IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Issues Presented

I.

[MIL. R. EVID.] 513 EXTENDS THE PSYCHOTHERAPIST-PATIENT PRIVILEGE TO A "CONFIDENTIAL COMMUNICATION" BETWEEN 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 Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), because Appellant's approved sentence included a dishonorable discharge and confinement for one year or more. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). The Members sentenced Appellant to five years of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

On May 14, 2021, the lower court affirmed the findings—striking the words "hips" and "on divers occasions" from the Specification—and reassessed the sentence to three years of confinement and a dishonorable discharge. *United States v. Mellette*, 81 M.J. 681, 701 (N-M. Ct. Crim. App. 2021).

On July 13, 2021, Appellant petitioned this Court for review. On September 7, 2021, this Court granted the Petition. On November 1, 2021, Appellant filed his Brief and the Joint Appendix.

Statement of Facts

A. The United States charged Appellant with sexual assault of a child and sexual abuse of a child.

The United States charged Appellant with penetrating the fifteen-year-old Victim's vulva with his penis, and with touching her buttocks, thighs, hips, and back on divers occasions with an intent to gratify his sexual desires. (J.A. 49–52.)

B. Pretrial, the Military Judge denied Appellant's motion to compel the Victim's mental health records.

[redacted]

1. In both her law enforcement interview and a deposition, the Victim disclosed her diagnoses, treatment, and prescriptions that stemmed from [redacted].

In her interview with law enforcement, the Victim admitted she "was put in the hospital" in August 2013 for "cutting" herself. (J.A. 377.)

[redacted]

[redacted]

2. Trial Counsel denied Appellant's discovery request for the Victim's mental health records citing, inter alia, Mil. R. Evid. 513.

[redacted]

3. Appellant moved to compel production of the Victim's mental health records and attached the deposition transcript and an email from his expert consultant in support.

[redacted]

[redacted]

4. In opposition, the United States argued that Mil. R. Evid. 513 protects diagnoses and treatment, and Appellant already had the requested information through other sources.

[redacted]

5. The Military Judge denied Appellant's Motion, concluding Mil. R. Evid. 513 protects diagnoses and treatment, and, regardless, Appellant already had the requested information.

[redacted]

[redacted]

C. At trial, the United States presented evidence that Appellant sexually abused the Victim.

1. The Victim testified that when she was fifteen and before he deployed in early 2014, Appellant touched and rubbed her back, buttocks, and thighs.

The Victim testified that in August 2013, when she was fifteen, she spent a week at a mental health facility for "cutting" because she was "depressed and had a little bit of anxiety." (J.A. 74–75, 281–82.) After her discharge, she and Appellant "started spending a little bit more time around each other." (J.A. 75, 78.)

She testified that Appellant rubbed her thighs and upper back between her shoulders during several car rides. (J.A. 79.) One time, he put his hand on her

back, "slid his hand down and undid [her] bra through [her] shirt." (J.A. 80.) On another occasion, Appellant touched her back, thighs, and buttocks while they were alone together at their home. (J.A. 82–83.) The Victim was "not really sure" of the exact dates and did not "want to say a date and be wrong," but she thought the incidents occurred "a couple months maybe" after leaving treatment and before Appellant's "early 2014" deployment. (J.A. 81, 83.)

2. While deployed in early 2014, Appellant's command confronted him about "racy" emails from the Victim. He claimed innocence but later admitted to a friend that he "talked his way" out of trouble by not telling the "full truth."

The Victim emailed Appellant during his February–April 2014 deployment and discussed "sexual stuff" about "all the touching" in the car. (J.A. 85–86, 181.) In an email to Chelsea, Appellant admitted his emails with the Victim "got a bit racy" because the Victim had asked him to take her virginity, as well as "what [he] would think if she told [him] that she wanted to f*** [him]." (J.A. 112, 311.) He also claimed that the Victim's words, "'when you were touching me, I wanted more' could have been simply put as 'I liked the back massage.'" (J.A. 315.)

When confronted about the emails by Master Chief Stacy Hammann—the Chief of the Boat—Appellant described his conduct as an "innocent touch" at "a family reunion" where "he placed his hand on her shoulder at one time." (J.A. 233–36.) But later, Appellant admitted to Petty Officer Anthony Robertson—his friend and the godfather to his children—that he "talked [his] way out of" a

disciplinary review board because "the story he gave wasn't the full truth." (J.A. 245–46, 253.)

3. The Victim testified that after Appellant's 2014 deployment, she and Appellant "became more sexual."

Post-deployment, Appellant and the Victim "were having more of the alone time interactions, but they kind of became more sexual." (J.A. 87.) He would kiss her, "rub on [her] body more," and "make comments" about her body. (J.A. 87.) One time, when the Victim wore a pair of "short shorts," he "reached under them" and touched her vagina. (J.A. 87.) He also touched her thighs and buttocks, and he commented how "nice" her buttocks was, how "big" her chest was, and "whether or not [her] vagina was wet." (J.A. 88.)

4. Appellant's ex-wife admitted during cross-examination that she reported Appellant's offenses while they were in the midst of a contentious custody dispute.

When Appellant and Chelsea divorced in 2016, she had primary custody of their two-year-old daughter. (J.A. 188, 204.) But in 2018, a family court judge granted Appellant's motion to take his daughter to Guam for the summer. (J.A. 217–18.) Neither Chelsea nor her family supported this, so she reported the Victim's allegations to Appellant's commanding officer. (J.A. 118, 205, 224–25.)

5. Appellant also highlighted the Victim's lack of memory and her motivation to help Chelsea with the custody dispute.

On cross-examination, Appellant emphasized that the Victim could not remember objective facts in pretrial statements, like when she sought inpatient treatment, when Chelsea lived with her, when she began dating her boyfriend, and when law enforcement came to her house. (J.A. 104–06.) Indeed, the Victim admitted she has "a hard time with remembering dates and times." (J.A. 103–04.) Additionally, the Victim conceded she never told law enforcement Appellant had touched her vagina because she "didn't remember it at that time." (J.A. 106–07.) Regardless, she was "very sure" she was fifteen when Appellant touched her and "100 percent sure" she was fifteen when he had sex with her. (J.A. 124.)

Moreover, the Victim conceded she knew Appellant intended to take his daughter to Guam—and neither the Victim nor her family wanted that to happen—before reporting the offenses. (J.A. 118.)

D. Closing arguments focused on the Victim's credibility.

Trial Counsel argued the Victim had "strong" credibility because although she "may have difficulty remembering exact dates," she remembers "important" dates. (J.A. 333–34.) He also argued she had no motivation to lie for the custody dispute because Appellant's daughter was not born at the time of the incidents, and by trial the child custody dispute was "already settled." (J.A. 334.)

Trial Defense Counsel accused the Victim and her family of fabricating the allegations to protect the custody arrangement. (J.A. 336, 345–47, 353.) She argued the Victim "does not remember when things happened. She does not remember correctly. She does not remember dates, time. And the timeline that she has put forward . . . doesn't make any sense." (J.A. 336–37.)

E. The Members convicted Appellant of sexual abuse of a child, acquitted him of sexual assault of a child, and sentenced him.

The Members convicted Appellant of sexual abuse of a child and acquitted him of sexual assault of a child. (J.A. 364.) They sentenced him to five years of confinement and a dishonorable discharge. (J.A. 365.)

F. The lower court concluded the Military Judge correctly ruled that Mil. R. Evid. 513 protects diagnoses and treatment, but erred denying production of the Victim's mental health records. Without reviewing the records, it held the nondisclosure error was both prejudicial and non-prejudicial, affirmed the findings, and reassessed the sentence.

On appeal, the Navy-Marine Corps Court of Criminal Appeals concluded the psychotherapist-patient privilege protects diagnoses and treatment. *Mellette*, 81 M.J. at 692. It compared the Rule to the "very similar" language in the lawyer-client privilege and reasoned that interpreting Mil. R. Evid. 513 as protecting communications but not diagnoses and treatment "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." *Id.* This "both ignores the plain language of the rule and leads to absurd results." *Id.*

Regardless, it concluded that the Military Judge abused his discretion in denying production for two reasons. First, the Victim waived her privilege under Mil. R. Evid. 510 by "discussing her mental health diagnoses and treatment, including her prescribed medications, with her family, with NCIS, and during her civil deposition." *Id.* at 693. Second, the requested records were "relevant and necessary" under R.C.M. 703(f) because diagnoses and treatment "could impact her credibility" in light of "a report made under circumstances—revolving around the custody battle over [their daughter]—giving rise to a strong motivation to fabricate at least their timeframe, if not their substance." *Id.* at 693.

Finally, the lower court faulted the Military Judge for not reviewing the records in camera because the Victim could not "remember the precise timeframe of the events in question"—the "crucial issue in the trial"—and her "behavioral, mental, and emotional difficulties" were "pertinent to both the timeframe and the substance of the charged offenses." *Id.* at 694. Such a review would have satisfied the Military Judge's concerns that the records were "not reasonably separable from other information subject to privilege." *Id.* at 693–94.

In its prejudice analysis, the lower court concluded the error was harmless beyond a reasonable doubt for pre-deployment offenses because the "provocative

emails" and "Appellant's admissions to third parties" were "strong corroboration for [the Victim's] testimony." *Id.* at 696. But for post-deployment offenses—with "little corroboration for [her] testimony"—the error "may have contributed to the finding." *Id.* at 696. Accordingly, it struck the words "on divers occasions" from the Specification, affirmed the remaining language, and reassessed the sentence to three years of confinement and a dishonorable discharge." *Id.* at 701.

Argument

I.

THE LOWER COURT CORRECTLY CONCLUDED THAT MIL. R. EVID. 513 PROTECTS DIAGNOSES AND TREATMENT.

A. This Court's conclusion about the scope of Mil. R. Evid. 513 in Issue I will determine if the Rule impacts Issue II. If Appellant incorrectly interprets the scope of the Rule, then the Victim waived her privilege. But if Appellant correctly interprets its scope, then the lower court erroneously concluded the Victim waived the privilege.

This Court's determination of the scope of Mil. R. Evid. 513 (Issue I) impacts whether and how the Rule applies to the Issue II analysis.[1]

[1] This Court should reach the merits of Issue I because the Courts of Criminal Appeals are split on the scope of Mil. R. Evid. 513. *Compare H.V. v. Kitchen*, 75 M.J. 717, 719 (C. G. Ct. Crim. App. 2016) (diagnoses and treatment privileged), *and Mellette*, 81 M.J. at 692 (same), *with United States v. Rodriguez.* No. ARMY 20180138, 2019 CCA LEXIS 387, at *8 (A. Ct. Crim. App. Oct. 1, 2019) (diagnoses and treatment *not* privileged).

A patient waives her psychotherapist-patient privilege if she "voluntarily discloses . . . any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege." Mil. R. Evid. 510(a); *see also United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000) (concluding appellant waived marital privilege by disclosing "a significant part" of privileged communications to third parties).

The lower court concluded the Victim waived her privilege based on its holding that Mil. R. Evid. 513 protects diagnoses and treatment. *See Mellette*, 81 M.J. at 693. If this Court agrees that the Rule does indeed protect diagnoses and treatment, then, under the law-of-the-case doctrine, the lower court's holding on waiver would stand, and Mil. R. Evid. 513 would not protect any previously-privileged communications between the Victim and her psychotherapist. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (declining to "reexamine the lower court's holding" when "not challenged by certification" unless "the lower court's decision is 'clearly erroneous and would work a manifest injustice' if the parties were bound by it").

On the other hand, if this Court agrees with Appellant that Mil. R. Evid. 513 does not protect diagnoses and treatment, then this Court must revisit the lower court's holding on waiver before addressing Issue II. Accepting Appellant's narrow interpretation of the Rule means the Victim's diagnoses and treatment were

not privileged. If true, then the disclosure of *non-privileged* diagnoses and treatment would not be a disclosure of privileged matter, let alone a "significant" one, that triggers waiver under Mil. R. Evid. 510(a). *See Mellette*, 81 M.J. at 693. Thu, Mil. R. Evid. 513 would still protect the Victim's undisclosed mental health records and prohibit their disclosure absent waiver or applicable exception.[3] *See also* Section II.B., *infra* (discussing test for constitutionality of exclusionary rules).

B. The standard of review is de novo.

"This court reviews questions of statutory interpretation de novo." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (citation omitted).

C. Appellate courts interpret an evidentiary rule by its language and context, and only consider its history where the rule is ambiguous or enforcing it according to its terms would lead to an absurd result.

The "principles of statutory construction are used in construing . . . the Military Rules of Evidence." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citations omitted). "The first step 'is to determine whether the language at issue has a plain and unambiguous meaning.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

[3] In that situation, where this Court reassesses the lower court's waiver conclusion, the United States would respectfully request supplemental briefing on the issue.

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). If "the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and internal quotation marks omitted).

D. The plain language of Mil. R. Evid. 513(a) protects diagnoses and treatment. The broader context of the Rule and the "very similar" language of Mil. R. Evid. 502 likewise compel this conclusion.

Under the psychotherapist-patient privilege, patients may "refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(a).

1. The plain language of Mil. R. Evid. 513(a) protects diagnoses and treatment because a psychotherapist confidentially communicates them to the patient to facilitate treatment.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citation omitted).

"A communication is 'confidential' if 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." Mil. R. Evid. 513(b)(4).

"Diagnosis" is the "determination of a medical condition (such as a disease) by physical examination or by study of its symptoms." *Black's Law Dictionary* 568 (11th ed. 2019). "Treatment" is 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." (J.A. 437) (reproducing *Black's Law Dictionary* 1502 (6th ed. 1990).

In *Kitchen*, the Coast Guard court noted it was "undeniable" that "diagnoses and the nature of treatment necessarily reflect, at least in part, the patient's confidential communications to the psychotherapist" because "[m]ost diagnoses of mental disorders rely extensively on what the patient has communicated to the psychotherapist." 75 M.J. at 719.

Here, the plain language of the Rule protects communications "between the patient and a psychotherapist" that are "made for the purpose of facilitating diagnosis and treatment." Mil. R. Evid. 513(a). And the "broad" definition of "treatment" encompasses "all the steps taken to effect a cure," including "examination and diagnosis as well as an application of remedies." (J.A. 437.)

In psychotherapy, a patient confidentially communicates her underlying symptoms to her psychotherapist "to effect a cure of an injury or disease." (J.A. 437.) Those communications are privileged. Mil. R. Evid. 513(a). As part of that "examination," the psychotherapist confidentially communicates to the patient his medical conclusions of her "diagnosis as well as an application of remedies"—the treatment and any prescriptions—to "effect a cure of an injury or disease." (J.A. 437.) Practically, the psychotherapist also documents those communications—the diagnosis, the prescriptions, and the treatments—in patient records. *See* Mil. R. Evid. 513(b)(5) (discussing "patient records that pertain to communications"). All of these communications are privileged. Mil. R. Evid. 513(a).

As Appellant points out, "communication" is a broad term that includes not only "'the expression or exchange of information by speech, writing, gestures, or conduct,'" but also "'the process of bringing an idea to another's perception.'" (Appellant's Br. at 22, Nov. 1, 2021) (quoting *Communication*, *Black's Law Dictionary* (8th ed. 2004).) Thus, to the extent that a psychotherapist brings diagnoses or treatment to a patient's "perception"—no matter it is done—the diagnoses and treatment are privileged under Mil. R. Evid. 513(a).

Simply put, because diagnoses and treatment are part of the confidential communications made to facilitate treatment, they are likewise privileged.

2. Diagnoses and treatment contained in records may be privileged, even if not communicated, because the Rule protects from production and admission records that pertain to confidential communications.

The language of a statute "must be understood in the context of the entire rule." *United States v. Kohlbek*, 78 M.J. 326, 331 (C.A.A.F. 2019) (citation omitted).

The Rule details the procedures for "the production or admission of evidence of a patient's records or communications." Mil. R. Evid. 513(e)(2); *see* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369, Sec. 537 (2014) (mandating President implement Mil. R. Evid. 513(e)).

It also defines "[e]vidence of a patient's records or communications," in part, as "patient records *that pertain to* communications by a patient to a psychotherapist . . . for the purposes of diagnoses or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(b)(5) (emphasis added). "Pertains" means "to relate directly to." *Black's Law Dictionary* 1383 (11th ed.). Thus, "patient records" that "pertain to communications" are records that relate to, originate from, or derive from, communications between a patient and psychotherapist, regardless of whether they are actually communicated.

In other words, even if a psychotherapist never communicates a patient's diagnosis or treatment plan to her and instead simply records that information in

her medical file, that information still would be protected under the Rule from production or admission as "patient records that pertain to communications." Mil. R. Evid. 513(b)(5). To that extent, Appellant's claim that Mil. R. Evid. 513(e) is "a separate section of the Rule discussing procedures to be followed when records are disclosed" ignores that section (e) addresses the procedure for disclosing and admitting *privileged* communications and records. (Appellant's Br. at 23–24.) That Mil. R. Evid. 513(e)(3) addresses "protected records" means those records are protected by the Rule because they include matters covered by the psychotherapist-privilege; otherwise, subsection (e) would be superfluous to R.C.M. 703, which already addresses the production of non-privileged evidence. *See e.g.*, R.C.M. 703(f) ("Determining what evidence will be produced"), (g) ("Procedures for production of witnesses and evidence").

Thus Mil. R. Evid. 513(a), read in the context of subsection (e) and (b)(5), shows the Rule protects records of communications to facilitate diagnoses or treatment, which includes diagnoses and treatment.

3. Because Mil. R. Evid 513(a) is structurally indistinguishable from Mil. R. Evid. 502(a), diagnoses and treatment are confidential communications in the same way as a lawyer's "rendition of professional legal services."

The principles of statutory construction require analysis within "the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also United States v. Banker*, 876 F.3d 530, 537 (4th Cir. 2017) (analyzing "adjacent statutes"

within the same Act that "use the same syntax" in "a consistent manner"). The same principle applies when courts interpret rules of evidence. *See United States v. McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014) (analyzing "plain" text of Article 12, UCMJ, alongside Article 58, UCMJ, where both "address treatment of military members in confinement" because statutory construction is "holistic endeavor"). "A legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

Structurally, Mil. R. Evid. 502(a) and 513(a) are indistinguishable. *See Mellette*, 81 M.J. at 692 (noting both have "very similar" language). Under the lawyer-client privilege, clients may "refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . between the client . . . and the lawyer or the lawyer's representative." Mil. R. Evid. 502(a)(1).

Both Rules protect: (1) confidential communications; (2) made for the purpose of facilitating services; (3) between a client and a practitioner. *Compare* Mil. R. Evid. 502(a)(1), *with* 513(a). And both identically define "confidential." *Compare* Mil. R. Evid. 502(b)(4), *with* 513(b)(4) (both defining 'confidential' as "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"). Thus, where

Mil. R. Evid. 502 and 513 appear in the same section of the Manual for Court-Martial governing privileges and "use the same syntax," this Court must construe them to mean the same thing. *See Banker*, 876 F.3d at 538.

"It is black-letter law that a military accused has a privilege to prevent the unauthorized disclosure of his confidential communications to his attorney." *United States v. Mays*, 33 M.J. 455, 458 (C.A.A.F. 1991). But "[t]he privilege will be denied if the communications were made for a purpose other than facilitating the rendition of professional legal services to the client." *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, *15 (Ct. Fed. Cl. 2009) (citation omitted). And seeking legal services constitutes communications because a lawyer must "know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The lawyer-client privilege extends not just to confidential communications facilitating legal services, but also to underlying "rendition of professional legal services." Mil. R. Evid. 502(a). Thus, the same must be true of Mil. R. Evid. 513(a): it extends not just to confidential communications facilitating treatment, but also to the underlying diagnoses and treatment. As the lower court explained, Mil. R. Evid. 502 protects "not only the description of the issue from the client to the attorney, but also the diagnosis—i.e., the legal advice—from the attorney to the client." *Mellette*, 81 M.J. at 692.

Appellant cites no authority to support his position that this Court can ignore the similarities between Mil. R. Evid. 513 and 502 simply because the latter privilege is older. (*See* Appellant's Br. at 31–32). His argument fails especially in light of precedent requiring such an analysis when construing the language of a rule. *See Robinson*, 519 U.S. at 341.

When construed alongside the "very similar" lawyer-client privilege, the psychotherapist-patient privilege covers diagnoses and treatment. *Mellette*, 81 M.J. at 692.

E. Even assuming the plain language of Mil. R. Evid. 513 is ambiguous, interpreting it as protecting diagnoses and treatment is consistent with the President's purpose in promulgating the Rule: to realize "the social benefit of confidential counseling" recognized by *Jaffee*.

If a plain language of a rule is ambiguous, courts look to the rule's history to discern its meaning. *See Sager*, 76 M.J. at 161.

In *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996), the Court recognized a federal psychotherapist-patient privilege that protects confidential communications made to a psychotherapist as well as "the notes taken during their counseling sessions." *Id.* In response, the President promulgated Mil. R. Evid. 513 because of "the social benefit of confidential counseling recognized by *Jaffee*." *Compare United States v. Rodriguez*, 54 M.J. 156, 157 (C.A.A.F. 2000), *with* Exec. Ord. 13140, 64 Fed. Reg. 55122 (Oct. 6, 1999).

With this backdrop, interpreting Mil. R. Evid. 513 as protecting diagnoses and treatment is consistent with the privilege's underlying purpose. To conclude otherwise would contradict its purpose and "deter patients from seeking mental health treatment in precisely the way *Jaffee* sought to avoid." *Compare* Exec. Ord. at 55122, *with Mellette*, 81 M.J. at 692.

The plain language of Mil. R. Evid. 513 protects diagnoses and treatment. Other rules of privilege and the history of the Rule support this.

II.

APPELLANT SUFFERED NO PREJUDICE FROM NONDISCLOSURE OF THE VICTIM'S MENTAL HEALTH RECORDS BECAUSE THE ERROR HAD NO SUBSTANTIAL INFLUENCE ON THE FINDINGS. REGARDLESS, THE LOWER COURT CORRECTLY CONCLUDED ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. The standard of review is de novo.

"This Court reviews 'the prejudicial effect of an erroneous evidentiary ruling de novo.'" *Kohlbek*, 78 M.J. at 334 (citations omitted).

B. The nonconstitutional discovery error implicates neither *Brady* nor *Scheffer*.

"There is no general constitutional right to discovery in a criminal case, and *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Instead, *Brady* implicates constitutional rights because "the suppression by the prosecution of evidence favorable to an accused"

in the possession of the government "violates due process." *Brady*, 373 U.S. at 87. Furthermore, "rules excluding evidence from criminal trials" do not implicate the constitutional "right to present a defense so long as they are not 'arbitrary' or 'disproportionate' to the purposes they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

But neither *Brady* nor *Scheffer* applies here. "As the mental health records in question here were not in the possession of the prosecution, they do not fall under the ambit of *Brady*. *United States v. Tinsley*, No. 20200337, 2021 CCA LEXIS 679, at *36–37, 40 (A. C. Crim. App. Dec. 15, 2021) (holding inadvertent receipt of exculpatory privileged information does not trigger "immediate *Brady* duty to disclose"). And *Scheffer* is inapposite because—assuming the lower court was correct that Mil. R. Evid. 513 covers diagnoses and treatment—the Victim waived her privilege.[5] Also, the Sixth Amendment does not apply because "the right to confrontation is a *trial* right." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (emphasis in original); *see also Tinsley*, 2021 CCA LEXIS 679, at *25–43 (explaining no Confrontation Clause or *Brady* exception to Mil. R. Evid. 513).

Accordingly, any error here is a discovery error and thus nonconstitutional. *See e.g.*, *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (noting whether "trial judge

[5] The United States recognizes *Scheffer* will apply to the reassessment of the lower court's conclusion that the Victim waived the privilege, if this Court concludes that Mil. R. Evid. 513 does not protect diagnoses and treatment.

properly applied the rules of discovery" was "a nonconstitutional matter"); *United States v. Clark*, 79 M.J. 449, 454–55 (C.A.A.F. 2020) (concluding "denial of production" under Jencks Act is "nonconstitutional error").

C. Because the *Kerr* factors favor the United States, Appellant suffered no prejudice and merits no relief.

"For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008) (citations omitted). "In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Kohlbek*, 78 M.J. at 334 (quoting, inter alia, *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

1. The United States' case was strong.

The Victim testified Appellant rubbed her thighs and back and unhooked her bra while on car rides; touched her back, thighs, and buttocks at the house; and reached under her "short shorts" and touched her vagina. (J.A. 79–82, 86–87.) While she did not remember several dates and events, three pieces of independent evidence corroborated her allegations. First, Appellant admitted the Victim sent him "racy" emails where they discussed "sexual stuff" of "all the touching," and he adopted that she said, "when you were touching me, I wanted more" by quoting that phrase to Chelsea. (J.A. 86, 103–04, 311–12, 315.) Second, Appellant told

Chelsea the "touching" was a "back massage" but told Master Chief Hammann it was an "innocent touch" on "her shoulder at one time" during "a family reunion." (J.A. 236, 311–12, 315.) Third, Appellant told Petty Officer Robertson he "talked [his] way out of" trouble by telling his command a "story" that "wasn't the full truth." (J.A. 245–46, 253.) This factor favors the United States.

2. Appellant's case was weak.

Appellant's cross-examination of the Victim repeatedly attacked her lack of memory and motivation to help Chelsea in her custody dispute. (*See* J.A. 102–22, 128.) But he could not rebut the "racy" emails from the Victim or his evolving story about what the "touching" described. (J.A. 86, 103–04, 236, 245–46, 253, 311–12, 315.) Although this strategy successfully resulted in his acquittal on the charge of sexual assault of a child—where the Victim's testimony was the only evidence of the offense—it did not negate or mitigate the "strong" evidence that "corroborated" the Victim's testimony of the charge of sexual abuse of a child. *Mellette*, 81 M.J. at 695. This factor favors the United States.

3. Even assuming the Victim's mental health records were material, Appellant's inability to review them did not substantially influence the verdict.

In *United States v. Carruthers*, 64 M.J. 340, 343 (C.A.A.F. 2007), the military judge allowed the appellant to cross-examine his co-conspirator about his plea agreement but not his potential sentence. *Id.* This Court found no prejudice

because the military judge "permitted sufficient cross-examination" where he "did not deny the defense the right to examine the possibility of bias, but rather simply limited its ability to inquire about yet another aspect of the plea agreement, when the agreement's bearing on bias had already been thoroughly explored." *Id.* at 344.

Here, similar to *Carruthers*, even assuming the Victim's mental health records were material, Appellant's inability to review them did not substantially impact the verdict for two reasons. First, Appellant successfully attacked the Victim's credibility by emphasizing her lack of memory and motivation to lie. *See* section II.C.2., *supra*. This resulted in the Members acquitting him of the offense where the Victim's testimony was uncorroborated and only convicting him where corroborating evidence existed. (*See* J.A. 87, 124, 364.) Based on the findings, the Members did not believe the Victim's "precise timeframe of the events in question, which was the crucial issue in the trial." *Mellette*, 81 M.J. at 694. And because the records would not impact her timeline, Appellant's inability to review them was irrelevant to her credibility.

[redacted]

[redacted]

Appellant suffered no prejudice and merits no relief.

D. Even recasting the discovery error as a cross-examination error, Appellant still merits no relief because he "sufficiently explored" the Victim's "personal bias" and "testimonial unreliability."

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986) (citations omitted). But "once this core function is satisfied by allowing cross-examination to expose a motive to lie, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury." *United States v. James*, 61 M.J. 132, 135 (C.A.A.F. 2005) (citation omitted). Trial courts "may preclude cumulative and confusing cross-examination into areas already sufficiently explored to permit the defense to argue personal bias and testimonial unreliability." *United States v. Nelson*, 39 F.3d 705, 708 (7th Cir. 1994).

Here, Appellant met the "core function" of cross-examination because he "sufficiently explored" the Victim's "personal bias and testimonial unreliability." *James*, 61 M.J. at 135; *Nelson*, 39 F.3d at 708. He emphasized her inability to

remember dates and facts, including that she never told law enforcement he had touched her vagina—despite testifying about it in detail— because she "didn't remember it at the time." (J.A. 87, 103–07.) And, he addressed both the Victim's and Chelsea's motivations to support the contentious custody dispute by eliciting how they reported the allegations years later, immediately following Appellant's successful motion to modify the custody agreement, which was contrary to the family's wishes. (J.A. 118, 188, 204–05, 217–18, 224–25).

Thus, at most, the nondisclosure only "denied [Appellant] the opportunity to add extra detail" to a cross-examination that otherwise "sufficiently explored" the Victim's "personal bias and testimonial unreliability." *James*, 61 M.J. at 135; *Nelson*, 39 F.3d at 708. Because there would have been only a "peripheral concern to the Sixth Amendment," no constitutional error occurred. *James*, 61 M.J. at 135.

E. Even assuming constitutional error, the lower court correctly found any error was harmless beyond a reasonable doubt. *Ritchie*, *Reese*, and *Jacinto* are distinguishable.

Appellate courts "review de novo the issue whether constitutional error was harmless beyond a reasonable doubt." *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001).

"A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003). An error "did not 'contribute' to

the ensuring verdict" when it was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2018) (citations omitted).

Whether "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias" depends "upon a host of factors" like "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 685.

1. The *Van Arsdall* factors favor the United States because Appellant already had the requested information and the findings suggest he effectively attacked her credibility.

In *United States v. Jones*, 49 M.J. 85, 90 (C.A.A.F. 1998), the military judge precluded the appellant from questioning the victim about "her associations with, perceptions of, and belief in demons, spirits, and Ouija boards" to attack her ability to perceive reality. *Id.* at 87. This Court found no prejudice because "the alleged victim's testimony might be explained away by the denied cross-examination testimony," but "the testimony of appellant's friends and the investigating police office reporting his admissions could not." *Id.* at 90. Thus, "there was simply no

reasonable possibility that the denied cross-examination would have changed the outcome of [the] appellant's trial." *Id.*

Here, similar to *Jones*, the *Van Arsdall* factors show the error was harmless beyond a reasonable doubt. The United States concedes the Victim's testimony was important and not cumulative. However, independent evidence corroborated her allegations, like the "racy" emails she sent to Appellant that discussed "sexual stuff," including the phrase "when you were touching me, I wanted more." (J.A. 86, 103–04, 311–12, 315.) Although he told Chelsea the "touching" was a "back massage," he told his command it consisted of a hand on "her shoulder" during "a family reunion." (J.A. 236, 311–12, 315.) Then later, Appellant admitted to Petty Officer Robertson that he lied to his command and "talked [his] way out of" trouble by telling a "story" that "wasn't the full truth." (J.A. 245–46, 253.)

Moreover, at most, the Military Judge's ruling had minimal impact on Appellant's cross-examination of the Victim because it denied "production of the requested records for in camera review;" it did not preclude Appellant from cross-examining her on "the fact of [her] inpatient treatment, and her diagnoses [that] are known to the defense." (J.A. 616.) That Appellant strategically chose to not address that line of questioning suggests the Victim's mental health was "unimportant in relation to everything else the jury considered" on her credibility. *Moran*, 65 M.J. at 187; (J.A. 594–95). Finally, as the lower court correctly noted,

"the Government's case was strong except for the timing of the offenses." *Mellette*, 81 M.J. at 698; *see* Section II.C.2., *supra*.

Any error was harmless beyond a reasonable doubt.

Finally, the Record refutes Appellant's three arguments. First, his claim that the "racy" emails "consisted of [the Victim's] words" misses the mark because Appellant adopted those words as a true account of what she said when he quoted them to Chelsea and tried to explain them. (*Compare* Appellant's Br. at 42–43, *with* J.A. 315.) Second, Appellant's argument that the lower court was "mistaken" about "admissions to third parties" ignores his emails to Chelsea and testimony of Master Chief Hammann and Petty Officer Robertson about his evolving story of the "touching." (*Compare* J.A. 236, 245–46, 253, *with* Appellant's Br. at 44.)

Third, his claim that there was no sexual activity before deployment because he "seemed surprised" by the Victim's email is illogical. (Appellant's Br. at 44.) Rather, Appellant was likely surprised that his sexual abuse of the Victim—his pregnant wife's fifteen-year-old sister—led to her professing "she was in love with him" and "wanted to lose her virginity to him." (J.A. 70–71, 188, 255.) Moreover, Appellant only claimed her emails were "crazy" after the command found out about them and "there were rumors going around" about "age being an issue," which "didn't look good for him." (J.A. 255–56.)

2. The lower court did not need to review the Victim's mental health records.

a. *Ritchie* and *Reece* are inapt: the United States did not have the Victim's records; Appellant generally knew the content of the undisclosed records; and Appellant declined to use what he knew about the records.

In *Pennsylvania v. Ritchie*, 480 U.S. 39, 43 (1987), the Court rejected the appellant's argument that a privilege must yield "when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony" because that would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view." *Id.* at 52.

It noted "the right to confrontation is a *trial* right" that "is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Id.* at 52–53 (emphasis in original). But because "the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment," the Court remanded so the trial court could "determine whether it contains information that probably would have changed the outcome of [the appellant's] trial." *Id.* at 57–58.

In *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987), the military judge rejected the appellant's request to review in camera the two victims' mental health records, one with "a history of inpatient treatment for alcohol, drug, and behavioral

problems" and the other who "was under the control of state welfare authorities, having been placed in a foster home for behavior described by her family as uncontrollable." *Id.* at 94. This Court found prejudice because (1) "there were no eyewitnesses to the alleged offenses," and "emotional or mental defects have been held to have high probative value on the issue of credibility;" and (2) "the information contained in the state's reports may have had an impact on the defense's trial strategy." *Id.* at 95.

[redacted]

see R.C.M. 701(a)(2)(A) (obligating discovery for material "within the possession, custody, or control of military authorities"). Likewise, the Courts' concerns that the unknown records may "have changed the outcome of [the appellant's] trial" or "have had an impact on the defense's trial strategy," respectively, are inapplicable for three reasons. *Ritchie*, 480 U.S. at 58; *Reese* 25 M.J. at 95.

[redacted] Second, the Victim's records would not have impacted trial, as Appellant decided to not use the

information he had. *See* section II.E.1., *supra*. And nothing in the records would have changed the Victim's inability to remember the "precise timeframe of the events in question, which was the crucial issue in the trial." *Mellette*, 81 M.J. at 694. Third, Appellant's inability to review the records did not impact his defense strategy, since nothing supports he would have declined to focus on attacking the Victim's memory and bias. (J.A. 103–07, 336–37, 345–347, 353.)

b. *Jacinto* is inapt: there are no "obvious omissions and ambiguities" in the Military Judge's rulings.

In *United States v. Jacinto*, 81 M.J. 350, 354 (C.A.A.F. 2021), this Court remanded for a fact-finding hearing because there were two "obvious omissions and ambiguities in the record" that "contain[] conflicting information about whether [the victim] was experiencing psychotic agitation when she was hospitalized shortly after her" allegations. *Id.* First, the military judge's findings of fact contradicted the defense expert's Article 39(a) testimony, but the record "omits five pages of hospital documents reviewed" by the parties. *Id.* Second, although the military judge ordered the hospital to produce documents, the record contains "no indication whether the Government and the hospital even complied with the military judge's orders" that "likely would have resolved the questions surrounding [the victim's] diagnosis and her . . . prescription." *Id.* The "unclear and incomplete" record of unprivileged materials that had already been produced

thus precluded this Court from making "an informed decision about whether the military judge's crucial factual findings are clearly erroneous." *Id.*

Jacinto is inapposite. This Court remanded there because the record was too "unclear and incomplete" for it to properly evaluate the military judge's ruling. *Jacinto*, 81 M.J. at 354. Not so here.

In sum, because nondisclosure of the Victim's mental health records did not impact either the trial or Appellant's defense strategy, nothing in *Ritchie*, *Reece*, or *Jacinto* required the lower court to review them before analyzing for prejudice.

F. If this Court finds the lower court erred by not reviewing the Victim's mental health records, then the appropriate remedy is to remand.

If the lower court correctly construed the scope of Mil. R. Evid. 513 but erred assessing for prejudice without reviewing the Victim's now-unprivileged mental health records, then this Court should remand to the lower court to allow it to review the Victim's mental health records in camera and reassess for prejudice. A *DuBay* hearing is unnecessary. (*Contra* Appellant's Br. at 45.)

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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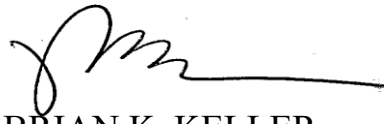

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Certificate of Compliance

1. This Brief complies with the type-volume limitation of Rule 24(c)(1) of this Court's Rules of Appellate Procedure because it contains fewer than 14,000 words.

2. This Brief complies with the typeface and type style requirements of Rule 37(a) of this Court's Rules of Appellate Procedure because it uses proportional, 14-point, Times New Roman font with one-inch margins on all four sides.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on December 20, 2021.

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United States v. Rodriguez

United States Army Court of Criminal Appeals

October 1, 2019, Decided

ARMY 20180138

Reporter
2019 CCA LEXIS 387 *; 2019 WL 4858233

UNITED STATES, Appellee v. Sergeant LUIS A. RODRIGUEZ JR., United States Army, Appellant.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Rodriguez, 2019 CAAF LEXIS 848 (C.A.A.F., Dec. 3, 2019)*

Review denied by *United States v. Rodriguez, 2020 CAAF LEXIS 33 (C.A.A.F., Jan. 23, 2020)*

Prior History: [*1] Headquarters, 7th Infantry Division. Timothy P. Hayes, Jr., Lanny J. Acosta, Jr., and Michael S. Devine, Military Judges, Colonel Russell N. Parson, Staff Judge Advocate.

Core Terms

military, voir dire, Screenshots, defense counsel, diagnosis, records, privileged, bias, medications, questions, in camera, sexual, rape, mental health records, confidential communication, sexual assault, challenges, ineffective assistance of counsel, communications, prescription, patient, court-martial, prescribed, waived, challenge for cause, medical record, mental health, witnesses, assault, sit

Case Summary

Overview

HOLDINGS: [1]-Screenshots 1 and 2 were not privileged under Mil. R. Evid. 513, Manual Courts-Martial, and the military judge (MJ) erred in concluding they were; [2]-Appellant failed to establish the first prong of Mil. R. Evid. 513(e)(3) (a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege), and therefore, he was not entitled to an in camera review of CPL AK's mental health records. The MJ did not abuse his discretion in denying the defense motion; [3]-Neither Brady nor the *Confrontation Clause* entitled appellant to an In-Camera Review of CPL AK's mental health records; [4]-The court did not find appellant's counsel were deficient in their decision not to challenge LTC CF because appellant failed to demonstrate a challenge for cause against LTC CF would have been successful.

Outcome
The findings of guilty and the sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans

Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN1[] **Privileged Communications, Psychotherapist-Patient Privilege**

Mil. R. Evid. 513(a), Manual Courts-Martial, provides that 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 Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN2[] **Privileged Communications, Psychotherapist-Patient Privilege**

A list of medical and mental health "problems" does not contain any "confidential communications," though privileged communications may have prompted evaluation for those diagnoses. Likewise, a list of prescription medications does not contain "confidential communications," though privileged communications may have facilitated a psychotherapist's prescription for a particular medication. A prescription, by its very nature, is intended to be disclosed to a non-psychotherapist third party--the pharmacist who fills it--which further informs the court's opinion that the medications prescribed to a person are not privileged "confidential communications."

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN3[] **Privileged Communications, Psychotherapist-Patient Privilege**

Privileged information cannot be used to establish the factual foundation for an in camera review of mental health records.

Military & Veterans Law > Military Justice > Disclosure & Discovery

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Military Justice, Disclosure & Discovery**

A military judge's ruling on a discovery or production request is reviewed for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > ... > Courts Martial > Evidence > Privileged Communications

HN5[] **Burdens of Proof, Allocation**

Congress codified four prerequisite showings that must be made before a military judge may conduct an in camera review of privileged matters. The movant bears the burden of establishing: (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 Mil. R. Evid. 513(d), Manual Courts-Martial; (C) that the information sought is not merely cumulative of other information available; and (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. Mil. R. Evid. 513(e)(3), Manual Courts-Martial.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN6[] **Privileged Communications, Psychotherapist-Patient Privilege**

Mil. R. Evid. 513, Manual Courts-Martial, is a rule of privilege, not exploration.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN7[] **Brady Materials, Brady Claims**

For Brady purposes, information under the control of the "prosecution" is not the same as information under the control of the entire government. Privileged information stored in a hospital's system of records is not within the possession or control of the "prosecution" for Brady purposes. Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not "in the possession of prosecution" and therefore cannot be Brady evidence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > Military Justice > Disclosure & Discovery

HN8[] **Criminal Process, Right to Confrontation**

An appellant's *Sixth Amendment* right to confront witnesses against him is a trial right, not a discovery right.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN9[] **Courts Martial, Court-Martial Member Panel**

The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN10[] **Burdens of Proof, Allocation**

R.C.M. 912(f)(3), Manual Courts-Martial, states, in part that the party making a challenge shall state the grounds for it. The burden of establishing that grounds for a challenge exists is upon the party making the challenge. R.C.M. 912(f)(2)(4) states, in part: membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial Review

HN11[] **Courts Martial, Court-Martial Member Panel**

Absent a clear showing of specific prejudice, or where application of waiver would result in a miscarriage of justice, failure to challenge a member at trial constitutes waiver of that issue on appeal. Allowing appellate defense counsel to label a decision not to challenge court members as ineffective assistance of counsel, would defeat the longstanding waiver rule for challenges.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial Review

HN12[] **Courts Martial, Court-Martial Member Panel**

When detailed voir dire is conducted by the defense counsel, counsel's subsequent failure to challenge a member is a tactical decision which waives any ground for challenge revealed by voir dire. An appellant cannot strategically decline to assert a challenge during voir dire and then complain of the inaction on appeal in order to revive an issue he previously waived.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. The court reviews both deficiency and prejudice de novo. To establish deficient performance, an appellant must show that his counsel's representation amounted to incompetence under prevailing professional norms. In order to establish prejudice, an appellant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN14[] **Bias & Impartiality, Actual & Implied Bias**

A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN15[] **Bias & Impartiality, Actual & Implied Bias**

Actual bias is defined as "bias in fact"--the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions. There is implied bias when most people in the same position would be prejudiced. Implied bias is evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

HN16[] **Bias & Impartiality, Actual & Implied Bias**

It is well established that a prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN17[] **Courts Martial, Court-Martial Member Panel**

The U.S. Court of Appeals for the Armed Forces recognized that military judges are "specially suited" to determine challenges because, unlike a reviewing court that is not physically present, military judges have observed a challenged member's demeanor during voir dire. Similarly, the U.S. Army Court of Criminal Appeals finds a trial defense counsel is best poised to determine whether to challenge panel members, as she observes each member, converses directly with them during individual voir dire, and reads their pretrial questionnaires, which are not part of the appellate record.

Counsel: For Appellant: Captain James J. Berreth, JA; Nathan Freeburg, Esquire (on brief and supplemental brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Virginia Tinsley, JA; Major Meghan Peters, JA (on brief).

Judges: Before ALDYKIEWICZ, MULLIGAN,[1] and SALUSSOLIA, Appellate Military Judges.

Opinion by: ALDYKIEWICZ

Opinion

MEMORANDUM OPINION

ALDYKIEWICZ, Senior Judge:

Appellant was charged with two specifications of violating *Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920* [UCMJ]: Specification 1 alleged rape; Specification 2 alleged abusive sexual contact. A panel of officers sitting as a general court-martial acquitted appellant of rape but convicted him, contrary to his plea, of abusive sexual contact. The convening authority approved the adjudged sentence of a bad-conduct discharge, two years of confinement, and reduction to the grade of E-1.

Appellant contends that the military judge erred in denying his Military Rule of Evidence (Mil. R. Evid.) 513 motion for an in camera review of his accuser's mental **[*2]** health records or, in the alternative, failing

[1] Senior Judge Mulligan decided this case while on active duty.

to abate the proceedings if his accuser did not agree to the production of her records. Appellant also asserts he received ineffective assistance of counsel because his trial defense team failed to challenge Lieutenant Colonel (LTC) CF, a member of his panel whose spouse was a victim of a sexual offense. We disagree with both assertions, and while both warrant discussion, neither merits relief.[2]

BACKGROUND

Between October 2016 and February 2017, appellant was a non-commissioned officer working as a medic in the same unit as Corporal (CPL) AK.[3] Eventually they made plans to socialize off duty. On 17 February 2017, appellant drove to CPL AK's barracks, picked her up, and the two of them went to the on-post Shoppette to purchase alcohol before returning to CPL AK's barracks room. At CPL AK's barracks room, they drank and played games.

After a few hours, CPL AK laid down to go to sleep, telling appellant he should go home because she was ready to go to sleep. Instead, appellant turned off the light, climbed into bed with CPL AK, and placed his arm over her body and his hand, over her clothing, on her crotch area. She pushed his hand away and told **[*3]** him, "No, I did not want to tonight. . . . I'm going to sleep. Go home." Ignoring her express desire that he stop and go home, appellant grabbed her "genitals [over her clothing] a lot more aggressively."

THE PRETRIAL MIL. R. EVID. 513 LITIGATION[4]

Prior to trial, defense counsel moved for the military judge to conduct an in camera review of CPL AK's mental health records. The defense argued that CPL AK might suffer from a condition that impacted her "credibility" and "ability to recount events accurately," and that they were "constitutionally required" pursuant to Mil. R. Evid. 513 and the *Confrontation Clause of the Sixth Amendment*.

In support of the defense motion, the defense submitted two screenshots of CPL AK's digital medical records and an affidavit from Dr. Keppler, an Army psychiatrist appointed as a defense expert consultant. The defense also called Dr. Keppler to testify at the motions hearing.

The screenshots were provided to the defense anonymously, left at the civilian defense counsel's office in a sealed envelope.[5] The defense provided copies of the screenshots to the government. Screenshot 1 contains patient notes and references a prescription medication, Rx-1. Screenshot 2 lists medical and mental

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[2] Appellant also contends that the evidence is legally and factually insufficient to sustain his abusive sexual contact conviction. We find no merit in this argument. Similarly, we find those matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A 1982)* to be without merit.

[3] At the time of the charged offense, 17 February 2017, Corporal AK held the rank of Specialist (SPC). Subsequent thereto she was laterally promoted to Corporal (CPL), the rank she held when she testified in appellant's court-martial. Throughout the opinion, she will be referred to as CPL AK.

[4] Consistent with Mil. R. Evid. 513(e)(6), the "[pretrial] motions, related papers, and the record of the hearing [were] sealed in accordance with R.C.M. 1103A." Our decision avoids unnecessary disclosure of CPL AK's medical records out of concern for her privacy, which was invaded through a HIPPA violation. This decision avoids disclosure of any specific diagnosis made or medication prescribed not because they are privileged, but because disclosure of either is unnecessary to resolution of the Mil. R. Evid. 513 assignment of error.

[5] The envelope's return address stated, in part: "JBLM Concerned Bystander."

health diagnoses, labeled "problems." Both reference **[*4]** a mental health disorder, Condition-A. Corporal AK did not provide a Health Insurance Portability and Accountability Act (HIPAA)[6] release for her medical records, including the screenshots. At the time of trial, CPL AK continued to assert her Mil. R. Evid. 513 privilege.

An investigation into the unauthorized release and HIPAA violation[7] narrowed the list of those who accessed CPL AK's records during the relevant period, without a medical need to know, to three persons, one of whom was appellant's wife. On four occasions, appellant's wife, herself an active duty medic, without authorization, accessed CPL AK's medical records, including the digital records captured in Screenshots 1 and 2.

During the motions session, the defense argued that an in camera review of CPL AK's mental health records was necessary to address Condition-B, a mental health condition that can impact credibility and ability to recall. However, the defense offered no evidence that CPL AK suffered from Condition-B, and it was not mentioned in Screenshots 1 and 2. Although Screenshots 1 and 2 mentioned *Condition-A*, Dr. Keppler testified that the references to Condition-A could indicate *either the presence or absence* ***[*5]*** of the condition, so he could not conclude that CPL AK suffered from Condition-A. Further, while those suffering from Condition-A *could* also suffer from Condition-B, a diagnosis of the former was not evidence of the latter. Although Screenshot 1 mentioned Rx-1, Dr. Keppler testified that the medicine would not be prescribed to someone for Condition-A.

In denying the defense motion, the military judge ruled, "the use of improperly, if not illegally, obtained evidence as a basis to establish a need to disclose evidence under [Mil. R. Evid.] 513 [is] exactly contrary to [the] purpose of the rule. The materials in the possession of the Defense retains [sic] its privileged nature." Having found Screenshots 1 and 2 privileged, the military judge denied the defense's Mil. R. Evid. 513 motion, concluding "[t]he Defense may not use the improperly disclosed materials, regardless of who possesses them, for any purpose."

The military judge went on, however, to rule in the alternative: even considering the "privileged" materials, the defense failed to show "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege."[8] *See* Mil. R. Evid.

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[6] HIPPA is a federal law that protects against the unauthorized disclosure or transmission of all "individually identifiable health information" by a HIPAA covered entity. The term "individually identifiable health information" means any information, including demographic information collected from an individual, that—(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—(i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual. *42 USC § 1320d(6) (2018)*.

[7] A knowing violation of HIPAA, which includes obtaining "individually identifiable health information relating to an individual" or disclosing "individually identifiable health information to another person" is subject to criminal prosecution, exposing the offender to a fine of $50,000 to $250,000, imprisonment in the range of one to ten years, or both. *See* *42 U.S.C. § 1320d(6) (2018)*.

[8] The military judge also found the defense failed to meet the requirement of Mil. R. Evid. 513(e)(3)(C)—that the information sought is "not cumulative from information available from other sources." Having found the military judge did not abuse his

513 (e)(3)(A). Therefore, **[*6]** the military judge ruled, "no disclosure or in camera review is required."

LAW AND DISCUSSION — DENIAL OF AN IN CAMERA REVIEW

Appellant alleges the military judge erred by failing to conduct an in camera review of CPL AK's mental health records or, in the alternative, abate the proceedings if CPL AK did not agree to the production of her mental health records. We disagree. Contrary to the military judge's conclusion, we find the records proffered by the defense were not privileged. However, we affirm the military judge's denial of the defense motion for the reasons noted below.

A. What constitutes a "Confidential Communication" under Mil. R. Evid. 513?

We take this opportunity to clarify the meaning of "confidential communication" pursuant to Mil. R. Evid. 513. As a threshold matter, the military judge had to determine whether Screenshots 1 and 2 were privileged, as they were the factual foundation offered by the defense counsel in support of their motion.

HN1[] Mil. R. Evid. 513(a) provides:

> 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 **[*7]** was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Whether a diagnosis or prescribed medication is privileged under Mil. R. Evid. 513 is a question that has not yet been directly addressed by our superior court. However, the Coast Guard addressed this question in *H. V. v. Kitchen, 75 M.J. 717, 2016 CCA LEXIS 395 (C.G. Ct. Crim App. 2016)* (2-1 decision) (Bruce, R., dissenting).

We find Judge Bruce's dissenting opinion in *Kitchen* most illustrative:

> A diagnosis, prescribed medications, and other treatments are matters of fact that exist independent of any communications between the patient and the psychotherapist. . . . The facts that there was a diagnosis, that medications were prescribed, or that other treatments were given, exist regardless of whether or to what extent they were discussed with the patient." *See H. V. v. Kitchen, 75 M.J. 717, 721, 2016 CCA LEXIS 395 (C.G. Ct. Crim App. 2016)* (2-1 decision) (Bruce, R., dissenting). A prescription, by its very nature, is intended to be disclosed to a third party (i.e., the pharmacist who fills the prescription).

Kitchen, 75 M.J. at 721. Adopting a plain language approach to the Mil. R. Evid. 513 privilege, Judge Bruce deftly highlighted "the rule protects 'communication' 'made for the purpose of facilitating diagnosis or treatment,' not *including* diagnosis and treatment.'" *Id. at 721*. Had the President **[*8]** 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." Instead, we

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discretion in denying the defense motion as it fails Mil. R. Evid. 513(e)(3)(A), we need not and do not address the validity of the military judge's ruling as it relates to Mil. R. Evid 513(e)(3)(C).

concur with the lone dissenting Judge Bruce that the Mil. R. Evid. 513 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.

Screenshots 1 and 2 contain a list of medical and mental health "problems," or diagnoses, and a list of prescription medications. HN2[] A list of medical and mental health "problems" does not contain any "confidential communications," though privileged communications may have prompted evaluation for those diagnoses. Likewise, a list of prescription medications does not contain "confidential communications," though privileged communications may have *facilitated* a psychotherapist's prescription for a particular medication. A prescription, by its very nature, **[*9]** is intended to be disclosed to a non-psychotherapist third party—the pharmacist who fills it—which further informs our opinion that the medications prescribed to a person are not privileged "confidential communications."

The fact that Screenshots 1 and 2 were illegally obtained in violation of HIPAA does not expand the psychotherapist-patient privilege created by the President. HIPAA protects against disclosure of a much broader category of medical information than the confidential communications that are privileged under Mil. R. Evid. 513. The military judge was correct that HN3[] *privileged* information could not be used to establish the factual foundation for an in camera review of mental health records. But his ruling conflates the Mil. R. Evid. 513 privilege with HIPAA protection. While the medical records were no doubt protected under HIPAA and should not have been disclosed without CPL AK's consent, we find Screenshots 1 and 2 were not privileged under Mil. R. Evid. 513, and the military judge erred in his conclusion that they were. Because the records in question are not privileged, we consider them, as the military judge did, in our Mil. R. Evid. 513 analysis.[9]

B. The Defense's Burden to Establish Entitlement to an In Camera Review

HN4[] A military judge's **[*10]** ruling on a discovery or production request is reviewed for an abuse of discretion. *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)*. "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004)*.

HN5[] Congress codified four prerequisite showings that must be made before a military judge may conduct an in camera review of privileged matters. As the movant, appellant bore the burden of establishing:

> (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 [Mil. R. Evid. 513(d)];
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3).

We agree with the military judge that appellant failed to

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[9] If the military judge had been correct in his determination that Screenshots 1 and 2 were privileged, he should *not* have considered them in his determination of the defense's motion to conduct an in camera review of CPL AK's mental health records.

establish the first prong of Mil. R. Evid. 513(e)(3)[10] and therefore, he was not entitled to an in camera review of CPL AK's mental health records.

The defense argued that CPL AK's records were relevant to CPL AK's "credibility" and **[*11]** "ability to recount events accurately." The defense tied this assertion to a specified mental health diagnosis, Condition-B. However, the evidence presented, to include the screenshots of CPL AK's medical records, mentioned a potential diagnosis of a different condition, Condition-A. While those that suffer from Condition-A could also suffer from Condition-B, the former is not proof of the latter, according to the defense's own expert.

The defense also attempted to link CPL AK to Condition-B by reference to Rx-1. However, the medication is not prescribed to treat either Condition-A or Condition-B. In short, the defense was on a "proverbial fishing expedition." *United States v. Chisum, 75 M.J. 943, 948 (A.F. Ct. Crim. App. 2016)*.

We find the military judge did not abuse his discretion in denying the defense motion. The defense failed to establish "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege." Mil. R. Evid. 513(e)(3)(A). While we have little doubt that defense counsel in criminal cases would like, as Dr. Keppler put it, to "explore the underlying psychopathology at work in the complainant," HN6[] Mil. R. Evid. 513 is a rule of privilege, not exploration.

*C. Neither Brady nor the Confrontation Clause Entitles **[*12]** Appellant to an In-Camera Review of CPL AK's Mental Health Records*

In addition to arguing the military judge erred in refusing to conduct an in-camera review, appellant argues that the evidence in question was discoverable under *Brady*.[11] We disagree. HN7[] "[F]or *Brady* purposes, information under the control of the 'prosecution' is not the same as information under the control of the entire government." *United States v. Shorts, 76 M.J. 523, 532 (Army Ct. Crim. App. 2017)*. Privileged information stored in a hospital's system of records is not within the possession or control of the "prosecution" for *Brady* purposes. "Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not 'in the possession of prosecution' and therefore cannot be 'Brady evidence.'" *Lk v. Acosta, 76 M.J. 611, 616 (Army Ct. Crim. App. 2017)*.

Finally, appellant argues:

> [R]egardless of other evidentiary or relevance burdens, it was error for the military judge to preclude the defense expert from considering the records in forming his opinion. In fact, on its face the military judge's ruling precluded the defense from even conducting further investigation based

[10] The military judge also found defense failed to meet the third prong of Mil. R. Evid. 513(e)(3), a showing "that the information sought is not merely cumulative of other information available." Mil. R. Evid. 513(e)(3)(C). Having found the military judge did not abuse his discretion in his Mil. R. Evid. 513(e)(3)(A) finding, we need not and do not address the validity of the military judge's ruling as it relates to Mil. R. Evid 513(e)(3)(C).

[11] *See generally Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)* (requiring the government to disclose to the defense certain information (i.e., evidence that is material and favorable to the defense) in the possession of the prosecution).

> upon the records, denying the Appellant the effective assistance of counsel. This ruling was simply outside **[*13]** of the military judge's authority and denied the Appellant his *Sixth Amendment* confrontation right.

We disagree. The military judge issued a protective order to prevent "unnecessary disclosure of evidence of a patient's records or communications." Though the screenshots are not privileged, their unauthorized disclosure constitutes a criminal violation of HIPAA. The military judge acted within his authority to regulate discovery when he issued the protective order. *See generally* Rule for Courts-Martial (R.C.M.) 701(g)(2). The order did not abridge appellant's constitutional rights. Appellant's *HN8*[⬆] *Sixth Amendment* right to confront witnesses against him is *a trial right*, not a discovery right. *Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)*. The right to confront witnesses does not include the right to discover information to use in confrontation. *Id.*

Appellant has failed to establish that he was prejudiced by the military judge's order denying his use of the information for any purpose. We find no abuse of discretion in the order and, more importantly, we find appellant suffered no material prejudice to a substantial right as a result of said order. *See Article 59(a), UCMJ*.

LIEUTENANT COLONEL CF'S SERVICE ON THE PANEL

A. Voir Dire

During group voir dire, the military judge posed the 28 standard group voir dire **[*14]** questions, to include: "Has anyone or any member of your family or anyone close to you personally ever been the victim of an offense similar to the ones charged in this case?" *See* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 2-5-1 (10 September 2014). All members except for LTC CF responded in the negative. When asked by the military judge, "do you believe that that experience would influence the performance of your duties as a court member in this case in any way?", LTC CF responded, "No, sir." Following the military judge's questioning of the group, the trial counsel asked 18 additional questions. Finally, trial defense counsel asked the group another 56 questions. The defense counsel's questions covered a range of topics including, *inter alia*: the members' relationships with government counsel, the convening authority and each other; prior experience with and personal views on sexual assault; previous involvement with victim advocates and law enforcement; preexisting notions regarding both suspects' and alleged victims' behavior; and, prior experience sitting on a court-martial panel.

During defense counsel's group voir dire, five of the ten members, including **[*15]** LTC CF, indicated they previously sat on a panel in a sexual assault case. During individual voir dire, a sixth member explained that he also served as a panel member on a sexual assault case. Considering the members' responses during group voir dire and the answers they provided in written questionnaires, trial defense counsel requested and conducted individual voir dire of all ten members.

During individual voir dire of LTC CF, trial defense counsel asked LTC CF to elaborate on his affirmative response to whether a family member or someone close to him was a victim of an offense similar to those charged. The following colloquy occurred:

> Q. Sir, I believe you answered affirmatively whether there'd been a family member or someone close to you that was a victim of a similar offense, is that correct?
>
> A. That's correct.
>
> Q. I'm sorry to have to delve into this, but could you

describe in general what you're speaking, sir.

A. It was my spouse. It was a number of years ago, but there were multiple instances in which she was a victim of, I'll say sexual assault, however you want to characterize it, it still has significant impacts today.

Q. Sir, the crime we're talking about, did that take place **[*16]** many years ago?

A. Yes. We've been married for 13 years, probably closer to 20 years ago.

Q. Did that offense come to light before you knew your wife?

A. No. It was afterwards.

Q. Were you involved in any way with investigative efforts or anything like that?

A. No.

Q. Was there any law enforcement involved in it or anything of that nature?

A. No.

Q. In the aftermath of an offense like that, I think you've alluded to that there's impacts and things of that nature. Do you believe that would color your ability to sit in a sexual offense case----

A. No.

Q. ----or prevent you--could you describe your thought process on that, sir?

A. I'd make sure to be fair. At least, I believe, I'm fair and will look at the evidence based on the merits. I don't come here with any preconceived notions regarding the case one way or the other.

Q. The perpetrator of that offense against your wife, was that a family member or a stranger?

A. It was an acquaintance of hers.

Counsel then transitioned to LTC CF's experience as a member on a prior sexual assault court-martial. He explained that he had sat on a court-martial panel in a sexual assault case in January of that year. Lieutenant Colonel CF said nothing from the experience **[*17]** stood out in his memory and he was committed to considering the evidence in the case and following the law provided by the military judge.

The government challenged for cause two of the panel members. The defense did not object and the military judge granted both challenges. The defense did not assert any causal challenges. Both the government and defense exercised their peremptory challenge, which the military judge granted. After the exercise of challenges, the panel consisted of six members, three of whom had previously served as members in sexual assault cases.

B. Lieutenant Colonel CF's Questions at Trial

During the course of trial, LTC CF submitted six questions that were marked as appellate exhibits. He directed questions at two NCO supervisors of CPL AK, an expert witness testifying in the field of forensic biology, and a medical doctor testifying about sexual assault forensic examinations. Most notably, during deliberation, the panel president requested that the court be called to order so that the military judge could be presented with LTC CF's final question: "May we have a transcript of CPL [AK's] testimony." As the typed transcript of the testimony was not yet available, **[*18]** LTC CF's question prompted the military judge to replay part of CPL AK's recorded testimony. After the members heard the portion of the recorded testimony requested, they returned to their deliberations.

LAW AND DISCUSSION — THE DEFENSE'S DECISION NOT TO CHALLENGE LIEUTENANT COLONEL CF

Appellant asserts he was denied his *Sixth Amendment* right to effective assistance of counsel because his defense counsel failed to challenge for cause LTC CF, a

member whose wife had been a victim of a sexual offense. Appellant characterizes defense counsel's "failure to challenge LTC F [as] an unreasonable omission [ ] especially since the challenge would have been granted under the 'liberal grant mandate,'" noting that that "a challenge for cause based on implied bias would have been successful." We disagree and conclude for the reasons below that appellant is entitled to no relief.

First, absent plain error, appellant's decision at trial not to challenge LTC CF as a member of the court waives any issue regarding his participation on the court. Further, appellant has failed to meet his burden to establish he was denied effective assistance of counsel, establishing neither deficiency by defense counsel's decision not **[*19]** to challenge LTC CF for cause nor prejudice by LTC CF's membership on the court.

A. The Burden to Bring Challenges and Waiver

HN9[] "The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel." *United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008)*.

HN10[] Rule for Courts-Martial 912(f)(3) states, in part: "The party making a challenge shall state the grounds for it. . . . The burden of establishing that grounds for a challenge exists is upon the party making the challenge." *United States v. Napoleon, 46 M.J. 279, 283 (1997)*. Rule for Courts-Martial 912(f)(2)(4) states, in part: "[m]embership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner." *See also United States v. Lopez, 37 M.J. 702, 705 (Army Ct. Crim. App. 1993)*.

HN11[] Absent a clear showing of specific prejudice, "or where application of waiver would result in a miscarriage of justice," failure to challenge a member at trial constitutes waiver of that issue on appeal. *United States v. Wilson, 21 M.J. 193, 197 (C.M.A. 1986)*. "Allowing appellate defense counsel to label a decision not to challenge court members as 'ineffective assistance of counsel,' would . . . defeat the longstanding waiver rule for challenges **[*20]** . . . ." *United States v. Travels, 47 M.J. 596, 598 (A.F. Ct. Crim. App. 1997)*.

We agree with the Air Force court and "find that HN12[] when, as here, detailed voir dire is conducted by the defense counsel, counsel's subsequent failure to challenge a member is a tactical decision which waives any ground for challenge revealed by voir dire." *Travels, 47 M.J. at 598*. Appellant cannot strategically decline to assert a challenge during voir dire and then complain of the inaction on appeal in order to revive an issue he previously waived. Appellant's allegation is a poor attempt at appellate "CPR," but new life cannot be breathed into legal issues previously waived by calling his counsel ineffective.

Notwithstanding our finding of waiver, we will review counsel's "inaction" under the framework for ineffective assistance of counsel, a review that similarly results in no relief for appellant.

B. Ineffective Assistance of Counsel

HN13[] In order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice. *United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct.*

2052, 80 L. Ed. 2d 674(1984)). We review both deficiency and prejudice de novo. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)). Appellant's claim fails on both counts.

To establish deficient performance, appellant must show **[*21]** that his counsel's "representation amounted to incompetence under 'prevailing professional norms.'" Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 690). In order to establish prejudice, appellant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Green, 68 M.J. at 362 (citing Strickland, 466 U.S. at 698).

1. No Deficiency

Any analysis of appellant's ineffective assistance of counsel claim necessarily requires an assessment of whether appellant had a viable challenge for cause against LTC CF. Defense counsel's performance cannot be called "deficient" for declining to make a challenge that would not have been successful.

HN14[↑] "'A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion.'" United States v. Woods, 74 M.J. 238, 243 (C.A.A.F. 2015) (citations omitted). "The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law." United States v. Wood, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936).

HN15[↑] "Actual bias [is defined] as 'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." United States v. Ai, 49 M.J. 1, 5 (1998) (internal quotations omitted). "The test for **[*22]** actual bias [in each case] is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" United States v. Napoleon, 46 M.J. 279, 283 (1997) (internal quotations omitted). "There is implied bias when most people in the same position would be prejudiced." United States v. Warden, 51 M.J. 78, 81 (C.A.A.F. 1999) (internal quotations omitted). Implied bias is "evaluated objectively under the totality of the circumstances and through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system." United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (citations and quotations omitted).

Appellant argues that implied bias exists when a family member is the victim of a similar crime. Our superior court disagrees, as do we. HN16[↑] It is well established that "[a] prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service." United States v. Terry, 64 M.J. 295, 297 (C.A.A.F. 2007); *see also* United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996) (a member is not per se disqualified because [the member] or a close relative has been a victim of a similar crime.).

In *Terry*, the Court of Appeals for the Armed Forces (C.A.A.F.) concluded it was error for the military judge to deny a challenge for cause against a member whose "experience with rape was pronounced and distinct." 64 M.J. at 297. The member's longtime girlfriend **[*23]** whom he intended to marry had been raped, a rape that resulted in her pregnancy. *Id.* The member's longtime girlfriend broke off their relationship because she "felt unworthy" of being with him after the rape. Id. at 300. Despite being a support system for the rape victim, the rape ultimately led to the end of the relationship,

changing the course of the member's life. Lieutenant Colonel CF's experience with his wife's sexual assault is distinguishable.

Lieutenant Colonel CF appeared to know few details of his wife's 20-year-old sexual assault. The crime occurred before he married his wife and it did not derail their lives together, as the rape did to the challenged member in *Terry*. Mere knowledge of his wife's experience as a sexual assault victim and an acknowledgement that it continues to impact her, albeit significantly, does not amount to a "pronounced and distinct" personal experience with a crime similar to those charged.

To agree with appellant's allegation that he received ineffective assistance of counsel, this court would have to find that defense counsel are per se ineffective when they choose not to challenge a member that reports a personal experience with a crime similar to those **[*24]** charged. Such a holding would fly in the face of the longstanding premise that a prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service on a panel. *See* *Terry, 64 M.J. at 297*. Imposing such a rule would also trample on the necessary strategic autonomy exercised by defense counsel in the presentation of an accused's defense. *HN17*[↑] Our superior court recognized that military judges are "specially suited" to determine challenges because, unlike a reviewing court that is not physically present, military judges have observed a challenged member's demeanor during voir dire. *Id. at 302*. Similarly, we find a trial defense counsel is best poised to determine whether to challenge panel members, as she observes each member, converses directly with them during individual voir dire, and reads their pretrial questionnaires, which are not part of the appellate record.

During individual voir dire, LTC CF's colloquy with the defense counsel provides insight into his fairmindedness and impartiality. Rather than simply giving affirmative or negative responses to defense counsel's queries, LTC CF delivered an unsolicited monologue about his intent to fairly decide **[*25]** the case on its merits. Lieutenant Colonel CF noted, "I'd make sure to be fair. At least, I believe, I'm fair and will look at the evidence based on the merits. I don't come here with any preconceived notions regarding the case one way or the other." There were no leading questions posed to suggest to LTC CF that he should dutifully set aside his wife's personal experience in order to sit as an unbiased member; he freely articulated his intent to do so in his own words.

Appellant has failed to support his allegation against his defense counsel. He could have provided an affidavit explaining that he noticed something off-putting about LTC CF's demeanor and expressions in court. He could have explained that he was uncomfortable having LTC CF on his panel and had in fact expressed that concern to his defense team. The absence of any affidavit from appellant's speaks volumes. Because he did not, we must assume that he did not personally notice anything noteworthy about LTC CF during voir dire that would have caused him to request that the member be challenged. Likewise, if there were disturbing answers contained in LTC CF's pretrial questionnaire, appellant did not move to attach it to **[*26]** the appellate record to support his bold assertion that a challenge against LTC CF would have been successful and should have been made by his counsel.

We do not find that appellant's counsel were deficient in their decision not to challenge LTC CF because appellant has failed to demonstrate a challenge for cause against LTC CF would have been successful.

2. No Prejudice

We need not address prejudice, as we find no deficiency in defense counsel's performance. However, we turn to the second prong of the *Strickland* analysis to point out that appellant has failed to even allege any prejudice, let alone support such a claim. Instead, appellant presumes prejudice, as if the failure to challenge a member automatically creates a reasonable probability of a different result sufficient to create serious doubt as to the outcome of the trial. Appellant would like us to treat his ineffective assistance of counsel allegation as structural error, one that "affects the framework within which the trial proceeds," such that it "defies analysis by harmless error standards." *Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-08, 198 L. Ed. 2d 420 (2017)* (citations omitted). But assuming we agreed with appellant that his counsel was deficient for failing to challenge LTC CF, appellant **[*27]** still bears the burden of showing how that prejudiced him at trial. The findings reached by the panel and LTC CF's behavior during trial make us confident that the defense counsel's decision not to challenge LTC CF did not prejudice appellant.

First, the panel acquitted appellant of rape, the gravamen offense. Even if LTC CF harbored some bias due to his wife's status as a victim of sexual assault, appellant's acquittal cuts against the contention that the failure to challenge LTC CF prejudiced appellant. Second, we have considered that LTC CF posed six thoughtful questions during the course of trial that were directed at a variety of witnesses. His questions demonstrate a focused attention to the evidence presented at trial and a personal desire to understand the testimony of the witnesses, including expert witnesses. Even during deliberation, LTC CF asked to reexamine CPL AK's testimony, which supports the conclusion that he was a thoughtful deliberator, not a biased husband. Despite his wife's personal experience with sexual assault, LTC CF did not exhibit a biased attitude or inelastic disposition.

Appellant's lead defense counsel conducted a thorough group voir dire and individual **[*28]** voir dire with every member. She gained insight from personal conversations with each member. Viewing the record as a whole, we conclude that appellant's defense team conducted a strategically savy voir dire and simply made a tactical decision not to challenge LTC CF for cause after hearing his answers and observing his affect and behavior. Notwithstanding our conclusion that appellant waived the issue of challenging LTC CF, defense counsel's decision not to challenge LTC CF did not constitute ineffective assistance of counsel.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge SALUSSOLIA concur.

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