IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

FRANTZ BEAUGE
Chief Petty Officer (E-7)
United States Navy,
Appellant

USCA Dkt. No. 21-0183/NA

Crim. App. No. 201900197

PATIENT/VICTIM C.G.'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE

Peter Coote
Pennoni Associates Inc.
1900 Market Street, 3rd Floor
Philadelphia, PA 19103
(215) 254-7857
pcoote@pennoni.com

CONTENTS

AUTHORITIES

Cases

Statutes

Other Authorities

Rules

GRANTED ISSUE

Whether the NMCCA created an unreasonably broad scope of the psychotherapist-patient privilege by affirming the military judge's denial of discovery, denying remand for an in camera review, and denying Appellant's claim of ineffective assistance of counsel.

CONSTITUTIONAL ISSUES PRESENTED BY PATIENT/VICTIM C.G.

1. Whether a search or seizure of psychotherapy records in violation of M.R.E. 513 also violates the Fourth Amendment rights of the patient.

2. Whether any military tribunal created under Article I of the Constitution may declare a law or rule to be unconstitutional.

INTEREST OF AMICUS CURIAE

When she was twelve years old, Patient/Victim C.G. was sexually abused by her uncle, Appellant Chief Petty Officer Beauge. She has a concrete interest in this Court's decision. Any reversal or remand would directly affect her privacy and her privilege to keep her communications with her psychotherapist confidential.

C.G.'s interests are statutorily protected. C.G. is a victim asserting her rights under 10 U.S.C. § 806b (right to be treated with fairness and respect for her dignity and privacy). C.G. is also the patient whose privileged M.R.E. 513 communications with her therapist are at issue in Beauge's appeal in this Court.

STATEMENT OF FACTS

In his Brief and his Supplement to Petition, Appellant states that C.G. did not allege at trial that Appellant tried to penetrate her vagina. Brief at 7, Supplement at 5. Appellant does not fully and fairly recite C.G.s testimony.

C.G. testified at trial that Appellant touched the "inner folds" of her vagina. J.A. at 136.

ARGUMENT

I. C.G.'s TESTIMONY DOES NOT CONTRADICT AND IS NOT INCONSISTENT WITH THE MANDATORY REPORT.

This Court granted Appellant's Petition for Review based upon the unrebutted facts and arguments presented in his Supplement. The Appellant represented to the Court that C.G.'s trial testimony contradicted the allegation in a mandatory report[1] that Appellant attempted to penetrate C.G. The Appellant recited only the portion of C.G.'s trial testimony that supported his argument that her testimony contradicted the mandatory report.[2] The Appellant did not disclose

[1] As explained in the NMCCA opinion and the parties' briefs, Florida law requires psychotherapists to disclose child abuse to an Abuse Hotline Information System. The mandatory report filed in this case was made by C.G.'s therapist, Ms. Deforest. Ms. Deforest reported that Appellant "attempted to penetrate" C.G." J.A. at 276.

[2] Appellant was not charged with a penetration offense, so penetration was not an element to be proven at trial. It would not be inconsistent or contradictory if

(continued...)

to the Court C.G.'s relevant testimony relating to penetration, specifically that the Appellant touched the inner folds of her vagina and clitoris. J.A. at 136.

Touching the inner folds of the vagina or clitoris is penetration of vulva. *United States v. Cox*, 18 M.J. 72, 73 (C.M.A. 1984); *United States v. Williams*, 25 M.J. 854, 855 (A.F.C.M.R. 1988). The female genitalia include many organs "located either partially or entirely inside the body's perimeter." *Cox*, 18 M.J. at 73. "[I]n order for the vulva in its entirety or the clitoris to be stimulated, there must be some penetration of at least the outer labia." *Williams*, 25 M.J. at 855 (providing detailed explanation of penetration). Penetration of the "outer lips" of the vulva is sufficient. *United States v. Jahagirdar*, 466 F.3d 149, 152 (1st Cir. 2006) (placing finger beyond "labia majora to at least the labia minora or inner lips").

The Appellant chose not to cross-examine C.G. on "attempted penetration" because touching the inner folds of C.G.'s vagina is consistent with and does not

---

C.G. did not testify regarding penetration since penetration was not relevant. Nevertheless, even the facts alleged in the Appellant's Supplement are sufficient to support an attempt at penetration. Supplement at 5 (C.G. told interviewer Appellant "touched her vagina") and 6 (at trial C.G. testified Appellant "touched her clitoris"). These statements are not inconsistent with or contradictory to the mandatory report that Appellant attempted to penetrate C.G.

contradict Ms. Deforest's report that Appellant attempted to penetrate C.G.[3] Appellant would have lost credibility with the members by quibbling over whether touching the inner folds is consistent with attempt to penetrate. The members would have been left wondering why the prosecution did not charge a penetration offense. Although Appellant could have been charged with a penetration offense, the government chose to charge only sexual contact.

The Appellant's failure to disclose C.G.'s testimony that Appellant touched her inner folds demonstrates that the Appellant is aware that this testimony refutes his argument that C.G. never testified about penetration.[4]

Since the Court relied upon the Appellant's incorrect assertion in his Supplement that C.G. did not testify about penetration, the Court should dismiss the appeal as improvidently granted.

---

[3] In certain portions of its Answer, the government argues that "attempted to penetrate" is "not necessarily inconsistent" with C.G.'s testimony. Answer at 24-25. The government's "not necessarily inconsistent" language is an understatement used to mirror the language in *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982). In other portions of the Answer, the government makes clear that C.G.'s testimony is consistent with "attempted to penetrate." Answer at 27.

[4] In his Brief, Appellant continues to assert C.G. did not testify regarding penetration. "At trial, C.G. never claimed that PSC Beauge attempted to penetrate her." Brief at 7 (citing J.A. 105-200). C.G. testified that Appellant touched her inner folds at J.A. 136.

II. PRODUCTION PERMITTED BY THE LEGAL DUTY TO REPORT EXCEPTION TO M.R.E. 513 MUST BE NARROWLY TAILORED TO ONLY THE PORTIONS OF RECORDS THAT THERE IS A LEGAL DUTY TO REPORT.

C.G. concurs with the government's analysis of this issue in sections I.B and C of its Answer. C.G. emphasizes the word "portions" in M.R.E. 513(e) (4) ("Any production or disclosure . . . must be narrowly tailored to only the . . . *portions* of such records or communications that meet the requirements for one of the enumerated exceptions to the privilege") (emphasis added). If the M.R.E. 513(d)(3) exception applied to all communications between a therapist and patient, there would be no need for the word "portions" that limits the exception to only the information required to be reported.

The NMCCA properly analyzed this issue in its opinion. *United States v. Beauge*, No. 2019000197, 2021 CCA LEXIS 9, *11-12 (N-M. Ct. Crim. App. Jan. 11, 2021). The Appellant does not address the NMCCA's reasoning and ignores M.R.E. 513(e)(4) entirely.

III. APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FAIL BECAUSE HE FAILS TO ESTABLISH HIS COUNSEL'S PERFORMANCE WAS DEFICIENT.

The Appellant concludes his counsel's performance was deficient without any analysis or reasoning. Brief at 22. He does not cite a single case establishing a reasonable probability that his counsel would have succeeded in raising the child abuse exception or the nonexistent constitutionally required exception.

The NMCCA held that Appellant had to show a reasonable probability that trial counsel's motion raising these exceptions "would have been meritorious, meaning *successful*." *Beauge*, 2021 CCA LEXIS 9 at *15-16 (emphasis in original). In a footnote, Appellant concedes he argued this same "meritorious" standard in his NMCCA brief, but claims he was mistaken. Brief at 22-23, n.95. He does not explain how his proffered "result would have been different" standard differs from the "motions would have been successful" standard. If the motions would not have succeeded, then the result would not have been different.

a. Child Abuse Exception.

The only case cited by the Appellant to support the M.R.E.513(d)(3) exception is *L.K. v. Acosta*, 76 M.J. 611 (A. Ct. Crim. App. 2017). In *Acosta*, the court ruled that the child abuse exception did not apply and that the communications remained privileged. While Appellant attempts to distinguish his facts from *Acosta*, he nevertheless fails to cite any case demonstrating his counsel would have succeeded on a motion. Without precedent to base a motion, counsel is not deficient because he chooses not to file a motion.

b. Constitutionally Required Exception.

There is no constitutionally required exception to M.R.E. 513. Congress removed the exception in 2014.[5] Since its removal, no appellate military court has ever held that M.R.E. 513 violates the constitutional rights of an accused. The Appellant cites no case, in any military or civilian court, that holds that the psychotherapist privilege violates an accused's constitutional rights.

If the Appellant's counsel had filed a motion to obtain C.G.'s privileged communications under the deleted constitutionally required exception, the motion would not be meritorious because it would have no reasonable probability of success.

1. *Payton O'Brien* Analysis.

The Appellant relies almost exclusively on *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017), but *Payton-O'Brien* does not hold that M.R.E. 513 is unconstitutional. Because the Appellant, NMCCA, and other military courts rely on *Payton-O'Brien*, C.G. will address Appellant's *Payton-O'Brien* arguments in detail.

[5] National Defense Authorizations Act for Fiscal Year 2015, Pub. L. No. 113-291, § 527, 128 Stat. 3292, 3369 (2014).

(a) Removal of M.R.E.513's "constitutionally required" exception was not "inconsequential" but removed the power of military courts to determine constitutionality of the privilege.

The *Payton-O'Brien* court concluded that removal of the constitutional exception was "inconsequential." *Payton-O'Brien*, 76 M.J. at 788.

The removal of the exception was not inconsequential. While its removal does not change the Constitution, it cannot be ignored. The *Payton-O'Brien* court did not apply fundamental canons of statutory construction.

Since promulgation of M.R.E. 513 in 1997, military judges routinely disclosed privileged records, losing the confidence and trust of Congress and the President. *DB v. Lippert*, 2016 CCA LEXIS 63, *14-16, 25 (Army Ct. Crim. App. 1 Feb. 2016) (mem. op.). Congress and the President can remove the power of military judges to decide when, if ever, the Constitution may require disclosing privileged evidence.

The proper and constitutional interpretation of the constitutional exception's removal is that Congress stripped military judges of the power to decide an issue they decided incorrectly for over fifteen years. If constitutional rights are violated by M.R.E. 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 a remedy in Article III courts does not violate the Constitution.

(b) *Payton-O'Brien* did not hold M.R.E. 513 violated the Constitution.

In arguing that M.R.E. 513 violated his constitutional rights, Appellant extensively and repeatedly relies upon *Payton-O'Brien* (seventeen consecutive footnote). Brief at 26-29 n.110-126.

Although *Payton-O'Brien* uses bold and definitive language such as "we may not allow the privilege to prevail over the Constitution," astonishingly *Payton-O'Brien* never holds that the privilege conflicts with the Constitution. Its holding includes: "[W]hen the failure to produce [privileged records] for review or release would violate the Constitution, military judges may craft such remedies as are required to guarantee a meaningful opportunity to present a complete defense."[6] *Payton-O'Brien*, 76 M.J. at 783. *Payton-O'Brien* never decides whether M.R.E. 513 would deny the accused his constitutional right to present a defense.

Payton-O'Brien misquotes but fails to apply *Holmes v. South Carolina*, 547 U.S. 319 (2006). The *Payton-O'Brien* 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

[6] The lawfulness of the *Payton-O'Brien* judicial remedies is further discussed below in Section V. below.

> 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)).

Payton-O'Brien, 76 M.J. at 789.

The *Payton-O'Brien* court's citation of the *Holmes* quote with italics indicates the Supreme Court emphasized "*infringement of the privilege*" in its opinion. This quote is not correct. The Supreme Court did not emphasize or even use the words "infringement" or "privilege" in *Holmes*.[7]

Holmes does not discuss privilege and is not about privilege.

Holmes is not about infringing evidence rules. Rather *Holmes* is about evidence rules that "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324-25.

Payton-O'Brien never applies *Holmes*' actual holding.[8] Instead the court acknowledges the impossibility of defining "all of the situations in which the

---

[7] The *Payton-O'Brien* misquote of *Holmes* is repeated and relied upon by the NMCCA in *Beauge* 2021 CCA LEXIS 9 at *20; *United States v. Jacinto*, 79 M.J. 870, 880 N-M. Ct. Crim. App. 2020).

[8] The Appellant's Brief, like the *Payton-O'Brien* court, fails to address whether M.R.E.513 is arbitrary or disproportionate and fails to identify any constitutional interest infringed. The Appellee applies *Holmes* and *United States v. Scheffer*, 523 U.S. 303 (1998) in its Answer. Answer at 30-31.

privilege's purpose would infringe upon an accused's weighty interests, like due process and confrontation." *Payton-O'Brien*, 76 M.J. at 789. The *Payton-O'Brien* court then claims that courts allow discovery of privileged information in three areas.[9]

The *Payton-O'Brien* court does not cite a single court allowing discovery of privileged information. The court cites only a law review article, Clifford S. Fishman, *Defense Access to A Prosecution Witness's Psychotherapy or Counseling Records*, (hereinafter "*Access*") 86 OR. L. REV. 1, 41-45 (2007). While it may be acceptable to rely upon a law review article in an opinion, the *Payton-O'Brien* court does not appear to have read the cases cited in the article.

The article never says that the Constitution requires discovery in these three areas, it only says that "courts have given serious consideration" to discovery requests. *Access*, at 41. *Access* cites sixteen cases within the *Payton-O'Brien* cited pages (pages 41-45). These sixteen cases are the only cases cited by *Access* to support its assertion that courts have given "serious consideration" to discovery.

---

[9] The Appellant extensively quotes *Payton-O'Brien* on this point. Brief at 28. The NMCCA below and other military courts have applied this language. *Beauge*, 2021 CCA LEXIS 9 at *20; *United States v. Mellette*, 81 M.J. 681, 694 (N-M. Ct. Crim. App. 2021); *United States v. Pittman*, 2020 CCA LEXIS 23, *35-36 (N-M. Ct. Crim. App. January 24, 2020); *Unites States v. Morales*, 2017 CCC LEXIS 612, *24-25 (September 13, 2017).

These cases cited in *Access* do not support *Payton-O'Brien's* conclusion that courts allow access to psychotherapy records. An analysis of these sixteen cases is included as an appendix to this brief.

The *Payton-O'Brien* court has turned academic observations and discussion into a constitutional requirement without ever reading the cases cited in *Access*. The *Payton-O'Brien*, and the court does not cite any other case law or authority to support its conclusion that disclosure in these three areas *may be* constitutionally required.

Payton-O'Brien does not hold that the Constitution requires disclosure of a patient's privileged records. It only provides a remedy in the event of a constitutional violation.

2. M.R.E. 513 does not abridge Appellant's opportunity to present a complete defense.

In his brief, the Appellant never analyzes how M.R.E. 513 unconstitutionally abridges his right to present a complete defense. He simply alleges it in a footnote citing *Holmes v. South Carolina*, 547 U.S. 319. Brief at 30 n.129. The Appellant does not cite any case, military or civilian, that holds that the psychotherapist privilege infringes a constitutional interest or is arbitrary or disproportionate. There are no such cases. He does not and cannot identify any constitutional interest being infringed by M.R.E. 513. "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 *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

Any motion asserting the nonexistent constitutional exception would not have been successful. Patient/Victim C.G. concurs with the Appellee's analysis of *Holmes and Scheffer* on this issue. Answer at 35-36. C.G. discusses this issue further to identify the plethora of state and federal case law upholding absolute psychotherapist privileges.

(a) 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 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

[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.

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

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)

(b) Federal Courts.

Every federal appellate court that has considered a defendant's constitutional challenge to the psychotherapist privilege has found the privilege constitutional. All federal circuit courts that have considered the issue have determined that the psychotherapist privilege applies despite a defendant's assertion of constitutional rights. *United States v. Portillo*, 969 F.3d 144 (5th Cir. 2020), *cert. denied Portillo v. United States*, 141 S. Ct. 1275 (2021); *Kinder v. White*, 609 Fed. Appx. 126 (4th

Cir. 2015); *Johnson v. Norris,* 537 F.3d 840, 845-847 (8th Cir. 2008); *United States v. LaVallee*, 439 F.3d 670, 692 (10th Cir. 2006); *Newton v. Kemna*, 354 F.3d 776, 781-782 (8th Cir. 2004).

In *Portillo*, the Fifth Circuit rejected the defendant's Confrontation Clause and *Brady* claims. In *Kinder v. White,* the Fourth Circuit 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 the defendant's need to challenge the credibility of the central government witness. *Id.* Despite a "perfect storm of facts," the *Kinder* court held that the psychotherapist privilege overrides the quest for relevant evidence and is not subject to any balancing test. *Id.*

Several lower federal courts have also held that the psychotherapist privilege is not subordinate to a defendant's constitutional rights. *United States v. DeLeon*, 426 F. Supp. 3d 878, 914-18 (D. N.M. 2019); *United States v. Shrader*, 716 F. Supp.2d 464 (S.D. W.Va. 2010); *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").

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

The Appellant's defense counsel was not deficient because any motion claiming a constitutionally required exception would not have been successful.

IV. *PENNSYLVANIA V. RITCHIE* DOES NOT REQUIRE AN IN CAMERA REVIEW OF PRIVILEGED RECORDS NOT IN POSSESSION OF GOVERNMENT.

The Appellant argues that *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) requires at least an in camera review. Brief at 34-36. The Appellant acknowledges that in *Ritchie* the Supreme Court held that confrontation is not a discovery right. *Id*. Appellant reasons that since the Supreme Court nevertheless required an in camera review in *Ritchie*, this Court should likewise order an in camera review. The Appellant fundamentally misses the basis of *Ritchie*'s holding.

The Appellant is correct that the Confrontation Clause does not create a right to discovery. *Ritchie*, 480 U.S. at 52; *Beauge*, 2021 CCA LEXIS 9 at 21; *L.K. v. Acosta*, 76 M.J. at 615-16; *Portillo*, 969 F.3d at 182-83; *LaVallee*, 439 F.3d at 692; *Kinder*, 609 Fed. Appx. at 128-29; *DeLeon*, 426 F. Supp. 3d at 914-18. There is no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Ritchie*, 480 U.S. at 59-60; *Acosta*, 76 M.J. at 616.

Although not "discovery," the government has the obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) to give an accused all evidence in its possession that

is favorable and material. *Ritchie*, 480 U.S. at 57; *Acosta*, 76 M.J. 616. The records in *Ritchie* were prepared by the protective service agency responsible for investigating child abuse. *Ritchie*, 480 U.S. at 43. The Supreme Court applied *Brady*'s due process analysis to the agency files and remanded for an in camera review to determine whether the records contained material information that would have changed the outcome of the trial. *Id*. at 57-58.

The privileged communications the Appellant is seeking are not in the possession or control of the government, so *Brady* does not apply. *Beauge*, 2021 CCA LEXIS 9 at *22 n.61; *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015); *Acosta*, 76 M.J. at 616.[11]

---

[11] 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).

Rulings by federal appellate courts are consistent with the military appellate courts. *Portillo*, 969 F.3d at 183 (prosecution team access to privileged records a "necessary prerequisite" for *Brady* claim to succeed); *DeLeon*, 426 F. Supp. 3d 878, 918; *United States v. Hach*, 162 F.3d 937 (7th Cir. 1998) (defendant not entitled 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

(continued...)

The Appellant concedes he has no Confrontation Clause right to discover C.G.'s privileged records. He has no *Brady* due process right to the records because they are not in the possession or control of the government. He has identified no other constitutional right to the records.

Appellant does not have any right to an in camera review of C.G.'s privileged communications with her therapist.

V. THE JUDICIAL REMEDIES PROFFERED BY THE PARTIES ARE UNLAWFUL.

Without any analysis, the parties agree that if 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 30-31; Appellee Answer at 39-40. The Appellant wants this Court to adopt the "workable" *Payton-O'Brien* remedies. Brief at 30. The *Payton-O'Brien* remedies are wrong for many reasons.

1. No Remedies Are Specified Within M.R.E. 513 and Military Courts Cannot Add Remedies.

M.R.E. 505 and 506 require the military judge to consider the relevance and necessity of classified or confidential government information. No other privilege

---

"possession, custody, or control"); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989).

authorizes a judge to consider relevance or necessity. M.R.E. 505 and 506, and no other privilege, provide remedies when the government chooses not to disclose relevant and necessary evidence.[12]

The *Payton-O'Brien* court failed to apply *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007) in its analysis of this issue. In *Custis*, 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*. *Custis*'s reasoning applies equally to judicial remedies. The authority to add remedies to M.R.E. 513 lies with the President and not the courts.

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 M.R.E. 505 and 506, failing to consider the consequences of its judicial remedies. The remedies applied by the *Payton-O'Brien* court are remedies in search of a violation.

[12] 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 accused or third parties. M.R.E. 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.

M.R.E. 513 gives patients "a privilege to refuse to disclose . . . a confidential communication." M.R.E. 513(a). The President determined that the social benefit of the privilege outweighs the need for relevant evidence. The Supreme Court has never held otherwise.

The *Payton-O'Brien* court cynically reasons that its 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).

M.R.E. 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 M.R.E. 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 patronizingly acknowledged the rule's "noble goals and notable policy concerns." *Id*. at 789. It recognized the obviously punitive consequences of its decision, explaining, "To be clear, the foregoing remedies are not crude devices to punish [victims] for electing to preserve the privilege."

The military justice system is intended to promote good order and discipline within the armed forces. Military sexual assault is a crime that destroys the good order of our military.

The *Payton-O'Brien* court's judicial remedy requiring a victim to waive her privilege transfers the prosecutorial decision 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 burden of decision would fall upon the victims of sexual assault. Victims are not trained to make prosecutorial decisions. They cannot be expected to advance the interests of the government. A victim will decide 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 Clifford S. Fishman, *Defense Access to A Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 24 (2007), the law review article cited by the *Payton-O'Brien* court. The article 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." *Id.* He calls it "unwise social policy." *Id*. The *Payton-O'Brien* court did not discuss or consider this effect on military justice.

The judicial remedies proffered by the parties are unlawful.

VI. THE FOURTH AMENDMENT PROTECTS C.G.'S RECORDS FROM UNREASONABLE SEARCHES AND SEIZURES.

While the Appellant has not identified any constitutional interest requiring disclosure of C.G.'s privileged psychotherapy records, C.G. has a specific and concrete right to be free from unreasonable government searches and seizures.

Since 1906, the Supreme Court has consistently held that subpoenas may not be used to violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. *Hale v. Henckel*, 201 U.S. 43 (1906) ("[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the *Fourth Amendment*); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (Holmes, J.); *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-307 (1924) ("Anyone who respects the spirit as well as the letter of the *Fourth Amendment* would be loath to believe Congress intended to . . . sweep all of our traditions into the fire… [Courts] cannot attribute to Congress an intent to defy the *Fourth Amendment* or even to come near to doing so as to raise a serious question of constitutional law."); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 203 n. 30 (1946) ("[E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the *Fourth Amendment*."); and *United States v. Dionisio*, 410 U.S. 1 (1973) ("The interests in

human dignity and privacy which the *Fourth Amendment* protects forbid any such intrusions on the mere chance that desired evidence might be obtained.").

The Ninth Circuit has held that a privilege created by Oregon Evidence Code § 40.260, Rule 506 ("Member of Clergy-Penitent Privilege") created a reasonable expectation of privacy, and the state's taping of a religious confession by an inmate to a Catholic priest was a violation of the Fourth Amendment. *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997). Like Oregon's *Rule 506,* M.R.E. 513 defines the reasonableness of any order to produce and disclose C.G.'s privileged records. Any order exceeding the limits set by M.R.E. 513 is an unreasonable search and seizure that violates the Fourth Amendment.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478-479 (1928) (Brandeis, J., dissenting).

C.G. has fundamental constitutional rights under the Fourth Amendment. There is no "military exception" to the Constitution. *Steffan v. Aspin*, 8 F.3d 57, 62 (D.C. Cir. 1993). C.G. wants to be let alone.

VII. MILITARY COURTS HAVE NO POWER TO DECLARE A LAW OR RULE UNCONSTITUTIONAL.

This Court and other military tribunals are constituted by Congress under Article I as Executive Branch entities. *Edmond v. United States*, 520 U.S. 651, 664 n.2 (1997). Military tribunals are not ordained and established under Article III of the Constitution, and their judges do not enjoy constitutional protection of their salary and tenure.

Military tribunals are incapable of exercising "the judicial Power" vested in Article III courts. *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018). Nevertheless, the judicial character of military tribunals gives them significant powers, including the power to adjudicate core private rights to life, liberty, and property. *Id.* at 2186 (Thomas, J., concurring) (distinguishing between "a judicial power" and "the judicial Power").

Although the Supreme Court has never drawn the line between "a judicial power" and "the judicial Power," "a judicial power" cannot extend to invalidating an act passed by Congress and signed into law by the President. The Constitution

assigns resolution of constitutional issues to the Judiciary. *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If a law conflicts with the Constitution, then Article III courts must determine which governs the case. "This is of the very essence of judicial duty." *Id*. at 178 (emphasis added).

Judging the constitutionality of an Act of Congress is the "gravest and most delicate duty" the Supreme Court is called on to perform. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Congress is a branch of government that is equal to the judicial branch, and its elected members take the same oath to uphold the Constitution. *Id.* The Supreme Court accords more than the customary deference accorded the judgments of Congress where the case arises in the context of national defense and military affairs. *Rostker*, 453 U.S. at 486.

A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). The judicial Power

cannot be shared with another branch of the government. *Stern v. Marshall*, 564 U.S. at 483. "There is no liberty if the power of judging be not separated from the legislative and executive powers." *Id*. (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

While the three branches are not hermetically sealed and the judicial character of military tribunals gives them significant powers, it remains that Article III imposes limits that cannot be transgressed. *Stern*, 564 U.S. at 483. The system of checks and balances and the integrity of judicial decision making could not be preserved if entities outside of Article III exercised the judicial Power. *Id*. at 484. The Constitution assigns resolution of constitutional law to the Judiciary. *Id*.

Although military tribunals have developed expertise in military law, they do not have expertise in constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), overruled on other grounds by *Solorio v. United States*, 483 U.S. 435 (1987) ("courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law"). The "experts" in constitutional law are the Article III courts. Judging the constitutionality of congressional acts is the prototypical exercise of judicial Power, and if this right is given to military tribunals then "Article III would be transformed from the guardian of individual liberty and separation of powers the [Supreme] Court has long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

CAAF judging the constitutionality of M.R.E. 513 infringes upon the Supreme Court's gravest and most delicate duty and violates the separation of powers principle. The Constitution forbids CAAF or any other Article I tribunal from exercising this great judicial Power.

To be clear, C.G. does not suggest that CAAF must or should ignore the Constitution. When interpreting statutes and rules, CAAF should interpret any ambiguity or gap in accordance with the Constitution. Where there is no ambiguity, CAAF and other tribunals must apply the laws or rules as written.

Service members are not without a remedy for constitutional violations. Although military tribunals cannot provide relief, service members may seek redress in civilian courts for constitutional wrongs suffered in the course of military service. *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983). Service members must appeal to an Article III court that has the judicial Power to judge the constitutionality of laws and rules.

CONCLUSION

WHEREFORE, Patient/Victim C.G. respectfully requests this Honorable Court affirm the lower court's ruling.

Respectfully submitted,

Peter Coote, Esq.
Attorney for Patient/Victim C.G.
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19103
pcoote@pennoni.com
Phone: (215) 254-7857

APPENDIX TO BRIEF

Analysis of Cases Cited in *Access*

None of the sixteen cases cited footnotes on pages 41-45 in Clifford S. Fishman, *Defense Access to A Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 24 (2007) apply or cite *Holmes* or *Scheffer*.

Nine of the sixteen cases predate *Jaffee v. Redmond*, 518 U.S. 1 (1996) (cases include *United States v. Diamond*, 964 F.2d 1325, 1329 (2d Cir. 1992); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994); other cases pre-dating *Jaffee* are cited below).

Other cases cited in *Access* were decided under state constitutions and not the federal constitution. *State v. Peseti*, 65 P.3d 119, 132-33 (Haw. 2003); *State v. Hoag*, 749 A.2d 331, 332 (N.H. 2000).

Some cited cases did not involve privileged communications. *Missouri ex rel. White v. Gray*, 141 S.W.3d 460, 466-67 (Mo. Ct. App. 2004) (confidential court records of adoption); *Commonwealth v. Figueroa*, 661 N.E.2d 65, 67-69 (Mass. 1996) (records of agency investigation did not include communications between patient and psychotherapist); *State v. Pandolfi*, 765 A.2d 1037, 1043 (N.H. 2000) (medication was discoverable); *State v. Gonzales*, 912 P.2d 297 (N.M. App. 1996) (patient waived privilege but prosecutor refused to produce records to court); *State v. Jackson*, 862 A.2d 880, 889 (Conn. App. Ct. 2005) (department of

children and families records were reviewed in camera under *Brady* and not disclosed).

Other *Access* cited cases affirmed convictions where privileged records were not produced. *State v. Speese*, 545 N.W.2d 510, 513 (Wis. 1996); *People v. Higgins*, 784 N.Y.S.2d 232 (N.Y. App. Div. 2004); *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1209-10 (Mass. 2004).

In *State v. L.J.P.*, 637 A.2d 532, 535 (N.J. Super. Ct. App. Div. 1994), the court reversed the conviction where the trial judge prohibited the defendant from introducing evidence that he already possessed.

In *State v. Luna*, 921 P.2d 950, 951(N.M. App. 1996), the court required disclosure of privileged records because of the government's procedural violations.

In *State v. Pinder*, 678 So. 2d 410, 417 (Fla. Dist. Ct. App. 1996), the court reversed the trial court's order compelling production for an in camera review of victim's therapy records.

In *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979), overruled on other grounds by *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983), the court held that psychotherapy records that are not in the government's possession are not discoverable.

CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief including appendix 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.

Respectfully submitted,

Peter Coote, Esq.
Attorney for Patient/Victim C.G.
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19103
pcoote@pennoni.com
Phone: (215) 254-7857

CERTIFICATE OF FILING AND SERVICE

I certify that on October 4, 2021 a copy of the foregoing was transmitted by electronic means to the following:

(1) This Court: efiling@armfor.uscourts.gov

(2) Counsel for Appellant: Lieutenant Michael W. Wester, JAGC, USN

(3) Counsel for Appellee: Major Clayton L. Wiggins, JAGC, USN

Respectfully submitted,

Peter Coote, Esq.
Attorney for Patient/Victim C.G.
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19103
pcoote@pennoni.com
Phone: (215) 254-7857