



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY (AFLOA)
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA

3 October 2014

MEMORANDUM FOR AFLOA/JAJD

FROM: AFLOA/SDC (Maj Gesl)

SUBJECT: Obtaining Mental Health Records of Military Victims

1. This memorandum is in response to the Judicial Proceedings Panel Data Call, specifically, Requests for Information 49 and 50.
2. As both an Area Defense Counsel and Senior Defense counsel I have requested the Complaining Witness' mental health records through a standard discovery request. The request is normally denied by Trial Counsel, citing MRE 513. In response, I file a motion to compel the records, asking the Military Judge to conduct an in-camera review to determine which records are actually discoverable. The process varies slightly for military and civilian witnesses:
 - a. For military witnesses, Trial Counsel normally provides a sealed copy of the records to the Military Judge for in-camera review.
 - b. For civilian witnesses, the Military Judge will likely have to sign an order for the provider to produce the requested records before he or she can conduct an in-camera review. I have attached a redacted order from a recent case.
3. I am available at paul.gesl.1@us.af.mil or DSN 228-5664 if you have any questions.

A handwritten signature in blue ink, reading "Paul Gesl", is positioned above the typed name.

PAUL M. GESL, Maj, USAF
Senior Defense Counsel

Attachment:
Redacted Court Order

**DEPARTMENT OF THE AIR FORCE
AIR FORCE TRIAL JUDICIARY**

UNITED STATES

v.

[REDACTED]

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ORDER TO PRODUCE RECORDS

9 July 2014

1. I have detailed myself as the trial judge in the above-captioned General Court- Martial. I have made a determination that the mental health records of [REDACTED] may be relevant in the case.

2. Pursuant to my authority, I hereby order the custodian of records, [REDACTED], or other appropriate individual, at [REDACTED], to provide copies of the aforementioned documents pertaining to [REDACTED]. Upon receipt of this order, single-sided copies shall be delivered in a sealed envelope marked "military judge only" to [REDACTED] at the [REDACTED].

3. Once received, I will review the records In Camera. If I determine any portions of those records are releasable, they will be released with an appropriate protective order to ensure [REDACTED] privacy rights are protected.

4. Failure to provide these documents will result in you being subpoenaed to appear in court, bring the original requested documents, and provide testimony in this matter at an Article 39a, UCMJ, session or any other court proceeding as may be scheduled.

SO ORDERED on this 9th day of July 2014.

[REDACTED]

**WITH THE UNITED STATES AIR FORCE JUDICIARY
AT OSAN AIR BASE, REPUBLIC OF KOREA**

UNITED STATES)	MOTION TO COMPEL
)	DISCOVERY:
v.)	MENTAL HEALTH
)	RECORDS UNDER RCM 701
SRA C. Q.)	
Squadron)	
(PACAF))	DATE: 3 November 2013

COMES NOW SrA C. Q., by and through counsel, pursuant to RCM 701(a), 703(f), 905(b)(4), and 906(b)(7), and moves this Honorable Court to compel the government to produce discovery of the mental health records of the alleged victims, the former-A1C JL, and/or A1C AC after an MRE 513 hearing.

FACTS

1. SrA Q. is charged with sexually assaulting A1C JL. and A1C AC.
2. The alleged victims' mental health records are currently unknown to the Defense.
3. On 9 July 2013, the Defense requested the government provide discovery, including, "The military and civilian medical, mental, and sex abuse treatment records of any person alleged to have suffered any physical and/or mental harm and/or any other suffering as a result of any crimes, charged or uncharged, allegedly committed or assisted by the accused. *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R.1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A.1977)." See Attachment 1, paragraph 1(d)(3).
4. On 5 October 2013, the Defense interviewed A1C AC. in preparation for the Article 32 hearing. In that interview, A1C AC. stated that she had seen a mental health provider to discuss the incident with SrA Q. She also stated that she had discussed her thoughts and feelings about what had happened to her as well as the impact that it has had on her life.
5. On 25 October 2013, the Government provided its initial discovery response. It stated, "One victim has seen a mental health provider; such records will be requested upon court order..." See Attachment 2.

BURDEN

6. As the moving party, the Defense bears the burden of persuasion in this motion, by a preponderance of the evidence. RCM 905(c)(2)(A)

LAW

7. At a court-martial, the parties and the court "shall have equal opportunity to obtain witnesses and other evidence." Article 46, UCMJ. "The military justice system provides for broader discovery than required by practice in federal civilian criminal trials." *US v. Santos*, 59 MJ 317, 321 (C.A.A.F. 2004). "RCM 701(a)(2)(A) requires the Government, upon defense request, to allow inspection of any tangible objects, such as papers and documents, that are 'are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense.'" *Id.* "Evidence that could be used at trial to impeach witnesses is subject to discovery under these provisions." *Id.*

8. MRE 513 establishes a psychotherapist-patient privilege. This privilege, however, is not absolute. MRE 513(d) lists the exceptions to the privilege, and MRE 513(d)(8) permits disclosure when constitutionally required. The Defense agrees that it is appropriate for the military judge to review these records and release relevant and discoverable material to the parties. The Military Rules of Evidence establish a low threshold of relevance. Any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence is relevant under MRE 401. The analysis of discoverability is not equivalent to the analysis of admissibility. That which is discoverable is not necessarily admissible. The key to fair and open discovery is to allow the defense equal access to evidence and information and to provide the defense with information material to its preparation of the case. This practice not only contributes to the truth-finding process, it is a substantial legal right of an accused. Trial counsel has a duty to protect the accused's right to discover the material required to be disclosed by the discovery rules. See, *US v. Dancy*, 38 MJ 1, 5 (CMA 1993); See also, *US v. Green*, 37 MJ 88 (CMA 1993).

9. *US v. Reece*, 25 MJ 93, (CMA 1987), held that the only restriction placed on the liberal discovery of documentary evidence by the accused is that the evidence must be relevant and necessary to the subject matter of the inquiry. In *Reece*, the court set aside a conviction for carnal knowledge and committing lascivious acts on females under 16 years of age when the military judge failed, at a minimum, to order in camera production of documents requested by the defense so that the defense could determine if the records contained information that may be relevant to cross-examination or impeachment of the alleged victims. At trial the defense established that a key issue was the credibility of the two victims. The court found that the military judge abused his discretion based on the "low threshold" test for relevance and the liberal discovery provisions in the Manual. The court specifically recognized the handicap defense counsel has in showing relevance when they have been denied all access to the records.

10. "The prosecution's suppression ...of evidence favorable to an accused, when requested, violates an accused's due process right to a fair trial where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 US at 87. This rule also applies to impeachment evidence. *Giglio v. US*, 405

U.S. 150, at 154, *US v. Watson*, 31 MJ 49, at 54 (CMA 1990).” *US v. Green*, 37 MJ 88 (CMA 1993).

DISCUSSION

11. A1C AC. and Ms. JL. are the alleged victims in this case and they are the government’s key witnesses to the alleged sexual assaults committed by SrA Q.. Their credibility will be the key issue in this case, as they provide the only direct evidence that the sex between them was non-consensual. The Government has stated in its discovery response that one of the alleged victims has mental health records. This leaves it unclear which alleged victim they mean, and it also makes it unclear if they have checked if the other alleged victims also have mental health records.

12. The defense does not currently have access to the full story. Mental health records may contain evidence of attention-seeking behavior, prior false reports of sexual assault, and other highly relevant pieces of evidence. Given the low threshold for discovery set by *Santos* and *Reece*, the Military Judge should allow the defense full access to the evidence of A1C AC. and Ms. JL’s mental health records after an MRE 513 hearing. Both were in the military at the time of the alleged incidents, and the evidence can be obtained without a court order.

13. The military’s broad discovery rules and the interests of justice demand the discovery of these documents, in order to ensure the defense can fully prepare for trial.

RELIEF REQUESTED

14. The defense requests that this Honorable Court compel the government to produce the mental health records of A1C AC. and Ms. JL. in discovery, after an MRE 513 hearing.

Respectfully submitted,



IAN S. HOLZHAUER, Capt, USAF
Defense Counsel

Attachments:

1. Defense Discovery Request, dated 7 July 2013 (9 pages)
2. Initial Government Discovery Response, dated 25 October 2013 (5 pages)

113J00

Time of Request: Sunday, October 26, 2014 22:39:44 EST
Client ID/Project Name:
Number of Lines: 294
Job Number: 2827:485999571

Research Information

Service: LEXSEE(R) Feature
Print Request: Current Document: 1
Source: Get by LEXSEE(R)
Search Terms: 65 M.J. 576

Send to: DEVITO, Allison
AF LEGAL
51 E MAXWELL BLVD BLDG 678
MAXWELL AFB, AL 36112-5927



Positive

As of: Oct 26, 2014

**UNITED STATES v. Michael T. KLEMICK, Lieutenant Commander (O-4), U. S.
Navy**

NMCCA 200300811

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

65 M.J. 576; 2006 CCA LEXIS 222

August 7, 2006, Decided

PRIOR HISTORY: [**1] Sentence adjudged 14 December 2001. Military Judge: H. Lazzaro. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Commander Navy Region Southeast, Jacksonville, FL.

CASE SUMMARY:

PROCEDURAL POSTURE: A general court-martial composed of a military judge sitting alone convicted appellant servicemember, pursuant to his pleas, of involuntary manslaughter and assault consummated by a battery upon a child under 16 years of age in violation of Unif. Code Mil. Justice art. 119, 128, *10 U.S.C.S. §§ 919, 928*. The matter was before the court on his assignments of error.

OVERVIEW: In a summary assignment of error, the servicemember asserted that his court-martial lacked jurisdiction because his case had no "service relation," noting that his offenses were committed off base and did not involve Government property or victims. The court disagreed and found that the court-martial had jurisdiction over him and the offenses. Next, the servicemember contended that the military judge erred when he granted a Government motion to compel production of the psychotherapist-patient records of the servicemember's wife for in camera review and then released a portion of those records to the parties. Among other things, the court stated that his unconditional guilty pleas waived any is-

sue regarding the military judge's treatment of his wife's psychotherapist's records. Even if this issue were not waived, however, the military judge did not err. The servicemember also asserted that a sentence that included a dismissal was inappropriately severe in light of his record of service. Balancing his offenses against his character and considering his excellent service record, the court did not find his sentence to be inappropriately severe.

OUTCOME: The findings of guilty and the sentence, as approved by the convening authority, were affirmed.

LexisNexis(R) Headnotes

Military & Veterans Law > Military Justice > Evidence > Privileges > Psychotherapist-Patient Privilege

[HN1] Mil. R. Evid. 513(a), Manual Courts-Martial (2000), permits a patient to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist. Exceptions to this general rule include when the communication is evidence of spouse abuse, child abuse, or neglect in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse. Mil. R. Evid. 513(d)(2), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Evidence > Privileges > Psychotherapist-Patient Privilege

[HN2] Mil. R. Evid. 513, Manual Courts-Martial (2000), states, in part: (e) Procedure to determine admissibility of patient records or communications. (1) In any case in which the production or admissibility 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; (3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

[HN3] In a case involving Wisconsin's patient-psychotherapist privilege, that State's Supreme Court, applying a de novo standard of review, stated that the threshold for in camera review was a showing by the moving party of a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available. The court declined to adopt a higher "materiality" standard as a prerequisite for in camera review. The court stated that the moving party must show that it had conducted a reasonable investigation into the background and counseling of the holder of the privilege through other means before the records would be made available. Mere conjecture or speculation as to the contents of the records would not suffice.

Military & Veterans Law > Military Justice > Evidence > Privileges > Psychotherapist-Patient Privilege

[HN4] When the patient objects, a threshold showing is required before an in camera review of records subject to the protections of Mil. R. Evid. 513, Manual Courts-Martial (2000), may be ordered. Failure to recognize this logical necessity would entirely thwart the basis of this rule: to facilitate and secure the social benefit of confidential counseling recognized by Jaffee and similar to the clergy-penitent privilege. Manual for Courts-Martial (2000), app. 22, at A22-44. Since Mil. R. Evid. 513 and military case law do not define that threshold, the U.S. Navy-Marine Corps Court of Criminal Appeals reviews de novo the military judge's decision using a standard similar to that of the Wisconsin Supreme Court in Green: (1) did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or

substantially similar information through non-privileged sources? This standard is not high, because the moving party will often be unable to determine the specific information contained in a psychotherapist's records.

Military & Veterans Law > Military Justice > Evidence > Privileges > Psychotherapist-Patient Privilege

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

[HN5] One decision has held that an appellant's references, voluntarily made to a third party, to the content of a marital communication amounted to a disclosure sufficient to waive the marital privilege under Mil. R. Evid. 510, Manual Courts-Martial. The decision stated that whether a conversation was privileged was a mixed question of law and fact, and the military judge's ultimate decision to admit the conversation into evidence was reviewed for an abuse of discretion. Application of an abuse of discretion standard to the decision to disclose a psychotherapist's records makes sense. This decision should not be subject to stricter appellate scrutiny than a possible follow-on decision by the military judge to admit those records into evidence.

Military & Veterans Law > Military Justice > Evidence > General Overview

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

[HN6] A finding of an abuse of discretion requires more than a mere difference of opinion between an appellate court and the military judge. A military court of criminal appeals will reverse a disputed evidentiary decision only when it was arbitrary, fanciful, clearly unreasonable or clearly erroneous.

Military & Veterans Law > Military Justice > Sentencing > General Overview

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

[HN7] In determining the appropriateness of a sentence, a military court of criminal appeals is to afford the appellant individualized consideration under the law. Specifically, it must review the appropriateness of the sentence based upon the nature and seriousness of the offense and the character of the offender. This requires a balancing of the offenses against the character of the offender. It may consider only sentence appropriateness as opposed to clemency, which is within the purview of the convening authority.

COUNSEL: LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel.

LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE J.W. ROLPH, C.L. SCOVEL, J.D. HARTY. Chief Judge ROLPH and Senior Judge HARTY concur.

OPINION BY: C.L. SCOVEL

OPINION

[*577] SCOVEL, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, pursuant to his pleas, of involuntary manslaughter and assault consummated by a battery upon a child under 16 years of age in violation of Articles 119 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 919 and 928. The appellant was sentenced to confinement for nine years and a dismissal. [*578] The convening authority approved the sentence as adjudged but, in accordance with a pre-trial agreement, suspended confinement in excess of seven years for a period of seven years from the date of sentencing and waived automatic forfeitures for six months.

We have considered the record of trial, [*2] the appellant's three assignments of error, and the Government's answer.¹ We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a) and 66(c), UCMJ.*

1 In a summary assignment of error, the appellant asserts that his court-martial lacked jurisdiction because his case had no "service relation," noting that his offenses were committed off base and did not involve Government property or victims. We disagree and find that the court-martial had jurisdiction over the appellant and the offenses. *See Solorio v. United States, 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987).* This assignment of error has no merit.

Spouse's Psychological Records

The appellant contends in an assignment of error submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, that the military judge erred when he granted a Government motion to compel production of the psychotherapist-patient [*3] records of the appellant's wife for *in camera* review and then released a portion of those records to the parties.

[HN1] Military Rule of Evidence 513(a), Manual for Courts-Martial, United States (2000 ed.), permits a pa-

tient to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist. Exceptions to this general rule include "when the communication is evidence of spouse abuse, child abuse, or neglect in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse." Mil. R. Evid. 513(d)(2).

Relying on the child-abuse exception to the general rule of privilege, the trial counsel moved to compel production of records created by a psychologist who began treating the appellant's wife two months after the death of a son and the discovery of injuries suffered by another son, allegedly caused by the appellant, the father of both boys. The Government's motion stated that Mrs. Klemick knew of statements made by the appellant concerning these events, as indicated by her sworn statement to state criminal investigators. Attached to the Government's [*4] motion were a copy of Mrs. Klemick's statement and copies of health insurance claim forms submitted by her psychologist for payment for her treatment. The trial counsel also noted that Mrs. Klemick was unavailable to testify.²

2 In moving for an oral deposition of Mrs. Klemick based on her unavailability, the trial counsel cited her failure to appear at the *Article 32, UCMJ*, hearing; her move from Florida to New Jersey with the surviving children; her delivery of a child after a "high-risk" pregnancy that left her bed-ridden due to post-natal complications; and his inability, even through her attorney, to arrange for an interview with her. AE XIII.

Implying that discussions between Mrs. Klemick and her psychotherapist in the months following the death of her son would likely have included her "first-hand knowledge of statements [of the appellant] regarding substantive events in the instant case" and noting that she "is and has been one of the primary caretakers of Maason [sic] [the son allegedly assaulted [*5] by the appellant]," the trial counsel argued that the child-abuse exception under Mil. R. Evid. 513(d)(2) made Mrs. Klemick's privilege inapplicable. Appellate Exhibit XIV at 2. The appellant opposed the trial counsel's motion, as did Mrs. Klemick (through counsel who entered an appearance in the court-martial on her behalf for this limited purpose). Record at 133-39, 202-05; AE XVI and XVIII.

After considering briefs and argument presented by the parties and Mrs. Klemick, the military judge ordered production in a sealed container of records, reports, notes, and evaluations in the possession of her psychotherapist. AE XIX. The military judge reviewed these materials *in camera* and then released to the parties those

portions concerning "her thoughts and her impressions on this trial and her own personal concerns that may or may not give rise to bias on one side or the [*579] other that may be useful in cross-examination if she testifies." Record at 204.

We note, first, that the appellant initially entered pleas of not guilty to the charges. During the course of his trial before members, however, he entered into a pre-trial agreement with the convening authority and pleaded guilty to [**6] lesser included offenses. His unconditional guilty pleas waived any issue regarding the military judge's treatment of his wife's psychotherapist's records. *See* Rule for Court-Martial 910(a)(2), Manual for Courts-Marital, United States (2000 ed.). Moreover, neither party offered the psychotherapist's records into evidence nor were they used in any other way in the course of the trial. The military judge did not rule on their admissibility as evidence. Absent plain error, the appellant has no basis to assert error now. Mil. R. Evid. 103(a), (d). Even if this issue were not waived by the appellant, however, we conclude that the military judge did not err.

While the appellant indirectly challenges the military judge's decision to release portions of the psychotherapist's records to the parties, he focuses primarily on the initial decision to conduct the *in camera* review. The appellant frames the issue in these terms: "Nothing in [Mil. R. Evid.] 513(d) suggests that just because an alleged crime involves spousal or child abuse, that [sic] the privilege that is the subject of [Mil. R. Evid.] 513 disappears, without some showing that the communication pertains to that alleged [**7] spousal or child abuse. The Government showing in this case was not sufficient to pierce the veil of privilege." Appellant's Supplemental Assignment of Error of 14 Dec 2005 at 2. We construe the appellant's contention to be that a threshold showing is required before a military judge may conduct an *in camera* review of psychotherapy records. We review here only the narrow issue of whether the military judge abused his discretion in ordering this *in camera* review.

[HN2] Mil. R. Evid.513 is silent on this matter, stating only:

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

(1) In any case in which the production or admissibility 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.

....

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

We have found no applicable military or Federal case law. For their persuasive authority only, we will consider State appellate court decisions addressing the issue of prerequisites for *in camera* [**8] review under State psychotherapist-patient privilege rules similar to Mil. R. Evid. 513.

In *Oregon v. Bassine*, 188 Ore. App. 228, 71 P.3d 72 (2003), the Oregon Court of Appeals held that the trial court did not err in refusing to conduct an *in camera* inspection of privileged psychiatric records before ruling on a defense request for their production in a case involving charges of child sexual abuse. The court differentiated between privileged material in the possession of the State and therefore subject to discovery, which must be disclosed for *in camera* review, and privileged material possessed solely by a third party and not subject to discovery. "To be entitled to an *in camera* inspection of privileged material not subject to discovery, defendant must make a threshold showing that the inspection might yield evidence that an exception to nondisclosure applied." *Id.* at 234.

[HN3] In a case involving Wisconsin's patient-psychotherapist privilege, that State's Supreme Court ruled that the trial court had not erred in refusing to conduct an *in camera* review of a child sexual assault victim's counseling records because the defense failed to meet its burden to compel review. [**9] *Wisconsin v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298 (Wis. 2002). Applying a de novo standard of review, the court stated that the threshold for *in camera* review was a showing by the moving party of "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence [*580] available. . . ." *Id.* at 303. The court declined to adopt a higher "materiality" standard as a prerequisite for *in camera* review. *Id.* at 309. The court stated that the moving party must show that it had conducted a "reasonable investigation" into the background and counseling of the holder of the privilege through "other means" before the records would be made available. *Id.* at 310. The court concluded by stating that "mere conjecture or speculation" as to the contents of the records would not suffice. *Id.*

We conclude that, [HN4] when the patient objects, a threshold showing is required before an *in camera* review of records subject to the protections of Mil. R. Evid. 513 may be ordered. Failure to recognize this logi-

cal necessity [**10] would entirely thwart the basis of this rule: to facilitate and secure "the social benefit of confidential counseling recognized by [*Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)], and similar to the clergy-penitent privilege." Manual for Courts-Martial, United States (2000 ed.), App. 22, at A22-44. Since Mil. R. Evid. 513 and military case law do not define that threshold, we will review de novo the military judge's decision using a standard similar to that of the Wisconsin Supreme Court in *Green*: (1) did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?

This standard is not high, because we know that the moving party will often be unable to determine the specific information contained in a psychotherapist's records. In this case, we find that the Government satisfied this three-part standard. The death [**11] of a child at the hands of his father, followed soon thereafter by a discussion between the parents of the father's treatment of the child and then by psychological counseling for the child's mother, reasonably led to the conclusion that records of that counseling would contain information related to the event and the reactions of the victim's mother. The counseling records could reasonably be expected to contain Mrs. Klemick's recollections of statements made by the appellant and her knowledge of the appellant's role in this event. The Government showed that, as evidence of child abuse, such information may be admissible as an exception to the general rule of privilege under Mil. R. Evid. 513(d)(2). The record does not suggest that this information was cumulative of other evidence then available to the Government. Finally, the Government attempted to interview Mrs. Klemick in an effort to obtain this and other evidence, but was not successful in doing so before it moved for production of the psychotherapist's records. Upon this threshold showing, the military judge properly ordered and conducted the *in camera* review.

We turn next to the appellant's indirect challenge of the military [**12] judge's decision to release portions of the psychotherapist's records to the parties. He contends that this decision "affected the presentencing portion of Appellant's trial by intimidating potential familial witnesses." Appellant's Supplemental Assignment of Error at 2.

Again, we note that these records were not admitted into evidence, but were made available to the parties for their possible use in cross-examining Mrs. Klemick.

Case law does not provide a standard of review to apply in this situation. We find guidance, however, in our superior court's analysis of a military judge's decision that [HN5] an appellant's references, voluntarily made to a third party, to the content of a marital communication amounted to a disclosure sufficient to waive the marital privilege under Mil. R. Evid. 510. In *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000), the court stated that whether a conversation was privileged was a mixed question of law and fact, citing *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997), and the military judge's ultimate decision to admit the conversation into evidence was reviewed for an abuse of discretion under *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999). [**13] Application of an abuse of discretion standard to the decision to disclose a psychotherapist's records makes [**581] sense. This decision should not be subject to stricter appellate scrutiny than a possible follow-on decision by the military judge to admit those records into evidence.

[HN6] A finding of an abuse of discretion requires more than a mere difference of opinion between an appellate court and the military judge. We will reverse a disputed evidentiary decision only when it was "arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous.'" *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

In this case, the military judge first reviewed the psychotherapist's records *in camera* to determine whether they contained communications from the patient related to possible child abuse, a question of fact. He then determined whether the communications fell under the exception to the general rule of privilege under Mil. R. Evid. 513(d)(2) and should be disclosed to the parties for possible use during the trial. We have reviewed those portions of the psychotherapist's records released [**14] by the military judge to the parties. AE XXVI. They contain evidence of possible child abuse, which we conclude fell under the Mil. R. Evid. 513(d)(2) exception. The military judge's decision was not arbitrary, unreasonable, or based on a clearly erroneous understanding of the law. He, therefore, did not abuse his discretion in ordering their disclosure to the parties.

Assuming *arguendo* that the military judge erred in disclosing the records, we note again that they were not used by the parties in the course of the trial. The appellant contends that the military judge's decision "intimidated" potential familial witnesses but fails to tell us which witnesses, why they decided not to testify, the substance of their proposed testimony, and the harm to the appellant caused by their refusal to testify. Presumably Mrs. Klemick was one of these witnesses, but the record and pleadings contain no information to explain

why she did not testify. We decline to speculate on the possible reasons and have no basis to conclude that the appellant was prejudiced by her absence. Any error by the military judge was harmless. This assignment of error is without merit.

Sentence Appropriateness

[**15] The appellant asserts that a sentence that includes a dismissal is inappropriately severe in light of his record of service.

[HN7] In determining the appropriateness of a sentence, we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). This requires a balancing of the offenses against the character of the offender. We may consider only sentence appropriateness as opposed to clemency, which is within the purview of the convening authority. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

Upon consideration of the entire record, including the providence inquiry, the appellant's unsworn statement, and the evidence offered in both aggravation and mitigation, we do not find the appellant's sentence to be inappropriately severe. The appellant admitted causing the death of his infant son by violently shaking him for 10 seconds in a fit [**16] of frustration. He further admitted violently grabbing and shaking his son on several occasions over the previous three months. Balancing these offenses against the appellant's character and considering his excellent service record, we do not conclude that a sentence that includes dismissal from the Navy is inappropriately severe. This assignment of error is without merit.

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Chief Judge ROLPH and Senior Judge HARTY concur.

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