No.

IN THE

Supreme Court of the United States

MAJOR BRIANA MCFARLAND,
NORTH CAROLINA ARMY NATIONAL GUARD,

Petitioner,

v.

UNITED STATES OF AMERICA AND LIEUTENANT COMMANDER DOMINIC R. BAILEY, UNITED STATES NAVY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a military sexual assault victim, holds a psychotherapist-patient privilege that was violated in the court-martial of her assailant. Pursuant to its absolute power to make rules governing the military, Congress requires the United States Court of Appeals for the Armed Forces ("CAAF"), an Article I tribunal, to review cases sent to it by a judge advocate general. The Navy Judge Advocate General sent this case to the CAAF to review whether the military judge's rulings violated Petitioner's privilege.

Holding that Petitioner lacked the standing required in Article III courts, the CAAF refused to review the case.

The questions presented are:

1. Whether the CAAF may prudentially apply Article III limits on judicial power despite its obligation to review cases in accordance with a law enacted pursuant to Congress's power to make rules governing the military.

2. If Article III limits apply, whether a victim has standing to challenge court-martial rulings affecting her psychotherapist-patient privilege.

PARTIES TO THE PROCEEDINGS BELOW

This petition arises from the general court-martial of Respondent, Lieutenant Commander Dominic R. Bailey, United States Navy. Respondent United States charged Respondent Bailey with sexually assaulting Petitioner, Major Briana McFarland, North Carolina Army National Guard (identified as B.M. in the military courts).

RELATED PROCEEDINGS

The proceedings related to this petition are:

In the Navy-Marine Corps Trial Judiciary, Southern Judicial Circuit:

United States v. LCDR Dominic Bailey, USN.

In the Navy-Marine Corps Court of Criminal Appeals:

B.M. v. United States, 83 M.J. 704 (N-M. Ct. Crim. App. 2023).

In the Court of Appeals for the Armed Forces:

B.M. v. United States, 83 M.J. 465 (C.A.A.F. 2023) (writ petition by Major McFarland under 10 U.S.C. § 806b).

B.M. v. United States, No. 23-0233, 2024 CAAF LEXIS 201 (C.A.A.F. Apr. 3, 2024) (record sent by Navy Judge Advocate General under 10 U.S.C. § 867(a)(2)).

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

Page

CONSTITUTIONAL PROVISIONS

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Page

Cited Authorities

Page

PETITION FOR WRIT OF CERTIORARI

Major Briana McFarland[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces ("CAAF"). The CAAF held that Major McFarland lacked standing to challenge the military judge's violations of her psychotherapist-patient privilege.

INTRODUCTION

The Court should grant the petition to resolve fundamental issues relating to the constitutional powers of each branch of government. Congress created the CAAF pursuant to its power to constitute tribunals inferior to this Court. U.S. Const., art. I, § 8, cl. 9 (the "Inferior Tribunals Clause"). Congress also has the responsibility and power to make rules governing and regulating the armed forces. U.S. Const., art. I, § 8, cl. 14 (the "Make Rules Clause"). Although the Constitution assigns the duty to command our military forces to the President, he has no statutory authority to review or modify the CAAF's decisions. This Court has a supervisory responsibility under the Inferior Tribunals Clause to supervise the CAAF.

The CAAF's refusal to review this case affects our national security. Military sexual assault undermines the good order and discipline of our armed forces. An effective fighting force is built on trust. Sexual assault undermines that trust. Trust is further diminished when military courts fail to adhere to the laws protecting victims. Too often, military trial courts deny victims their statutory

1. The military courts referred to Major McFarland as B.M. throughout their proceedings.

rights and privileges, and military appellate courts then deny them the ability to challenge these denials. In this case, the CAAF held that victims lack standing to challenge any abatement[2] before any appellate court within the military justice system. This holding abandons the tens of thousands of service members victimized annually by sexual assault and fosters a culture that shields sexual predators. Victims have standing.

First, pursuant to its power under the Make Rules Clause, Congress directed the CAAF to review issues sent to it by a judge advocate general. The CAAF refused to review the issues sent to it in this case because it prudentially applied Article III limitations on judicial power. Because the constitutional limits on federal courts do not apply to Article I tribunals, the CAAF was obligated to review the issues sent to it. The Court should decide this important constitutional structure issue.

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2. Although undefined in the Manual for Courts-Martial, an "abatement" is essentially a suspension of proceedings. An abatement may be temporary, or it may be tantamount to a dismissal that enables a government appeal under 10 U.S.C. § 862. *United States v. True*, 28 M.J. 1 (1989).

Abatement is not authorized or even mentioned in the Military Rules of Evidence which includes privileges. Abatement is authorized only under R.C.M. 703(b) (unavailable witnesses) and (e) (unavailable evidence). Major McFarland's privileged psychotherapy records were not unavailable because they were neither lost nor destroyed; they were subject to and produced by compulsory process.

Nothing in the Manual for Courts-Martial authorizes abatement for an assertion of privilege. The sole authorization for abatement in this case is *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M.C.C.A. 2017), the precedent the Navy Judge Advocate General asked the CAAF to reconsider.

Second, even if the CAAF could prudentially apply Article III limits, victims have standing to challenge courts-martial's legal decisions that affect their rights. Ignoring this Court's requirements of injury in fact, causation, and redressability, the CAAF applied *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), holding that victims lack standing to "assume the role of the government" by making prosecutorial decisions. App. 13. In fact, the military judge *required* Major McFarland to choose between her privilege and the continued prosecution of her assailant, foisting the prosecutorial decision upon her. The violations of her privilege were injuries in fact caused by the judge's rulings and redressable by an appellate court.

Third, the United States had standing to challenge the judge's abatement order. As long as one party had standing, standing existed for the CAAF to review the issues sent to it.

Military courts have historically deprived victims of their rights and refused to exercise jurisdiction over their appeals. This case forecloses the last avenue for a victim to enforce her rights in military appellate courts. The Court should grant the writ and order the CAAF to decide the issues sent to it by the judge advocate general.

OPINIONS BELOW

The CAAF's opinion for which review is sought (App. 1-30) is reported at *B.M. v. United States*, No. 23-0233/NA, 2024 CAAF LEXIS 221 (C.A.A.F. Apr. 22, 2024).

The United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") opinion (App. 31-66) is

reported at 83 M.J. 704 (N-M. Ct. Crim. App. June 14, 2023).

The court-martial ruling that abated the proceedings is unreported and reproduced at App. 67-68. The sealed ex parte court-martial ruling that violated Petitioner's privilege is unreported and reproduced in the sealed Supp. App. 1-3.

JURISDICTION

The CAAF entered judgment on April 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1259(2) because the Navy Judge Advocate General sent the case to the CAAF under 10 U.S.C. § 867(a)(2).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 9 of the Constitution provides, "The Congress shall have the Power To constitute Tribunals inferior to the supreme Court" (the "Inferior Tribunals Clause").

Article I, Section 8, Clause 14 of the Constitution provides, "The Congress shall have the Power To make Rules for the Government and Regulation of the land and naval Forces" (the "Make Rules Clause").

Article II, Section 2 of the Constitution provides, "The President shall be Commander in Chief."

Article III, Section 1 of the Constitution provides, "The judicial Power of the United States shall be vested

in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 provides that the judicial Power shall extend to Cases and Controversies.

10 U.S.C. § 806b affords victims specific rights and establishes procedures to enforce those rights. Reproduced at App. 79-84.

10 U.S.C. § 867(a)(2) provides, "The [CAAF] shall review the record in all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General . . . orders sent to the [CAAF]." Reproduced at App. 69-71.

10 U.S.C. § 941 established the CAAF under Article I of the Constitution. Reproduced at App. 72.

Military Rule of Evidence ("M.R.E.") 513 is the military psychotherapist-patient privilege. Reproduced at App. 73-78.

STATEMENT OF THE CASE

A. Military Sexual Assault Undermines Our National Security Because it Destroys the Good Order and Discipline of Our Armed Forces.

The Commander in Chief of our armed forces has emphatically stated, "Sexual assault is an abuse of power and an affront to our shared humanity. And sexual assault in the military is doubly damaging because it also shreds the unity and cohesion that is essential to the functioning

of the U.S. military and to our national defense."[3] He further emphasized, "This kind of violation and trauma should never occur. [Military sexual assault victims], *[y]ou have a right to be heard. You have a right to justice*." *Id.* (emphasis added).

In 2023, the Department of Defense estimated that nearly 29,000 active duty service members were sexually assaulted.[4] Furthermore, twenty-five percent of women were sexually harassed,[5] and almost two-thirds of women

3. Joseph Biden, *Statement of President Joe Biden on the Results of the Independent Review Commission on Military Sexual Assault*, The White House (July 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/02/statement-of-president-joe-biden-on-the-results-of-the-independent-review-commission-on-military-sexual-assault/. Before President Biden issued his statement, President Obama highlighted the detrimental impact of military sexual assault on trust and effectiveness. He stated, "[N]ot only is it a crime, not only is it shameful and disgraceful, but it also is going to make and has made the military less effective than it can be. And as such, it is dangerous to our national security." Barack Obama, *Remarks by President After Meeting on Sexual Assault in the Military*, The White House President Barack Obama (May 16, 2013, 4:53 PM), https://obamawhitehouse.archives.gov/the-press-office/2013/05/16/remarks-president-after-meeting-sexual-assault-military. "This is not sort of a second-order problem that we're experiencing. This goes to the heart and the core of who we are and how effective we're going to be." *Id.*

4. *Appendix B: Statistical Data on Sexual Assault*, Department of Defense 1, 11 (2023), https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY23/FY23_Appendix_B.pdf.

5. *Department of Defense Annual Report on Sexual Assault in the Military, FY 2023*, Department of Defense 1, 4 (2023), https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY23/FY23_Annual_Report.pdf.

service members did not trust the military to protect their privacy post-assault.[6] Violations of M.R.E. 513 undermine victims' trust in the military justice system. App. 43 (citing Dep't of Def. Instr. 6495.02, *Sexual Assault Prevention and Response: Program Procedures*, at 49 (Mar. 28, 2013) (emphasizing the importance of victims' perception of the military justice system)).

Of the estimated 29,000 sexual assaults, only 7,266 were reported,[7] and of those, only 234 went to courts-martial,[8] and only 74 cases resulted in a sexual offense conviction.[9] By these statistics, only one out of every 400 estimated sexual assaults resulted in a conviction for sexual assault. Despite significant efforts by Congress and the President to address military sexual assault, service members continue to commit thousands of sexual assaults each year.[10]

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6. *Id.* at 10.

7. *Id.* at 4.

8. Department of Defense, *supra* note 4, at 24.

9. *Id.*

10. Over the last decade, Congress and the President have repeatedly acted to address military sexual assault. Through 10 U.S.C. § 806b, Congress granted victims numerous rights; for example, the right to be protected from defendants, the right to notice of and to be heard at proceedings, the right to attend any public proceeding, the right to confer with the prosecuting attorney, the right to receive restitution, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and with respect for their dignity and privacy. Congress and the President have strengthened victims' rights under the military's rape shield rule, M.R.E. 412, and psychotherapist and victim advocate privileges, M.R.E. 513 and 514. To end harassment

Victims are reluctant to report or testify about their sexual assaults because they fear reprisals and loss of dignity and privacy. The military justice system has been used by defendants to harass, intimidate, and humiliate their victims. The President and Congress have granted military sexual assault victims the privilege to keep their communications with psychotherapists confidential. M.R.E. 513; 10 U.S.C. § 836 (authorizes the President to set courts-martial procedures).

Efforts to eliminate or even reduce military sexual assault have failed, with sexual assault rates increasing over the last decade. Department of Defense, *supra* note 4, at 11. A judge advocate general officer, Major David Lai, was prescient in his article, *Decades of Military Failures Against Sex Crime Earned America's Distrust and Congressional Imposition: The Judge Advocate General's Corps's Newest Most Important Mission*, The Army Lawyer, July 2015. He identified the problem, observing, "The [military justice system] is now squarely in the crosshairs. If we fail to lead the military out of this persistent cycle of the same problem, the [military justice system] may very well carry the blame at the next outbreak of sex scandals." *Id.* at 64.

In this case, the CAAF was directed to review issues regarding Major Mcfarland's psychotherapist privilege. The CAAF decided it would not review the issues because she lacked standing. This decision was wrong, but its effect extends far beyond this case. Although the CAAF

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of victims, they also criminalized reprisals against victims and precluded requiring victim testimony at the preliminary hearing or depositions.

noted that this case presented an "unusual and perhaps unprecedented" procedural posture, App. 8, the CAAF announced a broad rule that denies standing to the tens of thousands of victims annually who will be unable to challenge an abatement anywhere in the military justice system. App. 12.

As a result of the CAAF's judgment, military courts of criminal appeals may not exercise jurisdiction whenever the military judge abates the proceedings instead of ordering an outright violation of a victim's rights. If a military judge offers a victim a choice between abatement of proceedings and the assertion of any 10 U.S.C. § 806b right, the victim will lack standing before any military appellate court. For instance, the judge could require a victim to choose between waiving her § 832 right to not testify or abatement of the proceedings. Although a victim has a right to be heard through counsel under M.R.E. 412, 513, and 514, the judge could require her to choose between waiving the right to counsel or abatement. Demonstrating the absurdity of the CAAF's broad holding, if a rogue judge ordered the victim to choose between singing happy birthday to her rapist or abatement, the victim would not have standing to challenge the order. The CAAF's judgment in this case insulates from review any abatement order based upon a victim exercising her rights, nullifying any § 806b(e) enforcement.

It is important to understand that the CAAF's decision eliminates the final avenue victims had to challenge violations of their rights. Despite the clear and unambiguous grant of jurisdiction in § 806b(e)(3), the CAAF held that it lacked jurisdiction to review lower courts' denials of victims' mandamus petitions. *M.W. v.*

United States, 83 M.J. 361, 365 (C.A.A.F. 2023). Victims are unable to get legal review in federal district courts. *E.V. v. Robinson*, 906 F.3d 1082 (9th Cir. 2018); *cert. denied* 140 S. Ct. 501 (2019); *AV2 v. McDonough*, 2022 U.S. Dist. LEXIS 72609 * (E.D. Pa. April 20, 2022). The CAAF has uniformly denied victims' intervention in cases deciding their M.R.E. 513 privilege. *United States v. Mellette*, __ M.J. __, 2021 CAAF LEXIS 1012 * (C.A.A.F. Nov. 22, 2021); *United States v. Mellette*, 83 M.J. 36 (C.A.A.F. 2022); *United States v. Beauge*, 82 M.J. 51 (C.A.A.F. 2021). Even where the CAAF's opinions specifically remanded the record instead of the case (thereby retaining jurisdiction of the case under C.A.A.F. R. of Prac. and Proc. 30A(c)), the CAAF denied it had jurisdiction.[11] The CAAF has foreclosed all avenues of review for victims.

Denying victims standing violates the rules, statutes, and this Court's precedents.

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11. The CAAF's opinions in *United States v. Mellette,* 82 M.J. 374, 381 (C.A.A.F. 2022) and *United States v. Jacinto,* 81 M.J. 350, 355 (C.A.A.F. 2021) remand the records to the NMCCA. The CAAF inexplicably claimed that although the opinions stated the records were remanded, the CAAF actually remanded the cases and relinquished jurisdiction. *United States v. Mellette*, 83 M.J. 255, 2023 CAAF LEXIS 118 *, 2023 WL 2372714 (C.A.A.F. 2023); and *United States v. Jacinto*, 83 M.J. 255, 2023 CAAF LEXIS 117 *, 2023 WL 2372716 (C.A.A.F. 2023). This reasoning was included in footnotes in the orders; however, the CAAF did not include the footnotes in its published orders. Responding to the victims' counsel request, the CAAF corrected the orders in the online Lexis and Westlaw services but refused to correct the Military Justice Reporter.

B. Proceedings Below.

1. The Court-Martial Proceedings.

Respondent Lieutenant Commander Dominic Bailey, United States Navy, sexually assaulted Petitioner Major McFarland on a privately hosted retreat intended to connect single African American officers from all branches of the military. Bailey was court-martialed for abusive sexual contact and assault.

Despite seeking information from Major McFarland's privileged psychotherapy records, the military judge failed to adhere to the procedures required by M.R.E. 513(e). App. 3. The military judge ordered production of Major McFarland's diagnoses and treatments (determined to be nonprivileged under *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022) *cert. denied sub nom. S.S. v. United States*, 143 S. Ct. 2637 (2023)) for an in camera review.

Although the military judge specifically ordered the mental health treatment facility to redact privileged communications, the facility nevertheless produced privileged communications without redaction. Upon realizing the records included privileged communications, the military judge should have immediately halted her in camera review. App. 21. She did not. The military judge's continued review of privileged records violated M.R.E. 513(e). App. 43.

The military judge, sua sponte without any motion or hearing required by M.R.E. 513(e), determined that portions of Major McFarland's privileged communications

were constitutionally required to be disclosed to Bailey. Identifying privileged communications that she believed were required to be disclosed, the judge disregarded the deletion of the "constitutionally required" exception and abated the proceedings in accordance with *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M.C.C.A. 2017).

The military judge issued a sealed ex parte order indicating that she followed Rules for Courts-Martial ("R.C.M.") 703 procedures only. Supp. App. 1. The ex parte order required Major McFarland to choose between continuing the prosecution at the expense of her privacy or terminating it altogether. Supp. App. 2-3. The order violated M.R.E. 513 and 10 U.S.C. § 806b by shifting the prosecutorial decision from the government to Major McFarland.

When Major McFarland refused to waive her privilege, the military judge abated the court-martial proceedings. App. 4.

2. The NMCCA Proceedings.

Pursuant to § 806b, Major McFarland petitioned the NMCCA for a writ of mandamus, asserting the military judge (1) failed to follow procedures required by M.R.E. 513(e) before ordering an in camera review, (2) applied the deleted constitutionally required exception, and (3) abated the proceedings despite lack of authority under M.R.E. 513. The NMCCA did not question Major McFarland's standing but nevertheless denied her petition for mandamus. App. 66

3. The CAAF Proceedings.

Pursuant to § 806b(e)(3)(C), Major McFarland petitioned the CAAF to review the NMCCA's decision. The statute clearly grants the CAAF jurisdiction, stating, "*Review of any decision* of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection s*hall have priority in the [CAAF].*" *Id*. (emphasis added). The CAAF dismissed Major McFarland's writ-appeal petition for lack of jurisdiction, citing its previous ruling in *M.W.*, 83 M.J. at 365.

After the dismissal of Major McFarland's petition, the Navy Judge Advocate General identified two issues critical to the military justice system and worthy of the CAAF's review. Pursuant to 10 U.S.C. § 867(a)(2), the Navy Judge Advocate General ordered the CAAF to review: (1) whether the military judge was required to follow the M.R.E. 513(e) procedures, and (2) whether the Constitution required production of Major McFarland's mental health records. App. 2.

While the CAAF acknowledged its jurisdiction to address these issues, App. 6, and their "general importance to the military justice system," App. 15, it declined to review and decide the "certified"[12] issues. The CAAF justified this decision by claiming it follows Article III's standing requirements and advisory opinion prohibitions as a "prudential matter." App. 6-7. The CAAF concluded that abatement itself does not violate a victim's privilege,

12. § 867(a)(2) requires the CAAF to review cases "sent" to it by a judge advocate general. Military courts commonly use the terms "certified" or "referred" instead.

App. 10, thus, all victims lack standing to challenge any abatement in military courts. App. 12.

REASONS FOR GRANTING THE PETITION

The Court should decide the powers and duties of the legislative, executive, and judicial branches under the Constitution. In this case, our national security is affected by the scope of the respective branches' duties and the CAAF's obligation to follow statutes enacted pursuant to the Make Rules Clause.

Despite numerous actions taken by Congress and the President, military sexual assault continues to threaten our national security. The CAAF denied review of this case because it determined the victim, Major McFarland, lacked standing. This decision obstructs legislative and executive efforts to combat military sexual assault and lacks any basis in the law.

The jurisdictional statute, 10 U.S.C. § 867, mandates, "The [CAAF] shall review the record in all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the [CAAF]." By refusing to review this case, the CAAF disregarded its statutory obligations. The CAAF justified its refusal by prudentially applying Article III standing requirements that do not apply to Article I tribunals.

Even if Article III standing requirements applied, the CAAF wrongly held that Major McFarland lacked standing. The CAAF failed to consider whether she suffered an injury in fact caused by the military judge's ruling and redressable by a judicial order. Ignoring this

Court's many precedents, the CAAF relied solely on *Linda R.S*, 410 U.S. 614.

Even if Major McFarland lacked standing, Respondent United States had standing to challenge the abatement order. As long as one party has standing, standing exists to satisfy Article III requirements.

The refusal to recognize victim standing in military courts prevents victims from seeking redress for violations of their rights, thereby nullifying the laws intended to protect victims of military sexual assault. This failure not only affects the individual victims but also undermines the integrity of the military justice system as a whole.

I. The Court Should Decide Whether the Article I Tribunal CAAF May Prudentially Apply Article III Limits to Justify Its Refusal to Follow a Law Enacted by Congress Pursuant to the Make Rules Clause.

A. The Make Rules Clause Empowers Congress to Require Review of Certified Issues.

Congress is given explicit and plenary power to make rules governing the military. *Solorio v. United States*, 483 U.S. 435, 441 (1987); *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981). This power is essential to the common defense and ought to exist without limitation because it is impossible to foresee or define possible national emergencies. *Solorio*, 483 U.S. at 441 (citing The Federalist No. 23, 152-54 (Alexander Hamilton) (E. Bourne ed., 1947)). Judicial deference is "at its apogee" when Congress acts pursuant

to the Make Rules Clause. *Id.* at 447. The Constitution assigns to Congress the responsibility for determining how best our armed forces will fight wars. *Rostker*, 453 U.S. at 71-72. The Make Rules Clause allows Article III limits to give way to the military courts' "specialized areas having particularized needs." *Ortiz v. United States*, 585 U.S. 427, 444 (2018).

Article III courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 369, 376 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264 (1821)). A court's obligation to hear and decide cases is "virtually unflagging." *Jacobs*, 571 U.S. at 77 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Absent constitutional constraints, Congress determines the subject-matter jurisdiction of federal courts. *Bowles v. Russell*, 551 U.S. 205, 212 (2007). This rule applies with added force to the CAAF which owes its existence to Congress's power to constitute tribunals pursuant to Article I, § 8 of the Constitution. *United States v. Denedo*, 556 U.S. 904, 912 (2009).

Pursuant to its Make Rules Clause power, Congress mandated that the CAAF "shall review the record in all cases" sent to it by a judge advocate general. 10 U.S.C. § 867(a)(2). This mandatory review of "certain weighty cases" leaves no discretion. *Ortiz*, 585 U.S. at 432. As a jurisdictional statute, § 867 must be construed with "precision and fidelity." *Kukana v. Holder*, 558 U.S. 233, 252 (2010) (quoting *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968)). Congress's § 867 mandate must be precisely construed because of the importance of the highest

military court answering certified questions where the law is being misinterpreted, resulting in a needless waste of resources. *United States v. Russett*, 40 M.J. 184, 185 (C.A.A.F. 1994).

In this case, the Navy Judge Advocate General certified two issues: (1) whether a military judge must follow M.R.E. 513(e) procedures before ordering disclosure of diagnoses and treatments, and (2) whether an accused has a constitutional right to a victim's privileged psychotherapy records. These issues affect not only Petitioner but also the broader military justice system.[13] *Id.*

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13. These misinterpreted issues are having a significant impact on victims and the military justice system. Since the CAAF decided *Mellette*, 82 M.J. 374, courts-martial are struggling with application of the M.R.E. 513(e) procedures, likely prompting the advisory concurring opinions. *See* App. 21-24, 29. The lower military courts have struggled in the following cases: *United States v. Jacinto*, No. 201800325, 2024 CCA LEXIS 14 (N-M. Ct. Crim. App. Jan. 18, 2024); *In re SB*, No. 2023-10, 2023 CCA LEXIS 521 (A.F. Ct. Crim. App. Dec. 12, 2023); *In re SC*, No. 2023-11, 2023 CCA LEXIS 522 (A.F. Ct. Crim. App. Dec. 12, 2023); *In re RW*, No. 2023-08, 2024 CCA LEXIS 71 (A.F. Ct. Crim. App. Feb. 9, 2024); *United States v. Jones*, No. ACM 40226, 2023 CCA LEXIS 230, *22 (A.F. Ct. Crim. App. May 30, 2023); *Lundsten v. Army Ct. of Crim. Appeals*, No. 24-0054/AR, 2024 CAAF LEXIS 90 (C.A.A.F. Feb. 16, 2024). These cases involved procedures to be followed when seeking nonprivileged information intermingled with privileged records.

To understand the importance of the second certified issue, a brief history of M.R.E. 513 and the "constitutionally required" exception is provided. The President established M.R.E. 513 in 1999. Exec. Order No. 13140, 64 Fed. Reg. 55115 (Oct. 12, 1999). The rule initially included a "constitutionally required" exception that military judges used to justify reviewing and disclosing privileged

The CAAF unequivocally conceded it has jurisdiction, App. 6, and its precedents confirm its obligation to review the record under § 867(a). *United States v. Engle*, 3 C.M.R. 41, 43 (C.M.A. 1953) (the clear and unambiguous language imposes an "obligation to review the record in all cases forwarded by The Judge Advocate General"); *United States v. Leak*, 61 M.J. 234, 239 (C.A.A.F. 2005) (the CAAF is "obliged" to review a judge advocate general's certified question); *Russett*, 40 M.J. at 185.

The CAAF's claims that it adheres to Article III's limitations as a "prudential matter" essentially concede that Article III limits do not apply to it. App. 6-7. This prudential adherence is not grounded in constitutional or

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communications in every case. *D.B. v. Lippert*, 2016 CCA LEXIS 63, *14-15 (A. Ct. Crim. App. Feb. 1, 2016). It was the only privilege that included a "constitutionally required" exception. The CAAF did not provide any guidance as to when, if ever, disclosure of privileged records would be constitutionally required.

Congress and the President remedied this injustice by eliminating the M.R.E. 513(d) "constitutionally required" exception and establishing in M.R.E. 513(e) specific procedures and standards before production could be ordered for an in camera review. *National Defense Authorization Act for Fiscal Year 2015*, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13696, 80 Fed. Reg. 35783 (June 22, 2015).

Military judges continued applying the constitutionally required exception, hubristically declaring that Congress and the President cannot eliminate it. Despite numerous opportunities in the last twenty-five years, the CAAF still has not provided any guidance on the deleted exception. Because the Army Court of Criminal Appeals and the NMCCA have reached opposite conclusions on the issue, the Navy Judge Advocate General required the CAAF to finally decide it.

statutory requirements but is self-imposed and deserves scrutiny.

B. Purpose of Article III Standing Requirements.

The constitutional requirement of standing is built on the single idea of separation of powers. *FDA v. All. For Hippocratic Med.*, 2024 U.S. LEXIS 2604, *15 (June 13, 2024) (quoting *United States v. Texas*, 599 U.S. 670, 675 (2023)). Standing prevents Article III courts from "usurp[ing] the powers of the political branches." *Texas*, 599 U.S. at 676; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

The concern that the CAAF could usurp the power of the political branches does not exist because it is "not a part of that judicial power which is defined in the 3d article." *Ortiz*, 585 U.S. at 442 (quoting *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 26 U.S. 511, 546 (1828)); *see also Ortiz*, 585 U.S. at 456 (Thomas, J., concurring) (distinguishing between "*a* judicial power" exercised by the CAAF and "*the* judicial power" vested exclusively in Article III courts) (alteration in original).

The CAAF failed to explain why prudence counsels against adjudicating the sent issues in accordance with its statutory obligation. App. 6-7. The CAAF relied upon *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) and *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) to justify its refusal, but the CAAF did not refuse to decide the merits in either *Chisholm* or *Wuterich*.

This is not just another standing case. Prudence cannot override statutory mandates. Article III does not require standing in Article I tribunals, but § 867, enacted by Congress pursuant to the Make Rule Clause, obligates CAAF to review issues sent by a judge advocate general. The Court should grant the petition for a writ of certiorari in order to restore the structural powers and duties of each branch of government.

II. Petitioner Major McFarland Has Standing.

The CAAF's holding that Major McFarland lacks standing conflicts with this Court's precedents. A person has standing when she suffers an injury in fact caused by the challenged action and redressable by a court order. *FDA*, 2024 U.S. at *17-18; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023); *Spokeo*, 578 U.S. at 338; *Susan B. Anthony List*, 573 U.S. at 157-58; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Sprint Commc'ns v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008).

The CAAF fundamentally misunderstands the elements of standing: injury, causation, and redressability. It briefly mentions these elements but fails to provide any analysis or application of this Court's many precedents. App. 7. The sole Supreme Court precedent relied upon by the CAAF in its discussion of standing is *Linda R.S.*, 410 U.S. 614. App. 11-13.

Petitioner McFarland has standing because she has established injury to her privilege and privacy caused by erroneous legal rulings and redressable by judicial relief. *Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Linda R.S. does not apply here because the military judge's ex parte order is directed at Major McFarland, making her its object.

1. The Impairment of Major McFarland's Privilege Is an Injury in Fact.

The question of standing in this case is answered by the rules established in prior standing cases. *FDA*, 2024 U.S. LEXIS 2604, at *23. The precedents of this Court and the CAAF amply demonstrate that the violation of a privilege constitutes a concrete and particularized injury. Disclosure of documents one prefers to withhold is a concrete injury. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020). This Court has adjudicated the merits of numerous cases involving the assertion of a privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996) (psychotherapist-patient privilege); *Church of Scientology of Cal. v. United States*, 506 U.S. 9 (1992) (attorney-client privilege); *Swidler v. Berlin*, 524 U.S. 399 (1998); *Mohawk Indus. v. Carpenter*, 558 U.S. 100 (2009); *United States v. Nixon*, 418 U.S. 683 (1974); *Gravel v. United States*, 408 U.S. 606 (1972); *Perlman v. United States*, 247 U.S. 7 (1918). The *sub silentio* exercise of jurisdiction in these cases indicates standing existed. *E. Enter. v. Apfel*, 524 U.S. 489, 522 (1998).

Federal appellate courts consistently recognize that disclosure of privileged information constitutes injury in fact. *In re Grand Jury*, 111 F.3d 1066, 1073-74 (3d Cir. 1997); *In re Grand Jury Matter (JFK Hospital)*, 802 F.2d 96, 99 (3d Cir. 1986); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979); *In re Matter of Grand Jury (Schmidt)*, 619 F.2d 1022, 1026-27 (3d Cir.

1980) (legally cognizable interest not limited to privilege); *United States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982).

In *Doe v. United States*, 749 F.3d 999 (11th Cir. 2014), the sexual predator Jeffrey Epstein appealed an order requiring disclosure of attorney work product and plea negotiations privileges. The victims asserted the court lacked jurisdiction, but neither they nor the court addressed standing because standing for privilege holders is too well established to question. *Id.* The court held that Epstein's claims of privilege, "however tenuous," were sufficient to establish jurisdiction. *Id.* at 1006. Recognizing a sexual predator's standing to challenge the disclosure of privileged information while denying standing to a sexual assault victim would be unjust.

The CAAF's own precedents recognize standing for privilege holders. In *LRM v. Kastenberg*, the CAAF held that a sexual assault victim had standing based upon its "*long-standing precedent* that a holder of a privilege has a right to contest and protect the privilege." 72 M.J. 364, 368-69 (C.A.A.F. 2013) (emphasis added) (citing *Church of Scientology*, 506 U.S. 9).

Major McFarland's concrete and particularized injury was that the military judge violated her privilege by: (1) failing to follow the M.R.E. 513(e) procedures and (2) deciding that Respondent Bailey was constitutionally entitled to disclosure of privileged communications. These violations were sent by the Navy Judge Advocate as certified issues to the CAAF. The CAAF somehow turned the injury into whether the judge's abatement itself was a "judicially cognizable interest." App. 12.

Major McFarland's privilege was violated, and her injury is clear. The military judge required her to choose whether she would assert her privilege. M.R.E. 513 does not give Major McFarland a choice; it gives her a privilege.

The CAAF's finding that the abatement order did not violate Major McFarland's privilege is specious and an insult to military sexual assault victims. To Major McFarland and other victims, the CAAF's answer to the question, "What's it to you?" is "You do not matter." *FDA*, 2024 U.S. LEXIS 2604 at *16; *Transunion*, 141 S. Ct. at 2201 (2021) (citing Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983)).

While the CAAF's unanimous opinion does not discuss or recognize Major McFarland's concrete injury, the concurring opinions supported by a majority of the CAAF's judges recognize she was injured by the abatement itself. One concurring opinion states that Major McFarland has an interest in "avoiding the specter of abatement." App. 23 n.2. (Ohlson, C.J., concurring). The other concurring opinion recognizes that Major McFarland has a "privacy interest beyond whether certain information is privileged." App. 30 (Sparks, J., concurring).[14]

14. As discussed, the concurring opinions acknowledge Major McFarland's injuries. This footnote brings to the Court's attention the extraordinary concurring opinions' views on victims and the rules of evidence and procedure intended to ensure fairness to the parties and witnesses. Although the CAAF states that it cannot provide advisory opinions, the concurring opinions (supported by a majority of the CAAF) dive right in and provide "guidance." App. 21. The first certified issue asks whether a military judge must follow M.R.E. 513(e) procedures that determine the production of

Major McFarland's interests in avoiding abatement and keeping her privacy establish a concrete and particularized injury. All victims proudly serving in the armed forces, including Major McFarland, matter.

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patient records. While the unanimous opinion refuses to answer this issue, the concurring opinions advise military judges to use procedures not found in any rule within the Rules for Courts-Martial or Military Rules of Evidence. Instead of advising judges to follow the rules, the concurring opinions astonishingly recommend that sexual assault victims negotiate with the man who raped or assaulted her. The first concurring opinion advises, "military judges *should not hesitate to place the responsibility on the victim* . . . to take the initiative in" reaching an agreement with the defendant. App. 24 (emphasis added). It further advises, "military judges *should not hesitate to require the victi*m . . . to raise—and to resolve—issues regarding mental health records early in the court-martial process." *Id.* (emphasis added).

Instead of advising judges to follow the M.R.E. 513(e) procedures, the second concurring opinion advises victims to "simply ask the military judge" to determine whether there is nonprivileged information within the privileged psychotherapy records. App. 29. The opinion advises judges they can avoid the burden of reviewing voluminous documents if they ask the parties and victim to agree to diagnoses, treatments, or the expected testimony of the victim's therapist. *Id.*

This "guidance" would wreak emotional violence on victims and their privacy, privilege, and dignity. The opinions demonstrate a complete lack of respect for Military Rules of Evidence, Rules for Courts-Martial, the President, and Congress. Requiring sexual assault victims to bargain with their assailant despite clear rules that require judges to make decisions based upon the law is a horrendous injury.

2. Major McFarland's Injury Was Caused by the Military Judge's Orders and Would Be Redressed by the CAAF's Decision on the Merits.

The standing requirements of causation and redressability are often "flip sides of the same coin." *FDA*, 2024 U.S. LEXIS 2604 at *18 (quoting *APCC*, 554 U. S. at 288). The CAAF did not address either the causation or redressability elements of standing because it did not first address injury. Nevertheless, the military judge's orders directly caused the violation of Major McFarland's privilege and would be redressed if the military judge was ordered to correctly apply the law.

The erroneous disclosure of Major McFarland's psychotherapy records would not have occurred if the military judge had followed M.R.E. 513(e) procedures. A person accorded a procedural right to protect her interests has standing to assert that right. *Lujan*, 504 U.S. 572 n.7. Major McFarland has standing so long as the procedural right in question is designed to protect "some threatened concrete interest of [hers] that is the ultimate basis of [her] standing." *Id.* at 573 n.8; *see also Spokeo*, 578 U.S. at 341 (deprivation of a procedural right that affects a concrete interest suffices to create Article III standing). If the requested procedures could have affected the decision that caused the injury, the person has standing. *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). If M.R.E. 513(e) procedures had been followed, the judge would not have conducted an in camera review and would not have ruled on whether Respondent Bailey had a constitutional right to disclosure of these privileged communications.

Although its decision does not address injury, causation, or redressability, the CAAF's analytical framework appears to consider standing in terms of remedies requested. App. 8 ("We consider the victim's arguments for each of these remedies in turn."). There is no precedent for such framework.

The CAAF, failing to analyze injury, causation, and redressability, uses circular logic: It cannot review the judge's abatement order because Major McFarland lacks standing, and Major McFarland lacks standing because it cannot review the abatement order. The CAAF certainly has the power to review an abatement order, acknowledging its jurisdiction under 10 U.S.C. 862. App. 12.

Even if the CAAF could not order the military judge to lift the abatement, it could order a remand to require her to apply a "correct view of the law." *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010); *Leak*, 61 M.J. at 242. The CAAF did not consider whether other remedies would redress Major McFarland's injury to her privilege. "[T]he ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Uzuegbunum v. Preczewski*, 141 S. Ct. 792, 802 (2021) (quoting *Church of Scientology*, 506 U. S. at 13).

The CAAF held that returning Major McFarland's privileged records was moot. App. 13. Even where it is too late to provide a fully satisfactory remedy for the invasion of privacy that occurs when privileged information is disclosed, a court has the power to effectuate a partial remedy by ordering the destruction or return of the privileged records. *Church of Scientology*, 506 U.S. at

13. "The availability of this possible remedy is sufficient to prevent this case from being moot." *Id.* So long as Major McFarland has "a concrete interest, however small," the case is not moot. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 934 (2023); *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). The CAAF can at least partially redress Major McFarland's injury by ordering the destruction or return of her records and prohibiting the judge from relying on the records to abate the court-martial.

The CAAF's focus on remedies rather than redressability is flawed. This Court's standing precedents require only that the injury be capable of redress by a judicial order. *Lujan*, 504 U.S. at 561-62 (judgment will redress injury); *Texas*, 143 S. Ct. at 1970; *Transunion*, 141 S. Ct. at 2203.

Major McFarland's injury is redressable because the certified issues have been presented in an adversarial context and in a form historically viewed as capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Russett*, 40 M.J. at 186. Major McFarland seeks "typical appellate relief": reversing a lower court and directing the military judge to "undo what [she] has done." *MOAC Mall Holdings*, 143 S. Ct. at 935; *Chafin*, 568 U.S. at 173.

The answers to the certified issues turn on the proper construction of M.R.E. 513. The proper construction of an evidence rule is "eminently suitable to resolution in federal court." *Massachusetts*, 549 U.S. at 516. The CAAF has the power, and the duty, to review and redress the issues sent to it by the Navy Judge Advocate General.

3. Petitioner Major McFarland Is the Object of the Ex Parte Order.

When a person is the object of the action at issue, there is little question that the action caused her injury and that judgment preventing the action will address it. *California v. Texas*, 593 U.S. 659, 671 (2021); *Lujan*, 504 U.S. at 561-62. Major McFarland is the object of the military judge's ex parte order because it forces her to decide whether the prosecution of Respondent Bailey would continue.

The CAAF recognized that 10 U.S.C. § 806b and *Linda R.S.* do not allow a victim (or anyone else) to "assume the role of the government" by exercising prosecutorial discretion. App. 13. Victims may not even "impair" the prosecutorial discretion of convening authorities under §§ 830 and 834. *See* § 806b(d)(3). No citizen has a judicially cognizable interest in the prosecution or nonprosecution of another. App. 11 (citing *Linda R.S.*, 410 U.S. at 619). Last term, this Court emphasized that *Linda R.S.* applies to "challenges to the Executive Branch's exercise of enforcement discretion." *Texas*, 143 S. Ct. at 1970-71.

The CAAF's opinion equated the military judge's orders to a prosecutor's discretion and believed its decision would prevent Major McFarland from assuming the role of the government. App. 12-13. The CAAF appears oblivious to the practical reality that Major McFarland did not assume the role of the government; rather, the military judge foisted that role upon her. The military judge's ex parte order *required* Major McFarland to decide whether the court-martial of Respondent Bailey would proceed or be abated. The convening authority's decision to prosecute Bailey remains unchanged. The

judge has taken the burden of decision away from the convening authority and placed it squarely and solely upon Major McFarland.[15] The judge has given Major McFarland the legal authority to preclude the prosecution of a sexual predator.

The military judge's legal decisions that resulted in requiring Major McFarland to choose whether Respondent Bailey would be prosecuted is precisely the "direct nexus" that was lacking in *Linda R.S.* App. 11 (quoting *Linda R.S.*, 410 U.S. at 619). The Court specifically limited the

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15. No federal court has ever required a victim to choose between waiving her privilege and ending the prosecution of her assailant. Only three states follow such an approach. *State v. Slimskey*, 779 A.2d 723, 731-32 (Conn. 2001); *People v. Stanaway*, 521 N.W.2d 557, 577 (Mich. 1994); *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989). Other states that have considered this approach have rejected it because it places the fate of a criminal prosecution in the hands of a witness, a proposition "at odds with our legal traditions." *Douglas v. State*, 527 P.3d 291 (Alaska App. 2023); *see also Commonwealth v. Barroso*, 122 S.W.3d 554, 565 (Ky. 2003).

The genesis of military courts requiring a victim to choose between waiving her privilege or abatement appears to be a military law review article that advocated adopting Wisconsin's procedures. Major Cormac M. Smith, *Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice*, 2015 ARMY LAW. 6, 13-15 (2015). Shortly after this article, the NMCCA adopted Wisconsin's procedures. *Payton-O'Brien*, 76 M.J. at 789-92.

Wisconsin has since abandoned these procedures because they were unsound in principle, unworkable in practice, and undermined by developments in the law regarding sexual assault. *State v. Johnson*, 407 Wis. 2d 195, 225-26 (2023).

Linda R.S. holding to the "unique context of a challenge to [the non-enforcement of] a criminal statute." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 188 n.4 (2000) (quoting *Linda R.S.*, 410 U.S. at 617). Major McFarland is not seeking enforcement of any criminal statute but is asking that her rights be determined in accordance with the rules and laws within the normal course of a court-martial.

The military judge placed the burden of decision upon Major McFarland to decide whether Respondent Bailey would be prosecuted. Her order took the prosecutorial decision away from the government in violation of § 806b(d)(3) and *Linda R.S.* Major McFarland was the object of the judge's order, and the CAAF's judgment would fully redress the injury caused by it.

III. Respondent United States Has Standing.

The CAAF recognized that the Respondent United States has standing to challenge the military judge's abatement order. App. 12 ("Our decision does not mean that abatement orders are unreviewable."). The CAAF further acknowledged that the United States supported lifting the abatement order in this case. App. 12-13.

The presence of one party with standing satisfies Article III's case or controversy requirement. *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Since the United States had standing to challenge the abatement order, standing existed for the case. *Id.*

Requiring an appeal under 10 U.S.C. § 862 despite the United States supporting the same relief in this case with the same parties elevates form over substance. *See Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). The CAAF incorrectly required all parties to have standing. This is not the law. The CAAF erred when it did not decide the certified issues.

IV. The Court Has a Special Obligation to Supervise the CAAF.

The Court should grant Major McFarland's petition for a writ because of the unique challenges and special obligations presented by military tribunals. Tribunals constituted by Congress under Article I, Section 8, Clause 9 of the Constitution must remain inferior to this Court, implicitly placing a supervisory responsibility on the Court. As Congress has given jurisdiction for most appeals from tribunals to federal district and circuit courts, the Court fulfills its supervisory responsibility through petitions for certiorari under 28 U.S.C. § 1254. The Court has appellate jurisdiction to review the final judgments or decrees of the District of Columbia Court of Appeals, § 1257, Supreme Court of Puerto Rico, § 1258, and Supreme Court of the Virgin Islands, § 1260. Finally, the Court has appellate jurisdiction over cases reviewed by the CAAF under § 1259; *see also Ortiz*, 585 U.S. at 431.

What creates a special supervisory obligation under § 1259 is the nature and purpose of military law. Military law's purposes are not only to promote justice and deter misconduct, but also "to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and

thereby to strengthen the national security of the United States." *Manual for Courts-Martial*, pt I. § 3, (2024 ed.) These different purposes result in military tribunals' unique approach to interpreting and applying its laws and rules that are unlike civilian courts.

For instance, privileges in federal courts are governed by the principles of the common law "in the light of reason and experience." In contrast, military tribunals must follow the specific rules defining privilege holders, privileged information, exceptions, and procedures. *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000). Military tribunals are characterized by "temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel." *Id.* at 158. Military law requires far more stability than civilian law because commanders, convening authorities, investigating officers and other military personnel need specific rules that provide "predictability, clarity, and certainty" rather than a case-by-case adjudication of what the rules of evidence would be. *Id.*

This Court's precedent in *Jaffee* did not apply to military tribunals because the President "occupied the field" with his decision as to whether, when, and to what degree *Jaffee* should apply in military tribunals. *Rodriguez*, 54 M.J. at 160-61. While the President is responsible for discipline, he cannot review or modify the CAAF's decisions. *Ortiz*, 585 U.S. at 460. This Court needs to correct judicial errors within the military justice system by providing supervisory oversight of the CAAF.

In the present case, the CAAF's refusal to address the procedural requirements of M.R.E. 513 or the

constitutional implications of nondisclosure highlights the need for Supreme Court intervention. In the CAAF's refusal, it needed to find both: (1) Article III required Major McFarland to have standing, and (2) she lacked standing. The CAAF's decision, based on erroneous interpretations of standing, compromises the integrity of military justice. This Court previously recognized that courts-martial are "singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan v. Parker*, 395 US 258, 265 (1969) (*overruled on other grounds by Solorio*, 483 U.S. 435). The CAAF has poorly interpreted and applied the constitutional subtleties regarding standing.

This case affects all of the men and women selflessly serving our nation. By addressing these unique challenges, the Supreme Court ensures that the military justice system upholds the values and principles essential to our nation's security and the fair treatment of its service members.

CONCLUSION

The Court should grant Petitioner Major McFarland's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, DECIDED APRIL 3, 2024

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 23-0233

IN RE B.M.,

Appellant,

v.

UNITED STATES,

Appellee,

and

DOMINIC R. BAILEY, LIEUTENANT COMMANDER, UNITED STATES NAVY,

Real Party in Interest.

December 5, 2023, Argued; April 3, 2024, Decided

OPINION

Judges: Judge MAGGS delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge HARDY, and Judge JOHNSON joined. Chief Judge OHLSON filed a

separate concurring opinion. Judge SPARKS filed a separate concurring opinion, in which Judge JOHNSON joined.

Judge MAGGS delivered the opinion of the Court.

The Judge Advocate General of the Navy certified the following two questions arising from the decision of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) in *In re B.M.*, 83 M.J. 704 (N-M. Ct. Crim. App. 2023):

> I. M.R.E. 513 governs the procedures for production and in camera review of patient records that "pertain to" communications to a psychotherapist. The military judge applied R.C.M. 703 to order production and conduct an in camera review of Major B.M.'s diagnosis and treatment. Did the military judge err by applying the narrow scope of the M.R.E. 513(a) privilege defined in [*United States v.*] *Mellette*[, 82 M.J. 374 (C.A.A.F. 2022),] to bypass the procedural requirements of M.R.E. 513(e)?
>
> II. The Army [Court of Criminal Appeals] held no constitutional exception to M.R.E. 513 exists. The Navy-Marine Corps Court of Criminal Appeals ruled the Constitution required production of mental health records. The resulting disparity in appellate precedent precludes uniform application of the law. Should [*J.M. v.*] *Payton-O'Brien*[,76 M.J. 782 (N-M. Ct. Crim. App. 2017),] be overturned?

B.M. v. United States, 83 M.J. 463, 463 (C.A.A.F. 2023). For reasons that we will explain, we cannot fully answer either of these questions because of the unusual procedural posture of this case. We conclude, however, that the decision of the NMCCA should be affirmed.

I. Background

A convening authority referred charges against Lieutenant Commander Dominic R. Bailey (the accused) to a general court-martial. These charges included two specifications alleging that the accused did acts constituting abusive sexual contact and three specifications alleging that he did acts constituting assault consummated by a battery in violation, respectively, of Articles 120 and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 928 *In re B.M. v. United States and Bailey*, No. 23-0233/NA (2018). All the specifications alleged that the victim of these offenses was Major B.M. (the named victim).

At the accused's request, the military judge ordered a military health facility to produce nonprivileged portions of the named victim's mental health records that were limited to her diagnoses and treatments. In issuing this order, the military judge relied on the general procedure for ordering the production of evidence in Rule for Courts-Martial (R.C.M.) 703 instead of the special procedure for determining the admissibility of patient records or communications in Military Rule of Evidence (M.R.E.) 513(e). The military judge explained that "diagnoses, prescriptions, and treatment are not covered by [the

psychotherapist-patient privilege in] M.R.E. 513 and if that is the case then the applicable rule is R.C.M. 703 for the production of these records."

The military health facility attempted to comply with the military judge's order by producing certain records. In reviewing these records in camera, the military judge learned that, contrary to her order, the documents were not limited to diagnoses and treatments but also contained some communications protected by the psychotherapist-patient privilege established by M.R.E. 513(a). The military judge further determined that, if the accused were tried by court-martial, disclosure of certain portions of these records would be "constitutionally required" in order "to guarantee the accused a meaningful opportunity to present a complete defense." The military judge asked the named victim if she would waive her privilege with respect to the documents that contained exculpatory information so that the accused could see the documents. The named victim declined to waive her privilege. In response, the military judge abated the court-martial proceeding and ordered the records sealed.

The named victim then petitioned the NMCCA for extraordinary relief in the nature of a writ of mandamus and a stay of proceedings. *In re B.M.*, 83 M.J. at 706. She asked the NMCCA to order the military judge to (1) seal or destroy her mental health records; (2) lift the abatement order; and (3) disqualify herself so that another military judge could preside over the court-martial. *Id.* The Government did not file an appeal seeking to overturn the abatement order. *Id.* at 708 n.17.

Appendix A

The NMCCA determined that it could not provide the named victim with any relief. It denied the named victim's request for an order directing the military judge to seal or destroy the mental health records, explaining: "[B]ecause the records are now sealed in accordance with the military judge's order, we find no further remedy is necessary." *Id.* at 711. The NMCCA also refused to lift the abatement order, explaining:

> [T]he military judge did not abuse her discretion when she abated the trial in light of information learned while reviewing the records over which Petitioner asserted a privilege. Her inadvertent review of privileged material did not, in any respect, waive Petitioner's privilege, but it did alert the military judge to the fact that the records contained evidence of both confabulation and inconsistent statements made by Petitioner which would be constitutionally required to be produced because the records were exculpatory. . . . [W]e find that the military judge's decision was within the range of choices reasonably arising from the applicable facts and the law.

Id. at 717 (footnote omitted). The NMCCA further denied the named victim's request for an order disqualifying the military judge, explaining that "this matter is not ripe for consideration because the case is abated." *Id.*

The named victim filed a petition for review in this Court, but this Court dismissed the petition for lack of

jurisdiction. *B.M. v. United States*, 83 M.J. 465 (C.A.A.F. 2023). Following this Court's dismissal of the named victim's petition, the Judge Advocate General of the Navy certified for review the two questions quoted above.

II. Jurisdiction

Although this Court did not have jurisdiction to consider the named victim's petition for review, *see M.W. v. United States*, 83 M.J. 361, 362, 364-65 (C.A.A.F 2023) (holding that this Court lacks jurisdiction to review a petition filed by a victim of an offense), this Court does have jurisdiction to review questions certified by a Judge Advocate General, pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2018). This Court, however, does not issue advisory opinions even if it has jurisdiction. *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003) (explaining that this Court "generally adhere[s] to the prohibition on advisory opinions as a prudential matter"). An advisory opinion is a ruling on a legal question "which cannot affect the rights of the litigants in the case before [the court]." *St. Pierre v. United States*, 319 U.S. 41, 42, 63 S. Ct. 910, 87 L. Ed. 1199 (1943) (per curiam); *see also Chisholm*, 59 M.J. at 152 ("An advisory opinion is an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties."). Similarly, this Court does not answer questions that are not ripe for decision or that have become moot. *United States v. Wall*, 79 M.J. 456, 459 (C.A.A.F. 2020) (explaining that this Court generally adheres to the principle that issues not ripe for appeal cannot be decided); *United States v. McIvor*, 21 C.M.A.

156, 158, 44 C.M.R. 210, 212 (1972) (declining to decide a moot certified question). Finally, as a prudential matter, this Court follows the principles of standing that apply to Article III courts. *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008). In accordance with these principles, this Court only addresses claims raised by parties who can show "an injury in fact, causation, and redressability." *Id.* (citing *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)).

III. Discussion

A. Certified Question I

The first certified question asks in relevant part whether "the military judge err[ed] by applying the narrow scope of the M.R.E. 513(a) privilege defined in [*United States v.*] *Mellette*[, 82 M.J. 374 (C.A.A.F. 2022),] to bypass the procedural requirements of M.R.E. 513(e)."

Four preliminary points of explanation may help to clarify the meaning of this question. First, the referenced M.R.E. 513(a) creates a privilege allowing a patient "to refuse to disclose . . . a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Second, this Court held in the referenced *Mellette* decision that while the privilege in M.R.E. 513(a) protects certain communications between a patient and a psychotherapist, "diagnoses and treatments contained within medical records are not themselves uniformly

privileged under M.R.E. 513." 82 M.J. at 375. Third, the referenced M.R.E. 513(e) establishes a "*Procedure to Determine Admissibility of Patient Records or Communication*" that are or may be protected by the privilege established in M.R.E. 513(a). Fourth, as described above, the military judge in this case decided not to follow the special procedures set forth in M.R.E. 513(e), but instead followed the general procedures for ordering the production of evidence in R.C.M. 703.

The procedural posture in which we confront this certified question is unusual and perhaps unprecedented. Although the Judge Advocate General certified the question, the Government asks this Court to answer the question in the negative and to affirm the NMCCA's decision. The Government does not seek any relief from this Court based on this certified question. The named victim has submitted briefs "in support of the U.S. Navy Judge Advocate General's Certificate for Review," but her position differs from that of the Government. The named victim argues that this Court should answer the first certified question in the affirmative, and she further requests three specific remedies. First, the named victim asks this Court to reverse the NMCCA and to lift the military judge's abatement order. Second, the named victim asks this Court to disqualify the military judge from further proceedings in this case based on her erroneous actions and exposure to privileged material. Third, the named victim asks that "her mental health records [be] returned to a privileged and protected status." We consider the victim's arguments for each of these remedies in turn.

Appendix A

1. Lifting the Abatement Order

In support of her request that this Court lift the abatement order, the named victim contends that the military judge should not have looked at her medical records without following the procedures in M.R.E. 513(e). She asserts that any potentially exculpatory evidence that the military judge may have seen therefore came from "improperly divulged" privileged communications. (Internal quotation marks omitted.) (Citation omitted.) Finally, she argues that the military judge had no authority under either M.R.E. 513 or R.C.M. 703 to abate the court-martial proceedings based on such privileged communications.

Before addressing the merits of these arguments, we must consider a preliminary issue: whether the named victim initially had standing to challenge the abatement order by filing an extraordinary writ in the NMCCA. On this point, we observe that Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1), authorizes the victim of an offense to seek a writ of mandamus from a CCA only in specified circumstances. The provision states:

> If the victim of an offense . . . believes . . . *a courtmartial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4)*, the victim may petition the Court of Criminal Appeals for a writ of mandamus to require . . . the court-martial to comply with the section (article) or rule.

Article 6b(e)(1), UCMJ (emphasis added).[1] The referenced "paragraph (4)" includes protections afforded by Article 6b(a), UCMJ, and by "M.R.E. 513, relating to the psychotherapist-patient privilege." *Id.* § 806b(e)(4)(A), (D).

We first consider whether the "court-martial ruling violates the rights of the victim afforded by" M.R.E. 513. The named victim argues that the military judge violated M.R.E. 513 by not following the procedures in M.R.E. 513(e), when she was required to do so, before examining her records. But the named victim does not argue, nor could she argue, that the abatement order—which she is asking this Court to lift—itself violated either the privilege afforded by M.R.E. 513(a) or the procedures in M.R.E. 513(e). The abatement order served only to stop the court-martial proceedings; it did not vitiate her privilege or require her to waive the privilege. The abatement order is thus not "a court-martial ruling [that] violates the rights of the victim afforded by" M.R.E. 513.[2]

We next consider whether the "court-martial ruling violates the rights of the victim afforded by" Article 6b(a), UCMJ. This article grants victims certain rights, including a "right to proceedings free from unreasonable

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1. Article 6b, as amended in 2021, applies to this appeal. This version is codified at 10 U.S.C. § 806b (2018 & Supp. III 2019-2022).

2. The Government argues that the abatement order "force[d] the Victim to choose between waiving her privilege or facing abatement of charges." But that does not make the abatement order "a court-martial ruling [that] violates the rights of the victim afforded by" M.R.E. 513.

delay" and a "right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense." Article 6b(a)(7), (9), UCMJ. We hold that these rights, while important, do not provide the named victim with standing to challenge the military judge's abatement order.

In reaching this holding, we draw guidance from the United States Supreme Court's decision in *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973). In that case, a state prosecutor declined to prosecute a father for not paying child support for his illegitimate child. *Id.* at 615-16. The mother of the child sued the prosecutor, requesting from the Court a declaration that the practice of not bringing criminal charges against the fathers of illegitimate children was unlawfully discriminatory. *Id.* at 616. The Supreme Court held that the mother lacked standing to bring the lawsuit. *Id.* at 619. The Supreme Court explained:

> [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws.

Id.

Appendix A

Although the *Linda R.S.* case arose in a different context, and specifically concerned the standing of a plaintiff to bring a civil lawsuit against a prosecutor, we find that the general principles described by the Supreme Court preclude us from lifting this abatement order at the named victim's request. Under Article 6b(a), UCMJ, the victim of an alleged offense has a right to be treated with fairness and respect and a right to proceedings free from unreasonable delay. But we are not convinced that these rights give the victim "a judicially cognizable interest" in the ultimate question of whether the government will or will not prosecute the accused. Because the abatement order is not "a court-martial ruling [that] violates the rights of the victim afforded by" Article 6b(a), UCMJ, the named victim therefore lacked standing to challenge the abatement order before the NMCCA, and she lacks standing before this Court.

Our decision does not mean that abatement orders are unreviewable. On the contrary, this Court has recognized that Article 62(a), UCMJ, 10 U.S.C § 862(a) (2018), authorizes the *government* to take an interlocutory appeal asking for the lifting of an abatement order. In *United States v. True*, the Court reasoned that an "abatement order . . . is the functional equivalent of a 'ruling of the military judge which terminates the proceedings' under Article 62(a), [UCMJ,]" and held that such a "ruling is a proper subject for appeal by the Government under this statute." 28 M.J. 1, 2 (C.M.A. 1989) (quoting Article 62(a), UCMJ). But in this case, although the Government now says that it supports the named victim's arguments for lifting the abatement order, the Government did not file

an Article 62, UCMJ, appeal asking the NMCCA to lift the abatement order. *In re B.M.*, 83 M.J. at 708 n.17. Based on the language of Article 6b, UCMJ, and the principle established by the Supreme Court in *Linda R.S.*, the named victim cannot assume the role of the Government and lacks standing.

2. Disqualification of the Military Judge

The named victim's second requested relief is disqualification of the military judge. Given our decision not to lift the abatement order, we agree with the NMCCA's determination that this request is not ripe for decision. *In re B.M.*, 83 M.J. at 718. This conclusion does not preclude the named victim from challenging the military judge if the abatement order is lifted in the future, but we express no view on the issue of disqualification in this opinion.

3. Returning Records to a Privileged and Protected Status

Finally, we cannot grant the named victim's request to have her medical records returned to a privileged and protected status because, in our view, this remedy is moot. Any communications in the records that were privileged remain privileged. The named victim did not waive the privilege because she did not "voluntarily disclose[ ] or consent[ ] to disclosure of any significant part of " the privileged communications. M.R.E. 510(a). On the contrary, the named victim expressly declined to waive her privilege. Like the NMCCA, we therefore see no basis for concluding that the military judge's in camera

viewing of privileged communications—even if done erroneously—diminished the victim's right to assert her psychotherapist-patient privilege. *In re B.M.*, 83 M.J. at 717 & n.67. The military records are also already protected from disclosure because the military judge ordered them sealed and neither this Court nor the NMCCA has ordered them unsealed.

B. Certified Question II

The second certified question concerns a disagreement between the United States Army Court of Criminal Appeals (ACCA) and the NMCCA about whether there is a constitutional exception to the psychotherapist-patient privilege in M.R.E. 513. The question asks whether the NMCCA's decision in *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017), should be overturned. Both the Government and the named victim ask us to answer this certified question in the affirmative.

Four preliminary points of background may also help clarify this question. First, the original version of M.R.E. 513, as promulgated in 1999, contained a constitutional exception that stated: "There is no privilege under this rule . . . when admission or disclosure of a communication is constitutionally required." M.R.E. 513(d)(8) (2000 ed.).[3] Second, the President deleted this constitutional

3. The President created M.R.E. 513 in the 1999 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,140, § 2(a), 64 Fed. Reg. 55,115, 55,116-17 (Oct. 12, 1999). This was first included in the *Manual for Courts-Martial, United States* (2000 ed.) (*MCM*).

exception in 2015.[4] Third, the ACCA and the NMCCA have disagreed about the effect of the deletion of the constitutional exception. In *United States v. Tinsley*, the ACCA held that "the military courts do not have the authority to either 'read back' the constitutional exception into M.R.E. 513, or otherwise conclude that the exception still survives notwithstanding its explicit deletion." 81 M.J. 836, 849 (A. Ct. Crim. App. 2021). But in *Payton-O'Brien*, the NMCCA reached a different conclusion. 76 M.J. at 788. The NMCCA held that the "removal of the constitutional exception is inconsequential insofar as its removal purports to extinguish due process and confrontation rights." *Id.* The NMCCA then provided a non-exhaustive list of several situations in which it asserted that the psychotherapist-patient privilege must yield to the constitutional rights of the accused. *Id.* at 789. Certified Question II asks us to resolve this dispute between the ACCA and the NMCCA.

We recognize the general importance to the military justice system of resolving such conflicts among the Courts of Criminal Appeals. *See* C.A.A.F. R. 21(b)(5)(B)(iii). In this case, however, any decision that we would

4. In 2014, Congress directed that M.R.E. 513 be amended "[t]o strike the current exception to the privilege contained in subparagraph (d)(8) of Rule 513," i.e., the constitutionally required exception. *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, § 537(2), 128 Stat. 3292, 3369 (Dec. 19, 2014). The President then amended M.R.E. 513 in the 2015 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,696, Annex § 2(e), 80 Fed. Reg. 35,783, 35,819 (June 22, 2015). This amended version of M.R.E. 513 first appeared in the *MCM* (2016 ed.).

render on Certified Question II would be an advisory opinion because it would be a ruling on a legal question "which cannot affect the rights of the litigants in the case before [the court]." *St. Pierre*, 319 U.S. at 42. Regardless of whether we answered the question in the affirmative or in the negative, we could not provide any relief requested by the named victim (i.e., lifting the abatement order, disqualifying the military judge, and protecting the medical records). In our discussion of Certified Question I, we have already concluded on the basis of principles of standing, ripeness, and mootness, that we cannot grant this requested relief. Our decision did not turn on whether a constitutional exception to the privilege in M.R.E. 513(a) still exists. Because this Court does not issue advisory opinions, we therefore cannot answer Certified Question II in this case.

IV. Conclusion

For these reasons, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Chief Judge OHLSON, concurring.

I join the Court's opinion in full. As Judge Maggs clearly explains, the principles of standing, ripeness, and mootness constrain this Court from answering the certified issues. But despite the "unusual and perhaps unprecedented" procedural posture of the instant case, the substantive issues raised therein will most assuredly arise in future courts-martial. *B.M. v. United States*, M.J. __(7) (C.A.A.F. 2024). Therefore, I write separately to express my thoughts on how military judges, going forward, might address the challenges that arise when a victim's mental health records are at issue.

I. Additional Facts

The Court's opinion nicely identifies the basic facts of the case so I will not repeat them here. I will simply add a few key details that are helpful for the purposes of this discussion.

First, in the military judge's order to the mental health provider, she directed the facility to produce documents "ONLY to the extent those records reflect" diagnoses, mental health prescriptions, and mental health treatments of Major B.M. (the named victim). She further instructed:

> The appropriate records custodian shall NOT provide any portion of a written mental or behavioral health record that memorializes or transcribes *actual communications* made between the patient and the psychotherapist or

> assistant to the psychotherapist. *The custodian of the records shall produce only records containing no actual communications and indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescription, and/or treatment, and the date the diagnosis was resolved, if applicable* .

(Footnote omitted.) The order also stated that the military judge would conduct an in camera review of the records to determine if disclosure was required.

Second, after receipt of the named victim's records, the military judge noted in an email to the named victim and the parties that the clinic included material "encompassed by" Military Rule of Evidence (M.R.E.) 513, and she asked the named victim if she continued to assert her M.R.E. 513 privilege over this material. The named victim, through counsel, stated that she was "continuing to invoke her privilege under M.R.E. 513 and [was] not waiving that right."

Third, the military judge subsequently issued an ex parte order to the named victim regarding her mental health records. In the order the military judge stated: "Notwithstanding the court's attempt to limit its review to sections addressing diagnoses, medications, and treatment, the court read items that appear to constitute 'actual communications' within the meaning of *United States v. Mellette*," 82 M.J. 374 (C.A.A.F. 2022).

Fourth and finally, the military judge concluded that some of the privileged records were constitutionally

required to be disclosed to the defense under *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M. Ct. Crim. App. 2017). When the named victim continued to assert her privilege, the military judge abated the proceedings and sealed the mental health records.

II. Applicable Law

M.R.E. 513 governs the military's psychotherapist-patient privilege. "Broadly speaking, [M.R.E.] 513(a) establishes a privilege that allows a patient to refuse to disclose confidential communications between the patient and his or her psychotherapist if those communications were made for the purpose of diagnosing or treating the patient's mental or emotional condition." *United States v. Beauge*, 82 M.J. 157, 159 (C.A.A.F. 2022). However, as always, the devil is in the details. To begin with, in *Mellette* this Court held that "diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513." 82 M.J. at 375.

In addition, M.R.E. 513 itself recognizes seven exceptions to the broad psychotherapist-patient privilege. *See* M.R.E. 513(d)(1)-(7). As explained in the Court's majority opinion, there used to be an eighth enumerated exception under M.R.E. 513 which was commonly referred to as the "constitutionally required exception."[1] *B.M*,

1. The exception read as follows: "There is no privilege under this rule . . . when admission or disclosure of a communication is constitutionally required." M.R.E. 513(d)(8) (2000 ed.). This Court has yet to "decide the precise significance of the removal of this express exception." *Beauge*, 82 M.J. at 167 n.10.

M.J. at (12 & n.4). However, in 2015, consistent with congressional legislation, the President deleted this exception. Subsequently, in *Payton-O'Brien* the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) sought to reconcile the revised provisions of M.R.E. 513 with the rights afforded to an accused under the Constitution. The NMCCA explained that (1) by promulgating the new version of M.R.E. 513, Congress and the President were implementing a "policy decision" to protect the psychotherapist-patient privilege "to the greatest extent possible," 76 M.J. at 787, but (2) this privilege, however meritorious, cannot "prevail over the Constitution," *id.* at 787-88. Accordingly, the NMCCA held that when M.R.E. 513 prohibits the production of privileged records, and when this prohibition implicates the constitutional rights of an accused to obtain a fair trial, "military judges may craft such remedies as are required to guarantee [an accused] a meaningful opportunity to present a complete defense." *Id.* at 783. The remedies contemplated by the NMCCA notably included abating the proceedings. *Id.* at 791. As the NMCCA succinctly put it, these remedies were "precise judicial tools necessary to balance [a victim's] privilege against [an accused's] constitutional rights." *Id.* at 792.

III. Discussion

A. Certified Issue I

In regard to the instant case, I believe the military judge was placed in an unenviable position. Although she was assiduous in ensuring the clarity and accuracy

of her order to the mental health provider, the facility still "dumped in her lap" nonresponsive mental health records that were privileged. Upon conducting her in camera review of the documents and discovering privileged information, the military judge had two options. First, she could have halted her review and invoked the procedures required under M.R.E. 513(e), which deals with determining the admissibility of patient records or communications. Second, she could have halted her review and returned the records to the mental health facility as nonresponsive and ordered compliance with the terms of the order. What the military judge could *not* do was continue to examine the privileged records, as she did here. Such a step contravened her authority and the provisions of M.R.E 513. In light of this misunderstanding, I offer the following guidance to those military judges who are confronted with a similar conundrum in the future.

If, in the course of conducting an in camera review of the mental health records of a victim, a military judge discovers that privileged material is commingled with nonprivileged material, he or she should immediately stop reviewing those records. If up to that point, the military judge has not discovered any impeachment material in the records that he or she believes the accused is entitled to receive in furtherance of his right to a fair trial, the military judge should return the records to the mental health facility and order compliance with the order to produce responsive, nonprivileged records. If, however, the military judge has already 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.

The discussion above concerns those situations where a military judge has ordered a mental health facility to produce responsive medical records. However, I am not convinced that this approach to obtaining mental health information is optimal. Simply stated, mental health professionals typically do not have the time to go through sometimes voluminous mental health records and cull out responsive material that is not privileged, and any person to whom they may delegate this task may not possess the required expertise. Because of this unfortunate reality, it is not unusual for commingled records to be produced in response to even clear and narrowly constructed document requests. As a result, military judges who are confronted with the task of ensuring that an accused has proper access to the nonprivileged mental health records of a victim should perhaps consider alternative approaches.

One approach would be to encourage the victim, the accused, and the government to enter into a stipulation of fact that would address the victim's diagnoses, medications, and treatments. This method presumably would be the quickest and easiest way of ensuring that no privileged material is released in contravention of M.R.E.

513, while also ensuring that the accused has access to information he is entitled to receive in furtherance of his constitutional right to a fair trial. I have my doubts, however, about the extent to which an accused would be willing to rely upon the bare assertions of a victim about the scope and nature of the mental health issues involved, particularly if the accused has no independent means of ensuring the accuracy of the victim's representations. Nevertheless, it still is worth a try.

If efforts to have the victim, the accused, and the government enter into a stipulation of fact is unavailing, another option would be for the military judge to order the victim's psychotherapist to submit an affidavit to the trial court that explicitly *and solely* addresses the victim's diagnoses, medications, and treatments. (A related approach would be for the military judge to pose interrogatories to the psychotherapist that are narrowly tailored to elicit information only about the victim's diagnoses, medications, and treatments.) This is not a foolproof method, particularly in those instances where the psychotherapist is not affiliated with a government mental health facility. However, it may be making the best of a bad bargain.[2]

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2. Presumably, a psychotherapist working in a government-operated treatment facility will comply with a military judge's order to provide an affidavit or response to interrogatories as discussed above. However, I recognize that enforcement mechanisms in the civilian sphere can be tricky. In those situations where a civilian psychotherapist practicing in the private sector balks at responding to an order of this nature issued by a military judge, the named victim would have an interest in encouraging compliance by the psychotherapist to avoid the potential specter of abatement.

Just to tie up loose ends, I would like to make two additional points. First, military judges should not hesitate to place the responsibility on the victim, the accused, and the government to take the initiative in finalizing a stipulation of fact or, in the alternative, drafting the order or the interrogatories that are designed to obtain the necessary information from the psychotherapist. And second, military judges should not hesitate to require the victim, the accused, and the government to raise—and to resolve—issues regarding mental health records early in the court-martial process to ensure that the trial is not unnecessarily delayed. I am hopeful that if this guidance is followed, the chances of encountering a similarly perplexing case where a military judge concludes that it is necessary to abate the proceedings will be significantly reduced.

B. Certified Issue II

I now would like to turn my attention to the second certified issue. Although I want to underscore from the outset the obvious point that my views are not binding on this Court, I believe it may be helpful to note the following: I conclude that (a) the NMCCA's decision in *Payton-O'Brien* properly held that M.R.E. 513 is still subject to the Constitution, and (b) in seeking to protect the accused's constitutional rights, the NMCCA did not improperly create court-made procedures and remedies. I briefly set forth my reasoning below.

First, the *Payton-O'Brien* case did not reinsert the "constitutionally required" exception that Congress and

the President expressly removed. This is apparent in the language of the opinion: "[A]ny application of the former Mil. R. Evid. 513(d)(8) constitutional exception. . . . would force us to ignore the plain language of the rule, the obvious intent of both Congress and the President, and binding precedent. We cannot." *Payton-O'Brien*, 76 M.J. at 787. However, the NMCCA in *Payton-O'Brien* did properly recognize an iron-clad fact: the Military Rules of Evidence cannot supplant or supersede the Constitution of the United States. *Id.* at 787-88. Accordingly, M.R.E. 513 cannot limit the introduction of evidence that is required to protect the constitutional rights of an accused during trial, such as under the Due Process Clause. *See United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (discussing the military's scheme of hierarchical rights with the Constitution as the highest source and noting that lower sources on the hierarchy may not conflict with a higher source); *see also Herbert v. Lando*, 441 U.S. 153, 175, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) ("[e]videntiary privileges . . . must give way in proper circumstances").

As a result of this fact, in each case a military judge must make an individualized determination of whether the constitutional rights of the accused outweigh the interests of the victim that are intended to be protected under M.R.E. 513. *See Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (A rule of evidence abridges the constitutional right to present a defense when the rule "'infring[es] upon a weighty interest of the accused' and [is] 'arbitrary' or 'disproportionate to the purposes [the rule is] designed to serve.'" (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct.

1261, 140 L. Ed. 2d 413 (1998))). I recognize that the Supreme Court in *Jaffee v. Redmond* "reject[ed] the balancing component of the [psychotherapist] privilege" by noting 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." 518 U.S. 1, 17, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). However, that pronouncement by the Supreme Court came in a *civil* case with respect to balancing privacy interests against an evidentiary need. In the context of the military justice system, this Court and the lower courts are concerned with the constitutional rights of an accused in a *criminal* case. *See Romano*, 46 M.J. at 274. The Supreme Court has not decided this issue. *See Swidler & Berlin v. United States*, 524 U.S. 399, 408 n.3, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998) (declining to answer whether piercing the attorney-client privilege is appropriate in "exceptional circumstances implicating a criminal defendant's constitutional rights"). Moreover—and this is an important point that I want to emphasize—if the NMCCA's *Payton-O'Brien* approach is followed, then *a victim's privileged material will never be disclosed without the consent of the patient/privilege holder*. Therefore, I believe *Payton-O'Brien* provided the appropriate framework concerning M.R.E. 513 and an accused's constitutional rights.

And second, it is true that the lower court in *Payton-O'Brien* set forth procedures and remedies that a military judge may employ when handling this type of issue, despite the fact that M.R.E. 513 is silent on this point. However,

it is an unremarkable proposition that courts must sometimes develop mechanisms to protect an accused's constitutional rights at trial if no mechanism is provided in applicable statutes or rules.[3] Otherwise, the accused's constitutional rights would be hollow.

Despite my views on these issues, I agree with the Court's majority opinion that we cannot provide the relief that the named victim seeks due to standing, ripeness, and mootness grounds. I therefore join the Court's opinion in full.

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3. This Court has created procedures and remedies when a statute or rule does not. *See*, *e.g.*, *United States v. Moreno*, 63 M.J. 129, 142-43 (C.A.A.F. 2006) (establishing prospective rules setting forth timelines for post-trial processing and identifying the remedies "depend[ing] on the circumstances of the case"); *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) (recognizing that servicemembers have a due process right to speedy appellate review and adopting factors to evaluate whether appellate delay violates an appellant's due process rights).

Judge SPARKS, with whom Judge JOHNSON joins, concurring.

I agree with the Court's disposition of this case. I write separately only to remind military trial judges that they have the tools available to them in the *Manual for Courts-Martial, United States*, to address the issues arising from a request for records of diagnoses or treatment plans of victim witnesses who have been or are being treated by a mental health provider. In *United States v. Mellette*, this Court held that "diagnoses and treatments contained within medical records are not themselves uniformly privileged under M.R.E. 513." 82 M.J. 374, 375 (C.A.A.F. 2022). The Court's majority went on to clarify that "documents that are not themselves communications may be partially privileged to the extent that those records memorialize or otherwise reflect the substance of privileged communications." *Id.* at 379.

Before pursuing a determination on a motion to compel records of diagnoses and treatment, the military judge must be mindful that, although such records might not be privileged, they touch upon a patient's medical privacy interests. Considering such interests, the military judge should first look to Rule for Courts-Martial (R.C.M.) 703(e)(1): "Each party is entitled to the production of evidence which is relevant and necessary." Thus, the party requesting production must first establish that the requested records exist and that they are relevant, not cumulative, and would contribute to the presentation of the party's case in some positive way on a matter in issue. R.C.M. 703(e)(1) Discussion. Assuming the defense can shoulder this burden, the military judge must determine

where the records are located and a process for obtaining them. At this point, it may not yet be known whether the records requested are partially privileged or not privileged at all as described in *Mellette*. The military judge may wish to consult the regulation of discovery guidance provided in R.C.M. 701(g)(2). There she may find authority to deny, restrict, or defer discovery or inspection of records "or make such other order as is appropriate." *Id.* Further, "upon motion by a party, the military judge may review any materials in camera, and permit [a] party to make a showing . . . in writing to be inspected only by the military judge in camera." *Id.*

This guidance suggests that the privilege holder, with the assent of a party, might simply ask the military judge to examine the health records to determine whether there are nonprivileged records of diagnoses and treatment. However, the hope would be to proceed in a manner that relieves the military judge of the burden of wading through what might be a high volume of mental health documents. Other, more efficient means might be available. For instance, the military judge may ask the parties and the privilege holder whether they can reach a stipulation of fact concerning any mental health diagnoses or treatment the patient may have received. In the alternative, the parties could be amenable to a stipulation of expected testimony of the therapist. Finally, the military judge could explore the parties' interest in developing interrogatories for the therapist.

It is not my intent to mandate how military trial judges should approach the issue of mental health records

in light of *Mellette*. Nor can I pretend to anticipate the innumerable issues that might otherwise arise in a given case. I simply wish to reiterate that, whatever process is decided upon, it should remain sensitive to the fact that mental health patients have a medical privacy interest beyond whether certain information is privileged.

APPENDIX B — OPINION OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS, FILED JUNE 14, 2023

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

No. 202300050

In Re B.M.,

Petitioner,

UNITED STATES,

Respondent,

Dominic R. BAILEY, Lieutenant Commander (O-4),
U.S. U.S. Navy,

Real Party in Interest.

Decided June 14, 2023

Before MYERS, HACKEL, and KISOR Appellate Military Judges. Senior Judge MYERS delivered the opinion of the Court, in which Senior Judge HACKEL and Senior Judge KISOR joined.

PUBLISHED OPINION OF THE COURT

MYERS, Senior Judge:

The real party in interest [RPI], Lieutenant Commander [LCDR] Dominic R. Bailey, U.S. Navy, is charged in the general court-martial, *United States v.*

LCDR Dominic R. Bailey, U.S. Navy, with violating Articles 120 and 128, UCMJ.[1] Pursuant to facts that form the basis of this Petition for Extraordinary Relief, the military judge abated the proceedings.

On 1 February 2023, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Stay of Proceedings. Petitioner seeks a Writ of Mandamus ordering the military judge to seal or destroy all of Petitioner's mental health records, and a Writ of Mandamus directing the military judge to recuse herself from the court-martial proceedings because of actual and implied bias, and to reinstate this case to trial with a new military judge.

On 12 April 2023, this Court ordered the United States to answer the following questions: (1) Does the United States oppose the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, and if so, why?; and (2) Did the United States provide timely notice of appeal to the military judge's order abating the case in accordance with Article 62, UCMJ?[2] At the same time, we granted the RPI leave to file a response to the Government's answer. On 3 May 2023, Respondent filed its response, opposing the Petition for Extraordinary Relief, and answering the second question in the negative.

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1. 10 U.S.C. §§ 920, 928.

2. Order Directing Respondent United States to Address Certain Matters, dtd 12 April 2023.

Appendix B

I. Background

The RPI was charged with abusive sexual contact and assault consummated by a battery for offenses allegedly committed upon Petitioner. The military judge presided over this and all subsequent sessions of court.

On 31 August 2022, detailed defense counsel requested Petitioner's mental health treatment records. The request sought among other things:

> (11) Any evidence that any potential witness sought or received mental health treatment, including specifically the mental health treatment records of the complaining witness [Petitioner] including records of any diagnosis or prescribed medications before or after the offense.
>
> (a) This request also includes mental health diagnoses and prescription medications that the [Petitioner] had prior to or during the alleged offense as well as any mental health treatment records pertaining to the allegations asserted and treatment discussed in [Petitioner's published autobiographical book].[3]

Trial counsel responded on 21 September 2022, denying the records pertaining to Petitioner's autobiography as

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3. Defense Discovery Request dtd 31 Aug 2022; Petitioner's Br. at Attachment B, 9.

"irrelevant,"[4] and agreeing to produce the other records so long as Petitioner turned the documents over to trial counsel. Petitioner did not turn over the records to trial counsel.

On 28 November 2022, civilian defense counsel [CDC] filed a motion to compel production of Petitioner's mental health records, again seeking her diagnoses and treatment records. CDC sought (1) any records of any diagnosis and prescription medications that Petitioner had prior to or during the time of the alleged offenses; and (2) any records related to mental health treatment she has had "following this case."[5] CDC argued that because trial counsel did not deny the request on the grounds of psychotherapist-patient privilege, that Military Rule of Evidence [Mil. R. Evid.] 513 did not apply.

Several weeks later, the military judge held an Article 39(a), UCMJ, hearing to adjudicate the RPI's request. Over Petitioner's Special Victims' Counsel's [SVC] objection, Petitioner was ordered to testify.[6] She was questioned about her mental health treatment, specifically,

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4. Defense Motion to Compel Production of Evidence (citing Mental Health Diagnoses/Treatment records dtd 28 Nov 2022); Petitioner's Br. at Attachment E, 1.

5. It is unclear what timeframe the RPI's attorney was referring to by requesting medical records "following this case" as the case is still ongoing.

6. Special Victims' Counsel "represent[] the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." 10 U.S.C. § 1044e(b)(6).

names, dates, and treatment facilities she used before, during, and after the alleged assaults. At the conclusion of the hearing, under the authority found in Rule for Courts-Martial [R.C.M.] 703, the military judge ordered the production of Petitioner's mental health records for an *in camera* review, expressly limiting the order to just diagnosis and treatment records in accordance with *United States v. Mellette*.[7]

On 4 January 2023, the military judge ordered the mental health treatment facility to produce Petitioner's mental health records containing her mental health diagnosis, prescriptions and treatments. Prior to signing the order, the military judge submitted it for review and approval to SVC, trial counsel (who drafted the order), and civilian defense counsel. The military judge specifically ordered the following:

> **[T]he appropriate records custodian at the [mental health clinic] SHALL deliver to the Court a copy of all written mental or behavioral health records for [Petitioner] from 15 January 2022 to the present ONLY to the extent those records reflect:**
>
> Any mental/behavioral health diagnosis or list thereof;
>
> Any mental/behavioral health prescriptions for medication or list thereof; and

7. *United States v. Mellette*, 82 M.J. 374, 379 (C.A.A.F. 2022).

Appendix B

> Any prescribed mental/behavioral health treatment or list thereof.
>
> It is requested that the review for responsive material be conducted by a health care professional who has training in mental or behavioral health.
>
> The appropriate records custodian SHALL NOT provide any portion of a written mental or behavioral health record that memorializes or transcribes actual communications made between the patient and a psychotherapist or assistant to the psychotherapist. The custodian of records shall produce only records containing no actual communications and indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescriptions, and/or treatment, and the date the diagnosis was resolved, if applicable. The records custodian is authorized to produce records which have been partially reacted consistent with this Order.[8]

Upon receipt of the records, the military judge recognized that "directly contrary to the court's order, the clinic included in its response materials encompassed by Mil. R. Evid. 513,"[9] and emailed all counsel. The military judge inquired with SVC whether Petitioner continued to assert psychotherapist-patient privilege and was

8. Appellate Ex. XXXIII at 2.

9. Appellate Ex. XXXV at 2.

informed that Petitioner did not waive the privilege.[10] The military judge highlighted what she believed to be privileged psychotherapist-patient communications and provided the records *ex parte* to SVC for review. The military judge then shared with trial and defense counsel the psychotherapist records that she redacted and were therefore not covered by the Mil. R. Evid. 513 privilege, and sealed the original, un-redacted psychotherapist-patient records. The military judge noted that in her review, she encountered what she believed to be privileged records that must be produced to RPI.

In accordance with this Court's guidance in *J.M. v. Payton-O'Brien*,[11] the military judge determined that the privileged records were "constitutionally required to guarantee the accused a meaningful opportunity to present a defense"[12] because of "possible memory confabulation or conflation as a result of [her] past abuse"[13] and "highlighting multiple inconsistencies in [her] account of the assaults."[14]

The military judge noted that the privileged information was inadvertently disclosed to the military judge, which did not waive Petitioner's privilege.[15] She

10. Appellate Ex. XXXV at 1.

11. *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017).

12. Petitioner's Br. at 14 (quoting military judge's order).

13. *Id.*

14. *Id.*

15. Mil. R. Evid. 510, 511.

learned of the privileged information due to the mental health clinic's failure to comply with her order while she was attempting to review the information in accordance with *Mellette*. She informed SVC that should Petitioner continue to assert privilege (as was her right to do), then the military judge must abate the proceedings. The military judge ordered SVC to respond regarding whether Petitioner "will waive her privilege as to the highlighted items, understanding that the release of those items to the Defense will likely prompt additional [Mil. R. Evid.] litigation" and whether the SVC agreed with the military judge's identification of unprivileged matters under *Mellette*. SVC responded by asking the military judge for reconsideration, and argued that the military judge violated Petitioner's constitutional and statutory right to privacy by improperly reviewing her medical records, by (1) ordering the release of Petitioner's mental health records without a showing of necessity under R.C.M. 703; and (2) failing to perform a complete Mil. R. Evid. 513 analysis before conducting an *in camera* review. SVC also argued that the military judge should recuse herself due to her "clear errors,"[16] and that the military judge displayed actual and implied bias by erroneously compelling and reviewing privileged communications. The next day, after a brief R.C.M. 802 conference with defense counsel, SVC, and trial counsel, the military judge abated the proceedings and ordered sealed the records from the mental health facility.[17] SVC filed a motion to reconsider

16. Petitioner's Br. at 16.

17. The military judge did not set a timeline for dismissing the abated case should B.M. not agree to release the privileged records. In cases that are abated, military judges should consider setting a

the military judge's abatement order, for appropriate relief requesting that the military judge recuse herself, notice of intent to file petition for extraordinary relief, expedited written order, and a request for stay. The military judge denied SVC's motion.

II. Discussion

"As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue."[18] First, there is no other adequate means to attain the relief desired; second, the right to issuance of the writ is clear and indisputable; and third, the issuing court, in its discretion, must be satisfied that the issuance of the writ is appropriate under the circumstances. [19]

Petitioner argues that the writ should be granted because the military judge erred by: (1) failing to perform

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timeline upon which cases will be dismissed with or without prejudice if the circumstance causing the abatement is not resolved instead of abating indefinitely, so as to ensure the due process rights of the accused servicemembers are not violated. *J.M. v. Payton-O'Brien* outlined the many remedies available to military judges in cases such as this, and in those cases where abatement is appropriate, the military judge should consider abating the proceedings permanently or for a time certain. In this case, the Government has neither appealed the military judge's abatement order under Article 62, UCMJ (*see United States v. True*, 28 M.J. 1 (C.M.A. 1989), nor withdrawn the referred charges.

18. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (internal citations and quotation omitted).

19. *Id.* at 380-81 (internal citations omitted).

a full analysis under Mil. R. Evid. 513 prior to performing an *in camera* review of Petitioner's mental health records; (2) compelling Petitioner to testify, and requesting her mental health records when defense had not established that the records were relevant or necessary in accordance with R.C.M. 703; (3) abating the proceedings based on a Mil. R. Evid. 513 remedy in response to a R.C.M. 703 production request; (4) relying on the holding in *Payton-O'Brien* to find that the Constitution pierced Petitioner's Mil. R. Evid. 513 privilege; and (5) failing to recuse herself because of her actual and implied bias.

A. Petitioner seeks a writ of mandamus sealing or destroying Petitioner's mental health records that Petitioner argues were erroneously compelled and improperly viewed.

1. The military judge unintentionally and inadvertently reviewed privileged material under Mil. R. Evid. 513.

We consider the review of privileged material under Mil. R. Evid. 513 de novo because it is a question of law.[20]

The right of a crime victim to keep confidential his or her psychotherapist records was adjudicated in *United States v. Mellette*, which stemmed from a request of the accused to view the victim's psychotherapist records, specifically, medical records that disclosed the victim's diagnosis and treatment. These records were made relevant when the victim disclosed she had spent time in

20. *LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013).

a mental health facility at a deposition unrelated to the court-martial. The Appellant requested to view these records, and the Court of Appeals for the Armed Forces [CAAF] disagreed. CAAF noted that, "when interpreting [Mil. R. Evid.] 513, we must also account for the Supreme Court's guidance that 'testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence' and our own view that 'privileges run contrary to a court's truth-seeking function.'"[21] The CAAF held that "based on the plain language of Mil. R. Evid. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under Mil. R. Evid. 513."[22] The CAAF reasoned that the documents sought by *Mellette* involved critical issues of credibility and reliability, so they should have been admitted by the trial judge. *Mellette* specifically addressed whether treatment records, diagnoses, and even dates of treatment were privileged records under Mil. R. Evid. 513, and CAAF clearly held that "[t]hese documents were not protected from disclosure by Mil. R. Evid. 513(a), and as noted by the NMCCA, they involved key areas of concern that 'go to the very essence of witness credibility and reliability—potential defects in capacity to understand, interpret, and relate events.'"[23]

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21. *Mellette*, 82 M.J. at 377 (quoting *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) and *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013)).

22. *Id.* at 375.

23. *Id.* at 381.

Appendix B

In the present case, the military judge's request to the mental health facility articulated the records to be produced, which were "...only records containing no actual communications *and* indicating a diagnosis, medication, and/or treatment, the date of diagnosis, prescriptions, and/or treatment, and the date the diagnosis was resolved, if applicable."[24] The military judge was not seeking privileged information under Mil. R. Evid. 513, and the mental health treatment facility's inclusion of those privileged records was not attributable to the military judge, but to the mental health facility's apparently imprecise response to her request. The records received were not erroneously compelled.

The Article 39(a) session held to address defense counsel's motion to compel the medical records articulated two possible theories for why the record might be relevant and necessary under R.C.M. 703(e)(1): (1) possible memory confabulation or conflation due to Petitioner's past abuse; and (2) inconsistencies in Petitioner's account of the alleged assault. When the military judge received the records and recognized potential Mil. R. Evid. 513 material, she attempted to limit her review to non-privileged diagnoses, medications, and treatments in accordance with *Mellette* but nonetheless recognized and identified privileged material.[25] She found that this privileged material contradicted Petitioner's Article 39(a) testimony, and pertained to Petitioner's "inability

24. Appellate Ex. XXXIII at 2 (underline original).

25. Appellate Ex. XXXIV.

to accurately perceive, remember, and relate events."[26] In light of these findings, the military judge notified Petitioner's SVC that Petitioner retained the privilege, but if Petitioner asserted the privilege, the court would abate the proceedings.

When a military judge inadvertently encounters material privileged under Mil. R. Evid. 513(e)(2), the military judge should cease his or her review, and conduct a hearing as contemplated in Mil. R. Evid. 513(e). Alternatively, the military judge should order a taint team to review the records for privileged material and redact them.[27] Here, the military judge did neither, and chose to redact the records herself. The military judge continued reviewing the privileged materials, and in doing so, may have violated the procedures set forth in Mil. R. Evid. 513(e)(2), which outlines the procedures to be used when a party seeks a patient's psychotherapist records or communications. Violations of Mil. R. Evid. 513 can result in prejudice to victims by compromising their privacy and credibility, all while undermining their trust in our legal system.[28]

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26. Appellate Ex. XXXIV at 2 (quoting *Payton-O'Brien*, 76 M.J. at 788-789).

27. We also note that SVC could have provided the redacted records to the Court, redacting the records of any privileged material asserted by their client, but apparently the SVC elected not to do that in this case.

28. *See* Dep't of Def. Instr. 6495.02, *Sexual Assault Prevention and Response: Program Procedures*, at 49 (Mar. 28, 2013) [DoDI 1325.4] (emphasizing the importance of victims' perception of the military justice system).

Appendix B

Mil. R. Evid. 513(e)(2) requires that before ordering the production of the records or before admitting the records into evidence, the military judge *must* conduct a closed hearing in which witnesses, including the patient, may be called to testify. If reviewing the records is necessary to determine whether the records should be produced or are admissible, the military judge may review the records *in camera* as long as the moving party can meet four criteria by a preponderance of the evidence:

> A. A specific 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.[29]

CDC argued that the medical records requested were not covered by Mil. R. Evid. 513, but at the outset of the Article 39(a) hearing, the military judge made it very clear that the material RPI requested *was* covered by Mil.

29. Mil. R. Evid. 513(e)(3)(A)-(D).

R. Evid. 513, "...I review your motion to compel mental health records as a motion under [Mil. R. Evid.] 513 because I don't see any way you don't view it that way."[30] CDC disagreed with the military judge's conclusion, but was reminded that the request was far greater than simply mental health records; the request ventured into privileged information. In fact, 17 pages of argument between civilian defense counsel, the military judge, and SVC were dedicated to deciding whether this was or was not a Mil. R. Evid. 513 motion, and whether SVC could argue before the court.[31] Later, upon request from the military judge, CDC provided a list of the information sought from Petitioner. The military judge determined this list did not appear to contain privileged information under *Mellette* and although this ultimately was not a Mil. R. Evid. 513 hearing, Petitioner's testimony was closed to the public.

Petitioner now demands a writ of mandamus because the military judge erroneously compelled and improperly viewed Petitioner's privileged records. Petitioner argues that because a Mil. R. Evid. 513 hearing was not held, the military judge's receipt and review of Petitioner's privileged information violated her constitutional and statutory rights to privacy such that the records must be sealed.[32] We disagree. We find the military judge

30. R. at 29.

31. R. at 55-72.

32. Petitioner argues, "An order compelling a medical or mental health facility to turn over a victim's privileged medical and mental health records that exceeds the scope of the military judge's lawful

did not erroneously compel Petitioner's mental health records, and in fact ordered the records after a R.C.M. 703 hearing to address the relevance and necessity of the non-privileged records. The error lies with the mental health facility in releasing the complete mental health file. We find that the military judge inadvertently reviewed the privileged material, and because the records are now sealed in accordance with the military judge's order, we find no further remedy is necessary. We evaluate the merits of the writ of mandamus request below.

2. Compelling Petitioner to testify and requesting her non-privileged mental health records was not an abuse of discretion.

We review a military judge's discovery rulings for abuse of discretion, which calls for "more than a mere difference of opinion."[33] "Instead, an abuse of discretion occurs 'when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[34]

Petitioner argues that the Constitution guarantees the right to privacy in her mental health records, and

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authority is patently unreasonable and unconstitutional." Petitioner's Br. at 21.

33. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (quoting *United States v. Wicks*, 73 M.J. 93, 93 (C.A.A.F. 2014)).

34. *Stellato*, 74 M.J. at 480 (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

the military judge violated that right by ordering the release of her mental health information. Petitioner cites cases that hold the Fourth and Fifth Amendments of the Constitution protect her from unreasonable searches and seizures, that the military judge's order compelling Petitioner's mental health records exceeded the scope of the military judge's authority and was patently unreasonable and unconstitutional, violates the *Crime Victims' Rights Act* [CVRA], and *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs* [DoD HIPAA Manual].[35] These arguments were made before the trial court in a motion filed by Petitioner, who argued then, as now, that her right to fairness, respect and privacy, as granted to crime victims in Article 6b, UCMJ, was violated.[36] We note initially a slight correction

35. *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs*, DoD Manual 6025.18, dtd 13 Mar 2019. Petitioner's reliance on the CVRA and the DoD HIPAA Manual for the proposition that a crime victim, as defined by the CVRA, has rights greater than the Constitutional rights of an accused at trial is inaccurate. Furthermore, CVRA is inapplicable to members within the military justice system, as "crime victim" is defined as "a person directly ad proximately harmed as a result of the commission of *Federal offense* or an offense in the District of Columbia." 18 U.S.C. 3771(e)(2) (emphasis added). UCMJ offenses are not typically considered federal offenses. The psychotherapist records at issue were not under the control of the Department of Defense, thus the DoD HIPAA Manual is similarly irrelevant. But to be clear, the DoD HIPAA Manual grants the release of protected health information pursuant to a court order. DoD Manual 6025.18 § 4.4e(1)(a).

36. *Kastenberg* states, "While M.R.E. 412(c)(2) or 513(e)(2) provides a 'reasonable opportunity . . . [to] be heard,' including

to counsel and admonish them that the right to privacy is not an enumerated right; Article 6b(a)(8) states, "The right to be treated with fairness and with respect *for* the dignity and privacy of the victim of an offense under this chapter."[37] The right is for fairness and respect; the word "for" is a preposition that shows the relationship of *fairness and respect* to *dignity and privacy.* Article 6b

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potentially the opportunity to present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel, this right is not absolute. A military judge has discretion under R.C.M. 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. Furthermore, M.R.E. 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel, or any right to appeal an adverse evidentiary ruling. If counsel indicates at a M.R.E. 412 or 513 hearing that the victim or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed." *Kastenberg*, 72 M.J. at 371.

Trial defense counsel's motion in response to SVC's trial court filing quoted CAAF as stating, "There is no mention whatsoever of lower Courts and complaining witnesses' standing therein," and "just because Congress gave complaining witnesses the ability to seek a writ of mandamus in higher courts, they likewise have standing to 'raise corresponding issues first in the lower Court is a bridge too far, and unsupported by any legal authority." Appellate Ex. XXVII at 12. Civilian defense counsel at trial claims this quoted language came from *Randolph v. HV*, 76 M.J. 27 (C.A.A.F. 2017), yet this Court cannot find this quoted language anywhere. We caution counsel that deliberately misrepresenting cases (or language from cases) before our courts places them at risk of violating professional responsibility rules.

37. Article 6(b), UCMJ.

does not grant a crime victim the right to privacy, though it does grant them the right to be treated with fairness and respect *for* their dignity and privacy.

The arguments made above were also made in *In re AL*, adjudicated by our sister court, the Air Force Court of Criminal Appeals [AFCCA], but there were a few notable differences.[38] *In re AL* pertained to trial counsel's request for, and ultimate receipt of, AL's medical treatment records from the local military treatment facility. The 575 un-redacted pages were turned over to trial counsel, including 42 pages of Family Advocacy Program [FAP] records which contained psychotherapist records. Trial defense counsel filed a motion to compel those medical records pursuant to R.C.M. 701, and the military judge ordered trial counsel to produce all 575 pages to the Defense, without an in camera review to determine their relevance. The special victims' counsel requested a stay of proceedings from AFCCA and filed a writ of mandamus like the one at issue here. Before the Appellate Court, the petitioner argued that trial counsel had violated: (1) her right to fairness and respect for dignity and privacy as granted in Article 6b(a), UCMJ; (2) her constitutional right to privacy; (3) HIPAA; (4) DoDM 6025.18; and (5) Mil. R. Evid. 513 and 514.

The AFCCA recognized that the victim's right to privacy "is not absolute and 'must be weighed against the [G]overnment's interest in obtaining the records in

38. *In re AL*, 2022 CCA LEXIS 702 (A.F. Ct. Crim. App. Dec. 7, 2022) (unpublished), quoting *In re Grand Jury Subpeona*, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002) (citations omitted).

particular circumstances.'"[39] The Court also observed that HIPAA allows the release of private health information "to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law"[40] as does DoD Manual 6025.18.[41] AFCCA next addressed Mil. R. Evid. 513 and 514,[42] and held "[t]he core privilege established by Mil. R. Evid. 513(a) broadly empowers a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure." [43] This resulted in the Court granting in part and denying in part the petitioner's writ of mandamus, returning the matter of the privileged documents covered by Mil. R. Evid. 513 to the trial judge.

The present case deals with R.C.M. 703, not R.C.M. 701. Petitioner has made her mental health an issue for RPI to at least consider, by virtue of the fact she has published an autobiography about past abuses and discussed on at least one podcast her prior involvement

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39. *Id.* at *14 (quoting *In re Grand Jury Subpoena*, 197 F. Supp. 2d at 514).

40. 45 C.F.R. § 164.512(a)(1).

41. We note again that for the purposes of this case, the DoDM is not relevant.

42. As Mil. R. Evid. 514 is not at issue in the present case, we will not discuss AFCCA's analysis on this topic.

43. *In re AL*, 2022 CCA LEXIS 702 at *21.

with mental health providers.[44] When queries for information from civilian defense counsel to SVC via trial counsel were rebuffed by SVC, defense counsel is left with no recourse but to request her testimony at an Article 39(a) hearing to determine whether there are any mental health records that relate to defense counsel's query. Petitioner believes that by requiring Petitioner to testify at the Article 39(a) relating to the R.C.M. 703 motion, the military judge allowed a "fishing expedition in the extreme."[45] Petitioner's motion argues that the military judge "indisputably erred by compelling [Petitioner] to testify where the Defense, at best, merely speculated that evidence regarding diagnosis and treatment even existed."[46] Under these unique set of facts, Petitioner must recognize that the holder of the information sought by defense counsel is Petitioner, thus almost any query is speculative until Petitioner confirms or denies the existence of such information. Since Petitioner rebuffed defense counsel's written queries, the military judge directed Petitioner to testify. Similarly, the military judge also did not know whether there existed mental health diagnosis and treatment evidence related to the offense

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44. The trial court learned at the Article 39(a) hearing at which Petitioner was ordered to testify, that Petitioner did not actually seek mental health treatment as outlined in her book and on at least one podcast, though she was seeking mental health treatment after RPI's alleged assault on her.

45. Petitioner's Br. at 29 (quoting *United States v. Morales*, 2017 CCA LEXIS 612, at *8 (A.F. Ct. Crim. App. Sep. 13, 2017) (unpublished).

46. Petitioner's Br. at 29.

RPI was charged with, so the military judge reasonably compelled Petitioner's testimony (and it was compelled because Petitioner did not volunteer the information). Petitioner's tautological reasoning that defense counsel had no grounds to request such information because he did not know whether such evidence existed, which was made relevant because of Petitioner's purported childhood trauma counseling, gives even greater reason to compel Petitioner's testimony. Petitioner's reliance on Article 6(b) for granting a right of privacy such that victims of crimes are not required to testify at motions hearings about non-privileged matters such as the identity and location of mental health providers is misplaced.

At the Article 39(a) session, SVC objected to the testimony of the Petitioner, to which the military judge responded, "...your client like any other witness in a court-martial is subject to be compelled to testify in an Article 39(a). In contrast to Article 32's, she does not have the right to refuse. So...if she has non-privileged information that...would support the defense motion [to compel non-privileged records] then she can be requested by the defense and if relevant and necessary...for the purposes of the motion...she can be compelled to testify."[47] The military judge did not abuse her discretion when she ordered Petitioner to testify regarding the existence of mental health records, and the names of any providers. We note that Petitioner could have foregone testifying had Petitioner simply provided this non-privileged, relevant and necessary information to trial counsel.

47. R. at 227.

We also find that the military judge did not abuse her discretion when she ordered the mental health clinic to release Petitioner's medical records. The military judge's order was narrowly tailored so as to avoid Mil. R. Evid. 513 evidence and was reasonable given the circumstances. In fact, SVC reviewed and approved of the order prior to its issuance. In both instances (ordering the testimony of Petitioner and ordering the release of mental health information), the military judge's findings of fact were not erroneous, were not influenced by an erroneous view of the law and were within the range of choices reasonably arising from the applicable facts and law.

3. The military judge did not abuse her discretion when she abated the proceedings.

Petitioner argues that the military judge's abatement of the trial was "clear and indisputable error"[48] because she followed the remedy outlined in *J.M. v. Payton-O'Brien*.[49] Petitioner argues that because a hearing pursuant to Mil. R. Evid. 513 did not occur, abating the trial was an improper procedural remedy. We disagree. To analyze the military judge's abatement order, we consider whether she abused her discretion.[50]

Mil. R. Evid. 513(e)(2) provides, "Before ordering the production or admission of evidence of a patient's

48. Petitioner's Br. at 30.

49. *See Payton-O'Brien*, 76 M.J. at 792.

50. *See United States v. Monroe*, 42 M.J. 398 (C.A.A.F. 1995); *United States v. Ivey*, 53 M.J. 685 (A. Ct. Crim. App. 2000).

records or communication, the military judge must conduct a hearing, which shall be closed." This provides an opportunity for victims to challenge the potential release of privileged information, but this provision does not create a right of action for victims to challenge abatement proceedings. Here, Petitioner continues to assert privilege over the records at issue, thus preventing the release of the records. The military judge is not ordering the production or admission of Petitioner's privileged records, therefore there is no requirement for a hearing, a matter that was mooted by the military judge's finding that the records contained privileged information that Petitioner declined to waive.

As the military judge was reviewing what she reasonably believed to be non-privileged healthcare information, she recognized the inclusion of Mil. R. Evid. 513 evidence.[51] She notified SVC, who then asserted Petitioner's privilege. Petitioner argues that a hearing should have been conducted at that point. But, because the military judge had already reviewed the privileged information, a hearing would have been futile. It was unnecessary at that point because the military judge had already concluded the information was in fact privileged, the information was such that its deprivation would harm the RPI such that a constitutional violation would

51. We reiterate that not all health care material is privileged. "Based on the plain language of Mil. R. Evid. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under Mil. R. Evid. 513." *Mellette*, 82 M.J. at 375.

occur, and Petitioner later stated she was not waiving the privilege. It is very clear that defense counsel had no idea what the privileged records contained; therefore, conducting a hearing in which defense counsel could not make a showing under Mil. R. Evid. 513(e)(3)(A)-(D) would be ineffective. The military judge could not disclose the privileged information to defense counsel so as to make a Mil. R. Evid. 513(e) hearing fair to the accused, because the constitutional exception was eliminated from the rule. The state of the case is such that the military judge had privileged information that she believed to be exculpatory, but she had no lawful way to share that material with the accused.

Petitioner invites this Court to remedy the wrongs she finds in *Payton-O'Brien*. Petitioner asserts, "[t]he Military Judge clearly and indisputably erred by relying on the unenumerated constitutionally-required exception in its analysis. Before returning this matter to a military judge, this Court should overturn [*Payton-O'Brien*] to prevent additional Article 6b, U.C.M.J. violations and resolve the conflict in the service courts of criminal appeal."[52] Petitioner argues that *Payton-O'Brien* stands for the proposition that "the constitutionally-required exception is still a viable basis to pierce the privilege." We do not share Petitioner's view that *Payton-O'Brien* was wrongly decided and poorly reasoned, and in fact take the opportunity to build upon what we believe to be sound legal footing.

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52. Petitioner's Br. at 30.

Appendix B

All statutes and regulations are subject to the Constitution. "...[W]e may not allow the [Mil. R. Evid. 513] privilege to prevail over the Constitution. In other words, the privilege may be absolute outside the enumerated exceptions, but it must not infringe upon the basic constitutional requirements of due process and confrontation."[53] As CAAF noted in *Beauge* at footnote 10, the matter of the removal of the constitutional exception from the list of enumerated exceptions in Mil. R. Evid. 513(d) has created disagreement among the Courts of Criminal Appeal.[54] CAAF did not resolve the matter in *Beauge* as it was not needed to decide the case, but the Court did state, "[t]he right to cross-examine a witness for impeachment purposes has constitutional underpinnings because of the right to confront witnesses under the Sixth Amendment and the due process right to present a complete defense. And, in *certain instances*, the psychotherapist-patient privilege seemingly trumps an accused's right to fully confront the accuracy and veracity of a witness who is accusing him or her of a criminal offense."[55] CAAF did not say that in *all* instances, the psychotherapist-patient privilege trumps an accused's right to fully confront his or her accusers. CAAF then tempers this language by quoting the Supreme Court's decisions in *Pennsylvania v. Ritchie* , which held the Sixth Amendment right "to question adverse witnesses...does not include the power to require pretrial disclosure of any and all information that

53. *Payton-O'Brien*, 76 M.J. at 787.

54. *United States v. Beauge*, 82 M.J. 157, 167 fn. 10 (C.A.A.F. 2022).

55. *Id.* at 167 (emphasis added).

might be useful in contradicting unfavorable testimony,"[56] and *Holmes v. South Carolina*, which held that only rules which "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purpose they are designed to serve" will be held to violate the right to present a complete defense[57]. We are left with the precedent in *Payton-O'Brien*, and the guidance provided to us by CAAF in *Beauge*.

In the present case, although the military judge did not reference *Pennsylvania v. Ritchie*, it appears that she determined that the privileged information is more than simply helpful information that might be useful in contradicting unfavorable testimony (the *Pennsylvania v. Ritchie* standard), the denial of which would "infringe upon a weighty interest of the accused" (the *Holmes v. South Carolina* standard). The facts here are admittedly unique. In RPI's motion to compel Petitioner's mental health records, RPI included an affidavit for the military judge from RPI's forensic psychologist in which the forensic psychologist requested all of Petitioner's mental health records.[58] The basis for the request outlined Petitioner's

56. *Id.* (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)).

57. *Id.* (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

58. Appellate Ex. VIII. The request also sought "therapist notes, prescription history, treatment history, diagnoses, and any other encounter notes in order to assess [Petitioner's] memory, perceptions, and credibility and otherwise assist in case preparation." Appellate Ex. XXVIII at 1. Clearly, some records sought were privileged under Mil. R. Evid. 513.

"publications and interviews by [Petitioner] indicat[ing] that she has engaged in mental health treatment in the past and experienced significant psychiatric symptoms for many years."[59] The forensic psychologist outlined Petitioner's history of flashbacks as discussed in her autobiography; instances "where they lose touch with reality and feel as if they are outside of their body, leading to an altered or inaccurate perception of events," specifically related to bathrooms.[60] "[I]n her book, [Petitioner] describes multiple traumatic memories tied to the bathroom and ascribes significant anxiety to using the bathroom," and the allegations levied by Petitioner against RPI also allege that RPI pounded on the bathroom door, requesting she hurry up, while Petitioner brushed her teeth.[61] Shortly thereafter, one of the two alleged assaults occurred.[62] The relationship between the current allegation and past abuses was strong enough to support at least an exploration of conflation, a defense theory made prior to the military judge requesting the mental health records. It is against this backdrop that RPI requested Petitioner's mental health records.

Appellant argues that *Beauge* prohibits piercing the Mil. R. Evid. 513 privilege, and we agree that the privilege cannot be pierced outside of the enumerated exceptions. Appellant argues that our sister courts disagree with the holding in *Payton-O'Brien*, and that we should overrule it

59. Appellate Ex. XXVIII at 1.

60. Appellate Ex. XXVIII at 2.

61. Appellate Ex. XXVIII at 2.

62. Appellate Ex. IV at 12.

so as to be in alignment. Petitioner cites to several ACCA cases that held that there was not a constitutional exception to Mil. R. Evid. 513. In *United States v. McClure*, ACCA held that the accused was unable to show how the victim's mental health records were relevant and did not order the production of the records.[63] In that case, defense counsel argued that the Victim's discussion of her diagnoses with a Sexual Assault Nurse Examiner [SANE] waived any Mil. R. Evid. 513 privilege under Mil. R. Evid. 510's waiver provision. ACCA held that there was no constitutional right that would pierce the Mil. R. Evid. 513 privilege, but the Court limited its analysis to the Sixth Amendment's right to confrontation; the Court did not address other constitutional protections.

In *United States v. Tinsley*, ACCA addressed the Sixth Amendment's right to confrontation, but also addressed whether denying the disclosure of mental health records could be a *Brady* violation.[64] Ultimately, the *Tinsley* court held, "[i]n conclusion, because there is no requirement to recognize an exception to the psychotherapist-patient 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)."[65]

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63. *United States McClure*, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sep. 2, 2021) (unpublished).

64. *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021).

65. *Id.* at 853.

Appendix B

Although the discussion below highlights how our courts are not as divided as they may be perceived to be, it is critical here to at least mention that rarely are psychotherapist-patient records as material as they are in the present case. This fact alone distinguishes the present matter from *McClure* and *Tinsley*, cases in which the relevance of the requested records could not be established by the accused. It is a unique situation indeed where a victim has shared so much past personal medical history in a public space (although later determined to be false), such that an accused can make a valid, substantiated, and targeted request without ever speaking with the victim. As outlined above, Petitioner here levied allegations against RPI that clearly made her mental health status an issue of exploration for RPI. It is no surprise at all that the military judge ordered production of the non-privileged records in light of RPI's strong showing of necessity and relevance, which was entirely based on information pulled from the public realm. Petitioner's recantations under oath in which she denied mental health treatment for her childhood abuse only confuse the issue more and make her current mental health records all the more relevant.

To narrow the issue before this Court, there is no argument that the privilege may only be pierced based on one of the exceptions found in Mil. R. Evid. 513(d)(1)-(7); the disagreement surrounds what should happen when the assertion of the privilege conflicts with an accused's constitutional rights to due process and/or confrontation. The issue in the present case is not whether the privilege can be pierced (it cannot, outside of the enumerated exceptions), the question is what happens once the

privileged material is determined to contain evidence that must be turned over to the accused in order to protect his or her constitutionally-guaranteed rights. The question, then, is one of remedy.

The holding in *Payton-O'Brien* is "a military judge may not order production or release of Mil. R. Evid. 513 privileged communications when the privilege is asserted by the holder of the privilege unless the requested information falls under one of the enumerated exceptions to the privilege listed in Mil. R. Evid. 513(d). However, when the failure to produce said information for review or release would violate the Constitution, military judges may craft such remedies as are required to guarantee a meaningful opportunity to present a complete defense."[66] Therefore, the issue lies not in piercing the privilege, but the remedy to be applied should the military judge find that failure to waive the privilege reaches Constitutional proportions.

The military judge did not abuse her discretion when she ordered Petitioner's mental health records for in camera review, and the military judge did not abuse her discretion when she abated the trial in light of information learned while reviewing the records over which Petitioner asserted a privilege. Her inadvertent review of privileged material did not, in any respect, waive Petitioner's privilege,[67] but it did alert the military judge to the fact that the records contained evidence of

66. *Payton-O'Brien*, 76 M.J. at 783.

67. *See* Mil. R. Evid. 510, 511.

both confabulation and inconsistent statements made by Petitioner which would be constitutionally required to be produced because the records were exculpatory under *Brady* and its progeny. In accordance with the guidance found in *Payton-O'Brien*, we find that the military judge's decision was within the range of choices reasonably arising from the applicable facts and the law.

B. Petitioner seeks a writ of mandamus directing the military judge to recuse herself from the court-martial because of actual and implied bias.

Although this matter is not ripe for consideration because the case is abated, we will address whether the military judge should have recused herself prior to abating the proceeding.

A military judge's decision whether to recuse herself is reviewed for an abuse of discretion.[68] Petitioner argues that the military judge failed to "treat[] [Petitioner]] with fairness and with respect for [her] dignity" under Article 6b(a)(8), U.C.M.J., because the military judge did not recuse herself for actual and implied bias under R.C.M. 703. Petitioner made this request of the military judge after the military judge reviewed the privileged records and found them to be constitutionally required in RPI's defense. The military judge then provided the privileged records to SVC via an ex parte order, noting that if Petitioner asserted the privilege, the military judge

68. *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015).

"must abate the proceedings."[69] SVC asserted privilege on Petitioner's behalf and filed a motion with the military judge to reconsider the ex parte order and to recuse herself. If neither request were to be granted, Petitioner informed the trial court that she would file a writ of mandamus with this Court. The military judge responded to Petitioner's motion by abating the proceedings.

Petitioner argues that the "military judge's decision to improperly review privileged communications and deem them releasable under the unenumerated constitutionally-required exception, warrants disqualification under R.C.M. 902(b)(1)."[70] Petitioner's basic factual assertion is incorrect. As discussed previously, the military judge did not release any privileged records to anyone but Petitioner. Because Petitioner refused to further release the records, the military judge abated the proceedings rather than proceed with a constitutionally unfair trial. Although the proceedings are abated, which renders the matter moot, we will reiterate that pursuant to Art. 26, UCMJ, military judges cannot sit as a witness for the prosecution. This has been interpreted to mean activity in the case greater than what we see here.[71] We also note that a military judge

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69. Appellate Ex. XXXIV.

70. Petitioner's Br. at 52-53.

71. *See United States v. Head*, 25 C.M.A. 352, 2 M.J. 131, 54 C.M.R. 1078, 1977 CMA LEXIS 10572 (C.M.A. Mar. 2, 1977) (The military judge, sitting alone at special court-martial, did not become a witness for the prosecution by making a ruling on the admissibility of an extract from accused's service record as evidence of previous conviction on ground that the file showed that the military judge

must leave the proceedings "free from substantial doubt in the mind of reasonable persons with respect to the impartiality of the trial judge."[72] Military judges regularly view evidence that is otherwise inadmissible in court and need not recuse themselves. This is indeed an interesting case where only the military judge and the SVC know of information not otherwise known to the parties, but this does not require recusal.

As discussed above, to prevail on a petition for a writ of mandamus, a Petitioner must show (1) that there is no other adequate means to attain relief; (2) the right to issuance of a writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.[73]

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had prosecuted the accused at earlier trial, since the disqualification provision of Art. 26, UCMJ, prohibits the military judge from presiding over a trial in which he or she is also an accuser or a witness for the prosecution.). *See also, United States v. Conley*, 4 M.J. 327, 1978 CMA LEXIS 12158 (C.M.A. Apr. 3, 1978) (The military judge must be considered a witness for prosecution under Art. 26, UCMJ, and is disqualified from the court-martial, where military judge did not take witness stand to officially offer his expert testimony but a fair reading of the record of trial establishes unavoidable inference that he considered his own expertise as documents examiner in arriving at verdict.); *United States v. Griffin*, 8 M.J. 66, 1979 CMA LEXIS 8563 (C.M.A. Nov. 19, 1979) (An announcement by the military judge to court members that a witness was granted immunity did not cause military judge to become witness for prosecution.).

72. *United States v. Soriano*, 20 M.J. 337, 340 (C.A.A.F. 1985).

73. *Cheney*, 542 U.S. at 380-381 (internal citations and quotation omitted).

In the present case, there is no other adequate means to attain relief. But for her petition to this Court, Petitioner has no other avenue to challenge the military judge's actions. On this ground, we find for Petitioner. However, we do not find merit in any of Petitioner's allegations. Petitioner has not shown that her right to issuance of a writ is clear and indisputable. Nor do we find that issuance of the writ is appropriate under the circumstances. As analyzed above, the military judge did not fail to perform a full analysis under Mil. R. Evid. 513 because the military judge was not seeking Mil. R. Evid. 513 records. The military judge did perform a thorough R.C.M. 703 analysis prior to requesting the records, and only after a showing of necessity and relevance. The military judge's order to Petitioner to testify was not error in light of the motion to compel under R.C.M. 703, as filed by RPI, and defense counsel had clearly established that the records were relevant and necessary in accordance with R.C.M. 703. The military judge's decision to abate the proceedings was not unreasonable in light of her finding that the records must be turned over to RPI. The military judge did not intentionally pierce Petitioner's Mil. R. Evid. 513 privilege, and took appropriate action once she learned that she had viewed privileged material. As we find there is no evidence of actual or implied bias, we conclude that the military judge did not abuse her discretion in not recusing herself.

Applying the three-part test enumerated above, we find Petitioner has not demonstrated an entitlement to the extraordinary remedy requested. Accordingly, we find Petitioner has not shown her claimed right to a writ is clear

and undisputable. Furthermore, we are not convinced issuance of the requested writ is proper.

III. Conclusion

Upon consideration of the Petition, the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Stay of Proceedings is **DENIED**.

APPENDIX C — ABATEMENT ORDER, FILED JANUARY 24, 2023

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

ORDER OF ABATEMENT
24 JANUARY 2023

UNITED STATES,

v.

BAILEY, DOMINIC R.
LCDR/0-4 USN

As indicated in Appellate Exhibit XXXIV, the court engaged in *ex parte* communications with Special Victims' Counsel (SVC). *See United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022); *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M.C.C.A. 2017); and M.R.E. 513. Upon consideration of matters reviewed by the Court, this general court-martial proceeding is hereby abated. *Id.*

Sealed Enclosures (1) and (2) are attached to this order as part of the record.

Enclosure (1): EX PARTE ORDER RE: MENTAL HEALTH RECORDS OF MAJOR B.M., U.S. ARMY NATIONAL GUARD with enclosures

Appendix C

Enclosure (2): SVC MOTION TO RECONSIDER EX PARTE ORDER, MOTION FOR APPROPRIATE RELIEF, NOTICE OF INTENT TO FILE PETITION FOR EXTRAORDINARY RELIEF, EXPEDITED WRITTEN ORDER, AND REQUEST FOR STAY with enclosures[1]

So **ORDERED** this 24th day of January, 2023.

KELLY KIMBERLY
JOY.1259743270
KIMBERLY J. KELLY
CDR, JAGC, USN
Military Judge

Digitally signed by
KELLY KIMBERLY JOY 1259743270
Date: 2023.01.24 13:25:04 -05'00'

1. The Special Victims' Counsel Motion is denied.

APPENDIX D — 10 U.S.C. § 867

§ 867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate

counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c)

(1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to—

(A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals;

(B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or

(C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)) [10 USCS § 866(d)(1)(B)].

(2) In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that

action need be taken only with respect to the issues raised by him.

(3) In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review.

(4) The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges. Notwithstanding the preceding sentence, if a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.

APPENDIX E — 10 U.S.C. § 941

§ 941. Art. 141. Status

There is a court of record known as the United States Court of Appeals for the Armed Forces. The court is established under article I of the Constitution. The court is located for administrative purposes only in the Department of Defense.

APPENDIX F — M.R.E. 513 (2024)

MANUAL FOR COURTS-MARTIAL
UNITED STATES
(2024 EDITION)
Military Rules of Evidence

Rule 513. Psychotherapist—patient privilege

(a) *General Rule.* 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 Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services

from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel, defense counsel, or any counsel representing the patient to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

(2) 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;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(7) when an accused offers statements or other evidence concerning his mental condition in defense,

extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.

(e) *Procedure to Determine Admissibility of Patient Records or Communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be

closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision (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.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subdivision (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subdivision (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

APPENDIX G — 10 U.S.C. § 806b

§ 806b. Art. 6b. Rights of the victim of an offense under this chapter [10 USCS §§ 801 et seq.]

(a) Rights of a victim of an offense under this chapter. A victim of an offense under this chapter [10 USCS §§ 801 et seq.] has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A preliminary hearing under section 832 of this title (article 32) [10 USCS § 832] relating to the offense.

(C) A court-martial relating to the offense.

(D) A post-trial motion, filing, or hearing that may address the finding or sentence of a court-martial with respect to the accused, unseal privileged or private information of the victim, or result in the release of the accused.

(E) A public proceeding of the service clemency and parole board relating to the offense.

(F) The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter [10 USCS §§ 801 et seq.] would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A sentencing hearing relating to the offense.

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

(9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter [10 USCS §§ 801 et seq.].

(b) Victim of an offense under this chapter defined. In this section, the term "victim of an offense under this chapter" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter [10 USCS §§ 801 et seq.].

(c) Appointment of individuals to assume rights for certain victims. In the case of a victim of an offense under this chapter [10 USCS §§ 801 et seq.] who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.

(d) Rule of construction. Nothing in this section (article) shall be construed—

(1) to authorize a cause of action for damages; or

(2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter [10 USCS §§ 801 et seq.] or other person for the breach of which the United States or any of its officers or employees could be held liable in damages; or

(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34) [10 USCS §§ 830, 834].

(e) Enforcement by Court of Criminal Appeals.

(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) [10 USCS § 832] or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense,

the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3)

(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a) [10 USCS § 830a].

(B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all other proceedings before the Court of Criminal Appeals.

(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title [10 USCS § 832].

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

(f) Counsel for accused interview of victim of alleged offense

(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victims' Counsel or other counsel for the victim, if applicable.

(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.