IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re B.M. *Appellant*	
UNITED STATES *Appellee*	APPELLANT'S BRIEF IN SUPPORT OF U.S. NAVY JUDGE ADVOCATE GENERAL'S CERTIFICATE FOR REVIEW
Dominic R. BAILEY, Lieutenant Commander (O-4) U.S. Navy *Real Party in Interest*	NMCCA Dkt. No. 202300050 USCA Dkt No. 23-0233/NA 13 September 2023

ROCCO J. CARBONE, III
Major, JAGC, U.S. Air Force
Regional Special Victims' Counsel
National Guard Bureau
111 South George Mason Drive
Arlington, VA 22204
CAAF Bar No.: 37062

APRIL P. McCROSKEY
Captain, JAGC, U.S. Army
Regional Special Victims' Counsel
National Guard Bureau
111 South George Mason Drive
Arlington, VA 22204
CAAF Bar No.: 37888

ELIZABETH A. MURPHY
Lieutenant Colonel, U.S. Army
Senior Special Victims' Counsel
National Guard Bureau
111 South George Mason Drive
Arlington, VA 22204
CAAF Bar No.: 36131

Index

Table of Authorities

Service Courts of Criminal Appeals

Federal Courts

Statutes & Rules

Miscellaneous

Issues Presented

I

M.R.E. 513 GOVERNS THE PROCEDURES FOR PRODUCTION AND *IN CAMERA* REVIEW OF PATIENT RECORDS THAT "PERTAIN TO" COMMUNICATIONS TO A PSYCOTHERAPIST. 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 CRMINAL COURT OF APPEALS [sic] HELD NO CONSTITUTIONAL 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?

Statement of the Case

The United States Navy charged RPI with two specifications of Article 120, UCMJ,[1] abusive sexual contact, and three specifications of Article 128, UCMJ, assault consummated by a battery at a general court-martial. J.A. 24-27. MAJ B.M., the appellant, is the named victim. J.A. 24-27.

Following RPI counsel's discovery request for her mental health records, and subsequent hearing compelling those records, the military judge issued an *ex parte* order to MAJ B.M.'s Special Victims' Counsel (SVC). J.A. 103-105. [redacted] J.A. 103-105. MAJ B.M. filed a timely motion for reconsideration. J.A. 108-124. The military judge denied her motion and issued abatement and sealing orders. J.A. 127-129.

MAJ B.M. filed her timely petition for extraordinary relief in the nature of a writ of mandamus to the NMCCA. The NMCCA issued its published opinion denying MAJ B.M.'s petition. J.A. 1-23. The U.S. Navy Judge Advocate General certified two issues for this Court's review under Article 67(a)(2), UCMJ. J.A.

---

[1] References to Article 6b, UCMJ are to the 2021 amendments, unless otherwise noted, all other references to the UCMJ are to the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM].

207-209. No other appeals or similar requests for relief are before this Court or the NMCCA.[2]

Statement of the Facts

A. MAJ B.M. Published a Fictional Book in 2019

Nearly three years before RPI sexually and physically assaulted MAJ B.M., she self-published a book under a pseudonym regarding child abuse. J.A. 157-171; 176. The story and characters are fictional but based on her life. J.A. 157-171; 176; 184-193.

B. RPI Filed a Discovery Request for MAJ B.M.'s Mental Health Records

RPI's initial discovery to the Government requested, "[a]ny evidence that any potential witness sought or received mental health treatment, including specifically mental health treatment records of the complaining witness including records of any diagnosis or prescribed medications before or after the alleged

---

[2] Appellant timely filed her writ-appeal with this Court under Article 6b(e)(3)(C), UCMJ seeking review of the NMCCA's opinion. *B.M. v. United States*, No. 23-0211/NA, 2023 CAAF LEXIS 444 (C.A.A.F. July 5, 2023). This Court then issued its opinion in *M.W. v. United States*, holding it does not have jurisdiction to review victims' writ-appeals brought under Article 6b, UCMJ. 2023 CAAF LEXIS 472, __ M.J. ___, (C.A.A.F. 2023). Appellee and RPI moved to dismiss MAJ B.M.'s writ-appeal for lack of jurisdiction citing *M.W.,* and the day after TJAG issued his Certificate of Review, this Court granted these motions to dismiss for lack of jurisdiction. *B.M. v. United States*, No. 23-0211/NA, 2023 CAAF LEXIS 583 (C.A.A.F. Aug. 15, 2023).

offense." J.A. 32, ¶1.d.(11). The request "include[d] mental health diagnoses and prescription medications that the complaining witness had prior to or during the alleged offense as well as any mental health treatment records pertaining to the allegations asserted and treatment discussed in her book []" *Id.* at ¶1.d.(11)a.

The Government responded that it would request these records from the victim and provide them if received but objected to RPI's request for mental health records associated with MAJ B.M.'s book as irrelevant. J.A. 39, ¶(11). The Government counsel requested MAJ B.M.'s position through her SVC regarding RPI's request. J.A. 42-43. SVC objected to the release of any mental health records on several grounds, including M.R.E. 401, 403, 513, and 514. J.A. 42-43.

RPI moved to compel the Government to produce MAJ B.M.'s mental health records under R.C.M. 701. J.A. 44-55. RPI specifically requested: "(1) any records of any diagnosis and prescription medications that [MAJ B.M.] had prior to or during the timeframe of the alleged offenses pertaining to the abuse that she claims she suffered since childhood in her [book]" and "(2) any records related to mental health treatment she has had following this case." J.A. 44. In this motion, RPI never cited or made arguments under R.C.M. 703. J.A. 44-55. RPI's only reference to M.R.E. 513 was about how it did not apply. J.A. 52-55.

RPI argued the requested mental health records were relevant, but the protections of M.R.E. 513 did not apply. J.A. at 52-55, ¶¶29-35. Relying on

Mellette, RPI argued the privilege was limited to "communications" not records that contain "diagnoses and treatment." J.A. 54, ¶31. RPI argued that "even to the extent conversations are included, [M.R.E.] 513 does not apply," because MAJ B.M. had waived her privilege. J.A. 54-55, ¶¶32-34. RPI's counsel stated that he had provided the "motion as a courtesy to SVC . . .[but] she has no standing to appear before this Court in response." J.A. 55, ¶35.

SVC responded that RPI failed to meet the discovery and production standards under R.C.M. 701 and 703; the requested information was privileged and protected under M.R.E. 513, and that he failed to establish a basis to support an *in camera* review of the requested records. J.A. 59-67. She also argued that the constitutionally required exception is not a valid basis to order an *in camera* review or pierce MAJ B.M.'s privilege, and any alleged public statements by MAJ B.M. had made about her life did not waive her right to assert privilege regarding her mental health records. J.A. 59-67. Government counsel opposed RPI's motion on grounds the request was too broad and irrelevant, and asked the military judge to deny RPI's motion. J.A. 56-58, ¶6.

On the same date as the Government's response, RPI moved for appropriate relief and argued SVC lacked standing to object on her client's behalf. J.A. 68-83. RPI argued there was no legal basis to support SVC's ability to object to discovery

or production requests. J.A. 68-83. The SVC filed a response arguing she had standing under R.C.M. 703, M.R.E. 513, and Article 6b, UCMJ. J.A. 84-87.

Unbeknownst to MAJ B.M. and her SVC, over the same period the RPI counsel was filing motions regarding SVC's standing, the military judge, Government counsel, and RPI counsel engaged in email correspondence regarding RPI's request for MAJ B.M.'s mental health records. J.A. 90-95. During these communications, the military judge requested additional information from RPI regarding the scope of his request. J.A. 90-95. In response, RPI submitted an expert's affidavit. J.A. 88-89. This affidavit was not provided to SVC at the time, and she only received it later during the motion to compel hearing. J.A. 125-126.

The affidavit did not identify what, if any, diagnoses, treatments, or prescriptions MAJ B.M. had or received. J.A. 88-89. Instead, the expert discussed that "*[i]individuals* with a history of PTSD *may* experience dissociated symptoms (e.g., flashbacks) where they lose touch with reality[.]" J.A. 89, ¶4.c (emphasis added). With this assessment of a generalized individual, the expert then referenced excerpts from MAJ B.M.'s fictional book as a basis to access her mental health records. *Id.*

C. Motion to Compel Hearing

RPI began the hearing apologizing that his motion was "confusing." J.A. 132-133. This prompted the military judge to agree:

> *[I]t was confusing because you were not specific about what you were looking for either. . . I need that from the defense and it's your obligation, frankly, under 703(f) to very specifically identify what it is you're looking for and I don't see that in your motion* and I think that's partly what prompted the victim's legal counsel response.

J.A. 133 (emphasis added).

Rather than clarifying how the request met the R.C.M. 703(f) standard (or M.R.E. 513's admissibility procedures), RPI and the military judge discussed RPI's objection to SVC's standing. J.A. 133-145. During this exchange, the military judge noted, at least three times, her belief that an accused's constitutional rights "trump" a victim's rights. J.A. 138-142.

Following this exchange, SVC argued she had standing to object under Article 6b, UCMJ, and R.C.M. 703. J.A. 145-148. RPI's only explanation in response to these objections was that MAJ B.M.'s testimony needed to support the motion for "mental health records," and he requested she testify "in advance of that motion[.]" J.A. 149-150.

Without additional argument, the military judge ordered MAJ B.M. to testify. J.A. 150-151. Before she testified, however, the military judge asked RPI's counsel to provide "the parameters" for his questions. J.A. 150-151. RPI outlined his questions that included "the real name" of a doctor "who is mentioned in her book as her psychotherapist," the location of that doctor's office, dates when she saw that doctor, and the "real name of Dr. L[]who is the other doctor that she

discusse[d] seeing" in her fictional book. J.A. 150-151.[3] In addition, RPI sought the names of other therapists, psychologists, or psychiatrists; their office locations, and where and when she had seen them. J.A. 151-152.

In response to these proposed questions, and after the military judge had ordered MAJ B.M. to testify, the Government counsel asked where "the court stands on whether the book is relevant at all" because it was the Government's position "that the contents of the book are not relevant." J.A. 152. The Government counsel continued that "[t]he book stems from allega[tions]—or not even allegations, discussions . . . of child abuse, it doesn't discuss her current status. It doesn't really discuss any relevant factor to this court or to this proceedings[.]" J.A. 152.

In response, the military judge referenced RPI's expert's affidavit, and explained why she believed RPI was seeking this information, noting that he had not yet established the relevance of the request:

> *[H]ow can they tell me what they're looking for if they don't know what's there.* So, I think they are trying to provide themselves some basis to make further requests or to identify or to their obligation under R.C.M. 703(f) to identify what it is they want and why it's relevant. I mean, obviously, *we haven't gotten to the point of saying it*

---

[3] The transcript reflects that the "TC" was responding, but it appears clear from the context that RPI was informing the court what questions it intended to ask MAJ B.M.

> *is relevant* but they do have that obligation to identify those things . . . [I think they are asking] to ask these questions [] to provide that basis and that evidence to be able to say okay, *now we can meet our burden* of identifying what we want and explain to you why we want it.

J.A. 153-155 (emphasis added).

The Government counsel clarified he was objecting to the identities of specific individuals the defense wanted to identify. J.A. 155. The military judge then ordered the hearing closed for MAJ B.M.'s testimony. J.A. 156.

D. MAJ B.M.'s Closed Hearing Testimony

[redacted]

[redacted]

[redacted]

E. The Military Judge's Production and *Ex Parte* Orders and Subsequent Actions

After the hearing, the military judge ordered the mental health facility to produce MAJ B.M.'s records containing her mental health diagnoses, prescriptions, and treatment. J.A. 96-98. The order limited production to records that contained only: (1) "mental/behavioral health diagnosis or list thereof"; (2)

"mental/behavioral health prescriptions for medication or list thereof"; and (3) "prescribed mental/behavioral health treatment or list thereof.," and that the facility "shall NOT provide any portion of a written mental or behavioral health record that memorializes or transcribes actual communications made between the patient and a psychotherapist or assistant to the psychotherapist." J.A. 96-98, ¶¶2-3 (emphasis maintained). The records custodian was also authorized to produce partially redacted records. J.A. 96-98.

The military judge received MAJ B.M.'s mental health records and then emailed the parties and SVC. J.A. 99-101. In this email, she identified the facility had produced privileged communications under M.R.E. 513, asked whether MAJ B.M. still asserted privilege, and stated she intended to release the non-privileged material. J.A. 101. She directed RPI's counsel that "AFTER reviewing the redacted records and consulting with your expert, if you desire any additional records under M.R.E. 513, please alert the court so that I may set deadlines for an M.R.E. 513 motion and responses and schedule an Article 39a in advance of trial." J.A. 101 (emphasis maintained). SVC responded to the email asserting privilege regarding all MAJ B.M.'s mental health records in the military judge's possession. J.A. 99.

The military judge then issued an *ex parte* order. J.A. 102-105. [redacted]

[redacted]

[redacted]

---

4 [redacted]

[redacted]

SVC responded by filing a motion for reconsideration. J.A. 108-124. The next day the military judge denied the motion and issued her written Order Abating the proceedings and Order Sealing Enclosure (1) and Enclosure (2). J.A. 127-129. MAJ B.M. timely filed her petition with the NMCCA. J.A. 131-204.

F. The NMCCA Opinion

Before the NMCCA, MAJ B.M. argued that a writ should be granted because the military judge erred by: (1) failing to perform a full analysis under M.R.E. 513 prior to performing an *in camera* review of her mental health records;

(2) compelling her to testify, and requesting her mental health records when defense had not established that the records were relevant or necessary in accordance with R.C.M. 703; (3) abating the proceedings based on a M.R.E. 513 remedy in response to a R.C.M. 703 production request; (4) relying on the holding in *Payton-O'Brien* to find that the Constitution pierced her M.R.E. 513 privilege; and (5) failing to recuse herself because of her actual and implied bias. J.A. 1-23.

The NMCCA denied the petition. J.A. 1-23; *B.M. v. United States*, No. 202300050, 2023 CCA LEXIS 249 (N-M Ct. Crim. App. June 14, 2023). In doing so, it made several factual findings to include: (1) the "military judge unintentionally and inadvertently reviewed privileged material"; *id.*, at *9, (2) "[i]t is very clear that defense counsel had no idea what the privileged records contained; therefore, conducting a hearing in which defense counsel could not make a showing under [M.R.E.] 513(e)(3)(A)-(D) would be ineffective," *id.* at *23; and (3) "only the military judge and the SVC know of information not otherwise known to the parties." *Id.* at *34.

Moreover, the NMCCA made several legal findings, which included: (1) "[w]hen a military judge inadvertently encounters material privileged under [M.R.E.] 513(e)(2), the military judge should cease his or her review, and conduct a hearing as contemplated in [M.R.E. 513(e), or alternatively,] should order a taint team to review the records for privileged material and redact them;" *id.* at *12, and

(2) the military judge's review alerted her to the "fact that the records contained evidence of both confabulation and inconsistent statements made by Petitioner which would be constitutionally required to be produced because the records were exculpatory under *Brady* and its progeny." *Id.* at *31.

Based on the NMCCA's opinion, the U.S. Navy Judge Advocate General certified two issues for this Court's review. J.A. 207-209. MAJ B.M. timely files this brief in support of those issues.

Summary of Argument

This Court should apply the plain text of M.R.E. 513 and answer both U.S. Navy Judge Advocate General's certified issues in the affirmative.

First, M.R.E. 513's plain language requires a movant seeking records that pertain to communications protected by M.R.E. 513(a) to adhere to the admissibility procedures of M.R.E. 513(e). The military judge did not adhere to these procedures before ordering production. The rule and *Mellette* require that all records that pertain to mental health records undergo a M.R.E. 513(e) hearing. Because that did not occur here, MAJ B.M.'s privileged records were unlawfully reviewed and analyzed. Then, in violation of the rule's plain text, the military judge compounded this error by unilaterally moving for the production or admission of MAJ B.M.'s mental health records by imposing the *Payton-O'Brien* remedy. Had the military judge applied the rule as written, rather than applying

Payton-O'Brien, MAJ B.M.'s records never would have been erroneously compelled.

Second, military judges cannot create and impose judicially created remedies into M.R.E. 513. The service courts of criminal appeal are split on this issue and require this Court's intervention to make clear that military judges must apply the plain text of M.R.E. 513 unless the rule contravenes the Constitution or a statute. No court has ever found M.R.E. 513 unconstitutional. Even if one had, M.R.E. 513 is constitutional, because it does not violate either the Confrontation Clause under *Ritchie* or the Due Process Clause under *Holmes* or *Brady*. This Court's intervention is necessary to create uniformity in the military justice system.

MAJ B.M. requests that this Court reverse the NMCCA opinion below, remand to the trial court and order the sealing and protection of her erroneously compelled mental health records and disqualify the military judge.

Argument

I.

THE MILITARY JUDGE ERRED BY NOT APPLYING THE PROCEDURAL REQUIREMENTS OF M.R.E. 513(e) TO RPI'S REQUEST FOR MAJ B.M.'S MENTAL HEALTH RECORDS BASED ON THE PLAIN LANGUAGE OF M.R.E 513(e) AND THIS COURT'S PRECEDENT IN *MELLETTE* AND *BEAUGE*. THE APPROPRIATE REMEDY IS TO RETURN THE RECORDS TO APPELLANT.

A. Standard of Review

"Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the R.C.M., are questions of law reviewed *de novo*." *LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013).

B. The rules of statutory construction apply to this Court's interpretation of the Military Rules of Evidence.

The principles of statutory construction guide a court's interpretation of the Military Rules of Evidence. *See Kastenberg*, 72 M.J. at 370. Statutory interpretation begins with an analysis of the plain text. *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). When analyzing the text, if a term is undefined, "it is generally understood that the words should be given their common and approved usage." *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (citation and internal quotation marks omitted)). If the text is unambiguous, and its plain

meaning will not lead to an absurd result, then a court's interpretative analysis must stop. *Lewis,* 65 M.J. at 88.

C. The rule's text and *Mellette* are clear: the admissibility procedures of M.R.E. 513(e) apply to requests for records that pertain to a patient's communications to a psychotherapist.

M.R.E. 513(b)(5) defines "evidence of a patient's records or communications" as "testimony of a psychotherapist . . . or patient records that *pertain to communications* by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition." (emphasis added). "Pertain" is undefined in the Military Rules of Evidence, but it is defined as "[t]o relate directly to; to concern or have to do with." *Pertain, Black's Law Dictionary* 1383 (11th ed. 2019). Other dictionaries and courts' interpretation of this word correspond.[5] Based on the plain text of the rule, and the ordinary meaning of its terms, "evidence of a patent's records or communications," need not be privileged to fall within the definition of M.R.E. 513(b)(5), it only needs "to relate directly to; to concern or

---

[5] "[T]o relate to or have a connection with something." *Pertain*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/pertain-to?q=pertain (last visited Sep. 10, 2023). "[T]o have reference or relation." *Pertain*, DICTIONARY.COM, https://www.dictionary.com/browse/pertain (last visited Sep. 10, 2023). In the context of Freedom of Information Act requests, courts have found the word exceptionally broad, and "difficult to define because a record may pertain to something without specifically mentioning it." *Sack v. CIA*, 53 F. Supp. 3d 154, 164 (D.D.C. 2014).

have to do with" privileged material under M.R.E. 513(a). M.R.E. 513(b)(5)'s definition is repeatedly used in M.R.E. 513(e)'s admissibility procedures.

M.R.E. 513(e) is titled the "Procedures to Determine Admissibility of Patient *Records or Communications*." (emphasis added). The rule requires a party seeking these records or communications to file a written motion, M.R.E. 513(e)(1), but "[b]efore ordering the production or admission of a patient's *records or communications*, the military judge must conduct a hearing." M.R.E. 513(e)(2) (emphasis added). Moreover, the military judge may only examine the records "*in camera*, if such examination is necessary to rule on the production or admissibility of *protected records or communications*." M.R.E. 513(e)(3) (emphasis added). Besides the repeated use of the term under the admissibility procedures, this Court recently addressed these terms and the application of M.R.E. 513(e) when interpreting the scope of the privilege under M.R.E. 513(a).

In *Mellette*, this Court addressed the interplay between M.R.E. 513(b)(5)'s definition and M.R.E. 513(e)(3)'s admissibility procedures. This Court found "these provisions . . . recogniz[e] that to the extent testimonial or documentary evidence reveals what M.R.E. 513(a) expressly protects—confidential communications—*they are also partially protected*[.]" *Mellette*, 82 M.J. at 379

(emphasis added).[6] Moreover, this Court held that "Military Rule of Evidence 513(e)(3)—the only provision in M.R.E. 513(e) that uses the word 'protected'—does nothing more than acknowledge the well-established rule that documents that are not themselves communications *may be partially privileged* to the extent that those records memorialize or otherwise reflect the substance of privileged communications." *Mellette*, 82 M.J. at 379 (emphasis added) (citation and parenthetical omitted)). In this Court's concluding paragraphs, it made plain when M.R.E. 513(e)'s admissibility procedures apply under the rule.

When discussing the applicable remedy on remand for the accused's motion to compel production of the victim's "mental health records: to include the dates visited said mental health provider, the treatment provided and recommended, and her diagnosis," this Court acknowledged "*[t]hese documents were not protected from disclosure by M.R.E. 513(a)*," but "[t]o the extent that these documents existed—and were otherwise admissible under the Military Rules of Evidence and the Rules for Courts-Martial—*they should have been produced or admitted subject to the procedural requirements of M.R.E. 513(e)*." *Mellette*, 82 M.J. at 381 (emphasis added). In other words, even records that are

---

[6] This Court rejected the Government's argument that this language supported the position that these records were entirely privileged under M.R.E. 513(a). *Mellette*, 82 M.J. at 379.

not privileged under M.R.E. 513(a), but that "pertain to" privileged communications, "may be partially privileged" and "protected" and a movant must adhere to the procedural requirements of M.R.E. 513(e). *Id.*

M.R.E. 513(e)'s admissibility procedures do not delineate between privileged, partially protected, or non-privileged and unprotected records and communications. Instead, M.R.E. 513(e)'s title, and the subsections within M.R.E. 513(e), all rely on M.R.E. 513(b)(5)'s broader definition that includes "patient records or communications" that "pertain to" privileged communications or records under M.R.E. 513(a). Based on the plain text of the rule, and *Mellette*, a movant seeking records that fall within the defined term "evidence of patient records or communications" under M.R.E. 513(b)(5) must comply with M.R.E. 513(e)'s admissibility procedures. Thus, in a situation where a movant seeks mental health records, a military judge must hold a hearing and apply the admissibility procedures of the rule *before* ordering production for an *in camera* review. *United States v. Beauge*, 82 M.J. 157, 166 (C.A.A.F. 2022).

D. The military judge erred by applying R.C.M. 703—not M.R.E. 513—before ordering production of MAJ B.M.'s mental health records.

It is undisputed that the military judge applied R.C.M. 703, not M.R.E. 513(e), in ordering production of MAJ B.M.'s mental health records. J.A. 103-105. The military judge's application of R.C.M. 703 in ordering production of MAJ B.M.'s mental health records is erroneous for four reasons:

(1) The military judge erred by not applying M.R.E. 513(e)(3)(A)-(D)'s requirements.

The plain language of M.R.E. 513 and *Mellette* require a hearing where a movant must meet the requirements of M.R.E. 513(e)(3)(A)-(D) before a military judge may order production for an *in camera* review. By failing to require the movant to establish the four prongs of M.R.E. 513(e)(3)(A)-(D), the military judge erroneously applied *Mellette*'s narrow interpretation of M.R.E. 513(a) privilege to the procedures under M.R.E. 513(e). In other words, the military judge found that where records are not *privileged* under M.R.E. 513, they are not subject to the *procedures* specified by that rule. This error resulted in the erroneous production of records the military judge found were both privileged and non-privileged.

[redacted]

M.R.E. 513(e)(3) states that "[t]he military judge may examine the evidence or a proffer thereof *in camera*, if such examination is necessary to rule on the production or admissibility of protected records or communications," but only *after* the movant establishes the four prongs of M.R.E. 513(e)(3)(A)-(D). That did not

occur here, and despite the military judge's best intentions, she erred by failing to make any findings under M.R.E. 513(e)(3)(A)-(D) before ordering the production of these records and then reviewing those records *in camera*.

(2) The military judge's error unlawfully pierced MAJ B.M.'s M.R.E. 513 privileged records.

The military judge's application of R.C.M. 703, rather than M.R.E. 513(e)'s admissibility procedures, resulted in the unlawful piercing of her privileged records during an *in camera* review. Upon receipt of MAJ B.M.'s mental health records, the military judge realized the records exceeded her order. Rather than return the records as non-responsive, or hold a proper hearing under M.R.E. 513, the military judge conducted a detailed *in camera* review of records she understood she was not entitled to review. Although the NMCCA characterized the military judge's review of the privileged material as "inadvertent," this is inaccurate in light of the record.

[redacted] The military judge is not exempt from the prohibition of

reviewing these privileged records, because M.R.E. 513 authorizes privilege holders to "refuse to disclose and to prevent *any other person*" from access to their privileged communications. M.R.E. 513(a) (emphasis added). "[A]ny other person" includes military judges. *Id.*

The military judge's actions during and after the hearing make clear she understood that M.R.E. 513 did in fact govern the proceedings. This is shown by her email to the parties that notified them that an erroneous release of privileged materials had occurred and an M.R.E. 513 hearing for additional requested documents may be necessary. J.A. 99-101. This error caused the erroneous piercing of MAJ B.M.'s privileged records.

(3) The military judge erred because she cannot move for the production or admission of MAJ B.M.'s M.R.E. 513 protected mental health records.

The rule repeatedly makes clear that a "party" can seek an interlocutory order regarding the privilege. M.R.E. 513(e)(1)("a *party* may seek an interlocutory ruling by the military judge"); ("the *party* must"); (e)(3)("Prior to conducting an in-camera review, the military just must find by a preponderance of the evidence that the moving *party* showed …"); (e)(3)(D)("that the *party* made reasonable efforts . . ") (emphasis added). A military judge is not a party. *See* R.C.M. 103 (15) (defining military judge); *compare with*, (17) ("party" includes the accused, defense counsel, trial counsel, and agents acting on their behalf). Therefore, under

the plain language of the rule, a military judge cannot unilaterally review privileged materials, and then independently impose the *Payton-O'Brien* judicial remedy against a privilege holder without a party seeking an interlocutory order and meeting the burden under M.R.E. 513(e)(3)(A)-(D).

The NMCCA acknowledged these errors in part but excused the military judge. The court stated that "the military judge . . . chose to redact the records herself. The military judge continued reviewing the privileged materials, and in doing so, *may have violated the procedures set forth in [M.R.E.] 513(e)(2)." B.M.*, 2023 CCA LEXIS 249, at *12-13. MAJ B.M. asserts that if the military judge "may have violated the procedures" then she did, and in doing so, violated MAJ B.M.'s rights, and reversibly erred.

(4) The military judge erred in her application of R.C.M. 703.

[redacted]

The military judge erroneously compelled MAJ B.M.'s mental health records based on generalized conjecture from an expert's affidavit and public statements which did not specifically identify a diagnosis, treatment, or prescriptions. J.A. 89, ¶4.c. The military judge failed to hold RPI to his burden for

production of MAJ B.M.'s testimony and records. The expert's affidavit that "*[i]individuals* with a history of PTSD *may* experience dissociated symptoms (e.g., flashbacks) where they lose touch with reality," illustrates the insufficiency of the request under R.C.M. 703. *See Mellette*, 82 M.J. at 387-88 (Maggs and Sparks J.J., dissenting) (finding military judge did not abuse his discretion in denying production request where the appellant did not meet his burden under R.C.M. 703(e)(1)). The NMCCA compounded this error.

It found "the military judge did not erroneously compel [MAJ B.M.'s] mental health records," because she "in fact ordered the records *after* a R.C.M. 703 hearing *to address* the relevance and necessity of the non-privileged records." *B.M.*, 2023 CCA LEXIS 249, at *15 (emphasis added). Based on the plain language of the rule, if the military judge compelled the records "*after* a R.C.M. 703 hearing *to address* the relevance and necessity of the non-privileged records," then she failed to follow the requirements of R.C.M. 703.

E. If the military judge had applied M.R.E. 513's plain text, MAJ BM's records would never have been produced for an *in camera* review.

The procedures for admissibility under M.R.E. 513(e) are rigid. Before a military judge orders production, they must conduct a hearing where the movant "must establish *all* of the following by a preponderance of the evidence":

> (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 enumerated exceptions under subsection (d) of this rule;
>
> (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.

M.R.E. 513(e)(3)(A)-(D) (emphasis added). Neither RPI nor the NMCCA performed this analysis under the rule, and if they had, RPI would not have been able to meet this burden.

First, RPI never offered "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege." M.R.E. 513(e)(3)(A). To the contrary, the NMCCA conceded RPI knew nothing about what was in the privileged and protected mental health records. *B.M*, 2023 CCA LEXIS 249, at *23 ("[i]t is very clear that defense counsel had no idea what the privileged records contained; therefore, conducting a hearing in which defense counsel could not make a showing under [M.R.E.] 513(e)(3)(A)-(D) would be ineffective").

Second, RPI has not proffered "that the requested information meets one of the enumerated exceptions under subsection (d) of this rule." M.R.E. 513(e)(3)(B). Even if he had argued the constitutionally required exception applied, this is no

longer an "enumerated exception" based on the rule's plain language. *Id.* No other exceptions apply.

Third, RPI never established "that the information sought is not merely cumulative of other information available." M.R.E. 513(e)(3)(C). As a basis to seek her mental health records, RPI pointed to public statements that MAJ B.M. made in her fictional book and during one podcast about suffering child abuse unrelated to the allegations here. Although MAJ B.M. (and the Government counsel) assert this is irrelevant, these public statements could be used for RPI's cross-examination of MAJ B.M., making her protected mental health records "cumulative of other information available."

Fourth, RPI has not shown that he made "reasonable efforts to obtain the same or substantially similar information through non-privileged sources." M.R.E. 513(e)(3)(D). To the contrary, he has made no showing other than requesting the military judge to compel MAJ B.M.'s testimony.

This Court, and others, have held that failing to adhere to the M.R.E. 513 procedural requirements is reversible error. *Beauge*, 82 M.J. at 166. *S.W. v. United States*, No. 202200118, 2022 CCA LEXIS 335 (N-M Ct. Crim. App. June 7, 2022); *Payton-O'Brien*, 76 M.J. at 782; *DB v. Lippert*, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *33 (A. Ct. Crim. App. Feb. 1, 2016). MAJ

B.M.'s mental health records should never have been compelled for an *in camera* review because RPI could never have met the M.R.E. 513(e) requirements.

F. The appropriate remedy is to return the records to their privileged and protected status and disqualify the military judge from further proceedings in this case.

The appropriate remedy here is to return all the mental health records erroneously produced to their privileged and protected status. M.R.E. 511; *United States v. Ankeny*, 30 M.J. 10, 16 (C.M.A. 1990); *DB v. Lippert*, N. ARMY MISC 20150769, 2016 CCA LEXIS 63, at *33 (A. Ct. Crim. App. Feb. 1, 2016) (citing M.R.E. 501(b)(4); M.R.E. 511(a) (where records have been found to be erroneously disclosed, the effect "is to restore the disclosed records to their privileged status."). Additionally, the military judge should be disqualified from further proceedings.

[redacted] The NMCCA acknowledged her only avenue for relief was to seek disqualification of the military judge via a petition for extraordinary relief. *B.M.*, 2023 CCA LEXIS 249, at *34. [redacted]

Allowing the NMCCA opinion to stand will sanction the inevitable spillage of privileged material in violation of patients' M.R.E. 513 privilege. The military judge's erroneous application of both M.R.E. 513 and R.C.M. 703 to order production of mental health records, and the NMCCA's approval of that practice, creates a precedent that effectively moots the requirements of M.R.E. 513(e) for both production and *in camera* review of mental health records.

II.

MILITARY JUDGES CANNOT CREATE AND IMPOSE JUDICIALLY CREATED REMEDIES BASED ON A "CONSTITUTIONALLY REQUIRED" EXCEPTION, FOUND NOWHERE IN THE PLAIN TEXT OF M.R.E. 513, TO CIRCUMVENT THE PSYCHOTHERAPIST PRIVILEGE. THE MILITARY JUDGE ERRED ABATING THE PROCEEDINGS WHEN APPELLANT DECLINED TO WAIVE HER PRIVILEGE FOR MATERIALS THAT DID NOT SATISFY AN ENUMERATED EXCEPTION.

A. Standard of Review

"Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the R.C.M., are questions of law reviewed *de novo*." *LRM v. Kastenberg,* 72 M.J. at 369.

B. Article I military judges' authorities are limited by statute and do not include judicial rule making.

Congress delegated authority to the President to make procedural rules for courts-martial, including Military Rules of Evidence and the Rules for Courts

Martial. Art. 36, 10 U.S.C. § 836. As Article I judges, military judges' authority is limited by statute. "Courts-martial are courts of limited jurisdiction and have only the powers delegated to them by Congress." *United States v. French*, 10 C.M.A. 171, 27 C.M.R. 245, 251 (C.M.A. 1959). Military judges' failure to adhere to that authority is reversible error. *See United States v. Scheffer*, 523 U.S. 303, 312-14 (1998) (appellate court reversed after contradicting the rules of evidence and procedure as determined by the President).

Military courts do not have plenary authority to "oversee all matters arguably related to military justice." *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). "Military judges have no inherent judicial authority separate from a court-martial to which they have been detailed[.] To the extent that they perform judicial duties . . . their authority is not inherent but is either delegated or granted by executive order." *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (emphasis in original), *aff'd*, 510 U.S. 163 (1994).

The President, not the military courts, has the authority to promulgate the Rules for Courts-Martial and Military Rules of Evidence. *United States v. McDonald*, 55 M.J. 173 (C.A.A.F. 2001) (noting "Article I, sec 8, clause 14, gives Congress the discretion to create a military justice system, and Article 36(a), UCMJ, authorizes the President to promulgate Rules for Courts-Martial," and analyzing whether the Code and Manual's extant procedures are "sufficient to

ensure the proper balance between obtaining needed testimony and safeguarding rights of the accused.").

Pursuant to Article 36, UCMJ, the President promulgated M.R.E. 513, which contains no exception or remedy to the privilege for constitutionally required evidence. Neither the NMCCA—nor any other court—has shown that M.R.E. 513, as written, does not either protect an accused's rights under the Constitution, is illegitimate or unworkable. Yet, the service courts of criminal appeal have come to various conclusions about the role of military judges in their application and imposition of judicial remedies regarding this privilege.

C. The service courts of criminal appeal are split on whether military judges can impose their own judicially created remedies into M.R.E. 513.

In 1996, the United States Supreme Court formally recognized the psychotherapist-patient privilege under federal common law in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Supreme Court recognized that both "reason and experience" supported a psychotherapist-patient privilege because it "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 9-10 (internal quotation marks omitted) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Although "the general rule" disfavors testimonial privileges, they "may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Id.*

at 9 (citations omitted). This privilege was justified because it was "'rooted in the imperative need for confidence and trust.'" *Id.* at 10 (quoting *Trammel,* 445 U.S. at 51).

"Effective psychotherapy," unlike communications with a physician, "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* at 10. Due to "the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace[, and] . . . the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.* at 10. If these communications were not protected, then they "would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation." *Id.* at 11-12. This privilege "serves important private . . . [and] public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem," because the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11.

The Supreme Court rejected "the balancing component of the privilege implemented" by some courts, because "[m]aking 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. For the "purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Id.* at 18 (citing *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

In 1999, the President recognized this important public policy consideration and established the privilege as an evidentiary rule for the military. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999). Since then, this Court has repeatedly recognized the privilege's importance. *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (recognizing that in promulgating the rule, the President created a psychotherapist-patient privilege "based on the social benefit of confidential counseling as recognized by *Jaffee.*"); *see also United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (same). This Court has also recognized its limitations in interpreting the rule: "[i]n the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court." *Rodriguez*, 54 M.J. at 161. Despite its unqualified importance, the service courts of

criminal appeal have, at times, "treated privileged mental health records as having no privilege at all." *Lk v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017), *overruled in part*, *United States v. Tinsley*, 81 M.J. 836, 846 (A. Ct. Crim. App. 2021).

At first, the rule included an exception that allowed for the privilege to be pierced when constitutionally required. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999). This created significant litigation, and eventually led to Congress and the President removing this exception in 2015. 2015 NDAA, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369; Exec. Order No. 13696, 80 Fed. Reg. 35,783, 35,819 (17 Jun 2015). Even after its removal, however, "there is disagreement among the lower courts regarding the significance of the removal of the 'constitutional exception' from the list of enumerated exceptions in M.R.E. 513(d)." *Beauge*, 82 M.J. at 167 n.10. The conflict among the services courts of criminal appeal is best exemplified by the differences between the NMCCA and ACCA's approach to this issue.

The NMCCA, in *Payton-O'Brien*, and now in the opinion below, held that military courts may rely on its judicially created remedy to resolve this issue. 76 M.J. at 787-88. Although the court recognized that the President had specifically excised the constitutionally required exception, *id.*, and this Court had stated that "the authority to add exceptions to the codified privileges within the military

justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government," the NMCCA fashioned a unique judicial remedy for M.R.E. 513. 76 M.J. at 787 (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)). The court believed it could "not allow the privilege to prevail over the Constitution," because "the privilege may be absolute outside the enumerated exceptions, but it must not infringe upon the basic constitutional requirements of due process and confrontation." *Payton-O'Brien*, 76 M.J. at 787.

The NMCCA recognized the "scant" authority on the subject, and the need to "tread carefully" in balancing the rights of the accused and privileged communications. *Id.* at 789-92. Yet it fashioned its judicial remedy, in essence creating a new rule, based on one "learned treatise" and its interpretation of M.R.E. 505 and 506's enumerated "remedies" sections—two privileges regarding the protection of classified information in the possession of the government. *Id.* at 789-92 n. 31 (citing to M.R.E. 505(j)(4)(A) and 506(j)(4)(A)). The NMCCA held that, even if none of the enumerated exceptions to M.R.E. 513 apply, if each of the other factors for an *in camera* review are met under M.R.E. 513(e), then the military judge must determine whether an *in camera* review is constitutionally required. *Id.* at 786-88. The NMCCA held that where an accused's constitutional rights demanded disclosure of a victim's privileged materials, the victim was offered a

choice: assert privilege and the proceedings will be abated or waive privilege and provide the privileged documents to the accused. *Id.*

The ACCA's position is diametrically opposed to the NMCCA. This is best exemplified by *United States v. McClure*, No. ARMY 20190623, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sep. 2, 2021) and *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021).

In *McClure*, the defense raised issues of waiver, and sought to pierce the psychotherapist-patient privilege based on the constitutionally required exception. 2021 CCA LEXIS 454, at *15. The defense requested access to the victim-patient's medical records because she admitted having multiple mental health diagnoses and related prescriptions to a Sexual Assault Nurse Examiner. *Id.* The defense argued that the mental health records were constitutionally required based on the accused's due process and confrontation rights. *Id.* The military judge denied the request because it found the victim-patient did not waive her privilege, and the defense failed to establish the mandatory four prongs of the *in camera* review standard in M.R.E. 513(e). *Id.* at *20-22. In affirming the military judge's decision, ACCA held the military judge "did not undermine appellant's confrontation rights," *id.* at *22, because "the constitutional right to confront witnesses does not include the right to discover information to use in confrontation … [and] [t]he right to question adverse witnesses 'does not include the power to

require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'" *Id.* at *22-23 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987)). This Court initially accepted and certified an issue for review, in part, regarding the applicability of the constitutionally required exception, but then affirmed in light of *Mellette*. *United States v. McClure*, 82 M.J. 194 (C.A.A.F. 2022), *aff'ed*, No. 22-0023/AR, 2022 CAAF LEXIS 574 (C.A.A.F. Aug. 8, 2022). After ACCA decided *McClure*, it more directly addressed the issues in the published opinion *Tinsley*, 81 M.J. at 836.

There, the court explicitly held there is no constitutionally required exception under M.R.E. 513 and the plain language of M.R.E. 513 does not create a basis to require the release of "constitutionally required" documents or impose a remedy when they are not. *Id.* at 850-53. *Tinsley*, like this Court's decision in *Mellette*, 82 M.J. at 380-81, relied on the President's authority to promulgate the Military Rules of Evidence. 81 M.J. 849. In doing so, it determined the lack of a constitutionally required exception was not "clearly and unmistakably unconstitutional," 81 M.J. at 849, especially considering that several other recognized privileges, like the attorney-client privilege, have no such exception. *Id.* at 849-50 (no "indication that either the Supreme Court or C.A.A.F. has ever considered the psychotherapist-patient privilege to be 'less worthy' than any other recognized privilege."). Instead, ACCA affirmed the military judge denial because

the proponent failed to meet his burden under M.RE. 513(e)(2) by establishing all of required elements for an *in camera* review. *Tinsley*, 81 M.J. at 853-54.

ACCA went on to discuss remedies for the inadvertent disclosure of privileged material to the government, which could, in theory, potentially trigger *Brady* concerns. *Tinsley*, 81 M.J. 836, 851-53. Specifically, it offered a proposed remedy to the erroneous disclosures of privileged materials under R.C.M. 701 that balances the rights of the accused and the privilege holder. *Id.* The court held that if records are inadvertently disclosed to the "government" with "potentially exculpatory privileged information," then: (1) "the government is required to inform both the defense and the patient of the inadvertent disclosure in order to allow the patient to invoke the privilege"; and (2) "if the patient timely asserts privilege, and/or any disputed issues of waiver are resolved in the patient's favor, disclosure is barred and the government must return those portions of the records that are privileged." 81 M.J. at 851-852. *Id.* After ACCA affirmed, this Court denied review. *United States v. Tinsley*, 82 M.J. 372 (C.A.A.F. 2022).

Although this Court has not expressly addressed whether the Constitution requires production or review of records despite the plain language of M.R.E. 513, the recent opinion in *Beauge* addresses this issue in dicta. In *Beauge*, one of the issues addressed was whether the defense counsel was ineffective for failing to raise the constitutionally required exception. 82 M.J. at 167. Ultimately, it found

the defense counsel was not ineffective for failing to raise a "cutting-edge claim." *Beauge*, 82 M.J. at 167-68 n.12. This Court stated it was not explicitly addressing the viability of the exception because it was unnecessary to resolve the issues before it, however, it then discussed the applicable Supreme Court precedent. *Beauge*, 82 M.J. at 167 n.10.

This Court recognized an accused's constitutional concerns when seeking to pierce the privilege would arise from the right to confrontation and to present a complete defense. *Beauge*, 82 M.J. at 167. Recognizing this concern, however, it noted that Supreme Court precedent limited these arguments, because "in certain instances, the psychotherapist-patient privilege seemingly trumps an accused's right to fully confront the accuracy and veracity of a witness who is accusing him or her of a criminal offense." *Id.* at 167-68. In support, this Court cited *Ritchie*, and its discussion of the balance between discovery and an accused's Sixth Amendment right under the Confrontation Clause, noting that "the right to confront witnesses does not include the right to *discover* information to use in confrontation[.]" *Beauge*, 82 M.J. at 167 (quoting *Ritchie*, 480 U.S. at 39) ("If we were to accept this broad interpretation . . . 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.")).

This Court also recognized that any due process right to present a complete defense is viable only when rules "infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve[.]" *Id.* at 167 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (alteration in original) (emphasis added) (internal quotation marks omitted) (citation omitted)). Then citing *Jaffee*, this Court stated that it did not find that the privilege was either "arbitrary or disproportionate to the purpose served" in the instant case. *Id.* at 167-168 (quoting *Jaffe*, 518 U.S. at 9-10 (internal quotation marks omitted) (quoting *Trammel*, 445 U.S. at 51).

This Court's discussion in *Beauge* relied on the identical precedent and reasoning used in *Tinsley* and *McClure*, which both held there is no constitutional exception to the M.R.E. 513 privilege. *Beauge*, 82 M.J. at 167 (citing *Ritchie*, 480 U.S. at 53 and quoting *Jaffee*, 518 U.S. at 9-10); *compare with, Tinsley*, 81 M.J. at 850 (citing *Jaffee*); *McClure*, 2021 CCA LEXIS 454, at *22-23 (citing *Ritchie*)).

This disagreement among the service courts of criminal appeal has now come to a head. In *Payton-O'Brien*, and the published opinion below that relied on it, the NMCCA asserts that military judges can read a judicially created remedy into M.R.E. 513 that places the privilege holder in the position of either asserting privilege and abating the proceedings or waiving privilege to provide constitutionally required documents to the accused without ever finding the rule

violated the Constitution. Contrary to this position, ACCA's published opinion *Tinsley* holds that the plain language of M.R.E. 513 does not create a basis to require the release of constitutionally required documents or impose a remedy when they are not.

This Court's intervention is required to resolve this conflict. As the NMCCA correctly acknowledged, violations of M.R.E. 513 "can result in prejudice to victims by compromising their privacy and credibility, all while undermining their trust in our legal system." *B.M.*, 2023 CAAF LEXIS 583, *13 n.12. Unless this Court resolves this issue, the disagreement among the services will result in disparate treatment of victims and their privileged communications.

D. No court—including the NMCCA—has ever found M.R.E. 513 contravenes the Constitution or a statute.

This Court recently reaffirmed that the President is the "promulgator of the Military Rules of Evidence," with "the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy." *Mellette*, 82 M.J. at 380-81. And "[u]nless the President's decision with respect to that balance contravenes a constitutional or statutory limitation, *we must respect that choice*." *Id.* (emphasis added); *see also*, *Rodriguez*, 54 M.J. at 161 ("[i]n the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this

Court."). In *Payton-O'Brien* and its progeny, including the case before the Court, the NMCCA has not respected the President's choices regarding M.R.E. 513.

In 2015, the President chose to remove M.R.E. 513(d)(8), the previously enumerated constitutionally required exception. Exec. Order No. 13696, 80 Fed. Reg. 35,783, 35,819 (17 Jun 2015). The President has never included an abatement remedy as part of M.R.E. 513—unlike his decision to do so in M.R.E. 505 and 506. The NMCCA—nor any other court—has ever found M.R.E. 513 contravenes either a statute or the Constitution.

The NMCCA assumes that not turning over privileged information in accordance with the procedural requirements of a Military Rule of Evidence violates the Constitution. It held that "we may not allow the privilege to prevail over the Constitution. In other words, the privilege may be absolute outside the enumerated exceptions, but it must not infringe upon the basic constitutional requirements of due process and confrontation." *Payton-O'Brien*, 76 M.J. at 787-88. This pronouncement that "constitutional rights prevail over statutory and evidentiary rules," *id.* at 788, is neither controversial nor incorrect. But "[g]eneral propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). In reaching this conclusion, it failed to apply this Court's binding precedent, apply the Military Rules of Evidence plain text, and abated the proceedings for evidence that is potentially inadmissible.

(1) The NMCCA's position violates this Court's precedent.

First, the NMCCA's position conflicts with this Court's recognition of the privilege's purpose and importance in light of *Jaffee*. *See, e.g.*, *Rodriguez*, 54 M.J. at 160; *Clark*, 62 M.J. at 199. Although the NMCAA has touted the rule's protections, its injection of a judicial remedy undermines its assertions by placing patient-victims in a position to choose between seeking justice or waiving a recognized privilege.

Second, the NMCCA failed to interpret the rule's plain and unambiguous text violating the rules of statutory construction. *Mellette*, 82 M.J. at 380-81. The only way the NMCCA could read an unenumerated judicial remedy into the rule is if it had found it unconstitutional or violated a statute *sub silentio*. But doing so would have opposed the NMCCA's pronouncements of the privilege's worth and understanding of the President's intent. *Payton-O'Brien*, 76 M.J. at 786-787 ("the specific direction from Congress and the President on this privilege to be clear-cut.").

Third, reliance on an exception or a remedy not enumerated in a Military Rule of Evidence ignores *Custis's* holding. 65 M.J. at 370-71. Although military judges have the authority and responsibility to ensure a fair trial for the accused, they have no authority to author exceptions, or remedies, into the Military Rules of Evidence. *Id.* (requiring exceptions to be "expressly delineated."). Despite the

NMCCA's opinions stating this is a case about remedies, MAJ B.M. asserts that this is a case about the NMCCA creating both an exception *and* a remedy into the rule. The context of how this judicial remedy developed makes this clear.

The NMCCA fashioned the remedy after an accused argued he was entitled to privileged records under the constitutionally required exception that had been recently excised. 76 M.J. at 783-785. Based on these arguments, the NMCCA fashioned the judicial remedy at issue. *Id.* at 787-92. Put simply: the remedy cannot be imposed until a court finds the records may be constitutionally required. *Id.* There's no need to impose a *remedy* unless there is a violation *first*. Whether this is a case about remedies, exceptions, or both, *Custis* holds that other parts of the Federal Rules of Evidence, Military Rules of Evidence, or common law privileges, cannot be read into our rules—and that is what *Payton-O'Brien* does.

Fourth, the NMCCA's opinion violates *Beauge*. This Court emphasized a military judge lacks authority to perform an *in camera* review unless the movant meets its burden under M.R.E. 513(e)(A)-(D). *Beauge*, 82 M.J. at 166. Although the NMCCA acknowledged "[w]hen a military judge inadvertently encounters material privileged under [M.R.E.] 513(e)(2), the military judge *should* cease his or her review and conduct a hearing as contemplated in [M.R.E.] 513(e)," (emphasis added), it conceded that the military judge continued to review privileged records and "may" have violated MAJ B.M.'s rights by failing to meet the rule's

admissibility procedures. *B.M.*, 2023 CCA LEXIS 249, at *12-13. MAJ B.M. asserts that if the military judge "may" have violated M.R.E. 513, then she did. She violated the plain language of the rule, *Beauge*, and MAJ B.M.'s rights.

The NMCCA's position fails to apply the plain text of M.R.E. 513, and, instead, sanctioned the creation of a judicial remedy that effectively creates a new rule untethered from the language of the text by relying on other Military Rules of Evidence. Although the NMCCA made general assertions that the Constitution supersedes the Military Rules of Evidence, it has never found M.R.E. 513 is either facially unconstitutional or unconstitutional as applied to a specific accused. As such, because the NMCCA in *Payton-O'Brien* and the opinion below do not apply the plain text of the rule, unlike ACCA's opinion in *Tinsley*, its analysis and holding are erroneous.

(2) The NMCCA does not apply M.R.E. 510 and 511's plain text and this Court's precedent interpreting the rules.

The purpose of the MCM rules is "to provide for the just determination of every proceeding relating to trial by court-martial." R.C.M. 102(a). The rules should be constructed "to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." R.C.M. 102(b). Military judges must apply the rules based on their plain text, and to read these rules in harmony, as much as possible, to provide for uniformity between the services. *Payton-O'Brien* does not provide for uniformity in M.R.E. 513's

application and ignores several of the other applicable rules; specifically, M.R.E. 510 and 511.

When privilege is at issue, two integral considerations are waiver and erroneous disclosure. Although the NMCCA addressed M.R.E. 513's application and waiver with its abatement remedy, it never cited or addressed either M.R.E. 510 or 511. Its holding contravenes both rules' plain text. Under M.R.E. 510(a), a privilege holder may waive privilege if the holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that would be inappropriate to allow the claim of privilege." When waiver has not occurred, but privileged records have been erroneously released, M.R.E. 511(a) states that "[e]vidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously[.]" Military courts interpreting these rules have consistently protected the release of privileged information.

In protecting erroneously compelled records, courts have held that M.R.E. 511 "prevent[s] the use 'in any way' of an improperly divulged communication[.]"*Ankeny*, 30 M.J. at 16 (applying to attorney-client privilege) (citations omitted). And when privileged records are erroneously disclosed, those records retain their privileged status. *See, e.g.*, *McCollum*, 58 M.J. at 339 ("Courts have regularly held that the unauthorized disclosure of privileged information by

one spouse does not constitute waiver of the privilege."); *Tinsley*, 81 M.J. at 851-52. In such situations, where records have been found to be erroneously disclosed, the effect "is to restore the disclosed records to their privileged status." *Lippert*, 2016 CCA LEXIS 63, at *33 (citing M.R.E. 501(b)(4) and 511(a)).

Here, it is undisputed that the records were erroneously released—both the military judge and NMCCA agree. J.A. 1-23; 103-105. MAJ B.M. asserted privilege after their release. J.A. 99-101; 108-124. Yet, relying on *Payton-O'Brien*, the military judge then used these "improperly divulged communications" against her. As a crime victim who sought mental health treatment, she, as is every other crime victim within the Navy criminal justice system, subject to *Payton-O'Brien*. As a result, she faces a Hobson's choice: either waive her privilege to mental health communications to hold the perpetrator accountable for his crimes or assert privilege and forego her opportunity to assist the prosecutor's efforts to seek justice. Requiring her to waive privilege as a condition for continued prosecution of the offender who harmed her is coercive and violates the plain language of M.R.E. 510 and 511, because it demands her to involuntarily waive her privilege.

(3) The military judge's factual and legal findings in this case are likely erroneous as well.

Although MAJ B.M. has not challenged the military judge's findings regarding the substance of the privileged records, it is questionable whether the

records the military judge has identified, for the reasons she has identified them, would even be admissible if they are released.

Although it is unsettled whether character evidence under M.R.E. 404 might include "psychiatric diagnosis or personality disorders," it is still a potential argument to exclude this evidence. *United States v. Dimberio*, 56 M.J. 20, 25 (C.A.A.F. 2001); *see, e.g.*, *United States v. Jones*, No. ACM 40226, 2023 CCA LEXIS 230, at *29 n.7 (A.F. Ct. Crim. App. May 30, 2023) (noting "[w]hether a victim's ability to perceive and remember, mental capacity, or psychological condition are 'pertinent traits' within the meaning of [M.R.E.] 404(a) is an open question that we do not resolve today.") (citing *Dimberio*, 56 M.J. at 25). Moreover, extrinsic evidence, about "recantations under oath in which she denied mental health treatment for her childhood abuse," *B.M.*, 2023 CCA LEXIS 249, at *30, would likely be inadmissible to impeach by contradiction as it is a collateral matter. *In re Y.B.*, 83 M.J. 501, 508 (C.G. Ct. Crim. App. 2022); *aff'd*, *Fink v. Y.B.*, 83 M.J. 222, 223 (C.A.A.F. 2023). Thus, the military judge's imposition of *Payton-O'Brien's* judicial remedy may have been imposed over privileged records that may be inadmissible on other grounds.

E. M.R.E. 513 is constitutional.

When a rule is found to contravene the Constitution, a basic condition precedent is someone alleging and meeting the burden that the rule is

unconstitutional. That has never occurred for M.R.E. 513. Notably, *who* sought to modify the plain language of the rule was not the President, Congress, or the parties—it was the NMCCA—who lacks the authority to rewrite the rule. Even if the rule had been properly challenged, M.R.E. 513 is neither facially unconstitutional nor unconstitutional as applied to RPI.

Generally, "[t]he presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown." *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000) (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). To make such a showing, there are essentially two ways: the rule is facially unconstitutional or unconstitutional as applied to a specific accused. For a facial challenge, which is "the most difficult," the movant must establish "that no set of circumstances exists under which the [rule] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also*, *United States v. Castillo*, 74 M.J. 160, 161-62 (C.A.A.F. 2015) (holding that appellant did not "meet her burden for successfully advancing a facial challenge" under *Salerno*); *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000) (same). To determine whether a rule is unconstitutional as applied to a specific accused, a court must "conduct a fact-specific inquiry." *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012) (footnote omitted).

For M.R.E. 513 to be facially unconstitutional it would require that "no set of circumstances exists" under which the rule can protect confidential communications between a patient and a psychotherapist. Such an argument would be meritless on its face in light of *Jaffee*. If this argument was meritorious, and taken to its logical extension, however, it would mean that all the Military Rule of Evidence privileges are unconstitutional. This is not the case, and the specific constitutional arguments are detailed below.

Moreover, M.R.E. 513, on the facts here, cannot be found unconstitutional as applied to RPI for a simple reason: by relying on *Payton-O'Brien*, the military judge and NMCCA have never applied the rule's plain text to the facts of this case. *See, e.g., United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013) (rejecting an as applied challenge but finding, "[n]o one disagrees that the military judge scrupulously followed the procedures established by Congress in Article 29(b), UCMJ, as implemented by the President under R.C.M. 805(d)(1)."). As elaborated on below, had they applied the rule as written, M.R.E. 513 is not unconstitutional as applied to RPI.

(1) M.R.E. 513 does not violate the Sixth Amendment because the Confrontation Clause is not a constitutionally compelled rule of pretrial discovery.

The Sixth Amendment provides that an accused shall "be confronted with the witnesses against him[.]" U.S. Const. amend. VI. This right affords a criminal

defendant two protections: "the right physically to face those who testify against him, and the right to conduct cross-examination." *Ritchie*, 480 U.S. at 51. It does not, however, implicate an accused's right to pretrial discovery, because "[t]he Sixth Amendment's guarantees do not transform the desire to discover information into a constitutional right." *United States v. Beauge*, No. 201900197, 2021 CCA LEXIS 9, at *21 n. 55 (N-M Ct. Crim. App. Jan. 11, 2021) (citing *Ritchie*, 480 U.S. at 52)).

In *Ritchie*, the defendant was convicted, among several offenses, of raping his minor daughter. *Ritchie*, 480 U.S. at 43. During pretrial discovery, he requested the Children and Youth Services file made during its investigation. *Id.* at 44-45. He was denied access because the file was confidential under the Pennsylvania state statute. *Id.* He argued that the requested information was necessary to prepare for cross examination of his daughter. *Id.* at 51.

The Supreme Court rejected the broad interpretation that "a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness testimony." *Id.* at 51 (rejecting the Supreme Court of Pennsylvania's interpretation of *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). If it had accepted this position "the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery . . . [and]

[n]othing in the case law supports such a view." *Id.* This is a "*trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* (emphasis maintain) (citations omitted).

The Supreme Court found that applying privilege to protected records does not undermine an accused's confrontation right, because the right *"*does not include the right to discover information to use in confrontation … [and] [t]he right to question adverse witnesses 'does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'" *Id.* at 52-53 (citation omitted). Rather, the right is satisfied if an accused's "defense counsel receives wide latitude at trial to question witnesses," because the right "only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 52-53.

Here, the NMCCA in *Payton-O'Brien*, and the case below, asserted that disclosure of privileged information in pretrial discovery may be required to protect an accused's confrontation right. *Payton-O'Brien*, 76 M.J. at 788-89 (citing *Davis*, 415 U.S. at 94 and later stating "[i]t is impossible to define all of the situations in which the privilege's purpose would infringe upon an accused's weighty interests, like due process and confrontation."); *B.M.*, 2023 CCA LEXIS 249, at *26 ("although the military judge did not reference []*Ritchie*, it appears that

she determined that the privileged information is more than simply helpful information that might be useful in contradicting unfavorable testimony"). This reasoning conflicts with *Ritchie*, and even its own holding in *Beauge*. Despite its inconsistency, the NMCCA in *Beauge* was correct: "[t]he Sixth Amendment's guarantees do not transform the desire to discover information into a constitutional right." 2021 CCA LEXIS 9, at *21 n. 55 ((citing *Ritchie*, 480 U.S. at 52). Thus, it cannot be a basis to pierce or impose a judicially created remedy on an M.R.E. 513 privilege.

(2) M.R.E. 513 does not violate the Fifth Amendment's Due Process Clause because the rule is not arbitrary or disproportionate to the purposes it is designed to serve.

The Fifth Amendment to the Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.[7] "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Scheffer,* 523 U.S. at 308, and this latitude is limited, to ensure the constitutional

---

[7] "The Due Process Clause of the Fifth Amendment rather than that of the Fourteenth Amendment [] applies to the military justice system, an instrument of the federal government rather than the states. However, the Fifth Amendment also provides that no person shall be 'deprived of life, liberty, or property, without due process of law' and there is no reason to expect that the *general* scope of the protections would be different in this context." *United States v. Meakin*, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019) (emphasis maintained) (internal citations omitted)).

guarantee that criminal defendants have "'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 324-325 (citations and quotations omitted).

To ensure this meaningful opportunity, the Supreme Court has held that "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 right to present a complete defense." *Id.* at 167 (alterations in original) (quoting *Holmes*, 547 U.S. at 324-25); *see also, United States v. Hasan,* No. 21-0193, 2023 CAAF LEXIS 639, at *152-53 n.54 (C.A.A.F. Sep. 6, 2023) (citing *Holmes* approvingly); *Beauge*, 82 M.J. at 157 (same). In this context, "[a]rbitrary rules" are those that "exclude[] important defense evidence *but that did not serve any legitimate interests*." *Holmes*, 547 U.S. at 325-27 (emphasis added).

Here, the NMCCA has never actually applied *Holmes* to M.R.E. 513. Neither the NMCCA, nor any other service court of criminal appeals, has found M.R.E. 513 "arbitrary or disproportionate to the purposes" it is "designed to serve."' *Id.* at 167. To the contrary, the purposes of the rule, as recognized in *Jaffee*, have been touted by this Court and the NMCCA. M.R.E. 513 is not "arbitrary," and therefore, its application and the procedural requirements do not offend notions of due process. *See Beauge*, 82 M.J. at 168 ("We do not find a basis to conclude that the privilege, as applicable in the instant case, was either arbitrary

or disproportionate to the purposes served."). An accused can, and does, have a meaningful opportunity to present a complete defense while a patient has a right to protect privileged communications under M.R.E. 513.

(3) Records protected under M.R.E. 513 do not implicate *Brady*.

There "is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). And any argument that preventing the release of privileged information would violate an accused's due process rights under *Brady v. Maryland*, 373 U.S. at 83, lacks merit. *See Tinsley*, 81 M.J. at 850-53 (holding that there is "no *'Brady'* Exception to Military Rule of Evidence 513.").

In *Brady v. Maryland*, the Supreme Court established that the suppression of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. For information to rise to the level of *Brady* evidence, it must be: (1) exculpatory or impeachment evidence; (2) "material;" and (3) in the actual or constructive possession of the prosecution. *United States v. Shorts*, 76 M.J. 523, 532-33 (A. Ct. Crim. App. 2017). The *Brady* analysis is inapplicable to issues of privileged mental health records because these records are not in the actual or constructive possession of the prosecution, and finding such would violate Supreme Court and this Court's precedent.

Generally, "[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.'" *See Shorts*, 76 M.J. at 531-32 (quoting *Acosta*, 76 M.J. at 616) (emphasis in original). If privileged information is in the prosecution's possession the important question is *how* it entered their possession. It could have been in one of two ways: intentionally or inadvertently.

If the prosecution intentionally came into possession of privileged material from a military or civilian healthcare facility, without a valid waiver, this was likely unlawful, and the privilege would remain intact. The "government cannot intentionally subpoena or otherwise solicit a healthcare provider to procure what it knows to be privileged records." *Tinsley*, 81 M.J. at 851 (citing *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 255 (2d. Cir. 1986) (holding that the government "may not obtain evidence in violation of a valid privilege established under the Constitution, statute or common law") (citing *United States v. Calandra*, 414 U.S. 338, 346 (1974)). In such a situation, "the government's intentional misconduct cannot trigger a *Brady* obligation to disclose the privileged materials to another." *Id.* (citing M.R.E. 510; M.R.E. 511(a); *Ankeny*, 30 M.J. at 16).

Alternatively, where the prosecution "inadvertently obtains privileged records, *i.e.* a health care provider's inadvertent production of 'routine' medical

records that contain privileged communications between the patient and his or her therapist" also does not waive privilege. *Tinsley*, 81 M.J. at 851. In these situations, if the patient were to assert privilege, then "the records generally retain their privileged character." *Id.* at 851-52 (citing *McCollum,* 56 M.J. at 842). Moreover, to allow for a "*Brady*" exception would contradict the Supreme Court and this Court's precedent. *Tinsley*, 81 M.J. at 851. The Supreme Court rejected any balancing test for the psychotherapist-patient privilege, *Jaffee*, 518 U.S. at 17-18, and this Court has recognized its deference to Presidential decisions about the enactment of the Military Rules of Evidence. *Rodriguez*, 54 M.J. at 161; *Custis*, 65 M.J. at 370-71.

Here, any *Brady* concerns are inapplicable. The mental health records at issue have never been in the possession of the prosecution. *B.M.*, 2023 CCA LEXIS 249, at *34 ("only the military judge and the SVC know of information not otherwise known to the parties"). This is undisputed. Thus, the NMCCA's finding that the military judge's review alerted her to facts that "the records contained evidence of both confabulation and inconsistent statements made by Petitioner which would be *constitutionally required to be produced because the records were exculpatory under Brady and its progeny*," *id.* at *31, is patently wrong. Thus, factually and legally, in the case before this Court, there are no applicable *Brady* concerns.

F. Uniformity is essential among the service courts of criminal appeal regarding M.R.E. 513's application.

There is an evident lack of uniformity among the services regarding military judges' application of judicially created remedies to M.R.E. 513. *See, e.g.*, *Beauge*, 82 M.J. at 167 n.10; *Payton-O'Brien*, 76 M.J. at 787; *Tinsley*, 81 M.J. at 836. The ACCA and the NMCCA are fundamentally different in their holdings regarding M.R.E. 513 in at least three ways: (1) whether there is a constitutional balancing test under M.R.E. 513; (2) whether constitutional rights require the production of M.R.E. 513 privileged information; and (3) the appropriate remedies military judges may employ.

ACCA held that the plain language of M.R.E. 513 does not include an enumerated constitutionally required exception and the rule must be applied as written. *Tinsley*, 81 M.J. at 836; *McClure*, 2021 CCA LEXIS at 454. Thus, the rule must be applied without reliance on a judicially created remedy. *Id.* Although the NMCCA asserts that it agrees that the exception no longer exists and posits that "our courts are not as divided as they may be perceived to be," *B.M.*, 2023 CCA LEXIS 249, at *29, it then attempted to distinguish its opinion from ACCA's by comparing the materiality of the requested records in the opinion below. *Id.* Even so, this effort and identifying a distinction is irrelevant to the legal analysis. ACCA never analyzed the materiality of the requested records, instead ACCA considered the rule's constitutional and statutory parameters. *Tinsley*, 81 M.J. at 836;

McClure, 2021 CCA LEXIS at 454. The NMCCA's attempt to distinguish the cases belies how far apart it is from ACCA. Accepting that the NMCCA and the ACCA agree that the constitutionally required exception is no longer a viable basis to pierce the privilege, these opinions still conflict in their proposed remedies.

This disparity creates a lack of uniformity within the military justice system. This is especially harmful, as in this case, which involves a Soldier who would have received substantially greater legal protection had her assailant been in the Army. The military judge's reliance on *Payton-O'Brien* is precisely opposite of the Army's approach in *Tinsley*, which would have led an Army military judge to deny the defense request for production of mental health records under R.C.M. 703, and similarly deny a request for production or *in camera* review under M.R.E. 513. One of this Court's key roles is to provide uniformity among the services to ensure just results in the military justice system. This Court's intervention is necessary, and the NMCCA reasoning in *Payton-O'Brien* and its progeny should be rejected to provide that uniformity.

Conclusion

MAJ B.M. asks this Court to reverse the NMCCA's opinion below, order her mental health records returned to a privileged and protected status, and disqualify the military judge from this case.

Respectfully submitted,

ROCCO J. CARBONE, III
Major, JAGC, U.S. Air Force
Regional Special Victims' Counsel
National Guard Bureau
111 South George Mason Drive
Arlington, VA 22204
(856) 889-1360
Rocco.carbone.1@us.af.mil
CAAF Bar No.: 37062

/s/

APRIL P. McCROSKEY
Captain, JAGC, U.S. Army
Regional Special Victims' Counsel
National Guard Bureau
111 South George Mason Drive
Arlington, VA 22204
(571) 314-5380
April.p.mccroskey.mil@army.mil
CAAF Bar No.: 37888

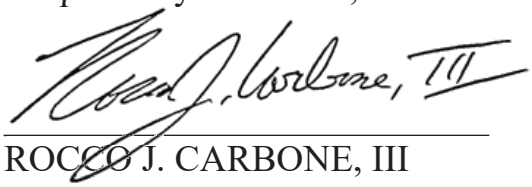
/s/

ELIZABETH A. MURPHY
Lieutenant Colonel, U.S. Army
Senior Special Victims' Counsel
National Guard Bureau
111 South George Mason Drive
Arlington, VA 22204
(317) 402-8710
Elizabeth.a.murphy98.mil@army.mil
CAAF Bar No.: 36131

Certificate of Compliance with Rule 24(b)

This brief complies with the type-volume limitation of Rule 24(b). This brief contains 13,929 words and complies with the typeface and type style requirements of Rule 37.

Respectfully submitted,

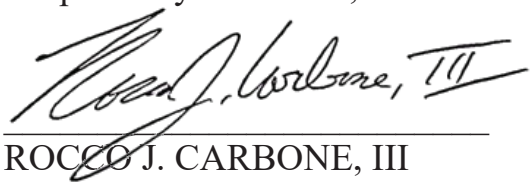


ROCCO J. CARBONE, III
Major, JAGC, U.S. Air Force
Regional Special Victims' Counsel
CAAF Bar No.: 37062

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court, delivered to Appellee's Counsel, Major Candace White, the RPI Counsel, Captain Colin Hotard, and the Navy-Marine Corps Court of Criminal Appeals, and mailed-first class to the Trial Circuit Military Judge, CDR Kimberly J. Kelly, on September 13, 2023.

Respectfully submitted,



ROCCO J. CARBONE, III
Major, JAGC, U.S. Air Force
Regional Special Victims' Counsel
CAAF Bar No.: 37062