

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

v.

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

v.

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

Respondent Below

APPELLANT'S REPLY BRIEF

USCA Dkt. No. 16-0678/CG

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

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

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Argument

Damage Controlman Second Class (DC2) Thomas J. Randolph, United States Coast Guard (USCG), through counsel, hereby replies to Appellee's Answer of August 08, 2016.

Appellee argues this Court should robustly interpret the term "communication" under Military Rule of Evidence (M.R.E.) 513(d)(5) to include mental or emotional health diagnoses and patient treatment plans. (Appellee's Answer at 9, 11.) But the plain language of M.R.E. 513(a) establishes a privilege only for confidential communications. Diagnoses and treatment plans do not fall within the privilege.

Appellee's expansive reading of M.R.E. 513 rests on Appellee misapplying the definition of another term—"evidence of patient's records or communications"—as an explanation of "communication." Specifically, Appellee claims that according to "the plain language in [M.R.E.] 513 [] *the privilege extends* to 'records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.'" (Appellee's Answer 8-9 (citing M.R.E.

513(b)(5)) (emphasis added). But rather than defining the privilege, the Appellee's quoted language defines a term used in M.R.E. 513(e)(2)-(5):

Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing...The military judge shall examine the evidence...*in camera*, if such examination is necessary to rule on the motion...To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

Merely part of the "definitions" subparagraph of M.R.E. 513, this language does not extend the privilege to a mental or emotional health diagnosis or treatment plan of a patient. Rather, it is a term that encompasses all disputed material, privileged or otherwise, that is to be reviewed by a military judge prior to its production or admission.

M.R.E. 513(e)(1). Under this procedure, the military judge may prohibit non-privileged records from being produced or admitted for reasons related to relevance and materiality.

The actual privilege is found at M.R.E. 513(a). That section clearly limits the privilege to "confidential communications 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." While closely related, records of a diagnosis or treatment of a patient's mental or emotion condition is plainly not the same thing as a communication purposely made to facilitate diagnosis or treatment.

Conclusion

For the foregoing reason and those previously stated, the decision of the Court of Criminal Appeals should be reversed.

Respectfully submitted,

/s/

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Certificate of Filing and Service

I certify that the foregoing Reply Brief was electronically filed with the Court and served on Appellate Government Counsel and Counsel for AMT2 H.V. on 12 August 2016.

/s/

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Certificate of Compliance

This Reply Brief complies with the page limitations of Rule 24(c) because it contains less than 7000 words. Using Microsoft Word 2010 with 14-point-Century-Schoolbook font, it contains 413 words.

/s/

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