United States Navy–Marine Corps
Court of Criminal Appeals

Before
MYERS, HACKEL, and KISOR
Appellate Military Judges

In Re B.M.
Petitioner

UNITED STATES
Respondent

Dominic R. BAILEY
Lieutenant Commander (O-4), U.S. U.S. Navy
Real Party in Interest

No. 202300050

Decided: 14 June 2023

Review of Petition for Extraordinary Relief in the Nature of a Writ of Mandamus to Enforce Article 6b, Uniform Code of Military Justice [UCMJ], and Application for Stay of Proceedings.

Military Judge:
Kimberly J. Kelly

For Petitioner:
Captain Rocco J. Carbone, III, U.S. Air Force

For Respondent:
Major Candace G. White, USMC

For Real Party in Interest:
Captain Colin W. Hotard, USMC

Senior Judge MYERS delivered the opinion of the Court, in which Senior Judge HACKEL and Senior Judge KISOR joined.

PUBLISHED OPINION OF THE COURT

MYERS, Senior Judge:

The real party in interest [RPI], Lieutenant Commander [LCDR] Dominic R. Bailey, U.S. Navy, is charged in the general court-martial, *United States v. LCDR Dominic R. Bailey, U.S. Navy,* with violating Articles 120 and 128, UCMJ.[1] Pursuant to facts that form the basis of this Petition for Extraordinary Relief, the military judge abated the proceedings.

On 1 February 2023, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Stay of Proceedings. Petitioner seeks a Writ of Mandamus ordering the military judge to seal or destroy all of Petitioner's mental health records, and a Writ of Mandamus directing the military judge to recuse herself from the court-martial proceedings because of actual and implied bias, and to reinstate this case to trial with a new military judge.

On 12 April 2023, this Court ordered the United States to answer the following questions: (1) Does the United States oppose the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, and if so, why?; and (2) Did the United States provide timely notice of appeal to the military judge's order abating the case in accordance with Article 62, UCMJ?[2] At the same time, we granted the RPI leave to file a response to the Government's answer. On 3 May 2023, Respondent filed its response, opposing the Petition for Extraordinary Relief, and answering the second question in the negative.

I. BACKGROUND

The RPI was charged with abusive sexual contact and assault consummated by a battery for offenses allegedly committed upon Petitioner. The military judge presided over this and all subsequent sessions of court.

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[1] 10 U.S.C. §§ 920, 928.

[2] Order Directing Respondent United States to Address Certain Matters, dtd 12 April 2023.

On 31 August 2022, detailed defense counsel requested Petitioner's mental health treatment records. The request sought among other things:

> (11) Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of the complaining witness [Petitioner] including records of any diagnosis or prescribed medications before or after the offense.
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> (a) This request also includes mental health diagnoses and prescription medications that the [Petitioner] had prior to or during the alleged offense as well as any mental health treatment records pertaining to the allegations asserted and treatment discussed in [Petitioner's published autobiographical book].[3]

Trial counsel responded on 21 September 2022, denying the records pertaining to Petitioner's autobiography as "irrelevant,"[4] and agreeing to produce the other records so long as Petitioner turned the documents over to trial counsel. Petitioner did not turn over the records to trial counsel.

On 28 November 2022, civilian defense counsel [CDC] filed a motion to compel production of Petitioner's mental health records, again seeking her diagnoses and treatment records. CDC sought (1) any records of any diagnosis and prescription medications that Petitioner had prior to or during the time of the alleged offenses; and (2) any records related to mental health treatment she has had "following this case."[5] CDC argued that because trial counsel did not deny the request on the grounds of psychotherapist-patient privilege, that Military Rule of Evidence [Mil. R. Evid.] 513 did not apply.

Several weeks later, the military judge held an Article 39(a), UCMJ, hearing to adjudicate the RPI's request. Over Petitioner's Special Victims' Counsel's [SVC] objection, Petitioner was ordered to testify.[6] She was questioned about

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[3] Defense Discovery Request dtd 31 Aug 2022; Petitioner's Br. at Attachment B, 9.

[4] Defense Motion to Compel Production of Evidence (citing Mental Health Diagnoses/Treatment records dtd 28 Nov 2022); Petitioner's Br. at Attachment E, 1.

[5] It is unclear what timeframe the RPI's attorney was referring to by requesting medical records "following this case" as the case is still ongoing.

[6] Special Victims' Counsel "represent[] the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." 10 U.S.C. § 1044e(b)(6).

her mental health treatment, specifically, names, dates, and treatment facilities she used before, during, and after the alleged assaults. At the conclusion of the hearing, under the authority found in Rule for Courts-Martial [R.C.M.] 703, the military judge ordered the production of Petitioner's mental health records for an *in camera* review, expressly limiting the order to just diagnosis and treatment records in accordance with *United States v. Mellette*.[7]

On 4 January 2023, the military judge ordered the mental health treatment facility to produce Petitioner's mental health records containing her mental health diagnosis, prescriptions and treatments. Prior to signing the order, the military judge submitted it for review and approval to SVC, trial counsel (who drafted the order), and civilian defense counsel. The military judge specifically ordered the following:

> **[T]he appropriate records custodian at the [mental health clinic] SHALL deliver to the Court a copy of all written mental or behavioral health records for [Petitioner] from 15 January 2022 to the present ONLY to the extent those records reflect:**
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> Any mental/behavioral health diagnosis or list thereof;
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> Any mental/behavioral health prescriptions for medication or list thereof; and
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> Any prescribed mental/behavioral health treatment or list thereof.
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> It is requested that the review for responsive material be conducted by a health care professional who has training in mental or behavioral health.
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> The appropriate records custodian SHALL NOT provide any portion of a written mental or behavioral health record that memorializes or transcribes actual communications made between the patient and a psychotherapist or assistant to the psychotherapist. <u>The custodian of records shall produce only records containing no actual communications and indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescriptions, and/or treatment, and the date the diagnosis was resolved,</u>

[7] *United States v. Mellette*, 82 M.J. 374, 379 (C.A.A.F. 2022).

> if applicable. The records custodian is authorized to produce records which have been partially reacted consistent with this Order.[8]

Upon receipt of the records, the military judge recognized that "directly contrary to the court's order, the clinic included in its response materials encompassed by Mil. R. Evid. 513,"[9] and emailed all counsel. The military judge inquired with SVC whether Petitioner continued to assert psychotherapist-patient privilege and was informed that Petitioner did not waive the privilege.[10] The military judge highlighted what she believed to be privileged psychotherapist-patient communications and provided the records *ex parte* to SVC for review. The military judge then shared with trial and defense counsel the psychotherapist records that she redacted and were therefore not covered by the Mil. R. Evid. 513 privilege, and sealed the original, un-redacted psychotherapist-patient records. The military judge noted that in her review, she encountered what she believed to be privileged records that must be produced to RPI.

In accordance with this Court's guidance in *J.M. v. Payton-O'Brien*,[11] the military judge determined that the privileged records were "constitutionally required to guarantee the accused a meaningful opportunity to present a defense"[12] because of "possible memory confabulation or conflation as a result of [her] past abuse"[13] and "highlighting multiple inconsistencies in [her] account of the assaults."[14]

The military judge noted that the privileged information was inadvertently disclosed to the military judge, which did not waive Petitioner's privilege.[15] She learned of the privileged information due to the mental health clinic's failure to comply with her order while she was attempting to review the information in accordance with *Mellette.* She informed SVC that should Petitioner continue to assert privilege (as was her right to do), then the military judge must abate the proceedings. The military judge ordered SVC to respond regarding whether

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[8] Appellate Ex. XXXIII at 2.

[9] Appellate Ex. XXXV at 2.

[10] Appellate Ex. XXXV at 1.

[11] *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017).

[12] Petitioner's Br. at 14 (quoting military judge's order).

[13] *Id.*

[14] *Id.*

[15] Mil. R. Evid. 510, 511.

Petitioner "will waive her privilege as to the highlighted items, understanding that the release of those items to the Defense will likely prompt additional [Mil. R. Evid.] litigation" and whether the SVC agreed with the military judge's identification of unprivileged matters under *Mellette*. SVC responded by asking the military judge for reconsideration, and argued that the military judge violated Petitioner's constitutional and statutory right to privacy by improperly reviewing her medical records, by (1) ordering the release of Petitioner's mental health records without a showing of necessity under R.C.M. 703; and (2) failing to perform a complete Mil. R. Evid. 513 analysis before conducting an *in camera* review. SVC also argued that the military judge should recuse herself due to her "clear errors,"[16] and that the military judge displayed actual and implied bias by erroneously compelling and reviewing privileged communications. The next day, after a brief R.C.M. 802 conference with defense counsel, SVC, and trial counsel, the military judge abated the proceedings and ordered sealed the records from the mental health facility.[17] SVC filed a motion to reconsider the military judge's abatement order, for appropriate relief requesting that the military judge recuse herself, notice of intent to file petition for extraordinary relief, expedited written order, and a request for stay. The military judge denied SVC's motion.

II. DISCUSSION

"As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue."[18] First, there is no other adequate means to attain the relief desired; second, the right to issuance of the writ is clear and indisputable; and third, the issuing court, in its discretion,

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[16] Petitioner's Br. at 16.

[17] The military judge did not set a timeline for dismissing the abated case should B.M. not agree to release the privileged records. In cases that are abated, military judges should consider setting a timeline upon which cases will be dismissed with or without prejudice if the circumstance causing the abatement is not resolved instead of abating indefinitely, so as to ensure the due process rights of the accused servicemembers are not violated. *J.M. v. Payton-O'Brien* outlined the many remedies available to military judges in cases such as this, and in those cases where abatement is appropriate, the military judge should consider abating the proceedings permanently or for a time certain. In this case, the Government has neither appealed the military judge's abatement order under Article 62, UCMJ (*see United States v. True*, 28 M.J. 1 (C.M.A. 1989), nor withdrawn the referred charges.

[18] *Cheney v. United States Dist. Court,* 542 U.S. 367, 380 (2004) (internal citations and quotation omitted).

must be satisfied that the issuance of the writ is appropriate under the circumstances.[19]

Petitioner argues that the writ should be granted because the military judge erred by: (1) failing to perform a full analysis under Mil. R. Evid. 513 prior to performing an *in camera* review of Petitioner's mental health records; (2) compelling Petitioner to testify, and requesting her mental health records when defense had not established that the records were relevant or necessary in accordance with R.C.M. 703; (3) abating the proceedings based on a Mil. R. Evid. 513 remedy in response to a R.C.M. 703 production request; (4) relying on the holding in *Payton-O'Brien* to find that the Constitution pierced Petitioner's Mil. R. Evid. 513 privilege; and (5) failing to recuse herself because of her actual and implied bias.

A. Petitioner seeks a writ of mandamus sealing or destroying Petitioner's mental health records that Petitioner argues were erroneously compelled and improperly viewed.

1. The military judge unintentionally and inadvertently reviewed privileged material under Mil. R. Evid. 513.

We consider the review of privileged material under Mil. R. Evid. 513 de novo because it is a question of law.[20]

The right of a crime victim to keep confidential his or her psychotherapist records was adjudicated in *United States v. Mellette*, which stemmed from a request of the accused to view the victim's psychotherapist records, specifically, medical records that disclosed the victim's diagnosis and treatment. These records were made relevant when the victim disclosed she had spent time in a mental health facility at a deposition unrelated to the court-martial. The Appellant requested to view these records, and the Court of Appeals for the Armed Forces [CAAF] disagreed. CAAF noted that, "when interpreting [Mil. R. Evid.] 513, we must also account for the Supreme Court's guidance that 'testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence' and our own view that 'privileges run contrary to a court's truth-seeking function.'"[21] The CAAF held that "based on the plain language of Mil. R. Evid. 513, and mindful of the Supreme

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[19] *Id.* at 380-81 (internal citations omitted).

[20] *LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013).

[21] *Mellette*, 82 M.J. at 377 (quoting *Trammel v. United States*, 445 U.S. 40 (1980) and *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013)).

Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under Mil. R. Evid. 513."[22] The CAAF reasoned that the documents sought by *Mellette* involved critical issues of credibility and reliability, so they should have been admitted by the trial judge. *Mellette* specifically addressed whether treatment records, diagnoses, and even dates of treatment were privileged records under Mil. R. Evid. 513, and CAAF clearly held that "[t]hese documents were not protected from disclosure by Mil. R. Evid. 513(a), and as noted by the NMCCA, they involved key areas of concern that 'go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events.'"[23]

In the present case, the military judge's request to the mental health facility articulated the records to be produced, which were "…only records containing no actual communications *and* indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescriptions, and/or treatment, and the date the diagnosis was resolved, if applicable."[24] The military judge was not seeking privileged information under Mil. R. Evid. 513, and the mental health treatment facility's inclusion of those privileged records was not attributable to the military judge, but to the mental health facility's apparently imprecise response to her request. The records received were not erroneously compelled.

The Article 39(a) session held to address defense counsel's motion to compel the medical records articulated two possible theories for why the record might be relevant and necessary under R.C.M. 703(e)(1): (1) possible memory confabulation or conflation due to Petitioner's past abuse; and (2) inconsistencies in Petitioner's account of the alleged assault. When the military judge received the records and recognized potential Mil. R. Evid. 513 material, she attempted to limit her review to non-privileged diagnoses, medications, and treatments in accordance with *Mellette* but nonetheless recognized and identified privileged material.[25] She found that this privileged material contradicted Petitioner's Article 39(a) testimony, and pertained to Petitioner's "inability to accurately perceive, remember, and relate events."[26] In light of these findings,

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[22] *Id.* at 375.

[23] *Id*. at 381.

[24] Appellate Ex. XXXIII at 2 (underline original).

[25] Appellate Ex. XXXIV.

[26] Appellate Ex. XXXIV at 2 (quoting *Payton-O'Brien*, 76 M.J. at 788-789).

the military judge notified Petitioner's SVC that Petitioner retained the privilege, but if Petitioner asserted the privilege, the court would abate the proceedings.

When a military judge inadvertently encounters material privileged under Mil. R. Evid. 513(e)(2), the military judge should cease his or her review, and conduct a hearing as contemplated in Mil. R. Evid. 513(e). Alternatively, the military judge should order a taint team to review the records for privileged material and redact them. [27] Here, the military judge did neither, and chose to redact the records herself. The military judge continued reviewing the privileged materials, and in doing so, may have violated the procedures set forth in Mil. R. Evid. 513(e)(2), which outlines the procedures to be used when a party seeks a patient's psychotherapist records or communications. Violations of Mil. R. Evid. 513 can result in prejudice to victims by compromising their privacy and credibility, all while undermining their trust in our legal system.[28]

Mil. R. Evid. 513(e)(2) requires that before ordering the production of the records or before admitting the records into evidence, the military judge *must* conduct a closed hearing in which witnesses, including the patient, may be called to testify. If reviewing the records is necessary to determine whether the records should be produced or are admissible, the military judge may review the records *in camera* as long as the moving party can meet four criteria by a preponderance of the evidence:

> A. A specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
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> B. That the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
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> C. That the information sought is not merely cumulative of other information available; and
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> D. That the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[29]

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[27] We also note that SVC could have provided the redacted records to the Court, redacting the records of any privileged material asserted by their client, but apparently the SVC elected not to do that in this case.

[28] *See* Dep't of Def. Instr. 6495.02, *Sexual Assault Prevention and Response: Program Procedures*, at 49 (Mar. 28, 2013) [DoDI 1325.4] (emphasizing the importance of victims' perception of the military justice system).

[29] Mil. R. Evid. 513(e)(3)(A)-(D).

CDC argued that the medical records requested were not covered by Mil. R. Evid. 513, but at the outset of the Article 39(a) hearing, the military judge made it very clear that the material RPI requested *was* covered by Mil. R. Evid. 513, "…I review your motion to compel mental health records as a motion under [Mil. R. Evid.] 513 because I don't see any way you don't view it that way."[30] CDC disagreed with the military judge's conclusion, but was reminded that the request was far greater than simply mental health records; the request ventured into privileged information. In fact, 17 pages of argument between civilian defense counsel, the military judge, and SVC were dedicated to deciding whether this was or was not a Mil. R. Evid. 513 motion, and whether SVC could argue before the court.[31] Later, upon request from the military judge, CDC provided a list of the information sought from Petitioner. The military judge determined this list did not appear to contain privileged information under *Mellette* and although this ultimately was not a Mil. R. Evid. 513 hearing, Petitioner's testimony was closed to the public.

Petitioner now demands a writ of mandamus because the military judge erroneously compelled and improperly viewed Petitioner's privileged records. Petitioner argues that because a Mil. R. Evid. 513 hearing was not held, the military judge's receipt and review of Petitioner's privileged information violated her constitutional and statutory rights to privacy such that the records must be sealed.[32] We disagree. We find the military judge did not erroneously compel Petitioner's mental health records, and in fact ordered the records after a R.C.M. 703 hearing to address the relevance and necessity of the non-privileged records. The error lies with the mental health facility in releasing the complete mental health file. We find that the military judge inadvertently reviewed the privileged material, and because the records are now sealed in accordance with the military judge's order, we find no further remedy is necessary. We evaluate the merits of the writ of mandamus request below.

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[30] R. at 29.

[31] R. at 55-72.

[32] Petitioner argues, "An order compelling a medical or mental health facility to turn over a victim's privileged medical and mental health records that exceeds the scope of the military judge's lawful authority is patently unreasonable and unconstitutional." Petitioner's Br. at 21.

2. Compelling Petitioner to testify and requesting her non-privileged mental health records was not an abuse of discretion.

We review a military judge's discovery rulings for abuse of discretion, which calls for "more than a mere difference of opinion."[33] "Instead, an abuse of discretion occurs 'when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[34]

Petitioner argues that the Constitution guarantees the right to privacy in her mental health records, and the military judge violated that right by ordering the release of her mental health information. Petitioner cites cases that hold the Fourth and Fifth Amendments of the Constitution protect her from unreasonable searches and seizures, that the military judge's order compelling Petitioner's mental health records exceeded the scope of the military judge's authority and was patently unreasonable and unconstitutional, violates the *Crime Victims' Rights Act* [CVRA], and *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs* [DoD HIPAA Manual].[35] These arguments were made before the trial court in a motion filed by Petitioner, who argued then, as now, that her right to fairness, respect and privacy, as granted to crime victims in Article 6b, UCMJ, was violated.[36] We note initially a slight correction to counsel and

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[33] *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (quoting *United States v. Wicks*, 73 M.J. 93, 93 (C.A.A.F. 2014)).

[34] *Stellato*, 74 M.J. at 480 (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

[35] *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs,* DoD Manual 6025.18, dtd 13 Mar 2019. Petitioner's reliance on the CVRA and the DoD HIPAA Manual for the proposition that a crime victim, as defined by the CVRA, has rights greater than the Constitutional rights of an accused at trial is inaccurate. Furthermore, CVRA is inapplicable to members within the military justice system, as "crime victim" is defined as "a person directly ad proximately harmed as a result of the commission of *Federal offense* or an offense in the District of Columbia." 18 U.S.C. 3771(e)(2) (emphasis added). UCMJ offenses are not typically considered federal offenses. The psychotherapist records at issue were not under the control of the Department of Defense, thus the DoD HIPAA Manual is similarly irrelevant. But to be clear, the DoD HIPAA Manual grants the release of protected health information pursuant to a court order. DoD Manual 6025.18 § 4.4e(1)(a).

[36] *Kastenberg* states, "While M.R.E. 412(c)(2) or 513(e)(2) provides a 'reasonable opportunity . . . [to] be heard,' including potentially the opportunity to present facts and legal argument, and allows a victim or patient who is represented by counsel to be

admonish them that the right to privacy is not an enumerated right; Article 6b(a)(8) states, "The right to be treated with fairness and with respect *for* the dignity and privacy of the victim of an offense under this chapter."[37] The right is for fairness and respect; the word "for" is a preposition that shows the relationship of *fairness and respect* to *dignity and privacy*. Article 6b does not grant a crime victim the right to privacy, though it does grant them the right to be treated with fairness and respect *for* their dignity and privacy.

The arguments made above were also made in *In re AL*, adjudicated by our sister court, the Air Force Court of Criminal Appeals [AFCCA], but there were a few notable differences.[38] *In re AL* pertained to trial counsel's request for, and ultimate receipt of, AL's medical treatment records from the local military treatment facility. The 575 un-redacted pages were turned over to trial counsel, including 42 pages of Family Advocacy Program [FAP] records which contained psychotherapist records. Trial defense counsel filed a motion to compel those medical records pursuant to R.C.M. 701, and the military judge ordered trial counsel to produce all 575 pages to the Defense, without an in camera review to determine their relevance. The special victims' counsel requested a stay of proceedings from AFCCA and filed a writ of mandamus like the one at

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heard through counsel, this right is not absolute. A military judge has discretion under R.C.M. 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. Furthermore, M.R.E. 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel, or any right to appeal an adverse evidentiary ruling. If counsel indicates at a M.R.E. 412 or 513 hearing that the victim or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed." *Kastenberg*, 72 M.J. at 371.

Trial defense counsel's motion in response to SVC's trial court filing quoted CAAF as stating, "There is no mention whatsoever of lower Courts and complaining witnesses' standing therein," and "just because Congress gave complaining witnesses the ability to seek a writ of mandamus in higher courts, they likewise have standing to 'raise corresponding issues first in the lower Court is a bridge too far, and unsupported by any legal authority." Appellate Ex. XXVII at 12. Civilian defense counsel at trial claims this quoted language came from *Randolph v. HV*, 76 M.J. 27 (C.A.A.F. 2017), yet this Court cannot find this quoted language anywhere. We caution counsel that deliberately misrepresenting cases (or language from cases) before our courts places them at risk of violating professional responsibility rules.

[37] Article 6(b), UCMJ.

[38] *In re AL*, 2022 CCA LEXIS 702 (A.F. Ct. Crim. App. Dec. 7, 2022) (unpublished), quoting *In re Grand Jury Subpeona*, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002) (citations omitted).

issue here. Before the Appellate Court, the petitioner argued that trial counsel had violated: (1) her right to fairness and respect for dignity and privacy as granted in Article 6b(a), UCMJ; (2) her constitutional right to privacy; (3) HIPAA; (4) DoDM 6025.18; and (5) Mil. R. Evid. 513 and 514.

The AFCCA recognized that the victim's right to privacy "is not absolute and 'must be weighed against the [G]overnment's interest in obtaining the records in particular circumstances.'"[39] The Court also observed that HIPAA allows the release of private health information "to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law"[40] as does DoD Manual 6025.18.[41] AFCCA next addressed Mil. R. Evid. 513 and 514,[42] and held "[t]he core privilege established by Mil. R. Evid. 513(a) broadly empowers a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure."[43] This resulted in the Court granting in part and denying in part the petitioner's writ of mandamus, returning the matter of the privileged documents covered by Mil. R. Evid. 513 to the trial judge.

The present case deals with R.C.M. 703, not R.C.M. 701. Petitioner has made her mental health an issue for RPI to at least consider, by virtue of the fact she has published an autobiography about past abuses and discussed on at least one podcast her prior involvement with mental health providers.[44] When queries for information from civilian defense counsel to SVC via trial counsel were rebuffed by SVC, defense counsel is left with no recourse but to request her testimony at an Article 39(a) hearing to determine whether there are any mental health records that relate to defense counsel's query. Petitioner believes that by requiring Petitioner to testify at the Article 39(a) relating to the R.C.M. 703 motion, the military judge allowed a "fishing expedition in the

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[39] *Id*. at *14 (quoting *In re Grand Jury Subpoena*, 197 F. Supp. 2d at 514).

[40] 45 C.F.R. § 164.512(a)(1).

[41] We note again that for the purposes of this case, the DoDM is not relevant.

[42] As Mil. R. Evid. 514 is not at issue in the present case, we will not discuss AFCCA's analysis on this topic.

[43] *In re AL*, 2022 CCA LEXIS 702 at *21.

[44] The trial court learned at the Article 39(a) hearing at which Petitioner was ordered to testify, that Petitioner did not actually seek mental health treatment as outlined in her book and on at least one podcast, though she was seeking mental health treatment after RPI's alleged assault on her.

extreme."[45] Petitioner's motion argues that the military judge "indisputably erred by compelling [Petitioner] to testify where the Defense, at best, merely speculated that evidence regarding diagnosis and treatment even existed."[46] Under these unique set of facts, Petitioner must recognize that the holder of the information sought by defense counsel is Petitioner, thus almost any query is speculative until Petitioner confirms or denies the existence of such information. Since Petitioner rebuffed defense counsel's written queries, the military judge directed Petitioner to testify. Similarly, the military judge also did not know whether there existed mental health diagnosis and treatment evidence related to the offense RPI was charged with, so the military judge reasonably compelled Petitioner's testimony (and it was compelled because Petitioner did not volunteer the information). Petitioner's tautological reasoning that defense counsel had no grounds to request such information because he did not know whether such evidence existed, which was made relevant because of Petitioner's purported childhood trauma counseling, gives even greater reason to compel Petitioner's testimony. Petitioner's reliance on Article 6(b) for granting a right of privacy such that victims of crimes are not required to testify at motions hearings about non-privileged matters such as the identity and location of mental health providers is misplaced.

At the Article 39(a) session, SVC objected to the testimony of the Petitioner, to which the military judge responded, "…your client like any other witness in a court-martial is subject to be compelled to testify in an Article 39(a). In contrast to Article 32's, she does not have the right to refuse. So…if she has non-privileged information that…would support the defense motion [to compel non-privileged records] then she can be requested by the defense and if relevant and necessary…for the purposes of the motion…she can be compelled to testify."[47] The military judge did not abuse her discretion when she ordered Petitioner to testify regarding the existence of mental health records, and the names of any providers. We note that Petitioner could have foregone testifying had Petitioner simply provided this non-privileged, relevant and necessary information to trial counsel.

We also find that the military judge did not abuse her discretion when she ordered the mental health clinic to release Petitioner's medical records. The military judge's order was narrowly tailored so as to avoid Mil. R. Evid. 513 evidence and was reasonable given the circumstances. In fact, SVC reviewed

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[45] Petitioner's Br. at 29 (quoting *United States v. Morales*, 2017 CCA LEXIS 612, at *8 (A.F. Ct. Crim. App. Sep. 13, 2017) (unpublished).

[46] Petitioner's Br. at 29.

[47] R. at 227.

and approved of the order prior to its issuance. In both instances (ordering the testimony of Petitioner and ordering the release of mental health information), the military judge's findings of fact were not erroneous, were not influenced by an erroneous view of the law and were within the range of choices reasonably arising from the applicable facts and law.

3. The military judge did not abuse her discretion when she abated the proceedings.

Petitioner argues that the military judge's abatement of the trial was "clear and indisputable error"[48] because she followed the remedy outlined in *J.M. v. Payton-O'Brien*.[49] Petitioner argues that because a hearing pursuant to Mil. R. Evid. 513 did not occur, abating the trial was an improper procedural remedy. We disagree. To analyze the military judge's abatement order, we consider whether she abused her discretion.[50]

Mil. R. Evid. 513(e)(2) provides, "Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed." This provides an opportunity for victims to challenge the potential release of privileged information, but this provision does not create a right of action for victims to challenge abatement proceedings. Here, Petitioner continues to assert privilege over the records at issue, thus preventing the release of the records. The military judge is not ordering the production or admission of Petitioner's privileged records, therefore there is no requirement for a hearing, a matter that was mooted by the military judge's finding that the records contained privileged information that Petitioner declined to waive.

As the military judge was reviewing what she reasonably believed to be non-privileged healthcare information, she recognized the inclusion of Mil. R. Evid. 513 evidence.[51] She notified SVC, who then asserted Petitioner's privilege. Petitioner argues that a hearing should have been conducted at that

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[48] Petitioner's Br. at 30.

[49] *See Peyton-O'Brien*, 76 M.J. at 792.

[50] *See United States v. Monroe*, 42 M.J. 398 (C.A.A.F. 1995); *United States v. Ivey*, 53 M.J. 685 (A. Ct. Crim. App. 2000).

[51] We reiterate that not all health care material is privileged. "Based on the plain language of Mil. R. Evid. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under Mil. R. Evid. 513." *Mellette*, 82 M.J. at 375.

point. But, because the military judge had already reviewed the privileged information, a hearing would have been futile. It was unnecessary at that point because the military judge had already concluded the information was in fact privileged, the information was such that its deprivation would harm the RPI such that a constitutional violation would occur, and Petitioner later stated she was not waiving the privilege. It is very clear that defense counsel had no idea what the privileged records contained; therefore, conducting a hearing in which defense counsel could not make a showing under Mil. R. Evid. 513(e)(3)(A)-(D) would be ineffective. The military judge could not disclose the privileged information to defense counsel so as to make a Mil. R. Evid. 513(e) hearing fair to the accused, because the constitutional exception was eliminated from the rule. The state of the case is such that the military judge had privileged information that she believed to be exculpatory, but she had no lawful way to share that material with the accused.

Petitioner invites this Court to remedy the wrongs she finds in *Payton-O'Brien*. Petitioner asserts, "[t]he Military Judge clearly and indisputably erred by relying on the unenumerated constitutionally-required exception in its analysis. Before returning this matter to a military judge, this Court should overturn [*Payton-O'Brien*] to prevent additional Article 6b, U.C.M.J. violations and resolve the conflict in the service courts of criminal appeal."[52] Petitioner argues that *Payton-O'Brien* stands for the proposition that "the constitutionally-required exception is still a viable basis to pierce the privilege." We do not share Petitioner's view that *Payton-O'Brien* was wrongly decided and poorly reasoned, and in fact take the opportunity to build upon what we believe to be sound legal footing.

All statutes and regulations are subject to the Constitution. "…[W]e may not allow the [Mil. R. Evid. 513] privilege to prevail over the Constitution. In other words, the privilege may be absolute outside the enumerated exceptions, but it must not infringe upon the basic constitutional requirements of due process and confrontation."[53] As CAAF noted in *Beauge* at footnote 10, the matter of the removal of the constitutional exception from the list of enumerated exceptions in Mil. R. Evid. 513(d) has created disagreement among the Courts of Criminal Appeal.[54] CAAF did not resolve the matter in *Beauge* as it was not needed to decide the case, but the Court did state, "[t]he right to cross-examine

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[52] Petitioner's Br. at 30.

[53] *Peyton-O'Brien*, 76 M.J. at 787.

[54] *United States v. Beauge*, 82 M.J. 157, 167 fn. 10 (C.A.A.F. 2022).

a witness for impeachment purposes has constitutional underpinnings because of the right to confront witnesses under the Sixth Amendment and the due process right to present a complete defense. And, in *certain instances*, the psychotherapist-patient privilege seemingly trumps an accused's right to fully confront the accuracy and veracity of a witness who is accusing him or her of a criminal offense."[55] CAAF did not say that in *all* instances, the psychotherapist-patient privilege trumps an accused's right to fully confront his or her accusers. CAAF then tempers this language by quoting the Supreme Court's decisions in *Pennsylvania v. Ritchie*, which held the Sixth Amendment right "to question adverse witnesses…does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony,"[56] and *Holmes v. South Carolina,* which held that only rules which "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purpose they are designed to serve" will be held to violate the right to present a complete defense[57]. We are left with the precedent in *Payton-O'Brien,* and the guidance provided to us by CAAF in *Beauge*.

In the present case, although the military judge did not reference *Pennsylvania v. Ritchie,* it appears that she determined that the privileged information is more than simply helpful information that might be useful in contradicting unfavorable testimony (the *Pennsylvania v. Ritchie* standard), the denial of which would "infringe upon a weighty interest of the accused" (the *Holmes v. South Carolina* standard). The facts here are admittedly unique. In RPI's motion to compel Petitioner's mental health records, RPI included an affidavit for the military judge from RPI's forensic psychologist in which the forensic psychologist requested all of Petitioner's mental health records.[58] The basis for the request outlined Petitioner's "publications and interviews by [Petitioner] indicat[ing] that she has engaged in mental health treatment in the past and experienced significant psychiatric symptoms for many years."[59] The forensic

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[55] *Id.* at 167 (emphasis added).

[56] *Id.* (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987)).

[57] *Id.* (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006)).

[58] Appellate Ex. VIII. The request also sought "therapist notes, prescription history, treatment history, diagnoses, and any other encounter notes in order to assess [Petitioner's] memory, perceptions, and credibility and otherwise assist in case preparation." Appellate Ex. XXVIII at 1. Clearly, some records sought were privileged under Mil. R. Evid. 513.

[59] Appellate Ex. XXVIII at 1.

psychologist outlined Petitioner's history of flashbacks as discussed in her autobiography; instances "where they lose touch with reality and feel as if they are outside of their body, leading to an altered or inaccurate perception of events," specifically related to bathrooms.[60] "[I]n her book, [Petitioner] describes multiple traumatic memories tied to the bathroom and ascribes significant anxiety to using the bathroom," and the allegations levied by Petitioner against RPI also allege that RPI pounded on the bathroom door, requesting she hurry up, while Petitioner brushed her teeth.[61] Shortly thereafter, one of the two alleged assaults occurred.[62] The relationship between the current allegation and past abuses was strong enough to support at least an exploration of conflation, a defense theory made prior to the military judge requesting the mental health records. It is against this backdrop that RPI requested Petitioner's mental health records.

Appellant argues that *Beauge* prohibits piercing the Mil. R. Evid. 513 privilege, and we agree that the privilege cannot be pierced outside of the enumerated exceptions. Appellant argues that our sister courts disagree with the holding in *Payton-O'Brien*, and that we should overrule it so as to be in alignment. Petitioner cites to several ACCA cases that held that there was not a constitutional exception to Mil. R. Evid. 513. In *United States v. McClure*, ACCA held that the accused was unable to show how the victim's mental health records were relevant and did not order the production of the records. [63] In that case, defense counsel argued that the Victim's discussion of her diagnoses with a Sexual Assault Nurse Examiner [SANE] waived any Mil. R. Evid. 513 privilege under Mil. R. Evid. 510's waiver provision. ACCA held that there was no constitutional right that would pierce the Mil. R. Evid. 513 privilege, but the Court limited its analysis to the Sixth Amendment's right to confrontation; the Court did not address other constitutional protections.

In *United States v. Tinsley*, ACCA addressed the Sixth Amendment's right to confrontation, but also addressed whether denying the disclosure of mental health records could be a *Brady* violation.[64] Ultimately, the *Tinsley* court held, "[i]n conclusion, because there is no requirement to recognize an exception to

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[60] Appellate Ex. XXVIII at 2.

[61] Appellate Ex. XXVIII at 2.

[62] Appellate Ex. IV at 12.

[63] *United States McClure*, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sep. 2, 2021) (unpublished).

[64] *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021).

the psychotherapist-patient based on *Brady* or any other constitutional balancing test, this court lacks the authority to create or otherwise recognize any such exception to Mil. R. Evid. 513. It follows that the *only* exceptions to the psychotherapist-patient privilege are those expressly set forth in Mil. R. Evid. 513(d)(1)-(7)."[65]

Although the discussion below highlights how our courts are not as divided as they may be perceived to be, it is critical here to at least mention that rarely are psychotherapist-patient records as material as they are in the present case. This fact alone distinguishes the present matter from *McClure* and *Tinsley*, cases in which the relevance of the requested records could not be established by the accused. It is a unique situation indeed where a victim has shared so much past personal medical history in a public space (although later determined to be false), such that an accused can make a valid, substantiated, and targeted request without ever speaking with the victim. As outlined above, Petitioner here levied allegations against RPI that clearly made her mental health status an issue of exploration for RPI. It is no surprise at all that the military judge ordered production of the non-privileged records in light of RPI's strong showing of necessity and relevance, which was entirely based on information pulled from the public realm. Petitioner's recantations under oath in which she denied mental health treatment for her childhood abuse only confuse the issue more and make her current mental health records all the more relevant.

To narrow the issue before this Court, there is no argument that the privilege may only be pierced based on one of the exceptions found in Mil. R. Evid. 513(d)(1)-(7); the disagreement surrounds what should happen when the assertion of the privilege conflicts with an accused's constitutional rights to due process and/or confrontation. The issue in the present case is not whether the privilege can be pierced (it cannot, outside of the enumerated exceptions), the question is what happens once the privileged material is determined to contain evidence that must be turned over to the accused in order to protect his or her constitutionally-guaranteed rights. The question, then. is one of remedy.

The holding in *Payton-O'Brien* is "a military judge may not order production or release of Mil. R. Evid. 513 privileged communications when the privilege is asserted by the holder of the privilege unless the requested information falls under one of the enumerated exceptions to the privilege listed in Mil. R. Evid. 513(d). However, when the failure to produce said information for review

[65] *Id*. at 853.

or release would violate the Constitution, military judges may craft such remedies as are required to guarantee a meaningful opportunity to present a complete defense."[66] Therefore, the issue lies not in piercing the privilege, but the remedy to be applied should the military judge find that failure to waive the privilege reaches Constitutional proportions.

The military judge did not abuse her discretion when she ordered Petitioner's mental health records for in camera review, and the military judge did not abuse her discretion when she abated the trial in light of information learned while reviewing the records over which Petitioner asserted a privilege. Her inadvertent review of privileged material did not, in any respect, waive Petitioner's privilege,[67] but it did alert the military judge to the fact that the records contained evidence of both confabulation and inconsistent statements made by Petitioner which would be constitutionally required to be produced because the records were exculpatory under *Brady* and its progeny. In accordance with the guidance found in *Payton-O'Brien,* we find that the military judge's decision was within the range of choices reasonably arising from the applicable facts and the law.

B. Petitioner seeks a writ of mandamus directing the military judge to recuse herself from the court-martial because of actual and implied bias.

Although this matter is not ripe for consideration because the case is abated, we will address whether the military judge should have recused herself prior to abating the proceeding.

A military judge's decision whether to recuse herself is reviewed for an abuse of discretion.[68] Petitioner argues that the military judge failed to "treat[] [Petitioner]] with fairness and with respect for [her] dignity" under Article 6b(a)(8), U.C.M.J., because the military judge did not recuse herself for actual and implied bias under R.C.M. 703. Petitioner made this request of the military judge after the military judge reviewed the privileged records and found them to be constitutionally required in RPI's defense. The military judge then provided the privileged records to SVC via an ex parte order, noting that if Petitioner asserted the privilege, the military judge "must abate the proceedings."[69] SVC asserted privilege on Petitioner's behalf and filed a motion with the military judge to reconsider the ex parte order and to recuse herself. If

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[66] *Peyton-O'Brien*, 76 M.J. at 783.

[67] *See* Mil. R. Evid. 510, 511.

[68] *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015).

[69] Appellate Ex. XXXIV.

neither request were to be granted, Petitioner informed the trial court that she would file a writ of mandamus with this Court. The military judge responded to Petitioner's motion by abating the proceedings.

Petitioner argues that the "military judge's decision to improperly review privileged communications and deem them releasable under the unenumerated constitutionally-required exception, warrants disqualification under R.C.M. 902(b)(1)."[70] Petitioner's basic factual assertion is incorrect. As discussed previously, the military judge did not release any privileged records to anyone but Petitioner. Because Petitioner refused to further release the records, the military judge abated the proceedings rather than proceed with a constitutionally unfair trial. Although the proceedings are abated, which renders the matter moot, we will reiterate that pursuant to Art. 26, UCMJ, military judges cannot sit as a witness for the prosecution. This has been interpreted to mean activity in the case greater than what we see here.[71] We also note that a military judge must leave the proceedings "free from substantial doubt in the mind of reasonable persons with respect to the impartiality of the trial judge."[72] Military judges regularly view evidence that is otherwise inadmissible in court and need not recuse themselves. This is indeed an interesting case where only the military judge and the SVC know of information not otherwise known to the parties, but this does not require recusal.

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[70] Petitioner's Br. at 52-53.

[71] *See United States v. Head*, 25 C.M.A. 352, 2 M.J. 131, 54 C.M.R. 1078, 1977 CMA LEXIS 10572 (C.M.A. Mar. 2, 1977) (The military judge, sitting alone at special court-martial, did not become a witness for the prosecution by making a ruling on the admissibility of an extract from accused's service record as evidence of previous conviction on ground that the file showed that the military judge had prosecuted the accused at earlier trial, since the disqualification provision of Art. 26, UCMJ, prohibits the military judge from presiding over a trial in which he or she is also an accuser or a witness for the prosecution.). *See also, United States v. Conley*, 4 M.J. 327, 1978 CMA LEXIS 12158 (C.M.A. Apr. 3, 1978) (The military judge must be considered a witness for prosecution under Art. 26, UCMJ, and is disqualified from the court-martial, where military judge did not take witness stand to officially offer his expert testimony but a fair reading of the record of trial establishes unavoidable inference that he considered his own expertise as documents examiner in arriving at verdict.); *United States v. Griffin*, 8 M.J. 66, 1979 CMA LEXIS 8563 (C.M.A. Nov. 19, 1979) (An announcement by the military judge to court members that a witness was granted immunity did not cause military judge to become witness for prosecution.). .

[72] *United States v. Soriano*, 20 M.J. 337, 340 (C.A.A.F. 1985).

As discussed above, to prevail on a petition for a writ of mandamus, a Petitioner must show (1) that there is no other adequate means to attain relief; (2) the right to issuance of a writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. [73]

In the present case, there is no other adequate means to attain relief. But for her petition to this Court, Petitioner has no other avenue to challenge the military judge's actions. On this ground, we find for Petitioner. However, we do not find merit in any of Petitioner's allegations. Petitioner has not shown that her right to issuance of a writ is clear and indisputable. Nor do we find that issuance of the writ is appropriate under the circumstances. As analyzed above, the military judge did not fail to perform a full analysis under Mil. R. Evid. 513 because the military judge was not seeking Mil. R. Evid. 513 records. The military judge did perform a thorough R.C.M. 703 analysis prior to requesting the records, and only after a showing of necessity and relevance. The military judge's order to Petitioner to testify was not error in light of the motion to compel under R.C.M. 703, as filed by RPI, and defense counsel had clearly established that the records were relevant and necessary in accordance with R.C.M. 703. The military judge's decision to abate the proceedings was not unreasonable in light of her finding that the records must be turned over to RPI. The military judge did not intentionally pierce Petitioner's Mil. R. Evid. 513 privilege, and took appropriate action once she learned that she had viewed privileged material. As we find there is no evidence of actual or implied bias, we conclude that the military judge did not abuse her discretion in not recusing herself.

Applying the three-part test enumerated above, we find Petitioner has not demonstrated an entitlement to the extraordinary remedy requested. Accordingly, we find Petitioner has not shown her claimed right to a writ is clear and undisputable. Furthermore, we are not convinced issuance of the requested writ is proper.

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[73] *Cheney,* 542 U.S. at 380-381 (internal citations and quotation omitted).

III. CONCLUSION

Upon consideration of the Petition, the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Stay of Proceedings is **DENIED.**

FOR THE COURT:

MARK K. JAMISON
Clerk of Court