

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee

v.

RENE D. ALFARO
Sergeant (E-5), United States Army,
Appellant

USCA Dkt. No. 26-0170/AR
Crim. App. No. ARMY 20220282

**PATIENT/VICTIM S.T.'S AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLEE**

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

Granted Issue

The Court granted review of the following issue drafted by Appellant:

Whether the Army Court of Criminal Appeals incorrectly held that M.R.E. 513 is absolute and a military judge must ignore exculpatory materials that he examines in camera.

The Granted Issue drafted by Appellant misframes the real issue presented.

M.R.E. 513 is not absolute as there are seven exceptions listed in M.R.E. 513(d).

Appellant is challenging only whether the Constitution requires disclosure of privileged communications for a court-martial to proceed. Whether the Constitution requires a military judge to disclose exculpatory materials he examines in camera is a due process sub-issue of whether the disclosure of privileged communications is constitutionally required.

Issue Presented

The actual issue presented to the Court is:

Whether the disclosure of privileged communications is constitutionally required in a court-martial.

Interest of Patient/Victim S.T.

Appellant Alfaro was convicted of sexually assaulting Patient/Victim S.T.

S.T. is asserting her rights as a victim under 10 U.S.C. § 806b (Article 6b, UCMJ). S.T. is also the patient whose privileged communications with her therapist are at issue in Appellant's appeal in this Court.

Counterstatement of Facts

Appellant asserts that Patient/Victim S.T.'s unredacted psychotherapy records, Appellate Exhibit LXII ("AE 62"), contain privileged communications that are exculpatory and appear to contradict S.T.'s court-martial testimony. Brief at 11, 13, 16. Appellant's support for these assertions that AE 62 contained exculpatory or contradictory information consists of pinpoint cites to *United States v. Alfaro*, 86 M.J. 561, 566-68 (Army Ct. Crim. App. 2026). Brief at 11, 13, 16. Nothing in ACCA's *Alfaro* decision supports his assertions. The ACCA decision only "*assum[es] arguendo* the military judge did see the information Appellant *claims* is present in [AE 62]." *Alfaro*, 86 M.J. at 566 (emphasis added). Appellant comes before this Court with absolutely no evidence that AE 62 contains any statements that are exculpatory or contradict Patient/Victim S.T.'s court-martial testimony.

In his Supplement Brief on Behalf of Appellant at ACCA ("Supplement Brief") at 7-8, Appellant claimed S.T.'s privileged communications in AE 62 conflicted with her court-martial testimony that she "always remembered Appellant penetrating her and never could not remember the charged acts." Supplement Brief at 7 (citing R. at 570). Nothing in AE 62 indicates S.T. did not remember Appellant penetrating her or could not remember the charged acts.

S.T.'s privileged records do not contradict her testimony that she was assaulted and remembers being assaulted.

Appellant asserts that during a meeting with government counsel, S.T. “expressed doubts as to whether the incident even occurred.” Brief at 7 (citing R. at 470). The testimony cited by Appellant does not concern doubts about whether the incident occurred. The military judge offered defense counsel several opportunities to have the witness identify the specific doubts S.T. had. At the conclusion of the witness’s testimony and arguments by counsel, the military judge found that S.T.’s statement that she had doubts does not “impeach[] any specific statement she made here in court or even outside of court.” R. at 470-76.

Summary of Argument

When the President added a psychotherapist-patient privilege (M.R.E. 513) to the Military Rules of Evidence, he included a “constitutionally required” exception because he believed that under some circumstances the Constitution *may* require disclosure of privileged communications. In 1999, the psychotherapist privilege had only recently been recognized by the Supreme Court, and there was no federal precedent deciding whether disclosure of privileged communications was constitutionally required.

Although there were no federal cases establishing whether the Constitution required disclosure of privileged communications, military judges routinely

disclosed them under the “constitutionally required” exception. The service courts of criminal appeals required in camera review upon request and disclosed privileged communications that had any relevance. Although many federal courts have now held the privilege does not violate constitutional rights of a defendant, this Court never decided or considered the issue.

After 15 years of routine disclosure of privileged communications within the military courts and guided by the development of case law, Congress and the President determined, like many state and federal appellate courts, the Constitution does not require disclosure of privileged psychotherapy communications in criminal cases. Congress passed a law requiring the President to remove the “constitutionally required” exception from M.R.E. 513. The President signed the law and deleted the “constitutionally required” exception.

Since then, neither this Court nor any service court of criminal appeals has found M.R.E. 513 violates any constitutional right of an accused. Two military appellate courts, the Army Court of Criminal Appeals (“ACCA”) and the Coast Guard Court of Criminal Appeals (“CGCCA”), decided that M.R.E. 513 does not violate any constitutional right. The Navy-Marine Corps Court of Criminal Appeals (“NMCCA”) provided a judicial remedy without finding any constitutional violation.

This Court must presume the M.R.E. 513 privilege is constitutional unless its lack of constitutionality is clearly and unmistakably shown. An evidence rule abridges an accused's right to present a complete defense only if it (1) is arbitrary or disproportionate to its purpose and (2) infringes upon a weighty interest of an accused. There is no Supreme Court or other precedent that clearly and unmistakably establishes any privilege's unconstitutionality.

The Court has no authority to declare M.R.E. 513 violates the constitutional rights of Appellant. The Court must affirm the decision below.

Standard of Review

The Court presumes a rule of evidence is constitutional unless its lack of constitutionality is clearly and unmistakably shown. *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000); *United States v. Tinsley*, 81 M.J. 836, 849 (Army Ct. Crim. App. 2021); *United States v. Woods*, 86 M.J. 574, 583 (C.G. Ct. Crim. App. 2026).

Argument

I. The Court must give substantial deference to Congress's and the President's determination that the Constitution does not require disclosure of privileged communications in a court-martial.

Courts should presume in every case that Congress believed its statute to be consistent with the constitutional commands. *United States v. X-Citement Video*,

Inc., 513 U.S. 64, 73 (1994) (“We do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.”).

The Supreme Court has not decided whether the psychotherapist or any other privilege violates the constitutional rights of an accused. *B.M. v. United States*, 84 M.J. 314, 324 (C.A.A.F. 2024) (Ohlson, C.J., concurring) (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 408 n.3 (1998) (declining to answer whether piercing the attorney-client privilege is appropriate in “exceptional circumstances implicating a criminal defendant’s constitutional rights”)). See also *J.M. v. Payton-O’Brien*, 76 M.J. 782, 788 (N-M. Ct. Crim. App. 2017) (“scant Supreme Court case law defining the boundaries between privileges and constitutional rights of the accused”).

A brief history of M.R.E. 513 is provided to explain why Congress and the President deleted the “constitutionally required” exception in 2014. After the Supreme Court’s decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the President created M.R.E. 513. Exec. Order No. 13,140, § 2(a), 64 Fed. Reg. 55,115, 55,116-17 (Oct. 12, 1999). Rather than the case-by-case examination of the psychotherapist privilege undertaken by a federal court applying and developing the common law, the President “set forth in detail the psychotherapist privilege for the military,” demonstrating his “continued commitment to occupy the field.” *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000).

The President included a “constitutionally required” exception to the privilege because *Jaffee* had only recently recognized the psychotherapist privilege. As there was no federal case law deciding whether the privilege would violate constitutional rights in a criminal trial, the President included the exception so that military courts could make rulings in light of developing case law. The President used the same language as M.R.E. 412’s “constitutionally required” exception.

Unfortunately, without any guidance from this Court on when, if ever, an accused was constitutionally entitled to privileged communications, military judges applied the relevancy standard from M.R.E. 412 and routinely disclosed and admitted privileged psychotherapy records. *Payton-O’Brien*, 76 M.J. at 787; *Woods*, 86 M.J. at 579-80; *D.B. v. Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *14 (Army Ct. Crim. App. Feb. 1, 2016) (unpublished); *see also* Major Angel M. Overgaard, *Redefining the Narrative: Why Changes to Military Rule of Evidence 513 Require Courts to Treat the Psychotherapist-Patient Privilege as Nearly Absolute* [hereinafter “*Changes to M.R.E. 513*”], 224 MIL. L. REV. 979, 980-81 (2016); Major Cormac M. Smith, *Applying the New Military Rule of Evidence 513: How Adopting Wisconsin’s Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice* [hereinafter “*Adopting Wisconsin*”], 2015 ARMY LAW. 6.

Dissatisfied with military courts' application of the relevancy standard to the psychotherapist privilege despite many state and federal courts' decisions upholding absolute psychotherapist privileges, Congress directed the President to remove the "constitutionally required" exception. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, *Pub. L. No. 113-291*, § 537(2), *128 Stat. 3292, 3369 (2014)*. The President signed the bill into law and removed the exception. Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819 (June 22, 2015); *Payton-O'Brien*, 76 M.J. at 787. Congress and the President acted in unison after concluding (in agreement with state and federal courts) the psychotherapist privilege did not violate the constitutional rights of an accused. *United States v. Alfaro*, 86 M.J. 561 (*Army Ct. Crim. App.* 2026); *Woods*, 86 M.J. at 579-80; *Tinsley*, 81 M.J. 836; *Changes to M.R.E. 513*, 224 *MIL. L. REV.* at 984-85.

This Court must presume that Congress believed deleting the constitutionally required exception did not violate constitutional rights. *X-Citement Video*, 513 U.S. at 73. The President, as the rule maker for the Military Rules of Evidence, has broad latitude under the Constitution to establish rules excluding evidence. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). When he acts pursuant to the express authorization of Congress, the President is at the apex of his authority, personifying the federal sovereignty. *Youngstown Sheet & Tube*

Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring); *Woods*, 86 M.J. at 583; *D.B. v. Lippert*, 2016 CCA LEXIS 63, at *25-26 n.14.

In determining the constitutional rights of service members, courts afford substantial deference to Congress. *Weiss v. United States*, 510 U.S. 163, 176-77 (1994); *United States v. Wheeler*, 85 M.J. 70, 75 (C.A.A.F. 2024); *United States v. Anderson*, 83 M.J. 291, 298 (C.A.A.F. 2023) (to succeed in a constitutional challenge to a statutory court-martial procedure, an appellant must demonstrate extraordinary factors to overcome the balance struck by Congress).

The Supreme Court's and this Court's decisions require deference under various constitutional analyses. Courts must give deference to Congress's determination of service members' constitutional rights. *Weiss*, 510 U.S. at 176-77. Courts must presume Congress did not pass an unconstitutional statute. *X-Citement Video*, 513 U.S. at 73. The President has broad latitude to exclude evidence. *Scheffer*, 523 U.S. at 308. When the President and Congress act in unison, their authority is at its constitutional apex. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-37. The Court presumes a rule of evidence is constitutional unless its lack of constitutionality is clearly and unmistakably shown. *Wright*, 53 M.J. at 481.

The Supreme Court and other courts created under Article III have the judicial power to decide whether a statute or presidential act is unconstitutional.

U.S. Const. art. III, § 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Neither the Supreme Court nor any federal appellate court has ruled that the psychotherapist privilege violates the constitutional rights of a civilian criminal defendant.

The various deference requirements applicable to Congress's and the President's authority to promulgate M.R.E. 513 compel the Court to affirm the ACCA and find that M.R.E. 513 does not violate Appellant's constitutional rights.

II. M.R.E. 513 does not violate an accused's constitutional rights.

Even without applying the substantial deference discussed above, M.R.E. 513 does not violate the constitutional rights of an accused. A rule of evidence violates the constitutional rights of an accused only if it (1) is arbitrary or disproportionate to its purpose *and* (2) infringes upon a weighty interest of the accused. *Scheffer*, 523 U.S. at 308; *United States v. Beauge*, 82 M.J. 157, 167-68 (C.A.A.F. 2022) (emphasis in original); *Woods*, 86 M.J. at 585; *Payton-O'Brien*, 76 M.J. at 789.

Although Appellant asserts the decision below is contrary to this Court's precedent (Brief on Behalf of Appellant ("Brief") at 18), the Court has never answered the question of whether the Constitution requires disclosure of privileged psychotherapy communications. *B.M.*, 84 M.J. at 321 (explicitly stating it could not answer the question). Although the Court in *Beauge* did not decide whether M.R.E.

513 violated constitutional rights, it nevertheless concluded: (1) debate on the right to confrontation is limited by *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion); and (2) the due process argument is limited by *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) because the privilege is not arbitrary or disproportionate. 82 M.J. at 167-68.

The Court should consider the analyses of the three lower courts of criminal appeals that have considered the constitutionality of M.R.E. 513.

A. The ACCA and CGCCA properly analyze M.R.E. 513.

After thorough analysis, the ACCA and CGCCA concluded that M.R.E. 513 does not violate the constitutional rights of an accused. Each court determined that M.R.E. 513 did not violate an accused's rights under the Sixth Amendment's Confrontation Clause or the Fifth Amendment's Due Process Clause. They cited and analyzed numerous federal cases upholding the psychotherapist privilege. The Court should affirm ACCA's decision below.

1. Sixth Amendment Confrontation Clause.

Appellant claims that the Confrontation Clause required abatement or disclosure of privileged communications. Brief at 15. He cites only *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) and *Davis v. Alaska*, 415 U.S. 308, 314 (1974). Neither case addresses privileged communications. The brief does not cite *Ritchie*, 480 U.S. 39.

Alfaro and *Woods* each address *Ritchie* and reach the same conclusion as this Court in *Beauge*, 82 M.J. at 167. In *Alfaro*, the ACCA concluded that any exception to M.R.E. 513 grounded in the Confrontation Clause does not exist because confrontation is a trial right that does not include the right to discover information. 86 M.J. at 573 (citing *Ritchie*, 480 U.S. at 53 and other Supreme Court precedent). The Confrontation Clause does not create a constitutionally compelled rule of pretrial discovery. *Id.* In *Tinsley*, ACCA extensively analyzed the Confrontation Clause. It cited numerous federal appellate courts' decisions upholding the privilege. 81 M.J. at 847-50 (citing *Kinder v. White*, 609 F. App'x 126, 128 (4th Cir. 2015); *Johnson v. Norris*, 537 F.3d 840, 842-45 (8th Cir. 2008); *Newton v. Kemna*, 354 F.3d 776, 779 (8th Cir. 2004); *United States v. Shrader*, 716 F. Supp. 2d 464, 472-73 (S.D. W. Va. 2010)). In *Woods*, the CGCCA agreed with the ACCA and questioned whether the Confrontation Clause was even implicated. 86 M.J. at 585.

ACCA and CGCCA have each carefully and thoroughly considered whether the Confrontation Clause requires disclosure of privileged psychotherapist communications to an accused. Each has determined it does not.

2. Fifth Amendment Due Process Clause.

The Fifth Amendment's Due Process Clause implicates two separate rights: (1) the right to present a defense, and (2) the right to discover favorable material in the possession of the prosecution under *Brady v. Maryland*, 373 U.S. 83 (1963).

a. Right to present a defense.

As discussed above and held by this Court, “only rules that infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate” will be held to violate the right to present a defense. *Beaue*, 82 M.J. at 167; *Holmes*, 547 U.S. at 324-25; *Scheffer*, 523 U.S. at 308.

The Supreme Court and this Court have recognized the psychotherapist privilege “promotes sufficiently important interests to outweigh the need for probative evidence.” *Beaue*, 82 M.J. at 167-68 (quoting *Jaffee*, 518 U.S. at 9-10); *see also Tinsley*, 81 M.J. at 848; *Woods*, 86 M.J. at 585-86. In *Rodriguez*, the Court explained that the President created M.R.E. 513 “based on the social benefit of confidential counseling recognized by *Jaffee*.” 54 M.J. at 160.

All military courts that have considered the issue have agreed that M.R.E. 513 is not arbitrary or disproportionate to its purpose.¹ Because this Court has already determined M.R.E. 513 promotes important interests that outweigh the need for probative evidence, the rule does not violate the constitutional rights of an accused even if it infringes upon his weighty interests. Regardless, Appellant has no weighty interests at stake.

¹ While the NMCCA in *Payton-O’Brien*, 76 M.J. 782 cited the “arbitrary or disproportionate” standard, it did not apply it. *Payton-O’Brien* is analyzed below.

b. *Brady v. Maryland.*

The granted issue includes consideration of whether a military judge must ignore exculpatory materials that he examines in camera. Appellant's brief argues that due process requires a judge to disclose exculpatory materials for a court-martial to proceed. Brief at 15-16. As discussed in the statement of facts above, there are no exculpatory materials in Patient/Victim S.T.'s psychotherapy records.

Assuming *arguendo*, as the ACCA did, that S.T.'s psychotherapy records contained exculpatory materials that contradicted S.T.'s testimony, the military judge was not required or permitted to disclose privileged communications. *Alfaro*, 86 M.J. at 566. Appellant provides no reasoning to support his conclusion and simply concludes that due process requires the judge to disclose privileged materials without citing any precedent or other authority. Brief at 16-17. There is no precedent requiring a judge to disclose privileged materials.

The ACCA decisions fully analyze the applicability of *Brady* to exculpatory materials within privileged psychotherapy communications. As *Tinsley* explains, disclosures required under *Brady* are "limited to matter that is: (1) exculpatory or impeachment evidence; (2) 'material'; and (3) [] in the actual or constructive possession of the prosecution." *Tinsley*, 81 M.J. at 851. "[M]aterial reviewed by a judge in camera, without the prosecution ever learning of its contents, is not *Brady*

material” and not constitutionally required to be disclosed. *Alfaro*, 86 M.J. at 572 (concurring opinion).

“[A] judge reading documents during an in camera review does not – cannot – convert the contents into *Brady* material.” *Id.* Appellant does not argue that the military judge is part of or aligned with the prosecution and he never discusses *Brady*. Appellant cites no precedent from any jurisdiction that a judge is obligated under the Due Process Clause to disclose privileged materials reviewed in camera. No precedent exists because an in camera review does not convert privileged material into *Brady* material.

c. Truth-seeking function argument.

Appellant’s due process argument focuses on the preservation of the court-martial’s truth-seeking function. Brief at 16-17. He does not cite any authority for his truth-seeking function argument. He argues that abatement “preserves the court-martial’s truth-seeking function.” Brief at 17.

The purpose of a court-martial is to seek the truth; however, Appellant’s abatement remedy does not *preserve* the court-martial’s truth-seeking function – it *ends* it.

Appellant ignores the obvious that “privileges by their very nature limit the truth-seeking function.” *Woods*, 86 M.J. at 583 (citing *Jaffee*, 518 U.S. at 9); *United States v. Mellette*, 82 M.J. 374, 378 (C.A.A.F. 2022); *United States v. Custis*, 65 M.J.

366, 370-71 (C.A.A.F. 2007). Privileges are justified by a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Mellette*, 82 M.J. at 377.

This Court has been clear on this truth-seeking issue: “[U]nder our system, it is for the policymaking branches of government to weigh the utility of the marital privileged communications against the truth-seeking function of the court-martial.” *Custis*, 65 M.J. at 371. There is no basis to treat the utility of the psychotherapist privilege differently.

The deletion of the constitutionally required exception to M.R.E. 513 is a policy decision by the President, with express support from Congress, that the Constitution does not require disclosure of privileged psychotherapy records. There is nothing extraordinary about this decision. Military judges were routinely disclosing privileged psychotherapy records under a relevancy standard – not a privilege standard. The removal of the constitutionally required exception simply brought the psychotherapist privilege in line with the lawyer-client privilege (M.R.E. 502), clergy privilege (M.R.E. 503), and marital privilege (M.R.E. 504). None of these other privileges has a constitutionally required exception.

M.R.E. 513 and its current exceptions reflect the policy judgments of the President and Congress. There is nothing in M.R.E. 513 that indicates the President or Congress intended to end the truth-seeking court-martial when a patient refuses

to waive her privilege. This Court does not have authority to balance the privilege and the truth-seeking function because that authority resides “with the policymaking branches of government.” *Custis*, 65 M.J. at 369. Determining whether an exception to a privilege should apply is a “legal policy question best addressed by the political and policy-making elements of the government.” *Id.* at 370. “The scope and limitations of M.R.E. 513 rests with the President, not this Court.” *Rodriguez*, 54 M.J. at 160-61.

The President and Congress have decided the Constitution does not require disclosure of privileged communications. They have determined the utility of the privilege outweighs the truth-seeking function of courts-martial. No Article III court, including the Supreme Court, has ever decided otherwise. This Court, an Article I court, has no authority to create a constitutionally required exception.

B. The NMCCA does not conclude M.R.E. 513 violates an accused’s constitutional rights.

Appellant’s brief ignores ACCA’s holdings and analysis in *Alfaro*.

Appellant focuses on the NMCCA’s opinion in *Payton-O’Brien*, 76 M.J. 782. His reliance is misplaced because *Payton-O’Brien* fails to analyze when – if ever – the Constitution requires disclosure of privileged communications for a court-martial to proceed. *Payton-O’Brien* instead creates a judicial remedy that avoids addressing whether disclosure of privileged communications is constitutionally required.

The Court should not follow *Payton-O'Brien* because it is poorly reasoned and contrary to law, and because it misreads the secondary sources on which it relies. Specifically, *Payton-O'Brien*: (1) requires a case-by-case analysis that this Court has rejected; (2) provides a judicial remedy without finding a constitutional violation; and (3) does not cite a single case from any jurisdiction where a privilege was found to violate the constitutional rights of an accused. The decision fails to apply the Supreme Court's holdings in *Holmes* and does not even cite *Scheffer* where the Supreme Court reversed this Court's decision regarding the constitutionality of a military rule of evidence.

1. This Court has rejected *Payton-O'Brien*'s case-by-case analysis.

Payton-O'Brien requires a case-by-case analysis. "Balancing the victim's and accused's rights under [M.R.E.] 513 also requires a variety of precise remedies, because the constitutional facets of *each case* will be so diverse." 76 M.J. at 791 (emphasis added).

This Court has rejected the case-by-case analysis. "The purpose of the Military Rules was to provide predictability, clarity, and certainty through specific rules rather than a case-by-case adjudication of what the rules of evidence would be." *Rodriguez*, 54 M.J. at 158; *Custis*, 65 M.J. at 370-71 ("whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated").

In *Jaffee*, the Supreme Court rejected a case-by-case balancing of the patient’s privacy and the party’s evidentiary need because it would “eviscerate the effectiveness of the privilege.” 518 U.S. at 17. Although *Jaffee* was a *civil* case, there is no case authority to treat privileges differently in a *criminal* case. *Swidler & Berlin*, 524 U.S. at 408-09. Because of the substantial uncertainty introduced, the Supreme Court has rejected use of a balancing test in defining the contours of the privilege. *Id.*; see also *United States v. Portillo*, 969 F.3d 144, 182-83 (5th Cir. 2020); *United States v. Murra*, 879 F.3d 669, 681 (5th Cir. 2018); *Kinder*, 609 F. App’x at 131.

The privileges in the Military Rules of Evidence are not subject to case-by-case analysis. *Rodriguez*, 54 M.J. at 158; *Custis*, 65 M.J. at 370-71.

2. *Payton-O’Brien* requires a judicial remedy without finding any constitutional violation.

Appellant argues that “nothing in the text of [M.R.E.] 513 forbids the remedies suggested in *Payton-O’Brien*.” Brief at 14. Nothing in M.R.E. 513’s text requires or permits judicial remedy. It is the President who decides. *Custis*, 65 M.J. 369-70. Although nothing in M.R.E. 504 forbade military courts from adding an exception to the marital privilege, the Court forbade exceptions. *Id.* at 371. Just as military courts are forbidden to add exceptions to privileges, they are forbidden to add remedies that are not in the text of the privilege. Only the President may choose to add remedies, as he did in M.R.E. 505 and 506.

Payton-O'Brien never finds that the accused's constitutional rights were violated.² The court provides no constitutional analysis and, relying upon a law review article, Clifford S. Fishman, Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records, 86 OR. L. REV. 1 (2007) [hereinafter "Access"], vaguely describes three general areas where an accused's "weighty interests, like due process and confrontation" *may* be infringed. 76 M.J. at 789. *Payton-O'Brien*'s reliance on secondary sources is further discussed in section II.B.3 below.

Without finding a violation, *Payton-O'Brien* creates a judicial remedy – abatement of the court-martial – if the patient refuses to waive her privilege. *Id.* at 789-92. However, without finding a constitutional violation, no remedy is needed.

The NMCCA is clear that abatement is a judicial remedy and not an interpretation of M.R.E. 513. Abatement terminates the proceedings. *United States v. True*, 28 M.J. 1, 2 (C.M.A. 1989) (abatement is the functional equivalent of dismissal). "[D]ismissal is a drastic remedy." *United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015).

²*Payton-O'Brien* found that the military judge in the case incorrectly used the "constitutionally required" relevancy standard from M.R.E. 412. 76 M.J. at 785. The NMCCA further "caution[ed] military practitioners not to conflate the constitutionally required standard envisioned in [M.R.E.] 412 with [M.R.E.] 513." *Id.* at 788 n.25.

A drastic judicial remedy cannot be supplied by military courts where M.R.E. 513's text does not include any remedy. The privileges held by third parties do not provide a remedy for constitutional violations. The privileges held by the government in M.R.E. 505 and 506 were used by *Payton-O'Brien* to fashion its abatement remedy for M.R.E. 513. The President *chose* to provide a remedy when the government was unwilling to disclose classified or confidential information to an accused. His inclusion of a remedy in M.R.E. 505 and 506 and not in the other privileges indicates he did not intend to dismiss or abate proceedings except for the refusal to disclose classified or confidential information. In M.R.E. 505 and 506, the government makes the decision whether it will continue the prosecution by waiving the privilege. There is no basis to conclude the President intended to place the prosecutorial decision in the hands of a third-party privilege holder whose interests differ from the government's.

Payton-O'Brien states that judicial remedies are essential to the judge's duty to ensure a constitutionally fair trial. 76 M.J. at 790. However, judges are not free to impose their personal and private notions of fairness and to disregard the limits that bind judges in their judicial functions. *Wright*, 53 M.J. at 481. The judiciary is not a rulemaking body. *Id.* The judicial remedies envisioned by *Payton-O'Brien* are an invitation for military judges to ignore the rules and do what they feel is fair.

Payton-O'Brien insists that its judicial remedy “scrupulously honors the victim’s choice” of whether to waive her privilege. 76 M.J. at 790. M.R.E. 513 gives victims a privilege – not a choice.

3. *Payton-O'Brien* does not apply the *Scheffer/Holmes* analysis or cite any case finding a privilege unconstitutional and relies only on secondary sources.

Under either *Scheffer* or *Holmes*, a rule excluding evidence does not violate the constitutional rights of an accused unless it is arbitrary or disproportionate *and* it infringes weighty interests of the accused. While *Alfaro*, *Tinsley*, and *Woods* fully analyze and apply this *Scheffer/Holmes* standard, *Payton-O'Brien* does not.

Payton-O'Brien does not consider whether M.R.E. 513 is arbitrary or disproportionate to its purpose. In fact, it does not cite *Jaffee*, the Supreme Court decision that recognized the psychotherapist privilege because of the important “public good” it promotes and that favorably compared it to the spousal and attorney-client privileges. 518 U.S. at 9-11; *Beaune*, 82 M.J. at 167-68; *Tinsley*, 81 M.J. at 847; *Woods*, 86 M.J. at 583-84.

The closest *Payton-O'Brien* comes to acknowledging any social benefit is its characterization of Congress’s and the President’s changes to M.R.E. 513 as “noble goals and notable policy concerns” that cannot “trump” an accused’s right to present a complete defense. 76 M.J. at 789. *Payton-O'Brien* did not find or even discuss whether Congress’s and the President’s noble goals and notable

policy concerns were arbitrary or disproportionate. *Payton-O'Brien* displaces Congress and the President as the policymaker, usurping their authority to weigh the utility of the psychotherapist privilege against the truth-seeking function of a court-martial. *Custis*, 65 M.J. at 371.

Payton-O'Brien mentions constitutional concerns (due process and confrontation) that could be implicated but does not analyze them or make any findings of unconstitutionality. *Payton-O'Brien*, 76 M.J. at 788-89. The NMCCA does not cite *Scheffer* and cites but does not apply *Holmes*. Instead of applying the Supreme Court's or any other court's precedents, it relies upon two law review articles and a treatise. It relies upon "*Access*," "*Adopting Wisconsin*," and Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 20-32.10 (4th ed. 2015). None of these secondary sources applies the *Scheffer/Holmes* framework.

a. Gilligan and Lederer treatise.

The Gilligan and Lederer treatise quoted by *Payton-O'Brien* does not conclude that privileged materials are constitutionally required; it only suggests a remedy (abatement) "[t]o the degree access to . . . privileged materials is constitutionally necessary." *Payton-O'Brien*, 76 M.J. at 790. It does not provide any analysis of when – if ever – privileged materials are constitutionally required.

b. *Adopting Wisconsin* article.

Payton-O'Brien cites *Adopting Wisconsin* only once (76 M.J. at 786 n.17), yet it adopts its procedures wholesale. The procedures advocated by *Adopting Wisconsin* were created by *State v. Shiffra*, 499 N.W.2d 719, 724 (Wis. Ct. App. 1993).

After *Adopting Wisconsin* was published in the Army Lawyer, the Wisconsin Supreme Court overruled *Shiffra*, finding that the procedures advocated by *Adopting Wisconsin* and implemented by *Payton-O'Brien* were “unsound in principle,” “unworkable in practice,” and “undermined by developments in the law.” *State v. Johnson*, 2023 WI 39, 407 Wis. 2d 195, 210-11, 217, 223, 225-26. *Shiffra* was decided prior to the Supreme Court’s decisions in *Jaffee* and *Holmes* and incorrectly applied *Ritchie*. *Id.* at 203-07.

This Court should reject *Payton-O'Brien*’s remedial procedures because, like the procedures in *Shiffra*, they are unsound in principle and unworkable in practice. The Court has seen their unsoundness and unworkability in the numerous cases that have come to it from the NMCCA. *United States v. Jacinto*, 86 M.J. 349 (C.A.A.F. 2026); *B.M.*, 84 M.J. 314; *Mellette*, 82 M.J. 374; *Beauge*, 82 M.J. 157; *United States v. Pittman*, 80 M.J. 358 (C.A.A.F. 2020); *United States v. Marquez*, 80 M.J. 96 (C.A.A.F. 2020).

c. Access article.

Payton-O'Brien's reliance on *Access* is misplaced not because the *Access* article is poorly written or legally incorrect, but because the court incorrectly restates what *Access* says and the cases cited by *Access* do not support the court's incorrect restatement.

Payton-O'Brien cites no case law supporting its conclusion that the psychotherapist privilege, or any other privilege, violates an accused's constitutional right to present a complete defense. *Payton-O'Brien* excuses its lack of analysis by claiming it is "impossible to define all of the situations" where the privilege's purpose would infringe on an accused's due process and confrontation interests. 76 M.J. at 789. Relying on *Access*, *Payton-O'Brien* states that "courts have *allowed discovery of privileged information* in the following areas: (1) recantation or other contradictory conduct by the alleged victim; (2) evidence of behavioral, mental, or emotional difficulties of the alleged victim; and (3) the alleged victim's inability to accurately perceive, remember, and relate events." *Payton-O'Brien*, 76 M.J. at 789 (emphasis added). However, the *Access* article does not say that courts have *allowed discovery of privileged information*. The *Access* article states, "courts have *given serious consideration to discovery requests* in three specific situations." *Access*, at 41 (emphasis added). "Allow" is

not the same as “*given serious consideration*,” just as “*privileged information*” is not “*discovery requests*.”

The vague descriptions of general areas where courts have given “serious consideration” are not a satisfactory substitute for the disciplined constitutional analysis required to declare Congress and the President violated the constitutional rights of an accused when they deleted the exception.

Access cites sixteen cases within the pages (41-45) cited by *Payton-O’Brien*. These sixteen cases are the only cases relied upon by *Access* to support its assertion that courts have given “serious consideration” to discovery. Although some of the cases cited in the article related to privilege, many did not.

The cases cited in *Access* do not support *Payton-O’Brien*’s conclusion that the Constitution *may* require discovery of privileged psychotherapy records.

- Most of the sixteen cases predate *Scheffer* and *Holmes*, and none applies the framework this Court is bound to apply today.
- Nine of the sixteen cases predate the Supreme Court’s 1996 decision in *Jaffee* and could not account for its holding. Pre-*Jaffee* cases include *United States v. Diamond*, 964 F.2d 1325, 1329 (2d Cir. 1992); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994). The remaining pre-*Jaffee* cases are discussed below as they suffer from other limitations.

- Two cases were decided under state constitutions and not the federal constitution. *State v. Peseti*, 65 P.3d 119, 132-33 (Haw. 2003); *State v. Hoag*, 749 A.2d 331, 332 (N.H. 2000).
- Five cited cases *did not involve privileged communications*. *State ex rel. White v. Gray*, 141 S.W.3d 460, 466-67 (Mo. Ct. App. 2004) (confidential court records of adoption); *Commonwealth v. Figueroa*, 661 N.E.2d 65, 67-69 (Mass. 1996) (records of agency investigation did not include communications between patient and psychotherapist); *State v. Pandolfi*, 765 A.2d 1037, 1043 (N.H. 2000) (medication was discoverable); *State v. Gonzales*, 912 P.2d 297 (N.M. Ct. App. 1996) (patient waived privilege but prosecutor refused to produce records to court); *State v. Jackson*, 862 A.2d 880, 889 (Conn. App. Ct. 2005) (department of children and families records were reviewed in camera under *Brady* and not disclosed).
- Three cases affirmed convictions even though privileged records were not produced. *State v. Speese*, 545 N.W.2d 510, 513 (Wis. 1996); *People v. Higgins*, 784 N.Y.S.2d 232 (N.Y. App. Div. 2004); *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1209-10 (Mass. 2004).
- *State v. L.J.P.*, 637 A.2d 532, 535 (N.J. Super. Ct. App. Div. 1994) did not involve disclosure of privileged records. The court reversed the

conviction because the defendant was prohibited from introducing evidence that he already possessed.

- In *State v. Luna*, 921 P.2d 950, 951 (N.M. Ct. App. 1996), the court struck the victim's testimony as a sanction for government misconduct.
- In *State v. Pinder*, 678 So. 2d 410, 417 (Fla. Dist. Ct. App. 1996), the court *reversed* the trial court's order compelling production of victim's therapy records.
- In *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979), overruled on other grounds by *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983), the court held that psychotherapy records that are not in the government's possession are not discoverable.

Payton-O'Brien has turned academic observations into a constitutional requirement. The *Access* law review article does not support the *Payton-O'Brien* opinion. *Payton-O'Brien* ignored the *Access* article's discussion that it would be "profoundly unwise social policy" to give a witness the legal authority to preclude the prosecution of a dangerous predator. *Access*, at 24. *Access* also acknowledged some courts have upheld the constitutionality of an absolute privilege. *Access*, at 19-20.

Every case *Access* cites in support of the passage that *Payton-O'Brien* relied upon is set out above. None supports a constitutional right to discover privileged psychotherapy records.

Conclusion

The President and Congress removed the “constitutionally required” exception from M.R.E. 513 because the Constitution does not require disclosure of privileged communications. M.R.E. 513 is not arbitrary or disproportionate to its purpose of protecting the confidentiality of communications between patients and therapists.

WHEREFORE, for the reasons stated herein, Patient/Victim S.T. respectfully requests that the Court affirm the decision of the Army Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(f) because it contains 6,436 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font.

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CERTIFICATE OF FILING AND SERVICE

I certify that this document was filed by email with the Court on August 31, 2026, and that a copy was simultaneously served by email to counsel for Appellant and Appellee.

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