**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| Thomas J. Randolph<br>Damage Controlman Second Class<br>United States Coast Guard<br>Appellant<br><br>v.<br><br>H.V.<br>Aviation Maintenance Technician Second Class<br>United States Coast Guard<br>Appellee<br><br>and<br><br>United States<br>Respondent | BRIEF ON BEHALF OF THE UNITED STATES<br><br>USCA Dkt. No. 16-0678/CG<br><br>Crim. App. Dkt. No. 001-16 |

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


Tereza Z. Ohley
Lieutenant, U.S. Coast Guard
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 36647
202-372-3811
Tereza.Z.Ohley@uscg.mil

Stephen P. McCleary
Appellate Counsel
2703 Martin L. King Ave SE
Washington, DC 20593
CAAF Bar No. 28883
202-372-3734
Stephen.P.McCleary@uscg.mil

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### Specified Issue

**WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS JURISDICTION OVER A WRIT-APPEAL PETITION FILED BY AN ACCUSED WHO IS SEEKING REVIEW OF A COURT OF CRIMINAL APPEALS DECISION RENDERED PURSUANT TO ARTICLE 6b(e), UCMJ.**

### Appellant's Issue II

**WHETHER THE "CONFIDENTIAL COMMUNICATIONS" PROTECTED BY MRE 513 INCLUDES [sic] RECORDS OF DIAGNOSES.**

## IV. Statement of Statutory Jurisdiction

Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012). For reasons discussed below, the United States submits that this Court has jurisdiction to hear Appellant's writ-appeal.

## V. Statement of the Case

On application of Appellee, the named victim in several of the charges pending against Appellant, the Coast Guard Court of Criminal

Appeals (CGCCA) issued a writ of mandamus pursuant to Article 6b(e), UCMJ, 10 U.S.C. § 806b (2015). Appellant has filed a writ-appeal, invoking this Court's jurisdiction under Article 67(a)(3). The United States files this brief in accordance with this Court's September 16, 2016 order.

## VI. Statement of Facts

Prior to his court-martial trial, Appellant moved for production of Appellee's mental health records and communications contained in those records. App. Ex. 25. The military judge found that defense had not made the requisite showing to perform an in-camera review of those records. However, the military judge found that certain requested records were not "confidential communications" privileged under Mil. R. Evid. 513, and ordered the following produced:

> those portions indicating a psychiatric diagnosis (as this phrase is used in the DSM-5), the date of such diagnosis, any medications prescribed, the duration the prescribed medications were to be taken, type of therapies used, and the resolution of the diagnosed psychiatric condition, if applicable.

App. Ex. 33 at 4-5. Appellee then petitioned the CGCCA for extraordinary relief from this ruling in the form of a writ of mandamus. App. Ex. 35. The CGCCA granted the requested writ. *Id.*

In its decision, the CGCCA did not examine the plain language of Mil. R. Evid. 513. *H.V. v. Kitchen*, No. 0001-16 *1-2 (Jul. 8, 2016). Rather, it referenced a federal district court case, *Stark v. Hartt Transportation Systems, Inc.*, 937 F.Supp.2d 88, (D. Me. 2013), as the single "published case[] brought to our attention" that was "directly on point." *Kitchen* at *2. *Stark* involved a civil suit brought by a terminated employee under the Americans with Disabilities Act. In denying the defendant-employer access to the plaintiff's mental health records, the *Stark* court held that "the [psychotherapist-patient] privilege shields information revealing the plaintiff's diagnoses." This Court adopted *Stark*'s conclusion, reasoning that construing the privilege narrowly would defeat societal interests protected by the privilege. *Id.* (citing *Stark*, 937 F. Supp.2d at 92).

The CGCCA also noted two other unpublished federal district court cases that addressed the privilege. One, *Sylvestri v. Smith*, is a civil case in which the court held that non-communicative information, such as the nature of diagnosis or treatment of the mental health condition, name of the provider, and dates and costs of treatment, was not covered by the psychotherapist-patient privilege. *Sylvestri v. Smith*,

No. 14-13137, 2016 WL 778358 (D. Mass. Feb. 26, 2016). The other case, *United States v. White*, is a criminal case in which the court aligned with *Stark*. *United States v. White* No. 2:12-CR-00221, 2013 WL 1404877, at *7 (S.D.W. Va. Apr. 5, 2013).[1] The CGCCA was, however, "persuaded that the *Stark* approach is correct." *Kitchen* at *4.

## VII. Summary of Argument

This Court has jurisdiction to hear Appellant's writ-appeal petition under Article 67(a)(3). The privilege in Mil. R. Evid. 513 extends only to communications and not to psychotherapy records generally, as evidenced by the plain language of the rule.

## VIII. Argument: Specified Issue

**WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS JURISDICTION OVER A WRIT-APPEAL PETITION FILED BY AN ACCUSED WHO IS SEEKING REVIEW OF A COURT OF CRIMINAL APPEALS DECISION RENDERED PURSUANT TO ARTICLE 6b(e), UCMJ**

[1] As Appellee correctly points out, the court in *White* ultimately found that the evidence in question was subject to release in order to vindicate the Due Process rights of Appellant, and released it. The decision to release the records was later reversed on appeal in *Kinder v. White*, 609 F. App'x 126, 131 (4th Cir. 2015).

**A. Standard of Review**.

Jurisdiction is a question of law that this Court reviews de novo. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013).

**B. This Court may find jurisdiction to hear this case under either Article 67(a)(3), UCMJ, or under the All Writs Act.**

This Court has jurisdiction to hear Appellant's case under Article 67(a)(3) or, alternatively, under 28 U.S.C. § 1651(a), the All Writs Act (All Writs Act). Appellant styles his pleading a "Writ-Appeal," and invokes jurisdiction under Article 67(a)(3). But neither the title of the petition nor the rule it is filed under extends or limits jurisdiction. *See* United States Court of Appeals for the Armed Forces Rules of Practice and Procedure (C.A.A.F. R.) 4(a)(3)(providing for review on petition of the accused and on good cause shown on cases reviewed by a Court of Criminal Appeals); C.A.A.F. R. 4(b)(2)(the court may, in its discretion, entertain a writ-appeal to review the decision of a Court of Criminal Appeals on a petition for extraordinary relief); and C.A.A.F. R. 4(c) ("These Rules shall not be construed to extend or to limit the jurisdiction of the United States Court of Appeals for the Armed Forces as established by law").

### C. Article 67(a)(3) provides this Court independent statutory jurisdiction to review this matter as a "case reviewed by the Court of Criminal Appeals."

Article 67(a) provides independent statutory jurisdiction for review of this case. In particular, Article 67(a)(3) requires this Court to review the record in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted review."

#### 1. This Court has long held that a "case" under Article 67(c), UCMJ includes interlocutory decisions and decisions on petitions for extraordinary relief, made by lower courts.

This Court has long held that Article 67 permits review of interlocutory decisions of Courts of Criminal Appeals (CCAs), including both petitions for extraordinary relief and appeals under Article 62, UCMJ, 10 U.S.C. § 862 (2012). Jurisdiction under Article 67(a) has been upheld in a number of different procedural postures. In *United States v. Curtin*, for example, this Court defined a "case" as used in Article 67 as including a "final action" by an intermediate appellate court on a petition for extraordinary relief. *United States v. Curtin* 44 M.J. 439, 440 (C.A.A.F. 1996) (finding jurisdiction under Article 67(a)(2) to review CCA's denial of government's petition for extraordinary relief). In *LRM*

*v. Kastenburg*, 72 M.J. 364,372 (C.A.A.F. 2013), this Court also found jurisdiction under Article 67(a)(2) to review a decision by the CCA that denied a victim extraordinary relief. In *Howell v. United States,* 75 M.J. 386, 390 (C.A.A.F. 2016), this Court found jurisdiction under Article 67(a)(2) to review a CCA decision on a government petition for extraordinary writ.

In *United States v. Lopez de Victoria*, 66 M.J. 67, 68 (C.A.A.F. 2008), this Court affirmed its previous holding in *United States v. Tucker*, 20 M.J. 52, 53 (C.M.A.1985) that cases appealed under Article 62 could be reviewed under Article 67(a)(3). To exclude matters heard by CCAs under Article 6b(e) from the definition of a "case" would be contrary to the precedent that has embraced all "cases," regardless of subject-matter or procedural posture, under the umbrella of Article 67.

2. **Even though Article 6b(e) provides a new statutory framework for victims to appeal, Article 6b should not be read to constrain review under Article 67(a)(3) by excluding cases reviewed under Article 6(b)from the definition of a "case" under Article 67.**

This Court previously addressed interpretation of Article 67 in the context of a new statutory framework: Article 62. In *Lopez de Victoria*, this Court analyzed Article 67 in the context of Article 62. *Lopez de*

*Victoria*, 66 M.J. at 68-71. In reaching its conclusion that Article 67(a)(3) permitted review of decisions rendered under Article 62, this Court in *Lopez de Victoria* looked to the history of Article 62, read statutes conferring jurisdiction as an integrated whole, and looked to the intent and purpose of Article 67. *Id.* This Court should apply the same approach to this case, and determine that Article 6b(e), does not constrain jurisdiction under Article 67(a)(3).

Prior to 1983, there was no statutory provision for interlocutory appeals by the government, and such issues were reviewable only in the context of petitions for extraordinary relief. *Lopez de Victoria*, 66 M.J. at 68. At the time that the Military Justice Act was enacted in 1983, providing specific statutory authority for government interlocutory appeals, the state of the law "explicitly comprehended jurisdiction to review interlocutory decisions by courts of military review, whether those arose by certification or petition." *Lopez de Victoria*, 66 M.J. at 70 (citing *United States v. Redding*, 11 M.J. 100, 104-06 (C.M.A. 1981) and *United States v. Caprio*, 12 M.J. 30, 30-33 (C.M.A. 1981)). In other words, "Congress legislated against a judicial backdrop that already provided for a broad reading of jurisdiction over "cases" in the

extraordinary writ context." *Id.* The development of Article 6b is similar to that of Article 62 because Article 6b(e) was implemented against a backdrop that had already begun to address victims' rights through petitions for extraordinary relief. See, e.g. *LRM* 72 M.J.at 367. (2013).

In *Lopez de Victoria*, this Court also addressed whether Article 67(c) should be read to constrain jurisdiction. *Id.* at 69. This Court stated that ". . . it is axiomatic that Article 67 must be interpreted in the light of the overall jurisdictional concept intended by Congress, and not through selective narrow reading of individual sentences within this article." *Lopez de Victoria*, 66 M.J. at 69, *quoting United States v. Leak*, 61 M.J. 234, 239 (C.A.A.F. 2005). In *Leak*, this Court declined to read Article 67(c) in isolation as a substantive limit on its jurisdiction because to do so "would defeat the overall intent of Article 67—to grant this Court jurisdiction to decide matters of law raised by appellants or certified by Judge Advocates General." *Leak*, 61 M.J. at 242.

Before coming to its holding in *Lopez de Victoria*, this Court examined the purpose of the statutory authority for review of all cases from the Courts of Criminal Appeals under Article 67(a)(2) and Article 67(a)(3): it "fulfills one of the central purposes of the Uniform Code of

Military Justice—uniformity in the application of the Code among military services." *Id.* This Court, applying *Leak*'s reasoning, also determined that a narrow reading of "all cases" in Article 67 to exclude Article 62 appeals would "defeat the purpose of both statutes by precluding direct appeal of disparate decisions by lower appellate courts. *Id.* at 70.

Similarly, Article 6b should not be read in isolation to constrain jurisdiction under Article 67(a)(3). Such reading would significantly depart with this Court's precedent in *Lopez de Victoria* and *Leak*, as well as the history of defining "all cases" expansively to accommodate a number of different procedural postures. Such a reading would also defeat the purpose of Article 67(a): providing uniformity in the application of the Code. Finally, reading Article 6b in isolation would result in Appellant having absolutely no recourse to gain interlocutory relief from a court's decision that affects the findings and sentence, and even has great potential to cause the accused harm.

### D. Alternatively, this Court would have jurisdiction over this case under the All Writs Act, because the case embraces issues that have the potential to impact the findings and sentence of Appellant's court-martial.

The All Writs Act grants power to "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, (1999). But when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act "in aid of" the court's existing jurisdiction. *Denedo v. United States* 66 M.J. 114, 120 (C.A.A.F. 2008), *aff'd and remanded*, 556 U.S. 904 (2009). This Court would have jurisdiction to grant relief in Appellant's case because the matter at issue is "in aid of" this Court's existing jurisdiction in that it affects the findings and sentence of a court-martial.

Article 67(c) describes the jurisdiction of this Court to act with respect to findings and sentence. *See Center for Constitutional Rights (CCR) v. United States*, 72 M.J. 126, 129 (C.A.A.F.2013) (finding no jurisdiction to hear media organization's writ petition, describing

Article 67(c) as "our jurisdictional statute," and distinguishing the case from *Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012), where "the harm alleged by the appellant—that the military judge was biased—had the potential to directly affect the findings and sentence"). While not all decisions rendered under Article 6b(e) would be of a nature to potentially affect the findings or sentence, the particular decision in this case does have the potential to affect the findings and sentence because of its impact on the universe of evidence that Appellant may use to prepare and present a defense. *See* R.C.M. 701(a)(2)(B), 701(a)(6). The CGCCA's ruling bestowed a Mil. R. Evid. 513 privilege on materials that had been previously ordered disclosed, thereby blocking Appellant's access to those materials. In Appellant's trial motion for relief, he described how the evidence sought was necessary to prepare and present a defense of bias or fabrication on the part of his accuser. App. Ex. 25. The availability or non-availability of such evidence has the potential to directly affect the findings, sentence, or both, in this case.

### E. The finding of jurisdiction in this case is in accordance with this Court's decision in *EV. V. United States* 75 M.J. 331 (C.A.A.F. 2016) because that case does not stand for the

**premise that Article 6b constrains jurisdiction under Article 67(a)(3) or the All Writs Act.**

In *EV v. United States*, 75 M.J. 331 (C.A.A.F. 2016), this Court held, based on the plain language of Article 6b(e), that it had no jurisdiction to review a victim's petition for relief under that statute. But that holding does not bar this Court from reviewing matters under Article 67(a)(3), or pursuant to the All Writs Act. After the CCA denied her petition for a writ of mandamus, EV petitioned this Court for "identical relief." *Id.* at 333. This Court held that Article 6b(e) was a "clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals to consider *petitions by alleged victims* for mandamus as set forth therein." *Id.* (emphasis added). Noting that the All Writs Act did not operate as an independent source of jurisdiction, this Court looked to Article 6b to determine whether it had jurisdiction to hear the victim's petition. *Id.* Finding no mention of the Court of Appeals for the Armed Forces in Article 6b(e), this Court interpreted the silence as a deliberate choice, stating "we must be guided by the choices Congress has made." *Id.* at 334.

This case, however, is distinguishable from *EV* in three important ways. First, in *EV*, the victim, not the accused, petitioned this Court.

Second, EV requested the same relief she requested below—a writ of mandamus—rather than review of the CCA's rejection of her claim. And third, EV did not invoke Article 67(a)(3) as a jurisdictional basis; instead asking this Court to assume All Writs Act jurisdiction over her Article 6b claim without any showing of potential effects on the findings or sentence necessary to establish that her claim was in aid of this Court's jurisdiction. *Id.*

In its ruling, this Court suggested it would have jurisdiction over cases issued under Article 6b when such cases arrived under the auspices of Article 67. EV, 75 M.J. at 331 (distinguishing *LRM*, 72 M.J. 364 in that that case "was certified to us by the Judge Advocate General of the Air Force, and therefore stood on a wholly different jurisdictional basis from [LRM]"). No part of this Court's holding or reasoning in EV suggests that in circumstances such as presented here, Article 6b(e) would limit an accused's ability to petition this Court for review, under either Article 67(a)(3) or the All Writs Act, of a "case" decided by a CCA under Article 6b(e).

**F. Appellant has sufficient interest in the privilege being litigated that he has standing to request review of the lower court's decision.**

The concept of "standing" encompasses the requirement that this Court may act only when deciding a "case" or "controversy." An accused does not automatically have standing to complain of a matter just by merit of being the accused, but rather must demonstrate harm. *United States v. Johnson*, 53 M.J. 459, 462 (holding that accused lacked standing to challenge an unlawful subpoena issued to his wife because he was "neither deprived of a right or hindered in presenting his case"), *United States v. Jones*, 52 M.J. 60, 63-64 (C.A.A.F. 1999) (holding that accused lacked standing to challenge violation of witness's 31(b)) rights). This Court has no jurisdiction to "adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief . . . that has no bearing on the findings or sentence." *CCR,* 72 M.J. at 126, 129.

In this case, Appellant has standing because the CGCCA's ruling deprived him of evidence that the military judge had previously ordered produced. *United States v. Wuterich*, *67* M.J. 63 (C.A.A.F. 2008) provides an example of how standing may be found. In that case, the government subpoenaed interviews of the accused from a media organization. *Id.* at 64. The military judge quashed the subpoena on

request of the media organization. The government appealed to the CCA under Article 62. The CCA vacated the military judge's ruling quashing the subpoena, but did not allow the accused to participate in that litigation. The accused petitioned this Court for review of the CCA's decision under Article 67(a)(3).[2] *Id.* at 68. Addressing the CCA's decision not to permit appellant to participate in the Article 62 litigation, this Court in *Wuterich* stated, "It was not appropriate to deprive [appellant] altogether of the opportunity to participate in appellate litigation having direct consequences on the prompt disposition of criminal proceedings brought against him by the United States." *Id* at 70. In this case, Appellant has directly sought review from this Court of the CGCCA's decision, which also has immediate relevance to the findings and sentence of his court-martial—a decision reversing a military judge's ruling ordering disclosure of relevant and necessary evidence. As such, nothing in the procedural posture of this case precludes Appellant from claiming standing, whether he requests review under Article 67(a)(3) or relief under the All Writs Act.

[2] The accused in *Wuterich* simultaneously filed a petition for extraordinary relief under the All Writs Act, as an alternative, in the event the Court determined he lacked standing under Article 67(a)(3), but since this Court found that he had standing to appeal under Article 67(a)(3), the writ petition was denied as moot.

## IX. Argument: Appellant's Issue II

### WHETHER THE "CONFIDENTIAL COMMUNICATIONS" PROTECTED BY MRE 513 INCLUDE RECORDS OF DIAGNOSES

**A. Standard of Review**.

Construction of military rules of evidence is a question of law which is reviewed *de novo*. *LRM*, 72 M.J. at 370.

**B. Under Mil. R. Evid. 101(b) and the principles of statutory interpretation as accepted by this Court, Mil. R. Evid. 513 should be interpreted by review of its plain language.**

"[P]rinciples of statutory construction are used in construing the. . . Military Rules of Evidence . . . ." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F.2007). Mil. R. Evid. 101(b) also provides guidance on interpretation of the rules:

> in the absence of guidance in this Manual or these rules, courts-martial will apply: (1) First, the Federal Rules of Evidence and the case law interpreting them; and (2) second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

Mil. R. Evid. 101(b) is best seen as direction on the hierarchy of sources to be consulted when it is necessary to venture outside the plain language of a rule. It is not a menu of options to be considered without first finding a particular rule ambiguous. In *United States v. Matthews*,

60 M.J. 29, 36 (C.A.A.F. 2009), this Court turned to common law to interpret Mil. R. Evid. 509, consistent with Mil. R. Evid. 101, because it would not otherwise be possible to interpret that rule. Before doing so, this Court studied the plain language in the rule, including common usage, and then attempted to discern meaning from other portions of the text, but was still left with ambiguity. *Id.* at 37-38. In the absence of any legislative history, controlling guidance in the Manual, or legislative history, it resorted to federal case law—specifically justifying its use because the rule itself referenced United States district courts—before adopting the "prevailing federal common law rule" *Id.* The CGCCA's majority opinion does not reveal whether any matters other than federal case law, including the plain language of the rule, were considered when construing the privilege in Mil. R. Evid. 513. *Kitchen* at 2-5.

### C. Because the plain language of Mil. R. Evid. 513 is unambiguous, it is unnecessary to look outside it to construe the privilege contained in the rule.

"When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Custis*, 65 M.J. at 370

(citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, (2000)). "In construing the language of a statute or rule . . . words should be given their common and approved usage." *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).

Under Mil. R. Evid. 513(a), "a patient has the right to refuse to disclose . . . a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." The rule's language is plain and unambiguous. The rule does not define "communication," and nothing in the rule suggests a usage different from the word's common meaning. *McCollum*, 58 M.J. at 340. The Merriam-Webster dictionary defines "communication" as "the act or process of using words, sounds, signs, or behaviors to express or exchange information or to express…ideas, thoughts, feelings, etc., to someone else." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 28 Sept. 2016. The plain language of the limitation "for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition," does not expand the definition of "communication," but rather excludes other patient-psychotherapist

communications, such as casual or social ones, from the privilege. Mil. R. Evid. 513(b)(5)'s definition of "evidence of a patient's records or communications" as "testimony of a psychotherapist . . . or patient records that pertain to communications by a patient to a psychotherapist . . . for the purpose of diagnosis or treatment of the patient's mental or emotional condition" also does not expand the common-usage meaning of "communication." Instead, this definition indicates where evidence of such confidential communications is commonly found—in testimony or in records.

As Judge Bruce noted in the dissenting opinion, nothing in the rule states that "communication" includes diagnosis and treatment. *Kitchen*, No. 001-16 at *7. "The facts that there was a diagnosis, that medications were prescribed, or that other treatments were given, exist regardless of whether or to what extent they were discussed with the patient." *Id.* at *8. Thus, a plain-language analysis results in the conclusion that only *communication*s, and not matters such as records of diagnoses, medications, or treatments, are privileged.

### D. If further guidance for interpreting Mil. R. Evid. 513 is needed, it can be found elsewhere in the Manual for Courts Martial.

Even assuming some lack of clarity in Mil. R. Evid. 513, it could be resolved by looking to other language in the Manual for Courts Martial, specifically, the Rules for Courts-Martial. Under Mil. R. Evid. 101(b), federal rules and common law should only be consulted "in the *absence* of guidance in this Manual or these rules." Mil. R. Evid. 102 states "these rules should be construed . . . to the end of ascertaining the truth and securing a just determination."

Under R.C.M. 701(a)(2)(B),

> the Government shall permit the defense to inspect any results or reports of physical or mental examinations…which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense.

While Mil. R. Evid. 513 addresses "communications," R.C.M. 701(a)(2)(B) is broader, encompassing "results or reports," indicating that the two concepts are different. Also, the

The plain language of Mil. R. Evid. 513, read in the context of the Manual for Court-Martial, is not ambiguous—only "confidential communications" are privileged. Although, reasonable minds could disagree about the desirability of this outcome, the interpretation itself

is not "absurd." As such, this Court should enforce it according to its terms. This approach aligns with this Court's treatment of Article 6b(e) in *EV v. United States,* where it found itself "bound by the choices [Congress] made." *EV,* 75 M.J. at 333.

**E. Even if Mil. R. Evid. 513 were found ambiguous, this Court should not resort immediately to federal law to interpret it, because while federal privileges are open-ended and develop through common law, the President has prescribed specific rules of evidence for the military.**

Even if this Court were to find Mil. R. Evid. 513 ambiguous, special caution is warranted prior to resorting to common law interpretations of this particular privilege. Under Mil. R. Evid. 101(b), when no guidance is available in the rules or the Manual, *first*, the court-martial must look to "the Federal Rules of Evidence and the case law interpreting them," and only second, and only when not inconsistent with the Federal Rules of Evidence, "the rules of evidence at common law." *Id.*

The civilian federal system has no specific rules of privilege. In 1973, the Supreme Court forwarded to Congress the proposed rules of evidence, drafted by its Advisory Committee. Major Dru Brenner-Beck, USA, *"Shrinking" the Right to Everyman's Evidence: Jaffee in the*

*Military,* 45 A.F. L. Rev. 201, 204 (1998). The proposed rules included thirteen detailed rules on privilege, including F.R.E. 504, a rule recognizing a psychotherapist-patient privilege. *Id.* Congress held hearings on the proposed rules, but ultimately abandoned the specific rules in favor of F.R.E. 501, a general rule which explicitly left the development of privilege to the Courts. *Id.* (citing Sen. Rep. No. 1277, 93 Cong., 2d Sess. 6 (1974)). In *United States v. Trammel*, 445 U.S. 40, 47 (1980), the Supreme Court declared that FRE 501 manifested an intention to "provide courts with the flexibility to develop rules of privilege on a case-by-case basis," and to leave the door open for change.

The President took exactly the opposite approach in the Military Rules of Evidence. Instead of allowing courts to develop privileges through a common-law approach, the President promulgated specific rules in order to provide for greater stability. Drafter's Analysis of Mil. R. Evid. 501, Manual, *supra* (2012 ed.) at A22–38 ("military law requires far more stability than civilian law. . . .[personnel] need specific guidance as to what material is privileged and what is not.") *See also United States v. Scheffer,* 523 U.S. 303, 312 (1998) (recognizing the President's authority to promulgate rules of evidence for the military in

order to provide clarity, predictability and certainty through specific rules rather than a case-by-case adjudication of what the rules of evidence would be).

### F. Where there is disagreement among federal courts, Mil. R. Evid. 101 does not give military courts license to select a particular approach without first finding that that approach is the prevailing rule, nor to expand a privilege.

In some situations, like that in *Matthews*, it is appropriate to "adopt a prevailing federal common law rule" when construing a Military Rule of Evidence. *Matthews,* 68 M.J. at 38. But absent a prevailing rule, a military court is not at liberty to choose from a variety of differing federal cases. *See United States v. Wuterich*, 68 M.J. 511, 521 (N-M. Ct. Crim. App. 2009) (military judge erred by recognizing a reporter's privilege, given disparate treatment given that privilege by federal courts). That practice goes beyond statutory interpretation and crosses into policymaking, which is reserved for the political and policy-making elements of the government. *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003) (finding that an expansive definition of "child of either" in the spousal privilege found "little support" in federal law where federal rules did not generally recognize a de-facto child exception to the marital communications privilege).

The existence of a very limited number of federal district court cases interpreting the federal common-law psychotherapist-patient privilege in different ways shows there is no prevailing common law rule. As such, it is inappropriate to rely on any one (or group) of the disparate cases to expand the definition of "communications" in Mil. R. Evid. 513 beyond its plain meaning.

## X. Conclusion

The United States asks this Court (1) to find jurisdiction to hear the Appellee's writ-appeal petition under Article 67(a)(3), UCMJ, and (2) to interpret Mil R. Evid. 513 in accordance with its plain meaning, which limits the privilege only to "communications".

## XI. Certificates

### A. Certificate of Compliance

This brief complies with the type-volume limitation of Rule 24(b) because it contains 6,004 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional font with 14-point type.

Date: 30 September 2016

**B. Certificate of Service**

I certify that a copy of the foregoing was electronically submitted to this Court on 30 September 2016 via: efiling@armfor.uscourts.gov, and electronically submitted to counsel for Appellee, LCDR Kismet Wunder, USCG, at Kismet.R.Wunder@uscg.mil and on counsel for Appellant, LT Jason Roberts, USCG, at Jason.W.Roberts@navy.mil.

/s/
Tereza Z. Ohley
Lieutenant, U.S. Coast Guard
2703 Martin L. King Ave SE
Washington, DC 20593-7213
CAAF Bar No. 36647
202-372-3811
Tereza.Z.Ohley@uscg.mil