IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

***In Re B.M.*,**
Appellant

v.

UNITED STATES,
Appellee

and

Dominic R. BAILEY,
Lieutenant Commander (O-4)
United States Navy,
Real Party in Interest

USCA Dkt. No. 23-0233/NA

Crim. App. No. 202300050

BRIEF OF AMICI CURIAE THE PINK BERETS AND NOT IN MY MARINE CORPS IN SUPPORT OF APPELLANT

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I. WHETHER A MILITARY JUDGE MUST COMPLY WITH THE PROCEDURAL REQUIREMENTS OF M.R.E. 513(e) BEFORE CONDUCTING AN IN CAMERA REVIEW OF PSYCHOTHERAPY RECORDS CONTAINING DIAGNOSES AND TREATMENTS.

II. WHETHER M.R.E. 513 VIOLATES THE CONSTITUTIONAL RIGHTS OF AN ACCUSED.

III. WHETHER THIS COURT, A TRIBUNAL CONSTITUTED UNDER ARTICLE I OF THE CONSTITUTION, MAY DECIDE THE CONSTITUTIONALITY OF M.R.E. 513.

INTERESTS OF AMICI CURIAE

The mission, duty, and purpose of Amicus Curiae The Pink Berets is to provide aid and relief to active duty women of the United States Armed Forces, Veterans, and First Responders suffering from invisible injuries caused by Military Sexual Trauma.

The mission of Amicus Curiae Not In My Marine Corps is to advocate for survivors of sexual assault and harassment among military service members and to expose the pervasive behaviors and attitudes that have been ingrained by complacent and dismissive military leadership.

ARGUMENT

I. A Military Judge Must Comply with the M.R.E. 513(e) Procedures Before Conducting an In Camera Review of Psychotherapy Records.

The Real Party in Interest ("RPI") sought production of mental health records containing Appellant B.M.'s diagnoses, prescriptions, and treatments. The production of these records was a matter in dispute, opposed by the Appellant and Appellee. The military judge ordered production of Appellant B.M.'s mental health records pursuant to R.C.M. 703, ignoring the procedural requirements of M.R.E. 513(e). *B.M. v. United States*, No. 202300050, 2023 CCA LEXIS 249, at *4 (N-M. Ct. Crim. App. June 14, 2023).

M.R.E. 513(e) explicitly applies because the RPI sought production of B.M.'s mental health records. M.R.E. 513 (e)(1) ("In any case in which the production . . . of records . . . of a patient . . . is a matter in dispute, ..."); M.R.E.513 (e)(2) ("Before ordering the production . . . of evidence of a patient's records . . . , the military judge must conduct a hearing . . .").

The military judge ordered production of Appellant/Patient B.M.'s mental health records. Even if the Appellant's diagnoses and treatment were not privileged (*United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022)), the procedures of M.R.E. 513(e) applied because they were contained within her mental health records.

M.R.E. 513 (e)(3) permits an in camera review of mental health records only if the military judge finds by a preponderance of the evidence that the moving party showed the four requirements set forth in M.R.E. 513 (e)(3)(A) through (D). M.R.E. 513(e)(3) allows production only if each of these four requirements are shown. It does not permit production of records to tease out nonprivileged information, including diagnoses and treatments. The military judge did not require the RPI to make any showing that the records contained evidence that meets an enumerated exception under M.R.E.513(d). The military judge erred and violated Appellant B.M.'s rights under M.R.E. 513(e).

The Court should reevaluate and overrule its decision in *Mellette* because it is unworkable. Congress removed the exception in 2014[1] and directed the President to amend M.R.E. 513(e)(3) to preclude routine in camera reviews of patients' mental health records. *D.B. v. Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *13-15 (A. Ct. Crim. App. Feb. 1, 2016). If Congress and the President intended to permit an in camera review to obtain diagnoses and treatments, they would have included their intent in M.R.E. 513(e)(3). They did not. Only by extraordinary linguistic acrobatics can a court find that M.R.E. 513(e)(3) permits an in camera review in this case.

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

Although *Mellette* holds that diagnoses and treatments are not privileged, M.R.E. 513(e)(3) does not permit an in camera review to obtain them. Diagnoses and treatments may be produced only if evidence of them comes from a source outside of the patient's mental health records.

This Court ignored M.R.E. 513 (e)(3)(A) through (D) in its *Mellette* decision. The language Congress and the President chose in subsections (A) through (D) indicates their intent that diagnoses and treatments were to be privileged. If they intended diagnoses and treatments to be nonprivileged, they would have authorized an in camera review for diagnoses and treatments. The Court should overrule its decision in *Mellette* and hold that psychotherapy diagnoses and treatments are privileged under M.R.E. 513. Alternatively, the Court should hold that M.R.E. 513(e)(3) prohibits in camera review or production of mental health records to obtain diagnoses and treatments unless the requirements of M.R.E. 513(e)(3)(a) through (D) are shown.

II. M.R.E. 513 Does Not Violate an Accused's Constitutional Rights.

a. No service court of criminal appeals has ever held that M.R.E. 513 violates the constitutional rights of an accused.

Although amici curiae agree with the Appellant's arguments in her brief that M.R.E. 513 does not violate any constitutional rights of an accused, amici disagree

with the Appellant's view that the service courts of criminal appeals are split on this issue.[2]

The Army Court of Criminal Appeals ("ACCA") held that M.R.E. 513 does not violate any constitutional rights of an accused. *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021); *United States v. McClure*, No. 20190623, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sep. 2, 2021). These ACCA cases fully analyze whether M.R.E. 513 violates an accused's Fifth Amendment Due Process (*Brady v. Maryland*, 371 U.S. 812 (1962)) rights or Sixth Amendment Confrontation rights. The ACCA did not discuss remedies because it found no violation of an accused's constitutional rights.

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[2] The Court in *Beauge* notes disagreement among the lower courts regarding removal of the "constitutional exception" from M.R.E. 513(d) . 82 M.J. at 167, n.10. There is no disagreement among the lower courts that M.R.E. 513 cannot alter the reach of the Constitution. Nevertheless, the removal of the "constitutional exception" from M.R.E. 513(d) is not inconsequential as held by *Payton-O'Brien*, 76 M.J. at 788. While its removal does not change the Constitution, it cannot be ignored. The *Payton-O'Brien* court did not apply fundamental canons of statutory construction.

Since the promulgation of M.R.E. 513, military judges routinely disclosed privileged records, losing the confidence and trust of Congress and the President. *DB v. Lippert*, 2016 CCA LEXIS 63, *14-16, 25 (Army Ct. Crim. App. Feb. 1, 2016) (mem. op.). The proper and constitutional interpretation of the constitutional exception's removal is that Congress stripped military judges of the power to decide an issue they decided incorrectly for over fifteen years. If constitutional rights are violated by M.R.E. 513, an accused must seek redress in an Article III court that has jurisdiction to grant the relief he requests. Requiring an accused to seek a remedy in Article III courts does not violate the Constitution.

The Navy-Marine Corps Court of Criminal Appeals ("NMCCA") has never decided the constitutionality of M.R.E. 513. In *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017), the NMCCA applied a remedy without holding that M.R.E. 513 violated the accused's constitutional rights. The NMCCA did not cite any authority or explain its reasoning to support its implication that M.R.E. 513 may have violated the accused's constitutional rights. As explained by the NMCCA's sister court, "Prudence suggests that a detailed analysis should accompany such a significant decision." *Lippert*, 2016 CCA LEXIS 63, at *25-26.

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

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

> Citing *Holmes* in a previous review of a petition for a writ of mandamus, we stated "when determining whether in camera review or disclosure of privileged materials is constitutionally required under M.R.E. 513, the military judge should determine whether *infringement of the privilege* is

> required to guarantee 'a meaningful opportunity to present a complete defense.'" *EV v. Robinson and Martinez*, No. 201600057, slip ord. at 1 n.2 (N-M. Ct. Crim. App. 25 Feb 2016).
> (quoting *Holmes*, 547 U.S. at 324 (emphasis in original)).

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

The *Payton-O'Brien* court incorrectly and misleadingly quotes *Holmes* using italics for emphasis. Its use of emphasis suggests the Supreme Court emphasized "*infringement of the privilege*" in its *Holmes* opinion. This quote is not correct. The Supreme Court did not emphasize or even use the words "infringement" or "privilege" in *Holmes*.[3]

Holmes does not discuss privilege and is not about privilege.

Holmes is not about infringing evidence rules. Rather *Holmes* is about evidence rules that "infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve." *United States v. Beauge*, 82 M.J. 157 (C.A.A.F. 2022) 547 U.S. at 324-25 (emphasis added by this Court).

Payton-O'Brien never applies *Holmes*' actual holding. Instead, the court acknowledges the impossibility of defining "all of the situations in which the privilege's purpose would infringe upon an accused's weighty interests, like due

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

process and confrontation." *Payton-O'Brien*, 76 M.J. at 789. The *Payton-O'Brien* court then claims that courts allow discovery of privileged information in three areas.

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

The article does not say that the Constitution requires discovery in these three areas, it only says that "courts have given serious consideration" to discovery requests. *Access*, at 41. *Access* cites sixteen cases within the pages (41-45) cited by *Payton-O'Brien*. These sixteen cases are the only cases cited by *Access* to support its assertion that courts have given "serious consideration" to discovery.

The cases cited in *Access* do not support *Payton-O'Brien's* conclusion that the Constitution requires discovery of psychotherapy records. An analysis of these sixteen cases is included as an appendix to this brief.

The *Payton-O'Brien* court has turned academic observations and discussion into a constitutional requirement. The court never read the cases cited in *Access*,

and did not cite any other case or authority to support its holding that disclosure in these three areas *may be* constitutionally required.

Payton-O'Brien does not hold that the Constitution requires disclosure of a patient's privileged records. No service court of criminal appeals has ever held that the psychotherapist-patient privilege violates the constitutional rights of an accused.

b. Federal and state courts have held the psychotherapist privilege does not violate an accused's constitutional rights.

Federal and state appellate courts have upheld absolute psychotherapist privileges against constitutional challenges.

(1) State court decisions.

The Supreme Court has held that rule makers have broad latitude under the Constitution to establish rules excluding evidence. *United States v. Scheffer*, 523 U.S. 523 U.S. 303, 308 (1998). The rule makers in many states have established absolute psychotherapist privileges that exclude confidential communications without any exceptions.[4] State courts have upheld these absolute privileges after considering constitutional challenges by defendants. These states include:

Arkansas

[4] The rule makers in other states have exercised their latitude to establish qualified privileges. Some qualified privileges require the judge to balance the probative value of the evidence against the interest of the holder of the privilege. M.R.E. 513 does not include any balancing test.

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

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

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

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

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

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

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

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

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

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

(2) Federal court decisions.

Every federal appellate court that has considered a defendant's constitutional challenge to the psychotherapist privilege has found the privilege constitutional. *United States v. Portillo*, 969 F.3d 144 (5th Cir. 2020), *cert. denied Portillo v.*

United States, 141 S. Ct. 1275 (2021); *Kinder v. White*, 609 Fed. Appx. 126 (4th Cir. 2015); *Johnson v. Norris,* 537 F.3d 840, 845-847 (8th Cir. 2008); *United States v. LaVallee*, 439 F.3d 670, 692 (10th Cir. 2006); *Newton v. Kemna*, 354 F.3d 776, 781-782 (8th Cir. 2004).

In *Portillo*, the Fifth Circuit rejected the defendant's Confrontation Clause and *Brady* claims. In *Kinder v. White,* the Fourth Circuit reversed the district court that applied a West Virginia statute requiring a court to determine whether the relevance of mental health records outweighed the importance of the privilege. *Kinder*, 609 Fed. Appx. at 131. The district court had ordered disclosure of a witness's mental health records based upon the defendant's need to challenge the credibility of the central government witness. *Id.* Despite a "perfect storm of facts," the *Kinder* court held that the psychotherapist privilege overrides the quest for relevant evidence and is not subject to any balancing test. *Id.*

Several lower federal courts have also held that the psychotherapist privilege is not subordinate to a defendant's constitutional rights. *United States v. DeLeon*, 426 F. Supp. 3d 878, 914-18 (D. N.M. 2019); *United States v. Shrader*, 716 F. Supp.2d 464 (S.D. W.Va. 2010); *United States. v. Doyle*, 1 F. Supp.2d 1187 (D. Oregon 1996); *Petersen v. United States*, 352 F. Supp. 2d 1016, 1023-24 (D. S.D. 2005); *United States v. Haworth*, 168 F.R.D. 660, 660-62 (D. N.M. 1996) (the

defendants "mistakenly equate their confrontation rights with a right to discover information that is clearly privileged").

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

c. Materiality is immaterial.

In its decision below, the NMCCA emphasizes the materiality of Appellant B.M.'s psychotherapy records. After acknowledging the ACCA's constitutional analysis in *Tinsley* and *McClure ,* the NMCCA trivializes and mischaracterizes ACCA's analysis. It states:

> Although the discussion below highlights how our courts are not as divided as they may be perceived to be, it is critical here to at least mention that rarely are psychotherapist-patient records as material as they are in the present case. This fact alone distinguishes the present matter from *McClure* and *Tinsley*, cases in which the relevance of the requested records could not be established by the accused.

B.M., 2023 CCA LEXIS 249 at *29.

The NMCCA does not cite any cases from any jurisdiction where materiality or relevance is either material or relevant to the constitutionality of a privilege. There are no such cases. Relevant and material evidence is routinely excluded by

the Constitution, federal statutes, military rules of evidence, and the manual for courts-martial. M.R.E. 402.[5]

Relevance and materiality are addressed in Section IV of the Military Rules of Evidence. Relevance and materiality are irrelevant and immaterial when applying the privileges in Section V.[6]

Privilege rules exclude relevant evidence. If evidence is irrelevant or its probative value is substantially outweighed by other considerations, the evidence is

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[5] Examples of Military Rules of Evidence excluding relevant evidence that an accused may consider essential to presenting a complete defense include M.R.E. 301 (privilege against self-incrimination), 403 (evidence outweighed by other considerations), 404 (character evidence), 412 (victim's sexual behavior), all privileges under Section V of the Military Rules of Evidence (although listed in Section V, M.R.E. 505 and 506 are not privileges), limits on witnesses under Section VI, limits on opinions and expert testimony including polygraph examinations under Section VII, limits on hearsay evidence under Section VIII, limits on admitting evidence without authentication and identification under Section IX, and limits on admitting writings, recordings and photographs under Section X of the Military Rules of Evidence.

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

excluded under M.R.E. 402(b) or 403, regardless of any privilege. If privileged, the evidence is excluded regardless of its relevancy. M.R.E. 402(a)(3) and (4).

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

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

Although M.R.E. 513 is a privilege, military courts have never treated it like other privileges. The testimony of a codefendant could be relevant and necessary to an accused's opportunity to present a complete defense. The testimony of the codefendant's attorney about his privileged communications with his client could

also be relevant and necessary. Military courts have never found that a codefendant's Fifth Amendment, 10 U.S.C. § 831, and M.R.E. 301 privilege or his M.R.E. 502 privilege violated another accused's right to present a complete defense.[7] Military courts, like civilian courts, would not entertain such arguments. *United States. v. Doyle*, 1 F. Supp.2d 1187 (D. Oregon 1996). The federal district court in *Doyle* made a useful comparison of the psychotherapist privilege to the attorney client privilege. It asked if anyone could imagine a court granting a motion by criminal codefendants to examine a cooperating defendant's attorney in camera regarding the privileged statements made by the cooperating defendant to his attorney to determine if any could be helpful to the defense. *Doyle*, at 1191. Although the government has the power to obtain testimony by granting immunity to a codefendant, it is not constitutionally compelled to grant such immunity. *United States v. Ivey*, 55 M.J. 251 (C.A.A.F. 2001).

There is no legal, moral, practical, equitable or other reason to treat the psychotherapist privilege differently than the other privileges in Section V of the Military Rules of Evidence. The privilege was established as a real privilege. Military courts must treat it as a real privilege. The NMCCA erred by considering the materiality of Appellant B.M.'s privileged records.

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

d. In *Beauge*, this Court acknowledged the constitutionality of M.R.E. 513.

Although this Court has never decided the constitutionality of M.R.E. 513, it has acknowledged that an accused's confrontation and due process rights are limited by the Supreme Court's decisions. *United States v. Beauge*, 82 M.J. 157, 167 -168 (C.A.A.F. 2022), quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion) (the Sixth Amendment right does not include the power to require pretrial disclosure of any and all information that may be useful in contradicting unfavorable testimony),[8] and *Holmes*, 547 U.S. at 324-25 (only rules which "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve" will be held to violate the constitutional the right to present a complete defense) (emphasis added by this Court). Although in *Beauge* this Court explicitly expressed no opinion as to when the Constitution may compel discovery of psychotherapy records (82 M.J. at 168,

[8] This Court also acknowledged that the Supreme Court based its decision to require an in camera review of the confidential records on the fact that the report was in the possession of the government. *Beauge*, 82 M.J. at 167, n.11. Further distinguishing *Ritchie* from this case is that *Ritchie* involved *confidential* communications made to an investigating agency on the prosecution team while this case involves *privileged* communications made during psychotherapy counseling. Even though the confidential communications in *Ritchie* were *Brady* material, the Supreme Court ordered only an in camera review.

n.12), this Court acknowledged the applicable Supreme Court precedent that makes it clear the Constitution never compels discovery of psychotherapy records because the privilege is not arbitrary or disproportionate because it promotes a sufficiently important interest that outweighs the need for probative evidence. *Id*. at 167-68, quoting *Jaffee v. Redmond*, 518 U.S. 1 (1996). As in *Beauge*, there is no basis to conclude that the privilege in this case is arbitrary or disproportionate to the purposes served by M.R.E. 513.

III. Military Courts Have No Power to Decide the Constitutionality of M.R.E. 513.

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

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

Although the Supreme Court has never drawn the line between "a judicial power" and "the judicial Power," "a judicial power" cannot extend to invalidating an act passed by Congress and signed into law by the President. The Constitution assigns resolution of constitutional issues to the Judiciary. *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

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

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

A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *United States v. Loving*, 517 U.S. 748, 757 (1996). Article III is "an inseparable element

of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). The judicial Power cannot be shared with another branch of the government. *Stern v. Marshall*, 564 U.S. at 483. "There is no liberty if the power of judging be not separated from the legislative and executive powers." *Id*. (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

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

Although military tribunals have developed expertise in military law, they do not have expertise in constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), overruled on other grounds by *Solorio v. United States*, 483 U.S. 435 (1987) ("courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law"). The "experts" in constitutional law are the Article III courts. Judging the constitutionality of congressional acts is the prototypical exercise of judicial Power. If this power is given to military tribunals,

then "Article III would be transformed from the guardian of individual liberty and separation of powers the [Supreme] Court has long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

If it decided the constitutionality of M.R.E. 513, this Court would infringe upon the Supreme Court's gravest and most delicate duty and would violate the separation of powers principle. The Constitution forbids this Court or any other Article I tribunal from exercising this great judicial Power.

Amici curiae do not suggest that this Court must or should ignore the Constitution. When interpreting statutes and rules, the Court should interpret any ambiguity or gap in accordance with the Constitution. Where there is no ambiguity, the Court must apply the laws or rules as written.

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

CONCLUSION

WHEREFORE, for the reasons stated herein, Amici Curiae The Pink Berets and Not In My Marine Corps request that this Court reverse the decision below and hold that (1) the military judge erred when she ordered an in camera review without complying with M.R.E. 513(e), and (2) M.R.E. 513 privilege does not violate an accused's constitutional rights.

Respectfully submitted,

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APPENDIX TO BRIEF

Analysis of Cases Cited in *Access*

None of the sixteen cases cited in the footnotes on pages 41-45 of Clifford S. Fishman, *Defense Access to A Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 24 (2007) apply or cite *Holmes v. South Carolina*, 547 U.S. 319 (2006); or *United States v. Scheffer*, 523 U.S. 523 U.S. 303 (1998).

Nine of the sixteen cases predate *Jaffee v. Redmond*, 518 U.S. 1 (1996) and have no precedential value. Pre-*Jaffee* cases include *United States v. Diamond*, 964 F.2d 1325, 1329 (2d Cir. 1992); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994). The remaining cases pre-dating *Jaffee* are discussed below.

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

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

v. Jackson, 862 A.2d 880, 889 (Conn. App. Ct. 2005) (department of children and families records were reviewed in camera under *Brady* and not disclosed).

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that on September 25, 2023, a copy of the foregoing was transmitted by electronic means to the following:

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

(2) Counsel for Appellant: Major Rocco Carbone

(3) Counsel for Appellee: Major Candace White

(4) Counsel for Real Party In Interest: Captain Colin Hotard

CERTIFICATE OF COMPLIANCE WITH RULES

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

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