IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re B.M.,	)	ANSWER ON BEHALF OF
Appellant	)	APPELLEE
	)	
v.	)	Crim.App. Dkt. No. 202300050
	)	
UNITED STATES,	)	USCA Dkt. No. 23-0233/NA
Appellee	)	
	)	
Dominic R. BAILEY,	)	
Lieutenant Commander (O-4)	)	
U.S. Navy	)	
Real Party in Interest	)	

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

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679, fax (202) 685-7687
Bar no. 36681

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
Bar no. 36701

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

Index of Brief

Table of Authorities

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES CASES

MILITARY COURTS OF CRIMINAL APPEALS CASES

UNITED STATES CIRCUIT COURTS OF APPEALS AND UNITED STATES DISTRICT COURT CASES

STATE CASES

OTHER RULES, STATUTES, SOURCES

Certified Issues

I.

[MIL. R. EVID.] 513 GOVERNS THE PROCEDURES FOR PRODUCTION AND IN CAMERA REVIEW OF PATIENT RECORDS THAT "PERTAIN TO" COMMUNICATIONS TO A PSYCHOTHERAPIST. THE MILITARY JUDGE APPLIED R.C.M. 703 TO ORDER PRODUCTION AND CONDUCT AN IN CAMERA REVIEW OF MAJOR B.M.'S DIAGNOSIS AND TREATMENT. DID THE MILITARY JUDGE ERR BY APPLYING THE NARROW SCOPE OF THE [MIL. R. EVID.] 513(a) PRIVILEGE DEFINED IN *MELLETTE* TO BYPASS THE PROCEDURAL REQUIREMENTS OF [MIL. R. EVID.] 513(e)?

II.

THE ARMY CRIMINAL COURT OF APPEALS HELD NO CONSTITUTIONAL EXCEPTION TO [MIL. R. EVID.] 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 Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 6b(e)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b(e)(1) (2019), to entertain an Article 6b Petition seeking a Writ of Mandamus under Mil. R. Evid. 513 and Article 6b(a)(8), UCMJ.

The Judge Advocate General of the United States Navy forwarded the Record of Trial and decision of the Navy-Marine Corps Court of Criminal Appeals to this Court under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2020).

This Court has jurisdiction under Article 67(a)(2).

Statement of the Case

The United States charged the Accused with two specifications of Article 120, UCMJ, abusive sexual contact, and three specifications of Article 128, UCMJ, assault consummated by a battery. (J.A. 24–27.) The Military Judge abated the proceedings after arraignment but before trial on the merits. (J.A. 127.)

Appellant, the Victim, filed an Article 6b Petition and moved for a stay of proceedings. (J.A. 1–23.) The Navy-Marine Corps Court of Criminal Appeals denied the Petition. (J.A. 1–23.)

The Judge Advocate General of the United States Navy forwarded the Record of Trial and decision of the Navy-Marine Corps Court of Criminal Appeals to this Court pursuant to Article 67(a)(2). (J.A. 207–09.)

Statement of Facts

A. The United States charged the Accused with abusive sexual contact and assault consummated by a battery.

The United States charged the Accused with two specifications of Article 120, UCMJ, abusive sexual contact, and three specifications of Article 128, UCMJ, assault consummated by battery. (J.A. 24–27.)

B. The Accused moved to compel production of the Victim's[1] diagnoses, prescription, and treatment records. The Victim responded that the evidence sought was privileged, and that the Accused failed to meet any enumerated exceptions to the privilege.

The Accused moved to compel production by the United States of (1) records of the Victim's "diagnosis and prescription medications"; and (2) "any records related to mental health treatment" of the Victim. (J.A. 44.) The Accused argued that Mil. R. Evid. 513 did not apply, given that the "requested documents related to diagnoses and treatment" and were unprotected by the privilege. (J.A. 53–55.)

In support of the Motion, the Accused submitted an Affidavit from a forensic psychologist. (J.A. 88–89.) The forensic psychologist reviewed the Victim's book and podcast interview, which contained information about the Victim's mental health. (J.A. 88–89.) The forensic psychologist opined it was "essential to know [the Victim's] mental health history . . . to develop the Defense of [the Accused]," including "therapy, . . . [and mental health providers'] sessions with [the Victim]," "therapist notes, prescription history, treatment history, diagnoses, and any other encounter notes." (J.A. 88–89.) Although the Victim did

[1] The United States recognizes that the Victim at this stage of trial is an "alleged Victim." For simplicity and with this understanding, the United States refers to Appellant throughout as "the Victim."

not initially receive the Accused's supporting Affidavit, she received it later during the closed hearing. (J.A. 125–26.)

The United States agreed that routine mental health records "that do not memorialize actual communications" were unprotected by the privilege. (J.A. 57.) But the United States argued the diagnoses and treatments sought were not relevant. (J.A. 57–58.)

The Victim responded that "there can be no dispute" that her mental health records were privileged under Mil. R. Evid. 513. (J.A. 66.) The Victim claimed that the Accused had "not met an enumerated exception under [Mil. R. Evid. 513]" and had "not met the criteria outlined in [Mil. R. Evid.] 513(e)(3) which would allow piercing of that privilege." (J.A. 66.) The Victim claimed that the Accused failed to meet the Mil. R. Evid 513(e)(3)(A) criteria because he had "not demonstrated . . . the records would yield evidence admissible under an exception to the privilege." (J.A. 66.) Thus, the Victim argued "it would be improper to . . . compel and conduct an *in-camera* review." (J.A. 66.)

C. The Military Judge closed the courtroom for litigation of the Motion to Compel, noting the Motion was "partly" under Mil. R. Evid. 513.

Because the Accused had asked for mental health records, the Military Judge asked if the Accused objected to closing the courtroom given that the Victim's testimony and argument was "partly" under Mil. R. Evid. 513. (J.A. 149.) The Accused did not object. (J.A. 149.)

The Accused noted that "our position is this is not a 513 issue unless the court determines that there is a privilege and, at that point, privileged communication." (J.A. 149.)

The Victim and her counsel were present at the closed hearing. (J.A. 156–205.) The Victim testified at the closed hearing, over her objection and pursuant to Order of the Military Judge. (J.A. 156–77; R. 227.) The Victim's counsel made statements at the closed hearing. (J.A. 188–95, 203–05.)

D. The Military Judge ordered production of the Victim's mental health diagnoses, prescription, and treatment records, and directed that no records "memorializ[ing] or transcrib[ing]" communications be produced.

The Military Judge's production Order stated: "I have determined under . . . R.C.M.[] 703 and . . . *Mellette* . . . that a review of [a] portion of the medical records . . . is required." (J.A. 96.)

The Military Judge ordered production of the Victim's mental health records from a Veterans Health Administration Clinic "ONLY to the extent those records reflect: [(a)] Any mental/behavioral health diagnosis or list thereof; [(b)] Any mental/behavioral health prescription for medication or list thereof; and [(c)] Any prescribed mental health/behavioral health treatment or list thereof." (J.A. 96.)

The Military Judge directed: "The . . . records custodian 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. The custodian of records shall produce only records containing no actual communications *and* indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescription, and/or treatment, and the date the diagnosis was resolved . . . The records custodian is authorized to produce records . . . partially redacted consistent with this Order." (J.A. 97 (emphasis in original).)

E. Contrary to the Military Judge's Order, the mental health provider produced the Victim's mental health records including privileged communications.

The Military Judge conducted an in camera review to determine if disclosure of the mental health records was required under R.C.M. 701. (J.A. 98); *see* R.C.M. 701(g)(2). The Military Judge then realized the mental health provider sent mental health records without redacting or excising confidential communications. (J.A. 100–01.) The Military Judge attempted to limit her review to segments pertaining to mental health diagnoses, prescriptions, and treatment. (J.A. 103.)

During her in camera review, the Military Judge applied *Payton-O'Brien* and determined that some privileged communications were "constitutionally required to guarantee the [A]ccused a meaningful opportunity to present a defense." (J.A. 103–05.)

F. The Victim declined to waive her privilege to her confidential communications. Applying *Payton-O'Brien,* the Military Judge abated the proceedings.

Applying *Payton-O'Brien*, the Military Judge asked the Victim if she wanted to assert privilege over confidential communications in the records. (J.A. 100.) The Victim declined to waive the privilege. (J.A. 99.)

The Military Judge abated the proceedings pursuant to *Payton-O'Brien*. (J.A. 103–05.)

G. The Navy-Marine Corps Court of Criminal Appeals held that (1) the Military Judge inadvertently viewed privileged material, (2) the Military Judge did not abuse her discretion by compelling the Victim to testify and requesting non-privileged mental health records under R.C.M. 703, and (3) the Military Judge properly abated the proceedings under *Payton-O'Brien*.

First, the Navy-Marine Corps Court of Criminal Appeals ruled that the Military Judge "was not seeking privileged information under Mil. R. Evid. 513" when she directed production of non-privileged records from the mental health facility. (J.A. 8.) Thus, the court held the R.C.M. 703 Order to Produce was proper; it was the mental health facility who improperly produced privileged records contrary to the Military Judge's Order. (J.A. 8.)

Second, the court ruled that the Military Judge "did not abuse her discretion when she ordered [the Victim] to testify regarding the existence of mental health records, and the names of any providers," which were "non-privileged, relevant and necessary information." (J.A. 14.) The court found that the Military Judge

"did not abuse her discretion when she ordered the mental health clinic to release [the Victim's] medical records [because the] . . . order was narrowly tailored so as to avoid Mil. R. Evid. 513 evidence." (J.A. 14.)

Third, the court held that the Military Judge "could not disclose the privileged information [she inadvertently saw] to defense counsel . . . to make a . . . hearing fair to the accused, because the constitutional exception was eliminated." (J.A. 16.) The court held that "in *certain instances,* the psychotherapist-patient privilege . . . trumps an accused's right to fully confront the accuracy and veracity of [an accuser]." (J.A. 17.) Thus, following *Payton-O'Brien* and the lower court's interpretation of this Court's *Beauge* opinion, the lower court held that abatement was proper due to "evidence of both confabulation and inconsistent statements" in the privileged materials. (J.A. 20.) Under these circumstances, the court found the Victim's "failure to waive the privilege reache[d] Constitutional proportions." (J.A. 20.)

Argument

I.

THE MILITARY JUDGE CORRECTLY APPLIED R.C.M. 703 TO ORDER PRODUCTION AND IN CAMERA REVIEW OF NON-PRIVILEGED DIAGNOSES, PRESCRIPTION, AND TREATMENT RECORDS. MIL. R. EVID. 513(e) PROCEDURES APPLY TO MOTIONS TO PRODUCE, DISCLOSE, OR ADMIT PRIVILEGED COMMUNICATIONS UNDER THE EXCEPTIONS OF MIL. R. EVID. 513(d).

A. The standard of review is de novo.

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

B. No privilege protects production of mental health diagnoses, prescriptions, and treatments. Congress provided a procedure in Mil. R. Evid. 513(e) to determine if an exception applies to permit production, disclosure, or admissibility of privileged records or communications. That privilege-protecting procedure must be narrowly construed.

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

This Court applies the standard principles of statutory construction when construing Military Rules of Evidence and Rules of Court-Martial. *United States v. Mellette*, 82 M.J. 374, 377 (C.A.A.F. 2022) (citing *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019)).

The first step in statutory interpretation is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the

particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)).

Plain meaning is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. Schmidt*, 82 M.J. 68, 76 (C.A.A.F. 2020) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Context and coherence matter for construing plain meaning. "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

"The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *McPherson*, 73 M.J. at 395; *accord Sager*, 76 M.J. at 161.

2. Privileges are strictly and narrowly construed.

Privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980); *United States v. Jasper,* 72 M.J. 276, 280 (C.A.A.F. 2013) (privileges must be "narrowly construed").

3. This Court in *Mellette* held that Mil. R. Evid. 513 provides no privilege over mental health diagnoses, prescriptions, and treatment. The *Beauge* court held that the procedures in Mil. R. Evid. 513(e) provide a process to produce, disclose, or admit privileged evidence that meets an enumerated exception to the privilege.

In *Mellette*, this Court held that the diagnoses, prescriptions, and treatments a patient receives are not privileged under Mil. R. Evid. 513. *Mellette,* 82 M.J. at 380.

The *Mellette* court further held that Mil. R. Evid. 513(e) provides a procedure for in camera review if necessary to rule on the production of records or communications. *Id.* at 379; *see also United States v. Beauge,* 82 M.J. 157, 161 (C.A.A.F. 2022) (Mil. R. Evid. 513(e) "provides the procedure that must be followed when a party seeks to discover information pursuant to any of the enumerated exceptions.").

The *Mellette* court cited two provisions of Mil. R. Evid. 513(e) that enable judges to review privileged and partly privileged documents. First, the court cited Mil. R. Evid. 513(e)(3), which requires proof of one of the Mil. R. Evid. 513(d) enumerated exceptions, and held that it enables in camera review of records that "memorialize or otherwise reflect . . . privileged communications." 82 M.J. at 379. Second, the court cited Mil. R. Evid. 513(e)(2) and held that the required hearing protects against the production or admission of testimony or documentary evidence that reveals "confidential communications." *Id.*

The *Mellette* court did not interpret Mil. R. Evid. 513(e)(1), which refers to the Mil. R. Evid. 513(e)(2) hearing protecting evidence that reveals confidential communications.

Nor did the *Mellette* court interpret Mil. R. Evid. 513(e)(4), which requires narrow tailoring of any production or disclosure to evidence that "meet[s] . . . one of the enumerated exceptions to the privilege . . . under [Mil. R. Evid. 513(d)]."

C. The Military Judge properly applied Mil. R. Evid. 513, R.C.M. 701, and R.C.M. 703, and ordered production of only non-privileged matters.

1. The Military Judge applied the protections of Mil. R. Evid. 513, R.C.M. 701, and R.C.M. 703: (1) the Accused filed a written motion; (2) the Victim attended and was heard at a closed hearing; (3) the Military Judge directed production only of non-privileged materials; and (4) the Military Judge conducted in camera review. To hold otherwise would elevate form over substance.

Substance, not form, is controlling in appellate law. *See, e.g., United States v. Mateo*, No. 20-13658, 2022 U.S. App. LEXIS 2471, at *6 (11th Cir. Jan. 26, 2022) (substance governs adequacy of plea); *United States v. True,* 28 M.J. 1, 3 (C.M.A. 1989) (substance controls legal analysis of order).

In *True,* the Court of Military Appeals considered the appealability of a judge's order and noted that "the trial judge's characterization of his own action cannot control the classification of the action." 28 M.J. at 3 (internal quotes and citation omitted). Instead of focusing on "the label placed on it," courts should focus on the "effect of the ruling." *Id.* (citation omitted). The *True* court held that an abatement order, thus, can become like a "dismissal" for purposes of an interlocutory appeal when "intractability has set in and the direction of a dismissal is imminent." *Id.*

Similarly here, the Military Judge not only compared the proceedings to Mil. R. Evid. 513, but provided the same protections to the Victim.

a. The Accused filed a written motion.

The Accused filed a Motion to Compel *in limine* with the Military Judge. (J.A. 44–55.) The Accused served the Motion on the Victim. (J.A. 59–67, 125–26.) The Victim was eventually served with a copy of the supporting Affidavit. (J.A. 125–26.) All of these protections are also protections provided by Mil. R. Evid. 513(e)(1).

b. The Victim attended and was heard at a closed hearing.

Before directing any production of evidence—privileged or non-privileged—the Military Judge told the Accused that she intended to close the courtroom, and that the Motion to Compel was raised "partly" under Mil. R. Evid. 513. (J.A. 149.) The Military Judge then closed the courtroom, with agreement of the Accused, to litigate the Motion. (J.A. 149, 156.) The Victim was present and testified during the closed hearing; the Victim's counsel participated in the closed hearing. (J.A. 156–205.) No Members were present. (J.A. 156–205.) These are protections listed in Mil. R. Evid. 513(e)(2).

c. The Military Judge ordered production of only non-privileged records.

The Military Judge declined to order production of privileged evidence, and instead directed that the Veterans Health Administration Clinic produce only non-privileged evidence. (J.A. 96–97.) The Military Judge's order closely tracked the *Mellette* opinion's language in directing the records custodian to "NOT provide"

any evidence that might be partially privileged, that is, "any portion of a . . . record that *memorializes or transcribes actual communications* . . . ." (J.A. 97); *Mellette,* 82 M.J. at 387 (Mil. R. Evid. 513(e)(3) reference to "protected records and communications" "does nothing more than acknowledge that . . . documents . . . may be partially privileged to the extent [they] . . . *memorialize or otherwise reflect* the substance of privileged communications.") (emphasis added).

Here, as the Military Judge only ordered production of non-privileged evidence, Mil. R. Evid. 513(e)(3) and (4) are both inapplicable by their explicit terms: they respectively require proof by "preponderance of the evidence" that "one of the enumerated exceptions" to the privilege applies, and require "narrow[] tailor[ing]" of any production order to evidence "that meet[s] . . . one of the enumerated exceptions" to the privilege.

d. <u>The Military Judge conducted an in camera review based on the personal nature of the records</u>.

As with any discovery matters, the Military Judge had full discretion to apply R.C.M. 701(g) to non-privileged records and "specify the . . . manner of making discovery," including "order[ing] that the discovery or inspection be denied [or] restricted . . . or make such other order as appropriate," including "protective" orders, and "review[ing] any materials in camera." R.C.M. 701(g)(1), (2).

This Court routinely analyzes similar orders by military judges under R.C.M. 701(g). *See, e.g., Mellette,* 82 M.J. at 374 n.4 (citing R.C.M. 701(g) and noting *DuBay* judge may have to "conduct in camera review, issue appropriate protective orders, and place portions of the record under seal"); *United States v. Branoff,* 38 M.J. 98 (C.A.A.F. 1993) (proper for judge under R.C.M. 701 to restrict discovery of personnel files of OSI agents, including sealing records and barring defense counsel from reviewing the records).

The Military Judge here, as in *Branoff* and as suggested by *Mellette,* properly restricted discovery of *non*-privileged information under R.C.M. 701(g), providing protections not dissimilar to those in the inapposite Mil. R. Evid. 513(e)(4)—which explicitly apply to the consideration of privileged records admissible under an enumerated exception to the privilege. *See also H.V. v. Kitchen*, 75 M.J. 717, 722 (C.G. Ct. Crim. App 2016) (Bruce, J. dissent) ("discovery [of non-privileged mental health diagnosis, prescriptions, and treatments] need not be entirely unconcerned about privacy rights outside the scope of the [Mil. R. Evid.] 513 privilege").

The Victim's complaint that Mil. R. Evid. 513(e) had to be the sole basis for closing the hearing or ordering production of non-privileged records, or that she was otherwise denied the protections of the Rule, elevates form over substance. This argument is meritless.

2. This Court's precedent says that Mil. R. Evid. 513(e) procedures only apply to privileged records—and also says that Mil. R. Evid. 513(e) procedures apply to any records. Given that Mil. R. Evid. 513(e) was drafted before this Court issued *Mellette,* this Court should resolve its own contradictory statements and hold that Mil. R. Evid. 513(e) applies only when an exception is sought to privileged materials.

The *Mellette* and *Beague* opinions contain internally conflicting language.

First, the *Mellette* opinion interpreted the Mil. R. Evid. 513(e)(2) protection of the Mil. R. Evid. 513(b)(5) definition of records that "pertain to communications" as "simply recognizing that to the extent testimonial or documentary evidence reveals . . . confidential communications—they are . . . partially protected." *Mellette,* 82 M.J. at 379. But later, prescribing a remedy, the *Mellette* court noted both that "S.S.'s mental health records: to include the dates visited . . . , the treatment provided and recommended, and her diagnosis," "were not protected from disclosure by [Mil. R. Evid. 513(a)]" and "should have been produced or admitted subject to the procedural requirements of [Mil. R. Evid. 513(e)]." *Id.* at 381.

But the latter statement is not true in every case. The *Mellette* court rightly notes that the definition of "records or communications" is restricted to evidence that "pertains to *communications"*—that is, as *Mellette* says, evidence that "reveals . . . confidential communications." 82 M.J. at 379.

The *Beauge* opinion summarizes the process consistently: "[Mil. R. Evid. 513(e) provides the procedure that must be followed when a party seeks to discover information *pursuant to* any of the *enumerated exceptions.*" 82 M.J. at 161 (emphasis added).

Thus, properly reading all subsections of Mil. R. Evid. 513(e) in context and together: where an order seeks production of *privileged* evidence to determine if it meets an enumerated exception, the procedures of Mil. R. Evid. 513(e) apply.

Where an order explicitly seeks production of *non*-privileged materials, Mil. R. Evid. 513(e) procedures need not apply, and at least Mil. R. Evid. 513(e)(3) and (4) explicitly do not apply. *See Schmidt*, 82 M.J. at 76; *Food and Drug Admin.*, 529 U.S. at 132–33; *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citations omitted).

Now that *Mellette* resolves the scope of the privilege, this Court should clarify its prior contradictory statements and hold that the Mil. R. Evid. 513(e) procedures do not govern non-privileged evidence.

However, whether Mil. R. Evid. 513(e) can be read to apply to requests for solely non-privileged material *need* not be decided today: the Military Judge

applied at least the protections of Mil. R. Evid. 513(e)(1) and (2) in this case, and the Accused sought no exception such that Mil. R. Evid. 513(e)(3) or (4) would apply.

3. This Court has already held that diagnoses, prescriptions, and treatments are non-privileged. To hold that the procedure in Mil. R. Evid. 513(e) bars the production, disclosure, or admission of *non-privileged* evidence would swallow the holding of *Mellette,* is contrary to the context of the Rule, and would create an incoherent result.

The Victim now asks this Court to hold that the Mil. R. Evid. 513(e)(3) requirement that the Accused demonstrate an "enumerated exception[]" precludes the Military Judge from ordering the production of evidence the *Mellette* court determined is not privileged under Mil. R. Evid. 513. (Appellant Br. 28.) This Court should reject this notion for three reasons.

a. The Rule must be construed consistent with this Court's precedent.

The *Mellette* court, relying on the text of Mil. R. Evid. 513 and the requirement that privileges be "strictly construed," held that diagnoses, prescriptions, and treatments are non-privileged under Mil. R. Evid. 513. 82 M.J. at 380.

The narrowest application of the Rule interprets the Mil. R. Evid. 513(e) procedure to enable parties to demonstrate that an enumerated exception applies to

otherwise privileged evidence being sought, and reads all parts of the Mil. R. Evid. 513(e) procedure in harmony. This is so for two reasons.

First, the *Beauge* court read the Mil. R. Evid. 513(e) as a procedure that enables application of the enumerated exceptions to *privileged* information. 82 M.J. at 161.

Second, the *Mellette* interpretation of the words "records or communications" in Mil. R. Evid. 513(e) as referring to evidence that "reveals . . . confidential communications," itself harmonizes (1) the definitions of Mil. R. Evid. 513(b), with (2) the Mil. R. Evid. 513(e) provisions directed toward identifying "exceptions" to the privilege, and with (3) the overall purpose of Mil. R. Evid. 513 and 513(a): to create a "Psychotherapist-patient privilege."

b. <u>The Rule must be construed within the overall context and statutory scheme</u>.

This harmonized reading in *Mellette* and *Beauge* is consistent with the overall context and statutory scheme. *See McPherson*, 73 M.J. at 395; *Sager*, 76 M.J. at 161; *United Sav. Ass'n of Tex.,* 484 U.S. at 371. It makes use of the purpose of Section V of the Military Rules of Evidence, which is "Privileges," and the header and title of Mil. R. Evid. 513, "Psychotherapist-patient privilege." Further, Congress specifically directed that the records in Mil. R. Evid. 513(e)(3) would be "protected *by the privilege*." (J.A. 242 (emphasis added).)

c. The Rule must be construed to create a coherent result.

If materials are not privileged, by definition, they require no proof of an exception prior to production or admission. *See Food and Drug Admin.*, 529 U.S. at 133 ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.").

To require courts to apply all Mil. R. Evid. 513(e) protections to non-privileged records would eliminate the distinction between non-privileged diagnoses, prescriptions, and treatments, and privileged records and records that memorialize confidential communications—and confer a procedural process meant to identify exceptions to the former, that the Rule does not contemplate. *See* Mil. R. Evid. 513(a); Mil. R. Evid. 513(e). Applying Mil. R. Evid. 513(e)(3)(A–D) to non-privileged materials creates an incoherent circular logic: requiring an exception to the privilege for materials not privileged by the Rule.

To bar production, disclosure, or admission of non-privileged information because it cannot meet the requirements of Mil. R. Evid. 513(e)(3) would be contrary to this Court's own precedent, expand the privilege beyond *Mellette*, ignore context and Congress' intent, and create an incoherent statutory scheme.

This Court should reject the Victim's invitation to do so.

D. Recusal is not required: the Military Judge properly recognized the privileged materials and sealed them.

A military judge is required to recuse herself if her "impartiality might reasonably be questioned." R.C.M. 902(a). This includes if she has "personal knowledge of disputed evidentiary facts concerning the proceeding," or if she has "acted as counsel" in the same case. R.C.M. 902(b)(1)–(2).

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "When not flowing from an extrajudicial source, bias or prejudice will not necessitate disqualification unless it is so egregious as to destroy all semblance of fairness." *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999) (citation omitted).

Here, the Victim complains that the Military Judge erroneously applied Mil. R. Evid. 513 and R.C.M. 703 to order production of mental health records, and thus must be disqualified. (Appellant Br. 31.) First, as demonstrated above, the Military Judge ordered solely non-privileged evidence, and committed no error in ordering that production. *See supra* Section I.C.1. Second, the Military Judge's actions under R.C.M. 703(g), providing protections tantamount to Mil. R. Evid. 513 protections, are exactly the routine legal ruling that are "alone almost never" a basis for recusal. *Liteky,* 510 U.S. at 555.

The only matter to be resolved, then, is if the Military Judge's ruling for abatement was proper.

II.

IN CREATING MIL. R. EVID. 513, CONGRESS SATISFIED THE *SCHEFFER* AND *HOLMES* TEST. FEDERAL COURT SPLITS UNDER *JAFFEE* AND FED. R. EVID. 501 ARE INAPPOSITE AS CONGRESS AND THE PRESIDENT ENACTED A CLEAR STATUTORY PRIVILEGE. *PAYTON-O'BRIEN'*S CREATION OF JUDICIAL REMEDIES, WHERE A VICTIM DECLINES TO WAIVE THE PRIVILEGE, SHOULD BE REVERSED.

A. The standard of review is de novo.

This Court reviews de novo the scope of the psychotherapist-patient privilege established by the Military Rules of Evidence. *Mellette*, 82 M.J. at 377 (citing *Beauge*, 82 M.J. at 162). This Court reviews constitutional and statutory questions de novo. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012).

B. Congress and the President have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," as long as the rules are not arbitrary or disproportionate to the purposes they are designed to serve.

1. Congress and the President have broad latitude, and are due deference, in rules governing courts-martial.

The Constitution expressly grants Congress the authority "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Congress has "plenary control" over matters pertaining to military discipline. *Weiss* v. *United States*, 510 U.S. 163, 177 (1994); *Chappell v. Wallace*,

462 U.S. 296, 301 (1983); *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013); *United States v. Mitchell*, 39 M.J. 131, 137 (C.A.A.F. 1994).

The Supreme Court has repeatedly reaffirmed that "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Id.* (quoting *Solorio v. United States*, 483 U.S. 435, 447–48 (1987)). The courts "are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (quoting *Burns v. Wilson*, 346 U.S. 134, 140 (1953)).

Deference "is at its apogee" when courts review congressional decisions regarding "regulations, procedures, and remedies related to military discipline." *Weiss*, 510 U.S. at 177 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (President's authority "at its maximum" when he acts under congressional authorization) (Jackson, J. concurring). When deciding constitutional questions about regulation of the military, courts "must be particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*, 453 U.S. at 68.

2. An accused's right to present a complete defense is not unlimited, and can constitutionally be restricted under the *Scheffer* and *Holmes* test.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted). However "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citations omitted); *see also United States v. Gaddis*, 70 M.J. 248, 252 (C.A.A.F. 2011) (right to present relevant testimony has limits and may "bow to accommodate other legitimate interests in the criminal trial process").

"State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes*, 547 U.S. at 324 (quoting *Scheffer*, 523 U.S. at 308). Of note, there is no general constitutional right to pretrial discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see infra* Section II.C.4.

3. The *Scheffer* and *Holmes* test permits rules abridging the evidence available for an accused's defense at trial when the rules restricting evidence are not arbitrary or disproportionate to their purpose.

"Such rules [of evidence] do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308 (citations omitted); *accord*

Gaddis, 70 M.J. at 253 (applying test to Mil. R. Evid. 412 and finding rule not unconstitutional). This is tested by evaluating "whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right[s] . . . ." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

In *Holmes*, the Supreme Court found a rule excluding evidence that someone else committed the crime violated the defendant's right to have "a meaningful opportunity to present a complete defense." 547 U.S. at 323, 331 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Although rules could exclude third-party guilt if the evidence lacked connection with the crime, the Court held the particular rule was "arbitrary" because it assessed the connection of the evidence solely on the strength of the prosecution's case, without considering the defense's theory. *Holmes*, 547 U.S. at 324–31.

In *Scheffer*, the Supreme Court held Mil. R. Evid. 707, which excluded all polygraph evidence in military trials, was a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence." 523 U.S. at 312. The Court noted that the government "unquestionably [had] a legitimate interest" in ensuring evidence was reliable, and that the defendant sought the polygraph evidence to merely bolster his own credibility after he testified. *Id*. at 308, 316–17.

By contrast, the Supreme Court has held exclusions of evidence violate the Constitution where they significantly undermined fundamental elements of the

accused's defense. *See, e.g.*, *Rock*, 483 U.S. at 62 (per se rule excluding all post-hypnosis testimony impermissibly infringed on defendant's right to testify on her own behalf); *Chambers v. Mississippi*, 410 U.S. 284, 302, (1973) (due process violation where critical testimony excluded along with a refusal to permit defendant to cross-examine key witness); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (Sixth Amendment violation where state arbitrarily denied defendant right to put on relevant and material witness who was physically and mentally capable of testifying).

C. Federal civilian courts post-*Jaffee* in the Fed. R. Evid. 501 context apply a "strict construction" rule to the judicially created privilege, and have split over whether they can balance an accused's rights against the privilege.

1. Generally, privileges may limit the production of evidence when they promote some public good that outweighs the truth-seeking function of the court.

In the federal civilian court context, where privileges exist at the common law and under Fed. R. Evid. 501, privileges "must be strictly construed and accepted . . . to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel,* 445 U.S. at 50 (citation and internal quotation marks omitted). The Supreme Court approvingly noted the "imperative need for confidence and trust"

within the marital communications, priest-penitent, lawyer-client, and physician-patient privileges. *Id*.

2. Federal civilian courts post-*Jaffee* recognize the "public interest" of a psychotherapist-patient privilege.

In the federal civilian Fed. R. Evid. 501 context, the Court in *Jaffee* reasoned that: "The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). The Supreme Court found the privilege "serve[s] a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* at 15 (citing *Trammel*, 445 U.S. at 50). The *Jaffee* judicially recognized privilege applies to federal civilian courts through Fed. R. Evid. 501. *See, e.g., Kinder v. White*, 609 F. App'x 126, 129 (4th Cir. 2015).

3. In face of the incompletely defined, non-absolute, judicially created privilege from *Jaffee,* federal civilian courts post-*Jaffee* split on the creation of judicial exceptions to the privilege.

Under Fed. R. Evid. 501, "matters of privilege in federal courts are to be resolved based on the common law 'as interpreted by United States courts in the light of reason and experience' unless it is contrary to the 'United States Constitution.'" *Kinder*, 609 Fed. Appx. at 129 (quoting Fed. R. Evid. 501). "The [*Jaffee*] Court did not attempt to flesh out the full contours of the privilege, but it rejected the idea that the psychotherapist-patient privilege was subject to a

balancing test" of the evidentiary need by the accused for evidence, against the importance of patient privacy. *Newton v. Kemna*, 354 F.3d 776, 784 (8th Cir. 2004); *Kinder,* 609 F. App'x at 130 (*Jaffee* "recognized that the privilege is not absolute . . . but left the delineation . . . for future cases."); *United States v. Shrader*, 716 F. Supp. 2d 464, 470 (S.D. W. Va. 2010).

"Since *Jaffee*, courts have differed on whether the Sixth Amendment can trump the [civilian *Jaffee*] psychotherapist-patient privilege." *Shrader*, 716 F. Supp. 2d at 471. Some courts have applied a balancing test,[2] and found that a defendant's constitutional rights trump the psychotherapist-patient privilege, while others have rejected that approach.[3] *United States v. Powell*, No. 4:21-cr-00290-BLW, 2023 U.S. Dist. LEXIS 74431 *11, 13 (D. Id. Apr. 27, 2023.)

---

[2] *See, e.g., United States v. Mazzola*, 217 F.R.D. 84, 88 (D. Mass. 2003) (weighing benefit of cross examination preparation against privilege); *Bassine v. Hill*, 450 F. Supp.2d 1182, 1185–86 (D. Or. 2006) (weighing right to confrontation, cross-examination, due process); *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D. Mont. 1997); *United States v. Alperin*, 128 F. Supp. 2d 1251, 1252–53 (N.D. Cal. 2001) (recognizing *Jaffee* instruction to not conduct balancing test, but directing *in camera* review given potential materiality of records).

[3] *See, e.g., Kinder*, 609 F. App'x at 127–28 ("lower court's use of a "balancing approach was erroneous" as it was "expressly rejected by the Supreme Court in *Jaffee*."); *Shrader*, 716 F. Supp. 2d at 467 (rejecting defendant request for counseling records, citing *Jaffee* rejection of balancing, holding "the psychotherapist privilege is not subordinate to the Sixth Amendment rights of [the] defendant"); *Powell*, No. 4:21-cr-00290-BLW, 2023 U.S. Dist. LEXIS 74431, at *2 (declining to order psychiatric records for *in camera* review, as disclosure would require balancing test rejected by *Jaffee*); *United States v. Doyle*, 1 F. Supp.

But as demonstrated below, the turmoil over the balancing test and the judicially-defined privilege has no relevance to the military context, given the clearly delimited military privilege.[4]

D. The statutorily defined Mil. R. Evid. 513 psychotherapist-patient privilege, with enumerated exceptions and no remedy, is not governed by *Jaffee,* but by the *Scheffer* and *Holmes* test. Congress' acts are also due deference under *Weiss*. Mil. R. Evid. 513 is not "arbitrary or disproportionate to the purposes [it is] designed to serve."

1. The "narrow construction" guidance applies differently where Congress and the President have enacted clearly defined privileges.

In contrast to federal common law under Fed. R. Evid. 501, in the military, where the privilege is explicitly defined and *Scheffer* and *Holmes* govern review of the privilege, the need for "narrow construction," or a bias for less privilege, may be different. For example, the *Custis* court rejected application of the "narrow construction" principle where a party sought to "*create* an exception" to the privilege. *United States v. Custis,* 65 M.J. 366, 369 (C.A.A.F. 2007) ("This we may not do.").

2d 1187, 1190–91 (D. Or. 1998) (rejecting defendant argument compulsory process trumps privilege in psychotherapist records, analogizing to attorney-client and marital communications privileges).

[4] Similar to the federal court split under Fed. R. Evid. 501, state cases are also split based on their unique statutory language and state precedent. *Compare, e.g., Vaughn v. State*, 608 S.W.3d 569 (Ark. 2020), *with*, *e.g., Douglas v. State*, 527 P.3d 291 (Alaska Ct. App. 2023).

2. Congress and the President explicitly defined the Mil. R. Evid. 513 privilege to preclude admission of psychotherapist-patient confidential communications with limited exceptions.

After *Jaffee*, the President created a psychotherapist-patient privilege in the Uniform Code by implementing Mil R. Evid 513. *United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (citing Exec. Order No. 13,140, 64 Fed. Reg. 55116 (1999)); *see also United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (detailing transition from *Jaffee* to Mil. R. Evid. 513 in the Uniform Code); *United States v. Jenkins*, 63 M.J. 426, 430 (C.A.A.F. 2006) (Mil. R. Evid. 513 approach more limited than *Jaffee*). "Rather than a case-by-case examination of the scope of the Rule as in the federal civilian sector, the President has set forth in detail the psychotherapist privilege for the military." *Rodriguez*, 54 M.J. at 160 (analyzing previous iteration of presidentially-defined privilege).

The military implementation of the Rule was "crafted to balance the interest of a victim in having private communications protected, the interest of an accused in having potentially exculpatory material disclosed, and the interest of the military in facilitating access to information that bears on the well-being of its servicemembers and the integrity of its operations." *Beauge,* 82 M.J. at 162–63.

The Rule's importance is reflected in Congress' action in the Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L No. 113-291, Sec. 537, 128 Stat. 3292, 3369 (2014) ("2015 NDAA"),

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

Given the widely recognized "social benefit to confidential counseling," Mil. R. Evid. 513 cannot be said to be arbitrary or disproportionate to its purpose. *LK v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017). If anything, this case—where the patient receiving confidential counseling was sexually abused as a child by a family member—serves only to highlight the importance of the Rule 513 privilege.

Indeed, unlike other federal courts, military courts have "been provided with a comprehensive set of evidentiary rules with regard to privileges and the exceptions thereto." *Custis*, 65 M.J. at 370. In our military system, "it is for the policymaking branches of government to weigh the utility of [privileges] against the truth-seeking function of the court-martial, and if appropriate, make adjustments to the express exceptions." *Id*. at 371.

3. Congress explicitly removed the "constitutional exception" in 2015. Mil. R. Evid. 513's evolving protections reflect attention by Congress and the President to protecting a psychotherapist-patient privilege in military courts.

Until 2015, there were eight exceptions to the psychotherapist-patient privilege in the military justice system. Mil. R. Evid. 513(d)(1)–(8), Supp. to

M.C.M. (2012 ed.). The eighth exception provided that there is no privilege when the "admission or disclosure of a communication is constitutionally required." *Id.*

In the 2015 National Defense Authorization Act, Congress directed the President "to significantly expand the protection offered to psychotherapist-patient communications in Military Rule of Evidence 513." Angel M. Overgaard, *Redefining the Narrative: Why Changes to Military Rule of Evidence 513 Require Courts to Treat the Psychotherapist-Patient Privilege as Nearly Absolute*, 224 Mil. L. Rev. *979, *979–86 (2016).

Congress specifically directed removal of the constitutionally-required exception in subsection (d)(8). (J.A. 242) (requiring Rule 513 to be modified "[t]o authorize the military judge to conduct a review in camera of records or communications *only* when [513(e)(3) test is met]."). The President then amended Mil. R. Evid. 513 and removed exception (d)(8). Exec. Order 13,696, 80 Fed. Reg. 35783, 35819-20 (June 17, 2015).

"After observing military judges routinely breach the privilege . . . , Congress and the President attempted to substantially strengthen the privilege by removing the constitutional exception . . . and adding . . . seven enumerated exceptions for in camera review." *Payton-O'Brien*, 76 M.J. at 787. "The policy decision of Congress and the President is clear: the psychotherapist-patient privilege should be protected to the greatest extent possible." *Id.*

4. No general constitutional right to discovery exists in criminal cases. The Accused has no discovery right to this evidence, given the Rule satisfies the *Scheffer* and *Holmes* test.

"There is no general constitutional right to discovery in a criminal case, and *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] did not create one." *Weatherford*, 429 U.S. at 559. The Sixth Amendment does not apply to discovery because "the right to confrontation is a *trial* right." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) (emphasis in original); *see also United States v. Tinsley*, 81 M.J. 836, 847–53 (A. Ct. Crim. App. 2021) (explaining no Confrontation Clause or *Brady* exception to Mil. R. Evid. 513). There is also no "clearly established Supreme Court precedent requiring that a defendant have access to a witness's psychiatric records for impeachment." *See, e.g., Newton,* 354 F.3d at 781.

The Accused has no discovery or Confrontation Clause right to the Victim's confidential psychotherapist-patient communications. *See Tinsley*, 81 M.J. at 847–53. As discussed above, rules excluding evidence from criminal trials do not implicate the constitutional "right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308 (citation and internal quotation marks omitted). Mil. R. Evid. 513 is neither arbitrary nor disproportionate: it is narrowly tailored to serve its purposes.

5. Mil. R. Evid. 513 is not "arbitrary or disproportionate" to the purpose it serves of protecting psychotherapist-patient confidential communications.

Nothing supports a finding that exclusion of privileged communications under Mil. R. Evid. 513 unconstitutionally denies an accused the right to present a complete defense under the *Scheffer* and *Holmes* test. Mil. R. Evid. 513 is not "arbitrary or disproportionate" for five reasons under Supreme Court precedent.

a. Mil. R. Evid. 513 is not disproportionate. It is narrowly tailored to serve its purpose, which is to protect confidential communications.

In *Crane*, the Supreme Court found an evidentiary ruling infringed the right to present a complete defense where it excluded evidence of the circumstances of a voluntary confession. 476 U.S. at 683. The Supreme Court emphasized that the "blanket exclusion" of "competent, reliable evidence" deprived the defendant of a fair trial, where the evidence was central to the defendant's claim of innocence. *Id.* at 690. The Court reversed, finding that no "rational justification [existed] for the wholesale exclusion of a body of potentially exculpatory evidence." *Id.* at 691.

In *Rock*, the Supreme Court held that a rule prohibiting introduction of hypnotically refreshed testimony was unconstitutional because the "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify . . . absen[t] . . . clear evidence by the State repudiating the validity of all post-hypnosis recollections." 483 U.S. at 61–62.

Unlike the blanket and wholesale exclusions in *Crane* and *Rock*, Mil. R. Evid. 513 is narrowly tailored to balance the interests of the accused, the victim, the government, and society. The privilege protects only "confidential communications." *Mellette*, 82 M.J. at 375. It allows parties access to unprivileged mental health diagnoses, prescriptions, and treatments under R.C.M. 701 and 703, and narrow access to privileged matters subject to the enumerated exceptions of Mil. R. Evid. 513(d).

Mil. R. Evid. 513 is not "disproportionate" under the *Scheffer* and *Holmes* test. *See Beauge,* 82 M.J. at 168 ("We do not find a basis to conclude that the privilege . . . in the instant case, was . . . disproportionate to the purposes served.").

b. Mil. R. Evid. 513's provisions directly relate to its purpose of protecting privileged communications.

In *Chambers*, the Supreme Court held unconstitutional the application of the voucher and hearsay rules to deny a murder defendant the ability to cross-examine a witness who previously confessed to the same murder, and to introduce evidence the witness made self-incriminating statements to three other people. 410 U.S. at 294. The *Chambers* Court noted that the State made no attempt to "defend" or "explain [the] underlying rationale" of one of the rules. *Id.* at 302.

In *Washington*, the Supreme Court found a rule prohibiting the defendant using accomplice testimony violated the right to compulsory process under the Sixth Amendment. 388 U.S. at 14. The Court noted that the archaic rule

prohibiting the accused from calling an accomplice could not be defended even on grounds that accomplices are "particularly likely to commit perjury," since acquitted accomplices were permitted to testify and the government could call accomplices. *Id*. at 22–23.

In contrast, Mil. R. Evid. 513 precludes only evidence of privileged confidential communications, and directly serves the purpose announced in Mil. R. Evid. 513(a)—to provide a "privilege to refuse to disclose . . . a *confidential communication* made between the patient and a psychotherapist." The Mil. R. Evid. 513 textual privilege serves a purpose similar to the purpose created in Article III courts in *Jaffee*: "protecting communications . . . serves a public good transcending the normal[] . . . principle of utilizing all rational means for ascertaining the truth." 518 U.S. at 9 (internal cite and quotations omitted).

The Mil. R. Evid. 513 privilege does not prevent presenting evidence at trial—which may provide other routes to attack a witness without using communications—of relevant non-privileged diagnoses, prescriptions, or treatments. Unlike the archaic rules the State did not defend in *Chambers,*

Congress and the President have repeatedly reaffirmed, and strengthened protections for confidential psychotherapist-patient communications.[5]

The Rule directly relates to its purpose.

c. Mil. R. Evid. 513 applies equally to the prosecution and defense: the rule is not arbitrary.

In *Washington*, the defendant was precluded from calling as a witness someone who had been charged and convicted of committing the same murder as the defendant. 388 U.S. at 14. The Court noted that in contrast, the prosecution was allowed to call the same accomplices to testify. *Id*. at 22–23. This haphazard application of the rule undermined its rationale of excluding unreliable testimony and thus the rule was arbitrary. *Id*.

Conversely, in *Scheffer*, Mil. R. Evid. 707 prohibited all polygraph evidence in courts-martial, whether offered by the United States or the accused, and therefore was found to be "rational and proportional" in excluding unreliable evidence. 523 U.S. at 312.

---

[5] Beyond Mil. R. Evid. 513 amendments, Congress and the President also recently passed The Brandon Act, a law that creates a self-initiated referral process for servicemembers seeking a mental health evaluation and aims to reduce stigma by allowing them to seek help confidentially. Self-Initiated Referral Process for Mental Health Evaluations of Members of the Armed Forces, National Defense Authorization Act for Fiscal Year 2022, 117 P.L. 81, Sec. 704, 2021 Enacted S 1605, 117 Enacted S 1605, 135 Stat. 1541 (2021).

Like *Scheffer*, the United States and the Accused are both governed by the same Rule precluding production, disclosure, and admission of privileged communications. Unlike *Washington*, all parties have the chance to demonstrate one of the enumerated exceptions in order to use privileged evidence. Mil. R. Evid. 513(e). And all parties have the opportunity to seek to use non-privileged diagnoses, treatments, and prescriptions. R.C.M. 701; R.C.M. 703.

d. Mil. R. Evid. 513 does not inhibit the accused's right to testify.

In *Scheffer*, the Supreme Court noted that Mil. R. Evid. 707 did not implicate any significant interest of the accused because it did not prohibit him from testifying on his own behalf. 523 U.S. at 316–17.

Conversely, the *Crane* defendant was prohibited from explaining the circumstances of his confession, 476 U.S at 690, and the *Rock* defendant was precluded from sharing any of her hypnotically refreshed testimony, 483 U.S. at 56. In *Crane*, the Supreme Court was concerned with excluding exculpatory evidence "in the absence of any state justification." 476 U.S. at 690. In *Rock*, the Court was troubled with the "[w]holesale inadmissibility of a defendant's testimony [was] an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections." 483 U.S. at 61.

Here, unlike *Crane* or *Rock*, Mil. R. Evid. 513 does not prohibit the accused from testifying on his own behalf. Like *Scheffer*, an accused is free to exercise "his choice to convey his version of the facts to the court-martial members." 523 U.S. at 317.

e. Mil. R. Evid. 513 does not prohibit an accused from calling and confronting witnesses with relevant, non-privileged diagnoses, prescriptions, and treatments.

In *Davis v. Alaska*, the Supreme Court found a rule protecting juvenile records violated the defendant's confrontation rights when he was precluded from cross-examining a witness regarding his probationary status, which was a possible bias. 415 U.S. 308, 319–20 (1974). In *Washington*, the defendant was precluded from calling and examining his accomplice who would have testified to exculpatory and mitigating circumstances. 388 U.S. at 15–16.

Unlike *Davis*, Mil. R. Evid. 513 does not preclude production, disclosure, and admission of evidence of non-privileged diagnoses, prescriptions, and treatments under R.C.M. 701, R.C.M. 703, and other rules of evidence. Unlike *Chambers*, *Washington*, or *Davis*, Mil. R. Evid. 513 does not prohibit the accused from calling and confronting witnesses with the non-privileged evidence, including diagnoses, prescriptions, and treatments. Instead, Mil. R. Evid. 513 provides sufficient avenues of cross-examination and impeachment.

Indeed, Mil. R. Evid. 513 does not preclude presentation of evidence at trial of relevant non-privileged diagnoses, prescriptions, or treatments—but instead provides routes to attack a witness without using confidential communications.

E. The Navy-Marine Corps Court of Criminal Appeals in *Payton-O'Brien* exceeded its authority in creating a judicial remedy that required the Victim to choose between abating the proceedings or allowing the Accused access to her privileged records. No such remedy exists in the Rule.

1. Courts-martial have only that authority given to them explicitly by the Congress and the President. The *Payton-O'Brien* opinion exceeds its statutory authority by judicially creating a list of remedies the President did not provide in Mil. R. Evid. 513.

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, UCMJ, 10 U.S.C. § 836. The Supreme Court has weighed in on this clear Congressional statutory balancing of authority in the military justice system, reminding practitioners that the President—not appellate courts—make rules of evidence and procedure at courts-martial. *Weiss*, 510 U.S. at 177; *Solorio*, 483 U.S. at 447–48; *Middendorf*, 425 U.S. at 43; *Rostker*, 453 U.S. at 70; *see also Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

Military judges are Article I judges and have "no inherent judicial authority" separate from the statutory authorities granted in the Uniform Code, and the regulatory grants provided by the President in the Rules for Courts-Martial and

Military Rules of Evidence. *United States v. Weiss,* 36 M.J. 224, 228 (C.A.A.F. 1992); *see also 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 Code and Manual's extant procedures are "sufficient to ensure the proper balance between obtaining needed testimony and safeguarding rights of the accused."). The *Payton-O'Brien* opinion exceeds that authority and judicially establishes procedures that require resort to the lower court's opinion, rather than the text of the already established and fully protective Rules.

The President used his Article 36 authority to promulgate Mil. R. Evid. 513, which contains no exception to the privilege for constitutionally-required evidence. The President, under the same authority, has promulgated a discrete number of procedural rules that give military judges the authority to remedy failures of discovery. *See, e.g.,* Mil. R. Evid. 505(f)(4), (5), Mil. R. Evid. 505(j)(4) (permitting convening authority or military judge to dismiss charges where privileged classified information is necessary for defense or would materially prejudice accused, or to strike or preclude testimony or declare mistrial); Mil. R. Evid. 506(e), (f), (j)(4) (where privileged government information would be "relevant and necessary" to defense but is not provided, convening authority or

military judge may provide remedies including providing substitute information, dismissing charges, declaring mistrial, or striking or precluding testimony); Mil. R. Evid. 507(e)(4) (where identity of informant is necessary to defense and material prejudice would result, military judge may dismiss charge).

Congress and the President have created no such remedy or balancing test to the Mil. R. Evid. 513 privilege. Absent Congress or the President enacting such remedies or exceptions, the Supreme Court agrees that appellate courts cannot simply tailor such rules with judicially created exceptions and remedies. *See Scheffer,* 523 U.S. at 312–14 (appellate court reversed after contradicting rules of evidence and procedure set by President).

2. The Military Judge's remedy requiring disclosure of privileged evidence or abatement is tantamount to re-creating the now-removed "constitutionally required" enumerated exception.

The Navy-Marine Corps Court of Criminal Appeals explicitly and correctly held that "a military judge may not order production or release of Mil. R. Evid. 513 privileged communications when the privilege is asserted . . . unless the requested information falls under one of the enumerated exceptions to the privilege listed in Mil. R. Evid. 513(d)." *Payton-O'Brien,* 76 M.J. at 783.

Then, without properly conducting either a *Scheffer* or *Holmes* analysis, the Navy-Marine Court judicially altered how Mil. R. Evid. 513 works. First, it required that if the "military judge determines . . . the accused's constitutional

rights still demand production or disclosure of the privileged materials," the judge should then "give[] the victim an opportunity to waive the privilege." 76 M.J. at 789–90. Then, it held that if the victim declines to waive and "when the failure to produce said information 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." *Id.* at 783.

The Navy-Marine Court's judicially created remedy, and the Military Judge's application of that remedy here, re-creates the "constitutionally required" enumerated exception by essentially forcing the Victim to reveal her privileged confidential communications—or lose the possibility of justice at court-martial. This was error.

In *Custis*, this Court held "the authority to add exceptions to the codified privileges within the military justice system lies not with this Court of the Courts of Criminal Appeals, but with the policymaking branches of government." 65 M.J. at 369. The *Custis* Court continued, "it is for the policymaking branches of government to weigh the utility of the . . . privilege against the truth-seeking function of the court-martial." *Id*. at 371.

In *Beauge*, this Court recently underscored that "where an Appellant's motion to compel does not meet the standard laid out in [Mil. R. Evid.] 513(e)(3), a military judge does not have the authority to conduct an in camera review." 82

M.J. at 166. With added emphasis, this Court explained, "Because the military judge ruled that the exception did not apply to this information, Appellant necessarily failed to meet his burden to show, by a preponderance of the evidence, either 'a specific factual showing that the records or communications would yield evidence admissible *under an exception to the privilege*' or 'that the requested information me[t] *one of the enumerated exceptions*." *Id*. (quoting Mil. R. Evid. 513(e)(3)(A)–(B) (2016 ed.)) (emphasis in *Beauge* opinion).

But here, the Military Judge and lower court judicially created a remedy that recreates the constitutional exception and creates remedies for non-disclosure, including abatement. That judicially created remedy must be discarded in favor of the plain text of the Rule, after applying *Scheffer* and *Holmes*.

3. The Supreme Court in *Jaffee* cautioned against balancing the common law privilege against the accused's rights on a case-by-case basis.

In *Jaffee*, the Supreme Court rejected the creation of a case-by-case balancing test that weighed the privilege against the accused's need for evidence. 518 U.S. at 17–18. A balancing test makes the privilege itself uncertain. *Id.* "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege . . . An uncertain privilege . . . is little better than no privilege at all." *Id*.

In contrast to those cases that arise in the framework of common law privileges and Fed. R. Evid. 501, which includes explicit exception to privileges where "the United States Constitution" "provides otherwise"—the Military Rules of Evidence no longer contain a constitutional exception, and the purpose of the military rules of evidence is "to provide predictability, clarity, and certainty through specific rules rather than a case-by-case adjudication of what the rules of evidence would be." *Rodriguez*, 54 MJ at 158. "The privileges set forth by the President provide the certainty and stability necessary for military justice." *Id.* (citation and internal quotation marks omitted).

The *Payton-O'Brien* court, acting as if Congress and the President had not already spoken and failing to apply any *Weiss*-type deference, treated the military privilege as if it were the *Jaffee* privilege and a matter of Fed. R. Evid. 501, and created uncertainty in the military application of the military psychotherapist-patient privilege.

The *Payton-O'Brien* test is tantamount to creating an exception to the privilege. It must be set aside.

F. *Payton-O'Brien* should be overturned.

In *Tinsley*, the Army Court of Criminal Appeals held that "the military courts do not have the authority to either 'read back' the constitutional exception into Mil. R. Evid. 513, or otherwise conclude that the exception still survives

notwithstanding its explicit deletion." 81 M.J. at 849. The United States agrees. This Court should reverse *Payton-O'Brien* to the extent it creates a remedy not created by Congress or the President, one that forces the Victim to choose between waiving her privilege or facing abatement of charges.

1. *Payton-O'Brien* failed to properly apply *Scheffer* and *Holmes* to the Rule and failed to give the appropriate *Weiss* deference to congressional and presidential governance of the military.

After recognizing the inviolability of the privilege, *Payton-O'Brien* incorrectly continued, "when the failure to produce said information 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." 76 M.J. at 783.

This holding failed to apply the *Weiss* deference due to Congress' decision to regulate military justice differently than it regulates the civilian justice system. This holding also failed to properly apply *Scheffer* and *Holmes,* or to recognize that Congress and the President crafted Mil. R. Evid. 513 in the constitutional framework of both *Scheffer* and *Holmes,* as explained above. The judicial remedy, where Congress and the President chose to provide none, must be set aside.

2. *Payton-O'Brien* undervalued the full government interest underlying the creation of an evidentiary privilege over confidential communications in Mil. R. Evid. 513.

The *Payton-O'Brien* court dismissed governmental interests as "noble goals and notable policy concerns." 76 M.J. at 789. And *Payton-O'Brien* further limited its analysis to the "privacy rights of the victim." *Id.*

But the proper test includes analysis of the "purposes" the evidentiary rule serves. *See supra* Sections II.B.3, II.D.2–3. Those interests include the societal and national security benefit of effective psychotherapy. *Beauge*, 82 M.J. at 162–63. They include that, at least for Article III courts and under Fed. R. Evid. 501: "The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee*, 518 U.S. at 11. And they include that "[t]he mental health of our citizenry . . . is a public good of transcendent importance," and that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.* at 10–11.

Payton-O'Brien undervalued the full interests required for application of the *Scheffer* and *Holmes* test.

3. *Payton-O'Brien* overvalues the accused's interest.

Payton-O'Brien identified that there may be scenarios of serious concerns "regarding witness credibility—which is of paramount importance—and may very

well be case dispositive." 76 M.J. at 789. The opinion then identified three areas in which some courts have allowed discovery of privileged information: "(1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and related events." *Id*.

However, *Payton-O'Brien* was decided before *Mellette*, when there was uncertainty about the scope of the Mil. R. Evid. 513 privilege. At that time, the Coast Guard Court of Criminal Appeals had held that the privilege extended to diagnoses, prescriptions, and treatments. *Kitchen*, 75 M.J. at 719. Post-*Mellette,* it is now clear that diagnoses, prescriptions, and treatments are not covered by the privilege.

The interest of the Accused in privileged communications—beyond information about diagnoses, prescriptions, and treatments—is therefore much smaller now than it was at the time *Payton-O'Brien* was decided.

4. *Payton-O'Brien* erroneously turns the right of a complete defense into a right of general discovery.

As discussed above, no general constitutional right exists to pretrial disclosure. *Weatherford*, 429 U.S. at 559. No Supreme Court precedent requires that a defendant must be able to access a witness's confidential communications. *Newton*, 354 F.3d at 781.

Despite this, *Payton-O'Brien* misconstrues the right to a meaningful opportunity to present a complete defense as a pretrial discovery right, when it highlights that other courts "have allowed *discovery* of privileged information" in various situations. As the Supreme Court cautioned against, this erroneously "transform[s] the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." *Ritchie,* 480 U.S. at 52.

5. *Payton-O'Brien* relies on inapposite state precedent.

Payton-O'Brien notes that some state courts allow discovery of privileged information in certain situations. 76 M.J. at 789, fn. 28 (citing Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. *1, *41–45 (2007)).

The Navy-Marine Court cited a Connecticut case, *State v. Peeler*, 857 A.2d 808 (Conn. 2004). *Payton-O'Brien*, 76 M.J. at 789, fn. 28 (citing 86 Or. L. Rev. at *18, fn. 77). In *Peeler,* the state privilege precluded disclosure of even mental health records of a witness' "diagnos[is of] significant mental disorders" before and after the alleged murders, and precluded disclosure that she had been "medicated with Thorazine, an antipsychotic drug, on several occasions." 857 A.2d at 842. Such diagnoses and prescriptions could have called into question her "mental stability at the time of the events . . . and . . . created doubt regarding her ability to accurately perceive and related the events surrounding the murders." *Id*.

However, under Mil. R. Evid. 513 evidence of diagnoses, prescriptions, and treatments are unprivileged and admissible to impeach a witness's mental stability and capability to perceive. *Mellette*, 82 M.J. at 375, 380–81. Thus, these required diagnosis and prescription records under *Peeler* would be disclosed under Mil. R. Evid. 513, avoiding the constitutional concern.

Further, *Payton-O'Brien* adopted a framework similar to Wisconsin in *State v. Shiffra*, 175 Wis. 2d 600 (Ct. App. 1993), of precluding victims from testifying, or abating the prosecution, if they did not waive their privilege and submit their records for in camera review. *Payton-O'Brien*, 76 M.J. at 789, fn. 28 (citing 86 Or. L. Rev. at *19, fn. 81); *see also* Cormac Smith, *Applying the New Military Rule of Evidence: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice* (Army Lawyer, Nov. 2015).

However, the Wisconsin Supreme Court recently overturned this same framework as unsound, unworkable, and incoherent, noting that the United States Supreme Court "never held that the right to present a complete defense applies before trial," and that evidentiary rules can be overturned only when they are "arbitrary [or disproportionately] exclude a defendant from introducing evidence at trial without a legitimate purpose for doing so." *State v. Johnson*, 407 Wis. 2d 195, 213–14 (Wis. 2023) (citing *Holmes*, 547 U.S. at 324–28).

Cases like *Peeler* and the now-overturned *Shiffra* shed no light on the application of Mil. R. Evid. 513 in the military. The lower court erred by relying on them.

6. *Payton-O'Brien* applied the balancing test *Jaffee* rejects.

By imposing a case-by-case balancing test at the trial level, *Payton-O'Brien* ignores the Supreme Court's rejection of just such a balancing test in *Jaffee*. 518 U.S. at 18; *Kinder*, 609 Fed. Appx. at 131–132 (overturning trial court's balancing test, and directing that "to the extent the district court has retained copies [of mental health records, they] be returned to the hospitals that produced the records or be destroyed."); *Johnson*, 407 Wis. 2d at 213–14 (in camera review still undermines statutory privilege and intrudes on victim's rights).

The *Payton-O'Brien* judicially-created "non-exhaustive list" of situations where the "privacy rights of the victim may yield to the constitutional rights of the accused" vitiates the policy choice inherent in Congress' and the President's explicit Military Rule of Evidence, and must be set aside. 76 M.J. at 789.

So too, the judicially created remedy serves to defeat the privilege that—although unlike the Article III *Jaffee* rule in that it is stronger and statutorily-defined—like *Jaffee* observes, results in "[a]n uncertain privilege [that] . . . is little better than no privilege at all." 518 U.S. at 17–18.

G. R.C.M. 703(g)(2) requires that the privileged documents reviewed *in camera* be sealed against all parties and attached to the record.

R.C.M. 703(g)(2) states that "[i]f the military judge reviews *any materials in camera,* the entirety of any materials examined by the military judge shall be attached to the record of trial as an appellate exhibit. . . [Sealed] material may only be examined by . . . appellate authorities in accordance with R.C.M. 1113."[6]

Here, the Military Judge inadvertently viewed confidential communications privileged by Mil. R. Evid. 513. These communications do not thereby lose their privilege. Mil. R. Evid. 513(b)(4) ("communication is 'confidential' if *not intended* to be disclosed to third persons other than . . . in furtherance of . . . professional services to the patient"); *see, e.g., Kinder,* 609 Fed. Appx. at 131–32.

Given that the Accused has no right to the Victim's privileged records, and given that *Payton-O'Brien* must be overturned to the extent it holds otherwise,

---

[6] In contrast, at least some federal civilian courts deal with this issue differently than does the military. The Fourth Circuit Court of Appeals in *Kinder v. White*, 609 Fed. Appx. 126 (4th Cir. 2015), reviewed a trial court that "employed precisely [the] . . . weighing [rejected by *Jaffee*] of Kinder's privacy interest versus White's evidentiary need" for privileged psychotherapist-patient records in a criminal case. The court observed that when the Supreme Court "recognizes . . . a privilege under [Fed. R. Evid.] 501, it necessarily has already determined that the privilege in question 'promotes sufficiently important interests to outweigh the need for probative evidence'." *Id.* at 131. The *Kinder* court reversed the trial court's order for mental health records and directed that "Kinder's mental health records, to the extent the district court has retained copies thereof, be returned to the hospitals that produced the records or be destroyed." *Id*. at 131–32. But the federal civilian rule—whatever it is—is inapplicable in courts-martial.

R.C.M. 703(g) appears to require sealing and attachment of the materials review by the Military Judge in camera.

H. As R.C.M. 701 and 703 demonstrate, and *Payton-O'Brien* itself indicates, undisclosed privileged materials may not receive a remedy under R.C.M. 703.

Although the Military Judge and lower court did not rely on it, R.C.M. 703(e) should not provide a remedy to abate trials if privileged evidence is not disclosed. R.C.M. 703(e)(2) provides that if evidence "otherwise not subject to compulsory process . . . is of such central importance to an issue . . . essential to a fair trial . . . the military judge shall grant a continuance . . . to attempt to produce the evidence or shall abate."

But in context, the Rules for Courts-Martial permit no use of this provision to achieve what the *Payton-O'Brien* court attempted to achieve by judicial activism.

First, R.C.M. 701(f) provides that "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence."

And second, R.C.M. 703(a), "Production of witnesses and evidence," directs that "prosecution and defense . . . shall have equal opportunity to obtain witnesses and evidence, subject to the limitations . . . in R.C.M. 701."

Read together, these provisions should be read to exclude "privileged information" from the evidence that is "otherwise not subject to compulsory process." That is, R.C.M. 701(f) and R.C.M. 703(a) should be read to never require production of privileged evidence, unless the Military Rules of Evidence themselves require it.

The *Payton-O'Brien* court agreed, creating its judicial remedy only after rejecting R.C.M. 701, 703, and Article 46, and "rules for discovery" "as grounds to pierce the psychotherapist-patient privilege." 76 M.J. at 788, fn.25. Ironically, the *Payton-O'Brien* court adds that "It is axiomatic that if a privileged communication is disclosed whenever it would be subject to the rules governing discovery then there [would be] no privilege at all." *Id.* (internal quotation and citation omitted).

Indeed.[7]

Conclusion

The United States respectfully requests that this Court answer certified question one in the negative and answer certified question two in the affirmative, in part.

---

[7] This Court's recent litigation in the *Warda* case is inapposite to the question of whether undisclosed privileged materials may be remedied under R.C.M. 703(e). There, the trial court was informed that United States Customs and Immigration Service "did not regard [the Victim] as holding a privilege with respect to her immigration records." Appellee Br. at 7, *United States v. Warda,* No. 22-0282/AR (C.A.A.F. Dec. 30, 2022).

The Military Judge's ruling abating proceedings should be set aside, and the record should be returned to the Judge Advocate General of the Navy for remand to the Military Judge for action not inconsistent with the Court's opinion. *See LRM v. Kastenberg*, 72 M.J. 364, 372 (C.A.A.F. 2013).

JAMES A. BURKART
Lieutenant Colonel, U.S. Marine Corps
Government Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
james.a.burkart2.mil@us.navy.mil
Bar no. 36681

CANDACE G. WHITE
Major, U.S. Marine Corps
Government Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
candace.g.white.mil@us.navy.mil
Bar no. 36701

JOSEPH M. JENNINGS
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-2947, fax (202) 685-7687
joseph.m.jennings.mil@us.navy.mil
Bar no. 37744

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
brian.k.keller3.civ@us.navy.mil
Bar no. 31714

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 12,046 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared in a proportional typeface using Microsoft Word Version 2016 with 14-point, Times New Roman font.

Certificate of Filing and Service

I certify this document was emailed to the Court's filing address, uploaded to the Court's case management system, and emailed to Counsel for Appellant, Lieutenant Colonel Elizabeth A. MURPHY, U.S. Army, and Captain April P. McCROSKEY, JAGC, U.S. Army, and Counsel for Real Party in Interest, Captain Colin W. HOTARD, U.S. Marine Corps, on September 25, 2023.

JAMES A. BURKART
Lieutenant Colonel,
U.S. Marine Corps
Appellate Government Counsel