

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

H.V.
AMT Second Class (E-5)
U.S. Coast Guard,
Appellee

v.

Cassie A. Kitchen
Commander, U.S. Coast Guard
Military Judge,
Respondent Below

v.

Thomas J. Randolph
Damage Controlman Second Class
(E-5)
United States Coast Guard,
Appellant

WRIT-APPEAL PETITION FOR
REVIEW OF COAST GUARD
COURT OF CRIMINAL APPEALS
DECISION ON APPLICATION
FOR EXTRAORDINARY RELIEF

USCA Dkt. No. 16-__ /CG

Crim. App. Misc. Dkt. No. 001-16

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

Preamble

Appellant, Damage Controlman Second Class (DC2) Thomas J. Randolph hereby prays for an order reversing the decision of the Coast Guard Court of Criminal Appeals and reinstating the order of the Military Judge.

History of the Case

The Appellee, the Petitioner Below, Aviation Maintenance Technician Second Class (AMT2) H.V., USCG, applied to the Coast Guard Court of Criminal Appeals (CGCCA) for extraordinary relief in the form of a writ of mandamus. The CGCCA granted the petition on July 8, 2016. Petty Officer Randolph now timely invokes this Court's jurisdiction under Article 67(a)(3), UCMJ. 10 U.S.C. § 867 (2012).

Relief Sought

This Court should reverse the decision of the CGCCA and reinstate the order of the military judge for the production of H.V.'s mental health records limited to only the portions that indicate a psychiatric diagnosis, 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.

Issues Presented

I. WHETHER ARTICLE 6B, UCMJ AND MRE 513 GRANT JURISDICTION TO REVIEW THE SUBSTANCE OF A MILITARY JUDGE'S RULING ON MRE 513 ISSUES.

II. WHETHER THE "CONFIDENTIAL COMMUNICATIONS" PROTECTED BY MRE 513 INCLUDES RECORDS OF DIAGNOSIS.

Statement of Facts

Petty Officer Randolph faces charges of dereliction of duty, false official statement, rape, larceny, uttering a check without sufficient funds, and assault in violation of Articles 92, 107, 120, 121, 123a, and 128, Uniform Code of Military Justice (UCMJ).

On 26 July 2014, DC2 Randolph and Aviation Maintenance Technician Second Class (AMT2) H.V. took a weekend trip to Picture Lake near Pocasset, Massachusetts. (Appellate Ex. 33 at 1.) At the lake, AMT2 H.V. and DC2 Randolph got into an argument. (Appellate Ex. 33 at 1.) It is undisputed that DC2 Randolph's truck door was closed on AMT2 H.V.'s arm. (Appellate Ex. 33 at 1.) Petty Officer H.V. alleges DC2 Randolph intentionally slammed the door on her arm. (Appellate Ex. 25 at 1.) DC2 Randolph told Coast Guard Investigative Service agents that AMT2 H.V. slammed the door on her own arm. (Appellate Ex. 25 at 2.) Text messages between DC2 Randolph and

AMT2 H.V. suggest AMT2 H.V. had a history of erratic behavior during her relationship with DC2 Randolph. (Appellate Ex. 33 at 2.)

On 2 March 2015, AMT2 H.V. informed CAPT Ehlers, AIRSTA Cape Cod Executive Officer that she was speaking with a therapist about “being attacked.” (Appellate Ex. 33 at 2.)

The convening authority referred charges against DC2 Randolph on 8 December 2015. On 27 January 2016, the defense requested discovery of AMT2 H.V.’s mental health records. (Appellate Ex. 25 at 4.) On 8 February 2016, the Government replied to the Defense confirming the existence of mental health records but asserting the privilege under Military Rule of Evidence (M.R.E.) 513. (Appellate Ex. 25 at 4.)

On 22 February 2016, the Defense filed a motion seeking production of AMT2 H.V.’s mental health records for an *in camera* review of her communications made to her psychotherapist. In its motion, the Defense explained to the military judge its concern that AMT2 H.V. may have a diagnosis of borderline personality disorder. (Appellate Ex. 25 at 5.) That theory was based, in part, on numerous facts regarding other aspects of AMT2 H.V.’s behavior that were

disclosed in discovery. (Appellate Ex. 25 at 6.) A hearing was held pursuant to M.R.E. 513. Through counsel, AMT2 H.V. exercised her right to be heard. (Appellate Ex. 17; R. at 17.)

On 11 March 2016, the military judge denied the Defense's request to review her communications. However, the military judge ordered production of non-communicative information from AMT2 H.V.'s mental health records. (Appellate Ex. 33 at 4-5.) Specifically, the military judge ordered production of "[only] those portions [of H.V.'s mental health record] indicating a psychiatric diagnosis...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." (Appellate Ex. 33 at 4-5.)

The argument below includes further facts necessary for the resolution of this case.

Reasons Issuance of the Writ is Inappropriate

I.

WHILE ART. 6B, UCMJ GRANTS CRIME VICTIMS THE ABILITY TO APPLY FOR WRITS OF MANDAMUS TO ENFORCE THEIR PROCEDURAL RIGHTS UNDER MRE 513, COURTS OF CRIMINAL APPEALS DO NOT HAVE THE AUTHORITY THROUGH ART. 6B TO OVERTURN THE SUBSTANCE OF A MILITARY JUDGE'S MRE 513 RULING.

Discussion

The court below held, without discussion or analysis, “We have jurisdiction to entertain the petition under Article 6b(e)(1), UCMJ, as the alleged victim asserts a violation of her substantive rights under M.R.E. 513, Manual for Courts-Martial, United States (2012 ed.), as amended by Executive Order 13696, 80 Fed. Reg. 35,783 (17 June 2015).” *H.V. v. Kitchen*, No. 0001-16 *1-2 (Jul. 8, 2016.) This holding from a divided panel erroneously expands the narrow subject matter jurisdiction granted by Congress in Article 6b, UCMJ.

Article 6b, UCMJ, lists the various rights of a crime victim under 10 U.S.C. §§ 801 *et seq.* In Pub. L. No. 114-92 (2015) (hereinafter FY16 NDAA), Congress modified Article 6b, UCMJ, to add that a victim may

petition a Court of Criminal Appeals for a writ of mandamus “[i]f the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of a victim afforded by a section (article) or rule specified in paragraph (4).” 10 U.S.C. § 806b, Pub. L. No. 114-92, § 531 (2014). Paragraph (4) includes M.R.E. 513.

Rule 513 grants three rights to alleged victims:

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

Mil R. Evid. 513(e). AMT2 H.V. exercised all these rights. In her petition to the CGCCA, Petty Officer H.V. did not contest that she had exercised the procedural rights granted under Article 6b, UCMJ. Instead, she sought relief from the substance of the military judge’s ruling. But neither Article 6b, UCMJ, nor M.R.E. 513 affords an alleged victim the ability to appeal the substance of a trial ruling.

Outside the limited procedural rights found in M.R.E. 513, an alleged victim has no right to challenge the military judge's ruling on discoverability. Thus, Article 6b, UCMJ, does not grant AMT2 H.V. the right to challenge, via a writ of mandamus, the military judge's decision regarding discovery. As a result, the lower court lacked jurisdiction to hear her claim. She cannot predicate her writ petition on her disagreement with the substance of the military judge's M.R.E. 513 ruling.

Why else would Congress create a statute that authorized an extraordinary writ, instead of one that permitted a direct or interlocutory appeal? The answer is simple: the proper reading of Article 6b(e), UCMJ, is that an alleged victim may only seek appellate review on the rare occasion when a military judge unreasonably denies a procedural right guaranteed under M.R.E. 513. It does not extend to challenging the substance of the military judge's ruling.

The exercise of writ authority is limited. *Clinton v. Goldsmith*, 526 U.S. 529, 529-30 (1999); *EV v. United States*, No. 16-0398, 2016 WL 3511973, at *2 (C.A.A.F. June 21, 2016). To empower the CGCCA to reach the substantive issue AMT2 H.V. raised in her petition, Congress

would have had to clearly and explicitly authorize review of a military judge's discovery ruling. Congress could have accomplished this by: (1) amending Article 62, UCMJ, to allow an alleged victim to bring an interlocutory appeal to challenge M.R.E. 513 discovery rulings; (2) modifying M.R.E. 513 to include an explicit right of alleged victims to challenge the ruling on discoverability; or (3) explicitly modifying Article 6b, UCMJ, to authorize the writ of mandamus to challenge the substantive judicial ruling on discoverability of M.R.E. 513 evidence. Congress did none of these. Petty Officer H.V.'s petition for review of the military judge's substantive ruling should therefore have been rejected as outside the jurisdiction of the CGCCA.

II.

THE DEFINITION OF CONFIDENTIAL COMMUNICATIONS PROTECTED BY M.R.E. 513 DOES NOT EXTEND TO RECORDS OF DIAGNOSIS.

1. M.R.E. 513 should be interpreted in light of its plain meaning.

The court below erroneously interpreted M.R.E. 513 by an analogizing a similar federal rule and incorporating its related federal case law. Unlike M.R.E. 513, the federal common law psychotherapist-

patient privilege, like all other federal common law privileges, has been interpreted through the United States courts in the light of reason and experience. FED. R. EVID. 501. M.R.E. 513, on the other hand, is a rule based privilege, and as such, interpretation begins with a reading of the rule's plain language. *United States v. McNutt*, 62 M.J. 16, 20 (C.A.A.F. 2005). Additionally, because the military rules expressly delineate privileges and their exceptions, they should be construed narrowly. *United States v. Custis*, 65 M.J. 366, 369-71 (C.A.A.F. 2007).

As the dissent below correctly noted, “the rule protects ‘communication’ ‘made for the purpose of facilitating diagnosis or treatment,’ not *including* diagnosis and treatment.” *Kitchen*, No. 001-16 at *7 (Bruce, J., dissenting). The dissent went on to note:

A diagnosis, prescribed medications, and other treatments are matters of fact that exist independent of any communications between the patient and the psychotherapist. The psychotherapist can decide on a diagnosis by comparing the patient's condition to criteria listed in the Diagnostic and Statistical Manual of Mental Disorders, and the psychotherapist can testify to a diagnosis without referring to confidential communications. While the psychotherapist may discuss diagnosis, medications, and other treatments with the patient, that does not mean that they exist only as a communication between the patient and the psychotherapist. 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.

2. Even interpreting M.R.E. 513 in light of federal case law, H.V. is not clearly entitled to the writ.

The Supreme Court has held that testimonial privileges must be strictly construed and accepted only if there is an overriding public good in limiting access to “every man’s evidence.” *Trammel v. United States*, 445 U.S. 40, 50 (1980).

The court below relies on one federal district court opinion that has broadened the scope of the psychotherapist-patient privilege first recognized in 1996 by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), but rejects out of hand a district court opinion taking the opposite position. In *Jaffee*, the Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. *Id.*, at 15.

In *Stark v. Hartt Transp. Sys., Inc.*, the District of Maine held that a diagnosis is as sensitive as the communications giving rise to the diagnosis; therefore, revealing the diagnosis while protecting the

substance of the communications would undermine the purposes of recognizing the privilege. *Stark v. Hartt Transp. Sys., Inc.*, 937 F. Supp. 2d 88, 92 (D. Me. 2013); *See also, United States v. White*, No. 2:12-CR-00221, 2013 WL 1404877, at *7 (S.D.W. Va. Apr. 5, 2013). This holding does not indicate a consensus on the matter. Recently, the District of Massachusetts strictly construed the term “confidential communication” to exclude non-communicative information such as the nature of any diagnoses or treatment. *Silvestri v. Smith*, Civ.A.No. 14-13137-FDS, 2016 U.S. Dist. LEXIS 23764, at *7 (D. Mass. Feb. 26, 2016).

The *Silvestri* court’s holding is consistent with other case law. The testimonial privileges between priest and penitent, attorney and client, and husband and wife limit protection strictly to confidential communications and not to underlying facts or other non-communicative information. *Trammel*, 445 U.S. at 51; *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981); *Jiang v. Porter*, Case No. 4:15-CV-1008, 2016 U.S. Dist. LEXIS 68934, at *14 (E.D. Mo. May 26, 2016).

Even if this Court were to interpret M.R.E. 513 in accordance with *Stark*, it is still not “clear and indisputable”AMT2 H.V. is entitled to the writ. It was be inappropriate to issue the writ in this case, when the

military judge has validly issued a ruling within her discretion, consistent with one line of cases in a split among courts that have addressed this issue. To do so inappropriately substituted the lower court's discretion for that of the military judge. *United States v. Redding*, 11 M.J. 100,109 (C.M.A. 1981).

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Conclusion

Because the lower court did not have jurisdiction to hear a challenge from AMT2 H.V. regarding the substantive holding of the military judge and M.R.E. 513 does not protect records of her diagnosis, this Court should reverse the decision of the CGCCA and reinstate the order of the military judge.

/s/

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Appendices

- 1. H.V. v. Kitchen, No. 001-16 (C.G. Ct. Crim. App. Jul. 8, 2016).**
- 2. H.V. Petition for Extraordinary Write.**
- 3. H.V. Brief in Support of Petition.**
- 4. Real Party in Interest Motion to File out of Time.**
- 5. Real Party in Interest Answer.**
- 6. App. Ex. 33 – Military Judge’s Ruling.**
- 7. App. Ex. 25 – Defense Motion.**
- 8. App. Ex. 17 – Special Victim’s Counsel Notice of Appearance.**
- 9. United States v. Randolph, R. at 17.**

Certificate of Filing and Service

I certify that the foregoing was electronically filed with this court and with the Appellate Government Division, the Respondent Below, and counsel for the Appellee on July 28, 2016.

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Certificate of Compliance

This supplement complies with the page limitations of Rule 24(d) because it contains fewer than 14,000 words. Using Microsoft Word version 2010 with 14-point-Century-Schoolbook font, this supplement contains 2,439 words.

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APPENDIX 1

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

H.V.
AMT Second Class (E-5)
U.S. Coast Guard,
Petitioner

v.

Cassie A. Kitchen
Commander, U.S. Coast Guard
Military Judge,
Respondent

and

Thomas J. Randolph
Damage Controlman Second Class (E-5)
U.S. Coast Guard,
Real Party in Interest

8 July 2016

PETITION FOR EXTRAORDINARY
RELIEF IN THE NATURE OF A WRIT
OF MANDAMUS FILED 9 JUNE 2016

MISC. DOCKET NO. 001-16

ORDER – PANEL THIRTY-FIVE

McCLELLAND, Chief Judge:

Petitioner, an alleged victim of a crime under the Uniform Code of Military Justice (UCMJ), seeks extraordinary relief in the nature of a writ of mandamus requiring the military judge in the court-martial case of United States v. Randolph to comply with Military Rule of Evidence 513, Manual for Courts-Martial, United States (2012 ed.), as amended by Executive Order 13696, 80 Fed. Reg. 35,783 (17 June 2015), asserting that the military judge erred by ordering production to the defense of certain mental health records of Petitioner.

Pursuant to our order of 17 June 2016, the real party in interest filed an Answer to the Petition on 28 June 2016. Petitioner filed a Reply on 5 July 2016.

We have jurisdiction to entertain the petition under Article 6b(e)(1), UCMJ, as the alleged victim asserts a violation of her substantive rights under Military Rule of Evidence (M.R.E.) 513, Manual for Courts-Martial, United States (2012 ed.), as amended by Executive

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Order 13696, 80 Fed. Reg. 35,783 (17 June 2015). We may issue the writ if Petitioner has no other adequate means to obtain relief, the right to issuance of the writ is clear and indisputable, and issuance of it is appropriate. *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012).

M.R.E. 513 establishes a psychotherapist-patient privilege. M.R.E. 513(a) sets forth a general rule of privilege:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

M.R.E. 513(b)(5) provides:

“Evidence of a patient's records or communications” is testimony of a psychotherapist, or assistant to the same, or patient 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.

M.R.E. 513(d) provides exceptions to the privilege, none of which is raised in this case. Consequently, if the privilege applies to any of the mental health records the military judge ordered produced, she erred with regard to those records.

At the trial of *United States v. Randolph*, the defense moved to compel production of the alleged victim's mental health records for *in camera* review notwithstanding the privilege claimed by the alleged victim. It was acknowledged that such records existed. After a hearing, the military judge ruled that M.R.E. 513 did “not prevent the disclosure of dates on which a patient was treated, the identity of the provider, the diagnostic code, or the therapies used.”

Accordingly, she ordered the Government to produce for the defense the mental health records of Petitioner for a stated period of time,

limited to ONLY 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 prescribed medications were to be taken, type of therapies used, and the resolution of the diagnosed psychiatric condition, if applicable. . . .

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(Exhibit 3 to Petitioner’s Brief in Support of Petition (United States v. Randolph, Court Ruling on Defense Motion to Compel Production of Mental Health Records dated 11 March 2016).)

The issue before us is whether the privilege is limited to the patient’s communications themselves or extends to the psychotherapist’s conclusions (diagnoses) and resulting treatments.

M.R.E. 513 grew out of *Jaffee v. Redmond*, 518 U.S. 1 (1996), which recognized a federal psychotherapist-patient privilege, based on the existence of some form of psychotherapist privilege in all fifty states and the District of Columbia. *Jaffee*, 518 U.S. at 12. The privilege “covers confidential communications” made to licensed psychiatrists and psychologists and clinical social workers. *Id.* at 15. Under the privilege, confidential conversations between patients and psychotherapists are protected from compelled disclosure. *Id.* at 18. Development of the details of the privilege was left to later cases. *Id.*

We are not aware of any federal appellate court decisions on the issue at hand. The published cases brought to our attention that are directly on point amount to a single federal district court case.

In *Stark v. Hartt Transportation Systems, Inc.*, 937 F.Supp.2d 88, 92 (D. Me. 2013), the court held “that the privilege shields information revealing the plaintiff’s diagnoses and the nature of his treatment.” The court explained,

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. As the *N.G.* court noted in rejecting an argument similar to the one advanced by the defendant in this case, “The 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.” *N.G.*, 291 P.3d at 334. Construing the privilege in this “narrow fashion ... would defeat the societal interests protected by the privilege.” *Id.*

Stark, 937 F.Supp.2d 88, 91-92.

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Stark observes that the privilege does not extend to information regarding the occurrence of treatment, including whether a psychotherapist treated the privilege holder, the dates of treatment, and the length of treatment on each date. *Id.* at 90.

Stark's statement that diagnoses and the nature of treatment necessarily reflect, in part, the patient's confidential communications to the psychotherapist is undeniable. Most diagnoses of mental disorders rely extensively on what the patient has communicated to the psychotherapist. Contrary to the dissent's assertion that diagnosis and treatments are matters of fact that exist independent of any communications between the patient and the psychotherapist, diagnosis does not have an independent existence. *Jaffee* emphasized this point:

a psychiatrist's ability to help her patients is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure ... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.

Jaffee, 518 U.S. at 10 (brackets and omissions in original; quotation marks and citations omitted).

An unpublished case exemplifies the contrary position. In a case in Massachusetts, the court concluded that a patient's mental health diagnoses and treatments are not within the privilege, citing a Massachusetts appellate case. *Sylvestri v. Smith*, No. 14-13137, 2016 WL 778358 (D. Mass. Feb. 26, 2016).

Another unpublished case, *United States v. White*, No. 2:12-cr-00221, 2013 WL 1404877 (S.D.W.V. April 5, 2013), aligns with the *Stark* case.

We are persuaded that the *Stark* approach is correct. Accordingly, we find that the military judge erred as a matter of law in ordering release to the defense of Petitioner's records indicating a psychiatric diagnosis, the date of such diagnosis, any medications prescribed, the duration prescribed medications were to be taken, type of therapies used, and the resolution of

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the diagnosed psychiatric condition. However, release of dates of treatment and the identity of the provider and time taken on each date are not privileged.

Petitioner urges that if dates of treatment and identity of provider are not privileged, that information should nevertheless not be produced because the defense failed to demonstrate that the information is relevant and necessary, as required by Rule for Courts-Martial 703(f)(1), Manual for Courts-Martial, United States (2012 ed.). That may be so, but the issue is beyond our remit under Article 6b. Petitioner should seek some other avenue to address it, such as by requesting reconsideration from the military judge.

It is, by the Court, this 8th day of July, 2016,

ORDERED:

That the Petition for Extraordinary Relief is granted; that the military judge shall protect the mental health records of Petitioner from disclosure in accordance with M.R.E. 513 as interpreted by this opinion.

Judge JUDGE concurs.

BRUCE, Judge (dissenting):

I would deny the writ. Accordingly, I dissent.

As the majority opinion states, there is no controlling precedent that interprets the scope of the privilege prescribed by Military Rule of Evidence 513, Manual for Courts-Martial, United States (2012 ed.), as amended by Executive Order 13696, 80 Fed. Reg. 35,783 (17 June 2015) (hereafter M.R.E. 513). *H.V. v. Kitchen*, Docket No. 001-16, at 3 (C.G.Ct.Crim.App. 2016). In the absence of controlling precedent, I look to the plain language of M.R.E. 513 to discern the scope of the privilege. Based on that, I would hold that the privilege is limited to communications between the patient and the psychotherapist, and records that pertain to those communications. Pertain is a somewhat vague word, but I take it to mean records that would reveal the substance of a privileged communication.

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In *United States v. Clark*, the Court of Appeals for the Armed Forces discussed the origin and scope of the psychotherapist-patient privilege as follows:

Following the Supreme Court's decision in *Jaffee v. Redmond*, the President adopted a psychotherapist-patient privilege for the military justice system with the implementation of M.R.E. 513. The rule allows a patient the privilege to refuse to disclose, or allow another to disclose, a confidential communication between the patient and a psychotherapist. But this rule "is not a physician-patient privilege." Rather, it is "based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege." M.R.E. 513 intends to safeguard statements "made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

United States v. Clark, 62 M.J. 195, 199 (C.A.A.F. 2005) (footnotes omitted).

The Supreme Court, in its *Jaffee* decision, discussed the competing principles that are considered when deciding whether to recognize a testimonial privilege.

The common-law principles underlying the recognition of testimonial privileges can be stated simply. "For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950) (quoting 8 J. Wigmore, *Evidence* § 2192, p. 64 (3d ed.1940)). See also *United States v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S., at 50, 100 S.Ct., at 912 (quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1688 (1960) (Frankfurter, J., dissenting)).

Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence...." 445 U.S., at 51, 100 S.Ct., at 912. Both "reason and experience" persuade us that it does.

Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996).

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As an exception to the general rule that the public has a right to every man's evidence, the psychotherapist-patient privilege recognized within the Federal Rules of Evidence should not be broadly interpreted. The same is true for the corresponding privilege adopted by the President for courts-martial in M.R.E. 513.

With the Supreme Court's guidance, the President presumably understood that he must decide how broad a military justice psychotherapist-patient privilege should be to promote the important interests in protecting confidential communications, while also respecting the need for probative evidence, especially in a criminal justice setting, as well as the need for commanders to have access to mental health information about service members under their command.

Accordingly, the text of M.R.E. 513 should be understood as language that was carefully considered to express the President's intent in granting a privilege that is circumscribed to balance the competing interests involved in the recognition of a testimonial privilege. That being the case, I do not find federal case law interpreting the Federal Rules of Evidence to be very helpful in understanding the President's intent in adopting M.R.E. 513. For that, I must look at the plain language of the rule itself.

The general rule of privilege is set forth in M.R.E. 513(a):

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Note that the rule protects "communication" "made for the purpose of facilitating diagnosis or treatment," not *including* diagnosis and treatment.

M.R.E. 513(b)(5) provides:

"Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient 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.

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Unlike the majority, I do not read the plain language of M.R.E. 513 as extending the privilege to diagnosis and treatment. The rule protects “communication made between the patient and a psychotherapist” and patient records that “pertain to the communications.” In my view, that means that testimony or records that reveal the substance of the patient’s confidential communications with the psychotherapist are protected, but that other evidence that may be provided by the psychotherapist is not privileged.

A diagnosis, prescribed medications, and other treatments are matters of fact that exist independent of any communications between the patient and the psychotherapist. The psychotherapist can decide on a diagnosis by comparing the patient’s condition to criteria listed in the Diagnostic and Statistical Manual of Mental Disorders, and the psychotherapist can testify to a diagnosis without referring to confidential communications. While the psychotherapist may discuss diagnosis, medications, and other treatments with the patient, that does not mean that they exist only as a communication between the patient and the psychotherapist. 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.

I would hold that the military judge was correct in holding that the privilege did not extend to diagnosis, medications, and other treatments. Accordingly, Petitioner has failed to show that her right to the writ of mandamus is clear and indisputable, and I would deny the writ.

I agree with the majority that Article 6b, gives this Court jurisdiction to entertain the writ petition in order to protect Petitioner’s right to the privilege afforded by M.R.E 513. However, if the military judge has properly applied M.R.E. 513, as I would hold, any issues concerning discovery are another matter, and beyond the reach of Article 6b.

Although I would hold that the President has not chosen to create a psychotherapist-patient privilege in court-martial proceedings that extends to medical records concerning diagnosis, medications, and other treatments, the rules of discovery need not be entirely unconcerned about privacy rights outside the scope of the M.R.E. 513 privilege. The determination of whether a witness is necessary, or if a witness is unavailable, might take into

H.V. v. KITCHEN, No. 001-16 (C.G.Ct.Crim.App. 2016)

consideration Service policy or applicable laws on medical privacy or on the treatment of alleged victims.



For the Court,

L. I. McClelland
Chief Judge

Copy: Office of Military Justice
Special Victims' Counsel
Appellate Government Counsel
Appellate Defense Counsel

**IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS**

AMT2 H.V.,)	
Petitioner,)	
)	
v.	)	BRIEF IN SUPPORT OF PETITION FOR
	)	EXTRAORDINARY RELIEF IN THE
	)	NATURE OF A WRIT OF MANDAMUS
)	
Cassie A. Kitchen)	
Commander, US Coast Guard,)	
Respondent,)	
)	
and	)	USCG Misc. Dkt. No. _____
)	
Thomas Randolph,)	
DC2/E-5, US Coast Guard,	)	09 June 2016
Real Party in Interest.)	

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS:**

Preamble

COMES NOW Petitioner, AMT2 H.V., by and through her undersigned Special Victims’ Counsel [hereinafter SVC], submits this brief in support of her Petition for Extraordinary Relief. As set forth herein, the Military Judge in the above-captioned action has erred as a matter of law in finding that certain mental health records are not privileged under Military Rule of Evidence (MRE) 513, and therefore, discoverable. Petitioner, by and through her undersigned Special Victims’ Counsel, respectfully states and prays that this Honorable Court grant extraordinary relief pursuant to Article 6(b), Uniform Code of Military Justice (UCMJ), as codified in Title 10, United States Code, Section 806(b), and Rule 2(b) and 20 of this Court’s Rules of Practice and Procedure, by granting petitioner’s request for extraordinary relief in the form of a writ of mandamus.

ISSUE

WHETHER THE MILITARY JUDGE ERRED AS A MATTER OF LAW WHEN SHE RULED THAT CERTAIN PORTIONS OF AMT2 H.V.'S MENTAL HEALTH RECORDS WERE NOT PRIVILEGED UNDER MIL. R. EVID. 513 AND THEREFORE DISCOVERABLE UNDER R.C.M. 703(f)(1).

Jurisdictional Statement

The jurisdiction for this Court to hear this matter is established in the petition for extraordinary relief filed in support of this brief.

STANDARD OF REVIEW

The Military Judge's interpretation as to whether the client's mental health records are privileged under MRE 513 is a question of law reviewed de novo. *See United States v. Matthews*, 68 M.J. 29, 35 (C.A.A.F. 2008); *see also United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005). The Military Judge's application of MRE 513 to the case at bar is reviewed for an abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

FACTS

The Accused, DC2 Randolph met AMT2 H.V. in February 2014 through a mutual friend. After "hanging out" one evening with the mutual friend, DC2 Randolph and AMT2 H.V. began dating. The relationship was tumultuous. 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. They ended up arguing 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.

While being treated for the injuries she received in the assault by DC2 Randolph, AMT2 H.V. reported to medical personnel at the Coast Guard Clinic in Cape Cod that DC2 Randolph had sexually assaulted her while they were dating.

On 2 March 2015, AMT2 H.V. informed CAPT Ehlers, AIRSTA Cape Cod Executive Officer, that she was speaking with a therapist about "being attacked."

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 07 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." The Military Judge, applying the threshold examination as required by MRE 513, found 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." Despite this, Military Judge ordered the government to produce and provide the defense with AMT2 H.V.'s mental health records, to include: "psychiatric diagnosis, 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." In summary, the Military Judge found the MRE 513 privilege only covered actual communications between AMT2 H.V. and her psychotherapist, and that "[MRE 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 MRE 513, the Military Judge did not cite any authority to support her ruling.

LEGAL AUTHORITY AND ARGUMENT

The Military Judge improperly ordered discovery of certain portions of AMT2 H.V.'s mental health records, including those "portions indicating psychiatric diagnosis (as the phrase is used in the DSM-5), the date of such a 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." United States v. Randolph, Court Ruling on Defense Motion to Compel Production of Mental Health Records, dated 11 March 2016.

In 1996, the Supreme Court recognized a psychotherapist-patient privilege under Federal Rule of Evidence 501. Jaffee v. Redmond, 518 U.S. 1 (1996). In the Jaffee opinion, the Supreme Court emphasized that the psychotherapist-patient privilege, like the attorney-client privilege and the clergy-penitent privilege, is "rooted in the imperative need for confidence and trust." 518 U.S. at 10. 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, MRE 513 was established to create a psychotherapist-patient privilege for investigations or proceedings authorized under the UCMJ. MRE 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. Under MRE 513(a), the psychotherapist-patient privilege aims to shield from disclosure, all confidential communications made between a patient and a psychotherapist, or an assistant to a psychotherapist, so long as these communications were made, “for the purpose of facilitating diagnosis or treatment of the [victim’s] mental or emotional condition.” MRE 513(a). “Evidence of a patient’s records or communications,” as defined by MRE 513(b)(5), is “testimony of a psychotherapist, or assistant to the same, or *patient 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.” MRE 513(b) [emphasis added].

Although MRE 513 is broad in its application, there are exceptions to the psychotherapist-patient privilege that may allow for a limited disclosure, as detailed in MRE 513(d). In order to determine whether these exceptions would require disclosure of the patient’s communications or records, the defense must demonstrate by a preponderance of the evidence that:

- (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 requested information meets one of the enumerated exceptions under subsection (d) of this rule;
- (C) that 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.

MRE 513(e).

The psychotherapist-patient privilege extends its shield of protection to even a Military Judge's in camera review unless and until the defense can make a threshold showing.

In this case, the Military Judge found the defense failed to make this threshold showing, thereby demonstrating their basis for seeking AMT2 H.V.'s mental health records was without merit and did not warrant disclosure or an in camera review by the Military Judge. Despite the defense's inability to meet their burden, the Military Judge's ruling that certain mental health records are not privileged, has effectively rendered the protections of MRE 513 meaningless and will allow the defense access to AMT2 H.V. private and sensitive mental health records.

Since the implementation of MRE 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, contrary to the ruling in this case, 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., 937 F. Supp. 2d 88, 92 (D. Me. 2013), the United States District Court for Maine held that the federal psychotherapist-patient privilege created by Jaffee and embodied in MRE 513 shields a party from discovering the "diagnoses and the nature of his treatment." As the court explained,

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... 'The 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.' *N.G.*, 291 P.3d at 334. Construing the privilege in this 'narrow fashion...would defeat the societal interests protected by the privilege.'

Id. at 91-92. 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].

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. Kinder v. White, 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. at 131. 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. at 131 (quoting Jaffee, 518 U.S. at 17.).

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 and MRE 513. 10 U.S.C. §806(b)(“[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 e.g. 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. Despite the ability to seal records, attorneys, judges, clerks, assistants, and the accused still have access to victims' private information.

Aware of their vulnerability, victims may choose not to seek the counseling they need or participate in the judicial process. This is precisely the reason for the robust privilege afforded by MRE 513. See Jaffee, 518 U.S. 1 at 10. To pierce the MRE 513 privilege when the defense cannot even meet their burden of making a specific threshold showing would undermine the foundation of MRE 513 and the psychotherapist-patient privilege. Furthermore, the standard articulated in MRE 513 requiring this threshold showing before even an *in camera* inspection, accords with the sound public policies underpinning MRE 513 and pronounced by the Supreme Court in Jaffee.

The Military Judge's ruling directing the Government to produce portions of AMT2 H.V.'s mental health records without her consent violated AMT2 H.V.'s privilege against disclosure under the general rule of privilege set forth in MRE 513(a).

Some federal courts have applied the psychotherapist-patient privilege in a more limited fashion. These courts found the privilege extended only to the communications made between the therapist and patient and that the underlying facts of treatment, such as the identity of the mental health care providers, the dates on which the patient was treated, and the length of the treatment were not privileged and were subject to disclosure. *See In re Zuniga*, 714 F.2d 632, 640 (6th Cir.1983); Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., Inc., 764 F.Supp.2d 736, 743 (D.Md.2011) (citing Zuniga, 714 F.2d at 640); Howe v. Town of North Andover, 784

F.Supp.2d 24, 34 (D.Mass.2011) (citation omitted); Merrill v. Waffle House, Inc., 227 F.R.D. 467, 471 (N.D. Texas 2005). Given the broad language used by the Supreme Court in Jaffee, the more appropriate determination would be in line with the reasoning set forth in the Stark opinion, *supra*. To narrow the scope of the MRE 513 would defeat the societal interests protected by the privilege.

If this Court should find the disclosure of dates on which AMT2 H.V. was treated and the identity of the provider are not privileged, this information should still not be produced because the defense failed to demonstrate this information is relevant and necessary as required by Rule for Courts-Martial (RCM) 703(f)(1). Specifically, the defense has not proffered any theory of their case in which the names of the providers or the dates of treatment would further their case. Quite to the contrary, the defense's argument for disclosure of AMT2 H.V.'s mental health records is because of an undisclosed diagnosis that may have been remarked on by AMT2 H.V.'s therapist. *See* Defense Motion to Compel Production of Mental Health Records And Communications Made Therein, at p.5. The name of the provider and the dates of treatment have no tendency to make this theory more or less probable. Consequently, this information is not discoverable under RCM 703(f).

Conclusion

Petitioner, through her Special Victims' Counsel, respectfully requests that this Honorable Court grant Petitioner's request for extraordinary relief.

Respectfully Submitted,

DATE: 09 June 2016

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing Brief in Support of Petition For Extraordinary Relief In The Nature Of A Writ Of Mandamus was sent via electronic mail to the Clerk's Office on the 9th day of June 2016. Copies were sent by electronic mail to the Government Appellate Division, Defense Appellate Division, defense counsel (LT Jason Roberts), trial counsel (LT Robert Canoy and LT Grace Oh), and respondent (CDR Cassie A. Kitchen) on the 9th day of June 2016.

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APPENDIX 3

**IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS**

AMT2 H.V.,) 28 June 2016
Petitioner)
	) MOTION TO FILE OUT OF TIME
v.)
)
Cassie A. Kitchen	) Dkt. No. 001-16
Commander, U.S. Coast Guard,	) Panel Thirty-Five
Respondent)
)
and)
)
Thomas J. Randolph	) Tried at Boston, MA on 07 March
Damage Controlman Second Class (E-5)	) 2016 by a general court-martial
U.S. Coast Guard,	) convened by Commander, First Coast
Real Party in Interest	) Guard District

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS**

Pursuant to Rule 23 of the Court of Criminal Appeals Rules of Practice and Procedure, the real party in interest, Petty Officer Randolph, through undersigned counsel, hereby moves to file an answer out of time. Due to a clerical mistake by counsel, the completed brief was not transmitted yesterday. Petty Officer Randolph should not be prejudiced by an error by counsel for which he is not responsible.

Respectfully submitted,

DATE: 28 June 2016

Philip A. Jones
Appellate Defense Counsel
Lieutenant, U.S. Coast Guard
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Washington, DC 20374

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on
28 June 2016.

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**IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS**

AMT2 H.V.,) 28 June 2016
Petitioner)
	) ANSWER ON BEHALF OF THE REAL
v.	) PARTY IN INTEREST AND RESPONSE
	) TO MOTION FOR ARGUMENT
)
Cassie A. Kitchen	) Dkt. No. 001-16
Commander, U.S. Coast Guard,	) Panel Thirty-Five
Respondent)
)
and)
)
Thomas J. Randolph	) Tried at Boston, MA on 07 March
Damage Controlman Second Class (E-5)	) 2016 by a general court-martial
U.S. Coast Guard,	) convened by Commander, First Coast
Real Party in Interest	) Guard District

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS**

The Real Party in Interest, Damage Controlman Second Class (DC2) Thomas J.

Randolph, through undersigned counsel, submits this answer to the Petitioner’s brief of 09 June 2016.

Statement of the Case

Petitioner filed a “Petition for Extraordinary Relief in the Nature of a Writ of Mandamus” on 09 June 2016. The Coast Guard court of Criminal Appeals (CGCCA) docketed the case on 15 June 2016 and on 17 June 2016 ordered the respondent to show cause why the petition should not be granted. The Court also authorized DC2 Randolph respond within ten days. This answer follows with a contemporaneously filed motion to file out of time due to a clerical mistake by the detailed appellate counsel.

Statement of Statutory Jurisdiction

This case is before this Court pursuant to 10 U.S.C. §806b (2015) (hereinafter “Article 6b, UCMJ”). However, as discussed *infra*, DC2 Randolph challenges the jurisdictional basis of the petition for extraordinary relief.

Statement of Facts

Petty Officer Randolph was charged with dereliction of duty, false official statements, rape, larceny, uttering a check without sufficient funds, and assault in violation of Articles 92, 107, 120, 121, 123a, and 128, Uniform Code of Military Justice (UCMJ).

On 26 July 2014, DC2 Randolph and Aviation Maintenance Technician Second Class (AMT2) H.V. were at Picture Lake near Pocasset, Massachusetts. (Appellate Ex. 33 at 1.) During this time, AMT2 H.V. and DC2 Randolph got into an argument. (Appellate Ex. 33 at 1.) It is undisputed that DC2 Randolph’s truck door was closed on her arm. (Appellate Ex. 33 at 1.) AMT2 H.V. alleges DC2 Randolph intentionally slammed the door on her arm. (Appellate Ex. 25 at 1.) DC2 Randolph told Coast Guard Investigative Service agents that AMT2 H.V. slammed the door on her arm. (Appellate Ex. 25 at 2.) Text messages between DC2 Randolph and AMT2 H.V. suggest AMT2 H.V. had a history of emotionally erratic behavior during her relationship with DC2 Randolph. (Appellate Ex. 33 at 2.)

On 2 March 2015, AMT2 H.V. informed CAPT Ehlers, AIRSTA Cape Cod Executive Officer, that she was speaking with a therapist about “being attacked.” (Appellate Ex. 33 at 2.)

Charges were referred on 8 December 2015. On 27 January 2016, the defense requested discovery of AMT2 H.V.’s mental health records. (Appellate Ex. 25 at 4.) On 8 February 2016, the Government replied to the Defense confirming the existence of mental health records but asserting the privilege under Military Rule of Evidence 513. (Appellate Ex. 25 at 4.)

On 22 February 2016, the Defense filed a motion seeking production of AMT2 H.V.'s mental health records for an *in camera* review of her communications made to her psychotherapist. In its motion, the Defense explained to the military judge its concern that AMT2 H.V. may have a diagnosis of borderline personality disorder. (Appellate Ex. 25 at 5.) That theory was based, in part, on numerous facts regarding other aspects of AMT2 H.V.'s behavior that were disclosed in discovery. (Appellate Ex. 25 at 6.) A hearing was held pursuant to M.R.E. 51. Through counsel, AMT2 H.V. exercised her right to be heard. (Appellate Ex. 17.)

On 11 March 2016, the military judge denied the Defense's request to review her communications but, finding the Defense did provide a sufficient factual basis, ordered production of non-communicative information ("...[only] those portions indicating a psychiatric diagnosis...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.") from AMT2 H.V.'s mental health records. (Appellate Ex. 33 at 4-5.)

Further facts necessary for the resolution of this case are contained in the argument below.

Summary of Argument

This Court should deny the requested writ for two reasons. First, petitioner does not assert a violation of her procedural rights under M.R.E. 513 and therefore does not have standing before this Court under Article 6b, UCMJ. Second, even if petitioner has standing, the military judge's ruling under M.R.E. 513 was within her discretion.

Standard of Review

To prevail on a writ for mandamus, the Petitioner must demonstrate (1) there is no other adequate means to attain relief; 2) the right to issuance of the writ is “clear and undisputable;” and (3) the issuance of the writ is appropriate under the circumstances.” *Hasan v. Gross*, 71 M.J. 416, 418 (2012). Petitioner has failed to demonstrate a “clear and indisputable” right to the writ.

An extraordinary writ is “a drastic instrument which should be invoked only in truly extraordinary situations.” *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983). Extraordinary writs are limited to “the exceptional case where there is a clear abuse of discretion or usurpation of judicial power.” *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953); *accord Will v. United States*, 389 U.S. 90, 95 (1967) (“[O]nly exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.”). A trial judge’s decision may be erroneous, but does not rise to the level of usurpation of judicial power, so long as the ruling is “made in the course of the exercise of the court’s jurisdiction to decide issues properly brought before it.” *Bankers Life*, 346 U.S. at 382.

This standard contains an unparalleled level of deference afforded to a military judge, the highest level of deference in military jurisprudence. “[W]hen a trial judge performs a discretionary act within the bounds of his legal authority, a superior tribunal will not, in the exercise of extraordinary writ powers, substitute its own discretion for that of the trial judge.” *United States v. Redding*, 11 M.J. 100, 109 (C.M.A.1981) (internal citations omitted).

The petitioner urges this Court to adopt an incorrect standard of review. The petitioner, citing *United States v. Matthews*, 68 M.J. 29, 35 (C.A.A.F. 2008), asserts, “[t]he Military Judge’s interpretation as to whether the client’s mental health records are privileged under M.R.E. 513 is a question of law reviewed de novo.” Citing *United States v. Sullivan*, 42 M.J. 360, 363

(C.A.A.F. 1995), petitioner asserts, “[t]he Military Judge’s application of M.R.E. 513 to the case at bar is reviewed for an abuse of discretion.” However, the procedural posture of both *Matthews* and *Sullivan* was very different. In those cases, the courts were reviewing decisions of military judge on direct appeal by the accused. Here, where a non-party to the litigation seeks to challenge the rulings of the military judge through a petition for an extraordinary writ, the much higher standard of deference applies. That standard is not met in this case.

Argument

I.

AMT2. H.V. CANNOT DEMONSTRATE HER RIGHT TO THE WRIT IS “CLEAR AND INDISPUTABLE” BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THIS PETITION FOR A WRIT OF MANDAMUS.

Discussion

AMT2. H.V. cannot demonstrate her “clear and indisputable” right to this writ. Though she attempts to establish standing by urging this Court to adopt a broad interpretation of Article 6b(e), UCMJ, this argument fails for several reasons.

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

Petitioner cites Article 6b(e), UCMJ as authority for a writ of mandamus. (Pet. at 2.) This argument is misplaced because the modifications to Article 6b, UCMJ, are designed to allow victims to petition for a writ of mandamus only in very limited circumstances. This petition is outside of that narrow allowance.

Article 6b, UCMJ, lists the various rights of a crime victim under 10 U.S.C. §§ 801 *et seq.* In Pub. L. No. 114-92 (2015) (hereinafter FY16 NDAA), Congress modified Article 6b, UCMJ, to add that a victim may petition a Court of Criminal Appeals for a writ of mandamus

“[i]f the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of a victim afforded by a section (article) or rule specified in paragraph (4).” 10 U.S.C. § 806b, Pub. L. No. 114-92, § 531 (2014). In other words, this change allowed alleged victims to seek a writ of mandamus in Courts of Criminal Appeals when the alleged victim believed a “court-martial ruling violates the *rights* of a victim afforded by [M.R.E. 513.]” *Id.* (emphasis added).

Rule 513 grants three rights to alleged victims:

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

Mil R. Evid. 513(e). AMT2 H.V. exercised all these rights and the military judge accommodated and preserved all of them. AMT2 H.V. now seeks relief from the substance of the military judge’s ruling, but that is not her right.

Outside the limited procedural rights found in M.R.E. 513, an alleged victim has no right to challenge the military judge’s ruling on discoverability. Thus, Article 6b, UCMJ, does not grant AMT2 H.V. the right to challenge, via a writ of mandamus, the military judge’s decision regarding discovery. As a result, this Court lacks jurisdiction to hear her claim, because she lacks standing. Her standing cannot be predicated on her disagreement with the substance of the military judge’s M.R.E. 513 ruling.

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

occasion when a military judge unreasonably denies a procedural right guaranteed under M.R.E. 513.

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

Given the limited jurisdiction in extraordinary writ cases, in order for AMT2 H.V. to have standing, Congress would have had to clearly and explicitly authorize review of a military judge's discoverability ruling. Congress could have accomplished this by: (1) amending Article 62, UCMJ, to allow an alleged victim to bring an interlocutory appeal to challenge M.R.E. 513 discovery rulings; (2) modifying M.R.E. 513 to include an explicit right of alleged victims to challenge the ruling on discoverability; or (3) explicitly modifying Article 6b, UCMJ, to authorize the writ of mandamus to challenge the substantive judicial ruling on discoverability of M.R.E. 513 evidence. Congress did none of these, and therefore the Petitioner's expansive reading of Article 6b(e), UCMJ, is inappropriate.

Petitioner's reading of Article 6b is also problematic in that, if this Court were to endorse AMT2 H.V.'s reading, it would contravene an accused's right to a speedy trial. The Supreme Court has held that appellate review of interlocutory matters must be limited in nature, especially in criminal cases where constitutional speedy trial concerns are looming over the proceedings:

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

Will v. United States, 389 U.S. 90, 96 (1967).

If this Court determines it has jurisdiction for this petition, this would allow an alleged victim to stall criminal proceedings against an accused for as long as it took (and as many petitions as necessary) to satisfy her *beliefs* that her substantive M.R.E. 513 rights were no longer

being violated. It defies credulity, and is unsupported by any legislative history, to believe such a substantial procedural block was intended by Congress in amending Article 6b, UCMJ. To do so would contravene the Sixth Amendment and Rule for Courts-Martial (R.C.M.) 707's guarantee of a speedy trial. It would also be unjust.

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

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

Conclusion

This Court should find it lacks jurisdiction to hear the petition and deny petitioner's request for a writ.

II.

THE DEFINITION OF CONFIDENTIAL COMMUNICATIONS PROTECTED BY M.R.E. 513 DOES NOT EXTEND TO RECORDS OF DIAGNOSIS.

Discussion

Unlike Military Rule of Evidence 513, the federal common law psychotherapist-patient privilege, like all other federal common law privileges, has been interpreted through the United States courts in the light of reason and experience. FED. R. EVID. 501. The Supreme Court has held that testimonial privileges must be strictly construed and accepted only if there is an overriding public good in limiting access to “every man’s evidence.” *Trammel v. United States*, 445 U.S. 40, 50 (1980).

The Petitioner relies on two federal district court opinions that have broadened the scope of the psychotherapist-patient privilege first recognized in 1996 by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), but does not address the line of cases arriving at the opposite conclusion with regard to diagnosis information. In *Jaffee*, the Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. *Id.*, at 15.

The two cases cited by the Petitioner hold that a diagnosis is as sensitive as the communications giving rise to the diagnosis; therefore, revealing the diagnosis while protecting the substance of the communications would undermine the purposes for recognizing the privilege. *Stark v. Hartt Transp. Sys., Inc.*, 937 F. Supp. 2d 88, 92 (D. Me. 2013); *United States v. White*, No. 2:12-CR-00221, 2013 WL 1404877, at *7 (S.D.W. Va. Apr. 5, 2013).

Fundamentally, the psychotherapist-patient privilege exists for the same reason the courts have recognized other testimonial privileges. The testimonial privileges between priest and penitent, attorney and client, and husband and wife limit protection strictly to confidential communications and not to underlying facts or other non-communicative information. *Trammel*, 445 U.S. at 51; *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981); *Jiang v. Porter*, Case No. 4:15-CV-1008, 2016 U.S. Dist. LEXIS 68934, at *14 (E.D. Mo. May 26, 2016).

The courts' rationale in the cases cited by the Petitioner is contrary to the large body of cases strictly construing the term "confidential communication." Other federal district courts have strictly construed the term "confidential communication" to exclude non-communicative information such as the nature of any diagnoses or treatment. *Silvestri v. Smith*, Civ.A.No. 14-13137-FDS, 2016 U.S. Dist. LEXIS 23764, at *7 (D. Mass. Feb. 26, 2016).

Further, the idea that the purpose of the privilege would be defeated if the requesting party had knowledge of a patient's diagnosis is unsupportable. It could apply with equal force to underlying facts that would be inseparably connected to private communications protected by other testimonial privileges. Such an expansion of the term "confidential communication" is not necessary to protect the overriding public good in recognizing testimonial privileges for communications as those identified above and is not needed to preserve the trust and confidence between patients and their mental healthcare providers. Therefore, the limited construction of the term "confidential communication" as interpreted in *Silvestri* is in keeping with reason and experience and should be followed here.

At the very least, the case law reveals a split among federal district courts on this question. The Court of Appeals for the Armed Forces has not resolved this matter and no Federal circuit court of appeals has squarely addressed it either. Even if this Court were to interpret

M.R.E. 513 in accordance with *Stark* and *White*, it is still not “clear and indisputable” AMT2 H.V. is entitled to the writ. In the context of a writ petition, it would be inappropriate to issue the writ in a case such as this where the military judge has validly issued a ruling within her discretion following one line of cases in a split among the trial courts which have addressed this issue. To do so would inappropriately substitute this Court’s discretion for that of the military judge. *Redding*, 11 M.J. at 109.

Conclusion

This Court should reject the petitioner’s proposed expansive reading of M.R.E. 513 and deny the petition.

Response to Motion for Oral Argument

This Court should deny petitioner’s motion for oral argument and resolve this petition in an expedited manner. This is the second time the forward progress of this trial has been disrupted by appellate litigation. Further delay prejudices DC2 Randolph’s right to a speedy trial. However, if this Court grants the petitioner’s motion for oral argument, DC2 Randolph respectfully requests an opportunity to argue in response.

Respectfully submitted,

DATE: 28 June 2016

Philip A. Jones
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on
28 June 2016.

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APPENDIX 5

COAST GUARD JUDICIARY
GENERAL COURT MARTIAL

)	
)	
UNITED STATES)	
)	
v.)	COURT RULING ON
	)	DEFENSE MOTION TO
Thomas Randolph	)	COMPEL PRODUCTION OF MENTAL
DC2/E5, U.S. Coast Guard	)	HEALTH RECORDS
)	
	)	11 March 2016
)	
)	

1 **NATURE OF MOTION.** The defense seeks to compel an *in camera* review of all mental
2 health records of the alleged victim, AMT2 HV. According to the defense, the alleged rape on or
3 about 26 April 2014 and 5 July 2014 are the critical events creating their need for the requested
4 mental health records. The Government and SVC oppose.

5 **FINDINGS OF FACT.** In reaching the findings and conclusions, the court considered all legal
6 and competent evidence presented by the parties and the reasonable inferences to be drawn there
7 from, and resolved all issues of credibility. In doing so, the court makes the following findings
8 and conclusions:

9 DC2 Randolph met AMT2 HV in February 2014 through a mutual friend. After
10 "hanging out" one evening with the mutual friend, DC2 Randolph and AMT2 HV began dating.
11 The relationship was tumultuous. The relationship ended multiple times, with the final break up
12 occurring in early July 2014.

13 On 26 July 2014, DC2 Randolph and AMT2 HV met at Picture Lake to discuss their
14 relationship. They ended up arguing and the meeting ended when the door of DC2 Randolph's
15 truck was closed on AMT2 HV's arm. AMT2 HV called 911 and police responded. DC2
16 Randolph was arrested and was later released on bail.

1 The following day, CGIS interviewed DC2 Randolph regarding the incident at Picture
2 Lake. At the time of that interview, allegations had not been made about rape or any kind of
3 sexual assault. Statements by DC2 Randolph made during the interview on 27 July 2014 and
4 text messages between DC2 Randolph and AMT2 HV suggest AMT2 HV had a history of
5 emotionally erratic behavior during their relationship.

6 On 2 March 2015, CAPT Ehlers, AIRSTA Cape Cod Executive Officer, was informed by
7 AMT2 HV that she was speaking with a therapist about "being attacked."

8 The defense is unaware of the substance of the conversations between AMT2 IIV and her
9 therapist. The defense offered no specific facts which demonstrate a reasonable likelihood that
10 AMT2HV's records or communications would yield evidence admissible under an exception to
11 the privilege. The defense did articulate numerous facts which call into question the diagnosis, if
12 any, of AMT2 IIV. AMT2 IIV agreed to speak with defense counsel prior to the Article 39(a)
13 session but the defense chose not to interview her prior to the proceeding.

14 **LEGAL ANALYSIS AND CONCLUSIONS OF LAW.**

15 Trial counsel and defense counsel shall have equal opportunity to obtain witnesses and
16 other evidence in accordance with such regulations as the President may prescribe. Article 46,
17 UCMJ. The military discovery rules are intended to promote full discovery to the maximum
18 extent possible consistent with legitimate needs for nondisclosure. Military discovery practice is
19 quite liberal and broader than that required in civilian federal practice. Analysis R.C.M. 701.
20 Discovery in military justice practice is intended to be broad and is not limited to matters
21 admissible at trial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

22 Materials that would assist the defense in formulating a defense strategy are also
23 discoverable. *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008). Moreover, defense

1 counsel has a duty to investigate in all cases. American Bar Association Standards for the
2 Administration of Criminal Justice, the Defense Function, Standard 4-4.1 (explicitly made
3 applicable to defense counsel in CG courts-martial in COMDTINST M5810.1E).

4 Accordingly, each party is entitled to the production of evidence that is relevant and
5 necessary. R.C.M. 703(i)(1). Relevant evidence is evidence that has any tendency to make any
6 fact of consequence more or less probable. M.R.E. 401. Relevant evidence is "necessary" under
7 R.C.M. 703(i) when it is not cumulative and helpful to a party's case on a matter at issue.
8 R.C.M. 703(f)(1) Discussion.

9 Evidence not under the control of the Government may be obtained by subpoena. R.C.M.
10 703(f)(4)(B). A warrant of attachment may be issued to compel production if the custodian of
11 the subpoenaed documents refuses to provide them. R.C.M. 703(e)(2)(G). However, there are
12 definite limits on what evidence may be obtained. A patient has a privilege to refuse to disclose,
13 and to prevent any other person from disclosing, a confidential communication between the
14 patient and treating psychotherapist made for the purpose of facilitating diagnosis or treatment of
15 the patient's mental or emotional condition. M.R.E. 513.

16 M.R.E. 513 does not, however, create a blanket privilege for every piece of information
17 contained within a psychotherapist's record for a particular patient; rather it seeks to protect the
18 confidential communications.¹ The rule does not prevent the disclosure of dates on which a
19 patient was treated, the identity of the provider, the diagnosis code, or the therapies used.

¹ MRE 513 (a) reads: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and the psychotherapist or an assistant to the psychotherapist. . ."; MRE 513(b)(2) defines "evidence of patient's records or communications" as those pertaining to communications by a patient for the purposes of diagnosis or treatment.

1 Before ordering the disclosure of privileged mental health records, the military judge may
2 conduct an *in camera* review, however the judge may deny a defense discovery request for such
3 records without doing so. Those considerations which are relevant to determining whether to
4 conduct an *in camera* review include: (1) did the moving party set forth a specific factual basis
5 demonstrating a reasonable likelihood that the requested records would yield evidence
6 admissible under an exception to the privilege; (2) did the moving party show that the requested
7 information meets an enumerated exception to the privilege; (3) did the moving party
8 demonstrate that the information is not cumulative of other information available; and (4) did the
9 moving party make reasonable efforts to obtain the information from non-privileged sources.

10 In this case, the defense did not articulate specific factual basis to demonstrate a
11 reasonable likelihood that AMT2 HV's records or communications would yield evidence under
12 an exception to the privilege, nor did the defense interview AMT IIV, as they had the
13 opportunity to do. The defense did present evidence demonstrating the relevance and necessity
14 of a diagnosis of AMT IIV, if any.

15 **RULING AND ORDER.** In light of the evidence, arguments of counsel, legal standards, and
16 defense theory, the defense is not entitled to an *in camera* inspection of AMT2 HV's mental
17 health communications and the motion is therefore DENIED. However, the government shall
18 produce the following records for the defense and/or, if necessary, call the custodian of said
19 records as an authenticating witness at the next Article 39(a) session to provide:

20 Mental health records of AMT2 HV from 1 July 2014 – 31 August 2015, limited to
21 ONLY those portions indicating a psychiatric diagnosis (as this phrase is used in the DSM-
22 5), the date of such diagnosis, any medications prescribed, the duration prescribed

1 medications were to be taken, type of therapies used, and the resolution of the diagnosed
2 psychiatric condition, if applicable. Any recording, transcription, or summary of a
3 confidential communication between HV and a treating psychotherapist, or assistant, shall
4 be **EXCLUDED**.

5 This information may be summarized on a new record created, or validated by the
6 treating psychotherapist(s) or assistant(s). Counsel shall handle, protect, and eventually destroy
7 these records in accordance with standards for the FOUO law enforcement documents containing
8 PII.

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12 C. A. Kitchen
13 Commander, USCG
Chief Trial Judge

APPENDIX 6

**GENERAL COURT MARTIAL
UNITED STATES COAST GUARD**

UNITED STATES)
) DEFENSE MOTION TO COMPEL
) PRODUCTION OF MENTAL HEALTH
) RECORDS AND COMMUNICATIONS
V.) MADE THEREIN
)
THOMAS RANDOLPH)
DC2/E-5) DATE: 22 FEBRUARY 2016
USCG)

1. Commander, First Coast Guard District, has referred this case to trial by General Court-Martial, convened by her order No. 01-14 dated 19 December 2014.

2. Relief Sought.

Damage Controlman Second Class (DC2) Thomas Randolph, through counsel, respectfully requests the Military Judge order and conduct an *in camera* hearing of the mental health records of AMT2 HV.

3. Burden of Persuasion and Burden of Proof.

Under Rule for Courts-Martial 905(c)(1) and (2) and Military Rule of Evidence 513(c)(3), the burden of proof and the burden of persuasion with respect to any factual issue is on the moving party to offer a preponderance of evidence.

4. Facts.

- a. Relying on the statements of AMT2 HV, the Government alleges that on 25 July 2014, DC2 Randolph slammed his truck's door on AMT2 HV's arm at Picture Lake in Pocasset, MA.
- b. Additional statements of AMT2 HV made in CGIS interviews form the foundation of the Government's other charges of rape and assault consummated by battery against AMT2 HV.
- c. Before the alleged incident occurred, AMT2 HV emailed DC2 Randolph's mother, Tammy. In her email, she alleges that DC2 Randolph and his motorcycle club are affiliating

themselves with an outlaw motorcycle gang known as the Outlaws. She also alleges that one of his friends came to her house in the pre-dawn hours and knocked on her doors in order to intimidate her. She mentions that she cannot go to the police and doesn't want to go to the command. (Enclosure 1).

d. Before Special Agent Mallett spoke to AMT2 HV, LT Robert Mills, Chaplain, reported to CAPT David Ehlers, then Executive Officer of Air Station Cape Cod, that a female came to him and reported physical violence committed against her by a Coast Guard male. LT Mills did not reveal the identities of AMT2 HV and DC2 Randolph to CAPT Ehlers.

e. CAPT Ehlers told S/A Mallett that AMT2 HV (who was unknown at this time) did not want to get DC2 Randolph (who was also unknown at this time) in trouble.

f. In her interview on 26 July 2014, she told she told Special Agent Mallett and Special Agent Cronin that she had wanted to talk only to the chaplain about the alleged incident and wanted his advice.

g. In the interview on 26 July 2014, AMT2 HV also said that she thought members of DC2 Randolph's motorcycle club were coming to her house and harassing her.

h. DC2 Randolph was interviewed by S/A Mallett and S/A Cronin on 27 July 2014. DC2 Randolph denied ever assaulting – sexual and otherwise – AMT2 HV. DC2 Randolph also denied sending his friends in the motorcycle club over to AMT2 HV's house to harass her.

i. In the same interview, DC2 Randolph also told S/A Mallett and S/A Cronin that AMT2 HV slammed her own arm in his truck's door.

j. DC2 Randolph provided his phone to CGIS for imaging and examination. Several text message communications stand out, notably the following:

- On 4 July (messages 6707 to 6700), AMT2 HV tells DC2 Randolph that she loves him and that he is her man. (Enclosure 2).¹
 - On 7 July 2014 (messages 6342 to 6302), AMT2 HV is threatening to call the police on DC2 Randolph for allegedly "cheating" on her. She also threatens to tell the command about something that transpired with two other Coast Guard members (one being SK1 Gregory) at a barbeque party that she and DC2 Randolph were at earlier that day.² (Enclosure 3).
 - On 8 July 2014 (messages 5572 to 5535), AMT2 HV tells DC2 Randolph that he gave her a sexually transmitted disease. (Enclosure 4). DC2 Randolph later went for an STD examination and received a clean bill of health.
 - On 8 July 2014 (messages 676 to 669), AMT2 HV accuses DC2 Randolph of abandoning her when he should know that she is sick and depressed. (Enclosure 5).
 - On 13 July 2014 (messages 3588 to 3548), AMT2 HV threatens to commit suicide at DC2 Randolph's home and to stage it as a homicide. (Enclosure 6).
 - On 16 July 2014 (messages 2527 to 2488), AMT2 HV tells DC2 Randolph that she gets depressed and feels worthless because of him. (Enclosure 7).
 - On 19 July 2014 (messages 1833 to 1670), AMT2 HV accuses DC2 Randolph of arranging a secret tryst with a former girlfriend, Sarah Sullivan, and threatens to tell the command that he is committing adultery. (Enclosure 8). DC2 Randolph had not engaged in sexual relations with Sarah Sullivan at any time during the relationship between him and AMT2 HV from February 2014 to approximately 26 July 2014.
- k. On 28 July 2014, AMT2 HV saw LCDR Preciosa Pacia-Rantayo, Physician, Air Station Cape Cod. During her visit, AMT2 HV makes statements to LCDR Pacia-Rantayo regarding the alleged incident at Picture Lake in Pocasset, MA, and the alleged rapes. She tells LCDR Pacia-

¹ AMT2 HV's phone number has an area code of (518) and DC2 Randolph's phone number has an area code of (334).

² According to SK1 Gregory, sometime before that day, DC2 Randolph showed him the call log to his cell phone, which showed that AMT2 [REDACTED] had placed over 100 calls to his phone before noon. The next time she called DC2 Randolph, SK1 Gregory answered the phone and told her that she should stop calling DC2 Randolph because her behavior was "stalkerish." AMT2 [REDACTED] told SK1 Gregory that she was pregnant with DC2 Randolph's child. SK1 Gregory then gave the phone back to DC2 Randolph and told him, "I don't want to be involved." At that barbeque, specifically in the garage of the homeowner who was throwing the barbeque, AMT2 [REDACTED] aggressively confronted SK1 Gregory for categorizing her behavior as "stalkerish."

Rantayo that she was not raped but that DC2 Randolph forced her to have sexual relations with him. (Enclosure 9).

l. On 31 July 2014, S/A Mallett set up covert video surveillance at AMT2 HV's residence to look for evidence of witness intimidation and other criminal misconduct. From 31 July 2014 to 22 October 2014, no activity of any criminal nature was observed. The surveillance was terminated on 22 October 2014.

m. During the course of investigation, CGIS learned that AMT2 HV was in a romantic relationship with AMT3 Adams in 2012.³ The relationship can fairly be characterized as unstable. AMT3 Adams told CGIS special agents that AMT2 HV sent him a text message saying she would press charges of assault and battery against him if he did not pay half of the housing expenses. (Enclosure 10).

n. On 5 August 2014, CGIS S/A Mallett interviewed Kimberly Fournier. Ms. Fournier was at Picture Lake on 26 July 2014 and observed AMT2 HV and DC2 Randolph arguing.⁴ Ms. Fournier told S/A Mallett that DC2 Randolph was trying to leave and that AMT2 HV was preventing him from leaving by purposely placing her foot in front of his tire. (Enclosure 11).

o. On 2 March 2015, AMT2 HV emailed CAPT Ehlers and stated that she was speaking with a therapist about being attacked, presumably by DC2 Randolph. (Enclosure 12).

p. On 27 January 2016, the Defense sent a request to Trial Counsel asking for discovery of AMT2 HV's mental health records.

q. On 8 February 2016, the Government replied to the Defense confirming the existence of mental health records but asserting the privilege under Military Rule of Evidence 513.

³ In the CGIS Investigative Action Report, AMT2 [REDACTED] is identified as "Suspect" and AMT3 Adams is identified as "Victim."

⁴ At the time of the interview, Ms. Fournier had no personal knowledge of the identities of the male and female she saw at Picture Lake.

5. Evidence and Witnesses.

In addition to the enclosures listed, above, the Defense submits as additional evidence the following article:

Jessica Engle BA & William O'Donohue PhD (2012) Pathways to False Allegations of Sexual Assault, *Journal of Forensic Psychology Practice*, 12:2, 97-123. (Enclosure 13).

The Defense requests the following witnesses be produced at the Article 39(a) session:

- AMT3 Kenneth Adams
- SK1 Justin Gregory
- Sarah Sullivan

6. Argument.

Military Rule of Evidence 513, which governs the psychotherapist-patient privilege, no longer contains the explicit "constitutionally required" exception which used to be found in the rule. However, the privilege is still subordinate to the Constitution.⁵

Nevertheless, the framework of MRE 513 exists. The rule requires the party seeking production of records and communications to specifically describe the evidence and state the purpose for which it is sought or offered. In this case, the Defense (and the Government) knows that communications were made by AMT2 HV to a therapist and that those communications or at least notes of those communications were preserved by the therapist.

Based on the above facts, the Defense believes there is a reasonable likelihood that AMT2 HV may have a serious mental condition known as borderline personality disorder (BPD) and that this condition may have been remarked on by AMT2 HV's therapist.

There are nine diagnostic criteria for BPD, which can be broken down into four domains:

- Affective disturbance that includes intense emotions, rapidly shifting emotions, and mood reactivity;

⁵ *Pennsylvania v. Richie*, 480 U.S. 39, 54 (1987) ("The constitutional error ... was that the defendant was denied the right 'to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness.'"). See also Footnote 10, "Rudderless: 15 Years and Still Little Direction on the Boundaries of Military Rule of Evidence 513" by Major Michael Zimmermann, Vol. 223 Mil. L. Rev. 312 (2015).

- Disturbed cognition;
- Impulsivity, either physically destructive to the self or generalized impulsivity;
- The existence of unstable and erratic relationships, in which the individual struggles to avoid either real or imagined abandonment.⁶

While researchers note that individuals with BPD are more likely to have experienced sexual assault, they also recognize that BPD may be a pathway for false allegations of sexual assault.

As Engle and O'Donohue state:

The switch from idealization to devaluation of the relationship and/or relationship partner may spur a desire for revenge for any past behaviors that are, in the devaluation phase, newly construed as mistreatment. In addition an individual with BPD who is feeling fear of abandonment may seek frantically to achieve the attention that is craved from the partner who is perceived to be neglectful. The impulsive nature of a person with BPD may also lead them to act on these motivations for attention or revenge by filing a false allegation of sexual assault before carefully considering the consequences.

In this case, we observe the following:

- Rapid idealization and devaluation of DC2 Randolph;
- Threatening DC2 Randolph to call the police and command in order to gain compliance from DC2 Randolph;
- Explicit statements made by ATM2 HV of feeling abandoned by DC2 Randolph;
- Physically self-destructive, impulsive behavior by placing her foot in front of DC2 Randolph's truck tire and also slamming her arm in his truck door;
- Frantically seeking attention from DC2 Randolph by claiming he gave her an STD and also threatening to commit suicide;
- Uncontrollable emotional outbursts in public gatherings;
- Delusions regarding sounds she heard at her home that she attributed to friends of DC2 Randolph attempting to intimidate her;
- Quickly making allegations to law enforcement and then walking back those allegations when speaking with medical staff;
- A history of unstable relationships.

The potential significance to the Defense of a diagnosis of BPD cannot be understated. A diagnosis of BPD is relevant to the determination of whether AMT2 HV's allegations may be due to abnormal information processing or knowingly fabricated. This information is not merely

⁶ Jessica Engle BA & William O'Donohue PhD (2012) Pathways to False Allegations of Sexual Assault, Journal of Forensic Psychology Practice, 12:2, 97-123, pg. 109.

cumulative of other information available because there is no other information available to the Defense that AMT2 HV has a diagnosis of BPD or what she told a therapist about her relationship with DC2 Randolph. The Defense has also made reasonable attempts to obtain the same or substantially similar information through non-privileged sources. The Government provided the Defense an 8,856 page report of AMT2 HV's cell phone data. The Defense conducted a thorough review of text communications made by AMT2 HV and found no information to indicate what she has told her therapist. Therefore, having demonstrated that there is a reasonable likelihood that the requested information contains evidence admissible to establish a likelihood of bias or fabrication, a review of the records *in camera* is necessary to rule on their production.

7. Conclusion.

The Defense respectfully requests that the Military Judge order the Government to subpoena the mental health records of AMT2 HV and review them *in camera* in order to determine whether AMT2 HV has a diagnosis of borderline personality disorder and whether she has made statements that are inconsistent or contradictory with the claims of the Government. After review, should the records contain such matters, the Defense requests the Military Judge order their production to the Defense. If produced, the Defense then seeks an opportunity to request an expert consultant in the field of forensic psychology.

//s//

J. W. Roberts
LT, USCG
Detailed Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by e-mail on 22 February 2016.

//s//

J. W. Roberts
LT, USCG
Detailed Defense Counsel

Tammy Randolph

July 24, Thursday

From: [REDACTED]
Subject: No Subject
Date: August 13, 2014 at 5:11 AM
To: [REDACTED]



Mrs. Randolph

I am asking for your help because I think you are the only one that can get through to Tom. I don't really know where to start besides telling you some of the basics. Tom told me I was the love of his life and I was his everything. But how he has treated me has not shown that at all. Last Thursday he finally admitted that he had been talking to his ex girlfriend, the one that got him kicked off the cutter Eagle. She had cheated on him and shortly after got married to the guy. Tom admitted that she emailed him to get together with him when she was in town and he said he thought about doing it. This broke my heart because he was my world. He broke down crying in my living room and asked me to give him another chance and to go with him when he sees a therapist. I agreed to all of it because I love him. But the next day he snapped and turned cold and mean again. Ever since Tom got divorced from Stefanie I think about 5 years ago, he has had a complex where he doesn't think he is good enough for anyone. She apparently messed with his mind and he couldn't see what he is really worth. He admittedly pushes me away when he feels like he could get hurt,

I tried very hard to make him see what I saw in him. I stuck by him when he was not a nice person and treated me badly. He has let his biker club friends completely disrespect me and threaten me repeatedly. He is so wrapped up in that club that it pushed us apart. He is at their beck and call and does anything they say or want him to do. Ever since I have voiced this opinion about them, they have not liked me at all. His club is affiliating themselves with some other clubs that are more like gangs, namely the Outlaws. Monday morning around 345 am one of his friends pounded on my front and back door, on what I'm assuming was a warning. I am scared to be in my own house now.

We have not spoken really since Sunday and I know that is partly because his club brothers are telling him not to. He is shut off and uncaring. It hurts because I believed him about his wanting to protect me, have a future with me and that I was his everything. I tried to talk to him to tell him what he is doing and his "biker brothers" are doing is wrong. I would just like to get my things back from him, and to know I am not going to be threatened by his club and their affiliates. I work in

1 of 2 HVV

LEGAL

Enclosure 1

Appellate Exhibit 25 For Identification
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the same building with one of the guys in his club, and this boy has repeatedly said nasty things about me and made my work environment very uncomfortable for me.

I can't go to the police because the president of his club was a former cop here. I don't want to go to the command because I know with all the things Tom has done and is involved in with that club, it would be the end of his career. I don't want that for him. I am worried about how self destructive he is and I am just sorry I couldn't do more to help. I talked to the Chaplin here and he can help with the safety issue, but not without getting the command involved. I really don't know what else to do. At the least I would just like my things back and the assurance from Tom that he won't let them hurt me. There has a lot of bad that has been said and done on both our parts, but I would at least like to make it civil between us. Our houses are within 3 minutes of each other and there are times we would have to see each other at work. The chaplin said he would help us at least make it tolerable, or the therapist that was suggested by Tom would also be a good option. Please help!

Thank you,

██████████

Sent from my iPhone

2 of 2 HKV

LEGAL

666 0	SMS Messages	7/4/2014 5:12:29 PM(UTC+0)	From: [REDACTED] Pres.	Yes	Yes
666 1	SMS Messages	7/4/2014 5:11:48 PM(UTC+0)		Hey can Danielle ride to Fall River with us tomorrow or no chicks allowed	Yes
666 2	SMS Messages	7/4/2014 5:11:44 PM(UTC+0)	From: +1 [REDACTED] Gary Jr	A veggie plater type thing sounds good	Yes
666 3	SMS Messages	7/4/2014 5:09:13 PM(UTC+0)	From: +1 [REDACTED] Pres.	Clutch what should I bring sunday	Yes
666 4	SMS Messages	7/4/2014 4:36:14 PM(UTC+0)		Aaaaaoooooooooooo I'm riding both days sounds good. GI sounds good about beers!	Yes
666 5	SMS Messages	7/4/2014 4:26:05 PM(UTC+0)	From: +1 [REDACTED] Pres.	OK sounds good	Yes
666 6	SMS Messages	7/4/2014 4:23:22 PM(UTC+0)		Have to work tomorrow	Yes
666 7	SMS Messages	7/4/2014 4:23:09 PM(UTC+0)		I'll ride with you GI	Yes
666 8	SMS Messages	7/4/2014 4:18:31 PM(UTC+0)	From: [REDACTED] Pres.	Also pops do you have beer at your house??? I suggest that if you do we do the same thing as clubhouse... \$1 a beer to replace what was drank.... Let me know	Yes
666 9	SMS Messages	7/4/2014 4:18:40 PM(UTC+0)	From: +1 [REDACTED] Pres.	Sunday anyone interested in running to fall river before the cookout?	Yes
667 0	SMS Messages	7/4/2014 4:18:03 PM(UTC+0)	From: +1 [REDACTED] Pres.	Game plan for tomorrow.... 0900 clubhouse.... Leave here head to pops house pick him up then to baby for black beard run.... From there we will play by ear....	Yes
667 1	SMS Messages	7/4/2014 4:12:09 PM(UTC+0)	From: [REDACTED] Pres.	Its last me 90 degrees I'm sitting on the couch naked with a cool wet cloth on my balls	Yes
667 2	SMS Messages	7/4/2014 3:38:03 PM(UTC+0)		I put mine in the room at 235 am. First time I slept in days. Throwing the other one in now fucking thing is heavy.	Yes
667 3	SMS Messages	7/4/2014 3:33:30 PM(UTC+0)	From: +1 [REDACTED] Pres.	I'm sweating NY balls off... I'm getting AC that's it... But it doesn't help right now	Yes
667 4	SMS Messages	7/4/2014 3:22:47 PM(UTC+0)		Fuck ya.	Yes
667 5	SMS Messages	7/4/2014 3:21:39 PM(UTC+0)		Ya should be cool!	Yes
667 6	SMS Messages	7/4/2014 3:21:14 PM(UTC+0)		That's awesome man.	Yes
667 7	SMS Messages	7/4/2014 3:20:45 PM(UTC+0)	From: +1 [REDACTED] Pres.	Ugh	Yes
667 8	SMS Messages	7/4/2014 3:18:21 PM(UTC+0)		Ya not feeling so hot myself	Yes
667 9	SMS Messages	7/4/2014 3:17:19 PM(UTC+0)		I am a bit mucky on the edges. Lol.	Yes
668 0	SMS Messages	7/4/2014 3:17:12 PM(UTC+0)	From: +1 [REDACTED] Pres.	Fuckin hungover	Yes
668 1	SMS Messages	7/4/2014 3:16:12 PM(UTC+0)		How's everyone feeling today? I was wasted last night	Yes
668 2	SMS Messages	7/4/2014 2:51:53 PM(UTC+0)	From: +1 [REDACTED] Ricky Jarvis	Sup Brother. Just made it to St. Johns, Canada. Heard about that damn hurricane. It hit the cape?	Yes
668 3	SMS Messages	7/4/2014 2:38:17 PM(UTC+0)	From: +1 [REDACTED] Ricky Jarvis	Sup Brother. Just made it to St. Johns, Canada. Heard about that damn hurricane. It hit the cape?	Yes
668 4	SMS Messages	7/4/2014 2:38:17 PM(UTC+0)	From: +1 [REDACTED] Pres.	Ok	Yes
668 5	Instant Messages	7/4/2014 2:34:40 PM(UTC+0)	From: [REDACTED]	Hey is that sporty fir sale still	Yes
668 6	SMS Messages	7/4/2014 2:28:27 PM(UTC+0)		Happy 4 th follas.	Yes
668 7	SMS Messages	7/4/2014 2:02:05 PM(UTC+0)		No sir why is that?	Yes
668 8	SMS Messages	7/4/2014 1:41:32 PM(UTC+0)		Young blood is it Danielle birthday ???	Yes
668 9	Instant Messages	7/4/2014 12:12:57 PM(UTC+0)	From: +1 [REDACTED]	Kind of annoyed right now	
669 0	Instant Messages	7/4/2014 12:07:13 PM(UTC+0)	From: +1 [REDACTED]	I'm on my way in a few	
669 1	Instant Messages	7/4/2014 7:01:49 AM(UTC+0)	From: +1 [REDACTED]	Love you boo	
669 2	Instant Messages	7/4/2014 7:01:49 AM(UTC+0)	From: +1 [REDACTED]	Love you boo	Yes
669 3	Instant Messages	7/4/2014 6:47:28 AM(UTC+0)	From: +1 [REDACTED]	Fuck	
669 4	Instant Messages	7/4/2014 6:47:28 AM(UTC+0)	From: +1 [REDACTED]	Fuck	Yes
669 5	Instant Messages	7/4/2014 6:44:47 AM(UTC+0)	From: +1 [REDACTED]	And I'm grateful	
669 6	Instant Messages	7/4/2014 6:44:37 AM(UTC+0)	From: +1 [REDACTED]	I'm passin out in my hobo bed with no covers it's a miracle that you love me	
669 7	Instant Messages	7/4/2014 6:43:12 AM(UTC+0)	From: +1 [REDACTED]	Fuck sar case	
669 8	Instant Messages	7/4/2014 6:43:12 AM(UTC+0)	From: +1 [REDACTED]	Brb	
669 9	Instant Messages	7/4/2014 6:43:00 AM(UTC+0)	From: +1 [REDACTED]	Yes I am!	
670 0	Instant Messages	7/4/2014 6:42:43 AM(UTC+0)	From: +1 [REDACTED]	My man	

670 1	Instant Messages	7/4/2014 8:42:07 AM(UTC+0)	From: + [REDACTED]	Aww really	
670 2	Instant Messages	7/4/2014 8:42:07 AM(UTC+0)	From: + [REDACTED]	Aww really	Yes
670 3	Instant Messages	7/4/2014 8:41:04 AM(UTC+0)	From: + [REDACTED]	Lil bit. But you a man	
670 4	Instant Messages	7/4/2014 8:39:07 AM(UTC+0)	From: + [REDACTED]	Lol creepy amplit sniffer	
670 5	Instant Messages	7/4/2014 8:38:56 AM(UTC+0)	From: + [REDACTED]	You love it.	
670 6	Instant Messages	7/4/2014 8:38:56 AM(UTC+0)	From: + [REDACTED]	Although they were smelling ripe at the parrot	
670 7	Instant Messages	7/4/2014 8:38:49 AM(UTC+0)	From: + [REDACTED]	I love you too. I can't wait to have my face in your armpit	
670 8	Instant Messages	7/4/2014 8:38:11 AM(UTC+0)	From: + [REDACTED]	I love you	
670 9	Instant Messages	7/4/2014 8:28:57 AM(UTC+0)	From: + [REDACTED]	Ok I will let you know when I'm on my way to plck your drunk ass up	
671 0	Instant Messages	7/4/2014 8:28:40 AM(UTC+0)	From: + [REDACTED]	Shit it's gonna rain tomorrow	
671 1	Instant Messages	7/4/2014 8:28:29 AM(UTC+0)	From: + [REDACTED]	Not all day I love you	
671 2	Instant Messages	7/4/2014 8:28:16 AM(UTC+0)	From: + [REDACTED]	The front door is unlocked I'll be on the couch	
671 3	Instant Messages	7/4/2014 8:28:08 AM(UTC+0)	From: + [REDACTED]	You can't sleep all day!	
671 4	Instant Messages	7/4/2014 8:25:49 AM(UTC+0)	From: + [REDACTED]	I want all day sleepin with you	
671 5	Instant Messages	7/4/2014 8:25:30 AM(UTC+0)	From: + [REDACTED]	I want you to come get me for sure	
671 6	Instant Messages	7/4/2014 8:24:44 AM(UTC+0)	From: + [REDACTED]	Ohh ok. Then I won't	
671 7	Instant Messages	7/4/2014 8:24:42 AM(UTC+0)	From: + [REDACTED]	Did you want me to just come there in the morning? Is your bed made?	
671 8	Instant Messages	7/4/2014 8:24:23 AM(UTC+0)	From: + [REDACTED]	Sleepin bag livin lol	
671 9	Instant Messages	7/4/2014 8:23:55 AM(UTC+0)	From: + [REDACTED]	Ok?	
672 0	Instant Messages	7/4/2014 8:23:42 AM(UTC+0)	From: + [REDACTED]	I'm home and in bed baby	
672 1	Instant Messages	7/4/2014 8:23:13 AM(UTC+0)	From: + [REDACTED]	Okde dokle then	
672 2	Instant Messages	7/4/2014 8:13:20 AM(UTC+0)	From: + [REDACTED]	You know that I'm not upset with you, right?	
672 3	Instant Messages	7/4/2014 8:11:12 AM(UTC+0)	From: + [REDACTED]	Why?? I thought you wanted to have a fire	
672 4	Instant Messages	7/4/2014 8:11:03 AM(UTC+0)	From: + [REDACTED]	I got trish to ride me home	
672 5	Instant Messages	7/4/2014 8:09:55 AM(UTC+0)	From: + [REDACTED]	I love you	
672 8	Instant Messages	7/4/2014 8:08:04 AM(UTC+0)	From: + [REDACTED]	Huh?	
672 7	Instant Messages	7/4/2014 8:09:02 AM(UTC+0)	From: + [REDACTED]	I'll be home babe you can wake me up	
672 8	Instant Messages	7/4/2014 5:55:13 AM(UTC+0)	From: + [REDACTED]	Call me when you get a chance	
672 9	Instant Messages	7/4/2014 5:55:02 AM(UTC+0)	From: + [REDACTED]	I love you baby I'm at the clubhouse and I'm safe	
673 0	Instant Messages	7/4/2014 5:46:49 AM(UTC+0)	From: + [REDACTED]	I'll be at the house in a sec I love you baby	
673 1	Instant Messages	7/4/2014 5:45:36 AM(UTC+0)	From: + [REDACTED]	Driving or rlding	
673 2	Instant Messages	7/4/2014 5:45:36 AM(UTC+0)	From: + [REDACTED]	Boo	
673 3	Instant Messages	7/4/2014 5:45:32 AM(UTC+0)	From: + [REDACTED]	Hey	
673 4	↩ SMS Messages	7/4/2014 5:39:07 AM(UTC+0)	From: Pres. [REDACTED]	Full time	Yes
673 5	↩ SMS Messages	7/4/2014 5:38:43 AM(UTC+0)	From: Pres. [REDACTED]	Dajhhhh talking to owner trying to hire her	Yes
673 6	↩ SMS Messages	7/4/2014 5:38:34 AM(UTC+0)		Or " old enough to know better lo young to care "	Yes
673 7	↩ SMS Messages	7/4/2014 5:37:44 AM(UTC+0)		Correct answer " to fast to live to young to die "	Yes
673 8	↩ SMS Messages	7/4/2014 5:36:43 AM(UTC+0)	From: Pres. [REDACTED]	Nick how old is Danielle	Yes
673 9	Instant Messages	7/4/2014 5:36:17 AM(UTC+0)	From: + [REDACTED]	I'm awake but I might be asleep babe	
674 0	Instant Messages	7/4/2014 5:09:20 AM(UTC+0)	From: + [REDACTED]	I brb. You gonna be up	
674 1	Instant Messages	7/4/2014 5:09:20 AM(UTC+0)	From: + [REDACTED]	You have no idea how much I'm looking forward to this weekend	

630 2	Instant Messages	7/7/2014 3:24:48 AM(UTC+0)	From: + [REDACTED]	Wow your dumb piece of shit. You did this. I fucking hate you. You win, I need my medicine
630 3	Instant Messages	7/7/2014 3:24:04 AM(UTC+0)	From: + [REDACTED]	I havnt blocked you no need for the secret number
630 4	Instant Messages	7/7/2014 3:15:04 AM(UTC+0)	From: + [REDACTED]	Wow I know you are busy with her but I need my medicine and the rest of my stuff
630 5	Instant Messages	7/7/2014 3:12:58 AM(UTC+0)	From: + [REDACTED]	Or just make me suffer even more because you're a asshole
630 6	Instant Messages	7/7/2014 3:11:44 AM(UTC+0)	From: + [REDACTED]	I know your busy with Carolina but I really need my medicine out of your car
630 7	Instant Messages	7/7/2014 2:59:21 AM(UTC+0)	From: + [REDACTED]	I'll talk to ya in the am
630 8	Instant Messages	7/7/2014 2:57:46 AM(UTC+0)	From: + [REDACTED]	Thanks bro lots went just down
630 9	Instant Messages	7/7/2014 2:57:04 AM(UTC+0)	From: + [REDACTED]	I figured something went down
631 0	Instant Messages	7/7/2014 2:57:04 AM(UTC+0)	From: + [REDACTED]	It's not a big deal. I'm not holding it against you
631 1	Instant Messages	7/7/2014 2:58:54 AM(UTC+0)	From: + [REDACTED]	I know the house is shot right now and I'm sorry you had to come home to that I really am
631 2	Instant Messages	7/7/2014 2:55:42 AM(UTC+0)	From: + [REDACTED]	You were right
631 3	Instant Messages	7/7/2014 2:55:33 AM(UTC+0)	From: + [REDACTED]	I know I am I'll talk to you tomorrow bro
631 4	Instant Messages	7/7/2014 2:54:56 AM(UTC+0)	From: + [REDACTED]	Alright we will chat
631 5	Instant Messages	7/7/2014 2:50:40 AM(UTC+0)	From: + [REDACTED]	Or just ignore me. Have fun with Carolina tonight.
631 6	Instant Messages	7/7/2014 2:43:42 AM(UTC+0)	From: + [REDACTED]	Need the rest of my stuff back or just give it to master chief when you see him tomorrow
631 7	Instant Messages	7/7/2014 2:37:52 AM(UTC+0)	From: + [REDACTED]	Need rest of stuff
631 8	Instant Messages	7/7/2014 2:28:43 AM(UTC+0)	From: + [REDACTED]	And you Justin and Ricky can all answer to the command about what you did to me
631 9	Instant Messages	7/7/2014 2:22:56 AM(UTC+0)	From: + [REDACTED]	You cheating piece of shit. I am callin the police now
632 0	Instant Messages	7/7/2014 2:22:16 AM(UTC+0)	From: + [REDACTED]	You win
632 1	Instant Messages	7/7/2014 2:16:32 AM(UTC+0)	From: + [REDACTED]	By Lindsey's asshole
632 2	Instant Messages	7/7/2014 2:15:53 AM(UTC+0)	From: + [REDACTED]	I came find you if I don't know where you are
632 3	Instant Messages	7/7/2014 2:15:35 AM(UTC+0)	From: + [REDACTED]	Past 711 asshole
632 4	Instant Messages	7/7/2014 2:15:16 AM(UTC+0)	From: + [REDACTED]	You answer me
632 5	Instant Messages	7/7/2014 2:14:34 AM(UTC+0)	From: + [REDACTED]	I'm at seven eleven
632 6	Instant Messages	7/7/2014 2:14:24 AM(UTC+0)	From: + [REDACTED]	Past it
632 7	Instant Messages	7/7/2014 2:14:22 AM(UTC+0)	From: + [REDACTED]	Going toward home
632 8	Instant Messages	7/7/2014 2:14:07 AM(UTC+0)	From: + [REDACTED]	I don't know
632 9	Instant Messages	7/7/2014 2:13:48 AM(UTC+0)	From: + [REDACTED]	OK I got it answer me so I know where to meet you
633 0	Instant Messages	7/7/2014 2:13:21 AM(UTC+0)	From: + [REDACTED]	Fuck you. I just need my keys
633 1	Instant Messages	7/7/2014 2:12:55 AM(UTC+0)	From: + [REDACTED]	I'm coming
633 2	Instant Messages	7/7/2014 2:12:48 AM(UTC+0)	From: + [REDACTED]	Walking home asshole
633 3	Instant Messages	7/7/2014 2:12:30 AM(UTC+0)	From: + [REDACTED]	You
633 4	Instant Messages	7/7/2014 2:12:24 AM(UTC+0)	From: + [REDACTED]	Where are you
633 5	Instant Messages	7/7/2014 2:12:16 AM(UTC+0)	From: + [REDACTED]	Who fucking does this to someone
633 6	Instant Messages	7/7/2014 2:11:50 AM(UTC+0)	From: + [REDACTED]	Answer me
633 7	Instant Messages	7/7/2014 2:11:42 AM(UTC+0)	From: + [REDACTED]	Walking you piece of Shit
633 8	Call Log	7/7/2014 2:10:05 AM(UTC+0)	To: [REDACTED] [REDACTED]	
633 9	Instant Messages	7/7/2014 2:10:03 AM(UTC+0)	From: + [REDACTED]	Hello
634 0	Instant Messages	7/7/2014 2:09:21 AM(UTC+0)	From: + [REDACTED]	I'm coming
634 1	Instant Messages	7/7/2014 2:09:10 AM(UTC+0)	From: + [REDACTED]	?
634 2	Instant Messages	7/7/2014 2:09:02 AM(UTC+0)	From: + [REDACTED]	Are you still at seven eleven

553 5	⇒ SMS Messages	7/8/2014 11:49:50 PM(UTC+0)		What's every one up to tonight	Yes
553 6	⇒ SMS Messages	7/8/2014 11:15:34 PM(UTC+0)		Mad I mist it brothers sry	Yes
553 7	⇒ SMS Messages	7/8/2014 10:40:57 PM(UTC+0)	From: + [REDACTED] Pres.	Great meeting last night... And very relaxing	Yes
553 8	⇒ SMS Messages	7/8/2014 9:54:04 PM(UTC+0)	From: 6848	AT&T Free Msg: The myAT&T app is a fast, free and secure way to view and pay your bill virtually anytime, anywhere. It's a simple way to check your account balance at a glance, make a payment and avoid potential late fees. Learn more at att.com/fastmyall. Standard data rates apply. Reply stop to end mktg msgs	
553 9	Instant Messages	7/8/2014 8:53:36 PM(UTC+0)	From: + [REDACTED]	I'm on way home	
554 0	Instant Messages	7/8/2014 8:52:27 PM(UTC+0)	From: + [REDACTED]	Where are you	
554 1	Instant Messages	7/8/2014 8:51:13 PM(UTC+0)	From: + [REDACTED]	Not possible	
554 2	Instant Messages	7/8/2014 8:51:13 PM(UTC+0)	From: + [REDACTED]	Not possible	Yes
554 3	Instant Messages	7/8/2014 8:51:01 PM(UTC+0)	From: + [REDACTED]	What?	
554 4	Instant Messages	7/8/2014 8:51:01 PM(UTC+0)	From: + [REDACTED]	What?	Yes
554 5	Instant Messages	7/8/2014 8:50:08 PM(UTC+0)	From: + [REDACTED]	You gave me an std	
554 6	Instant Messages	7/8/2014 8:50:08 PM(UTC+0)	From: + [REDACTED]	You gave me an std	Yes
554 7	Instant Messages	7/8/2014 8:49:24 PM(UTC+0)	From: + [REDACTED]	It's important	
554 8	Instant Messages	7/8/2014 8:49:24 PM(UTC+0)	From: + [REDACTED]	It's important	Yes
554 9	Instant Messages	7/8/2014 8:45:12 PM(UTC+0)	From: + [REDACTED]	I just left the hospital. We need to talk now. It's important	
555 0	Instant Messages	7/8/2014 8:45:12 PM(UTC+0)	From: + [REDACTED]	I just left the hospital. We need to talk now. It's important	Yes
555 1	Instant Messages	7/8/2014 7:39:44 PM(UTC+0)	From: + [REDACTED]	Kick ball?	
555 2	Instant Messages	7/8/2014 7:39:44 PM(UTC+0)	From: + [REDACTED]	Kick ball?	Yes
555 3	⇒ SMS Messages	7/8/2014 6:58:51 PM(UTC+0)	From: + [REDACTED]	Mr randolph please call scott at asf asap at [REDACTED]	
555 4	⇒ Voicemail	7/8/2014 6:51:43 PM(UTC+0)	From: [REDACTED]	From: [REDACTED]	
555 5	⇒ SMS Messages	7/8/2014 4:23:09 PM(UTC+0)		Aaaaaaooooowww,,have a great day stay cool !!!!	Yes
555 6	Instant Messages	7/8/2014 4:08:32 PM(UTC+0)	From: + [REDACTED]	Just catching up been gone for a while let's get a beer. Working my ass off too	
555 7	Instant Messages	7/8/2014 3:38:08 PM(UTC+0)	From: + [REDACTED]	Shit man workn my tl balls off why what's up	
555 8	Instant Messages	7/8/2014 3:37:53 PM(UTC+0)	From: + [REDACTED]	What are you up to bro	
555 9	⇒ Voicemail	7/8/2014 2:38:27 PM(UTC+0)	From:	From:	
556 0	⇒ SMS Messages	7/8/2014 1:44:34 PM(UTC+0)		Bout ready to quit to be honest u	Yes
556 1	⇒ SMS Messages	7/8/2014 1:42:25 PM(UTC+0)		Hey buddy what's up how's work	Yes
556 2	⇒ SMS Messages	7/8/2014 1:38:48 PM(UTC+0)	To: + [REDACTED] Pres.	I'll call you in a bit bro	Yes
556 3	⇒ SMS Messages	7/8/2014 1:38:36 PM(UTC+0)	From: + [REDACTED] Pres.	Kill someone	Yes
556 4	Instant Messages	7/8/2014 1:34:29 PM(UTC+0)	From: + [REDACTED]	Right. Well I wanted to say thank you for ruinin my life. Thank you for ripping my heart out and lying to me. Thank you for ruining my work environment and you and SK1 Gregory and YN1 Gregory start rumors about me. And thank you for letting your drug runner biker buddies disrespect me. I hope you and Carolina are very happy. I hope you are happy with what you have done. Not that you give a fuck. You won't feel any remorse. Bye	
556 5	⇒ Call Log	7/8/2014 1:22:57 PM(UTC+0)	To: + [REDACTED] Pres.		Yes
556 6	Instant Messages	7/8/2014 1:20:25 PM(UTC+0)	From: + [REDACTED]	At least your truck is unlocked right? You said my stomach medicine is in there	
556 7	Instant Messages	7/8/2014 1:17:52 PM(UTC+0)	From: + [REDACTED]	You don't have a bathtub. That would of been filling	
556 8	Instant Messages	7/8/2014 1:08:40 PM(UTC+0)	From: + [REDACTED]	So just fucking admit it was all a big scam so you can be rid of me	
556 9	Instant Messages	7/8/2014 1:08:16 PM(UTC+0)	From: + [REDACTED]	You said you wanted to talk last night and everything would be fine. But obviously that was a lie. Once you get around those assholes and whoever else you change	
557 0	Instant Messages	7/8/2014 1:02:58 PM(UTC+0)	From: + [REDACTED]	That's why you are treating me like shit now. So just say it and get it over with	
557 1	Instant Messages	7/8/2014 1:02:00 PM(UTC+0)	From: + [REDACTED]	Tell me you didn't mean you wanted to get married and have 2 boys and a girl and that I was your everything. Just say it	
557 2	Instant Messages	7/8/2014 1:00:48 PM(UTC+0)	From: [REDACTED]	You obviously don't give a fuck what happens to me so just admit it	

658	Mike Nalley	7/9/2014 10:52:50 AM(UTC+0)		Read	Yes	
659		7/9/2014 2:13:52 AM(UTC+0)		Read	Thursday sounds good to me lol	Yes
660	JJ	7/9/2014 2:13:22 AM(UTC+0)		Read	Wens Thurs when u can just give me a buzz	Yes
661		7/8/2014 11:51:31 PM(UTC+0)		Read	Working brother	Yes
662		7/8/2014 11:15:34 PM(UTC+0)		Read	Mad I mist if brothers sry	Yes
663	Free	7/8/2014 10:40:57 PM(UTC+0)		Read	Great meeting last night... And very relaxing	Yes
684	6848	7/8/2014 9:54:04 PM(UTC+0)		Read	AT&T Free Msg: The myAT&T app is a fast, free and secure way to view and pay your bill virtually anytime, anywhere. It's a simple way to check your account balance at a glance, make a payment and avoid potential late fees. Learn more at att.com/fastmyatt. Standard data rates apply. Reply stop to end mktg msgs	
665		7/8/2014 6:58:51 PM(UTC+0)		Read	Mr randolph please call scott at asf aspp at 877 890 7322 ext 1116.	
666		7/8/2014 4:23:09 PM(UTC+0)		Read	Aaaaaaooooowww,,,have a great day stay cool !!!!	Yes
667		7/8/2014 1:44:34 PM(UTC+0)		Read	Bout ready to quit to be honest u	Yes
668	Free	7/8/2014 1:38:38 PM(UTC+0)		Read	Kill someone	Yes
669		7/8/2014 8:04:50 AM(UTC+0)		Read	And you could care less I am sick and depressed, You said you would take care of me. But you abandoned me again	
670		7/8/2014 8:04:04 AM(UTC+0)		Read	You said they would take me in and act like I'm family. Yet I go there and they treat me like a leeper. And then you defend them and don't have my back. Why are your priorities so fucking twisted. It wasn't like this Sunday morning	
671		7/8/2014 7:49:13 AM(UTC+0)		Read	Why are people that completely disrespected me so much more important? You say I'm your world and you love me yet you choose them over me? It doesn't make sense	
672		7/8/2014 4:37:01 AM(UTC+0)		Read	Tom you know I'm sick	
673	Free	7/8/2014 4:36:57 AM(UTC+0)		Read	I can't believe you can tell me you want to marry me then treat me like this	
674		7/8/2014 4:36:53 AM(UTC+0)		Read	You know how depressed I am	
675		7/8/2014 4:36:50 AM(UTC+0)		Read	You don't even care. You won't miss me	
676		7/8/2014 4:36:38 AM(UTC+0)		Read	Don't do this to me	
677		7/8/2014 3:57:01 AM(UTC+0)		Read	Danielle has it brother all good bro thanks	Yes
678	Geely Jr	7/8/2014 3:16:14 AM(UTC+0)		Read	Good night brothers and proud to call u my brothers	Yes
679		7/8/2014 3:00:12 AM(UTC+0)		Read	Aaaaaooooowww home good night brothers	Yes
680		7/8/2014 2:47:44 AM(UTC+0)		Read	Talk to u tomorrow	Yes
681	Free	7/8/2014 2:42:21 AM(UTC+0)		Read	Found it in my underwear	Yes
682		7/8/2014 2:41:02 AM(UTC+0)		Read	Clutch did you finds neck less in the pool or yard at all?	Yes
683		7/8/2014 2:32:26 AM(UTC+0)		Read	Have a good night !!	Yes
684		7/8/2014 2:31:46 AM(UTC+0)		Read	you too my brother!	Yes
685		7/8/2014 2:28:39 AM(UTC+0)		Read	Have a good night brother!	Yes
686		7/8/2014 2:28:17 AM(UTC+0)		Read	great!!	Yes
687		7/8/2014 2:28:11 AM(UTC+0)		Read	home safe brothers, have a greasy night and be safe!	Yes
688		7/7/2014 11:20:16 PM(UTC+0)		Read	Brothers sry I couldn't make it tonight. Someone please call me and fill me in. Love you guys	Yes
689	Mr Carter	7/7/2014 9:34:14 PM(UTC+0)		Read	Hey its Alex Aviles, if there a plan for tomorrow morning or show up at the gym?	
690		7/7/2014 8:33:45 PM(UTC+0)		Read	goin' to, thanks brother	Yes
691		7/7/2014 4:48:12 PM(UTC+0)		Read	AT&T Free Msg: Your promise to pay \$188.46 on 07/16/2014 has been recorded.	Yes

354 8	Instant Messages	7/13/2014 3:39:37 AM(UTC+0)	From: + [REDACTED]	And you and Sarah will be tried for adultery	
354 9	Instant Messages	7/13/2014 3:39:35 AM(UTC+0)	From: + [REDACTED]	Idk she said I'll find her in my tub	Yes
355 0	Instant Messages	7/13/2014 3:39:19 AM(UTC+0)	From: + [REDACTED]	Nope. I won't be around	
355 1	Instant Messages	7/13/2014 3:39:18 AM(UTC+0)		You think she's really going to your house?!	Yes
355 2	Instant Messages	7/13/2014 3:39:07 AM(UTC+0)	From: + [REDACTED]	Yup it's a big joke. You will see. Like you said. It's just like you killed me	
355 3	Instant Messages	7/13/2014 3:39:07 AM(UTC+0)	From: + [REDACTED]	Remember what you just threatened when your asking me to come see you tomorrow	
355 4	Instant Messages	7/13/2014 3:38:42 AM(UTC+0)	From: + [REDACTED]	Ahhh ok	
355 5	Instant Messages	7/13/2014 3:38:32 AM(UTC+0)	From: + [REDACTED]	You're a lying piece of shit and good luck with Sarah. Both of your lives are ruined. Just like you did to me	
355 6	Instant Messages	7/13/2014 3:38:05 AM(UTC+0)	From: + [REDACTED]	Ahhh ok	
355 7	Instant Messages	7/13/2014 3:37:55 AM(UTC+0)	From: + [REDACTED]	Too late. And you did this	
355 8	Instant Messages	7/13/2014 3:37:54 AM(UTC+0)	From: + [REDACTED]	8F84EA86-A507-	Yes
355 9	Instant Messages	7/13/2014 3:37:54 AM(UTC+0)		Hehaha	Yes
356 0	Instant Messages	7/13/2014 3:37:37 AM(UTC+0)	From: + [REDACTED]	And this is why I'll never be with you	
356 1	Instant Messages	7/13/2014 3:37:16 AM(UTC+0)	From: + [REDACTED]	Yea ok cops will be on there way	
356 2	Instant Messages	7/13/2014 3:37:00 AM(UTC+0)	From: + [REDACTED]	Apparently she's going to my house and somehow gonna call you lol I'm not home	Yes
356 3	Instant Messages	7/13/2014 3:36:27 AM(UTC+0)	From: + [REDACTED]	And I'll make sure the cops see the text	
356 4	Instant Messages	7/13/2014 3:36:12 AM(UTC+0)	From: + [REDACTED]	Tub	
356 5	Instant Messages	7/13/2014 3:36:10 AM(UTC+0)	From: + [REDACTED]	I don't have a tub	
356 6	Instant Messages	7/13/2014 3:36:66 AM(UTC+0)	From: + [REDACTED]	Don't anwr she's threatening shit	Yes
356 7	Instant Messages	7/13/2014 3:36:34 AM(UTC+0)	From: + [REDACTED]	Lol ok go ahead	
356 8	Instant Messages	7/13/2014 3:36:28 AM(UTC+0)	From: + [REDACTED]	You did this, Because you Are a lying piece of shit that makes it a game to fuck with my head	
356 9	Instant Messages	7/13/2014 3:36:28 AM(UTC+0)	From: + [REDACTED]	Yup. An thy will see the note	
357 0	Instant Messages	7/13/2014 3:36:28 AM(UTC+0)	From: + [REDACTED]	And they will all know exactly what you did you me	
357 1	Instant Messages	7/13/2014 3:36:28 AM(UTC+0)	From: + [REDACTED]	Look in your tub when you get home	
357 2	Instant Messages	7/13/2014 3:36:28 AM(UTC+0)		Oh for the love of ged.	Yes
357 3	Instant Messages	7/13/2014 3:36:28 AM(UTC+0)		How did you find that out. And why does she want to call me?!	Yes
357 4	Instant Messages	7/13/2014 3:34:36 AM(UTC+0)	From: + [REDACTED]	Nope	
357 5	Instant Messages	7/13/2014 3:34:19 AM(UTC+0)	From: + [REDACTED]	Not until you tell me the threat	
357 6	Instant Messages	7/13/2014 3:33:51 AM(UTC+0)	From: + [REDACTED]	So what's the threat	
357 7	Instant Messages	7/13/2014 3:33:20 AM(UTC+0)	From: + [REDACTED]	I'm done with you treatin me like shit an lyig to me	
357 8	Instant Messages	7/13/2014 3:33:20 AM(UTC+0)	From: + [REDACTED]	Fine. On my way to your house. And talking to your Sarah. You won't like either	
357 9	Instant Messages	7/13/2014 3:33:20 AM(UTC+0)	From: + [REDACTED]	Call me now	
358 0	Instant Messages	7/13/2014 3:33:20 AM(UTC+0)	From: + [REDACTED]	Are you calling me or not	
358 1	Instant Messages	7/13/2014 3:33:17 AM(UTC+0)	From: + [REDACTED]	Tell me and I might	
358 2	Instant Messages	7/13/2014 3:33:10 AM(UTC+0)	From: + [REDACTED]	Are you	
358 3	Instant Messages	7/13/2014 3:32:58 AM(UTC+0)	From: + [REDACTED]	What's the outcome	
358 4	Instant Messages	7/13/2014 3:32:19 AM(UTC+0)	From: + [REDACTED]	Ok so what's the threat I'm dyin to hear it	
358 5	Instant Messages	7/13/2014 3:31:47 AM(UTC+0)	From: + [REDACTED]	And what is that	
358 6	Instant Messages	7/13/2014 3:31:12 AM(UTC+0)	From: + [REDACTED]	If you don't fix this rgl now you won't like what happens	
358 7	Instant Messages	7/13/2014 3:31:12 AM(UTC+0)	From: + [REDACTED]	Are you calling me	
358 8	Instant Messages	7/13/2014 3:31:12 AM(UTC+0)	From: + [REDACTED]	If you don't fix this right now you won't be happy with the outcome	

248 8	SMS Messages	7/16/2014 1:17:57 PM(UTC+0)		Oh my	Yes
248 9	Instant Messages	7/16/2014 1:17:52 PM(UTC+0)	From: + [REDACTED]	I need to know why you lied about following me anywhere	
249 0	Instant Messages	7/16/2014 1:17:52 PM(UTC+0)	From: + [REDACTED]	Is it okay I'm crying?	
249 1	Instant Messages	7/16/2014 1:17:52 PM(UTC+0)	From: + [REDACTED]	That is hurting me so much	
249 2	Instant Messages	7/16/2014 1:17:18 PM(UTC+0)	From: + [REDACTED]	Hen just keep texting and I'll read em on break	
249 3	Instant Messages	7/16/2014 1:16:27 PM(UTC+0)	From: + [REDACTED]	I'm putting my phone in the truck I've got work to do I already feel pissed off at you	
249 4	Instant Messages	7/16/2014 1:16:58 PM(UTC+0)	From: + [REDACTED]	You'd cry anyways there's no way to help it	
249 5	Instant Messages	7/16/2014 1:15:44 PM(UTC+0)	From: + [REDACTED]	You could help it but you don't want to	
249 6	Instant Messages	7/16/2014 1:15:44 PM(UTC+0)	From: + [REDACTED]	You wonder why I get depressed and feel worthless	
249 7	Instant Messages	7/16/2014 1:15:44 PM(UTC+0)	From: + [REDACTED]	I got sick at work last night. Don't you even care?	
249 8	Instant Messages	7/16/2014 1:16:44 PM(UTC+0)	From: + [REDACTED]	Well I need to talk and get things off my chest so I can sleep	
249 9	Instant Messages	7/16/2014 1:15:44 PM(UTC+0)	From: + [REDACTED]	It's like you want me to suffer	
250 0	Instant Messages	7/16/2014 1:15:43 PM(UTC+0)	From: + [REDACTED]	Wow. Thank you for making me cry	
250 1	Instant Messages	7/16/2014 1:15:40 PM(UTC+0)	From: + [REDACTED]	Jk	
250 2	Instant Messages	7/16/2014 1:15:30 PM(UTC+0)	From: + [REDACTED]	It's ok	
250 3	Instant Messages	7/16/2014 1:15:25 PM(UTC+0)	From: + [REDACTED]	Wow. Sorry I'm such a burden	
250 4	Instant Messages	7/16/2014 1:14:56 PM(UTC+0)	From: + [REDACTED]	Well I have people to manage and a job to do	
250 5	Instant Messages	7/16/2014 1:13:38 PM(UTC+0)	From: + [REDACTED]	If it was switched I would do my best to talk to you because I know you would need to get it off your chest so you could sleep	
250 6	Instant Messages	7/16/2014 1:12:49 PM(UTC+0)	From: + [REDACTED]	Stop being so selfish	
250 7	Instant Messages	7/16/2014 1:12:28 PM(UTC+0)	From: + [REDACTED]	Knock it off before I get upset	
250 8	SMS Messages	7/16/2014 1:12:04 PM(UTC+0)		Too funny good job Bball	Yes
250 9	SMS Messages	7/16/2014 1:11:52 PM(UTC+0)		Lol	Yes
251 0	Instant Messages	7/16/2014 1:11:48 PM(UTC+0)	From: + [REDACTED]	That's all you ever do is think all night then want to text while I'm at work	
251 1	Instant Messages	7/16/2014 1:11:28 PM(UTC+0)	From: + [REDACTED]	What else am I suppose to do? I can't sleep with all thos on my mind	
251 2	Instant Messages	7/16/2014 1:11:25 PM(UTC+0)	From: + [REDACTED]	And you know I have been thinking all night. It's not fair I need to talk and you it or me	
251 3	MMS Messages	7/16/2014 1:11:15 PM(UTC+0)	+ [REDACTED]	I Dont know about B ball performing his duties as Sgt at Arms.... We make him a handler of the two prospects and I walk out into bar and I see this.... What is he teaching them.... And they both had stare in thier eyes	Yes
251 4	Instant Messages	7/16/2014 1:10:53 PM(UTC+0)	From: + [REDACTED]	Every time things get a little better you do this to me at work so either stop it be string until later or I'll just shut my phone off	
251 5	Instant Messages	7/16/2014 1:10:31 PM(UTC+0)	From: + [REDACTED]	That's so fucked up. A change of heart? Really? So you were serious when you said you aren't leaving the cape?	
251 6	Instant Messages	7/16/2014 1:09:57 PM(UTC+0)	From: + [REDACTED]	I've just had a change of heart an believe me I still have txts too	
251 7	Instant Messages	7/16/2014 1:09:20 PM(UTC+0)	From: + [REDACTED]	Tell me why you lied about following me anywhere	
251 8	Instant Messages	7/16/2014 1:09:20 PM(UTC+0)	From: + [REDACTED]	I still have all the texts	
251 9	Instant Messages	7/16/2014 1:08:19 PM(UTC+0)	From: + [REDACTED]	I'm working be strong	
252 0	Instant Messages	7/16/2014 1:08:03 PM(UTC+0)	From: + [REDACTED]	You told me many times you would follow me anywhere. But you lied to me. Why	
252 1	Instant Messages	7/16/2014 1:08:42 PM(UTC+0)	From: + [REDACTED]	You need to not do this to me at work it only upsets me	
252 2	Instant Messages	7/16/2014 1:08:19 PM(UTC+0)	From: + [REDACTED]	And how much you hurt me when you said you wouldn't leave here, even if I couldn't stay	
252 3	Instant Messages	7/16/2014 1:07:19 PM(UTC+0)	From: + [REDACTED]	I can't so you need to be strong for me	
252 4	Instant Messages	7/16/2014 1:07:12 PM(UTC+0)	From: + [REDACTED]	And I need you to show me you love me and are sorry for how awful you have been to me	
252 5	Instant Messages	7/16/2014 1:08:38 PM(UTC+0)	From: + [REDACTED]	But you Don't do the same for me	
252 6	Instant Messages	7/16/2014 1:08:30 PM(UTC+0)	From: + [REDACTED]	Right. Thanks, I always talk to you when I'm at work	
252 7	Instant Messages	7/16/2014 1:08:05 PM(UTC+0)	From: + [REDACTED]	Sorry I have to work and I can't be on my phone today	

179 3	Instant Messages	7/19/2014 2:00:34 AM(UTC+0)	From: + [REDACTED]	I want answers then you can rot in hell with your dirty whore your so obsessed with
179 4	Instant Messages	7/19/2014 2:00:28 AM(UTC+0)	From: + [REDACTED]	With her lol call her and see where she's at just be done this is sick
179 5	Instant Messages	7/19/2014 1:59:33 AM(UTC+0)	From: + [REDACTED]	That makes so much sense!
179 6	Instant Messages	7/19/2014 1:58:02 AM(UTC+0)	From: + [REDACTED]	You're pushing is causing
179 7	Instant Messages	7/19/2014 1:57:51 AM(UTC+0)	From: + [REDACTED]	I dare you
179 8	Instant Messages	7/19/2014 1:57:49 AM(UTC+0)	From: + [REDACTED]	Ok so leave me then
179 9	Instant Messages	7/19/2014 1:57:20 AM(UTC+0)	From: + [REDACTED]	All I want is answers. Then I'm done
180 0	Instant Messages	7/19/2014 1:57:20 AM(UTC+0)	From: + [REDACTED]	Funny how you said you don't want to lose me a few hours ago then treat me like this
180 1	Instant Messages	7/19/2014 1:57:20 AM(UTC+0)	From: + [REDACTED]	I sure as hell don't deserve this. You fucking said you would be here and fix my fence. Then you lie and end up at a bar with her
180 2	Instant Messages	7/19/2014 1:57:20 AM(UTC+0)	From: + [REDACTED]	You know it's all your fault
180 3	Instant Messages	7/19/2014 1:57:20 AM(UTC+0)	From: + [REDACTED]	Nope. You're being an ASSHOLE caused this
180 4	Instant Messages	7/19/2014 1:57:18 AM(UTC+0)	From: + [REDACTED]	Wow, You are being a prick and deserve the whore
180 5	Instant Messages	7/19/2014 1:56:58 AM(UTC+0)	From: + [REDACTED]	You don't deserve second of my time acting like you are and you won't get it
180 6	Instant Messages	7/19/2014 1:56:18 AM(UTC+0)	From: + [REDACTED]	Ok sure
180 7	Instant Messages	7/19/2014 1:55:18 AM(UTC+0)	From: + [REDACTED]	Then why still call if I'm such a liar piece of shit you're proving my point to a T
180 8	Instant Messages	7/19/2014 1:55:12 AM(UTC+0)	From: + [REDACTED]	I deserve to know why you are a fucking liar and why you did this to me tonight
180 9	Instant Messages	7/19/2014 1:55:12 AM(UTC+0)	From: + [REDACTED]	I'm sure the commands would love to know you two are committing adultery
181 0	Instant Messages	7/19/2014 1:55:12 AM(UTC+0)	From: + [REDACTED]	I deserve answers you fucking asshole
181 1	Instant Messages	7/19/2014 1:55:12 AM(UTC+0)	From: + [REDACTED]	Sad you're plan of getting back with her will be ruined
181 2	Instant Messages	7/19/2014 1:54:44 AM(UTC+0)	From: + [REDACTED]	And even that's a stretch
181 3	Instant Messages	7/19/2014 1:54:38 AM(UTC+0)	From: + [REDACTED]	I'm not answering again til your calm
181 4	Instant Messages	7/19/2014 1:53:23 AM(UTC+0)	From: + [REDACTED]	If that's what u need to think
181 5	Instant Messages	7/19/2014 1:53:04 AM(UTC+0)	From: + [REDACTED]	You fucking said you would call
181 6	Instant Messages	7/19/2014 1:53:04 AM(UTC+0)	From: + [REDACTED]	Liar
181 7	Instant Messages	7/19/2014 1:52:42 AM(UTC+0)	From: + [REDACTED]	Ok sure
181 8	Instant Messages	7/19/2014 1:52:08 AM(UTC+0)	From: + [REDACTED]	Go ahead
181 9	Instant Messages	7/19/2014 1:50:56 AM(UTC+0)	From: + [REDACTED]	But she cheated on you so maybe she likes that sort of thing. She was obviously trying to get with you when she's fucking MARRIED
182 0	Instant Messages	7/19/2014 1:50:34 AM(UTC+0)	From: + [REDACTED]	I'm sure she will love the texts from you telling me how much you love me and I'm the love of your life
182 1	Instant Messages	7/19/2014 1:49:21 AM(UTC+0)	From: + [REDACTED]	Thought you were leaving me
182 2	Instant Messages	7/19/2014 1:49:04 AM(UTC+0)	From: + [REDACTED]	Ok
182 3	Instant Messages	7/19/2014 1:48:48 AM(UTC+0)	From: + [REDACTED]	I deserve answers. Fuck you
182 4	Instant Messages	7/19/2014 1:48:46 AM(UTC+0)	From: + [REDACTED]	Wow. Are you fucking kidding me
182 5	Instant Messages	7/19/2014 1:48:46 AM(UTC+0)	From: + [REDACTED]	So you can give them to me or whore can. Then your little plan of getting back with her will be ruined
182 6	Instant Messages	7/19/2014 1:48:21 AM(UTC+0)	From: + [REDACTED]	Good to know you are okay to eat.
182 7	Instant Messages	7/19/2014 1:48:13 AM(UTC+0)	From: + [REDACTED]	But I'm the crazy one. You are fucking lying
182 8	Instant Messages	7/19/2014 1:47:04 AM(UTC+0)	From: + [REDACTED]	I'm eatin gimme a minute
182 9	Instant Messages	7/19/2014 1:46:40 AM(UTC+0)	From: + [REDACTED]	It's been over 30 minutes. You said gimme a minute 30 minutes ago
183 0	Instant Messages	7/19/2014 1:46:40 AM(UTC+0)	From: + [REDACTED]	I deserve answers
183 1	Instant Messages	7/19/2014 1:46:27 AM(UTC+0)	From: + [REDACTED]	You're acting shady now and you lied about calling. It's been well over 30 minutes
183 2	Instant Messages	7/19/2014 1:45:58 AM(UTC+0)	From: + [REDACTED]	Go ahead I'm not hiding anything
183 3	Instant Messages	7/19/2014 1:44:03 AM(UTC+0)	From: + [REDACTED]	Callin her now. Then I'm calling the bar you're at.

HEALTH RECORD

CHRONOLOGICAL RECORD OF MEDICAL CARE

Active Medications	Status	Sig	Refills Left	Last Filled
DIAZEPAM---PO 5MG TAB	Active	1 TABLET AT BEDTIME MAY CAUSE DROWSINESS	HR	28 Jul 2014
RANITIDINE--PO 150MG TAB	Active	TAKE ONE TWICE DAILY #180 RF3	3 of 3	23 Jul 2014
OMEPRAZOLE---PO 20MG CAP	Active	T2 CAP PO DAILY #180 RF3	3 of 3	23 Jul 2014
OMEPRAZOLE--PO 20MG CAP	Active	T1 CAP PO QD #90 RF3	3 of 3	19 Aug 2013
RANITIDINE--PO 150MG TAB	Active	TDD #180 RF3	3 of 3	19 Aug 2013

SO Text Note Written by PACIA-RANTAYO, PRECIOSA @ 06 Aug 2014 1650 EDT

30yo ad female here stated she was sent to have her right arm checked
Had disagreement with boyfriend on Saturday (Pocasset) and she said he closed the car door on her right arm
There were people by the lake where they are (mother with kids) but when they heard disagreement they left according to patient

She called 911 but she said he grabbed her phone but somehow Bourne police still was able to come
Stated boyfriend smiled when Bourne police came because he knew them/association with them
She was taken to Falmouth ER, xray done and was told no fracture noted

Patient with boyfriend for 6 months now

Denies rape but stated twice in past he has forced her to have sexual relations with him

Difficulty sleeping, very anxious, stated she does have difficulty trusting people (since the incident)

Stated she went to court today and there is restraining order for him for 12 months

She said she was told to fill paperwork

Admits feeling tired and staying now with friends, afraid of boyfriend and his friends

Boyfriends name is Tom Randall according to patient

She said her boyfriend lives close to her house and the bar they frequently go to are also close to her house

Currently on 2 weeks of leave

Vitals not taken as patient prefers not to be screened

Right arm in sling swelling and bruising area immediately below elbow

Was given hydrocodone by ER for pain

Provide valium 5mg at bedtime as needed may cause drowsiness

She has contacted chaplain (she was talking him when I came in the room)

Patient during this visit did not express suicidal or homicidal ideation

she is still looking forward to completing her flight physical soon

I will call her today to check once she is at friends home (called patient 7-28-14 at 463pm confirmed patient is safe at her friend's home- advised not to travel by herself if she does not feel safe traveling alone)

Called patient 307pm 7-29-2014 to check if patient is safe, she said she is safe, had some sleep the valium given yesterday helped, ate some also, informed her also I will call her again to check on her safety.

Called patient today 7-30-2014 she is safe, only has 2 tablets left (valium) which helps her get some rest
Prefers not to come to base to pick prescription and just send to local pharmacy, she said CVS in Falmouth so I stated I will call her back to get number from her.

Called her back and she provided number for CVS in Falmouth and I called spoke to Kate and I was given their fax machine number I faxed prescription for Valium 5mg #15 1 Tablet at bedtime as needed may cause drowsiness

Called patient today 7-31-2014 231 pm no answer, will call again later

I called patient again today at 315pm and left message on her voicemail, she called back and she is at pharmacy
CVS was told too early to renew (only got 5 tablets of valium on her visit with me), instead she will come in clinic tomorrow at 0600 and meet me at back parking lot to pick prescription

8-1-14 patient came this morning to pick medication Valium 5mg 1 tablet at bedtime as needed may cause drowsiness #30 dispensed from pharmacy (HS2 Keeton), she said she was able to sleep 2 hours last night

Name:	[REDACTED]	Sex:	F	Sponsor/SSN:	[REDACTED]
FMB/SSN:	[REDACTED]	Tel H:	[REDACTED]	Rank:	PETTY OFFICER SECOND CLASS
DOB:	01 Aug 1983	Tel W:	[REDACTED]	Unit:	CC AIRSTA CAPE COD
PCat:	USCG ACTIVE DUTY	CS:		Output Rec. Rtn:	
MC Status:		SWS:		PCM:	PACIA-RANTAYO, PRECIOSA
Insurance:	NO			Tel. PCM:	

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CHRONOLOGICAL RECORD OF MEDICAL CARE
THIS INFORMATION IS PROTECTED BY THE PRIVACY ACT OF 1974 (PI-93-579). UNAUTHORIZED ACCESS
TO THIS INFORMATION IS A VIOLATION OF FEDERAL LAW. VIOLATORS WILL BE PROSECUTED.

STANDARD FORM 600 (REV. 5)
Prescribed by GSA and ICMB
FPMR (41 CFR) 201-45.505

Enclosure 9

Appellate Exhibit 25 Page 3 of 4
Page 11 of 21 page(s)

HEALTH RECORD

CHRONOLOGICAL RECORD OF MEDICAL CARE

28 Jul 2014 1551

Facility: Clinic: CAPE COD PRIMARY CARE Provider: PACIA-RANTAYO,PRECIOSA

Patient stated her family coming over from New York as it is her birthday today, will be in town until Sunday

8-4-2014 called today patient phone just rang (814am) but I did not left message - I am thinking patient is still asleep I will call her later

8-5-2014 called patient this morning 827am she states she is safe, inquired if there is something we can do for her today , she stated none at this time.

Called patient today 8-6-2014 reminded patient needs to see us for duty status , she said she will call and make appt

AMP Written by PACIA-RANTAYO,PRECIOSA @ 06 Aug 2014 1556 EDT

1. **CONTUSION WITH INTACT SKIN SURFACE - FOREARM RIGHT:** I purposely did not place my notes in PGUI until today 8-6-2014 due to sensitivity and since incident only occurred recently and trying to avoid somebody accidentally clicking on patients encounter , I however kept a daily note as events occur

Disposition Written by PACIA-RANTAYO,PRECIOSA @ 06 Aug 2014 1634 EDT

Sick at Home / Quarters - for

Follow up: as needed with PCM. - Comments: patient not given duty status chit as she was on leave on day of visit and until this week (week of 04 August 2014 to 08 August 2014) but advised to stay home

Discussed: Diagnosis, Medication(s)/Treatment(s), Alternatives, Potential Side Effects with Patient who indicated understanding.

Signed By PACIA-RANTAYO,PRECIOSA (Physician, Air Station Cape Cod) @ 06 Aug 2014 1634

Name: [REDACTED]

Sex: F

Sponsor/SSN: [REDACTED]

FMP/ASN: [REDACTED]

Tel H: [REDACTED]

Rank: PETTY OFFICER SECOND CLASS

DOB: 01 Aug 1983

Tel W: [REDACTED]

Unit: CG AIRSTA CAPE COD

PCat: USCG ACTIVE DUTY

CS: [REDACTED]

Onpt Rec. Rm.:

MC Status:

SWS: [REDACTED]

PCM: PACIA-RANTAYO,PRECIOSA

Insurance: NO

Tel. PCM:

LEGAL

CHRONOLOGICAL RECORD OF MEDICAL CARE
THIS INFORMATION IS PROTECTED BY THE PRIVACY ACT OF 1974 (PL-93-579). UNAUTHORIZED ACCESS
TO THIS INFORMATION IS A VIOLATION OF FEDERAL LAW. VIOLATORS WILL BE PROSECUTED.

STANDARD FORM 600 (REV. 3)
Prescribed by GSA and ICAR
FHARL (47 CFR) 201-45.505



Coast Guard Investigative Service



Action Report

Action Report # ACT-2014-10-004187 Action Type INVESTIGATIVE ACTION REPORT Action Date 10/07/2014 Approval Status APPROVED

Action Report Details

Location:

Reported Date: 10/07/2014 13:35 Hate Crime: Domestic Violence:

Reporting Agent: WOOD, DALE Approving Official: JEANFREAU, BRIAN

Related CG Unit: NC CG AIRSTA ELIZ CITY Op Name:

Related CG Type: AIR STATION Related FIR:

Related CG District: DISTRICT 05 Action Recorded: AUDIO AND VIDEO

Related CG Area: ATLANTIC AREA CGIS Office: CGIS CHESAPEAKE REGION

Related MISLE #: CGIS Region: CGIS CHESAPEAKE REGION

CGIS Self Initiated: YES Insider Threat Incident:

OIG Referral #: OIG Misc #:

Synopsis:

ON 10/02/2014, CGIS CHESAPEAKE REGION INTERVIEWED (V) KENNETH ADAMS WHO REPORTED HE WAS BATTERED BY (S) [REDACTED] DURING THEIR RELATIONSHIP WHILE STATIONED AT AIR STATION CAPE COD, MA

Associated Names

Action Report/Name Information

Involvement: VICTIM
Linked Name: ADAMS, KENNETH S Juvenile At Time:

Action Report/Name Information

Involvement: SUBJECT
Linked Name: [REDACTED] Juvenile At Time:

Action Report/Name Information

Involvement: PERSON WITH KNOWLEDGE
Linked Name: COLLINS, JAMES Juvenile At Time:

Action Report/Name Information

Involvement: PERSON WITH KNOWLEDGE
Linked Name: GOMEZ, KELVIN Juvenile At Time:

Action Report/Name Information

Involvement: PERSON WITH KNOWLEDGE
Linked Name: LYMAN, RICHARD M. Juvenile At Time:

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Action Report #	Action Type	Action Date	Approval Status
ACT-2014-10-004187	INVESTIGATIVE ACTION REPORT	10/07/2014	APPROVED

Narratives For Action

Created On: 10/07/2014 14:27 **Title:** INTERVIEW OF (V) KENNETH ADAMS
Reporting Agent: WOOD, DALE **Participating Agent:** WILLIAMS, JOHN

Narrative:

On 10/02/2014, S/A John Williams and I interviewed (V) Kenneth Adams, at the CGIS office Base Elizabeth City, NC. (V) Adams provided the following information. He was stationed at CG Air Station Cape Cod from 2008- 2013 and met (S) [REDACTED] while at CG Air Station Cape Cod in 2012. They starting a dating relationship and in August 2012, he and (S) [REDACTED] rented a house together at 237 Old Mills Rd, Marstons Mills, MD. Shortly after moving in together, (S) [REDACTED] filed a complaint against the night supervisor over her duty section for unfair treatment. He noticed (S) [REDACTED] started to come home from work and was extremely stressed. One day in August or September when (S) [REDACTED] returned home from work and an argument started between them. (S) [REDACTED] shoved him in the chest with her hands and after he turned around and walked away, she shoved him in the back. He left the house and while he was gone, (S) [REDACTED] threw all of his belongs out of the residence on to the front yard, including his dog. He called 911 and the Barnstable Police Department responded to the residence. The police took no action but he left the residence to avoid further issues. He does not recall what started the argument. On one occasion, he reported to duty with scratches on his face, which he got from (S) [REDACTED]. On another occasion, he reported to work with a black eye from when (S) [REDACTED] struck him during an argument. (PK) Kelvin Gomez and (PK) James Collins had noticed the injuries and told him to report to (PK) Richard Lyman. He reported to (PK) Lyman and the Command Master Chief of the Air Station that (S) [REDACTED] had been getting violent with him while in the relationship. He does not recall the Command Master Chief's name. He noticed that their relationship got worse over time especially towards December. During arguments, (S) [REDACTED] would become very angry and violent with him. He was unsure why (S) [REDACTED] would always lash out at him so he decided to live in the garage and sleep on an air mattress. During an argument in December 2012, (S) [REDACTED] became violent and began to hit him. The Barnstable Police Department responded to the residence and he filed a report. He and (S) [REDACTED] later received notices in the mail to appear in court for assault and battery. The court dismissed the case since neither party wanted to press charges. After the December argument, he moved into (PK) Lyman's residence until he could transfer to Air Station Elizabeth City, NC in March 2013. During the course of their live-in relationship, (S) [REDACTED] had thrown shoes, a gallon jug of water at him, struck him, scratched his face, and gave him a black eye. He never struck (S) [REDACTED] during any of the arguments, but he would only attempt to restrain her from hitting him. (S) [REDACTED] never accused him of sexually assaulting her to the police or anyone else. He and (S) [REDACTED] having consensual sex during the time they lived together. He stayed in touch with (S) [REDACTED] after he moved out because he was paying for half of the rental house expenses. (S) [REDACTED] texted a message that she would press charges of assault and battery against him if he did not pay half of the house expenses. In the summer of 2013, (S) [REDACTED] came to his Elizabeth City residence uninvited. (S) [REDACTED] told him she destroyed his things because she was mad, (S) [REDACTED] also came to his residence while she attended training at ATTC Elizabeth City. She wanted to help him replace everything of his she threw out when they lived together -He felt uncomfortable that (S) [REDACTED] knew where he lived so he stayed with (PK) Dallas Prudent until (S) [REDACTED] training was over. In August 2014, he got a new cell phone and a new phone number. He does not have his old cell phone that he used while in the relationship with (S) [REDACTED]. (V) Adams provided a voluntary written statement (See Attachment). (V) Adams was provided the contact information to CG Work Life. The interview was video/audio recorded with the Case Cracker recording system and burned onto a Digital Video Disc (DVD) and placed into evidence.

Involved Agents

Agent: WOOD, DALE	Involvement: REPORTING AGENT		
Investigative Hours: 6.00	Travel Hours: 0.00	Intel Support Hours: 0.00	Total Hours: 6.00
Agent: WILLIAMS, JOHN	Involvement: PARTICIPATING AGENT		
Investigative Hours: 4.00	Travel Hours: 0.00	Intel Support Hours: 0.00	Total Hours: 4.00
Grand Total Hours:			10.00

Action Related Evidence / Custody Items

BarCode #	Property Type	Category	Status	Receipt #
EVI-2014-10-000891		RECORDING (AUDIO/VIDEO)	CHECKED IN	3818072

Action Related Cases

Case Management ID	Case Type	Date/Time Logged	Investigation Status	Primary	Comments
<u>CSE-2014-07-000250</u>	CRIMINAL INVESTIGATION	07/26/2014 08:09	OPEN PENDING ADJUI	<input type="checkbox"/>	(V) ADAMS INTERVIEW

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Coast Guard Investigative Service



Action Report

Action Report # ACT-2014-08-001541 Action Type INVESTIGATIVE ACTION REPORT Action Date 08/05/2014 Approval Status APPROVED

Action Report Details

Location: 3025 CRANBERRY HIGHWAY, EAST WAREHAM, MA

Reported Date: 08/05/2014 14:41 Hate Crime: Domestic Violence:

Reporting Agent: MALLETT, PETER Approving Official: HOYLE, KELLY

Related CG Unit: Op Name:

Related CG Type: Related FIR: NO

Related CG District: DISTRICT 01 Action Recorded: NO

Related CG Area: ATLANTIC AREA CGIS Office: CGIS NEW ENGLAND REGION

Related MISLE #: CGIS Region: CGIS NEW ENGLAND REGION

CGIS Self Initiated: NO Insider Threat Incident: NO

OIG Referral #: OIG Misc #:

Synopsis:
ON 08/05/14 I INTERVIEWED (W)FOURNIER.

Associated Names

Action Report/Name Information

Involvement: WITNESS

Linked Name: FOURNIER, KIMBERLY A Juvenile At Time:

Action Report/Name Information

Involvement: SUBJECT

Linked Name: RANDOLPH, THOMAS J. Juvenile At Time:

Action Report/Name Information

Involvement: VICTIM

Linked Name: [REDACTED] Juvenile At Time:

Narratives For Action

Created On: 08/05/2014 15:08 Title: SEARCH FOR (W)FOURNIER

Reporting Agent: MALLETT, PETER Participating Agent:

Narrative:
On 08/05/2014, I telephonically contacted the Massachusetts State Police to seek assistance in identifying the potential witness who dialed 9-1-1 reporting a domestic altercation between (S)Randolph and (V) [REDACTED] on 07/26/2014. I was contacted a short time later and provided the telephone number of the reporting source who called the 9-1-1 operating center at 1028 hours on 07/26/2014 reporting a domestic altercation. I subsequently ran a CLEAR report on the provided telephone number. This search revealed the caller's identity as Kimberly Fournier. (W)Fournier had a listed address in East Wareham, MA.

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Public Availability to be Determined Under 5 U.S.C. §552

Action Report #	Action Type	Action Date	Approval Status
ACT-2014-08-001541	INVESTIGATIVE ACTION REPORT	08/05/2014	APPROVED

Created On: 08/08/2014 08:41	Title: TELEPHONE CONTACT
Reporting Agent: MALLETT, PETER	Participating Agent:
Narrative:	
<p>On 08/05/2014 at 1320 hours, I telephonically contacted (W) Kimberly Fournier to arrange an interview. Fournier called me back at 1350 hours. Fournier said she was in the middle of a family emergency but agreed to speak briefly by phone and to sit down for a formal interview at a later date. Fournier recalled arriving at Picture Lake that Saturday morning and witnessing a male and a female arguing in the parking area near the beach. The unidentified female was standing near the door of the unidentified males truck. She could not hear what they were arguing about but it was clear the female did not want the male to leave. Fournier recalled overhearing the male state something approximating either, "Can you just move so I can leave?" or "Just let me go." Fournier could not recall if the female had her arms in the window of the truck, but said it was clear to her she was attempting to prevent him from leaving. She also witnessed the female place her foot in front of the rear drivers side tire as the truck was attempting to move forward. She specifically recalled it was the female who placed her foot in front of the tire vice the truck moving forward towards her foot. At short time later, Fournier recalled hearing a scream, the female's voice saying, "Ow!" and then she saw the female running to her car. Fournier did not witness any interaction between the two immediately leading up to the scream. The male then left in a hurry but returned almost immediately and parked near the female. Fournier then called the police, reported the incident and left the area with her children. The telephone contact ended at 1400 hours.</p>	

Involved Agents							
Agent: MALLETT, PETER				Involvement: REPORTING AGENT			
Investigative Hours:	1.00	Travel Hours:	2.00	Intel Support Hours:	0.00	Total Hours:	3.00
						Grand Total Hours:	3.00

Action Related Cases						
Case Management ID	Case Type	Date/Time Logged	Investigation Status	Primary	Comments	
CSE-2014-07-000250	CRIMINAL INVESTIGATION	07/28/2014 08:09	OPEN PENDING ADJUI	<input type="checkbox"/>	TELEPHONE CONTACT WITH (W)FOURNIER	

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-----Original Message-----

From: [REDACTED] K AMT2
Sent: Monday, March 02, 2015 2:32 PM
To: Ehlers, David M CAPT
Cc: Ash, AnnaCarrie M CDR; Wunder, Kismet R LCDR; Cardona, Leslie S CIV
Subject: PCS Request-AMT2 [REDACTED]

Captain,

As per my instructions, please accept this email as my request and my reasons for an expedited PCS transfer and a IDY in the area until the transfer happens. Originally, I was slated for a one-year extension at Air Station Cape Cod, but after recent events, I believe relocating is in my best interest.

After dealing with the traumatizing events of being attacked, my Air Station was a safe haven and my job provided me with a positive outlet to focus on. That is no longer the case. I do not feel safe returning to work at Air Station Cape Cod. After being domestically and sexually assaulted, I went to my command for protection, support and help. But instead of protection, my command aided in the decision to move my attacker back within my proximity and on multiple occasions neglected to let me know when my attacker was on base. I begged to have the attacker moved away from my immediate area for safety reasons, but I was told that since "he hadn't hurt me in months, that I should feel safe".

Instead of support and concern for my well-being, I experienced a series of events involving my command not supporting me and ultimately me feeling like I was in a hostile work environment. When my command grounded me after I reported a fellow co-worker's harassing and bullying behavior towards me, there was no way that I could continue to effectively serve at the Air Station.

After I was grounded and lost the ability to perform my duties, I feel into a depression and physical illness that has been hard to overcome. The emotional, physical and mental distress caused by Air Station Cape Cod's command has had a crippling effect on my life. It was recommended and documented by two doctors that the hostile work environment is too toxic and dysfunctional, and if I remain in this type of environment, it will further damage my health.

I would like the opportunity to delay my expedited transfer until the normal transfer season, such as May timeframe, for the reasons below.

-I am finally speaking with a therapist about not only being attacked, but about the mental damage that the command has done to me. For very obvious reasons, it is hard for me to trust. I feel that starting over right away after I finally am receiving treatment would be detrimental to the progress I have made. A few month delay would contribute greatly to my emotional health.

-I also have a huge support system here, which is what I need right now to try to overcome what has been happening to me. My family's support is essential to my well being.

-Sadly the stress that I have been under has affected my physical health, so I need to get my stomach issues resolved and I am being treated by a gastroenterologist in the area.

-Due to retaliation from the hostile work environment investigation, my last RPQ was not signed off. I would like to get that resolved and be eligible for my SWE before I move out of the area.

-There are topics that need to be discussed in person for the multiple CGIS investigations and with the Bourne Police Department.

-A lot of my belongings are inaccessible due to massive amounts of snow that has blessed the Cape Cod area. It would also be impossible to get a moving truck down my small street.

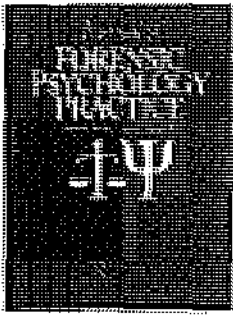
-It is very important to me to not stand out. Arriving at a new air station before it is even remotely considered transfer season would immediately ostracize me and in my weakened state right now, that will further damage my psyche. I want the best possible situation to go into so I can continue my career and hopefully restore my faith in the Coast Guard.

If my request is approved, if possible, I would like to be temporarily assigned to a unit other than the Air Station.

For all of these reasons, I am requesting an expedited transfer to Air Station New Orleans. My biggest reason for that is the support system I will have in that area. I have family and close friends that are in that area. I have worked very hard to assimilate to the H60 airframe and community. But due to the incidents at Air Station Cape Cod, I no longer feel I will ever get a fair chance at any H60 air station. The aviation community is obviously very small, but the H60 community is even smaller and I know that any H60 air station I go to will be briefed on how I brought up all the glaring problems at the air station and I will be immediately labeled. Although I loved my time on C-130's, I am most content working on helicopters. I would like the opportunity to continue to work on a helicopter platform. I have been through an airframe transition before and quickly fulfilled my air crew and maintenance duty requirements. I feel that Air Station New Orleans will give me the well deserved opportunity to have a fresh start, the chance to get far away from the toxic environment I am in now, and most importantly the ability to completely heal.

Thank you for your consideration of this request.

V/R,
AMT2 [REDACTED]



Pathways to False Allegations of Sexual Assault

Jessica Engle BA & William O'Donohue PhD

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To link to this article: <http://dx.doi.org/10.1080/15228932.2012.650071>



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AREA REVIEWS

Pathways to False Allegations of Sexual Assault

JESSICA ENGLE, BA

Department of Clinical Psychology, University of Nevada, Reno, Nevada

WILLIAM O'DONOHUE, PhD

Department of Psychology, University of Nevada, Reno, Nevada

Not all allegations of sexual assault are true. Unfortunately, there has been little work on understanding the prevalence of false allegations or pathways to these. This paper proposes 11 pathways to false allegations of sexual assault: (a) lying, (b) implied consent, (c) false memories, (d) intoxication, (e) antisocial personality disorder, (f) borderline personality disorder, (g) histrionic personality disorder, (h) delirium, (i) psychotic disorders, (j) dissociation, and (k) intellectual disability. These pathways originate in the psychological diatheses of the individual. Further research is needed into the frequency of these pathways, ways to accurately detect these, and whether other pathways exist.

KEYWORDS *false allegations, sexual assault, psychological pathways, rape, lying, mental disorders*

In many sexual assault cases, there is little, if any, unequivocal physical evidence of a crime and no third-party eyewitnesses to bring decisive testimony to the event in question (Binder & McNeil, 2007), complicating the task of discerning the truth of a claim. Without clear physical evidence, the decisions of the legal system are based merely on the relative credibility of the narratives of the persons involved. In addition, physical evidence can be ambiguous: Medical evidence may allow a determination of whether intercourse occurred, and perhaps whether the intercourse was "rough," but not whether that sexual contact was consensual. Thus, in cases such as these

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that lack clear corroborating evidence, an understanding of pathways to false allegations may be useful to help determine the accuracy of the claims.

Binder and McNeil (2007) presented several civil cases in which the alleged perpetrator of sexual assault and/or boundary violations completely denied all wrongdoing, and there was no corroborating evidence to help verify the claims of either party. The authors contended that in cases such as these, carefully administered and interpreted psychological evaluations may provide a context for allegations by allowing the court to understand personality traits, personality disorders, cognitive disability, and psychotic symptoms that may affect the alleged victim's allegations. Certain psychological processes have in past cases explained the lack of corroborating accounts between a plaintiff and a defendant. Some relevant psychological processes that have been suggested are psychosis, hypersensitivity when interacting with others, tendency toward exaggeration, and serious cognitive problems (Binder & McNeil). The authors also suggested that there may be several additional psychological markers to consider when determining the credibility of a complaint. We believe that a more thorough identification of these pathways is important and can be partly achieved by understanding the role of psychological disorders, as currently specified by the *Diagnostic and Statistical Manual* (DSM-IV-TR; American Psychiatric Association, 2000), in explicating specific motivations and cognitive distortions that may be associated with false allegations and malingering behaviors. Some of these variables may interact in a complex manner. For instance, an individual with borderline personality may place herself in riskier situations and may, therefore, have an increased risk of actual sexual assault. Conversely, as we discuss below, the individual with borderline personality disorder may also suffer from certain key cognitive distortions that lead to false reports. We caution against a simplistic reading of this analysis in that it never is the case that because a person suffers from a certain diagnosis that her allegations are, therefore, false. In addition, it can be useful for the forensic mental health professional to understand these pathways in context with the alleged perpetrator's mental health status. Again, no diagnosis would mean that the perpetrator is guilty of the accusations; however, mental health professionals can offer expertise in helping to understand the pathways to false allegations and false denials. Part of the focus of the present paper, then, is to bring attention to the dearth of psychological literature investigating correlates and causal mechanisms of false allegations of sexual assault and to propose a model specifying the major causal pathways to false allegations. These pathways are intended as a model for further empirical investigation.

Therefore, a legitimate concern about enumerating such pathways is the misuse of psychological diagnoses in determining the accuracy of specific accusations. It is important to recognize that a model that comprehensively and accurately identifies pathways provides information regarding necessary

but not sufficient conditions for false allegations. There is no psychological diagnosis that alone could preclude the possibility that a sexual assault occurred. Rather, these generate rival plausible hypotheses that need to be evaluated to thoroughly evaluate all the possible candidates for explaining the allegation. That is, an investigation into a contested sexual assault charge is more complete and accurate when two overarching hypotheses are considered: (a) This individual with psychological condition x was indeed sexually assaulted or (b) this individual with psychological condition x is making a false allegation due to condition x (x can be equal to 0). This is more complete than considering only one of these possibilities. Of course, when no relevant psychological condition is present, the second need not be considered. In addition, where there is overwhelming evidence (witnesses) that make condition (b) obviously false, then again, this condition need not be evaluated. Other methodologies such as lie detection (Gruben & Madsen, 2005) may be used to make assessments, but a review of these methods is beyond the scope of this paper.

A person falsely convicted (or even accused) of an alleged crime will experience significant psychological, financial, and social consequences. Prevention of both false convictions and false acquittals should be the utmost priority in any sexual assault case. Considering the dearth of forensic research on causal mechanisms of false allegations by claimants, it appears that this work is needed to offset the bulk of forensic practice that is not guided by a model to understand how false allegations may be generated. We make no claim regarding the moral equivalency of a true allegation that is not believed versus a false allegation that is believed. Rather, we do suggest that minimizing both of these kinds of errors is a worthy goal.

LEGAL AND CULTURAL HISTORY OF SEXUAL ASSAULT IN THE UNITED STATES

It is no surprise that merely raising the issue of false allegations may evoke tension and unease in some; for some, this question is not politically correct. To be sure, historically claims of sexual assault were handled relatively unfairly for the victims both legally and socially. In early America, many people looked upon rape perpetration as little more than a sexual misdeed on the level of premarital sex and as an unfortunate consequence of sexual desire (Block, 2006). Women's claims of sexual assault were often unfairly doubted. In fact, *psuedologia phantastica* was the legally and scientifically acknowledged term used to describe a delusional state in which a woman falsely believed that she had been raped (Bessmer, 1984).

Beginning in the 1960s, a public counteraction to the prevailing treatment of rape victims gained prominence, largely spurred by the feminist

movement (Spohn & Horney, 1992). As a result, the nation underwent significant changes in the legal handling of sexual assault cases. Sweeping new laws were adopted in all 50 states aimed at decreasing complainant attrition, increasing rates of reporting, and improving the overall treatment of victims filing complaints. Despite these efforts, recent studies on the outcome of rape reform laws have shown mixed results about their impact, indicating partial effectiveness at best (see Clay-Warner & Burt, 2005; Spohn and Horney, 1992). Furthermore, studies on the number of unreported sexual assaults reveal consistently low rates of reporting to the police, from 15% of all rapes (Wolitzky-Taylor et al., 2011; Tjaden & Thoennes, 2006) down to 5% in some samples (see Fisher, Cullen, & Turner, 2000).

Study findings have identified several reasons for the low rates of reporting. In a national sample of U.S. women, the most commonly endorsed reason for choosing not to report was fear of reprisal by the perpetrator (Wolitzky-Taylor et al., 2011), indicating an endemic distrust of case processing and protection services for the victim. Among victims who reported the rape and those who did not, the most frequently endorsed concern about reporting was the belief that others would blame the victim for the rape. Indeed, the acceptance of *rape myths*, or widely held and generally false beliefs about rape that serve to deny and justify male sexual aggression (Lonsway & Fitzgerald, 1994), is associated with a higher tendency to ascribe responsibility for sexual assault to the victim (Burt, 1980). Examples of rape myths include the incorrect beliefs that women routinely lie about being raped, that most rapes are perpetrated by strangers, and that only women who have certain characteristics (e.g., poor moral character, promiscuous, unsafe) are victims of rape (Lonsway & Fitzgerald, 1994).

Given the mixed performance of rape reform laws and the persistence of rape myths, it is no surprise that empirical investigations of false rape allegations would be subject to heated contention. Past studies of false allegations have been carefully inspected for methodological, definitional, and ideological mistakes, and many have been found (Lisak, Gardiner, Nicksa, & Cote, 2010). The significant variability in estimates of false rape allegations has reflected these methodological weaknesses, with study estimates ranging from 1% to 90% of all reported cases (Gross, 2009; Kelly, 2010; Lonsway, 2010; Lisak et al., 2010). These differences were generally related to discrepancies between researchers about definitions of terms and methodology of data collection (Lisak et al., 2010). One predominant criticism of the literature has been the inaccurate categorization of rape investigation results by the police. It has been suggested that law enforcement agencies have been known to incorrectly categorize "unfounded" cases, among other cases, as "false allegations" (Lisak et al., 2010). As articulated by the International Association of Chiefs of Police (IACP), during police investigations a false allegation may be determined only using the following process:

The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. *This determination can be made only after a thorough investigation.* This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case, the investigation would be labeled unsubstantiated. *The determination that a report is false must be supported by evidence that the assault did not happen.* (IACP, 2005, pp. 12–13; emphasis in original)

“Evidence that the assault did not happen” must consist of the existence of physical or eyewitness evidence as opposed to the mere absence of evidence (IACP, 2005). Lisak et al (2005) compiled findings from studies that addressed the aforementioned issues of categorization, terminology, and methodology and placed a narrower estimate of the frequency of false rape allegations between 2% and 10%. Thus, the most recent, more methodologically adequate studies have indicated that false allegations are somewhat rare. However, it is important to note that law enforcement agencies cannot always identify false allegations during the investigation process, as it is often the case that little or no physical or eyewitness evidence exists to substantiate that sex was consensual or that the rape never occurred. However uncommon, false accusations of sexual assault, indeed, occur, and falsely alleged perpetrators are thus subject to besmirched reputations, interruptions in important life functions and, in some cases, incarceration. In the event that an investigation fails to identify a false allegation and the case proceeds to prosecution, a psychologically informed conceptualization of the etiology of false allegations could bolster existing evidence that supports the falsehood of a claim.

A brief description of one infamous and controversial legal case may help to elucidate the potential contribution of psychological pathways of false allegations of sexual assault and the initial and lingering consequences for accused persons. In the following case, the alleged victim never recanted her claim, and her allegations were never determined to be false. However, an understanding of the psychological functioning of the alleged victim as considered in the context of available evidence could have informed the investigators about potential motives or cognitive distortions that could lead the accuser to file a false rape allegation. On March 13, 2006, the lacrosse team at Duke University hired two exotic dancers, Crystal Magnum and Kim Roberts, to perform at a house party (Hemmens, 2008). While at the house, Magnum fell unconscious for a short while after which an exchange of insults occurred between the lacrosse team and the two strippers. Roberts then drove Magnum to a store where she was dropped off. After being arrested for public drunkenness, Magnum accused three of the Duke lacrosse teammates of rape. The allegations were pursued over the

course of 1 year in which all three men were charged with rape and publicly vilified. The lacrosse season was cancelled, and the coach was fired. According to some, a large amount of evidence was withheld from the public that may have cast suspicion on the accusation, all while the reputations of the three accused men were continually besmirched (Hemmens, 2008; Setrakian, 2007). DNA evidence revealed no physical evidence that any of the three men had raped her. Magnum also came under the suspicion of the authorities by telling conflicting versions of the sexual assault. In one instance, Magnum reported that she was gang raped by five men in the bathroom; at another time, she reported that she was not forced to have intercourse with anyone, although the men did pull her from her car and groped her (Taylor & Johnson, 2007).

The discrepancies in Magnum's account are considered "core" discrepancies in that they are central details of the case and, thereby, any variation in these details is considered a strong indication of a false account of events. Research on the accuracy of emotional memories indicates that in an emotional event, individuals are more likely to remember core features of the event (e.g., forced intercourse occurred, whether the event occurred inside or outside) than peripheral features (e.g., which street the rape occurred on, what perpetrators were wearing) and, in fact, memory for core features of the event is actually enhanced by the emotionality of the situation whereas memory of peripheral features tends to be poorer (Kensinger, 2007).

It is noteworthy that Magnum's initial claim that she was raped occurred when she was being admitted to an inpatient ward for psychiatric observation and treatment—a fact that did not receive much attention by the prosecution or others (Taylor & Johnson, 2007). Knowing the details of the mental health report could have helped investigators determine whether there were (a) motives for knowingly filing a false allegation or (b) reasons why Magnum would have unknowingly misinterpreted the events that took place.

Later, the men were exonerated in what the judge called, "a tragic result of a rush to accuse." This rush to accuse should have been mediated by a fair consideration of the possibility of a false accusation and an examination of pathways to false accusations. Despite this ruling, the case could still be labeled "unfounded," as the term *false allegation* is often reserved for cases in which a claimant knowingly filed allegations that were false; either the claimant knowingly identified the wrong perpetrator, or she fabricated the entire event (Gross, 2009). In this case, Magnum never recanted her claims, and it cannot be determined whether she actually believed the events occurred or whether she knew that she had fabricated her story. However, an increased understanding of possible psychological pathways could have helped explain core inconsistencies in her statement and potential motivations to file a false allegation.

For the purposes of our paper, we will define the term *false allegations* as either knowingly fabricated or claims based on abnormal information processing, because in some cases, the claimant may actually believe that a coerced sexual experience occurred in ways that it did not occur. In this paper, we suggest that some psychological disorders may increase the likelihood of believing a sexual assault occurred when it did not. Additionally, some psychological disorders may be related to an increase in motivation to fabricate an allegation of sexual assault in an effort to achieve what may be believed are the positive consequences of a false report.

PATHWAYS TO FALSE ACCUSATIONS OF SEXUAL ASSAULT

The pathways introduced in this section require further empirical investigation and validation. These may not be an exhaustive list of possible pathways, although many pathways worth careful consideration have been included.

Lying for Conscious and Unconscious Secondary Gain

That the alleged victim is knowingly making a false claim of sexual assault is a pathway that is usually considered, and sometimes this is the only pathway considered by key individuals in the case. Humans do lie, and their lies can be difficult to detect. Often, humans lie because of what they perceive as the favorable consequences for lying; for sexual assault these consequences could be

1. the severe negative consequences that the alleged perpetrator experiences,
2. secondary gain from victim status,
3. excusing behaviors or characteristics of the alleged victim (e.g., sexual activity, pregnancy, sexually transmitted diseases), and
4. financial gain.

In sections below, we consider lying that comes out of other psychiatric diagnoses (e.g., the chronic lying associated with an individual with antisocial personality disorder). In this pathway, we acknowledge that lying also occurs with "normal" individuals (i.e., individuals who have no psychiatric diagnosis, who seek certain consequences through their lying). Thus, the victim knowingly lying about the assault is a rather obvious pathway to false allegations. Deception is difficult to detect, but the alleged victim's history of truthfulness, current motivations, and gain from the allegations need to be considered.

Denial of Consent

A key issue in sexual assault is whether consent was given for the sexual contact. Consent is complex and, in real-world situations, may have significant variability and may be rather subtle and, in general, an intricate process. Rarely do sexual interactions begin with individuals explicitly stating "I give you permission to do x, y, and z" (Hall, 1998). Consent in sexual situations is often implied, sometimes by the absence of a negative ("She didn't say no or move away") or inferred ("She seems to be enjoying this" or "We did this in the past so I assumed she was ok with it"). Hickman and Muehlenhard (1999) found that nonverbal tactics were used more often than verbal consent. Consent is thought to involve both knowledge of what is being consented to and a belief that the person is free to either assent or not. Thus, a claim of lack of consent can also come from the person's "feeling trapped" or "coerced," which, again, the two parties may interpret differently. However, mistakes can be made in these situations and given the motivations of the parties, these mistakes can be motivated ("I want this, so I interpret her silence as consent" or "She was free to leave at anytime; I was on top of her because I thought she wanted that").

Understanding whether consent was given is made more complex by the fact that consent early in the interaction for a certain kind of sexual contact is not consent for any and all further sexual contact in that episode. In addition, consent for the same act (consent last week) is not consent for all future contact. This complexity led to the infamous Antioch College consent policy that stated that there were multiple levels of sexual intimacy and every time someone wants to proceed to another level, they must explicitly ask and receive explicit verbal permission to proceed to this level (Francis, 1996):

If the level of sexual intimacy increases during an interaction (i.e., if two people move from kissing while fully clothed—which is one level—to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before moving to that new level. If one person wants to *initiate* moving to a higher level of sexual intimacy in an interaction, *that person is responsible for getting the verbal consent of the other person(s) involved before moving to that level.* (p. 137)

This policy was critiqued on the grounds of its impracticality, but it raises the question how explicit and how often does consent need to be conveyed? This ambiguity creates a pathway for a false allegation in which the alleged victim engaged in behaviors that can plausibly be interpreted as providing consent, but the victim herself may not understand or realize this. Thus, a false allegation can arise when it was reasonable to believe consent was given but the alleged victim falsely believes that it was not.

In this situation, the controversy is not whether sexual content occurred but whether consent for this sexual content occurred.

The final level of complexity regarding this pathway occurs in the attempt of professionals involved in the case to accurately understand after the fact the details of whatever consent process did or did not take place. By its nature, this will generally be a "he said, she said" matter in which it is very difficult to resolve conflicting claims. However, much can ride on the heuristics individuals use to resolve this indeterminate matter.

A False Memory

The theory of *repression*, according to Freud (1910), posits that traumatic memories can be pushed out of conscious awareness and essentially forgotten for long periods of time. Though some psychologists argue there is a lack of empirical support for the theory of repression (Loftus, 1993), many psychologists do believe that repression is a real process by which memories can be forgotten and later remembered (Boag, 2010). One psychological process that may resemble repression is false memory.

The existence and prevalence of repressed memories is a source of controversy (McNally & Geraerts, 2009), and yet research does exist demonstrating the successful implantation of fabricated memories. In one of the first studies on the implantation of false memories, participants were given short narratives of childhood experiences, purportedly obtained from relatives, and asked to try to remember these experiences (Loftus, Coan, & Pickrell, 1996). Participants' relatives were contacted and asked to provide childhood stories about the participants. However, researchers created one fabricated narrative: The participant, at age 5 or 6, had been lost in a public place (e.g. a shopping mall) for an extended period of time and eventually rescued. Participants were encouraged to try to remember both true and fabricated events over the course of several weeks. When participants were asked later whether they recalled the events, nearly one-fourth of them reported having memories of the fabricated event. Though some individuals reported remembering being lost only vaguely, others reported remembering vivid visual details and emotional experiences. Since this study, several researchers have successfully replicated these results using different suggestive techniques and scenarios (e.g. Mazzoni, Loftus, Scitz, & Lynn, 1999; Hyman & Billings, 1998; Hyman & Pentland, 1996; Garry, Manning, Loftus, & Sherman, 1998). Many of the suggestive methods used in these experiments are similar to those employed by some therapists during psychotherapy (Ofshe & Watters, 1994; Pesant & Zadra, 2004).

It has been argued that suggestive therapeutic techniques could cause a client to create a false traumatic memory (Loftus, 1993). An example of this type of suggestion would be for a therapist to conclude that the client shows signs of abuse despite no memory of abuse, and thus the client should try

harder to remember whether any abuse may have occurred (as cited in Loftus, 2003).

Indeed, there have been several legal cases in which therapy clients or their relatives successfully sued or received settlements from their therapists for using therapy techniques that may have induced patients into creating false memories of past abuse (Loftus, 1997). In one such case in 1986, Nadeen Cool sued her therapist who used hypnosis and other suggestive therapeutic techniques to uncover "lost memories" of abuse (Loftus, 1997). Through therapy, Cool remembered being in a satanic cult, eating babies, and being raped, among other horrific events. She came to believe she had more than 120 different personalities and even underwent an exorcism led by her therapist who sprinkled holy water and demanded Satan to leave her body. Later, Cool realized that her memories were not real and were planted by her therapist. The therapist settled out of court for \$2.4 million.

Though the false memories discussed thus far have all been entirely fabricated, some false memories are created surrounding real events. Memories of an event can be tampered by exposure to subtle misinformation after the event has occurred (Loftus & Palmer, 1974; Loftus, 1975; Loftus, Miller, & Burns, 1978). In one famous study by Loftus and Palmer (1974), researchers showed participants short clips of traffic accidents and were asked to rate the speed at which the accident happened. However, when questioning the participants, researchers cleverly manipulated the use of verbs. For instance, some participants were asked the speed at which vehicles *smashed* into each other. Other participants were asked to report the speed at which vehicles *hit*, *collided with*, *bumped*, or *contacted* each other. Participants responding to the word *smashed* not only reported a higher speed at which the cars were travelling but weeks later were more likely to recall having seen broken glass at the scene. These findings in addition to Loftus's later work on the nature of leading questions (Loftus, 1975; Loftus et al., 1978) revealed how subtle information introduced after an event may alter the memory of that event. Loftus and her students have since conducted more than 200 studies with more than 20,000 participants demonstrating how misinformation introduced after an event can induce people into creating false memories (Loftus, 1997).

Repressed memories have not been disproved. However, scientific studies have demonstrated that significant errors in memory and the creation of false memories of traumatic events are possible. When the claimant suddenly recovers a memory of a past sexual assault, investigation of the events surrounding the recovery of the memory, including suggestive therapy and investigative techniques (e.g. events surrounding police lineups and questioning), must be examined and may shed light on the validity of the recovered memory.

Intoxication

As a prerequisite for this pathway, the consumption of intoxicating substances must have led to distortions in information processing. There are currently many drugs that are used by sexual assault perpetrators to incapacitate victims (Horvath & Brown, 2005). These drugs may include Rohypnol (e.g., "roofies") and amphetamines, muscle relaxants, alcohol, or antihistamines. Other drugs, such as gamma hydroxybutyrate, cocaine, and ketamine have also been indicated in drug-assisted sexual assault cases (see Horvath & Brown, 2005; Hindmarch & Brinkmann, 1999). In a forensic case, it is important to determine whether the accuser voluntarily or involuntarily consumed drugs. If the drugs were not voluntarily consumed, it is likely that the individual who drugged the claimant had premeditated plans to control the claimant (Welner, 2001), regardless of whether the perpetrator assaulted the claimant.

Though consent issues are clearly important considerations when determining the nature of sexual behaviors while intoxicated, they are superfluous considerations in this pathway. Under most state laws, a person cannot legally consent to sexual activity while intoxicated (Davis & Loftus, 2008). In fact, even if consent to engage in sexual activity is *ex ante* (before the first dose of the intoxicating substance), the act of engaging in sexual activity while intoxicated can later be determined to be non-consensual sexual activity and is often sufficient evidence to convict someone of rape. Therefore, issues of consent, for these reasons, will not be discussed in the context of this pathway.

A key issue in this pathway is whether the claimant believes that he or she was sexually assaulted while under the influence of intoxicating substances, when in reality no sexual activity took place or activity occurred very different from what she is now claiming (e.g., she claimed penetration when no penetration occurred). Some drugs, when consumed at sufficient levels, may cause impairments in information processing—sensation, perception, storage, or retrieval. Substances known to cause these effects are alcohol, sedatives/hypnotics (e.g., benzodiazepines, soporifics), and anxiolytics (American Psychiatric Association, 2000). High doses of alcohol have been shown to inhibit memory in humans and animals (Bisby, Leitz, Morgan, & Curran, 2010; Grego et al., 2009; Spinetta et al., 2008). Moreover, upon ceasing to use these drugs, withdrawal symptoms may include delirium and psychotic disorders (American Psychiatric Association, 2000; Lin, Heacock, & Fogel, in press)—two additional pathways to false allegations that will be discussed later in this paper.

The information-processing errors of the intoxicating substances mentioned above may cause confusion surrounding events that occurred while a person was intoxicated. A person who does not accurately recall events

that occurred while he or she was under the influence or while experiencing the side effects of withdrawal from a substance may attempt to make sense out of the disjointed and seemingly incoherent memories of events that occurred while intoxicated. In an effort to make sense of and organize what memories are intact, a person may confabulate or fill in the memory lapses with events that seem probable or which for some reason they come to believe "must have" taken place. For example, waking up naked but not remembering how his or her clothes were removed, a person may conclude that someone else removed the clothes without his or her consent, even if the individual had, while intoxicated, actually removed his or her own clothes without remembering having done so. In addition, some drugs can artificially affect sexual interest (e.g., ecstasy, cocaine) or modify the individual's normal disinhibitions regarding sexuality that can affect the analysis of sexual consent. Thus, an individual may not normally have been sexually interested or may typically have been more sexually inhibited and not given consent. She may come to be puzzled after a sexual interaction and conclude that she was sexually assaulted because her behavior did not fit with her expectations.

Antisocial Personality Disorder (or Conduct Disorder in Adolescents)

The DSM-IV-TR (American Psychiatric Association, 2000) explains the essential feature of antisocial personality disorder as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in early childhood or early adolescence and continues into adulthood." Diagnostic criteria consist of the following:

1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;
2. deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;
3. impulsivity or failure to plan ahead;
4. irritability and aggressiveness, as indicated by repeated physical fights or assaults;
5. reckless disregard for safety of self or others;
6. consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and
7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Diagnostic criteria 1, 2, 4, and 7 are of particular importance in this pathway. If an individual with antisocial personality disorder is likely to lie

to achieve power and pleasure, a false allegation of sexual assault might be the means by which he or she attempts to achieve power over the falsely accused. Falsely claiming someone sexually assaulted you can be an aggressive act fitting diagnostic criterion 4. Furthermore, a lack of remorse could allow the individual to file an allegation of sexual assault and maintain this allegation with few, if any, conflicts of conscience. Thus, a pathway to a false allegation of sexual assault can occur when an individual with antisocial personality disorder makes a false claim of assault.

Antisocial personality disorder occurs more in men than women (Lamont & Brunero, 2009; American Psychiatric Association, 2000), with prevalence rates of 3% and 1%, respectively, based on data from community samples (American Psychiatric Association, 2000). Though women are the most frequent reporters of being victims of sexual assault, men may also report sexual assault. It is important to note that individuals with antisocial personality disorder are more likely than individuals without antisocial personality disorder to report having experienced sexual assault during their lifetime and are believed to be at a higher risk for sexual victimization (Burnam et al., 1988).

Borderline Personality Disorder

Borderline personality disorder (BPD) is a serious mental condition characterized by affective dysregulation, impulsiveness, difficulties in interpersonal relationships, and difficulties with self-image (Lieb, Zanarini, Schmahl, Linehan, & Bohus, 2004). Prevalence estimates for BPD from community and clinical samples have ranged from .6% to 3.9% of the general population (American Psychiatric Association, 2000; van Asselt, Dirksen, Arntz, & Severen, 2007; as cited in Lenzenweger, Lane, Loranger, & Kessler, 2007), and the majority diagnosed with BPD—an estimated 75% of people—are women (American Psychiatric Association, 2000).

The DSM-IV-TR (American Psychiatric Association, 2000) includes nine diagnostic criteria for this disorder, which for simplicity can be narrowed down to four domains (Lieb et al., 2004). The first domain is affective disturbance that includes intense emotions, rapidly shifting emotions, and mood reactivity. The second domain is disturbed cognition that includes three levels of symptomatology: troubling but non-psychotic problems including dissociation (discussed above) and intense feelings of being bad (relevant to this pathway); quasi-psychotic and psychotic-like symptoms of delusions and hallucinations (further discussed below) that are somewhat reality-based; and psychotic symptoms of delusions and hallucinations. The third domain is impulsivity, either physically destructive to the self or generalized impulsivity. The fourth domain involves the existence of unstable and erratic relationships, in which the borderline individual struggles to avoid either real or imagined abandonment.

When parsing these domains, it can be more clearly seen how BPD may serve as a pathway for false allegations of sexual assault. The first domain (Leib et al., 2004) includes the diagnostic criterion of quickly switching from idealization to devaluation of relationship (American Psychiatric Association, 2000). The instability of relationships experienced by an individual with BPD may be rooted in the tendency to quickly switch from idealizing significant others or lovers to devaluing them (American Psychiatric Association, 2000). This sudden change in conceptualization of a partner is often caused by feeling that the partner is not caring enough or giving enough or by suspicion of abandonment. The rapid shifting between idealizing and demonization may bring about a change in perspective such that a relationship that was viewed idealistically in the past is now seen through the devalued lens of abuse or mistreatment. Past events then may become construed as "abuse" and may lead a person with BPD to believe he or she is a victim of sexual assault.

As Kanin (1994) found in his longitudinal study, two of the three major motivations to file a false allegation of rape were attention-seeking and revenge. The switch from idealization to devaluation of the relationship and/or relationship partner (American Psychiatric Association, 2000) may spur a desire for revenge for any past behaviors that are, in the devaluation phase, newly construed as mistreatment. In addition an individual with BPD who is feeling fear of abandonment may seek frantically to achieve the attention that is craved from the partner who is perceived to be neglectful (American Psychiatric Association, 2000). The impulsive nature of a person with BPD may also lead them to act on these motivations for attention or revenge by filing a false allegation of sexual assault before carefully considering the consequences. Also, there is some evidence that individuals with BPD engage in behaviors that are viewed as "manipulative" (Linehan, 1993). Manipulative behaviors are often outside the conscious awareness of the individual and are learned through positive reinforcement, as manipulation frequently results in positive outcomes for the manipulator. Thus, an individual with BPD may use a sexual assault allegation as a way of impacting a third party for some desired outcome.

The second domain (Lieb et al., 2004), consisting of symptoms of reality-based delusions and hallucinations, may lead to false beliefs of sexual assault, and clinical experience suggests that sexuality is a common theme in delusions and hallucinations. The DSM-IV-TR (American Psychiatric Association 2000, p. 299) defines delusions as "erroneous beliefs that usually involve misinterpretations of perceptions or experiences." Hallucinations involve sensory experiences that do not appear to be externally caused.

Thus, individuals with BPD may represent a "perfect storm" of symptoms in which an impulsive, emotionally dysregulated individual who is demonizing someone and has loose contact with reality and who is seeking

attention and revenge makes a false allegation of sexual assault. However, when considering this pathway, it is important to keep in mind that individuals with BPD are more likely to have experienced sexual or physical assault (Lieb, et al., 2004) due to the same characteristics of the disorder. Thus, it is important to fairly and adequately weigh the evidence presented in an allegation of sexual assault.

Histrionic Personality Disorder

The DSM-IV-TR (American Psychiatric Association, 2000) defines histrionic personality disorder as "pervasive and excessive emotionality and attention-seeking behavior" (p. 711). Prevalence estimates range from .6% to 2.9% of the general population (as cited in Lenzenveger et al., 2007; American Psychiatric Association, 2000). Diagnosis is indicated by the presence of five or more of the following diagnostic criteria:

- 1) is uncomfortable in situations in which he or she is not the center of attention;
- 2) interaction with others is often characterized by inappropriate sexually seductive or provocative behavior;
- 3) displays rapidly shifting and shallow expressions;
- 4) consistently uses physical appearance to draw attention to the self;
- 5) has a style of speech that is excessively impressionistic and lacking in detail;
- 6) shows self-dramatization, theatricality, and exaggerated expression of emotion;
- 7) is suggestible (i.e., easily influenced by others or circumstances), and
- 8) considers relationships to be more intimate than they actually are (p. 714).

The primary diagnostic criteria of interest in this pathway are diagnostic criteria 1, 2, 5, 7, and 8. Other relevant behaviors include the tendency to play out stereotyped roles in their relationships with others; an intense desire for novelty and excitement; and the upset and depression that may follow periods in which they received little attention (American Psychiatric Association, 2000).

Filing a false allegation of sexual assault may serve to benefit individuals with histrionic personality disorder in several important ways. The sexualized behavior of individuals with histrionic personality disorder can lead to sexual relationships that may be used to seek attention (e.g., having sex with a person and telling all of their friends about it). Filing a false sexual assault claim may regain lost attention, either from the desired partner or from other

individuals, providing a novel and exciting environment that may be stimulating to a person who is histrionic. They may enjoy the large amounts of attention received for filing a sexual assault charge and for the "victim" role that can be played out in other relationships. In times when attention is not being received to the desired level, a false allegation of sexual assault may help to pull individuals with histrionic personality disorder out of their depressed state.

The misperception that relationships are more intimate than they actually are may lead a person with histrionic personality disorder to misconstrue nonsexual interactions as events that are sexual in nature. For example, a person who is histrionic may, after a co-worker complements her clothing and accidentally bumps into her during the day, construe these actions as intentional communications of sexual interest. This misperception can lead her to feel that if the individual had touched her chest while bumping into her, it was an intentional action of unwanted assault. Thus, a pathway to false allegations of sexual assault may be through individuals with a diagnosis of histrionic personality disorder who for reasons of attention and misinterpretation may knowingly or unknowingly make a false allegation of sexual assault.

Delirium

According to the DSM-IV-TR (American Psychiatric Association, 2000, p. 136), delirium is a "disturbance of consciousness that is accompanied by a change in cognition that cannot be better accounted for by a preexisting or evolving dementia." Relevant to this pathway are the perceptual disturbances that may be present, including misinterpretations, illusions, or even hallucinations.

Delirium may be caused by medical conditions, substance use, or withdrawal or may have multiple etiologies (American Psychiatric Association, 2000). An individual suffering from delirium is out of contact with reality and thus may make statements or allegations that are not veridical, including false allegations of sexual assault. In these circumstances, an individual with delirium may be under the care and protection of hospital staff, family members, friends, or even law enforcement. In such situations, caregivers may be in close physical proximity to the patient. The care provided could be construed as sexual, even though the care may have been nonsexual.

Psychotic Disorders

The term *psychotic* generally refers to conditions that are marked by delusions and hallucinations (American Psychiatric Association, 2000). Psychotic disorders include the following: schizophrenia, schizophreniform disorder, schizoaffective disorder, delusional disorder, brief psychotic disorder, shared

psychotic disorder, psychotic disorder due to a general medical condition, substance-induced psychotic disorder, and psychotic disorder not otherwise specified. Each of these disorders is known to cause gross impairment in functioning.

The DSM-IV-TR (American Psychiatric Association, 2000) details common delusions that may be pervasive in individuals with delusional disorder. Other psychotic disorders may be associated with these delusional themes as well. *Erotomatic* delusions involve irrational, unsubstantiated, or impossible claims that some person is in love with the delusional individual. The individual may claim that a movie star or superior at work is secretly in love with him or her and that there is a spiritual tie between them. Another delusional theme of interest is the *persecutory* type. This delusional theme is characterized by irrational, unsubstantiated, or impossible claims that the individual has been wronged and that some injustice has taken place. Frequent appeals to the court system are common in which the individual attempts to persecute the central person in the delusion. *Mixed* types of delusions involve delusions in which no one type predominates. A mixed erotomatic and persecutory type might be the type of delusion that would lead to a false allegation of sexual assault. However, delusions can be complex and difficult to categorize, even when they are sexual in nature.

Studies investigating the content of delusions have found delusions that are sexual in nature are not uncommon and are occur more often in women than in men (Galdos & van-Os, 1995; Meloy, 1989). Some cases of sexual delusions have been documented. In one case, Rosenthal and McGuinness (1986), two psychiatric nurses, wrote about a client with delusions centered on sex. "When her hydrotherapist offered her a backrub one day, she exclaimed, 'Don't touch me! I am not your homosexual lover'"(p. 149). These delusions may lead a person to claim adamantly that sexual relations or events occurred that may be impossible or highly improbable.

Dissociation

Dissociation is "the lack of the normal integration of thoughts, feelings, and experiences into the stream of consciousness and memory" (Berstein & Putnam, 1986). According to the DSM-IV-TR (American Psychiatric Association, 2000), dissociation involves a disruption or splitting off of memory, personality, identity, consciousness, or general perceptions of the self and surroundings; it can be recurring, gradual, or transient. Currently, there is some controversy concerning the function, antecedents and etiology of dissociation (Candel, Merckelbach, & Kuijpers, 2003).

Dissociative tendencies have been thought to exist as a stable trait in some individuals (Waller, Putnam, & Carlson, 1996), though most research has looked only at dissociation in relation to traumatic experiences. Much of the focus on the relationship between trauma and dissociation may be the result of earlier studies that found a relationship

between reports of childhood trauma and high levels of dissociation (e.g. Sanders & Giolas, 1991). Dissociation can occur either during the traumatic experience (*peritraumatic dissociation*) or afterward (*posttraumatic dissociation*). *Peritraumatic dissociation* is characterized by numbness, detachment, derealization, depersonalization, and reduced responsiveness during the traumatic event (Tichenor, Marmar, Weiss, Metzler, & Ronfeldt, 1996). A meta-analysis comparing the results of 35 empirical studies on the relationship between levels of peritraumatic dissociation and posttraumatic stress disorder (PTSD) found that peritraumatic dissociation was a moderate predictor of PTSD (Breh & Seidler, 2009).

Some psychologists have conceptualized dissociation as a coping mechanism in response to trauma-related stress (Gershuny & Thayer, 1999). However, others have argued that dissociation is a trait that precedes a traumatic experience and may contribute to psychological responses in trauma survivors (Tichenor et al., 1996). Whatever the case may be, dissociation has been shown in multiple studies to be related to memory fragmentation (Kindt, Van den Hout, & Buck, 2005; van der Kolk & Fisler, 1995) and to two prominent correlates: fantasy proneness (Merckelbach, Campo, Hardy, & Geisbrecht, 2005) and absentmindedness (Merckelbach, Muris, Rassin, & Horselenberg, 2000).

In one study (Candel et al., 2003), low and high dissociators were read stories of a traumatic nature and asked to freely recall the story. Even after controlling for fantasy proneness, high dissociators provided more errors of commission—that is, added false content—than low dissociators, though the two groups did not differ on errors of omission. In another study by Merckelbach and colleagues (Merckelbach, Horselenberg, & Schmidt, 2002), participants were read a story and asked to recall the content of the story. They were then asked several misleading questions meant to test suggestibility. As hypothesized, participants who were high dissociators were more likely to endorse story elements that were fabricated than low dissociators. Also, participants who were high dissociators were also more likely to have trait absentmindedness but were not more likely to have fantasy proneness. Similar studies have shown a small trend toward a relationship between fantasy proneness and memory commissions (Giesbrecht, Geraerts, & Merckelbach, 2007). The results of these studies indicate that dissociators are capable of “remembering” events that did not happen and that absentmindedness may be a mediator in the relationship between traumatic events and commission errors of memory. The results of these studies suggest that it may be important to consider the possibility that the memory of the event may include false details if the claimant has high levels of dissociation.

A review of the literature on dissociation and memory (Giesbrecht, Lynn, Lillienfeld, & Merckelbach, 2008) cited evidence that trait dissociation is likely to be associated with memory distortions. In an effort to align

fragmented memories with an individual's self-concept and worldview, the likelihood of altering memories of events, either consciously or unconsciously, increases (Eisen & Lynn, 2001). Thus, it is possible that in the event of a sexual assault, dissociation may cause a person to fill in the parts of the experience that are not clearly remembered with events that for them feasibly could have occurred. Of course, memory lapses will not necessarily be filled in with a confabulated event, let alone a sexual one. However, high dissociators may seek to make their stories more coherent by adding details to an incomplete memory that would make sense to them when considered in the context of the event. Thus, these confabulations may lead to erroneous claims that have forensic relevance, including who the perpetrator was, what happened, where, and how many times.

Intellectual Disability

Intellectual disability (ID; Schalock, 2007), also known as mental retardation (American Psychiatric Association, 2000), is characterized by below-average IQ and adaptive functioning (Schalock, 2007; American Psychiatric Association, 2000). Limitations in functioning include deficits in the acquisition of social, occupational, academic, and general self-care skills. ID has several etiologies that often are related to biological or pathological processes affecting the central nervous system. Many of the specific vulnerabilities that arise from ID overlap to some extent with other disorders (e.g., autism spectrum disorders, cerebral palsy, fetal alcohol syndrome) and thus, in many cases, individuals with other developmental disabilities may also have ID.

Rates of sexual assault are higher in intellectually disabled populations than populations without ID (Mitra, Mouradian, & Diamond, 2011). It is hypothesized that the true rate of sexual assault among individuals with ID is higher than indicated in studies (Joyce, 2003). There are many reasons to believe that study findings are an underrepresentation of the actual amount of sexual assaults that occur against intellectually disabled people. Difficulties with communication and comprehension of language faced by individuals with ID may interfere with the ability to report a sexual assault (Ahlgren-Delzell & Duxley, 2001). Fear of repercussions for reporting—as caregivers are often the perpetrators—may also discourage reporting (Joyce, 2003). Another reason why individuals with ID may not report a sexual assault is because of a misunderstanding of the legal process. For instance, Joyce (2003) briefly mentioned one alleged victim with ID who was reluctant to continue with an allegation because she was afraid she would get into trouble if the alleged perpetrator was found “not guilty.” Finally, it can be assumed that individuals with ID may choose not to report a sexual assault for the same reasons that individuals without ID choose not to report:

because the legal process can be daunting and there may be repercussions from filing the allegation.

Studies have indicated that sexual assaults among populations with ID are most likely to be perpetrated by peer service users (Brown, Stein, & Turk, 1995). Abuse by family members and care providers is also common, whereas perpetration by strangers is the least common. In cases where peer service users are the alleged perpetrators, issues of consent are often the focus of the investigation. Establishing the capacity to consent can be challenging in this population as it may be unclear whether individuals have sufficient knowledge and understanding to provide fully informed consent (Joyce, 2003). For instance, in some sexual assault cases, individuals with ID do not have the ability to name the body parts that were involved in the assault. Clear protocols for determining informed consent in this population would be useful, as adults with ID have specific challenges that increase their potential for coercion and exploitation.

Intellectually disabled individuals, compared to individuals without ID, have vulnerabilities related to memory and communication that the legal system may not be equipped to handle adequately. Individuals with moderate-to-profound ID may have significant difficulty communicating about the events that occurred because of language skills deficits or other communication-interfering conditions (e.g., related neurological conditions). Ahgrim-Delzell and Dudley's (2001) findings indicate that communications skills are essential in filing a sexual assault charge; alleged victims with mild ID were more likely than individuals with moderate or severe ID not only to file sexual assault charges but to have their allegations confirmed. Difficulties with memory may also complicate the investigation process for individuals with ID (Gudjonsson & Henry, 2003) who have been shown to have poorer memory than control groups and are more likely than control participants to fill in memory gaps with confabulated material (Clare & Gudjonsson, 1993). However, memories of individuals with ID are not necessarily unreliable; rather, when information is gathered in a non-leading way, they are likely to provide accurate, although usually more limited, information about the event (Ternes & Yuille, 2008). In other words, individuals with ID are less likely to remember the details of the event (Kehbel & Hatton, 1999).

Specific vulnerabilities in individuals with ID, in addition to poorer memory, may account for inaccurate reporting of events (Gudjonsson & Joyce, 2011). Individuals with ID have been shown to be significantly more suggestible to leading questions (Gudjonsson & Henry, 2003; Everington & Fulero, 1999) and significantly more likely to acquiesce (Clare & Gudjonsson, 1993) compared to individuals without ID, although there is variability among individuals with ID on these traits. Suggestibility refers to a tendency toward accepting information communicated by others and incorporating this information into beliefs and memories. Acquiescence refers to the predisposition to passively accept or actively agree with information that is presented (Chronbach, 1946). Thus, investigative procedures that involve

focused and suggestive questions may elicit both agreement with interviewer assumptions and confabulations, thereby decreasing the accuracy of responses (Cederborg & Lamb, 2008; Clare & Gudjonsson, 1993; Joyce, 2003; Kebbel & Hatton, 1999; Kebbel, Hatton, & Johnson, 2004). Partly because of these vulnerabilities, there is a disproportionately high rate of false confessions in ID populations compared to the average population, and this is believed to be associated with (a) misunderstanding the potential consequences of a false confession and (b) the use of interrogative techniques that elicit compliance with the interrogator (Kassin et al., 2010). It is, therefore, a concern that individuals with ID may be prone to providing positive response sets, changing their account of events in response to leading questions, and having misunderstandings about the legal process.

Therefore, a heightened potential for suggestibility and acquiescence in individuals with ID may be relevant in cases of false allegations of sexual assault in which (a) the alleged victim did not initiate the complaint and is consequently questioned in a manner that elicits positive responses and confabulation or (b) suspicion of sexual abuse was conveyed to the victim in a suggestive way by an individual or group that would potentially benefit from an allegation by proxy. In the first case, the individual who initiates the false complaint may have suspicions about sexual abuse related to perceived indications that a sexual assault occurred (e.g., a change in the disabled person's sexual behavior, signs that a sexual relationship may be occurring). In the second case, care providers who serve to benefit from filing a false allegation—perhaps traceable to another psychological pathway for filing a false allegation—might take advantage of the suggestible and acquiescent nature of an individual with ID. In either case, the individual with ID is at a higher risk of submitting a false allegation in these situations than individuals without ID because of this population's greater tendency toward suggestibility and acquiescence.

In a false allegation of sexual assault, shifts in the reporting of core features of the sexual assault (e.g., the general location, features of the assault) may indicate that the methods of questioning were suggestive or that the alleged victim is confabulating. Furthermore, the involvement of a litigation-minded advocate of the alleged victim who has the potential to gain from his or her association with the case might warrant a further investigation into the motives and actions of this individual. If evidence suggests that the origin of the false allegation is related to high suggestibility or acquiescence and thus a false belief that a sexual assault occurred, suggestibility may be assessed by examining the alleged victim's response sets for significantly high levels of agreement with the interviewer and patterns of inconsistent responses emerging after suggestive questioning. Additionally, the Gudjonsson Suggestibility Scale (GSS; Gudjonsson, 1984) has shown to be a reliable and valid (Merckelbach et al., 1998) measure of suggestibility and may be employed as an adjunctive measure of susceptibility to suggestive questioning.

SUMMARY AND CONCLUSIONS

These 11 pathways merit further investigation and supplementation if additional pathways are identified. Ascertaining the psychological processes and functioning of a claimant may help explain possible motivations and information processing errors that could lead to an untruthful claim. Binder and McNeil (2007) underline the utility of psychological evaluation as a tool in the assessment of accusers and the accused, though they also stress the importance of examining these in the context of the presence or absence of corroborating evidence. Without corroborating evidence, forensic evaluators must acknowledge that "he said, she said" sexual assault cases are inherently difficult to assess for truth and that truth is unlikely to be found in its entirety within the results of psychological evaluation. Nevertheless, psychological evaluations may inform forensic evaluators of psychological processes by which a person may either intentionally or unintentionally file a false allegation of sexual assault. The results of a psychological evaluation are not intended merely as a useful tool for the defense; evaluation may also help establish the veracity of a claimant's account of events and may be relevant for a prosecutor's decisions to pursue an indictment.

In proposing these pathways, it is important to acknowledge that psychological evaluations should serve only as corroborating evidence and should not be construed as sufficient evidence upon which to determine truth. All evidence must be weighed appropriately to assess the veracity of a claim. Forensic evaluators must also be aware that some psychological disorders are more likely to be associated with experiences of sexual assault and abuse. For example, certain populations such as the intellectually disabled and other populations with cognitive difficulties may be at an increased risk of sexual assault. These risks should be assessed and weighed appropriately in conjunction with all of the evidence in cases where the claimant may have difficulty communicating or recalling the entire event.

The legal system has an obligation to be mindful of discrimination faced by victims and biases faced by the accused. Further investigation of pathways and other possible causal mechanisms of false allegations may help elucidate more evidence that can be utilized in the determination of truth in a sexual assault case.

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APPENDIX 7

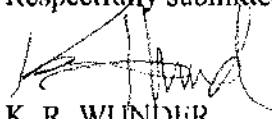
**GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD**

UNITED STATES)	
)	
v.	)	NOTICE OF APPEARANCE
	)	SPECIAL VICTIM'S COUNSEL
)	
THOMAS RANDOLPH)	
DC2/E-5	)	1 MARCH 2016
U.S. Coast Guard)	

NOW COMES LCDR Kismet Wunder, COUNSEL FOR H.V., ("the Victim") and submits the following notice of appearance.

1. H.V. is the named victim in the above captioned case. The Victim submitted a request for Special Victim's Counsel in accordance with 10 U.S.C. §§ 1044 and 1565b, as implemented by *United States Coast Guard Special Victims' Counsel Program, Initial Concept of Operations*.
2. On 13 August 2014, CAPT Sloan Tyler, Office of Special Victims' Counsel, detailed me to represent the Victim and I entered into an attorney-client relationship with the Victim on or about 13 August 2014. I am admitted to practice in the State of Ohio and qualified and certified as a Coast Guard Judge Advocate.
3. I respectfully request the Court direct the parties to provide me with informational copies of future motions or accompanying papers filed pertaining to issues arising under MREs 412, 513, 514, 615, and 701 in which the Victim is a subject of the motion. I have previously received copies of the pleadings in this case to date.
4. The Victim and I reserve the right to be present throughout the court-martial, with the exception of closed proceedings that do not involve the Victim.
5. The Victim has limited standing in this court-martial and reserves the right to make factual statements and legal arguments herself or through counsel.
6. I respectfully request to appear telephonically for the Art. 39a motions hearing currently set for 07 March 2016 to represent the interests of the Victim regarding production and review of evidence pursuant to M.R.E. 412 and 513.
7. My contact information is as follows: USCG Base Cleveland, 1240 E. 9th Street, Rm. 2693, Cleveland, OH; (216) 902-6350; kismet.r.wunder@useg.mil.

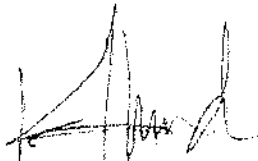
Respectfully submitted,



K. R. WUNDER
LCDR, USCG
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of this notice of appearance was service via electronic mail to the Military Judge, Defense Counsel and Trial Counsel on the 1st day of March 2016.



K. R. WUNDER
LCDR, USCG
Special Victims' Counsel

1 [The session was called to order on 7 March 2016.]

2 CDR CASSIE KITCHEN: ----39(a) session is called to order.

3 The purpose of today's proceeding is to litigate motions in the case
4 of U.S. vs. Randolph. Prior to coming on record we had an 802 -- in
5 person 802 conference at 9:30 this morning. Present for that was
6 myself, Lieutenant Roberts, the detailed defense counsel, Lieutenant
7 Commander Trest, Lieutenant Canoy, Lieutenant Oh and Lieutenant

8 *Dalla Betta*

~~Delabetta~~, did I pronounce that correct?

9 *Dalla Betta*
10 LT ~~DELABETTA~~: Yes, ma'am.

11 CDR CASSIE KITCHEN: We discussed the presence of the SVC
12 telephonically which do we have Lieutenant Commander Wunder on the
13 phone yet?

14 LT ROBERT CANOY: Not at the moment, Your Honor. As I
15 mentioned in the 802 I think the plan will be just to get him on the
16 line for the 412 and 513 portions only.

17 CDR CASSIE KITCHEN: We briefly discussed the involvement
18 of SVC into these proceedings. No written pleadings were received
19 by the Court from Lieutenant Commander Wunder, who is SVC on this
20 case on behalf of his client with respect to the MRE 412 and 513
21 motions. It's the court's understanding that his participation is
22 going to be telephonic today but only for the purpose of awareness,
23 as opposed to any sort of advocacy with respect to those two
24 motions. Further we discussed the presence of witnesses, defense
25 does intend to call witnesses telephonically. Government, were you
able to make contact with Mr. Brown?

Cle
30 Mar 11
Her
24 Mar 16