30 January 2017

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S REPLY TO THE GOVERNMENT BRIEF**
Appellee,	)	
	)	
v.	)	Before Panel No. 2
	)	
Technical Sergeant (E-6)	)	Case No. ACM 39018
Ralph G. Morales	)	
USAF,	)	Tried by general court-martial at
	)	Fairchild Air Force Base, WA by the
Appellant.	)	Commander, Headquarters 18th Air
	)	Force (AMC) on 9-13 November
	)	2015.

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

Argument

1. Appellant did not forfeit or waive any objection based on the application of Executive Order 13696.

Appellant did not forfeit or waive any objection based on the application of Executive Order 13696—including the failure to apply its savings clause—because his written motion was clear enough to make all of the parties below appreciate that his argument included an objection to the ex-post facto application of the new rule on Due Process grounds. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005). The motion said as much in its first paragraph. App. Ex. XXXV at 1. Appellant went on to articulate that to "be clear, [Appellant] unequivocally attacks the validity of redacting the Mil. R. Evid. 513(d)(8) exception on Constitutional grounds." AE XXXV at 4. He further argued that the language of the order was not retrospective, and that Trial Counsel would be "hard-pressed to cite any definitive reference within Executive Order 13696 substantiating its retroactive application." *Id*. at 6. And he concluded his motion by arguing that the

Executive Order was inapplicable to his court-martial because it "became effective long after the charge[d] offenses occurred, and after the specifications were preferred and ultimately referred." This argument was sufficient to make all parties at trial "fully appreciate the substance of the defense objection"—which included the argument that the new version of Mil. R. Evid. 513 should not apply in an action that had already begun—and to give the military judge full opportunity to consider all aspects of the argument.

This consideration should have included the fact that the Executive Order itself stated that actions which had already begun could proceed as if the amendments had not been made. Likewise, it should have also included the fact that Appellant made his original request for the mental health records under the old rule; App. Ex. V. at 10, that the Government essentially conceded that the records should be produced and reviewed *in-camera*; App. Ex. VI at 4, and that the complaining witness would not permit the defense to interview her prior to trial and did not testify during the preliminary hearing, App. Ex. XXXV at 3.

2. Appellant met the standard required for *in-camera* review.

This Court has recognized that it is appropriate to resolve competing claims of privilege and a defendant's right to review information by *in-camera* review and it has explained that, in such cases, *in-camera* review does not do cognizable harm to the privilege. *United States v. Chisum*, 75 M.J. 943, 946 (A. F. Ct. Crim. App. 2016)(citing *United States v. Wright*, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015)). It uses a three-part test to determine whether *in-camera* review should be done that looks at: (1) whether 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) whether the information sought is cumulative of other information; and (3) whether the moving party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. *Id*.

Applied here, Appellant met his burden to trigger *in-camera* review. In his motion, he noted that the complaining witness had confirmed under oath that she received mental health treatment while living Alexandria, Virginia and that she was physically abused by Mr. AUA, who also lived in Alexandria, Virginia. App. Ex. XXXV at 4. This was confirmed by the complaining witness at trial as was the fact that she had regular contact with Mr. AUA. R. at 427, 442. Likewise, the fact that Ms. YM actually spoke about the abuse she suffered during her mental-health counseling was established through Defense Exhibit D. In that exhibit, the licensed clinical social worker detailed abuse Ms. YM claimed to have suffered at the hands of her "boyfriend." Def. Ex. D at 2. She also discussed the abuse she suffered at the hands of Mr. AUA and stated that her boss had "recently attacked and choked" her co-worker then threatened her. *Id*. In light of this, the claim that the additional counseling records might have yielded other information that would have been relevant to Appellant's defense is reasonable and not far-fetched. This was not a fishing expedition. The defense demonstrated that Ms. YM talked about the abuse she suffered during her counseling sessions. It further demonstrated that there were at least two other potential perpetrators of the violence here. The additional records might have contained other admissions by Ms. YM that would have been relevant to Appellant's defense. Her boss, for example, might have made good on his threat or Mr. AUA might have continued his abuse of Ms. YM and struck her during one of their custody swaps. This information was not available to the defense in any other form as it

would only have been available as recorded in the mental health records that were requested or from the mouth of Ms. YM herself.

In light of the above, the military judge should have ordered the records produced for *in-camera* review.

3. Ms. YM waived the privilege by voluntarily producing portions of her mental health records.

Notwithstanding the discussion above, the records also should have been produced because Ms. YM waived the psychotherapist-patient privilege by voluntarily disclosing a legally significant portion of the confidential communications she made under circumstances that made it inappropriate to allow a further claim of the privilege. Mil. R. Evid. 510. At trial, the defense cross-examined Ms. YM using Defense Exhibit D. R. at 424-36. Defense Exhibit D was a portion of Ms. YM's mental health counseling records that she had provided to the Government. R. at 424. Her voluntary disclosure of these records waived the psychotherapist-patient privilege. *United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013). As the CAAF has explained, waiver of a privilege is not subject to the same high standards as the waiver of a constitutional right. *Id*. Waiver of a privilege need not be knowing or intelligent to be effective. *Id*. It occurs whenever a privilege holder "voluntarily consents to the disclosure of privileged statements" without express limitation. That is what happened here.

Ms. YM voluntarily disclosed Defense Exhibit D to the Government but—apparently—did not disclose any other portions of her mental health records. Her motivation for doing this is discernible from reading the exhibit. Some of it was inculpatory in that it documented abuse at the hands of her "boyfriend" (who is presumably the Appellant). Def. Ex. D. at 2. This supported her allegations of abuse. But

some of it was also exculpatory in that it detailed other potential sources for the injuries Ms. YM claimed were inflicted by Appellant. *Id*. Once this mixed bag of evidence was produced, it became inappropriate to allow Ms. YM to continue to refuse to produce the remainder of her mental health records under the claim of privilege. She inadvertently put the issue of other sources of injury into play by waiving the privilege and voluntarily disclosing the record that detailed other potential sources of abuse. In doing so, she waived the privilege with respect to the remainder of her mental health records in so far as they might have contained other information relevant to Appellant's defense (i.e., other statements by Ms. YM about other potential sources of injury). Accordingly, the Military Judge should have ordered the remaining records produced for *in-camera* review and then examined them for relevant evidence.

4. Ms. YM was not planning to frame Appellant from the beginning of their relationship.

The Government asserts that for Appellant's theory of the case to be plausible one must assume that Ms. YM was "somehow planning to frame Appellant for this abuse from the beginning of their relationship . . . ." Appellee's Brief at 27-28. That is not so. But what must be recognized is that the Government's case rests almost entirely on the word of Ms. YM and that she demonstrated time and again that she cannot be trusted. The Government notes that the "most obvious way to ensure that Appellant did not get custody of their daughter would have been to allege that Appellant was hurting their daughter" and that, in the face of this, Ms. YM credibly testified that Appellant never hurt their child. Appellee's Brief at 28. But what it fails to point out is that on November 26, 2014—just a few weeks after the two separated—Ms. YM filed a report with the State of Washington's Department of Social and Health Services in which she alleged Appellant

abused their daughter. R. at 467-68; *See also* Attachment "c" to the Addendum to the Staff Judge Advocate's Recommendation dated 11 March 2016. That claim was investigated and determined to be unfounded. *Id*. Thus, she did try the "most obvious" avenue to ensure that Appellant did not get custody of their daughter—it just did not work. Accordingly, the fact that she testified "credibly" that Appellant never hurt their child does not reflect her honesty. To the contrary, it simply reveals that she has no qualms about changing her allegations after they have been proven false. Her lies change to suit her needs and the situation.

One need not believe that Ms. YM intended to frame Appellant all along in order to have reasonable doubt here. One need only recognize that Ms. YM was regularly seeing Mr. AUA—a man who had threatened her life and repeatedly abused her—throughout the relevant time period here. The bruises depicted in the photographic evidence could be the result of his continued abuse. She could have been documenting her injuries to hold over Mr. AUA's head then simply used them to implicate Appellant when it became advantageous for her to do so.

The photographs lend themselves to this purpose in that they show only bruising. She could turn them to her advantage by simply saying that Appellant was the source of the bruising. Yet it could easily have been Mr. AUA that actually caused the bruises. In fact, the testimony of Technical Sergeant Jorge Cortijo and Staff Sergeant Gerardo Hernandez suggests that Appellant was not the source of Ms. YM's injuries. Taken together, their testimony established that Ms. YM and Appellant were not together from approximately 18 September 2010 to January of 2011. R. at 580, 587, 592. That is, they were not seeing each other at all in October of 2010. This suggests that the injuries

depicted in Prosecution Exhibit 4, which occurred around that time, were the handiwork of Mr. AUA, whom Ms. YM was still seeing regularly and who had previously threatened Ms. YM's life and physically abused her. Prosecution Exhibit 6, which depicts bruises on Ms. YM's chest further demonstrates her machinations. The pictures were provided by Ms. YM as evidence of the abuse she suffered. She testified that they showed where Appellant hit her. R. at 413. But Colonel Alaaeldeen Elsayed, a pathologist, testified that the bruises shown in the picture looked like the kind of bruising that would result from the breast augmentation surgery that Ms. YM had had. R. at 603-04.

Ms. YM's consistent credibility issues cast reasonable doubt on the findings and the sentence here. Accordingly, this Court should set both aside.

Conclusion

WHEREFORE, the Appellant prays that that this Honorable Court will, for the reasons set forth in his brief and assignment of errors as well as those detailed above, set aside the findings and the sentence here as legally and factually insufficient or, in the alternative, set aside the findings and the sentence here and order a rehearing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 January 2017.

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