IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

B.M.,
Appellant

v.

United States
Appellee

And

Dominic R. Bailey
Lieutenant Commander, U.S. Navy
Real Party in Interest

Amicus Curiae Brief in Support of B.M., *Appellant*

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Table of Contents

Table of Cases, Statutes, and Other Authorities

UNITED STATES DISTRICT COURTS

MIITARY COURTS OF CRIMINAL APPEALS

STATUTES

MILITARY RULES OF EVIDENCE AND RULES FOR COURTS-MARTIAL

OTHER AUTHORITIES

Interest of Amicus

The United States Marine Corps Victims' Legal Counsel Organization (VLCO) and United States Navy Victims' Legal Counsel Program (VLCP) provide legal advice, counseling, and representation to victims of sexual assault, domestic violence, and other serious offenses, while ensuring that victims' rights are protected at all stages of reporting, investigating, and adjudicating those offenses throughout the military justice process. Our victim programs were established by statute and are functionally independent of convening authorities, staff judge advocates, trial counsel, and defense counsel. 10 U.S.C. § 1044e (2023). Victims' Legal Counsel (VLC) represent victims exercising rights under Article 6b, UCMJ, M.R.E. 513, and other law and regulation during the investigation of offenses under the UCMJ and adjudication of those offenses before courts-martial. *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013).

ISSUES PRESENTED

Amicus address both issues certified to this Court:

> I. M.R.E. 513 GOVERNS THE PROCEDURES FOR PRODUCTION AND *IN CAMERA* REVIEW OF PATIENT RECORDS THAT "PERTAIN TO" COMMUNICATIONS TO A PSYCHOTHERAPIST. THE MILITARY JUDGE APPLIED R.C.M. 703 TO ORDER PRODUCTION AND CONDUCT AN *IN CAMERA* REVIEW OF MAJOR B.M.'S DIAGNOSIS AND TREATMENT. DID THE MILITARY JUDGE ERR BY APPLYING THE NARROW SCOPE OF M.R.E. 513(A) PRIVILEGE DEFINED IN *MELLETTE*

TO BYBASS THE PROCEDURAL REQUIREMENTS OF M.R.E. 513(E)?

II. THE ARMY CRIMINAL COURT OF APPEALS [sic] HELD NO CONSTITIONAL EXCEPTION TO M.R.E. 513 EXISTS. THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS RULED THE CONSTITUTION REQUIRED PRODUCTION OF MENTAL HEALTH RECORDS. THE RESULTING DISPARITY IN APPELLATE PRECEDENT PRECLUDES UNIFORM APPLICATION OF THE LAW. SHOULD *PAYTON-O'BRIEN* BE OVERTURNED?

Relevance of this Amicus Brief

Amicus adopts and supports Appellant's strong brief on the certified issues specific to this case but writes separately to address matters of broader interest to the many clients of the Marine and Navy programs whose rights under M.R.E. 513 also depend on precise and uniform application of the law. Given the nature of representation which Marine and Navy Victims' Legal Counsel (VLC) provide, our clients frequently call upon our counsel to seek enforcement of their due process and privacy rights, particularly as they relate to the extremely private and sensitive information contained in psychotherapist records—and the ability of victims to recover from trauma through effective mental health treatment.

Since this Court's decision in *Mellette*, the litigation landscape for production of psychotherapist records has become ill-defined and chaotic. Military trial judges are interpreting the scope of M.R.E. 513 differently under the same

factual scenarios "so that a victim or patient's rights vary from courtroom to courtroom." *Kastenberg*, 72 M.J. at 372. Some judges apply R.C.M. 703(e) to circumvent the production procedures in M.R.E. 513(e)(2) for evidence of diagnosis and treatment in psychotherapist records. Others apply the production procedures set out in M.R.E. 513(e)(2). Both approaches frequently result in the spillage of privileged information because treatment providers and records custodians lack the requisite legal expertise to tailor responses to production orders in accordance with the terms of the order, the requirements of M.R.E. 513, and existing case law.

The disparate treatment of M.R.E. 513 has become more pronounced since Congress removed the "constitutional exception" from M.R.E. 513(d) in 2014. The Courts of Criminal Appeals now apply different requirements depending on the service of the accused. The Navy-Marine Corps courts appliey a "de facto" constitutional requirement to produce privileged records,[1] while the Army does not.[2] The differential treatment of victims based on the Service affiliation of the accused is fundamentally unfair.

Summary of Argument

First, the plain language of M.R.E. 513, this Court's holding in *Mellette*, and

[1] *J.M. v. Payton O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017).
[2] *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021).

persuasive federal precedent demonstrate that the scope of the procedural requirements of the Rule are broader than the scope of the privilege. M.R.E. 513 effectively preempts the field of regulation related to production of mental health records—whether privileged or not—and a military judge may only order production of evidence of a patient's diagnosis and treatment after the moving party meets its burdens of proof and persuasion under M.R.E. 513(e).

Second, a military judge may not review in camera psychotherapist privileged material without first requiring an accused to satisfy M.R.E. 513(e) based on its plain text of M.R.E. 513(e) and *Beauge*.

Third, M.R.E. 513(d) contains no constitutional requirement to produce privileged information based in its plain language,[3] this Court's settled precedent in *Rodriguez*,[4] and a majority of federal circuits rejecting any constitutional exception within the federal psychotherapist privilege. A military judge has no authority to create a judicial remedy not within M.R.E. 513 to abate the proceedings based on a non-existent constitutional requirement to pierce the psychotherapist privilege.

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[3] Congress removed the constitutional exception in the 2015 NDAA. *See Infra* II.B. The President affirmed that removal in a later Executive Order. *Id*.

[4] *United States v. Rodriguez*, 54 M.J. 156, 161 (C.A.A.F. 2000) (President decides whether, when, and to what degree the psychotherapist privilege applies, not this Court)

Argument

I.

BASED ON THE PLAIN LANGUAGE OF M.R.E. 513(b)(5) AND (e), THIS COURT'S HOLDING IN *MELLETTE*, AND PERSUASIVE FEDERAL PRECEDENT, EVIDENCE OF A PATIENT'S DIAGNOSIS AND TREATMENT MAY ONLY BE PRODUCED AFTER THE PROCEDURAL REQUIREMENTS OF M.R.E. 513(e) ARE SATISFIED. THE MILITARY JUDGE ERRED IN TWO WAYS: (1) APPLYING R.C.M. 703 INSTEAD OF M.R.E 513(e) AND (2) CONDUCTING AN IN CAMERA REVIEW OF PRIVILEGED MATERIAL WITHOUT SATISFYING M.R.E. 513(e) REQUIREMENTS.

A. Standard of review is de novo.

This Court reviews de novo the interpretation of M.R.E. 513.[5] *Kastenberg*, 82 M.J. at 369.

B. A patient's diagnosis and treatment, though outside the scope of the privilege defined in M.R.E. 513(a), still falls within the scope of procedure defined in M.R.E. 513(b)(5) and is subject to the production requirements contained in M.R.E. 513(e).

The scope of the term "[e]vidence of a patient's records or communications" in M.R.E. 513(b)(5) is far broader than the scope of the privilege this Court found

[5] The Military Judge never denied an in camera review under M.R.E. 513(e) because she erred as a matter of law that R.C.M. 703, and not M.R.E. 513(e), applied to the request of Appellant's mental health records. Her interpretation of the law is reviewed *de novo* and not for an abuse of discretion. *See United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021).

defined within M.R.E. 513(a). Thus, non-privileged evidence of a patient's diagnosis and treatment is subject to the procedural requirements in M.R.E. 513(e) based on the plain language of the Rule, this Court's holding in *Mellette*, federal precedent, and a contextual reading of the Rule with Article 6b, UCMJ.

Amicus agrees with and incorporates Appellant's arguments on statutory construction and that this Court's holding in *Mellette* controls. Amicus adds the following in support.

1. The plain language of M.R.E. 513(b)(5) is broader than M.R.E. 513(a) since it includes additional words and phrases, including: "pertains to," records, and the disjunctive "or" in the phrase "records or communications".

When reviewing M.R.E. 513, this Court employs principles of statutory construction. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019). The plain language of a [rule] will control unless it leads to an absurd result. *United States v. King*, 71 M.J. 50, 52 (C.A.A.F 2012).

M.R.E. 513(a), which defines the actual privilege, reads:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of a patient's mental or emotional condition.

M.R.E. 513(e)(2), defining the procedure, reads:

> Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed.
>
> M.R.E. 513(b)(5) defines the term from the above language:
>
> Evidence of a patient's records or communications means testimony of a psychotherapist . . . or patient records that pertain to communications by a patient to a psychotherapist . . . for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

a. The Second Circuit held the phrase "pertains to" is broad and gives a "wider reach."

The President's inclusion of the phrase "pertains to" widens the scope of M.R.E. 513(e)(2) beyond just privileged communications within M.R.E. 513(a). The Second Circuit interpreted "pertaining to" as a "broad phrase" that "plainly gives the statute a *wider reach*." *Spadaro v. United States Customs & Border Prot.*, 978 F.3d 34, 46 (2d Cir. 2020) (emphasis added). There, the court was interpreting a statute that kept confidential matters "pertaining to the issuance or refusal of visas or permits." *Id*. The Second Circuit held that the statute "encompasses revocation documents" even though those documents were not issuances or refusals of visas or permits because those documents were "closely related" to the "issuance of a visa." *Id*. at 46-49.

Like *Spadaro*, M.R.E. 513(e) has a "wider reach" than just privileged material defined in M.R.E. 513(a). If the President wished to limit M.R.E. 513(e) to just privileged material, he would not have added the phrase "pertain to." But he

did. M.R.E. 513(b)(5) and (e) must be broader than privileged communications and encompass records and communications "closely related" to privileged communications. And evidence of diagnosis and treatment, by their very nature, are "closely related" to communications made for "the purpose of facilitating diagnosis and treatment."

b. M.R.E. 513(e) includes "records" and not just communications.

The President chose to include the word "records" within M.R.E. 513(b)(5) and (e)—making it on its face broader than the privilege from M.R.E. 513(a), which only covers "communications." *Compare* Mil. R. Evid 513(b)(5) and (e) *with* Mil. R. Evid 513(a). Courts presume Congress (or here the President) acts "intentionally and purposefully" when they "include[] particular language in one section of a statute but omit[] it in another section." *Russello v. United States v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

c. M.R.E. 513 includes the disjunctive "or" between records and communications.

The terms "records" and "communications" must be given separate meanings since the President included the disjunctive "or" between the terms. *See United States v. Sager*, 76 M.J. 158, 161-162 (C.A.A.F. 2017) (terms connected by disjunctive given separate meanings) (citations omitted). Since those terms have separate meanings—the scope of that phrase within M.R.E. 513(e)(2) must

necessarily be broader than just privileged material covered by M.R.E. 513(a).

The President could have used the same words within M.R.E. 513(e)(2) as he did in M.R.E. 513(a). He did not and for good reason. The President's choice to use "particular language" in M.R.E. 513(e) and omit that language in M.R.E. 513(a) is "intentional and purposeful" and commands "disparate treatment." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (citations omitted).

The President made a "limited psychotherapist privilege" after *Jaffe*. *Rodriguez*, 54 M.J. at 160-161. While federal common law privileges are always "strictly construed," *see Trammel v. United States*, 445 U.S. 40, 50 (1980) (citations omitted), this Court has generally construed the military's codified privileges according to their plain text. *See Mellette*, 82 M.J. at 382 (Maggs, J. dissenting) (questioning the application of *Trammel* for military privileges).

Regardless, M.R.E. 513(e) "sets forth the procedures to be applied in identifying *what might be privileged*." *Rodriguez*, 54 M.J. at 160 (emphasis added). Unlike the privilege itself, there is no need for these procedural requirements to be "limited" or "strictly construed," even if this Court is inclined to go beyond its plain text. Rather, the scope of the Rule should be construed based on its text and its purpose as the gatekeeper for determining "what might be privileged" and its production. That necessarily draws a wider scope than privileged "communications" in M.R.E. 513(a) and includes non-privileged

records of a victim's diagnosis and treatment.

2. The plain language of R.C.M. 703 and 701 makes production of mental health records subject to the requirements of M.R.E. 513.

In this case, the military judge did not conduct the analysis required under M.R.E. 513, applying R.C.M. 703 instead. *B.M. v. United States*, 2023 CCA LEXIS 249, at *34–35. However, the lower court's finding in that regard is only partially correct. In fact, the trial judge in this case only selectively applied R.C.M. 703, excluding the critical precondition in R.C.M. 703(a) that production of witnesses and evidence under that rule is "subject to the limitations set forth in R.C.M. 701[.]" Those limitations include, among other things, R.C.M. 701(f), a paragraph titled "[i]nformation not subject to disclosure", which provides that nothing in R.C.M. 701 "shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence." Selective application of R.C.M. 703 to order production of non-privileged mental health records is thus unlawful because even non-privileged evidence of diagnosis and treatment is "protected from disclosure" by the broader reach of the definition of "patient records that pertain to communications" found in M.R.E. 513(b)(5).

3. Civilian federal precedent limits disclosure of non-privileged records based on "legitimate interests in privacy" of patients.

Applying the procedural requirements of M.R.E. 513(e) to non-privileged mental health records is consistent with federal precedent. In *In re Sealed Case*

(Medical Records), the D.C. Circuit held a district court "may not compel production" of an appellant's mental health records "without determining whether any are subject to a federal privilege, and without weighing the probative value of each of the *non-privileged* documents against the extent of the intrusion into the appellant's legitimate privacy interests." 381 F.3d 1205, 1218 (D.C. Cir. 2004) (emphasis added). The D.C. Circuit recognized that when weighing interests in discovery, "courts look to statutory confidentiality provisions, even if they do not create enforceable privileges." *Id*. at 1215 (citing the Privacy Act, 5 U.S.C. § 552a, as an example).

In *Northwestern Mem'l Hosp. v. Ashcroft*, the Seventh Circuit affirmed the district court's quashing of a subpoena for non-privileged medical records after weighing "the possibility" the records could be probative against "the loss of privacy by the patients." 362 F.3d 923, 924-27 (7th Cir. 2004).

Likewise, federal district courts consider a victim's "right to fairness and respect for a victim's dignity and privacy" in the production of non-privileged, but sensitive, materials. *See United States v. Thompson*, 2022 U.S. Dist. LEXIS 78644 at *1, *5 (W.D. Wash. 2022) (citing *United States v. Madoff*, 626 F. Supp. 2d 420, 425-27 (S.D.N.Y. 2009) (applying "dignity and privacy" provision of CVRA to victims' emails); *United States v. Bradley*, 2011 U.S. Dist. LEXIS 30105 at *1 (S.D. Ill. 2011) (finding subpoena requesting victim's schooling, juvenile court,

and mental health records a "blatant violation" of victim's Crime Victims' Rights Act (CVRA) rights); *United States v. Patkar*, 2008 U.S. Dist. LEXIS 6055, at *5 (D. Haw. 2008) (limiting disclosure of documents based on victim's rights).

While not binding, these cases can guide this Court's interpretation of the plain text of M.R.E. 513. *In re Sealed Case (Medical Records)* is noteworthy because its examination of CVRA provisions are closely related to a victim's "right to be treated with fairness and with respect for [their] dignity and privacy" in court-martial cases and commands a weighing of the victim's rights against the probative value of the requested materials. Article 6b, UCMJ; 10 U.S.C. §806b (2021). M.R.E. 513(e)(2) provides the appropriate procedure and forum to weigh those interests. It requires a closed hearing. It requires a military judge to provide the patient "a reasonable opportunity to attend the hearing and be heard." Mil. R. Evid. 513(e)(2). At the same time, an accused may "call witnesses . . . and offer other relevant evidence" to establish the relevance and necessity for such evidence. *Id.* It also requires production to be "narrowly tailored" and the issuance of protective orders based on the victim's privacy interests. Mil. R. Evid. 513(e)(4)-(5); *see Beauge*, 82 M.J. at 165 (President intended "limited disclosure" and each record or communication must be reviewed independently).

4. Applying the procedural requirements of M.R.E. 513 to non-privileged evidence of patient records or communications prevents unnecessary spillage of privileged material.

Mental health records necessarily contain both privileged communications and non-privileged materials. *See Mellette*, 82 M.J. at 379 (documents may be partially privileged). Some federal courts have expanded a privilege when non-privileged material "is so inextricably intertwined" with privileged material. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (government deliberations privilege); *see also Mellette*, 82. M.J. at 385 (Maggs, J., dissenting) (treatise and cases showing attorney client privilege expanded). The complexity of deciphering what is or is not privileged in any case is a sound reason to apply the more restrictive production rules and more protective forum of an M.R.E. 513 hearing.

Just as this Court strictly construed the scope of the privilege under M.R.E. 513, it should also strictly apply the procedural protections of that rule to limit disclosure and unnecessary spillage of sensitive, but non-privileged, material. The President recognized the private, sensitive nature of this information, regardless of its privileged nature, by providing a broader definition of patient records or communications under M.R.E. 513(b) and expanding the procedural requirements of M.R.E. 513(e). This Court must acknowledge that difference and include evidence of diagnosis and treatment as falling within M.R.E. 513(e).

The Military Judge's actions in this case impermissibly out-sourced the

court's judicial gatekeeping functions and placed an unsustainable burden on treatment facility personnel unfamiliar with cutting-edge litigation on the law of privileges applicable to military justice proceedings. Attempting to sort privileged and non-privileged materials among commingled information cannot easily or efficiently be separated and the Military Judge's expectation that the medical treatment facility could do so was erroneous and highlights the flaws from applying R.C.M. 703. An M.R.E. 513(e) hearing is the proper forum to litigate the myriad and mixed questions of law and fact related to privacy and privilege.

5. M.R.E. 513 grants victims standing, while R.C.M. 701 and 703 exclude a victim or their counsel from argument regarding private, sensitive material.

The approach ratified by the court below will impermissibly deprive victims of their standing, their counsel, and meaningful exercise of their rights. The express terms of M.R.E. 513(e)(2) grant victims the right to be heard through counsel and standing to argue, while R.C.M. 703 and 701 do not. In current practice, trial judges routinely deny victims standing and the right to be heard regarding evidence of diagnosis and treatment within patient-psychotherapist records. *See In re HVZ*, No. 2023-03, 2023 CCA LEXIS 292 (A.F. Ct. Crim. App. July 14, 2023) (certified issue on victim standing under R.C.M. 703 pending before this Court); *see also B.M. v. United States*, 2023 CCA LEXIS 249, at *14 ("In fact, 17 pages of argument between civilian defense counsel, the military judge, and

SVC were dedicated to deciding whether this was or was not a Mil. R. Evid. 513 motion, and whether SVC could argue before the court." (footnote omitted)). Moreover, R.C.M. 703(e)(3) does not allow a victim standing to request relief when evidence is controlled by the Government. R.C.M. 703(e)(3)(G) only allows a victim to contest a subpoena of evidence outside Government control when it is "unreasonable, oppressive, or prohibited by law." But the Rule never expressly grants a victim the right to be heard, much less through counsel.

The clearest resolution of the harm caused by ordering production of mental health records under R.C.M. 701 and 703 is to require trial courts to apply the law that govern mental health records: M.R.E. 513. Doing so is most consistent with the plain text of the rule and this Court's prior precedent and interpretive approach, and allows a victim to be heard through counsel in an appropriate forum. That posture is consistent with federal courts "frequently permitt[ing] third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed." *Kastenberg*, 72 M.J. at 369 (citing line of federal cases holding third party standing).

C. The Military Judge erred reviewing Appellant's privileged material in camera without satisfying the requirements of M.R.E. 513(e), contrary to this Court's precedent in *Beauge* and *Mellette* and persuasive ethical guidance.

1. *Beauge*, *Mellette*, and the facts of this case clearly required the Trial Judge to stop reading the privileged materials.

In *Beauge*, this Court held "a military judge may not conduct in camera review of privileged material where a party moving to compel production of protected records or communications has not made a showing that the information sought meets an enumerated exception as required by M.R.E. 513(e)(3)(A) and (B)." 82 M.J. at 168, *see also Mellette*, 82 M.J. at 379 (M.R.E. 513(e)(2) requires a hearing before ordering production or conducting in camera review).

The Military Judge ignored *Beauge* and its binding authority when she reviewed the privileged material in camera without requiring the RPI to show the information met an enumerated exception under M.R.E. 513. That error only grew with the breadth of review (all of the privileged material). While the lower court characterized the trial court's review as "inadvertent," that characterization is demonstrably false on the facts of this case. *See B.M. v. United States*, No. 202300050, 2023 CCA LEXIS 249, at *9 (N-M Ct. Crim. App. June 14, 2023). The Military Judge received the materials, recognized they contained privileged matters, intentionally read through them in their entirety, made proposed redactions, and exercised independent legal judgment regarding discrete portions

of that record to determine some material was "constitutionally required" to be disclosed to the RPI. The review by the Military Judge was comprehensive, deliberate, and unauthorized—a conclusion the lower court reached in part, despite its unwillingness to grant relief. *See B.M. v. United States*, No. 202300050, 2023 CCA LEXIS 249, at *12 (N-M Ct. Crim. App. June 14, 2023) ("When a military judge inadvertently encounters material privileged under Mil. R. Evid. 513(e)(2), the military judge should cease his or her review, and conduct a hearing as contemplated in Mil. R. Evid. 513(e).")

2. The Navy's Rules of Professional Conduct cautions covered attorneys who inadvertently receive privileged material to "refrain from reviewing them."

The U.S. Navy Rules of Professional Conduct governing the Military Judge caution military attorneys who inadvertently receive "confidential or privileged material" to "refrain from reviewing them." JAGINST 5803.1E, Rule 1.10, *Imputed Disqualification: General Rule*, Comment (a)(4) (Jan. 20, 2015). The Comment further advises covered attorneys to "refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court." *Id*.

This Comment is directed toward covered attorneys who "share common spaces" and "represent adverse interests," but it should have at least provided persuasive guidance for the Military Judge and guided her follow-on actions upon

receiving privileged materials. It did not. She conducted no hearing prior to reviewing the material and ignored the continued claims of privilege by Appellant.

3. Well-established guidance on the Professional Rules of Responsibility requires an attorney to stop reviewing privileged material following inadvertent disclosure.

The American Bar Association Model Code of Judicial Conduct applies to all military judges in the Department of the Navy. JAGINST 5803.1E, Para. 7 (Jan. 20, 2015). In 1992, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued an opinion, based on the Model Rules of Professional Conduct, related to inadvertent disclosure of confidential materials. The opinion provided:

> A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 368 (1992). In another opinion, the committee stated:

> A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 382 (1994).

Additionally, the Federal Rules of Civil Procedure now require lawyers receiving inadvertent disclosures of privileged material to "promptly return, sequester, or destroy specified information and any copies [and] not use or disclose the information until the claim is resolved . . ." Fed. R. Civ. P. 26(b)(5).

The Military Judge clearly knew that the materials produced included privileged information disclosed over objection and contrary to the court's order or production. Rather than ceasing her review and returning the materials to the medical treatment facility or holder of the privilege, she reviewed the materials in their entirety—knowing they held privileged information. The Military Judge's actions violated the above rules to the prejudice of the Appellant.

D. Remedy.

The appropriate and necessary remedy is to order the Military Judge to return the privileged material to Appellant or the medical treatment facility and require a M.R.E. 513(e) hearing *prior to* any in camera review or production of Appellant's psychotherapist records. Additionally, the Military Judge must conduct the hearing as though no privileged materials had previously been reviewed.

II.

THE TRIAL AND LOWER COURTS EXCEEDED THEIR AUTHORITIES BY FAILING TO PROPERLY APPLY, AND ESTABLISHING NON-ENUMERATED EXCEPTIONS TO, A RULE ESTABLISHED BY CONGRESS PURSUANT TO ITS AUTHORITY UNDER THE "MAKE RULES" CLAUSE OF ARTICLE 1, §8. THE PLAIN LANGUAGE OF THAT RULE IS CLEAR, CONSTITUTIONAL, AND CONSISTENT WITH A MAJORITY OF FEDERAL COURTS WHICH REJECT A CONSTITUTIONAL EXCEPTION TO THE PSYCHOTHERAPIST PRIVILEGE. THE MILITARY JUDGE HAD NO AUTHORITY TO ABATE THE PROCEEDINGS AFTER SHE DEEMED PRIVILEGED MATERIALS WERE "CONSTITUTIONALLY REQUIRED" DESPITE M.R.E 513 CONTAINING NO SUCH REMEDY.

A. Standard of review is de novo.

The meaning of evidentiary rules such as M.R.E. 513 are questions of law that this Court decides de novo. *United States v. Matthews*, 68 M.J. 29, 35-36 (C.A.A.F. 2009).

B. Congress removed the "constitutionally-required exception" from M.R.E. 513 pursuant to its authority to "make Rules for the Government and Regulation of the land and naval Forces."

The Constitution expressly grants Congress power over the military justice system. U.S. CONST. Article I, § 8, cl. 14. Thus, Congress has "plenary control over . . . regulations, procedures, and remedies related to military discipline . . . ."

Chappell v. Wallace, 462 U.S. 296, 301 (1983); *see also United States v. Hasan*, No. 21-0193, 2023 CAAF LEXIS 639, at *61-62 (Sept. 6, 2023).

Congress, under that authority, removed the constitutional exception from M.R.E. 513(d) in the 2015 National Defense Authorization Act. Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) ("Rule 513 . . . shall be modified" to strike the constitutional exception). Acting pursuant to the direction of Congress, the President then removed the constitutional exception from M.R.E. 513(d). Exec. Order No. 13,696, 80 Fed. Reg. at 35,819 (Jun. 22, 2015) ("Mil. R. Evid. 513(d)(8) is deleted").

These actions leave no doubt—Congress and the President intended there to be no "constitutional exception" in M.R.E. 513. If this Court cannot "second-guess the Executive," it has even less discretion to second-guess Congress in their decision to "balance the interest of a victim in having private communications protected [and] the interest of an accused in having potentially exculpatory material disclosed." *Beauge*, 82 M.J. at 162-63. The plain text contains no exception and this Court cannot judicially create one.

1. <u>This Court, in *Custis*, rejected importing "a common law exception" to the marital communication privilege because it was not in the Rule. It should do the same here</u>.

In *Custis*, this Court refused to recognize a common law exception to the marital privilege in M.R.E. 504 because it was not explicitly codified in that Rule.

65 M.J. 366 (C.A.A.F. 2007). There, the military judge and the Court of Criminal Appeals had recognized a federal common law "crime/fraud" or "joint crime participant" exception to the martial privilege. *Id*. at 369. This Court held it could not "*create* an exception to a rule where none existed before" and had no authority to "add exceptions to the codified privileges" since that power resided with "the policymaking branches of government." *Id*. (emphasis in original) (citation omitted); *see also United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003) (exceptions to privileges a legal policy question best addressed by political and policy-making parts of government); *Rodriguez*, 54 M.J. at 160-61 (same); *United States v. Tipton*, 23 M.J. 338, 343-43 (C.M.A. 1987) (rejecting application of common law exception to spousal privilege since it was not codified in Rule).

This Court should apply the same reasoning to this case as it did in *Custis*, *McCollum*, *Rodriguez*, and *Tipton*. Military courts may not "create" an exception where none exists.

2. Federal courts repeatedly reject a discovery-related constitutional exception to the federal common law psychotherapist privilege.

The Supreme Court has recognized a common law patient-psychotherapist privilege protecting confidential communications between a psychotherapist and her patient to promote "sufficiently important interests to outweigh the need for probative evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996). The *Jaffee* Court

expressly rejected an ad hoc balancing approach to the privilege, opining that making "the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id*. at 17.

Since then, federal courts have generally rejected any "constitutional exception" to the common law psychotherapist privilege. *See Kinder v. White*, 609 Fed. Appx. 126 (4th Cir. 2015) (rejected any constitutional exception and ordering all privileged records be returned by the district court or destroyed); *Newton v. Kemna*, 354 F.3d 776, 779-82 (8th Cir. 2004) (rejected confrontation clause claim for access to psychiatric records for impeachment purposes); *United States v. Shrader*, 716 F.Supp.2d 464, 472 (S.D.W. Va. 2010) ("psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of the defendant"); *Petersen v. United States*, 352 F.Supp.2d 1016, 1023-24 (D.S.D. 2005) (rejecting an argument that the psychotherapist-patient privilege is secondary to a defendant's rights); *United States v. Doyle*, 1 F.Supp.2d 1187 (D. Oregon 1998) (district court refused to conduct in camera review of privileged materials and rejected balancing defendant's constitutional rights against victim's right to confidentiality); *United States v. Haworth*, 168 F.R.D. 660, 660-62 (D.N.M.1996) (concluding that the psychotherapy records were privileged after in

camera review and not subject to discovery, and stating that the defendants "mistakenly equate their confrontation rights with a right to discover information that is clearly privileged.").

Consistent with that federal precedent, this Court need not redraft a rule of evidence which has been directed by Congress and implemented by the President. *Jaffee* rejected a balancing of interests that a "constitutional exception" necessarily must entail—this Court should as well.

C. A military judge may not create judicial remedies to circumvent the procedural requirements and policy foundations of a rule of evidence. The Military Judge erred in ordering abatement of a case in which a victim asserted an evidentiary privilege in a manner consistent with the plain language of that privilege.

Remedies, like the scope of a privilege or its exceptions, must be construed according to the plain text of the Rule. The President, not military courts, has the authority to makes rules of evidence and procedure for courts-martial. *See* Article 36(a), UCMJ.[6] This principle is especially true in relation to codification of privileges and any applicable exceptions. *See Custis*, 65 M.J. at 369; *McCollum*, 58 M.J. at 342; *Rodriguez*, 54 M.J. at 160-61. That is because, when codifying a privilege, the President necessarily makes a policy decision on how best to "balance" the interests involved, and how best to protect certain materials as

[6] As noted *supra*, in this case the President acted not just with the consent of Congress, but at its direction.

privileged against an accused's interest "in having potentially exculpatory material disclosed." *Beauge*, 82 M.J. at 162-63.

It follows, logically, that if the President includes no remedy when codifying a military privilege—then none exists. The privilege cannot be pierced outside of any enumerated exception or waiver.

1. M.R.E. 513 provides for no remedies when the privilege is not waived and no exception exists. Thus, outside of an enumerated exception or waiver, the privilege cannot be pierced.

The military psychotherapist-patient privilege has no "remedies" in the Rule. Mil. R. Evid. 513. The Rule provides for "exceptions" to the privilege, Mil. R. Evid. 513(d), and limits who may "claim the privilege." Mil. R. Evid. 513(c). The Rule also provides a "procedure" for the production and admission of "protected" materials only if "an exception to the privilege" applies. Mil. R. Evid. 513(e)(3). Even if an enumerated exception applies, the Rule requires a military judge to "narrowly tailor[]" production or disclosure to only "specific records or communications" that meet the enumerated exception. Mil. R. Evid. 513(e)(4).

The President provided no "remedy" in the Rule. The President could have included "remedies" in the Rule, as he did in several other privileges, and he chose not to. *See* Mil. R. Evid. 505(f)(5) (remedy where proceeding without privileged, classified information would materially prejudice accused); Mil. R. Evid. 505(j)(4) (remedy when alternatives to full disclosure of privileged, classified information

not sufficient); Mil. R. Evid. 506(f)(5) (same as M.R.E. 505(f)(5) but for privileged government information); Mil. R. Evid. 506(j)(4) (same as M.R.E. 505(j)(4) but for privileged government information). This Court must presume the President acted "intentionally and purposefully" when including "particular language in one section of a statute but omit[] it in another section." *Russello*, 464 U.S. at 23 (citation omitted). The absence of remedies makes the psychotherapist privilege absolute when no enumerated exception applies and without a waiver.

2. Similar privileges, like the attorney-client, marital, and clergy privileges, contain no "remedies."

The attorney-client, clergy, and marital communications privileges provide for no remedies when the privilege is not waived. Mil. R. Evid. 502, 503, 504. The Supreme Court, in *Jaffee*, likened the "spousal and attorney-client privileges" to the "psychotherapist privilege" because all three are "rooted in the imperative need for confidence and trust." 510 U.S. at 10 (internal quotations and citations omitted). Likewise, this Court likened the psychotherapist privilege to the clergy privilege "based on [their] social benefit of confidential counseling recognized by *Jaffee*." *United State v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005).

On the other hand, the psychotherapist-patient privilege is fundamentally different to the classified information privilege or the government information privilege. The government holds the privilege for both M.R.E. 505 and 506, *see* Mil R. Evid. 505(d), while non-government individuals typically claim the

attorney-client, clergy, marital and psychotherapist privilege. The President's choice to provide remedies to an accused when the government declines to waive its privilege is entirely reasonable considering the government holds the privilege for material that should be disclosed.

Not so with the psychotherapist, attorney, clergy, and marital privileges. The privilege holder is not the government, or the charging sovereign and, like B.M.'s records, the information is rarely possessed by the government. The President's choice to codify a stronger privilege that cannot be pierced outside of certain exceptions is well within his authority to "balance" those competing interests. The military courts cannot supplant that decision by fiat.

3. *Payton-O'Brien* is poorly reasoned and unsupported. That court attempted to shoehorn by judicially created remedies a "constitutional exception" into the psychotherapist privilege when none exists.

In *Payton-O'Brien*, the Navy-Marine Corps Court of Criminal Appeals held a military judge may grant "a variety of precise remedies" when the judge "deems disclosure [of privileged psychotherapist communications] constitutionally necessary" and the victim declines to waive the privilege. *J.M. v. Payton-O'Brien*, 76 M.J. 782, 790-91 (N-M. Ct. Crim. App. 2017).

Payton-O'Brien cites no case from any court where an individual was required to waive a privilege during pretrial discovery based on information being constitutionally required. *Id*. The cases *Payton-O'Brien* relies on involve

constitutional infringements occurring *at trial*. *See Davis v. Alaska*, 415 U.S. 308 (1974) (limiting cross-examination at trial violated Confrontation Clause) and *Holmes v. South Carolina*, 547 U.S. 319 (2006) (state evidentiary rule excluding evidence of third-party guilt at trial violated Due Process Clause and Confrontation Clause).

Indeed, *Payton-O'Brien* fails to consider *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). There, the Court held the Confrontation Clause "does not include the power to require the *pretrial disclosure* of any and all information that might be useful in contradicting unfavorable testimony." *Ritchie*, 480 U.S. at 53 (emphasis added); *see also Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (no general constitutional right to discovery in criminal case). The right to confrontation "is a *trial* right." *Id*. at 52 (emphasis in original) (citation omitted).

Similarly, *Payton-O'Brien* cites no rule or statute promulgated by the President or Congress and no case from this Court that authorizes a Court of Criminal Appeals to judicially "create" pretrial remedies involving the military psychotherapist privilege in M.R.E. 513. Instead, *Payton-O'Brien* cites "one learned treatise" and then shoehorns the remedies within M.R.E. 505 and 506 to M.R.E. 513. *Payton-O'Brien*, 76 M.J. at 790-91; *see supra* II.C.2 (M.R.E. 505 and 506 not analogous to M.R.E. 513).

Payton-O'Brien thus both operates without and runs afoul of precedent regarding Presidential and Congressional authority to promulgate privileges and the decision in *Jaffee* rejecting a balancing analysis for the psychotherapist privilege. Privileges are the province of the political branches of our government—not appellate courts. *Payton-O'Brien* is wrongly decided.

This Court should hold a military judge may not create judicial remedies to circumvent the policy foundation and procedural requirements of M.R.E. 513 by reintroducing a "constitutional exception" the President and Congress removed.

4. The lower court has impermissibly encouraged counsel in the field to further derogate from the requirements of M.R.E. 513 by suggesting a "taint team" or Appellant's counsel should redact privileged material.

The lower court, in *B.M. v. United States*, erred in opining the military judge "should order a taint team to review the records for privileged material and redact them" or noting Appellant's counsel "could have provided the redated records." 2023 CCA LEXIS 249, at *12 n.27. First, the lower court cites no Rule, and Amicus is aware of none, that authorizes a taint team under these circumstances. M.R.E. 513 does not authorize a "taint team", and disclosures to any member of such a team over the objection of the holder of a privilege are without authority. This judicially created remedy, just like the judicially created remedies from *Payton-O'Brien*, is both without precedent in military courts and would impermissibly encroach upon the gatekeeping functions of a military judge. No

statute or rule authorizes a taint team to review privileged psychotherapist communications. Further, the suggestion of a "taint team" is wholly unnecessary to the resolution of the case before the lower court. This Court cannot allow the lower court to ignore the express requirements of M.R.E. 513 in favor of its preferred policy outcomes and approaches.

The lower court's preferences for other procedures and outcomes are especially dangerous where, as here, it suggests a VLC breach a duty of loyalty to a client. Requiring a VLC to redact client records would strain the attorney-client relationship and require a covered attorney to exercise independent legal judgment about what is or isn't "constitutionally required" for a party whose interests are plainly adverse to those of the VLC's client. *See* JAGINST 5803.1E, Rules 1.2 and 1.6 (Jan. 20, 2015). More problematically, it places the onus on the victim's counsel to perform unique gatekeeping functions which belong to a military judge. The lower court's unhelpful dicta in this case reveals a fundamental misunderstanding of the role of the victim's counsel, and this Court should reject that dicta in plain terms.

D. Remedy.

This Court should remand this case to the Military Judge with an order to lift the abatement and either: (1) return all privileged material to Appellant or the medical facility, or (2) destroy it.

CONCLUSION

Amicus assert this Court should hold as follows: First, non-privileged evidence of patient diagnosis, treatment, and other information which pertains to mental health treatment fall within the definition of "evidence of a patient's records or communications" under M.R.E. 513(b), and are therefore subject to the procedural requirements of M.R.E. 513(e) and may not be ordered produced pursuant to R.C.M. 703 or 701. Second, the Military Judge erred in conducting an in camera review of privileged information without satisfying the requirements in M.R.E. 513(e). Third, a military judge may not require a patient to waive their M.R.E. 513 privilege to avoid a judicially created remedy of abatement not found within M.R.E. 513. Appellant must be placed back into the same position before the Military Judge's errors in this case.

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Rule 24(c) and Rule 26: it contains 6,931 words.
2. This Brief complies with the typeface and type style requirements of Rule 37: it has been prepared in a monospaced typeface using Microsoft Word with 14-point, Times New Roman font.

CERTIFICATE OF FILING AND SERVICE

I certify that on September 25, 2023, this brief was electronically filed with the Court and served, via electronic mail, to Counsel for Appellant, Major Rocco J. Carbone III, U.S. Air Force; Appellee, United States Navy and Marine Corps Appellate Government Division; and Counsel for the Real Party in Interest, Captain Colin Hotard, Appellate Defense Counsel.

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