IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re B.M.,
Appellant

v.

UNITED STATES,
Appellee

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

ANSWER ON BEHALF OF REAL PARTY IN INTEREST

Crim.App. Dkt. No. 202300050

USCA Dkt. No. 23-0233/NA

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

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

MILITARY 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 PSYCHOTHERAPIST. THE MILITARY JUDGE APPLIED R.C.M. 703 TO ORDER PRODUCTION AND CONDUCT AN IN CAMERA REVIEW OF [APPELLANT'S] DIAGNOSIS AND TREATMENT. DID THE MILITARY JUDGE ERR BY APPLYING THE NARROW SCOPE OF THE M.R.E. 513(A) PRIVILEGE DEFINED IN *MELLETTE* TO BYPASS THE PROCEDURAL REQUIREMENTS OF M.R.E. 513(E)?

II.

THE ARMY CRIMINAL 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

After Appellant alleged Real Party in Interest (RPI) sexually and physically assaulted her, and in light of her public disclosures about her ongoing mental health issues in the wake of prior sexual and physical abuse, RPI moved to compel production of her mental health records.[1] The Military Judge granted the motion as to Appellant's diagnoses and treatment information, which the Government conceded was subject to production.[2] At Appellant's request, the Military Judge agreed to review her records in camera, to ensure they did not contain any privileged information.[3]

While conducting her in camera review, the Military Judge discovered that the records contained privileged information.[4] She informed the parties and Appellant and announced her intended course of action to continue her in camera review and redact out the privileged information.[5] Neither the parties nor Appellant objected to this course of action.[6]

Thereafter, as the Military Judge continued her review to redact any privileged information, she came across certain privileged information that she

[1] J.A. at 44-55.
[2] J.A. at 96-98, 186.
[3] J.A. at 191-93, 96-98.
[4] J.A. at 100-01.
[5] J.A. at 100-01.
[6] J.A. at 99.

determined must be produced in order to ensure that RPI could present a complete defense and thus receive a fair trial.[7] She informed Appellant of her determination, and her further determination that if the information were not produced, she would be forced to abate the proceedings.[8] When Appellant maintained her privilege to the information at issue, rather than order it produced over her objection, the Military Judge abated the proceedings.[9]

Appellant then petitioned the Navy-Marine Court of Criminal Appeals (NMCCA) under Article 6b, Uniform Code of Military Justice (UCMJ), to issue a writ of mandamus overturning the Military Judge's ruling and disqualifying her from further participation in the case.[10] The NMCCA denied the petition and upheld the Military's Judge's ruling, finding that "rarely are psychotherapist-patient records as material as they are in the present case."[11]

Appellant filed a writ-appeal petition with this Court, which was denied for lack of jurisdiction.[12] The U.S. Navy Judge Advocate General (JAG) then certified the instant issues for this Court's review pursuant to Article 67(a)(2), UCMJ.[13]

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[7] J.A. at 46.
[8] J.A. at 1, 105.
[9] J.A. at 127.
[10] J.A. at 2.
[11] J.A. at 19.
[12] *B.M. v. United States*, ___M.J. ___, 2023 CCA LEXIS 583 (C.A.A.F. 2023).
[13] J.A. at 207-09.

Statement of Facts

A. Appellant publically discussed her ongoing mental health issues.

In 2019, Appellant wrote a book entitled, "They Told Me to Love My Abuser."[14] Her "memoir," as she described on a podcast, detailed her history of sexual and physical trauma and her ongoing struggles with her mental health.[15] She recounted how significant men in her life caused her trauma through physical assault, emotional abuse, and sexual abuse.[16] She wrote extensively about her conversations with her psychotherapists, at times detailing conversations verbatim.[17] She described how her past trauma caused her to lapse into dissociated mental states during her therapy sessions.[18] And she described how her adult therapy sessions were her way to deal with problems in her dating relationships, which stemmed from a deeper trauma "correlated to her violent and tumultuous past."[19]

Appellant also wrote specifically about her anxiety and "extreme" fear of bathrooms and showers.[20] She wrote, "It was the fear of what was on the other side of the bathroom door . . . . I never knew exactly what was happening, which is why

[14] J.A. at 206.
[15] J.A. at 45, 88.
[16] J.A. at 45, 88.
[17] J.A. at 45, 88.
[18] J.A. at 18, 88.
[19] J.A. at 46.
[20] J.A. at 88.

I didn't like going to the bathroom. That's the problem with taking showers. The house is quiet when I go in, but by the time I come out, all hell had broken lose [sic]."[21]

B. Appellant alleged RPI sexually and physically assaulted her in their shared cabin after she went in the bathroom and started taking a shower.

A few years after she disclosed her extreme fear and anxiety about bathroom showers (and other ongoing mental health issues), Appellant met RPI.[22] They met at a "Single Officers Retreat," a retreat for single, African American officers of the various service branches.[23] Although she did not know RPI prior to the retreat, she agreed to share a cabin with him.[24] On the first night of the retreat, the two socialized in a hot tub before they returned to their cabin, where she went into the bathroom and started taking a shower.[25]

Appellant subsequently alleged that while she was in the shower, RPI, a twenty-year career officer, started screaming and pounding on the bathroom door and then pushed her over a sink.[26] [redacted]

[21] J.A. at 88.
[22] J.A. at 46.
[23] J.A. at 46.
[24] J.A. at 46.
[25] J.A. at 46.
[26] J.A. at 89, 174.

[redacted].[27] [redacted].[28]

[redacted]

[redacted].[30] The next morning, she started telling multiple people multiple stories about what allegedly occurred.[31]

C. RPI moved for production of Appellant's mental health records.

After being charged with sexual and physical assaults based on Appellant's allegations, RPI moved for production of her mental health records.[32] He averred that her ongoing, publically-disclosed mental health issues, including her extreme fear and anxiety about bathroom showers demonstrated the relevancy and necessity of the records.[33] The motion sought not only her non-privileged diagnoses, medication, and treatment information, but also her privileged communications based on the theory that her public disclosures in her memoir had effectively waived her privilege under Military Rule of Evidence (M.R.E.) 510.[34] In support of the motion, RPI provided an affidavit from a forensic psychologist.[35] The

[27] J.A. at 175.
[28] J.A. at 175.
[29] J.A. at 175.
[30] J.A. at 175.
[31] J.A. at 48.
[32] J.A. at 28, 44.
[33] J.A. at 28, 44.
[34] J.A. at 54.
[35] J.A. at 88-89.

psychologist opined that Appellant's disclosures in her book suggested she had ongoing mental health disorders that could alter her memory or perception, cause flashbacks leading to altered or inaccurate perceptions of events, and be triggered by environmental cues such as her extreme fear of bathroom showers.[36]

D. After Appellant's closed-session testimony on the motion to produce her mental health records, the Government conceded that her non-privileged diagnoses and treatment information were subject to production.

Pursuant to M.R.E. 513, the Military Judge held a closed hearing at which she allowed the parties to call witnesses, including Appellant.[37] When Appellant objected to testifying, the Military Judge provided the parties strict limitations on the scope of their examination.[38] Appellant provided limited testimony about her mental health treatment, including when and where she had received it.[39] [redacted][40]

Based on this testimony, RPI no longer argued her disclosures waived the privilege and requested production of Appellant's non-privileged diagnoses, medications, and treatment information for the time period she testified to

[36] J.A. at 17-18, 88-89.
[37] J.A. at 156-96, 3.
[38] J.A. at 150-51, 3.
[39] J.A. at 158, 160, 3-4.
[40] J.A. at 162, 166-67.

receiving mental health treatment.[41] Although Appellant continued to object to the production of her non-privileged records, the Government agreed with RPI and conceded that under *Mellette* any diagnoses and treatments for the relevant time period were subject to production.[42]

E. After ordering production of Appellant's non-privileged diagnoses, medications, and treatment information, the Military Judge granted Appellant's request to conduct an in camera review of the records.

After considering the evidence and arguments on the motion, the Military Judge granted RPI's motion to produce insofar as it related to Appellant's non-privileged diagnoses, medications, and treatment information, which she determined was required to be produced under R.C.M. 703 and *Mellette*.[43]

Concerned that privileged communications might be comingled with this non-privileged information, Appellant requested that the Military Judge review her mental health records in camera before producing the information to the parties.[44] The Military Judge granted Appellant's request, allowed her and the parties to review and request changes to her written order, and then ordered the relevant Veterans Affairs (VA) mental health clinic to send her Appellant's non-privileged mental health diagnoses, prescriptions, and treatment information.[45] Her written

[41] J.A. at 178-80.
[42] J.A. at 186.
[43] J.A. at 96, 14.
[44] J.A. at 191.
[45] J.A. at 192-93, 103, 96-98.

order made clear that the information sent to her was to be limited to those specific categories of non-privileged information.[46]

F. When the Military Judge found that the records contained privileged information, she announced her intention to redact it during her in camera review, to which neither the parties nor Appellant objected.

While reviewing the mental health records in camera, the Military Judge realized that the VA Clinic failed to adhere to her order's specific limitations and included privileged psychotherapist-patient communications.[47] She notified the parties of this fact, explained her intended course of action to redact the privileged information in accordance with her order, and asked if Appellant still maintained her claim of privilege.[48] Appellant maintained her claim of privilege and did not object to the Military Judge's redaction plan.[49]

While redacting the records, the Military Judge limited her review and did not review [redacted][50] Nevertheless, while making the appropriate redactions, the Military Judge came across privileged information that

[46] J.A. at 96-98.
[47] J.A. at 100-01.
[48] J.A. at 100-01.
[49] J.A. at 99.
[50] J.A. at 103.

she concluded needed to be produced to RPI in order for him exercise his right to a complete defense and thus ensure a fair trial.[51] Specifically, she found privileged information pertaining to Appellant's "inability to accurately perceive, remember, or relate events;" "possible memory confabulation or conflation as a result of her past abuses;" and "multiple inconsistences in her account of the assaults."[52]

Upon finding this information, the Military Judge *ex parte* asked if Appellant maintained her privilege over the information and explained that if the information remained privileged, the inability to produce it to RPI would require abatement of the court-martial proceedings.[53] When Appellant responded that she maintained her privilege, rather than order the privileged information produced over Appellant's objection, the Military Judge ordered an abatement of the proceedings in order to prevent a fundamentally unfair trial.[54]

G. Appellant petitioned for a writ of mandamus directing that the Military Judge seal or destroy the VA records and recuse herself, which the NMCCA denied.

After the Military Judge denied Appellant's motions to reconsider her ruling and recuse herself, Appellant petitioned the NMCCA to issue a writ of mandamus directing the Military Judge to seal or destroy Petitioner's mental health records

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[51] J.A. at 104, 16.
[52] J.A. at 104 (citing *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017).
[53] J.A. at 105.
[54] J.A. at 127.

and to recuse herself.[55] Both RPI and the Government responded in opposition to the writ petition.[56]

After considering the record and the filings, the NMCCA denied Appellant's writ petition.[57] The court found the military judge: (1) "did not abuse her discretion when she ordered [Petitioner] to testify regarding the existence of mental health records, and the names of any providers;" (2) did not abuse her discretion when she ordered the mental health clinic to release [Appellant's] medical records;" and (3) "did not abuse her discretion when she abated the proceedings."[58]

The court found that RPI's motion to compel was rooted in Appellant's "publications and interviews . . . indicating that she ha[d] engaged in mental health treatment in the past and experienced significant psychiatric symptoms for many years."[59] The court noted that in her book the Appellant had discussed a history of flashbacks and instances "where [victims] lose touch with reality and feel as if they are outside their body, leading to an altered or inaccurate perception of events."[60] In this context, the court concluded that "rarely are psychotherapist-patient records as material as they are in the present case."[61]

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[55] J.A. at 2.
[56] J.A. at 2.
[57] J.A. at 22.
[58] J.A. at 14-15.
[59] J.A. at 17.
[60] J.A. at 18.
[61] J.A. at 19.

Summary of Argument

This Court should answer both certified questions in the negative. As even the Government concedes, the Military Judge did not err—much less clearly and indisputably err—in applying the R.C.M. 703, M.R.E. 513, and this Court's binding case precedent at every step of her analysis. Following a closed hearing, the Military Judge properly granted RPI's motion to compel as it related to Appellant's non-privileged diagnosis and treatment information (which the Government conceded was subject to production); agreed *at Appellant's request* to conduct an in camera review of the information produced from the clinic; and later appropriately announced her intent to redact out any privileged information, to which *Appellant did not object*. As this Court has previously found, such in camera review is precisely the way a privilege may be respected and preserved while also ensuring an accused's right to a complete defense and a fair trial.[62]

Nor did the Military Judge err—much less clearly and indisputably err—in determining that certain privileged information she encountered was so crucial to a fair trial that the failure to produce it to RPI required abating the proceedings. She found the information revealed potential defects in Appellant's ability to accurately perceive, remember, and relate events, which are among the key issues of concern

[62] *See, e.g.*, *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F 1997) (involving information subject to the attorney-client privilege).

that this Court specifically found "go to the very essence of witness credibility and reliability."[63] Far from an inappropriate remedy, abatement is exactly the sort of judicial action R.C.M. 703 and the Constitution call for in such situations. Thus, in this respect, the real question is not whether *Payton-O'Brien* should be overruled (if the Court believes it can reach that question), but how much of the NMCCA's reasoning this Court should adopt.

Argument

I. The Military Judge correctly applied M.R.E. 513, *Mellette*, and R.C.M. 703 in ordering production of Appellant's non-privileged diagnoses, medications, and treatment information, and did not err in reviewing the information in camera at Appellant's request.

Standard of Review

Appellant must show "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; (3) the issuance of the writ is appropriate under the circumstances."[64]

Discussion

Before analyzing the Military Judge's methodical, reasoned approach to the issues before her, RPI submits as an initial matter that Appellant lacks standing for

[63] *United States v. Mellette*, 82 M.J. 374, 381 (2022) (quoting *United States v. Mellette*, 81 M.J. 681, 694 (N-M. Ct. Crim. App. 2021) (quoting *Payton-O'Brien*, 76 M.J. at 789 n.28)).

[64] *United States v. Howell*, 75 M.J. 386, 390 (C.A.A.F. 2016) (citing *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)). *See* Section II.B.4 *infra* for further discussion on the appropriate standard of review.

her writ petition because she has suffered no injury. An injury-in-fact "must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[65] Here, far from suffering any such redressable injury, Appellant's privilege over her mental health information at issue is intact; has been neither voided nor harmed by the in camera review the Military Judge commenced at her request and continued without her objection; and will not be harmed by an abatement.[66] Thus, Appellant lacks standing.

A. The Military Judge applied the correct law when she ordered production of Appellant's non-privileged diagnoses, medications, and treatment information.

Assuming arguendo an issue without an injury-in-fact is justiciable by this Court, the Military Judge followed the procedural requirements of M.R.E. 513(e) in addressing the issue before her. Because Appellant asserted that the requested information was privileged, the Military Judge closed the hearing pursuant to Military Rule of Evidence 513(e)(2) and afforded Appellant the opportunity to be

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[65] *LRM v. Kastenberg*, 72 M.J. 364, 373 (C.A.A.F. 2013) (Ryan, J., dissenting) (citing *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2012) (internal quotations omitted); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

[66] *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (providing that a privilege is not voided during an in camera review); *Romano*, 46 M.J. at 274; *see also United States v. Wright*, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015) (citing *Romano*, 46 M.J. at 274) (providing that "the Government does not suffer a cognizable harm to a privilege it holds merely because the military judge orders documents to be produced for in camera review.").

heard.[67] She then, pursuant to the rule, allowed the parties to "call witnesses, including the patient" during the closed session.[68] And when RPI called Appellant, the Military Judge ensured that the scope of her examination was subject to appropriate limitations under the rule, to which Appellant did not object.[69]

Based on the evidence adduced on the motion, including Appellant's testimony, the Military Judge granted RPI's motion to produce only as to non-privileged diagnoses and treatment information, which she found (and the Government conceded) was subject to production under R.C.M. 703 and *Mellette*.[70] Far more than more "generalized conjecture" as Appellant argues,[71] the relevance and necessity of this information are well supported by the evidence. The ongoing mental health issues of Appellant—the central witness in the case—including but not limited to her particularized fear of bathrooms where she alleged RPI commenced his sexual and physical assaults, proved the records relevancy and necessity.

Thus, there was no abuse of discretion—much less a clear and indisputable one—in the Military Judge's application of R.C.M. 703, M.R.E. 513(e), and

[67] J.A. at 156-96.
[68] M.R.E. 513(e)(2).
[69] J.A. at 156-77.
[70] J.A. at 96, 186.
[71] Appellant Br. at 26.

Mellette in ordering the production of this non-privileged information.[72]

B. Appellant's argument regarding the applicability of every aspect of M.R.E. 513(e)(3) to the circumstances here is without merit.

As the Government acknowledges, Appellant is misguided in her argument as to the applicability of every aspect of M.R.E. 513(e)(3) to the circumstances of this case.[73] First, this rule delineates the conditions under which a military judge may order in camera review to rule on the production or admissibility of "*protected* records or communications," not *non-privileged* diagnosis and treatment information.[74] As the Government concedes, the four prongs of subparagraphs (A)-(D) of M.R.E. 513(e)(3) are simply not applicable to an order for production of non-privileged information.[75]

Second, Appellant's argument to the contrary ignores the fact that the Military Judge only conducted an in camera review of the records produced in this case *at Appellant's request,* to ensure no privilege information was commingled with the non-privileged information.[76] Appellant also fails to mention her acquiescence to the Military Judge's proposed course of action when her in camera review found exactly what Appellant was concerned about, the commingling of

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[72] J.A. at 195.
[73] Appellant Br. at 22-24.
[74] M.R.E. 513(e)(3) (emphasis added).
[75] *United States v. Beauge*, 82 M.J. 157, 161 (C.A.A.F. 2022).
[76] J.A. at 186.

privileged communications. When that occurred and the Military Judge notified all involved of her plan to continue her in camera review and redact out the privileged information, Appellant voiced no objection and simply maintained her privilege.[77] Thus, while Appellant *now* objects to the Military Judge's continuation of the in camera review Appellant herself requested, she made no such objection to the Military Judge's intended course of action at the time.

Nor was this Military Judge actually required to provide such notice before continuing the in camera review. In fact, contrary to Appellant's mischaracterization of the rule, M.R.E. 513(a) does not "authorize[] privilege holders to 'refuse and to prevent any other person' from *access to their privileged communications*."[78] What the rule actually states is that a patient can "refuse to disclose or prevent any other person from *disclosing* a confidential communication . . . ."[79] Because the Military Judge has not disclosed any of Appellant's confidential communications, she has not violated the rule.

In other words, contrary to Appellant's view, a military judge's in camera review of privileged records does not circumvent a privilege. The law holds just the opposite, that "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege" because a

[77] J.A. at 101.
[78] Appellant Br. at 25 (original emphasis deleted) (emphasis added).
[79] M.R.E. 513(a).

defendant who meets the standard does not automatically gain access to the records.[80] Here, the Military Judge acted well within her discretion, both before and after ordering the records produced, when she examined and redacted them in camera to ensure their contents were in compliance with her order.

Accordingly, this Court should find no error—let alone clear and indisputable error—in the Military Judge's application of M.R.E. 513, *Mellette*, and R.C.M. 703.

[80] *See Zolin*, 491 U.S. at 572 (explaining that "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege" because a defendant who meets the standard does not automatically gain access to the records).

II. Even if the second certified issue was justiciable (it is not), the NMCCA's decision in *J.M. v. Payton-O'Brien*, like the Military Judge's ruling, accords with the Rules for Courts-Martial and the Constitution.

Standard of Review

Appellant must show "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; (3) the issuance of the writ is appropriate under the circumstances."[81]

Discussion

Before examining the second certified issue, RPI submits as a (second) initial matter that the certified issue of whether *J.M. v. Payton-O'Brien* should be overruled is not a justiciable case or controversy. Article I courts incorporate Article III courts' constitutional case or controversy requirement, which requires a court to review only cases where an actual, redressable injury is presented.[82] When no such case or controversy is presented, an issue impermissibly asks a court to provide an advisory opinion.[83] Article 67(c), UCMJ, provides in pertinent part that "[i]n *any* case reviewed by it, [this Court] may act *only* with respect to . . . a decision, judgment, or order by a military judge, as affirmed or set aside as

[81] *Howell*, 75 M.J. at 390 (citing *Hasan*, 71 M.J. at 418); *see* Section II.B.4 *infra* for further discussion on the appropriate standard of review.
[82] *See United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008); *TransUnion*, 141 S. Ct. at 2203.
[83] *See United States v. Chisolm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (per curiam).

incorrect in law by the Court of Criminal Appeals."[84] The second certified issue makes no reference to any decision, judgment, or order by the Military Judge and does not ask this Court to review the lower court's ruling with respect to it. Thus, this Court of limited jurisdiction has no authority to address this second issue.

This case is distinguishable from certified issues in such cases as *LRM v. Kastenburg*, which related to an asserted error by a military judge and the appellate court's jurisdiction to address it.[85] Instead, here, the JAG asks this Court to review an NMCCA case decided six years ago and provide an advisory opinion as to whether *J.M. v. Payton-O'Brien* was correctly decided, regardless of whether or how it impacts this case.

What makes this issue all the more perplexing is the uncertainty of how the parties are to address it. What case is before this Court? Should RPI simply "answer the question" and argue that *Payton-O'Brien* was correctly decided, irrespective of any connection that may or may not have to this case? Or should he argue that the Military Judge's ruling and the lower court's affirmation of it were correct, irrespective of what *Payton-O'Brien* says?

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[84] Article 67(c)(1)(B), UCMJ (emphasis added).

[85] *Kastenberg*, 72 M.J. at 366 (certifying issues as to (a) whether the military judge erred by denying an alleged victim the right to be heard through counsel; (b) whether the court of criminal appeals erred by finding it lacked jurisdiction to hear the petition for writ of mandamus; and (c) whether this Court should issue the writ of mandamus).

Appellant's brief and the Government's answer further muddies the water. Appellant argues (for the first time) that the privileged records would be inadmissible at trial,[86] and the Military Judge should be disqualified from further proceedings."[87] But neither of these issues were certified for review and are outside the holding of *Payton-O'Brien*. Furthermore, the Government avers that *United States v. Scheffer*[88] and *Holmes v. South Carolina*[89]—cases reviewing the constitutionality of evidentiary rules—controls[90] and Appellant argues the constitutionality of M.R.E. 513,[91] even though *Payton-O'Brien* held the rule to be constitutional.

Importantly, the case before this Court is vastly distinguishable from *Payton-O'Brien*. It does not involve an accused seeking in camera review of privileged records. It involves a military judge who ordered production of non-privileged information, which Appellant then requested be reviewed in camera. Thus, the question of whether *Payton-O'Brien* should be overturned does not answer the central issue in the case: Whether the Military Judge (clearly and indisputably) erred by abating the proceedings after finding privileged information that she determined must be produced to RPI to ensure his right to a complete

[86] Appellant Br. at 50.
[87] Appellant Br. at 30.
[88] 523 U.S. 303 (1998).
[89] 547 U.S. 319 (2006).
[90] Appellee Answer at 23-27.
[91] Appellant Br. at 50-59.

defense and thus a fair trial. Because the second certified issue fails to seek review of the lower court's ruling on this issue, this Court has no jurisdiction to address it under the Constitution or Article 67(c), UCMJ.

A. The abatement remedy announced in *Payton-O'Brien* and followed by the Military Judge in this case accords with the President's prescribed rule for handling such issues: R.C.M. 703(e)(2).

In Article 46(a), UCMJ, Congress mandated that the parties at a court-martial shall have "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Pursuant to this congressional authorization, the President prescribed in R.C.M. 703(e)(1) that each party is "entitled to the production of evidence is relevant and necessary." The President further prescribed under R.C.M. 703(e)(2) that "a party is not entitled to the production of evidence which is . . . not subject to compulsory process."[92] However, when evidence is not subject to compulsory process due to the invocation of privilege (or for some other reason), the President has prescribed the following mandatory rule:

> If such evidence is of such *central importance* to an issue that it is *essential to a fair trial*, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in

[92] *See* R.C.M. 703(b)(3) (stating "a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a)"); M.R.E. 804(a)(1) (stating "[a] declarant is considered to be unavailable as a witness if the declarant . . . is exempted from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies").

> order to attempt to produce the evidence or *shall abate the proceedings*.[93]

In *United States v. Warda*, this Court recently applied the rule and found a complaining witness's confidential communications to be evidence of central importance, essential to a fair trial.[94] The complaining witness, a foreign national, moved to the United States after marrying the appellant and remained in-country even after the two divorced.[95] He sought production of her immigration records, arguing that the records would either show that she retained her resident status by claiming abuse or, if the records did not reflect a claim of abuse, then appellant could impeach her with an inconsistent statement.[96] Regardless of what they included, he asserted that the records could undermine the complaining witness's credibility.[97] But the United States agency in possession of the records, citing a federal statute that prevented disclosure, refused to produce the records or even admit their existence.[98] Additionally, the complaining witness refused to waive her privilege.[99]

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[93] R.C.M. 703(e)(2) (emphasis added).
[94] *United States v. Warda*, No. 22-0282, 2023 CAAF LEXIS 687, at *28 (C.A.A.F. Sept. 29, 2023).
[95] *Id.* at *4.
[96] *Id.* at *23-24.
[97] *Id.* at *24.
[98] *Id.* at *7.
[99] *Id.* at *8.

Without deciding whether the records were subject to compulsory process, this Court found the requested records were essential to a fair trial as the confidential communication potentially related to the appellant's theory and potentially included exculpatory information related to the complaining witness's credibility.[100] "In cases such as this one, where there is no substantial evidence supporting the complaining witness's allegation of domestic abuse, the credibility of the complaining witness is of central importance."[101] Thus, the military judge's failure to abate the proceeding ran counter to R.C.M. 703(e)(2) and was an abuse of discretion.[102]

Although the NMCCA did not cite R.C.M. 703(e)(2) six years ago when deciding *Payton-O'Brien* (which predated *Warda),* the court certainly adhered to the intent and spirit of this rule. It discussed that an accused's "weighty interests" (such as, for example, the essentiality of a fair trial) could necessitate access to privileged information in the following areas of central importance:

> (1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and relate events. . . .[103]

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[100] *Id.* at *23-25.
[101] *Id.* at *25-26.
[102] *Id.* at *29. At the time of trial, R.C.M. 703(f) governed but has since been moved to R.C.M. 703(e). *See id.* at *17 n.10.
[103] *Payton-O'Brien*, 76 M.J. at 789.

The court further noted that the second and third of these key areas, as quoted in this Court's opinion in *Mellette*, "go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events."[104]

Thus, while Appellant disparages *Payton-O'Brien's* allowance of "judicial" remedies like abatement to address privileges, that is exactly what Congress and the President designed through Article 46 and R.C.M. 703. If evidence so centrally important that it is essential to a fair trial is rendered unavailable through the invocation of privilege, R.C.M. 703(e)(2) mandates that the military judge "*shall* grant a continuance or other relief in order to attempt to produce the evidence or *shall abate the proceedings* . . . .[105]

Nor does M.R.E. 513 somehow supplant R.C.M. 703(e)(2) by requiring the military judge to pierce the patient's privilege in lieu of any other remedy. Military Rule of Evidence 513 does not address what remedy the military judge must or can impose if her production order is not complied with. And abatement has always been available as a mechanism for addressing such issues relating to privileged mental health information, just as Congress and the President intended it

[104] *Mellette*, 82 M.J. at 381 (quoting *United States v. Mellette*, 82 M.J. 681, 694 (N-M. Ct. Crim. App. 2021) (quoting *Payton-O'Brien*, 76 M.J. at 789 n.28)).
[105] R.C.M. 703(e)(2) (provides also that there is no adequate substitute for the evidence) (emphasis added).

to be.[106] Indeed, it is difficult to imagine a more "narrowly tailored" piercing of the mental health privilege than not piercing it at all, and instead simply abating the proceedings as to the affected charges (as specifically mandated by R.C.M. 703(e)(2)).[107]

Additionally, the Government is misguided in its argument that R.C.M. 703(e)(2) does not apply to this case,[108] which is in fact exactly the sort of situation it was designed to address. First, the language the Government points to in R.C.M. 703(a) is inapplicable, as it originally read, "subject to the limitations set forth *in R.C.M. 701(e)(1)*," and was added in the 2016 Manual for Courts-Martial (MCM) solely to address new limitations that were simultaneously added to R.C.M. 701(e)(1) regarding a defense counsel's ability to interview sex-offense victims.[109] The addition of this new language to R.C.M. 703(a) in 2016, from which "(e)(1)" was subsequently deleted, was (and is) irrelevant to privileged information in R.C.M. 701(f), a rule that has remained unchanged in the MCM for many decades.[110]

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[106] *See, e.g.*, *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (military judge abated the proceedings as to certain charges when the Government did not comply with his production order for evidence relating to those charges).
[107] M.R.E. 513(e)(4).
[108] Appellee Answer at 54-55.
[109] *Compare* R.C.M. 701(e)(1), 703(a) (2012) *with* R.C.M. 701(e)(1), 703(a) (2016) (emphasis added).
[110] *Compare* R.C.M. 701(f) (1984) *with* R.C.M. 701(f) (2023).

Second, the key language in R.C.M. 703(e)(2)—regarding what assessments and actions the military judge must undertake when relevant and necessary evidence is unavailable because it is not subject to compulsory process (or for some other reason)—has also remained unchanged in the MCM for many decades.[111] As has the language that the invocation of privilege is one of the ways such unavailability might be caused.[112] Thus, if anything should be read together, it is the fact that for many decades R.C.M. 703(e)(2) has existed unchanged without being subject to any limitation in R.C.M. 701(f).

Lastly, contrary to the Government's erroneous interpretation, these rules comport to the facts of this case. The Military Judge determined that Appellant's diagnoses and treatment information were relevant and necessary and thus subject to production under R.C.M. 703(a). She then ordered production of such non-privileged information. At Appellant's request, she reviewed the information in camera and encountered certain privileged information that she determined was also relevant and necessary and thus subject to production under R.C.M. 703(e)(1) (as opposed to disclosure under R.C.M. 701).

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[111] *Compare* R.C.M. 703(f)(2) (1984) *with* R.C.M. 703(e)(2) (2023).
[112] *Compare* R.C.M. 703(b)(3) (1984) (stating "a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a)") *with* R.C.M. 703(b)(3) (2023) (same); *also compare* M.R.E. 804(a)(1) (1984) (stating unavailability as a witness includes situations where the declarant is exempted from testifying about the subject matter of the declarant's statement because the military judge rules that a privilege applies) *with* M.R.E. 804(a)(1) (2023) (same).

The relevant and necessary information was "unavailable" under R.C.M. 703(e)(2). And while the Military Judge did not explicitly analyze the issue through the rule's framework, she certainly assessed whether the evidence was of such central importance to an issue that it was essential to a fair trial. As this Court would later direct in *Warda*, the Military Judge considered RPI's theory and the information bearing on Appellant's credibility.[113] She then ascertained whether the evidence could be rendered available (through withdrawal of privilege) such that it could be produced. When Appellant continued her assertion of privilege, and there was no adequate substitute for the evidence, the Military Judge was forced to abate the proceedings.

As this Court found in *Warda*, "there is no substantial evidence supporting [Appellant's] allegations," and Appellant's "credibility . . . is of central importance."[114] Abating the proceeding was the only appropriate remedy.

B. The Military Judge did not clearly and indisputably err when she determined RPI was entitled to certain privileged communications to ensure his constitutional right to a complete defense and thus a fair trial.

When evaluating the scope of a rule, the President is presumed to not abridge an accused's constitutional right to present a complete defense. As the Supreme Court has instructed, "every reasonable construction must be resorted to,

[113] *Warda*, 2023 CAAF LEXIS 687 at *24; J.A. at 104.
[114] *Id.* at *24-25.

in order to save a statute from unconstitutionality."[115] Thus, based on the "presumption of validity" and the "constitutional doubt" canons, the President's promulgation is presumed constitutional and "should be interpreted in a way that avoids placing [a rule's] constitutionality in doubt."[116]

"It is undeniable that a defendant has a constitutional right to present a defense."[117] And the Supreme Court has long recognized that criminal defendants must have "access to the raw materials integral to the building of an effective defense."[118] In this case, where the principal witness's credibility and veracity is of paramount importance, the Military Judge recognized that those crucial raw materials necessary to ensure the fairness of RPI's trial encompassed portions of Appellant's privileged mental health records. Indeed, as the NMCCA explicitly found, "rarely are psychotherapist-patient records as material as they are in the present case."[119]

1. Both the Supreme Court and federal circuit courts have found that constitutional due process entitles an accused to evidence material to his defense.

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[115] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).
[116] *United States v. Kohlbek*, 78 M.J. 326, 332 (C.A.A.F. 2019) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247 (2012).
[117] *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001).
[118] *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).
[119] J.A. at 19.

In *Pennsylvania v. Ritchie*, the Supreme Court balanced a witness's privilege and an accused's due process right to a fair trial.[120] The respondent sought production of certain records held by a state agency.[121] The records were privileged under a state statute, which was subject to several statutory exceptions, including one that permitted disclosure with a court order.[122] But the trial judge declined to order production.[123] While a plurality of the Court concluded the confrontation right did not apply to such pretrial access to evidence, the Court held that the right to due process entitled the defendant to have the privileged records reviewed in camera to determine whether they contained material evidence, which would then be subject to disclosure.[124]

Other courts have applied *Ritchie* in finding the psychotherapist-patient privilege can yield to an accused's due process right to material evidence. In *United States v. Robinson*, the Tenth Circuit addressed the denial of mental health evidence bearing on the uncorroborated testimony of a key government witness, whose "credibility was of paramount concern."[125] The court found that the witness's testimony could have been undermined by information in his mental

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[120] *Pennsylvania v. Ritchie*, 480 U.S. 39, 43 (1987).
[121] *Id.*
[122] *Id.* at 43-44.
[123] *Id.*
[124] *Id.* at 60-61.
[125] *United States v. Robinson*, 583 F.3d 1265, 1271 (10th Cir. 2009).

health records that he was suffering from auditory hallucinations, seeing thing that were not really there, and possibly experiencing psychosis, all of which bore on his "ability to perceive or to recall events or to testify accurately."[126]

Given the importance of the witness's credibility to the prosecution's case, the court found that the trial judge, who had reviewed the mental health records in camera, committed reversible error by not concluding that they contained material information that should have been disclosed to the defense.[127] Thus, viewed against the backdrop of the witness's centrality to the government's case, the evidence that was withheld, including his mental health issues, led the court to conclude "the verdict is not worthy of confidence."[128]

Similarly, in *United States v. Fattah,* the Third Circuit applied *Ritchie* to hold the defendant was not deprived of due process when the trial judge reviewed the mental health records in camera for material evidence and found they "reveal[ed] nothing that calls into question [the witness's] memory, perception, competence, or veracity."[129] In assessing the materiality of the evidence, the court held the trial judge applied the correct standard of determining, in accordance with

[126] *Id.* at 1272 (citation and internal quotation marks omitted).
[127] *Id.* at 1271.
[128] *Id.* at 1274.
[129] *United States v. Fattah*, 914 F.3d. 112, 179-80 (3d Cir. 2019).

Ritchie, "whether there is a *reasonable probability* that disclosure would change the outcome of [the] trial."[130]

2. As this Court has previously explained, a privilege can yield to a constitutional right without invalidating the privilege rule itself.

Although this Court has never decided whether the psychotherapist-privilege yields to constitutional rights, it has specifically contemplated that the attorney-client privilege does.[131] In *United States v. Romano*, a witness testified under a grant of immunity at an Article 32 hearing of a co-conspirator and later at the appellant's trial.[132] During the Article 32 hearing, the witness's testimony revealed certain privileged communications between her and her attorney.[133] Subsequently, when the witness was called to testify at the appellant's trial, the appellant sought to ask her about inconsistent statements she had made to her defense counsel, arguing the privilege had been waived by her earlier testimony.[134] But after the witness asserted her privilege over the communications, the military judge suppressed the evidence.[135]

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[130] *Id.* at 180.
[131] *Romano*, 46 M.J. at 272.
[132] *Id.*
[133] *Id.*
[134] *United States v. Romano*, 43 M.J. 523, 528 (A.F. Ct. Crim. App. 1995), *rev'd*, 46 M.J. 629 (1997).
[135] *Id.*

This Court agreed that the witness did not waive her attorney-client privilege under M.R.E. 502 since testimony given "under a grant or promise of immunity does not . . . waive a privilege . . . ."[136] However, the Court went on to discuss that on remand the trial judge was to consider whether the privileged communications should be disclosed because an accused's "constitutional right to produce evidence under the compulsory clause *may overcome the attorney-client privilege*."[137]

Thus, even though M.R.E. 502 did not (and does not) provide an exception for constitutionally required evidence, the Court acknowledged in *Romano* that the attorney-client privilege could yield to an accused's constitutional rights under certain circumstances: "While a lower source on the hierarchy [the privilege rule] may grant additional or greater rights than a higher source [the Constitution], those additional rights may not conflict with a higher source."[138] As such, without holding M.R.E. 502 itself unconstitutional, the Court directed the trial judge balance its guarantees with the constitutional rights of an accused.[139]

The same reasoning applies here to M.R.E 513. Notwithstanding the lack of any explicit constitutionally required exception, the psychotherapist-patient

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[136] *Romano*, 46 M.J. at 273 (quoting M.R.E. 510(b)).
[137] *Id.* at 274 (citing *United States v. Rainone*, 32 F.3d 1203 (7th Cir. 1994); *Jenkins v. Wainwright*, 763 F.2d 1390 (11th Cir. 1985); *Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984); *Blackwell v. Franzen*, 688 F.2d 496 (7th Cir. 1982); *United States v. Coven*, 662 F.2d 162, 170 (2d Cir. 1981)) (emphasis added).
[138] *Id.*
[139] *Id.*

privilege must still be viewed in the context of an accused's constitutional rights. If in certain instances, the sacrosanct attorney-client privilege dating back to the British Crown[140] can yield to constitutional rights, then so can the psychotherapist-patient privilege under M.R.E. 513. Thus, whether ultimately rooted in compulsory process, confrontation, or due process, M.R.E 513 can and does yield to the weighty interests of an accused to obtain material evidence as necessary to ensure his right to both a complete defense and a fair trial.[141]

3. The Military Judge correctly found that the failure to disclose certain privilege information would undermine RPI's right to a fair trial.

As this Court held decades ago, a military judge "confronted with a proffer of clearly exculpatory evidence of a witness who will invoke his privilege against self-incrimination if called to testify . . . cannot sit idly by."[142] To the contrary, in such situations, "consideration of the accused's due-process and fair-trial rights require the military judge to fashion an appropriate remedy.'[143] And the privileged

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[140] *Carpenter v. United States*, 138 S. Ct. 2206, 2249 (2018) (Alito, J., dissenting) (citing *Rex* v. *Dixon*, 3 Burr. 1687, 97 Eng. Rep. 1047 (K. B. 1765).
[141] *See Romano*, 46 M.J. at 274 (directing the trial judge to determine whether constitutional right to produce evidence under the compulsory clause overcomes the attorney-client privilege); *Mellette*, 82 M.J. at 378 (explaining that the confrontation clause limits the scope of M.R.E. 513); *Ritchie*, 480 U.S. at 42 (holding that the due process clause entitles an accused to material privileged communications).
[142] *United States v. Zayas*, 24 M.J. 132, 135 (C.M.A. 1987).
[143] *Id.* at 136.

evidence need not be exculpatory, but only material to the defense, since "evidence used for impeachment purposes . . . can be just as important to a defendant's right to a fair trial as that used substantively."[144]

Indeed, most state courts hold that when an accused can make a preliminary showing of a "reasonable belief" that protected records contain material information, some degree of pretrial disclosure is required.[145] In *Crime Victims R.S. v. Thompson*, for example, the Arizona Supreme Court held that "any restrictions imposed by the [state psychotherapist-patient privilege] on [an accused's] access to

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[144] *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

[145] *Commonwealth v. Barroso*, 122 S.W.3d 554, 561-62 (Ky. 2003) (citing *State v. Storlazzi*, 191 Conn. 453, 464 A.2d 829, 832-33 (Conn. 1983); *Bobo v. State*, 256 Ga. 357, 349 S.E.2d 690, 692 (Ga. 1986) (plurality opinion); *State v. Peseti*, 101 Haw. 172, 65 P.3d 119, 128 (Haw. 2003); *People v. Dace*, 114 Ill. App. 3d 908, 449 N.E.2d 1031, 1035, 70 Ill. Dec. 684 (Ill. App. Ct. 1983), *aff'd.* 104 Ill. 2d 96, 470 N.E.2d 993, 83 Ill. Dec. 573 (Ill. 1984), *overruled on other grounds as recognized by People v. Hamilton*, 283 Ill. App. 3d 854, 670 N.E.2d 1189, 1194, 219 Ill. Dec. 301 (Ill. App. Ct. 1996); *Commonwealth v. Stockhammer*, 409 Mass. 867, 570 N.E.2d 992, 1002 (Mass. 1991); *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557, 562 (Mich. 1994); *State v. McBride*, 213 N.J. Super. 255, 517 A.2d 152, 160 (N.J. Super. Ct. App. Div. 1986); *People v. Acklin*, 102 Misc. 2d 596, 424 N.Y.S.2d 633, 636 (Sup. Ct. 1980); *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992), *superseded on other grounds by* Tenn. Code Ann. § 39-13-392; *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, 304-12 (Wis. 2002); *Gale v. State*, 792 P.2d 570, 581 (Wyo. 1990). *Contra People v. Hammon*, 15 Cal. 4th 1117, 65 Cal. Rptr. 2d 1, 938 P.2d 986, 993 (Cal. 1997); *People v. Dist. Court*, 719 P.2d 722, 727 (Colo. 1986); *State v. Famiglietti*, 817 So. 2d 901, 906 (Fla. Dist. Ct. App. 2002); *Goldsmith v. State*, 337 Md. 112, 651 A.2d 866, 873 (Md. 1995); *Commonwealth v. Wilson*, 529 Pa. 268, 602 A.2d 1290, 1296-98 (Pa. 1992)).

information essential for the effective preparation of a complete defense must be balanced against the due process right to a fundamentally fair trial."[146] The court therefore held that if an accused can show by a "reasonable probability" that privileged records include "information essential for the effective preparation of a complete defense," the trial judge shall conduct an in camera review.[147]

In comparison to these holdings, *Payton-O'Brien* clarified the sorts of circumstances under which the psychotherapist-patient privilege could "infringe on an accused's weighty interests" and provided a reasonable, detailed list of the situations under which the privilege may "yield to the constitutional rights of the accused."[148] Like the Tenth and Third Circuits' explanation of what material evidence is constitutionally required, the NMCCA discussed in *Payton-O'Brien* various types of key evidence under which "serious concerns may be raised regarding witness credibility—which is of paramount importance—and may very well be case dispositive."[149]

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[146] *Crime Victims R.S. v. Thompson*, 251 Ariz. 111, 117-18 (2021).
[147] *Id*. at 120.
[148] *Payton-O'Brien*, 76 M.J. at 789.
[149] *Id.*

Indeed, as the court went on to explain, with clairvoyant relevance to the facts of this case:

> This is particularly true for cases of sexual assault, where most often, only the accuser and the accused are present and there is little or no corroborating physical evidence. Judging the credibility of the accuser is crucial in these situations, as reliability may well determine guilt or innocence. The crucible of cross-examination is a powerful tool for an accused to test an accuser's account. But in appropriate cases, waiver of the psychotherapist privilege may be necessary to satisfy the accused's rights to due process and confrontation.[150]

Here, the testimony of one sole witness, Appellant, is case dispositive. While redacting out privileged information from her mental health records, the Military Judge came across communications impacting Appellant's credibility and veracity. The Military Judge found that Appellant's privileged records included vital impeachment material, bearing on her "inability to accurately perceive, remember, and relate events and inconsistent statements" and contradicting her accounts of the charged conduct.[151] Citing the sorts of concerns addressed in *Payton-O'Brien*, the Military Judge considered RPI's trial strategies of "(1) positing possible memory confabulation or conflation as a result of [Appellant's] past abuse and (2) highlighting multiple inconsistencies in [her] account of the

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[150] *Id.* at 789 n.29; *see also United States v. Payne*, 63 F.3d 1200, 1210 (2d. Cir. 1995) ("In general impeachment evidence has been found to be material where the witness has been found to be the only evidence linking the defendant to the crime.").

[151] J.A. at 104, 20.

assaults."[152] The Military Judge then respected Appellant's privilege and, only after she maintained her privilege, abated the proceedings in order to "guarantee the accused a meaningful opportunity to present a defense."[153] Thus, the Military Judge protected against a fundamentally unfair trial.

In other words, the Military Judge did precisely what this Court's precedent expects, requires, and gives her the discretion to do. She did not "sit idly by" when faced with privileged evidence that she found material to RPI's due process right to a complete defense and thus a fair trial.[154] Instead, she determined that Appellant's privilege, under the facts and circumstances of this particular case, must yield to RPI's constitutional rights.[155] Considering that an accused's "due-process and fair-trial rights require the military judge to fashion an appropriate remedy,"[156] she employed the analysis outlined by *Payton-O'Brien* in abating the proceedings. Based on the facts of this case, that determination by the Military Judge was no abuse of discretion, let alone a clear and indisputable error.

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[152] J.A. at 104, 18.
[153] J.A. at 104.
[154] *Zayas*, 24 M.J. at 135.
[155] *Romano*, 46 M.J. at 273.
[156] *Zayas*, 24 M.J. at 136.

4. When reviewing cases derived from a petition for a writ of mandamus, this Court employs a heightened standard of review.

In this regard, it is worth noting here that writ petitions require a heightened standard of review.[157] In *United States v. Labella*, for example, the Court of Military Appeals (CMA) reviewed a military judge's jurisdictional ruling that the alleged offenses were not service-connected, resulting in the military judge dismissing the charges.[158] The military judge had based his ruling on his interpretation of binding case law.[159] The Navy-Marine Corps Court of Military Review (NMCMR) had granted the government's petition for a writ of mandamus.[160] Acknowledging that the law was subject to differing interpretations, the CMA reversed the NMCMR, holding that a writ of mandamus was inappropriate because it did not breach the high mandamus threshold.[161]

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[157] *See, e.g.*, *Howell*, 75 M.J. at 386 (holding that the military judge must "clearly and indisputably err" for petitioner to obtain relief); *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (per curiam) (applying the "heightened standard required for mandamus relief" the Court found that petitioner had shown a "clear and indisputable" right to relief); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979) (articulating the difference between the standards that govern the award of relief in appellate review and the standards that govern in an extraordinary proceeding).
[158] *United States v. Labella*, 15 M.J. 228 (C.M.A. 1983) (per curiam).
[159] *Id.* at 229.
[160] *United States v. Labella*, 14 M.J. 976 (N-M.C.M.R. 1982), *rev'd per curiam*, 15 M.J. 228.
[161] *Labella*, 15 M.J. at 229.

The CMA held that the military judge's decision "must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power'" to warrant reversal through a writ of mandamus.[162]

More recently, in *United States v. Howell*, this Court addressed various issues certified for its review where the lower court had granted a writ petition.[163] One of those issues involved whether a military judge's Article 13, UCMJ, violation finding "exceeded his authority by not following Article III courts' holdings . . . ."[164] This Court answered this question of law in the negative, holding the military judge did not "clearly and indisputably" err.[165]

On the other hand, in *LRM v. Kastenberg*, the only other case in which a Judge Advocate General has certified a victim's petition for writ of mandamus, this Court made no mention of a heightened standard of review.[166] Instead, the Court employed the ordinary de novo standard of review when deciding questions of law.[167]

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[162] *Id.* (quoting *United States v. Di Stefano*, 464 F.2d 845, 850 (2d Cir. 1972)) (internal quotations omitted).
[163] *Howell*, 75 M.J. at 388 n.2, 389.
[164] *Id.* at 391.
[165] *Id.* at 392.
[166] *See generally Kastenberg*, 72 M.J. at 364.
[167] *Id.* at 367.

This departure from the writ standard drew a sharp dissent from Judge Ryan, who noted the "impropriety" of allowing a non-party to "evad[e] the ordinary limitations on [this Court's] review of interlocutory issues":

> This unprecedented use of Article 67(a)(2) was made despite the fact that to have its interlocutory issues considered, the Government would have to meet the stringent requirements of Article 62, UCMJ . . . and an accused would have to satisfy both the jurisdictional requirement of Article 67, UCMJ, in order to invoke the power of the All Writs Act . . . and the extraordinary burdens needed to meet the criteria for an extraordinary writ.[168]

In this case, the Court should not differentiate the standard of review for a certified issue on a writ petition, and should continue to employ the same standard used by the Supreme Court, which for many decades has routinely articulated a higher, *extraordinary* standard of review for petitions for writs of mandamus.[169] In fact, the Supreme Court has held that only exceptional circumstances amounting to a "clear abuse of discretion"[170] or judicial "usurpation of power"[171] will justify the

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[168] *Id.* at 374 (Ryan, J., dissenting) (citations omitted).

[169] *See, e.g.*, *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 370, 380, 382-83 (2004) (internal quotation marks and citations omitted); *Allied Chemical Corp. v. Daiflon Inc.*, 449 U.S. 33 (1980) (per curiam); *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394 (1975); *see also Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (holding that mandamus is not appropriate absent a "*clear* abuse of discretion") (emphasis added); *Ex Parte Fahey*, 332 U.S. 258 (1947) ("Mandamus [is a] drastic and extraordinary remed[y] . . . reserved for really extraordinary causes."); *Maryland v. Soper*, 270 U.S. 9, 28-30 (1926) (stating that a writ was justified because of the *gross abuse of discretion* of the lower court) (emphasis added).

[170] *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

[171] *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consol. Mines,*

invocation of this extraordinary remedy, even as to questions of law such as those presented in the certified issues.[172]

In *Bankers Life & Casualty Company v. Holland*, for example, the Supreme Court affirmed the Fifth Circuit's decision to deny the petition for a writ of mandamus against the respondent district court judge.[173] The Court rejected petitioner's argument that the judge exceeded his legal powers when he issued an erroneous ruling on venue and ordered severance and transfer of the action.[174] The Court specifically held that "[t]he ruling *on a question of law* decisive of the issue presented," even if erroneous, "was made in the course of the exercise of the court's jurisdiction . . . ."[175] The Court therefore chose not to determine whether the ruling on the question of law was merely erroneous, articulating instead that

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Ltd. v. United States, 325 U.S. 212, 217 (1945)).

[172] The Supreme Court has cautioned against issuing a writ upon a mere showing of abuse of discretion. *See, e.g.*, *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 n.7 (1978) ("Although in at least one instance we approved the issuance of the writ upon a mere showing of abuse of discretion . . . we warned soon thereafter against the dangers of such a practice.") (citations omitted); *see also In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186-87 (10th Cir. 2009) ("There must be more than what we would typically consider to be an abuse of discretion for the writ to issue."); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309-10 (5th Cir. 2008) (en banc) ("[The Supreme Court's] admonition warns that we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal."), *cert. denied sub nom. Singleton v. Volkswagen of Am.*, 555 U.S. 1172 (2009).

[173] *Bankers Life*, 346 U.S. at 379.

[174] *Id.* at 382.

[175] *Id.* (emphasis added).

even if erroneous, the extraordinary writ review power is meant to be used only in the "exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power.'"[176]

The Military Judge's decision to follow binding case precedent in *Payton-O'Brien*, given the holding's similarity with both the regulatory standard of R.C.M. 703(e)(2) and the due process standard in *Ritchie*, is neither error nor clear and undisputed error.

5. Neither *United States v. Beauge* nor *United States v. Tinsley* supports that M.R.E. 513 trumps an accused's due process rights.

Finally, neither this Court's decision in *United States v. Beauge* nor the Army Court of Criminal Appeals (ACCA)'s decision in *United States v. Tinsley* supports that M.R.E. 513 automatically overrides a criminal accused's due process and fair-trial rights.

a. In *Beauge*, the Court made clear to express no opinion as the constitutional right to compel the discovery or production of information material to the defense.

In *Beauge*, this Court discussed an accused's due process rights in the context of a claim of ineffective assistance of counsel.[177] In doing so, it "express[ed] no opinion as to when the Constitution may compel discovery of

[176] *Id.* at 382-83 (quoting *De Beers Consol. Mines, Ltd.*, 325 U.S. at 317).
[177] *Beauge*, 82 M.J. at 168.

documentary records."[178] Rather, this Court simply noted that the facts did not "*establish*[]" that the psychotherapist-patient privilege, "*in that instant case*," was arbitrary or disproportionate to the purpose it was designed to serve.[179]

Of course, *Beauge's* facts are not these facts. *Beauge* reviewed a trial defense counsel's failure to move for the in camera review of privileged mental health information based on the mere speculation that its production to the defense was constitutionally required.[180] Here, by contrast, the Military Judge only ordered the production of *non-privileged* information; only agreed to review it in camera at Appellant's request; and only continued her in camera review to redact any privileged information after no one objected. While doing so, the Military Judge saw privileged information ripe for impeachment and damning to Appellant's credibility, in a case where such evidence is of such central importance essential to a fair trial.

In other words, in the language of the Third and Tenth Circuits' reasoned interpretation of *Ritchie*, the Military Judge found the information was material to RPI's defense because it "call[ed] into question [the witness's] memory, perception, competence, [and] veracity,"[181] with respect to a key government

[178] *Id.* at 168 n.12.
[179] *Id.* at 168.
[180] *Id.* at 167.
[181] *Fattah*, 914 F.3d. at 179-80.

witness whose "credibility was of paramount concern."[182] And in reviewing her ruling in the context of Appellant's allegations against RPI, the lower court echoed her findings, concluding that "rarely are psychotherapist-patient records as *material* as they are in the present case."[183]

b. In *Tinsley*, the Army Court of Criminal Appeals mistakenly imported *Jaffee v. Redmond*, unaltered, into a criminal justice context vastly different from this one.

Nor does the ACCA's decision in *Tinsley* adequately resolve the issues before this Court in this case. Not only did *Tinsley* deal with an entirely different factual scenario and procedural posture, but it stretched the reasoning of *Jaffee v. Redmond* far beyond the bounds of the civil-case context the Supreme Court addressed.

(1) *Tinsley* considered facts vastly different than the facts here.

First, *Tinsley* addressed the far more typical scenario of an accused who sought privileged mental health information without satisfying the strictures of M.R.E. 513(e)(3).[184] The appellant asserted that he "believed" it was "likely" that the victim and her therapist had discussed the allegation, and that such statements "might" contradict what she reported.[185] Based entirely on these speculative

[182] *Robinson*, 583 F.3d at 1271.
[183] J.A. at 19 (emphasis added).
[184] *United States v. Tinsley*, 81 M.J. 836, 851. (A. Ct. Crim. App. 2021).
[185] *Id.* at 845.

assertions, the appellant argued that at least an in camera review of the privileged records was appropriate.[186] The ACCA disagreed and, without addressing the due process clause, held the confrontation clause does not entitle an accused to privileged documents.[187]

By contrast, this case is far from *Tinsley's* proverbial "fishing expedition." After Appellant publically disclosed her various ongoing mental health issues, some of which are particularly germane to her allegations, the Military Judge granted RPI's motion only as to non-privileged information in the possession of a governmental agency.[188] The Military Judge conducted an in camera review at Appellant's expressed request. The Military Judge then continued her in camera review to redact privileged information without objection from Appellant. She did so solely to make redactions and, in the process of doing so, saw privileged communications uniquely material to both RPI's due process right to a complete defense and the Military Justice's obligation to protect against a fundamentally unfair trial.

Thus, this case is not about whether the Military Judge was correct to order in camera review, which *Tinsley* addressed. Rather, this case is about whether

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[186] *Id.*
[187] *Id.* at 853.
[188] *See Ritchie*, 480 U.S. at 58 (concluding that confidential records possessed by a state agency entitled Ritchie to have access to the records as a matter of due process under the Fourteenth Amendment); *see also Beauge*, 82 M.J. at 167 n.11 (noting the same).

material, discoverable information that the Military Judge deems to be essential to a fair trial, can be hidden from an accused in a trial for felony-level offenses for which RPI faces decades of confinement and a life-long stigma. The answer to that question is most assuredly "no."

In *Mellette*, this Court quoted *Payton-O'Brien* in explaining that the material at issue "involve[s] key areas of concern that 'go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events.'"[189] Although the psychotherapist-privilege, like other privileges, serves a purpose in our society, that purpose can yield to other societal interests and rights. Here, those interests and rights are enshrined in the Bill of Rights.

Indeed, as the Supreme Court has explained, "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."[190] That is particularly true where the presiding military judge is aware of the evidence at issue, since "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."[191] Considering these weighty interests of an accused in the context of mental health issues strikingly relevant to Appellant's allegations

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[189] *Mellette*, 81 M.J. at 694 (quoting *United States v. Mellette*, 81 M.J. 681, 694 (N-M. Ct. Crim. App. 2021) (quoting *Payton-O'Brien*, 76 M.J. at 789 n.28)).
[190] *Nixon*, 418 U.S. at 709.
[191] *Id.* at 712.

against RPI, this case demonstrates both why and when M.R.E. 513 can yield to the constitutional rights of the accused.

(2) Contrary to this Court's precedents, *Tinsley* transposed *Jaffee* to criminal trials while at the same time disregarding *Ritchie*.

The ACCA was mistaken in its constitutional analysis in *Tinsley*. It first errantly dismissed *Ritchie* as "easily distinguishable."[192] The ACCA classified the entire holding as a "plurality decision"[193] even though "five members of the court agreed that the due process clause of the Fourteenth Amendment required some disclosure of records."[194]

Second, the ACCA drew its reasoning principally from *Jaffee*, which merely recognized the psychotherapist-patient privilege under Federal Rule of Evidence 501.[195] *Jaffee* addressed a *civil* action, implicating neither confrontation nor due process rights.[196] As this Court has stated, "[t]he constitutional interests of a civil defendant and a criminal defendant are distinct."[197] Thus, "the right to production of relevant evidence in civil proceedings does not have the same constitutional dimensions as it does in the criminal context."[198] Because an accused's

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[192] *Tinsley*, 81 M.J. at 836, 850 n.5. Of note, the ACCA did not discuss the interplay between the privilege and an accused's due process rights.
[193] *Id.* at 850 n.5.
[194] *Ritchie*, 480 U.S. at 42.
[195] *Jaffee*, 518 U.S. at 1.
[196] *Id.* at 2.
[197] *United States v. Gaddis*, 70 M.J. 248, 255 (C.A.A.F. 2011).
[198] *Cheney*, 542 U.S. at 384 (internal quotations and citations omitted).

constitutional interests were not implicated in *Jaffee*, the Supreme Court did not analyze the privilege in respect to constitutional rights.

In fact, this Court has rejected *Jaffee's* applicability to the Military Rules of Evidence.[199] "When the President promulgated M.R.E. 513, he did not simply adopt *Jaffee*; rather, he created a limited psychotherapist privilege for the military."[200] Indeed, as this Court held in *United States v. Rodriguez* prior to the promulgation of M.R.E. 513, *Jaffee's* recognized psychotherapist-patient privilege was not applicable to courts-martial.[201] Thus, *Tinsley's* wholesale application of *Jaffee* to the court-martial context is misplaced.

(3) *Tinsley's* remedy, which Appellant asks this Court to adopt, runs counter to *Brady v. Maryland*.

While Appellant criticizes *Payton-O'Brien's* "sanctioned . . . creation of a judicial remedy" of abatement,[202] as discussed above, this remedy is exactly what the President has prescribed for such situations in R.C.M. 703(e)(2). And while it may place Appellant in the position of choosing to her privileged information over the Government's ability to prosecute RPI, the fact remains that her privilege

[199] *See Rodriguez*, 54 M.J. at 156.
[200] *Id.* at 161.
[201] *Id.* at 157. At the time of trial, the President had not promulgated M.R.E. 513. But on review, the rule was in effect. *Id.*
[202] Appellant Br. at 47.

remains intact. Unlike other systems in which the privilege is simply pierced,[203] Appellant maintains her option.

Tinsley, on the other hand, if it speaks at all to the facts before this Court, advocates for exactly what this Court eschewed decades ago: to have the military judge "sit idly by" when "consideration of the accused's due-process and fair-trial rights require the military judge to fashion an appropriate remedy" for material evidence that is brought to her attention yet is privileged from disclosure.[204]

Here, then, is the real Hobson's choice in this case—the Military Judge's choice between taking action to prevent a fundamentally unfair trial or sitting idly by. Like all Hobson's choices, for the Military Judge is this case, it was really no choice at all. She simply did exactly what the law demands of her, in a way that "scrupulously honor[ed]" Appellant's privilege.[205]

Conclusion

The Court should dismiss the certified issue as non-justiciable or, alternatively, uphold the Military Judge's ruling and affirm *Payton-O'Brien*.

Respectfully submitted.

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[203] *See, e.g.*, *Thompson*, 251 Ariz. at 120.
[204] *Zayas*, 24 M.J. at 135.
[205] *Payton-O'Brien*, 76 M.J. at 790.

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I certify that on October 20, 2023 this brief was electronically filed with the Court and served to counsel for Appellant; Appellee, United States Navy and Marine Corps Appellate Government Division; and counsel for amici curiae, Major Brian Farrell and Mr. Peter Coote.

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