26 June 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	FINAL BRIEF ON BEHALF OF
Appellee,	)	THE UNITED STATES
	)	
v.	)	USCA Dkt. No. 17-0199/AF
	)	
Senior Airman (E-4),	)	Crim. App. No. S32311
RICKY D. CHISUM, USAF,	)	
Appellant.	)	

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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26 June 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Senior Airman, RICKY D. CHISUM, USAF, *Appellant*.	))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 17-0199/AF Crim. App. No. S32311

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

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE'S FAILURE TO CONDUCT AN IN CAMERA REVIEW OF AND FAILURE TO DISCLOSE THE MENTAL HEALTH RECORDS OF AB A.K. AND AB C.R. DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONT THE SOLE WITNESSES AGAINST HIM IN VIOLATION OF THE SIXTH AMENDMENT OF THE CONSTITUTION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

Appellant was tried and convicted, by exceptions and substitutions, of using cocaine on a single occasion in New Orleans between on or about 1 April 2012 and on or about 31 October 2013 "as witnessed by [AB A.K.] and [AB C.R.]" (J.A. at 19.) Prior to trial, the Government identified AB A.K. and AB C.R. as two witnesses who would be testifying against Appellant. (J.A. at 223.)

“

AB A.K. and AB C.R.'s testimony on the merits.

On the merits, AB A.K. testified that he and Appellant purchased and ingested cocaine from a bag on a side street near Bourbon Street in New Orleans. (J.A. at 52-53.) He also testified that AB C.R. was in New Orleans with them, but he did not remember what AB C.R. was doing at the time they used cocaine. (J.A. at 53-54.) AB C.R. testified on the merits that he was present with AB A.K. and Appellant in New Orleans in summer 2012. (J.A. at 104.) He observed Appellant take a bag with a white powder down an alleyway off of Bourbon Street and bring his hands up to his face. (J.A. at 104-05.) As will be discussed in further detail in the argument section below, both witnesses were extensively cross-examined by trial defense counsel. (J.A. at 55-90; 105-12.)

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion in choosing not to conduct an *in camera* review of AB A.K. and AB C.R.'s mental health records. The Air Force Court of Criminal Appeals erred in its opinion below by failing to afford the military judge the appropriate deference required by the abuse of discretion standard. The military judge received evidence on the motion, gave trial defense counsel multiple opportunities to make their argument, carefully considered the issue, and applied the appropriate law. He correctly found that trial defense counsel did not set forth a specific factual basis to believe the mental health

records would contain “constitutionally required” evidence, and that any evidence that might be contained in the mental health records was cumulative with what trial defense counsel already possessed or could access through non-privileged sources. His decision was well within the range of reasonable choices arising from the applicable law and facts, and should not be disturbed. Since the military judge did not abuse his discretion in declining to conduct an *in camera* review of the mental health records, the findings and sentence should be affirmed on that matter alone.

Assuming the military judge did err by failing to conduct an *in camera* review, Appellant still suffered no prejudicial error because nothing contained in the mental health records was constitutionally required to be disclosed. As the Supreme Court enunciated in Pennsylvania v. Ritchie, 480 U.S. 39 (1987), the Confrontation Clause does not entitle an accused to pretrial disclosure of privileged material. Moreover, since the privileged mental health records were accessible neither to the defense nor to the prosecution, Appellant had no right to pretrial disclosure of the records under Brady v. Maryland, 373 U.S. 85 (1963).

Even if the Due Process Clause of the Fifth Amendment or the Compulsory Process Clause could require disclosure of privileged evidence under Mil. R. Evid. 513(d)(8), a review of Supreme Court case law shows that an appellant’s burden of showing that such evidence was “constitutionally required” under those rules is high. Appellant would be required to demonstrate that nondisclosed evidence was

“material,” meaning there is a *reasonable probability* that had the evidence been disclosed it would have produced a different outcome at trial. In evaluating whether evidence was “material” and thus “constitutionally required” under the Due Process Clause or Compulsory Process Clause, this Court should consider whether the evidence was probative as to a central issue in the case, whether it was reliable, whether it would have been admissible, whether it was cumulative, and whether it would have constituted a major part of Appellant’s attempted defense. Ultimately, Appellant cannot establish that any evidence contained in AB A.K. and AB C.R.’s mental health records was material to his defense and thereby constitutionally required to be disclosed. As such, the findings and sentence should be affirmed.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DECIDING NOT TO CONDUCT AN IN CAMERA REVIEW OF AB C.R. AND AB A.K.’S MENTAL HEALTH RECORDS AND DID NOT ERR BY FAILING TO DISCLOSE THE CONTENTS OF THE MENTAL HEALTH RECORDS.

Standard of Review

A military judge’s ruling denying disclosure of documents to the defense on the grounds of privilege is reviewed for an abuse of discretion. United States v. Rivers, 49 M.J. 434, 437 (C.A.A.F. 1998). “An abuse of discretion exists where

reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice." United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (citations and ellipsis omitted). The "abuse of discretion standard is a strict one . . . To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous to be invalidated on appeal." Id.

Law

Pursuant to Mil. R. Evid. 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 . . . in a case arising under the Uniform Code of Military Justice, if such a communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Mil. R. Evid. 513 "clarifies military law in light of the Supreme Court decision in Jaffee v. Redmond, 518 U.S. 1 (1996)" in which the Supreme Court "interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings." (Mil. R. Evid. 513 Analysis at A22-51, (2013)). Mil. R. Evid. 513 is "based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege." Id.

At the time of Appellant's trial, there was an exception to the privilege under Mil. R. Evid. 513 "when admission of a communication is constitutionally required." Mil. R. Evid. 513(d)(8).[2] In cases where the production or admission of records or communications of a patient is a matter in dispute, a party may seek an interlocutory ruling by the military judge. Mil. R. Evid. 513(e)(1). The party seeking such a ruling "must file a written notice at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered . . ." Mil. R. Evid. 513(e)(1)(A). "The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion." Mil. R. Evid. 513(e)(3).

Mil. R. Evid. 513 should not be conflated with the military rules entitling an accused to discovery. Rule for Courts-Martial (R.C.M.) 701, which governs discovery, states, in pertinent part, that "[n]othing in this rule shall be construed to require disclosure of information protected from disclosure by the Military Rules of Evidence." R.C.M. 701(f). Thus, a military accused cannot claim a discovery "right" to privileged evidence in mental health records based on the Rules for Courts-Martial. *See* D.B. v. Lippert, Army Misc 20150769 (Army Ct. Crim. App. 1 February 2016) unpub. op. at *32 ("if a privileged communication is disclosed whenever it would be subject to the rules governing discovery then there is no

[2] The "constitutionally required" exception to Mil. R. Evid. 513 was removed in June 2015.

privilege at all.") Furthermore, Article 46, UCMJ, directs that "[t]he counsel for the Government, the counsel for the accused, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." In a case such as this, where neither trial counsel nor defense counsel could review the mental health records due to a privilege, it cannot be said that Article 46, UCMJ is invoked. Mental health records can only be produced or admitted pursuant to a specific exception of Mil. R. Evid. 513, even if the evidence contained therein might normally be discoverable under R.C.M. 701. *See generally*, LK v. Acosta, ____ M.J. _____, ARMY MISC 20170008 (A. Ct. Crim. App. 24 May 2017) slip op. at 3-4 (discussing the Army's history of conflation of rules of discovery and rules of privilege). In Appellant's case, the only possibly relevant exception to the psychotherapist-patient privilege was the "constitutionally required" exception under Mil. R. Evid. 513(d)(8).

a. The military judge did not abuse his discretion in declining to conduct an *in camera* review of AB A.K. and AB C.R.'s mental health records.

In this case, the Air Force Court of Criminal Appeals (AFCCA) misapplied the abuse of discretion standard when it found that the military judge erred in deciding not to conduct an *in camera* review of AB A.K. and AB C.R.'s mental

health records.[3] AFCCA simply did not give the required deference to the military judge's ruling, and substituted its own judgment rather than identifying a true abuse of discretion.[4]

It was entirely appropriate for the military judge to use the test from Klemick to evaluate whether an *in camera* review of the mental health records was necessary. In Klemick, 65 M.J. at 580, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) set forth a threshold standard that a party must meet "before an *in camera* review of records subject to the protections of Mil. R. Evid. 513 may be ordered." NMCCA reasoned that failure to apply such a threshold "would entirely thwart the basis of this rule: to facilitate and secure 'the social benefit of confidential counseling . . .'" Id.

The three-part threshold inquiry asks: (1) did the moving party set forth a specific factual basis demonstrating a *reasonable likelihood* that the requested privileged records would yield evidence admissible under an exception to Mil. R.

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[3] By ordering the United States to produce AB A.K. and AB C.R.'s mental health records for its own *in camera* review pursuant to Article 66, UCMJ, AFCCA essentially ordered the production of post-trial discovery. The United States also questions whether AFCCA erred by failing to consider United States v. Campbell, 57 M.J. 134 (C.A.A.F. 2000) before ordering such post-trial production of evidence outside the record.

[4] Notably, one of the judges on the original AFCCA panel that issued the order to produce the mental health records for appellate review, Chief Judge Allred, would have held that the military judge did not abuse his discretion in declining to perform the *in camera* review, and would not have ordered the production of the mental health records. (J.A. at 29.)

Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or similar information through non-privileged sources?[5] Id. (emphasis added.)

Appellant does not appear to contest before this Court that the military judge erred by using the Klemick threshold test. (App. Br. at 16-18.) Indeed, NMCCA's reasoning in Klemick is consistent with what the Supreme Court has articulated about *in camera* reviews of privileged materials. *See* United States v. Zolin, 491 U.S. 554 (1989) (Before engaging in *in camera* review of privileged material "the judge should require a showing of a factual basis to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that [an exception to the privilege] applies"); Ritchie 480 U.S. at 58, n.15 ("Ritchie, of course, may not require the trial court to search through the [Child Youth Services] files without first establishing a basis for his claim that it contains material evidence.")

Both Mil. R. Evid. 513 itself and Supreme Court precedent on conducting *in camera* reviews of privileged materials make clear that the decision is highly

[5] After Appellant's trial, AFCCA also adopted a standard similar to the one in Klemick for determining when a trial court should conduct an *in camera* review of privileged material. United States v. Wright, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015). Moreover, subsequent to Appellant's trial, Mil. R. Evid. 513 was amended by the 2015 National Defense Authorization Act to require a threshold inquiry similar to the one in Klemick before the military judge conducts an *in camera* review of mental health records. 2015 NDAA, Pub. L. No. 113-291, § 535, 128 Stat. 3292, 3369.

discretionary. Mil. R. Evid. 513(2)(3) states that "[t]he military judge *may* examine the evidence . . . in camera, if such examination is necessary to rule on the motion." In discussing the crime-fraud exception to the attorney-client privilege, the Supreme Court asserted that once a party had made an adequate showing, "the decision whether to engage in *in camera* review rests in the ***sound discretion*** of the district court." Zolin, 491 U.S. at 572 (emphasis added). In this case, the military judge received evidence and gave trial defense counsel multiple opportunities to argue for why an *in camera* review was required, even entertaining a motion for reconsideration. Given the military judge's careful consideration of the matter, this Court should ensure that it affords the military judge's decision the proper deference it deserves.

Appellant needed to do more than merely speculate that because a witness may have spoken to a mental health provider previously about an incident, the records in question might contain statements about that incident that are inconsistent with the witness's testimony at trial. *See* D.B. v. Lippert, unpub. op. at *17-18, n.11 (quoting Clifford S. Fishman, *Defense*

Access to a Prosecution Witness's Psychotherapy or Counseling Records, 86 Or. L. Rev. 1, 37 (2007)).[6] The military judge correctly recognized that this speculation about potential inconsistent statements was insufficient to require an *in camera* review of the mental health records.[7]

"Evidence of a witness's psychological state is properly excluded if it did not affect her ability to perceive

[6] Fishman writes, "On one point there appears to be unanimous consensus [among state courts]. In sexual-assault and child abuse cases, there is general agreement that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial."

[7] This Court should be equally cautious about the weight that it affords to supposed "inconsistent" statements found in mental health records, as they might not represent true inconsistencies. Statements make to a mental health provider are not made for the purpose of furthering a criminal investigation, and therefore will very often be inconclusive of a witness's truthfulness. United States v. Smith, NMCCA 201100433 (N.-M. Ct. Crim. App. 28 September 2012) unpub. op. at *17. Alleged inconsistencies "could just as easily be explained by the fact that the statements were contained in someone else's notes, and that they were products of various therapeutic settings over a period of time." *See* Id., unpub. op. at *17. *See also* Angel M. Overgaard, *Redefining the Narrative: Why Changes to Military Rule of Evidence 513 Require Courts to Treat the Psychotherapist-Patient Privilege as Nearly Absolute,* 224 Mil. L. Rev. 979, 1001, n.132 (2016) (asserting that information produced in psychotherapy sessions is not the type of information that makes for reliable testimony, since psychotherapists may be exploring a patient's doubts, insecurities, and self-blame as part of treatment, and not because a patient has been lying).

and tell the truth." United States v. Sullivan, 70 M.J. 110, 117 (C.A.A.F. 2011).

AFCCA's most significant error below was failing to give appropriate deference the military judge's determination that any information the defense was seeking in the mental health records would be cumulative with evidence they already had or that could be obtained through non-privileged sources. Specifically, the military judge concluded, "there is information in the possession of the defense not subject to privilege that allows them to fully confront the witnesses in the form of each witness talking about their memory and ability to perceive reality." (J.A. at 191.) The military judge correctly recognized Appellant could not justify piercing the privilege guaranteed in Mil. R. Evid. 513, when he could already fully explore AB C.R.'s claims of memory loss. Nothing prevented trial defense counsel, who obviously had been afforded the opportunity to interview AB C.R. before trial, from interviewing AB C.R. more extensively about his memory problems in general and about how well he recalled the night he saw Appellant in New Orleans. *See* Florida v. Pinder, 678 So. 2d 410, 416 (Fla. Dist. Ct. App. 1996) (where broad pretrial discovery is already available and privileged information is replaceable by other means, "a defendant must satisfy a stringent test" to justify an *in camera*

review of privileged material); Davis v. Litscher, 290 F.3d 943, 947 (7th Cir. 2002) (denying *in* camera review of witness' mental health records not unreasonable where defendant already knew of witness' depression and abuse of cocaine and prescription medication and was free to cross-examine her "on any effect these factors might have had on her ability to recall the events of" the night in question).

Appellant has still not described how any information that might theoretically have been contained in the mental health records would have been more helpful to his case than AB C.R. himself admitting that he did not have any clear memories of the 2012 timeframe and admitting that sometimes he did not know what was real and what was not real. Trial defense counsel already had access to this damaging testimony and presented it at trial without piercing the Mil. R. Evid. 513 privilege.

Likewise, with respect to AB A.K., it was incorrect for AFCCA to find that the military judge abused his discretion because another military judge in a different court-martial had allowed *in camera* review of AB A.K.'s mental health records. The military judge in this case had no way of knowing the facts of the other case or whether or how the accused in that case had met his burden under Klemick. Despite this fact, AFCCA essentially concluded that because a different military judge had a different opinion than the judge in Appellant's case, an abuse of discretion must have occurred. However, a difference of opinion has never been

sufficient to establish an abuse of discretion. United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014).

Furthermore, Appellant's case is immediately different from the prior case where AB A.K.'s records were released, because Appellant now had access to the contents of those records through a non-privileged source: namely, the prior testimony and cross-examination of AB A.K. in Appellate Exhibit VI. The military judge in Appellant's case had the opportunity to review Appellate Exhibit VI and recognized the wealth of impeachment evidence it contained. The military judge rightly acknowledged that trial defense counsel was unable to identify with specificity any material that *might* be in the records themselves that they did not already have access to through Appellate Exhibit VI.

The military judge's decision to deny an *in camera* review of the mental health records was not arbitrary, fanciful, clearly unreasonable or clearly erroneous. The decision was well within "the range of choices reasonably arising from the applicable facts and law." United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015). The military judge sagely recognized that probing the mental health records of the witnesses based on a meager proffer of necessity would defeat the purpose behind the psychotherapist-patient privilege, which is to foster "an atmosphere of confidence and trust in which the patient is willing to make a frank

and complete disclosure of facts, emotions, memories and fears."[8] *See* Jaffee, 518 U.S. at 10. Although AFCCA or this Court may have reached a different decision had they been in the military judge's position that is not enough to establish an abuse of discretion.

As such, AFCCA erred by substituting its own opinion for that of the military judge. The military judge heard evidence, carefully considered the issue, and applied the appropriate law. His decision was not an abuse of discretion. Since the military judge did not abuse his discretion in denying an *in camera* review, Appellant is not entitled to relief and the findings and sentence should be affirmed.

b. Even assuming the military judge should have conducted an *in camera* review of AB A.K. and AB C.R.'s mental health records, none of the evidence contained therein was constitutionally required to be disclosed.

Appellant frames the nondisclosure of AB A.K. and AB C.R.'s mental health records as a violation of the Confrontation Clause. However, the Supreme Court's plurality opinion in Ritchie strongly suggests that this is the wrong analysis. In Ritchie, the trial court refused to release Child Youth Services (CYS) records to Ritchie that were normally privileged under state law. Id. at 44. One of the exceptions to the privilege allowed disclosure to "a court of competent jurisdiction pursuant to a court order." Id. at 43-44. The Supreme Court found

[8] As the Supreme Court has acknowledged, even *in camera* review by judicial authorities works to erode a privilege. Zolin, 491 U.S. at 570-71.

that the trial court's failure to disclose the privileged records did not violate the Confrontation Clause. Id. at 52. The Supreme Court further asserted that the Confrontation Clause is not "a constitutionally compelled rule of pretrial discovery." Id. Instead, it is a trial right that does not include "the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Id. at 52-53.

The Court considered that a criminal defendant might have a right to the privileged material under the Sixth Amendment's guarantee of compulsory process, but declined to decide the case on that point. Id. at 56. Instead, a majority of the Court concluded that the Due Process Clause of the Fourteenth Amendment required the trial court to at least conduct an *in camera* review of the privileged material, assuming Ritchie first established "a basis for his claim that it contained material evidence." Id. at 56-58. The Supreme Court based its decision, in part, on the fact that the Pennsylvania Legislature had obviously "contemplated *some* use of CYS records in judicial proceedings." Id. at 58. The opinion states, "we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that information is 'material' to the defense of the accused.[9]" Id.

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[9] The Supreme Court stated no opinion on whether the outcome of Ritchie would have been different if the statute at issue had disallowed disclosure of the

<u>What it means for evidence to be "constitutionally required" as articulated in Mil. R. Evid. 513(d)(8).</u>

In light of Ritchie, failure to disclose evidence in AB A.K. and AB C.R.'s mental health records did not violate Appellant's rights under the Confrontation Cause. Arguably though, pursuant to Ritchie, the nondisclosure *could* have affected Appellant's rights under the Due Process Clause of the Fifth Amendment[10] or the Compulsory Process Clause of the Sixth Amendment. However, Appellant has failed to complain on appeal that those constitutional rights were violated, and those constitutional rights are not included the granted issue. Any such argument concerning Appellant's other constitutional rights should be considered waived by this Court. But assuming this Court does not apply waiver, it will have to consider a question it has not yet addressed in a prior opinion: what it means for evidence to be "constitutionally required" in the context of Mil. R. Evid. 513.[11]

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privileged to anyone, including law enforcement and judicial personnel. Id. at 58, n.14.

[10] While Ritchie, a case originating in Pennsylvania state court, discusses the Due Process of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment applies to the military justice system. United States v. Bess, 75 M.J. 70, 74, n.3 (C.A.A.F. 2016).

[11] It is again important to divorce the question of what is "constitutionally required" from the statutory discovery rights afforded to military members under R.C.M. 701 and Article 46, UCMJ. As the Army Court of Criminal Appeals has recognized "the discovery provisions of Article 46, UCMJ, are not a basis for determining that discovery is *constitutionally* required." D.B. v. Lippert, unpub. op. at *27, n.14 (emphasis in original).

In a recent opinion, the Army Court of Criminal Appeals (ACCA) held that when mental health records "located in military and civilian healthcare facilities . . . have not been made part of the investigation" they are "not in the possession of the prosecution" and therefore are not constitutionally required to be disclosed.[12] LK v. Acosta, slip op. at 6-7. Significantly, ACCA made the crucial distinction between the "disclosure" of privileged information and the "admission" of privileged information: "The right to disclosure involves the right to possess information that one currently does not possess. Whereas, 'admission' involves the right to introduce into a criminal trial information one already possesses." Id., slip. op. at 5.

ACCA highlighted that the Confrontation Clause encompasses a "trial right" and does not create a pretrial right to discovery for an accused. Id., slip. op. at 6. ACCA then noted that the constitutional right to "discovery" is governed by Brady v. Maryland, 373 U.S. 85 (1963), and that Brady requires that evidence be in the actual or constructive possession of the prosecution. Id. The mental health records at issue were not in the possession of the prosecution, and therefore did not "fall under the ambit of Brady." Id., slip. op. at 7. Since ACCA found "no other

[12] In LK v. Acosta, ACCA interpreted the 2015 version of Mil. R. Evid. 513 for which there was no "constitutionally required exception." Slip. op. at 4. However, ACCA asserted its belief that the removal of the exception was of no consequence because "the Constitution is no more or less applicable to a rule of evidence because it happens to be specifically mentioned in the Military Rules of Evidence." Id., slip. op. at 5.

constitutional right to disclosure at play" it concluded that "the disclosure of the mental health records in this case is not 'constitutionally required.'"[13] Id.

The mental health records in Appellant's case were not in the possession of the prosecution. Although the records were maintained by a military healthcare facility, they were privileged and the prosecution could not review them unless they were first disclosed by a military judge pursuant to Mil. R. Evid. 513(e). Applying the reasoning of ACCA in LK v. Acosta, neither Brady, nor the Confrontation Clause, nor any other constitutional right of disclosure required disclosure of the documents, and therefore it cannot be concluded that they were "constitutionally required" to be disclosed.

However, if this Court disagrees with ACCA's conclusions in LK v. Acosta, and believes that other constitutional rights of an accused may compel review and

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[13] ACCA's opinion does not evaluate the Due Process Clause or Compulsory Process Clause as discussed in Ritchie as possible bases for requiring disclosure of the evidence. It is unclear whether ACCA believes those constitutional rights will never require disclosure of material not in the possession of the prosecution, or if those rights were not "at play" simply because they were not raised as a basis for disclosure in the case. Significantly, at least one court has asserted that the due process analysis used in Ritchie is inapplicable to "records or information which are shielded from all eyes, state and defense." Pinder, 678 So. 2d at 414. The court noted that the Supreme Court's analysis "necessarily assumed that Pennsylvania CYS was a government agency subject to the obligation to disclose Brady material," and that the CYS agents were linked to the prosecution because they investigated potential criminal conduct. Id.

disclosure of mental health records,[14] it should look to Supreme Court case law to determine when privileged evidence is "constitutionally required" to be disclosed. Supreme Court has indicated that the Compulsory Process Clause under the Sixth Amendment and the Due Process Clause of the Fifth Amendment are violated when an accused is deprived of the right to present[15] evidence that is "relevant and material and vital to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 872 (1982). *See also* United States v. Begay, 937 F.2d 515, 525 (10th Cir. 1991) ("the Constitution requires that a criminal defendant be given the opportunity to present evidence that is relevant, material and favorable to his defense"); Ritchie, 480 U.S. at 57.

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[14] This Court should consider the Fourth Circuit Court of Appeals' decision in Kinder v. White, 609 Fed. Appx. 126 (4th Cir. 2015). In that case, the Fourth Circuit found it was error for the district court to order production of a key witness' mental health records in order for the defendant to "fully exercise his Fifth Amendment right to a fundamentally fair trial." Id. at *130. The Fourth Circuit interpreted the psychotherapist-patient privilege articulated in Jaffee to disallow the weighing of the patient's privacy interest against the accused's evidentiary need and Fifth Amendment right to a fundamentally fair trial. Id. at *130-31. It is questionable whether the Fourth Circuit's reasoning applies in this case, where the President appears to have specifically contemplated and provided for such balancing by including the constitutionally required exception in the Mil. R. Evid. 513. However, the Fourth Circuit's reasoning may be more persuasive in cases involving the 2015 version of Mil. R. Evid. 513, where the "constitutionally required" exception has been removed.

[15] Again, it is worth noting that these cases are not entirely analogous to the issue at hand because they address the right to *present* evidence at trial, not the right to have evidence disclosed.

An appellant's burden to show that evidence is "constitutionally required" is high.

An examination of relevant Supreme Court case law reveals that an accused or appellant has a high burden to show that evidence - privileged or otherwise - is "constitutionally required." The Supreme Court has said that "the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible . . . [t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 42 (1996). Indeed, the Supreme Court has contemplated that under a psychotherapist-patient privilege, not all favorable evidence will be disclosed to a defendant since "a privilege protecting confidential communications between a psychotherapist and her patient promotes sufficiently important interests to outweigh the need for probative evidence."[16] Jaffee, 518 U.S. at 9-10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). *See also* Brown v. Ruane, 630 F.3d 62, 74 (1st Cir. 2011) ("the

[16] In Jaffee, the Supreme Court suggested that there may be occasions where the psychotherapist-patient privilege "must give way." Jaffee, 518 U.S. at 18, n.19. One might fairly interpret the Supreme Court's words to signal when evidence normally protected by the privilege is "constitutionally required." In Jaffee, the threshold seems high: "for example, if a *serious threat* of harm to the patient or to others can be averted *only* by means of disclosure by the therapist." Id. (emphasis added). One images that if mental health records revealed that a witness had fabricated an allegation against an accused, the privilege would certainly have to give way. However, minor inconsistencies in accounts of events or collateral matters surely are not contemplated within the Supreme Court's example.

Supreme Court has made clear that a defendant's right to present relevant evidence "may, in appropriate cases, bow to accommodate other legitimate interests") (citing Michigan v. Lucas, 500 U.S. 145, 149).

Since the Constitution does not entitle a criminal accused to present any evidence he wishes, this raises the question of when the exclusion of evidence rises to the level of a constitutional error. The Supreme Court has articulated that to prevail on a due process claim related to the exclusion of evidence, a defendant had to sustain the "heavy burden" of showing that the exclusion "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Engelhoff, 518 U.S. at 42 (internal citations omitted).

Given an appellant's "heavy burden" to establish a due process violation, this Court should accordingly recognize that not all evidence contained in mental health records that could theoretically be used for impeachment is "constitutionally required" to be disclosed. The Supreme Court has asserted that "[t]he ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Ritchie, 480 U.S. at 53. Similarly, this Court has itself acknowledged that the right to cross-examine witnesses is not absolute and reasonable limits may be placed on cross-examination without offending the constitution:

> An accused does not have a right to cross-examine a witness on any subject solely because he describes it as one of credibility, truthfulness, or bias. There must be a direct nexus to the case that is rooted in the record . . . the right to cross-examine is the right to question where the proffer establishes a real and direct nexus to a fact or issue at hand.

Sullivan, 70 M.J. at 115.

If the right to cross-examine a witness at trial may be so limited, then it follows that not all impeachment evidence that *might* be used in cross-examination is "constitutionally required" to be disclosed. In short, an accused cannot meet his heavy burden of showing evidence is "constitutionally required" under Mil. R. Evid. 513 merely by suggesting it might be used for cross-examination.

Furthermore, in order to have been constitutionally required, the evidence at issue must also have been "material" to Appellant's defense. The definition of "material" in the appellate context also reinforces that an appellant has a high burden to show that evidence is "constitutionally required." Evidence is considered to have been "material" "only if there is a reasonable *probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[17]" United States v. Bagley, 473 U.S.667 682 (1985) (emphasis added); Ritchie, 480 U.S. at 56. "A 'reasonable probability' is a

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[17] "The [Supreme] Court treats the prejudice enquiry as synonymous with the materiality determination under Brady v. Maryland." Strickler v. Greene, 527 U.S. 263, 297 (U.S. 1999) (Souter, J., dissenting.) Thus, by showing "materiality" an appellant has also demonstrated prejudice.

probability sufficient to undermine confidence in the outcome." Id. "The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-110 (1976).

The Ninth Circuit Court of Criminal Appeals has offered another useful framework for determining when excluded evidence is so important to the defense "that the error assumes constitutional magnitude." United States v. Stevers, 603 F.3d 747, 755-56 (9th Cir. 2010). The Court considers "the probative value of the evidence on the central issue; its reliability; whether it is capable of evaluation by the trier of fact; whether it is the sole evidence on the issue or merely cumulative; and whether it constitutes a major part of the attempted defense." Id. (quoting Miller v. Stagner, 757 F.2d 988, 944 (9th Cir. 1985)). *See also* Manai v. Valenzuela, 2015 U.S. Dist. LEXIS 57633 (N.D. Cal. May 1, 2015) (citing the factors articulated in Stevers as a means for determining whether "excluded evidence is relevant and material, and vital to the defense.") The Ninth Circuit's choice of the words "*central* issue" and "*major* part of the attempted defense" is significant. Evidence will not be constitutionally required if it relates to a collateral issue. Nor will it be constitutionally required if it would be inadmissible, if it is merely cumulative with other evidence, or if it is of questionable reliability.

These factors can assist this Court in determining whether nondisclosed evidence had a reasonable probability of producing a different outcome at trial.

In sum, to prevail in this appeal, Appellant must ultimately show that there was a reasonable probability that if an *in camera* review had been performed and certain evidence contained in the mental health records had been disclosed to the defense, that the outcome of his court-martial would have been different. *See also* Davis v. Litscher, 290 F.3d at 947. In evaluating whether any evidence in AB A.K. and AB C.R.'s mental health records had a reasonable probability of producing a different outcome at trial, and thus was "material" and "constitutionally required" to be disclosed, this Court should consider whether that evidence was probative as to a central issue in the case, whether it was reliable, whether it would have been admissible, whether it was cumulative, and whether it would have constituted a major part of Appellant's attempted defense. This Court should also ensure there is a real and direct nexus between the contested evidence and a fact or issue in the case.

No evidence in AB A.K. or AB C.R.'s mental health records was constitutionally required to be disclosed.

Although Appellant asserts that the military judge erred by failing to conduct an *in camera* review of AB A.K.'s mental health records, Appellant has not alleged that any particular pages from AB A.K.'s records should have been disclosed or that he was prejudiced by the nondisclosure of any such records. As such, this

Court should find no error or prejudice with respect to the nondisclosure of AB A.K.'s mental health records.

In contrast, Appellant argues that five main errors resulted from the nondisclosure of AB C.R.'s mental health records:

s

In sum, Appellant cannot establish that any of the evidence contained in AB A.K. and AB C.R.'s mental health records was constitutionally required to be disclosed under Mil. R. Evid. 513(d)(8). The evidence Appellant has identified had little to no probative value to any central issue in the case, and even assuming it all was admissible, it does not raise a reasonable possibility that the result of Appellant's court-martial would have been different had it been disclosed. Since he cannot show that any of the nondisclosed evidence was material to his defense, Appellant has necessarily failed to demonstrate that he suffered any prejudice from the nondisclosure. The military judge did not err in failing to disclose AB A.K. and AB C.R.'s mental health records, and Appellant is not entitled to any relief.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian appellate defense counsel, and to the Appellate Defense Division on 26 June 2017.

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/s/____

MARY ELLEN PAYNE, Major, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 26 June 2017

APPENDIX

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

ARMY MISC 20150769

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

2016 CCA LEXIS 63

February 1, 2016, Decided

NOTICE: NOT FOR PUBLICATION

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

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

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

Amicus Curiae:

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

For Protect Our Defenders: Peter Coote, Esq.

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

OPINION BY: WOLFE

OPINION

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

WOLFE, Judge,

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

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

Petitioner assigns four errors.[2] As we agree with the first, second, and fourth assignments of error, we do not reach the third. The petition is GRANTED in part in that we set aside the military judge's ruling under Mil. R.

Evid. 513. The petition is DENIED in that we make no determination on whether petitioner's mental health records would be admissible at trial, assuming a properly conducted hearing under Mil. R. Evid. 513.[3]

2 The assignments of error are as follows:

> I. Whether the military judge erred as a matter of law when he ruled that the disclosure of [petitioner's] mental health records prior to an evidentiary hearing as required by Mil. R. Evid. 513(e)(2) did not violate her privilege under Mil. R. Evid. 513(a).
>
> II. Whether the military judge erred as a matter of law [*3] in determining that a mandatory disclosure under Mil. R. Evid. 513(d)(2) was sufficient to trigger an in camera review of [petitioner's] mental health records.
>
> III. Whether the military judge erred as a matter of law by ruling that the constitutional exception applies under Mil. R. Evid. 513.
>
> IV. Whether the military judge abused his discretion when he ruled that the defense met its burden under Mil. R. Evid. 513 and *United States v. Klemick [65 M.J. 576 (C.A.A.F. 2006)]* where the defense offered no evidence or witnesses in support of their motion to compel production of [petitioner's] mental health records.

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

I. JURISDICTION

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

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

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

Many victim rights are procedural, and even if a court-martial disregards the rights, such action may often be unlikely to have the potential to directly affect the findings or sentence.[4] However, in December 2014, *Article 6b, UCMJ*, was amended to provide that a victim of an offense may petition this court for a writ of mandamus to [*5] enforce certain statutory and procedural rights. *UCMJ art. 6b(e)*; *10 U.S.C. § 806b(e) (2012 Supp. II)*; *see* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 [hereinafter 2015 NDAA], Pub. L. No. 113-291, § 535, 128 Stat. 3292, 3368 (2014) (Enforcement of Crime Victims' Rights Related to Protections Afforded by Certain Military Rules of

Evidence). We understand the mandate of *Article 6b(e)(3), UCMJ* (as recently amended), for such petitions to be forwarded "directly" to this court and "to the extent practicable," for this court to give such petitions "priority over all other proceedings" to be a new and separate statutory authority for this court to issue writs. National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 531(e)(3) (2015) (Enforcement of Certain Crime Victim Rights by the Court of Criminal Appeals). That is, *Article 6b, UCMJ*, is a distinct authority from the All Writs Act.

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

To consider a petition for a writ under *Article 6b, UCMJ*, we need not find that the matter is in aid of our jurisdiction under *Article 66*. Or, more precisely, we need not find that the matter(s) raised in the petition has "the potential to directly affect the findings and sentence." *LRM, 72 M.J. at 368*. Instead, to find jurisdiction to issue a writ under *Article 6b* we need only determine that the petition addresses the limited circumstances specifically enumerated under *Article 6b(e)*.[5] As this petition alleges that the military judge failed to follow Mil. R. Evid. 513, a matter specifically enumerated in *Article 6b(e)(4)(D)*, we find that we have jurisdiction to consider the merits of the petition.

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

II. STANDARD

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

III. CHRONOLOGY

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

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

The next day, on 16 September 2015, the trial counsel issued a subpoena for petitioner's records from two civilian mental healthcare providers. The subpoena

stated that the production was for the purpose of "judicial in-camera review." The subpoena stated that failure to comply could result in apprehension [*9] or fines of up to $500.

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

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

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

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

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

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

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

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

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

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

IV. DISCUSSION

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

A. Ordering the Production of Mental Health Records.

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

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

First, the failure to object cannot be construed as either an affirmative waiver of a privilege or waiver of

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

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

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

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

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

> (3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:
>
> (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
>
> (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable e fforts to obtain the same or substantially similar information through non-privileged sources."

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

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

C. *The Defense Motion*

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

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

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

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

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

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

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

D. The Mil. R. Evid. 513 Hearing

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

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

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

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

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

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

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

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

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

Addressing the requirement under Mil. R. Evid. 513(e)(3)(A) that the moving party show "a specific factual basis demonstrating a reasonable likelihood that the records" yield admissible evidence, the military judge found that "the defense" had satisfied this requirement because the government intended to introduce the journal entry. The military judge determined the existence of the journal entry, (or as the judge stated "the fact that the

government is attempting to introduce" the journal entry) made it reasonably likely that the remaining records "would yield some admissible evidence under an exception to Mil. R. Evid. 513. That exception being the 'constitutionally required' exception." The military judge's reasoning was flawed in several respects.

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

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

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

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

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

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

When addressing the second requirement, that under Mil. R. Evid. 513(e)(3)(B) the mental health record must meet one "of the enumerated exceptions," the military judge stated that the mental health records met "the constitutionally required exception." While we do not resolve this issue today, the military judge's ruling was problematic in that there is no longer an "enumerated" constitutional exception to Mil. R. Evid. 513. *See* 2015 NDAA, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 ("Not later than 180 days after the date of the enactment of this Act, Rule 513 of the Military Rules of Evidence shall be modified as follows . . . To strike the current exception to the privilege contained in subparagraph (d)(8) of Rule 513."); Exec. Order No. 13696, 80 Fed. Reg. at 35,819 ("Mil R. Evid. 513(d)(8) is deleted."). It is clear from the record that the military judge was well aware of this amendment at the time of his ruling. It therefore appears that the military judge must have determined that Mil. R. Evid. 513 is facially unconstitutional. If so, he did not make this determination clear, cite any authority, or explain his reasoning (either when he ruled on the record or when he reconsidered his ruling by email). Prudence suggests that [*26] a detailed analysis should accompany such a significant decision.[14]

> The presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown. *National Endowment for the Arts v. Finley, 524 U.S. 569, 580, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998)* ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and

only as a last resort.'"); *United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)* ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Appellant must show that [the challenged rule] "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff, 518 U.S. 37, 43-45, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)* (examining historical practices on due process challenges).

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

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

3. Cumulative Nature of Records

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

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

4. Non-privileged Sources of Information

The fourth requirement under Mil. R. Evid.

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

5. Narrowly Tailored Production and Disclosure

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

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

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

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

6. Privilege versus Discovery

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

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

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

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

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

V. CONCLUSION

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

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

Senior Judge HAIGHT and Judge PENLAND concur.

UNITED STATES OF AMERICA v. MARCUS R. SMITH, AVIATION ELECTRICIAN'S MATE AIRMAN (E-3), U.S. NAVY

NMCCA 201100433

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2012 CCA LEXIS 367

September 28, 2012, Decided

SUBSEQUENT HISTORY: Motion granted by *United States v. Smith, 2012 CAAF LEXIS 1264 (C.A.A.F., Nov. 27, 2012)*
Later proceeding at *United States v. Smith, 2013 CAAF LEXIS 160 (C.A.A.F., Feb. 8, 2013)*
Motion granted by *United States v. Smith, 2013 CAAF LEXIS 236 (C.A.A.F., Mar. 5, 2013)*
Motion granted by *United States v. Smith, 2013 CAAF LEXIS 349 (C.A.A.F., Mar. 29, 2013)*
Petition denied by *United States v. Smith, 2013 CAAF LEXIS 362 (C.A.A.F., Apr. 2, 2013)*

PRIOR HISTORY: [*1]
GENERAL COURT-MARTIAL. Sentence Adjudged: 18 March 2011. Military Judge: CDR Kevin R. O'Neil, JAGC, USN. Convening Authority: Commander, Navy Region Southwest, San Diego, CA. Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

COUNSEL: For Appellant: LT Toren G. Mushovic, JAGC, USN.

For Appellee: Maj William C. Kirby, USMC.

JUDGES: Before J.R. PERLAK, M.D. MODZELEWSKI, R.Q. WARD, Appellate Military Judges. Chief Judge PERLAK and Judge WARD concur.

OPINION BY: MODZELEWSKI

OPINION

OPINION OF THE COURT

MODZELEWSKI, Senior Judge:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault in violation of Article 120, Uniform Code of Military Justice, *10 U.S.C. § 920*. The members sentenced the appellant to confinement for 30 days, reduction to pay grade E-1, and a bad-conduct discharge. On 12 August 2011, the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

I. Background

Intelligence Specialist Third Class NW (NW) organized a birthday party for her husband and invited the appellant and his wife. The appellant was friends with NW's [*2] husband and the two wives were friendly. Apart from the friendships between the husbands and between the wives, there is no evidence of an independent relationship between NW and the appellant. At the party, most people were drinking, to include both

NW and the appellant. After midnight, NW removed herself from the party in order to go to sleep, because she had to wake up early the next day with her young child. NW fell asleep alone in her bedroom.

Not long after she fell asleep, NW awoke to the feeling of a hand going down the back of her pants, and a finger entering her vagina. She opened her eyes and recognized the appellant, who left the room without saying anything. NW then sent her husband a text message asking him to come to the room. When her husband arrived, NW told him that the appellant had touched her.

Aviation Machinist's Mate Second Class (AD2) Malone was another guest at NW's party. He was a friend of NW and her husband, and an acquaintance of the appellant. At trial, AD2 Malone testified that, on the night of the party, the appellant admitted to him that he had "fingered" NW. Record at 575. AD2 Malone did not disclose this admission to either trial or defense counsel [*3] until a few days before the trial, despite having testified telephonically at the Article 32 hearing and having spoken to both sides more than once before trial.

Unrelated to these events, NW had a history of mental health treatment spanning at least two years before the night in question. During that period, she saw several different treatment providers and was diagnosed with Borderline Personality Disorder (BPD). At trial, the primary defense theory was that NW's diagnosed personality disorder and related need for attention created a bias or a motive to fabricate the allegation against the appellant.

II. Assignments of Error

The appellant assigns three errors and we address them in the following order: first, that the military judge improperly limited a defense expert's testimony about the victim's mental health disorder; second, that the military judge improperly limited trial defense counsel's cross-examination of NW; and third, that the evidence was factually and legally insufficient to support the finding of guilty.

III. Limitations on Testimony by Defense Expert

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Sullivan, 70 M.J. 110, 114 (C.A.A.F. 2011).* [*4] Below, we first address the legal framework that the military judge applied to the proffers by trial defense counsel and by Dr. Kennedy, the defense team's forensic neuropsychologist. Next, we consider the admissibility of the contents of NW's mental health records. Finally, we address the appellant's argument that Dr. Kennedy was unfairly barred from talking about dissociative episodes, a characteristic of BPD.

A. The legal framework applied to mental health evidence

With scant analysis and extremely limited citations, the appellant assigns this error citing to the *Fifth* and *Sixth Amendments*. However, the Military Rules of Evidence governed Dr. Kennedy's testimony at trial, and we begin our analysis there. Evidence of a witness's mental health condition may be admissible, but it must be relevant to the issue of bias or the witness's competency to testify. *United States v. Sojfer, 47 M.J. 425, 427-28 (C.A.A.F. 1998).* More specifically, with respect to competency to testify the evidence must relate to the witness's ability to perceive and tell the truth. *Sullivan, 70 M.J. at 117*; *see also United States v. Sasso, 59 F.3d 341, 347-48 (2d Cir. 1995)* (employing a multi-factor analysis) *and* [*5] *United States v. Butt, 955 F.2d 77, 82 (1st Cir. 1992)* (summarizing "over forty years" of federal jurisprudence).

Here, the military judge repeatedly explained these "ground rules" to counsel, citing *Sojfer* and *Sasso* for the proposition that any evidence of NW's mental health conditions must have some connection to her "ability to perceive or recall events accurately." Record at 278. On the record, the military judge even opined that there was tension between *Sasso* and *Butt*, and he chose to follow *Sasso* because it was more inclusive of the type of evidence that the appellant sought to admit. Record at 277-78. Without taking a position on whether that tension exists in the federal courts, we find that the military judge applied the rules of evidence correctly.[1]

1 To the extent that the appellant challenged the military judge's statement of the law, we have reviewed the military judge's analysis *de novo* and found it to be correct. *See United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011)* (noting that even when appellate courts review the admissibility of evidence under an abuse of discretion standard, pure questions of law are reviewed *de novo*).

B. [*6] **The contents of NW's mental health records**

The appellant also argues that, even if the military judge applied the correct legal rule, he improperly limited Dr. Kennedy to discussing "generalities" as opposed to NW's "specific facts and circumstances." Appellant's Brief of 21 Feb 2012 at 8. These facts and circumstances were described in NW's mental health records, which Dr. Kennedy read and relied on to form her own opinions. The military judge did permit Dr. Kennedy to testify concerning some material in the records,[2] but he prohibited her from discussing the treatment providers' notes, which contained summaries of statements made by NW in the course of treatment. We conclude that the military judge did not abuse his discretion in doing so, because the statements were double and triple hearsay, and improper impeachment of NW.

2 The military judge allowed Dr. Kennedy to say that she reviewed all of NW's available records, and to describe all of the criteria leading to a diagnosis of BPD (e.g. that the patient craves attention). Record 839, 910-20. Dr. Kennedy then opined that NW suffered from BPD, and the military judge allowed her to explain that other providers reached the same conclusion, [*7] which Dr. Kennedy knew from reading the mental health records. *Id.* at 918-20.

1. Hearsay

The notes are undoubtedly hearsay and they became double hearsay when the appellant offered them through Dr. Kennedy. There is also a third layer of hearsay in the notes that contain summaries of NW's statements.[3]

3 One note, on page 19 of Appellate Exhibit XXXV, even contains quadruple hearsay. The multiple layers of hearsay involved here make it unnecessary to consider whether any of these statements might have qualified at the first layer as statements made for the purpose of medical diagnosis or treatment under MILITARY RULE OF EVIDENCE 803(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Even statements reflecting just one level of hearsay are ordinarily inadmissible in the context of expert testimony. An expert witness may rely on them to form an opinion, but may not disclose them to the members "unless the military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect." MILITARY RULE OF EVIDENCE 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant never persuaded the military [*8] judge that the notes were highly probative of any issue, beyond their role in shaping Dr. Kennedy's opinion, and he has not challenged the military judge's analysis under MIL. R. EVID. 703. Rather than address the specific evidentiary issue, the appellant continues to emphasize the general impact that these providers' notes may have had on NW's credibility, arguing that they showed her attempting to manipulate her previous providers by telling them each a different set of facts. We do not discount the appeal of such evidence, but it is nevertheless hearsay.

The military judge was within his discretion to conclude that any probative value that the notes held was substantially outweighed by their prejudicial effect and confusion of the issues. First, they had nothing to do with the sexual assault at the heart of this case. The notes related only to past issues, and made no mention of the appellant. Second, NW could not have described these past issues easily in black-and-white terms. The notes dealt with subjective matters of varying degree, like addiction, personal motivations, and the status of relationships, making it difficult to conclude that they were probative of untruthfulness. [*9] Third, Dr. Kennedy never adequately explained how the notes were connected to the relevant issue of NW's ability to perceive or remember. Instead, Dr. Kennedy simply opined that NW was "an unreliable reporter,"[4] which the military judge properly recognized as impermissible human lie-detector testimony and prohibited. Fourth, the appellant provided no basis for us to treat historic statements made in confidence to health care providers, in the context of seeking care, as statements on the same legal footing as contemporaneous reporting to one's spouse and to law enforcement.

4 Record at 856.

2. Improper Impeachment

Because Dr. Kennedy failed to connect the notes with NW's ability to perceive and remember, their only possible relevance was for impeachment. But a mental disorder does not necessarily give rise to a bias or motive to fabricate.[5] The rules of legal and logical relevance

apply to impeachment, *Sojfer, 47 M.J. at 427*, and the proponent of mental-health evidence must establish that there was a "real and direct nexus" between the witness's disorder and the facts of the case, *Sullivan, 70 M.J. at 115*. Whether that nexus exists is a question of logic and common sense, answered by the [*10] presentation of evidence, not by the incantation of words like "bias" and "motive to fabricate."

5 We consider the admissibility of the statements under MIL. R. EVID. 608(c), as evidence of bias, prejudice, or motive to misrepresent. Although they are specific instances of conduct that relate to NW's character for truthfulness as contemplated by MIL. R. EVID. 608(b), they were not properly admissible as impeachment evidence on direct examination of Dr. Kennedy.

The appellant's proffer on this issue consisted of the records themselves and Dr. Kennedy's explanation of BPD.[6] Although Dr. Kennedy opined that NW suffered from BPD, her opinion did not establish a nexus between the specific contents of the medical records and some fact or issue in the case. In fact, her explanation of how BPD operates highlights the *absence* of a nexus in this case. When asked whether there was "[a] trigger inside of an individual with Borderline that can be flipped," she described a BPD patient's "need to be loved," which can cause them to "do whatever they can to get that attention back" if it is lost. Record at 913. The "if" in Dr. Kennedy's testimony sets up the possible nexus. But neither her testimony nor [*11] any other evidence established that NW ever acted on any such impulse.

6 Dr. Kennedy defined BPD for the members as a character or personality disorder belonging to the emotional histrionic group and highlighted several specific characteristics of the disorder, including being "attention-seeking," "impulsive," and "self destructive." Record at 910-16.

The lack of any "trigger" for the BPD makes this case almost identical to the facts of *Butt*, where a defense expert testified that the victim's BPD and related psychoses could have caused her to falsely accuse the defendants as an "emotional backlash." *955 F.2d at 81*. As in this case, however, defense counsel never established a nexus between that theory and the facts of the case.

Because the appellant did not carry his burden to establish a nexus between the mental health records and the facts of the case, the military judge was within his discretion to limit Dr. Kennedy's testimony. The records contained "personal and potentially stigmatizing material,"[7] and the military judge was properly as vigilant in weighing those concerns as he would be with traditional concerns like distraction and confusion of the members.[8]

7 *Butt, 955 F.2d at 83-84*.
8 *Sullivan, 70 M.J. at 115*.

C. [*12] **Dissociation and Dr. Kennedy's trial testimony**

The appellant also argues that the military judge prevented trial defense counsel from exploring how BPD can cause dissociation, thereby depriving the members of relevant information about NW's ability to perceive and recall the sexual assault. Appellant's Brief at 10. But our review of the record turns this argument on its head. In fact, the trial defense counsel repeatedly declined to ask about dissociation, despite the apparent interest of both the military judge and the members in that topic.

The military judge appears to have recognized immediately the congruence between his ruling about the mental health evidence and Dr. Kennedy's description of dissociation, which she defined as "the inability of someone to form a cogent recollection . . . ." Record at 203. The military judge specifically asked Dr. Kennedy about dissociation during the first motion session, but the trial defense counsel never returned to the topic during subsequent sessions or either of the times that Dr. Kennedy testified at trial. Finally, a member asked about NW's ability to distinguish fantasy from reality, and Dr. Kennedy discussed dissociation without objection. [*13] *Id*. at 934. The trial defense counsel again asked no follow-up questions, and instead shifted his focus back to NW's perception of "a hostile world." *Id*. at 958-59. It is apparent to us that the absence of further testimony about dissociation is not attributable to the rulings of the military judge.

Overall, the military judge's rulings were straightforward applications of the rules of evidence with no constitutional implications. We find that he did not abuse his discretion.

IV. Limitations on Defense Cross-Examination of NW

The appellant also assigns error under the *Sixth Amendment's Confrontation Clause*, arguing that the military judge improperly limited his cross-examination of NW. "Trial rulings limiting cross-examination are reviewed for an abuse of discretion." *United States v. Israel, 60 M.J. 485, 488 (C.A.A.F. 2005)* (citation omitted).

This case highlights the tension within *Confrontation Clause* jurisprudence. On one hand, there is perhaps no more important moment at trial than when an accused is afforded the opportunity to cross-examine his accuser, and that opportunity must be adequate. *Crawford v. Washington, 541 U.S. 36, 57, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. Accordingly, the Court of Appeals for the [*14] Armed Forces has encouraged us to "allow liberal admission of bias-type evidence." *United States v. Moss, 63 M.J. 233, 236 (C.A.A.F. 2006)*. On the other hand, "the *Confrontation Clause* guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)*. Military judges retain "wide latitude" to limit cross-examination, even when a line of questioning attacks an accuser's credibility. *Sullivan, 70 M.J. at 115* (quoting *Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986))*.

The appellant urges us to find a constitutional violation based on four areas in which the military judge limited or foreclosed questioning: (1) NW's alleged motive to fabricate the sexual assault; (2) her statements to past mental health providers; (3) a Facebook posting she wrote to her husband; and, (4) trial defense counsel's reading of a document during the cross-examination. The appellant also makes a fifth argument that the military judge "insert[ed] himself in the role of prosecutor" by making *sua sponte* objections during the cross-examination of NW, revealing a bias in [*15] front of the members that permeated the entire trial. Appellant's Brief at 14. Below, we address each argument and discuss a sixth issue that was not briefed or argued by either party on appeal, concerning NW's past allegations of sexual assault.

A. NW's alleged motive to fabricate

The military judge ended a line of questioning once trial defense counsel began asking NW about what the counsel characterized as a "motivation to lie" that she "uses her body to gain attention." Record at 512. Putting aside our observation that trial defense counsel described a personality trait and not a motive, we nonetheless find that there was no nexus tying the alleged motive to the facts of the sexual assault.

The evidence at trial does not indicate that NW sought attention from anyone on the night of the sexual assault, or that she sought it at any time from the appellant. For an attention-seeking motive to be relevant, therefore, one would have to believe that NW was constantly in need of attention, at all times, to the extent that she was permanently prepared to falsely accuse someone of a crime. But that is "a general description of a person's disposition or of a personality," which is the definition [*16] of a character trait, not a motive. 1-7 WEINSTEIN'S EVIDENCE MANUAL, §7.01. Thus, the military judge did not abuse his discretion when he ruled that the trial defense counsel's questions were impermissible proof of character. *See Sullivan, 70 M.J. at 114 n.3* (noting that the military judge in that case permissibly analyzed a defense proffer as relating to character, not bias).

B. NW's statements to past mental health providers

The military judge also ruled that the trial defense counsel could not ask NW about statements she made to past mental health providers. Trial defense counsel offered these statements as impeachment by specific instances of untruthfulness under MIL. R. EVID. 608(b). However, even under that approach, the material must be probative of truthfulness or untruthfulness "in the discretion of the military judge." MIL. R. EVID. 608(b). The purpose of this grant of discretion is to "avoid holding mini-trials on peripherally related or irrelevant matters." *United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992)* (citation omitted).

Here, the matters about which trial defense counsel sought to impeach NW were at best peripherally related. As we discussed above, these notes [*17] by NW's providers had no relation to the sexual assault or the appellant. They are subjective observations by the providers based on their discussions with NW of her relationships, personal motivations, and addiction. The record before us suggests that cross-examination on these topics would yield very little probative value to her untruthfulness: defense counsel had not established the actual falsity of the statements to her providers, despite having access to all of NW's mental health records and to

the providers whose notes were at issue. At best, the appellant identified apparent inconsistencies that could just as easily be explained by the fact that the statements were contained in someone else's notes, and that they were products of various therapeutic settings over a period of time. Attempts to impeach NW on these inconsistencies would likely prove distracting and confusing for the members, and inconclusive of her truthfulness. *See, e.g., United States v. Crowley, 318 F.3d 401, 416 (2d Cir. 2003)*(finding that the trial judge did not abuse his discretion in refusing to allow cross-examination of a victim on alleged prior false allegations). Therefore we find that the trial judge [*18] did not abuse his discretion in refusing to allow cross-examination on this matter.

We are receptive to the appellant's argument that the military judge may have misstated the law when he repeatedly characterized trial defense counsel's attempt at impeachment as an attempt "to prove credibility by specific instances." Record at 534. However, his imprecision may also be attributable to trial defense's counsel's failure to distinguish between MIL. R. EVID. 608(b) and 608(c). Trial defense counsel simply referred to "credibility and veracity,"[9] and never articulated that he was seeking to impeach NW under MIL. R. EVID. 608(b). Nonetheless, it is clear to us that the military judge applied MIL. R. EVID. 608(b), because he correctly focused on whether the statements reflected mental health providers' "observations and conclusions" as opposed to NW's assertions of fact. He also observed that the statements were "getting collateral" in subject matter, all of which is standard MIL. R. EVID. 608(b) analysis.

9 Record at 531.

C. Facebook post

The military judge also prohibited the trial defense counsel from asking about Appellate Exhibit LXIV, a post written by NW on Facebook. The appellant characterizes [*19] this post as evidence of NW "lying in a relationship to create drama,"[10] which was also how his defense counsel phrased the question to NW at trial: "[A]re you the kind of person that would lie in a relationship to create drama?" Record at 553.

10 Appellant's Brief at 13.

We note first that this question, like trial defense counsel's statement of the MIL. R. EVID. 608(c) motive, is phrased in distinctly character terms. It asks about NW's general characteristics, not a specific act of hers.[11] Assuming that defense counsel was highlighting the untruthfulness of the post on Facebook, we must consider whether this post was in fact probative of NW's truthfulness. On its face, it is apparent that AE LXIV discusses a practical joke played by NW and a friend. There is nothing to contradict NW's contention that she was joking, and there is no evidence that the joke was analogous in any way to a false claim of sexual assault. The posting was in the nature of an apology for any mischief or angst that the joke may have caused. It is difficult to see how AE LXIV is at all probative of NW's truthfulness, and the military judge was well within his discretion to keep it out of the trial.

11 Also note [*20] that it was the military judge, not trial defense counsel, who formulated this as an issue under MIL. R. EVID. 608(b). Trial defense counsel did not articulate a specific theory of admission.

D. Trial defense counsel's reading of a document

The fourth and final limitation identified in the appellant's brief is that the military judge prevented trial defense counsel from reading a document to NW while he questioned her.[12] Before he relied on the document, trial defense counsel asked NW three different times whether she had a phone conversation with AD2 Malone's wife (another witness), and each time NW responded that she did not remember. Trial defense counsel then began reading from a document listing the time and date that the conversation allegedly took place, but the military judge prevented him from finishing the question.

12 Although the appellant characterizes this document as a "telephone log," Appellant's Brief at 12, the document is not attached to the record of trial.

We find that the military judge did not abuse his discretion, particularly since the appellant assigns this error under MIL. R. EVID. 613 ("Prior statements of witnesses"). If the document in question was actually [*21] a telephone log, as the appellant claims, then it was not NW's prior statement. Furthermore, by the time that trial defense counsel turned to the document, NW had repeatedly stated that she did not remember the conversation. In order to proceed on the same subject,

then, the trial defense counsel would have had to refresh her recollection, but he did not take that approach. He simply continued asking about the conversation, even though it would have been impossible for NW to say anything more about something she did not remember. By the time trial defense counsel read from the document, his questions were asked-and-answered, and the military judge was within his discretion to end the inquiry.

E. The military judge's *sua sponte* objections

The appellant also argues that the military judge abandoned his impartiality and became, in effect, a second prosecutor whenever he objected *sua sponte* to questions by the trial defense counsel. We have discussed directly above one of the occasions highlighted by the appellant, the military judge's intervention when trial defense counsel began reading from a document. The appellant also identifies several occasions during Dr. Kennedy's testimony when [*22] the military judge intervened without objection, a moment when he told trial defense counsel that his questions were argumentative "to [his] peril,"[13] and several occasions on which the military judge told trial defense counsel to "move on."[14]

13 Record at 600.

14 *See, e.g.*, Record at 547.

We find no abuse of discretion in the military judge's control of the court-martial, nor any reason to question his impartiality. There is a strong presumption that military judges are impartial. *United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001)*. They must take care not to become an advocate for either party, but that does not prevent them from participating "actively" in courts-martial to ensure that the members receive the information they need. *United States v. Foster, 64 M.J. 331, 332-33 (C.A.A.F. 2007)*. In fact, military judges "*shall* exercise reasonable control over . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MIL. R. EVID. 611(a) (emphasis added).

Turning to each of the errors identified by the appellant, we find [*23] that the military judge's interventions during Dr. Kennedy's testimony served all three of the MIL. R. EVID. 611(a) purposes, particularly the latter two. Notably, the military judge was not objecting at whim, but instead enforcing his own pretrial rulings as counsel persisted in testing the limits of the same.

The military judge's comment to trial defense counsel about "peril" may not have been the ideal choice of words, but it does not rise to the level of error. Contextually, in front of members, it may well have been a signal that this argumentative advocacy might be backfiring. The question that incited this comment was in fact argumentative, and the comment itself does not appear to have limited proper cross-examination. Likewise, the military judge's direction to counsel to "move on" is not automatic error. *See United States v. Wilcox, 631 F.3d 740, 750-51 (5th Cir. 2011)*.

Overall, the military judge stayed well-within the scope of his authority and responsibility under MIL. R. EVID. 611(a). There is insufficient evidence to overcome the presumption of impartiality, and no reason that the military judge's conduct would, "taken as a whole in the context of [the] trial," place the [*24] legality, fairness, and impartiality of the court-martial into question. *Quintanilla, 56 M.J. at 78*.

F. NW's past allegations of sexual assault

In the course of our review under *Article 66(c), UCMJ*, we have also considered the military judge's ruling on the admissibility of NW's past allegations of sexual assault. NW's mental health records contain several references to three separate occasions on which NW claimed to have been sexually assaulted or inappropriately touched, spanning back as far as her elementary school days. From her medical records, it appears that NW may have recounted those events to therapists years later, imprecisely using legal or technical terms. Trial defense counsel argued that he was entitled to confront NW about these earlier allegations and about her later conversations with mental health providers about these episodes, to explore whether she had lied or exaggerated. The military judge ruled that trial defense counsel could not confront NW about the allegations because he had not shown they were false.

The military judge did not abuse his discretion, because the past allegations were not relevant in the absence of evidence that they were actually false. The [*25] appellant bore the burden to provide such evidence, since the mere existence of the allegations was not relevant to NW's credibility. *United States v. McElhaney,*

54 M.J. 120, 130 (C.A.A.F. 2000). But the appellant provided no evidence to establish the falsity of the statements. The only evidence in the record supports the military judge's conclusion that none of the three allegations was shown to be false.

There is also no evidence before us that NW exaggerated any of the three prior allegations. The terms "sexual assault" and "rape" were not NW's statements *per se* -- they appear in the notes written by NW's mental health providers. Accordingly, we find no error.

VI. Factual and Legal Sufficiency

We have also reviewed the findings for factual and legal sufficiency. When we examine the factual sufficiency of the evidence, we must be convinced beyond a reasonable doubt of the appellant's guilt, mindful of the fact that we did not personally observe the witnesses. *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the essential [*26] elements beyond a reasonable doubt. *Id. at 324*.

The appellant urges us to find factual insufficiency by discounting the testimony of NW and AD2 Malone. The arguments concerning NW emphasize her impeachment on trivial matters, and we need not address them. With respect to AD2 Malone, we concur that his eve-of-trial disclosure of the appellant's admissions was unusual, but he endured extensive cross-examination on the subject. His explanation for the late disclosure is at least somewhat logical; he was deployed to Kuwait during the pretrial stages, testified telephonically at the Article 32 hearing, and had limited communications with either counsel.

AD2 Malone's account of the appellant's statement is even more convincing in light of the appellant's own reversal in his pretrial statements. The appellant first issued a strong denial of any wrongdoing, Prosecution Exhibit 5, but in a second statement he claimed lack of memory while admitting that he "got out of hand" at NW's house and "disrespect[ed]" her and her husband. PE 6 at 2. This admission is consistent with what he told AD2 Malone. It is not surprising that the appellant was more graphic with a friend than with a law enforcement [*27] agent.

Considering also the immediacy of NW's reporting to her husband and the lack of evidence that she harbored any ill will toward the appellant, we are persuaded beyond a reasonable doubt of the appellant's guilt, and we are convinced that a reasonable fact finder would be as well.

VI. Conclusion

Finding no error materially prejudicial to the appellant's substantial rights, the findings and the sentence as approved by the convening authority are affirmed.

Chief Judge PERLAK and Judge WARD concur.