# APPENDIX

# APPENDIX

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## APPENDIX A

*This opinion is subject to revision before publication*

**UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

**No. 21-0312**
**Crim. App. No. 201900305**

**[Filed: July 27, 2022]**

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| **UNITED STATES** Appellee | ) |
| **v.** | ) |
| **Wendell E. MELLETTE Jr., Electrician's Mate (Nuclear) First Class Petty Officer** United States Navy, Appellant | ) |

Argued February 8, 2022—Decided July 27, 2022

Military Judge: Warren A. Record

For Appellant: *Lieutenant Commander Michael W. Wester*, JAGC, USN (argued).

For Appellee: *Lieutenant Commander Jeffrey S. Marden*, JAGC, USN (argued); *Lieutenant Colonel Christopher G. Blosser*, USMC, *Major Clayton L. Wiggins*, USMC, *Lieutenant John L.*

*Flynn IV*, JAGC, USN, and *Brian K. Keller*, Esq. (on brief).

Amicus Curiae on behalf of Patient/Victim SS: *Peter Coote*, Esq. (on brief).

Amici Curiae on behalf of the United States Navy, the United States Marine Corps, and the United States Coast Guard Victims' Legal Counsel and Special Victims' Counsel Programs: *Major Nathan H. Cox*, USMC, *Lieutenant Commander Adam J. Sitte*, JAGC, USN, and *Paul T. Markland*, Esq. (on brief).

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON and Senior Judge RYAN joined. Judge MAGGS filed a dissenting opinion in which Judge SPARKS joined.

Judge HARDY delivered the opinion of the Court.

The Government charged Appellant with sexually abusing and assaulting SS, a fifteen-year-old girl with a history of mental health issues. In preparation for his court-martial, Appellant sought access to SS's mental health diagnoses and treatments on the basis that the records could prove relevant to SS's credibility as a witness. The Government declined to provide the requested records, asserting that the psychotherapist-patient privilege provided by Military Rule of Evidence (M.R.E.) 513 protected the records in toto from disclosure. Appellant filed a motion to compel production and in camera review of SS's mental health records, arguing primarily that the psychotherapist-

patient privilege does not sweep so broadly as to protect a patient's diagnoses and treatment plan.

The military judge denied the motion, and the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed, holding that the psychotherapist-patient privilege protects not only confidential communications, but diagnoses and treatment plans contained within medical records. *United States v. Mellette*, 81 M.J. 681, 691–93 (N-M. Ct. Crim. App. 2021). We granted review to determine the scope of the patient-psychotherapist privilege under M.R.E. 513. *United States v. Mellette*, 82 M.J. 13 (C.A.A.F. 2021) (order granting review).

Based on the plain language of M.R.E. 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 M.R.E. 513. The decision of the NMCCA is set aside, and we return the case to the Judge Advocate General of the Navy for further proceedings consistent with this opinion.

## I. Background

While serving in the Navy, Appellant engaged in a sexual relationship with SS, the fifteen-year-old sister of Appellant's then-wife. After Appellant's wife discovered the relationship, the couple divorced, with Appellant's now ex-wife receiving custody of their young daughter. During a later dispute over Appellant's visitation rights, Appellant's ex-wife reported his prior sexual relationship with SS to

Appellant's commanding officer, leading to an investigation by the Naval Criminal Investigative Service (NCIS).

After the NCIS investigation, which included an interview with SS in which she revealed that she had spent time in a mental health facility, the Government charged Appellant with one specification of sexual abuse of a child and one specification of sexual assault of a child, both under Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b (2012). A critical element of each charge was that the alleged misconduct occurred prior to SS's sixteenth birthday in July 2014. *See* Article 120b(h)(4), UCMJ (defining a child as "any person who has not attained the age of 16 years").

In parallel to the criminal investigation and proceedings, Appellant and his ex-wife continued their legal dispute over custody of their daughter. As part of those civil proceedings, SS sat for a deposition in which she discussed her prior sexual relationship with Appellant. During the deposition, SS disclosed that in August 2013, she voluntarily spent a week in a mental health facility after her high school administrators discovered she had engaged in self-harm. SS revealed at least part of the mental health diagnoses she received at the facility, her treatment plan during her stay, and the follow-up treatment plan she received when she was discharged.

Prior to his court-martial, Appellant sought discovery of any evidence that SS "sought or received mental health treatment" and copies of "S.S.'s medical records related to mental health and prescriptions"

from the period when SS was in the mental health facility through the start of Appellant's court-martial. The Government denied the request, partially on the basis that the requested information was protected by the psychotherapist-patient privilege provided in M.R.E. 513. In response, Appellant moved to compel production and in camera review of SS's mental health records. Appellant asserted that the requested information was "relevant to issues of suggestion, memory, and truthfulness" with respect to SS.

The military judge denied Appellant's motion to compel, holding that the documents sought by Appellant were protected by the psychotherapist-patient privilege under M.R.E. 513. The military judge further concluded that Appellant had not provided any evidentiary or legal basis to order production of the documents and perform in camera review.

At Appellant's court-martial, SS testified that she had engaged in self-mutilation and spent time in a mental health treatment facility for depression and anxiety in August 2013. SS stated that she started spending more time with Appellant in the months following her discharge from the mental health facility. SS described how Appellant starting sexually abusing her during those encounters, but she struggled to provide precise dates for when the abuse occurred. Although Appellant departed for deployment in February 2014, SS testified that the sexual abuse escalated when Appellant returned in April 2014.

Given the need for the Government to prove beyond a reasonable doubt that Appellant's alleged misconduct occurred before SS's sixteenth birthday in July 2014,

Appellant's defense counsel focused on SS's inability to provide specific dates for the incidents of abuse and assault during SS's cross-examination. SS repeatedly answered that she didn't know or was not sure when the events she described during her direct testimony occurred, a fact that Appellant's counsel highlighted during his closing arguments.

The members, sitting as a general court-martial, convicted Appellant of one specification of sexual abuse of a child but acquitted him of sexual assault of a child, both offenses under Article 120b, UCMJ. The members sentenced Appellant to confinement for five years and a dishonorable discharge. The convening authority approved the sentence.

Before the NMCCA, both Appellant and the Government argued that the military judge erred in holding that medical records that revealed SS's diagnoses and treatments were privileged under M.R.E 513. *Mellette*, 81 M.J. at 691. The NMCCA disagreed, holding both that the plain language of M.R.E. 513 protected such records and that it would be absurd to conclude otherwise. *Id.* at 692. The NMCCA further held SS had waived the privilege by discussing her mental health diagnoses and treatment, including her prescribed medications, with her family, with NCIS, and during her civil deposition. *Id.* at 693.[1]

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[1] Even if SS had not waived the privilege, the NMCCA held in the alternative that the military judge abused his discretion in concluding that Appellant had not shown, at the very least, that in camera review of the pertinent mental health records was constitutionally required to protect Appellant's due process and confrontation rights. *Mellette,* 81 M.J. at 694.

Having found error, the NMCCA then held that Appellant's lack of access to the requested information about SS's mental health diagnoses and treatments only prejudiced Appellant with respect to the post-deployment allegations, which were supported solely by SS's testimony. *Id.* at 695–96. Because strong corroborating evidence existed for the predeployment allegations, the NMCCA held that the error was harmless beyond a reasonable doubt with respect to those findings. *Id.* Accordingly, the NMCCA struck the words "on divers occasions" from Appellant's conviction for sexual abuse of a child and reduced Appellant's sentence to three years of confinement and a dishonorable discharge. *Id.* at 701.

This Court granted review of the following three issues:

> I. M.R.E. 513 extends the psychotherapist-patient privilege to a "confidential communication" between patient and psychotherapist or assistant. Did the lower court err by concluding diagnoses and treatment are also subject to the privilege, invoking the absurdity doctrine?
>
> II. Did the NMCCA depart from Supreme Court and CAAF precedent by not reviewing the evidence at issue—diagnoses and treatment, including prescriptions—in concluding: (1) the mental health evidence was both prejudicial and non-prejudicial; and (2) failure to produce it was harmless beyond a reasonable doubt where the unknown evidence could have negated the evidence the NMCCA claimed to be "overwhelming" evidence?

> III. Whether the Court of Criminal Appeals erred by holding that [SS] waived the psychotherapist-patient privilege.

*Mellette*, 82 M.J. at 13–14.

## II. Discussion

We granted review of three questions in this case, but our answer to the first question—whether the patient-psychotherapist privilege established by M.R.E. 513 protects a patient's diagnoses and treatments from disclosure—moots the remaining two. Because we conclude that such records are not privileged under M.R.E. 513, we do not reach the second or third questions presented.

### A. Standard of Review

This Court reviews questions regarding the scope of the patient-psychotherapist privilege established by the Military Rules of Evidence de novo. *United States v. Beauge*, 82 M.J. 157, 162 (C.A.A.F. 2022). When construing those rules, we apply the standard principles of statutory construction. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019). When the language of a rule is susceptible to only one interpretation, we enforce the rule according to its terms. *Id.* (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 6 (2000)). But when a rule's language is ambiguous, we interpret that language within the broader context of the rule. *Beauge*, 82 M.J. at 162.

When interpreting M.R.E. 513, we must also account for the Supreme Court's guidance that

"[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence," *Trammel v. United States*, 445 U.S. 40, 50 (1980) (alteration in original removed) (internal quotation marks omitted) (citation omitted), and our own view that "privileges 'run contrary to a court's truth-seeking function,'" *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)). The Supreme Court has further advised that evidentiary privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotation marks omitted) (citation omitted); *see also Jasper*, 72 M.J. at 280 (recognizing that privileges must be "narrowly construed").

**B. Military Rule of Evidence 513**

We begin our analysis, as we must, with the text of the rule. M.R.E. 513(a) states:

> 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 [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

By its terms, the rule protects "confidential communication[s]" between a patient and a psychotherapist "made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[2]

Although the first question presented asks whether "diagnoses and treatment are also subject to the privilege," that is not precisely the correct query. We have no doubt, and neither party disputes, that communications between a patient and a psychotherapist involving diagnoses and treatments are privileged and that a medical record could transcribe a communication in such a way to make it privileged. The critical question in this case is whether *other* evidence that does not qualify as a communication between a patient and a psychotherapist—such as a patient's routine medical records—are also protected by the rule. Essentially, the question before us is whether "communication[s]" in rule M.R.E. 513(a) should be interpreted narrowly to exclude medical records and other similar evidence that does not constitute a confidential communication or interpreted broadly to include all evidence that in some way reflects, or is derived from, confidential communications.

The Government argues that the plain language of M.R.E. 513(a) protects medical records that contain

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[2] More accurately, the rule protects such communications between a patient and "a psychotherapist *or an assistant to the psychotherapist*." M.R.E. 513(a) (emphasis added). To be clear, all references to communications with a psychotherapist in this opinion include communications to an assistant to the psychotherapist.

diagnoses and treatment, but we disagree. The phrase "communication made between the patient and a psychotherapist" does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist. We must begin with the assumption that the President's specific choice of the word "communication" in M.R.E. 513(a)—rather than broader nouns such as "documents," "information," or "evidence"—and the President's inclusion of the limiting phrase "made between the patient and a psychotherapist" have meaning. Otherwise, nothing would distinguish the language of M.R.E 513(a) from a hypothetical, alternative rule that simply protected "documents made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

The President has the authority, within the limits of the Confrontation Clause, to define the scope of the patient-psychotherapist privilege as broadly as he sees fit. If the President intended M.R.E. 513(a) to broadly protect all patient medical records, the President could have used express language that unambiguously reflected that intent. Indeed, other jurisdictions have done exactly that. In Florida, for example, the legislature expressly protected mental health patients' records and diagnoses:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or *records* made for the purpose of diagnosis or treatment of the patient's mental or emotional condition,

> including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. *This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.*

Fla. Stat. Ann. § 90.503(2) (West 2018) (emphasis added).[3] But here, the President chose a different path, including only confidential communications made between the patient and a psychotherapist with no mention of any other types of evidence.

The Government argues that, despite the specific language of M.R.E. 513(a), broader consideration of the entire rule makes clear that M.R.E. 513 protects all evidence that discloses a patient's diagnoses and treatment, regardless whether that evidence qualifies as a communication made between the patient and the psychotherapist. In support of this argument, the Government points to two provisions, M.R.E. 513(e)(2) and M.R.E. 513(b)(5). Again, we disagree. Neither provision overcomes the plain language of M.R.E. 513(a), especially given that we are required to narrowly construe the language of the rule. *Trammel*, 445 U.S. at 50; *Jasper*, 72 M.J. at 280.

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[3] *See also, e.g.*, Wyo. Stat. Ann. § 33-38-113(a) (1999) (preventing the disclosure of "confidential information, including information contained in administrative records"); 740 Ill. Comp. Stat. Ann. 110/10(a) (West 2017) (preventing the disclosure of a patient's "record or communications"), Ark. R. Evid. 503(b) (preventing the disclosure of a patient's "medical records or confidential communications").

M.R.E. 513(e) establishes a procedure to determine the admissibility of patient records or communications. Because the rule authorizes a military judge to examine the proffered evidence in camera "if such examination is necessary to rule on the production or admissibility of *protected* records or communications," M.R.E. 513(e)(3) (emphasis added), the Government argues that the patient-psychotherapist privilege must extend to all patient records. We disagree. Military Rule of Evidence 513(e)(3)—the only provision in M.R.E. 513(e) that uses the word "protected"—does nothing more than acknowledge the well-established rule that documents that are not themselves communications may be partially privileged to the extent that those records memorialize or otherwise reflect the substance of privileged communications. *See, e.g., Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962) ("Documentary evidence of confidential communications is necessarily privileged as much as testimonial evidence."). It does not mean that every document or record related to the diagnosis or treatment of a patient's mental health is privileged.

Similarly, M.R.E. 513(e)(2) requires a military judge to conduct a hearing before ordering the production or admission of "evidence of a patient's records or communication," defined as "testimony of a psychotherapist, or assistant to the same, or patient records *that pertain to* communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition." M.R.E. 513(b)(5) (emphasis added). The Government argues that because all patient records "pertain to communications"

between the patient and the psychotherapist, they must all be included within the scope of M.R.E. 513(a). Again, we disagree. We interpret these provisions as simply recognizing that to the extent testimonial or documentary evidence reveals what M.R.E. 513(a) expressly protects—confidential communications—they are also partially protected; not, as the Government argues, that the entirety of every patient record is necessarily included within the patient-psychotherapist privilege.

The Government also argues that we should interpret M.R.E. 513(a) as protecting all patient records related to the diagnosis or treatment of a patient's mental health because the textually similar lawyer-client privilege established by M.R.E. 502 protects attorney records. This argument is fatally flawed because it disregards the fact that the attorney work-product privilege is separate and distinct from the attorney-client privilege. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975). As defined by the Federal Rules of Evidence, attorney-client privilege is "the protection that applicable law provides for confidential attorney-client communications," while the work-product protection is "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial." Fed. R. Evid. 502(g)(1)–(2).

This distinction between communications and tangible materials (i.e., records and other nontestimonial evidence), is also reflected in the *Manual for Courts-Martial, United States*. Although the military's attorney-client privilege protects

"*confidential communications* made for the purpose of facilitating the rendition of professional legal services," M.R.E. 502(a) (emphasis added), an entirely separate provision—Rule for Courts-Martial (R.C.M.) 701(f)—protects attorney-work product. That provision expressly shields from disclosure or production "notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." *Id*. Thus, the existence of an entirely separate provision from M.R.E. 502 protecting attorney-work product—and the lack of any parallel provision establishing a psychotherapist work-product privilege—undermines the Government's argument that M.R.E. 513(a) protects patient records.

Finally, the Government argues that a psychotherapist's diagnoses and treatment of a patient should be protected by M.R.E. 513(a) in the same way that an attorney's legal advice is protected by the attorney-client privilege. This argument fails because it conflates the content of communications with underlying facts. *See* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 5:1 (2014) ("An important but commonly misunderstood limitation of the privilege is that it does not protect the information contained within communications to the attorney."); *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .").

As explained by the United States Court of Appeals for the Second Circuit in a case where the government

prosecutors sought answers from witnesses to a series of factual questions related to work performed by the corporate defendant's employees at the direction of their attorneys in preparation for litigation:

> Although an attorney-client communication is privileged and may not be divulged, the underlying information or substance of the communication is not, as appellants incorrectly believe, so privileged. Further, the remaining 19 questions seek underlying factual information to which the prosecutor is clearly entitled. The factual information is not protected by the attorney-client privilege just because the information was developed in anticipation of litigation.

*In re Six Grand Jury Witnesses*, 979 F.2d 939, 945 (2d Cir. 1992) (citation omitted). Even though the answers to the prosecutor's questions might reveal the substance of the legal advice provided by the defendant's attorneys, the government was still entitled to ask the recipients of the legal advice specific factual questions, such as:

- What analysis did you perform?
- What records did you review?
- What conclusions did your draw?
- What information did you give anyone other than an attorney?
- When did you give them this information?

*Id*. at 946 (Appendix A). This case demonstrates the fundamental principle that the attorney-client privilege prevents the disclosure of what an attorney advised a client to do, but it does not prevent the disclosure of what the client actually did or did not do in response to that advice.

Accordingly, the Government is incorrect in its assertion that M.R.E. 513(a) must extend "not just to confidential communications . . . , but also to the underlying diagnoses and treatments." Brief for Appellee at 22, *United States v. Mellette*, No. 21-0312 (C.A.A.F. Dec. 20, 2021). A patient's diagnosis and the treatment that a patient received to care for those conditions are "underlying facts," *Upjohn Co.*, 449 U.S. at 395, not confidential communications. Although M.R.E. 513(a) prevents a witness from being required to disclose the substance of the communications between a patient and a psychotherapist, it does not extend to all evidence that might reveal a patient's diagnoses and treatments. The NMCCA erred in holding otherwise.

It is worth emphasizing that this conclusion is not based on our views on the proper scope of the patient-psychotherapist privilege or a belief that the benefits of protecting a patient's diagnoses and treatment from disclosure fail to "transcend[] the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotation marks omitted) (citation omitted). Instead, our analysis rests solely on the specific text of M.R.E. 315(a) and the Supreme Court's mandate—and our own precedent—that states that evidentiary

privileges "must be strictly construed." *Trammel,* 445 U.S. at 50; *see Jasper*, 72 M.J. at 280. As the promulgator of the Military Rules of Evidence, the President has both the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy. Unless the President's decision with respect to that balance contravenes a constitutional or statutory limitation, we must respect that choice.

### C. Remaining Issues

Because we hold that the NMCAA erred when it concluded that M.R.E. 513(a) protects all evidence of a mental health patient's diagnoses and treatments from disclosure, we need not decide whether SS waived the privilege with respect to those topics or whether the NMCCA erred by performing its prejudice analysis without examining the undisclosed evidence.

### D. Remedy

Before trial, Appellant filed a motion to compel production and in camera review of "S.S.'s mental health records: to include the dates visited said mental health provider, the treatment provided and recommended, and her diagnosis." These documents were not protected from disclosure by M.R.E. 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." *Mellette*, 81 M.J. at 694 (internal quotation marks omitted) (citation omitted). To the extent that these documents existed—and were otherwise admissible under the

Military Rules of Evidence and the Rules for Courts-Martial—they should have been produced or admitted subject to the procedural requirements of M.R.E. 513(e).

The military judge's error may have denied Appellant from reviewing relevant and material evidence before his court-martial. Without any way of knowing whether any such evidence existed, or if so, how important that evidence might have been to Appellant's defense, we decline to decide whether Appellant was prejudiced by this error. Instead, we remand to the NMCCA to order a *DuBay* hearing for the purpose of obtaining any records that were responsive to Appellant's original motion to compel and determining whether those records should have been provided to Appellant prior to his court-martial.[4] Once all the responsive, relevant, and admissible evidence has been identified, the lower court shall determine whether the military judge's original denial of Appellant's motion to compel materially prejudiced Appellant's defense pursuant to its authority under Article 66, UCMJ, 10 U.S.C. § 866 (2012). Following these proceedings, Article 67, UCMJ, 10 U.S.C. § 867 (2012), shall apply.

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[4] *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). This may require the *DuBay* military judge to conduct an in camera review, issue appropriate protective orders, and place portions of the record under seal as necessary. *See* R.C.M. 701(g); R.C.M. 1113.

## III. Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The record is returned to the Judge Advocate General of the Navy for remand to the lower court for further proceedings consistent with this opinion.

Judge MAGGS, with whom Judge SPARKS joins, dissenting.

The first assigned issue, and the only question that the Court decides in this appeal, is whether the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) erred in concluding that the psychotherapist-patient privilege established by Military Rule of Evidence (M.R.E.) 513 covers diagnoses and treatments. This issue is difficult and important. Indeed, it has divided the Courts of Criminal Appeals. *Compare H.V. v. Kitche*n, 75 M.J. 717, 719 (C.G. Ct. Crim. App. 2016) (holding that the privilege covers diagnoses and treatments), *and United States v. Mellette*, 81 M.J. 681, 692 (N-M. Ct. Crim. App. 2021) (same), *with United States v. Rodriguez*, No. ARMY 20180138, 2019 CCA LEXIS 387, at *7–8, 2019 WL 4858233, at *4 (A. Ct. Crim. App. Oct. 1, 2019) (unpublished) (holding that the privilege does not cover diagnoses and treatments).

In its thoughtful opinion, the Court determines, with some qualifications, that the privilege does not extend to diagnoses and treatments and holds that the NMCCA erred in deciding otherwise. My analysis is different, leading me to conclude that the privilege

covers diagnoses and treatments to the extent that they reveal what a patient told a psychotherapist or a psychotherapist told a patient for the purpose of facilitating the diagnosis and treatment of the patient's mental condition. I therefore do not believe that the military judge or the NMCCA erred in their resolution of this issue.

The Court's conclusion with respect to the first assigned issue makes it unnecessary for the Court to reach the other assigned issues in this case. Because I disagree with the Court's resolution of the first assigned issue, I must go further and also address the other assigned issues. For the reasons that I present below, although I disagree with some aspects of the NMCCA's opinion in this case, I would affirm that court's judgment. *Mellette*, 81 M.J. at 701.

## I. Background

Prior to the trial in this case, Appellant moved for production of the victim's mental health records, requesting information about any "treatment provided and recommended, and her diagnosis."[1] Appellant sought these records for their potential value in cross-examining the victim when she testified against him with respect to the sole specification at issue in this appeal.[2] Appellant asserted that this evidence would be

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[1] Appellant also sought records concerning the dates that the victim visited her mental health provider, but the production of records concerning these dates is not at issue in this appeal.

[2] The sole specification at issue in this appeal alleged that Appellant, in violation of Article 120b, Uniform Code of Military

"relevant to issues of suggestion, memory, and truthfulness."

The military judge, however, denied Appellant's motion, ruling that the psychotherapist-patient privilege in M.R.E. 513(a) shielded the records from discovery. Relying on the opinion of the United States Coast Guard Court of Criminal Appeals (CGCCA) in *H.V. v. Kitchen*, 75 M.J. at 719, the military judge further ruled that even if the records were not privileged, they were not discoverable under R.C.M. 703 because Appellant had failed to show that they were "relevant and necessary." The military judge reasoned that Appellant had no basis for believing that any nonprivileged records of the kind he sought existed or that such records would not be merely cumulative of information that he already had. Indeed, the military judge further ruled that there was no evidence that the victim might be suffering from a condition relevant to issues of "suggestion, memory, and truthfulness." The military judge accordingly concluded that "the defense [was] engaged in a 'fishing expedition.'"

The NMCCA partially agreed and partially disagreed with the military judge's ruling. *Mellette*, 81 M.J. at 688, 691–93. The NMCCA's analysis consisted

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Justice (UCMJ), 10 U.S.C. § 920b (2012), "did at or near Trenton, Florida, on divers occasions, between on or about August 2013 to on or about 12 July 2014, commit lewd acts upon [the victim], a child who had not attained the age of 16 years."

of four steps relevant to this appeal.[3] First, the NMCCA held that the psychotherapist-patient privilege in M.R.E. 513(a) covers "diagnoses and treatment, including prescribed medications" *Id.* at 691–92. Second, the NMCCA held that the victim waived this privilege under M.R.E. 510(a) by making voluntary disclosures of some of her diagnoses and treatments. *Id.* at 693. Third, the NMCCA held that the military judge abused his discretion in concluding that the requested medical records were not "relevant and necessary" under R.C.M. 703 given that other diagnoses "could impact her credibility" and medications could have a "potential for adverse effect on memory." *Id.* Fourth, the NMCCA held that the military judge's error caused material prejudice to the Appellant by limiting how effectively he could challenge the victim's allegations. *Id.* at 695–96. The NMCCA redressed the error by excepting from the specification at issue the words "on divers occasions," but it otherwise affirmed the finding of guilt. *Id.* at 696. In so doing, the NMCCA reasoned that other evidence corroborated the victim's testimony with respect to at least one occurrence of the charged offense. *Id.*

In this appeal, Appellant challenges the first and fourth steps of the NMCCA's reasoning. With respect to the first step, Appellant contends that the NMCCA erred in concluding that the psychotherapist-patient privilege in M.R.E. 513(a) extends to diagnoses and treatments. With respect to the fourth step, Appellant

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[3] The NMCCA addressed a possible alternative to the second and third steps but discussion of this alternative is not relevant to this appeal.

argues that the NMCCA erred in conducting its prejudice analysis because the NMCCA did not conduct an in camera review of the victim's mental health records to determine their content. Appellant asks this Court to set aside the NMCCA's decision and remand for a *DuBay* hearing with respect to the issue of prejudice. *See United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967).

The Government, in contrast, generally supports the NMCCA's analysis. But the Government asserts that if we choose to revisit the second step of the NMCCA's analysis, we should hold that the NMCCA erred in concluding that the victim completely waived her psychotherapist-patient privilege. In any event, the Government argues that this Court should affirm the adjudged and approved findings and sentence.

In my view, the NMCCA chose the correct four-step framework for deciding this case and its decision should be affirmed. I also generally agree with the NMCCA's reasoning in these steps. But that said, I would qualify the NMCCA's conclusions as follows:

With respect to the NMCCA's first conclusion, I agree that the psychotherapist-privilege in M.R.E. 513(a) covers diagnoses and treatments *but only to the extent that they reveal confidential communications between the patient and psychotherapist that were made for the purpose of diagnosing or treating the patient's mental condition.*

With respect to the NMCCA's second conclusion, I agree that the victim in this case waived her psychotherapist-patient privilege *but only with respect*

*to the communications containing the information that she revealed.*

With respect to the NMCCA's third conclusion, I agree that the military judge erred in denying production of the victim's medical records *but only to the extent that he denied production of the narrow class of records that contained communications about diagnoses and treatments with respect to which the victim previously had waived her privilege.*

With respect to the NMCCA's fourth conclusion, the qualifications above cause my prejudice analysis to differ somewhat from the analysis of the NMCCA. Unlike the NMCCA, I conclude that any error did not prejudice Appellant. Having reached that determination, I conclude that regardless of whether the NMCCA's remedial measure (i.e., excepting the words "on divers occasions" from the specification at issue) was required for addressing an error with respect to M.R.E. 513(a), no further remedy is necessary.

## II. Standards of Review

Several different standards of review apply to this case. This Court must uphold the military judge's findings of fact unless they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Issues about the meaning of evidentiary rules such as M.R.E. 510(a) and M.R.E. 513(a) are questions of law that this Court must decide de novo. *United States v. Matthews*, 68 M.J. 29, 35–36 (C.A.A.F. 2009). This Court reviews a military judge's denial of production of evidence under M.R.E. 703(e)(1) for abuse

of discretion. *United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995). Finally, "[w]e review prejudice determinations under a de novo standard of review." *United States v. Ward*, 74 M.J. 225, 227 (C.A.A.F. 2015) (citing *United States v. Diaz*, 45 M.J. 494, 496 (C.A.A.F. 1997)).

## III. Discussion

Following the framework of the NMCCA's opinion, I address the following issues: (A) the application of the psychotherapist-patient privilege in M.R.E. 513(a) to diagnoses and treatments; (B) the victim's possible waiver of the psychotherapist-patient privilege under M.R.E. 510(a); (C) Appellant's right to production of records under R.C.M. 703; and (D) the prejudice to Appellant under Article 59(a), UCMJ, 10 U.S.C. § 859(a).

### A. Application of the Psychotherapist-Patient Privilege in M.R.E. 513(a) to Diagnoses and Treatments

M.R.E. 513(a) creates an evidentiary privilege that protects from disclosure certain communications between a patient and a psychotherapist.[4] The rule states in relevant part:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the

[4] M.R.E. 513(b)(2) defines the term "[p]sychotherapist" in part to include "a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed . . . to perform professional services."

> patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

M.R.E. 513(a).

This Court interprets the M.R.E., including those rules establishing privileges, according to their plain meaning. *Matthews*, 68 M.J. at 38. Although the Supreme Court strictly construes federal common law privileges to limit their application, *Trammel v. United States*, 445 U.S. 40, 50 (1980), this practice has no clear application to the interpretation of codified privileges. 25 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5586, at 715 (1989) (explaining that *Trammel* does not affect the meaning of privileges codified in statutes). Consistent with this view, this Court has not construed privileges in the M.R.E. to be more limited than what their text provides. *See United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007) (declining to create an exception to M.R.E. 504 by departing from the rule's text notwithstanding what the Supreme Court said in *Trammel*).

In this case, the parties' dispute over the meaning of M.R.E. 513(a) is simply summarized. Appellant argues that the psychotherapist-patient privilege covers "communication[s] . . . made *for the purpose of facilitating diagnosis or treatment*" but does not extend to the diagnosis and treatment themselves. Relying on the opinion of the United States Army Court of Criminal Appeals in *Rodriquez*, 2019 CCA LEXIS 387, at *7–8, 2019 WL 4858233, at *4, Appellant contends

that the plain meaning of M.R.E. 513's text supports this conclusion. The Government responds that diagnoses and treatments are privileged. Quoting the CGCCA's opinion in *H.V. v. Kitchen*, 75 M.J. at 719, the Government argues that "'diagnoses and the nature of treatment necessarily reflect, at least in part, the patient's confidential communications to the psychotherapist' because '[m]ost diagnoses of mental disorders rely extensively on what the patient has communicated to the psychotherapist.'" (Alteration in original.) The Government further contends that diagnoses and treatment are part of the confidential communications that a psychotherapist makes to facilitate treatment.

In my view, the text of M.R.E. 513 supports the view of the Government and the *H.V. v. Kitchen* opinion. M.R.E. 513(a) grants a patient a privilege to prevent anyone from "disclosing" a confidential communication between the patient and a psychotherapist that was made for the purpose of facilitating diagnosis or treatment of the patient's mental condition. Key to interpreting this provision is a careful consideration of how someone might "disclose" a covered communication. In general, the verb "to disclose" means "to reveal in words (something that is secret or not generally known)." *Merriam–Webster Unabridged Dictionary* https://unabridged.merriam-webster.com/unabridged/disclose (last visited July 26, 2022). The central question here is whether M.R.E. 513(a) addresses only complete and verbatim disclosures of covered communications or instead addresses any disclosures of such communications.

M.R.E. 513(a) certainly empowers a patient to prevent a complete and verbatim disclosure of a covered communication. For example, the patient could prevent the psychotherapist from releasing either the original copy or a photocopy of a confidential written communication between the psychotherapist and the patient that was made for the purpose of facilitating the diagnosis or treatment of the patient's condition. Similarly, if the covered communication was made orally, the patient could prevent the psychotherapist from releasing a video or audio recording or a transcription of the communication. Such acts would be disclosures within the meaning of M.R.E. 513(a) because they would reveal the covered communications.

But R.C.M. 513(a) does not qualify the term "disclosing" in such a way that the privilege only allows a patient to prevent someone from disclosing a complete and verbatim record of a covered communication. A partial or nonverbatim disclosure is still a disclosure so long as it reveals some of what would otherwise be secret. Accordingly, a patient may use the privilege in R.C.M. 513(a) to prevent the psychotherapist from disclosing notes of what was discussed during covered communication, even if those notes are not necessarily a complete and verbatim transcript of what was said. *See United States v. Beauge*, 82 M.J. 157, 159–60 (C.A.A.F. 2022) (holding that the military judge did not abuse his discretion in denying the appellant's motion for in camera review of the victim's psychiatric records including "the psychotherapist's notes"). Similarly, the privilege allows a patient to prevent a psychotherapist from testifying about what he or she remembered was said

in a covered communication, even if the psychotherapist could not necessarily recollect the exact words that were uttered. *See United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006) (assuming that a psychotherapist's testimony was covered by R.C.M. 513(a) but determining that it fell within the exceptions in M.R.E. 513(d)(4) and (6)).

Much like a nonverbatim summary or recollection, a diagnosis or treatment also may provide some evidence of what a patient confidentially told the psychotherapist or what the psychotherapist confidentially told the patient for the purpose of treating the patient's mental condition. As a U.S. district court explained in *Stark v. Hartt Transportation Systems, Inc.*, "[a] person's mental health diagnoses and the nature of his or her treatment inherently reveal something of the private, sensitive concerns that led him or her to seek treatment and necessarily reflect, at least in part, his or her confidential communications to the psychotherapist." 937 F. Supp. 2d 88, 91 (D. Me. 2013); *see also H.V. v. Kitchen*, 75 M.J. at 719 (citing and following *Stark*). Or as another U.S. district court explained in *United States v. White*, "[a] party armed with knowledge of a patient's diagnosis will be able to make an educated guess about the substance of the communications that gave rise to the diagnosis." Criminal Action No. 2:12-cr-00221, 2013 U.S. Dist. LEXIS 49426, at *23, 2013 WL 1404877, at *7 (S.D.W.Va. Apr. 5, 2013), *rev'd sub nom. Kinder v. White*, 609 F. App'x 126, 131 (4th Cir. 2015) (agreeing with the trial court that the records of a diagnosis were privileged but overruling its determination that an exception to the privilege

applied). In other words, disclosing a diagnosis or a treatment may reveal what the patient said to the psychotherapist or what the psychotherapist said to the patient for the purpose of facilitating treatment of the patient's mental condition.

Accordingly, I would hold that a record of a patient's diagnosis is privileged to the extent that its disclosure would reveal what the patient confidentially told the psychotherapist or what the psychotherapist confidentially told the patient for the purpose of diagnosing or treating the patient's mental condition. For example, a record containing a diagnosis of anxiety or depression would be privileged to the extent that disclosure of the diagnosis reveals, even if only indirectly, that the patient told the psychotherapist that the patient was anxious or depressed for the purpose of obtaining treatment. Likewise, I would hold that a treatment is privileged to the extent that its disclosure would reveal what the psychotherapist confidentially told the patient or what the patient confidentially told the psychotherapist for the purpose of diagnosing or treating the patient's mental condition. For example, a record showing that the psychotherapist prescribed a regimen of counseling or medication would be privileged to the extent that disclosing the treatment regimen provides some evidence about what the psychotherapist confidentially told the patient for the purpose of treating the patient's mental condition.[5]

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[5] Communications from a psychotherapist to a patient about a diagnosis or treatment might be beneficial or even required. After observing that "psychiatrists often have to break difficult news to

Similar questions about what constitutes a disclosure have arisen with respect to other privileges. A leading treatise notes that "[a]n important question about the power of the client to prevent disclosure of attorney-client confidences . . . is whether the privilege bars circumstantial as well as direct evidence of attorney-client communications." 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5489, at 424 (1986). Some courts have reasoned, correctly in my view, that a "lawyer's papers should be privileged if they would be circumstantial evidence of the client's communication" under the attorney-client privilege. *Id.* § 5491, at 459; *see also* 24 Charles Alan Wright, Kenneth W. Graham, Jr. & Ann Murphy at 318 n.89 (1986 & Supp. 2022) (citing cases). Likewise, although the government deliberations privilege generally does not cover portions of documents that contain only facts, the privilege will cover factual "material [that] is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

In this case, as explained above, Appellant moved for production of the victim's mental health records,

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patients," the author of one peer-reviewed study discusses both the "negative and positive effects of disclosing the diagnosis to patients." Michelle Cleary et al., *Delivering Difficult News in Psychiatric Settings*, 17 Harv. Rev. Psychiatry 315, 319 (2009). Such disclosures, the author asserts, may facilitate treatment by providing patients the benefits of "increased insight into their symptoms, ability to access treatment, and plans for the future." *Id.*

requesting information about any "treatment provided and recommended, and her diagnosis." To the extent that any such records containing a diagnosis and treatment would reveal what the victim confidentially told her psychotherapist or the psychotherapist confidentially told the victim for the purpose of facilitating her diagnosis and treatment, they are privileged. Such records are not discoverable.

But what about possible records containing diagnoses and treatments that somehow disclose nothing about the confidential communications between the victim and her psychotherapist? The answer is twofold. First, if any such records somehow existed, they would not be privileged under R.C.M. 513. Second, as the military judge recognized, they still would not necessarily be discoverable. Under R.C.M. 703(e)(1), the accused "is entitled to the production of evidence which is relevant and necessary." To obtain an order of production under this rule, the accused must show more than a mere prospect or possibility that a production order will yield relevant and necessary evidence. "[T]he defense, as the moving party, . . . [is] required as a threshold matter to show that the requested material exist[s]." *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

In this case, the military judge found that "the defense has offered some evidence that the records might include an additional diagnosis." But the military judge concluded that the defense "has offered no factual basis upon which to conclude the records would yield evidence admissible under M.R.E. 513." I agree with the military judge's assessment. Appellant

has not provided any reason for this Court to believe that the victim's mental health records contain any information about diagnoses and treatments *that do not reveal what the victim confidentially told her psychotherapist or what the psychotherapist confidentially told the victim for the purpose of facilitating her diagnosis or treatment.* And even if the records somehow might exist, I agree with the military judge's assessment that such records would not be "reasonably segregable from records of communications between [the victim] and her mental health providers." Appellant in this case has not suggested any method by which a military judge could decide whether a diagnosis or treatment provides evidence of their confidential communications.[6] For these reasons, Appellant has not shown that he is entitled to the records or even an in camera review of the records.

B. Waiver of the Privilege Under M.R.E. 510(a)

Under M.R.E. 510(a), a party may waive the protection of the psychotherapist-patient privilege. This provision states in relevant part:

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or

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[6] Perhaps in other cases, the record might contain evidence that would allow a military judge to make such a decision. For example, a psychotherapist might testify that he or she made a diagnosis without relying on confidential communications with the patient for the purpose of treating the patient's mental condition.

> consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.

M.R.E. 510(a). Appellant argues that the victim waived whatever privilege she may have had by voluntarily revealing numerous details about her mental health in a deposition, in an interview with agents of the Naval Criminal Investigative Service, and in an interview with trial counsel. The Government responds that when the victim disclosed some of her diagnoses and treatments, she waived her privilege *only for* "that particular communication" between her and her psychotherapist that "included the diagnoses and treatments that she disclosed."

I agree with the Government because its argument accords with the text of both M.R.E. 510(a) and M.R.E. 513(a). Although M.R.E. 510(a) states a general waiver rule applicable to any disclosure of a privileged "matter or communication," M.R.E. 513(a) provides a privilege only for "communication[s]" not for "matters." Thus, the test for waiver of the psychotherapist-patient privilege in M.R.E. 513(a) is not whether the patient talked about her mental health in general, but is instead whether she disclosed a "significant part" of a particular privileged "communication." *See Custis*, 65 M.J. at 371 (holding that under M.R.E. 510(a), the appellant did not waive the spousal privilege because a "comment to his coworker did not relay either the actual conversation between Appellant and his wife or the substance of the privileged communications between Appellant and his wife").

The NMCCA appears to have missed this distinction when it concluded that the victim waived her psychotherapist-patient privilege when she "openly discussed her *mental health matters* with multiple people on multiple occasions." *Mellette,* 81 M.J. at 693 (emphasis added). The NMCCA instead should have determined whether particular disclosures by the victim waived her privilege with respect to particular communications. In my view, because the NMCCA did not follow this approach, it overstated the victim's waiver of her privilege in this case.

Under M.R.E. 510(a), when the victim disclosed evidence of her diagnosis and treatment for two mental health conditions (hereinafter the "two disclosed conditions"), she waived the privilege over her psychotherapist's communications to her about the diagnoses and treatments with respect to these two disclosed conditions. The victim, however, did not waive her privilege over other communications—including other communications that might have led to additional diagnoses and treatments. As discussed immediately below, this important distinction affects the analysis of the necessity of producing records containing communications for which the privilege was waived.

C. Production of Records Under R.C.M. 703(e)(1)

Under R.C.M. 703(e)(1), a "party is entitled to the production of evidence which is relevant and necessary." Under R.C.M. 703(f), an accused seeking production of an item of evidence must "include a description of [the] item sufficient to show its relevance and necessity." The military judge, in my view, did not

abuse his discretion in concluding that Appellant could not meet these requirements in seeking records of diagnoses and treatments for possible conditions other than the two that the victim had disclosed. Although Appellant "offered some evidence that the [psychotherapist's] records *might* include an additional diagnosis," the military judge concluded that the defense "has offered no factual basis upon which to conclude the records would yield evidence admissible under M.R.E. 13." *See Rodriguez*, 60 M.J. at 246 (holding that, where the appellant "did not carry his burden as the moving party to demonstrate that the [evidence] he requested existed," he could not show it was relevant or necessary). To the extent the NMCCA ruled otherwise, I disagree.

But in my view, the military judge did abuse his discretion in denying production of records containing diagnoses and treatments for the two disclosed conditions. These records were not privileged because the victim waived her privilege with respect to them. And even if such records would be mostly cumulative, I agree with the NMCCA that they were still subject to production under R.C.M. 703, to "confirm [the victim's] stated diagnoses" and "prescribed medications, not all of which she could remember the names of." *Mellette*, 81 M.J. at 693.

D. Prejudice Under Article 59(a), UCMJ

In the foregoing discussion, I have concluded that the military judge abused his discretion in not ordering the production of records concerning the victim's diagnoses and treatments with respect to two disclosed conditions. The final question is whether this abuse of

discretion materially prejudiced Appellant under Article 59(a), UCMJ. I conclude that it did not.

When assessing prejudice for nonconstitutional errors, this Court weighs "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks omitted) (citations omitted). Here, although the first two factors do not strongly favor either party, I do not believe the materiality and quality of the evidence are such that the error could have substantially impacted the findings. As explained above, Appellant already knew from the victim's own statements that she had been diagnosed with the two disclosed conditions and had received treatments for them. Her mental health records might have provided confirmation of what the victim disclosed. But the record of trial provides no suggestion that having such mental health records would have benefitted Appellant at trial.

After the victim testified, trial defense counsel cross-examined and then recross-examined her. During these cross-examinations, trial defense counsel never asked the victim about her two disclosed conditions. Unless trial defense counsel erred (which Appellant has not alleged), then the most reasonable inference is that trial defense counsel believed that the two disclosed conditions were not "relevant to issues of suggestion, memory, and truthfulness." And if they are not so relevant, then I cannot see how additional or

confirmatory communications about those two disclosed conditions would have made a difference.

The NMCCA believed that there was prejudice but that the appropriate remedy for addressing the prejudice was to except from the specification at issue the words "on divers occasions."[7] Because I would not have awarded any remedy for the failure to produce the medical records, I easily conclude that Appellant is not entitled to any additional remedy.

## IV. Conclusion

For the foregoing reasons, I would affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals.

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[7] The NMCCA also based its decision to except this language because some of the evidence purporting to support it was improper opinion testimony. *Mellette*, 81 M.J. at 698.

## APPENDIX B

**United States Court of Appeals**
**for the Armed Forces**
**Washington, D.C.**

**USCA Dkt. No. 21-0312/NA**
**Crim.App. No. 201900305**

**[Filed: September 13, 2022]**

| | |
|---|---|
| United States, | ) |
| Appellee | ) |
| | ) |
| v. | ) |
| | ) |
| Wendell E. Mellette, Jr., | ) |
| Appellant | ) |
| | ) |

**O R D E R**

On consideration of Patient/Victim S.S.'s renewed motion to intervene, petition for clarification, petition for reconsideration, and motion to file a substituted petition for reconsideration, it is, by the Court, this 13th day of September, 2022,

ORDERED:

That the motion to intervene is denied; and

That the petition for clarification, petition for reconsideration, and motion to file a substituted

petition for reconsideration are dismissed for lack of jurisdiction.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Wester)
Appellate Government Counsel (Marden)
Amicus Curiae (Coote)

## APPENDIX C

*This opinion is subject to administrative correction before final disposition.*

**United States Navy-Marine Corps**
**Court of Criminal Appeals**

**No. 201900305**

**[Filed: May 14, 2021]**

Before
GASTON, STEWART, and HOUTZ
Appellate Military Judges

| | |
|---|---|
| **UNITED STATES** | ) |
| *Appellee* | ) |
| | ) |
| **v.** | ) |
| | ) |
| **Wendell E. MELLETTE, Jr.** | ) |
| Electrician's Mate (Nuclear) First Class (E-6), U.S. Navy | ) |
| *Appellant* | ) |
| | ) |

Decided: 14 May 2021

Appeal from the United States Navy-Marine Corps
Trial Judiciary

Military Judge:
Warren A. Record

Sentence adjudged 16 August 2019 by a general court-martial convened at Naval Air Station Jacksonville, Florida, consisting of officer and enlisted members. Sentence in the Entry of Judgment: confinement for five years and a dishonorable discharge.

For Appellant:
*Lieutenant Gregory R. Hargis, JAGC, USN*
*Lieutenant Michael W. Wester, JAGC, USN*

For Appellee:
*Lieutenant Commander Jeffrey S. Marden, JAGC, USN*
*Major Kerry E. Friedewald, USMC*

Senior Judge GASTON delivered the opinion of the Court, in which Judges STEWART and HOUTZ joined.

**PUBLISHED OPINION OF THE COURT**

GASTON, Senior Judge:

Appellant was convicted, contrary to his plea, of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b (2012), for committing sexual contact upon his 15-year-old sister-in-law.

He asserts six assignments of error [AOEs], which we renumber as follows: (1) the military judge abused his discretion by denying a Defense motion for in camera review and production of the victim's mental health diagnoses, treatment, and prescribed medications; (2) the military judge abused his discretion by allowing the Government to admit expert

testimony that Appellant fit the profile of a perpetrator who grooms children for sex; (3) the evidence is legally and factually insufficient to support his conviction; (4) the military judge committed plain error by allowing the victim to recommend a specific sentence in her unsworn victim impact statement; (5) the record of trial is incomplete because the military judge failed to attach four enclosures of a Defense motion;[1] and (6) the findings and sentence should be set aside under the cumulative error doctrine.

We find merit in Appellant's first, second, and fourth AOEs, order some of the language stricken from the specification, affirm the finding as to the remaining language, and reassess the sentence.

## I. BACKGROUND

In August 2013, Stacy,[2] the 15-year-old sister of Appellant's then-wife, Ms. Mitchell, underwent a week of inpatient mental health treatment for ongoing depression and anxiety, which had resulted in her cutting herself. Upon discharge, she was prescribed Prozac, continued receiving professional counseling for about a year, and remained on Prozac and other medications, the side effects of which included causing her nightmares.

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[1] As we have granted the Government's motion to attach the missing enclosures to the record, we find this AOE to be without merit. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

A couple of months after Stacy's discharge from the mental health facility, Appellant started taking on a more big-brotherly role toward her, having one-on-one conversations with her, and taking her on rides in his truck to get ice cream or run errands. During these rides Appellant began placing his hand on Stacy's thigh and her upper back between her shoulders, and on one occasion slid his hand down and undid her bra through her shirt. On an occasion in the home where they both lived with Ms. Mitchell and Stacy's parents, he asked Stacy to walk over to look at something on his computer or phone and then touched her back, thigh, and buttocks.

When Appellant deployed on his submarine from February to April 2014, Stacy sent him provocative emails telling him things like "when you were touching me, I wanted more"[3] and asking him what he would think if she told him she wanted "to f[***]" him.[4] Stacy's emails were intercepted by the submarine's email monitoring system, and Appellant was confronted about them by his chain of command. Appellant explained that the emails were from his wife's little sister, that she was infatuated with him, and that the comments related to him innocently placing his hand on her shoulder. His command had him email Stacy instructing her to stop emailing him, and he also sent an email to Ms. Mitchell informing her about the situation.

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[3] Pros. Ex. 9.

[4] Pros. Ex. 6.

Nevertheless, Appellant told a friend and colleague aboard the submarine that he was contemplating doing what Stacy's email suggested—i.e., having sex with her—and at some point after he returned from deployment, he resumed his one-on-one interactions with Stacy, which became more overtly sexual. He kissed her; touched her thighs, buttocks, and vaginal area; commented on her buttocks and the size of her breasts; and asked, coarsely, whether she was aroused. Eventually, he began having vaginal intercourse with her, and did so on a number of occasions.

In mid-February 2015, Ms. Mitchell caught Appellant kissing Stacy. When confronted, Appellant denied they were having sex. Around this time, the local Department of Children and Family Services [DCF] sent someone to Stacy's house to investigate a report of an inappropriate relationship made by Stacy's boyfriend, whom Stacy had told, along with her two closest female friends, about her relationship with Appellant. When questioned by DCF, Stacy denied anything had happened between her and Appellant.

Appellant and Ms. Mitchell separated soon after his relationship with Stacy came to light, and they divorced in 2016. Custody of their daughter, Christine, was awarded to Ms. Mitchell with visitation rights to Appellant. In 2018, Appellant successfully petitioned for a modification of the custody arrangement to enable Christine to visit him in Guam, where he was then stationed. When Ms. Mitchell subsequently refused to allow Christine to be picked up for a scheduled visitation per the custody arrangement, Appellant filed for Ms. Mitchell to be held in contempt of court.

In response, Ms. Mitchell went with her (and Stacy's) mother to Appellant's commanding officer and reported Appellant's inappropriate relationship with Stacy from several years before. Stacy's mother spoke to Stacy about what had happened between her and Appellant and helped Stacy reconstruct the timeline of events. At her mother's urging, Stacy agreed to be interviewed by the Naval Criminal Investigative Service [NCIS] in June 2018. During the interview, Stacy told NCIS that Appellant had committed the sexual conduct with her when she was still 15 years old, but admitted she had "always been horrible with remembering times and dates."[5] She said she did not report what happened sooner because Appellant had told her not to and she was scared of him. Stacy later gave a civil deposition in April 2019 in connection with Appellant and Ms. Mitchell's custody dispute over Christine. When asked during the deposition about her sexual interactions with Appellant, Stacy stated that she was not sure of the dates or specific timeframes, but that the touching occurred prior to the sexual intercourse.

The timing of the sexual conduct in relation to Stacy's 16th birthday in mid-July 2014 was a central issue at Appellant's court-martial, as both the offenses charged against him—sexual abuse of a child and sexual assault of a child—required the Government to prove beyond a reasonable doubt that Stacy was under the age of 16 years at the time of the offense. Appellant's friend from the submarine testified that Appellant admitted having sexual intercourse with

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[5] App. Ex. XXXII at 29.

Stacy, but believed this disclosure did not occur until late-July or August 2014. Appellant admitted during a recorded telephone conversation with Stacy's father that he had sex with Stacy multiple times, but maintained it did not happen until after her 16th birthday. Stacy testified she had trouble remembering dates and times, and could "remember things from a couple of weeks ago but not a couple of years ago," but she was "very sure" or "100 percent sure" that Appellant touched her in a sexual way and started having sexual intercourse with her when she was 15 years old.[6] She testified she was sure of this because the first time Appellant had sexual intercourse with her was when Ms. Mitchell was still pregnant with Christine, who was born in June 2014, a month prior to Stacy's 16th birthday.

The members convicted Appellant of sexual abuse of a child by touching Stacy on "divers," or multiple, occasions with an intent to gratify his sexual desire, but acquitted him of sexual assault of a child by having vaginal sex with her.

## II. DISCUSSION

### A. In Camera Review and Production of Mental Health Records

Appellant asserts the military judge erred in denying his pretrial motion for in camera review and production of Stacy's mental health diagnoses, treatment, and prescribed medications. We review the denial of such a motion for an abuse of discretion.

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[6] R. at 460, 481.

*United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018). A military judge abuses his discretion when he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *United States v. Commisso*, 76 M.F. 315, 321 (C.A.A.F. 2017) (citations omitted). We review a military judge's conclusions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

Generally, the parties to a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46(a). The rules prescribed by the President provide that "[e]ach party is entitled to the production of evidence which is relevant and necessary." Rule for Courts-Martial [RCM] 703(f)(1). Evidence is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence. Military Rule of Evidence [MRE] 401. "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." RCM 703(f), Discussion.

Relevant and necessary evidence can be excepted from production or disclosure by a proper claim of privilege. MRE 501. The privilege at issue here—the psychotherapist-patient privilege—provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing

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

MRE 513(a). The rule provides that communications are confidential if "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication." MRE 513(b)(4).

Before ordering such privileged material produced even for in camera review, the military judge must find the moving party has demonstrated four things by a preponderance of the evidence:

> (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;
>
> (B) that the requested information meets one of the enumerated exceptions under subsection (d) of [MRE 513];
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

MRE 513(e)(3). If the military judge determines each of the above factors is met except for one of the rule's enumerated exceptions, the military judge must then determine whether in camera review is constitutionally required, and if so, take further action as necessary. *J.M. v. Payton-O'Brien*, 76 M.J. 782, 789-90 (N-M. Ct. Crim. App. 2017).

Here, after openly discussing with family members and NCIS and during her civil deposition her mental health diagnoses and treatment, including her recollection of her prescribed medications, Stacy asserted her psychotherapist-patient privilege to prevent Appellant's trial defense counsel from accessing this information in her mental health records. The Defense then moved for in camera review and production of the information, arguing that (1) the requested information was not privileged because the confidential communication that the psychotherapist-patient privilege protects does not include diagnosis and treatment information; [7] (2) Stacy waived any privilege by repeatedly discussing her mental health issues with various third parties; and (3) even if not waived, the privilege should yield to in camera review and production of the requested information as constitutionally required. A Defense expert opined that based on the information and symptoms Stacy had already revealed, Stacy could have Borderline Personality Disorder, which could further manifest in attention-seeking and manipulative behaviors, particularly when associated with fear of

[7] The Defense clarified it was seeking the diagnosis and treatment plan, "not . . . specific notes from any counseling session." R. at 53.

abandonment. The Defense argued that information about Stacy's diagnoses and treatment was relevant to the issues of suggestion, memory, and truthfulness, which all impacted her credibility as the only Government eyewitness to the charged offenses. It argued her medication list was important to assessing any additional side effects or adverse interactions among her medications, as it related to memory issues associated with Stacy's allegations of misconduct several years before.

The military judge denied the Defense motion. He concluded that the records containing the information were privileged, that the Defense had not shown the requested information was "reasonably segregable [sic]"[8] from the privileged communications, and that waiver applied only to the information Stacy had already disclosed. He concluded that the Defense had failed to meet its burden of demonstrating that in camera review or production of the requested information was required. He found that by her own admission Stacy had been diagnosed with depression, anxiety, and self-harm, and that the Defense offered only mere speculation of other diagnoses. He found that the information sought was cumulative because Appellant already knew of Stacy's diagnoses and treatment from her previous disclosures. Finally, he concluded the Defense had failed to show why the requested information was relevant and necessary

[8] R. at 70.

under RCM 703, as opposed to a mere "fishing expedition."[9]

*1. What information is covered by the psychotherapist-patient privilege*

As an initial matter, we must determine whether the mental health information requested by the Defense—i.e., diagnoses and treatment, including prescribed medications—is protected from disclosure by the psychotherapist-patient privilege. Both parties argue the military judge erred in concluding such information was privileged. We disagree.

"[C]onstruction of a statute is a question of law we review de novo." *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citation omitted). Where a privilege is codified in the evidentiary rules, ordinary principles of statutory construction control, with the caveat that "privileges should be construed narrowly, as they run contrary to a court's truth-seeking function." *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007) (quoting *Trammel v. United States*, 445 U.S. 40, 50-51 (1980)). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Custis*, 65 M.J. at 370 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000)).

The psychotherapist-patient privilege protects against the disclosure of "confidential communication made *between the patient and a psychotherapist* or an

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[9] App. Ex. V at 7.

assistant to the psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." MRE 513(a) (emphasis added). Under a plain reading of this language, the privilege protects communications "between" the patient and the psychotherapist—meaning communication from the patient to the psychotherapist and communication from the psychotherapist to the patient—that are made for the purpose of facilitating diagnosis and treatment of the patient's condition. In other words, the protection covers not only the patient's description of her symptoms, but also the psychotherapist's rendering of a diagnosis and treatment plan, based on those symptoms, back to the patient.

This language is very similar to the language used in the attorney-client privilege, which protects confidential communications "between" the client and the lawyer that are "made for the purpose of facilitating the rendition of professional legal services to the client." MRE 502.[10] "Professional legal services" include, at a minimum, providing legal advice. It is beyond cavil that the attorney-client privilege covers not only the description of the issue from the client to the attorney, but also the diagnosis—i.e., the legal advice—from the attorney to the client. For this reason, we disagree with our sister court's view that the psychotherapist-patient privilege "extends to

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[10] By contrast, the language in the privilege covering communications to clergy protects only "confidential communication by the person *to* a clergyman." MRE 503 (emphasis added).

statements and records that reveal the substance of conversations that may have been for the 'purpose of facilitating diagnosis or treatment,' but not to the diagnosis or treatment itself." *United States v. Rodriguez*, No. 20180138, 2019 CCA LEXIS 387, at *8 (A. Ct. Crim. App. Oct. 1, 2019) (unpublished), *pet. for rev. denied*, 79 M.J. 430 (C.A.A.F. 2020) (citing *H.V. v. Kitchen*, 75 M.J. 717, 721 (C. G. Ct. Crim. App. 2016) (Bruce, J., dissenting)). Interpreting the psychotherapist-patient privilege in this manner not only ignores its use of the word "between" as a protection for two-way communications, but would be akin to finding the attorney-client privilege protects the client's statements made for the purpose of facilitating the provision of legal advice, but not the legal advice itself. Thus, we reject this interpretation because it both ignores the plain language of the rule and leads to absurd results.

Although we should construe privileges narrowly, such an overly narrow interpretation of what the psychotherapist-patient privilege covers would also undermine the purpose of the privilege. The psychotherapist-patient privilege came into existence as a result of the Supreme Court's decision in *Jaffee v. Redmond*, which recognized the societal interest in a mentally healthy populace and found that "confidentiality is a *sine qua non* for successful psychiatric treatment." 518 U.S. 1, 10 (1996). The Court further recognized that the patient's expectation in this regard is vitally important, since the "promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Id.* at 13. Consequently, we have

previously found that in codifying the privilege in MRE 513 in the wake of *Jaffee*, "[t]he policy decision of Congress and the President is clear: the psychotherapist-patient privilege should be protected to the greatest extent possible." *Payton-O'Brien*, 76 M.J. at 787.[11] To interpret the privilege as covering only the patient's description of her symptoms, but not the psychotherapist's diagnosis and treatment of her condition, would deter patients from seeking mental health treatment in precisely the way *Jaffee* sought to avoid.

For the same reason we hold that, insofar as it pertains to mental health treatment, the prescription of medication is also covered by the privilege. The Coast Guard Court of Criminal Appeals held as much in *H.V. v. Kitchen*, pointing out that "diagnoses and the nature of treatment necessarily reflect, in part, the patient's confidential communications to the psychotherapist . . . ." 75 M.J. at 719. We agree. Revealing what psychiatric medication a patient has been prescribed to treat a diagnosed condition would in many circumstances suggest, if not reveal, the

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[11] *See also* Dep't of Def. Instr. 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to [Servicemembers]*, para. 3 (Aug. 17, 2011) (requiring that, "to dispel the stigma of seeking mental health care," Department of Defense healthcare providers "shall follow a presumption that they are not to notify a [servicemember's] commander when the [servicemember] obtains mental health care," and where notification is required, "shall provide the minimum amount of information to the commander concerned as required to satisfy the purposes of the disclosure").

diagnosis itself.[12] Thus, we find that as a form of mental health treatment, the prescription of medication falls within the same concern, noted in *Kitchen*, that "[t]he privilege would essentially be gutted if a psychotherapist could be ordered to testify about a person's diagnosis or treatment, over the person's objection, so long as the psychotherapist refrained from expressly describing or referring to the content of any confidential communications." *Kitchen,* 75 M.J. at 719 (quoting *Stark v. Hartt Transportation Systems, Inc.*, 937 F. Supp. 2d 88, 91-92 (D. Me. 2013)).

*2. Waiver of the privilege*

While we find the military judge correctly construed what information is covered by the psychotherapist-patient privilege, we hold that he erred in summarily rejecting the Defense argument that Stacy waived the privilege by discussing her mental health diagnoses and treatment, including her prescribed medications, with her family, with NCIS, and during her civil deposition.

A privilege is waived where the holder of the privilege "voluntarily discloses or consents to disclosure

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[12] We also find unpersuasive the *Rodriguez* court's position that mental health prescriptions cannot involve "confidential communications" because they are "intended to be disclosed to a non-psychotherapist third party—the pharmacist who fills it." *Rodriguez*, 2019 CCA LEXIS 387, at *9. Drawing from the language of the rule, we find that communications from the psychotherapist to a pharmacist to fill prescriptions are "in furtherance of the rendition of professional services to the patient," and are therefore protected from further disclosure. MRE 513(b)(4).

of *any significant part* of the matter or communication *under such circumstances that it would be inappropriate to allow the claim of privilege*." MRE 510(a) (emphasis added). This language is plainly broader than the military judge's interpretation that "even if the privilege were waived, it would be only as to those matters already disclosed."[13] We also note that "whether a waiver is valid turns on whether the disclosure was voluntary," not whether the privilege holder knew the information disclosed was privileged or intended to waive the privilege by disclosing it. *United States v. Jasper*, 72 M.J. 276, 280-81 (C.A.A.F. 2013) (citations omitted).

Here, Stacy openly discussed her mental health matters with multiple people on multiple occasions. The inpatient and follow-up treatment she received occurred immediately prior to and during the timeframe of the charged offenses, the reporting of which was delayed for a number of years and eventually occurred in response to a child-custody dispute over Stacy's niece. Irrespective of whether Stacy knew the information was privileged or intended to waive the privilege by discussing it, we find based on the record before us that her disclosures were voluntary, involved a significant part of the matters at issue, and occurred under such circumstances that it would be inappropriate to allow the claim of privilege.[14]

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[13] App. Ex. V at 7.

[14] To conclude otherwise would allow a privilege holder to delimit discoverable evidence to establish advantageous facts and then invoke the privilege to deny the evaluation of their context,

Hence, in this regard, we concur with the parties in concluding the military judge erred in finding the information requested by the Defense was privileged.

We further find error in the military judge's conclusion that the requested information was not subject to production under RCM 703(f). Here, the Defense sought to confirm Stacy's stated diagnoses and ascertain whether there were any other related diagnoses that could impact her credibility. The Defense also sought to review the list of Stacy's prescribed medications, not all of which she could remember the names of, to assess their interactive side effects and potential for adverse effect on memory in a case involving a delay in reporting for several years, allegations that Stacy had previously denied, and a report made under circumstances—revolving around the custody battle over Christine—giving rise to a strong motive to fabricate at least their timeframe, if not their substance. Under these circumstances we find clearly unreasonable the military judge's conclusion that the requested information was not relevant and necessary.

The military judge expressed concern that the requested information—diagnoses and treatment, including prescribed medications—was not reasonably separable from other information subject to privilege. But this situation is contemplated by the rule, which not only authorizes the military judge to conduct an in

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relevance, or truth—thus turning the privilege from a shield into a sword—a circumstance the waiver rule's broader language seeks to avoid.

camera review of the records in which information subject to production is contained, but also specifically requires that

> [a]ny production or disclosure permitted by the military judge must be narrowly tailored to only the specific records or communications, *or portions of such records or communications*, that meet the requirements for one of the enumerated exceptions to the privilege . . . and are included in the stated purpose for which the records or communications are sought . . . .

MRE 513(e)(4) (emphasis added). The purpose of in camera review is to allow the trial judge to review the records and separate out the information that should be produced or disclosed from the information that should remain protected. Accordingly, we hold the military judge erred in not following the procedures we have previously outlined either to conduct the in camera review or to take further action as necessary. *See Payton-O'Brien*, 76 M.J. at 789-90.

*3. In camera review and production under MRE 513(e)(3)*

Even assuming *arguendo* that Stacy's discussions of her mental health matters did not waive her privilege, we find the military judge abused his discretion in concluding the Defense had not shown, at the very least, that an in camera review of the pertinent mental health records was constitutionally required. We have previously identified several key areas where courts have overridden privileges in order to protect against the infringement of an accused's weighty interests of

due process and confrontation: "(1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and relate events." *Payton-O'Brien*, 76 M.J. at 789. As we explained, "[t]he second and third areas, in particular, . . . go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events. Additionally, these areas intersect with the medical community's ability to interpret that credibility." *Id.* at 789 n.28.[15]

This case involves all of these key areas of concern. After telling friends about her sexual relationship with Appellant, Stacy denied to local DCF authorities that anything inappropriate had happened between them. There is substantial evidence of Stacy's behavioral, mental, and emotional difficulties, which necessitated not only inpatient treatment but continued follow-on care, the timing of which was pertinent to both the timeframe and the substance of the charged offenses. And Stacy repeatedly stated in both formal and informal settings that she was unable to remember the precise timeframe of the events in question, which was the crucial issue in the trial.

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[15] *See also United States v. Reese*, 25 M.J. 93, 95 (C.M.A. 1987) (stating that "[s]ome forms of emotional or mental defects have been held to 'have high probative value on the issue of credibility . . . a conservative list of [which] would have to include . . . most or all of the neuroses, . . . alcoholism, drug addiction, and psychopathic personality.'") (quoting *United States v. Lindstrom,* 698 F.2d 1154, 1160 (11th Cir.1983)).

The information requested by the Defense not only bore on these issues, but under the circumstances of this case was (1) reasonably likely to yield admissible information, (2) was not cumulative, and (3) was not available through other non-privileged sources. The military judge found these latter three requirements were not satisfied based largely on the view that Appellant already knew of Stacy's diagnoses and treatment from her own disclosures. However, Stacy admitted she was unable to recall all of her medications, and as the military judge recognized with respect to the information she did disclose, "she might have told the truth and she might not have told the truth."[16] Given the centrality of Stacy's testimony to the substantially delayed allegations, the circumstances under which they were reported, and the plethora of issues posed by her mental health diagnoses and treatment, we conclude the military judge's application of the factors under MRE 513(e) to the facts of this case constituted an abuse of discretion.

*4. Prejudice*

Having found error in the denial of the Defense motion, we must determine whether the error materially prejudiced Appellant's substantial rights. *Chisum*, 77 M.J. at 179. Where an error includes a "constitutionally improper denial of a defendant's opportunity to impeach a witness for bias," we must find the error harmless beyond a reasonable doubt. *Id.* For such a review, we weigh factors including:

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[16] R. at 70.

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

*Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 179 (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003)). "To say that an error did not 'contribute' to the ensuing verdict" means "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* at 179 (quoting *Yates v. Evatt,* 500 U.S. 391, 403 (1991)).

As we noted in *Payton-O'Brien*, "[i]n these scenarios, serious concerns may be raised regarding witness credibility—which is of paramount importance—and may very well be case dispositive." *Payton-O'Brien*, 76 M.J. at 789. Moreover, "[w]e cannot discount the possibility that the information contained in [Stacy's records] may have had an impact on the [D]efense's trial strategy." *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987).

In this case, there was little dispute that a sexual relationship occurred between Appellant and his teenage sister-in-law, as Appellant admitted having vaginal intercourse with her on multiple occasions. The

principal issue at trial was whether the charged acts occurred before or after Stacy's 16th birthday in mid-July 2014. Stacy testified that the touching offenses happened on multiple occasions and preceded the vaginal intercourse. Her testimony on the timing of the conduct was subject to vigorous cross-examination, which thoroughly revealed the inconsistency of her prior denials and other statements, the years-long delay of her report, her faulty memory and the contaminating influence on it by other family members, and a strong ulterior motive to slant her testimony in favor of aiding her sister's ongoing child-custody dispute against Appellant. While the members acquitted Appellant of sexual assault of a child, they convicted him of sexual abuse of a child "on divers occasions," which indicates they found multiple instances of sexual contact were proven beyond a reasonable doubt.

We find strong corroboration for Stacy's testimony that the sexual contact began prior to Appellant's submarine deployment from February to April 2014—namely, the provocative emails she sent to Appellant, telling him things like "when you were touching me, I wanted more."[17] That sexual contact occurred prior to Appellant's deployment was also corroborated by the family's awareness of Appellant's one-on-one interactions with Stacy and, at least to some extent, by Appellant's admissions to third parties.[18] Thus, the

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[17] Pros. Ex. 9.

[18] In addition to admitting his sexual desire for Stacy to a friend aboard the submarine, Appellant emailed Ms. Mitchell that the

evidence before the members that sexual contact occurred on at least one occasion before Stacy's 16th birthday was both corroborated and strong. With respect to this pre-deployment sexual contact, after weighing all of the factors, we conclude that the error is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record," and find it harmless beyond a reasonable doubt. *Chisum*, 77 M.J. at 179.

By contrast, for the alleged sexual contact after Appellant's deployment, there was little corroboration for Stacy's testimony that it occurred prior to her 16th birthday. As the proof for this contact rested exclusively on Stacy's testimony, we find the error may have contributed to the finding in this regard. Consequently, we find that the words, "on divers occasions," must be stricken from the specification of which Appellant was convicted, which we accomplish in our decretal paragraph below.

**B. Admission of Profile Testimony Regarding "Grooming"**

Appellant asserts the military judge erred in admitting testimony from the Government's forensic psychologist that Appellant fit the profile of a perpetrator who grooms children for sex. We review a trial court's decision to admit expert testimony for abuse of discretion. *United States v. Hays*, 62 M.J. 158, 165 (C.A.A.F. 2005). "The abuse of discretion standard

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statement Stacy emailed him, "'when you were touching me, I wanted more,' could have been simply put as 'I liked the back message [sic].'" Pros. Ex. 9.

is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

*1. The limits of opinion testimony*

A witness qualified as an expert may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

MRE 702. Under this rule expert testimony about certain aspects of victim behavior is generally admissible. Experts may, for example, testify "as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms," or discuss "various patterns of consistency in the stories of child abuse victims and compar[e] those patterns with patterns in . . . [the victim's] story," so long as they do not opine as to whether the witness is telling the truth about an allegation. *United States v. Harrison*, 31 M.J. 330, 332

(C.M.A. 1990) (citations and internal quotation marks omitted).

By contrast, "[g]enerally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper." *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992). "Profile evidence is evidence that presents a 'characteristic profile' of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile as proof of guilt." *United States v. Traum*, 60 M.J. 226, 234 (C.A.A.F. 2004) (citations omitted). Thus, "the focus is upon using a profile as evidence of the *accused's* guilt or innocence, and not upon using a characteristic profile to support or attack a witness's or victim's credibility or truthfulness." *United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007) (emphasis in original).

"[T]he ban on profile evidence exists because this process treads too closely to offering character evidence of an accused in order to prove that the accused acted in conformity with that evidence on a certain occasion and committed the criminal activity in question." *Traum*, 60 M.J. at 235. The prohibition thus "is rooted in MRE 404(a)(1) that precludes the prosecution from introducing character evidence of an accused who has not put his character at issue." *Banks*, 36 M.J. at 161. As "[o]ur system of justice is a trial on the facts, not a litmus paper test for conformity with any set of characteristics, factors, or circumstances," profile evidence can be admitted "only in narrow and limited circumstances," to include "as purely background material to explain sanity issues[,] . . . as an

investigative tool to establish reasonable suspicion[,] . . . [or] in rebuttal when a party 'opens the door' by introducing potentially misleading testimony." *Id.* (citations omitted).

Here, the Defense objected to the Government's intent to elicit testimony from its expert about "grooming behavior," which the expert defined as the "behaviors of a perpetrator of child sexual abuse to solicit the access to and compliance of the targeted victim, as well as the manipulation in favor with the gatekeepers to that child."[19] The expert opined that Appellant's one-on-one interactions with Stacy—spending "private time," sexually escalating touching, intimate conversation—were consistent with grooming behavior. The Government argued admission of the opinion testimony was proper under MRE 404(b) to prove Appellant's motive, intent, and scheme to have sex with Stacy.[20] The Defense argued that allowing such profile testimony invaded the fact-finding province of the members and was tantamount to impermissibly opining that Appellant "fit[ ] the profile of an offender."[21]

The military judge overruled the Defense objection, concluding the expert's testimony did not amount to

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[19] R. at 723.

[20] As the Government had previously announced, its intention was to use evidence of Appellant's earlier acts with Stacy "to show a pattern of grooming behavior . . . leading up to . . . the penetrative act." R. at 22.

[21] R. at 730.

profile evidence. Citing principally *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007), *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), and *United States v. Huberty*, 53 M.J. 369 (C.A.A.F. 2000), he found it was permissible for the expert to testify that the evidence of Appellant's behavior was consistent with grooming behavior, so long as the expert did not opine that Appellant had in fact groomed Stacy, that he was a child sex abuser, or that child sex abuse occurred. He found such limited testimony regarding grooming was relevant and admissible as non-profile evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993), and MRE 403.

The military judge then allowed the Government to elicit the following testimony from the expert about "grooming" in its case-in-chief:

- That "instead of focusing on the victim's side of behaviors, it has to do with the offender's side of behaviors."[22]
- That "common patterns of grooming behavior" include cultivating a special relationship with the targeted victim, sharing special time together, giving gifts, lowering the child's inhibitions through innocuous or "quasi-sexual" touches, and then "escalating towards more progressively sexually explicit conduct."[23]

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[22] R. at 773.

[23] R. at 775.

- That the evidence adduced at the court-martial revealed "behaviors that are consistent with common patterns of grooming," to include Appellant's relationship with Stacy, his role as "big brother" to her, the time he spent alone with her, taking car rides, going for ice cream, and his progression to more sexualized touching and actions.

The Government then drew from the expert's testimony in its closing argument, arguing that in connection with the charged offenses Appellant had been grooming Stacy.[24]

The Government expert's testimony was thus elicited and used in precisely the way the rule against profile testimony forbids. This was not an instance where, as in *Huberty*, expert testimony about grooming was used to explain the victim's behavior or to rebut issues in this area raised by a Defense expert. *See Huberty*, 53 M.J. at 373. Nor was it used as a means of explaining Stacy's complicity in the secret relationship with Appellant, thus supporting her credibility with respect to her delayed allegations. Rather, the testimony was "admitted for the purpose of showing that Appellant fit the 'profile' of a sex abuser." *Id.* at 373. It was elicited and used to show that Appellant's actions were consistent with patterns of grooming behavior exhibited by child sex abusers, in order to support the conclusion that he was guilty of the charged offense of child sexual abuse. The admission of this testimony was therefore erroneous.

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[24] R. at 870-71, 878.

*2. Prejudice*

Having found error, we test for prejudice. For non-constitutional evidentiary errors, the test for prejudice "is whether the error had a substantial influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks and citation omitted). In conducting this analysis, we weigh "(1) the strength of the Government's case, (2) the strength of the [D]efense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (quoting *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015)).

Here, given Appellant's admissions that multiple sexual encounters with Stacy occurred, the Government's case was strong except for the timing of the offenses, which Appellant maintained occurred after Stacy turned 16. Even in regard to the timing of the offenses, as discussed above, there was strong corroborating evidence that at least one instance of sexual abuse occurred prior to the Appellant's deployment in February 2014 and, therefore, prior to Stacy's 16th birthday in mid-July 2014. The Defense case on the pre-deployment contact was weak by comparison, as it was focused principally on the timing issue, where the Government's case was weakest. In light of the evidence admitted, we find the expert testimony in question was not material to the timing issue for the strong, corroborated claim of pre-deployment sexual abuse. We therefore conclude the error in its admission did not have a substantial influence on the findings with respect to that instance, among the "divers occasions" charged.

On the other hand, we conclude the expert's testimony *was* material to the post-deployment sexual abuse Stacy testified about, because it corroborated the escalating nature of the sexual contact, which in turn supported Stacy's credibility on the issue of whether she was still 15 years old at the time. We find the quality of the testimony particularly important in this regard, as it came from an expert and thus lent the imprimatur of a scientific foundation to the Government's case. Accordingly, we conclude that Appellant was prejudiced as to any post-deployment sexual abuse and conclude that must be remedied by striking the words, "on divers occasions," from the specification, which we accomplish in our decretal paragraph.

### C. Legal and Factual Sufficiency

Appellant asserts the evidence is legally and factually insufficient to support his conviction. We review such questions de novo. UCMJ art. 66(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325 (C.M.A. 1987). In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict." *United States v. Rankin,* 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

In order to prove the offense of sexual abuse of a child as charged, the Government was required to prove beyond a reasonable doubt that (1) Appellant committed sexual contact upon Stacy by intentionally touching, directly or through the clothing, her buttocks, thighs, hips, and back with his hand; (2) he did so with the intent to gratify his sexual desire; and (3) at the time Stacy had not attained the age of 16 years. *Manual for Courts-Martial*, *United States* (2016 ed.), pt. IV, para. 45.b.b.(4)(a).

The Government concedes the proof was lacking for the word, "hips," which is not supported by the evidence. After also removing the words, "on divers occasions," which we have concluded must be dismissed due to legal error, we find the remainder of the specification legally and factually sufficient. As

discussed above, that Appellant touched Stacy's back, thighs, and buttocks for sexual gratification on at least one occasion prior to his deployment in February 2014 (well before her 16th birthday) was supported by not only Stacy's testimony, but also by the provocative emails Stacy sent to Appellant on his submarine, the family's knowledge of their one-on-one interactions, and Appellant's admissions to third parties. Considering the evidence in the light most favorable to the Prosecution, we conclude a reasonable fact-finder could have found all the essential elements of this offense beyond a reasonable doubt. The evidence is thus legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we, too, are convinced of Appellant's guilt beyond a reasonable doubt.

**D. Sentence Reassessment**

Having set aside some of the language from the specification of which Appellant was convicted, we must determine whether we can reassess the sentence at the appellate level or whether we must remand for the trial court to do so. We do so by determining: (1) whether there have been dramatic changes in the penalty landscape or exposure; (2) whether sentencing was by members or a military judge alone; (3) whether the nature of the remaining offenses captures the gravamen of the criminal conduct included within the original offenses and whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the

remaining offenses; and (4) whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial. *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

Here, we determine that we can reassess the sentence. As Appellant remains convicted of one specification of sexual abuse of a child under Article 120b, there has been no change in the penalty landscape or exposure. However, excepting the words, "hips" and "on divers occasions," from the specification, while not changing the gravamen of his criminal conduct, does significantly alter the circumstances of the offenses relevant to sentencing, as it narrows the finding of criminal conduct to a single occasion. While Appellant was sentenced by members, the specification as modified deals with an offense of the type with which appellate judges have experience to reliably determine what sentence would have been imposed at trial. Under these circumstances, and excluding from our consideration the evidence we have found was erroneously admitted, we are confident that the sentence the members would have imposed for the specification as excepted would have been no less than three years' confinement and a dishonorable discharge. We affirm this reassessed sentence in our decretal paragraph.

**E. Sentence Recommendation in Unsworn Victim Impact Statement**

Appellant asserts the military judge erred in allowing Stacy to recommend a specific sentence.

Because there was no objection at trial, we review for plain error, which occurs when there is an error, it is clear or obvious, and it results in material prejudice to a substantial right. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

"[A] crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing hearing relating to that offense." RCM 1001(c)(1). This right includes the right to make an unsworn statement including victim impact and matters in mitigation. RCM 1001(c)(3), (5). "[V]ictim impact" includes "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." RCM 1001(c)(2)(B). However, the victim's statement "may not include a recommendation of a specific sentence." RCM 1001(c)(3).

During the presentencing hearing, Stacy made an unsworn victim impact statement in which she described the prolonged period Appellant's behavior had impacted her mental health and her relationship with her family. She concluded by stating, without objection from the Defense:

> I ask that as you come to your decision you keep this in mind: I suffered in silence for five years before circumstances made me tell the truth of what he had done to me. *I think that he needs a*

> *significant amount of jail time* to think about the pain he has put me through.[25]

The trial counsel then argued for a sentence that included five years' confinement. After deliberating an hour and a half, the members awarded a sentence that included five years' confinement.

We hold it was error for the military judge to allow Stacy to state, "I think [Appellant] needs a significant amount of jail time," because it constitutes a recommendation of a specific sentence. Our superior court held it improper to admit presentencing testimony opining that an accused has "[n]o potential for continued service," which it found was tantamount to saying "[g]ive the accused a punitive discharge." *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989). Similarly, opining that an accused "needs" a certain form of punishment is tantamount to recommending that the sentence include that form of punishment. To allow a victim to make such a recommendation is not in keeping with the framework for victim impact statements established under RCM 1001(c), which is designed to enable crime victims to tell the sentencing authority what impact the accused's misconduct has had on them, not what to do about it. Here, Stacy was allowed to tell the sentencing authority that from her perspective Appellant needed not just confinement, but a "significant amount" of it. Allowing her to make such a recommendation was clear, obvious error.

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[25] R. at 976 (emphasis added).

If an error occurs in the admission of evidence at sentencing, the test for prejudice is "whether the error substantially influenced the adjudged sentence." *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (citation omitted). We determine this by considering four factors: "(1) the strength of the Government's case; (2) the strength of the [D]efense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* (citation omitted).

Appellant asserts the members sentenced him to five years' confinement because Stacy's impact statement recommended significant jail time after stating she had suffered for five years because of what Appellant had done to her. We disagree. The trial counsel specifically asked for five years' confinement during the Government's sentencing argument. Based on the comparative strengths of the parties' sentencing cases, we do not find the unsworn impact statement to be so material or of such quality as to find that it substantially influenced the adjudged sentence. Even assuming it did, we conclude our reassessment of the sentence in light of the language we set aside in the specification has purged the sentence of any possibility of such influence.

**F. Cumulative Error**

Finally, we address cumulative error. "It is well established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually." *United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011). "Courts are far less likely to find cumulative error where evidentiary errors

are followed by curative instructions or when a record contains overwhelming evidence of a defendant's guilt." *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996). As we have found three errors that were not cured at trial, we ask whether we can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error . . . ." *Banks*, 36 M.J. at 171 (quoting *United States v. Yerger*, 3 C.M.R. 22, 24 (C.M.A. 1952)) (internal quotation marks omitted).

Under the circumstances of this case, we conclude that the errors, taken together with our remedial actions, did not undermine the fairness or integrity of Appellant's trial such that we must set aside his conviction or sentence in toto. First, in striking the words "on divers occasions" from the specification, we have cleansed the finding of any prejudicial error associated with the MRE 513 issue or the profile testimony. As to the specification's remaining language, we find that as discussed above the record contains overwhelming evidence of Appellant's guilt. Hence, we hold that, "[a]s to the errors we found, we do not believe there is a reasonable probability that, taken cumulatively, those errors might have contributed to the conviction." *Flores*, 69 M.J. at 373. Second, in reassessing the sentence, we have cleansed it of any error associated with either the profile testimony or the victim impact statement. Accordingly, we can say with certainty that the cumulative effect of these errors has not affected the outcome of this case.

## III. CONCLUSION

We **SET ASIDE** and **DISMISS** the words, "hips," and "on divers occasions," from the specification. The findings as to the specification's remaining language and that portion of the sentence extending to a dishonorable discharge and three years' confinement are **AFFIRMED**.

Judges STEWART and HOUTZ concur.

[SEAL] FOR THE COURT:

/s/ Rodger A. Drew, Jr.
RODGER A. DREW, JR.
Clerk of Court

## APPENDIX D

**United States Court of Appeals**
**for the Armed Forces**
**Washington, D.C.**

**USCA Dkt. No. 21-0312/NA**
**Crim.App. No. 201900305**

**[Filed: November 22, 2021]**

| | |
|---|---|
| United States, | ) |
| Appellee | ) |
| | ) |
| v. | ) |
| | ) |
| Wendell E. Mellette, Jr., | ) |
| Appellant | ) |
| | ) |

**O R D E R**

On consideration of the motions filed by Patient/ Victim S.S. to intervene and to examine sealed material, it is, by the Court, this 22nd day of November, 2021,

ORDERED:

That the motions are denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Acting Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Wester)
Appellate Government Counsel (Marden)
Amicus Curiae (Coote)

## APPENDIX E

**United States Court of Appeals**
**for the Armed Forces**
**Washington, D.C.**

**USCA Dkt. No. 21-0312/NA**
**Crim.App. No. 201900305**

**[Filed: December 10, 2021]**

| | |
|---|---|
| United States, | ) |
| Appellee | ) |
| | ) |
| v. | ) |
| | ) |
| Wendell E. Mellette, Jr., | ) |
| Appellant | ) |
| | ) |

**O R D E R**

On consideration of Patient/Victim's petition for reconsideration of this Court's order denying the motion to examine sealed material issued November 22, 2021, and Patient/Victim's motion for a written opinion explaining the denial of her motion, we note that counsel has not complied with the Rules of this Court. Accordingly, it is, by the Court, this 10th day of December, 2021,

ORDERED:

That the petition for reconsideration is denied; and

That the motion is denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Acting Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Wester)
Appellate Government Counsel (Marden)
Amicus Curiae (Coote)

## APPENDIX F

**United States Court of Appeals**
**for the Armed Forces**
**Washington, D.C.**

**USCA Dkt. No. 21-0312/NA**
**Crim.App. No. 201900305**

**[Filed: January 10, 2022]**

| | |
|---|---|
| United States, | ) |
| Appellee | ) |
| | ) |
| v. | ) |
| | ) |
| Wendell E. Mellette, Jr., | ) |
| Appellant | ) |
| | ) |

**O R D E R**

On consideration of the motion filed by Patient/Victim S.S. for a more specific order; or alternatively, motion to file an *amicus curiae* brief and to examine sealed records, it is, by the Court, this 10th day of January, 2022,

ORDERED:

That the motion is denied as it pertains to a more specific order explaining the order issued by the Court on December 10, 2021; and granted as it pertains to

permission to examine sealed material and to file an *amicus* curiae brief.

For the Court,

/s/ Malcolm H. Squires, Jr.
Acting Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Wester)
Appellate Government Counsel (Marden)
*Amicus Curiae* (Sitte; Coote)

## APPENDIX G

## STATUTORY PROVISIONS AND RULES INVOLVED

### 10 USCS § 836(a)

**§ 836. Art. 36. President may prescribe rules**

**(a)** Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [*10 USCS §§ 801* et seq.] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title [*10 USCS §§ 948a* et seq.], be contrary to or inconsistent with this chapter [*10 USCS §§ 801* et seq.].

### MANUAL FOR COURTS-MARTIAL UNITED STATES

### (2012 EDITION)

### Military Rules of Evidence

### M.R.E.513(e)(3):

### Rule 513. Psychotherapist-patient privilege

(e) *Procedure to determine admissibility of patient records or communications.*

. . .

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

. . .

**MANUAL FOR COURTS-MARTIAL UNITED STATES**

**(2019 EDITION)**

**Military Rules of Evidence**

**M.R.E.513:**

**Rule 513. Psychotherapist—patient privilege**

(a) *General Rule*. 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.

(b) *Definitions*. As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or

who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel, defense counsel, or any counsel representing the patient to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.

(e) *Procedure to Determine Admissibility of Patient Records or Communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an

interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) 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. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in-camera review, the military judge

must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subdivision (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subdivision (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

**National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291,**

**§ 537, 128 Stat. 3292, 3369 (2014)**

**H. R. 3979—78**

**SEC. 537. MODIFICATION OF RULE 513 OF THE MILITARY RULES OF EVIDENCE, RELATING TO THE PRIVILEGE AGAINST DISCLOSURE OF COMMUNICATIONS BETWEEN PSYCHOTHERAPISTS AND PATIENTS.**

Not later than 180 days after the date of the enactment of this Act, Rule 513 of the Military Rules of Evidence shall be modified as follows:

(1) To include communications with other licensed mental health professionals within the communications covered by the privilege.

(2) To strike the current exception to the privilege contained in subparagraph (d)(8) of Rule 513.

(3) To require a party seeking production or admission of records or communications protected by the privilege—

(A) to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) to demonstrate by a preponderance of the evidence that the requested information meets one of the enumerated exceptions to the privilege;

(C) to show that the information sought is not merely cumulative of other information available; and

(D) to show that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) To authorize the military judge to conduct a review in camera of records or communications only when—

(A) the moving party has met its burden as established pursuant to paragraph (3); and

(B) an examination of the information is necessary to rule on the production or admissibility of protected records or communications.

(5) To require that any production or disclosure permitted by the military judge be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which the such records or communications are sought.

# APPENDIX H

## RELEVANT EXCERPTS FROM DSM-5

### SECTION I DSM-5 BASICS
### Cautionary Statement for Forensic Use of DSM-5
### Page 25 of DSM-5

**Cautionary Statement for Forensic Use of DSM-5**

Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals. It is also important to note that DSM-5 does not provide treatment guidelines for any given disorder.

When used appropriately, diagnoses and diagnostic information can assist legal decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination. By providing a compendium based on a review of the pertinent

clinical and research literature, DSM-5 may facilitate legal decision makers' understanding of the relevant characteristics of mental disorders. The literature related to diagnoses also serves as a check on ungrounded speculation about mental disorders and about the functioning of a particular individual. Finally, diagnostic information about longitudinal course may improve decision making when the legal issue concerns an individual's mental functioning at a past or future point in time.

However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary

widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

Use of DSM-5 to assess for the presence of a mental disorder by nonclinical, nonmedical, or otherwise insufficiently trained individuals is not advised. Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the etiology or causes of the individual's mental disorder or the individual's degree of control over behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.