

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

UNITED STATES,	)	BRIEF ON BEHALF OF
Appellee	)	APPELLEE
	)	
v.	)	
	)	
SERGEANT (E-5)	)	Crim. App. Dkt. No. 20220282
RENE D. ALFARO,	)	
United States Army,	)	USCA Dkt. No. 26-0170/AR
Appellant	)	

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Appellant	)	

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

Issue Presented

**WHETHER 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.**

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 (UCMJ); 10 U.S.C. § 866.¹ This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

¹ All references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM].

Statement of the Case

On May 26, 2022, a military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of three specifications of sexual assault and one specification of violating a lawful general regulation, in violation of Articles 120 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 892 [UCMJ]. (JA 100; JA 118).² The military judge sentenced Appellant to be confined for twenty-four months, reduced to E-3, and dishonorably discharged. (JA 118; JA 102). On June 15, 2022, the convening authority took no action on the findings and sentence. (JA 103). On June 22, 2022, the military judge entered judgment. (JA 106).

Following trial, Appellant petitioned the Army Court. 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).

On December 3, 2025, the Army Court agreed to reconsider its decision *en banc*. On February 12, 2026, the Army Court issued its *en banc* opinion affirming the findings and sentence. *United Staes v. Alfaro*, 86 M.J. 561 (A. Ct. Crim. App. 2026) (*en banc*).

² All of appellant's convictions involved findings by exception and substitution, wherein the military judge corrected the rank of the victim. (JA 100; JA 118).

Statement of Facts

Prior to trial, the defense moved to compel discovery of the victim's behavioral health appointment history, prescriptions, and mental health diagnoses. (JA 32-33). In response, the Special Victims' Counsel (SVC), on behalf of the victim, invoked the psychotherapist-patient privilege. (JA 32-33).

On November 18, 2021, in a written ruling after a hearing on the issue, the military judge concluded the mental health appointment records, diagnoses, and prescriptions were not privileged under Mil. R. Evid. 513. (JA 32-33). The military judge's signed production order directed the government to produce "mental health diagnoses and any records of antidepressant meds for an in-camera review." (JA 33). The military judge noted in his production order he did not seek privileged records, because no privilege had been waived. (JA 33).

In late November 2021, the military judge received encrypted copies of the victim's mental health records from the custodian of records. (JA 33). The mental health records contained privileged material, and the military judge initially did not review them because they were not responsive to the military judge's production order. (JA 33). The records custodian indicated they were not qualified to screen the records to remove the privileged information. (JA 33).

The military judge, following the refusal of the records custodian to screen

the materials, offered to conduct an in-camera review in order to screen the records for relevant, non-privileged information and redact any privileged information within the records. (JA 34). The court did not release any privileged information, and the victim did not consent to the release of any privileged information. (JA 34). She waived her privilege only for the purpose of facilitating this limited-basis in-camera review. (JA 34). The military judge highlighted for the record:

So, the unredacted, privileged records I reviewed are marked as a sealed appellate exhibit for the record.³ There's also a second exhibit marked of the records I did release, which are the redacted, unprivileged records.

(JA 34).

After trial, Appellant's appellate defense counsel moved to examine all appellate exhibits in the military judge's sealing order. (Appellant's Mot. to Examine Sealed Materials, dated July 10, 2023). The Army Court granted the motion in part and denied it in part. *Alfaro*, 86 M.J. at 564.

After the Army Court denied his motion in part, Appellant moved this Court to grant his motion for extraordinary relief. (Appellant's Writ Petition in the Nature of Mandamus and in the Nature of Prohibition and Brief in Support, dated August 3, 2023). On September 13, 2023, this Court initially denied Appellant's motion without prejudice.

³ These privileged records were sealed and marked as Appellate Exhibit LXII.

On October 24, 2023, this Court granted Appellant's motion for extraordinary relief except for Item Y.

After reviewing the sealed exhibit (the victim's privileged mental health records) Appellant raised a new assignment of error, specifically, that the military judge should have asked the victim to waive her privilege or abated the trial. *See Alfaro*, 86 M.J. at 565.

Summary of Argument

The Army Court did not hold that Mil. R. Evid. 513 is absolute, instead it held that the enumerated exceptions listed in Mil. R. Evid. 513 are the only means to disclose privileged psychotherapist-patient records and that privileged records obtained inadvertently maintain their privilege. The psychotherapist-patient privilege includes seven exceptions listed in Mil. R. Evid. 513(d). Appellant did not establish the threshold showing that any of these exceptions applied. Thus, the military judge properly reviewed the records only for mental health diagnoses and prescribed antidepressant medications in accordance with his ruling, maintaining the privilege and preventing any further disclosure. Further, as the military judge was not conducting an in-camera review in accordance with Mil. R. Evid. 513(e)(3), he did not have the duty or authority to sua sponte disclose privileged records. Appellant did not have a constitutional right to pretrial discovery of privileged records, and Appellant's right to present a defense was not abridged.

Finally, as the Army Court noted, and there is no evidence the military judge viewed anything that would require disclosure.

Issue Presented

WHETHER 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 regarding the scope of the patient-psychotherapist privilege established by the Military Rules of Evidence de novo.” *United States v. Mellette*, 82 M.J. 374, 377 (C.A.A.F. 2022) (citing *United States v. Beauge*, 82 M.J. 157 162 (C.A.A.F. 2022)). When construing the Military Rules of Evidence, this Court applies the standard principles of statutory construction. *Mellette*, 82 M.J. at 377 (citing *United States v. Kohlbeek*, 78 M.J. 326, 330 (C.A.A.F. 2019)). When the language of a rule is susceptible to only one interpretation, this Court enforces the rule according to its terms. *See Kohlbeek*, 78 M.J. at 330 (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Argument

Military Rule of Evidence 513 protects a patient's right to refuse to disclose communications made between a patient and psychotherapist in cases arising under the UCMJ. Mil. R. Evid. 513(a). The privilege is held by the patient and may be claimed by a guardian, conservator, or patient's counsel. Mil. R. Evid. 513(c).

The Supreme Court recognized the importance of the psychotherapist-patient privilege in *Jaffee v. Redmond*, stating, "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." 518 U.S. 1, 11 (1996).

Mil. R. Evid. 513(a) provides,

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, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

In December 2014, Congress passed, and the President signed, the 2015 National Defense Authorization Act (NDAA), which removed what was then an enumerated exception to the rule that allowed the defense to seek an in-camera review of mental health records on the basis it was "constitutionally required." National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 13-291, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. at 35,819 (Jun. 22,

2015). Thus, the rule no longer provides a “constitutionally required” exception. *See* Mil. R. Evid. 513(d)(1)-(7).

The rule establishes specific procedures to determine the admissibility of patients’ mental health records or communications. Mil. R. Evid. 513(e). *Before* the court can conduct an in-camera review to determine the admissibility of patient records, the court must find by a preponderance of the evidence that the moving party established *all* of the following:

- (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
- (C) that the information sought is not merely cumulative of other information available; and
- (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

Mil. R. Evid. 513(e)(3).

“[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 made a showing that the information sought meets an enumerated exception as required by M.R.E. 513(e)(3)(A) and (B).” *Beauge*, 82 M.J. at 168.

A. The Army Court correctly interpreted the scope of Mil. R. Evid. 513.

As the Army Court correctly noted, “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.” *Alfaro*, 86 M.J. at 566. The Army Court’s interpretation of the rule is consistent with its plain language. “Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result. *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012). The text of the rule is clear. The moving party must show the requested information meets an *enumerated* exception of Mil. R. Evid. 513(d).

Without making this threshold showing, the military judge was not permitted to conduct in camera review for privileged materials in accordance with Mil. R. Evid. 513(e)(3). *See Beauge*, 82 M.J. at 168. Without authority to view privileged materials, the military judge did not have the authority to sue sponte expand the scope of his review into privileged materials, even if they were, as Appellant alleges, exculpatory.

Congress removed the enumerated constitutional exception, and the Army Court recognized this in *Tinsley*, stating,

there is no requirement to recognize an exception to the psychotherapist-patient provide based on *Brady* or any other constitutional balancing test, this court lacks the authority to create or otherwise recognize any such

exception to Mil. R. Evid. 513. It follows that the *only* exceptions to the psychotherapist-patient privilege are those expressly set forth in Mil R. Evid. 513(d)(1)-(7).

Tinsley, 81 M.J. at 850.

This analysis (which the Army Court relied on in *Alfaro*) is consistent with this Court's precedent. Military courts do not have the authority to add exceptions to codified privileges. *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007) (holding "the authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policy making branches of government.").

This court should recognize the Army Court's ruling is consistent with the text of Mil. R. Evid. 513. It is well established that principles of statutory construction are used in interpreting the Military Rules of Evidence. *Custis*, 65 M.J. at 370. "A fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). With respect to Mil. R. Evid. 513, this Court should interpret the rule as written. When Congress and the President removed the "constitutional exception" to Mil. R. Evid. 513, it was a purposeful effort to give the privilege the full effect of the plain text of the rule.

Other rules of evidence have no constitutional exception. “[T]here 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.’” *Alfaro*, 86 M.J. at 567 (quoting *Jaffee*, 518 U.S. at 10.).

The Army Court’s interpretation of the rule gives full weight and meaning to the plain text of the rule and is consistent with precedent from this court and the United States Supreme Court.

B. The Constitution and Mil. R. Evid. 513 do not require pretrial disclosure of privileged records.

An accused’s right to present evidence is subject to reasonable restrictions. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998). “[S]tate and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.” *Scheffer*, 523 U.S. at 308.

The psychotherapist-patient privilege is not arbitrary. It is the deliberate creation of Congress and the President. Nor is it disproportionate. “[A]s the Supreme Court recognized in *Jaffee*, the psychotherapist-patient privilege ‘promotes sufficiently important interests to outweigh the need for probative

evidence.” *Beauge*, 82 M.J at 168 (quoting *Jaffee*, 518 U.S. at 9-10)). Given that the current version of Mil. R. Evid. 513 ““is the result of both a legislative and executive act, the President was likely at the apex of his authority in implementing M.R.E. 513.”” *Tinsley*, 81 M.J. at 849 (quoting *DP v. Lippert*, ARMY MISC 20150769 2016 CCA LEXIS 63 at *27 n. 14) (mem. op.); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37, (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

Prior to the 2015 NDAA, military judges would employ a balancing test “to determine whether the accused’s Confrontation Clause rights outweighed the victim’s psychotherapist-patient privilege”. *Tinsley*, 81 M.J. at 847. The Supreme Court has rejected the idea of using a balancing test to determine whether the privilege should be upheld on a case-by-case basis, holding that “[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 17-18. An uncertain privilege that “results in widely varying applications by the courts, is little better than no privilege at all.” *Jaffee*, 518 U.S. at 18.

Reading the rule as Appellant argues would directly contradict the plain text

of the rule and transform a rule of privilege into a rule of relevance. Such an interpretation is not supported by the text of the rule, is not supported by Congress and the President's modification of the rule, and it is inconsistent with the certainty the Supreme Court interpreted the privilege to afford.

1. Confrontation is a trial right, not a discovery right and Appellant suffered no due process violation.

Confrontation is the right to confront a witness at the time of trial. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (plurality opinion) (citing *California v. Green*, 399 U.S. 149, 157 (1970)); *see also Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (“the 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.”).

Appellant argues the Army court ignored his right to effective cross-examination and interfered with his right to present a complete defense.

(Appellant's. Br. 15). However, the use of the Confrontation Clause as a basis to seek discovery is limited by the Supreme Court, which has made it clear the right to question witnesses does not include unlimited pretrial disclosure.

[T]he debate on the confrontation issue is limited by the Supreme Court's decision in *Pennsylvania v. Ritchie*, in which the plurality of the Court opined that the Sixth Amendment right “to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”

Beauge, 82 M.J. at 168 (quoting *Ritchie*, 480 U.S. at 53).

This Court has recognized the Supreme Court has similarly limited due process arguments. *See Beauge*, 82 M.J. at 167. “As the Court stated in *Holmes v. South Carolina*, only rules which ‘infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve’ will be held to violate the right to present a complete defense.” *Beauge*, 82 M.J. at 168 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). As argued above, the psychotherapist-patient privilege is not arbitrary or disproportionate and it does not violate Appellant’s right to present a complete defense.

The Confrontation Clause is not a constitutionally compelled rule of pretrial discovery, and the Supreme Court has rejected the prospect of turning it into one.

In *Ritchie*, the lower court interpreted the Supreme Court’s decision in *Davis v. Alaska*, 415 U.S. 308 (1974) to mean a privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach a witness. *See Ritchie*, 480 U.S. at 52. The Supreme Court rejected the lower court’s argument, holding, “[i]f we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view.” *Ritchie*, 480 U.S. at 52. As the Supreme Court

declined to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery in *Ritchie*, so too should this Court.

The limits of pretrial discovery undercut Appellant's reliance on *United States v. Ellerbrock*, 70 M.J. 314, 319 (C.A.A.F. 2011). *Ellerbrock* does not address the scope of pretrial discovery, which is at the heart of the issue in this case. Rather, this Court's opinion in *Ellerbrock* addresses Mil. R. Evid. 412. *See Ellerbrock*, 70 M.J. at 319. Military Rule of Evidence 412 is a poor proxy for Mil. R. Evid. 513, because Mil. R. Evid. 412 does not address privileged information.

2. There is no *Brady*⁴ exception to Mil. R. Evid. 513.

Appellant argues the Army Court's holding prevents him from confronting the victim with inconsistent statements. (Appellant's Br. 15). "Evidence affecting a prosecution witness's credibility is within the scope of potential '*Brady*' material." *Alfaro*, 86 at 572 (Murdough, J., concurring) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). However, *Brady* material is evidence that is in the actual or constructive possession of the prosecution. *See United States v. Stellato*, 74 M.J. 473, 487 (C.A.A.F. 2015); *see also United States v. Shorts*, 76 M.J. 523, 532-33 (A. Ct. Crim. App. 2017).

Material reviewed by a military judge in camera, without the prosecution learning of its contents, is not *Brady* material. *Alfaro*, 86 M.J. at 572 (Murdough,

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

J., concurring). “[An] individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the *government’s behalf* in the case . . .” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added). Additionally, *Brady* did not create a general constitutional discovery right. “There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one[.]” *Weatherford v. Bursey*, 429 U.S. 545, 559-60 (1977).

In the case at bar, there is no rational argument the military judge was acting on the government’s behalf. The military judge was not part of the prosecution, and a military judge reading documents in-camera does not convert the contents into *Brady* material when the documents are not in the government’s possession. *See Alfaro*, 86 M.J. at 572. The military judge even went out of his way to ensure the privileged material remained sealed. (R. at 224).

Just as *Brady* does not create a duty to disclose evidence not in the government’s possession, “[Rule for Courts-Martial] 701(a)(6) generally does not place on the Government the duty to search for exculpatory evidence held by people or entities not under the control of the Government, such as a witness.” *Stellato*, 74 M.J. at 486. Further, the government’s “R.C.M. 701 obligation does *not* apply in the context of determining whether privileged material should be disclosed under Mil. R. Evid. 513.” *Tinsley*, 81 M.J. at 852. ““The disclosure of a privileged matter is an entirely separate question, governed by separate rules, from

whether the information would be otherwise discoverable under R.C.M. 701 and Article 46, UCMJ.” *Tinsley*, 81 M.J. at 851 (quoting *Lk v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2021)).

Rule for Courts-Martial 701(f) states, “[n]othing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence.” Not only are privileged psychotherapist-patient records not in the government’s possession under R.C.M. 701, “the government cannot intentionally subpoena or otherwise solicit a healthcare provider to procure what it knows to be privileged records.” *Tinsley*, 81 M.J. at 851 (citing *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 255 (2d. Cir. 1986)).

The government did not have possession or access to the privileged records, and there is no *Brady* violation when a military judge does not sue sponte disclose privileged records where an accused has failed to meet the requirements (under Mil. R. Evid. 513(e)(3)) to initiate in camera review of privileged material.

3. The judicial remedy proposed in *Payton-O’Brien* does not comply with Mil. R. Evid. 513.

Appellant argues the military judge should have either sought the victim’s consent to release her psychotherapy records or should have abated the trial. (Appellant’s Br. 13). Appellant’s reliance on *J.M. v. Payton-O’Brien* for this argument is misplaced for two reasons.

First, “*Payton-O’Brien* only held that, where the privilege afforded by Rule 513 implicates the constitutional rights of the accused to a fair trial, ‘military judges *may* craft such remedies as are required to guarantee the accused a meaningful opportunity to present a complete defense.’” *Tinsley v. United States*, 2026 U.S. Dist. LEXIS 159401 at * 13 (D.D.C., July 18, 2026) (mem. op.) (quoting *Payton-O’Brien*, 76 M.J. 782, 783 (N-M. Ct. Crim. App. 2017)).⁵

Second, the Navy Court prescribed a process for the military judge to review records *in-camera* that does not comport with the plain text of Mil. R. Evid. 513.

In addressing judicial remedies when the privilege is not waived, the Navy court prescribed a multi-part test. *See Payton-O’Brien*, 76 M.J. at 790. First, “[t]he procedure to determine the admissibility of the victim's records or communications under Mil. R. Evid. 513(e)(2) begins in a closed hearing, where the military judge applies the same test used for in camera review found in Mil. R. Evid. 513(e)(3).” *Id.* at 789-90.

Next, if the moving party satisfied all of the requirements of Mil. R. Evid. 513(e)(3) but does not meet an enumerated exception under Mil. R. Evid. 513(d),

⁵ Plaintiff (Tinsley) sought collateral review of his court-martial conviction, arguing his conviction was void because the military judge exclusion of evidence deprived him of his rights under the Confrontation Clause. Plaintiff’s Motion for Summary Judgement was denied in *Tinsley v. United States*, 2026 U.S. Dist. LEXIS 159401 (D.D.C., July 18, 2026).

“then the military judge determines whether the accused’s constitutional rights still demand production or disclosure of the privileged materials.” *Id.* at 790.

If the military judge finds the materials demand disclosure, then the military judge gives the victim an opportunity to waive the privilege for in camera review for by the military judge. *Id.*

If the victim elects to waive her privilege *only* for in camera review, the military judge reviews the materials for possible disclosure. If the military judge continues to find that the accused’s constitutional rights demand disclosure of certain materials to the defense, she earmarks those items for review by the victim of VLC. If, after review, the victim or VLC elect to further waive the privilege, the materials are provided to the defense.

Id.

The Navy Court’s proposed test ignores the plain text of Mil. R. Evid. 513. Specifically, the Navy Court’s proposal calls for the military judge to determine whether the accused’s constitutional rights demand production of privileged materials even after the moving party fails to meet an enumerated exception under Mil. R. Evid. 513(d). This proposal circumvents the privilege by allowing evaluation for disclosure to continue even after the moving party *fails* to meet its burden as required under the plain text of Mil. R. Evid. 513(e)(2)(B). This test treats the psychotherapist-patient privilege as a rule of relevance rather than an evidentiary privilege.

The Supreme Court has rejected the idea of using a balancing test, holding that “[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 17-18.

The text of Mil. R. Evid. 513(e)(3)(B) is clear. “Prior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed the requested information meets one of the enumerated exceptions under subdivision (d) of this rule[.]” The rule does not allow a military judge to conduct in-camera review for privileged psychotherapist-patient records without this showing. Consequently, *Payton-O’Brien*’s proposed test is extra-textual and is improper.

However, assuming for the sake of argument the test for judicial remedies (including abatement) as outlined in *Payton-O’Brien* is proper, even under the *Payton-O’Brien* test, Appellant’s claim fails.

In the case at bar, the military judge never made a finding that appellant satisfied all the prongs of Mil. R. Evid. 513(e) but met no enumerated exception under Mil. R. Evid. 513(d). *Tinsley v. United States* addressed the issue, stating, “Indeed, Plaintiff overlooks the language in *Payton-O’Brien* that a military judge need make an individual determination only ‘if the moving party satisfied all of the

prongs, but meets no enumerated exception.’ Plaintiff did not pass that threshold step.” *Tinsley v. United States*, 2026 U.S. Dist. LEXIS 159401 at * 13 (mem. op.) (quoting *Payton-O’Brien*, 76 M.J. at 790).

Appellant did not satisfy even the first step in the *Payton-O’Brien* proposed analysis. The remedy of abatement, in absence of a finding that Appellant has satisfied the requirements of Mil. R. Evid. 513(e)(3), is improper, even under *Payton-O’Brien*’s proposed test.

C. The victim did not unconditionally waive her privilege and the military judge had no authority to disclose privileged materials.

Early in the litigation, the military judge conducted an in-camera review for the purpose of providing evidence of the victim’s mental health diagnoses and prescriptions. The victim waived the privilege for the limited purpose of allowing the military judge to review the documents for diagnosis and treatments: materials that are not privileged under Mil. R. Evid. 513. *See United States v. Mellette*, 82 M.J. 374, 379 (C.A.A.F 2022) (holding that “diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513.”).

In his efforts to facilitate the production of diagnoses and treatments, the military judge screened the records specifically for this unprivileged information. The military judge did not review the materials in-camera in accordance with Mil. R. Evid. 513(e)(3). Critically, Mil. R. Evid. 513(e)(3) provides the procedural

framework for review to determine the admissibility of *protected records or communications*, not unprivileged records. In this case, the military judge was not trying to determine the admissibility of protected records in accordance with Mil. R. Evid. 513(e). Rather, he was facilitating the production of unprivileged records.⁶

The Army Court correctly found the military judge was also not obligated to disclose privileged records. At trial, Appellant never requested nor even initiated the process necessary to assess the admissibility of the victim's privileged communications under Mil. R. Evid. 513, thus, the military judge was not examining the records for this purpose. *See Alfaro*, 86 M.J. at 566.⁷ The military judge could not conduct an in-camera review to determine whether to pierce the privilege because “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 made a showing that the information sought meets an enumerated exception as required by M.R.E. 513(e)(3)(A) and (B).”

⁶ This kind of in-camera review “is an acceptable and permissible way to disaggregate discoverable from non-discoverable information, including separating ‘*Mellette* information’ from confidential psychotherapist communications.” *United States v. Alfaro*, 86 M.J. 561, 570 (A. Ct. Crim. App. 2026) (Murdough, J., concurring).

⁷ “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.” *United States v. Alfaro*, 86 M.J. 561, 570 (A. Ct. Crim. App. 2026).

Beauge, 82 M.J. at 168.

Simply stated, the military judge did not have the authority (under *Brady* or the Constitution) to sua sponte disclose *privileged* information where Appellant failed to meet the initial threshold showing required by Mil. R. Evid. 513.

1. In-camera review does not terminate the privilege.

Appellant argues the psychotherapy records lost their privileged status when the patient consented to disclosure to a non-therapist, the military judge. (Appellant's Br. 19). In-camera review does not terminate a privilege. "[D]isclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege."

United States v. Zolin, 491 U.S. 554, 568-69 (1989). Here, the victim allowed the military judge to review the records in-camera to sift out unprivileged material.

This did not terminate the privileged status of the mental health records.

As the Army Court notes in its opinion, military judges have encountered the challenged of reviewing records that commingle information privileged under Mil. R. of Evid. 513 and information that is not privileged under *Mellette*. See *United. Alfaro*, 86 M.J. at 570. This puts courts in the position where they must provide the parties with the "*Mellette* information" without disclosing privileged information. See *Alfaro*, 86 M.J. at 570.

If this court were to agree with Appellant's argument and find that in-camera

review is enough to terminate the psychotherapist-patient privilege, then the privilege would effectively be destroyed, and the well-established practice of in-camera review by judges would become useless in determining the merits of a claim of privilege. Such an interpretation is inconsistent with the text of Mil. R. Evid. 513 and case law.

2. Mil. R. Evid. 510 and waiver of privilege.

Waiver of an evidentiary privilege is defined in Mil. R. Evid. 510. Waiver occurs when a privilege holder “voluntarily discloses any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.” Mil. R. Evid. 510(a). Simply stated, it is perfectly appropriate to allow the victim to claim the privilege after she agrees to allow the military judge to review records for the purpose of facilitating the disclosure of unprivileged materials as defined in *Mellette*. To interpret waiver of the privilege as Appellant argues would lead to the wholesale forfeiture of the privilege anytime a military judge must review records to identify whether there are unprivileged materials that are subject to disclosure and discovery. This would effectively eliminate the privilege.

Appellant Exhibit LXII, the victim’s unredacted medical and mental health records, were never provided to the trial counsel or trial defense counsel; rather, the military judge reviewed them in-camera, redacted them, and gave the redacted

copies to the parties. (R. at 224).⁸ The military judge's in-camera review was for the specific purpose of identifying non-privileged information; there is no indication the military judge read any of the privileged information that appellant did. *See Alfaro*, 86 M.J. at 566. No privilege was ever unconditionally waived, and the trial court never released any privileged information. The military judge did not conduct an analysis in accordance with Mil R. Evid. 513(e)(3), and Appellant never made a showing as required by Mil R. Evid. 513(e)(3) to even initiate in-camera review.

Rather, the military judge conducted an in-camera review to facilitate the production of unprivileged "*Mellette* materials." This is not waiver under Mil. R. Evid. 510, and there is no provision of Mil. R. Evid. 513 that equates in-camera review to unconditional waiver.

Conclusion

The Army Court correctly interpreted the scope of Mil. R. Evid. 513. Appellant did not have a constitutional right to pretrial discovery of privileged records, Appellant's right to present a defense was not abridged, the victim did not unconditionally waive her privilege, Appellant failed to initiate the necessary

⁸ This court should recognize that Appellant's mistaken claim that these materials were available to counsel at trial formed the sole basis for his request that he be permitted to review the materials, and this claim is not supported by the record. Appellant never sought review of the victim's privileged mental health records and did not make any of the required showings enumerated in Mil. R. Evid. 513(e)(3).

process to assess the admissibility of the victim's privileged communications under the rule, and the military judge did not have the authority to sua sponte disclose privileged materials without Appellant complying with the requirements of Mil. R. Evid. 513.

WHEREFORE, the Government respectfully requests this Honorable Court affirm the Army Court's decision.



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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 6,603 words.
2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins on all four sides.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to
efiling@armfor.uscourts.gov on September 2, 2026 and electronically filed to
Defense Appellate Counsel and Victim's Counsel on September 2, 2026.

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