IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

CC, Staff Sergeant, US Army, Petitioner,	)	
v.	)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND APPLICATION FOR STAY OF PROCEEDINGS
Jeffery D. Lippert, Colonel, US Army, Respondent,	)	
and	)	Army Misc. Dkt. No._____
Michael D. Osier, Staff Sergeant, US Army, Real Party in Interest.	)	13 October 2014

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS:

Preamble

COME NOW the undersigned special victim counsel, on behalf of Petitioner and pursuant to Rule 2(b) and 20 of this court's Rules of Practice and Procedure, and request that this Honorable Court grant extraordinary relief by: (1) staying the trial proceedings pending a decision of this Court on this petition, and (2) granting petitioner's request for extraordinary relief in the nature of a writ of mandamus and issue a stay of proceedings.

Facts and Procedural History

Those facts necessary for the disposition of this Petition are included in Petitioner's Brief in Support of the Petition for Extraordinary Relief.

All motions that have been filed are included with the brief in support of this petition as separate exhibits. Trial is currently scheduled to begin on 15 October 2014 (but the military judge has indicated he will continue the case so the defense can review the mental health records he orders disclosed).

ISSUES

I.

WHETHER THE MILITARY JUDGE ERRED BY ORDERING THE PRODUCTION OF CC'S MENTAL HEALTH RECORDS FOR *IN CAMERA* REVIEW WITHOUT CONDUCTING THE EVIDENTARY HEARING REQUIRED BY MIL. R. EVID. 513(e)(2).

II.

WHETHER THE MILITARY JUDGE VIOLATED CC'S DUE PROCESS RIGHTS BY DENYING HER THE REASONABLE OPPORTUNITY TO BE PRESENT AND BE HEARD ON THE RECORD BY FAILING TO CONDUCT THE REQUIRED EVIDENTIARY HEARING PRIOR TO ORDERING PRODUCTION OF HER MENTAL HEALTH RECORDS FOR *IN CAMERA* REVIEW.

III.

WHAT IS THE STANDARD THAT MUST BE MET BY THE PARTY REQUESTING PRODUCTION OF MENTAL HEALTH RECORDS UNDER MIL. R. EVID. 513 BEFORE THE COURT CAN ORDER PRODUCTION OF THOSE RECORDS FOR *IN CAMERA* REVIEW?

IV.

WHETHER THE DEFENSE COUNSEL HAS MET THE STANDARD REQUIRED FOR PRODUCTION OF MENTAL HEALTH RECORDS FOR IN CAMERA REVIEW IN THEIR MOTION TO COMPEL DISCOVERY IN THIS CASE.

Jurisdictional Statement

It is well-established in military law that the superior military appellate courts have the authority to require "'inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do.'" *McPhail v. United States,* 1 M.J. 457, 461-62 (C.M.A. 1976) (quoting *Virginia v. Rives,* 100 U.S. 313, 323 (1879)). As the highest judicial tribunal in the United States Army, this court has the "'judicial authority over the actions of trial judges within the Department that may potentially reach [this court]' enabling [this court] to 'confine an inferior court to the lawful exercise of its prescribed jurisdiction.'" *Ponder v. Stone,* 54 M.J. 613, 615-16 (N.M. Ct. Crim. App. 2000) (concluding that Courts of Criminal Appeals possess such authority, but declining to exercise it) (quoting *Dettinger v. United States,* 7 M.J. 216,

218 (C.M.A. 1979)); *see also United States v. Curtin,* 44 M.J. 439, 440 (C.A.A.F. 1996). As this court explained in *Davis v. United States,* 35 M.J. 640 at 645 (Army Ct. Crim. App. 1992):

> Our authority to issue extraordinary writs "in aid of jurisdiction" under the All Writs Act is not limited to our actual or potential appellate jurisdiction defined in Article 62, 66, and 69, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 880 these statutory provisions do not encompass our entire authority as a court. As the highest judicial tribunal in the Army's court-martial system, we are expected to fulfill an appropriate supervisory function over the administration of military justice.

In *Davis,* this court held that it had the authority to review constitutional claims (but not exclusively constitutional claims) under a petition for extraordinary relief, citing the Court of Military Appeals rationale in *Unger v. Ziemniak* 27 M.J. 349, 353 (1989). In finding authority to exercise jurisdiction under the All Writs Act the *Unger* court held:

> Reexamining the history and judicial applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in "aid" of our jurisdiction is not limited to the appellate

> jurisdiction defined in Article 67 [U.C.M.J.]…, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.

Id. (quoting *Robinson v. Abbott,* 23 C.M.A. 219 (1974)).

Additionally, this court has jurisdiction to review the claims of the Petitioner pursuant to the All Writs Act, 28 U.S. C. 1651, under the courts supervisory responsibility within the military justice scheme. As generally explained in *Noyd v. Bond,* 395 U.S. 683, (1969), this court, as the highest tribunal in the Army, has the inherent authority to oversee the interlocutory actions of the inferior courts of the Army. This role of the court was also affirmatively recognized in *Dew v. United States,* 48 M.J.639, 645 (Army Ct. Crim. App. 1998) which held "[o]ur jurisdiction is predicated upon the All Writs Act and our supervisory responsibility in the military justice system."

Therefore review of this Petition under the All Writs Act is properly a matter in aid of the jurisdiction of this court in its supervisory capacity over Army trial courts.

Although not a party to the above-captioned court-martial, CC, as the named victim-patient, nonetheless holds certain privileges. It is a long established and recently reaffirmed rule that the holder of a privilege has the right to contest and

protect that privilege and standing to do so. *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F., 2013) citing *CCR v. U.S.*, 72 M.J. 126 (C.A.A.F., 2013). The *Kastenberg* court asserted, "[t]he President has expressly stated the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings under Military Rules of Evidence 412 and 513." *Id.* at 369. The opportunity to be heard "includes the right to present facts and legal argument and that a victim or patient who is represented by counsel be heard through counsel." *Id*. at 370. In the present matter, CC is listed by the government as the alleged victim-patient in the specification of the charge under Article 120 (Exhibit 1). She thus holds the privileges granted to her by Mil. R. Evid. 412, 513, and 514.

Reasons for Granting the Writ

Petitioner, Staff Sergeant CC, by and through her undersigned counsel, submits the attached brief in support of his Petition for Extraordinary Relief. As set forth therein, Sergeant CC's rights have been violated by the military judge when he denied her the opportunity to be present and be heard prior ordering the release of her medical records for in camera review, and ordering such records produced absent a hearing, findings of facts, and conclusions of law in volition of Military Rule of Evidence 514.

Staff Sergeant CC cannot seek or obtain relief through the ordinary course of appeals because her privileged mental health records and communications therein have already been ordered produced, and she will not have standing, in the event this case is eligible for an appeal. This is a case of first impression.

A motion For Leave of the Court to Appear Pro Hoc Vice for the below signed counsel is submitted along with this petition, as well as a brief in support of this petition.

Conclusion

Petitioner, through her counsel, respectfully requests that this Honorable Court issue a stay in the proceedings (including the military judge's order for the production of mental health records) pending a decision of this court and any higher court on this petition, and grant Petitioner's request for extraordinary relief.

(b) (6) [redacted]

Special Victim Counsel

[redacted]

Special Victim Counsel

I Corps Office of the Staff Judge Advocate
Legal Assistance Office
Box 339500, Mail Stop 69
Joint Base Lewis-McChord, Washington 98433-9500

CERTIFICATE OF FILING AND SERVICE

I certify that the original and two copies of the foregoing *CC v. Lippert* were sent by FedEx to the Clerk's Office on the 14th day of October 2014. Copies were sent by FedEx to the Government Appellate Division and Defense Appellate Division on the 14th day of October 2014. The Clerk of Court, Government Appellate Division and Defense Appellate Division were served digital copies via email on the 13th day of October 2014. Copies have been served on defense counsel ((b) (6) [redacted], trial counsel ((b) (6) [redacted]), and respondent (COL Jeffery Lippert) via email on the 13th day of October 2014.

//original signed//

_____

(b) (6) [redacted]

Special Victims' Counsel

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

CC, Staff Sergeant, US Army, Petitioner,	)	
v.	)	BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND APPLICATION FOR STAY OF PROCEEDINGS
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Michael D. Osier, Staff Sergeant, US Army, Real Party in Interest.	)	13 October 2014

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Petitioner, Staff Sergeant CC, by and through her undersigned Special Victims' Counsel [hereinafter SVC], submits this brief in support of her Petition for Extraordinary Relief. As set forth herein, the military judge in the above-captioned action has violated the due process rights of CC, the victim-patient in this case, afforded to her under the Military Rules of Evidence [hereinafter Mil. R. Evid.] and applicable case law. Therefore, the petitioner requests that this court issue an order in the form of a Writ of Mandamus ordering the trial court and military judge to hold an evidentiary hearing pursuant to Mil. R. Evid. 513(e)(2) and make findings of fact and conclusions of law as to whether the Defense counsel, as the

moving party, have met their burdens of proof and persuasion, requiring CC's mental health records to be produced under seal for *in camera* review. Additionally, the petitioner requests that this court stay the proceedings in *United States v. Staff Sergeant Michael D. Osier* during the pendency of her petitions before this court and superior courts.

ISSUES

I.

WHETHER THE MILITARY JUDGE ERRED BY ORDERING THE PRODUCTION OF CC'S MENTAL HEALTH RECORDS FOR *IN CAMERA* REVIEW WITHOUT CONDUCTING THE EVIDENTARY HEARING REQUIRED BY MIL. R. EVID. 513(e)(2).

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WHAT IS THE STANDARD THAT MUST BE MET BY THE PARTY REQUESTING PRODUCTION OF MENTAL HEALTH RECORDS UNDER MIL. R. EVID. 513 BEFORE THE COURT CAN ORDER PRODUCTION OF THOSE RECORDS FOR *IN CAMERA* REVIEW?

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V.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS.

JURISDICTIONAL STATEMENT

It is well-established in military law that the superior military appellate courts have the authority to require "'inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do.'" *McPhail v. United States,* 1 M.J. 457, 461-62 (C.M.A. 1976) (quoting *Virginia v. Rives,* 100 U.S. 313, 323 (1879)). As the highest judicial tribunal in the United States Army, this court has the "'judicial authority over the actions of trial judges within the Department that may potentially reach [this court]' enabling [this court] to 'confine an inferior court to the lawful exercise of its prescribed jurisdiction.'" *Ponder v. Stone,* 54 M.J. 613, 615-16 (N.M. Ct. Crim. App. 2000) (concluding that Courts of Criminal Appeals possess such authority, but declining to exercise it) (quoting *Dettinger v. United States,* 7 M.J. 216, 218 (C.M.A. 1979)); *see also United States v. Curtin,* 44 M.J.

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Kastenberg, 72 M.J. 364, 368 (C.A.A.F., 2013) citing *CCR v. U.S.*, 72 M.J. 126 (C.A.A.F., 2013). The *Kastenberg* court asserted, "[t]he President has expressly stated the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings under Military Rules of Evidence 412 and 513." *Id.* at 369. The opportunity to be heard "includes the right to present facts and legal argument and that a victim or patient who is represented by counsel be heard through counsel." *Id*. at 370. In the present matter, CC is listed by the government as the alleged victim-patient in the specification of the charge under Article 120 (Exhibit 1). She thus holds the privileges granted to her by Mil. R. Evid. 412, 513, and 514.

STANDARD OF REVIEW

The military judge's interpretation as to whether a hearing is required prior to production of mental health records under Mil. R. Evid. 513 is a question of law reviewed de novo. *See United States v. Matthews*, 68 M.J. 29, 35 (C.A.A.F. 2008); *see also United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005). The military judge's application of Mil. R. Evid. 513 to the case at bar is reviewed for an abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

FACTS

On 16 July 2014, the Special Victim Counsel (hereinafter SVC) was retained by the client, herein referred to as CC, the named victim in the case of *US v. Osier* at Joint Base Lewis-McChord, Washington. On that date, the SVC sent out notification of representation to Trial Counsel and Defense Counsel which included the SVC's contact information.

This case was referred to General Court-Martial on 2 September 2014 by MG Terry Ferrell, Commanding General, 7th Infantry Division, Joint Base Lewis-McChord, Washington. The accused was arraigned on 11 September 2014 and the SVC sent a memorandum Notice of Appearance to the military judge that day. On 12 September 2014, COL Samuel Schubert, Military Judge, issued a pretrial order in the case and all parties and the SVC were notified that trial was docketed for 15-16 October 2014.

On 8 September 2014, Defense counsel served on the Government a request for discovery in this case (Exhibit 2), which included a request for "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." On 24 September 2014, the Government responded to this request (Exhibit 3), stating "This request is DENIED, pending the proper MRE 513 motion." On 26 September 2014, Defense counsel filed a

Motion to Compel Discovery (Exhibit 4) of the above-mentioned records pertaining to CC. Government counsel filed a response (Exhibit 5) to this motion on 29 September 2014 and SVC filed a response (Exhibit 6) to this motion on 30 September 2014.

On 1 October 2014, COL Jeffery D. Lippert, Military Judge, held a Rule for Court-Martial [hereinafter R.C.M.] 802 conference in which the Motion to Compel Discovery was discussed. During that conference, COL Lippert inquired into the Defense counsel's reasoning for requesting the records. Defense counsel stated that they sought records pertaining to an alleged prior incident from Hawaii in 2008 as well as any records pertaining to the subject-matter sexual assault for three purposes: 1) for use in cross-examination on sentencing as to the impact of the sexual assault on CC; 2) for use on the merits to demonstrate that CC is an "eggshell plaintiff" and may have incorrectly perceived the events of the night of her sexual assault; and 3) to determine if there is any evidence of fabrication or exaggeration made in her statements to her psychotherapist.

Colonel Lippert then ordered the Trial Counsel to investigate whether such records exist, where the records -if there are any- are located, whether those records are in possession of the Government, and what the extent of those records is, both with regard to the alleged 2008 Hawaii incident

as well as the case at bar. He further stated that, in the event the Government was able to provide such information about the records, he may order them produced prior to having a hearing on the matter. Finally, he stated that, if CC invoked her privilege and did not discuss any potential records with the Trial Counsel, and if the Trial Counsel was otherwise unable to ascertain the existence or location of the records, that he would order her to testify at an Article 39(a) session and ask her for that information at that time. If she invoked her privilege under Mil. R. Evid. 513 and refused to discuss her records, COL Lippert then stated that he would "decide at that time whether the case goes forward."

The SVC sent an email to the military judge on 2 October 2014 in order to clarify the court's rulings made at the R.C.M. 802 session (Exhibit 7). Later that day, the military judge responded (Exhibit 8).

On 2 October 2014, CC authorized the Trial Counsel in the case to invoke privilege on her behalf in accordance with Mil. R. Evid. 513(c). The Trial Counsel informed the court that he was able to determine that CC had mental health records both at Madigan Army Medical Center at Joint Base Lewis-McChord, Washington and Tripler Army Medical Center in Hawaii (Exhibit 9). COL Lippert then instructed the Trial Counsel via email and without holding a hearing on the record to prepare an order for

his signature ordering those records produced for *in camera* review (Exhibit 10). On 7 October 2014, the military judge signed the order for release and production of CC's mental health records (Exhibit 11), and on 10 October 2014, the military judge sent his order to counsel. It appears, based on the military judge's email (Exhibit 12) and counsel's own experience of prior practice at Joint Base Lewis-McChord in this area, that the military judge intends to conduct his in camera review of the records, independently determine what the court deems is discoverable, disclose those records to both parties, and then hold the 513 hearing to allow the parties to litigate what is admissible and for what purposes.

LEGAL AUTHORITY AND ARGUMENT

I. THE MILITARY JUDGE ERRED IN ORDERING THE PRODUCTION OF CC'S MENTAL HEALTH RECORDS FOR *IN CAMERA* REVIEW WITHOUT THE EVIDENTIARY HEARING REQUIRED BY MIL. R. EVID. 513(e)(2).

Mil. R. Evid. 513(e)(2) states that "[b]efore ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing." The patient whose records are in question has the reasonable opportunity to be present and be heard, and upon motion and a showing of good cause, the military judge may also close the

hearing. *Id.* Further, and only after such a hearing, "[t]he military judge shall examine such evidence or a proffer thereof *in camera*, if such an examination is necessary to rule on the motion." Mil. R. Evid. 513(e)(3). An *in camera* review of mental health records is not automatic or a foregone conclusion. It is only appropriate if, after the taking of evidence and testimony at the hearing, it is still required for the military judge to rule on the motion. Mil. R. Evid. 513 (e)(2) and (3).

R.C.M. 802 provides that "[a]fter referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial." R.C.M. 802(a). "The purpose of such conference [sic] is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues." R.C.M. 802(a) discussion. Furthermore, "issues may be resolved only by agreement of the parties; they may not be litigated or decided at a conference. To do so would exceed, and hence be contrary to, the authority established under Article 39(a) [Uniform Code of Military Justice]." R.C.M. 802(a) analysis at A21-45.

The military judge in this case ordered production of CC's records without holding a hearing required by the Mil. R. Evid., and instead has ordered the records be produced pursuant to

discussion between the parties and the SVC at a pretrial conference. At that conference, the military judge asked defense counsel for their basis for requesting the records, essentially asking them to make oral argument in the R.C.M. 802 session as to why the records should be produced. This argument was not on the record, nor has it as of the date of this filing been put on the record. The Trial Counsel and the SVC argued that the Defense counsel had failed to show a connection between the evidence cited in their motion and any mental health records of CC. The issue of production of CC's mental health records was improperly litigated and ordered based on a R.C.M. 802 conference in violation of the purpose of that Rule and contrary to the authority of Article 39(a).

It is axiomatic that should the military judge disclose CC's mental health records to the parties after an in camera review, and then schedule a "513" hearing to litigate the relevance, admissibility, and the permissible use of such records will only compound the violation of CC's rights.

II. THE MILITARY JUDGE VIOLATED CC'S RIGHTS BY DENYING HER THE REASONABLE OPPORTUNITY TO BE PRESENT AND BE HEARD ON THE RECORD BY FAILING TO HOLD AN EVIDENTIARY HEARING PRIOR TO ORDERING PRODUCTION OF HER MENTAL HEALTH RECORDS FOR *IN CAMERA* REVIEW.

As stated above, CC, as the patient whose mental health records are at issue, "shall be afforded a reasonable opportunity to attend the hearing and be heard …." Mil. R. Evid. 513(e)(2). It is not customary that witness or even the accused in a given case will be present at R.C.M. 802 conferences: "The presence of the accused is not necessary in most cases since most matters dealt with at conferences will not be substantive. The participation of the defense in conferences and whether the accused should attend are matters to be resolved between defense counsel and the accused." R.C.M. 802 analysis at A21-45.

Understanding that substantive matters are not to be litigated at an R.C.M. 802 conference, the SVC informed CC that she need not be present at the conference, but does have the right to be at a Mil. R. Evid. 513 hearing. Thus, CC was not present at the 802 hearing for what essentially amounted to litigation of the Motion to Compel Discovery. In failing to hold a hearing in accordance with the rule and improperly litigating the matter at an R.C.M. 802 conference, the military judge deprived CC of her rights to reasonably be present and be heard on the issue of production and disclosure of her mental health records.

III. THE PARTY REQUESTING PRODUCTION OF MENTAL HEALTH RECORDS UNDER MIL. R. EVID. 513 MUST MAKE A THRESHOLD SHOWING AS OUTLINED IN *UNITED STATES V. KLEMICK,* 65 M.J. 576 (N.M. Ct. Crim. App. 2006) BEFORE THE COURT CAN ORDER PRODUCTION OF THOSE RECORDS FOR *IN CAMERA* REVIEW.

During the R.C.M. 802 session, the defense counsel expanded their basis and rationale for their request for production of CC's mental health records. Since this discussion was not on the record, there exists no accurate record of what was said. Assuming, *in arguendo*, that the defense counsel's proffer met the Mil. R. Evid. 513 standard of "specifically describing the evidence and stating the purpose for which it is sought or offered," this proffer was not included in their initial overly-broad request for discovery. It appears that the military judge combined the written submission and discussions during the 802 session to determine that the defense met its burden. The military judge erred by creating a nebulous and ill-defined threshold standard for production and which as not on the record.

The Navy-Marine Court addressed this precise issue in *United States v. Klemick*, 65 M.J. 576 (N.M. Ct. Crim. App. 2006). That court held that "when a 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." This threshold showing, which should be adopted by this court, requires the proponent of the evidence demonstrate: (1) "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) that the information sought is not "merely cumulative of other information available;" and (3) that [the proponent of the evidence] made "reasonable efforts to obtain the same or substantially similar information through non-privileged sources[.]" *Id*. at 580. The *Klemick* decision, though persuasive authority, has been cited by the Court of Appeals for the Armed Forces regarding different points of law. See *Kastenberg*, 72 M.J. 364.

The United States Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 5-7 (1996) noted the privilege is similar to the attorney-client and spousal privileges in that it is "rooted in the imperative need for confidence and trust." *Id*. at 10 (internal citations omitted).

> Effective psychotherapy … depends on an atmosphere of confidence and trust in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears. Because of the

> sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Id. at 10.

In making the privilege absolute under Federal Rule of Evidence 501 and rejecting any balancing requirement between the defendant and patient's interests, the Court found that "[m]aking a promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of a patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id*. at 17. "The exceptions [to Mil. R. Evid. 513] were drafted to limit the privilege in order to balance the public policy goals stated in *Jaffee* with 'the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.'" *United States v. Jenkins*, 63 M.J. 426, 430 (C.A.A.F. 2006) (citing Mil. R. Evid. 513 analysis at A22-45).

The intent behind the creation of the exceptions to Mil. R. Evid. 513 is being subverted by the manner in which the exceptions are being applied in our trial courts. It is vital to military readiness that all personnel in the military, not just victims of offenses under Article 120, U.C.M.J., be able to seek mental health assistance in response to any and all mental trauma, whether personal or professional. The uncertainty as to whether these records may be produced and subsequently disclosed in a trial by court-martial will have an undeniable chilling effect on the ability of military personnel to seek psychotherapy, thereby crippling the readiness of our military. By requiring a well-defined and easily applied threshold showing by the requesting party, as well as establishing a uniformity across the Army, this Court can provide reassurance to Soldiers that, in the event they do seek mental health treatment, their privacy interests will be treated with some deference and trial and defense counsel will be required to draw at least some connection between the case at bar and the requested records before they are produced or disclosed. By requiring the trial courts to apply the three-part test adopted in *Klemick*, this court can ensure a uniform application of the Rule and its exceptions across the Army Trial Judiciary.

IV. THE DEFENSE COUNSEL HAS NOT MET THE STANDARD REQUIRED FOR PRODUCTION OF MENTAL HEALTH RECORDS IN THEIR MOTION TO COMPEL DISCOVERY.

Should this court adopt the three-part test outlined in *Klemick* for a threshold showing prior to production of mental health records for an *in camera* review, the defense counsel in this case have failed to make such a showing. Rather than offering "a specific factual basis" as required by the first part of the *Klemick* test, the defense offers speculation alone about what might be in the records rather than connecting the statements made by CC in her statement to CID to anything allegedly contained in her mental health records. Defense points to nothing in the record of this case to support their claim. Specifically, they allege that the "records at issue may" provide multiple grounds for use by the Defense, but fail to state why they believe this is so or ground this allegation in any actual evidence. It is on this speculative basis alone that the military judge in this case ordered the production of CC's mental health records for *in camera* review. The defense in the case at bar made no showing at all to have the records produced, nor were they required to by the military judge. Defense counsel in this case have not cleared the first hurdle of the *Klemick* test, and therefore the production of the records should not have been ordered.

V. A WRIT OF MANDAMUS IS THE APPROPRIATE RELIEF

A writ of mandamus is a discretionary remedy, and is appropriate in this case. In *Dew v. United States* 48 M.J. 639 (Army Ct. Crim. App. 1998), a case involving writs of mandamus and coram nubus, this court relied on *Bauman v. United States 557 F.2d 650 (9th Cir. 1977)* to identify what factors should be considered in determining whether or not a writ of mandamus was appropriate. *Bauman* at 654-55. The factors to be considered are:

(1) The party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired;

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;

(3) The lower court's order is clearly erroneous as a matter of law;

(4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules;

(5) The lower court's order raises new and important problems, or issues of law of first impression.

Here, all five factors weigh in favor of issuing a writ. First, CC has no means of challenging the judge's production order direct appeal.

Second, CC's harm will not be correctable on appeal as the harm will have already occurred by production of her records and

the violation of her rights to heard and be present cannot be remedied.

Third, the military judge's did not follow the clear and plain reading of MRE 513 before he ordered production of CC's mental health records. The military judge also violated the clear and plain reading of RCM 802 by litigating contested matters and issued orders off the record.

Fourth, this issue is certain to arise again. The military judge's approach in the instant case is the default course of action when this situation arises. As it perpetually escapes the chance of review on appeal, it is unknown how often or how disparate this is applied between judges within the same jurisdiction, and across the jurisdictions. Because this violation of CC's right, or any other victim-patient in a similar situation, cannot be corrected or addressed through the ordinary course of appeals, this court will likely only be able to establish clear guidance for the Army Trial Judiciary by exercising its writ authority. Without standardization, a victim-patient's rights will be interpreted differently and without predictability depending on the military judge, ultimately harming the victim-patients the rule is specifically designed to protect if those differing permutations are incorrect, as was the interpretation in the current case.

Finally, this issue is one of first impression.

Therefore, a writ of mandamus is the appropriate relief.

CONCLUSION

For the aforementioned reasons, the petitioner through her below signed Special Victim Counsel, respectfully requests the court grant a stay of proceedings (including production of the mental health records) until the Petition for Extraordinary Relief is decided upon, and further requests that a writ of mandamus be issued.

//original signed//
(b) (6)

//original signed//
[redacted]

(b) (6)
[redacted]

I Corps Office of the Staff Judge Advocate
Legal Assistance Office
Box 339500, Mail Stop 69
Joint Base Lewis-McChord, Washington 98433-9500

CERTIFICATE OF FILING AND SERVICE

I certify that the original and two copies of the foregoing *CC v. Lippert* were sent by FedEx to the Clerk's Office on the 14th day of October 2014. Copies were sent by FedEx to the Government Appellate Division and Defense Appellate Division on the 14th day of October 2014. The Clerk of Court, Government Appellate Division and Defense Appellate Division were served digital copies via email on the 13th day of October 2014. Copies have been served on defense counsel ((b) (6) [redacted], trial counsel (b) (6) [redacted]), and respondent (COL Jeffery Lippert) via email on the 13th day of October 2014.

//original signed//
_____

(b) (6) [redacted]

Special Victims' Counsel

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

Staff Sergeant CC,
U.S. Army, Petitioner
v.
Colonel JEFFERY D. LIPPERT,
U.S. Army, Respondent
and
Staff Sergeant MICHAEL D. OSIER,
U.S. Army, Real Party in Interest

ARMY MISC 20140779

ORDER

WHEREAS:

On 15 October 2014, Petitioner filed a "Petition for Extraordinary Relief in the Nature of a Writ of Mandamus," an "Application for Stay of Proceedings," a "Brief in Support of [the] Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and [the] Application for Stay of Proceedings," and a "Motion for Leave of the Court to Appear Pro Hac Vice."

This court has jurisdiction to review this petition. *See* All Writs Act, 28 U.S.C. § 1651(a) (2012); *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

NOW THEREFORE, IT IS ORDERED:

1. Petitioner's Motion for Leave of the Court to Appear Pro Hac Vice is GRANTED.

2. The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is GRANTED IN PART.

a. The 7 October 2014 Judicial Order for production of Petitioner's mental health records is vacated; and

b. The military judge will comply with Military Rule of Evidence 513(e)(2) prior to deciding whether to order production of Petitioner's mental health records for in camera review.

3. Petitioner's Application for a Stay of Proceedings is DENIED AS MOOT.

DATE: 16 October 2014.

FOR THE COURT:

ANTHONY O. POTTINGER
Acting Clerk of Court

CF: Petitioner Real Party in Interest
Respondent JALS-CR3
JALS-DA JALS-CCR
JALS-GA JALS-CCZ