERT, Military Judge, Respondent, Sergeant OTIS R. DUCKSWORTH, Real Party in Interest

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, United States Army Alaska. Jeffery D. Lippert, Military Judge.

Counsel: For Petitioner: Captain Randy L. Johnson (on brief); Captain Randy L. Johnson (on reply brief).

For Real Party in Interest: Lieutenant Colonel Jonathan F. Potter, JA; Major Andres Vazquez, Jr., JA (on brief).

Amicus Curiae: For the Air Force Special Victims' Counsel Program: Lisa R. Kreeger-Norman, Esq.

For Protect Our Defenders: Peter Coote, Esq.

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS

WOLFE, Judge,

Petitioner DB has requested that this court issue a writ of mandamus setting aside the military judge's ruling on Military Rule of Evidence [hereinafter Mil. R. Evid.] 513 and that we declare the mental health records that were the subject of that ruling to be inadmissible at trial. Additionally, petitioner asked this court to stay the court-martial proceedings pending such a decision. We granted petitioner's request for a stay on 30 November 2015.[1] We now address the substance of the petition and lift the stay.

Petitioner assigns four errors.[2] As we agree with the first, second, and fourth assignments of error, we do not reach the third. The petition is GRANTED in part in that we set aside the military judge's ruling under Mil. R. Evid. 513. The petition is DENIED in that we make no determination on whether petitioner's mental health

[1] In granting the stay we also specifically provided for **[*2]** the opportunity for the Government and Defense Appell ate Divisions to file responsive briefs and to ″attach any matters they believe are necessary to the resolution of this pet ition″ in order to provide an opportunity to supplement the record. The accused, as the real party in interest submitted a responsive brief but did not attach new matt ers. The government submitted neither a brief nor additional matters. Accordingly, we will resolve the petition based on the limited record before us.

[2] The assignments of error are as follows:

> I. Whether the military judge erred as a matter of la w when he ruled that the disclosure of [petitioner's] mental health records prior to an evidentiary hearing as required by Mil. R. Evid. 513(e)(2) did not violate her privilege under Mil. R. Evid. 513(a).
>
> II. Whether the military judge erred as a matter of law **[*3]** in determining that a mandatory disclosure under Mil. R. Evid. 513(d)(2) was sufficient to trigger an in camera review of [petitioner's] mental health records.
>
> III. Whether the military judge erred as a matter of law by ruling that the constitutional exception applies under Mil. R. Evid. 513.

records would be admissible at trial, assuming a properly conducted hearing under Mil. R. Evid. 513.[3]

I. JURISDICTION

Before we can address petitioner's questions, we must first determine whether we have jurisdiction to issue the writ requested. *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (Jurisdiction must be established as a threshold matter without exception). As the provisions of *Article 6b(e), UCMJ*, are relatively new, some inquiry is necessary.

The Army Court of Criminal Appeals is a court of limited jurisdiction, established by The Judge Advocate General. *UCMJ art. 66(a)*. ("Each Judge Advocate General shall establish a Court of Criminal Appeals . . . ."). The mandate to establish **[*4]** this court was made pursuant to the authority of Congress to pass laws regulating the Armed Forces. *See U.S. Const. art. I, § 8, cl. 14*. Our jurisdiction has generally been limited to appeals by the United States under *Article 62, UCMJ*, and reviewing the findings and sentences of certain courts-martial under *Article 66(b), UCMJ*. While not a separate grant of jurisdiction, this court may also issue writs under the All Writs Act. *28 U.S.C. § 1651(a) (2012)*. Our ability to issue writs under the All Writs Act is limited to our "subject matter jurisdiction over the case or controversy." *United States v. Denedo, 556 U.S. 904, 911, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009)*; *see also UCMJ art. 66*.

Accordingly, writ jurisdiction under the All Writs Act is limited to those matters that are "in aid of [our] respective jurisdiction[]" under *Article 66, UCMJ*. *28 U.S.C. § 1651(a)*. Jurisdiction under the All Writs Act is therefore limited to matters that "have the potential to directly affect the findings and sentence." *Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129 (2013)* (citing *Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012))*; *see also LRM v. Kastenberg, 72 M.J. 364, 368 (2013)*.

Many victim rights are procedural, and even if a court-martial disregards the rights, such action may often be unlikely to have the potential to directly affect the findings or sentence.[4] However, in December 2014, *Article 6b, UCMJ*, was amended to provide that a victim of an offense may petition this court for a writ of mandamus to **[*5]** enforce certain statutory and procedural rights. *UCMJ art. 6b(e)*; *10 U.S.C. § 806b(e) (2012 Supp. II)*; *see* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 [hereinafter 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). We understand the mandate of *Article 6b(e)(3), UCMJ* (as recently amended), for such petitions to be forwarded "directly" to this court and "to the extent practicable," for this court to give such petitions "priority over all other proceedings" to be a new and separate statutory authority for this court to issue writs. National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 531(e)(3) (2015) (Enforcement of Certain Crime Victim Rights by the Court of Criminal Appeals). That is, *Article 6b, UCMJ*, is a distinct authority from the All Writs Act.

To consider a petition for a writ under *Article 6b, UCMJ*, we need not find that the matter is in aid of our jurisdiction under *Article 66*. Or, more precisely, we need not find that the matter(s) raised in the petition has

---

IV. Whether the military judge abused his discreti on when he ruled that the defense met its burden under Mil. R. Evid. 513 and *United States v. Klemick* [65 M.J. 576 (C.A.A.F. 2006)] where the defense offered no evidence or witnesses in support of their motion to compel production of [petitioner's] mental health records.

[3] We granted two motions to submit briefs as amicus curiae from "Protect Our Defenders" and The United States Air Force Special Victims' Counsel Division.

[4] For example, the ability to be heard has been described as both a both a "right" and a "rite." *See* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 Yale L. & Pol'y Rev. 431, 433 (2008) ("Being afforded the right to participate in the **[*6]** solemn rite of a trial signals to the speaker that what she has to say is valued. She has been called to participate in one of the weightiest of our community rituals because her presence and observations are deemed an important part of the legal process. The speaker's views may not prevail, but her insights, experiences, and contributions are nonetheless acknowledged and validated by the mere fact that she was heard in an official forum.").

"the potential to directly affect the findings and sentence." *LRM, 72 M.J. at 368*. Instead, to find jurisdiction to issue a writ under *Article 6b* we need only determine that the petition addresses the limited circumstances specifically enumerated under *Article 6b(e)*.[5] As this petition alleges that the military judge failed to follow Mil. R. Evid. 513, a matter specifically enumerated in *Article 6b(e)(4)(D)*, we find that we have jurisdiction to consider the merits of the petition.

II. STANDARD

To obtain the requested writ of mandamus, petitioner must show that: (1) there is "no other adequate means to attain relief;" (2) the "right to issuance of the writ is clear and **[*8]** indisputable;" and (3) the issuance of the writ is "appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)* (citations and internal quotation marks omitted).

III. CHRONOLOGY

On 23 June 2015, the government preferred charges against the accused (the real party interest) for allegedly committing sexual offenses against the petitioner and one other victim in 2012 and 2013. On 15 September 2015, the military judge ordered the government to "produce in complete and unredacted form, sealed for *in camera* review by a military trial judge, all [of petitioner's records] currently maintained by the Alaska Office of Child Services." The authority cited by the military judge was *Article 46, UCMJ* ("Opportunity to obtain witnesses and other evidence").[6]

The next day, on 16 September 2015, the trial counsel issued a subpoena for petitioner's records from two civilian mental healthcare providers. The subpoena stated that the production was for the purpose of "judicial in-camera review." The subpoena stated that failure to comply could result in apprehension **[*9]** or fines of up to $500.

Also on 16 September 2015, the defense counsel filed a motion to compel the production of those same mental health records under Mil. R. Evid. 513.[7] (That is, the military judge's order predated the defense motion, and the defense motion was contemporaneous with the trial counsel's subpoenas).

On 29 September 2015, the military judge held a closed *Article 39(a)* session to address the defense's motion to compel the production of the mental health records. The military judge noted his error in prematurely ordering **[*10]** the production of mental health records before the hearing had ever occurred, and stated that while the records had been produced, he had not yet reviewed the records.

At the hearing, neither side presented any evidence nor called any witnesses.

The military judge issued a verbal ruling on the record granting the defense's motion for an *in camera* review of all the mental health records. The hearing recessed at 1443 hours.

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[5] Were writ jurisdiction under Article 6b, UCMJ, limited to matters that had the potential **[*7]** to directly affect the findings and sentence, we would lack jurisdiction over a writ petition in cases where Congress specifically authorized a victim to file a petition. Consider, for example, a writ petition that alleges that the victim petitioner was improperly excluded from attending the trial. Under Article 6b(a)(3), a victim may only be excluded if the military judge finds by clear and convincing evidence that the victim's presence would materially alter the victim's testimony. Accordingly, a writ pe tition alleging the *improper* exclusion of a victim is permissible only when a victim was excluded and the victim's presence *would not* materially alter testimony. In other words, Article 6b authorizes a writ petition only in circumstances where the exclusion of the victim is *unlikely* to affect the findings and sentence. It would be difficult to imagine that Congress intended to authorize the filing of a writ to this court but not authorize this court to have jurisdiction to consider the matter.

[6] Email traffic between the parties suggests that the military judge's order was in response to a request from the trial counsel who was seeking to avoid a continuance.

[7] Unless otherwise noted, references or citations to the Military Rules of Evidence in this opinion will be to thos e rules found in the Supplement to the 2012 edition of the *Manual for Courts-Martial* ("a complete revision to the Military Rules of Evidence . . . implementing the 2013 Amendments to the MCM" enacted by Executive Order 13643), as modified by subsequent legislation and executive action (e.g., Exec. Order 13696). Any exceptions will be annotated. *See also* "Updated Military Rules of Evidence" posted by the Joint Service Committee on Military Justice in June 2015. *Part III Military Rules of Evidence*, http://jsc.defense.gov/Portals/99/ Documents/MREsRemoved412e.pdf (last visited 29 Jan. 2016, 1145).

That same day, the Special Victim Counsel (SVC) requested that the military judge delay disclosure of any mental health records pending the filing of this writ petition. The military judge denied the request.

Just over ten hours after the hearing ended, at 0101 hours on 30 September 2015, the military judge emailed the parties and informed them that he had completed the *in camera* review and that he was ordering "numerous" pages disclosed.[8] The email included what could be interpreted as a two-sentence protective order, stating that the disclosed records are "FOUO" and that copies of the records will be returned to the trial counsel at the conclusion of trial.

On 27 October 2015, the SVC requested that **[*11]** the military judge reconsider his ruling.

On 6 November 2015, the military judge reconsidered but reaffirmed his prior ruling.

IV. DISCUSSION

The problems that this case presents are manifold, and we will address each in turn.

A. Ordering the Production of Mental Health Records.

As noted above, the military judge and trial counsel ordered the production of petitioner's mental health records for the purpose of conducting an *in camera* review prior to having a hearing under Mil. R. Evid. 513, and (at least in the case of the military judge) prior to the defense filing a motion for the production of the records. This act was in clear violation of the rules. Mil. R. Evid. 501(b)(3) ("A claim of privilege includes . . . refus[al] to produce any object or writing"); Mil. R. Evid. 513(a) ("A patient has a privilege to refuse to disclose and prevent any other person from disclosing . . . ."); Mil. R. Evid. 513(e)(1)(A) (in order to obtain a ruling by the military judge, a party "must" file a written motion); Mil. R. Evid. 513(e)(2) ("Before ordering the production . . . the military judge must conduct a hearing.").

The military judge admitted this error during the subsequent motion hearing and explained that the production of the records had been at the request of the trial counsel. He further explained that he **[*12]** thought the SVC was included on the email and that the SVC had not objected. This explanation falls short in several respects.

First, the failure to object cannot be construed as either an affirmative waiver of a privilege or waiver of the procedural requirements under Mil. R. Evid. 513. *See, e.g.*, Mil. R. Evid. 510 (Waiver of privilege by voluntary disclosure). Even if the SVC had been included in the email chain, which he apparently was not, his silence cannot be deemed a waiver of procedural requirements.

Second, in *CC v. Lippert*, ARMY MISC 20140779 (Army Ct. Crim. App. 16 Oct. 2014) (order), this court, in response to a similar petition for a writ of mandamus, instructed this military judge that he "will comply with Military Rule of Evidence 513(e)(2) prior to deciding whether to order production of Petitioner's mental health records for in camera review." That is, less than a year prior to the military judge's actions in this case, we were required to direct that this same judge follow this same rule.

Finally, ordering the production of privileged mental health records "for the purpose of an in camera review" prior to receiving any motion or conducting a hearing may undermine public confidence in the fairness of the court-martial proceedings.

B. **[*13]** *Prerequisites to an In Camera Review*.

On 17 June 2015, the President signed Executive Order 13696 ("2015 Amendments to the Manual for Courts-Martial, United States"). Exec. Order No. 13696, 80 Fed. Reg. 119, 35,781 (22 Jun. 2015). Included in the executive order, which was effective immediately for any case which had not been arraigned, were substantial changes to Mil. R. Evid. 513. Military Rule of Evidence 513(e)(3) was amended to read as follows:

> (3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find 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;

[8] Petitioner avers that the disclosed records numbered over 1400 pages.

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable e fforts to obtain the same or substantially similar information through non-privileged sources."

Exec. Order No. 13696, 80 Fed. Reg. 119, 35,819-20.

In short, the amendments substituted **[*14]** a requirement for specific findings in place of what had been a somewhat nebulous rule. Prior to the June 2015 amendment, Mil. R. Evid. 513(e)(3) stated, without explanation, that a military judge could conduct an *in camera* review "if such an examination is necessary to rule on the motion." *See* Mil. R. Evid. 513 (*Manual for Courts-Martial, United States* (2012 ed.)). Commentators have speculated that the amendments were needed because *in camera* review, which is itself a limited piercing of the privilege, had become "almost certain" upon a party's request. Major Cormac M. Smith, *Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice*, Army Lawyer, Nov. 2015, at 10 (prior to its amendment, Mil. R. Evid. 513 "essentially compelled a prudent military judge wishing to protect the record to at least review the privileged communication in camera once a party requested production."). The fact that the trial counsel in this case requested that the military judge order the production of petitioner's mental health records (again, prior to receiving the defense motion) gives credence to concerns that *in camera* review had become a matter of routine. If such commentary is **[*15]** correct—and our own routine review of court-martial records does not lead us to believe otherwise—the purpose of Mil. R. Evid. 513 is clearly frustrated by such routine reviews. *See* Jaffee v. Redmond, 518 U.S. 1, 11-12, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) (without a psychotherapist privilege "confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation").

C. *The Defense Motion*

The Mil. R. Evid. 513 motion[9] filed by the defense counsel did not attempt to meet the procedural requirements set forth in the amended rule and, in fact, explicitly disavowed them as being applicable.

The defense motion first argued that the recent amendment to Mil. R. Evid. 513(d)(8) (removing th e "constitutionally **[*16]** required" exception to the privilege) was without effect. *See* 2015 NDAA, Pub. L. No. 113-291, § 535, 128 Stat. 3292, 3369. Second, the defense argued that the records contained constitutionally required material because: A) "[t]he defense's theory of the case is that [petitioner] did not like the Accused being her stepdad" and therefore fabricated the allegation against him; and B) that the "defense needs access to the alleged victim's mental health records to corroborate their theory that this allegation is false. . . . [and that] [w]ithout this material the defense will not be able to impeach and discredit the victim in this case." The motion did not identify, other than broad generalizations of possible impeachment evidence, what information they believe d the records contained, stating only that the records "*may* contain constitutionally required material needed to impeach [petitioner]." (emphasis added). Nor did the motion identify with any specificity what constitutional issues were at play. The omission of any claim as to the contents of the petitioner's mental health records appears to be intentional, as the motion also argued that the procedural requirements under Mil. R. Evid. 513 are invalid when the defense **[*17]** is seeking constitutionally required material.[10] Instead, the defense, in its 16 September 2015 "Motion to Compel Production of Mental Health . . . Records," cited case law (predating the establishment of the privilege) that their only obligation was "showing . . . [that] the credibility of the victims was paramount to the defense and that the records *might* contain evidence of [the victim's] ability to perceive events, or evidence of their credibility in general." (citing United States v. Reece , 25 M.J. 93 (C.M.A. 1987) (emphasis added).

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[9] The defense's motion was styled as a motion to compel. In addition to requesting mental health records under Mil. R. Evid. 513, the motion included requests for non-mental health records such as "academic and disciplinary records." There is a vast difference, both in substance and procedural requirements, between a motion to compel discovery filed under Rule for Courts-Martial [hereinafter R.C.M.] 905(b)(4) and a motion seeking access to privileged communications filed under Mil. R. Evid. 513. It is unwise to conflate the two.

[10] The defense motion also included an argument that the mental health records met the child abuse exception under Mil. R. Evid. 513(d)(2). The military judge rejected that argument, and review of that decision is not before us.

The defense introduced no evidence (witness testimony or otherwise) in support of the motion.[11]

The contents of a motion under Mil. R. Evid. 513 are critical. First, the military judge must "narrowly tailor" any ruling directing the production or release of records to the purposes stated in the motion. Mil. R. Evid. 513(e)(4). Second, Mil. R. Evid. 513 is not merely a rule that describes how certain types of evidence may be produced; it is also the means by which a patient is provided due process prior to the production or disclosure of privileged communications. Mil. R. Evid. 513(e)(1). Broadly, the rule provides for notice and an opportunity to be heard (i.e. due process). More specifically, timely notice is provided by the requirement that absent good cause, such a motion must be filed prior to the entry of pleas. Mil. R. Evid. 513(e)(1)(A). Substantive notice is provided by the requirement that the motion must "specifically describ[e] the evidence and stat[e] the purpose for which it is sought . . . ." *Id.* Unless impractical, the patient must be notified of the hearing and given an opportunity to be heard. Mil. R. Evid. 513(e)(2). As discussed below, these procedural due process rights can be frustrated when, to the surprise of both parties and the patient, a completely novel factual and legal theory is introduced **[*19]** at the hearing in support of breaching the privilege.

D. The Mil. R. Evid. 513 Hearing

After rejecting the defense counsel's argument that the child abuse exception under Mil. R. Evid. 513(d)(2) would allow the defense to have access to petitioner's mental health records, the military judge confirmed that the defense did not intend to introduce any evidence.

The military judge appeared particularly concerned as to whether the government intended to introduce any evidence of petitioner's mental health at sentencing, stating to the trial counsel: "Okay. So [petitioner is] not going to get on the stand and say this is the worst thing in my life. I've had to go to counseling for the last however many years it's been, three years, because the accused did what he did to me?" Presumably, such testimony would be admissible during sentencing as direct evidence in aggravation under R.C.M. 1001(b)(4) ("Evidence in aggravation includes . . . psychological, and medical impact on . . . any person or entity who was the victim of an offense . . . ."). In response to the military judge's repeated questions, the trial counsel responded he would not offer any such evidence.

To the extent that the military judge was envisioning piercing a privileged communication **[*20]** because of a concern about the accused's rights to impeach or confront a witness during sentencing, there is not a constitutional right of confrontation during sentencing proceedings. *United States v. McDonald, 55 M.J. 173, 177 (C.A.A.F. 2001)* ("it is only logical to conclude that the *Sixth Amendment* right of confrontation does not apply to the presentencing portion of a non-capital court-martial."). While the rules of evidence provide for cross-examination of sentencing witnesses, *see* Mil. R. Evid. 611(b) and 1101(a), these are regulatory confrontation rights rather than a *constitutional* right of confrontation that could form the basis for piercing a privileged communication.

The remainder of oral argument did not address the theory of admissibility identified by the defense in their motion. Rather, the milita ry judge offered a novel theory of admissibility *sua sponte*. The military judge noted that in an unrelated motion, the trial counsel had moved to introduce a journal entry written by petitioner. The journal entry was apparently disclosed to law enforcement by mental healthcare providers because it was a required disclosure under Alaskan state law.[12] There is "no privilege" under Mil. R. Evid. 513 when state law requires such a disclosure. Mil. R. Evid. 513(d)(3). It does not appear that petiti oner had any choice **[*21]** in whether to disclose the journal entry. The journal entry, styled as a letter, was written as part of therapy and included inculpatory statements adverse to the accused that the government wanted to admit during the merits portion of trial.

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[11] "On one point there appears to be a unanimous consensus. In sexual-assault and child abuse cases, there is general agreement that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial." **[*18]** Clifford S. Fishman, *Defense Access to A Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 37 (2007)

[12] As the Special Victim's Counsel had no notice of the military judge's theory of admissibility prior to the hearing, it was only in his motion for reconsideration that he fully informed the military judge that the journal entry had been disclosed pursuant to Alaska Statute (AS) 47.17.020(a)(1). After considering the SVC's motion, the military judge ruled that his prior ruling "will not be disturbed" and that "the defense must be given the opportunity to review [petitioner's] other mental health records."

The military judge advanced a theory that because one document had been disclosed from petitioner's mental health records—even one disclose d because of a state mandatory disclosure requirement—all of petitioner's mental health records were subject to review.[13]

In granting the defense's motion for production, the military judge made several conclusions of law and fact — all of which require discussion.

1. Military Rule of Evidence 513(e)(3)(A)

Addressing the requirement under Mil. R. Evid. 513(e)(3)(A) that the moving party show "a specific factual basis demonstrating a reasonable likelihood that the records" yield admissible evidence, the military judge found that "the defense" had satisfied this requirement because the government intended to introduce the journal entry. The military judge determined the existence of the journal entry, (or as the judge stated "the fact that the government is attempting to introduce" the journal entry) made it reasonably likely that the remaining records "would yield some admissible evidence under an exception to Mil. R. Evid. 513. That exception being the 'constitutionally required' exception." The military judge's reasoning was flawed in several respects.

First, as there was no evidence before the court of any kind, **[*23]** there was little basis to determine what the records would contain, let alone conclude they contained admissible evidence.

Second, to the extent that the military judge implicitly notified the parties he was considering the journal entry as part of the motion, the journal entry was by all accounts *inculpatory*. This could perhaps lead to an inference that the records contained other inculpatory evidence. However, we cannot identify any logic to support the proposition that an inculpatory excerpt in one portion of a record makes it likely to find admissible defense evidence in another.

Third, less than four months earlier, we addressed a similar issue in yet another writ petition arising from this military judge, this time addressing the application of Mil. R. Evid. 514. *AT v. Lippert, ARMY MISC 20150387, 2015 CCA LEXIS 257* (Army Ct. Crim. App. 11 June 2015 (summ. disp.). In that case, the victim petitioner complained of the military judge's ruling that all communications with a victim advocate were unprivileged once she made an unrestricted report. This court characterized the military judge's ruling as seeming "to declare all of the Sexual Harassment/Assault Response and Prevention (SHARP) records to be non-confidential and unprotected by Mil. R. Evid. 514." *Id.* at n.1. **[*24]** While this court denied the petition, we stated that "it is the victim who defines the scope of information to be disclosed to third persons . . . . *[A] nything in the judge's order that might be interpreted otherwise would be incorrect*." *Id. at 2* (emphasis added).

Fourth, and similar to his ruling in *AT v. Lippert* declaring *all* SHARP records non-confidential because the victim made one unrestricted report, here the military judge applied his analysis and ruling to *all* of petitioner's mental health records. According to the military judge's description of the journal entry during oral argument, the journal entr y was derived from page 37 of the "Voices Workbook" where petitioner was asked to write a letter to her mother. The military judge applied his analysis not only to page 37 or the surrounding pages and related records, but to all mental health records, created both before and after the journal entry, spanning a period of years, and involving unrelated mental healthcare providers and institutions.

Accordingly, the military judge's finding that because petitioner's mental health records yielded one (unprivileged) inculpatory document, there was a reasonable likelihood that the remaining **[*25]** records would yield admissible defense information was clearly erroneous.

2. Military Rule of Evidence 513(e)(3)(B) Enumerated Exceptions

When addressing the second requirement, that under Mil. R. Evid. 513(e)(3)(B) the mental health record must meet one "of the enumerated exceptions," the military judge stated that the mental health records met "the constitutionally required exception." While we do not resolve this issue today, the military judge's ruling was

[13] We offer no opinion on whether the journal entry would be admissible. We note the military judge's concern that use of the Psychotherapist-patient privilege to selectively use (or cherry-pick) **[*22]** documents or statements may in some cases prohibit an accused from defending hims elf against alleged charges. Though not presented in this writ, we note a military judge is under no obligation to admit such evidence if doing so would deprive the accused of a fair trial.

problematic in that there is no longer an "enumerated" constitutional exception to Mil. R. Evid. 513. *See* 2015 NDAA, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 ("Not later than 180 days after the date of the enactment of this Act, Rule 513 of the Military Rules of Evidence shall be modified as follows . . . To strike the current exception to the privilege contained in subparagraph (d)(8) of Rule 513."); Exec. Order No. 13696, 80 Fed. Reg. at 35,819 ("Mil R. Evid. 513(d)(8) is deleted."). It is clear from the record that the military judge was well aware of this amendment at the time of his ruling. It therefore appears that the military judge must have determined that Mil. R. Evid. 513 is facially unconstitutional. If so, he did not make this determination clear, cite any authority, or explain his reasoning (either when he ruled on the record or when he reconsidered his ruling by email). Prudence suggests that **[*26]** a detailed analysis should accompany such a significant decision.[14]

> The presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'"); *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Appellant must show that [the challenged rule] "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43-45, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (examining historical practices on due process challenges).

United States v. Wright , 53 M.J. 476, 481 (C.A.A.F. 2000). While we would review *de novo* a determination that a rule is unconstitutional, the lack of accompanying analysis makes this impossible, and we leave resolution of this issue for another day when the issue is more fully developed.

3. Cumulative Nature of Records

Turning to the third requirement under Mil. R. Evid. 513(e)(3)(C) that the information in the mental health records must not be cumulative, we are again at a loss to understand the military judge's reasoning. Given that there was no evidence (or even a proffer) to the contents of petitioner's mental health records, or of the other evidence the defense intended to introduce, it was likely impossible for the military judge to determine whether the records were cumulative with other defense evidence.[15] Rather, the military judge stated that he found that *all* the mental health records were not cumulative because the trial counsel was seeking to introduce the journal entry. That is, as the military judge found the government had a single (unprivileged)

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[14] The significance of the deletion of Mil. R. Evid. 513(d)(8) is certainly subject to reasonable debate, likely focused on whether the resulting rule creates a "qualified" or "unqualified" privilege. *Compare* *Jaffee*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 **[*27]** *with* *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) and *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The Supreme Court has not yet held that there is a constitutional right to *discover* impeachment evidence that is not in the possession of the government. *See* *Commonwealth v. Barroso*, 122 S.W.3d. 554, 561 (Ky. 2003) (summarizing relevant Supreme Court case law). While military defendants enjoy broader *statutory* discovery rights than their federal court peers, the discovery provisions of ***Article 46, UCMJ***, are not a basis for determining that discovery is *constitutionally* required. The constitutional issues are unusual with regards to Mil. R. Evid. 513 in that the rule is the result of *both* a legislative and executive act. *See* 2015 NDAA, § 537; Exec. Order No. 13696. Accordingly, the President was likely at the apex of his authority in implementing Mil. R. Evid. 513 as he acted in his constitutional role as Commander in Chief and under a specific legislative direction. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he posse sses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these **[*28]** circumstances, it usually means that the Federal Government as an undivided whole lacks power.").

[15] We note that the rule presumes that before addressing whether the **[*29]** records are cumulative the moving party has already filed a motion "specifically describing the evidence . . . ." Mil. R. Evid. 513(e)(1)(A); *see also* Mil. R. Evid. 513(e)(3)(A). By holding the moving party to this standard, the military judge is better positioned to apply the rule to the facts of the case.

document that was arguably not cumulative with other *prosecution* evidence, he determined that all of the mental health records were not cumulative with whatever evidence the defense may have sought to introduce. This simply does not follow and was a clear abuse of discretion.

4. Non-privileged Sources of Information

The fourth requirement under Mil. R. Evid. 513(e)(3), that the moving party make reasonable efforts to obtain the information by other non-privileged sources, is again problematic in this case. Here, the military judge found the defense had made reasonable efforts to obtain the information by asking petitioner's mental healthcare providers about petitioner's treatment and behavior while in their care. He noted that "quite naturally" they did not respond favorably to those requests. This analysis missed the point of the fourth requirement. The purpose of this requirement is not to find other means of determining the contents of the mental health records—after all the defense was not seeking mental health records for the sake of them being mental health records—the purpose is to see if the underlying information (e.g., evidence regarding credibility) purportedly contained in the records can be adequately obtained **[*30]** from *non-privileged* sources. For example, in their motion, the defense sought the mental health records because they hoped the mental health records contained information undermining petitioner's credibility and highlighting her dislike of the accused. As to this "information," the relevant inquiry was whether other *non-privileged* sources (e.g., emails, texts, and the testimony of family members, friends, associates, etc.) could establish this same information without resorting to piercing a privilege.

5. Narrowly Tailored Production and Disclosure

Even were we to assume the defense had met the threshold for an *in camera* review of some portion of petitioner's mental health records, the decision of the military judge was overbroad. Military Rule of Evidence 513(e)(4) reads as follows:

> (4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communicati ons, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) [requiring a specific description of the **[*31]** evidence sought in the moving party's motion] of this Rule.

As previously discussed, the military judge conducted an *in camera* review of all of petitioner's mental health records. Nowhere in his ruling did the military judge tailor his decision to release a specific type of record or communication or explain his reasoning as to how he determined a document was releasable.

Rather, in ruling on the motion for reconsideration, the military judge stated that under the constitutional principles of "fundamental fairness and due process, the defense must be given the opportunity to review [petitioner's] other mental health records for other potentially admissible evidence." That is, instead of the page-by-page, communication-by-communication analysis as to whether an exception to a privilege under Mil. R. Evid. 513 applies, the military judge appears to have made a blanket determination that all of pet itioner's mental health records were unprivileged and subject to disclosure and review by the defense.

6. Privilege versus Discovery

Finally, and more broadly, we are concerned that the military judge confused an accused's right to discovery under Rule for Courts-Martial 701 and *Article 46, UCMJ*, with the prerequisites **[*32]** for disclosing a privileged communication under Mil. R. Evid. 513. For example, during his discussions with the trial counsel during oral argument, the military judge appeared to analogize the issue in front of him as one of discovery:

> MJ: Okay. Absent - -all things being equal, you go into a file, pull out [a] piece of evidence you want to introduce into court, right? Wouldn't the defense be entitled to the opportunity to review the rest of the file to see what was there?
>
> TC: But----
>
> MJ: Isn't that true?

Similarly, in his initial ruling releasing the mental health records, the military judge ruled that "[t]here are numerous pages of *discoverable* material" and that the "Court will deliver the *discoverable* material . . . for disclosure to defense."

In reconsidering his ruling, the military judge again appears to confuse the standard stating that "the defense must be given the opportunity to review [petitioner's] other mental health records for *potentially* admissible evidence."

It is axiomatic that if a privileged communication is disclosed whenever it would be subject to the rules governing discovery then there is no privilege at all. As the Supreme Court said in *Ritchie*, "[i]f we were to accept this broad interpretation **[*33]** . . . the effect would be to transform the *Confrontation Clause* into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view." *480 U.S. at 52* (plurality opinion).

V. CONCLUSION

In light of the above, we are firmly convinced that petitioner has demonstrated she has no other means to obtain relief, that the right to relief is clear and indisputable, and that relief is appropriate. As the military judge's ruling under Mil. R. Evid. 513 was a clear abuse of discretion, it is set aside. The effect of this ruling is to restore the disclosed records to their privileged status. That is, petitioner may "prevent another from being a witness or disclosing any matter or producing any object or writing." Mil. R. Evid. 501(b)(4); *see also* Mil. R. Evid. 511(a) (disclosure of privileged matter not admissible against the privilege holder if disclosure was erroneous or compelled); 513(a). However, we decline to determine, as petitioner asks, that the disclosed records be deemed inadmissible at trial. There has not yet been a proceeding or determination that correctly applies the procedural and substantive requirements of Mil. R. Evid. 513 to the facts of this case. During the closed hearing held pursuant to Mil. R. Evid. 513, the defense never had a chance to discuss their theory of **[*34]** admissibility. Accordingly, we offer no opinion as to whether any of petitioner's mental health records may be subject to disclosure and admissible at trial after a proper hearing under Mil. R. Evid. 513. To ensure that the accused has the benefit of such a determination, we do not preclude him from addressing the issue anew.

Petitioner's writ petition is GRANTED in part and the military judge's ruling under Mil. R. Evid. 513 is set aside. The stay ordered by this court on 30 November 2015 is hereby lifted. The petition is DENIED in that the admissibility of petitioner's mental health records may be determined after a properly conducted hearing under Mil. R. Evid. 513 and other applicable rules of evidence.

Senior Judge HAIGHT and Judge PENLAND concur.

FEDERAL REGISTER

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Part III

The President

Executive Order 13696—2015 Amendments to the Manual for Courts-Martial, United States

Federal Register
Vol. 80, No. 119
Monday, June 22, 2015

Presidential Documents

Title 3—

The President

Executive Order 13696 of June 17, 2015

2015 Amendments to the Manual for Courts-Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, and Part IV of the Manual for Courts-Martial, United States, are amended as described in the Annex attached and made a part of this order.

Sec. 2. These amendments shall take effect as of the date of this order, subject to the following:

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

THE WHITE HOUSE,
June 17, 2015.

Billing code 3295–F5

(c) Mil. R. Evid. 513(b)(2) is amended to read as follows:

"(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials."

(d) Mil. R. Evid. 513(d)(8) is deleted.

(e) Mil. R. Evid. 513(e)(2) is amended to read as follows:

"(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

(f) Mil. R. Evid. 513(e)(3) is amended to read as follows:

"(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find 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."

(g) A new Mil. R. Evid. 513(e)(4) is inserted immediately after Mil. R. Evid. 513(e)(3) and reads as follows:

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule."

(h) Mil. R. Evid. 513(e)(4) is renumbered as Mil. R. Evid. 513(e)(5).

(i) Mil. R. Evid. 513(e)(5) is renumbered as Mil. R. Evid. 513(e)(6).

(j) The title of Mil. R. Evid. 514 is amended to read as follows:

"Victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege"

(k) Mil. R. Evid. 514(a) is amended to read as follows:

"(a) *General Rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and Department of Defense Safe Helpline staff, in a case

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Chicago
2/12/2016

Re: Chad Thomas Evans
Attorney No. 6292783

To Whom It May Concern:

The records of the Clerk of the Supreme Court of Illinois and this office reflect that Chad Thomas Evans was admitted to practice law in Illinois on 11/8/2007; is currently registered on the master roll of attorneys entitled to practice law in this state; has never been disciplined and is in good standing.

Very truly yours,
Jerome Larkin
Administrator

By: 
Andrew Oliva
Registrar