IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Wendell E. MELLETTE, Jr.** Electrician's Mate (Nuclear) First Class (E-6) U.S. Navy, Appellant	**BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 21-0312/NA Crim. App. Dkt. No. 201900305

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

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Issues Presented

I.

M.R.E. 513 EXTENDS THE PSYCHOTHERAPIST-PATIENT PRIVILEGE TO A "CONFIDENTIAL COMMUNICATION" BETWEEN A PATIENT AND PSYCHOTHERAPIST OR ASSISTANT. DID THE LOWER COURT ERR BY CONCLUDING DIAGNOSES AND TREATMENT ARE ALSO SUBJECT TO THE PRIVILEGE, INVOKING THE ABSURDITY DOCTRINE?

II.

DID THE NMCCA DEPART FROM SUPREME COURT AND CAAF PRECEDENT BY NOT REVIEWING THE EVIDENCE AT ISSUE—DIAGNOSES AND TREATMENT, INCLUDING PRESCRIPTIONS—IN CONCLUDING: (1) THE MENTAL HEALTH EVIDENCE WAS BOTH PREJUDICIAL AND NON-PREJUDICIAL; AND (2) FAILURE TO PRODUCE IT WAS HARMLESS BEYOND A REASONABLE DOUBT WHERE THE UNKNOWN EVIDENCE COULD HAVE NEGATED THE EVIDENCE THE NMCCA CLAIMED TO BE "OVERWHELMING" EVIDENCE?

Statement of Statutory Jurisdiction

The Navy-Marine Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[1] Thus, this Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

At a general court-martial in 2019, Appellant was found guilty, contrary to his pleas, of one specification of sexual abuse of a child in violation of Article 120b, UCMJ.[3] The members acquitted him of one specification of sexual assault of a child by vaginal penetration under Article 120b, UCMJ.[4] The members sentenced him to five years' confinement and a dishonorable discharge.[5]

On May 14, 2021, the NMCCA issued an opinion ordering some of the language stricken from the specification but otherwise affirming the finding while reassessing the sentence to three years' confinement and a dishonorable discharge.[6] Appellant petitioned this Court on July 13, 2021. This Court granted review on September 7, 2021.

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[1] 10 U.S.C. § 866(b)(3) (2018).
[2] 10 U.S.C. § 867(a)(3) (2018).
[3] J.A. 364.
[4] J.A. 364.
[5] J.A. 365.
[6] *United States v. Mellette*, 81 M.J. 681, 688 (N-M. Ct. Crim. App. 2021).

Statement of Facts

A. During the time of the allegations, S.S. received mental health treatment, including medications whose names she was unable to [redacted]

The complaining witness in this case, S.S., is Appellant's ex-wife's sister.[7] When S.S. was fifteen, her parents sent her to an inpatient mental health care facility for one week after someone reported to school authorities that she was engaging in self-mutilation.[8] In a deposition, S.S. said she was treated for "[d]epression, anxiety and self-harm" at the facility.[9]

After leaving inpatient treatment, S.S. received "very detailed" mental health counseling for at least one year afterward.[10] [redacted]

Though she claimed in the deposition that she received counseling for "[a]bout a year,"[12] in a separate interview, [redacted]

[7] J.A. 171.
[8] J.A. 281-82.
[9] J.A. 490.
[10] J.A. 562.
[11] J.A. 496-97.
[12] J.A. 497.
[13] [redacted]

S.S. also took medications both while at the inpatient facility and after she was released, some of which gave her "really bad nightmares."[14] In the deposition, she was unable to remember definitively *which* medications she took. Aside from Prozac, she stated: "I don't remember the names of them."[15]

Though it is not clear how long S.S. remained on [redacted]

Regardless, during a period in which S.S. received mental health treatment in 2013 and 2014, she began having regular contact with Appellant. He received orders from New York to Georgia, which allowed him and his wife to visit S.S. and his wife's parents periodically.[18] Seeing that S.S. was "withdrawn," S.S.' father wanted someone to have interaction with her in a "one-on-one" setting.[19] Appellant volunteered to take on a "big brother" role.[20] He would talk to S.S. and

[14] J.A. 495.
[15] J.A. 494.
[16] J.A. 495 [redacted]
[17] J.A. 562-63.
[18] J.A. 174-75.
[19] J.A. 283.
[20] J.A. 283-84.

take her on short car rides to the store.[21] Yet their one-on-one contacts were limited: S.S.' father stated that aside from short trips to the store, Appellant and S.S. spent very little time alone.[22]

Several months after S.S. turned sixteen, Appellant's wife caught her and Appellant kissing.[23] Around this time, S.S. separately told her boyfriend that she was engaging in sexual activity with Appellant, prompting the authorities to come to the house.[24] But when the authorities questioned S.S., she told them "nothing had happened."[25]

Three years later, S.S. changed her story amid a child custody dispute involving her sister—by this point, Appellant's ex-wife—and Appellant.[26] Now, she claimed Appellant and she engaged in sexual contact when she was fifteen, not only when she was sixteen.[27] She told NCIS that Appellant grabbed her thighs or hips, undid her bra, or tried to put his hand in her pants.[28]

Around the same time, S.S.' father called Appellant with the help of NCIS in

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[21] J.A. 176-78.
[22] J.A. 285 ("Alone, little to none. Except, you know, they rolled down to the store. And the store from my house is 15 minutes there and 15 minutes back. But not a great amount of time alone to my knowledge.").
[23] J.A. 207.
[24] J.A. 540.
[25] J.A. 541.
[26] J.A. 106, 118-19.
[27] J.A. 382.
[28] J.A. 378.

a secretly recorded phone call. In the phone call, Appellant confessed to having sex with S.S. when she was sixteen.[29]

B. Before trial, the defense moved to compel production of S.S.' mental health diagnoses and treatment, including medications.

Charges were referred to a general court-martial five to six years after the alleged incidents.[30] Before trial, the defense submitted a discovery request requesting S.S.' diagnoses and treatment, including her prescriptions, from when she received inpatient mental health treatment until the present date.[31] When the Government denied the request, citing the psychotherapist-patient privilege under M.R.E. 513, the defense moved to compel production of this information.[32]

In its motion, the defense argued the evidence was necessary since S.S.' diagnoses and medications could have affected her "memory, ability to tell the truth, ability to distinguish the truth, her suggestibility, and the likelihood of her to embellish facts."[33] The defense argued the evidence was not privileged and that, regardless, S.S. waived any privilege by discussing the information with NCIS and during the deposition.[34] The defense also argued the evidence was essential to

[29] J.A. 297-98.
[30] J.A. 49-50.
[31] J.A. 457.
[32] J.A. 438.
[33] J.A. 445.
[34] J.A. 441, 443.

Appellant's right to present a complete defense.[35]

As an enclosure to its motion, the defense provided a statement from a forensic [redacted][36] [redacted] explained that the "cutting behavior discussed by S.S. is a common feature of someone with Borderline Personality Disorder or someone who has traits of Borderline Personality Disorder."[37] He added that patients with Borderline Personality Disorder "often have symptoms of cutting and depression."[38]

[redacted]

[35] J.A. 445.
[36] J.A. 481-82.
[37] J.A. 481.
[38] J.A. 481.
[39] J.A. 481.
[40] J.A. 481.

[redacted]

Dr. Holguin added that "[c]ore features of Borderline Personality Disorder often include attention-seeking and manipulative behaviors" and that additional symptoms may include "fear of abandonment, and drastic or volatile behavior in response to that fear."[42]

C. The military judge denied the motion, concluding that S.S.' diagnoses and treatment were privileged and not relevant or necessary, even while acknowledging S.S. "might not have told the truth" about her diagnoses.

The parties litigated the motion involving S.S.' diagnoses and treatment in an Article 39(a), UCMJ, session.

[redacted]

[41] J.A. 481.
[42] J.A. 482.

[redacted]

In a written ruling, the military judge denied the motion on the basis that the evidence sought was privileged and, in any event, not relevant or necessary.[46] The military judge deemed the defense to be engaged in a "fishing expedition."[47]

On the record, the military judge acknowledged that S.S. "might not have told the truth" about her diagnoses, but explained that further inquiry was not warranted.[48] He explained: "she stated with enough clarity and particularity for the defense to be aware of what *she states* are her conditions."[49]

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[43] J.A. 592-94.
[44] J.A. 444 [redacted] J.A. 597.
[45] J.A. 605.
[46] J.A. 616.
[47] J.A. 616 ("As such the Court finds that the defense is in [sic] engaged in a 'fishing expedition' with regard to these tangible items of evidence.").
[48] J.A. 607.
[49] J.A. 607 (emphasis added).

D. At trial, S.S. struggled to remember when the alleged incidents occurred, but said she was confident she was fifteen.

At trial, the dispute centered on whether S.S. was fifteen or sixteen at the time of the alleged incidents. The trial evidence showed the following timeline:

- August 2013: S.S. was admitted for one week of inpatient mental health treatment near her home in Florida.[50] She was fifteen.
- December 2013: Appellant executed a permanent change of station from New York to Georgia, and Appellant saw S.S. while visiting his wife's parents' home in Florida with his wife.[51]
- February-April 2014: Appellant went on an eighty-day deployment.[52]
- July 13, 2014: S.S. turned sixteen.[53]
- Sometime in or after August 2014: Appellant again went on deployment.[54]
- February 2015: Appellant's wife caught him and S.S. kissing.[55]

The allegations rested mainly on S.S.' testimony and recollection. At trial, S.S. stated that on one occasion before one of Appellant's deployments, Appellant touched her thigh, back, and shoulders and undid her bra through her shirt as he was driving with her.[56] On another occasion, she stated that he touched "[her] back

[50] J.A. 175.
[51] J.A. 175, 214.
[52] J.A. 181, 242.
[53] J.A. 292.
[54] J.A. 217.
[55] J.A. 207.
[56] J.A. 79-84.

or [her] thighs or [her] butt" in her house after asking her to view something on the computer.[57] After Appellant returned from his deployment, S.S. described another incident in which Appellant touched her vagina and "on [her] butt and [her] thighs."[58]

While claiming these events happened before a deployment, when pressed for a specific time as to when the incidents occurred, S.S. could not provide one. For example, when trial counsel asked her when the incident in the car occurred, S.S. replied: "I'd say—I'm not really sure. I don't want to say a date and be wrong."[59] She said it "maybe" occurred a couple of months after she left inpatient treatment.[60] Similarly, when defense counsel asked her when Appellant touched her "thighs and back on the car ride," she replied "I don't remember."[61] When defense counsel asked her when Appellant "unhooked [her] bra," she stated: "I don't remember."[62] Yet again when defense counsel asked her when Appellant touched her "thighs, butt and back" in the house, she replied: "I don't know."[63]

Separately, defense counsel noted during cross-examination that S.S. never

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[57] J.A. 82.
[58] J.A. 87-88.
[59] J.A. 81.
[60] J.A. 81.
[61] J.A. 110.
[62] J.A. 110.
[63] J.A. 110-11.

told NCIS that Appellant touched her vagina even though her NCIS interview took place closer in time to the alleged event. When confronted with this, S.S. acknowledged that she did not provide this information to NCIS because: "I didn't remember it at that time."[64]

S.S.' inability to remember the dates of the incidents was not new. In her pre-trial deposition, she similarly said that she could not remember when the events occurred.[65] She admitted having problems remembering dates and times.[66] She even agreed to having memory problems.[67]

To try to clarify the timeline, the Government admitted several emails Appellant sent his wife during a deployment four months before S.S.' sixteenth birthday. In the emails, Appellant told his wife that S.S. sent him an email asking him if he wanted to have sex with her.[68] In another email, Appellant told his wife that S.S. told him in an email: "when you were touching me, I wanted more."[69]

Appellant denied to his wife in the emails that he had engaged in any improper touching with S.S. He suggested that the "touching" referred to non-

[64] J.A. 106-07.
[65] J.A. 517.
[66] J.A. 524.
[67] J.A. 525.
[68] J.A. 311.
[69] J.A. 315.

sexual touching, possibly a "back massage" or something similar.[70] Appellant also told his wife that he was struggling to figure out how to respond to S.S. in view of her mental health.[71]At trial, Appellant's ex-wife acknowledged that Appellant and S.S. *would* sometimes engage in non-sexual touching, like a massage. As she put it, Appellant and S.S. "would wrestle around or he would ask for a back massage or something like that."[72]

Separately, the Government presented testimony from a Sailor who claimed that during the February-to-April 2014 deployment, Appellant told him that he "might" accept S.S.' invitation in the email to have sex with her after the deployment.[73] He also stated that Appellant told him the email "was crazy" in a tone that suggested "he didn't know where it was coming from."[74]

The members ultimately found Appellant guilty of one specification of sexual abuse of a child under Article 120b UCMJ, for touching the "clothing, buttocks, thighs, hips, and back of S.S." to gratify his sexual desires "on divers occasions, between on or about August 2013 to on or about 12 July 2014."[75]

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[70] J.A. 315.
[71] J.A. 315 ("Like I said, I should have probably instantly forwarded you the message from your sister but was too busy trying to figure out how to reply to her in a sugar coated 'NO' so as to prevent her from cutting/going back to vista.").
[72] J.A. 179.
[73] J.A. 247.
[74] J.A. 255.
[75] J.A. 364, 423.

E. Even though both Appellant and the Government agreed on appeal the military judge erred in deeming diagnoses and treatment privileged, the NMCCA disagreed, citing the absurdity doctrine.

Before the NMCCA, both Appellant and the Government agreed the military judge erred in concluding that S.S.' diagnoses and treatment were privileged under M.R.E. 513.[76] Despite this, the NMCCA explained that "[t]o interpret the privilege as covering only the patient's description of her symptoms, but not the psychotherapist's diagnosis and treatment of her condition, would deter patients from seeking mental health treatment in precisely the way [*Jaffee v. Redmond*] sought to avoid."[77]

The NMCCA acknowledged its interpretation conflicted with the Army CCA, which held that the privilege "'extends to statements and records that reveal the substance of conversations that may have been for the 'purpose of facilitating diagnosis or treatment,' *but not to the diagnosis or treatment itself*.'"[78] But the NMCCA said its interpretation of M.R.E. 513 aligned with the plain language of the Rule and that the parties' interpretation would produce "absurd results."[79]

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[76] *Mellette*, 81 M.J. at 691 ("Both parties argue the military judge erred in concluding such information was privileged. We disagree.").
[77] *Id*. at 692 (citing 518 U.S. 1 (1996)).
[78] *Id*. (citing *United States v. Rodriguez*. No. ARMY 20180138, 2019 CCA LEXIS 387, at *8 (A. Ct. Crim. App. Oct. 1, 2019)) (emphasis added).
[79] *Id*.

1. The NMCCA separately concluded that the military judge erred in failing to order production of the requested information since S.S. waived her privilege or it was constitutionally necessary.

At the same time, the NMCCA found that the military judge erred by concluding that S.S. did not waive her privilege when she discussed her diagnoses and mental health treatment in her NCIS interview and during the deposition.[80] The NMCCA held that even if there was no waiver, disclosure was constitutionally necessary.[81] The NMCCA further concluded that the military judge erred in concluding the evidence was not relevant or necessary.[82]

The NMCCA concluded this evidence was subject to discovery under Rule for Court-Martial (R.C.M.) 703(f). First, regarding S.S.' diagnoses, the NMCCA explained that the defense had the right "to confirm" S.S.' diagnoses and determine whether "there were any other related diagnoses that could impact her credibility."[83] Second, regarding the need for the defense to review S.S.' medications, the court explained:

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[80] *Id*. at 693 ("Irrespective of whether [S.S.] knew the information was privileged or intended to waive the privilege by discussing it, we find based on the record before us that her disclosures were voluntary, involved a significant part of the matters at issue, and occurred under such circumstances that it would be inappropriate to allow the claim of privilege.").
[81] *Id*. at 694.
[82] *Id*.
[83] *Id*. (citing MANUAL FOR COURTS-MARTIAL [M.C.M.], UNITED STATES (2019), Rule for Courts-Martial (R.C.M.) R.C.M. 703(f)).

> Defense also sought to review the list of [S.S.'] prescribed medications, not all of which she could remember the names of, to assess their interactive side effects and potential for adverse effect on memory in a case involving a delay in reporting for several years, allegations that [S.S.] had previously denied, and a report made under circumstances—revolving around the custody battle of [Appellant's ex-wife's child]—giving rise to a strong motive to fabricate at least their timeframe, if not their substance. Under these circumstances we find clearly unreasonable the military judge's conclusion that the requested information was not relevant and necessary.[84]

F. Without reviewing the requested mental health evidence, the NMCCA determined Appellant was both prejudiced and not prejudiced by its failure to be produced.

Without reviewing the requested mental health evidence, the NMCCA found that Appellant was not prejudiced as to any "pre-deployment" sexual touching but *was* prejudiced as to post-deployment allegations.[85] The court found that there was "strong corroboration" for the pre-deployment acts.[86] It pointed to the email Appellant sent his ex-wife that contained S.S.' statement to Appellant.[87] It also noted the testimony of the Sailor on the ship who testified that Appellant told him *during* the deployment that he "might" have sex with S.S. in the future.[88]

On the other hand, the NMCCA concluded that Appellant was prejudiced as to post-deployment allegations since these allegations relied "exclusively" on S.S.'

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[84] *Id*.
[85] *Id*. at 695-96.
[86] *Id*. at 695.
[87] *Id*.
[88] *Id*. n.18.

testimony.[89]

The NMCCA excepted the words "divers occasions" to reflect that only the pre-deployment allegations should be affirmed and reassessed Appellant's sentence to three years' confinement and a dishonorable discharge.[90]

[89] *Id*. at 696.
[90] *Id*. at 701. The NMCCA also excepted the word "hips" from the affirmed specification, finding it to be legally and factually insufficient. *See id.* at 699.

Summary of Argument

By its plain terms, the psychotherapist-patient privilege under M.R.E. 513(a) extends only to a "confidential communication" between a patient and a psychotherapist or assistant "for the purpose of facilitating diagnosis or treatment," not to the diagnosis or treatment itself. This is further supported by the canon of statutory construction against surplusage as well as the canon that a word gathers meaning from the words around it. Even if it were plausible to read M.R.E. 513(a) as shielding diagnosis or treatment from disclosure, because a narrower reading is also plausible, the narrower reading controls. Contrary to the NMCCA's conclusion, this interpretation of M.R.E. 513(a) would not yield absurd results.

Despite its erroneous view of privilege, the NMCCA correctly concluded that disclosure of the evidence was necessary and that the evidence was both relevant and necessary. However, the NMCCA erred in declaring the erroneous nondisclosure of the mental health evidence was both prejudicial and non-prejudicial without first reviewing it. As to the evidence's effect on pre-deployment alleged offenses, the evidence could have negated the evidence the NMCCA claimed corroborated these allegations: S.S.' emails to Appellant.

This Court should set aside the lower court's judgment and remand for an evidentiary hearing.

Argument

I.

THE LOWER COURT ERRED BY CONCLUDING THAT DIAGNOSES AND TREATMENT ARE PRIVILEGED BY THE PSYCHOTHERAPIST-PATIENT PRVILEGE UNDER M.R.E. 513.

Standard of Review

This Court reviews questions of the meaning and scope of evidentiary privileges *de novo*.[91]

A. Military evidentiary privileges are given their plain meaning and are narrowly construed as running contrary to a trial's search for the truth.

This Court has explained and applied "the well established rule that principles of statutory construction are used in construing the *Manual for Courts-Martial* in general and the Military Rules of Evidence in particular."[92] This Court in *United States v. Custis* explained that "'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is

[91] *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019) (explaining that this Court interprets Military Rules of Evidence using principles of statutory construction through a *de novo* standard of review).

[92] *United States v. Custis*, 65 M.J. 366, 367, 370 (C.A.A.F. 2007) (declining to apply a "common law exception generally recognized in the United States federal courts but not listed within the exceptions specifically enumerated under M.R.E. 504(c)").

not absurd—is to enforce it according to its terms.'"[93]

In the context of privileges, there is another guiding principle: a court must construe a privilege narrowly.[94] Indeed, in *Trammel v. United States*, the Supreme Court explained that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'"[95] As a result, "they must be strictly construed and accepted 'only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'"[96]

In the context of military privileges specifically, the *Trammel* rule arguably takes added effect. Unlike with Federal Rule of Evidence 501, in which federal courts develop privileges on a case-by-case basis through common law,[97] in the military, the President dictates the specific terms of a privilege.[98] This approach

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[93] *Id*. (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).
[94] *Id*. at 369 (citing *Trammel v. United States*, 445 U.S. 40, 50-51 (1980)).
[95] *Trammel*, 445 U.S. at 50 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).
[96] *Id*. (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).
[97] *See generally Jaffee*, 518 U.S. at 8 ("Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'") (quoting Fed. R. Evid. 501).
[98] *United States v. Rodriguez*, 54 M.J. 156, 157 (C.A.A.F. 2000) ("In contrast to the Federal Rules of Evidence, Congress has delegated to the President the

"provide[s] predictability, clarity, and certainty through specific rules rather than a case-by-case adjudication of what the rules of evidence would be."[99]

In *United States v. Rodriguez*, for example, this Court explained that it would not resort to policy arguments when interpreting a privilege, but rather would hew closely to the specific wording the President chose.[100] Adhering to this principle, this Court in *Rodriguez* rejected an argument that the President intended to simply adopt the Supreme Court's notion of the psychotherapist-patient privilege from *Jaffee* through M.R.E. 501—prior to the creation of M.R.E. 513.[101]

B. By its plain terms, the psychotherapist-patient privilege under M.R.E. 513(a) extends only to a "confidential communication" between a patient and psychotherapist "*for the purpose of facilitating* diagnosis or treatment"—not to the diagnosis or treatment itself.

The NMCCA concluded that the psychotherapist-patient privilege "covers not only the patient's description of her symptoms, but also the psychotherapist's rendering of a diagnosis and treatment plan, based on those symptoms, back to the patient."[102] This ignored the text of M.R.E. 513(a), which provides:

A patient has a privilege to refuse to disclose and to prevent any other

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authority to issue rules of evidence for courts-martial."); Art. 36, UCMJ, 10 U.S.C. § 836 (2012).

[99] *Rodriguez*, 54 M.J. at 158.

[100] *Id*. at 161 (explaining that "in the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court").

[101] *Id*. at 161 (citing 518 U.S. 1 (1996)).

102 *Mellette*, 81 M.J. at 691.

> person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the UCMJ, if such communication was made *for the purpose of facilitating* diagnosis or treatment of the patient's mental or emotional condition.[103]

The Rule defines the word "confidential" as "[a] communication . . . not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication."[104] But this only raises the question: what is a "communication?" And what is a "diagnosis" or "treatment?" Since the Rule does not define these terms, their ordinary meanings are applied.[105]

Black's Law Dictionary defines "communication" as "the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception."[106] By contrast, Black's Law Dictionary defines "diagnosis" as "[t]he determination of a medical condition (such as a disease) by physical examination or by study of its symptoms."[107] It defines

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[103] MIL. R. EVID. 513(a) (emphasis added).
[104] MIL. R. EVID. 513(b)(4).
[105] *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (explaining that "this court 'interpret[s] words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context") (citation omitted) (alteration in original).
[106] *Communication*, *Black's Law Dictionary* (8th ed. 2004); J.A. 434.
[107] *Diagnosis*, *Black's Law Dictionary* (8th ed. 2004); J.A. 435.

"treatment" as "[a] broad term covering all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies."[108]

It follows that the word "confidential communication" has a distinct meaning from "diagnosis or treatment." As the Army CCA noted when disagreeing with the Coast Guard CCA's conclusion to the contrary, "[a] diagnosis, prescribed medications, and other treatments are matters of fact that exist independent of any communications between the patient and the psychotherapist."[109] Thus, the NMCCA's view, which effectively adopted the Coast Guard CCA's,[110] fails under a plain meaning analysis.

1. The Rule's definition of "evidence of a patient's records or communications" does not lead to a contrary result.

The Rule separately defines the term "[e]vidence of a patient's records or communications" as "testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's

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[108] *Treatment*, *Black's Law Dictionary* (6th ed. 1990); J.A. 437.
[109] *Rodriguez*, 2019 CCA LEXIS at *7 (quoting *H.V. v. Kitchen*, 75 M.J. 717, 721 (C.G. Ct. Crim. App. 2016) (Bruce, J, dissenting).
[110] *Cf. Mellette*, 81 M.J. at 692 ("The Coast Guard Court of Criminal Appeals held as much in *H.V. v. Kitchen*, pointing out that 'diagnosis and the nature of treatment necessarily reflect, in part, the patient's confidential communications to the psychotherapist'. . . .We agree.") (quoting 75 M.J. at 719) (citation omitted).

mental or emotional condition."[111]

It appears that this term has a limited applicability. For one, it is not used in M.R.E. 513(a) but rather a separate section of the Rule discussing procedures to be followed when records are disclosed.[112] Additionally, unlike with M.R.E. 513(a), this term only applies to the *patient's* communications.[113] As a matter of logic, it is difficult to conceive how the patient's communications to the doctor could include "diagnosis or treatment"—matters based on the *psychotherapist's* expertise.

Regardless, like with M.R.E. 513(a), this term—"[e]vidence of a patient's records or communications"—does not define the terms "communication" or "diagnosis or treatment," though it refers to them. Thus, these words would be given their ordinary and distinct meanings. As before, this would lead to the same conclusion that "confidential communication" does not include "diagnosis or treatment."

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[111] MIL. R. EVID. 513(b)(5).

[112] *Cf.* MIL. R. EVID. 513(e) (describing "Procedure to Determine Admissibility of Patient Records or Communications").

[113] MIL. R. EVID. 513(b)(5) (explaining the term's applicability to "testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications *by a patient to a psychotherapist*, or assistant to the same , for the purposes of diagnosis or treatment of the patient's mental or emotional condition.") (emphasis added).

C. To read "confidential communication" as encompassing "diagnosis or treatment" would violate the surplusage canon of statutory construction.

As a leading treatise explains, "[c]ourts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally."[114] Describing this canon against surplusage, the Supreme Court has said it is "'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'"[115]

This Court also applied the canon in *United States v. Sager* when interpreting a provision of Article 120, UCMJ.[116] This Court rejected the view that the words "asleep, unconscious, or otherwise unaware" in Article 120 created only one theory of liability since such an interpretation would have rendered the words "asleep," "unconscious," and "or" as surplusage.[117]

The same canon counsels strongly against the NMCCA's view that "confidential communication" under M.R.E. 513(a) includes "diagnosis or treatment." Following this Court's reasoning in *Rodriguez*, it must be presumed that the President used the words "diagnosis or treatment" in M.R.E. 513(a)

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[114] 2A N. Singer & J. Singer, *Sutherland Statutory Construction* § 46:6, at 256-259 (7th ed. 2014).
[115] *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (quoting *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988)).
[116] *Sager*, 76 M.J. at 162.
[117] *Id*.

purposefully. Indeed, his use of the words in the privilege itself necessarily shows that he had "diagnosis or treatment" in mind when he crafted the privilege's *limits*. As the Army CCA similarly observed:

> Had the President wished to broaden the category of information that would be privileged under Mil. R. Evid. 513, he could have included diagnosis and treatment in the plain language of the rule. As the words 'diagnosis' and 'treatment' appear in the rule, we cannot conclude that the President merely overlooked the issue of whether a diagnosis or treatment constitutes a 'confidential communication.[118]

Sure enough, some states *have* explicitly included "diagnosis" in their definition of the term "confidential communications."[119] As the Army CCA noted, the President did not do this in M.R.E. 513(a).

D. To read "confidential communication" as covering "diagnosis or treatment" would also violate the canon that a word gathers meaning from the words around it.

The Supreme Court also relies on the principle of *noscitur a sociis*—which counsels that "a word is known by the company it keeps"—when interpreting a

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[118] *Rodriguez*, 2019 CCA LEXIS at *7-8.

[119] *See, e.g.*, FLA. STAT. § 90.503(2) (2016) ("A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. *This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship*.") (emphasis added).

statute.[120] As the Supreme Court explained in *Yates v. United States*, the purpose of this canon is "to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'"[121] The rule is "wisely applied where a word is capable of many meanings in order to avoid the giving of intended breadth to Acts of Congress."[122]

For example, in *Jarecki v. G. D. Searle & Co.*, the Supreme Court applied the canon when interpreting the word "discovery" in a statute that exempted "[i]ncome resulting from exploration, discovery or prospecting, or any combination of the foregoing" from a tax.[123] The appellants in *Jarecki* claimed the term "discovery" applied to their businesses, which involved the development of drugs and photography technology.[124] The Supreme Court disagreed. The Court noted that the terms 'exploration, discovery, or prospecting' in the law "all describe income-producing activity in the oil and gas and mining industries, but it is difficult to conceive of any other industry to which they all apply."[125] The Court noted that when used together, "[t]hese words strongly suggest that a precise and

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[120] *Yates v. United States*, 574 U.S. 528, 543 (2015).
[121] *Id*. (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).
[122] *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).
[123] *Id*. at 305.
[124] *Id*. at 305-06.
[125] *Id*. at 307.

narrow application was intended in [the tax law]."[126]

The same canon aptly applies to the term "confidential communication" in relation to "diagnosis or treatment" M.R.E. 513(a). The NMCCA's reading of "confidential communication" adopted a broad reading untethered to the words with which the President qualified it. Indeed, "confidential communication" is modified by the phrase "for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[127] Applying *noscitur a sociis*, the term "confidential communication" would not extend to the "diagnosis or treatment" itself since "confidential communication" is modified by these same words in the adjoining phrase: "for the purpose of *facilitating* diagnosis or treatment:"[128]

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the UCMJ, if such communication was made *for the purpose of facilitating* diagnosis or treatment of the patient's mental or emotional condition.[129]

E. Even if it were plausible to read "confidential communication" as covering "diagnosis or treatment," because a narrower reading is possible consistent with the text of M.R.E. 513(a), the narrower reading prevails.

If nothing else, a narrow construction of M.R.E. 513(a) leads to the same

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[126] *Id*.
[127] MIL. R. EVID. 513(a).
[128] *Id*. (emphasis added).
[129] *Id*. (emphasis added).

conclusion that diagnosis or treatment are not privileged. As the Supreme Court has explained, "[w]e have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."[130] This Court has recognized this principle within the realm of military evidentiary privileges.[131] Of particular relevance to this case, the Supreme Court has applied the principle where an appellant advanced a policy rationale that clashed with a plain reading of the privilege.

For example, in *St. Regis Paper Company v. United States*, the Supreme Court interpreted a statute that prevented the Census Bureau from disclosing information given to it.[132] The issue was whether the Federal Trade Commission could order the person who *gave* the information to the Census Bureau to produce the same information.[133] The Solicitor General conceded that "'literally construed'" the statute did not privilege the information in question.[134] Yet he argued that "the purpose of the statute [was] to encourage the free and full submission of statistical data to the Bureau," which he claimed could only be done "through the creation of

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[130] *Pierce County v. Guillen*, 537 U.S. 129, 144 (2003).
[131] *Cf. Custis*, 65 M.J. at 369 (acknowledging "the principle that privileges should be construed narrowly, as they run contrary to the court's truth-seeking function").
[132] 368 U.S. 208, 215-16 (1961).
[133] *Id*. at 213-214.
[134] *Id*. at 218.

a confidential relationship which will extend the privilege to the [appellant] and like reporting companies."[135]

The Supreme Court rejected this argument. The Court noted that "[o]urs is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, *strictly construed*, requires such a result."[136] The Court wrote: "[w]e fully realize the importance to the public of the submission of free and full reports to the Census Bureau, but we cannot rewrite the Census Act."[137]

The NMCCA borrowed the same faulty spirit-of-the-law analysis rather than narrowly construing the text. The NMCCA acknowledged—but did not apply—the principle that a privilege should be construed narrowly.[138] Instead, like the Solicitor General in *St. Regis Paper Company*, the NMCCA claimed a narrow interpretation would "undermine the purpose of the privilege," which it claimed was to further "the societal interest in a mentally healthy populace[.]"[139]

But since it is the privilege's text—not its supposed spirit—that governs the analysis, this Court should reject the NMCCA's approach.

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[135] *Id*.
[136] *Id*. (emphasis added).
[137] *Id*.
[138] *Mellette*, 81 M.J. at 692.
[139] *Id*.

F. Interpreting "confidential communication" as not shielding "diagnosis or treatment" from disclosure would not lead to absurd results, contrary to the lower court's reading.

The lower court separately concluded that interpreting "confidential communication" as not including "diagnosis or treatment" would lead to "absurd results."[140] It drew an analogy to the attorney-client privilege, which shields confidential communications "'between'" the lawyer and client "'made for the purpose of facilitating the rendition of professional legal services to the client.'"[141] The lower court then explained that to conclude that "diagnosis or treatment" were not privileged "not only ignores [M.R.E. 513(a)'s] use of the word 'between' as a protection for two-way communications, but would be akin to finding the attorney-client privilege protects the client's statements made for the purpose of facilitating the provision of legal advice, but not the legal advice itself."[142]

This argument misses the point. The relevant issue is the meaning of the *psychotherapist-patient* privilege, not the attorney-client privilege. As the Supreme Court has noted, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[143] By contrast, the

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[140] *Id*.
[141] *Id*. (citing MIL. R. EVID. 502).
[142] *Id*.
[143] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Supreme Court did not recognize the psychotherapist-patient privilege until 1996.[144] Perhaps the President took this into account in M.R.E. 513.

Regardless, the NMCCA's "absurd results" conclusion is incorrect. As this Court recently explained in *United States v. McPherson*, "[a] party's argument that the court should reject 'a literal reading' of a statute 'because it produces absurd results' fails if 'Congress *could rationally have* made such a' reading [of] the law."[145] And here, there could have been a variety of reasons why the President wanted to shield communications between the patient and the psychotherapist—but leave the disclosure of diagnosis or treatment to ordinary rules of relevance and necessity under R.C.M. 703.

For example, perhaps the President believed this would strike the proper balance between a trial's search for the truth and a patient's privacy. Perhaps the President believed diagnosis and treatment consist of less sensitive information than conversations between the patient and provider. Or perhaps the President believed that allowing a court to learn about a witness' diagnoses and treatment could avoid needless litigation; revealing this information could prevent in camera

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[144] *Cf. Jaffee*, 518 U.S. at 18 ("Because this is the first case in which this Court has recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would govern all future questions.").
[145] Dkt. No. 21-0042, 2021 CAAF LEXIS 710, at *19 (C.A.A.F. Aug. 3, 2021) (emphasis in original) (citation omitted).

review of privileged communications if the diagnoses and prescriptions presented no reason to inquire further.

The point is that "if there is a basis to conclude that Congress intended the plain language of a statute or the effects of that plain language, judges must defer to Congress's legislative authority and must not invoke the absurdity doctrine."[146] Because there is such a basis here, the absurdity doctrine is inapposite.

G. This Court's holding will moot the NMCCA's alternative holdings and will avoid needless litigation on the Government's disagreements with the alternative holdings.

It is especially important for this Court to formally hold that diagnoses and treatment are not privileged because the NMCCA's alternative holdings potentially confuse the proper relief of in camera review, as discussed in the next section.

The NMCCA held that although diagnosis and treatment are privileged, S.S. waived the privilege by discussing these matters with NCIS and during a deposition.[147] The NMCCA also held that even if there was no waiver, piercing the privilege was constitutionally required.[148]

The Government disagreed. The Government argued before the NMCCA that even assuming waiver, S.S. would have only waived the privilege as to the

[146] *Id*. at *40 (Ohlson, C.J., dissenting).
[147] *Mellette*, 81 M.J. at 693-94.
[148] *Id*. at 694-95.

specific matters she discussed with NCIS and during her deposition.[149] The Government also disagreed with the constitutional argument.[150]

This Court's holding that diagnoses and treatment are not privileged will moot these alternative arguments. It will also prevent needless litigation on remand as to what matters should be reviewed and disclosed, as discussed below.

Conclusion

The lower court erred in concluding that diagnoses and treatment were privileged under M.R.E. 513(a). This Court should hold that M.R.E. 513(a) does not extend to diagnoses and treatment.

[149] *See* Ans. on Behalf of Appellee (Nov. 12, 2020) at 31.
[150] *Id*. at 32-34.

II.

THE LOWER COURT ERRED BY CONCLUDING THE EVIDENCE WAS BOTH PREJDUCIAL AND NON-PREJUDICIAL WITHOUT REVIEWING IT AND THUS THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING.

Standard of Review

This Court reviews a CCA's prejudice determination *de novo*.[151]

A. The Supreme Court and this Court have explained that in camera review is the proper course of action to assess prejudice for an erroneous denial of production of sensitive records.

In *Pennsylvania v. Ritchie*, the Supreme Court concluded that an in camera review was the proper means to assess prejudice for a trial court's erroneous nondisclosure of records of a child protective agency privileged under a state statute.[152] In *Ritchie*, the appellant's thirteen-year-old daughter accused him of sexually assaulting her, whereupon the police forwarded the matter to the agency.[153] Before trial, the appellant moved to compel production of records from the agency relating to his daughter, claiming that they "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence."[154]

After concluding that that the trial court's refusal to produce the records

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[151] *United States v. Steen*, 81 M.J. 261, 263 (C.A.A.F. 2021).
[152] *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).
[153] *Id*. at 43.
[154] *Id*. at 44.

implicated the appellant's due process rights, the Supreme Court explained:

> At this stage, of course, it is impossible to say whether any information in the [agency's] records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file.[155]

The Supreme Court then concluded that the appellant was "entitled to have the [agency's] file reviewed by the trial court to determine whether" the information's nondisclosure at trial was harmless beyond a reasonable doubt.[156]

Shortly after *Ritchie* was decided, this Court decided *United States v. Reece*.[157] Like in *Ritchie*, the appellant was accused of sexual abuse—this time by two female minors whose testimony formed the sole evidence of the allegations.[158] Before trial, the appellant learned that one of the girls "had a history of inpatient treatment for alcohol, drug, and behavioral problems" and that the other girl "was under the control of state welfare authorities" after engaging in "behavior described by her family as uncontrollable."[159] After the Government denied his discovery requests for this evidence, the appellant moved to compel production for the same, which the military judge denied.[160] The appellant was found guilty of

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[155] *Id*. at 57.
[156] *Id*. at 58.
[157] 25 M.J. 93 (C.M.A. 1987).
[158] *Id*. at 93-94.
[159] *Id*. at 94.
[160] *Id*.

both girls' allegations at trial.[161]

On review of the military judge's ruling, this Court cited R.C.M. 703's policy allowing "liberal discovery of documentary evidence" as long as a party shows it is relevant and "would contribute to a party's presentation of the case in some positive way on a matter in issue.'"[162] This Court explained "[s]ome forms of emotional or mental defects have been held to 'have high probative value on the issue of credibility" and that it could not "discount the possibility that the information contained in the state's reports may have had an impact on the defense's trial strategy."[163] This Court returned the record of trial for an evidentiary hearing, instructing a *DuBay*[164] military judge to order production of the records for in camera inspection and to hear argument on how the evidence may have contributed to the trial.[165]

Recently, this Court followed a similar approach in *United States v. Jacinto*.[166] There, the military judge ordered production of the complaining witness' prescriptions and diagnoses.[167] Though these records suggested the

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[161] *Id*. at 93.
[162] *Id*. at 95 (citing R.C.M. 703(f)(1), Discussion).
[163] *Id*.
[164] *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).
[165] *Reece*, 25 M.J. at 95-96.
[166] No. 20-0359, 2021 CAAF LEXIS 686 (C.A.A.F. July 15, 2021).
[167] *Id*. at *3.

complaining witness was suffering from a mental disease relevant to evaluating her credibility, the military judge denied in camera review of the complete records, citing M.R.E. 513, and also denied the defense's motion for a continuance.[168] On review, this Court directed either the NMCCA or a *DuBay* military judge "to conduct an in camera review" to review relevant information from the mental health records necessary to evaluating the military judge's ruling.[169]

B. Despite its erroneous view of privilege, the NMCCA was correct in concluding the military judge erred by failing to order production of S.S.' diagnoses and treatment, including her medications, since they were relevant and necessary to assessing the credibility of her allegations.

Here, like in *Ritchie, Reece*, and *Jacinto*, the defense sought sensitive information relevant to assessing the credibility of the allegations. The undisputed evidence showed that S.S. received inpatient mental health treatment before she met Appellant and continued to receive mental health counseling during the time of the alleged incidents [redacted] And during a deposition, she could not

[168] *Id*. at *6-7.
[169] *Id*. at *13.
[170] J.A. 496-97.
[171] J.A. 496 (explaining that she "came off" her medications "in 2019").

remember all of the medications she had been given.[172]

In the face of this evidence, the defense presented a statement from Dr. Holguin, who explained why it would be important to review S.S.' treatment history. He explained that her self-cutting behavior was "a common feature of someone with Borderline Personality Disorder or someone who has traits of Borderline Personality Disorder."[173] He further explained that this disorder manifests in "attention-seeking and manipulative behaviors" as well as "fear of abandonment, and drastic or volatile behavior in response to that fear."[174] [redacted] In other words, Dr. Holguin provided evidence of why it was important to review S.S.' mental health diagnoses and treatment plan from the time she began her inpatient treatment until the time of the court-martial. This is what the defense asked for.[176]

Though premised on its erroneous view that the information was privileged, the NMCCA still correctly concluded that the military judge erred when he ruled

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[172] J.A. 494 (acknowledging that she took other medications but adding: "I don't remember the names of them").
[173] J.A. 481.
[174] J.A. 482.
[175] J.A. 481.
[176] J.A. 446 ("The Defense requests that the Military Judge compel discovery of the complaining witness's mental health treatment provider, diagnosis, treatment history, and prescription history.").

that this information should not have been produced to the defense.[177] As the NMCCA noted, R.C.M. 703(e)(1) entitles each party "to the production of evidence which is relevant and necessary" and "[r]elevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue."[178] The NMCCA aptly described the relevance and necessity of S.S.' diagnoses and treatment by explaining the defense needed "to assess [the medications'] interactive side effects and potential for adverse effect on memory in a case involving a delay in reporting for several years, allegations that [S.S.] had previously denied, and a report made under circumstances . . . giving rise to a strong motive to fabricate at least their timeframe, if not their substance."[179] The NMCCA concluded that this information was subject to disclosure since S.S. waived her privilege or, if she had not done so, it was necessary to pierce the privilege under the Appellant's constitutional right to present a defense.[180]

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[177] *Mellette*, 81 M.J. at 693.
[178] *Id*. (citing MIL. R. EVID. 401 and R.C.M. 703(f), Discussion).
[179] *Id*.
[180] *Id*. at 695-93. For clarity's sake, Appellant does not abandon his alternative arguments raised before the NMCCA that even if there were a privilege, S.S. waived it and, regardless, the evidence was constitutionally necessary. *See* Appellant's Br. and Assignments of Error (June 15, 2020) at 42-47. Rather, it is Appellant's position that this Court's resolution of the first granted issue moots these arguments.

However, despite reaching the correct conclusion as to the discoverability of S.S.' diagnoses and treatment, including her medications, the NMCCA erred when it departed from *Ritchie*, *Reece*, and *Jacinto* by assessing for prejudice without reviewing this evidence. Rather than ordering that this information be produced to the NMCCA or through a *DuBay* military judge, the NMCCA simply determined that evidence's nondisclosure was both prejudicial and non-prejudicial.[181] This conclusion was flawed for the reasons provided below.

C. The NMCCA's conclusion that the evidence was harmless as to pre-deployment offenses overlooked that the unknown evidence could have negated the email the NMCCA claimed provided "strong corroboration."

As it explained in its motion, the defense sought the evidence to challenge the credibility of S.S.' allegations.[182] In *Delaware v. Van Arsdall*, the Supreme Court explained that the test for evaluating an improper denial of impeachment of a witness "is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."[183]

This Court has specifically applied this standard in the context of a denial of

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[181] *Id*. at 695-96.
[182] J.A. 445 ("This behavior is indicative of some mental health condition, the diagnoses and treatment of which could have bearing on [S.S.'] memory, ability to tell the truth, ability to distinguish the truth, her suggestibility, and the likelihood of her to embellish facts.").
[183] 475 U.S. 673, 684 (1986) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

production of mental health records. This Court has explained that the error must be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."[184]

Here, the NMCCA acknowledged S.S.' credibility problems. It noted her testimony gave "rise to a strong motive to fabricate" the timeline of the charged offenses "if not their substance."[185] It also suggested her medications could have had "side effects and potential for adverse effect on memory" and further noted that S.S. had previously denied that Appellant engaged in impropriety.[186]

Despite this, the NMCCA claimed there was no error in the military judge's failure to produce the mental health evidence as to pre-deployment offenses. It explained that it found "strong corroboration for [S.S.'] testimony that the sexual contact began prior to Appellant's submarine deployment from February to April 2014" based on "the provocative emails she sent to Appellant, telling him things like 'when you were touching me, I wanted more.'"[187]

This incorrectly presumed that the missing mental health evidence would not have negated this evidence. The email statements on which the NMCCA relied

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[184] *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018) (citing *Yates*, 500 U.S. at 403).
[185] *Mellette*, 81 M.J. at 693.
[186] *Id*.
[187] *Id*. at 695.

consisted of *S.S.'* words, not Appellant's. By her own admission, S.S. sent Appellant the provocative emails during a time when [redacted] Surely if S.S.' records revealed that she had a mental disorder when she sent the statements—especially if it was one that manifested in "attention-seeking and manipulative behaviors"[189]—this would have been "important"[190] in assessing whether to accept the emails at face value, as the NMCCA did.

Additionally, it is especially important to know whether the emails may have been a byproduct of S.S.' mental health struggles since S.S.' statements in the "touching" email the NMCCA cited was ambiguous. At trial, S.S.' sister acknowledged that Appellant and S.S. "would wrestle around or he would ask for a back massage or something like that."[191] She gave no indication that there was anything sexual about these interactions. But perhaps S.S. viewed these interactions differently, owing to her mental illness, and relayed this interpretation to Appellant in the emails. This possibility only further shows why review of S.S.' mental health evidence was necessary before evaluating the emails.

As for the other evidence the NMCCA claimed "corroborated" the pre-

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[188] J.A. 496-97.
[189] J.A. 482.
[190] *Chisum*, 77 M.J. at 179 (citing *Yates*, 500 U.S. at 403).
[191] J.A. 179.

deployment sexual contact, it did no such thing. First, the NMCCA cited the fact that Appellant's parents-in-law were aware that he was having "one-on-one interactions with [S.S.]" before the deployment.[192] At best, this merely showed that Appellant had the opportunity to commit the alleged crimes. Even then, it did so marginally: S.S.' father said S.S. and Appellant spent very little time together.[193]

Next, the NMCCA claimed that Appellant "at least to some extent" had made "admissions to third parties."[194] This was mistaken. The evidence the NMCCA was referring to here did not even address pre-deployment offenses. In a footnote, the lower court explained that it was referring to the testimony of a Sailor who testified about what Appellant told him about S.S.[195] But at trial, this Sailor testified that Appellant made the statement *during* the deployment.[196] Even then, he added that Appellant seemed surprised by the email—suggesting Appellant and S.S. had not engaged in sexual activity prior to this point.[197] Thus, this evidence actually could have *negated* the notion that there was pre-deployment sexual activity between Appellant and S.S.

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[192] *Mellette*, 81 M.J. at 695.
[193] J.A. 284-85.
[194] *Mellette*, 81 M.J. at 695.
[195] *Id*. at 695 n.18.
[196] J.A. 247.
[197] J.A. 255 (answering "Yes" to question asking if Appellant's tone was such that "he didn't know where [the email from S.S.] was coming from").

D. This Court should remand for a *DuBay* hearing, ensuring that the defense is provided with S.S.' diagnoses and treatment, including medications, during the times relevant to the court-martial.

As this Court recently did in *Jacinto*, it should set aside the judgment of the NMCCA and remand for a *DuBay* hearing. In accordance with the first granted issue, this Court should clarify that the information the defense requested in its motion—i.e., S.S.' diagnoses and treatment plan, including prescribed medications, during times relevant to the court-martial—is not privileged.[198] To obtain this information, this Court should direct the *DuBay* military judge to review the relevant mental health records from when S.S. first entered inpatient treatment until the entry of judgment in this court-martial.[199] and provide to the defense all evidence of S.S.' mental health diagnoses and treatment throughout this time. As at trial, Appellant should be permitted to have any expert assistance required in interpreting the records. Following the *DuBay* hearing, this Court should direct that the NMCCA reassess for prejudice.

[198] *Cf. Jacinto*, 2021 CAAF LEXIS at *13 n.13 (directing additional factfinding by the NMCCA or through a *DuBay* military judge regarding missing mental health evidence and clarifying the dates of relevant records subject to review).
[199] *Id*. (citing date of "entry of judgment" as relevant end point of relevance of records).

Conclusion

This Court should set aside the decision of the lower court and remand for a *DuBay* hearing.

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on November 1, 2021.

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