IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Frantz BEAUGE Personnel Specialist Chief Petty Officer (E-7) U.S. Navy, Appellant	**REPLY ON BEHALF OF APPELLANT** Crim.App. Dkt. No. 201900197 USCA Dkt. No. 21-0183NA

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

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STATUTES, RULES, BRIEFS, OTHER SOURCES

Appellant replies to the Government's Answer,[1] pursuant to Rule 19(b)(3) of this Court's Rules of Practice and Procedure.

Argument

A. The psychotherapist-patient privilege pertains to the communications between a patient and her psychotherapist, not a psychotherapist and a non-patient third party.

Military Rule of Evidence 513 sets forth the parameters of the psychotherapist-patient privilege. The privilege pertains to the "confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist . . . if such communication was made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition."[2] This Rule was derived from the Supreme Court's holding in *Jaffee v. Redmond* that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure."[3] Exceptions articulated in Mil. R. Evid. 513(d) establish specific circumstances under which the psychotherapist-patient privilege does not exist.[4]

Nothing in the Rule suggests that the psychotherapist-patient privilege extends to communications between a psychotherapist and a non-patient third

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[1] The Court granted the Government's motion to file its brief under seal out of time on 29 September 2021.
[2] Mil. R. Evid. 513(a).
[3] *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).
[4] Mil. R. Evid. 513(d).

party. Mil. R. Evid 513(d)(3) states that there is no privilege over communications made between a patient and a psychotherapist when "state law . . . imposes a duty to report information contained in a communication." The privilege pertains to the communications between the patient and the psychotherapist. Therefore an exception to that privilege pertains to those communications between a patient and a psychotherapist.

The Government argues that this exception applies only to the information that the state required be reported by the psychotherapist.[5] So the Government effectively argues that an exception was written to establish that the psychotherapist-patient privilege does not extend to communications that were never covered by the psychotherapist-patient privilege. Setting aside that the text of the Rule is clear, such an "exception" is unnecessary and thus cannot be what Mil. R. Evid. 513(d)(3) intends.

This Court should not expand or alter Mil. R. Evid. 513. If the President intended to limit Mil. R. Evid. 513(d)(3) to that information provided by a psychotherapist to a third party, then he would have done so using clear language. He did not—likely because there is no psychotherapist-patient privilege over such third-party communications regardless of the existence of Mil. R. Evid. 513.

[5] Gov't Answer, 15-21.

The Rule is clear. This Court should not adopt the Government's suggested manipulation of the plain language of Mil. R. Evid. 513(d)(3).

B. While the evidence produced or disclosed as a result of an exception to Mil. R. Evid. 513 should be narrowly tailored, the Military Judge here failed to disclose any of the pertinent evidence. Instead, the Judge provided non-privileged information that did not fall within the Rule.

The Government spent 11 pages of its Answer explaining the canons of statutory construction, focusing primarily on the language of Mil. R. Evid. 513(e)(4), which states that the production or disclosure of communications or records under the Rule must be "narrowly tailored." Appellant does not disagree that Rule 513(e)(4) calls for a narrow tailoring of the information that is produced or disclosed to the parties. The government's error, however, lies in its assessment of what communications Mil. R. Evid. 513(d)(3) applies to. The Government relied on Mil. R. Evid. 513(e)(4) to improperly interpret Mil. R. Evid. 513(d)(3) as only requiring disclosure of the information contained in the Hotline Report and Investigative Summary.[6] But that is not what the Rule calls for.

According to Mil. R. Evid. 513(e)(4), after a Military Judge determines that an exception applies and the psychotherapist-patient communications are not protected by privilege, the military judge must ensure that the production or disclosure be narrowly tailored to the specific records or communications that meet

[6] Gov't Answer, 17.

the requirements of the exception and are included in the stated purpose for which the records are sought.

Appellant agrees that Mil. R. Evid. 513(e)(4) expressly calls for a narrow tailoring of the evidence that a military judge deems must be produced. This could have been accomplished here by the military judge reviewing the relevant psychotherapist records *in camera* and disclosing only the portion of those records that were relevant to the exception. This would mean first limiting the records to those from C.G.'s meeting with Ms. DeForest on December 15, 2016 that resulted in the mandatory report and then only producing the portion of those records specifically sought in PSC Beauge's motion pursuant to Mil. R. Evid. 513(d)(3)—the complete accounting of C.G.'s allegations of child sexual abuse as detailed to her psychotherapist.[7]

C. Trial Defense Counsel's performance was deficient when they failed to request C.G.'s communications with her psychotherapist under the child-abuse exception to the psychotherapist-patient privilege.

The child-abuse exception to the psychotherapist-patient privilege in Mil. R. Evid. 513(d)(2) applied in PSC Beauge's case. The Government did not dispute this.[8] Instead, the Government mischaracterized the Army court's conclusions in *Acosta* to claim that the only evidence that had to be disclosed to achieve the

[7] J.A. 310-11.
[8] *See* Gov't Answer, 28-31.

purpose of Mil. R. Evid. 513(d)(2) was the same evidence they claimed met the purpose of Mil. R. Evid. 513(d)(3). The Government again relied on its analysis of Mil. R Evid. 513(e)(4) to improperly conclude that Mil. R. Evid. 513(d)(2) was satisfied by the disclosure of non-privileged information—the Hotline Report and Summary.[9]

Appellant does not contend that Mil. R. Evid. 513(d)(2) applies to *all* child abuse cases.[10] It applies in those specific circumstances clearly identified in the Rule. There is no privilege over psychotherapist-patient communications when those communications contain evidence of child abuse.[11] It is certainly possible that there are "cases of child abuse" where the child sought therapy but never discussed the abuse. Appellant is not suggesting that such records or communications would fall within the child-abuse exception to Mil. R. Evid. 513.[12] The Government is wrong that Appellant's interpretation of the exception would "swallow the rule."[13]

The language of Mil. R. Evid. 513(d)(2) is clear—there is no psychotherapist-patient privilege "when the communication is evidence of child abuse." On December 15, 2016, C.G. met with a counselor and told that counselor

[9] Gov't Answer, 31.
[10] *See* Gov't Answer, 31.
[11] Mil. R. Evid. 513 (d)(2).
[12] *See, e.g., United States v. Acosta*, 76 M.J. 611, 618 (A. Ct. Crim. App. 2017).
[13] *See* Gov't Answer, 31.

that Chief Beauge sexually abused her.[14] C.G. was then specifically referred to the counseling center.[15] That alone is evidence that when C.G. later met with Ms. DeForest at the counseling center on December 15, 2016, she was there specifically to discuss the allegations of child abuse.[16] But there is even more information that definitely proves that the communications between C.G. and her counselor contain evidence of child abuse—Ms. DeForest's report to the Florida Abuse Hotline Information System on the same date as her session with C.G. articulating that C.G. reported child sexual abuse.[17] There is no question that the communications between C.G. and Ms. DeForest on December 15, 2016 contained evidence of child abuse. Military Rule of Evidence 513(d)(2) obviously applied.

Despite acknowledging that an inquiry into the meaning of a particular statute "ceases if the statutory language is unambiguous,"[18] the Government forgoes any substantive analysis of the plain language of Mil. R. Evid. 513(d)(2), and focuses instead on the "purpose" of the exception, relying on the non-binding Analysis of the Manual for Courts-Martial.[19] This was inappropriate. The Court need not look beyond the plain language of the Rule.

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[14] J.A. 258, 266, 334.
[15] J.A. 334.
[16] J.A. 334.
[17] J.A. 293, 313, 334.
[18] Gov't Answer, 12.
[19] Gov't Answer, 30.

In making its argument as to the purpose of Mil. R. Evid. 513(d)(2), the Government mischaracterized the Army court's conclusion in *Acosta*.[20] In *Acosta*, the Army court did not find that the military judge erred in ordering production of the victim's mental health records because "inconsistent statements" are not "evidence of child abuse," as the Government claims.[21] Instead, the court clearly found that Mil. R. Evid. 513(d)(2) cannot be used to "access . . . mental health records for evidence that there was no child abuse."[22] The Court never stated that seeking inconsistent statements is an improper purpose if those statements are evidence of child abuse.

Here, the specific communications and records that Trial Defense Counsel was interested in were those related to the alleged child sexual abuse. In Appellant's motion pursuant to Mil. R. Evid. 513(d)(3), Appellant sought the complete accounting of C.G.'s allegations of child sexual abuse as detailed to her psychotherapist.[23] The Hotline Report and Summary generated from the psychotherapist's communications with a third party are no substitute for the actual psychotherapist's records documenting her communications with C.G. about the alleged abuse.

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[20] *See* Gov't Answer, 29-30.
[21] *See* Gov't Answer, 26.
[22] *Acosta*, 76 M.J. at 618.
[23] J.A. 310-11.

Chief Beauge was entitled to know the entirety of the allegations against him and had a right to effectively confront those witnesses who testified against him. Chief Beauge was denied the opportunity to put on a complete defense and confront the complaining witness in this case because he did not know the full details of what C.G. reported.

D. Trial Defense Counsel's failure to seek C.G.'s communications with her psychotherapist under the child-abuse exception prejudiced PSC Beauge because he did not know what C.G. actually reported to her psychotherapist and thus could not thoroughly attack the credibility of the Government's primary witness or develop and present a complete defense.

The Government argued that PSC Beauge was not prejudiced because Trial Defense Counsel "conducted a thorough cross-examination" of the complaining witness, comparing the case to *United States v. Green*.[24] In *Green*, the CAAF specifically highlighted information elicited by counsel that supported the Court's conclusion that the civilian defense counsel conducted a thorough cross-examination of the complaining witness. The evidence elicited by the Trial Defense Counsel here pales in comparison to that in *Green*:

[24] Gov't Answer, 31-32.

Green[25]	***Beauge***[26]
The victim talked with her father every day and never told him about the alleged sexual abuse.	C.G. never reported the alleged abuse to her parents who she spoke to on the phone while staying at PSC Beauge's home. C.G. never reported the alleged abuse to any of the people in PSC Beauge's home at the time, despite trusting and being close with multiple people in the house.
The victim initially said that she had sex with the appellant ten times a week, but she later reduced this number to two to three times a week.	C.G. changed the number of times she claims PSC Beauge allegedly abused her. She testified that it occurred every time her aunt went to work, totaling about 15 to 20 times. But she told prosecutors that it only occurred six times. She admitted she did not know how many times it happened.
During an Article 32 hearing, the victim said the appellant had not punched her in the face with his fist but later testified on direct examination that he had punched her with his fist.	C.G. admitted that when she claims PSC Beauge was humping her, she did not know what she was feeling—she thought it was his leg or his clothing. She did not think it was an erect penis at the time it was occurring.
The victim enjoyed her life with the appellant and his wife more than her life with her parents.	
The victim had regular fights with the appellant and his wife because they grounded her too much for having bad grades and not going work around the house	
Victim spent between a month and a half to two months at a lock-down	

[25] *United States v. Green*, 68 M.J. 360, 362 (C.A.A.F. 2010).
[26] J.A. 409-10, 440-52.

facility for children with drug and alcohol abuse problems or with significant behavioral problems.	
The victim admitted that she had told someone that she had never had sexual intercourse or oral sex with the appellant and that the appellant had never touched her in any sexual way.	

The *Green* court also emphasized that the appellant was acquitted of seven of the thirteen charged specifications.[27] The appellant was not convicted of any offense for which the victim's testimony was the only evidence.[28] The appellant was convicted of the offenses that were corroborated by DNA evidence or eye-witness testimony.[29] That is markedly different from the outcome here, where PSC Beauge was convicted of two of the three charged specifications, including two specifications of sexual abuse of a child in violation of Article 120b, UCMJ, for which C.G.'s testimony was the only evidence. There was no DNA to corroborate her testimony. There was no eye witness to support her story.

Had Trial Defense Counsel requested the production of C.G.'s communications with her psychotherapist from December 15, 2016 (or the relevant records reflecting those communications) under the child-abuse exception, the records would have been produced and Counsel would have been able to execute a

[27] *Green*, 68 M.J. at 362.
[28] *Id.*
[29] *Id.*

more effective cross examination of C.G.

Conclusion

PSC Beauge requests that this Court reverse the NMCCA's decision and set aside the findings and sentence. If a rehearing is authorized, this Court should direct that the Military Judge conduct an *in camera* review of the psychotherapist's clinical notes.[30]

Respectfully Submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 24(c) because:

This brief contains less than 7,000 words.

[30] *See United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997) (The Court explained that "[i]f a rehearing is ordered, we would expect the military judge to examine in camera any documents for which work-product privilege is claimed. The Military Judge should determine which documents fall under the work-product privilege in accordance with the principles discussed above.").

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in 14-point, Times New Roman front.

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on October 12, 2021.

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