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United States Navy–Marine Corps Court of Criminal Appeals

Before
HOLIFIELD, HACKEL, and KISOR
Appellate Military Judges

In re K.J.
Petitioner

UNITED STATES
Respondent

Kevin J. ARMSTRONG
Personnel Specialist Seaman (E-3), U.S. Navy
Real Party in Interest

No. 202300109

Decided: 2 August 2023

Review of Petition Pursuant to Article 6b, UCMJ, for Extraordinary Relief in the Nature of a Writ of Mandamus, and application for Stay of Proceedings.

Military Judge:
Hayes Larsen

For Petitioner:
Lieutenant Greggary E. Lines, JAGC, USN
Commander Adrianne M. Mittelstaedt, JAGC, USN

For Respondent:
Major Mary Claire Finnen, USMC

For Real Party in Interest:
Lieutenant Megan E. Horst, JAGC, USN

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

PER CURIAM:

K.J. petitions this Court for extraordinary relief in the nature of a writ of mandamus. Petitioner seeks relief from the military judge's decision, contained in a series of orders in March and April 2023, that it is necessary to conduct an in camera review of Petitioner's military mental health records, which are privileged under Military Rule of Evidence [Mil. R. Evid.] 513, to preserve the Real Party in Interest [RPI]'s constitutional right to a fair trial. However, in this series of orders, applying this Court's decision in *J.M. v. Payton-O'Brien*,[1] the military judge afforded Petitioner the opportunity to make a decision by 3 April 2023 of whether or not to waive the privilege and allow an in camera inspection of those records.[2] The military judge later suspended that deadline in order for this Petition to proceed in this Court.[3] As Petitioner has not yet made the decision in question, this Petition is not yet ripe for our review.

I. BACKGROUND

This case arises out of an alleged sexual assault at a private home in April 2021. According to Petitioner, she became intoxicated due to alcohol consumption and woke up next to the RPI's wife, in the RPI's bed. She states that she told Naval Criminal Investigative Service officials that she has no memory of being assaulted, but sought a forensic sexual assault examination based on other information.[4] Eventually the RPI was charged with sexual assault.

The Defense filed a motion to compel production of Petitioner's mental health records. After a series of hearings, the military judge ordered production of Petitioner's non-privileged records and all parties agreed on a procedure

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

[2] Trial Court Order of 24 March 2023 at 9; Trial Court Order of 31 March 2023 at 5.

[3] Trial Court Order of 18 April 2023 at 2.

[4] Petition for Extraordinary Relief at 5.

whereby an independent staff judge advocate would review and redact the records. After production, the Defense filed a renewed motion for production of "all records of communications made during mental health appointments during which [Petitioner] discussed her allegations against [RPI] and the underlying behaviors and history that gave rise to the diagnosis of borderline personality disorder [[BPD]]."[5] After another hearing in which a defense expert testified, the military judge issued a ruling, granting the Defense's request for an in camera review of the redacted portions of the records, finding that an in camera review for constitutionally required evidence was necessary.[6] In this ruling, applying *J.M. v. Payton-O'Brien,* the military judge provided that Petitioner had to elect whether or not to waive her Mil. R. Evid. 513 privilege to permit in camera review of these records. The military judge then forecast several possibilities as to what could happen if Petitioner did, or did not, waive the privilege for this limited review, depending on what the military judge might find in the records if he were permitted an in camera inspection.[7]

Rather than make an election, Petitioner filed a motion for reconsideration, which the military judge denied, explicitly finding that the diagnostic criteria for BPD were themselves not privileged.[8] Again, the military judge gave Petitioner the option to waive the privilege for an in camera review, and a date by which to inform the court of her election: 3 April 2023.[9] However, the Victim's Legal Counsel in this case requested a Rule for Courts-Martial 802 conference, informing the military judge that Petitioner would seek relief with this Court. As a result, the military judge suspended the date by which Petitioner was to make her election. Petitioner ultimately filed this Petition with the Court, and, so far as we are aware, has not yet made an election.

In bringing this Petition for Extraordinary Relief, Petitioner presents several issues that she requests this Court decide:

I. Should the Navy-Marine Corps Court of Criminal Appeals apply ordinary standards of review to Petitioner's Article 6b, Uniform Code of Military Justice [UCMJ], petition for a writ of mandamus?

[5] Petition for Extraordinary Relief at 8.

[6] Trial Court Order of 24 March 2023 at 2.

[7] *Id*. at 9.

[8] Trial Court Order of 31 March 2023. By diagnostic criteria, the military judge meant those specific criteria that Petitioner had that led to the diagnosis of BPD in her case, rather than what the diagnostic criteria are for BPD generally.

[9] *Id*. at 5.

II. *Mellette* and the case law it relies upon define "underlying facts" as background information of a privileged communication.[10] Did the military judge err in finding that Petitioner's diagnostic criteria were "underlying facts" when the Petitioner communicated them to a provider for the rendition of further mental health treatment?

III. CAAF has stated that privileges must be read plainly. Did the Military Judge err when he read the constitutionally required exception into Mil. R. Evid. 513?

IV. A military judge must weigh the interest of the accused with the interest of the victim in maintaining the privilege. Did the military judge err in finding that RPI's constitutional interest in pretrial discovery outweighed Petitioner's privacy interest under Article 6b and Mil. R. Evid. 513?

V. All four prongs of Mil. R. Evid 513(e)(3) must be met and *Payton-O'Brien* scenarios must be present before in camera review of privileged communications. Did the military judge err in ordering in camera review of Petitioner's privileged communications despite the Defense failing to meet its burden?

II. DISCUSSION

A. Legal Standards

Once this Court has satisfied itself that it has jurisdiction, three conditions must be satisfied before this Court may issue a writ of mandamus.[11] 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, this Court, , must be satisfied that the issuance of the writ is appropriate under the circumstances.[12]

The ripeness doctrine requires that federal courts reserve judicial power for resolution of concrete and fully crystalized disputes.[13] In considering the ripeness of an issue, courts evaluate both "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration."[14] The United States Court of Appeals for the District of Columbia

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[10] *United States v. Mellette*, 82 M.J. 13 (C.A.A.F. 2021)

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

[12] *Cheney*, 542 U.S. at 380-81.

[13] *Cobell v. Jewell*, 802 F.3d 12, 21 (D.C. Cir. 2015) (internal quotation marks and citations omitted).

[14] *Id.* (internal quotation marks and citations omitted).

Circuit has explained that a case is ripe when it presents a concrete legal dispute and no further factual development is essential to clarify the issue, and the issue has "crystallized" sufficiently for purposes of judicial review.[15] In short, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"[16]

B. The Dispute in this Case is not Ripe for Appellate Review.

In this case, Petitioner has not yet determined whether to waive the privilege to the extent necessary to permit an in camera review; and the military judge has not yet determined what course of action to take in light of Petitioner's eventual decision. These contingent future events render this Petition unripe.

The RPI contends that the issue as to whether the diagnostic criteria themselves are privileged is ripe for review, but whether the military judge abused his discretion in determining that an in camera review was necessary is not ripe, because the military judge gave Petitioner a choice as required by *J.M. v. Payton-O'Brien*.[17] For its part, the Government contends that this case is not ripe because Petitioner does not "demonstrate" to this Court exactly what the "diagnostic criteria" are, and further, has failed to indicate whether Petitioner will waive the privilege to permit in camera review.[18]

We find that this petition is not ripe. First, we do not know whether the undisclosed diagnostic criteria at issue constitute privileged communications because we do not know what they are or how they were reached; therefore, the military judge did not abuse his discretion in deciding that an in camera review was required. Nor do we know the result of that future review might be, or what eventualities might flow from it. Thus, the issue is not fit for judicial decision.

Further, Petitioner has not demonstrated that the right to the issuance of this writ is clear and indisputable as to her second and fifth issues because those issues are not ripe. Nor can Petitioner demonstrate that issuance of the writ is appropriate as to her third and fourth issues, because Petitioner's argument rests on the faulty premise – rejected by this Court in *J.M. v. Payton O'Brien* – that court-martial convictions resulting from the withholding of con-

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[15] *In re Al-Nashiri*, 47 F.4th 820, 826 (D.C. Cir. 2022).

[16] *Id*. (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)).

[17] Real Party in Interest Brief at 2.

[18] Gov't Brief at 26.

stitutionally required evidence from accused are somehow tolerable in the military justice system.[19] Finally, we decline to issue an advisory opinion as to Petitioner's first issue, as to what standard of review would apply to a ripe petition for extraordinary relief filed under Article 6b, UCMJ.

We reject Petitioner's argument that the military judge lacked authority to request Petitioner waive the privilege for the limited purpose of the military judge reviewing in camera Petitioner's mental health records. Petitioner posits that "[h]ad Petitioner made a choice between waiving her psychotherapist-patient privilege or having the [m]ilitary [j]udge consider alternative remedies (e.g. abatement), the issue of whether the military judge could even request in camera review would have become moot because of that very decision."[20] Regardless of whether this is so, it focuses on the wrong point in time to determine whether extraordinary relief in the nature of mandamus is appropriate under the circumstances here. We are confident that a military judge's *request* that an alleged victim waive the privilege for the limited purpose of in camera review, does not dilute the privilege because "the victim always holds the key to the privilege and the victim's rights will be protected by the military justice system to the greatest extent possible, even if that results in an abatement of the entire court-martial."[21]

There are at least three possibilities here: (1) Petitioner waives the privilege and permits an in camera review and the military judge finds evidence that is constitutionally required, in which case Petitioner has another election to make; (2) Petitioner waives the privilege and permits an in camera review and the military judge does not find any constitutionally required evidence; or (3) Petitioner does not waive the privilege and the military judge must therefore craft a remedy. In sum, this dispute has not crystalized sufficiently to permit appellate review at this point.

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[19] *Payton-O'Brien*, 76 M.J. at 790-91.

[20] Petitioner's Reply Brief at 3.

[21] *Payton-O'Brien*, 76 M.J. at 791.

III. CONCLUSION

The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is **DENIED** for a lack of ripeness. The Stay of Proceedings issue by this Court on 21 April 2023 is lifted.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court