

**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. Dkt. ARMY 20220282

Filed: September 1, 2026

REPLY BRIEF ON BEHALF OF APPELLANT

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INDEX

TABLE OF AUTHORITIES	ii
1. The <i>Payton-O'Brien</i> procedure does not violate Mil. R. Evid. 513	1
2. The military judge was permitted to conduct an <i>in camera</i> review for privileged matters because the alleged victim consented to the review.	2
3. The government ignores the distinction between voluntary and involuntary disclosure of psychotherapy records.	3
4. This case does not deal with pre-trial discovery or with <i>Brady</i> material but with due process and confrontation.	5
5. The psychotherapist-patient privilege is not superior to the attorney-client privilege.	6
6. The government and the Army Court misrely on <i>Jaffee</i>	9
Conclusion	11

TABLE OF AUTHORITIES

Cases

<i>B.M. v. United States</i> , 84 M.J. 314 (C.A.A.F. 2024)	6
<i>Bassine v. Hill</i> , 450 F.Supp.2d 1182 (D. Or. 2006)	10
<i>Baxter v. Palmigiano</i> , 425 U.S. 308 (1999)	10
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	7
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	8
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996)	9, 10
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999)	10
<i>Murdoch v. Castro</i> , 365 F.3d 699 (9th Cir. 2004)	7
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987)	7
<i>United States v. Alfaro</i> , 86 M.J. 561 (A. Ct. Crim. App. 2026)	7, 8
<i>United States v. Alperin</i> , 128 F.Supp.2d 1251 (N.D.Cal.2001)	11
<i>United States v. Benzer</i> , 2014 U.S. Dist. LEXIS 169337 (D. Nev. Dec. 8, 2014)	8
<i>United States v. Castillo</i> , 2016 U.S. Dist. LEXIS 123792, (E.D. Mich. Sept. 13, 2016)	11
<i>United States v. Chee</i> , 191 F. Supp. 3d 1150 (D. Nev. 2016)	11
<i>United States v. Custis</i> , 65 M.J. 366 (C.A.A.F. 2007)	4
<i>United States v. Fosler</i> , 70 M.J. 225 (C.A.A.F. 2011)	1
<i>United States v. Grace</i> , 439 F. Supp. 2d 1125 (D. Mont. 2006)	8
<i>United States v. Jasper</i> , 72 M.J. 276 (C.A.A.F. 2013)	4

<i>United States v. Lewis</i> , 65 M.J. 85 (C.A.A.F. 2007)	4
<i>United States v. Mazzola</i> , 217 F.R.D. 84 (D. Mass. 2003).....	11
<i>United States v. Mix</i> , 2012 U.S. Dist. LEXIS 88044 (E.D.La. June 26, 2012)	8
<i>United States v. Rainone</i> , 32 F.3d 1203 (7th Cir. 1994).....	7
<i>United States v. Sager</i> , 76 M.J. 158 (C.A.A.F. 2017)	1, 4
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	7
<i>United States v. Zolin</i> , 491 U.S. 554 (1989).....	3
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	7
<i>Weatherford v. Bursey</i> , 429 U.S. 545 (1977).....	9

Other Authorities

<i>Ballentine's Law Dictionary</i> , 3rd Ed.....	5
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Rules

Mil. R. Evid. 510.....	4
Mil. R. Evid. 513.....	1, 2, 4, 11
R.C.M. 901	5

Comes now Appellant, Rene D. Alfaro, in reply to Appellee's Brief and respectfully submits the following:

1. The *Payton-O'Brien* procedure does not violate Mil. R. Evid. 513

The government ignores the plain text of Mil. R. Evid. 513 and claims that the *Payton-O'Brien* procedure violates that rule. "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (internal quotation marks omitted) (citation omitted). Here, nothing in the text of Mil. R. Evid. 513 prohibits a military judge from seeking an alleged victim's consent to release psychotherapy records to an accused. Nothing in the text of Mil. R. Evid. 513 prohibits a military judge from abating a trial. Instead, Mil. R. Evid. 513 prohibits only the involuntary disclosure of psychotherapy records where none of the Mil. R. Evid. 513(d) exceptions apply. Mil. R. Evid. 513(a). Therefore, the *Payton-O'Brien* procedure is consistent with Mil. R. Evid. 513.

The government inappropriately applies interpretive tools to create a constitutional conflict inside of Mil. R. Evid. 513 where the text contains none. Contra Gov. Br. at 17-18. Where "there is no clear indication... expressed in the text... [this court will not adopt] an interpretation [that] would contravene constitutional mandates." *United States v. Fosler*, 70 M.J. 225, 231-232 (C.A.A.F. 2011). Neither appellant nor the *Payton-O'Brien* court proposed the involuntary

release of psychotherapy records under circumstances where no Mil. R. Evid. 513(d) exception applies. The *Payton-O'Brien* procedure is consistent with the rule because the rule prohibits involuntary disclosure, not “evaluation for disclosure.” Contra Gov. Br. at 19. This court should therefore find that the *Payton-O'Brien* procedure comports with the text of Mil. R. Evid. 513 and is valid.

2. The military judge was permitted to conduct an *in camera* review for privileged matters because the alleged victim consented to the review.

The government incorrectly claims that “the military judge was not permitted to conduct in camera review for privileged materials in accordance with Mil. R. Evid. 513(e)(3).” The government ignores that the alleged victim consented to the military judge’s review of her psychotherapy records. Pursuant to this consent, the military judge conducted a review for items “not privileged.” JA at 24. 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 judge stated on the record that he read the entirety of the privileged matters. These items are apparently item x on the military judge’s sealing order.

The military judge released to the defense records that he redacted. *Id.* How could the military judge redact S.T.’s records without casting his eye 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 find that

the military judge reviewed, and was permitted to review, the entirety of S.T.'s psychotherapy records and was aware of exculpatory content therein.

3. The government ignores the distinction between voluntary and involuntary disclosure of psychotherapy records.

The government misrelies upon *United States v. Zolin*, 491 U.S. 554, 568-69 (1989). Gov. Br. at 23. *Zolin* deals with an adverse party obtaining court-ordered production of records for *in camera* review. “[T]he IRS filed in the District Court a petition to enforce its summons [seeking] 12 sealed documents the Clerk had refused to produce in response to the IRS summons.” *Id.* at 557-58. The “privileged materials” to which the Supreme Court refers in *Zolin* are therefore those obtained by compulsory process by an adverse party.

Unlike *Zolin*, where the IRS, an adverse party, subpoenaed privileged documents, here, appellant did not compel S.T.'s therapist to release her patient communications. Gov. Br. at 25. Instead, S.T.'s treatment facility over-released her records. S.T. could have then insisted that those records be returned to the facility for resubmission. She did not. Instead, she consented to the military judge's *in camera* review of those records. JA at 24.

S.T.'s consent to release her psychotherapy caused those records to lose privilege. Contra Gov. Br. at 23-24. This court applies normal rules of statutory construction to the interpretation of the Military Rules of Evidence. *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). Unambiguous text ends judicial inquiry

without reliance on any other canon of construction. *Sager*, 76 M.J. at 161. Here, the text of Mil. R. Evid. 510 and 513 are unambiguous. Psychotherapy records are privileged only so long as they remain between a patient and a “psychotherapist” or “assistant to a psychotherapist.” Mil. R. Evid. 513(a). Where a patient “consents to disclosure,” Mil. R. Evid. 510(a), the privilege is waived if maintenance of the privilege would be inappropriate under the circumstances.

This court need not determine here whether S.T.’s waiver under the circumstances is total. Instead, this court should merely determine that it would be “inappropriate under the circumstances” to direct a court-martial to ignore exculpatory matter presented to it. Privileges must be narrowly construed and waivers liberally applied because 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). Here, this court should find S.T.’s waiver makes it inappropriate to block the *Payton-O’Brien* procedure. As discussed above, the *Payton-O’Brien* procedure does not violate the text of Mil. R. Evid. 513. Even if it did, this court should find that S.T.’s voluntary release of her psychotherapy records to the military judge made inappropriate the total maintenance of the privilege. Instead, assuming *arguendo* the Mil. R. Evid. 513 privilege contravenes the *Payton-O’Brien* procedure, this court should find limited waiver permitted the *Payton-O’Brien* procedure because requiring the military

judge to ignore that exculpatory information would be “inappropriate under the circumstances.”

4. This case does not deal with pre-trial discovery or with *Brady* material but with due process and confrontation.

The government misrelies upon caselaw dealing with pre-trial discovery. According to the government, “the scope of pretrial discovery... is at the heart of the issue in this case.” Gov. Br. at 15. This is incorrect. Matters that are pre-trial occur prior to arraignment. R.C.M. 901. The military judge’s examination of S.T.’s psychotherapy records occurred after arraignment. JA at 34. The issue here is not a pre-trial issue but instead an issue with a court-martial’s post-arraignment acquisition of exculpatory evidence. The government’s assertions concerning the pre-trial scope of confrontation and discovery are therefore not relevant because the issue here is not pretrial. Contra Gov. Br. at 13-15.

The issue here is further not one of discovery. Discovery is “[a] remedy for the sole purpose of **compelling** the... disclosure of facts within his own knowledge, information, or belief, or to disclose and produce documents, books and other things...” *Ballentine's Law Dictionary*, 3rd Ed (emphasis added). The *Payton-O'Brien* procedure does not involve *compelling* an alleged victim to disclose psychotherapy records. Instead, it involves seeking an alleged victim’s *consent* for disclosure. It is not a discovery procedure because it does not compel the release of documents over an alleged victim’s objection.

The issue instead is whether the due process clause or confrontation clause permits a military judge to ignore exculpatory materials that he discovers *in camera*. They do not. 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). This procedure both allows an alleged victim to prevent the release of her psychotherapy records and also prevents the miscarriage of justice that would occur if a military judge ignored exculpatory evidence he reviewed. It is not a pretrial procedure and is not a discovery procedure. This court should therefore find that the government's reliance on pretrial discovery jurisprudence is misplaced.

5. The psychotherapist-patient privilege is not superior to the attorney-client privilege.

The government incorrectly endorses the Army Court's holding that “there is no constitutional exception to the attorney-client, spousal, or clergy-penitent privilege.” Gov. Br. 11 quoting *United States v. Alfaro*, 86 M.J. 561, 567(A. Ct.

Crim. App. 2026). This is incorrect. “The attorney-client privilege should not be an unequivocal bar to access to the only evidence of inconsistent statements and ulterior motives made by accomplices turned government witnesses.” *Murdoch v. Castro*, 365 F.3d 699, 705 (9th Cir. 2004)(rev. in part on oth. grounds). “Even the attorney-client privilege . . . hallowed as it is . . . might have to yield in a particular case if the right of [effective] confrontation . . . would be violated by enforcing the privilege.” *United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994).

Evidentiary rules cannot “significantly undermine[] fundamental elements of the defendant's defense.” *United States v. Scheffer*, 523 U.S. 303, 315 (1998) (synthesizing the holdings of *Rock v. Arkansas*, 483 U.S. 44 (1987), *Washington v. Texas*, 388 U.S. 14 (1967), and *Chambers v. Mississippi*, 410 U.S. 284 (1973)). This is why federal district courts routinely examine the attorney-client privileged documents *in camera* and direct the release of those documents where necessary to vindicate an accused’s right to a fair trial. “It follows hand in glove that in weighing the competing interests [between a privilege and a fair trial] is the exculpatory value of the lost evidence to the accused that weighs most heavily on the scale of fair trial.” *United States v. Grace*, 439 F. Supp. 2d 1125, 1142 (D. Mont. 2006) citing *Id.* at 316-317; *Davis v. Alaska*, 415 U.S. 308, 319 (1974); *Rock*, 483 U.S. at 57.” (commentary and citations as in original). See also *United States v. Mix*, 2012 U.S. Dist. LEXIS 88044, *5-6 (E.D.La. June 26,

2012)(order)[allowing a Defendant to use attorney-client privileged materials essential for his defense]; *United States v. Benzer*, 2014 U.S. Dist. LEXIS 169337, *31-32 (D. Nev. Dec. 8, 2014)[same holding].

In *Grace*, attorney-client privileged documents contained exculpatory information. Defendants sought to utilize these documents in their defense, but the privilege holder refused to waive his privilege. *Id.* The District Court did not treat the privilege as absolute. Instead, consistent with *Murdoch* and *Rainone*, the district court reviewed the privileged documents *in camera*.

“I have reviewed the privileged documents... [b]ased on that review it appears that each of Defendants... has submitted documents that may... be of such probative and exculpatory value as to compel admission of the evidence over... objection [from] the attorney-client privilege holder.”

Grace, 439 F. Supp. 2d at 142.

Similar to *Grace*, where attorney-client privileged documents contained exculpatory information, *id.*, here, psychotherapist-patient privileged documents contained exculpatory information. *Alfaro*, 86 M.J. at 571. Further similar to *Grace*, in which the district court reviewed documents *in camera*, *Grace*, 439 F. Supp. 2d at 142, here, the military judge also reviewed the documents *in camera*. Just as in *Grace*, where it would violate the accused’s due process and confrontation rights to exclude known exculpatory evidence, here appellant’s trial

violated his due process and confrontation rights because the military judge viewed exculpatory information and proceeded with appellant's trial irrespective of it.

Unlike *Grace*, in which the method of vindicating the accused's rights involved overriding the attorney-client privilege, here, the *Payton-O'Brien* procedure preserves the privilege, if desired by the alleged victim, by abating the court-martial. It is a less intrusive means of complying with the constitution.

The attorney-client privilege arguably has its roots in the constitution. *Weatherford v. Bursey*, 429 U.S. 545, 554, n.4 (1977). The psychotherapist-patient privilege does not. It is rooted in the perceived need to increase trust between patients and treating psychotherapists. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). The psychotherapist-patient privilege is not a superior privilege to the attorney-client privilege. If the attorney-client privilege yields to due process and confrontation, so must the patient-psychotherapist privilege. This court should therefore find that the military judge erred when he viewed exculpatory materials contained within S.T.'s psychotherapy records, but did not apply the *Payton-O'Brien* procedure.

6. The government and the Army Court misrely on *Jaffee*.

The government ignores that *Jaffee* was civil case. Contra Gov. Br. at 11. "The question we address is whether statements the officer made to her therapist during the counseling sessions are protected from compelled disclosure in a federal

civil action...". *Jaffee*, 518 at 3 (emphasis added). When contrasting the application of a privilege between a defendant's evidence in a criminal case and a civil matter, Article III courts "treat[] civil and criminal cases differently [because] 'the stakes are higher' in criminal cases, where liberty or even life may be at stake, and where the Government's 'sole interest is to convict.'" *Mitchell v. United States*, 526 U.S. 314, 328 (1999) quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1999).

The *Jaffee* court decided that the patient-psychotherapist privilege was more important than a civil litigant's ability to obtain evidence in support of his claim. *Id.* *Jaffee* is not a judicial override of appellant's criminal trial rights because those rights were not at issue in *Jaffee*.

Federal courts have gone beyond *Payton-O'Brien* and ordered the involuntary release of exculpatory psychotherapy records to vindicate an accused's confrontation and due process rights. In *Bassine v. Hill*, 450 F.Supp.2d 1182, 1185-86 (D. Or. 2006), the district court distinguished *Jaffee* as a civil case, and held that an accused's confrontation and due process rights outweighed the psychotherapist-patient privilege and required the involuntary release of an alleged victim's psychotherapy records. *United States v. Alperin*, 128 F.Supp.2d 1251, 1253 (N.D.Cal.2001), *United States v. Mazzola*, 217 F.R.D. 84, 86 (D. Mass. 2003), *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D.Mont. 1997), *United*

States v. Castillo, No. 16-cr-20344, 2016 U.S. Dist. LEXIS 123792, *9 (E.D. Mich. Sept. 13, 2016) and *United States v. Chee*, 191 F. Supp. 3d 1150, 1151-57 (D. Nev. 2016), reached similar holdings.

This court can leave for another day whether the Constitution requires the involuntary disclosure of patient-psychotherapy records or permits an accused to compel the *in camera* review of psychotherapy records outside of the exceptions contained in Mil. R. Evid. 513. Here, Appellant merely asserts that where a military judge reviews exculpatory materials pursuant to the consent of the alleged victim, an accused's Due Process and confrontation rights require either the *voluntary* disclosure of that exculpatory information or the abatement of the trial and do not permit the military judge to ignore exculpation presented to him.

Conclusion

WHEREFORE, appellant respectfully requests that this Honorable Court grant to him the relief outlined in his opening brief.

Respectfully submitted,

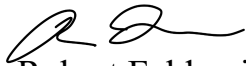


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This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(b) because this brief contains 2,497 words. This brief also complies with the typeface and type style requirements of Rule 37.



Robert Feldmeier, Attorney-at-law

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I certify that an electronic copy of the forgoing was electronically sent to the Court and served on the Government Appellate Division and on Mr. Peter Coote on September 1, 2026.



Robert Feldmeier, Attorney-at-law