IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Crim.App. Dkt. No. 201900197
v.	)	
	)	USCA Dkt. No. 21-0183/NA
Frantz BEAUGE Chief Personnel Specialist (E-7) U.S. Navy Appellant	)	

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Issue Presented

DID THE LOWER COURT CREATE AN UNREASONABLY BROAD SCOPE OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BY AFFIRMING THE MILITARY JUDGE'S DENIAL OF DISCOVERY, DENYING REMAND FOR IN CAMERA REVIEW, AND DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included one year or more of confinement. This Court has jurisdiction over this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of Members sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). The Members sentenced Appellant to reduction to pay grade E-1 and confinement for one year. The Convening Authority approved the sentence as adjudged and ordered it executed.

On direct appeal, a Navy-Marine Corps Court of Criminal Appeals panel affirmed the findings and sentence. *United States v. Beauge*, No. 201900197, 2021 CCA LEXIS 9, at *26 (N-M. Ct. Crim. App. Jan. 11, 2021).

Appellant timely petitioned this Court for review on March 12, 2021, and filed his Petition on April 5, 2021. This Court granted review on May 14, 2021. Appellant filed his Brief and the Joint Appendix on August 4, 2021.

Statement of Facts

A. The United States charged Appellant with sexually abusing a child.

The United States charged Appellant with sexual abuse of a child by committing a lewd act—specifically, rubbing the Victim's clitoris, "humping" her stomach and inner thigh, and kissing and putting his tongue in her mouth. (Charge Sheet, Sept. 17, 2018.)

B. In a pretrial Motion, Appellant moved to compel production of the Victim's confidential communications with her psychotherapist. The Military Judge denied the Motion.

Appellant moved to compel production of "all communications" between the Victim and her psychotherapist that led to the psychotherapist's report of child sexual abuse against Appellant. (J.A. 307.) The Government opposed the Motion. (J.A. 328–32.)

1. As mandated by Florida state law, the Victim's psychotherapist reported the Victim's sexual abuse allegations against Appellant to Florida's Central Abuse Hotline. Pretrial, Appellant received a copy of this Hotline Report and the Confidential Investigative Summary generated from it.

The United States provided Appellant with a copy of two reports: (1) a Hotline Report, based on the Victim's psychotherapist's call to Florida's Central

Abuse Hotline, and (2) a "Confidential Investigative Summary" report generated from the Hotline Report. (J.A. 307–09, 313, 322.) These documents summarized the Victim's statement that Appellant [redacted]

(J.A. 313, 322.)

2. Appellant submitted a "Motion to Compel Discovery under M.R.E. 513," citing the need for "more details" as to what the Victim shared in confidential communications with her psychotherapist.

Appellant moved the court to order production of "records of communications between [the Victim] and [her psychotherapist, [redacted] (J.A. 291–306; 312.) Appellant asserted that those communications would "provide more details that are essential to fully understanding what [the Victim] reported at which times to which people." (J.A. 310–11.)

Appellant noted that Ms. D's report to the Central Abuse Hotline "was required under Florida law, which imposed a duty on [redacted] to report the information contained in [the Victim's] communication." (J.A. 310.) Citing "section 201 of Chapter 39 of Title V of the 2013 Florida Statutes," Appellant noted that "'any person who knows, or has reasonable cause to suspect, that a child is abused . . . shall report such knowledge or suspicion to [the Central Abuse Hotline.]" (J.A. 310.)

Given Florida's duty to report, Appellant argued, the Mil. R. Evid. 513(d)(3) exception applied to "communications by the Victim to [redacted] and that those communications were therefore not privileged. (J.A. 310.)

Appellant acknowledged that, even if his Motion were denied, he could confront the Victim with the Hotline Report and the Confidential Investigative Summary, both of which noted that the Victim claimed Appellant [redacted] (J.A. 82–84, 313, 322.) Trial Defense Counsel stated, "[W]e can certainly ask the question, 'You told [redacted] that he [redacted] on a couple occasions[].'" (J.A. 82.)

3. The United States responded that Mil. R. Evid 513(d)(3) only required the state-mandated reports to be disclosed, not the entirety of the Victim's privileged psychotherapist communications.

The United States responded that the Mil. R. Evid. 513(d)(3) exception only extended to communications that the psychotherapist was mandated by Florida state law to report. (J.A. 295–96, 328–332.)

4. The Military Judge denied Appellant's Motion, concluding that Florida law only required that Appellant be provided the state-mandated reports.

The Military Judge denied Appellant's Motion in a written Ruling. (J.A. 333–38.)

a. The Military Judge found that the Victim asserted her privilege with respect to her psychotherapist communications and that the Victim did not waive that privilege.

The Military Judge found that, "after reporting the incident to her school Guidance Counselor, the Victim saw a psychotherapist, [redacted] (J.A. 334.) The Victim "disclosed [redacted] by [Appellant]" to [redacted] who reported the abuse to Florida's child abuse hotline in accordance with Florida's mandated reporting requirements. (*Id*.) The report led to an investigation and the charges against Appellant. (*Id*.)

The Victim asserted privilege over her communications with her psychotherapist and did not waive that privilege. (*Id*.) The Victim completed a forensic interview "detailing her alleged abuse." (*Id*.)

b. The Military Judge concluded that Florida's duty to report required limited reporting necessary to "initiate a safety assessment for alleged victims and start an investigation."

The Military Judge found that the Mil. R. Evid. 513(d)(3) exception only applies to that information that is required by state law to be reported. (J.A. 338.) The Military Judge concluded that the disclosure requirement under Mil. R. Evid. 513(d)(3) were coterminous with the scope of Florida's duty to report law. (J.A. 336–38.)

The Military Judge found that a Florida psychotherapist was only required to report information "necessary to communicate the abuse to the appropriate

authority/agency." (J.A. 336.) He concluded that the purpose of Florida's duty to report law was "to initiate a safety assessment for alleged victims and start an investigation process." (*Id.*) The Military Judge found that Florida law provided psychotherapists "a vehicle to be able to report to the [Central Abuse Hotline] without violating their professional responsibilities." (J.A. 337.)

The Military Judge concluded that Florida state law permits disclosure of "the Confidential Investigative Summary and associated records generated therefrom" if a court, after in camera review, determines those documents are necessary. (*Id.*)

Because Appellant "ha[d] already received the Confidential Investigative Summary" at the time of his Ruling, the Military Judge concluded that the United States had already met its obligations because Mil. R. Evid. 513(d)(3) "does not pierce the psychotherapist-patient privilege" beyond that limited disclosure. (J.A. 337–38.)

C. At trial, the United States offered testimony of two witnesses.

1. The Victim testified that Appellant sexually assaulted her multiple times during the summer of 2014.

a. On direct-examination, the Victim testified that Appellant sexually abused her when she was twelve by putting his tongue in her mouth, rubbing her buttocks, and touching her clitoris and vagina.

The Victim testified that Appellant, her uncle, abused her multiple times while she lived with him in the summer of 2014. (J.A. 106–200.) The Victim was twelve-years-old and lived with Appellant because her parents were going through financial difficulties. (J.A. 106–09.). Shortly after she began living with Appellant, he told the Victim it was not fair that he was taking care of her and not "getting anything back." (J.A. 113.) Appellant then kissed the Victim on the lips, putting his tongue in her mouth. (J.A. 113–14.) Over the next few months, Appellant repeatedly sexually abused the Victim by putting his hands up her shirt, rubbing her lower back, touching her buttocks under her pants, kissing her, touching her clitoris and vagina, and having her "hump him" by "rub[bing] [herself] against his pelvic area." (J.A. 125–26, 128, 136.) This would go on for ten to fifteen minutes, and Appellant would tell the Victim "thank you" and send her back to the room she shared with her cousin. (J.A. 126, 131, 138.)

The sexual abuse happened throughout Appellant's home and ended when the Victim left Appellant's house approximately four weeks after she arrived. (J.A. 113, 128, 133, 137–138, 188–89.)

The Victim reported the abuse to her mother in August, 2014, and to her school counselor approximately two years later. (J.A. 139, 196–97.)

b. On cross-examination, Trial Defense Counsel confronted the Victim with inconsistent statements but did not confront her with the "attempted penetration" statement contained in the state-mandated reports.

Trial Defense Counsel cross-examined the Victim regarding inconsistencies in the number of people present in the home while Appellant sexually abused her. (J.A. 144–45, 184–85.) Trial Defense Counsel also highlighted inconsistencies regarding her recollection as to the number of times Appellant had abused her. (J.A. 189–90.) Trial Defense Counsel did not ask the Victim if she told [redacted] that Appellant attempted [redacted]. (*See* J.A. 144–91.)

c. On redirect, the Victim recalled telling the Investigators that Appellant never inserted anything into her vagina.

On redirect, the Victim testified that when investigators from Child Protective Services had asked if Appellant had ever inserted anything into the Victim's vagina and she had responded "no." (J.A. 192–93.)

d. On re-cross, Trial Defense Counsel did not ask the Victim if she had ever told her psychotherapist or anyone else that the Appellant had [redacted] her.

On re-cross, Trial Defense Counsel did not confront her with the [redacted] statement from the state-mandated reports.

2. The Victim's Mother testified that the Victim told her about the sexual assault.

The Victim's Mother corroborated that she sent her children to live with Appellant, her brother, because her house was in foreclosure. (J.A. 202–03.) The Victim told her mother that Appellant had "touched her private part[s]" while she was living with him. (J.A. 204–05.)

D. Appellant presented testimony from his three children who also lived with him during the summer of 2014.

Appellant's two sons testified that, during the summer that the Victim lived with their family, they never saw the Victim alone with Appellant. (R. 561, 577.) One son testified that his sister and the Victim "never [left] each other's side." (R. 575.)

Appellant's daughter testified that, during the summer of 2014, she shared a room with the Victim. (R. 588.) Appellant, when home, stayed in his room most of the time. (R. 596.)

E. Closing arguments focused on the credibility of the Victim.

Trial Counsel argued that the case "comes down to the credibility of the witnesses in the case." (J.A. 233.)

Trial Defense Counsel stated: "There is no politically-correct way to put this: [the Victim] lied to you." (J.A. 240.) He argued that the Victim was unclear on how many times Appellant had abused her—"Every night? Maybe 6 times? Maybe 20 times?" (J.A. 242.) Trial Defense Counsel argued that the inconsistency from the Victim evidenced "a teenager forgetting about the details of the story she made up." (J.A. 242–44.) Trial Defense Counsel argued that the Victim made inconsistent statements and asked Members, "[a]re those consistent? Absolutely not. They're not consistent because this story never happened." (J.A. 242.)

F. The Members convicted Appellant and sentenced him.

Members found Appellant guilty of two specifications of sexual abuse of a child, acquitted him of one specification of sexual abuse of a child, and sentenced him to be reduced to the grade of E-1 and confined for one year. (J.A. 256–57.)

Argument

THE PLAIN LANGUAGE OF MIL. R. EVID. 513 REQUIRES THAT ANY PRODUCTION OR DISCLOSURE UNDER AN ENUMERATED EXCEPTION BE "NARROWLY TAILORED." THE MILITARY JUDGE DID NOT ERR IN LIMITING DISCLOSURE UNDER THE "DUTY TO REPORT" EXCEPTION TO ONLY THAT INFORMATION REQUIRED BY FLORIDA STATE LAW TO BE PRODUCED. FURTHER, TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE WHERE NEITHER MIL. R. EVID. 513(d)(2) NOR THE CONSTITUTION PROVIDED ANY OTHER MEANS TO COMPEL DISCLOSURE OF THE REMAINDER OF THE VICTIM'S PRIVILEGED COMMUNICATIONS.

A. The standard of review is de novo.

"This court reviews questions of statutory interpretation de novo." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

B. Congress mandated that any production or disclosure under Mil. R. Evid. 513 must be narrowly tailored "to only the specific records or communications" that meet the requirements for one of the seven enumerated exceptions.

1. Appellate courts construe Military Rules of Evidence using principles of statutory interpretation. The plain meaning of a provision is determined in the context of the entire Rule.

"It is a well-established rule that principles of statutory construction are used in construing the Manual for Courts-Martial in general and the Military Rules of Evidence in particular." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citations omitted). "'The first step is to determine whether the language at issue

has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).

"'The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Id.*; *accord Sager*, 76 M.J. at 161 (plain meaning ascertained by "ordinary meaning of the language," its context, "and the broader statutory context"). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (citations omitted).

Only if a rule remains unclear after construing its plain language does a court turn to legislative history to resolve the ambiguity. *See Sager*, 76 M.J. at 161; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 436 (2012) (plain-meaning rule applied "without recourse to policy arguments, legislative history, or any other matter extraneous to the text—unless this application leads to an absurdity").

2. Mil. R. Evid. 513 prevents disclosure of psychotherapist-patient communications in courts-martial absent patient consent or an applicable exception. Mil. R. Evid. 513(e)(4), which Congress mandated, requires that any disclosure under an exception "be narrowly tailored."

Military Rule of Evidence 513 provides a general privilege for communications between a psychotherapist and patient if made "for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[1] (J.A. 49 (Mil. R. Evid. 513(a), Manual for Courts-Martial, United States (2016 ed.) (M.C.M.).) Absent voluntary disclosure or consent, (*see* J.A. 47 (Mil. R. Evid. 510)), "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication" with a psychotherapist, (J.A. 49 (Mil. R. Evid. 513(a)).

Subdivision (d) provides seven enumerated exceptions to the psychotherapist-patient privilege. Mil. R. Evid. 513(d)(1)-(7). The second exception removes the privilege, inter alia, "when the communication is evidence of child abuse." Mil. R. Evid. 513(d)(2). The third exception removes the privilege when, inter alia, "state law . . . imposes a duty to report information contained in a communication." Mil. R. Evid. 513(d)(3).

[1] Though the granted issue references the "scope of the psychotherapist-patient privilege," it more precisely deals with the scope of two *exceptions* to the privilege, Mil. R. Evid. 513(d)(2)–(3).

Subdivision (e) provides the procedure for determining which records or communications may be produced or disclosed under an enumerated exception. Mil. Rule. Evid. 513(e)(4). There, the President explicitly limits any "production or disclosure" by requiring they be "narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions." *Id.*

Congress mandated that the President include this express limitation, which became effective in 2015. (*See* J.A. 43 (Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369, Sec. 537 (2014)).) While this Court has previously discussed aspects of Mil. R. Evid. 513(d) exceptions,[2] it has never construed its scope since Congress mandated and the President promulgated Mil. R. Evid. 513(e)(4).

[2] *See, e.g.*, *United States v. Custis*, 65 M.J. at 366; *United States v. Jenkins*, 63 M.J. 426, 426 (C.A.A.F. 2006); *United States v. Harding*, 63 M.J. 65, 65 (C.A.A.F. 2006); *United States v. Clark*, 62 M.J. 195, 196 (C.A.A.F. 2005); *United States v. Rodriguez*, 54 M.J. 156, 156 (C.A.A.F. 2000).

C. A plain language analysis of the "duty to report" exception requires that it be construed in the context of the entire Rule. This includes Mil. R. Evid. 513(e)(4), a provision mandated by Congress that explicitly requires "any production or disclosure" pursuant to an enumerated exception be "narrowly tailored." The Military Judge did not abuse his discretion applying this statutory limitation to the Mil. R. Evid. 513(d)(3) "duty to report" exception.

1. The plain meaning of Mil. R. Evid. 513 requires that any production or disclosure under the "duty to report" exception be "narrowly tailored" to information contained in the state-mandated report.

When interpreting a rule, this Court consistently looks not only to the specific language at issue, but also construes that language in context. *See Sager*, 76 M.J. at 161; *see also*, *United States v. Kohlbek*, 78 M.J. 331 (C.A.A.F. 2019) (to construe Rule 707(a), it "must be understood in the context of the entire rule") (citing *Timbers of Inwood Forest*, 484 U.S. at 371 for proposition that "[s]tatutory construction . . . is a holistic endeavor.")). This "whole-text" canon of statutory interpretation "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Reading Law* at 167 (noting failure to follow this canon is one of the most common interpretative faults).

Important in this endeavor is a rule's use—or failure to use—words of exclusion or limitation. *See, e.g.*, *United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015) (interpreting statute, noting it contained "no limiting or qualifying words"); *see also United States v. Gaddis*, 70 M.J. 248, 258 (C.A.A.F. 2011) (J.

Effron, concurring) (noting lack of "express words of exclusion or limitation" when interpreting Mil. R. Evid. 412).

Here, because the Victim's communications meet the requirements of Mil. R. Evid 513(a), "they are privileged unless they otherwise fall under an exception to that rule." *See Custis*, 65 M.J. at 369. And while Mil. R. Evid. 513(d)(3) in isolation could be read as a categorical exception to the privilege—as Appellant urges—it could also be fairly read to operate more narrowly, as the lower court held, to remove the privilege only as to that "information contained in a communication" that state law compels disclosed. *Compare* (Appellant's Br. at 14–18, Aug. 4, 2021 (exception is broad)), *with Beauge*, 2021 CCA LEXIS 9, at *11 (exception is narrow); *and* (J.A. 338 (Military Judge reaching same conclusion)).

Just as in *Kohlbek*, context clarifies the conflict: When the "duty to report" exception is construed alongside Mil. R. Evid. 513(e)(4)—as it must be, *see Sager*, 76 M.J. at 161—three textual indicators compel the conclusion that exceptions to the psychotherapist-patient privilege operate narrowly. First, Mil. R. Evid. 513(e)(4) applies broadly to "*any* production or disclosure" under an enumerated exception to Rule 513. *Id.* (emphasis added).

Second, if production or disclosure is permitted, Mil. R. Evid. 513(e)(4) requires it to be "narrowly tailored," meaning "no broader than absolutely

necessary." *Narrowly tailored*, Black's Law Dictionary (9th ed. 2010). Here, because Florida's duty to report law mandates reporting of allegations of child sexual abuse, (J.A. 335–36), and permits disclosure of the resulting Hotline Report and Investigative Summary, (*see* J.A. 337), disclosure to Appellant of the Investigative Summary and Hotline Reports—and no more—is narrowly tailored to meet the requirement of Mil. R. Evid. 513(d)(3). As the Military Judge concluded, the disclosure requirements under Mil. R. Evid. 513(d)(3) are coterminous with the scope of Florida's duty to report law. (J.A. 338). Requiring more would violate Congress's mandate to narrowly tailor.

And third, the general/specific canon instructs that, when in conflict, a specific provision prevails over a general one. *See, e.g.*, *United States v. Dinger*, 77 M.J. 447, 453 n.6 (C.A.A.F. 2018) (referencing the canon); *Loving v. United States*, 68 M.J. 1, 26 (C.A.A.F. 2009) (applying it); *United States v. Yarbrough*, 55 M.J. 353, 356 (C.A.A.F. 2001) (same). Here, subsection (e)(4)—a specific provision—restricts applicability of exceptions "to *only* the *specific* records or communications, *or portions* of such records or communications, that meet the requirements for one of the enumerated exceptions . . . ." Mil. R. Evid. 513(e)(4) (emphasis added). These "limiting or qualifying words" necessarily effect the meaning of Mil. R. Evid. 513(d)(3), a general provision. *See Schloff*, 74 M.J. at 314.

In sum, the plain language of Mil. R. Evid. 513 compels courts to "narrowly tailor" the application of the duty to report exception to "only the specific records" that meet the exception's requirements—here, the "information contained in a communication" reported under state law. Mil. R. Evid. 513(d)(3), (e)(4). The Military Judge correctly found that narrow tailoring only required disclosure of the "Confidential Investigative Summary" and that the United States had already met its obligations because Mil. R. Evid. 513(d)(3) "does not pierce the psychotherapist-patient privilege" beyond that limited disclosure. (J.A. 337–38.)

2. The surplusage canon requires that every word and provision of Rule 513 to be given effect. Appellant's suggested reading would result in de facto repeal of subsection (e)(4), which Congress mandated.

In *Sager*, this Court reviewed whether the Article 120, UCMJ, prohibition against making sexual contact with a person who is "asleep, unconscious, or otherwise unaware" created a single theory of liability or three separate theories. 76 M.J. at 161. This Court chose the latter interpretation because the single theory interpretation would render "asleep," unconscious," and "or" mere surplusage. *Id.* at 162. "'The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.'" *Id.* (quoting *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015)); *see also Reading Law* at 174 ("[I]t is no more the court's function to revise by subtraction than by addition.").

Here, the surplusage canon compels a narrow reading of the scope of Rule 513(d) exceptions to give effect to subsection (e)(4)'s narrow tailoring requirement. In arguing for a broader interpretation of the duty to report exception, Appellant fails to mention subsection (e)(4), much less construe its impact on subsection (d)(3). (*See* Appellant's Br. at 12–18.) The surplusage canon precludes Appellant's interpretation—rendering Mil. R. Evid. 513(e)(4) superfluous—just as it precluded adopting the single theory of liability in *Sager*. 76 M.J. at 161–62.

3. Interpreting Rule 513 to require narrow tailoring of production under an exception does not lead to absurd results.

The absurdity doctrine will "override the literal terms of a statute only under rare and exceptional circumstances." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). "'[A] departure from the letter of the law' may be justified to avoid an absurd result if 'the absurdity . . . is so gross as to shock the general moral or common sense.'" *United States v. McPherson*, No. 21-0042, 2021 CAAF LEXIS 710, at *17 (C.A.A.F. Aug. 3, 2021) (quoting *Crooks*, 282 U.S. at 60); *see also* Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2389–90 (2003) (an absurd result is an outcome "so contrary to perceived social values that Congress could not have intended it").

In *McPherson*, this Court reviewed the Government's argument that a five-year statute of limitation for the offense of indecent acts against a child was "bizarre and shocking to morals and common sense," and that therefore such an

interpretation of the statute at issue was an absurd result. 2021 CAAF LEXIS 710, at *18–19. In rejecting that argument, this Court noted that such an argument fails if "Congress *could rationally have* made such a reading [of] the law." *Id.* at *19.

Here, Appellant asserts that the lower court ignored the plain language of Rule 513 and that "lead to an absurd result." (Appellant's Br. at 15.) He reasons that because the psychotherapist-patient privilege "does not exist to protect a state-ordered report," the lower court erred by applying the subsection (d)(3) exception to a *report* instead of to the Victim's *communications*. (Appellant's Br. at 14–15.) This reasoning fails for at least three reasons. First, the lower court did not apply the exception to a state-ordered report, as Appellant asserts, but instead "to the 'information' that [was] mandatorily reported" from the Victim's privileged counseling. *Beauge*, 2021 CCA LEXIS 9, at *10–11. "[I]nformation contained in a communication" is exactly what the duty to report exception covers. *See* Mil. R. Evid. 513(d)(3).

Second, absent an applicable exception or waiver, the mere fact that otherwise privileged information is contained in a state-mandated report does not remove the privilege in military courts. *See* Mil. R. Evid. 510(a) (absent voluntary disclosure or consent, privilege remains). Here the Victim asserted her privilege and never waived it. (J.A. 334.)

And third, the duty to report exception removes the privilege for "*information* contained in a communication," regardless of how that information is reported or recorded. Mil. R. Evid. 513(d)(3) (emphasis added). Florida state law imposes a duty on mental health professionals to report suspected child sexual abuse to the State's "Central Abuse Hotline." (J.A. 55 (Fla. Stat. Ann. § 39.201(2)(c)–(d).) No matter how Florida chooses to record the information from a psychotherapist-patient communication under § 39.201(2), it does not change that the information derives from an otherwise privileged communication.

Appellant fails to show that this case approaches the "rare and exceptional circumstances" that would allow this Court to apply the absurdity doctrine to "override the literal terms" of Mil. R. Evid. 513. *See Crooks*, 282 U.S. at 60.

4. Assuming arguendo the scope of the duty to report exception is not clear from a plain language analysis, the Drafter's Analysis and history of Mil. R. Evid. 513 clarify any ambiguity. Both compel a narrow interpretation of the scope of the enumerated exceptions.

Only if a rule remains unclear after construing its plain language—or if such interpretation is inherently absurd—does a court turn to legislative history to resolve the rule's meaning. *See Sager*, 76 M.J. at 161; *see also McPherson*, CAAF LEXIS 710, at *23.

"The [Rule 513] exceptions were drafted to limit the privilege in order to balance the public policy goals stated in [*Jaffee v. Redmond*, 518 U.S. 1, 11

(1996)] with 'the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.'" *Jenkins*, 63 M.J. at 430 (quoting M.C.M., Analysis of the Military Rules of Evidence app. 22 at A22-44 (2005 ed.); *see also* M.C.M., app. 22 at A22-51 (2016 ed.) (same). In *Jenkins*, this Court rejected the appellant's argument that Mil. R. Evid. 513(d)(4) and (d)(6) were ambiguous and that ambiguity must be resolved "by narrowly interpreting them." *Id*.

Further, the Drafter's Analysis accompanying the original promulgation of Rule 513 indicated the exceptions did something less than completely remove the privilege: "These exceptions are intended to emphasize that military commanders are to have access to all information *that is necessary* for the safety and security of military personnel, operations, installations, and equipment." M.C.M., app. 22 at A22-51 (2016 ed.) (emphasis added). It is difficult to imagine that the entirety of a child victim's communications to her psychotherapist would be necessary for these military concerns.

And even assuming Rule 513 as originally drafted would have permitted the sweeping interpretation of exceptions that Appellant urges this Court to adopt, the history of Congress's and the President's amendments to the Rule support what the plain language of the Rule now compels: production and disclosure under an exception must be narrow. *See* M.C.M., app. 22 at A22-51 (2016 ed.) (2011

amendments "expanded the overall scope of the privilege" and 2015 amendments added the requirements of subsection (e)(4); *see also supra* Sections C.1–2.

In sum, the Military Judge did not abuse his discretion when he determined that the disclosure requirement under Mil. R. Evid. 513(d)(3) extends only so far as the scope of Florida's duty to report law. (J.A. 336–38.)

D. Even assuming the Military Judge erred by failing to interpret Mil. R. Evid. 513(d)(3) as forfeiting the Victim's claim to any privilege at all under Mil. R. Evid. 513, the error was harmless.

1. This Court reviews the prejudicial effect of an erroneous evidentiary ruling de novo and, for nonconstitutional errors, tests for harmlessness.

"This Court reviews the prejudicial effect of an erroneous evidentiary ruling de novo." *Kohlbek*, 78 M.J. at 334 (citation and internal quotation marks omitted). "Article 59(a), UCMJ, provides that the 'finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.'" *Id.* "For nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *Id.* "In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.*

2. Assuming error, it was harmless: the statement that Appellant "attempted to penetrate" the Victim is not necessarily inconsistent with the Victim's testimony nor helpful to Appellant, as evidenced by Appellant's tactical decision not to confront the Victim with that statement.

In *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), a murder case on appeal from a denial of habeas corpus, the appellant alleged his counsel was ineffective for failing to cross-examine a witness on a potentially inconsistent statement. *Id.* at 1009. The witness had testified that he learned appellant had committed the murder from the appellant, but the witness had previously stated that it was another person that told him that. *Id.* There, the court held that "the district court was justified in concluding that [the appellant's] counsel had made a tactical decision not to confront [the witness] with his earlier statement." *Id.* The court noted that that was a "decision that does not appear to have been unwise even in hindsight" because the witness's statements "are not necessarily inconsistent." *Id.* (citation omitted). The court reasoned that the witness "could have heard of [the appellant's] complicity in the murder from both sources" and "[h]ad he said as much to the jury, his testimony would have been devastating." *Id.* The court also noted that the cross-examination of the witness in question was otherwise extensive. *Id.*

As in *Bell*, so too here. Although *Bell* was in the context of an ineffective assistance claim, the reasoning is apt here. Even if the Military Judge's Ruling

was error, the lack of prejudice in that Ruling is evidenced by Appellant's choice to not pursue (at trial) the very line of questioning that he now argues (on appeal) was necessary for his defense. Appellant acknowledged during the motion hearing that he had evidence sufficient to confront the Victim with whether she told her psychotherapist that Appellant [redacted] her. (J.A. 82.)

Furthermore, just as the witness' statements in *Bell* were "not necessarily inconsistent," neither were the Victim's alleged statements here: even if she did tell her psychotherapist that Appellant [redacted] her, that is not inconsistent with anything she later said. Appellant now avers he did not confront the Victim with this "inconsistent statement" to avoid "opening the door to prior consistent statements." (Appellant's Br. at 33.) Just as in *Bell*, Appellant cannot transmute his tactical decision at trial into prejudicial harm on appeal.

Regardless of why Appellant chose not to confront the Victim with the alleged inconsistent statement, the fact that he made that choice evidences that the Military Judge's Ruling—even if it was error—was harmless.

3. Assuming error, it was not constitutional: the Confrontation Clause is inapposite because Appellant sought disclosure of information, not the right to confront the Victim with information already in his possession.

The right to confront a witnesses does not include the right to discover information to use in confrontation. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). If that were not true, "the effect would be to transform the Confrontation

Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view." *Id.* at 52.

In *Lk v. Acosta*, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017), the court distinguished appellant's motion for in camera review of privileged information yet to be disclosed from a motion to admit privileged information already disclosed. *Id.* The former—that is, asserting a "right to possess information that one currently does not have"—is different from the latter, which involves the "right to introduce into a criminal trial information that one already possesses." *Id.* In *Acosta*, the court found that the appellant's request was one for disclosure and, therefore, did not implicate the Confrontation Clause." *Id.* at 615–16.

Here, as in *Acosta*, the Confrontation Clause is inapposite to Appellant's request for disclosure of the Victim's mental health records. *See* U.S. Const. amend. VI. Appellant's assertion that he "was stripped of the ability to effectively confront," the Victim (Appellant's Br. at 20), misses what the Supreme Court made clear in *Ritchie*: the Confrontation Clause is not "a constitutionally compelled rule of pretrial discovery." *See Ritchie*, 480 U.S. at 52; *see also Acosta*, 76 M.J. at 616 ("Mental health records located in military or civilian healthcare facilities *that have not been made part of the investigation* are not 'in the possession of the prosecution' and therefore cannot be '*Brady* evidence.'").

Appellant argues that without [redacted]'s clinical notes, Appellant "was never given an opportunity to fully and effectively cross-examine" the Victim. (Appellant's Br. at 21.) As a threshold matter, an assertion of [redacted] is not inconsistent with the Victim's other allegations that Appellant rubbed her clitoris and "humped" her stomach and inner thigh. (J.A. 125–26, 128, 136.) So even if the Victim's statement to the psychotherapist were more detailed, it is not at all clear how it is inconsistent such that a member would believe it contradicts her other allegations, of which the Members convicted Appellant.

But even assuming, arguendo, that the statement was inconsistent, there are at least three problems with Appellant's argument: (1) Appellant *did* have the "[redacted] statement" with which, as he acknowledged at trial, he *could* have confronted the Victim, (2) the Record contains no evidence of any other "inconsistent statements" in the Victim's privileged records, and (3) Appellant did have other ways to attack the Victim's credibility—and he used them. (*See* J.A. 144–45, 184 –87, 190–91.)

By relying on *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009)—where this Court tested prejudice under the constitutional standard—Appellant makes the same mistake the Supreme Court cautioned against in *Ritchie*. *See* 480 U.S. at 52; (Appellant's Br. at 17–19).

Similarly, Appellant's reliance on *United States v. Chisum*, 77 M.J. 176 (C.A.A.F. 2018), (*see* Appellant's Br. at 18–19), is misplaced primarily for two reasons. First, the issue granted in *Chisum* was constitutional. *See Chisum*, 77 M.J. at 177–78 (issue granted asked whether appellant was deprived right to confront witnesses in violation of the Sixth Amendment to the Constitution). Second, at the time, Congress had not yet mandated the removal of the Mil. R. Evid. 513(d)(8) constitutional exception. *See United States v. Chisum*, 75 M.J. 943, 945, 948 (A.F. Ct. Crim. App. 2016) (appellant convicted in January 2015, and court relied on Mil. R. Evid. 513 (2013 ed.)).[3] Here, on the other hand, the granted issue—at least as to the duty to report exception—focuses on an alleged erroneous evidentiary ruling, not a violation of the Constitution. (*See, e.g.* Appellant's Br. at 12.)

E. Trial Defense Counsel was not ineffective for failing to seek disclosure of the Victim's privileged communications under Mil. R. Evid. 513(d)(2) because the prior disclosure of the state-mandated reports satisfied the Mil. R. Evid. 513(d)(2) requirements.

1. The standard of review is de novo.

Appellate courts review claims of ineffective assistance of counsel de novo. *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018).

[3] Nor had Congress yet limited in camera review "only when," inter alia, the Mil. R. Evid. 513(e)(3) test was met, (*see* J.A. 43), as discussed infra in Section F.1.

2. A claim of ineffective assistance of counsel will fail unless an appellant can show that the counsel's performance amounted to incompetence under the prevailing professional norms. Even then, the appellant must still show prejudice. Courts apply a "strong presumption" that counsel is not ineffective.

To prevail on a claim of ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To meet this standard, the counsel's performance must amount to "incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. The court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*.

3. It was not unreasonable for Trial Defense Counsel not to request the Victim's privileged communications under the Mil. R. Evid. 513(d)(2) exception.

There is no psychotherapist-patient privilege when, inter alia, "the communication is evidence of child abuse." Mil. R. Evid. 513(d)(2). This exception "does not apply to statements that are silent as to whether there was child abuse or that would be evidence that no child abuse occurred." *Acosta*, 76 M.J. at

617. The purpose of the psychotherapist-patient privilege exceptions is to ensure military commanders "have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment." *Id.* (quoting Mil. R. Evid. 513 analysis at A22-51).

In *Acosta*, the appellant sought the victim's mental health records to obtain information as to the truthfulness of the victim and the extent of her injuries. *Id.* at 613. There, the court found the military judge erred in ordering production of the victim's mental health records because what appellant sought—inconsistent statements—is not "evidence of child abuse." *Id.* at 613, 617–18. The court went on to hold that Mil. R. Evid. 513(d)(2) was "inapplicable" to the appellant's request. *Id.* at 618.

Here, two points show that Trial Defense Counsel was not deficient for failing to request the Victim's psychotherapist records under Mil. R. Evid. 513(d)(2). First, Appellant had already received the information to which Mil. R. Evid. 513(d)(2) might be applicable—the Hotline Report and the Confidential Investigative Summary. Consistent with the purpose of the child abuse exception, as discussed in *Acosta*, the release of those records provided information sufficient to allow the commander to ensure the safety of the victim and to investigate the allegations. *Acosta*, 76 M.J. at 617.

Second, interpreting Mil. R. Evid. 513(d)(2) to categorically remove the privilege in all cases of child abuse is precluded by the plain meaning of Rule 513(d)(2), runs counter to at least three canons of interpretation, and would cause the exception to swallow the rule. *See supra* Section C.

In sum, Trial Defense Counsel's conduct fell "within the wide range of reasonable professional assistance" and he was not ineffective for failing to seek the Victim's privileged mental health records under Mil. R. Evid. 513(d)(2). *Strickland*, 466 U.S. at 689.

4. Even assuming Trial Defense Counsel erred by not seeking the Victim's privileged communications under Mil. R. Evid. 513(d)(2), Appellant was not prejudiced.

"In order to show prejudice under *Strickland*, the defendant must show that that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Green*, 68 M.J. at 362 (citations and internal quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In *Green*, the Court of Appeals for the Armed Forces denied the appellant's claim that his counsel was ineffective for failing to obtain the victim's mental health records. *Id.* at 361–62. There, the appellant's "civilian defense counsel conducted a thorough cross-examination of [the victim] in which she elicited" inconsistent statements including the victim's initial statements that she had sex

with the appellant ten times a week, which she later reduced to two or three times a week. *Id.* at 362. The appellant was acquitted of seven of thirteen specifications and the court held that, even if the victim's mental health records had been obtained, there was not a reasonable probability they "would have further discredited [the victim]" such that the result would have been different. *Id.*

Like *Green*, Trial Defense Counsel conducted a thorough cross-examination of the Victim, highlighting perceived inconsistencies in her testimony. (J.A. 144–45, 184–85, 190–91.) And like *Green*, Appellant confronted the Victim with discrepancies in the number of times she said Appellant abused her and the Members returned mixed findings. (J.A. 190–91, 256.) The lack of prejudice here is even stronger than *Green* because Appellant had access to portions of the Victim's privileged communications—the Hotline Report and the Confidential Investigative Summary—but he chose not to use them. (*See* J.A. 143–90.)

Appellant's reliance on *Davis v. Alaska*, 415 U.S. 308, 310–12 (1974)—where an appellant was denied the opportunity to cross-examine a witness on the witness's record of juvenile convictions—is misplaced. (Appellant's Br. at 32.) In *Davis*, although the appellant had information that a witness was on probation for burglary, the court prevented the appellant from using it in cross-examination to expose that witness' bias and motive to fabricate. *Davis*, 415 U.S. at 311. Here,

unlike *Davis*, Appellant *was* permitted to cross-examine the Victim on the content of the disclosed records—and again, he chose not to. (*See* J.A. 143–90.)

In sum, even assuming error, Appellant was not prejudiced because he fails to show—as he must—a reasonable probability that the result of the proceeding would have been different even if Trial Defense Counsel erred in not seeking the Victim's mental health records under Mil. R. Evid. 513(d)(2).

F. Trial Defense Counsel was not ineffective for declining to seek the Victim's privileged mental health records through either a "constitutional exception" to Rule 513 or under the Confrontation Clause.

1. Rule 513 has not had a "constitutional exception" since Congress mandated the removal of Mil. R. Evid. 513(d)(8) in 2015.

Until 2015, there were eight exceptions to the psychotherapist-patient privilege in the military justice system. Mil. R. Evid. 513(d)(1)–(8), Supp. to M.C.M. (2012 ed.). The eighth exception provided that there is no privilege when the "admission or disclosure of a communication is constitutionally required." *Id.*

Congress mandated removal of this "constitutionally required" exception in 2015. (*See* J.A. 43 (Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014)) (requiring Rule 513 to be modified "[t]o authorize the military judge to conduct a review in camera of records or communications *only* when [513(e)(3) test is met]).) The President implemented this change. Exec. Order 13,696, 80 Fed. Reg. 35,783 (17 Jun. 2015). This "substantially broadened the protections" of Rule 513. *J.M. v.*

Payton-O'Brien, 76 M.J. 782, 786 (N-M. Ct. Crim. App. 2017); *accord E.V. v. Robinson*, 200 F. Supp. 3d 108, 111 (D.D.C. 2016) (after 2015 NDAA, a military judge may only examine Rule 513 communications *in camera* or disclose them if information meets an enumerated exception).

Service courts disagree on the impact of the 2015 NDAA's removal of the constitutional exception. *See Payton-O'Brien*, 76 M.J. at 789–90 (if no enumerated exception yet constitution still demands privileged materials, victim given option to waive privilege); *Acosta*, 76 M.J. at 615 ("[T]he reach of the constitutional exception is the same today as it was prior to the deletion of the constitutional exception pursuant to [the 2015 NDAA]."); *United States v. Morales*, No. 39018, 2017 CCA LEXIS 612, at *26–27, (A.F. Ct. Crim. App. Sep. 13, 2017) (assuming arguendo a non-enumerated constitutional exception exists).

Although "[i]t is axiomatic that the removal of a constitutional exception from an executive order-based rule of evidence cannot alter the reach of the Constitution," *Acosta*, 76 M.J. at 615, the President's removal of that exception— at Congress's behest— renders the Mil. R. Evid. 513(e)(3) test inapplicable to claims that exercise of the privilege violates an accused's constitutional rights. *See also Gaddis*, 70 M.J. at 253 (President cannot limit through a rule evidence required by the Constitution).

It is for Congress and the President to determine what exceptions should apply to Rule 513, *see Custis*, 65 M.J. at 371; a military judge has no authority to create one himself, *see id.* at 369.

Here, Trial Defense Counsel could not be deficient for "fail[ing] to include the constitutional exception in his motion" where no such exception to Rule 513 even existed. (*See* Appellant's Br. at 26.)

2. Trial Defense Counsel was not ineffective for declining to raise a claim that Rule 513 was unconstitutional as applied to Appellant because the Rule is not "arbitrary or disproportionate to the purposes [it is] designed to serve."

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted). However "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citations omitted); *see also Gaddis*, 70 M.J. at 252 (right to present relevant testimony has limits and may "bow to accommodate other legitimate interests in the criminal trial process").

As a result, "'state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.'" *Holmes*, 547 U.S. at 324 (quoting *Scheffer*, 523 U.S. at 308). "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." *Scheffer*, 523 U.S. at 308 (citations omitted); *accord Gaddis*, 70 M.J. at 253 (applying test to Mil. R. Evid. 412 and finding rule not unconstitutional). This is tested by evaluating "whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right[s]. . . ." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

The Supreme Court has held exclusions of evidence violate the Constitution where they significantly undermined fundamental elements of the accused's defense. *See, e.g.*, *Rock*, 483 U.S. at 62 (per se rule excluding all posthypnosis testimony impermissibly infringed on defendant's right to testify on his own behalf); *Chambers v. Mississippi*, 410 U.S. 284, 302, (1973) (due process violation where critical testimony excluded along with a refusal to permit defendant to cross-examine key witness); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (Sixth Amendment violation where state arbitrarily denied defendant right to put on relevant and material witness who was physically and mentally capable of testifying).

"The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee*, 518 U.S. at 11. After *Jaffee*, the President adopted a psychotherapist-patient privilege in the military justice system by implementing Mil R. Evid 513. *Clark*, 62 M.J. at 199 (citing Exec. Order No. 13,140, 64 Fed.

Reg. 55116 (1999)); *see also Rodriguez*, 54 M.J. at 160 (detailing transition from *Jaffee* to Mil. R. Evid. 513 in military justice system); *Jenkins*, 63 M.J. at 430 (Rule 513 approach more limited than *Jaffee*).

The Rule's importance is reflected in Congress's action in the 2015 NDAA, (J.A. 43), which "substantially broadened" the Rule's protections*, see Payton-O'Brien*, 76 M.J. at 786. Further, the privilege is not unique to the military justice system—every state recognizes a psychotherapist privilege. *Jaffee*, 518 U.S. at 12. Given the widely recognized "social benefit to confidential counseling," *see Acosta*, 76 M.J. at 614, Rule 513 cannot be said to be arbitrary or disproportionate to its purpose. If anything, this case—where the patient receiving confidential counseling is a child who has been sexually abused by a family member—serves only to highlight the importance of the Rule 513 privilege.

Neither *Rock*, *Chambers*, nor *Washington* require that Rule 513 be invalidated because, unlike the evidentiary rules at issue in those cases, here Rule 513 does not implicate any significant interest of Appellant. For example, Rule 513 did not inhibit Appellant's right to testify (as in *Rock*), it did not present a rare combination of facts that "defeat the ends of justice," 410 U.S. at 303, (as in *Chambers*), nor did it preclude Appellant from calling a critical witness (as in *Washington*).

Further, as discussed supra, Section E.4, Trial Defense Counsel conducted a

thorough cross-examination of the Victim, highlighting perceived inconsistencies in her testimony. (J.A. 144–45, 184–85, 190–91.)

In sum, because Rule 513 is not arbitrary or disproportionate to the purpose it was designed to serve and, here, it did not implicate any significant interest of Appellant, Trial Defense Counsel was not ineffective for declining to argue that failure to disclose the Victim's privileged mental health records violated the Confrontation Clause. *Strickland*, 466 U.S. at 689. Trial Defense Counsel's conduct fell "within the wide range of reasonable professional assistance." *Id.*

G. Appellant has not met his burden under Mil. R. Evid. 513(e)(3) for in camera review even if Mil. R. Evid. 513(d)(2) or (d)(3) were applicable. And even if Appellant's Confrontation Clause argument were successful, in camera review is precluded absent applicability of an enumerated exception.

1. Congress expressly limited a military court's authority to order in camera review of psychotherapist-patient communications.

When "necessary to rule on the production or admissibility of" a patient's protected mental health records or communications, a military judge may examine "the evidence or a proffer thereof in camera." Mil. R. Evid. 513(e)(3). But first, the moving party bears the burden of demonstrating, by a preponderance of the evidence, inter alia, that "[t]he requested information meets one of several enumerated exceptions" under the Rule." Mil. R. Evid. 513(e)(3)(B).

2. Even if the lower court erred in its interpretation of the scope of Mil. R. Evid. 513(d)(2) and (d)(3), Appellant has not met his burden under subsection (e)(3) to show in camera review is justified.

Even this Court disagrees with the United States as to the scope of either Mil. R. Evid. 513(d)(2) or (d)(3), in camera review is precluded because the Appellant has failed to meet his burden under subsection (e)(3). *See Beauge*, 2021 CCA LEXIS 9, at *23–24 (explaining why Appellant fails subsection (e)(3) test). And if this Court disagrees with that, the appropriate remedy is remand to the lower court, as discussed infra, Section G4.

3. Even if deprivation of the Victim's privileged communications violated the Confrontation Clause, in camera review is not an available remedy. Rule 513 is distinguishable, in that regard, from the statute in *Ritchie*.

Even if deprivation of the Victim's privileged communications violated the Constitution, in camera review is not a permissible remedy under Rule 513. *See* Mil. R. Evid. 513(d)(1)–(7), (e)(3)–(4).

A person holding a privilege under Rule 513 may elect to waive the privilege to permit in camera review. *See* Mil. R. Evid. 510(a) (permitting waiver of privilege). If necessary, after in camera review, the privilege holder may elect to further waive the privilege for disclosure to the parties. *Id.* Absent waiver, if a military court determines that disclosure of the disputed communications would otherwise be necessary for a fair trial, a military judge may select from remedies

the President explicitly provides in the Manual for Courts-Martial. *See, e.g.*, Mil. R. Evid. 403 (permitting exclusion of testimony or material related to undiscoverable evidence if danger of unfair trial); R.C.M. 703(f)(2) (abatement).

Here, in arguing that the Confrontation Clause compels in camera review, Appellant erroneously relies on *Ritchie* to suggest that the Military Judge should have at least ordered in camera review of the Victim's privileged mental health records. (*See* Appellant's Br. at 34 –36.) The argument fails, though, because the statute in *Ritchie* and Rule 513 differ in an important way. The former explicitly permitted in camera review of otherwise privileged records. *Richie*, 480 U.S. at 57 (noting statute permits disclosure if ordered by court); (Appellant's Br. at 35–36 (acknowledging the same)). But Rule 513 explicitly prohibits it: Mil. R. Evid. 513(e)(3) permits no in camera review unless the preponderance of evidence shows an enumerated exception applies.

Assuming no enumerated exception applies to the Victim's privileged communications, the lower court did not err by not ordering in camera review under Appellant's constitutional theory.

4. <u>If this Court disagrees and holds in camera review is permissible here, the appropriate remedy is to remand</u>.

Even if this Court disagrees with the United States and holds that Mil. R. Evid. 513 permits in camera review based on an enumerated exception or under the Confrontation Clause, the Court should remand to the lower court.

Conclusion

The United States respectfully requests that this Court affirm.

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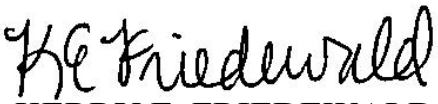

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on September 24, 2021.

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United States v. Morales

United States Air Force Court of Criminal Appeals

September 13, 2017, Decided

No. ACM 39018

Reporter
2017 CCA LEXIS 612 *

UNITED STATES, Appellee v. Ralph G. MORALES, Technical Sergeant (E-6), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Morales, 2018 CAAF LEXIS 114 (C.A.A.F., Mar. 5, 2018)

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Marvin W. Tubbs II. Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-4. Sentence adjudged 13 November 2015 by GCM convened at Fairchild Air Force Base, Washington.

Counsel: For Appellant: Kirk Sripinyo, Esquire (argued); Major Mark C. Bruegger, USAF.

For Appellee: Major Meredith L. Steer, USAF (argued); Colonel Katherine E. Oler, USAF; Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire.

Judges: Before MAYBERRY, JOHNSON, and SPERANZA, Appellate Military Judges. Senior Judge JOHNSON delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge SPERANZA joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of aggravated assault and two specifications of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1] The court-martial sentenced Appellant to a bad-conduct discharge, confinement for four months, reduction to the grade of E-4, and a reprimand. With the exception of the reprimand, the convening authority approved the **[*2]** sentence as adjudged, but he waived the mandatory forfeiture of pay and allowances for the benefit of Appellant's dependent child.

Appellant raises three issues for our consideration on appeal: (1) whether the application of the executive order removing the "constitutionally required" exception from Military Rule of Evidence (Mil. R. Evid.) 513 was an abuse of discretion by the military judge or deprived Appellant of his rights to confrontation, compulsory process, or due process of law; (2) whether the military judge erroneously instructed the court members regarding the burden of proof;[2] and (3) whether the evidence is legally and factually sufficient to sustain Appellant's convictions.[3] Finding no relief is warranted, we affirm the findings and sentence.

I. BACKGROUND

YM, the victim in this case, met Appellant in October 2008 at Fort Belvoir, Virginia, where YM worked as a recreation specialist.[4] At the time, Appellant was a

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[1] The court-martial found Appellant not guilty of three specifications of assault consummated by battery and one specification of wrongfully communicating a threat, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934.

[2] As the United States Court of Appeals for the Armed Forces recently decided this issue adversely to Appellant's position, we do not further address this issue here. *See United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017).

[3] Appellant's third assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] The following factual summary is based on YM's trial

member of the Air Force Honor Guard stationed at Bolling Air Force Base (AFB), District of Columbia. Appellant and YM began dating in January or February 2009 and were married in May 2011. In November 2011, their daughter was born. In early 2013, Appellant went **[*3]** to San Antonio, Texas, for several months to train into a new career field; during this time, YM and their daughter lived with YM's mother in Alexandria, Virginia. In August 2013, after Appellant completed training, the family moved to Fairchild AFB, Washington.

YM testified Appellant began to physically abuse her in March or April of 2009, shortly after they began dating. YM described an incident during which, in response to a comment she made as they were walking to Appellant's car on a street after having drinks, Appellant punched her "around her chest," knocked her to the ground, dragged her to the car, and grabbed her by the hair. As a result, she had bruises on her chest and marks on her face. According to YM, the following morning she and Appellant both cried about the incident, and they reconciled after he told her it would not happen again. YM attempted to conceal the injuries, and made up a story that she had fallen to explain the visible mark on her face to her mother and co-workers.

However, YM testified she had another argument with Appellant after they had been drinking in approximately May 2009. YM testified she did not "remember much" of the incident, but she recalled **[*4]** Appellant hit her as they were going from his car into his off-base apartment. It was in the early hours of the morning and no one else was around.

The next incident YM described occurred on New Year's Eve in December 2009. YM and Appellant were dancing at a club when another man asked to dance with YM. A dispute ensued that resulted in Appellant and YM getting "kicked out" of the club. When they returned to their car, Appellant blamed YM for the incident and began punching her. YM attempted to leave the car, but Appellant grabbed and held her and drove them to his apartment.

Appellant assaulted YM again in October 2010 in the bedroom of his apartment after another argument. Appellant punched her "around" her chest and arms "very, very hard," and "bear-hugg[ed]" her. YM screamed and hit the walls so that the neighbors would hear, but the police did not respond that night. Appellant then threw YM on the floor and stepped on her hand, intentionally putting all his weight and "bouncing" on it, breaking her little finger. Afterwards, YM covered the bruises on her body with her clothing, but went to see a doctor regarding her broken finger.

YM testified in May or June of 2011, when she was pregnant, **[*5]** Appellant punched her again in the kitchen of his apartment following another argument. Appellant also pushed YM down, pinned her to the floor with his knee, kicked her, and spat on her. YM further testified that Appellant grabbed a knife, pointed it at her, and said he would "kill [them] both." However, according to YM, Appellant then got on his knees and hugged her. The following morning YM went to a hospital alone to ensure the unborn baby was unharmed; she did not disclose the assault or threat, but instead told the hospital staff she had fallen down.

On 18 November 2011, ten days after their daughter was born, after another argument, Appellant punched YM very hard on the arm as she held the baby in the living room of Appellant's apartment. YM attempted to leave with the baby, but Appellant resisted. YM left their daughter with Appellant and went to her mother's home. YM took two pictures of the resulting bruises and sent them to Appellant's mother. She also called Appellant's mother and informed her of the abuse.

YM testified that in May or June of 2012, she had yet another argument with Appellant in his apartment. After YM retreated to a bathroom, Appellant broke through the door **[*6]** and struck her on her breasts. YM testified she did not report this assault and covered the resulting bruises with her clothing so no one would see.

In December 2013, YM and Appellant were in Alexandria, Virginia, visiting YM's seriously ill mother. YM and Appellant had an argument at YM's mother's house, which led to Appellant breaking open a door and stomping on YM's foot. YM again took pictures of the injury but did not inform anyone.

Finally, YM testified that in August 2014 at Fairchild AFB, after yet another argument, Appellant grabbed her by the neck and pushed her back. In 2015, YM and Appellant divorced, and YM was ultimately awarded primary custody of their daughter.

On 9 March 2015, the following specifications were preferred against Appellant: one specification of aggravated assault in violation of Article 128, UCMJ, for the October 2010 incident in which he broke YM's finger with his foot; five specifications of assault consummated by battery in violation of Article 128, UCMJ, for the

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testimony.

incidents that occurred in May or June of 2011 and thereafter; and one specification of communicating a threat to the prejudice of good order and discipline and of a nature to bring discredit **[*7]** on the armed forces in violation of Article 134, UCMJ, in May or June of 2011. The assaults from 2009 were not charged.[5] The convening authority referred the charges and specifications to trial by general court-martial on 20 May 2015.

On 2 June 2015, the Defense requested copies of, *inter alia*, all of YM's medical and mental health records.

On 17 June 2015, Executive Order (EO) 13,696 went into effect. The EO, *inter alia*, deleted Mil. R. Evid. 513(d)(8), which had provided an exception to the psychotherapist-patient privilege established by Mil. R. Evid. 513 where "admission or disclosure of a communication is constitutionally required." However, Section 2 of the EO stated:

> Nothing in these amendments shall be construed to invalidate any . . . referral of charges, trial in which arraignment has occurred, or other action begun prior to the effective date of this order, and any such . . . action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Exec. Order 13,696, 80 Fed. Reg. 35,783 (17 Jun. 2015).

On 8 July 2015, the Defense moved to compel production of, *inter alia*, YM's mental health records. On 13 July 2015 the Government responded that it had provided the Defense copies of the medical and mental health **[*8]** records in its possession, and was in the process of obtaining further records for in camera review by the military judge.[6] However, the Government contended the Defense request was "unduly burdensome, overly broad, and . . . completely unsupported," and asked the military judge to release only those portions of the records that were "material to the preparation of the Defense."

On 21 July 2015, the military judge held a closed hearing on the Defense motion to compel. Pursuant to Mil. R. Evid. 513, YM asserted her privilege to prevent disclosure of previously-undisclosed records. The Defense acknowledged EO 13,696 had "changed the landscape of military jurisprudence," but maintained Appellant had a right to the requested records under the Sixth Amendment,[7] as well as the Due Process Clause of the Fourteenth Amendment[8] under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, trial defense counsel conceded he had "no way of knowing" and could "merely speculate" as to what information was in the requested records. The Government opposed the motion, which assistant trial counsel characterized as "a fishing expedition in the extreme." In an oral ruling, the military judge denied the motion, finding no specific factual basis demonstrating a reasonable likelihood the records sought would yield evidence admissible **[*9]** under an exception to Mil. R. Evid. 513, nor that the requested information met such an exception. However, the military judge indicated he would permit the Defense to separately raise the "constitutional issue" of whether the EO's deletion of the constitutionally required exception to Mil. R. Evid. 513 was "facially invalid."

Accordingly, on 26 July 2015 the Defense filed a "Motion Related to Inapplicability of [EO] 13696 to Defense Motion to Compel IAW [Mil. R. Evid.] 513." Therein the Defense contended, *inter alia*, that although Appellant "can only speculate" as to the contents of YM's mental health records, the United States Supreme Court's decision in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), established his due process right to have the military judge conduct an *in camera* review of the records to determine if they contained information that would probably alter the outcome of the trial. In addition, the Defense contended the EO's redaction of the constitutionally-required exception was a "legally untenable" and "statutorily unconscionable" deprivation of Appellant's Sixth Amendment right to confront and cross-examine witnesses. Furthermore, the Defense asserted the application of the EO to Appellant's trial was an

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[5] In general, a person charged with assault under Article 128, UCMJ, "is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." 10 U.S.C. § 843.

[6] At some point during the investigation, YM voluntarily provided to the Government three pages of mental health records documenting one particular visit to a mental health provider. The Government provided this record to the Defense. However, both parties were aware YM had seen both military and civilian mental health providers on a number of other occasions.

[7] U.S. CONST. amend. VI.

[8] U.S. CONST. amend. XIV.

inappropriate retroactive application of the rule change that violated **[*10]** the Constitution's prohibition on ex post facto laws[9] because the EO took effect after the charges and specifications were referred to trial. In response, the Government continued to oppose disclosure, contending: (1) Appellant sought the sort of balancing of interests that the Supreme Court rejected in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996); (2) testimonial privileges do not necessarily require a constitutional exception; (3) the privilege did not implicate Appellant's Sixth Amendment confrontation rights; (4) the Defense had not shown a specific factual basis demonstrating a reasonable likelihood the records would yield admissible evidence, as required by Mil. R. Evid. 513(e)(3)(B); and (5) the application of the EO to Appellant's trial did not violate the Ex Post Facto Clause.

On 27 October 2015, the military judge issued a written ruling denying the Defense motion. The military judge cited *United States v. Weiss*, 510 U.S. 163, 177, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994), for the proposition that "when determining what due process is, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.'" He then explained:

> [ ] The Defense makes two contentions in its motion, first that the changes to Mil. R. Evid. 513 that were mandated by Congress are facially unconstitutional and second that even if not **[*11]** facially unconstitutional, applying the changes to the accused's case would constitute an *Ex Post Facto* violation.
>
> [ ] With respect to the first contention that the changes by Congress are facially unconstitutional this Court finds that the changes are not. First, given the applicable precedent dealing with Congressional determinations as to due process, the Court finds that the Defense has failed to establish that a due process violation has occurred. Furthermore, this Court finds that the changes to Mil. R. Evid. 513 do not facially violate the accused's right to confrontation. This Court interprets *Jaffe*, [sic] *supra* to not require after the fact trial court determinations of the confidentiality of statements protected by this privilege.
>
> [ ] The Defense contention that the changes to the law constitute an *ex post facto* violation are also without merit. This court finds that the changes to Mil. R. Evid. 513 does [sic] not 1) punish as a crime an act previously committed, which was innocent when done; 2) make more burdensome the punishment for a crime, after its commission; or 3) deprive one charged with a crime of any defense available according to law at the time when the act was committed. The current version of **[*12]** Mil. R. Evid. 513 does not change the elements of any offenses, the burden of proof at trial, the maximum punishment, or the right of an accused to present any defenses. As such, the changes to Mil. R. Evid. 513 do not violate the *Ex Post Facto* Clause.

Appellant's trial commenced on 9 November 2015. Contrary to his pleas, he was convicted of the October 2010 aggravated assault and November 2011 and December 2013 assaults consummated by battery; he was acquitted of the other three charged assaults and of communicating a threat.

II. Discussion

A. Mil. R. Evid. 513

1. Law

We review a military judge's ruling on a discovery or production request for abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). "Our review of discovery/disclosure issues utilizes a two-step analysis: first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *Id.* at 325.

Mil. R. Evid. 513(a) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential **[*13]** communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the [UCMJ], if such communication was made for the

[9] *See* U.S. Const. art. I, § 9, cl. 3.

> purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

The privilege is subject to a number of exceptions. Mil. R. Evid. 513(d). Prior to 17 June 2015, these exceptions expressly included when the records are "constitutionally required." Mil. R. Evid. 513(d)(8) as amended by Exec. Order 13,643, 78 Fed. Reg. 29,559, 29,592 (15 May 2013). However, as described above, EO 13,696 eliminated the enumerated "constitutionally-required" exception to Mil. R. Evid. 513 as of 17 June 2015.

Before ordering the production or admission of a patient's records or communications under Mil. R. Evid. 513, the military judge must conduct a closed hearing at which the patient is provided a reasonable opportunity to attend and be heard. Mil. R. Evid. 513(e)(2). Before conducting an in camera review of Mil. R. Evid. 513 evidence, "the military judge must find by a preponderance of the evidence that the moving party showed":

> (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
>
> (B) that the requested information meets one of the **[*14]** enumerated exceptions under [Mil. R. Evid. 513(d)];
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3).

A prosecutor may not suppress evidence favorable to an accused upon request, as this violates constitutional notions of due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. When a witness's reliability may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). Therefore, the Government violates an accused's due process rights if it withholds evidence that is "exculpatory, substantive evidence, or evidence capable of impeaching the [G]overnment's case," and "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (quotation marks omitted).

2. Analysis

Appellant makes several arguments related to the military judge's application of Mil. R. Evid. 513, including *inter alia*: (1) the military judge abused his discretion by applying **[*15]** the "new," post-EO 13,696 version of the rule to his court-martial; (2) the removal of the "constitutionally-required" exception violated Appellant's constitutional rights; (3) YM waived her Mil. R. Evid. 513 privilege by voluntarily releasing a portion of her mental health records; and (4) the Constitution required the military judge to review YM's mental health records in camera.

a. Application of the "new" version of Mil. R. Evid. 513 to Appellant's trial

EO 13,696 went into effect on 17 June 2015, after the charges and specifications were referred to trial but before Appellant moved to compel production of YM's mental health records, and before Appellant was arraigned and tried. In ruling on the Defense motion to compel, the military judge applied the "new" Mil. R. Evid. 513 which lacks the "constitutionally-required" exception. Appellant seizes on language in Section 2 of the EO that "any . . . referral of charges, trial in which arraignment has occurred, or other action begun prior to the effective date of this order . . . may proceed in the same manner and with the same effect as if these amendments had not been prescribed" to argue that the military judge was not *required* to apply the change and, under the circumstances, abused his discretion **[*16]** by doing so. Exec. Order 13,696, 80 Fed. Reg. 35,783 (17 Jun. 2015).

We are not persuaded. First, although this provision *permits* such actions to proceed under the previous version of the rules, it does not *require* application of the old rules. Second, the evident purpose of this savings clause is to preserve the fairness and integrity of ongoing actions where the previous version of a rule has been applied. For example, if the military judge had made a pretrial ruling prior to 17 June 2015 relying on a provision of an "old" rule that had been changed by the EO, this clause would avert the need for the military judge to revisit that ruling in light of the change. However, in the instant case Appellant brought no motion and the military judge made no ruling prior to the

rule change. Third, and relatedly, Appellant has identified no way in which the rule change has particularly impacted him to his detriment that is distinct from the impact it will have on other accused individuals in the future. Put another way, Appellant has not demonstrated any compelling reason why his trial should have proceeded differently than any other court-martial conducted after the effective date of the rule change. Under these **[*17]** circumstances, we do not find the military judge abused his discretion by applying the "new" version of Mil. R. Evid. 513 in effect at the time Appellant filed his motion and at the time of his court-martial. *Cf. United States v. Roberts*, 75 M.J. 696, 700 (N-M. Ct. Crim. App. 2016) (EO 13,696 revisions to Mil. R. Evid. 404 "clearly and indisputably apply to trials in which the appellant was arraigned on or after 17 June 2015").

b. The effect of the removal of Mil. R. Evid. 513(d)(8) on Appellant's constitutional rights

Appellant contends "the President's removal of the 'constitutionally required' exception violated Appellant's constitutional rights and was a nullity." He cites *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), for the proposition that "the exclusion of evidence [is] unconstitutionally arbitrary or disproportionate . . . where it has infringed upon a weighty interest of the accused." Appellant asserts the exclusion of constitutionally-required evidence in favor of a psychotherapist-patient privilege violates these principles.

In a sense, Appellant is tilting at legal windmills here. A rule of evidence cannot dictate the scope of the Constitution, and the absence of a "constitution-ally-required" exception does not render a rule of evidence unconstitutional—the Constitution applies in any event. As our sister court **[*18]** recently observed:

> If the Constitution demands the "admission or disclosure" of otherwise privileged communications, the deletion of Mil. R. Evid. 513(d)(8) does not limit the Constitution's reach into the rule. Put differently, the Constitution is no more or less applicable to a rule of evidence because it happens to be specifically mentioned in the Military Rules of Evidence. . . . Accordingly, the reach of the constitutional exception is the same today as it was prior to the deletion of the constitutional exception . . . .

LK v. Acosta, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017). Therefore, although the removal of Mil. R. Evid. 513(d)(8) impacts the operation of the Rule, it is not unconstitutional because the scope of the Constitution is unaffected.

However, in another sense, Appellant's concern is understandable. The military judge's written ruling appears to rely on *Jaffee* for the proposition that constitutional concerns will not pierce the psychotherapist-patient privilege of Mil. R. Evid. 513. *See Jaffee*, 518 U.S. at 17 ("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."). We doubt the Court's decision in *Jaffee*, a civil case, **[*19]** stands for the proposition that in a criminal trial an accused's constitutional rights must yield to a military rule of evidence that includes seven other specific exceptions. *See id.* at 18 ("Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'") (citation omitted). However, it is unnecessary for us to further address the point because, for reasons explained below, the military judge's refusal to order production of the requested records or to conduct in camera review was not an abuse of discretion.

c. The effect of YM's voluntary disclosure of the records of one mental health consultation on her Mil. R. Evid. 513 privilege

In his reply to the Government's answer to his assignment of errors, Appellant contends for the first time that YM waived her privilege by producing three pages of her mental health records before trial, which the Government shared with the Defense and which were introduced at trial as a Defense exhibit. This exhibit appears to comprise the complete record of one consultation with a civilian mental health counselor **[*20]** in June 2010. Appellant cites Mil. R. Evid. 510, which provides in part:

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.

Mil. R. Evid. 510(a). Because Appellant did not assert this claim of waiver at trial, we test it under the plain error standard on appeal. *See United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (to prevail under a plain error analysis, an appellant must show (1) there was an error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right).

We find no error, plain or otherwise. Mil. R. Evid. 513 entitled YM "to refuse to disclose and to prevent any other person from disclosing *a confidential communication* made between the patient and a psychotherapist . . . ." Mil. R. Evid. 513(a) (emphasis added). Thus the patient may elect to invoke the privilege with respect to one such confidential communication, but not another. Mil. R. Evid. 510(a) provides a caveat that if the patient discloses or consents to disclose a significant part of one such communication, she will be considered to **[*21]** have waived it with respect to all of that particular communication if retaining the privilege with respect to the rest of that communication would be inappropriate under the circumstances. However, it appears from the record the Defense obtained the entirety of the particular consultation that YM elected to disclose.

Appellant cites *United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013), for support. We are not persuaded. In *Jasper*, the United States Court of Appeals for the Armed Forces (CAAF) applied Mil. R. Evid. 510(a) to hold that the alleged victim's affirmative consent to the disclosure of a communication covered by the Mil. R. Evid. 503 privilege for communications to clergy prevented her from later invoking the privilege with regard to the same specific information previously disclosed. *Id.* The CAAF found permitting invocation of the privilege would be inappropriate even though the alleged victim was unaware of the privilege when she originally consented to disclosure. *Id.* Although *Jasper* involved the application of Mil. R. Evid. 510(a), the essential issue was quite different than in the instant case. The CAAF did not hold that consent to disclosure of one communication required disclosure of a different communication; rather, it held that, under the circumstances, prior consent to **[*22]** disclose a communication to trial counsel waived the privilege with respect to that same communication at trial. Thus, it does not support Appellant's position here.

d. Appellant's failure to offer a specific factual basis for disclosing YM's mental health records under Mil. R. Evid. 513, regardless of the continued applicability of the Constitution

In *United States v. Chisum*, 75 M.J. 943, 948-49 (A.F. Ct. Crim. App. 2016), *rev. granted*, 76 M.J. 264 (C.A.A.F. 2017), this court found the military judge abused his discretion by failing to perform an in camera review of the mental health records of two prosecution witnesses. Chisum was tried under the "old" version of Mil. R. Evid. 513, before EO 13,696 came into effect and removed the "constitutionally-required" exception enumerated at Mil. R. Evid. 513(d)(8). We found, under the circumstances of that case, the appellant had presented "specific facts to demonstrate a reasonable likelihood that the records contain relevant, non-cumulative information, necessary to confront a witness in cross-examination." *Id.* at 948. However, after reviewing the records in question, we further concluded the appellant was not prejudiced by the error. *Id.* at 952. Our superior court has since granted review. *Chisum*, 76 M.J. 264.[10]

Although we have not previously addressed the requirements for in camera review under the current version of Mil. R. Evid. 513, our sister **[*23]** courts have published opinions reflecting significantly different approaches to the interplay between a patient's privilege under the "new" rule and an accused's rights under the Constitution. In *Acosta*, the United States Army Court of Criminal Appeals addressed the current status of the "constitutional" exception to Mil. R. Evid. 513 in the context of a patient's petition for extraordinary relief challenging a military judge's order directing the Government to produce mental health records for in camera review. 76 M.J. at 614-16. As quoted above, the court found the deletion of Mil. R. Evid. 513(d)(8) had no impact on the Constitution's application to the rule. *Id.* at 615. The court then distinguished constitutional rights to pretrial disclosure of information from rights to admit information at trial. *Id.* Finding the former and not the latter were implicated in this situation, the court then analyzed the accused's constitutional right to discovery under *Brady* and its progeny. *Id.* at 615-16. Referring to its previous decision in *United States v. Shorts*, 76 M.J. 523, 531-32 (A. Ct. Crim. App. 2017), the court held

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[10] Specifically, the CAAF granted review of the following issue: "WHETHER THE MILITARY JUDGE'S FAILURE TO CONDUCT AN IN CAMERA REVIEW OF AND FAILURE TO DISCLOSE THE MENTAL HEALTH RECORDS OF AB AK AND AB CR DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONT THE SOLE WITNESSES AGAINST HIM IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION." *Chisum*, 76 M.J. 264.

"[m]ental health records located in military or civilian healthcare facilities *that have not been made part of the investigation* are not 'in the possession of the prosecution' and therefore cannot be '*Brady* evidence.'" *Acosta*, 76 M.J. at 616 (emphasis **[*24]** in original).[11]

The United States Navy-Marine Corps Court of Criminal Appeals adopted a very different approach in *J.M. v. Payton-O'Brien*, 76 M.J. 782, 2017 CCA LEXIS 424 (N-M. Ct. Crim. App. 2017). There the court granted a patient's petition challenging a military judge's order that her mental health records be produced and disclosed, notwithstanding the deletion of Mil. R. Evid. 513(d)(8), because the accused's constitutional rights required it. *Id.* at *1-5. The court found the intent of Congress and the President that the privilege be absolute, outside of the enumerated exceptions, to be "clear-cut." *Id.* at *11-12. The court stated: "any application of the former Mil. R. Evid. 513(d)(8) constitutional exception by the military judge was improper. Adopting the military judge's rationale would force us to ignore the plain language of the rule, the obvious intent of both Congress and the President, and binding precedent." *Id.* at *14. Yet, the court continued, "we may not allow the privilege to prevail over the Constitution." *Id.* The court stated, "noble goals and notable policy concerns cannot trump the [accused's] right to 'a meaningful opportunity to present a complete defense.'" *Id.* at *17 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). The court continued:

> It is impossible to define all of the situations in which the privilege's purpose would infringe upon an **[*25]** accused's weighty interests, like due process and confrontation. However, courts have allowed discovery of privileged information in the following areas: (1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and relate events.
>
> This non-exhaustive list illustrates situations in which the privacy rights of the victim may yield to the constitutional rights of the accused. In these scenarios, serious concerns may be raised regarding witness credibility—which is of paramount importance—and may very well be case-dispositive.

Id. at *17-18 (footnotes omitted). The court then described the procedure military judges should follow to carefully delineate the extent to which a patient has elected to invoke the privilege, and to craft judicial remedies—such as striking or precluding testimony, dismissing charges, abating proceedings, or declaring a mistrial—to protect such weighty interests of the accused as might be threatened by the invocation of the privilege in the particular case. *Id.* at *18-25.

Acosta and *Payton-O'Brien*, then, present very different **[*26]** approaches to reconciling an accused's constitutional rights with the current Mil. R. Evid. 513. *Chisum*, although decided under the prior version of the rule, may be read to represent a third approach. Notably, in *Chisum* we did not explicitly rely on or refer to Mil. R. Evid. 513(d)(8) in concluding the appellant's constitutional rights required piercing the patient's privilege at least to the extent of securing the records in question for in camera review. *Chisum*, 75 M.J. at 948. *Chisum* may be read, in contrast to *Acosta* and *Payton-O'Brien*, for the proposition that an accused's constitutional rights with regard to mental health records that have not been made part of the accused's investigation may override a patient's non-disclosure privilege under Mil. R. Evid. 513 so as to require in camera review, irrespective of the existence of an enumerated exception. Again, we note the CAAF has taken *Chisum* for review.

In such an unsettled area of the law, it behooves us to tread lightly. In the interests of judicial economy and in fairness to the parties before us today, we are well-advised to decide the issue based on what is clear, and leave questions that do not require decision for another day. In this case, what is clear is that the Defense failed to present the **[*27]** military judge with a specific factual basis demonstrating a reasonable likelihood that the records would yield information constitutionally required to be admitted or disclosed. *See* Mil. R. Evid. 513(e)(3)(A). The Defense provided no detail with respect to the anticipated contents of YM's mental health records in its 8 July 2015 motion to compel, which was amalgamated with its motion to compel production of numerous other items it sought in pretrial discovery. During the hearing on the Mil. R. Evid. 513 motion, trial defense counsel frankly conceded he had "no way of knowing" and could "merely speculate" as to the contents of the records. The military judge then denied the motion. We cannot say he abused his discretion in doing so in the total absence of any specific

[11] The court went on to analyze whether disclosure was required under the exception for child abuse or neglect enumerated at Mil. R. Evid. 513(d)(2), a claim Appellant has not raised before us in his appeal.

showing.

The subsequent 26 July 2015 "Motion Related to Inapplicability of [EO] 13696 to Defense Motion to Compel IAW [Mil. R. Evid.] 513," while primarily focused on the alleged inapplicability of the change to Mil. R. Evid. 513 to Appellant's court-martial, offered slightly more in terms of what the Defense believed might be in YM's mental health records. The Defense proposed:

> It is further reasonable to conclude that records of such counseling sessions . . . would contain information related to **[*28]** the charged events (and perhaps events related to [AU, the father of YM's son by a previous relationship]), to include the alleged victim's reactions. The counseling records could plausibly be expected to contain her recollections of statements made (or perhaps not made) by [Appellant].

However, the motion continued: "Naturally the Defense can only speculate as to the contents of these counseling records. Simply stated 'we cannot know what we have not seen.'" As described above, the military judge focused his ruling on this motion on rejecting Appellant's contentions that both the change to Mil. R. Evid. 513 and its application to his court-martial were unconstitutional, but to the extent he declined to revisit his previous denial of the motion to compel we find no abuse of discretion on so anemic a showing.

Therefore, even if we presume (without holding) that the constitutional interests of an accused articulated in *Chisum* continue to apply despite the redaction of Mil. R. Evid. 513(d)(8), we find the Defense did not make the requisite showing of the kind this court found to exist in *Chisum* that warranted in camera review. 75 M.J. at 948-49. Thus, Appellant is entitled to no relief.

B. Legal and Factual Sufficiency

We review issues of factual **[*29]** and legal sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). The "reasonable doubt" standard does not require that the evidence be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see also United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." **[*30]** *Washington*, 57 M.J. at 399.

As the military judge instructed the court members, Appellant's conviction for aggravated assault in October 2010 required the Prosecution to prove the following elements beyond a reasonable doubt: (1) that within the state of Maryland, between on or about 1 October 2010 and on or about 12 October 2010, Appellant did bodily harm to YM; (2) that Appellant did so by a certain force by stomping on her right hand with his foot; (3) that the bodily harm was done with unlawful force or violence; and (4) that the force was used in a manner likely to produce grievous bodily harm. *Manual for Courts-Martial, United States* (2012 ed.) (*MCM*), pt. IV, ¶ 54.b.(4)(a). "Grievous bodily harm" includes "fractured or dislocated bones." *MCM*, pt. IV, ¶ 54.c.(4)(a)(iii). Appellant's convictions for assault consummated by battery in November 2011 in Maryland and December 2013 in Virginia required the Prosecution to prove the following elements: (1) that at the location and on the dates alleged, Appellant did bodily harm to YM; (2) that Appellant did so by striking YM in the manner alleged; and (3) that the bodily harm was done with unlawful force or violence. *MCM*, pt. IV, ¶ 54.b.(2)(a).

YM provided testimony **[*31]** establishing each of the required elements. In addition, her testimony regarding the October 2010 aggravated assault was supported by the testimony of two doctors and medical records documenting her broken finger, as well as by photographs YM took of the bruises on her body.

Similarly, the Government introduced photographs YM took of the bruises Appellant's assaults left on her arm in November 2011 and her foot in December 2013. YM's testimony was further supported by the testimony of Appellant's sister, who confirmed YM called Appellant's mother after the November 2011 assault, and who personally spoke with YM who was "crying a lot" and told her Appellant physically abused her. In addition, the Government introduced the testimony of one of YM's friends, who stated YM began informing her of the abuse before YM's daughter was born, and who saw photos of YM's injuries.

Before us, Appellant returns to several themes he argued at trial. He emphasizes YM's physically abusive prior relationship with AU, which ended in 2008 before YM met Appellant. Appellant emphasizes that AU still lived in the Alexandria, Virginia area and remained in contact with YM due to the joint custody of YM and AU's **[*32]** son. However, we find no support for Appellant's assertion that AU rather than Appellant was the likely source of YM's injuries, or that she used these injuries to falsely accuse Appellant. Similarly, we find unpersuasive Appellant's contention that YM "never alleged" Appellant abused her until after they split and engaged in a custody battle over their daughter. The medical testimony and records, the photographs, the testimony of Appellant's own sister and of YM's friend, and even the three-page mental health record introduced as a Defense exhibit all tend to show the assaults and injuries were real and that YM told others Appellant was hurting her long before they separated. These and other arguments put forward by Appellant fail to significantly undermine the evidence supporting his convictions.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," *Barner*, 56 M.J. at 134, the evidence was legally sufficient to support Appellant's convictions beyond a reasonable doubt. Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. **[*33]** *See Turner*, 25 M.J. at 325. Appellant's conviction is therefore also factually sufficient.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

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