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

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| AMT2 H.V., | ) | |
| Appellee, | ) | ANSWER FILED ON BEHALF OF |
| | ) | THE APPELLEE TO WRIT-APPEAL |
| v. | ) | PETITION FOR REVIEW OF COAST |
| | ) | GUARD COURT OF CRIMINAL |
| | ) | APPEALS DECISION |
| Cassie A. Kitchen | ) | |
| Commander, US Coast Guard, | ) | USCA Dkt. No. 16-___/CG |
| Respondent Below, | ) | |
| | ) | Crim. App. Misc. Dkt. No. 001-16 |
| and | ) | |
| | ) | |
| Thomas Randolph, | ) | 08 August 2016 |
| DC2/E-5, US Coast Guard, | ) | |
| Appellant. | ) | |

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[1] In accordance with the C.A.A.F. Rules of Practice and Procedure (Rule 38(b)), LCDR Wunder will apply for admission to this Court's Bar within 30 days of filing this pleading.
[2] Since filing the original writ in this case LCDR Wunder transferred from USCG Base Cleveland to USCG Ninth District.

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**



**Cases**

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

## Preamble

COMES NOW Aviation Maintenance Technician Second Class (AMT2) H.V., Appellee, by and through her undersigned Special Victims' Counsel (SVC), and respectfully request that this Court deny Appellant's Writ-Appeal.

## I. Facts and Procedural History

The Accused, Petty Officer Damage Controllman Second Class (DC2) Randolph met AMT2 H.V. in February 2014 and they began dating. The relationship ended multiple times, with the final break-up occurring in July 2014. On 26 July 2014, DC2 Randolph and AMT2 H.V. met at Picture Lake to discuss their relationship. An argument ensued and the meeting ended when DC2 Randolph slammed the door of his truck on AMT2 H.V.'s arm. AMT2 H.V. called 911 and police responded. DC2 Randolph was arrested and was later released on bail. AMT2 H.V. was taken to the Coast Guard Clinic in Cape Cod. While being treated for her injuries, AMT2 H.V. reported to medical personnel DC2 Randolph had sexually assaulted her while they were dating.

On 2 March 2015, AMT2 H.V. informed CAPT Ehlers, Executive Officer, USCG Air Station Cape Cod, that she was speaking with a therapist about "being attacked." She did not provide any details about her treatment.

On 22 February 2016 the Defense filed a motion seeking production of AMT2 H.V.'s mental health records. This motion was opposed by the Government and SVC.

On 7 March 2016, the court conducted an Article 39(a), UCMJ, hearing to receive oral arguments on this (and other) issue(s).

On 11 March 2016, the court issued its ruling denying the Defense's motion for an *in camera* review as it pertained to AMT2 H.V.'s "mental health communications." Appellant's Writ-Appeal, Appendix 6 at 4. The Military Judge denied the defense's motion on the basis that the defense had failed "to articulate a specific basis to demonstrate a reasonable likelihood that AMT2 H.V.'s records or communications would yield evidence under an exception to the privilege" and failed to "interview AMT2 H.V., as they had the opportunity to do[,]" but "did present evidence demonstrating the relevance and necessity of a diagnosis of AMT2 H.V., if any." Accordingly, the Military Judge ordered the government to produce and provide the defense with AMT2 H.V.'s mental health records, to include: "psychiatric diagnosis (as this phrase is used in the DSM-5), the date of such diagnosis, any medications prescribed, the duration prescribed medications were to be taken, type of therapies used, and the resolution of the diagnosed psychiatric condition, if applicable." *Id.*, Appendix 6 at 4-5. The Military Judge ruled that the Mil. R. Evid. 513 privilege only covered actual communications between AMT2 H.V. and her psychotherapist, and that "[Mil. R. Evid. 513] does not prevent the disclosure of dates on which a patient was treated, the identity of the provider, the diagnosis code, or the therapies used." Other than Mil. R. Evid. 513, the Military Judge did not cite any authority to support her ruling.

On 9 June 2016, AMT2 H.V. petitioned for a Writ of Mandamus from the CGCCA requesting the Military Judge's ruling be reversed.

On 8 July 2016, the CGCCA granted AMT2 H.V.'s Petition setting aside the Military Judge's ruling.

On 28 July 2016, the Appellant filed the above captioned Writ to this Honorable Court seeking review of the CGCCA's decision under Article 67, UCMJ.[3]

## II. Relief Sought

Appellee seeks an Order denying Appellant's Writ-Appeal Petition.

## III. Issues Presented

**A. WHETHER ARTICLE 6b, UCMJ AND MIL. R. EVID. 513 GRANT JURISDICTION TO REVIEW THE SUBSTANCE OF A MILITARY JUDGE'S RULING ON MIL. R. EVID. 513 ISSUES.**

**B. WHETHER THE CONFIDENTIAL COMMUNICATIONS PROTECTED BY MIL. R. EVID. 513 INCLUDE RECORDS OF DIAGNOSIS.**

[3] It is noteworthy that if the CGCCA had ruled in favor of the Appellant, AMT2 H.V. would have no ability to seek redress from CAAF.

## IV. Argument

### A. THE COAST GUARD COURT OF CRIMINAL APPEALS HAD JURISDICTION UNDER ARTICLE 6B, UCMJ TO DETERMINE THE MERITS OF AMT2 H.V.'s PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF A WRIT OF MANDAMUS.

Article 6b, UCMJ, was amended to provide a victim of an offense the right to petition the service courts for a Writ of Mandamus to enforce certain rights. Article 6b(e), UCMJ; 10 U.S.C. § 806b(e) (2012 Supp. II); s*ee* 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), allows victims to forward petitions "directly" to the service court and "to the extent practicable" for the court to give such petitions "priority over all other proceedings." *National Defense Authorization Act for Fiscal Year 2016* (2016 NDAA), Pub. L. 114-92, § 531(e)(3) (2015) (Enforcement of Certain Crime Victim Rights by the Court of Criminal Appeals (CCA)). Thus, Article 6b, UCMJ, is a distinct authority from the All Writs Act, which is 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).

Because AMT2 H.V.'s Petition sought relief under Article 6b, UCMJ, in order to find jurisdiction to issue a writ, the CGCCA "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 Appellant's argument rests on the proposition that Article 6b, UCMJ only provides a victim the right to seek relief for procedural violations and that the only rights provided to a victim under Mil. R. Evid. 513 are procedural rights (all of which were exercised by the Appellee).[4] The Appellant's argument is unsupported and without merit.

The Appellant's assertion that Article 6b appeals are limited to Mil. R. Evid. 513(e) procedural rights ignores Article 6b(e)(4), UCMJ, which states, in relevant part: "Paragraph (1) applies with respect to the protections afforded by the following: … (D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege." The plain language of Article 6b, UCMJ only requires the Writ to seek protections afforded by Mil. R. Evid. 513. Among these protections, Mil. R. Evid. 513 gives AMT2 H.V. the right to "refuse to disclose and prevent any

[4] At the lower court, Appellant argued that an accused's right to speedy trial may be violated, but Article 6(b) requires the appellate courts to expeditiously review any writ of mandamus, which was implemented to ensure that an accused's 6th Amendment Right is protected. Appellant has not provided any cases from any of the Services where a victim who filed a petition for extraordinary relief caused a substantial delay in a court-martial. Consequently, many motions hearings at the trial level are part of a bifurcated process where the trial on the merits will not immediately take place.

other person from disclosing a confidential communication made between [AMT2 H.V.] 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." Mil. R. Evid. 513(a).

In her petition to the CGCCA, AMT2 H.V. correctly argued the Military Judge's production order violated her Mil R. Evid. 513 privilege and erroneously determined certain portions of her mental health records were not encompassed in the definition found in Mil. R. Evid. 513(b)(5). In granting AMT2 H.V.'s Petition, the CGCCA determined it had jurisdiction because these substantive protections were specifically encompassed in Article 6b(e).

These two issues were previously addressed in *D.B. v. Lippert*. In that case, the Army Court of Criminal Appeals stated, "[a]s 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." *Lippert* at 4. In that case, the military judge failed to conduct the required Mil. R. Evid. 513 analysis before ordering the release of D.B.'s records which violated her substantive rights under Mil. R. Evid. 513 and Article 6(b) rights to privacy.

Appellant also argues the Military Judge's ruling that certain information contained in AMT2 H.V.'s mental health records did not fall within the protections

of Mil. R. Evid. 513, which made it a discovery issue under R.C.M. 703. Therefore, because R.C.M. 703 is not enumerated in Article 6b, UCMJ, AMT2 H.V. had no right to file a writ of mandamus and the CGCCA was without jurisdiction. This argument is also without merit.

The Military Judge incorrectly merged these rules when she ruled that opinions, diagnosis, treatment and medications were not "confidential communications" used to facilitate treatment and diagnosis. Appellant also mistakenly combines the rule of privilege and the rule of discovery. These rules are separate and require different analysis. Under R.C.M. 703, a party is not entitled to the production of evidence that is not otherwise subject to compulsory process. R.C.M. 703(f)(2). Because Mil. R. Evid. 513 protects certain privileged records from production, a court must use the process outlined under this rule to determine whether a record should be produced.

## B. THE DEFINITION OF CONFIDENTIAL COMMUNICATIONS PROTECTED BY MIL. R. EVID. 513 EXTENDS TO RECORDS OF DIAGNOSIS.

### 1. Diagnosis and treatment records under Mil. R. Evid. 513 are privileged because they necessarily include confidential communications.

The Appellant asks this Court to adopt the dissenting position in the CGCCA's decision. This argument ignores the plain language in Mil. R. Evid. 513 that the privilege extends to "records that *pertain to communications* by a patient to

a psychotherapist or assistant to the same for the *purposes of diagnosis or treatment* of the patient's mental or emotional condition." Mil. R. Evid. 513(b)(5) (emphasis added).

Even though courts are split on this matter, there is support for the CGCCA granting Appellee's petition for a writ. This plain reading aligns with reasoning for a robust interpretation of "communications." In *United States ex rel. Edney v. Smith*, an Eastern District of New York case, the court stated, "'An individual's physical ills and disabilities, the medication he takes, the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities. One does not normally expect to be required to have to reveal to a government source, at least in our society, these facets of one's life.'" *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1042-43 (E.D.N.Y. 1976) (quoting *Roe v. Ingraham*, 403 F. Supp. 931, 936-937 (S.D.N.Y. 1975)). In *Taylor v. United States*, the court stated:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition…It would be too much to expect them to do so if they knew that all they say -- and all that the psychiatrist learns from what they say may be revealed to the whole world from a witness stand.

*Taylor v. United States*, 95 U.S.App.D.C. 373, 222 F.2d 398, 401 (1955), quoting from Guttmacher and Weihofen, *Psychiatry and the Law*, 272 (1952).

As additional support, in the creation of Rule 504 of the Federal Rules of Evidence the Advisory Committee, stated: "Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication." Advisory Committee Notes to Proposed Rule 504, Federal Rules of Evidence, 56 F.R.D. 183, 242 (1972) (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960)).

State courts have also examined confidential communications. In *N.G. v. Superior Court*, the Court of Appeals of Alaska conducted a lengthy analysis of the scope of confidential communications. In deciding this issue, the court found:

> [T]he psychotherapist-patient privilege likewise should cover not only the confidential communications themselves but also other types of information generated during the professional relationship as a result of the confidential communications—information such as test results and diagnostic perceptions, theories, and conclusions.

*N.G. v. Superior Court*, 291 P.3d 328, 333; 2012 Alas. App. LEXIS 176. This court went on to state, "[t]he privilege would essentially be gutted if a psychotherapist could be ordered to testify about a person's diagnosis or treatment,

over the person's objection, so long as the psychotherapist refrained from expressly describing or referring to the content of any confidential communications." *Id.* at 334.

Unlike a medical doctor who can assess, diagnose, and treat a laceration, broken bone, contusion, or other medical condition based on a physical examination or medical testing, a psychological diagnosis and treatment is largely based on communications with the patient and cannot exist wholly independent of communications made by the patient. Therefore, a mental or emotional health diagnosis or treatment plan necessarily pertains to communications made by the patient and is privileged under Mil. R. Evid. 513.

**2. The CGCCA correctly granted AMT2 H.V.'s Writ.**

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)). In this case, AMT2 H.V. met all three prongs to obtain the Writ of Mandamus.

First, AMT2 H.V. had no other adequate means of relief because she was not a party to the case and no other court could vindicate her rights under the UCMJ and Mil. R. Evid. 513. As stated above, Article 6b, UCMJ established a

framework for a victim to seek redress when their rights are violated. In the instant case, the Military Judge's ruling to disclose AMT2 H.V.'s privileged mental health records triggered her right to file this Petition before the CGCCA.

Second, AMT2 H.V. showed a "clear and indisputable" right to issuance of the Writ. As addressed in Issue B.1. above, her rights under Mil. R. Evid. 513(a) were violated when the Military Judge ordered the government to produce AMT2 H.V.'s privileged psychotherapist records to the person who physically and sexually assaulted her.

As the Supreme Court stated in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the psychotherapist-patient privilege, like the attorney-client privilege and the clergy-penitent privilege, is "rooted in the imperative need for confidence and trust." Further, the *Jaffee* court recognized that problems discussed with a mental health care provider are often private and sensitive, and that "disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace." *Id.* at 10. The Court made clear that the psychotherapist-patient privilege is robust because, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.*

In light of the Supreme Court's decision in *Jaffee*, Mil. R. Evid. 513 was established to create a psychotherapist-patient privilege for investigations or

proceedings authorized under the UCMJ. Mil. R. Evid. 513 is intended to be a broad and robust privilege, similar to the priest-penitent privilege and specifically fashioned after the federal psychotherapist-patient privilege established in *Jaffee*. *See Manual for Courts-Martial*, United States (2012 ed.), Ap. 22 at A22-45.

Since the implementation of Mil. R. Evid. 513, very few military courts have had the occasion to interpret the scope of the psychotherapist-patient privilege. Nevertheless, multiple federal district courts have addressed the scope and strength of this privilege after the Supreme Court's decision in *Jaffee*. As discussed below, these federal courts have held the psychotherapist-patient privilege is not merely limited to confidential communications but extends to diagnoses and treatment.

In *Stark v. Hartt Transp. Sys., Inc.*, the United States District Court for Maine held that the federal psychotherapist-patient privilege created by *Jaffee* and embodied in Mil. R. Evid. 513 shields a party from discovering the "diagnoses and the nature of his treatment." *Stark v. Hartt Transp. Sys., Inc.*, 937 F. Supp. 2d 88, 92 (D. Me. 2013) The *Stark* court explicitly rejected the argument that "because the Supreme Court describes the privilege as protecting '*confidential communications* between a licensed psychotherapist and her patients *in the course of diagnosis or treatment*[,]' it does not cover portions of records disclosing the nature of the treatment or the patient's diagnosis." *Id.* at 90, [emphasis added]. The court further elaborated:

> A person's mental health diagnoses and the nature of his or her treatment inherently reveal something of the private, sensitive concerns that led him or her to seek treatment and necessarily reflect, at least in part, his or her confidential communications to the psychotherapist…Construing the privilege in this 'narrow fashion...would defeat the societal interests protected by the privilege.'

*Id.* at 91-92.

Similarly, in *United States v. White*, No. 2:12-CR-00221, 2013 WL 1404877, at *7 (S.D.W. Va. Apr. 5, 2013), the United States District Court for the Southern District of West Virginia held that the psychotherapist-patient privilege is not limited to confidential communications and extends to patient diagnoses. As in *Stark,* the defendant in *White* argued that the privilege was limited strictly to communications between a patient and his or her mental health provider. *Id.* The *White* court rejected that narrow argument, explaining that it was unable to find "any rational basis for distinguishing between a diagnosis and the underlying communication for purposes of disclosure." *Id.* Notably, the *White* court concluded the following:

> A psychiatric diagnosis is born of and inseparably connected to private communications between a therapist and his or her patient. For this reason, any attempt to draw a line between communications and diagnoses would undermine the basis for recognizing a privilege in the first place. Like confidential communications, a psychiatric diagnosis reveals sensitive information about a patient that 'may cause embarrassment or disgrace' if revealed to others. *Jaffee,* 518 U.S. at 10. A party armed with knowledge of a patient's diagnosis will be able to make an educated guess about the

> substance of the communications that gave rise to the diagnosis, which again defeats the purpose for which the privilege is recognized.

*Id.* Ultimately, despite the *White* court's determination that the privilege included the diagnosis, it released the records to the defendant in that case. Subsequently, the government appealed the court's decision to the Fourth Circuit Court of Appeals. The Fourth Circuit, in an unpublished decision, reversed the district court's decision to release the records. *Kinder v. White*, 609 Fed. Appx. 126 (2015).

The *Kinder* court found the trial court's balancing of the defendant's constitutional rights "demonstrably at odds with both Jaffee and basic principles underlying the recognition of testimonial privilege" and noting that "all common law testimonial privileges" are, on their face, barriers to the search for information without restriction. *Id.* at 130. The Fourth Circuit noted that the Supreme Court "had already determined" that the accused's desire for evidence such as the mental health records in question was overridden by the strong public policy interest in a reliance on confidential counseling records sufficient to warrant exclusion. *Id.* at 131. The court noted it would be "counterproductive and unnecessary for a court to weigh the opponent's evidentiary need for disclosure" because exclusion had already been justified by the nation's highest court. *Id*. In quoting *Jaffee*, which *explicitly rejected* a test which balanced the evidentiary need for disclosure against

the patient's privacy interests, the Fourth Circuit echoed that "'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.'" *Id.* (quoting *Jaffee*, 518 U.S. at 17.).

Third, the issuance of a writ was appropriate under the circumstances. The importance of the psychotherapist-patient privilege has been reinforced by sexual assault victims' heightened right of privacy. *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006). Additionally, in the military context, victims of sexual assault have an explicit right of privacy that is implicated by the psychotherapist-patient privilege. *See* 10 U.S.C. § 806b, Art. 6b(a)(8) ("[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim of [sexual assault]"). It is well established that victims of sexual assault can be re-victimized by the criminal justice process. *See United States v. Clements*, 12 M.J. 842, 845 (A.C.M.R. 1982) (recognizing that sexual assault victims risk serious psychological harm by testifying). Victims are frequently the targets of invasive and inappropriate probing into their personal lives. Furthermore, the judicial process often leaves victims exposed and vulnerable.

In this case, the defense failed to make their threshold showing under Mil. R. Evid. 513(d) to justify even an *in camera* review of AMT2 H.V.'s mental health

records. Yet despite the defense's failure to demonstrate a "reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege," the military judge's ruling circumvented the Mil. R. Evid. 513 protections and provided the attorneys, the military judge, court personnel and the accused potential access to the victim's sensitive mental health records.

The trial court's ruling had the potential for a chilling effect on victims, which, if upheld, may have discouraged victims from seeking the counseling they needed or from participating in the judicial process. Avoiding this effect is precisely the reason for the privilege afforded by Mil. R. Evid. 513. This is also why it was appropriate under the circumstances for the CGCCA to establish clear boundaries of a "patient's records or communications" under Mil. R. Evid. 513 so that a patient seeking mental health treatment is aware their sensitive information will not be disclosed to their attackers. Mil. R. Evid. 513(b)(5).

## V. Conclusion

For the reasons stated above, Petitioner, through her Special Victims' Counsel, respectfully requests this Honorable Court uphold the Coast Guard Court of Criminal Appeal's decision.

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## Appendix

1. H.V.'s Reply to Real Party in Interest Answer to H.V. Petition for Extraordinary Writ.

## CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing Answer to the Appellant's Writ-Appeal Petition for Review of Coast Guard Court of Criminal Appeals (CGCCA) Decision on Application for Extraordinary Relief was sent via electronic mail to the Clerk's Office on the 8th day of August 2016. Copies were sent by electronic mail to the Government Appellate Division, Defense Appellate Division, defense counsel (LT Jason Roberts), trial counsel (LT Grace Oh), and respondent (CDR Cassie A. Kitchen) on the 8th day of August 2016.

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