IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. Sergeant (E-5) **RENE D. ALFARO**, United States Army, Appellant	) **SUPPLEMENT TO PETITION FOR**) **GRANT OF REVIEW**))) Crim. App. Dkt. No. ARMY 20220282)) USCA Dkt. No. 26-0170/AR))))

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

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Reasons to Grant Appellant's Petition

This Court should grant appellant's petition concerning the first, second and fourth presented issues because the Army court applied the law in a manner inconsistent with this court's precedent and at variance with the precedent of other service courts. This court should grant appellant's third and fifth presented issues because they are issues upon which this court has not ruled, but should.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016)[hereinafter UCMJ]. This honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3)(2016).

Statement of the Case

On May 23-26, 2022, a military judge sitting as a general court martial tried petitioner. Contrary to his pleas, the military judge convicted appellant, by exceptions and substitutions, of three specifications of abusive sexual contact and one specification of failure to obey a lawful order, in violation of Articles 120 and 92, 10 U.S.C. §§ 920 and 892 (2022). (R. at 620-21). The military judge sentenced appellant to be reduced to the grade of E-3, to twenty-four months of confinement and to a dishonorable discharge. (R. at 837-38). The Convening Authority approved the adjudged sentence. (R. at Action).

On February 8, 2023, the Judge Advocate General of the Army transmitted the record of trial to the Clerk of this honorable court. On July 9, 2023, undersigned counsel moved for leave to examine the sealed portions of the record of trial pursuant to Rule for Courts-Martial [RCM] 1113(b)(3). On July 12, 2023, this Army Court granted in part and denied in part petitioner's motion. The Army court denied petitioner's motion as to Appellate Exhibits XL, XLI, XLVI, XLIX, LV, LVII, LIX, LX, LXII, and item "y" on the record of trial's November 20, 2022 sealing order. These items were sealed pursuant to Mil. R. Evid. 513. (R. at Sealing Order).

On July 17, 2023, appellant moved the Army court to reconsider its decision. On July 21, 2023, this court declined to reconsider its decision. On August 3, 2023, appellant petitioned this honorable court for relief from that decision in the nature of a writ of mandamus. On September 13, 2023, this court denied that petition while preserving to him the ability to again petition for relief after challenging the validity of A.C.C.A. R. 6.9 before this court. *Alfaro v. Judges of the Army Court of Criminal Appeals,* 2023 CAAF LEXIS 653 (C.A.A.F. Sep. 13, 2023)(disp. order).

On September 19, 2023, appellant challenged the validity of A.C.C.A. R. 6.9 before the Army court and requested relief from that rule. On September 25, 2023, the Army court denied appellant's challenge to A.C.C.A. R. 6.9. On October 24,

2023, this court granted appellant a writ of mandamus, permitting undersigned to examine the sealed matters, with the exception of item y. *Alfaro v. Judges of the Army Court of Criminal Appeals*, USCA Dkt. No. 23-0258/AR (C.A.A.F. Oct. 24, 2023). On November 21, 2023, appellant moved the Army court for leave to have his military appellate counsel transmit the sealed items to his civilian appellate counsel. On November 28, 2023, the Army court denied appellant's motion to transmit the sealed items. On December 4, 2023, appellant filed before this honorable court a petition for a writ of mandamus seeking an order permitting his military appellate counsel transmit the sealed items to his civilian appellate counsel, with the exception of item y. On January 4, 2024, this honorable court granted appellant's petition in the nature of mandamus and issued an order directing the same. *Alfaro v. Judges of the Army Court of Criminal Appeals*, USCA Dkt. No. 24-0050/AR (C.A.A.F. Jan. 4., 2024)(Disp. Order).

On April 17, 2025, appellant demanded speedy appellate processing.

On July 24, 2025 moved to file a supplemental brief before the Army court, raising a claim of unreasonable post-trial delay. On July 30, 2025, appellant moved to amend his supplemental brief to include an assignment of error invoking *United States v. Mendoza*.

On September 30, 2025, the Army court affirmed the findings and sentence. *United States v. Alfaro*, 2025 CCA LEXIS 468 (A. Ct. Crim. App. Sep. 30, 2025)(mem. op.)(Appendix A).

On December 3, 2025, the Army court granted appellant's motion for reconsideration and agreed to reconsider the court's decision *en banc*.

On February 12, 2026, the Army court issued an *en banc* opinion again denying appellant any relief. *United States v. Alfaro*, __ M.J. __, 2026 CCA LEXIS 78 (February 12, 2026)(slip op.)(Appendix B).

Statement of Facts

PFC ST was a member of appellant's network access team. (R. at 255). PFC ST lived in the same barracks as appellant. (R. at 256). September 19, 2019 was PFC ST's 21st birthday. (R. at 255). Around 1413 on September 19, 2019, PFC ST claimed that she texted appellant and told him that she had purchased alcohol. (R. at 282). She also texted her friend, PV2 Vincent Bazurto. *Id.* It was her idea to bring alcohol to appellant's room. *Id*; Pros. Ex. 5 at 4. At around 1700, PFC ST texted her boyfriend. (R. at 299). Around the same time, she began cooking dinner. (R. at 354). PV2 Bazurto joined her and ate with her. *Id.*

Appellant had asked PFC ST to come his barracks room to sign a counseling statement on that day. (R. at 256-57). This was presumably because PFC ST's

work area was too compact of an area in which to counsel a Soldier. (R. at 457-58).

Appellant discussed the counseling form with PFC ST. *Id.* PFC ST signed her counseling form. *Id.* She claimed that she then commenced drinking to celebrate her birthday. (R. at 263). Appellant and PV2 Bazurto joined her. *Id.* PV2 Bazurto only had one mixed drink. (R. at 359). Appellant also had only one drink. (R. at 377). PFC ST, however, drank several mixed and straight drinks. (R. at 359). She then began dancing, "twerking," and doing splits. (R. at 361). She then took off her clothes and crawled into appellant's bed. *Id.* Around twenty minutes thereafter, PFC ST awoke, moved to the edge of appellant's bed, and vomited. (R. at 264, 361). She said "sorry" and then went back to sleep. (R. at 361). Thereafter, she "slithered" out of appellant's bed and onto the floor, landing in the puddle of vomitus which she had previously expelled. (R. at 362-63).

Appellant assisted PFC ST to the shower in order to wash away the vomitus with which she was then covered. (R. at 264-65). PFC ST walked from the shower into appellant's bed. (R. at 268). PFC ST fell two or three times while in the shower. (R. at 365). Appellant asked PV2 Bazurto to retrieve for PFC ST a change of clothing. (R. at 366). He sprinted to her room, retrieved the clothing, and returned. *Id.*

When PV2 Bazurto returned, PFC ST was still in the shower. Appellant was trying to clean up her vomitus. (R. at 366-67). PFC ST emerged from the shower, wearing two towels. She walked to appellant's recliner and lay down. (R. at 368). She stayed there around twenty minutes and then awoke, moved to appellant's bed, and went back to sleep. (R. at 368). Appellant and PV2 Bazurto conversed until 0130. (R. at 371). Appellant told PV2 Bazurto that he would sleep on his couch while PFC ST slept. *Id.*

At some point, PFC ST again showered. (R. at 290). Appellant chose to shower after PFC ST's second shower. While he was in the shower, PFC ST could have left appellant's room. Instead, she returned to appellant's bed. (R. at 299).

According to PFC ST, she woke up the morning of September 20, 2019 in appellant's bed. (R. at 272). She told investigating CID agents, however, that she left around 0200. (R. at 289). PV2 Bazurto, who lived across the hall from appellant, heard PFC ST leave around 2220. (R. at 380). She claimed that she returned to her room and then called her boyfriend, PV2 Dadens Momplaisir. (R. at 273). PV2 Momplaisir was then stationed at Fort Gordon, Georgia. *Id*.

PV2 Momplaisir testified that PFC ST told him that she could not remember much of the evening. (R. at 412). PFC ST told PV2 Momplaisir that she signed a form, presumably her counseling statement, took two to three shots, then blacked out, then showered, then left. *Id.* She did not state that she had been penetrated.

Instead, PFC Momplaisir assumed that this was the case. (R. at 414). After speaking with PFC Momplaisir, PFC ST spoke with her cousin Yari. (R. at 568). Yari told PFC ST that she had been assaulted. *Id.*

In addition to speaking with PV2 Momplaisir, PFC ST engaged in text message conversations with him. (R. at 301-302). Following their telephone conversation, PV2 Momplaisir sent PFC ST text messages accusing her of infidelity. (R. at 413). PFC ST responded "I'm sorry, Daden. I can't say that enough," told him that she "did not want to lose him" and told him that "I'm literally undeserving of your love, and I honestly don't deserve you. Losing you would be the greatest loss of my life." (R. at 303). Only after PFC ST spoke with her cousin did she claim to PV2 Momplaisir to have been sexually assaulted. (R. at 417).

The next morning, PV2 Bazurto ran into both appellant and PFC ST outside their barracks building. (R. at 373). PFC ST invited both appellant and PV2 Bazurto to accompany her to Waffle House. *Id.* They breakfasted together. At breakfast, PFC ST did not remember much of her behavior the previous evening. (R. at 374).

In court, PFC ST could not recall when she next saw PV2 Bazurto after the alleged incident, even though she testified that she had breakfast with him the next

day. (R. at 568). She barely remembered that breakfast. (R. at 569). She did not remember what she told PFC Bazurto about the incident. (R. at 570)

PFC ST maintained a lack of memory about many details about her birthday night. She did not clearly remember petting SPC Barzuto. (R. at 284). She does not remember doing splits. *Id.* She did not remember dancing. *Id.* She does not remember how her clothes came off. *Id.* When PFC ST spoke to PV2 Bazurto about the night of her birthday the next morning, she could not remember throwing up, dancing, discussing personal matters, showering, laying on appellant's sofa or twice laying in his bed. (R. at 385). She did not remember petting PV2 Bazurto at all. *Id.*

Despite this lack of memory, PFC ST subsequently decided that appellant penetrated her vagina twice, once with an unknown object and once with a finger. (R. at 269-70). She alleged that appellant then penetrated her a third time with his finger. (R. at 271). PFC ST claimed to be able to remember these details despite having a "blank spot" in her mind after showering. (R. at 275). PFC ST did not initially report her allegation. She made a restricted report alleging sexual assault on October 31, 2019 and unrestricted her report in July, 2020.

PFC ST's in-court testimony was materially different to the account she gave Army CID agents. (R. at 292). She did not see appellant during any alleged penetration. She did not look at the face of anyone involved during the alleged

penetration. (R. at 322). In her meeting with government counsel, PFC ST expressed doubts as to whether the incident even occurred. (R. at 470). Although independent witnesses heard her express her doubts to Trial Counsel, PFC ST claimed she could not remember the relevant conversation. (R. at 326-327).

In the days immediately after the alleged incident, PFC ST exchanged jocular texts with appellant. (R. at 310). She also gave him her Instagram ID. *Id.* She made plans with him to go shopping for an intimate item. (R. at 311). Ten days after these conversations, PFC ST engaged in a sexualized text message exchange with appellant in which she told him that she preferred to sleep in the nude. (R. at 313). When appellant inquired whether PFC ST had an enjoyable evening, she told him "Your girl got lit not laid." (R. at 315). A few nights later, after appellant invited PFC ST to stay in his room, she declined because she thought it would lead to sex. Appellant responded to this by asking "How so? We haven't and you've slept here before..." PFC ST did not contradict appellant by using words to the effect of "No, but you fingered me when I slept over last." Instead, she agreed and said "true." Def. Ex. D for Id at 11-12. PFC ST told appellant that she would stay over in his room in the future. "[N]ext time more notice so I'm not already in bed squinting at my phone." (R. at 317). PFC ST had other even more lurid discussions with appellant referenced in the sealed portions of the transcript.

PFC ST claimed that appellant subsequently grazed with his hand the area outside her vagina over her clothing. (R. at 274). She claimed appellant did this in PV2 Bazurto's room. *Id.* She did not remember when this happened, except that it happened in late October 2019. (R. at 273). She did not know how many days or weeks intervened between the incident on her birthday, at the end of September 2019, and the end of October. (R. at 274). PV2 Bazurto was present when this grazing allegedly happened. (R. at 332). He did not testify about such an incident. PFC ST could not remember whether this alleged touching occurred under or over her clothing. (R. at 560).

At trial, the military judge did not permit PV2 Bazurto to testify as to whether appellant was "unduly familiar" with himself or PFC ST. (R. at 383). The military judge ruled that this term was "a term of art." *Id.* Instead, PV2 Bazurto testified that he did not perceive that he had an overly close relationship with appellant. *Id*. He testified that he did not perceive that PFC ST was overly close with appellant. *Id*. He further testified that he did not believe that he or PFC ST could receive special favors from appellant. (R. at 384). He further testified that whenever PFC ST threw dinner parties, she would invite her entire squad, including appellant. *Id.* Appellant briefly attended to greet his Soldiers and then left. *Id.* These parties occurred after the alleged incident, almost every weekend. (R. at 397-98).

At trial, Dr. Reagen Wetherill testified as an expert in forensic psychology with primary expertise in alcohol and its effects on cognition, behavior, and memory. (R. at 499). Dr. Wetherill testified that alcohol disinhibits. (R. at 499). At increased amount of consumption, alcohol inhibits memory recordation by limiting the amount of information that the brain can absorb. (R. at 500). An alcoholic blackout in an episode in which a person can interact with his environment but cannot remember the interaction. (R. at 500-01). A fragmentary blackout is one in which a person can only record portions of his activities while intoxicated. (R. at 501). An en bloc blackout is one in which a person can remember nothing. *Id.* An en bloc blackout usually ends with the intoxicated person going to sleep. *Id.* The higher and more quickly a person's blood alcohol spikes, the more likely it is that a person will experience a blackout. (R. at 506-07). A person with a history of blackouts or alcohol abuse is more likely to experience a blackout. (R. at 524).

Blacking out and passing out are not the same phenomena. *Id.* A person who is passed out is unconscious. *Id.* A person in a blackout state is fully conscious and interacting with others. *Id.* A person undergoing a blackout can make decisions but simply cannot remember those decisions. (R. at 502).

When a person lacks memories because of an alcohol-induced blackout, his mind attempted to fill those gaps. (R. at 504). The reconstruction process can be

contaminated by events immediately after the blackout event. *Id.* There is a particular risk for contamination when a person is told what should and should not have happened. (R. at 504-505). Past trauma can also contaminate the reconstruction process. (R. at 523-24).

A person who had undergone a blackout has a "malleable" memory because of the gaps in recordation during the blackout. When he subsequently repeats his incomplete, the reactions of others can influence the memory and fill the gaps in recollection. (R. at 508). The passage of time increases the likelihood of variance between a person's memory and what actually occurred.

Dr. Wetherill heard in court testimony and reviewed the admitted evidence. (R. at 503). She opined that PFC ST was in a blackout state during the relevant period. *Id*. This was because PFC ST is female and consumed straight liquor over a short period and because there are significant gaps in her memory. (R. at 507-08). She further opined that, because of the gaps in her memory, her memory was not reliable. (R. at 510). PFC ST's changing testimony based after repeated discussion of her allegation was strong indication that her memory had changed over time and was inaccurate. (R. at 513). A person's confidence in the accuracy of his memory after a blackout is inverse to the accuracy of that memory. (R. at 514). The only way to determine whether a reconstructed memory is accurate is to

consult persons who witnessed the same event and were not in a blackout state. (R. at 531).

PFC ST spoke with a therapist about her experiences. *Alfaro*, 2026 CCA LEXIS 78, *6-7. Her records contained matters that directly contradicted her in-court testimony. *Id.* at *12. Defense counsel did not examine those matters, although the military judge did. *Id.*

Trial Counsel argued during closing that PFC ST was "unresponsive and was out of it due to the level of her intoxication…. because consent isn't… given when a person is sleeping and unconscious." (R. at 581-83). The government further argued that appellant was guilty as charged because "[PFC ST] [was] significantly intoxicated, throwing up, and passing out or falling asleep in [appellant's bed and then [appellant] sexually assaulting her [while she was passed out or asleep]." (R. at 617). The government further argued that PFC ST "was asleep and unconscious and provided no verbal or physical resistance." (R. at 823).

Argument

I

THE ARMY COURT INCORRECTLY HELD THAT MIL. R. EVID. 513 IS ABSOLUTE AND A MILITARY JUDGE MUST IGNORE EXCULPATORY MATERIALS THAT HE EXAMINES IN CAMERA

Standard of Review

This court reviews questions of law de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Law and Discussion

A. Mil. R. Evid. 513 cannot create a constitution-free zone in the Rules of Evidence.

The Army Court erred when it found that the Mil. R. Evid. 513 privilege is absolute. "There is a hierarchy of sources of rights in the military…the paramount source is the U.S. Constitution." *United States v. Marie*, 43 M.J. 35, 37 (C.A.A.F. 1995). The Army court apparently accepts Appellant's contention that the materials contained in App. Ex. LXII were exculpatory and thus constitutionally required. *Alfaro*, 2026 CCA LEXIS 78, *16. Constitutionally required evidence includes that evidence necessary to permit effective cross-examination by discrediting a complaining witness. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011). In this case, these materials were constitutionally required because they directly contradicted M.H.'s in-court testimony. *Id.* Although the Army court held that it lacks authority to read into Mil. R. Evid. 513 an exception allowing the release of privileged materials without a privilege holder's consent on constitutional grounds, *Alfaro*, 2026 CCA LEXIS 78, *15-16 citing *United States v. Tinsley*, 81 M.J. 836, 849 (A. Ct. Crim. App. 2021), this does not mean that Mil. R. Evid. 513 may create a constitution-free court-martial. It simply means that a

military judge who discovers constitutionally required matters must either obtain the consent of the alleged victim for their release to the Defense or abate the proceedings. *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N.M. Ct. Crim. App. 2017).

The Army court acknowledges that it "must 'narrowly construe' M.R.E. 513," *Alfaro*, 2026 CCA LEXIS 78, *11 quoting *United States v. Mellette*, 82 M.J. 374, 379 (C.A.A.F. 2022) but fails to do so in its opinion. Mil. R. Evid. 513 does not state that courts-martial shall proceed irrespective of constitutionally required matters made known to the military judge, as the Army court ruled. See *Alfaro*, 2026 CCA LEXIS 78, *16. Rather, the revised version of Mil. R. Evid. 513 merely removes non-consensual disclosure of the records as a means of complying with the constitution.

The constitution is paramount. *Marie*, 43 M.J. at 37. If privileged psychotherapy records contain constitutionally-required matters, a court-martial may not proceed because the constitution's requirements are superior to any rule of evidence.

B. The Army court's holding that the military judge may not have read the required matters is unsupported by the record.

The Army court incorrectly held that the military judge may not have read the constitutionally required matters contained in App. Ex. LXII. *Alfaro*, 2026 CCA LEXIS 78, *14. This court presumes that the military judge follows his own

rulings. *United States v. Hill*, 62 M.J. 271, 276 (C.A.A.F. 2006). Here, the military judge ruled that MT "had waived her privilege for [the military judge's in-camera review...." (R. at 224). The military judge therefore ruled that he had the authority to read the entirety of PFC S.T.'s psychotherapy records. *Id.*

The Army court incorrectly limits the review that the military judge conducted. The military judge did not conduct a review only for "mental health diagnoses and prescribed antidepressant medication." Contra *Alfaro*, 2026 CCA LEXIS 78, *12. Instead, he conducted a review for items "not privileged." (R. at 224). It is impossible to conceive how he could determine that records were not privileged without reading them. Precisely because a full review was necessary to differentiate between privileged and non-privileged matters, the military stated on the record that he read the entirety of the privileged matters. "[T]he unredacted, privileged records **I reviewed** are marked as a sealed appellate exhibit for the record." *Id.* (emphasis added). These items are now apparently known to be item x on the military judge's sealing order, App. Ex. LXII.

It is inconceivable how the military judge could redact M.H.'s records without casting his eyes over the matters to be redacted. The process of redaction required him to drag the mouse of his computer over the to-be redacted items. This court should therefore reconsider its holding that it was possible that the military judge did not review constitutionally required matters.

C. The Military Judge had a duty to comply with the constitution.

The Army Court erred when it found that "the military judge did not have a *sua sponte* duty to…abate the trial" when he discovered constitutionally required materials contained in App. Ex. LXII. *Alfaro*, 2026 CCA LEXIS 78, *15-16. This statement cannot be true. A military judge, like all other federal and state officials, is "bound by Oath or Affirmation, to support this Constitution." Article VI, clause 1, Constitution of the United States of America. A military judge therefore has an affirmative duty to comply with the constitution's requirements. He cannot ignore matters within the constitution's requirements when they are presented to him. If a military judge's *in camera* review

> "uncovered impeachment material within the records necessary for the accused to receive a fair trial, the military judge must inform the victim of this discovery and then ask whether the victim wishes to waive the privilege regarding that material. If the victim agrees to the waiver, the military judge should then disclose that material to the parties for potential use at trial. If the victim does not agree to the waiver, the military judge should follow the procedures articulated by the NMCCA in *Payton-O'Brien*, 76 M.J. at 789-92."

B.M. v. United States, 84 M.J. 314, 323 (C.A.A.F. 2024) (Ohlson, C. J., concurring).

Here, ST consented to the military judge's review of her psychotherapy records and affirmatively waived her Mil. R. Evid. 513 privilege for that review. (R. at 224). In doing so, she let the Mil. R. Evid. 513 cat out of the bag and into

the military judge's chamber. Unfortunately for the government, that cat had constitutional spots. When the military judge read the constitutionally required matters contained within App. Ex. LXII, he was required to ask PFC ST's consent to release them to appellant. If she did not consent, he was required to abate the court-martial. *Id.* This court should grant review to confirm the validity of Chief Judge Ohlson's concurrence in *B.M. v. United States, Id.*

II

THE ARMY COURT FAILED TO CONSIDER THE MIL. R. EVID. 513 MATTERS AS A PART OF ITS FACTUAL SUFFICIENCY REVIEW

Standard of Review

"When this Court reviews a service court's factual sufficiency analysis, we ask whether the court applied 'correct legal principles' in performing its factual sufficiency review." *United States v. Downum*, 86 M.J. 200, 203 (C.A.A.F. 2025) quoting *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024).

Argument

The Army Court did not apply "correct legal principles" in its factual sufficiency review and treated the sealed Mil. R. Evid. 513 materials as beyond the scope of that review. Under the version of Article 66 applicable to this case, "[t]he [service] court must assess the evidence in the **entire** record without regard to the findings reached by the trial court, and it must make its own independent

determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Here, the sealed Mil. R. Evid. 513 matters were part of the record. "If 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**…". R.C.M. 701(g)(2)(emphasis added). The Army Court, however, gives no indication that it independently considered those exculpatory matters contained within the Mil. R. Evid. 513 matters. Instead, the Army Court describes those matters as "protected" and apparently concluded that they were beyond the scope of factual sufficiency review. *Alfaro*, 2026 CCA LEXIS 78, *15.

The Army court had a duty to consider evidence contained in "the entire record" in reaching a factual sufficiency determination. The "entire record" included not just those matters released to trial defense counsel, but also those matters that were sealed. The Army Court apparently did not do so. Therefore, this court should grant review for the purpose of correcting the Army court's error.

III

THE ARMY COURT MISAPPLIED *MENDOZA* AND ITS PROGENY.

Standard of Review

This court applies plain error review for a new rule announced while appellate review is pending. *United States v. Harcow*, 66 M.J. 154, 160-61 (C.A.A.F. 2008)(Ryan, J. concurring).

Law and Discussion

Conflation of consciousness with capacity.

The Army Court erred when it conflated regaining consciousness with regaining capacity. Contra *Alfaro*, 2025 CCA LEXIS 468, *18. A person who does not "possess the… physical ability… to communicate a decision regarding [consent]" is not competent. *United States v. Pease*, 75 M.J. 180, 183 (C.A.A.F. 2016). A person who cannot walk or move and is either asleep or barely conscious is not competent. See e.g. *United States v. Key,* 71 M.J. 566, 569-70 (N-M. Ct. Crim. App. 2012). Here, during interludes of wakefulness concurrent with the alleged sexual acts, the alleged victim testified that she was incapacitated. According to PFC ST, prior to the first alleged penetration, she "couldn't move [her] body" and "couldn't walk [her]self to [her] room" following the second a third alleged penetration. (R. at 321). She further stated that she was either "blacked out" or asleep due to her intoxication. (R. at 323). At no point in the record did PFC ST testify that she communicated or could communicate non-consent to appellant. Contra *Alfaro*, 2025 CCA LEXIS 468, *18. Likewise, PFC

ST's "declining [appellant's] invitation to take a shower with him and ultimately locating her clothes, leaving the room and immediately telling her boyfriend and another family member about the incident," *Id.,* does not mean that PFC ST had capacity at the time of the alleged incident because these occurred several hours after the alleged incident.

Although the Army Court found that PFC ST was able to roll away from appellant, PFC ST did not testify that she pulled up her pants as a means of communication. Instead, by her own account, she could not move. Nowhere does PFC ST testify that she could talk or that she told appellant of her non-consent. PFC ST therefore was incapacitated. *Pease*, 75 M.J. at 183. The Army Court erred when it conflated regaining consciousness with regaining capacity and when it used *ex post facto* events to find her competent during the sexual act.

This Court found that "charging [nonconsent] and proving [incapacity] 'raises significant due process concerns.'" *United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024). Although the government may use evidence of intoxication as proof of the unlikeliness of nonconsent, that is not what Trial Counsel argued. Contra *Alfaro*, 2025 CCA LEXIS 468, *18. Instead, Trial Counsel argued that PFC ST was "unresponsive and was out of it due to the level of her intoxication…. because consent isn't… given when a person is sleeping and unconscious," (R. at 581-83), that "[PFC ST] [was] significantly intoxicated, throwing up, and passing

out or falling asleep in [appellant's bed and then [appellant] sexually assaulting her [while she was passed out or asleep]." (R. at 617), and that PFC ST "was asleep and unconscious and provided no verbal or physical resistance." (R. at 823). This was not an argument of unlikelihood of consent but was an argument of incapacity.

When, as here, "nothing in the record indicates whether the military judge found that [the victim] was capable of consenting but did not, or that [the victim] was incapable of consenting and thus could not," *Mendoza*, 85 M.J. at 221, a service court must set aside a conviction. It is therefore not true that the government may use non-consent as an umbrella theory "so long as evidence of intoxication is not the *only* evidence of non-consent." Contra *Alfaro*, 2025 CCA LEXIS 468, *18. This court should grant review for the purpose of correcting the Army court's error.

IV

APPELLANT IS DUE RELIEF FOR POST-TRIAL DELAY BECAUSE THE ARMY COURT'S ERROR CREATED LARGE PORTIONS OF DELAY

Standard of Review

This court reviews allegations of excessive post-trial delay de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022).

Law and Discussion

Appellant is due relief for post-trial delay. A delay is presumptively unreasonable when a case remains pending eighteen months beyond docketing. *United States v. Moreno,* 63 M.J. 129, 143 (C.A.A.F. 2006). Appellant's case was docketed before this honorable court on July 18, 2022. He demanded speedy post-trial processing on April 17, 2025 and again on July 7, 2025. Appellant's case was pending before the Army court for over three years. This court should therefore find that appellant's case is unreasonably delayed and that he is due relief.

The Army court erred when it placed blame on appellant for that court's refusal to allow his counsel to examine sealed matters. "[A]ppellant's appeal was with him and his counsel for briefing for almost 400 days." *Alfaro*, 2025 CCA LEXIS 468, *22. The Army Court ignores that appellant first sought access to the sealed matters in July, 2023 and did not obtain access to them until January 9, 2024. This court found that the Army Court improperly obstructed appellant's access to said sealed matters. "**Without further delay**, the lower court shall permit and facilitate the military counsel to securely transmit or virtually share the sealed materials - except for Item Y - with civilian counsel." *Alfaro v. Judges of*

the Army Court of Criminal Appeals, 84 M.J. 259 (2025). This court should therefore grant review for the purpose of correcting the Army Court's shift of responsibility for delay to appellant.

V

CHARGE II FAILS TO STATE AND OFFENSE AND THE EVIDENCE FOR IT IS LEGALLY INSUFFICENT

Standard of Review

This court reviews *de novo* whether a specification fails to state an offense. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). This court reviews questions of legal sufficiency *de novo. United States v. Oliver,* 70 M.J. 64, 68 (C.A.A.F. 2011).

Law and Discussion

A. Failure to State an Offense.

Charge II fails to state an offense because it alleges that a "perception" is prohibited. (R. at Charge Sheet). Army Regulation [AR] 600-20, *Army Command Policy* (6 November 14), para 4-14(b)(emphasis added), prohibits certain "relationships between Soldiers of different grade." It does not prohibit perceptions. Instead, it merely charges "[s]oldiers of different grades" to "**be cognizant** that their interactions do not create an actual or clearly predictable perception of undue familiarity…." Army Regulation [AR] 600-20, *Army*

Command Policy (6 November 14), para 4-14(b)(emphasis added). This language explains to a Soldier how he may avoid improper relationships. It does not criminalize perceptions because such a provision would unconstitutionally impose criminal liability for other people's thoughts.

The duty which AR 600-20, para 4-14(b) sets is to avoid defined categories of improper relationship. While AR 600-20, para 4-14(b) may make perception of undue familiarity *evidence of* an improper relationship, it does not impose a duty to avoid perception. Instead, it imposes a duty to avoid the actual improper relationship. The government did not charge breach of duty to avoid improper relationship. (R. at Charge Sheet). Therefore, Charge II fails to state an offense.

In the alternative, assuming, *arguendo*, that the language of AR 600-20, para 4-14(b) imposes a duty, that duty is of "cognition." The government neither charged nor proved appellant's cognition. Therefore, the Charge failed to state an offense and was legally insufficient.

B. Assuming, *arguendo*, that someone else's perception can be a crime, Charge II is legally insufficient because the government provided no evidence of anyone's perception.

Charge II is legally insufficient because the government admitted no evidence of actual perception. A court may not affirm a conviction based on an uncharged theory of liability. *United States v. Bennitt*, 74 M.J. 125, 128 (C.A.A.F. 2015). Where a provision contains two or more theories of liability and the

government charges the wrong theory, a court may not affirm a conviction on the basis of the uncharged theory, even if the uncharged theory fits the facts admitted. *United States v. Brantley*, 2017 CCA LEXIS 742, *9 (A. Ct. Crim App. 30 Nov. 2017)(mem. op. on rem.).

A perception of undue familiarity may be either "actual" or "clearly predictable." AR 600-20, para 4-14(b). Here, the government alleged that appellant "wrongfully create[ed] a perception of undue familiarity." (R. at Charge Sheet). The government did not allege that appellant's conduct created a "clearly predictable" risk of perception. The government was therefore limited to proving an actual perception.

The record contains no testimony that anyone who perceived appellant thought his conduct was undue. The government therefore failed to offer evidence of perception. This court should therefore grant review for the purpose of finding Charge II to be legally and factually insufficient.

Conclusion

WHEREFORE, appellant respectfully requests that this honorable Court grant his petition for review.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court and Army Government Appellate Division, and on April 18, 2026.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
POND, MORRIS, and FLEMING
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant RENE D. ALFARO
United States Army, Appellant

ARMY 20220282

Headquarters, Eighth Army
Christopher E. Martin, Military Judge
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Captain Matthew S. Fields, JA; Robert A. Feldmeier, Esquire (on brief); Major Matthew S. Fields, JA; Robert A. Feldmeier, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Colonel Jacqueline J. DeGaine, JA; Major Justin L. Talley, JA; Captain Stewart A. Miller, JA (on brief).

30 September 2025

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

MORRIS, Senior Judge:

A military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of violating a lawful general regulation and three specifications of sexual assault, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920 [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-four months, and reduction to the grade of E-3.

Appellant raises six assignments of error; two assignments of error in his original brief, two additional assignments of error in a supplemental brief filed under seal, and two supplemental assignments of error alleging appellate post-trial processing delay and requesting further review in light of the Court of Appeals for the Armed Force's [CAAF] decision in *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024). Appellant's assignments of error concerning the Military Rule of

Evidence [Mil. R. Evid.] 513 issue, *Mendoza*, and appellate post-trial processing delay warrant discussion, but no relief.[1]

BACKGROUND

At the time of the incident, appellant was a noncommissioned officer stationed at Camp Humphreys, Republic of Korea. The victim was appellant's direct subordinate who had arrived in Korea approximately two weeks prior to the sexual assault for which appellant was charged and convicted. On the night of assault, the victim arrived at appellant's barracks room with another male soldier to conduct her initial counseling. Because she was also celebrating her twenty-first birthday, she brought a bottle of vodka with her, which she had already begun to consume. The other male soldier and appellant each drank a small amount of the alcohol. After drinking a large amount of the bottle, the victim, who was suffering the effects of intoxication, started behaving strangely and dancing seductively. She then climbed into appellant's bed and fell asleep. Shortly thereafter she woke up and vomited on appellant's floor and fell back to sleep. The next time she woke up, she slid out of appellant's bed and through her vomit on the floor. Appellant helped her into the shower and left her there. The victim fell multiple times while in the shower. Appellant checked on the victim and sent the other soldier to the victim's room to get her a change of clothes. After returning with the victim's clothes, the soldier continued to help clean up the victim's vomit. Sometime later, the victim came out of the bathroom wearing a towel and climbed into appellant's recliner, before transitioning back into appellant's bed to sleep. With the victim asleep, appellant and the other soldier continued to talk about the military before the other soldier retired to his own barracks room across the hall. Before the soldier left, appellant told him he planned to sleep in his chair and would take care of the victim.

Approximately twenty minutes after he left, the other soldier heard appellant's door open and shut and assumed the victim was returning to her barracks room. While it is not clear if that was in fact the victim leaving or not, the victim testified that during the time she remained in the room, she was awakened by painful penetrations of her vagina three separate times. The first penetration of her vagina was with an unknown object, to which she responded by trying to move away, prompting appellant to tell her to take another shower. She complied and returned to his bed and was awakened by appellant penetrating her vagina for a second time, this time, with his finger. The victim tried to leave again but, due to her intoxicated state, was unable to locate her clothes and remove herself from the bed. After she awoke a third time by a vaginal penetration with appellant's finger, the victim located her clothes and left the room. At trial, when pressed by trial defense counsel

[1] We have given full and fair consideration to the remaining matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

about her memory of the sexual assault, the victim testified that at all times she was aware of and remembered the sexual assaults in appellant's barracks room.

After leaving appellant's room, the victim immediately called her boyfriend, another soldier who was stationed in the United States. Her boyfriend was initially angry with her because he believed she put herself in "a bad situation." The victim then told her cousin, who after listening to what occurred, told her she was a victim. The next morning, the victim went to breakfast with appellant and the soldier from the night before. Also, later this same day, appellant sent a text message to the victim stating, "Hey, wanted to apologize to you 'bout last night and being so touchy with you." He followed up with, "Besides that, great conversation, though, lol." About a month later, while the victim was spending time drinking alcohol with appellant and the same male soldier, the victim testified that appellant swiped his hand over her vaginal area, prompting her to file a restricted sexual assault report. Over the course of the next ten months, the victim continued to communicate personally and professionally with appellant in an attempt to cope with and normalize the incident. Ultimately, she decided to switch her report to unrestricted. The government subsequently charged appellant with sexual assault and violating the Army's regulation prohibiting undue familiarity between noncommissioned officers and junior enlisted soldiers, including the victim.

Prior to trial, defense filed a motion to compel discovery of the victim's behavioral health appointment history, prescriptions, and mental health diagnosis to assist with defense preparation. In their motion, defense counsel asserted the requested discovery was not privileged and did not fall under the protections of Mil. R. Evid. 513. Both the government and the victim's Special Victims' Counsel (SVC) filed responses requesting the military judge deny the defense request, arguing the request was overly broad and did not identify how the information was relevant to the defense preparation. The SVC's response also explicitly stated the victim was invoking her psychotherapist-patient privilege.[2] In a written ruling after a closed hearing on the issue, the military judge concluded that mental health appointment records, diagnoses, and prescriptions were not privileged under Mil. R. Evid. 513 and ordered the government to provide the following for in camera review: (1) any records of AV1's mental health diagnoses from the time of her entry on active duty through July 2020 and (2) any records of antidepressant medications prescribed to AV1 in the year before the sexual assault. The military judge denied defense counsel's request for the victim's appointment history finding that the defense had not met its burden to demonstrate that any such records were relevant to defense preparation.

During his initial in camera review, the military judge discovered the medical facility had failed to comply with his order and had provided the victim's entire

[2] At all times, the victim maintained her privilege to her records.

medical and mental health records. He ceased his review and returned the records to the medical facility, requesting the facility comply with his order and return only the requested items. After the medical facility asserted they were not qualified to comply, the military judge provided the victim the option of either trying once again to obtain compliance from the medical facility or allowing the military judge to screen the records in camera to redact all but the non-privileged diagnoses and prescriptions. The victim elected to allow the military judge to review and redact the records in camera. Once complete, the military judge provided both the redacted and unredacted records to the victim and her SVC, who both agreed the redacted records could be provided to defense counsel. The military judge subsequently marked and sealed as appellate exhibits both the redacted and unredacted versions of the victim's mental health records.

After trial, the case was docketed at this court on 8 February 2023. On 10 July 2023, civilian appellate defense counsel (CADC) submitted a motion to examine all appellate exhibits referenced in the military judge's sealing order. The CADC's motion incorrectly alleged that *all* the requested material was reviewed by prosecution and defense counsel at trial. However, neither the trial counsel nor the defense counsel had seen the victim's unredacted mental health and medical records. Only the military judge had reviewed those records, which were marked as Appellate Exhibit (AE) LXII, and listed as "item x" in the military judge's sealing order. However, the CADC requested to examine all sealed exhibits, including "item x" as well as "item y," which does not actually exist in the record.[3] The CADC further incorrectly asserted that all the requested sealed materials related to Mil. R. Evid. 412. This court granted the motion for fifteen of the twenty-five sealed exhibits[4] that were related to the Mil. R. Evid. 412 litigation at trial and denied the CADC access to the remaining sealed exhibits. According to the sealing order, the denied exhibits concerned trial litigation pursuant to a Mil. R. Evid. 513 motion and the victim's redacted and privileged unredacted mental health records.[5] After this court

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[3] The military judge's sealing order, dated 20 November 2022, lists twenty-five items "a" through "y." Pursuant to this document, item y, is purported to be "AV Mental Health and Medical Records (1CD)." Based on the fact that this item was not assigned an appellate exhibit number and it is almost identical to item x, which was listed as "AE LXII, AV Mental Health and Medical Records (Unredacted) (1CD)," it appears the addition of item y was a scrivener's error.

[4] In light of the phantom "item y" in the military judge's sealing order, there were actually only twenty-four sealed exhibits.

[5] Seven of the ten exhibits pertaining to the Mil. R. Evid. 513 litigation the CADC requested were either written motions from the defense or prosecution or rulings

(continued . . .)

denied the CADC's motion for reconsideration; where for the first time he acknowledged the exhibits he was requesting related to trial litigation pursuant to Mil. R. Evid. 513, including the victim's unredacted mental health and medical records; the CADC filed a writ of mandamus with CAAF on behalf of appellant. In this petition, the CADC argued that in order to view the items to which trial defense counsel had access under Rule for Courts-Martial [R.C.M.] 1113(b)(3), he only needed to make a colorable showing of reasonable necessity to fulfill his duties as appellate counsel. On 13 September 2023, CAAF denied appellant's petition for extraordinary relief.

Over the course of the next three months, the CADC filed two additional petitions for extraordinary relief at CAAF on behalf of appellant, one requesting access to all sealed materials in the record and the other requesting that CAAF direct this court to permit his military appellate defense counsel to securely transmit the sealed materials to the CADC located in Israel. The CADC also filed a petition for extraordinary relief in the nature of a writ of prohibition ordering this court not to enforce Army Court of Criminal Appeals Rule (A.C.C.A.R.) 6.9, which required counsel to notify the privilege holder of any motion to examine sealed privileged matters.[6] In response to the petition for extraordinary relief, the government appellate division did not take a position on whether the CADC should be permitted to examine the sealed materials. Our superior court granted each of these petitions for extraordinary relief and the CADC was ultimately provided all the sealed materials from record, with the exception of the phantom "item y", access to which CAAF denied. Upon receipt and review of the sealed exhibits, including a limited

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(. . . continued)
from the military judge, so there is no doubt counsel reviewed those items at trial. The remaining three exhibits included the phantom "item y" and the redacted and unredacted copies of the victim's medical and mental health records. With the victim's consent, both prosecution and defense counsel received a copy of the victim's redacted mental health records, AE LX, but neither counsel received a copy of the victim's unredacted mental health records, AE LXII, at trial. At all times, the victim maintained her privilege to her unredacted mental health records. The CADC seems to have subsequently acknowledged the fact in his motion to our court and his petition to our superior court that the counsel at trial perhaps did not receive "item y", but he failed to acknowledge that "item y" and "item x" were referring to the same appellate exhibit.

[6] Army Court of Criminal Appeals Rule 6.9(d) required any motion to examine privileged materials to include a certification that the privilege holder has been notified of the motion or that counsel has taken reasonable steps to notify the privilege holder of any motion to examine sealed privileged material. The rule also required the motion include an explanation of why the privilege had been waived, did not exist, or did not apply because of a recognized exception.

review of the victim's privileged, unredacted mental health records, the CADC discovered information that he now asserts should have either been disclosed to the parties at trial, or in the absence of disclosure, should have required the military judge to abate the trial proceedings.

We are in an unusual situation in this case, because the issue appellant asserts was discovered during the appellate process by a disclosure of the victim's sealed and privileged mental health records, in violation of Mil. R. Evid. 513. While multiple parties could have intervened, as the government points out, the disclosure of the documents was a result of the CADC's mistaken assertions in his multiple motions to this court and petitions to our higher court that all of the sealed documents he requested to examine had been provided to the parties at trial. In fact, the parties at trial had access to all but one of the requested appellate exhibits. The one appellate exhibit the parties were not provided, AE LXII, *was clearly marked* as the victim's unredacted mental health and medical records.[7] Appellant now alleges that based on his CADC's limited review of the victim's privileged mental health communications that it was an abuse of discretion for the military judge not to allow disclosure of the privileged communications or abate the trial. We disagree.

LAW AND DISCUSSION

A. Military Rule of Evidence 513

We review this issue under an abuse of discretion standard. *United States v. Tinsley*, 81 M.J. 836, 846 (Army Ct. Crim. App. 2021) (internal citation omitted), pet. denied, 82 M.J. 372 (C.A.A.F. 2022). "An abuse of discretion occurs when a military judge's decision is based on clearly erroneous findings of fact or incorrect conclusions of law." *United States v. Hernandez*, 81 M.J. 432, 437 (C.A.A.F. 2021) (internal citation omitted). Our superior court has already decided that diagnoses and prescriptions are not uniformly privileged under Mil. R. Evid. 513. *United States v. Mellette*, 82 M.J. 374, 375 (C.A.A.F. 2022) ("Based on the plain language of M.R.E. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513."). It is undisputed in the record and by the parties that the military judge released a

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[7] It is not lost on this court, that instead of contesting the requirements of A.C.C.A. R. 6.9, if the CADC had simply followed the rule, it is possible the victim, who was present at the trial and maintains an interest in protecting the privacy of her mental health records could have intervened and identified to both courts at a very early stage of the appellate review process what was ultimately never released to the parties. We further note that the government had ample opportunity to address, either to this court or our superior, that the CADC was requesting access to view sealed, privileged records that had not been reviewed by the parties at trial.

redacted version of the victim's mental health and medical records to the prosecution and defense teams at trial. Since the redacted records only included the victim's mental health diagnoses and prescribed antidepressant medications, the military judge's ruling was in compliance with *Mellette* and not an abuse of his discretion.

Appellant argues, however, that in the process of his counsel reviewing the privileged records to identify the victim's mental health diagnoses and prescriptions that the military judge would have seen information requiring disclosure to the parties or abatement of trial. *See, e.g.*, *B.M. v. United States*, 84 M.J. 314, 322 (C.A.A.F. 2024) (Ohlson, C. J., concurring) (noting the "unenviable position" the military judge placed herself in by reviewing protected mental health records, erroneously turned over by a mental health facility, and discovering impeachment materials, the disclosure of which was necessary for the real party in interest to receive a fair trial). In coming to this conclusion, appellant makes multiple incorrect assumptions. First, he assumes that by conducting an in camera review to identify and release the prescriptions and diagnoses that the military had to read, for content, portions of the victim's mental health record that included confidential communications. This assumption is mere speculation. The technical language included in a medical diagnosis and prescription would be easily discernible from the language a victim would use in a communication of personal details about an assault. Thus, a military judge could conceivably conduct an in camera review for non-privileged diagnoses and prescription information without the more in-depth review and analysis of the entire contents, as contemplated by appellant.

Second, appellant assumes that if the military judge had indeed read the information, he would have determined, sua sponte, that admission of the contents was required. This assumption, however, is based on a misunderstanding of the law and the facts in this case. "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition" under Mil. R. Evid. 513(a). To request production or admission of patient records or communications, a party must follow the procedures outlined in Mil. R. Evid. 513(e). *E.g.*, *Mellette*, 82 M.J. at 379. Since defense counsel never requested nor initiated the necessary process for admissibility of the patient's privileged communications under the rule, the military judge was not examining the records for this purpose. A judge is presumed to know and follow the law. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). In following the law, the military judge would have purposefully avoided reading confidential communications, as he was aware appellant never requested nor made a proffer for the privileged records and the victim never waived her privilege as to those confidential communications.

Under his mandate to review the records for non-privileged information, the military judge did not have a sua sponte duty to pursue release of the privileged information or abate the trial. He was only reviewing the documents for releasable information. He was not reviewing the documents to determine if privileged information qualified for an exception or somehow impacted appellant's constitutional rights. As such, he did not abuse his discretion.

Even in his submission to this court, appellant failed to offer any evidence that the admissibility of the records could have been appropriate under one of the enumerated exceptions to Mil. R. Evid. 513. Instead, he argues that the privilege "must not infringe upon the basic constitutional requirements of due process and confrontation," citing to *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N.M. Ct. Crim. App. 2017). But he never mentions this court's precedent in *Tinsley*, 81 M.J. 836.

In *Tinsley*, this court conducted a thorough analysis of the patient-psychotherapist privilege and the impact of the President's striking the constitutional exception from the rule. *Id.* Recognizing the deletion of the constitutional exception as both a legislative and executive act, "the President was likely at the apex of his authority in implementing M.R.E. 513." *Id.* at 849 (internal citation and quotations omitted). Holding that neither a confrontation clause exception nor a *Brady* exception[8] applied to Mil. R. Evid. 513, *Tinsley* ultimately concluded military courts do not have the authority to read a constitutional exception back into Mil. R. Evid. 513 "or otherwise conclude that the exception still survives notwithstanding its explicit deletion." *Id.* at 849, 851.

In addition to *Tinsley*,

> we must also heed the Supreme Court's guidance that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence," *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (alteration in original removed) (internal quotation marks omitted) (citation omitted), and our own view that "privileges 'run contrary to a court's truth-seeking function,'" *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)).

Mellette, 82 M.J. at 377. Consequently, we must "narrowly construe" M.R.E. 513. *Id.* at 379. The President, in his role as the promulgator of the Military Rules of

[8] The government is required to disclose evidence within its possession or control that is material and favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Evidence, has "the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy." *Id.* at 380. Further, there is no constitutional exception for the attorney-client, spousal, or clergy-penitent privileges in the military rules of evidence and there is every indication the psychotherapist-patient privilege was meant to be equal to those privileges and "rooted in the imperative need for confidence and trust." *Tinsley*, 81 M.J. at 850 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)). Contrary to appellant's arguments otherwise, and in the absence of an applicable exception under Mil. R. Evid. 513(d), appellant had no right to access the victim's confidential communications.

Privileged records obtained inadvertently maintain their privilege. Here, the victim has not voluntarily disclosed or consented to the disclosure of the privileged matters to the CADC on appeal and this particular disclosure does not waive the privilege. As noted in *Tinsley*, when addressing the marital privilege, courts have regularly held the unauthorized disclosure of privileged information does not waive the privilege. *Id.* at 852. Similarly, this court found the inadvertent disclosure of potentially exculpatory privileged information to the government, "does not constitute a waiver or otherwise trigger an immediate *Brady* duty to disclose." *Id.* at 852. That result applies equally to the defense. "Regardless of how [a party] obtains the records, that is either intentionally or inadvertently, it is no less bound to honor evidentiary privileges than the defense. *See LK v. Acosta*, 76 M.J. 611, 616 (Army Ct. Crim. App. 2017) ("The privilege governing mental health records, by contrast, applies to both the prosecution and the defense."). We find the victim's unredacted records in AE LXII remain privileged materials. Therefore, the CADC should return or confirm the deletion of the victim's improperly disclosed privileged mental health records.

B. United States v. Mendoza

We next briefly address appellant's supplemental assignment of error that appellant's convictions of sexual assault are not legally and factually sufficient after *Mendoza* because the government failed to prove the victim had the capacity to consent. Despite appellant's assertions to the contrary, appellant was not convicted under a theory of incapacity. "Nothing in the article bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent." *United States v. Casillas*, __ M.J. __, 2025 CAAF LEXIS 692, at *12 (C.A.A.F. 20 Aug. 2025) (alteration and internal quotations omitted) (citing *Mendoza*, 85 M.J. at 222). As the CAAF noted, a victim's intoxication can still be relevant under a "without consent" theory of liability, so long as evidence of intoxication is not the *only* evidence of non-consent. *Mendoza*, 85 M.J. at 222. The evidence of the victim's intoxication is undisputed in this case. Notwithstanding her intoxication, the victim testified that she felt and remembered every penetration. Like the victim in *Casillas*, the victim awoke to the assault in-progress for each of

the three penetrations and was capable of consenting. 2025 CAAF LEXIS 692, at *11. In this victim's case, despite her intoxication, she manifested a lack of consent by physically moving her body as far away from appellant as she could, declining his invitation to take a shower with him and ultimately locating her clothes, leaving the room and immediately telling her boyfriend and another family member about the incident. This evidence established that she was both capable of consenting and did communicate her non-consent to the charged sexual acts. Based on our review of the record, we conclude that appellant's conviction is legally and factually sufficient under both *Mendoza* and *Casillas*.

C. Post-Trial Delay

1. Additional Facts

Appellant's case was docketed with this court on 8 February 2023. Appellate review was initially marred by litigation, with multiple writs submitted to our superior court regarding sealed materials from the court-martial as discussed above. Ultimately, appellant received access to these records, including the unredacted mental health records of the victim, which had not been reviewed by counsel at trial. These delays, coupled with nine additional requests for time from appellate defense counsel, resulted in appellant's brief being submitted to this court on 4 March 2024. Approximately one month later, on 17 April 2024, appellant "notic[ed] the court" of his "demand for speedy appellate processing," before government appellate counsel submitted their brief. Appellate government counsel filed their brief on 17 June 2024, putting the case at issue. Subsequently, appellant renewed his demand for speedy appellate processing on 24 July 2025, moving to amend his brief to include delayed appellate post-trial processing as an assignment of error. The following week, appellant sought leave of court, for a second time, for the court to consider an additional, unrelated assignment of error. Appellant again asserted his request for speedy appellate processing. None of these requests, including the newly offered Assignment of Error III, included any articulation of prejudice appellant experienced due to the appellate processing of his case.

2. Law and Discussion

"[C]onvicted service members have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (internal citations omitted). We review allegations of unreasonable delay in post-trial processing and appellate review de novo. *Id.* (internal citations omitted). Whether the delay is reasonable or dilatory is determined on a case-by-case basis. *E.g.*, *United States v. Toohey* (*Toohey I*), 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Abdullah*, 85 M.J. 501, 2024 CCA LEXIS 479, at *28-29 (Army Ct. Crim. App. 5 Nov. 2024).

There are "two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the Due Process Clause of the Fifth Amendment; and (2) the statutory basis under Article 66 when there is no showing of 'actual prejudice.'" *Abdullah*, 2024 CCA LEXIS 479, at *9 (quoting *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022)). In determining whether an appellant has been deprived of speedy post-trial and appellant review, courts presume a delay is unreasonable if this court does not reach a decision within eighteen months of a case being docketed. *Moreno*, 63 M.J. at 142. A presumptively unreasonable delay triggers an analysis of the four factors from *Barker v. Wingo*, 407 U.S. 514 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) assertion of the right to timely review and appeal; and (4) prejudice. *Id.* at 135, 142; *see also United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (internal citation omitted).

"We analyze each factor and make a determination as to whether that factor favors the Government or appellant," with "[n]o single factor [being] required for finding a due process violation . . . ." *Moreno*, 63 M.J. at 136. When there is no finding of prejudice under the fourth *Barker* factor, a due process violation still occurs when "in balancing the three other factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey* (*Toohey II*), 63 M.J. 353, 362 (C.A.A.F. 2006)).

Where post-trial delay does not constitute a due process violation, this court still has statutory authority under Article 66(d)(2), UCMJ, to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record."

After carefully examining the basis for appellate processing delay in appellant's case, we find no relief is warranted. Appellant has not asserted any unique prejudice due to the amount of time it has taken this court to thoroughly review his record and render a decision. As such, we are only able to provide relief if the balance of the other *Barker* factors weighs so heavily in favor of appellant "that tolerating [the delay] would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (internal quotation marks and citations omitted).

Though appellant asserted his request for speedy appellate processing, this alone is insufficient to warrant relief. We acknowledge over 950 days passed from when this court received appellant's record of trial to when this decision would be rendered. While this amount of time is lengthy, a nuanced parsing of the pertinent timeline is required. In this instance, appellant's appeal was with him and his counsel for briefing for almost 400 days, partially resulting in the case not being put "at issue" with this court until approximately 450 days ago. In the days since, appellant has further supplemented his assignments of error to this court, twice,

including raising a new, substantive assignment of error based on the rendering of a decision by our superior court. In total, given the procedural and jurisdictional ebbs and flows that appellant's case took, we find the total processing time does not constitute a due process violation. Separately, under our statutory authority, we do not find relief would be appropriate under Article 62(d)(2), UCMJ.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge POND and Senior Judge FLEMING concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*[1]

UNITED STATES, Appellee
v.
Sergeant RENE D. ALFARO
United States Army, Appellant

ARMY 20220282

Headquarters, Eighth Army
Christopher E. Martin, Military Judge
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Captain Matthew S. Fields, JA; Robert A. Feldmeier, Esquire (on brief); Major Matthew S. Fields, JA; Robert A. Feldmeier, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Colonel Jacqueline J. DeGaine, JA; Major Justin L. Talley, JA; Captain Stewart A. Miller, JA (on brief).

12 February 2026

OPINION OF THE COURT ON RECONSIDERATION

MORRIS, Senior Judge:

Appellant's case poses a novel dilemma. During the course of appellate review, appellant's counsel discovered what they claimed to be "constitutionally required" evidence in the victim's privileged psychotherapist records, records which were reviewed, to some degree, by the military judge during the course of pretrial litigation. Based on this discovery, appellant now alleges the military judge abused his discretion, either in failing to sua sponte disclose said information or in requiring the victim authorize the release of privileged information or else risk the abatement of proceedings. For the reasons set forth, we disagree.

A military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of violating a lawful general regulation and three specifications of sexual assault, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920 [UCMJ]. The military

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[1] Judge JUETTEN did not participate in the decision.

judge sentenced appellant to a dishonorable discharge, confinement for twenty-four months, and reduction to the grade of E-3.

Previously before this court, appellant raised six assignments of error in addition to matters submitted personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). A panel of this court found three of these assignments of error to merit discussion but not relief and affirmed the findings and sentence. *United States v. Alfaro*, ARMY 20220282, 2025 CCA LEXIS 468 (Army Ct. Crim. App. 30 Sept. 2025) (mem. op.). Appellant then requested this court reconsider his case on only one assignment of error, that the military judge erred by not disclosing privileged materials he learned during an in camera review of mental health records or alternatively abating the proceedings.

We agreed to reconsider this issue *en banc*.[2] For the reasons that follow, we again conclude that the military judge did not err and again affirm the findings and sentence.

BACKGROUND

At the time of the incident, appellant was a noncommissioned officer stationed at Camp Humphreys, Republic of Korea. The victim was appellant's direct subordinate who had arrived in Korea approximately two weeks prior to the sexual assault for which appellant was charged and convicted. On the night of assault, the victim arrived at appellant's barracks room with another male soldier to conduct her initial counseling. Because she was also celebrating her twenty-first birthday, she brought a bottle of vodka with her. The other male soldier and appellant each drank a small amount of the alcohol. After drinking a large amount of the bottle, the victim, who was suffering the effects of intoxication, started behaving strangely and dancing seductively. She then climbed into appellant's bed and fell asleep. Shortly thereafter, she woke up and vomited on appellant's floor and fell back to sleep. The next time she woke up, she slid out of appellant's bed and through her vomit on the floor. After the other soldier picked up the victim, appellant helped her into the shower and left her there. The victim fell multiple times while in the shower. Appellant checked on the victim and sent the other soldier to the victim's room to get her a change of clothes. After returning with the victim's clothes, the soldier continued to clean up the victim's vomit. Sometime later, the victim came out of the bathroom wearing a towel and climbed into appellant's recliner, before transitioning back into appellant's bed to sleep. With the victim asleep, appellant and the other soldier continued to talk about the military before the other soldier retired to his own barracks room across the hall. Before the soldier left, appellant told him he planned to sleep on a sofa and would take care of the victim.

[2] Our prior decision stands on the other assignments of error, to include the matters personally submitted by the appellant.

Approximately twenty minutes after he left, the other soldier heard appellant's door shut and assumed the victim was returning to her barracks room. While it is not clear if that was in fact the victim leaving or not, the victim testified that during the time she remained in the room, she was awakened by painful penetrations of her vagina three separate times. The first penetration of her vagina was with an unknown object, to which she responded by trying to move away, prompting appellant to tell her to take another shower. She complied and returned to his bed and was awakened by appellant penetrating her vagina for a second time, this time, with his finger. The victim tried to leave again but, due to her intoxicated state, was unable to locate her clothes and remove herself from the bed. After she awoke a third time by a vaginal penetration with appellant's finger, the victim located her clothes and left the room. At trial, when pressed by trial defense counsel about her memory of the sexual assault, the victim was unable to remember ancillary details surrounding the night in question, though she testified she was aware of and remembered the sexual assaults in appellant's barracks room.

After leaving appellant's room, the victim immediately called her boyfriend, another soldier who was stationed in the United States. Her boyfriend was initially angry with her because he believed she put herself in "a bad situation." The next morning, the victim went to breakfast with appellant and the soldier from the night before. Also, later this same day, appellant sent a text message to the victim stating, "Hey.... Wanted to apologize to you bout last night and being so touchy with you." He followed up with, "Besides that, great conversation though lol." About a month later, while the victim was spending time drinking alcohol with appellant and the same male soldier, the victim testified that appellant swiped his hand over her vaginal area, prompting her to file a restricted sexual assault report. Over the course of the next ten months, the victim continued to communicate personally and professionally with appellant in an attempt to cope with and normalize the incident. Ultimately, she decided to switch her report to unrestricted. The government subsequently charged appellant with sexual assault and violating the Army's regulation prohibiting undue familiarity between appellant as a noncommissioned officer and junior enlisted soldiers, including the victim.

Prior to trial, defense filed a motion to compel discovery of the victim's behavioral health appointment history, prescriptions, and mental health diagnoses to assist with defense preparation. In their motion, defense counsel asserted the requested discovery was not privileged and did not fall under the protections of Military Rule of Evidence [Mil. R. Evid.] 513. Both the government and the victim's Special Victims' Counsel (SVC) filed responses requesting the military judge deny the defense request, arguing the request was overly broad and did not identify how the information was relevant to the defense preparation. The SVC's response also explicitly stated the victim was invoking her psychotherapist-patient privilege. In a written ruling after a closed hearing on the issue, the military judge concluded that mental health appointment records, diagnoses, and prescriptions were

not privileged under Mil. R. Evid. 513 and ordered the government to provide the following for in camera review: (1) any records of the victim's mental health diagnoses from the time of her entry on active duty through July 2020 and (2) any records of antidepressant medications prescribed to the victim in the year before the sexual assault. The military judge denied defense counsel's request for the victim's appointment history, finding that the defense had not met its burden to demonstrate that any such records were relevant to defense preparation.

During his initial in camera review, the military judge discovered the medical facility had failed to comply with his order and had provided the victim's entire medical and mental health records. He ceased his review and again requested the facility comply with his order and return only the requested items. After the medical facility asserted they were not qualified to comply, the military judge provided the victim the option of either trying once again to obtain compliance from the medical facility or allowing the military judge to screen the records in camera to redact all but the non-privileged diagnoses and prescriptions. The victim elected to allow the military judge to review and redact the records in camera. Once complete, the military judge provided both the redacted and unredacted records to the victim and her SVC, who both agreed the redacted records could be provided to defense counsel. The military judge subsequently marked and sealed as appellate exhibits both the redacted and unredacted versions of the victim's mental health records.

After trial, the case was docketed at this court on 8 February 2023. On 10 July 2023, civilian appellate defense counsel (CADC) submitted a motion to examine all appellate exhibits referenced in the military judge's sealing order. The CADC's motion incorrectly alleged that *all* the requested material was reviewed by prosecution and defense counsel at trial. However, neither the trial counsel nor the defense counsel had seen the victim's unredacted mental health and medical records. Only the military judge had reviewed those records, which were marked as Appellate Exhibit (AE) LXII, and listed as "item x" in the military judge's sealing order. However, the CADC requested to examine all sealed exhibits, including "item x" as well as "item y," which does not actually exist in the record.[3] The CADC further incorrectly asserted that all the requested sealed materials related to Mil. R. Evid. 412. This court granted the motion for fifteen of the twenty-five sealed exhibits[4]

[3] The military judge's sealing order, dated 20 November 2022, lists twenty-five items "a" through "y." Pursuant to this document, item y, is purported to be "AV Mental Health and Medical Records (1CD)." Based on the fact that this item was not assigned an appellate exhibit number and it is almost identical to item x, which was listed as "AE LXII, AV Mental Health and Medical Records (Unredacted) (1CD)," it appears the addition of item y was a scrivener's error.

[4] In light of the phantom "item y" in the military judge's sealing order, there were actually only twenty-four sealed exhibits.

that were related to the Mil. R. Evid. 412 litigation at trial and denied the CADC access to the remaining sealed exhibits. As listed on the sealing order, the denied exhibits concerned trial litigation pursuant to a Mil. R. Evid. 513 motion and the victim's redacted and privileged unredacted mental health records.[5]

After this court denied the CADC's motion for reconsideration—where for the first time he acknowledged the exhibits he was requesting related to trial litigation pursuant to Mil. R. Evid. 513—the CADC filed a writ of mandamus with the Court of Appeals for the Armed Forces [CAAF] on behalf of appellant. In this petition, the CADC argued that in order to view the items to which trial defense counsel had access under Rule for Courts-Martial [R.C.M.] 1113(b)(3), he only needed to "make a colorable showing of need" to fulfill his duties as appellate counsel. On 13 September 2023, CAAF denied appellant's petition for extraordinary relief.

Over the course of the next three months, the CADC filed two additional petitions for extraordinary relief at CAAF on behalf of appellant, one requesting access to all sealed materials in the record and the other requesting that CAAF direct this court to permit his military appellate defense counsel to securely transmit the sealed materials to the CADC. The CADC also filed a petition for extraordinary relief in the nature of a writ of prohibition ordering this court not to enforce Army Court of Criminal Appeals Rule (A.C.C.A.R.) 6.9, which required counsel to notify the privilege holder of any motion to examine sealed privileged matters.[6] In response to the petition for extraordinary relief, the government appellate division

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[5] Seven of the ten exhibits pertaining to the Mil. R. Evid. 513 litigation the CADC requested were either written motions from the defense or prosecution or rulings from the military judge, so there is no doubt counsel reviewed those items at trial. The remaining three exhibits included the phantom "item y" and the redacted and unredacted copies of the victim's medical and mental health records. With the victim's consent, both prosecution and defense counsel received a copy of the victim's redacted mental health records, AE LX, but neither counsel received a copy of the victim's unredacted mental health records, AE LXII, at trial. At all times, the victim maintained her privilege to her unredacted mental health records. The CADC seems to have subsequently acknowledged the fact in his motion to our court and his petition to our superior court that the counsel at trial perhaps did not receive "item y", but he failed to acknowledge that "item y" and "item x" were referring to the same appellate exhibit.

[6] Army Court of Criminal Appeals Rule 6.9(d) required any motion to examine privileged materials to include a certification that the privilege holder had been notified of the motion or that counsel had taken reasonable steps to notify the privilege holder of any motion to examine sealed privileged material. The rule also required the motion include an explanation of why the privilege had been waived, did not exist, or did not apply because of a recognized exception.

did not take a position on whether the CADC should be permitted to examine the sealed materials. Our superior court granted each of these petitions for extraordinary relief, and the CADC was ultimately provided all the sealed materials from record, including the victim's unredacted mental health and medical records, with the exception of the phantom "item y", access to which CAAF denied. Upon receipt and review of the sealed exhibits, including a limited review of the victim's privileged, unredacted mental health records, the CADC discovered information that he now asserts should have either been disclosed to the parties at trial, or in the absence of disclosure, should have required the military judge to abate the trial proceedings.

As noted above, we are in an unusual situation in this case, because the error appellant now raises on appeal was discovered by a disclosure of the victim's sealed and privileged mental health records, in violation of Mil. R. Evid. 513, during the appellate process. While multiple parties could have intervened, as the government points out, the disclosure of the documents was a result of the CADC's mistaken assertions in his multiple motions to this court and petitions to our higher court that all of the sealed documents he requested to examine had been provided to the parties at trial. In fact, the parties at trial had access to all but one of the requested appellate exhibits. The one appellate exhibit the parties were not provided, AE LXII, *was clearly marked* as the victim's unredacted mental health and medical records.[7]

Appellant now alleges that based on his CADC's limited review of the victim's privileged mental health communications, which resulted in the CADC's discovery of what he claims are "constitutionally required" materials, it was an abuse of discretion for the military judge not to allow disclosure of the privileged communications or abate the trial. We disagree.

LAW AND DISCUSSION

We review this issue under an abuse of discretion standard. *United States v. Tinsley*, 81 M.J. 836, 846 (Army Ct. Crim. App. 2021) (citation omitted), pet. denied, 82 M.J. 372 (C.A.A.F. 2022). "An abuse of discretion occurs when a military judge's decision is based on clearly erroneous findings of fact or incorrect

[7] It is not lost on this court that instead of contesting the requirements of A.C.C.A. R. 6.9, if the CADC had simply followed the rule, it is possible the victim, who was present at the trial and maintains an interest in protecting the privacy of her mental health records, could have intervened and identified to both courts at a very early stage of the appellate review process what was ultimately never released to the parties. We further note that the government had ample opportunity to address, either to this court or our superior court, that the CADC was requesting access to view sealed, privileged records that had not been reviewed by the parties at trial.

conclusions of law." *United States v. Hernandez*, 81 M.J. 432, 437 (C.A.A.F. 2021) (citation omitted). Our superior court has already decided that diagnoses and prescriptions are not uniformly privileged under Mil. R. Evid. 513. *United States v. Mellette*, 82 M.J. 374, 375 (C.A.A.F. 2022) ("Based on the plain language of M.R.E. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513.").

It is undisputed in the record and by the parties that the military judge released a redacted version of the victim's mental health and medical records to the prosecution and defense teams at trial. Since the redacted records only included the victim's mental health diagnoses and prescribed antidepressant medications, the military judge's ruling was in compliance with *Mellette* and not an abuse of his discretion.

Appellant argues, however, that in the process of his counsel reviewing the privileged records to identify the victim's mental health diagnoses and prescriptions that the military judge would have seen information requiring disclosure to the parties or abatement of trial. *See, e.g.*, *B.M. v. United States*, 84 M.J. 314, 322 (C.A.A.F. 2024) (Ohlson, C. J., concurring) (noting the "unenviable position" the military judge placed herself in by reviewing protected mental health records, erroneously turned over by a mental health facility, and discovering impeachment materials, the disclosure of which was necessary for the real party in interest to receive a fair trial). In coming to this conclusion, appellant makes multiple incorrect assumptions. First, he assumes that by conducting an in camera review to identify and release the prescriptions and diagnoses that the military had to read, for content, portions of the victim's mental health record that included confidential communications. This assumption is mere speculation. The technical language included in a medical diagnosis and prescription would be easily discernible from the language a victim would use in a communication of personal details about an assault. Thus, a military judge could conceivably conduct an in camera review for non-privileged diagnoses and prescription information without the more in-depth review and analysis of the entire contents, as contemplated by appellant.

Second, appellant assumes that if the military judge had indeed read the information, he would have determined, sua sponte, that disclosure of the contents was required. This assumption, however, is based on a misunderstanding of the law and the facts in this case. Pursuant to Mil. R. Evid. 513(a):

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist . . . if such communication was made for the purpose of

> facilitating diagnosis or treatment of the patient's mental or emotional condition.

To request production or admission of patient records or communications, a party must follow the procedures outlined in Mil. R. Evid. 513(e). *See e.g.*, *Mellette*, 82 M.J. at 379 (noting Mil. R. Evid. 513(e) "authorizes a military judge to examine the proffered evidence in camera 'if such examination is necessary to rule on the production or admissibility of *protected* records or communications . . . ." (emphasis in original) (citation omitted)). Since defense counsel never requested nor initiated the necessary process for admissibility of the patient's privileged communications under the rule, the military judge was not examining the records for this purpose. A judge is presumed to know and follow the law. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). Because defense counsel had not followed the required procedures under Mil. R. Evid. 513(a) to request any privileged records, the military judge was not required to review the confidential communications with an eye of determining whether an exception to the privilege under Mil. R. Evid. 513(d) existed. Undoubtedly, he was aware appellant never requested nor made a proffer for the privileged records and the victim never waived her privilege as to those confidential communications.

Under his mandate to review the records for non-privileged information, the military judge did not have a sua sponte duty to pursue release of the privileged information or abate the trial. He was only reviewing the documents for non-privileged information. He was not reviewing the documents to determine if privileged information qualified for an exception or somehow impacted appellant's constitutional rights. As such, he did not abuse his discretion.

Assuming arguendo the military judge did see the information the CADC claims is present in the victim's mental health records, nothing in the Constitution requires the judge to disclose the privileged information or abate the trial if the victim does not consent to this disclosure.

Appellant failed to offer any evidence that the disclosure of the records could have been appropriate under one of the enumerated exceptions to Mil. R. Evid. 513. Even after this court identified this shortfall, appellant failed to proffer an applicable exception to Mil. R. Evid. 513. Instead, he has continued to argue that the privilege "must not infringe upon the basic constitutional requirements of due process and confrontation[,]" citing to *J.M. v. Payton-O'Brien*, 76 M.J. 782, 788 (N.M. Ct. Crim. App. 2017). But he never mentions this court's precedent in *Tinsley*, 81 M.J. 836.

In *Tinsley*, this court conducted a thorough analysis of the patient-psychotherapist privilege and the impact of the President striking the constitutional exception from the rule. *See generally id.* at 845-54. Recognizing the deletion of

the constitutional exception as both a legislative and executive act, "the President was likely at the apex of his authority in implementing M.R.E. 513." *Id.* at 849 (internal quotation marks omitted) (citation omitted). Holding that neither a confrontation clause exception nor a *Brady* exception[8] applied to Mil. R. Evid. 513, *Tinsley* ultimately concluded military courts do not have the authority to read a constitutional exception back into Mil. R. Evid. 513 "or otherwise conclude that the exception still survives notwithstanding its explicit deletion." *Id.* at 849, 850-51.

In addition to *Tinsley*,

> we must also account for the Supreme Court's guidance that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence," *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (alteration in original removed) (internal quotation marks omitted) (citation omitted), and our own view that "privileges 'run contrary to a court's truth-seeking function[.]'" *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)).

Mellette, 82 M.J. at 377. Consequently, we must "narrowly construe" Mil. R. Evid. 513. *Id.* at 379 (citation omitted). The President, in his role as the promulgator of the Military Rules of Evidence, has "the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy." *Id.* at 380. Further, there is no constitutional exception for the attorney-client, spousal, or clergy-penitent privileges in the Military Rules of Evidence and there is every indication the psychotherapist-patient privilege was meant to be equal to those privileges and "'rooted in the imperative need for confidence and trust.'" *Tinsley*, 81 M.J. at 847 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)). Contrary to appellant's arguments otherwise, and in the absence of an applicable exception under Mil. R. Evid. 513(d), appellant had no right to access the victim's confidential communications.

Privileged records obtained inadvertently maintain their privilege. Here, the victim has not voluntarily disclosed nor consented to the disclosure of the privileged matters to the CADC on appeal and this particular disclosure does not waive the privilege. As noted in *Tinsley*, when addressing the marital privilege, courts have regularly held the unauthorized disclosure of privileged information does not waive

[8] The government is required to disclose evidence within its possession or control that is material and favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

the privilege. *Id.* at 852. Similarly, this court found the inadvertent disclosure of potentially exculpatory privileged information to the government "does not constitute a waiver or otherwise trigger an immediate *Brady* duty to disclose." *Id.* That result applies equally to the defense. "Regardless of how [a party] obtains the records, that is either intentionally or inadvertently, it is no less bound to honor evidentiary privileges than the defense." *Id.* at 851 (citing *LK v. Acosta*, 76 M.J. 611, 616 (Army Ct. Crim. App. 2017) ("The privilege governing mental health records, by contrast, applies to both the prosecution and the defense."), rev'd in part on other grounds, 81 M.J. 836).[9] We find the victim's unredacted records in AE LXII remain privileged materials.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge FLOR, Senior Judge POND, Senior Judge FLEMING, Judge WILLIAMS, Judge COOPER, Judge STEELE, Judge MURDOUGH, and Judge SCHLACK concur.

Judge MURDOUGH, joined by Judge WILLIAMS, Judge STEELE, and Judge SCHLACK, concurring:

We have previously held that neither a constitutional exception grounded in the Confrontation Clause nor a "*Brady* exception" to Military Rule of Evidence [Mil. R. Evid.] 513 exists. *United States v. Tinsley*, 81 M.J. 836, 850 (Army Ct. Crim. App. 2021) (citation omitted), pet. denied, 82 M.J. 372 (C.A.A.F. 2022). The court reaffirms that holding here, and I agree.

I would go further and say explicitly what the majority leaves mostly implicit. A military judge is not required – and thus not legally permitted – to disclose privileged psychotherapist-patient communications contained in a person's mental health records unless an enumerated exception to Rule 513 applies. Stated differently, there is no implicit constitutional exception to the rule—at all. This is true even if the military judge encounters exculpatory materials during an in camera review.

"The question of whether a communication is privileged is a mixed question of fact and law." *United States v. Harpole*, 77 M.J. 231, 234 (C.A.A.F. 2018). We review "legal questions, including the interpretation of a rule's language . . . de novo." *Id.* at 234-35 (citations omitted).

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[9] In our prior opinion, we ordered the CADC to "return or confirm the deletion of the victim's improperly disclosed privileged mental health records." 2025 CCA LEXIS 468, at *17. He has complied.

At the outset, I accept the factual premise of appellant's argument, that the military judge reviewed the entire body of records[10] and was aware of the information appellant now asserts was "constitutionally required." But, as does the majority, I reject appellant's argument that the military judge "discovered constitutionally required materials" contained in these records. I would hold that, even if the military judge recognized possibly favorable information within privileged communications, the information was not "constitutionally required" and therefore not discoverable.

A. The Ghost of the "Constitutionally Required" Exception

In the military, Mil. R. Evid. 513 establishes the "psychotherapist-patient" privilege, which protects the disclosure of "confidential communication[s] made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(a); *see also* Mil. R. Evid. 513(b)(1-2) (defining "patient" and "psychotherapist"). The rule currently contains seven enumerated exceptions to the privilege. *See* Mil. R. Evid. 513(d). In addition to the enumerated exceptions, the privilege holder, i.e., the patient, may voluntarily waive the privilege. Mil. R. Evid. 510.

When the President first established the rule in 1999, the rule contained an eighth exception—there was no privilege "when admission or disclosure of a communication is constitutionally required."[11] For the entire history of this "constitutionally required" exception, military justice, at least in the Army, effectively "treated privileged mental health records as having no privilege at all." *LK v. Acosta*, 76 M.J. 611, 614 (Army Ct. Crim. App. 2017), rev'd in part on other grounds, *Tinsley*, 81 M.J. 836. In retrospect, we observed that production and review of privileged mental health records had become "routine . . . without specifying what constitutional issue was at play." *Id.* at 615 n.3 (internal quotation marks omitted) (citation omitted).[12]

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[10] As appellant points out, the military judge described these records as "the unredacted, privileged records *I reviewed*." (emphasis added).

[11] Executive Order 13,140, 64 Fed. Reg. 55,115, 55,117 (October 12, 1999).

[12] Our sister court has suggested this as the exact reason Congress eliminated the eighth exception. *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N.M. Ct. Crim. App. 2017) ("After observing military judges routinely breach the privilege in sexual assault cases, Congress and the President attempted to substantially strengthen the privilege by removing the constitutional exception from the rule . . . .")

Congress ordered the removal of this language in the 2015 National Defense Authorization Act (NDAA).[13] Shortly after the legislative amendment to the rule, both we and our sister court opined on its significance. As we noted in *LK v. Acosta*, "Under our constitutional hierarchy, a federal statute cannot bar the 'admission or disclosure' of a communication that is 'constitutionally required.'" *Id.* at 615. We agreed then with the core premise of our sister court's opinion in *Payton-O'Brien* that "constitutional rights prevail over statutory and evidentiary rules." 76 M.J. at 788.

In the wake of *Acosta* and *Payton-O'Brien*, litigants and jurists have endeavored, with varying degrees of precision, to answer the question we first posed in *Acosta*: what, exactly, does the Constitution require when it comes to the disclosure and production of confidential and privileged communications?[14] I would answer it definitively, even more so than we did in *Tinsley*—no "constitutionally required" exception exists, under *any* constitutional doctrine.

B. United States v. Mellette and the commingling of privileged and non-privileged information

In the years following the 2015 NDAA, most Mil. R. Evid. 513 litigation seeking to assert the ephemeral "constitutionally required" exception (up to and including *Tinsley*) sought production of mental health records generally, including privileged communications notwithstanding the language of the rule, from the possession of the applicable records holders. *E.g.*, *Acosta*, 76 M.J. at 613 (defense

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[13] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014).

[14] Our sister court holds the Constitution requires abatement of the proceedings if privileged material is necessary to afford the accused a "meaningful opportunity to present a complete defense." *Payton-O'Brien*, 76 M.J. at 783 (internal quotation marks omitted) (citation omitted). Some suggest that "constitutionally required" stems from the Confrontation Clause. *See id.* at 788-89; *see also United States v. Demayo*, ARMY 20220594, 2025 CCA LEXIS 444, at *10-11 (Army Ct. Crim. App. 12 Sept. 2025) (mem. op.) (denying appellant's argument that evidence at issue was necessary "to effectively confront witnesses and present a complete defense[,]" even under *Payton-O'Brien* (internal quotation marks omitted)). Others have relied on *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. *See, e.g.*, *B.M. v. United States*, 83 M.J. 704, 717 (N.M. Ct. Crim. App. 2023) ("the records contained evidence of both confabulation and inconsistent statements . . . which would be constitutionally required to be produced because the records were exculpatory under *Brady* and its progeny."), aff'd, 84 M.J. 314 (C.A.A.F. 2024). Still others have invoked the Due Process clause more generally. *See, e.g.*, *United States v. Beauge*, 82 M.J. 157, 167 (C.A.A.F. 2022).

sought "the mental health records of . . . the alleged victim"); *Payton-O'Brien*, 76 M.J. at 783 (defense sought "production of all mental health records" of the victim); *Tinsley*, 81 M.J. at 846 (defense sought victim's "mental health information and treatment history"). In *Tinsley*, unlike in this case, neither the parties nor the military judge ever saw *any* portion of the records. *Id.* at 845-46.

With more recent authority clarifying the narrow scope of the privilege, primarily *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022), the focus has shifted. As occurred in this case, litigants often seek only non-privileged material, but the custodian of records nonetheless turns over privileged communications as part of the production. *E.g.*, *R.C. v. Hynes*, 85 M.J. 678, 680-81 (Army Ct. Crim. App. 2025). Then, the military judge chooses to review the materials himself in an attempt to separate the privileged from non-privileged materials. *Id.* at 681. In this scenario, the privileged communications become part of the record.[15] In the view of some, this has altered the calculus of when disclosure of the records becomes "constitutionally required," because now the judge knows their content. I disagree; *Mellette* did not change either the reach of the Constitution or, more specifically, its limits.

In *Mellette*, the CAAF distinguished between "confidential communications" and other, discoverable materials contained within a patient's mental health records. 82 M.J. at 375. In doing so, the CAAF acknowledged the axiom that evidentiary privileges must be "narrowly construed." *Id.* at 377 (quoting *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013)). Strictly applying the plain text of Mil. R. Evid. 513(a), the court held the privilege covers *only* confidential communications, not the broader category of "routine medical records." *Id.* at 378. Thus, "diagnoses and treatments contained within medical records are not themselves uniformly privileged under [Mil. R. Evid.] 513." *Id.* at 375.

Military judges applying this doctrine to the discovery and production of mental health records have encountered a particularly acute challenge. Owing to the nature of the information at issue and the means by which it is collected and stored, it is virtually certain that discoverable "*Mellette* information" (e.g., diagnoses, treatments, et al.) is commingled with privileged material (i.e. confidential communications) in the same record or system of records.[16] Both our court and our

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[15] "If 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. The military judge shall seal any materials examined in camera and not disclosed . . . ." Rule for Courts-Martial [R.C.M.] 701(g)(2).

[16] The President's recent addition to Mil. R. Evid. 513(a) of the phrase, "including records of such communications," did not expand the rule to now include a broader category of records or abrogate the holding in *Mellette*. *Hynes*, 85 M.J. at 683-84.

sister courts have seen various examples of trial judges' best efforts to provide the parties with *Mellette* information, and only *Mellette* information, without the inadvertent production of privileged confidential communications. These efforts have met mixed levels of success despite the extremely explicit wording of these rulings and orders.[17]

I do not comment on the propriety or preferability of these approaches; trial judges have discretion to regulate the practice of discovery. R.C.M. 701(g)(1). However, I disagree with any implication that an in camera review should be disfavored in the wake of *Mellette*. The military judge is ultimately responsible for ruling on interlocutory questions and questions of law, which includes the existence of a privilege. Mil. R. Evid. 104(a); R.C.M. 801(a)(4). And an in camera review is a tool the military judge may use to make that decision. *See* R.C.M. 701(g)(2). *See also United States v. Zolin*, 491 U.S. 554, 568 (1989) (in camera review is an appropriate means to determine the existence of a privilege or exceptions thereto, without terminating the privilege); *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997); *United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998) (applying Mil. R. Evid. 506 and noting: "Where a conflict arises between the defense search for information and the Government's need to protect [privileged] information, the appropriate procedure is '*in camera* review' by a judge." (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987); further citation omitted)); *B.M.*, 84 M.J. at 325 (Sparks, J., concurring) ("[I]t may not yet be known whether the records requested are partially privileged or not privileged at all as described in *Mellette*. The military judge may wish to consult the regulation of discovery guidance provided in R.C.M. 701(g)(2)."); *United States v. Bowser*, 73 M.J. 889, 897 (A.F. Ct. Crim. App. 2014) ("Where discovery obligations potentially impact a recognized privilege, an *in camera* review is generally the preferred method for resolving the

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[17] *See, e.g.*, *Hynes*, 85 M.J. at 681 (entire body of mental health records released notwithstanding judge's order to provide only a list of pertinent items while "copies of actual mental health records **SHALL NOT** be produced" (emphasis in original)); *B.M.*, 83 M.J. at 707 (privileged materials released notwithstanding an order that: "The custodian of records shall produce only records containing no actual communications . . . ." (emphasis in original)); *In re HVZ*, Misc. Dkt. No 2023-03, 2023 CCA LEXIS 292, at *6 (A.F. Ct. Crim. App. 14 July 2023) (trial judge ordered medical unit to "work with a medical law attorney" to redact privileged materials prior to providing them to counsel), rev'd on other grounds, 85 M.J. 8 (C.A.A.F. 2024); *In re RW*, Misc. Dkt. No. 2023-08, 2024 CCA LEXIS 71, at *9-11, 22-24 (A.F. Ct. Crim. App. 9 Feb. 2024) (military judge, after two unsuccessful attempts to have "in-house" medical attorneys review records, erred by designating a third attorney in another organization to perform what amounted to a "taint team" in camera review); *see also B.M. v. United States*, 84 M.J. 314, 323 (C.A.A.F. 2024) (Ohlson, C.J., concurring) (suggesting stipulations of fact and affidavits from the psychotherapist as alternatives to disclosure of the records themselves).

competing compulsions." (citation omitted)), aff'd, 74 M.J. 326 (C.A.A.F. 2015); *United States v. Trigueros*, 69 M.J. 604, 611 (Army Ct. Crim. App. 2010) ("'The preferred practice is for the military judge to inspect the medical records *in camera* . . . .'" (quoting *United States v. Briggs*, 48 M.J. 143, 145 (C.A.A.F. 1998)), pet. denied, 69 M.J. 269 (C.A.A.F. 2010). Review in camera under R.C.M. 701(g)(2), as the military judge did in this case, is an acceptable and permissible way to disaggregate discoverable from non-discoverable information, including separating "*Mellette* information" from confidential psychotherapist communications.[18]

Neither we nor the CAAF have directly answered the question of what a military judge is to do when, as appellant alleges here, he discovers privileged yet plausibly exculpatory information during an in camera review of mental health records undertaken solely for the purpose of *excluding* privileged records from disclosure. *But see B.M.*, 84 M.J. at 322-23 (Ohlson, C.J., concurring) (suggesting that military judges who "uncover[] impeachment material within the records necessary for the accused to receive a fair trial . . . must inform the victim of this discovery and then ask whether the victim wishes to waive the privilege").

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[18] This is not the same in camera review contemplated by Mil. R. Evid. 513(e)(3). As we noted in *DB v. Lippert*, "[t]here is a vast difference, both in substance and procedural requirements, between a motion to compel discovery filed under [R.C.M. 905(b)(4)] and a motion *seeking access to privileged communications* filed under Mil. R. Evid. 513." ARMY MISC 20150769, 2016 CCA LEXIS 63, at *15 n.9 (Army Ct. Crim. App. 1 Feb. 2016) (mem. op.) (emphasis added). A motion seeking even non-privileged "*Mellette* materials" within a victim's records must still comply with the requirements of Mil. R. Evid. 513(e)(1)-(2), including written motion, notice, and a closed hearing, because the plain text of that rule refers to "records *or* communications." *See H.V.Z. v. United States*, 85 M.J. 8, 16-17 (C.A.A.F. 2024). But, again applying the plain text of the rule, the four preconditions for in camera review under Mil. R. Evid. 513(e)(3) only apply when the judge is asked to rule "on the production or admissibility of *protected* records or communications." (emphasis added); *see also Beauge*, 82 M.J. at 168 ("a military judge may not conduct in camera review of privileged material where a party moving to compel *production of protected records or communications* has not [satisfied Mil. R. Evid. 513(e)(3)(a) or (b).]" (emphasis added)). When the motion seeks and the ruling produces only non-privileged information (e.g. "*Mellette* materials"), the correct standard for in camera review is R.C.M. 701(g)(2) rather than Mil. R. Evid. 513(e)(3). *In re RR v. Anderson*, Misc. Dkt. No. 2024-08, 2024 CCA LEXIS 293, at *14 (A.F. Ct. Crim. App. 22 July 2024) ("Mil. R. Evid. 513 has certain procedural requirements that must be met for an in camera review, but an in camera review is also authorized under other rules as well." (citation omitted)). The military judge in his sealed ruling carefully noted that "at no time has the Court ordered the production of privileged material;" his in camera review was not a Rule 513(e)(3) review.

Appellant, citing predominantly to our sister court's opinion in *Payton-O'Brien*, asserts that the military judge, upon discovering "constitutionally required" information in the records, had a sua sponte duty to seek the victim's consent to disclose the information to the appellant or else abate the proceedings.

This argument fails, because nothing in the Constitution requires the judge to disclose privileged information even if it is putatively favorable. And because the Constitution does not require it, as the military judge correctly recognized, the Rule 513 privilege *prohibits* him from doing so.

C. The Constitution and Mil. R. Evid. 513

The appellant here argues that the military judge's non-disclosure of privileged communications amounted to a violation of his "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). The notion of a "constitutional right to present a defense" is rooted in some combination of the Due Process, Compulsory Process, and Confrontation clauses. *United States v. Bess*, 75 M.J. 70, 74 (C.A.A.F. 2016) (citing *Crane*, 476 U.S. at 690). As the case before us deals with production of evidence, rather than witnesses, the Compulsory Process clause is not directly applicable. However, the production and discovery of evidence implicates the constitutional Due Process doctrine established in *Brady v. Maryland*, 373 U.S. 83. Appellant here generally asserts that the material he avers is "constitutionally required" would have adversely affected the victim's credibility. Evidence affecting a prosecution witness's credibility is within the scope of potential "*Brady* material." *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." (citation omitted)). I therefore address both appellant's explicit and implicit arguments.

1. Brady does not apply to a judge's in camera review

In *Tinsley*, we expressly affirmed "no '*Brady*' exception to Military Rule of Evidence 513" exists. 81 M.J. at 850. *Brady* material is evidence that is: (1) favorable, (2) material, and (3) in the actual or constructive possession of the prosecution. *United States v. Stellato*, 74 M.J. 473, 486-87 (C.A.A.F. 2015); *United States v. Ellis*, 77 M.J. 671, 675 (Army Ct. Crim. App. 2018), pet. denied, 78 M.J. 23 (C.A.A.F. 2018). Any argument that *Brady* requires the military judge to disclose plausibly favorable information discovered during an in camera review ignores the third element of this analysis. A military judge is not part of, or closely aligned with, the prosecution, and a judge reading documents during an in camera review does not – cannot – convert the contents into *Brady* material. *See also United States v. Shorts*, 76 M.J. 523, 532 (Army Ct. Crim. App. 2017) ("[F]or *Brady* purposes, information under the control of the 'prosecution' is not the same as information

under the control of the entire government."), pet. denied, 76 M.J. 334 (C.A.A.F. 2017).

When it comes to discovery and production of evidence, though Article 46, UCMJ, and the Rules for Courts-Martial may provide greater rights, *Brady* sets the "constitutional floor." *Id.* at 532 n.6; *see also Acosta*, 76 M.J. at 616 ("There is no general constitutional right to discovery in a criminal case. Rather, constitutional 'discovery' is usually delineated by the contours of the seminal case of *Brady*." (cleaned up)). Discovery and production are not "constitutionally required" except for *Brady* material, and material reviewed by a judge in camera, without the prosecution ever learning of its contents, is not *Brady* material.[19]

2. The remainder of the Due Process and Confrontation rights do not compel disclosure of information learned during in camera *review*

Apart from *Brady,* the due process component of a "complete defense" analysis examines whether the rule "infringe[s] upon a weighty interest of the accused" or is "arbitrary or disproportionate to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324 (cleaned up) (citing *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). When it comes to Rule 513, "as the Supreme Court [has] recognized . . . the psychotherapist-patient privilege 'promotes sufficiently important interests to outweigh the need for probative evidence.'" *Beauge*, 82 M.J. at 167-68 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996)).[20] Moreover, "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17. The Due Process clause does not expect, let alone require, trial judges to make the sort of qualitative assessment that the appellant argues here, even if the trial judge encounters plausibly favorable information within privileged communications during an in-camera review. Such an interpretation would turn a rule of privilege into a rule of relevance. In other words, the balance between the

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[19] In *Tinsley*, we held where the government inadvertently obtains "potentially exculpatory privileged information, such action does not constitute a waiver or otherwise trigger an immediate *Brady* duty to disclose." 81 M.J. at 852.

[20] Here, I respectfully part ways with our sister court's opinion in *B.M. v. United States*, which cites *Beauge*'s adoption of the language in *Holmes* but omits the citation to *Jaffee*. 83 M.J. at 715; *see also B.M.*, 84 M.J. at 324 (Ohlson, C. J., concurring) (distinguishing *Jaffee* as a civil case). Though a civil case, *Jaffee* was the forerunner to, and impetus for, the privilege established in Mil. R. Evid. 513. *See Tinsley*, 81 M.J. at 848 (citing *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000)); *United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005)).

constitutional interests of a "complete defense" for an accused and the confidentiality of a patient was already struck as far back as *Jaffee*.

Finally, turning to the Confrontation Clause, our precedent is unmistakable: "any 'constitutional exception' to Mil. R. Evid. 513 grounded in the Confrontation Clause does not exist." *Tinsley*, 81 M.J. at 850 (citation omitted). As we noted in *Acosta* and reiterate here, the "'right to confrontation is a trial right.'" 76 M.J. at 615 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality op.))[21]; *see also Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."). "The right to confront witnesses does not include the right to *discover* information to use in confrontation." *Acosta*, 76 M.J. at 615 (emphasis in original) (citation omitted).[22] "The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ritchie*, 480 U.S. at 53 (plurality op.); *see also Delaware v. Fensterer*, 474 U.S. 15, 20 (per curiam) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (emphasis in original) (citation omitted)). The Confrontation Clause does not create "a constitutionally compelled rule of pretrial discovery." *Ritchie*, 480 U.S. at 52.

Having addressed each constitutional doctrine presented in support of the notion that an in camera review can convert privileged communications into a "constitutionally required" evidentiary disclosure, I end where I began—agreeing with the majority. Applying our precedent in *Tinsley* alongside the other authorities discussed above, the military judge did not err when he held the Constitution did not require, and thus the rule prohibited, the disclosure of privileged communications he encountered during his in camera review.

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[21] The controlling, five-justice majority opinion in *Ritchie* addressed only the Compulsory Process Clause. *See generally Ritchie*, 480 U.S. at 55-60. A four-justice plurality issued this section of the opinion, which we previously cited in *Acosta*, addressing the Confrontation Clause. *Id.* at 51-54. The CAAF endorsed this language from *Ritchie* as a "limitation" on "the debate on the confrontation issue." *Beauge*, 82 M.J. at 167.

[22] In *Tinsley*, we also noted that the *Ritchie* plurality did not impose or suggest a "blanket rule that a defendant's 'fundamental due process' rights [always] require an *in camera* review in all cases and for all privileges." 81 M.J. at 850 n.5. I reiterate that here; as noted above, an in camera review is merely one of the tools the military judge has at his disposal – I do not suggest it will or must be used in every case.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court