IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

SALVADOR JACINTO,
Aviation Structural Mechanic First Class, (E-6)
United States Navy,
Appellant

USCA Dkt. No. 20-0359/NA

Crim. App. No. 201800325

AMICUS CURIAE PROTECT OUR DEFENDERS' BRIEF IN SUPPORT OF THE BRIEF FILED BY APPELLEE UNITED STATES

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May 6, 2021

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ISSUES PRESENTED

Second Granted Issue

The Fifth and Sixth Amendments guarantee an accused the right to a meaningful opportunity to present a complete defense. Did the military judge abuse his discretion by denying the defense motion for in camera review of the complaining witness's mental health records?

Additional Issue Presented by Amicus Curiae

Did the deletion of Mil. R. Evid. 513's "constitutionally required" exception remove military courts' jurisdiction to determine whether review, disclosure, or admittance of mental health records are constitutionally required?

INTEREST OF AMICUS CURIAE

Protect Our Defenders honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted, or harassed by fellow service members. Military victims of sexual assault are affected by the production and disclosure of mental health records in violation of Mil. R. Evid. 513.

SUMMARY OF ARGUMENT

The Second Granted Issue states that the Fifth and Sixth Amendments guarantee an accused the right to a meaningful opportunity to present a complete defense. The Appellant did not address the Second Granted Issue. This brief addresses the Second Granted Issue.

Mil. R. Evid. 513 gives patients a privilege to refuse to disclose confidential communications with their psychotherapists. Like all privileges, the rule excludes from trial or disclosure relevant evidence of privileged communications.

Military Rules of Evidence excluding relevant evidence do not abridge an accused's right to present a complete defense so long as they are not arbitrary or disproportionate to the purposes they serve. No court anywhere has ever found the psychotherapist privilege to be arbitrary or disproportionate.

Even if arbitrary or disproportionate, a rule is unconstitutional only if it infringes upon a weighty interest of the accused. The Granted Issue identifies two constitutional interests of an accused: the Fifth and Sixth Amendment right to present a complete defense.

Here, there is no Fifth Amendment right to due process because the privileged records are not in the possession or control of the prosecution and do not fall within the ambit of *Brady v. Maryland*, 373 U.S. 83 (1963).

There is also no Sixth Amendment right to confrontation because the right to confront witnesses is a trial right that does not include the right to discover information to be used in confrontation. There is no constitutional right to discovery in a criminal case.

Mil. R. Evid. 513 is not arbitrary or disproportionate and does not infringe upon any constitutional interest of the accused. The military judge was required to

apply the rule as written and had no discretion or authority to violate the rule by reviewing, even in camera, the complaining witness's mental health records.

Mil. R. Evid. 513 was promulgated by the President in 1999. Despite the privilege, military judges routinely reviewed in camera patients' psychotherapy records and disclosed to trial and defense counsel some or all the privileged records. In 2014 Congress and the President lost confidence in the ability of military judges to decide when, if ever, disclosure was constitutionally required after a military judge at the United States Naval Academy reviewed and disclosed the mental health records of a midshipman who had been raped.

In the next National Defense Authorization Act, Congress directed the President to remove the "constitutionally required" exception to the privilege. The President signed the legislation and issued an executive order removing the exception. Removing the "constitutionally required" exception from Mil. R. Evid. 513 removed the power of military judges to determine whether review or disclosure of mental health records is constitutionally required.

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO.

Whether Mil. R. Evid. 513 violates the Appellant's Fifth or Sixth Amendment interests is a constitutional question of law that this Court reviews de novo. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012).

The abuse of discretion standard of appellate review is not appropriate where the law or rule precludes the military judge from exercising discretion. Mil. R. Evid. 513 does not have a constitutionally required exception and does not permit an in camera review unless the requested information meets an enumerated exception. Mil. R. Evid. 513(e)(3)(B). The Appellant is not seeking information under any enumerated exception. Without an enumerated exception, the military judge did not have any discretion to conduct an in camera review.

II. MIL. R. EVID. 513 DID NOT ABRIDGE APPELLANT'S OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.

In his brief, the Appellant never addresses the Second Granted Issue – whether Mil. R. Evid. 513 unconstitutionally abridged his Fifth or Sixth Amendment right to present a complete defense. Except for his recitation of the Granted Issue, Appellant does not mention the Fifth Amendment. The Appellant's only mention of the Sixth Amendment is in a footnote citing, but not applying, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Appellant Brief at 61, n.386.

The footnote quotes but does not analyze "a meaningful opportunity to present a complete defense." *Id*.

The Supreme Court has provided the standard for determining whether an accused has had a meaningful opportunity to present a complete defense.

a. Rules Excluding Evidence Do Not Abridge the Right to Present a Defense Unless Arbitrary or Disproportionate and Infringe Upon a Weighty Interest of the Accused.

In *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), this Court held that exclusion of polygraph evidence violated the accused's right to "present a defense." The Supreme Court reversed and explicitly set the standard for determining whether a rule excluding relevant evidence abridges an accused's right to "present a defense." *United States v. Scheffer*, 523 U.S. 303, 307 (1998).

An accused's interest in presenting relevant evidence may bow to accommodate other legitimate interests in the criminal trial process. *Id*. at 308. Rulemakers have broad latitude under the Constitution to establish rules excluding evidence. *Id*. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *Id*. Even if arbitrary or disproportionate, a rule is unconstitutional only if it infringes upon a weighty interest of the accused. *Id*.

b. Mil. R. Evid. 513 Is Not Arbitrary or Disproportionate.

As discussed in the Appellee's Answer, Mil. R. Evid. 513 is neither arbitrary nor disproportionate to its purpose. Answer, at 27-29, 35-39. When the Supreme Court first recognized the psychotherapist privilege in *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996), it acknowledged the social benefit of the privilege and noted that all fifty states already recognized the privilege. Because of the importance of the privilege, the Supreme Court rejected the balancing test implemented by the circuit court and some states. *Id*. at 18. The Supreme Court observed that making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. *Id*.; *Kinder v. White*, 609 Fed. Appx. 126, 130-31 (8th Cir. 2015) (rejecting balancing test in a criminal case because of the public benefit and importance of the privilege).

Although *Jaffee* was a civil case, the privilege survives constitutional scrutiny in a criminal case because it is not arbitrary or disproportionate under *Scheffer*. No court in any jurisdiction has ever held that a psychotherapist privilege is arbitrary or disproportionate to its purpose. The psychotherapist privilege serves a legitimate public interest and is not arbitrary or disproportionate. Mil. R. Evid. 513's exclusion of evidence is constitutional.

c. Mil. R. Evid. 513 Does Not Infringe Any Constitutional Interests.

Even if arbitrary or disproportionate, a rule excluding relevant evidence is constitutional unless it infringes upon a weighty interest of the accused. *Scheffer*, 523 U.S. at 308. "To rise to the level of constitutional error, a ruling must have infringed upon a weighty *constitutional* interest of the accused." *United States v. Dimberio*, 56 M.J. 20, 26 (C.A.A.F. 2001) (emphasis added) (citing *Scheffer*, 523 U.S. at 308).

The Granted Issue identifies two constitutional interests for analysis: the Fifth and Sixth Amendments' interest in presenting a complete defense.

1. Mil. R. Evid. 513 Does Not Infringe a Fifth Amendment Interest.

The Appellant makes no argument that his Fifth Amendment due process right has been infringed.

Mil. R. Evid. 513 does not infringe the Appellant's Fifth Amendment interest because the privileged records he seeks are not in the possession or control of the prosecution and do not fall within the ambit of *Brady v. Maryland*, 373 U.S.

83 (1963). *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015); *LK v. Acosta*, 76 M.J. 611, 616 (A. Ct. Crim. App. 2017).[1, 2]

2. Mil. R. Evid. 513 Does Not Infringe a Sixth Amendment Interest.

Mil. R. Evid. 513 does not infringe the Appellant's Sixth Amendment interests because the Sixth Amendment right to confront witnesses is a trial right that does not include the right to discover information to be used in confrontation. *Acosta*, 76 M.J. at 615-16 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)).

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[1] The inapplicability of *Brady* to evidence not in the possession or control of the prosecution team is well established in military courts. See *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004); *United States v. Mahoney*, 58 M.J. 346, 348 (C.A.A.F. 2003) (duty to disclose information known to *anyone acting on government's behalf*); *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1983) (duty extends to "*military investigative authorities*"); *United States v. Figueroa*, 55 M.J. 525 (A. F. Ct. Crim. App. 2001); and *United States v. Sebring*, 44 M.J. 805 (N-M. Ct. Crim. App. 1996).

[2] Rulings by federal appellate courts are consistent with the military appellate courts. *United States v. Hach*, 162 F.3d 937 (7th Cir. 1998) (the Due Process Clause does not entitle defendant to an in camera review of the witness's mental records because "if the documents are not in the government's possession, there can be no 'state action' and consequently, no violation of [*Brady*]"); *see also United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006) (*Brady* applies only to information in the government's "possession, custody, or control"); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (defendant's *Brady* claim "fails . . . because he has not shown any withholding of evidence within the control of the Government"); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (*Brady* "applies only to information possessed by the prosecutor or [investigative or prosecutorial personnel] over whom he has authority");

There is no constitutional right to discovery in a criminal case. *Acosta*, 76 M.J. at 616 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

d. Relevance is Irrelevant.

Although Appellant never addresses the Granted Issue concerning the Fifth or Sixth Amendments, he repeatedly asserts that the victim's mental health records are relevant, material, and probative. Appellant Brief at 17 (trial counsel concedes and military judge agrees records are relevant), 34 ("highly relevant"), 38 ("right to explore *every facet* of relevant evidence") (quoting pre-*Jaffee* case *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974) (emphasis added in Brief), 39 ("highly probative"), 42, 48 (quoting pre-*Jaffee* case *United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 1980 U.S. App. LEXIS 21757 (4th Cir. 1980), 56 (citing *United States v.* Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011) applying Mil. R. Evid. 412 – a relevance rule), 64, 65.

The Appellant's emphasis on relevancy incorrectly assumes relevant evidence is constitutionally required to be disclosed and admitted. Relevant and material evidence is routinely excluded by the Constitution, federal statutes, military rules of evidence, and the manual for courts-martial. Mil. R. Evid. 402.[3]

[3] Examples of Military Rules of Evidence excluding relevant evidence that an accused may consider essential to presenting a complete defense include Mil. R. Evid. 301 (privilege against self-incrimination), 403 (evidence outweighed by other considerations), 404 (character evidence), 412 (victim's sexual behavior), all

(continued...)

Relevance and materiality are addressed in Section IV of the Military Rules of Evidence. Relevance and materiality are irrelevant and immaterial when applying the privileges in Section V.[4]

Privilege rules exclude relevant evidence. If evidence is irrelevant or its probative value is substantially outweighed by other considerations, the evidence is excluded under Mil. R. Evid. 402(b) or 403 regardless of any privilege. If privileged, the evidence is excluded regardless of its relevancy. Mil. R. Evid. 402(a)(3) and (4).

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privileges under Section V of the Military Rules of Evidence, limits on witnesses under Section VI, limits on opinions and expert testimony including polygraph examinations under Section VII, limits on hearsay evidence under Section VIII, limits on admitting evidence without authentication and identification under Section IX, and limits on admitting writings, recordings and photographs under Section X of the Military Rules of Evidence.

[4] The only Section V privileges that authorize consideration of the relevance of privileged evidence are Mil. R. Evid. 505 and 506. These two privileges are military unique privileges that protect national security from the disclosure of secret or confidential information. The rules provide specific procedures for determining whether information is relevant and necessary, and further provides the military judge the discretion to implement specific alternatives and remedies, including precluding a witness's testimony, declaring a mistrial, finding against the government, and dismissing the charges. Mil. R. Evid. 505(j)(4)(A) and Mil. R. Evid. 506(j)(4)(A). Relevance is not relevant in any other privilege, and no other privilege provides a remedy. The analysis of privilege in this section of the amicus brief does not include the relevance and necessity considerations of Mil. R. Evid. 505 and 506.

Although privileged, military courts have accorded privileged mental health records the same standard applied to disclosure of nonprivileged matters under Mil. R. Evid. 701. *LK v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017) ("we treated privileged mental health records as having no privilege at all"). In *United States v. Cano*, ARMY 20010086, 2004 CCA LEXIS 331 (A. Ct. Crim. App. 4 Feb. 2004), the Army Court of Criminal Appeals reversed a trial judge who ordered production of "everything . . . even remotely potentially helpful to the defense" because everything was not enough. *Acosta*, 76 M.J. at 614.

The *Acosta* court recognized and acknowledged the error in applying discovery rules to privileged records. *Id.* "When matter is declared to be privileged, it means relevant and otherwise admissible evidence will often be excluded from proceedings." *Id.* Although *Acosta* did not apply the arbitrary or disproportionate standard of *Scheffer*, it found that psychotherapist privilege did not violate any Fifth or Sixth Amendment interest of the accused.

Although Mil. R. Evid. 513 is a privilege, military courts have never treated it like other privileges. The testimony of a codefendant could be relevant and necessary to an accused's opportunity to present a complete defense. The testimony of the codefendant's attorney about his privileged communications with his client could also be relevant and necessary. Military courts have never found that a codefendant's Fifth Amendment, Article 31, and Mil. R. Evid. 301 privilege

or his Mil. R. Evid. 502 privilege violated another accused's right to present a complete defense.[5] Military courts, like civilian courts, would not entertain such arguments. *United States. v. Doyle*, 1 F. Supp.2d 1187 (D. Oregon 1996). The federal district court in *Doyle* made a useful comparison of the psychotherapist privilege to the attorney client privilege. It asked if anyone could imagine a court granting a motion by criminal codefendants to examine a cooperating defendant's attorney in camera regarding the privileged statements made by the cooperating defendant to his attorney to determine if any could be helpful to the defense. *Doyle*, at 1191. Although the government has the power to obtain testimony by granting immunity to a codefendant, it is not constitutionally compelled to grant such immunity. *United States v. Ivey*, 55 M.J. 251 (C.A.A.F. 2001).

There is no legal, moral, practical, equitable or other reason to treat the psychotherapist privilege differently than the other privileges in Section V of the Military Rules of Evidence. The privilege was established as a real privilege. Military courts must treat it as a real privilege.

[5] Nor has any court required a codefendant to waive his privileges to enable prosecution of another accused.

e. Appellant Cites No Federal Case Finding the Psychotherapist Privilege Unconstitutionally Abridges an Accused's Rights.

The Appellant does not cite a single federal case, military or civilian, that finds the psychotherapist privilege unconstitutionally abridges an accused's rights. As discussed above, military courts have routinely disclosed and admitted privileged mental health records by applying the relevancy standard for discovery, but none have applied any constitutional analysis or justification. The Supreme Court has never found the psychotherapist privilege to be unconstitutional.[6] This Court has never found Mil. R. Evid. 513 to be unconstitutional.

1. Military Courts of Criminal Appeals.

The Appellant does not cite a single military court of criminal appeals decision that finds Mil. R. Evid. 513 violated an accused's constitutional rights.[7] *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017) is the case most

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[6] The Appellant cites *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), but *Ritchie* involved the confidential files of the state agency responsible for investigating child abuse. It did not involve confidential communications with a psychotherapist for the purpose of facilitating diagnosis or treatment. In fact, the Supreme Court contrasts the qualified protection of the investigating agency's files with the unqualified privilege for communications between sexual assault counselors and victims. *Id*. at 57-58.

[7] Appellant cites three NMCCA cases. *United States v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006) addresses the procedural requirements for an in camera review of privileged records. *United States v. Jacinto*, 79 M.J. 870 (N-M. Ct. Crim. App. 2020) is this case. *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017) is further discussed.

relied upon by the Appellant. The *Payton-O'Brien* court properly quotes *Holmes v. South Carolina*'s holding:

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. . . . This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. . . . This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Id. at 789, quoting *Holmes*, 547 U.S. at 324 (omitting *Holmes'* citation to *Scheffer*).

Curiously, the *Payton-O'Brien* court fails to apply or discuss this standard. The *Payton-O'Brien* court does not find that Mil. R. Evid. 513 is arbitrary or disproportionate to its purpose. It does not find any constitutional interest of the accused was infringed. Analysis became unnecessary because the court instead misleadingly quotes *Holmes* so that *Holmes'* holding is completely changed. The court states:

> Citing *Holmes* in a previous review of a petition for a writ of mandamus, we stated "when determining whether in camera review or disclosure of privileged materials is constitutionally required under Mil. R. Evid. 513, the military judge should determine whether *infringement of the privilege* is required to guarantee 'a meaningful opportunity to present a complete defense.'" *EV v. Robinson and Martinez*, No. 201600057, slip ord. at 1 n.2 (N-M. Ct. Crim. App. 25 Feb 2016) (quoting *Holmes*, 547 U.S. at 324 (emphasis in original)).

Id.[8]

The Supreme Court in *Holmes* did not use or emphasize "*infringement of the privilege*" in its opinion. The words "infringement" and "privilege" are not even mentioned. *Holmes* and *Scheffer* are not about infringing a privilege, but about evidence rules that infringe upon a constitutional interest of the accused and are arbitrary or disproportionate.

By rewriting the actual standard, the *Payton-O'Brien* court avoids the need for further analysis because the misquoted standard directs it to infringe the privilege. The court does not provide military judges any standard for determining whether an in camera review is constitutionally required except to instruct, using circular logic, the judge to determine whether "*infringement of the privilege*" is required. The court never holds that the privilege is unconstitutional.

2. Other Federal Courts.

Two of the three federal court cases cited by the Appellant in his argument on the Second Granted Issue predate the recognition of the psychotherapist

[8] The parenthetical "emphasis in original" within the parenthetical "quoting *Holmes*" misleadingly indicates "*infringement of the privilege*" is emphasized in *Holmes*.

privilege in *Jaffee*.[9] Because there was no psychotherapist privilege when these cases were decided, the normal relevancy standard applied.

The only case cited by the Appellant post-*Jaffee* is *Larson v. Dep't of State*, 565 F.3d 857 (D.C. Cir. 2009). *Larson* did not involve a privilege but was a suit filed under the Freedom of Information Act, 5 U.S.C.S. § 552.

The Appellant is unable to cite any federal case, military or civilian, that finds the psychotherapist privilege unconstitutionally abridges an accused's rights.

f. The Existence of Absolute Psychotherapy Privileges in Many State and Federal Courts Demonstrate Mil. R. Evid. 513 Does Not Abridge Appellant's Right to Present a Complete Defense.

In contrast to the paucity of precedent in support of Appellant's arguments, many state and federal courts have held absolute psychotherapy privileges do not abridge an accused's constitutional rights.

1. State Courts.

Rulemakers have broad latitude under the Constitution to establish rules excluding evidence. *Scheffer*, 523 U.S. at 308. The rulemakers in many states have established absolute psychotherapist privileges that exclude confidential

[9] *Chnapkova v. Koh*, 985 F.2d 79 (2d Cir. 1993) (civil case holding based upon relevance) (Appellant Brief at 66); *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974) ("every facet of relevant evidence") (Appellant Brief at 65).

communications without any exceptions.[10] State courts have upheld these absolute privileges after considering constitutional challenges by defendants. These states include:

Arkansas

Vaughn v. State, 608 S.W.3d 569 (Ark. 2020)

California

People v. Hammon, 938 P.2d 986 (Cal. 1997)

Colorado

People v. Turner, 109 P.3d 639 (Colo. 2005)

Florida

State v. Famigliglietti, 817 So. 2d 901, 906 (Fla. Dist. Ct. App. 2002)
State v. Roberson, 884 So. 2d 976, 980 (Fla. Dist. Ct. App. 2004)

Illinois

People v. Foggy, 521 N.E.2d 86 (Ill. 1988)

Indiana

State v. Fromme, 949 N.E.2d 789 (Ind. 2011)
Friend v. State, 134 N.E.3d 441 (Ind. App. 2019)

New Jersey

[10] The rulemakers in other states have exercised their latitude to establish qualified privileges, and some qualified privileges require the judge to balance the probative value of the evidence against the interest of the holder of the privilege.

State v. J.G., 619 A.2d 232 (N.J. Super. 1993)

New Mexico

Albuquerque Rape Crisis Ctr. v. Blackmer, 120 P.3d 820 (N.M. 2005)

Pennsylvania

Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992)
Commonwealth v. Counterman, 719 A.2d 284 (Pa. 1998)

Utah

State v. Gomez, 63 P.3d 72 (Utah 2002)

2. Federal Courts.

Every federal appellate court that has considered a defendant's constitutional challenge to the psychotherapist privilege has found the privilege constitutional. The Fourth Circuit Court of Appeals in *Kinder* and the Eighth Circuit Court of Appeals in *Johnson v. Norris,* 537 F.3d 840, 845-847 (8th Cir. 2008) and *Newton v. Kemna*, 354 F.3d 776, 781-782 (8th Cir. 2004) are the only federal appellate courts to consider this issue, and both have determined that the privilege applies despite a defendant's constitutional rights.

In *Kinder v. White,* the court reversed the district court that applied a West Virginia statute requiring a court to determine whether the relevance of mental health records outweighed the importance of the privilege. *Kinder*, 609 Fed. Appx. at 131. The district court ordered disclosure of a witness's mental health records based upon a "perfect storm of facts" including the defendant's need to challenge

the credibility of the central government witness. *Id.* Despite this "perfect storm," the *Kinder* court held that the Supreme Court in *Jaffee* made it clear that the psychotherapist privilege overrides the quest for relevant evidence and is not subject to any balancing test. The privilege is not arbitrary or disproportionate to the purpose it serves. Both *Jaffee* and *Kinder* extensively discuss the public good the privilege serves.

Several lower federal courts have also held that the psychotherapist privilege is not subordinate to a defendant's constitutional rights. *United States. v. Doyle*, 1 F. Supp.2d 1187 (D. Oregon 1996); *Petersen v. United States*, 352 F. Supp.2d 1016, 1023-24 (D. S.D. 2005); *United States v. Haworth*, 168 F.R.D. 660, 660-62 (D. N.M. 1996) (the defendants "mistakenly equate their confrontation rights with a right to discover information that is clearly privileged."); *United States v. Shrader*, 716 F. Supp.2d 464 (S.D. W.Va. 2010).

The weight of authority in federal and state courts is that psychotherapy privileges do not abridge an accused's constitutional rights.

III. THE JUDICIAL REMEDIES PROFERRED BY THE PARTIES ARE UNLAWFUL.

For differing reasons, the parties agree that if a military judge finds that privileged evidence is deemed constitutionally required, the judicial remedy is to allow the privilege holder the opportunity to waive the privilege and, absent

waiver, to take other measures such as excluding testimony, dismissing charges or abating the proceedings. Appellant Brief at 59-62; Appellee Answer at 37, 39-40.

a. Appellant's Justification of Judicial Remedies.

The Appellant argues that the Court should adopt the *Payton-O'Brien* court's remedies that "provide a workable balance between the Constitution and policy branch prerogatives." Appellant Brief at 61. The *Payton-O'Brien* remedies require the military judge to give the victim the opportunity to waive her privilege. *Id*. at 60. If the victim refuses to waive her privilege, Appellant argues that the military judge should apply the remedies specified in Mil. R. Evid 505(j)(4)(A) for when the government refuses to disclose relevant and necessary evidence. The remedies available include striking or precluding the testimony of a witness; declaring a mistrial; finding against the government on issues as to which the evidence is relevant; and dismissing the charges.

The Appellant wants this Court to adopt the *Payton-O'Brien* remedies. The *Payton-O'Brien* remedies are wrong for many reasons.

1. No Remedies Are Specified Within Mil. R. Evid. 513 and Military Courts Cannot Add Remedies.

As discussed in footnote 4 above, consideration of privileged evidence's relevance and necessity is specifically required for Mil. R. Evid. 505 and 506 but not for any other privilege. Mil. R. Evid. 505 and 506 are not traditional privileges recognized in civilian courts. In these two rules, the President requires the military

judge to consider relevance and necessity and provides for specific remedies when the government chooses not to disclose relevant and necessary evidence.[11] The President did not authorize military judges to consider relevance or necessity or to apply remedies in any other privilege in Section V of the Military Rules of Evidence.

When analyzing whether a military judge may apply an exception to Mil. R. Evid. 513 that was not specifically enumerated, the *Payton-O'Brien* court relied on *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007). In *Custis*, the military judge applied a crime/fraud exception to the marital privilege granted by Mil. R. Evid. 504. Although Mil. R. Evid. 504 did not include a crime/fraud exception, every federal court addressing the issue found a common law crime/fraud exception, and other military privileges (Mil. R. Evid. 502 and 513) included a crime/fraud exception. *Custis*, 65 M.J. at 369. The military judge reasoned he had the authority to apply the crime/fraud exception to Mil. R. Evid. 504.

[11] Requiring consideration of relevancy and providing remedies is important in these two rules because it is the government choosing to withhold relevant evidence. Other privileges may be asserted by the government, the accused, or third parties. Mil. R. Evid. 505 and 506 prevent the government from abusing the privilege by conducting secret trials that could convict an accused without informing him of the evidence against him.

This Court reversed the military judge because the authority to add exceptions to the codified privileges within the military justice system lies with the policymaking branches of government. *Id*.

The *Payton-O'Brien* court properly analyzed and applied *Custis* when it determined that the military judge could not add a "constitutionally required" exception to Mil. R. Evid. 513. The court nevertheless failed to analyze *Custis*'s applicability to whether it can lawfully craft remedies for privileges that do not contain any remedy.

Although *Custis* held that judges cannot add even a well-accepted exception to a privilege without the exception, its reasoning applies equally to judicial remedies. The crime/fraud exception unlawfully applied by the military in *Custis* had wide acceptance in federal courts. In this case, Appellant argues for a remedy that does not have wide acceptance in any court.

The President was certainly aware he could require military judges to consider relevance and necessity in all privileges and could have specified remedies for privileges as he specified in Mil. R. Evid. 505 and 506. The President made the policy decision not to. The *Payton-O'Brien* court's application of the

remedies from Mil. R. Evid. 505 and 506 frustrated the privilege established by Mil. R. Evid. 513.[12]

2. The *Payton-O'Brien* Court Failed to Consider the Consequences of the Judicial Remedies It Applied.

The *Payton-O'Brien* court myopically applied the remedies intended for Mil. R. Evid. 505 and 506, failing to consider other important consequences of its judicial remedies. The court discusses only the interests of defendants and victims, ignoring the interests of the government and purpose of military law "to promote justice, assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Manual for Courts-Martial, Part I, Preamble, Paragraph 3.

a. When considering defendants' interests, the *Payton-O'Brien* court did not find abridgement of any specific constitutional interest, reciting without analysis the right to present a "complete defense."

The remedies proposed by the Appellant and applied by the *Payton-O'Brien* court are remedies in search of a violation. As discussed in Section II above, there was no violation of the Appellant's constitutional rights. The Appellant failed to even argue a violation except to conclusively argue - without citing any legal

[12] Upon information and belief, the victim in the *Payton-O'Brien* case refused to waive her privilege, and the rape and sexual assault charges were dismissed.

precedent - that his right to present a "complete defense" was violated. The *Payton-O'Brien* court cited but did not even reach this conclusion.

The *Payton-O'Brien* remedies do not remedy any constitutional rights of an accused.

b. The *Payton-O'Brien* court cynically assures victims the judicial remedies are for their own good.

Mil. R. Evid. 513 gives patients "a privilege to refuse to disclose . . . a confidential communication." Mil. R. Evid. 513(a), General Rule.

The purpose of Mil. R. Evid. 513 is to protect patients, including victims of sexual assault, from disclosing private, personal, and possibly embarrassing communications with their psychotherapists. The President has determined that the social benefit of the privilege outweighs the need for relevant evidence. The Supreme Court has never held otherwise.

As the *Payton-O'Brien* court thwarts the purpose of the privilege, it salves its conscience by telling itself that this judicial remedy "allows the military judge to *scrupulously honor the victim's choice* of whether—and how much—to waive the privilege." *Payton O'Brien*, 76 M.J. at 790 (emphasis added).

Mil. R. Evid. 513 does not give victims a mere choice. It gives them a privilege. Anything less than the privilege in accordance with the plain language of Mil. R. Evid. 513 is not scrupulously honoring anything, including the rule of law. The *Payton-O'Brien* court then waxes about judicial remedies being essential

judicial duties. Id. at 790. The court cites no law, rule, or precedent to craft such judicial remedies.

The court knew exactly the effect its ruling would have on victims as it patronizingly acknowledged the rule's "noble goals and notable policy concerns." *Id*. at 789. It attempted to excuse its decision by explaining, "To be clear, the foregoing remedies are not crude devices to punish [victims] for electing to preserve the privilege." Its excuse is in fact an admission that the judicial remedies are crude devices that punish victims.

c. The *Payton-O'Brien* court did not consider the interests of the government.

The military justice system is intended to promote good order and discipline within the armed forces. It must be able to prosecute crimes it determines threaten good order and discipline. Military sexual assault is a crime that destroys the good order of our military.

Congress and the President continually change the laws and rules to better protect sexual assault victims and to punish those who commit sexual crimes.

The *Payton-O'Brien* court's judicial remedies transfer the decision of whether sexual assault crimes will be prosecuted from the government to the victim. No matter how egregious the crime, the government would no longer make the final determination of whether the crime will be prosecuted. The government would be unable to protect its forces from predatory criminals.

The burden of decision would fall upon the victims of sexual assault. The victims are not trained to make prosecutorial decisions. They cannot be expected to advance the interests of the government. A victim will make her decision on the basis of whether she wants the justice of holding her rapist responsible more than she wants to protect her communications with her therapist.

The removal of the prosecutorial decision from the government is discussed in a law review article cited by the *Payton-O'Brien* court. The court cites Clifford S. Fishman, *Defense Access to A Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, (2007). In the article, Professor Fishman explains that precluding the prosecutor from calling a witness who refuses to waive her privilege "gives the witness the legal authority to preclude the prosecution of a dangerous predator." Fishman, at 24. He calls it "unwise social policy." *Id*. The *Payton-O'Brien* court did not discuss or consider this effect on military justice.

b. The Appellee's Justification of Judicial Remedies.

The Appellee arrives at the same judicial remedies advocated by the Appellant and applied by the *Payton-O'Brien* court, but the Appellee uses a different route. The Appellee argues that other remedies have been prescribed by the President for violations of the right to present a "meaningful defense." Appellee Answer at 37.

The Appellee argues that Mil. R. Evid. 403 allows the exclusion of government evidence where the absence of defense-requested evidence may mislead members or create prejudice. *Id.* Presumably, the Appellee is arguing the excluded government evidence would be the victim's testimony and the absence of defense-requested information would be the victim's privileged records.

The Appellee fails to provide any precedent or analysis for this argument. Mil. R. Evid. 403 excludes evidence if its probative value is substantially outweighed by other considerations. The victim's testimony is probably the most probative evidence presented so it would never be excluded under Mil. R. Evid. 403 analysis.

The Appellee next argues that R.C.M. 703 requires that if evidence of central importance is not subject to compulsory process, the judge may abate the proceedings. Appellee Answer at 59. This remedy is not permitted by R.C.M. 703 because R.C.M. 703(a) applies the limitations in R.C.M. 701 to all of R.C.M. 703. R.C.M. 701(f) states that nothing in the rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Since Mil. R. Evid. 513 protects psychotherapy records from disclosure, they are not subject to disclosure under either R.C.M. 701 or 703.

The Appellee further argues that R.C.M. 907 allows a judge to dismiss on the grounds that the defense is unable to present constitutionally required evidence

and R.C.M. 915 allows for a mistrial. The language of these rules does not support Appellee's arguments and Appellee offers no precedent or further analysis.

None of the above rules cited by the Appellee support the judicial remedy of requiring the victim to waive her privilege under the threat of dismissal. The plain language of the rules does not authorize judicial remedies and there is no precedent for these judicial remedies.

If these judicial remedies are applied to evidence protected from disclosure by the psychotherapist privilege, there is no basis to refuse to apply the same remedies to the privilege against self-incrimination and the attorney-client privilege.

The judicial remedies proffered by the parties are unlawful.

IV. THE REMOVAL OF THE "CONSTITUTIONALLY REQUIRED" EXCEPTION REMOVED THE POWER OF MILITARY JUDGES TO DETERMINE CONSTITUTIONAL REQUIREMENTS.

Military courts are Article I tribunals created by Congress and placed within the executive branch. *Ortiz v. United States*, 138 S. Ct. 2165, 2176 (2018). Military courts are courts of limited jurisdiction defined entirely by statute. *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015).

Congress gave the President the power to prescribe rules of evidence for courts-martial. 10 U.S.C. 836 (President may prescribe rules). Pursuant to this authority, President Clinton established Mil. R. Evid. 513, *Psychotherapist-*

Patient Privilege. Exec. Order No. 13140, 64 Fed. Reg. 55115 (Oct. 12, 1999). The rule was promulgated shortly after the Supreme Court recognized the psychotherapist privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). In both *Jaffee* and *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998) the Supreme Court discussed (in dictum) that privileges could possibly be limited in "exceptional circumstances implicating a criminal defendant's constitutional rights." To this day, the Supreme Court has never found such exceptional circumstances.

The President included the "constitutionally required" exception in Mil. R. Evid. 513 because he trusted military judges to recognize, as the Supreme Court did in *Jaffee* and *Swidler*, that under some extraordinary hypothetical fact pattern the privilege may have to bow to a defendant's constitutional rights. This sacred trust was misplaced.

Military judges routinely violated the privilege and treated mental health records as having no privilege at all. *LK v. Acosta*, 76 M.J. at 614. Psychotherapy patients, especially sexual assault victims, were betrayed. They suffered the injustice of military judges providing their rapists with sensitive and personal communications that the rules said were privileged. Judges never explained the constitutional reason that required disclosure of privileged communications. *Id.* at 615.

Congress recognized the injustice wrought by military judges misapplying the "constitutionally required" exception and the failure of military appellate courts to correct the injustice by providing guidance. Major Michael Zimmerman, *Rudderless: 15 Years and Still Little Direction on Boundaries of Military Rule of Evidence 513*, 223 Mil. L. Rev. 312, 315 and 329 (2015). Congress responded by directing the president to eliminate the "constitutionally required" exception. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) ("*NDAA 2015*"). The President signed NDAA 2015 into law and eliminated the exception. Executive Order No. 13,696, 80 Fed. Reg. 35,783 (June 17, 2015).

After the "constitutionally required" exception was eliminated, some military justice commentators, judges, and appellate courts have hubristically argued and found that Congress and the President do not have the power to remove the exception. The *Payton-O'Brien* court, relying on military justice commentators, concluded that removal of the constitutional exception was "inconsequential." *Payton-O'Brien*, 76 M.J. at 788. Although the *Acosta* court correctly noted that removal of the "constitutionally required" exception from Mil. R. Evid. 513 does not alter the reach of the Constitution, it incorrectly concluded that "the reach of the constitutional exception is the same today as it was prior to deletion of the constitutional exception." *Acosta*, 76 M.J. at 615.

The removal of the exception is not inconsequential. While its removal does not change the Constitution, it cannot be ignored. The courts and commentators are not applying fundamental canons of statutory construction.

In the NDAA 2015, Congress removed the "constitutionally required" exception. Courts must presume that what Congress said in NDAA 2015 was what it meant and meant in NDAA 2015 what it said. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id*. quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation marks omitted) (citations omitted).

This Court must respect the choice made by Congress in NDAA 2015 unless there is no interpretation that comports with the Constitution. The lower courts in *Payton-O'Brien* and *Acosta* assumed without demonstrating that removal of the "constitutionally required" exception was unconstitutional and that Congress intended to violate the Constitution. When the validity of a law is in question, "it is a cardinal principal . . . [to] first ascertain whether a construction of the statute is fairly possible by which the question may avoided." *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), quoting *Crowell v. Benson*, 285 U.S. 22, 72 (1932); *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019).

Military judges have demonstrated they are unable to properly apply the rule. They have lost the confidence and trust of Congress and the President. Congress and the President have the authority and the duty to regulate, govern, and command the armed forces. They have the power to remove the jurisdiction of military judges from deciding when, if ever, the Constitution may require disclosing privileged evidence.

The proper and constitutional interpretation of NDAA 2015 is that Congress intended to remove the power of military judges to decide an issue that military judges incorrectly decided for fifteen years. Military justice does not operate in a vacuum free from Congress and the President. It must abide by their laws and rules.

If constitutional rights are violated by Mil. R. Evid. 513, an accused must seek redress in an Article III court that has jurisdiction to grant the relief he requests. Requiring an accused to seek this remedy in Article III courts does not violate the Constitution.

CONCLUSION

WHEREFORE, Protect Our Defenders respectfully requests this Honorable Court affirm the lower court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief is less than 7,000 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 6, 2021 a copy of the foregoing was transmitted by electronic means to the following:

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