IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Frantz BEAUGE Personnel Specialist Chief Petty Officer (E-7) U.S. Navy, Appellant	**BRIEF ON BEHALF OF APPELLANT: REDACTED** Crim.App. Dkt. No. 201900197 USCA Dkt. No. 21-0183NA

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

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Issue Presented

DID THE LOWER COURT CREATE AN UNREASONABLY BROAD SCOPE OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BY AFFIRMING THE MILITARY JUDGE'S DENIAL OF DISCOVERY, DENYING REMAND FOR *IN CAMERA* REVIEW, AND DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012) because Appellant's approved sentence included one year confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A general court-martial composed of members with enlisted representation convicted Chief Personnel Specialist (PSC) Frantz Beauge (/Bō-zhay/), contrary to his pleas, of two specifications of Article 120b, UCMJ, 10 U.S.C. § 920b (2016).[1] The members sentenced Appellant to be reduced to paygrade E-1 and one year confinement.[2] The Convening Authority approved the sentence as adjudged and ordered it executed.[3]

[1] Joint Appendix (J.A.) 256.
[2] J.A. 257.
[3] J.A. 79.

The Record of Trial was docketed at the lower court on July 12, 2019. On January 11, 2021, the lower court affirmed the sentence and the findings.[4]

On March 12, 2021, Appellant petitioned this Court for review and moved to file the supplement to petition separately. Appellant filed his supplement to petition for grant of review on April 5, 2021. This Court granted Appellant's petition for review on May 14, 2021.[5]

Statement of Facts

A. PSC Beauge took in and was supporting multiple members of his extended family, including the alleged victim, when the alleged conduct occurred.

In 2014, PSC Beauge's brother-in-law lost his house to foreclosure.[6] In addition to his wife and three children, PSC Beauge took in seven people from the Beauge extended family for the summer, including his 12-year-old niece, C.G., and his nephew, T.J.[7] In August 2014, C.G. and T.J. returned to live with their parents and to start school.[8]

[4] *United States v. Beauge*, No. 2019000197, 2021 CCA LEXIS 9 (N-M. Ct. Crim. App. Jan. 11, 2021).
[5] J.A. 10.
[6] J.A. 109.
[7] J.A. 143-45, 202-03.
[8] J.A. 139.

B. Two years later, C.G. claimed that PSC Beauge touched her inappropriately when she and her brother resided in his home.

More than two years later, in December 2016, an unidentified teacher found C.G. crying in the hallway at school.[9] C.G. was taken to a guidance counselor.[10] C.G. initially told the guidance counselor that she was crying because of something that her boyfriend had done.[11] [redacted][12] [redacted].[13]

[redacted][14] C.G. disclosed details of how PSC Beauge allegedly sexually abused her two years earlier.[15] [redacted].[16] [redacted].[17] [redacted].[18] The hotline created an audio

[9] J.A. 258, 265-66.
[10] J.A. 258, 265-66.
[11] J.A. 258, 266.
[12] J.A. 334.
[13] J.A. 334.
[14] J.A. 334.
[15] J.A. 276.
[16] J.A. 293.
[17] J.A. 313, 334.
[18] J.A. 293, 313, 334.

recording of the oral report and generated a Confidential Investigative Summary.[19] The Confidential Investigative Summary summarized consisted of a single brief paragraph that provided general details of the alleged abuse, including a statement that PSC Beauge "even attempted to penetrate her on some occasions."[20]

[redacted][21] [redacted].[22] [redacted]"[23] [redacted].[24]

On June 5, 2018, the Government preferred charges against PSC Beauge.[25] PSC Beauge was not charged with a penetrative offense.[26]

[19] J.A. 86-88, 276.
[20] J.A. 276.
[21] J.A. 313, 323-25, 334.
[22] J.A. 313.
[23] J.A. 313.
[24] J.A. 313.
[25] J.A. 72.
[26] J.A. 72.

C. Defense requested Ms. DeForest's clinical notes because the report of "attempted to penetrate" from the hotline indicated a specific contradiction between C.G.'s initial allegation and subsequent statements to investigators and at trial.

[redacted],[27] [redacted] [redacted][28]) [redacted].[29] [redacted]

[redacted]"[30] Trial Defense Counsel did not raise any other exceptions to the privilege. [redacted]

[redacted]."[31] Without Ms. DeForest's notes, Trial Defense Counsel was essentially impotent—unable to properly impeach C.G.

[27] J.A. 337-38.
[28] J.A. 300-302.
[29] J.A. 307-11.
[30] J.A. 309-10.
[31] J.A. 342.

based on a hotline report that was based on Ms. DeForest's oral report that was based on what C.G. told her during a counseling session.[32]

[redacted].[33] [redacted] [redacted] [redacted].[34] [redacted] [redacted] [redacted][35] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]"[36] [redacted] [redacted].[37]

[32] J.A. 83-84.
[33] J.A. 338.
[34] J.A. 334, 336-38.
[35] J.A. 334.
[36] J.A. 337.
[37] J.A. 333-38.

D. During her testimony at trial, C.G. did not claim that PSC Beauge attempted to penetrate her.

At trial, C.G. testified that on her first or second day at the Beauge family home, PSC Beauge called her into the garage.[38] Standing in the open garage, C.G. alleged that PSC Beauge leaned down and kissed her.[39] C.G. testified that PSC Beauge would take her to his room at night.[40] She claimed that he would kiss her and hump her.[41] She explained that she could feel PSC Beauge's erection through his clothing.[42] At some point in the summer, C.G. alleged that PSC Beauge came into the bathroom while she was showering.[43] She stated that he reached under her towel and touched her clitoris.[44] PSC Beauge allegedly stopped when his daughter walked into the bathroom.[45] C.G. never told anyone in the house what was happening.[46] At trial, C.G. never claimed that PSC Beauge attempted to penetrate her.[47]

[38] J.A. 113.
[39] J.A. 113-14.
[40] J.A. 124-26.
[41] J.A. 125-28.
[42] J.A. 129.
[43] J.A. 133-34.
[44] J.A. 135-36.
[45] J.A. 136-37.
[46] J.A. 127-30.
[47] J.A. 105-200.

On cross-examination, Trial Defense Counsel did not confront C.G. with the statement contained in the hotline summary regarding attempted penetration.[48] Trial Defense Counsel limited the extent to which the Government could introduce prior consistent statements.[49] Trial Defense Counsel's theory of the case was that C.G. lied about being assaulted, which was supported by the fact that none of the other ten people in the house saw anything amiss that summer.[50]

Summary of Argument

I. The military judge abused his discretion when he determined that the duty-to-report exception did not apply to Ms. DeForest's clinical notes. Florida state law imposed a duty on Ms. DeForest to report the abuse alleged by C.G. Thus, in accordance with the plain language of Mil. R. Evid. 513(d)(3)—"[t]here is no privilege . . . when . . . state law . . . imposes a duty to report information contained in a communication"—the underlying communications that resulted in Ms. DeForest's report are not protected by the psychotherapist-patient privilege. But the Military Judge improperly concluded that the exception only applied to the report generated pursuant to Florida law. But the psychotherapist-patient privilege applies to communications between a patient and her psychotherapist, thus any

[48] J.A. 143-190, 199-200.
[49] J.A. 196.
[50] J.A. 240, 243-246.

exception to the privilege applies to those communications, not to a report generated as a result of state law.

Ms. DeForest's notes would have provided the Defense with inconsistent statements from C.G. that would have aided in PSC Beauge's defense. During her forensic interview and trial testimony, C.G. never alleged that PSC Beauge attempted to penetrate her. But, according to the hotline summary, C.G. told Ms. DeForest that PSC Beauge *did* attempt to penetrate her. These contradicting stories from C.G. were key evidence that PSC Beauge needed to properly develop and present his defense. But this single comment contained in a summary based on Ms. DeForest's report of what C.G. told her is not sufficient to effectively impeach C.G. It provided Defense with the option to ask a single, vague question based on a report that C.G. likely had not seen. Details of the alleged abuse that C.G. reported to Ms. DeForest were contained in Ms. DeForest's notes. And those details were necessary to properly confront the Government's primary witness—the complaining victim.

II. Trial Defense Counsel provided ineffective assistance by failing to raise two additional exceptions to the psychotherapist-patient privilege. First, Ms. DeForest's clinical notes were evidence of child abuse excepted from the privileged under MIL. R. EVID. 513(d)(2). Second, PSC Beauge had a constitutional right to disclosure of Ms. DeForest's notes to confront the

complaining witness with inconsistent statements. Therefore, the clinical notes should have been subpoenaed for *in camera* review. Trial Defense Counsel's failure to raise the child abuse and constitutional exceptions constituted ineffective assistance of counsel. If Trial Defense Counsel had obtained C.G.'s statements contained in Ms. DeForest's clinical notes, then the defense would have been able to effectively attack C.G.'s credibility during cross-examination.

Trial Defense Counsel's failure to obtain Ms. DeForest's notes prejudiced his ability to cross-examine the complaining witness before the members. In a case without physical evidence or eyewitnesses, the only direct evidence of the charges was C.G. If PSC Beauge had been able to thoroughly cross-examine C.G. and confront her with prior inconsistent statements, there is a reasonable likelihood that the members would not have found him guilty.

III. No court has reviewed the requested documents to determine whether any relevant information exists. The NMCCA erred by not remanding the case for *in camera* review of the requested notes to determine whether the information would have changed the outcome of trial.

Argument

THE LOWER COURT UNREASONABLY EXPANDED THE SCOPE OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE BY AFFIRMING THE MILITARY JUDGE'S DENIAL OF DISCOVERY, DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND FAILING TO REMAND FOR *IN CAMERA* REVIEW.

A. The NMCCA erred when it failed to find the Military Judge abused his discretion by denying discovery of the psychotherapist records that led to the report of alleged child sexual abuse.

1. Standard of review.

A military judge's ruling on a motion to compel psychotherapist records is reviewed for an abuse of discretion.[51] "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law."[52] Appellant challenges only the Military Judge's conclusions of law interpreting the rule. Conclusions of law, including regarding interpretation of a statute, are reviewed *de novo*.[53]

[51] *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018).
[52] *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).
[53] *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Reeves*, 62 M.J. 88, 91 (C.A.A.F. 2005).

2. The Military Judge erred when he denied the defense motion to compel discovery of Ms. DeForest's clinical notes under the duty-to-report exception.

Military Rule of Evidence 513 provides that "[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 . . . 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."

Military Rule of Evidence 513 protects certain confidential communications between a patient and a psychotherapist from discovery or production.[54] The psychotherapist-patient privilege includes seven enumerated exceptions where the privilege does not apply.[55] Military Rule of Evidence 513(d)(3) states, "There is *no privilege* . . . when federal law, state law, or service regulation imposes a duty to report information contained in a communication."[56]

Section 39.201, Florida Statutes (2016) requires psychiatrists to submit a report to the Department of Children and Family Services when they "know[], or [have] reasonable cause to suspect, that a child is the victim of childhood sexual abuse."[57] Reports of abuse are made to the Florida central abuse hotline.[58] "Any

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[54] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513(a) (2016).
[55] MIL. R. EVID. 513(d) (2016).
[56] MIL. R. EVID. 513(d)(3) (2016) (emphasis added).
[57] Fla. Stat. § 39.201(1)(c)-(d) (2016).
[58] Fla. Stat. § 39.201(2)(b) (2016).

person alleged in the report as having caused the abuse" is entitled to the hotline records.[59]

[redacted][60][redacted][61]

[redacted][62][redacted][63][redacted][64]

[59] Fla. Stat. § 39.202(2)(e) (2016).
[60] J.A. 307-27.
[61] J.A. 337-78.
[62] J.A. 337.
[63] J.A. 337.
[64] J.A. 338.

The well-established principles of statutory construction are used to interpret Military Rules of Evidence.[65] Statutory construction begins by looking at the plain language of a rule. "The plain language will control unless use of the plain language would lead to an absurd result."[66] Here, ignoring the plain language of the rule is what lead to an absurd result.

By its plain language, Mil. R. Evid. 513(d)(3) is a broad exception to privilege. The exception states, "There is no privilege . . . when there is a "duty to report information contained in a communication."[67] A Military Rule of Evidence, like a statute, should not be interpreted in a way that causes words to be ignored.[68] The fact that Florida law imposes a duty to report effectively eliminates the psychotherapist-patient privilege for the entire conversation that Ms. DeForest had with C.G, per the plain language of MIL. R. EVID. 513(d)(3).

The Military Judge took an inappropriately narrow view of MIL. R. EVID. 513(d)(3), [redacted]

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[65] *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (citing *United States v. McNutt*, 62 M.J. 16, 20 n.27 (C.A.A.F. 2005); *United States v. Lucas*, 1 C.M.R. 19, 22 (C.M.A. 1951)).

[66] *Lewis*, 65 M.J. at 88 (citing *United States v. Martinelli*, 62 M.J. 52, 81 n.24 (C.A.A.F. 2005) (Crawford, J., dissenting) ("'When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))).

[67] MIL. R. EVID. 513(d)(3) (2016).

[68] *See United States v. Sager*, 76 M.J. 158, 165 (C.A.A.F. 2017).

[redacted].[69] The NMCCA adopted the Military Judge's improper interpretation of the rule.[70] This ignores that the privilege exists to protect the "confidential communication made between the patient and a psychotherapist,"[71] and so any exception to that privilege pertains to the *communications*. The privilege does *not* exist to protect a state-ordered report and so any exception to that privilege does *not* apply to such reports. The lower court reasoned that the exception was inserted to permit military psychotherapists to properly report child abuse to military authorities, *not* to permit evidence to be admitted at a court-martial.[72] If President did not want to affect the admissibility of evidence, he would not have made this a Military Rule of *Evidence*. For the exception to mean what the Military Judge and NMCCA improperly interpreted it to mean, it would need to state, "There is no privilege *over the specific reports generated* as a result of any federal law, state law, or service regulation that imposes a duty to report information contained in a communication." The concern that piercing the privilege would undermine the public policy of encouraging

[69] J.A. 338.
[70] *Beauge*, 2021 CCA LEXIS 9 at *13-14.
[71] MIL. R. EVID. 513(a) (2016).
[72] *Beauge*, 2021 CCA LEXIS 9 at *14-15.

patients to speak to therapists does not give the Military Judge or the lower court the authority to rewrite the Rules of Evidence.

Both the Military Judge and NMCCA cited to *LK v. Acosta* in support of the ruling that the Florida Statute does not completely pierce the psychotherapist-patient privilege.[73] In *Acosta,* the accused attempted to obtain the mental health records of the victim, his step-child, pursuant to MIL. R. EVID. 513(d)(2).[74] Military Rule of Evidence 513(d)(2) states, "There is no privilege . . . when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse." The accused argued that MIL. R. EVID. 513(d)(2) applied because the:

> mental health records are essential for defense preparation, specifically "the extent of mental health treatment, what [LK] stated to the mental health treatment providers to obtain her diagnosis, and what diagnosis she has are all relevant to this case because they have a tendency to make the existence of facts that are of consequence, the truthfulness of [LK] and the extent of her injury, more or less probable."[75]

The trial judge ordered *in camera* review of the alleged victim's mental health records under MIL. R. EVID. 513(d)(2).[76] On a writ brought by the alleged victim, the ACCA overturned *in camera* review and determined that the exceptions of

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[73] J.A. 336-37; *Beauge*, 2021 CCA LEXIS 9 at *10, 14.
[74] *Lk v. Acosta*, 76 M.J. 611, 619-20 (A. Ct. Crim. App. 2017).
[75] *Id.* at 619-20 (edits in original).
[76] *Id.* at 613.

MIL. R. EVID. 513(d)(2) did not apply because the evidence sought by the accused was not evidence of child abuse.[77] The accused was attempting to find evidence that child abuse did *not* occur by relying on a rule that only applies when there is evidence that child abuse *did* occur.

Acosta is distinguishable. Relying on the Rule's plain language, the Army Court of Criminal Appeals concluded that MIL. R. EVID. 513(d)(2) only applies to communications that are evidence that child abuse or neglect "actually occurred."[78] Here, the Military Judge and NMCCA relied on an improper limitation of the exception. Military Rule of Evidence 513(d)(3) clearly states that there is no privilege when there is "a duty to report information contained in a communication." Claiming the privilege continues to apply to these communications is an improper reading of the clear language of the Rule.

The Military Judge erred when he denied Defense's motion. The defense was entitled to the entire context of that report as contained in Ms. DeForest's clinical notes to test the credibility of C.G.'s allegations, particularly considering how the Government emphasized C.G.'s credibility during argument.[79] At a

[77] *Id.* at 618.
[78] *Id.* at 617.
[79] J.A. 233, 239.

minimum, the Military Judge should have conducted an in camera review of Ms. Deforest's clinical notes.[80]

3. The Government bears the burden to show that failure to disclose Ms. DeForest's clinical notes did not contribute to the finding of guilty.

When a military judge errs by failing to order disclosure of mental health records, the "[a]ppellant is only entitled to relief if such abuse of discretion materially prejudiced his substantial rights."[81] "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[82] "To say that an error did not 'contribute' to the ensuing verdict" means "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."[83]

"Where an error constitutes a 'constitutionally improper denial of a defendant's opportunity to impeach a witness for bias," our harmless beyond a reasonable doubt review includes weighing" five factors:

- the importance of the witness' testimony in the prosecution's case,
- whether the testimony was cumulative,
- the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points,

[80] MCM, MIL. R. EVID. 513(e)(3) (2016).
[81] *United States v. Pittman*, No. 201800211, 2020 CCA LEXIS 23, at *27 (N-M. Ct. Crim. App. Jan. 24, 2020) (quoting *Chisum*, 77 M.J. at 179).
[82] *Chisum*, 77 M.J. at 179 (quoting *Mitchell v. Esparza*, 540 U.S. 12 (2003)).
[83] *Id.* at 179 (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991)).

- the extent of cross-examination otherwise permitted, and
- the overall strength of the prosecution's case[84]

This Court applied the above standard in *United States v. Chisum* where the appellant claimed that the military judge abused his discretion by denying appellant's motion to compel the production and in camera review of mental health records of two key government witnesses.[85] The CAAF affirmed the lower court's decision, finding that the military judge's ruling did not prejudice appellant's substantial rights because the defense had significant information to conduct strong cross-examinations of both witnesses.[86] This information included one witness describing himself as "a con artist" and admitting that he experienced memory problems due to habitual drug use, while the other witness suffered from substantial memory loss, struggled to differentiate reality from fantasy, was inebriated at the time of the appellant's offense, and had no clear memory of the time during which the alleged offense occurred.[87] The Court concluded that "the information in the sealed records would have added little to the defense counsel's strong cross-examination" of the witnesses.[88]

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[84] *Id.* at 179 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).
[85] *Chisum*, 75 M.J. at 179.
[86] *Id.* at 179-80.
[87] *Id.*
[88] *Id.*

Here, the factors all weigh in favor of PSC Beauge. First, the testimony of C.G. was central to the prosecution's case. Second, none of C.G.'s testimony was cumulative with other testimony because she was the complaining witness and the sole eyewitness to the alleged abuse. Third, there was a complete lack of corroborating evidence to the alleged abuse. Fourth, without the inconsistent statement from Ms. DeForest's clinical notes, defense's case was limited to pointing out the lack of corroboration from the other occupants of the Beauge family home. Unlike in *Chisum*, the Defense here had no reasonable ability to significantly attack C.G's credibility. Trial Defense Counsel acknowledged that they could have asked the alleged victim if she told Ms. DeForest that PSC Beauge penetrated her, but that was the most they could possibly get out of the extremely limited summary of the hotline report.[89] And fifth, the government's case was weak. It was based entirely on C.G.'s memory of events from two years earlier, which would have been credibly attacked if the Defense could have shown that C.G. was telling inconsistent stories to different people.

PSC Beauge was still denied the opportunity to put on a complete defense, denying him due process. He was stripped of the ability to effectively confront the complaining victim—the sole eyewitness in a case with no physical evidence. C.G.'s credibility was the entire essence of the government's case against PSC

[89] J.A. 82.

Beauge. By denying the defense's ability to confront C.G. with her inconsistent statements to Ms. DeForest, PSC Beauge was substantially limited in attacking her credibility. The entire theory of PSC Beauge's case-in-chief was that the story C.G. told members was false and that she did not have a credible memory of events from years earlier. Clinical notes that highlighted these inconsistencies (by showing C.G. gave a different story to Ms. DeForest) would have bolstered the Defense's case.

To warrant relief, this Court "need not conclude that Appellant's defense *would* have succeeded."[90] The focus is on whether PSC Beauge was deprived of a defense that "may have tipped the credibility balance in [his] favor."[91] Here, PSC Beauge's best defense was to show the members that C.G.'s memory was not reliable. To effectively develop and present that theory, Defense needed access to the inconsistent statements C.G. made to Ms. DeForest contained in Ms. DeForest's clinical notes. Without those notes, the Defense was never given an opportunity to fully effectively cross-examine the Government's primary witness and fully develop its theory. The Government cannot show that this error was harmless beyond a reasonable doubt because the statements contained in Ms.

[90] *United States v. Collier*, 67 M.J. 347, 356 (C.A.A.F. 2009) (emphasis in the original).
[91] *Id.*

DeForest's notes could have "tipped the credibility" determination by members in the Defense's favor.

B. The NMCCA erred in denying Appellant's claim of ineffective assistance of counsel based on Trial Defense Counsel's failure to raise two exceptions to MIL. R. EVID. 513—(1) evidence of child abuse exception, (2) Constitutional exception.

1. Standard of review.

Claims of ineffective assistance of counsel are reviewed *de novo*.[92]

2. A counsel's performance is ineffective when it is deficient and the deficiency results in prejudice.

The Sixth Amendment entitles criminal defendants to representation that does not fall "below an objective standard of reasonableness . . . under prevailing professional norms."[93] The *Strickland* test for ineffective assistance of counsel requires appellant to show both that (1) his counsel's performance was deficient, and (2) the deficiency resulted in prejudice.[94] "[T]o show prejudice under *Strickland*, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[95]

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[92] *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018) (citing *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016)).
[93] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
[94] *Strickland*, 466 U.S. at 687.
[95] *United States v. Green*, 68 M.J. 360 (C.A.A.F. 2010) (quoting *Strickland*, 466

3. Trial Defense Counsel was ineffective for failing to seek disclosure of C.G.'s privileged communications under the child abuse exception because the communications undeniably contained evidence of child abuse.

There is no psychotherapist-patient privilege under MIL. R. EVID. 513 "when the communication is evidence of child abuse."[96]

In *L.K. v. Acosta*, the accused sought to pierce the psychotherapist-privilege of the alleged victim, who had made exculpatory statements to a psychotherapist that the she had made up the abuse allegations.[97] The accused argued that the records were essential for defense preparation, and the military judge ordered *in camera* review under MIL. R. EVID. 513(d)(2).[98] On a writ-appeal by the victim, the Army Court of Criminal Appeals (ACCA) set aside the military judge's order, finding that MIL. R. EVID. 513(d)(2) did not apply because the evidence sought by the accused was proof that child abuse did *not* occur, not evidence that child abuse had occurred.[99] The ACCA reasoned that the exception was only to allow mental

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U.S. at 698). In Appellant's brief at the NMCCA, Appellant mistakenly cited the standard that applies when counsel is ineffective for failure to make a motion to *suppress*. *Harpole,* 77 M.J. at 236 ("When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion to suppress evidence, an appellant must show that there is a reasonable probability that such a motion would have been meritorious."). This standard was also cited in the NMCCA's opinion. *Beauge*, 2021 CCA LEXIS 9, at *16.

[96] MIL. R. EVID. 513(d)(2) (2016).

[97] *Acosta*, 76 M.J. at 613.

[98] *Id.*

[99] *Id.* at 617.

healthcare providers to communicate that child abuse had actually occurred.[100] The exception did not apply when the accused claimed the mental health records "would establish the absence of abuse."[101]

Unlike in *Acosta*, the Military Judge knew Ms. DeForest's notes contained evidence of child abuse because they resulted in a report of suspected child abuse, which provided limited details as to what C.G. told Ms. DeForest about the abuse. Ms. DeForest's clinical notes were not evidence that "would establish the absence of abuse"[102] for PSC Beauge. The evidence that C.G. alleged penetration, on its own, could support a charge of child abuse. Additionally, it would have provided valuable evidence to the defense to attack the credibility of C.G. because it contradicts her statements to investigators and on the witness stand.

Consequently, if Trial Defense Counsel had included the exception under MIL. R. EVID. 513(d)(2) in the motion to compel discovery, then the psychotherapist-patient privilege would not have applied and the records would have been produced, at a minimum, for *in camera* review.[103]

The NMCCA acknowledged that the issue in *Acosta* "differs in a crucial way" from PSC Beauge's request—"There, the accused sought generalized mental

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[100] *Id.*
[101] *Id.* at 618.
[102] *Id.*
[103] MIL. R. EVID. 513(e)(3) (2016).

health records without the sort of information that Appellant has here, namely, that [C.G.] had some communication with her psychotherapist discussing child abuse."[104] But the court still improperly concluded that the Military Judge would have denied a motion to compel C.G.'s privileged communications through MIL. R. EVID. 513(d)(2) because "[t]he exceptions to the psychotherapist-patient privilege were created to 'address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security'" "not to turn over every alleged child victim's mental health records to the alleged abuser."[105] The NMCCA improperly ignored the plain language of the Rule, which would have been followed by the Military Judge.

Even the NMCCA acknowledged that Ms. DeForest and C.G. "discussed some allegation of child abuse" during their meeting that resulted in Ms. DeForest's report.[106] The NMCCA further concurred with defense's characterization of *Acosta* and acknowledged that it "differs in a crucial way."[107]

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[104] *Beague*, 2021 CCA LEXIS 9 at *17.
[105] *Id.* at *18-19.
[106] *Id.* at *17.
[107] *Id.*

4. Assuming this Court concludes that no exceptions under MIL. R. EVID. 513 apply, PSC Beauge was entitled to Ms. DeForest's clinical notes because they were constitutionally required to impeach her and present a complete defense. Trial Defense Counsel was ineffective for not raising this issue.

Trial Defense Counsel filed a motion to produce Ms. DeForest's clinical notes but failed to include the constitutional exception in his motion despite clear authority in support of such a claim. PSC Beauge was entitled to the evidence contained in Ms. DeForest's clinical notes that contained evidence of C.G.'s inconsistent statements. Counsel's failure to raise this issue prevented PSC Beauge from developing and presenting a complete defense.

a. In *J.M. v. Payton-O'Brien*, the NMCCA reconciled the removal of the constitutional exception with an accused's right to a meaningful defense.

Under the previous version of MIL. R. EVID. 513, there was no psychotherapist-patient privilege "when admission or disclosure of a communication [was] constitutionally required."[108] But in 2014, this exception was removed from the Rule.[109] But the deletion of the constitutionally required

[108] MIL. R. EVID. 513 (d)(8) (2012).
[109] National Defense Authorizations Act for Fiscal Year 2015, Pub. L. No. 113-291, § 527, 128 Stat. 3292, 3369 (2014) (explaining that Mil. R. Evid. 513 "shall be modified" so as "[t]o strike the current exception to the privilege contained in [Mil. R. Evid. 513(d)(8)].").

exception in MIL. R. EVID. 513(d)(8) does not limit the Constitution's reach into the Rule, as constitutional rights prevail over evidentiary rules.[110]

In *J.M. v. Payton-O'Brien*, the NMCCA addressed the interaction of the psychotherapist-patient privilege and an accused's constitutional rights.[111] The accused moved, *inter alia*, for *in camera* review of the alleged victim's privileged mental health records under the current MIL. R. EVID. 513.[112] The military judge recognized that the Rule no longer contained a constitutional exception.[113] But the judge granted the accused's motion for *in camera* review anyway, citing the accused's right to present a complete defense.[114] The alleged victim then petitioned the NMCCA for a writ of mandamus.[115]

The NMCCA found that "the President was likely at the apex of his authority in implementing [MIL. R. EVID.] 513 [to remove the constitutional exception] as he acted in his constitutional role as Commander in Chief and under a specific legislative direction."[116] Nevertheless, the NMCCA wrote that "[w]hile

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[110] *J.M. v. Payton-O'Brien*, 76 M.J. 782, 788 (N-M. Ct. Crim. App. 2017).
[111] *Id.* at 782.
[112] *Id.* at 783.
[113] *Id.* at 785.
[114] *Id.* at 784.
[115] *Id.* at 783.
[116] *Id.* at 787 (citations omitted).

we decline to wholly override the psychotherapist-patient privilege, we may not allow the privilege to prevail over the Constitution."[117]

The NMCCA provided a non-exhaustive list of situations where the psychotherapist-patient privilege may "yield to the constitutional rights of the accused": "(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."[118] "In these scenarios, serious concerns may be raised regarding witness credibility—which is of paramount importance—and may very well be case-dispositive."[119] The NMCCA elaborated:

> This is particularly true for cases of sexual assault, where most often, only the accuser and the accused are present and there is little or no corroborating physical evidence. Judging the credibility of the accuser is crucial in these situations, as reliability may well determine guilt or innocence. The crucible of cross-examination is a powerful tool for an accused to test an accuser's account. But in appropriate cases, waiver of the psychotherapist-privilege may be necessary to satisfy the accused's rights to due process and confrontation.[120]

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[117] *Id.* at 787-88.
[118] *Id.* at 789 (citations omitted).
[119] *Payton-O'Brien*, 76 M.J. at 789.
[120] *Id.* at 789, n. 29.

The NMCCA wrote that the judge should first allow the moving party to make a showing for *in camera* review.[121] After the hearing, if the military judge finds that the moving party satisfied the standard but failed to meet an exception, "the military judge determines whether the accused's constitutional rights still demand production or disclosure of the privileged materials."[122]

If the military judge determines that the accused's constitutional rights demand production or disclosure of the privileged materials, the military judge gives the holder of the privilege the option to waive the privilege for *in camera* review only.[123] If after completing *in camera* review the military judge finds that the accused's constitutional rights require the disclosure of certain materials, the judge will provide those materials to the victim or VLC for review.[124]

If the holder of the privilege refuses to waive the privilege, a judge may "fashion an appropriate remedy."[125] The NMCCA consulted remedies in MIL. R. EVID. 505 regarding the Government's refusal to disclose relevant classified evidence.[126] Adopting these, the NMCCA concluded that a judge may: "(1) strike or preclude all or part of the witness's testimony; (2) dismiss any charge or

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[121] *Id.* at 789.
[122] *Id.* at 789-90.
[123] *Id.* at 790.
[124] *Payton-O'Brien*, 76 M.J. at 790.
[125] *Id.*
[126] *Id.* (citing MIL. R. EVID. 505(j)(4)(A) (2016)).

charges, with or without prejudice; (3) abate the proceedings permanently, or for a time certain to give the witness an opportunity to reconsider; or (4) declare a mistrial."[127]

b. *J.M. v. Payton-O'Brien* provided a workable balance between the Constitution and policy branch prerogatives on this issue, and this Court should adopt its reasoning.

The procedures in *Payton-O'Brien* do not permit a judge to disregard the removal of the constitutional exception from the Rule,[128] while ensuring an accused will not be forced to defend himself without all necessary evidence.[129] Additionally, the remedies in the event of non-disclosure that *Payton-O'Brien* proposes are well established in military practice. In fact, these remedies not only coincide with those in MIL. R. EVID. 505 but also those in R.C.M. 703 for when the Government fails to produce an essential witness at trial.[130]

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[127] *Id.* at 791.

[128] *Id.* at 787 (citing *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007) (holding that a military judge cannot add an exception to a military rule of privilege)). *Custis*, 65 M.J. at 369 ("But 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 policymaking branches of government.") (citation omitted).

[129] *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citations omitted).

[130] *Cf.* MCM, R.C.M. 703(b)(1)(3) (2016) (explaining that "the military judge shall grant a continuance or other relief in order to attempt to secure" an essential witness' presence "or shall abate the proceedings, unless the availability of the

This Court should adopt the NMCCA's procedures in *Payton-O'Brien* to provide clarity and ensure uniformity among the service courts in this unsettled area of military justice.[131]

c. Trial Defense Counsel was ineffective for failing to argue that the Constitution required disclosure of C.G.'s privileged communications.

Ms. DeForest's clinical notes provide evidence of a substantial inconsistency in C.G.'s description of the alleged assaults. The evidence satisfies two of the instances referenced in *Payton-O'Brien*: (1) contradictory conduct by the alleged victim, and (2) the alleged victim's inability to accurately remember and relate events.[132] During her forensic interview, C.G. never alleged that PSC Beauge attempted to penetrate her.[133] PSC Beauge was not charged with penetration offenses, nor did C.G. testify at trial that PSC Beauge attempted to penetrate her.[134] Ms. DeForest, however, told the hotline that C.G. alleged that PSC Beauge "attempted to penetrate [C.G.] on some occasions."[135] Therefore, Ms. DeForest's clinical notes likely contain specific factually inconsistent statements by C.G.

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witness is the fault of or could have been prevented by the requesting party").
[131] *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F 2008) (recognizing that review by the Court of Appeals of the Armed Forces and the Supreme Court "fulfills one of the central purposes of the Uniform Code of Military Justice – uniformity in the application of the Code among the military services").
[132] *Payton-O'Brien*, 76 M.J. at 789.
[133] J.A. 54.
[134] J.A. 72-74.
[135] J.A. 276.

Ms. DeForest's clinical notes are the exact kind of evidence that require subordination of the psychotherapist-patient privilege to the constitutional rights of the accused, but Trial Defense Counsel failed to even offer this as an alternate theory in their written motion to compel,[136] bench brief,[137] or oral argument.[138] At trial, the Government relied almost entirely on the testimony of the complaining witness without any physical evidence or other eyewitnesses. Evidence that would have permitted the defense to significantly attack the credibility of the complaining witness was vital to Appellant's case, and failure to raise the constitutional issues was deficient and amounts to ineffective assistance of counsel.

d. PSC Beauge was prejudiced by Trial Defense Counsel's failure to raise either the child abuse exception or Constitutional exception because it prevented adequate cross-examination of the complaining witness and the ability to fully develop and present a complete defense.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."[139] The defense is permitted to "delve into the witness' story to test the witness' perceptions and memory" and "allowed to impeach, i.e., discredit, the witness."[140]

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[136] J.A. 307-11.
[137] J.A. 339-43
[138] J.A. 291-306.
[139] *Davis v. Alaska*, 415 U.S. 308, 316 (1974).
[140] *Id.* 316.

On cross-examination, Trial Defense Counsel did not confront C.G. on her inconsistent statements to Ms. DeForest. Without the additional evidence from Ms. DeForest's clinical notes, the Defense were limited to a single, vague cross-examination question regarding penetration that came from a summary written by a hotline based on Ms. DeForest's report about what C.G. told her. Trial Defense Counsel would have been asking the question blind—with no context, no clear understanding of what C.G. actually told Ms. DeForest, and no idea how C.G. would answer. Trial Defense Counsel had to decide between (1) opening the door to prior consistent statements with a weak question that could yield a useless response, or (2) foregoing asking the single question at their disposal based on the hotline report. Trial Defense Counsel chose not to ask the because he lacked Ms. DeForest's clinical notes which would have provided substantial evidence to confront C.G., which could have made the Government introducing prior consistent statements less harmful to Defense's case. Had Trial Defense Counsel raised the child abuse or Constitutional exception, he would not have been put in such a difficult position. C.G.'s inconsistent statements would have substantially undermined her credibility by showing that she was changing her story. The members could have discredited her testimony as either fabricated or lacking sufficient memory of the events to accurately recall the alleged abuse from over two years ago.

The members were entitled to the defense theory that the key government witness, C.G., lacked credibility. Without Ms. DeForest's clinical notes, PSC Beauge's Trial Defense Counsel was unable to effectively cross-examine C.G. A complete cross-examination would have included C.G.'s inconsistent statements. Those inconsistent statements would have lead reasonable members to come to a different verdict by finding C.G. lacked credibility.

By failing to raise two exceptions to privilege, Trial Defense Counsel substantially prejudiced PSC Beauge, preventing effective confrontation of the complaining witness with the inconsistent statements during cross-examination. Trial Defense Counsel could have prevailed on both theories to pierce the psychotherapist-patient privilege: (1) MIL. R. EVID. 513(d)(2) evidence of child abuse, and (2) the Constitutional exception. Failure to pursue these two theories prevented PSC Beauge from developing and presenting a complete defense and amounted to ineffective assistance of counsel.

C. The NMCCA erred when it failed to remand for *in camera* review.

The NMCCA, relying on *Ritchie v. Pennsylvania*, determined that "the Sixth Amendment's guarantees do not transform the desire to discover information into a constitutional right."[141] In *Ritchie*, the defendant was charged with multiple

[141] *Beauge*, 2021 CCA LEXIS 9 at *21 (citing *Ritchie v. Pennsylvania*, 480 U.S. 39, 52 (1987)).

offenses related to child sexual abuse based on the report made by his 13-year-old daughter who claimed that she had been assaulted by her father two or three times per week over a four-year period.[142] The defendant sought broad discovery of records related to multiple child abuse investigations by Pennsylvania Children and Youth Services (CYS), including the file related to the charged offenses, as well as other records that were compiled as part of an earlier investigation "when CYS investigated a separate report by an unidentified source that Ritchie's children were being abused."[143] No criminal charges were brought as a result of the earlier CYS investigation.[144] At trial, the defendant argued that he was entitled to the information contained in the requested records because they "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence."[145] The defendant's daughter was the primary government witness at trial.[146]

The Supreme Court ruled that the Confrontation Clause is not a discovery right and the files did not need to be turned over to Ritchie's attorneys for review.[147] But the Pennsylvania statute creating confidentiality of the files

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[142] *Ritchie*, 480 U.S. 39, 43 (1987).
[143] *Id.*
[144] *Id.* at 43 n.1.
[145] *Ritchie*, 480 U.S. at 44.
[146] *Id.* at 44.
[147] *Id.* at 54.

permitted disclosure to the court in some circumstances, and no court had ever reviewed the requested records to determine if any relevant evidence existed.[148] The Supreme Court remanded the case to the state courts for *in camera* review of the files to determine if the information would have changed the outcome of trial.[149] The Supreme Court held that *in camera* review balanced the state's interest in confidentiality and the defendant's interest in potentially exculpatory evidence.

Like the Pennsylvania statute in *Ritchie*, MIL. R. EVID. 513 authorizes disclosure of mental health records in some specific circumstances—including a specific *in camera* review process. But still, the NMCCA declined to follow a similar process as *Ritchie* for PSC Beauge.[150]

Conclusion

This Court has not ruled on the proper scope of the psychotherapist-patient privilege. The excessively narrow application of the MIL. R. EVID. 513 exceptions by the lower court is improper. The analysis of the lower court substantially discounts the burden the privilege places on the judicial search for truth and unreasonably subordinates the rights of military defendants to a statutory privilege.

PSC Beauge requests that this Court reverse the NMCCA's decision and set aside the findings and sentence. If a rehearing is authorized, this Court should

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[148] *Id.* at 57-58.
[149] *Id.* at 58.
[150] *Beauge*, 2021 CCA LEXIS at *22, n.60 (citing *Ritchie*, 480 U.S. at 54).

direct that the Military Judge conduct an *in camera* review of the psychotherapist's clinical notes.[151]

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[151] *See United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997) (The Court explained that "[i]f a rehearing is ordered, we would expect the military judge to examine in camera any documents for which work-product privilege is claimed. The Military Judge should determine which documents fall under the work-product privilege in accordance with the principles discussed above.").

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on August 4, 2021.

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