IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

RICKY D. CHISUM, JR.,
Senior Airman,
United States Air Force,
Appellant.

USCA Dkt. No. 17-0199/AF

Crim. App. Dkt. No. ACM S32311

BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS IN SUPPORT OF FINAL BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

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

Protect Our Defenders files this *amicus* brief in support of Appellee United States' Final Brief, and Protect Our Defenders respectfully requests that this Court deny Appellant Senior Airman Chisum's appeal. Protect Our Defenders asks this Court to hold that the *Confrontation Clause* of the Sixth Amendment of the Constitution does not require disclosure or admission of privileged mental health records.

ISSUE PRESENTED

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

Statement of Protect Our Defenders' Interest

Protect Our Defenders honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted or harassed by fellow service members. Military victims of sexual assault are affected by military judges who improperly order production and disclosure of mental health records in violation of Mil. R. Evid. 513. This *amicus* brief cites cases and provides analysis that are not addressed by the parties. This *amicus* brief explains why this Court should affirm the outcome of the decision by the Air Force Court of Criminal Appeals ("AFCCA"), but it should reverse AFCCA's holding that the trial judge

abused his discretion when he refused to perform an *in camera* review of the witnesses' mental health records.

STATEMENT OF THE CASE AND FACTS

Protect Our Defenders is unable to fully address manyof the relevant facts presented by the parties because the Appellant filed his brief under seal and the Appellee filed its brief with half of its pages redacted. Protect Our Defenders is without many of the facts relied upon by the parties, and is without any of the legal arguments made and case law cited by the Appellant.

The military judge at Senior Airman Chisum's court-martial did not order production for an *in camera* review of the mental health records of two witnesses, AB A.K. and AB C.R. The judge determined that the Appellant failed to articulate a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under an exception to Mil. R. Evid. 513. The mental health records of these witnesses were not produced, and they were not available to either party or the military judge for the entire court-martial.

The witnesses' mental health records were not produced until the September 15, 2016 Order by the AFCCA. September 15, 2016 Order, at 1. There is no indication in the records available to Protect Our Defenders that the witnesses were given any notice of the AFCCA order, whether they were provided any opportunity to oppose the order, or whether even until this day they remain unaware that their

privileged mental health records have been reviewed by at least the Appellant, his trial and appellate attorneys, the government trial and appellate attorneys, the judges of the AFCCA and the judges of this Court. The AFCCA fails to cite any rule of courts-martial as authority to order production of the witnesses' mental health records. Protect Our Defenders is aware of none.

In deciding the issue granted review, the Court should consider only facts that were before the military judge at the court-martial and not the contents of the witnesses' mental health records.

Finally, although the Court has granted review solely upon the Appellant's Sixth Amendment right to confront witnesses against him, the AFCCA based its decision that the military judge should have conducted an *in camera* review entirely upon the Appellant's Fifth Amendment due process rights and not his Sixth Amendment confrontation rights. See November 29, 2016 AFCCA Order, at 5 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v. United States*, 405 U.S. 150, 154 (1972)).[1] This *amicus* brief, except for the footnote below, will

[1]*Brady* is not applicable because the information is not in the hands of the prosecution team. *United States v. Stellato*, 74 M.J. 473, 484-485 (C.A.A.F. 2015); *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004); *United States v. Mahoney*, 58 M.J. 346, 348 (C.A.A.F. 2003) (duty to disclose information known to anyone acting on government's behalf); U.S. v. Williams, 50 M.J. 436 (C.A.A.F. 1999); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1983) (duty extends to "military investigative authorities"); *United States v. Figueroa*, 55 M.J. 525 (A.F. Ct. Crim. App. 2001); *United States v. Sebring*, 44 M.J. 805 (N-M. Ct. Crim. App. 1996); and recently, *L.K. v. Acosta*, 2017 CCA LEXIS 346 (A. Ct. Crim. App. May 24, 2017). "There can

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address only the granted *Confrontation Clause* issue and not the due process issue.

Protect Our Defenders respectfully requests that the Court allow the parties and

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be no discovery of documents or things not in the Government's possession." *United States v. Birbeck*, 35 M.J. 519, 522 (A.F. Ct. Crim. App. 1992).

In *Stellato*, this Court explained that evidence not in the possession of the prosecution team is still within its possession, custody, or control when (1) the prosecution has both knowledge and access to the evidence; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case but the evidence remains in possession of the agency that originally had the case. *Stellato*, at 484-485. The privileged information in the witnesses' mental health records was not in the possession, custody or control of the prosecution team until after the AFCCA released the records to the appellate counsel for the Government and the Appellant.

Judge Stucky points out in his *Stellato* dissent that discovery rights under R.C.M. 701 is broader than under *Brady* because under R.C.M. 701(a)(2)(A) discovery rights extend to evidence in the possession, custody or control of "military authorities" and not just the "prosecution team." *Stellato*, at 492, n.1. This distinction does not make information in the possession of government mental health facilities discoverable because R.C.M. 701(f) excepts information privileged under Mil. R. Evid. 513 from disclosure under R.C.M. 701. The "constitutionally required" exception under the previous version of Mil. R. Evid. 513 would not require disclosure because the Constitution does not require disclosure except under *Brady*. *Brady* does not require disclosure when information is in the possession and control of military authorities, it only requires disclosure if the information is in the possession or control of the prosecution team.

Rulings by appellate federal courts are consistent with the rulings by the military appellate courts. *United States v. Hach*, 162 F.3 937 (7th Cir. 1998) (the Due Process Clause does not entitle defendant to an in camera review of the witness's mental records because "if the documents are not in the government's possession, there can be no 'state action' and consequently, no violation of [*Brady*]"); see also *United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006) (*Brady* applies only to information in the government's "possession, custody, or control"); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (defendant's *Brady* claim "fails . . . because he has not shown any withholding of evidence within the control of the Government"); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (*Brady* "applies only to information possessed by the prosecutor or [investigative or prosecutorial personnel] over whom he has authority").

In *Disponnett v. Cook*, 2013 U.S. Dist. LEXIS 52084 (D. Or., Apr. 8, 2013), the court held that *Brady* and its progeny do not establish a right to discover privileged information from agencies who are not associated with the prosecution. There was no evidence in *Disponnett* that the state or anyone associated with the prosecution ever possessed the mental health records sought. State prosecutors were not allowed access to the mental health files. Like *Disponnett*, the prosecution team is precluded by HIPAA from obtaining the witnesses' mental health files.

Protect Our Defenders an opportunity to provide further briefing if it intends to grant relief on any basis other than the granted issue.

Summary of Argument

In deciding the granted *Confrontation Clause* issue, relevance is not relevant. The focus must remain on the law because the contents of the witnesses' mental health records are not relevant to deciding the granted issue. The Court must first look at the plain language of Mil. R. Evid. 513 and presume it is constitutional unless its unconstitutionality is clearly and unmistakably shown. Since no federal appellate court, including the Supreme Court, has ever found the psychotherapist-patient privilege to violate a defendant's confrontation rights, Mil. R. Evid. 513's unconstitutionality cannot be clearly and unmistakably shown.

No matter how relevant the contents of the witnesses' psychotherapy records may be to the Appellant's case, whether the records contain evidence of conflicting statements, inability to perceive and recall, or bias or motive to fabricate, the records are privileged. If privileged communications were required to be disclosed whenever they were relevant and material, then there would be no privilege at all. The essence of a privilege is that it protects relevant and material communications. If the communication were not relevant or material, the privilege would not be needed to protect it.

None of the Supreme Court cases relied upon by the Appellant deal with privilege. The Appellant even fails to cite and analyze the case wherein the Supreme Court first recognized the psychotherapist privilege, *Jaffee v. Redmond*, 518 U.S. 1 (1996). Absent a Supreme Court case directly and on-point holding that the *Confrontation Clause* requires disclosure of relevant and material privileged psychotherapist communications, this Court must defer to the President and Congress's determinations that Mil. R. Evid. 513 is constitutional.

ARGUMENT

I. A HISTORY OF MIL. R. EVID. 513.

President Clinton established Mil. R. Evid. 513, *Psychotherapist- Patient Privilege*, in 1999. Exec. Order No. 13140, 64 Fed. Reg. 55115 (Oct. 12, 1999). The rule was created to clarify military law in light of the Supreme Court's recognition of the psychotherapist privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). Mil. R. Evid. 513 was created with eight exceptions to the privilege. One of these exceptions, the "constitutionally required" exception, has been deleted by Congress and the President. At the time of the Appellant's court-martial, the "constitutionally required" exception still existed.

In the eighteen years since Mil. R. Evid. 513 was established, this Court has never provided any guidance on the "constitutionally required" exception.[2] No service court of criminal appeals provided any guidance on this exception until February of 2016, several months after Congress deleted the "constitutionally required" exception. This lack of guidance has allowed military judges to routinely violate the rule by reviewing and ordering the disclosure of privileged psychotherapy communications. *D.B. v. Lippert*, at 14-15; *L.K. v. Acosta*, 2017 CCA LEXIS 346, *8 (A. Ct. Crim. App. May 24, 2017) ("review under the constitutional exception was 'routine' but without specifying what constitutional issue was at play"); *J.M. v. Payton-O'Brien*, No. 2017-00133, 2017 CCA LEXIS 424, *12-13 (N-M. Ct. Crim. App. June 28, 2017).[3] Military judges do not cite any applicable military or Supreme Court case law in their decisions concerning the rule's "constitutionally required" exception, but rely solely upon on their own personal opinion or upon case law applicable to Mil. R. Evid. 412. The routine

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[2]See Major Michael Zimmerman, Rudderless: 15 Years and Still Little Direction on Boundaries of Military Rule of Evidence 513, 223 Mil. L. Rev. 312, 315 and 329 (2015).

[3]The court in Lippert cited Major Cormac M. Smith, Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice, Army Lawyer, Nov. 2015, at 10. MAJ Smith explained that in camera review had become "almost certain" upon a party's request because "prudent" military judges felt "essentially compelled" to conduct an in camera review in order to protect the record. Smith, at 6, 8, 9-10. The Lippert court concluded, "If such commentary is correct – and our own routine review of courts-martial records does not lead us to believe otherwise – the purpose of Mil. R. Evid. 513 is clearly frustrated by such routine reviews." Lippert, at 14-15. See also Zimmerman, supra note 16, at 324.

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review and disclosure of privileged communications between patients and psychotherapists has been failure by the military justice system.[4]

Congress and the President has remedied this injustice by eliminating the "constitutionally required" exception to Mil. R. Evid. 513 and establishing specific requirements that must be satisfied before a military judge may order production for an *in camera* review. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014) (hereinafter "2015 NDAA); and Exec. Order No. 13696, 80 Fed. Reg. 35783 (June 22, 2015).

Although all military court-martial judges were routinely ordering disclosure of patients' mental health records without ever specifying which constitutional issue was at play or providing any citation to military or civilian precedent to justify disclosure, military appellate courts ignored this problem and did not

[4]*In camera* reviews of mental health records became so "ubiquitous" that the government requests them or fails to object to them on behalf of victims, and military judges' order production prior to conducting the required hearing. *Smith*, *supra* note 17, at 9. At least one military judge, Colonel Jeffery D. Lippert, refused to follow the rules despite numerous reversals by the Army Court of Criminal Appeals. *C.C. v. Lippert*, No. 20140779, slip. Op. at 2 (A. Ct. Crim. App. October 16 2014); *A.T. v. Lippert*, 2015 CCA LEXIS 257 (A. Ct. Crim. App. June 11, 2015) (application of Mil. R. Evid. 514 and not Mil. R. Evid. 513); and *D.B. v. Lippert*, 2016 CCA LEXIS 63, 14-15 (A. Ct. Crim. App. 2016).

In *United States v. Briggs*, No. 38730, 2016 CCA LEXIS 385 (A.F. Ct. Crim. App. June 23, 2016) the patient's Special Victim Counsel brought his client's records with him to the Mil. R. Evid. 513 hearing.

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establish any guidelines for the "constitutionally required" exception.[5] They ignored it until after Congress eliminated the "constitutionally required" exception.

Since Congress and the President eliminated the "constitutionally required" exception to Mil. R. Evid. 513, the service courts of criminal appeals have now ruled on this issue in fourteen cases.[6] Except for the Army Court of Criminal Appeals ("ACCA"), the analysis and logic used by the service courts of criminal appeals is poor. In five of the seven cases decided by the AFCCA, the court relied

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[5]"Undoubtedly, part of the problem is also that practitioners have continued to view access to privileged mental health records through the lens of discovery. *See, e.g., DB v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (Army Ct. Crim. App. 1 Feb. 2016)* (mem. op.). However, in tracing back the history of why this is so, we end up at our own doorstep. This court initially accorded privileged mental health records the same standards for disclosure as any other matter; which is to say, **we treated privileged mental health records as having no privilege at all**." *Acosta*, at *5-6 (emphasis added).

[6]The fourteen courts of criminal appeals Cases are:

United States v. Chisum, 75 M.J. 943 (A.F. Ct. Crim. App. 2016)
D.B. v. Lippert, No. 2015-0769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016)
E.V. v. Robinson, No. 2016-00057 (N-M. Ct. Crim. App. Feb.25, 2016)
United States v. Tso, No. 2014-00379, 2016 CCA LEXIS 114 (N-M. Ct. Crim. App. Feb.29, 2016)
United States v. Briggs, No. 38730, 2016 CCA LEXIS 385 (A.F. Ct. Crim. App. June 23, 2016)
United States v. Moore, No. 38773, 2016 CCA LEXIS 533 (A.F. Ct. Crim. App. Sept. 7, 2016)
United States v. Barry, No. 2015-00064, 2016 CCA LEXIS 634 (N-M. Ct. Crim. App. Oct. 31, 2016)
United States v. Mancini, No. 38783, 2016 CCA LEXIS 660 (A.F. Ct. Crim. App. Nov. 7, 2016)
United States v. Owens, No. 38834, 2016 CCA LEXIS 757 (A.F. Ct. Crim. App. Dec. 16, 2016)
United States v. Jones, No. 38859, 2017 CCA LEXIS 26 (A.F. Ct. Crim. App. Jan. 18, 2017)
United States v. Rodriguez, No. 2015-00247, 2017 CCA LEXIS 42 (N-M. Ct. Crim. App. Jan. 30, 2017)
United States v. Bishop, No. 38879, 2017 CCA LEXIS 71 (A.F. Ct. Crim. App. Feb. 2, 2017)
L.K. v. Acosta, No. 2017-0008, 2017 CCA LEXIS 346 (A. Ct. Crim. App. May 24, 2017)
J.M. v. Payton-O'Brien, No. 2017-00133, 2017 CCA LEXIS 424 (N-M. Ct. Crim. App. June 28, 2017)

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upon *Brady* and *Giglio* even though none of the records were available to the prosecution team, and only the ACCA (in *Lippert* and *Acosta*) and the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") (in *Payton-O'Brien"*) have correctly analyzed with appropriate citations the inapplicability of *Brady* and *Giglio*. The AFCCA failed to even cite *Jaffee* in its seven cases, the NMCCA cited *Jaffee* in only one of its five cases, and the ACCA cited and analyzed *Jaffee* in both of its cases.

The NMCCA consistently misquotes and misapplies *Holmes v. South Carolina, 547 U.S. 319 (2006).*[7] Only three of the fourteen cases (one NMCCA and both ACCA) cite *Davis v. Alaska*, 415 U.S. 308 (1974), and only four cases (one AFCCA, one NMCCA and both ACCA) cite *Pennsylvania v. Ritchie*, 480

[7]In *E.V. v. Robinson*, No. 2016-00057 (N-M. Ct. Crim. App. Feb.25, 2016), the NMCCA inaccurately cites *Holmes v. South Carolina*, 547, U.S. 319, 324 (2006). The appellate court states that "the military judge should determine whether *infringement of the privilege* is required to guarantee 'a meaningful opportunity to present a complete defense.'" Order at fn. 2 (emphasis in original). In *J.M. v. Payton-O'Brien*, at *15 n.25, and *16-17, the NMCCA repeated its error by quoting this "*infringement of the privilege*" language from *E.V. v. Robinson*.

Holmes is not about any privilege, and it is not about whether any evidence rule should be "infringed." It is about evidence rules that **both** (1) infringe upon a weighty interest of the accused **and (2)** are arbitrary or disproportionate to the purpose the rules are designed to serve. *Holmes*, at 324. In *E.V.* and *J.M.*, the NMCCA failed to analyze whether Mil. R. Evid. 513 is arbitrary or disproportionate. This is a fundamental error that leads the NMCCA to direct Military Judge in *J.M.* to "take [judicial] remedial action, as necessary, to ensure the RPI receives a trial wherein his constitutional rights are fully protected." *J.M.* , at *26-27. There is no basis or authorization in the Manual for Courts-Martial for such judicial "remedial actions." The NMCCA in *J.M.* applied the rules from Mil. R. Evid. 505 and 506 to Mil. R. Evid. 513. It further applied a "balancing test" that is not any part of Mil. R. Evid. 513. The lawlessness of the NMCCA opinion in *J.M.* is the epitome of why this Court needs to speak clearly about the constitutionality of Mil. R. Evid. 513. The accused does not have any constitutional right to privileged psychotherapy records.

U.S. 39 (1987). Although neither *Davis* nor *Ritchie* involve a privilege, the analysis of the *Confrontation Clause* issue by the ACCA in each of its two cases correctly concludes that the *Confrontation Clause* does not require disclosure of privileged psychotherapy records.

Only the ACCA recognizes that relevance is not relevant in its constitutional analysis. "When matter is declared to be privileged, it means relevant and otherwise admissible evidence will often be excluded from the proceedings. More candidly, when certain matter is declared privileged, it means the accuracy of the proceeding will, at least occasionally, suffer in order to maintain the privilege." *L.K. v. Acosta*, at *6. "It is axiomatic that if a privileged communication is disclosed whenever it would be subject to the rules governing discovery [i.e., relevant] then there is no privilege at all." *Lippert*, at *32.

II. THE SUPREME COURT HAS CONSISTENTLY HELD THAT THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES IS A TRIAL RIGHT AND THERE IS NO CONSTITUTIONAL RIGHT TO PRETRIAL DISCOVERY.

The Appellant claims that the Sixth Amendment's right to confront witnesses against him was violated when the military judge refused to conduct an *in camera* review of and to disclose AB A.K.'s and AB C.R.'s psychotherapy records. The only Supreme Court cases addressing the *Confrontation Clause* cited by the Appellant in his Supplement are *Davis v. Alaska*, 415 U.S. 308 (1974) and

Delaware v. Van Arsdall, 475 U.S. 673 (1986).[8] Both of these cases predate the Supreme Court's decision in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Although *Ritchie* involved disclosure of a state agency's investigation aligned with the prosecution team and not privileged psychotherapy records, its analysis is useful.

The Appellant and Appellee fully analyze all three prongs of the threshold inquiry established in *United States v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006) to determine whether an *in camera* review by the military judge is appropriate. The first prong of the *Klemick* test is "did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513." If this prong is not satisfied, the military judge should not conduct an *in camera* review or order disclosure of any privileged communications.

In applying this test to the "constitutionally required" exception, the Appellant needed to set forth a specific factual basis demonstrate a reasonable likelihood the requested records were "constitutionally required." However, in order to determine what "specific factual basis" is required, there must be some

[8]Neither of these Supreme Court cases involved exclusion at trial of privileged communications. *Van Arsdall* is cited by the Appellant primarily for its argument concerning whether an alleged *Confrontation Clause* violation was harmless. There is no need to analyze harmlessness if there is no violation of the *Confrontation Clause*.

legal standard as to what "constitutionally required" means and under what factual circumstances could privileged communications be constitutionally required. As discussed below, there are no circumstances that the Constitution requires disclosure of privileged communications. Absent a specific legal standard, specific facts are meaningless. The lack of any legal standard is the reason *in camera* review and disclosure has been routine in the military justice system. Military judges are left with no legal standard, they apply their own personal notion of fairness, and never cite to any case law justifying their review or disclosure.

There is no Supreme Court or federal appellate case law indicating that review or disclosure of privileged communications is ever constitutionally required. Therefore, there can be no specific factual basis to meet the "constitutionally required" exception.

The following analysis and case law demonstrate that the Constitution's *Confrontation Clause* does not require a breach of the psychotherapist privilege.

In *Pennsylvania v. Ritchie*, the Supreme Court held that the trial judge erred when he failed to conduct an *in camera* review of the investigation file prepared by Children and Youth Services ("CYS"), the Pennsylvania state agency responsible for investigating mistreatment and abuse of children. *Ritchie*, at 61. The Court based its holding on due process application of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id*. at 57-58. The majority of the Supreme Court acknowledged that it was

not deciding whether an absolute statutory ban would be upheld because an absolute ban was not before the Supreme Court. *Id.* Since the Pennsylvania legislature contemplated some use of CYS records in judicial proceedings, the Supreme Court held that absent any apparent state policy to the contrary, relevant information must be disclosed if a court determines that the information is "material" to the defense of the accused. *Id.*, at 58. Under the majority's holding in *Ritchie*, relevance and materiality are considered only when due process requires disclosure of *Brady* evidence in possession of the government. The *Ritchie* Court still left open the possibility that relevant and material information may not need to be disclosed if the state statute were absolute. *Id.*

The Supreme Court has consistently held that the *Confrontation Clause* is a trial right and has never held that the *Confrontation Clause* gives a defendant the right to pretrial discovery. *Id.*, at 52 ("nothing in the case law supports" the view that the *Confrontation Clause* compels pretrial discovery).[9] The Supreme Court's *Ritchie* analysis of the *Confrontation Clause* is not binding because only a plurality of four justices joined that portion of the opinion. Nevertheless, only three justices believed that the *Confrontation Clause* creates a right to pretrial discovery. Each of the *Confrontation Clause* cases analyzed in Justice Brennan's dissenting opinion

[9]See also *Weatherford v. Bursey*, 429 U.S. 545 (1977) ("There is no general constitutional right to discovery in a criminal case") *quoted by United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978); and *L.K. v. Acosta*, 2017 CCA LEXIS 346, at *10.

(with whom only Justice Marshall concurs) dealt with either trial rights (analyzing and extending the reasoning of *Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Pointer v. Texas,* 380 U.S. 400, 404 (1965); and *Delaware v. Fensterer,* 474 U.S. 15, 18 (1985)), discovery of evidence in possession of government agents (*Jencks v. United States*, 353 U.S. 657 (1957) (but this case was not based upon the Constitution), and pretrial line-ups (*United States v. Wade*, 388 U.S. 218 (1967).

Although not binding, the four-justice plurality's analysis is more compelling given subsequent Supreme Court analysis of the *Confrontation Clause.* The seminal *Confrontation Clause* case is *Davis v. Alaska*. *Ritchie's* four-justice plurality opinion fully analyzed *Davis*. In *Davis,* the Supreme Court found that despite the state of Alaska's legitimate interest in protecting the identity of juvenile offenders, the restrictions on questioning a key witness at trial about his juvenile record violated the *Confrontation Clause*. *Ritchie*, at 52. The Pennsylvania Supreme Court in interpreted *Davis* "to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information." The *Ritchie* plurality rejected the Pennsylvania Supreme Court's interpretation, noting that such a broad interpretation of *Davis* would "transform the *Confrontation Clause* into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view." *Id.* The plurality continued, "The ability to question adverse witnesses, however, does not include

the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Id.*, at 53.

Subsequent Supreme Court precedent has further defined the reach of *Davis*. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes*, at 324 (quoting *United States v. Scheffer*, 523 U.S. 303 (1998)). The Supreme Court unanimously held that the *Confrontation Clause*'s guarantee of a meaningful opportunity to present a defense is abridged by evidence rules that (1) infringe upon a weighty interest of the accused **and** (2) are **arbitrary or disproportionate to the purposes they are designed to serve.** *Id.* (emphasis added), *quoting Scheffer*.

The unanimous Court then illustrated arbitrary rules that that excluded important defense evidence but did not serve any legitimate interests. *Id.*, at 325.The Court found evidence rules were arbitrary when the rules: (1) barred a person who has been charged as a participant in a crime from testifying in defense of another alleged participant (*Washington v. Texas*, 388 U.S. 14 (1967)), (2) prevented a defendant from impeaching his own witness (*Chambers v. Mississippi*, 410 U.S. 284 (1973)), (3) prevented defendant from showing at trial that his confession was unreliable (*Crane v. Kentucky*, 476 U.S. 683 (1986)), and (4) prohibited any and all admissibility of hypnotically refreshed testimony (*Rock v. Arkansas*). By contrast, in *Scheffer* the Supreme Court reversed this Court and

held that Mil. R. Evid. 707's absolute ban on "all polygraph evidence did not abridge the right to present a complete defense because the rule 'serve[d] several legitimate interests in the criminal trial process,' was 'neither arbitrary nor disproportionate in promoting these ends,' and did not 'implicate a sufficiently weighty interest of the defendant.'" *Holmes*, at 326 (*quoting Scheffer*, at 309).

Thus, in order for this Court to find that the *Confrontation Clause* required the military judge to either conduct an *in camera* review or to disclose AB A.K. and AB C.R.'s psychotherapy records, this Court would need to find (conceding the Appellant has a sufficiently weighty interest in obtaining the witnesses' psychotherapy records) that Mil. R. Evid. 513 serves no legitimate interest in the criminal trial process or that the rule is arbitrary or disproportionate in achieving its legitimate purpose.

As discussed below concerning *Jaffee*, the Supreme Court recognized that all fifty states have enacted a privilege to protect communications between patients and their psychotherapists. The Supreme Court in *Jaffee* recognized the privilege in all federal courts. After *Jaffee*, the military justice system still did not recognize the psychotherapist privilege until the President promulgated Mil. R. Evid. 513. *United States v. Rodriguez*, 54 M.J. 156 (C.A.A.F. Sept. 25, 2000). The President's promulgation of Mil. R. Evid. 513 was his determination that the psychotherapist privilege was an important governmental interest. A sexual assault

victim's privacy interest is a legitimate interest in the criminal trial process. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991). There can be no doubt that Mil. R. Evid. 513 serves a legitimate interest in the criminal trial process.

The next issue this Court must decide is whether Mil. R. Evid. 513 is an arbitrary or disproportionate means to achieve the rule's legitimate purpose. No court, state or federal, has ever found any federally recognized privilege, be it attorney-client, spousal, clergy-penitent or psychotherapist-patient privilege, to be arbitrary or disproportionate. This Court would be the first court in the country to find the psychotherapist-patient privilege to be arbitrary or disproportionate to the purposes of the privilege.

There are two federal appellate courts that have upheld the constitutionality of precluding disclosure of privileged psychotherapist communications.[10] The Fourth Circuit Court of Appeals in *Kinder v. White*, 609 Fed. Appx. 126 (4th Cir.

[10] Several federal district courts have also held that the psychotherapist privilege is not subordinate to a defendant's constitutional rights. *United States. v. Doyle*, 1 F. Supp.2d 1187 (D. Oregon 1996); *Petersen v. United States*, 352 F. Supp.2d 1016, 1023-24 (D. S.D. 2005); *United States v. Haworth*, 168 F.R.D. 660, 660-62 (D. N.M. 1996), (the defendants "mistakenly equate their confrontation rights with a right to discover information that is clearly privileged."); *United States v. Shrader*, 716 F. Supp. 2d 464 (S.D. W.Va. 2010).

The district court in *Doyle* made a useful comparison of the psychotherapist privilege to the attorney client privilege. It asked if anyone could imagine a court granting a motion by criminal co-defendants to examine a cooperating defendant's attorney *in camera* regarding the privileged statements made by the cooperating defendant to his attorney to determine if any could be helpful to the defense. *Doyle*, at 1191. Few lawyers could imagine a court granting such a motion. See also *Shrader*, at 473 ("Any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs.").

2015) upheld the federal psychotherapist privilege on a due process challenge by a criminal defendant. The *Kinder* court did not analyze the *Confrontation Clause* because it concurred with the federal district court's finding that the defendant was not entitled to the witness's mental health records to vindicate his rights under the *Confrontation Clause*. *Id.*, at 129.

The other federal appellate court to address whether the *Confrontation Clause* trumps the psychotherapist privilege is the Eighth Circuit in *Johnson v. Norris*, 537 F. 3d 840, 845-847 (8th Cir. 2008) and *Newton v. Kemna*, 354 F. 3d 776, 781-782 (8th Cir. 2004). In *Newton*, the Eighth Circuit distinguished *Ritchie* by noting that *Ritchie* involved a state statute protecting the confidentiality of a state agency's investigatory files and not psychotherapy records which the Supreme Court later recognized as falling under a federal common law privilege in *Jaffee*. *Id.* at 784-785. The Eighth Circuit in both *Newton* and *Johnson* acknowledged the Supreme Court's holding in *Davis v. Alaska*, but further pointed out that in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) the Supreme Court did not decide and expressly left open the question of whether a criminal defendant's rights might overcome the attorney-client privilege. *Newton*, at 781; *Johnson*, at 846. "Whether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake, and **we are unable to discern any transcendental**

governing principles that foreshadow what the Supreme Court would do in the case before us." *Newton*, at 781-782 (emphasis added). It refused to speculate whether the Supreme Court would find that the psychotherapist privilege must give way to a defendant's constitutional rights. *Id.*, at 782.

"Although *Davis* and *Ritchie* establish that in at least some circumstances, an accused's constitutional rights are paramount to a State's interest in protecting confidential information, those decisions do not establish a specific legal rule that answers whether a State's **psychotherapist-patient privilege** must yield to an accused's desire to use confidential information in defense of a criminal case." *Johnson*, at 846 (emphasis added).

This Court has held "[t]he presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown." *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000), *citing National Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998). Given this deferential standard that a lack of constitutionality must be clearly and unmistakably shown, given no court has ever found that the psychotherapist privilege to be arbitrary or disproportionate, given that two federal appellate courts have found the privilege to be constitutional, this Court must find that the Appellant's constitutional right to confront witnesses was not violated by the military judge refusing to conduct an *in camera* review or to disclose AB

A.K.'s or AB C.R.'s psychotherapy records. This Court is no better equipped than the Eighth Circuit to discern any transcendental governing principle to predict what the Supreme Court would do in applying the *Confrontation Clause* against the psychotherapist privilege. This Court should refrain from speculating what the Supreme might do because it must apply Mil. R. Evid. 513 as it was written unless its unconstitutionality is clearly and unmistakably shown.

III. THE SUPREME COURT IN *JAFFEE* UNDERSTOOD THAT RECOGNIZING THE PSYCHOTHERAPIST PRIVILEGE WOULD EXCLUDE RELEVANT EVIDENCE AND IT EXPRESSLY REJECTED ANY BALANCING TEST.

Although the Appellant ignores *Jaffee v. Redmond*, its holding is critical to understanding the reach and strength of the psychotherapist privilege. In *Jaffee*, the Supreme Court compared the newly created psychotherapist privilege to the attorney-client and spousal privileges. *Jaffee*, 518 U.S. at 10 ("Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust.").[11] "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing

[11]Military courts have never reviewed the relevancy of information privileged under Mil. R. Evid. 502 (lawyer-client privilege), Mil. R. Evid. 503 (clergy privilege), Mil. R. Evid. 504 (spousal privilege) or any other privilege except the psychotherapist-patient privilege. Applying a relevancy standard to other privileges would result in absurd results. An accused would be able to cross-examine trial defense counsel of other defendants because what the other defendants told their attorneys could be relevant and material. Special Victim Counsel would also be subject to cross-examination. Priests, ministers, rabbis, imams, husbands and wives would be required to disclose relevant and material communications.

to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." The Supreme Court found that the psychotherapist privilege serves the public interest by facilitating appropriate treatment for those suffering the effects of a mental or emotional problem. *Id.* at 11. "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.*, at 11-12.

The Supreme Court recognized that the privilege would preclude relevant evidence. *Id.*, at 17, n.15. The Supreme Court expressly and unmistakably rejected any balancing of the privilege against relevance. It held "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would **eviscerate the effectiveness of the privilege**." *Id.*, at 17; *see also Newton*, at 784. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.*, at 18 (*quoting Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

Any doubt that the Supreme Court in *Jaffee* did not realize the costs of creating the psychotherapist privilege is dispelled by Justice Scalia's blunt dissent:

> The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling. ***It has not mentioned the purchase price: occasional injustice. That is the cost of every rule which excludes reliable and probative evidence***--or at least every one categorical enough to achieve its announced policy objective.

Jaffee, at 18-19 (J. Scalia dissenting) (emphasis added).

Justice Scalia also objected to the Supreme Court's judicial adoption of the psychotherapist privilege while all fifty states and the District of Columbia enacted statutes to create the privilege. Mil. R. Evid. 513 was not created by judicial adoption of the privilege, but was promulgated by the President under his constitutional authority as commander-in-chief and statutory authority under 10 U.S.C. § 836.

Mil. R. Evid. 513 is a strong privilege that will preclude disclosure of relevant and material evidence and precludes balancing the interests of the psychotherapy patient against the constitutional rights of the accused.

IV. EVEN IF THE CONSTITUTION REQUIRED DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS BETWEEN A PATIENT AND PSYCHOTHERAPIST IN A CIVILIAN COURT, THE SUPREME COURT'S CLEAR DEFERENCE TO THE CONGRESS AND PRESIDENT IN MILITARY MATTERS REQUIRES

UPHOLDING AS CONSTITUTIONAL MIL. R. EVID. 513 AS WRITTEN.

The Constitution grants to Congress the power to govern and regulate our nation's military. The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). "Unlike courts, it is the primary business of armies and navies to fight." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). The trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. Military tribunals have not and "probably never can be constituted in such a way that they can have the same kind of qualifications that the constitution has deemed essential to fair trials of civilians in federal courts." *Id.*

The Supreme Court recognizes that the tests and limitations of due process may differ in the military context. *Weiss v. United States*, 510 U.S. 163,177 (1994). The Constitution gives Congress plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline. *Id.* "Judicial deference thus 'is at its apogee' when reviewing congressional decisionmaking in this area." *Id. (quoting Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). The deference extends to rules relating to the rights of service members because Congress has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Id.*

The Court of Appeals for the Armed Forces has held that military courts must presume that "the statutory scheme established by Congress and implemented by the President constitutes both the parameters of what process is due and a fair trial in the military context." *United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013).

In *Schmidt v. Boone*, 59 M.J. 841 (A.F. Ct. Crim. App. 2004), the AFCCA stated: "In deference to the Executive Branch, courts are reluctant to intrude upon the discretionary authority of the Executive in military and national security matters." The presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown. "Judges are not free, in defining 'due process,' to impose [their] 'personal and private notions' of fairness." *Wright*, at 481. Since so many state and federal courts had upheld absolute privileges against constitutional challenge, it is not possible that the lack of constitutionality is "clearly and unmistakably" shown.

The President has stated that military sexual assault destroys unit cohesion and threatens our national security, and this Court must defer to the President's judgment on this issue. Congress and the President have given patients the privilege to refuse to disclose and to prevent any other person from disclosing their confidential communications with therapists. Even if there were some Supreme Court case (but there is none) that held the psychotherapist-patient privilege in a

civilian criminal court must bow to a defendant's constitutional due process rights, this Court should still defer to the President's determination and judgment that patients' communications with their psychotherapists shall be privileged in military courts. This Court should not find a constitutional right where none exists, and should defer to Congress and the President.

CONCLUSION

WHEREFORE, Protect Our Defenders respectfully requests this Honorable Court to rule in favor of Appellee and find that the military judge did not deprive the Appellant of his Sixth Amendment right to confront witness AB A.K. and AB C.R.

Respectfully submitted,

/ELECTRONICALLY SIGNED/

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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains 6,968 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on July 6, 2017, to the following:

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MILITARY SERVICE COURTS OF APPEALS
ANALYSIS OF "CONSTITUTIONALLY REQUIRED" UNDER MRE 513

Date	Case	Court	Victim Petition or Accused Appeal	How MJ Ruled	CCA Action on MRE 513 Issues	Relevance Considered by CCA?	Brady Cited	Giglio Cited	Holmes Cited	Ritchie Cited	Jaffee Cited	Davis Cited	"Confrontation" or "confront" Mentioned by CCA?	"Constitutionally Required" Quoted by CCA?
1999 thru 2015	No Cases in Any Court													
Nov-16	**Chisum**	**AFCCA**	**Accused Appeal**	**Refused to conduct in camera**	**MJ abused discretion by not conducting in camera review, but no predjudice**	**Yes**	**Yes**	**Yes**	**No**	**No**	**No**	**No**	**Yes**	**No**
Feb-16	DB v Lippert	ACCA	Victim Petition	TC produced without order and MJ implied 513 unconstitutional	Granted Petition	No	No	No	No	Yes	**Yes**	**Yes**	**Yes**	Yes
Feb-16	EV v Robinson	NMCCA	Victim Petition	MJ reviewed *in camera* and released some records	Denied Petition	Yes	No	No	Yes	No	**No**	**No**	**No**	Yes
Feb-16	Tso	NMCCA	Accused Appeal	Reviewed in camera but **no release**	**Assumed** w/o deciding **MJ abused discretion** but not constitutional error	Yes	Yes	No	No	No	**No**	**No**	**No**	Yes
Jun-16	Briggs	AFCCA	Accused Appeal	SVC gave to MJ to review *in camera* , MJ released some records	"No constitutional right to discovery" and **MJ abused discretion** in not turning over form but harmless beyond reasonable doubt	Yes	Yes	Yes	No	Yes	**No**	**No**	**Yes**	Yes
Sep-16	Moore	AFCCA	Accused Appeal	MJ reviewed *in camera* and released some records	Did not decide if abuse of discretion because no predjudice	Yes	Yes	Yes	No	No	**No**	**No**	**Yes**	Yes
Oct-16	Barry	NMCCA	Accused Appeal	MJ reviewed *in camera* and released some records	Records were not material, relevant or necessary	Yes	No	No	Yes	Yes	**Yes**	**No**	**Yes**	Yes
Nov-16	Mancini	AFCCA	Accused Appeal	MJ reviewed *in camera* and released some records	Release of records would not have changed result of trial	Unclear	**No**	**No**	**No**	**No**	**No**	**No**	**No**	No
Dec-16	Owens	AFCCA	Accused Appeal	MJ reviewed *in camera* and released some records	Records were not relevant or material	Yes	**No**	**No**	**No**	**No**	**No**	**No**	**Yes**	No
Jan-17	Rodriguez	NMCCA	Accused Appeal	**Refused to conduct in camera**	MJ did not abuse discretion	No	**No**	**No**	**No**	**No**	**No**	**No**	**No**	Yes
Jan-17	Jones	AFCCA	Accused Appeal	**Refused to conduct in camera**	Records were not relevant or material	Yes	Yes	Yes	No	No	**No**	**No**	**No**	No
Feb-17	Bishop	AFCCA	Accused Appeal	MJ reviewed *in camera* and released some records	Records were not exculpatory or constitutionally required	Yes	Yes	Yes	No	No	**No**	**No**	**Yes**	Yes
May-17	LK v. Acosta	ACCA	Victim Petition	MJ ordered production of records for an *in camera* review	Granted Petition	No	**Yes**	**No**	**No**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
Jun-17	JM v Payton -O'Brien	NMCCA	Victim Petition	MJ ordered production of records for an in camera review	Granted Petition but suggested "judicial remedies."	Yes	**Yes**	**No**	**Yes**	**No**	**No**	**Yes**	**Yes**	**Yes**

EXHIBIT A

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

EV Petitioner v. E.H. Robinson, Jr. LtCol, USMC Military Judge Respondent and David A. Martinez Sgt, USMC Real Party in Interest	NMCCA NO. 201600057 PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF *MANDAMUS* AND APPLICATION FOR STAY OF PROCEEDINGS ORDER

Upon consideration of the combined Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus* and Application for Stay of Proceedings, properly filed on 25 February 2016,[1] we find the right to an issuance of a writ is not "clear and indisputable," *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004), following the guidance in *United States v. Klemick*, 65 M.J. 576 (N.M.Ct.Crim.App. 2006) (specifying guidelines for *in camera* review) and MILITARY RULE OF EVIDENCE 513(d)(5) (establishing an exception to the privilege when the communication contemplates the future commission of a fraud or crime).[2]

It is, by the Court, this 25th day of February 2016,

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[1] The pleading was delivered to the Court via e-mail on 19 February 2016. On 22 February 2016 Petitioner's counsel was informed that the case would not be docketed until service on the Appellate Government Division of the Office of the Judge Advocate General was completed in accordance with the Court's Rules of Practice and Procedure. The absence of certain enclosures in the pleading was also noted to counsel. On 25 February 2016, the Court received a Certificate of Service and was notified that the missing enclosures had been placed in the mail. The case was docketed on 25 February 2016.

[2] However, we caution military judges against applying case law establishing the constitutionally required standard as envisioned in MIL. R. EVID. 412 directly to MIL. R. EVID. 513. MIL. R. EVID. 412 permits *the admission of evidence* the exclusion of which would violate the constitutional rights of the accused. In contrast, when determining whether *in camera* review or disclosure of privileged materials is constitutionally required under MIL. R. EVID. 513, the military judge should determine whether *infringement of the privilege* is required to guarantee "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

ORDERED:

That the combined Petition for Extraordinary Relief in the Nature of a Writ of *Mandamus* and Application for Stay of Proceedings is denied.

For the Court

R.H. Troidl
Clerk of Court
25 Feb 2016

Copy to:
Maj Evans
LtCol Robinson
Capt Squires
45
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02
05

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ACM S32311**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Senior Airman (E-4)	)	
RICKY D. CHISUM, JR.,	)	
USAF,	)	
Appellant	)	**Special Panel**

Appellant asserts, among other allegations of error, that the military judge erred in failing to conduct an in camera review of the mental health records of two witnesses who the Government intended to call in its case in chief. As the court has determined the military judge did, in fact, err, this order requires the Government to provide, under seal, the mental health records of these two witnesses, that were within the control of the Government as of the date of the trial, to this court for our review.[1] This production will allow this court to determine whether the military judge's failure to conduct an in camera inspection prejudiced Appellant.

Background

Contrary to his pleas, Appellant was convicted by a special court-martial composed of officer members of using cocaine on one occasion, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[2] The evidence of this use of cocaine was based primarily on the testimony of two witnesses. The credibility of these two witnesses, as well as their ability to accurately perceive and recall what occurred, were central to the Government's ability to prove, beyond a reasonable doubt, that Appellant wrongfully used cocaine on this occasion.

The first witness, Airman Basic (AB) AK, testified that, in 2012, Appellant went with him to New Orleans, Louisiana, intending to buy and use the drug ecstasy. They were not able to find that particular drug, however, and instead purchased a baggie of cocaine, which they shared by snorting it through a dollar bill rolled into a straw in an alley near Bourbon Street. When they had finished using that bag of cocaine, Appellant and AB AK

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[1] Chief Judge Allred participated in this matter prior to his retirement. He would hold that the military judge did not abuse his discretion in declining to perform an in camera review and, as such, would not order the production of mental health records in this case.

[2] Appellant was acquitted of all other alleged drug offenses, including divers use of "ecstasy," divers use of marijuana, divers use of cocaine, divers use of hydrocodone, and divers distribution of hydrocodone.

returned to the dealer who had initially sold them the drug. They purchased more cocaine, and used it in the manner they had used the drug earlier.

The second witness, AB CR, testified that he saw Appellant holding a bag containing a white powdery substance. He then witnessed AB AK and Appellant walk into an alley, and, from across the street, he saw Appellant raise his hands up to his nose.

As to these two witnesses, Appellant's counsel learned that they both had admitted to experiencing significant memory problems and that they had both previously discussed those problems with their mental health providers. The Defense then requested the military judge perform an in camera review of AB AK's and AB CR's mental health records, and requested that the military judge disclose matters necessary for the Defense's cross-examination of these witnesses. The information the Defense provided to the military judge to support their request for an in camera review were as follows:

(1) AB AK: The witness told defense counsel that, as a result of being a habitual drug user, he has experienced memory issues. AB AK also disclosed that he had seen mental health providers, discussed his memory problems with them, and received a mental health diagnosis. In addition, the military judge was informed that AB AK previously testified at another court-martial two weeks prior and that the military judge in that case, after conducting an in camera review, determined that a portion of AB AK's mental health records were properly releasable to counsel in that case.[3]

(2) AB CR: This witness testified in a closed hearing that he has had memory issues, and potentially suffered from post-traumatic stress disorder since returning from a prior deployment to Iraq. AB CR also admitted that he told Appellant's counsel that he suffered from paranoia and that he felt the need to have a sanity board. He testified that he talked to military mental health providers about his memory issues and the facts and circumstances surrounding his court-martial.

The military judge concluded that Appellant failed to articulate a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under a Mil. R. Evid. 513 exception. The military judge also found the information sought to be cumulative with material already available to the Defense through non-privileged means. The military judge denied the Defense motion for production and in camera review, and elected not to attach any of the mental health records as sealed appellate exhibits for further appellate review.

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[3] Although the military judge in his ruling did not specifically reference this, both this information and a transcript of AB AK's prior trial testimony was provided to the military judge.

Law

We review a trial judge's decision that the Defense failed to provide a sufficient basis for an in camera review for an abuse of discretion. *See United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008) (reviewing a military judge's decision to quash a subpoena under an abuse of discretion standard); *United States v. Lyson*, ACM 38067, unpub. op. at 14 (A.F. Ct. Crim. App. 16 September 2013) (finding no abuse of discretion in the military judge's decision to not conduct an in camera review of trial counsel's interview notes).

Rule for Courts-Martial (R.C.M.) 701 addresses discovery in courts-martial. R.C.M. 701(a)(2)(B) requires that the Defense be permitted to inspect the "results or reports of physical or mental examinations . . . which are within the possession, custody, or control of military authorities, . . . and which are material to the preparation of the defense." R.C.M. 701(f) adds, however, "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence."

R.C.M. 703 governs the production of witnesses and evidence. This rule entitles both parties to the production of evidence which is relevant and necessary. R.C.M. 703(f)(1). Despite this, neither party is entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. R.C.M. 703(f)(2).

"Normally, in camera review is an appropriate mechanism to resolve competing claims of privilege and right to review information." *United States v. Wright*, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015); *United States v. Bowser*, 73 M.J. 889, 897 (A.F. Ct. Crim. App. 2014), *aff'd* 74 M.J. 326 (C.A.A.F. 2015). There is not a "cognizable harm to a privilege it holds merely because the military judge orders documents to be produced for *in camera* review. However, in camera review is not automatically appropriate every time one party seeks information over which another claims privilege. *Wright*, 75 M.J. at 510.

Mil. R. Evid. 513 addresses the disclosure of psychotherapist-patient records. Generally, this privilege 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 the 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.

This privilege, however, is not an absolute privilege. *See Bowser*, 73 M.J. at 899–900 (addressing an in camera review of documents claimed to be protected by the attorney work product doctrine). A prosecutor may not suppress evidence favorable to an accused

upon request, as this violates notions of due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When a witness's reliability may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Therefore, the government violates an accused's due process rights "if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *United States v. Behenna*, 71 M.J. 228, 237–38 (C.A.A.F. 2012) (quoting *Smith v. Cain*, 132 S.Ct. 627–30 (2012). "Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case. Evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id.* at 238. "Where discovery obligations potentially impact a recognized privilege, an *in camera* review is generally the preferred method for resolving the competing compulsions." *Bowser*, 73 M.J. at 897.

Despite the value of a military judge utilizing an in camera review as a tool to balance the constitutional rights of an accused with the privacy interests of a witness, Mil. R. Evid. 513 provides little insight as to when a military judge might abuse his discretion in relation to production and in camera review of such records.

In *Wright*, 75 M.J. 501, we examined the requirements for ordering in camera review of potentially privileged material. In doing so, we cited with approval and followed *United States v. Klemick*, 65 M.J. 576, 580 (N.M. Ct. Crim. App. 2006), where our sister service court established a three-prong test for this question of in camera review:

> (1) Did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?

In applying this three-prong test, we recognize that the standard for in camera review is not high because the moving party will often be unable to determine the specific information contained in a psychotherapist's records. *See Klemick*, 65 M.J. at 580.

Analysis

In applying this test to this case, a finding of necessity is the critical thread that weaves its way into all three questions. Therefore, the test here is whether a sufficient

factual basis exists demonstrating a reasonable likelihood that the records over which the Government claimed privilege contain information necessary to confront AB AK and AB CR regarding their ability to accurately perceive and recall the incidents that purportedly occurred in New Orleans three years earlier.[4] In other words, in reaching its determination, this court considers whether the Defense provided sufficient facts demonstrating a reasonable likelihood that the records contain relevant, non-cumulative information, necessary to confront AB AK and AB CR. After considering this question, we conclude that the military judge abused his discretion in not conducting an in camera review of both AB AK's and AB CR's mental health records.

As to AB AK's records, the military judge abused his discretion for two reasons. First, AB AK admitted to significant memory problems and testified that he discussed these very problems with his mental health provider. That AB AK admitted to some memory problems does not mean that the Defense was at the mercy of AB AK to accurately describe and reveal his memory problems before testifying at trial. That he had significant memory problems was not in dispute—though the severity of his memory problems and how they may have impacted his ability to accurately recall and testify at this court-martial was. AB AK's discussions with his mental health provider, and any potential diagnosis related to those discussions, would provide a greater understanding of his ability to perceive and accurately recall what he may have observed three years earlier. This was not a proverbial fishing expedition by the Defense. They had a reasonable basis to question AB AK's ability to accurately perceive and recall, and provided to the military judge a reasonable basis to believe that further information reflecting the extent and severity of his memory problems would be reflected in his mental health records.

Second, another military judge had reviewed AB AK's mental health records several weeks prior in a companion case where AB AK was a witness, and that other military judge actually released portions of the record to the Defense. Admittedly, the military judge here did not know exactly what was previously released or why, but knowledge that something was released should have been a consideration in deciding whether to conduct an in camera review here. Apparently this was not a consideration of the military judge in his ruling. The military judge did not reference the other military judge's prior review and release of matters in his ruling denying the Defense's request. This was an abuse of discretion. In so concluding, we do not assert that this military judge would have come to the same conclusion as the prior military judge about what, if anything, should be released. We do not assert that this information was necessarily non-cumulative with information already obtained by the Defense. We do conclude, however, that the Defense carried their burden such that the military judge should have at least conducted an in camera review.

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[4] The Defense also asserted that there was a reasonable likelihood that the records contained inconsistent statements, evidence of bias, and evidence of fabrication. We do not rely on those bases in determining whether the military judge should have conducted an in camera review.

The Government, both at trial and on appeal, views the significance of this prior release of records differently. They cite to the Defense receiving the prior cross-examination of AB AK as evidence that an in camera review was not required—that the Defense effectively received the benefit of another attorney reviewing the records. That argument is misplaced. Though it may have been a related case, the defense counsel in that case formulated the cross examination in a manner to best assist their client, not Appellant. The information in the cross-examination may very well be cumulative, but that is a conclusion best reached by first reviewing the mental health records in camera and making a determination based on the unique facts and circumstances of this case.

As to AB CR's records, the military judge also abused his discretion in not conducting an in camera review. Like AB AK, AB CR also admitted to significant memory issues. Unlike AB AK, however, AB CR attributed his issues as stemming from a prior deployment. He also, however, described himself as suffering from paranoia and that he felt he needed a sanity board. AB CR sought assistance for these problems and talked to mental health about his memory issues. In this context, statements about his memory problems and potentially any diagnosis relating to memory loss would be critical in evaluating the witness's credibility. As with AB AK, the existence of significant memory problems was not in dispute, though the severity of the problems and how it might impact his testimony was critical to the Defense case. This testimony provided a sufficient basis for the military judge to perform an in camera review of AB CR's mental health records.

Consequently, we must next determine whether this er ror prejudiced Appellant. Production of these records for appellate review is necessary to answer this question.

Accordingly it is by the Court on this 16th day of August, 2016,

ORDERED:

The Government will provide this court, under seal, the mental health records of AB AK and AB CR that would have been provided to the military judge at trial if he had conducted an in camera review as requested by Appellant. This information must be provided to the court by 15 September 2016.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist